

## **Coach accountability reduces vicarious liability**

**by**

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### I. Introduction - Head Coach Accountability - New Standard

In October of 2012, NCAA Bylaw 11.1.2.1 was created to read as follows:

It shall be the responsibility of an institution's head coach to promote an atmosphere for compliance within the program supervised by the coach and to monitor the activities regarding compliance of all assistant coaches and other administrators involved with the program who report directly or indirectly to the coach.<sup>1</sup>

As a result of NCAA Bylaw 11.1.2.1, an institution's head coach is presumed to be responsible for the actions of all assistant coaches and administrators who report directly and indirectly to the head coach. Under the new Bylaw, a head coach is required to cultivate an atmosphere of compliance within his program and to monitor the activities of all assistant coaches and administrators involved with the program who report directly or indirectly to the head coach. The new legislation holds head coaches directly accountable for NCAA violations by members of their coaching staff.

The NCAA Bylaw 11.1.2.1 incorporates the doctrine of vicarious liability.<sup>2</sup>

Vicarious liability occurs in a situation in which one person incurs liability, not due to his own negligence or behavior, but due to the negligence or behavior of another.

Vicarious liability is a tort doctrine which imposes responsibility upon one person for the failure of another, with whom the person has a special relationship to exercise such

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<sup>1</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, 2012-13 NCAA DIV. I MANUAL art. 11.2.1 (2012-2013), available at <http://www.fiusports.com/Portals/1/D1%20NCAA%202012-13%20Manual.pdf>.

<sup>2</sup> Benjamin Haynes, Esq., *New NCAA Rule Incorporates Doctrine of Vicarious Liab. To Head Coaches*, SPORT IN LAW (Oct. 26, 2012) available at <http://sportinlaw.com/2012/10/26/new-ncaa-rule-incorporates-doctrine-of-vicarious-liability-to-head-coaches/>.

care as a reasonably prudent person would use under similar circumstances.

Traditionally, the type of relationship leading to one being held vicariously liable includes the relationship between a parent and child, the owner of a vehicle and the driver, and the employee and his employer.

This rule is also called the master/servant rule and is recognized in both common law and civil law jurisdictions.<sup>3</sup> In order for this doctrine to apply, the assistant coach or administrator must be acting within the scope of their employment, and rules violations or tortious acts must occur. Vicarious liability is the responsibility of A for the wrongful or negligent acts B committed against C when A himself had no part in B's conduct. "Literally translated, the doctrine of respondeat superior means 'let the master answer,' and then operates to render the master liable for the wrongs of his servant committed while furthering the master or principal's business."<sup>4</sup> Of course the negligent or wrongful actor -- in this case the assistant coach or administrator -- is always individually liable for their acts.

## II. A New Four-Tier Penalty Structure

As of August 1, 2013, there will be no more major and secondary infractions; instead they will be replaced with a four-tier penalty system that ranges from severe breaches of conduct that threaten the integrity of the NCAA to incidental infractions.

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<sup>3</sup> *Id.*

<sup>4</sup> Arthur F. Southwick, *Vicarious Liability of Hospitals*, 44 *Marq.L.Rev.* 153 (1960)

The new tiers include: (1) Level I: Severe Breach of Conduct; (2) Level II: Significant Breach of Conduct; (3) Level III: Breach of Conduct; and (4) Level IV: Incidental Issues.<sup>5</sup>

Level I violations are severe breaches of conduct that seriously undermine or threaten the integrity of the NCAA collegiate model as set forth in the NCAA Constitution and Bylaws, including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive or other advantage, or a substantial or extensive impermissible benefit.<sup>6</sup>

Examples of Level I violations might include lack of institutional control, academic fraud, cash payments or other benefits intended to secure the enrollment of a prospective student-athlete, intentional violations or reckless indifference to the NCAA Constitution or Bylaws, and collective Level II and Level III violations, individual unethical or dishonest conduct, regardless of whether the underlying institutional violations are considered Level I. Bylaw 11.1.2.1, violation by a head coach resulting from an underlying Level I violation by an individual within the sport program.<sup>7</sup>

Level II violations are significant recruiting, competition or other breaches of conduct involving more than a minimal but less than a substantial or extensive advantage or impermissible benefit.<sup>8</sup>

Examples of Level II violations might include a failure to monitor systemic violations that do not amount to a lack of institutional control, multiple recruiting,

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<sup>5</sup> Casey Kannenberg, Bingham Greenebaum Doll LLP, *The New NCAA Enforcement Model*, YOUNG LAWYERS DIV. (Apr. 15, 2013), [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/the\\_new\\_ncaa\\_enforcement\\_model.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_new_ncaa_enforcement_model.html).

