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## NCAA DIVISION I ATHLETIC DIRECTORS: AN ANALYSIS OF THE RESPONSIBILITIES, QUALIFICATIONS AND CHARACTERISTICS

GLENN M. WONG,\* CHRISTOPHER R. DEUBERT\* & JUSTIN HAYEK\*

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## I. INTRODUCTION

College athletics, perhaps even more so than professional sports, engender a high degree of affinity and attachment. Boosters and alumni are willing to give millions to further the cause of their alma mater. Several schools<sup>1</sup> welcome over one hundred thousand spectators from all over the country to a single home football game on autumn Saturdays.<sup>2</sup> College football's 2014 (and last) Bowl Championship Series ("BCS") National Championship game garnered some of the highest ratings in cable history.<sup>3</sup> Every

1. Throughout this Article, we use the terms "school," "college" and "university" interchangeably to represent institutions of higher learning.

2. See generally 2012 *National College Football Attendance*, NCAA, [http://fs.ncaa.org/Docs/stats/football\\_records/Attendance/2012.pdf](http://fs.ncaa.org/Docs/stats/football_records/Attendance/2012.pdf) (listing attendance statistics for all NCAA Men's varsity football teams for 2012 season). Over 37 million attended Division I FBS football games in 2012. See *id.* Michigan led the national average with 112,252 per game. See *id.*

3. See Michael Humes, *College Football Generates Record Audiences*, ESPN MEDIAZONE (Jan. 10, 2014), <http://espnmediazone.com/us/press-releases/2014/01/college-football-generates-record-audiences/> (providing increased audience statistics as game became "third most viewed cable program ever").

March, economists estimate hundreds of millions of dollars in productivity is lost due to Madness.<sup>4</sup>

The position of Athletic Director is perhaps the most prestigious in all of college athletics. It is, in a sense, the general manager of a portfolio of sports teams that potentially represents the university in front of millions of spectators. However, the duties and responsibilities of an Athletic Director are very different from its professional counterpart. Instead of reporting to a team president or owner, the Athletic Director answers to the university president, chancellor, or board of directors (or governors). The teams do not belong to a professional sport league, but instead are part of the National Collegiate Athletic Association (“NCAA”). NCAA amateurism rules (for now)<sup>5</sup> require that student-athletes are not paid, and therefore Athletic Directors primarily concern themselves with issues such as compliance, fundraising, and coaching contract decisions, in lieu of salary caps, player contract negotiations, drafts, and free agency.

The purpose of this Article is to study how the constitution of Division I Football Bowl Subdivision (“FBS”)<sup>6</sup> Athletic Directors has changed over the last twenty years. The revenues associated with college football and men’s basketball have increased as those sports have become more popular.<sup>7</sup> Given the rising stakes and increasing pressure to perform, many industry professionals believe that there is a conscience movement away from the traditional exercise of hiring ex-coaches as Athletic Directors toward a preference for individuals with a strong business background or previous Athletic Director experience. In support, many cite that the compensation package for top Athletic Directors has become commensurate with business executives who deal with tens or hundreds of millions in revenue. For example, Vanderbilt Athletic Director David Williams

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4. See generally Caroline Fairchild, *March Madness Watchers To Cost Businesses \$134 Million In Just The First Two Days: Study*, HUFFINGTON POST (Mar. 17, 2013), [http://www.huffingtonpost.com/2013/03/17/march-madness-at-work\\_n\\_2868016.html](http://www.huffingtonpost.com/2013/03/17/march-madness-at-work_n_2868016.html) (providing estimations of how much economic productivity is lost due to March Madness).

5. For a discussion on the possibility of changes to NCAA amateurism rules, see *infra* Section III(A)(i): Student-Athlete Compensation and Rights of Publicity.

6. See *infra* Sections II (A)-(B) and accompanying footnotes for a discussion of the significance of the FBS designation. This distinction is further discussed in Section II.A of the NCAA MANUAL *infra* note 13.

7. See generally Revenues & Expenses 2004-2012, NCAA Division I Intercollegiate Athletics Programs Report, NCAA, available at <https://www.ncaapublications.com/p-4306-revenues-and-expenses-2004-2012-ncaa-division-i-intercollegiate-athletics-programs-report.aspx> (discussing increasing revenues in college sports such as football and basketball).

was the highest paid Athletic Director in 2013, earning over \$3.2 million.<sup>8</sup> In all, nine Athletic Directors that year posted earnings over \$1 million.<sup>9</sup>

To study whether this hypothesized tendency toward business experience is accurate and to identify other trends in the data, we gathered as much information as possible on the Athletic Directors of the 120 FBS institutions during the 1989-1990, 1999-2000, and 2011-2012 school years.<sup>10</sup> The information was gathered using a variety of sources, including colleges and universities' news articles and media guides.

