SPORTS LAW TODAY

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As Chairman of the Ropes & Gray Sports Law Group, I welcome you to the Winter 2010 edition of Sports Law Today. The NCAA is celebrating its 100 year anniversary in 2010 and the legal issues facing the NCAA grow increasingly complex and controversial. From protecting student-athletes and their amateur status against unscrupulous actors to regulating the ability of schools to offer scholarships to prospective recruits, the NCAA's plate has never been fuller. "Bad behavior" is not limited to the college game and we offer some practical tips for professional and collegiate teams and organizations for putting an effective program in place to best protect themselves. The landscape surrounding these complex issues is constantly evolving, and it is critically important to be well-advised. We have a long history of representing public and private higher education institutions as well as individuals employed all over the wide world of sports, and we view our experience in sports legal matters as a natural outgrowth of our firm's core strengths. We hope you find this edition informative and useful. Please contact me or one of my colleagues if you have any questions or if we can be of service to you.

Sincerely,

Dennis Coleman
Chairman, Sports Law Group

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IN THIS ISSUE

NCAA AT 100 YEARS: PERSPECTIVES ON ITS PAST, PRESENT, AND FUTURE

By Andrew D. Hohenstein

On October 15, 2010, Ropes & Gray joined with Boston College Law Review to host a symposium in honor of the 100-year anniversary of the National Collegiate Athletic Association (NCAA). During that time period, the NCAA has fostered tremendous growth in college sports, making it difficult to imagine the landscape of college athletics without its predominant governing body. With over 400,000 student-athletes in twenty-three sports nation wide, the NCAA is as well-known – and perhaps controversial – as many of the sports under its governance.

As college sports have grown in both scope and popularity, so too have they become, in many cases, increasingly lucrative. One of the consequences of this growth, however, is the emergence of a conflict that pits certain core values such as amateurism, academic standards and equal access against practical realities like television contracts, merchandising rights and competitive pressures. Athletes, schools and the NCAA have frequently looked to the legal system to resolve various conflicts. The symposium sought to examine several of the most relevant legal issues raised by the NCAA's growth.

The NCAA and Gender. Professor Nancy Hogshead-Makar of Florida Coastal School of Law kicked off the symposium by offering a primer on Title IX and its modern day implications in college sports. Title IX is a federal law designed to eliminate discrimination from participation in educational programs based on sex. Although Title IX makes no mention of sports specifically, Professor Hogshead-Makar pointed out that collegiate sports most directly and frequently implicate Title IX because sports are one of the few remaining educational programs that actively allow sex segregation.

Using Professor Hogshead-Makar's examination of Title IX as a foundation, Professor Erin Buzuvis of Western New England College School of Law discussed a recent case, Biediger v. Quinnipiac University, in which competitive cheer, a new sport at Quinnipiac University, was ruled outside the scope of "sport" relative to Title IX. Professor Buzuvis explained that with few exceptions Title IX required that an academic institution needed to offer roughly the same percentage of athletic opportunities as compared to the respective gender percentage in the school. In Biediger, the court ruled that under Title IX, competitive cheer was too underdeveloped as a sport to offset male sports at Quinnipiac University, citing among other reasons, its lack of a varsity level competition, the lack of a chief governing organization and the lack of standardization within

the sport. Professor Buzuvis opined that rather than hurt the sport of competitive cheer, the ruling helped define "sport" within the structure of Title IX and also provided certain guidelines for schools in the future.

The NCAA and Students. Often, college sports extend far beyond the playing field. Establishing a tradition of excellence in sports can lead to an increase in enrollment, monetary incentives and national recognition, but it can also place enormous pressures on student-athletes and coaches to perform at the highest levels. Professor Maureen Weston of Pepperdine University School of Law offered her thoughts on the long history of NCAA rules violations resulting from such pressures and how the punishment often does not address the actual wrong-doers, nor does it deter those individuals from committing similar offenses in the future. As Professor Weston demonstrated, often the coach or player that has committed a gross violation of NCAA regulations is no longer with the school to receive the punishment, which can range from reducing scholarships to vacating victories to a ban on post-season play. Professor Weston proposed that a new regime should be put in place to allow for the imposition of financial penalties on those who actually commit the infractions, and that requires disgorgement of winnings and bonus or claw-back provisions in coaches' contracts.