<sup>6</sup> *Id.*

<sup>7</sup> *Final Report: NCAA Working Group on Collegiate Model-Enforcement* ¶ C (Aug. 2012) (on file with author)(hereinafter Final Report).

<sup>8</sup> Kannenberg, *supra* note 5.

financial aid, or eligibility violations that do not amount to a lack of institutional control, and conduct that may compromise any NCAA enduring value.<sup>9</sup>

Level III violations are breaches of conduct that are “isolated or limited in nature, providing no more than a minimal recruiting, competitive or other advantage; and do not include more than a minimal impermissible benefit.”<sup>10</sup>

Examples of Level III violations might include an inadvertent violation of NCAA Bylaws that are isolated or limited in nature or extra benefit, financial aid, academic eligibility and recruiting violations provided they do not create more than minimal advantages.<sup>11</sup>

Lastly, Level IV violations are incidental infractions that are minor and are inadvertent and isolated, technical in nature, and result in a negligible, if any, competitive advantage.<sup>12</sup>

Examples of Level IV violations might include camp brochures, recruiting correspondence related to size, paper limitations, and institutional promotional activities, no IRL activation prior to official visit, and other minor, paperwork and technical violations.<sup>13</sup>

### III. Penalties

The new enforcement structure increases the scope and severity of penalties relative to Level I and II violations. There are seven different categories of core penalties.

1. competition penalties, which limit an institution's post-season participation

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<sup>9</sup> Final Report, *supra* note 7.

<sup>10</sup> Kannenberg, *supra* note 5.

<sup>11</sup> Final Report, *supra* note 7.

<sup>12</sup> Kannenberg, *supra* note 5.

<sup>13</sup> Final Report, *supra* note 7.

2. financial penalties, which include fines and disgorgement of post-season revenue
3. scholarship reductions
4. show-cause orders, which restrict some or all athletics-related duties of institutional personnel
5. head coach restrictions, which include suspensions from coaching activities if a head coach fails to adequately promote rules compliance
6. recruiting restrictions, which include limits on official and unofficial visits as well as limits on off-campus activities and recruiting communication; and
7. probation.<sup>14</sup>

In terms of severity, the penalty ranges within each category allow for far greater penalties than traditionally imposed in prior major infractions cases.<sup>15</sup>

For example, the following table indicates the penalty range for a "Level 1 standard" violation<sup>16</sup>:

<b>Competition</b>	<b>Financial</b>	<b>Scholarship</b>	<b>Show-Cause</b>	<b>Head Coach</b>	<b>Recruiting</b>	<b>Probation</b>
1 to 2 year post-season ban	3% of program budget or post-season money disgorgement	12.5% to 25% reduction	2 to 5 years	suspended for 30% to 50% of the season	12.5% to 25% reduction in visits, off-campus activity, and communication	2 to 6 years

The following table indicates the even more severe penalty range for a "Level 1 aggravated" violation<sup>17</sup>:

<b>Competition</b>	<b>Financial</b>	<b>Scholarship</b>	<b>Show-Cause</b>	<b>Head Coach</b>	<b>Recruiting</b>	<b>Probation</b>
2 to 4 year post-season ban	5% of program budget or post-season money disgorgement	25% to 50% reduction	5 to 10 years	suspended for 50% to 100% of the season	25% to 50% reduction in visits, off-campus activity, and communication	6 to 10 years

The range of penalties may be further refined based on aggravating and mitigating factors in each case.

<sup>14</sup> Carrie McCaw, Mark Jones & Stuart Brown, *New NCAA Division I Enforcement Model*, ICE MILLER LLP (Dec. 20, 2012), [http://www.icemiller.com/publication\\_detail/id/1987/index.aspx](http://www.icemiller.com/publication_detail/id/1987/index.aspx).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

Aggravating factors for Level I and II violations are set forth in newly adopted NCAA Bylaw 19.9.3.<sup>18</sup> There are 14 aggravating factors, including the catch-all "other facts warranting a higher penalty range."<sup>19</sup> Generally, aggravating factors involve multiple violations or a pattern of violations, intentional misconduct, unethical conduct, or a lack of institutional control.<sup>20</sup> Mitigating factors are set forth in newly adopted NCAA Bylaw 19.9.4.<sup>21</sup> There are eight mitigating factors, which focus on prompt institutional detection and correction of problems as well as "exemplary cooperation" by an institution during an enforcement staff investigation.<sup>22</sup>