This Article is comprised of four sections. The first section describes the environment in which Athletic Directors operate in order to better understand their job responsibilities. In so doing, we attempt to briefly elucidate the operation of the NCAA and the athletic departments of universities. The second section explains the numerous duties of a college Athletic Director framed in the context of the difficult legal issues covering those duties. The third section examines the data we collected and analyzed, giving particular attention to collegiate playing and coaching experience, past Athletic Director experience, business background, education, age, and gender and race. This data is then compared among the three samples taken over the twenty-year window. The final section, termed "Career Tracks," draws conclusions on what paths recent Athletic Directors have taken to reach their positions.

## II. THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Before discussing the athletic department and, more specifically, the Athletic Director, it is important to first understand the unique environment in which athletic departments operate. The NCAA consists of over 1,200 member institutions and is designed to oversee the intercollegiate competition between colleges and uni-

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8. See generally *Athletic Director Salary Database*, USA TODAY, March 6, 2013, available at <http://www.usatoday.com/story/sports/college/2013/03/06/athletic-director-salary-database-methodology/1968783/> (evidencing that David Williams, Vanderbilt Athletic Director, was highest paid in 2013).

9. See *id.* (identifying nine Athletic Directors that earned more than \$1 million in 2013). The following nine Athletic Directors earned over \$1 million: David Williams (Vanderbilt) \$3.2M; Tom Jurich (Louisville) \$1.4M; Steve Patterson (Texas) \$1.4M; Jeremy Foley (Florida) \$1.2M; Barry Alvarez (Wisconsin) \$1.2M; Shawn Eichorst (Nebraska) \$1.1M; DeLoss Dodds (Texas) \$1.1M; Gene Smith (Ohio State) \$1.0M; Jack Swarbrick (Notre Dame) \$1.0M; Joe Castiglione (Oklahoma) \$1.0M. See *id.*

10. In the 1989-90 season, 106 schools played Division 1-A football; in the 1999-2000 season, 114 schools played Division 1-A football; and, in 2011, 120 schools played FBS football.

versities across the United States.<sup>11</sup> Founded in 1906, there are now more than 400,000 student-athletes participating in 23 sports, all of them fighting for one of 89 championships.<sup>12</sup> According to the NCAA Division I Manual, the NCAA's basic purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."<sup>13</sup> The NCAA divides its membership into three divisions: Division I, Division II, and Division III. Division I is further divided based on certain criteria.

### A. Division I Membership Structure

Division I is the highest division in the NCAA divisional structure. The division itself is divided into three subdivisions based on a school's football team: Football Bowl Subdivision ("FBS", previously Division I-A), Football Championship Subdivision ("FCS", previously Division I-AA), and Division I (often referred to as "Division I without football", previously I-AAA). As of 2013, there were 123 FBS members, 126 FCS members, and 97 Division I members.<sup>14</sup> Most of the schools in Division I are considered to be among the larger universities in the United States. Sixty-six percent of Division I institutions are public; the remaining thirty four percent of Division I institutions are private.<sup>15</sup>

A school must meet a set of minimum requirements in order to qualify as a Division I institution. An institution must offer at least 14 sports (including a minimum six for men and seven for women), sponsor a minimum of two team sports for each gender, and have

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11. See *Who We Are, Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited March 9, 2015) (providing brief historical overview of NCAA).

12. See *id.* (explaining that three-division structure provides more opportunities for student athletes).

13. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2013-2014 NCAA DIVISION I MANUAL, art. 1.3.1, NCAA, [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/p-4322-2013-2014-ncaa-division-i-manual.aspx> (highlighting NCAA purpose and goals and providing schools with operational and administrative bylaws).

14. See *NCAA Members by Division*, NCAA, available at <http://web1.ncaa.org/onlineDir/exec2/divisionListing> (last visited February 15, 2014) (listing NCAA membership statistics in 2013).

15. Compare Steve Berkowitz, *Most NCAA Division I Athletic Departments Take Subsiding*, USA TODAY, July 1, 2013, <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/> (stating there are 228 public Division I institutions). See also *Members by Division*, *supra* note 14 (listing all 346 Division I institutions).

at least one sport in each season (fall, winter, and spring).<sup>16</sup> In order for a sponsored sport to be counted against one of the fourteen required sports, it must meet the minimum contests and participants requirement unique to each sport.<sup>17</sup> For example, the soccer team must play a minimum of eleven contests, while the individual sport of golf must have at least eight contests and at least five participants.<sup>18</sup>

Division I also has financial aid limitations and requirements that set it apart from the other Divisions. Each sport has a maximum number of scholarships, known as “grants-in-aid,” it is allowed to provide to student-athletes.<sup>19</sup> The NCAA divides sports into “head-count” sports and “equivalency” sports. In head-count sports, student-athletes receiving grants-in-aid are counted against the maximum if they receive any aid, regardless if it is full or partial.<sup>20</sup> For example, women’s tennis is a head-count sport, and a maximum of eight student-athletes can receive aid.<sup>21</sup> In equivalency sports, only what a student-athlete receives is counted toward the grants-in-aid limitation.<sup>22</sup> For example, men’s soccer is an equivalency sport with a maximum value of 9.9 financial aid awards.<sup>23</sup> Thus, the value of 9.9 scholarships could theoretically be spread across all eighteen or so members of the soccer team.