One of the most heavily regulated areas in college sports is the recruitment process of young student-athletes, which the NCAA monitors very closely. Professor Alfred Yen of Boston College Law School focused his discussion on the practice of universities offering athletic scholarships to progressively younger student athletes. At present, the NCAA does not allow formal commitments until a recruit's senior year, but as a result, coaches seek out verbal non-binding commitments from the athletes. Professor Yen argued that this practice places an undue pressure on recruits to commit early. As an alternative, Professor Yen proposed a system of early commitments that would be binding on the schools, creating more accountability and forcing schools to only make offers they intend to keep.

Postseason College Football, the Bowl Championship Series, and the National Championship. For some, the phrase "college football is religion" does not come close to capturing the passion and fanfare the sport garners. Indeed, from South Bend to Tuscaloosa to the blue turf in Boise, college football transcends passion for the game; it goes beyond the realm of normalcy and it consumes fans with an indescribable fury. Capturing this sentiment, ESPN's Jeremy Schapp moderated a spirited conversation between Roy Kramer, former Commissioner of the South Eastern Conference and founder of the Bowl Championship Series (BCS) and Matthew Sanderson, Executive Director of the Playoff PAC, one of the foremost opposition groups to the BCS.

Mr. Kramer began the conversation with a riveting monologue on the history of the bowl system, He explained that prior to the BCS, there was an absolute monopoly in the bowls, with conference affiliations to certain bowls and the same major conference teams continuously receiving invites to the most famed bowls. His vision, and the purpose behind the BCS, was to enhance interest in college football,

especially beyond the major college football markets, to protect the regular season and to protect the bowl structure while allowing more teams to participate against one another, to include allowing the two highest ranked teams in the country to play each other.

In response, Mr. Sanderson explained that the Playoff PAC exists as an opposition group to the BCS, seeking to expose its purported shortcomings and ultimately replace it with a playoff system. Mr. Sanderson offered that the BCS, by not providing a playoff, takes away merit-based competition and replaces it with a championship decided by pundits, not athletes. He also acknowledged the monetary disparity among schools under the BCS system, pointing out that under the BCS, the revenue distribution heavily favors the automatic qualifying schools even though non-automatic qualifying schools often have similar or greater success in both game attendance and television ratings. In short, Mr. Sanderson argued college football needs to continue to evolve, allowing teams of less tradition a chance at greatness.

The NCAA as a Commercial Enterprise. College sports – mainly college football and men's college basketball – have become increasingly lucrative, with television and merchandising contracts creating revenue streams for certain schools and conferences in the tens of millions of dollars. In fact, Professor Michael McCann of Vermont Law School noted that the BCS alone generated over $143 million in 2010, eighty-one percent of which went to the automatic qualifying schools. Critics of the BCS, however, argue that its structure and internal makeup violate antitrust laws, specifically sections 1 and 2 of the Sherman Act. In essence, the charge is that the BCS acts as a cartel to prevent others from competing through acts of collusion and monopolistic behavior. Professor McCann explained both sections of the Sherman Act in great detail, and ultimately came to the conclusion that although not conclusive, the BCS probably does not violate any antitrust laws.

Almost as lucrative as the BCS, and just as controversial, the exploitation of the intellectual property rights of student-athletes by the NCAA has moved to the forefront of the college athletics legal landscape. Through the merchandising and licensing of everything from video games and fantasy sports leagues to advertising and sponsorship, the value of a college athlete's likeness has skyrocketed. Professor Joseph Liu of Boston College Law School tackled this hot-button issue in discussing a student-athlete's right of publicity. Specifically, Professor Liu discussed the implications of a current case, O'Bannon v. NCAA, in which Ed O'Bannon, a former player, is suing the NCAA for improperly misappropriating his purported right to profit from his own likeness. Rather than attack the issue of whether the players validly assign their intellectual property rights to the NCAA, Professor Liu took the novel approach of contemplating whether these athletes should have such rights at all. Ultimately, Professor Liu argued that fans, the consumers in this regard, would be better off if the athletes did not have these rights of publicity as it would allow for a wider range of products for consumers.