The NCAA's new rule presumes that a head coach will be responsible for Level 1 and Level II violations occurring within his or her program unless the coach can show that he or she promoted an atmosphere of compliance and monitored his or her staff.<sup>23</sup>

Under the new enforcement model, head coaches will also face greater personal accountability for Level 3 violations.<sup>24</sup> Already, men's basketball and football head coaches are subject to game suspensions in response to certain Level 3 (formerly "secondary") violations in their programs.<sup>25</sup> Beginning on August 1, 2013, head coaches in all sports face suspensions for a broad array of Level 3 violations, including Level 3 violations committed by assistant coaches without the head coach's knowledge.<sup>26</sup> Furthermore, under the new enforcement model, the enforcement staff

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> NAT'L COLLEGIATE ATHLETIC ASS'N, 2012-13 NCAA DIV. I MANUAL art. 11.1.2.1 (2012-2013), available at <http://www.fiusports.com/Portals/1/D1%20NCAA%202012-13%20Manual.pdf>; See also McCaw, *supra* note 14.

<sup>24</sup> McCaw, *supra* note 14.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

will publicly announce a head coach's suspension as a result of a Level 3 violation, and member institutions will be able to obtain a five-year history of a head coach's Level 3 violations.<sup>27</sup>

As previously referenced, beginning August 1, 2013, head coaches may be suspended for identified Level III violations committed by assistant coaches. For Division I Men's Basketball coaches, the list of identified Level III violations might include but are not limited to:

- In-person, off-campus contacts during a dead period (particularly during the National Letter of Intent (NLI) signing dead period.)
- Exceeding the permissible number of opportunities with a prospective student-athlete
- Intentional or significant game-day simulations and/or impermissible recruiting aids.
- Providing team gear or other inducements to prospective student-athletes
- Violations that occur as a result of engaging non-scholastic third parties in the recruiting process.<sup>28</sup>

The same applies to Division I football coaches. A list of identified Level III violations might include, but is not limited to:

- In-person, off-campus contacts during a dead period (particularly during the NLI signing dead period).
- Exceeding the permissible number of contacts with a prospective student-athlete.
- Intentional or significant game-day simulations and/or impermissible recruiting aids.
- Providing team gear or other inducements to prospective student-athletes.
- Violations that occur as a result of engaging non-scholastic third parties in the recruiting process (e.g. prescheduled unofficial visits that are impermissibly funded, etc).
- Collective recruiting violations and/or other intentional recruiting violations (e.g., multiple impermissible early phone calls, multiple impermissible contacts, providing inducements).

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<sup>27</sup> *Id.*

<sup>28</sup> *Head Coach Responsibilities Regarding Compliance with and Violations of NCAA Rules*, USATODAY.COM, [http://usatoday30.usatoday.com/sports/investigations%20and%20enterprise%20docs/ncaa\\_enforcement\\_proposal.pdf](http://usatoday30.usatoday.com/sports/investigations%20and%20enterprise%20docs/ncaa_enforcement_proposal.pdf) (last visited Aug. 15, 2013).

- Holding 7-on-7 events on an institution's campus and/or otherwise attending or being involved in non-scholastic events.
- Impermissible benefits to student-athletes or inducements to prospective student-athletes by third parties that the coaching staff knows about or is involved with.
- Providing a written offer of athletically related financial aid to a prospective student-athlete prior to August 1 of the prospect's senior year in high school.<sup>29</sup>

#### IV. Action Plan

The use of the words "promoting an atmosphere of compliance and monitoring a coach's staff" is once again extremely vague and subject to interpretation. However, guidelines are provided by the new rule in which the NCAA will examine to determine if a coach has promoted an atmosphere of compliance and has monitored his staff.

The NCAA has labeled this the "Action Plan" and outlines the Action Plan in "Head Coach Responsibilities Regarding Compliance with and Violation of NCAA Rules." There are three main components that the NCAA highlights in the Action Plan. They are: 1) Communication; 2) Monitoring; and 3) Documentation<sup>30</sup>:

##### 1. Action Plan: Communication

A head coach should demonstrate and document a commitment to compliance through ongoing communication with his or her athletics director, compliance staff and coaching staff. The outline below was created to assist a head coach with managing this dialogue.

- Meet with the chancellor or president to discuss his/her expectations for NCAA rules compliance.
- Meet with the athletics director to discuss his/her expectations for NCAA rules compliance.