It also bears mentioning that recent events have set the stage for further division among NCAA member institutions. In August 2014, the NCAA Board of Directors approved a plan that would provide a degree of autonomy for college sports’ five largest and most powerful conferences: the Southeastern Conference, ACC, Big 12, Big Ten and Pacific-12.<sup>24</sup> Moving forward, the five confer-

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16. See generally NCAA MANUAL, *supra* note 13, art. 20.9 (providing detailed description of specific requirements necessary for Division I membership).

17. See *id.* art. 20.9.6.3 (listing minimum requirements for sports sponsorship).

18. See *id.* (providing specific requirements for given sports).

19. See generally NCAA MANUAL, *supra* note 13, art. 15.5 (listing various schemes and requirements for grants-in-aid per sports).

20. See *id.* art. 15.5.9.1.1.2 (defining how grants-in-aid are counted).

21. See *id.* art. 15.5.2.1 (listing specific head-count maximums for different sports).

22. See generally NCAA MANUAL, *supra* note 13, art. 15.5.3.2 (providing information on how financial aid is computed in equivalency sports). The actual computation of financial aid in equivalency sports is slightly more complicated than this. Briefly, what a student-athlete receives in aid is divided by cost of a full grant. The fractions are then summed, and the sum must not exceed the limit provided for each sport listed in article 15.5.3.1 of the NCAA Manual.

23. See *id.* art. 15.5.3.1.1 (listing equivalency values of various men’s sports).

24. See Kent Babb, *NCAA Board of Directors Approves Autonomy for ‘Big Five’ Conference Schools*, WASH. POST, Aug 7, 2014, <http://www.washingtonpost.com/sports/>



ences will be able to propose rules, which will govern only them. A new 80-member panel, including 15 current players, was created to vote on the big five's proposed rule changes. To pass a rule requires either a 60 percent majority of the 80-member panel plus three of the five power conferences or a simple majority plus four of the five leagues.<sup>25</sup> The increased autonomy is likely to provide the five conferences with the authority to provide more stipends and insurance benefits to student-athletes, increase staff sizes, lessen recruiting restrictions, and increase the number of permitted hours of practice.<sup>26</sup> The policy change was a clear sign that the big five conferences, with their dominating football teams and large television contracts, are competing on a different level than the other Division I members.

### 1. *FCS Versus FBS*<sup>27</sup>

FBS and FCS schools must meet additional requirements above those minimum requirements set forth for Division I membership. FCS schools are required to sponsor at least 14 varsity intercollegiate sports, including a minimum of seven women's sports and six men's sports.<sup>28</sup> Most importantly as compared to the basic Division I requirements, FCS schools are required to have a football team,<sup>29</sup> and that football team must play more than half of its football games against FCS or FBS teams.<sup>30</sup>

FBS institutions are required to sponsor at least 16 varsity intercollegiate sports (including football) with a minimum of six men's sports and eight women's sports.<sup>31</sup> Furthermore, FBS member in-

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colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1\_story.html (discussing plan of NCAA Board of Directors to provide autonomy for five largest and most powerful sports conferences).

25. See Brian Bennett, *NCAA Board Votes to Allow Autonomy*, ESPN, Aug. 8, 2014, [http://espn.go.com/college-sports/story/\\_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences](http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences) (discussing how Big Five Conferences can impact NCAA changes going forward).

26. See *id.* (providing how this new autonomy will benefit conferences).

27. See generally NCAA MANUAL, *supra* note 13, art. 20.9.9 (describing additional requirements for FBS and FCS schools in addition to Division I requirements).

28. See *id.* art. 20.9.10.1 (providing minimum sponsorship requirements).

29. See *id.* art. 20.9.10.1. (listing requirements for FCS members). FCS Members are required to have a football team. Further, this football team must play more than half of its games against FBS and FCS members.

30. See *id.* art. 20.9.10.2 (providing minimum game requirements for FCS and FBS members).

31. See *id.* art. 20.9.9.1 (defining minimum requirements to sponsor teams).



stitutions must annually offer at least 200 athletics grants-in-aid or spend at least \$4 million on athletics grants-in-aid.<sup>32</sup>

Most of the other rules differentiating FCS versus FBS schools predictably apply specifically to football. For instance, an FBS school must play at least 60 percent of its football games against other FBS member institutions.<sup>33</sup> There is also a requirement that the institution average at least 15,000 in “actual or paid attendance” over a two year rolling period for all home football games.<sup>34</sup> Finally, FBS member institutions must provide an average of at least 90 percent of the permissible maximum football grants-in-aid during a rolling two-year period.<sup>35</sup>

## B. Financial Implications of FBS Versus FCS and No Football

While the structure and administration highlights some differences among the Division I subdivisions, the most notable difference between Division I subdivisions are the football programs and the revenue and expenses they generate. The finances of major Division I athletic departments have long been contentious issues in college athletics.<sup>36</sup> Some critics cite the amount of revenues generated by the NCAA and large college programs to support their argument that student-athletes should be better compensated for their efforts.<sup>37</sup> Others cite the deficit under which most athletic programs operate to argue against the inclusion of the athletic department as part of the university experience.<sup>38</sup>

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32. *See id.* art. 20.9.9.4 (outlining additional financial aid requirements).