The NCAA and Constitutional Law. At first blush, the constitutional implications for the NCAA may seem minimal, or at least secondary, but Professor Vikram Amar of UC Davis School of Law made the case that with its continued growth and expansion, the NCAA may be pushing our legal system to reevaluate whether it has become a state actor. The Fourteenth Amendment limits State actors, but a private actor can still be implicated as a state actor if it is providing a state function. Of course, Professor Amar correctly points out that in 1988, the Supreme Court decided in Tarkanian v. NCAA that the NCAA was not a state actor. Professor Amar debated the logic of that ruling and discussed how that logic might apply today. Ultimately, Professor Amar opined that to truly determine whether a private entity was a state actor, the Supreme Court should develop a more predictable and functional approach that would capture the reasons for importing constitutional norms on state actors in the first instance, incorporating federalism, separation of powers and autonomy.

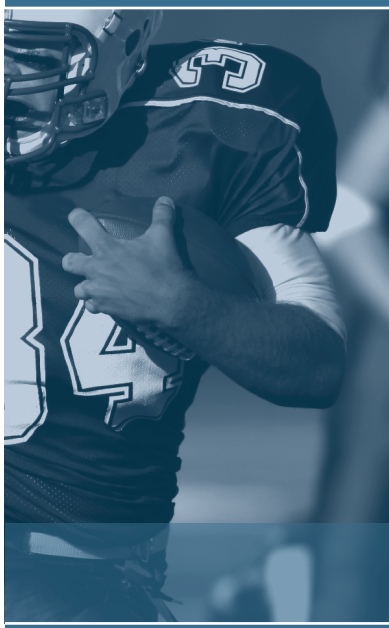
As the finale to an academic endeavor into the NCAA and college athletics, Professor Richard Albert of Boston College Law School spoke about the role the constitution plays in a sports organization. Professor Albert began with an exercise of breaking down any constitution, whether the Constitution of the United States or the constitution of the NCAA, noting conventional distinctions between private and public constitutions as well as international, national and local constitutions. From this exercise, Professor Albert was able to develop a theory that every constitution is or should be composed of certain constitutional basics and constitutional virtues. Using his theory as a foundation, Professor Albert compared the United States Constitution and the NCAA constitution to determine which was more "constitution-like." Applying the basics and virtues discussed, Professor Albert demonstrated a surprising result: the NCAA constitution proved to be more constitution-like than our own national Constitution.

To view the symposium in its entirety, click here. The Kramer/Sanderson discussion is the first video that is posted.

KNOWLEDGE IS POWER: AN EXAMINATION OF CALIFORNIA'S "STUDENT-ATHLETES' RIGHT TO KNOW ACT"

By David Mindell and Joseph Polniak

Last February, David Sills, a 7th grade quarterback at Delaware's Red Lion Christian Academy, made a verbal commitment to attend the University of Southern California. No, Sills is not the real life Doogie Howser of football, but the coaches at USC believe he might be the next Matt Leinart and so they offered Sills a place at USC when he graduates high school five years from now. Of course, Sills is only able to verbally commit at this stage and there is always the chance that USC reneges on its verbal offer if, in the coming years, Sills does not live up to the middle school hype. Nonetheless, the fact that major college athletic programs take recruiting very seriously is clearly evidenced. How much competition there was for the verbal commitment of a middle school phenom quarterback is unclear, but the competition for other top recruits to sign a formal letter of



intent is real and fierce. Even if the competition for Sills' verbal commitment was limited, USC recruiters almost certainly touted the many great advantages to playing football at USC. USC recruiters also likely emphasized the history of USC football, the school's winning tradition, and the great weather in Southern California. Oh...they probably also mentioned that a player of Sills' caliber could have all that and get a top notch education for free on a "full" athletic scholarship.