Suggested talking points:

- o Athletics director's philosophy and expectations on rules compliance.
- o Compliance resources for your program.
- o Program's shared responsibility with compliance staff.
- o Establish a plan in writing for continued dialogue with athletics director to discuss the institution's and program's compliance environment and expectations (e.g., regularly scheduled meetings with minutes, etc.).

- Meet with the compliance director to discuss his/her expectations for NCAA rules compliance.<sup>31</sup>

Suggested talking points:

- o Compliance director's philosophy and expectations on rules compliance.

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



- o Compliance resources for your program.
  - o Discuss compliance staff's and program's expectations for submitting rules interpretations and waiver requests, and determine how to best resolve any disagreements over the submission of such requests.
  - o Program's shared responsibility with compliance staff.
  - o Expectations for reporting actual and potential NCAA rules issues (e.g., immediate action; reporting lines).
  - o Establish a written plan for continued dialogue with compliance director to discuss the institution's and program's compliance environment and expectations (e.g., regularly scheduled meetings, etc.).
  - o Establish a written plan for ongoing dialogue between coaching staff and compliance staff to discuss key issues facing the sport and program (e.g., agents, initial eligibility, pre-enrollment amateurism, etc.).<sup>32</sup>
- Meet jointly with the president, athletics director and compliance director to discuss the institution's and program's compliance environment and expectations.
  - Meet with coaching and support staff to discuss head coach's expectations for NCAA rules compliance. Include a written document outlining the head coach's commitment to ethical conduct along with suggested talking points:
    - o Program's ethical standards.
    - o Expectations for reporting actual and potential NCAA rules issues (e.g., immediate action; reporting lines).
    - o Review president's, athletics director's and compliance director's philosophy and expectations for rules compliance.
    - o Expectations for regular communication between coaching staff and compliance staff.
    - o Establish a plan for continued dialogue with staff to discuss the institution's and program's compliance environment and expectations (e.g., regularly scheduled meetings, etc.).
    - o Establish ongoing dialogue with staff to review any issues involving prospective student-athletes and current student-athletes (e.g., agents, initial eligibility, pre-enrollment amateurism, etc.).<sup>33</sup>

## 2. Action Plan: Monitoring

A head coach also should demonstrate a commitment to compliance through monitoring his or her staff's activities in consultation with the compliance staff. This may include staff meetings with agendas that specifically address compliance issues. The outline below was created to assist a head coach with managing his/her monitoring responsibilities.<sup>34</sup>

- Actively look for red flags of potential violations. For example, if a prospective student-athlete takes an unofficial visit to campus, ask how the prospective student-athlete paid for the trip.
- Ask questions. For example, if a coach is suspicious of a third party or handler being involved in a prospective student-athlete's recruitment, ask questions of the coaching staff about the

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

person. Emphasize the program's ethical standards, set the tone for what is and is not acceptable in dealing with third parties and keep a written record of the conversations.

- In consultation with the compliance director, create written procedures to ensure your staff is monitoring your program's rules compliance. Suggested procedures:
  - o Assign a staff liaison(s) to the compliance staff.
  - o Assign staff members to monitor specific areas of compliance (e.g., recruiting contacts, initial eligibility, amateurism, telephone contacts).
  - o Regularly evaluate staff members to ensure their areas of compliance are monitored and that all responsibilities are executed in a timely manner.
  - o Ensure that the entire program has adequate and ongoing compliance training and that there is a plan in place for discussion of important information.
  - o Determine reporting lines for resolving actual and potential NCAA rules issues.
  - o Determine reporting lines to alert compliance staff of issues involving prospective student-athletes and current student-athletes (e.g., agents, initial eligibility, pre-enrollment amateurism, etc.).
- Regularly solicit feedback from your staff members concerning their areas of compliance and the program's overall compliance environment in order to ensure that the monitoring systems are functioning properly. Ask the staff where the biggest areas for mistakes or ethical traps exist. Where is the grey area and how will the staff deal with it?
- Ensure that the program immediately notifies the compliance staff when concerns or red flags occur related to potential NCAA rules violations. A lack of immediate action by the head coach will be a significant factor in determining whether the head coach met the obligations imposed by Bylaw 11.1.2.1.<sup>35</sup>

### 3. Additional Considerations: Documentation

A head coach should document the ways in which he/she has communicated and/or demonstrated a commitment to compliance and be able to produce documentation relating to the procedures in place for monitoring the program's rules compliance. Potential areas for documentation:

- Meetings with athletics director, compliance staff and coaching staff.
- Program's procedures for monitoring specific areas of compliance.
- Reports to compliance of actual and potential NCAA rules issues.
- Monitoring efforts undertaken by the program to ensure that the staff and student-athletes are complying with NCAA rules and compliance obligations.