33. *See* NCAA MANUAL, *supra* note 13, art. 20.9.9.2 (providing requirement that FBS members must play at least sixty percent of their games against other FBS institutions). However, the Division I NCAA bylaws do permit for a FBS member institution to count one contest against an FCS member to satisfy the scheduling requirement, “provided the Football Championship Subdivision opponent has averaged 90 percent of the permissible maximum number of grants-in-aid per year in football over a rolling two-year period.” *See id.* art. 20.9.9.2.1.

34. *See id.* art. 20.9.9.3 (outlining how NCAA counts attendance and differentiates between actual and paid attendance).

35. *See id.* art. 20.9.9.4 (expanding upon NCAA financial aid requirements).

36. *See generally* MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2000) (discussing contentious issues surrounding Division I sports and their financials).

37. *See* Michael Wilbon, *College Athletes Deserve to be Paid*, ESPN (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid) (providing discussion of one contentious issue, whether college athletes should be compensated as college sports bring in significant revenue).

38. *See generally* PETER A. FRENCH, ETHICS AND COLLEGE SPORTS: ETHICS, SPORTS, AND THE UNIVERSITY (2004) (discussing common argument that university athletic department is not part of educational experience).

## 1. *FBS Financials*

The FBS consists of the largest revenue generating athletic departments in the NCAA, generating median revenues of nearly \$41.9 million in 2013.<sup>39</sup> This number has been on the rise; median revenues increased over 37% from 2008.<sup>40</sup> The median generated revenue for men's sports in 2013 was \$31.3 million, whereas the media revenue for women's sport was only \$1.2 million.<sup>41</sup> The athletic department, which generated the most revenue in 2013, reported over \$165 million.<sup>42</sup>

NCAA and conference distributions are the largest source of generated revenue for FBS institutions, bringing in over \$10.4 million (24.8% of generated revenues). Other major sources of revenue include ticket sales (\$8.8 million/21.0%), contributions from donors and alumni (\$8.7 million/20.8%), and royalties, advertising, and sponsorships (\$3.4 million/8.0%).<sup>43</sup> The average football team generates \$20.3 million in revenue (48.4% of revenues) while the average men's basketball team generates \$5.6 million (13.3%).<sup>44</sup>

However, expenses have been on the rise at the same time. Median total expenses were \$62.2 million in 2013, up over 50% since 2008's level of \$41.4 million.<sup>45</sup> The median FBS athletic department expended \$11.6 million more than it brought in (not including institutional funds) in 2013.<sup>46</sup> In fact, in 2013, only 20 of the 125 FBS university athletic departments generated revenues that exceeded their expenses.<sup>47</sup> There is also a large discrepancy in

39. NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES 2004-2013, 20 (2014) [hereinafter NCAA REVENUES AND EXPENSES], available at <http://www.ncaapublications.com/productdownloads/DIREVEXP2013.pdf> (providing summary fiscal information for Fiscal Years 2004 through 2013). "Generated revenues" do not include revenues allocated to the athletic department by the university. "Total revenues" include allocated revenues.

40. *See id.* (illustrating that 2008 median generated revenues for men's and women's sports was \$30,494,000).

41. *See id.* at 24 (listing comparisons of media generated revenue for men's and women's sports).

42. *See id.* at 20 (showing largest generated revenue of 2013).

43. *See id.* at 30 (describing sources of revenue for college athletics).

44. *See* NCAA REVENUES AND EXPENSES, *supra* note 39, at 37 (illustrating that men's football generates more revenue, on average, than men's basketball).

45. *See id.* at 21 (showing rising expenses associated with college athletics).

46. *See id.* at 24 (illustrating that Athletic Departments expend more than they earn in generated revenue).