For most college athletes who will never have the opportunity to play professionally, the decision where to attend school and showcase their talents is largely driven by the scholarship package offered by the school. For example, the star high school point guard might have parents who went to Duke and he may have grown up with all of Coach K's books on his nightstand, but if North Carolina offers a better deal, he is probably wearing Tar Heel Blue next winter. Despite the importance of the decision, most prospective college athletes and their parents do not realize that "full" scholarship offers come with a lot of fine print and the receipt thereof does not mean there are no expenses to the student-athlete. For instance, what happens to the scholarship if the player is injured and who is responsible for subsequent medical bills and for how long? What happens if the player is underperforming or there is a coaching change at the school? How much does a "full" scholarship really cover and what expenses is the student-athlete still going to be responsible for? It is estimated based on a March 2009 study conducted by the National College Players Association ("NCPA"), a 14,000 member organization of current and former Division 1 athletes, student-athletes face scholarship-shortfalls ranging from $200 per year up to more than $6,000 per year. The NCAA and the vast majority of schools, if not all, have policies on all of these things (and if they do not, they should), but they are rarely at the forefront of discussion during a recruiting push. The fact that many student athletes are not aware of these issues is not the fault of the coaches or other recruiters – in fact, many will tell you that they try to make a point of going over the fine print with recruits. However, at the end of the day, the bottom-line for a recruiter is getting student-athletes to commit to their school, rather than ensuring that the student-athletes fully understand the details of their financial package or the full implications of their commitment.

On September 30, 2010, in an attempt to provide student-athletes with more disclosure of scholarship shortfalls and just as equally important NCAA and school policies, the state of California amended its Education Code by enacting the "Student-Athlete's Right to Know Act". Despite the passage of the new law being promoted as a major victory by the NCPA, a major force behind the legislation, the law is relatively hollow and poses only a limited additional burden on athletic programs. First, the law is only applicable to postsecondary institutions in California (although we may see other states enacting similar laws in the future). Consequently, if Sills were to be recruited by Texas rather than USC, he would not be impacted by the law Second, the requirements of the law are not mandatorily imposed until January 1, 2012, so it will have no impact on this year's recruiting class (although it

will have been enforced for a few years by the time Sills is eligible to sign a letter of intent). Third, the law does nothing to change the substantive nature of the rights of college athletes and is instead simply a law of disclosure. So what is the only real requirement of college coaches and recruiters from California going forward under this law? Any time they contact a potential recruit in writing they must "include a direct link to the institution's Internet Web page" that contains certain information regarding the institution's athletic scholarship program, including:

- the most recent published costs of attendance expenses and the sum of these expenses that are prohibited by NCAA regulations from being included in full grant-in-aid scholarships;
- whether scholarships will be extended for summer school;
- NCAA regulations on verbal commitments versus Letter of Intents and policies on scholarship duration;
- the policy on renewals and nonrenewals of a scholarship, including when a student-athlete is injured or performs athletically below expectations;
- NCAA and school policies on payment of medical expenses stemming from athletic injuries; and
- NCAA and school transfer policies for student-athletes.

In sum, the new law's only significant change is in transparency. Coaches and recruiters should not be concerned that this law is going to be a significant burden on their ability to recruit. If they have not done so already, schools should take the time now to set up a website that clearly sets out the information required by the new law in a user friendly format and ensure that their recruiting materials clearly include a link to the page. Given the little impact that the new law will have on a school's ability to recruit, and the fact that the appearance of greater transparency may be an advantage over schools that do not publish such information, there is little reason for a California school to wait until the 2012 deadline to come into compliance. Furthermore, given the importance of the issue to the NCPA, we expect the organization to pursue passage of similar laws in other states and it may prove beneficial for non-California schools to proactively comply despite not being legally mandated to do so at this juncture.