Please note that the ultimate determination of whether a head coach has exercised proper control over his/her program rests with the NCAA Committee on Infractions, and a failure to promote an atmosphere of compliance and/or failure to monitor determination will consider the unique facts and circumstances of each case. There is no way to set forth a checklist of items that will in all circumstances prevent a finding. Further, it is important that you consult with your athletics administration and compliance staff for additional guidance on how to tailor the best action plan for your institution.<sup>36</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

## VI. EXAMPLES

The following information is a summary of some of the Division I Committee on Infractions case decisions that were included in "Head Coach Responsibilities Regarding Compliance with and Violation of NCAA Rules," and that included a finding that the head coach failed to promote an atmosphere of compliance and/or monitor compliance within his or her program and underscore how the action plans may be of use.

### Key Takeaways

1. The head coach and staff have an obligation to report potential rules violations and actual rules violations to the administration.

- o Ask your staff about any red flags in a prospect's recruitment or a student-athlete's enrollment and immediately alert compliance.

2. The head coach has an obligation to ensure that his/ her program's monitoring systems are operating properly.

- o Ask your staff about any issues with the program's monitoring systems and alert compliance (e.g., timeliness, accuracy).

3. The head coach and staff have an obligation to consult with compliance staff to determine if their actions are consistent with NCAA rules.

- o Ask compliance staff before acting, especially in areas of grey.

4. The head coach and staff have an obligation to identify situations where circumstances could result in NCAA violations, alert compliance and monitor the situation closely.

### Fact Scenarios: Bylaw 11.1.2.1 Violations

The following information summarizes some of the factors that were noted by the Committee on Infractions in public infractions reports when finding that the head coach failed to meet his responsibilities under Bylaw 11.1.2.1.

1. The head coach and staff knew that an agent/booster had a relationship with an elite prospect.

- The head coach failed to alert the compliance staff and administration of possible improprieties between the agent/booster and prospect.

- The head coach and staff knew of the prospect's limited financial resources and did not take any steps to determine whether the relationship between the prospect and agent/booster involved violations of NCAA legislation.

- The NCAA Committee on Infractions noted that Bylaw 11.1.2.1 does not require a head coach to investigate wrongdoing, but it does require the head coach to recognize potential problems, address them and report them to the athletics administration.

2. The head coach and staff knew that several incoming two-year institution transfer student-athletes were deficient academically and were taking numerous classes in a short period of time to meet eligibility requirements.

- The head coach asked his staff only general questions about the prospects' progress and did not ask how the prospects were supporting themselves, how the prospects were traveling around town, how their classes were being paid for and how involved his staff was with the prospects.

- The head coach failed to involve the compliance staff in monitoring the prospects' situations.

3. The head coach and staff encouraged a booster/high school coach to assist the program in recruiting and believed that the booster's employment as a high school coach superseded his status as a booster.

- The head coach failed to consult with compliance to determine whether the booster's actions were permissible.

4. The head coach and staff were told that they could not have any involvement with an on-campus nonscholastic even, but the head coach provided the event operator with access to the program's boosters in order to solicit funding for the event.

- The head coach failed to consult with compliance staff to determine if his interactions with the event operator posed any potential NCAA rules issues.

- The head coach permitted his incoming assistant coaches to attend the event (during a quiet period) and failed to consult with compliance staff to determine if their attendance was permissible.

5. The institution's men's basketball program's telephone contacts were subject to heightened scrutiny due to past violations.

- The men's basketball program's system for monitoring telephone contacts was not functioning properly because the coaches were submitting inaccurate information and were not submitting the logs in a timely manner.

- The head coach had no knowledge that the system was not functioning, and when he was made aware that coaches were not submitting their logs in a timely manner, he failed to resolve the issue with his staff.

- The Committee on Infractions noted that promoting an atmosphere of compliance requires more than general comments about compliance responsibilities.

#### Fact Scenarios: Monitoring Expectations

The following information summarizes some of the monitoring considerations that were noted by the Committee on Infractions in public infractions reports that predate the adoption of Bylaw 11.1.2.1 (2005).

1. Institution failed to monitor a prospective student-athlete, who was living in the university's locale, the summer prior to initial enrollment.

The head coach failed to provide the institution with information about the prospect that would have facilitated the institution's monitoring efforts.

Effective rules compliance demands more than providing rules education and requires actually checking to see whether the staff complies with the rules.

2. A prospective student-athlete received impermissible housing from a current student-athlete the summer prior to initial enrollment.