47. *See id.* at 13 (illustrating that in only twenty cases did generated revenue exceed expenses). It is important to note that generated revenue is revenue that is generated solely by the operations of the athletic department and does not include revenues otherwise received from the university. *See id.* at 9.

the expenses of men's and women's sports. The median Division I FBS university spent \$24.8 million on men and \$10 million on women.<sup>48</sup> However, much of this can be traced to expenses relating to the football program; an average of \$15.3 million was spent on football alone in 2013.<sup>49</sup> Men's basketball saw another \$5.2 million in expenses.<sup>50</sup>

The largest expenditure category for an athletic department is the university paid salaries and benefits of the personnel, with a median expense of \$20.7 million.<sup>51</sup> These salaries account for over 33% of all athletic department expenses. Other single areas of major expense include grants-in-aid at \$8.7 million (14.0%), facilities maintenance and rental (\$5.5 million/8.9%), and team travel (\$4.0 million/6.4%).<sup>52</sup>

## 2. *Division I FCS and Division I Without Football*

There is a stark difference when comparing the financials of FBS schools to those of FCS schools. For example, in 2013, the median generated revenue of FCS schools was \$3.79 million, only 9% of what the median FBS school generated.<sup>53</sup> Even the largest FCS revenue generating institution brought in only \$23.3 million, approximately \$18.5 million less than the revenues of the median FBS school.<sup>54</sup>

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48. *See id.* at 24 (comparing university expenditures on men's sports with women's sports).

49. *See* NCAA REVENUES AND EXPENSES, *supra* note 39, at 27 (evidencing that differences between expenditures on men's and women's sports revolve around football).

50. *See id.* (evidencing that another difference is expenditures on men's basketball programs).

51. *See id.* at 32 (illustrating that salaries of university personnel also contribute to expenditures on collegiate athletics).

52. *See id.* at 32-33 (showing other expenditures that collegiate athletic programs face).

53. *Compare* NCAA REVENUES AND EXPENSES, *supra* note 39, at 49, *with id.* at 24 (evidencing stark difference between finances of FBS and FCS programs). *See also id.* at 17-22 (providing side-by-side comparison and summary of FBS and FCS generated revenues and expenses from 2004-2013).

54. *See* NCAA REVENUES AND EXPENSES, *supra* note 39, at 49 (showing that FCS schools generate less in revenue than FBS schools). Football at the FCS level generates a median of \$955,000 per school. *See id.* at 52 (providing average revenues for FCS institutions). Furthermore, the median total expenses for FCS athletic departments were about \$14.5 million, or 387% of generated revenues. *See id.* at 49 (illustrating that Football at FCS institutions brings in much less in revenue than schools spend in expenditures). The expenses incurred by football were by far the largest at \$3.0 million, followed by \$1.3 million for men's basketball. *See id.* at 62 (illustrating most expenditures of FCS institutions are due to costs of football).

Division I schools without football show an even greater disparity in their finances. The median revenue generation of such schools was \$2.4 million in 2013.<sup>55</sup> These schools almost certainly do not operate at a profit. Even without having to deal with the high cost of a football team, median expenses at a Division I university without a football team are over \$14 million.<sup>56</sup> Many Division I schools without football have filled the gap with hockey, another high-expense sport, at a median cost of \$2.3 million in 2013.<sup>57</sup> Men's basketball came in a close second at \$1.9 million in average expenses.<sup>58</sup>

These numbers suggest that FCS and non-football Division I programs are not intended to be, and likely cannot be, self-sustaining. The lack of revenue generation coupled with still relatively high expenses makes self-sustenance impractical. The major revenue-generating sports of football and men's basketball in these two subdivisions do not generate enough revenue to cover the sports' own expenses in many instances, let alone supplement other parts of the athletic department. Instead, FCS and Division I schools without football rely heavily on allocated revenues from the university and other sources to operate the athletic department.

### III. THE DUTIES OF A DIVISION I ATHLETIC DIRECTOR AND RELATED LEGAL ISSUES

College athletics is big business. The NCAA received \$871.6 million in revenue for the 2011-12 academic year.<sup>59</sup> Moreover, the 100 highest revenue producing athletic programs averaged approximately \$59,361,468 in revenues during the 2012-13 academic year and thirteen programs brought in more than \$100 million in revenue.<sup>60</sup> Athletic Directors' duties are closely tied to generating and

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55. See NCAA REVENUES AND EXPENSES, *supra* note 39, at 75 (illustrating average revenues of Division I schools without football).

56. See *id.* (showing that even without football teams, Division I schools still generate many expenses).

57. See *id.* at 88 (providing explanation as to how Division I schools can generate expenses without football teams).

58. See *id.* (providing further evidence that schools without football teams can generate large expenses).

59. See *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited February 15, 2014) (providing information regarding NCAA profits).

60. See Steve Berkowitz, Christopher Schnaars & Jodi Upton, *College Finances*, USA TODAY, <http://www.usatoday.com/sports/college/schools/finances> (last visited Mar. 9 2015) (crediting Malcolm Moran, Cory Collins, Megan Filipowski, Patricia Foley, Autumn Grayson, Cate Grider, Alec Johnson, Sam King, Jon LaFollette, Tian Liang, Daniel McFadin, Nicholas Moyle, Manny Randhawa, Greg

protecting these revenues. Yet, organizations of any kind certainly are not able to produce such high revenues without its share of concomitant legal issues. The most important aspects of an Athletic Director's job and the related legal issues include: the NCAA and compliance; conference issues and responsibilities; university rules, regulations and responsibilities; compliance with Title IX,<sup>61</sup> and, negotiating contracts. We discuss each area in turn.