AGENT PROVOCATEURS: COMBATING THE EPIDEMIC OF ROGUE AGENTS

By Daniel Adams and Matthew Byron

In recent months, the NCAA has launched several investigations into inappropriate relationships between student-athletes and agents or their runners. As a result, athletes and schools such as the University of Southern California and the University of North Carolina have faced player ineligibility and other sanctions. While the great majority of agents play by the rules, it is often glossed over that those who do not, these so-called "rogue agents," are breaking the law by providing improper benefits to student-athletes. By and large, sports agents operate according to state and federal statutes and also rules and regulations promulgated by their industry. Providing improper benefits to

college athletes is often a violation of both state and federal laws. Yet it is the student-athletes, some of whom are still teenagers, that face suspension from competition and potential expulsion from school – while the rogue agents largely remain unpunished.

Existing legislation over agents' interaction with student-athletes varies by state. To date, 42 states have laws governing sports agents, 39 of which have enacted the Uniform Athletes Agent Act. Additionally, a federal cause of action exists in the Sports Agent Responsibility and Trust Act of 2004. Despite these myriad rules and regulations, data show that these laws are rarely enforced. State prosecuting bodies claim to lack the resources to effectively enforce agent laws; believing resources are better spent on other, more pressing, criminal investigations. For example, the North Carolina Secretary of State has not sought to prosecute any of the rogue agents involved in the University of North Carolina scandal, despite announcing an initial investigation in July 2010.

Evidenced by the recent investigations into the football programs of USC and UNC, the NCAA has significant resources to assist state and local law enforcement in cracking down on agents breaking the law. Further, these organizations can seek the assistance of the great majority of law-abiding agents in the industry who have a vested interest in seeing this type of activity eradicated. Still, there are certain inherent complications in obtaining information about rogue agent activities. Many athletes have a fear of retribution for reporting agent misconduct as they often bear the brunt of any consequences. Moreover, schools have little impetus to investigate agent misconduct because if they uncover it, the school is forced to take ownership of the NCAA penalties and face player ineligibility and program sanctions. For example, the University of North Carolina has fully cooperated with the NCAA in its recent investigation into the football program, yet was not rewarded with increased transparency from the NCAA. Other schools, including the University of Alabama and Auburn University have chosen to instead resist the NCAA's request for full disclosure and access and have so far reaped the rewards of this tactic by little to no sanctions. Without providing incentives for schools to investigate agent transgressions or increasing enforcement of existing law, players and institutions are left shouldering the burden of agency sanctions.

As the NCAA continues to investigate college football programs across the country, including one of the leading contenders for the Heisman trophy, Cam Newton of Auburn, various suggestions have been proposed to combat the epidemic of unscrupulous agents and improper benefits to college athletes. The solution that has gained the most traction recently is to sanction football players responsible for violating NCAA rules once they begin their professional career. This suggestion does not attack the problem at its root–the rogue agents.

The NCAA and the universities should work in conjunction with state and local law enforcement, and agent industry organizations to form an information sharing partnership. For example, the information gleaned from the NCAA's investigation into USC's football program would provide a strong foundation for the California Secretary

of State's criminal investigation into the agent who provided Reggie Bush with improper benefits.

Further, schools that cooperate with the NCAA should be rewarded for maintaining effective compliance programs and affirmatively reporting any issues to the NCAA. The NCAA must improve its investigative transparency for universities to create an incentive for full cooperation.

In conclusion, the recent uptick in rogue agent activity in college sports must be addressed at its foundation. State and local law enforcement, working in conjunction with the NCAA, individual universities and industry organizations, should begin prosecuting agents who break the law. Schools and student-athletes, alike, should be proactive in handling any issues relating to agent relations or NCAA infractions. In dealing with such matters, it is important that you be advised by experienced and trusted advisers. The Ropes & Gray Sports Law Group is highly experienced in this area and can help.