The institution should have monitored the prospect's circumstances, particularly as it relates to lodging, because of the heightened possibility for rules violations.

The head coach should have inquired about the prospect's lodging and determined whether it was permissible.

3. A booster engaged in numerous impermissible contacts with a prospect and provided the prospect with \$4,000 of cash payments while the prospect was residing in the locale of the institution during the summer prior to initial enrollment.

The monitoring efforts should have included rules education for the prospect, and the institution should have formally monitored the prospect's presence in the locale of the institution.

The prospect's status as an elite prospect should have created a heightened sense of awareness and prompted the institution to increase vigilance and closer monitoring.

4. An international student-athlete, who was a nonqualifier, received cash from the director of basketball operations in order to satisfy financial burdens.

The Committee on Infractions noted that when an international student-athlete is also a nonqualifier, who is ineligible to receive athletically related financial aid, the institution has a greater responsibility to monitor the student-athlete in order to avoid potential rules violations.

Although the director of basketball operations concealed the payments and left no "paper trail," the institution does not avoid responsibility to monitor the situation since the institution had other information available to prompt an inquiry (e.g., nonqualifier, international student-athlete).

5. A booster assisted the men's basketball staff in its recruiting efforts by having impermissible recruiting contacts with prospective student-athletes.

The Committee on Infractions noted that a head coach is expected to recognize potential NCAA violations and report them to the athletics administration.

The head coach failed to recognize that the individual's promotion of the institution to prospects caused him to become a booster of the institution.

## VII. Contractual Provisions

Compliance with the new NCAA Rule is beginning to be enumerated in newly executed coaches' contracts as a duty of the coach. The following are examples of the dictates of NCAA Bylaw 11.1.2.1 as contained in relatively newly executed contracts.

KINGSBURY - Texas Tech University: IV. Performance. Coach will follow all applicable University policies and procedures. Coach shall not, either directly or indirectly, breach, or countenance the breach, by any player or coach subject to his control or supervision, of any of the rules and standards of the Big 12 Conference, the National Collegiate Athletic Association (NCAA), as well as other associations or agencies to which the Texas Tech university adheres. Coach understands that he is presumed to be responsible for the actions of all assistant coaches and other administrators who report, directly or indirectly to him.. Coach shall promote an atmosphere of compliance within the football program and shall monitor the activities of all assistant coaches and other administrators involved in the program who report, directly or indirectly to him.<sup>37</sup>

ANDERSON - University of Wisconsin-Madison: Scope of Services/Duties. II.D. Coach agrees to abide by and comply with the constitution, bylaws, rules, regulations and interpretations (collectively "Legislation") of the National Collegiate Athletic Association (NCAA), Big Ten Conference and any applicable conferences with which the University may be affiliated (Conference), and University rules and regulations relating to the conduct and administration of the athletic program, including recruiting and eligibility rules, as now constituted or as any of the same may be amended during the term hereof. Coach shall also take reasonable steps to ensure that all assistant coaches, student-athletes, and other individuals under his supervision comply with the aforementioned NCAA, Conference or University Legislation. In the event Coach becomes aware or has reasonable cause to believe that violations of NCAA, Conference or University Legislation may have taken place, he shall report the same promptly to the Director of Athletics or designee or the Division's Compliance coordinator.<sup>38</sup>

HURLEY - University of Rhode Island: Coach's Duties. 4.1.3. To recognize and comply with the laws, policies, rules, and regulations of and governing the University and its employees, and the rules of the National Collegiate Athletic Association "NCAA", and the Conference, as now constitute or as they may be amended during the term hereof. The Coach shall also endeavor to ensure that all assistant coaches, basketball student-athletes, and any other employees or any representatives of the University's

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<sup>37</sup> Coaching Contract between Kliff Kingsbury and Tex. Tech Univ. ¶ IV (Feb. 18, 2013) (on file with author) [Kingsbury Contract].

<sup>38</sup> Coaching Contract between Gary L. Anderson and Univ. of Wis.-Madison ¶ II(D) (Jan. 2, 2013) (on file with author) [Hereinafter Andersen Contract].

athletic interests for whom the Coach is administratively responsible, comply with the University, NCAA and conference aforesaid policies, rules, and regulations as well.<sup>39</sup>

HELFRICH - University of Oregon: Helfrich's contract contains a sample Action Plan which is attached to the contract as Exhibit A and states as follows<sup>40</sup>:

### Communication

The president of the University will meet with the Coach annually to discuss the president's expectations for NCAA rules compliance.