### A. NCAA Issues and Compliance

Maintaining and ensuring compliance with NCAA Bylaws is perhaps an Athletic Director's most important responsibility. The NCAA's Division I Manual of rules and regulations is notoriously thick: 417 pages separated into 33 Articles.<sup>62</sup> There are hundreds, if not thousands, of individual rules that, although designed to ensure fairness and to protect the tenets of amateurism, can also come across as silly and counterintuitive. NCAA Bylaws understandably prohibit offering cash and other gifts as an inducement to enroll,<sup>63</sup> but also prohibit member institutions from contacting prospective student-athletes via text message (unless they play basketball),<sup>64</sup> and declares student-athletes ineligible if they ever played on a team with a professional player, even if they were never compensated.<sup>65</sup>

It is essential that athletic departments have a strong compliance department. Almost all, if not all, member institutions have a compliance department, which consists of a team of individuals whose everyday mission and task is to ensure that the institution's athletic department, teams, coaches, and student-athletes comply with NCAA Bylaws. The compliance department is responsible to ensure each step of a student-athlete's journey into, through, and out of the university is NCAA-compliant. This includes making sure the student-athlete is eligible, that the school recruited the athlete

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Rappaport, Jazmin Reid & Madison Warfel of Indiana University's National Sports Journalism Center) (providing data to calculate revenue of university athletic programs).

61. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (evidencing that schools must provide students with equal opportunities for participation in sports).

62. See generally NCAA MANUAL, *supra* note 13 (listing NCAA bylaws, rules and regulations).

63. See *id.* art. 13.2 (evidencing that schools may not offer cash or gifts as an inducement to enroll).

64. See *id.* arts. 13.4.1.2-13.4.2.1 (evidencing that schools may not contact prospective athletes via text message).

65. See *id.* art. 12.2.3.2 (illustrating that playing on teams with professional athletes can disqualify NCAA participation).

appropriately, that the student-athlete remains academically eligible, does not accept impermissible benefits, practices and plays in accordance with NCAA Bylaws, and then, if possible, transitions into professional sports without jeopardizing his or her eligibility and the school's standing in the process.

Former Auburn quarterback Cam Newton is an illustrative example. Coming out of high school in Atlanta, Georgia in 2007, Newton was one of the top-ranked college football recruits and attracted the attention of many of the top programs in the country.<sup>66</sup> Considering the competitiveness with which Newton was recruited, an Athletic Director and compliance personnel would have paid special attention to the number of visits Newton made to the university,<sup>67</sup> the nature of the visits, the frequency and timing with which the football team staff contacted Newton,<sup>68</sup> the nature and date of the scholarship offer,<sup>69</sup> and Newton's academic standing.<sup>70</sup>

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66. See *Cameron Newton*, RIVALSON.COM, <http://rivals.yahoo.com/footballrecruiting/football/recruiting/player-Cameron-Newton-41356> (last visited Mar. 9, 2015) (discussing Cam Newton's high school career and his prospects).

67. See NCAA MANUAL, *supra* note 13, art. 13.6.2.1 (providing rule on official visit limitations). NCAA Bylaws strictly limit a prospective student-athlete to one "official" visit; see also *id.* art. 13.02.16.1 (evidencing that "official visits" are visits "to a member institution by a prospective student-athlete. . . financed in whole or in part by the member institution"). See also *id.* art.13.7.1 (evidencing that prospective student-athletes can take unlimited "unofficial visits"); *id.* art. 13.02.16.2 (illustrating that if universities provide anything of value greater than \$100 to visiting student-athletes, visits becomes "official.").

68. See NCAA MANUAL, *supra* note 13, art. 13 (discussing several rules concerning the type and amount of contacts permitted). For example, generally, off-campus recruiting contacts cannot be made before July 1 following the completion of the prospective student-athlete's junior year in high school. See *id.* art. 13.1.1.1. "In football, one telephone call to an individual . . . may be made from April 15 through May 31 of the individual's junior year in high school." *Id.* art. 13.1.3.1.2. During a prospective student-athlete's senior year, the school is permitted to make one telephone call per week. See *id.* art. 13.1.3.1. Each sport has its own specific calendar controlling when the school can contact prospective student-athletes. See *id.* art. 13.17. Lastly, while school officials are permitted to send emails and facsimiles to prospective student-athletes, they are prohibited from sending text messages. See *id.* art. 13.4.1.2.

69. See NCAA MANUAL, *supra* note 13, arts. 15.1, 15.02.2 (discussing nature and dates of scholarship offers). Financial aid is limited to the "cost of attendance," defined as "an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition, fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." *Id.* art. 15.02.2. An institution cannot offer a scholarship until August 1 of a prospective student-athlete's senior year in high school. See *id.* art. 13.9.2.2.