OUT OF BOUNDS: HOW TO MINIMIZE THE NEGATIVE IMPACT OF OFF-FIELD ACTIVITY

By Christopher Conniff and Ned Sebelius

There was a time when news about professional athletes related only to on-field activities. However, athletes today increasingly are making headlines off the field as well. During the past few years, there have been stories involving star athletes being arrested for gun possession, domestic violence, assault, drug and alcohol related crimes, and other reckless behavior. And it's not just athletes getting into this type of trouble. The manager of a team that would eventually play in this year's World Series was reported to have tested positive for an illicit substance during last season. Recently, New York papers reported that a Major League Baseball equipment manager was under investigation for illegal gambling activities. These incidents, while clearly detrimental to the individuals involved, also cause significant damage to an organization, not the least of which is the possible loss of a star player for an extended period of time. While no organization can insulate itself completely from these types of events, there are a number of ways that it can protect against such occurrences. This article identifies some of the basic components of an effective program.

First, educate your players, coaches and staff about the consequences of making these "mistakes." We often forget that most professional athletes are still very young when they arrive on the scene. They quickly find themselves being paid well, traveling from city to city, and enjoying a lot of "down time." All of this can lead to trouble. An organization that wants to set the right tone with its personnel should develop a program for its new employees, whether star athletes or not, that educates them on what they may face as part of their employment with the team. Mandatory sentencing guidelines do not make exceptions for people who were unaware of their existence. A lecture by former law enforcement personnel about the realities of the judicial system or from a former player who made a costly mistake is a good way to set the tone from the beginning.

Second, set the tone. Players, coaches,

and staff need to understand that they represent the team at all times and not just during games. On-field rules are designed to protect the players and teams must develop off-field policies to do the same thing. No team can insulate its players from all the uncertainties of off-field life, but every team should be proactive in identifying activities and situations that lead to bad outcomes. Setting the tone works only if programs are in place to support the players and other personnel. A few months ago, there was a story in the news about the DUI arrest of a New York Jets player. The story revealed that the Jets had instituted a program to provide rides to any of its players who felt they were no longer able to drive home. This was a great idea by the Jets organization. Unfortunately, although the player was aware of the program, he chose not to use it. This demonstrates that even the best-intentioned and well-designed programs will fail if players and coaches fail to buy in to believing the program is an essential part of the organization. It's clear that rookies emulate and imitate veteran behavior. If seasoned players and coaches participate in off-field programs, new additions to the team will understand that utilizing such programs is a part of life for that team. Establishing positive incentives also creates a culture of compliance with an off-field program.

Third, enforce the rules. Teams cannot, nor should they, monitor their employees 24 hours a day. However, off-field behavior can distract teammates, disrupt seasons, and cost teams the chance to win games. Organizations must not let rules violators slide in order to keep winning or because an incident did not become public. There must be a firm response to any violation so that the players and employees know that the organization is serious about enforcing these rules. This way, players and coaches will understand that their off-field behavior can jeopardize their season and their future with the team. Tolerating or turning a blind eye to violations of team policy encourages other team members to believe that the rules may exist but may not apply. Players, coaches, and staff have to understand that off-field rules exist to protect their lives and the livelihood of the team.

By following these three simple steps, an organization can begin to create an environment of compliance and, by doing so, decrease the likelihood that it will see one of its coaches, players, or staff on the cover of a tabloid newspaper and/or saddled with legal troubles for a season or more.

SPORTS LAW TEAM:

Dennis Coleman, Partner
Sports Law Group Chairman

Christopher Conniff, Partner

David McIntosh, Partner

Mark Nuccio, Partner

Susan Progoff, Partner

Sharon Remmer, Counsel

Daniel Adams, Associate

Matthew Byron, Associate

Megan Bisk, Associate

Matthew Elliott, Associate

Lindsey Goldstein, Associate

Andrew Hohenstein, Associate

Deborah Mason, Associate

Cynthia McMakin, Associate

David Mindell, Associate

Kendi Ozmon, Associate

Joseph Polniak, Associate

Emily Proskine, Associate

Jennifer Rikoski, Associate

Christine Santariga, Associate

Ryan Schaffer, Associate

Ned Sebelius, Associate

Adam Stella, Associate

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