The athletics directors will meet with the Coach annually to discuss the athletics director's expectations for NCAA rules compliance. The meeting will address the following:

- Athletics director's philosophy and expectations on rules compliance.
- Compliance resources for the football program.
- The football program's shared responsibility with compliance staff.
- Continued dialogue with athletics director to discuss the institution and football program's compliance environment and expectations.

The compliance director will meet with the Coach at least annually to discuss his/her expectations for NCAA rules compliance. The meeting will address the following:

- Compliance director's philosophy and expectations on rules compliance.
- Compliance resources for the football program.
- A discussion of the compliance staff's and football program's expectations for submitting rules interpretations and waiver requests and how to best resolve any disagreements over the submission of such requests.
- Football program's shared responsibility with compliance staff.
- Expectations for reporting actual and suspected NCAA rules issues (e.g., immediate action; reporting lines).
- Establishment of a plan for continued dialogue with compliance director to discuss the institution and program's compliance environment and expectations.
- Establishment of a plan for ongoing dialogue between coaching staff and compliance staff to discuss key issues facing the sport and program (e.g., agents; initial eligibility; pre-enrollment amateurism, etc.).

The president, athletics director, compliance director and Coach will meet annually to discuss the institution and program's compliance environment and expectations.

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<sup>39</sup> Coaching Contract between Daniel Hurley and Univ. of R.I. ¶ 4.1.3 (Mar. 21, 2012) (on file with author) [Hereinafter Hurley Contract].

<sup>40</sup> Exhibit A of Coaching Contract between Mark Helfrich and Univ. of Or. (Jan. 20, 2013) (on file with author).

## Monitoring

The Coach will actively look for red flags of potential violations.

In consultation with the compliance director, the Coach will create written procedures to ensure that the football staff, including assistant coaches, is monitoring the football program's rules compliance.

In consultation with the compliance director, the Coach will:

- Assign a football staff liaison to the University's compliance staff.
- Assign football staff members to monitor specific areas of compliance (e.g., recruiting contracts, initial eligibility, amateurism, telephone contacts).
- Regularly evaluate football staff members to ensure their areas of compliance are monitored and that all responsibilities are executed in a timely manner.
- Ensure that the football program has adequate and ongoing compliance training and that there is a plan in place for discussion of important information.
- Determine reporting lines for resolving actual and potential NCAA rules issues.
- Determine reporting line to alert compliance staff of issues involving prospective student-athletes and current student-athletes (e.g., agents, initial eligibility, pre-enrollment amateurism, etc.).
- Regularly solicit feedback from the football staff concerning their areas of compliance and the program's overall compliance environment in order to ensure that the monitoring systems are functioning properly.
- Ensure that football staff immediately notifies the compliance staff when concerns or red flags occur to potential NCAA rules violations.

## VIII. Commentary

The coaching and athletic community has certainly commented on the new accountability requirements.

USC athletic director Pat Hayden said "[t]he point is, for head coaches -- and this goes for any sport -- you have this responsibility. You need to be constantly vigilant and you need to be constantly coaching your coaches about how important it is to play by the rules."<sup>41</sup>

Creighton men's basketball coach, Greg McDermott said, "[t]he biggest change needs to be in documentation, in terms of meeting with your staff, your boss, your compliance

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<sup>41</sup> Pedro Moura, *Kiffin on New NCAA Enforcement Plans*, ESPN.COM (Oct. 30, 2012), [http://espn.go.com/blog/los-angeles/usc/post/\\_/id/15380/kiffin-chimes-in-on-new-ncaa-enforcement-plans](http://espn.go.com/blog/los-angeles/usc/post/_/id/15380/kiffin-chimes-in-on-new-ncaa-enforcement-plans).



coordinator, or your president...[i]f anything were to ever happen, you need to protect yourself by having everything documented."<sup>42</sup>

Michigan State's coach Tom Izzo said, I struggle with it all...I have a job to do, and I get paid to do it. If I'm not doing it, my president should fire me...How many things can be our fault? If we're not doing our job, fire us...I agree that if an assistant does something wrong, it should be on the head coach. I agree with that 100%. I'm fine with that. It's our job and we should be held accountable...but I think absolutes are hard. There are some circumstances I struggle with."<sup>43</sup> We delegate responsibility to our head coaches and presidents delegate to athletic directors, just like companies delegate to different levels of management.