70. See *id.* art. 14.3 (detailing academic requirements for freshman student-athletes); see also *id.* art. 14.3.1.1.2 (charting initial-eligibility based on combination of GPA and SAT or ACT score).



Newton ultimately chose to enroll at the University of Florida, the defending national champions.

Newton's journey through the NCAA process was only beginning however. In the fall of 2008, Newton was arrested for the theft of a laptop computer from another Florida student.<sup>71</sup> While NCAA Bylaws do not proscribe penalties from criminal conduct by student-athletes, the NCAA Bylaws dictate that all student-athletes and persons associated with athletic departments are to act ethically.<sup>72</sup>

After Florida suspended Newton, Newton decided to transfer. Although he was poised to become a big-time college football player, Newton could not transfer to another Division I institution without sitting out one year.<sup>73</sup> Newton instead chose to transfer to Blinn College, a junior college in Brenham, Texas governed not by the NCAA, but instead by the National Junior College Athletic Association ("NJCAA"). Newton played only one season at Blinn and led the school to the 2009 NJCAA National Football Championship, throwing for 2,833 yards and 22 touchdowns (and rushing for 16 more) in 12 games.<sup>74</sup>

One year removed from his Florida departure, Newton was once again eligible to play NCAA Division I football. Newton was again recruited by the college football powerhouses, and ultimately chose to sign with Auburn University. Newton's transfer from a junior college came with its own subset of NCAA Bylaws, including that he had spent at least one full-time semester at the junior college and that he had earned a grade point average of at least 2.0.<sup>75</sup>

Newton's biggest NCAA challenge yet came at Auburn. Newton's Auburn career got off to a roaring start when he accounted for five touchdowns and 357 yards in a September 4, 2010

71. See *Florida's Newton Faces Felony Counts After Fellow Student's Laptop Stolen*, ASSOCIATED PRESS, Nov. 21, 2008, <http://sports.espn.go.com/nfl/news/story?id=3718266> (discussing charges that Newton faced after fellow student's laptop was stolen).

72. See generally NCAA MANUAL, *supra* note 13, art. 10.1 (providing evidence that Cam Newton's criminal charges violated NCAA bylaws because NCAA restrict unethical conduct).

73. See *id.* art. 14.5.1 (illustrating requirement that students whom wish to transfer to another institution cannot transfer without sitting out one season).

74. See Blinn College Football, *Statistics: Cameron Newton*, NAT'L JR. COLLEGIATE ATHLETIC ASS'N, [http://www.njcaa.org/colleges\\_college\\_player.cfm?category=vstats&sid=11&divid=0&slid=5&collegelid=1687&teamid=92308&athleleid=270689&seasonselect=459](http://www.njcaa.org/colleges_college_player.cfm?category=vstats&sid=11&divid=0&slid=5&collegelid=1687&teamid=92308&athleleid=270689&seasonselect=459) (last visited Nov. 25, 2014) (illustrating Cam Newton's statistics while playing for Blinn College).

75. See NCAA MANUAL, *supra* note 13, art. 14.5.4.1 (illustrating that Cam Newton could not transfer from Blinn College to NCAA institution without complying with additional NCAA bylaws).



win over Arkansas State.<sup>76</sup> While Newton and Auburn's stellar play continued on the field, speculation of improper recruiting practices swirled off it. In early November 2010, several Mississippi State University athletic boosters claimed that Cecil Newton, Cam's father, sought a cash payment of between \$100,000 and \$180,000 to secure Cam's transfer from Blinn to Mississippi State.<sup>77</sup>

Weeks earlier, the NCAA's enforcement staff sent Jay Jacobs, Auburn's Athletic Director, a request for documents, including telephone records and emails related to Newton's recruiting, as well as bank records for Newton's parents.<sup>78</sup> In addition, the NCAA warned Newton and the Auburn football coaches that if they discussed the matter among themselves, they would be in violation of NCAA Bylaws 10.1 (Unethical Conduct) and/or 32 (Cooperative Principle).<sup>79</sup>

Auburn denied that it had paid Newton or his father for Newton's transfer or that it had violated any NCAA Bylaws in recruiting Newton. However, in the middle of a run to a possible national championship, Auburn had to decide whether to play Newton and risk having to forfeit wins and possibly championships in the event Newton and Auburn were later found to have violated NCAA Bylaws, or declare Newton ineligible and risk the chance to win a national championship. The NCAA determined that Cecil Newton had in fact made such a demand and, on November 30, 2010, declared Newton ineligible, only days before undefeated Auburn was scheduled to play South Carolina in the SEC Championship.<sup>80</sup>

Auburn's athletic department immediately filed a request seeking Newton's reinstatement on the ground that Newton was una-

76. See *Cam Newton Runs for 2 TDs, Throws 3 TDs in Auburn Romp*, ESPN, Sept. 4, 2010, <http://espn.go.com/ncf/recap?gameId=302470002> (discussing initial success of Cam Newton's career at Auburn).