Kansas State athletic director John Currie said, "ultimately the leader is accountable."<sup>44</sup> "We expect head coaches to provide practices and training and written materials that instruct their assistant coaches how to act."<sup>45</sup>

Ed Ray, Chairman of the NCAA Board, said the onus is on the coaches. "We expect head coaches to provide practices and training and written materials that instruct their assistant coaches how to act. If they've done that, it can become mitigating evidence that they shouldn't be held accountable for what [a member of their coaching staff] did. But head coaches have to have these things in place or the presumption will be that they didn't care enough to set standards and take responsibility for their programs. If there is no guidance and an assistant goes rogue, then it's partly the head coach's fault and he/she should be held accountable."<sup>46</sup>

Jim Haney, Executive Director of the National Association of Basketball Coaches said that he had one reservation about the rule, stating that there could potentially be head coaches who "will be penalized for actions of their assistant coaches despite the fact that the head coach was clear in his communication to his assistant coaches not to violate rules."<sup>47</sup>

NCAA president Emert said that the NCAA has upped the ante on schools and coaches that are willing to use risk-reward analysis to determine whether they play by the rules.<sup>48</sup>

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<sup>42</sup> Nicole Auerbach, *Coaches Recognize NCAA Demand to be more Accountable*, USA TODAY SPORTS (July 11, 2013), <http://www.usatoday.com/story/sports/ncaab/2013/07/11/college-basketball-coaches-rule-monitoring/2510215/>.

<sup>43</sup> *Id.*

<sup>44</sup> Michael Marot, *NCAA Approves Tougher Sanctions for Rule-Breakers*, THE WASHINGTON TIMES (Oct. 30, 2012), <http://www.washingtontimes.com/news/2012/oct/30/ncaa-approves-tougher-sanctions-rule-breakers/?page=all>.

<sup>45</sup> *Id.*

<sup>46</sup> Gregg Clifton, Paul Kelly & Bethany Swaton Wagner, *New NCAA Rule Puts Premium on Head Coaches' Accountability*, SPORTS BUSINESS JOURNAL (Jan. 7, 2013), <http://m.sportsbusinessdaily.com/Journal/Issues/2013/01/07/Opinion/Clifton-Kelly-Wagner.aspx>.

<sup>47</sup> Cadie Carroll, *NCAA Considers Tougher Penalties for Head Coaches*, JONC (July-Aug. 2012), <http://www.hackneypublications.com/journal/issues/2012/JONC-July-August-2012.pdf>.

<sup>48</sup> Marot, *supra* note 44.

## IX. Conclusion

Head coaches will find themselves under more scrutiny by virtue of the NCAA heightened emphasis on personal responsibility for NCAA violations pursuant to the new enforcement model. The model applies to all Division 1 head coaches and changes the burden from one of presumption of knowledge to presumption of responsibility.

The bottom line is simply that head coaches now can be punished for the acts of others and that ignorance will no longer be acceptable as a tendered defense.<sup>49</sup> In essence, then, coaches can no longer turn a blind eye to impermissible conduct, but will suffer personal sanctions.<sup>50</sup> As a result, head coaches can now be suspended for up to one season if a member of their staff commits a serious rules infraction, and lesser periods for lesser violations. The new rule may put a premium on the selection process where head coaches make certain that they are hiring rule-abiders rather than rule-circumventers.

One thing is for certain; that is, the new rule places more responsibility on a head coach. A head coach must overcome the presumption of responsibility which requires dedicated personal action, a plan on the part of the coach to follow up, affirmative action, affirmative action that involves communication, monitoring, and documentation as defined by the NCAA.

It appears that the rule mandates that a head coach take on more of a compliance director's role as part of their responsibility.<sup>51</sup>

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<sup>49</sup> Marot, *supra* note 44.

<sup>50</sup> Marot, *supra* note 44.

<sup>51</sup> Haynes, *supra* note 2.

Fair? Some will argue that a head coach is responsible for his staff's actions to a degree, and rightfully so. Others will argue that this rule makes a head coach take on an investigator role, which surpasses the type of burden a head coach should have regarding such issues. In short, a head coach must now be proactive in complying with the NCAA's "Action Plan" in order to cover himself from future penalties.<sup>52</sup>

Finally, it has been said that:

It is presumed that head coaches are aware of everything that goes on in their program, from players to assistants, the head honcho is just that - the ringleader - expected to oversee every action of his team....[s]o if the second-in-command veers from the rule book, the head coach could be held responsible for those violations....The key words here are 'presumed,' 'expected to,' and 'could be.'"<sup>53</sup>

I would like to thank Ryan Session, a third-year law student at Marquette University Law School for his assistance in editing and footnoting this article.

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<sup>52</sup> Haynes, *supra* note 2.

<sup>53</sup> Carroll, *supra* note 47.