77. See Bill Bell, *Mississippi State Booster, Says He Received Payment Plan For Cam Newton: Report*, HUFFINGTON POST, May 25, 2011, [http://www.huffingtonpost.com/2010/11/17/bill-bell-booster-cam-newton\\_n\\_785196.html](http://www.huffingtonpost.com/2010/11/17/bill-bell-booster-cam-newton_n_785196.html) (providing evidence that Cecil Newton sought cash payments from Mississippi State Boosters).

78. See NAT'L COLLEGIATE ATHLETIC ASS'N, *Cam Newton Investigation Documents*, [hereinafter "Cam Newton Investigation Documents"], available at <http://i.usatoday.net/sports/college/football/2011-11-04-ncaa-auburn-newton.pdf> (last visited Nov. 25, 2014) (collection of documents related to NCAA's investigation into Cam Newton's situation).

79. See *id.* (providing evidence that NCAA determined Cecil Newton made certain demands and that Cam Newton was ineligible to play).

80. See *Cam Newton Cleared to Play*, ESPN, <http://sports.espn.go.com/ncf/news/story?id=5870788> (last updated Dec. 3, 2010) (evidencing that Cam Newton was declared ineligible to play after confirmation that Cecil Newton had in fact made demand).

ware of his father's request and that he was not using Kenny Rogers, the Mississippi State booster and alumnus to whom Cecil's request was made, as an impermissible agent.<sup>81</sup> The very next day, December 1, 2010, the NCAA agreed with Auburn and reinstated Newton.<sup>82</sup> Newton went on to lead Auburn to the SEC Championship, national championship and to win the Heisman Trophy.

Following his junior season, Newton chose to enter the NFL Draft rather than return for his fourth year of collegiate football. Newton's decision to turn professional was also fraught with potential compliance problems. Considering Newton's level of play, he almost certainly attracted the attention of NFL player representation firms, i.e., agents, and their ugly cousin, "runners."<sup>83</sup> The player representation industry is a fiercely competitive, and many claim often unethical, business.<sup>84</sup> Agents, runners, financial advisors, marketing advisors, and almost anyone who believed they could earn income or notoriety from representing Newton likely tried to recruit Newton and persuade him to utilize their services.

The NCAA has a strict prohibition against the use of agents by student-athletes or even agreeing to future use of a particular

81. See Cam Newton Investigation Documents, *supra* note 78 (illustrating that Auburn filed request for reinstatement, arguing that Cam Newton was unaware of his father's demand).

82. See Erick Smith, *NCAA Rules Auburn's Newton Eligible for now After Rules Violation*, USA TODAY, <http://content.usatoday.com/communities/campusrivalry/post/2010/12/auburn-cam-newton-ncaa-eligible/1> (last updated Dec. 1, 2010) (discussing Cam Newton's reinstatement). In October 2011, the NCAA closed its investigation into Auburn's recruitment of Newton without any punishment. The NCAA interviewed more than 50 people and was unable to determine that Newton or his family received improper benefits from Auburn. See Charles Goldberg, *NCAA Says Auburn Had No Major Violations, Ends Investigation in Signing of Quarterback Cam Newton*, AL.COM, [http://www.al.com/sports/index.ssf/2011/10/ncaa\\_says\\_auburn\\_finds\\_no\\_majo.html](http://www.al.com/sports/index.ssf/2011/10/ncaa_says_auburn_finds_no_majo.html) (last updated Oct. 12, 2011) (illustrating that NCAA ended investigation into Auburn's signing of Cam Newton). See also Letter from Jackie A. Thomas, NCAA Director of Enforcement, to Jay Jacobs, Athletic Director of Auburn University, Oct. 11, 2011, available at [http://media.al.com/sports\\_impact/other/JJacobs\\_OC\\_101111\\_Auburn%28JAT%29.pdf](http://media.al.com/sports_impact/other/JJacobs_OC_101111_Auburn%28JAT%29.pdf) (illustrating that NCAA did not find Auburn in violation with regards to Cam Newton).

83. See Chris Deubert, *What's a "Clean" Agent to Do? The Case for a Cause of Action Against a Players Association*, 18 VILL. SPORTS & ENT. L.J. 1, 5 (2011) (discussing term "runner"). "The term 'runner' generally describes someone employed by an agent, typically a young person, whose job is to become friendly with the student-athlete, providing the student-athlete with cash, meals, clothes or other gifts and ultimately steering the student-athlete towards the employing agent." See *id.*

84. See *id.* (discussing competitiveness of player representation industry). See also *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 868 (7th Cir. 1999) (granting defendant sports agency summary judgment in its defense against competing sports agency's tortious interference with business relationship suit arising out of then Texas Ranger Ivan Rodriguez switching agencies).

agent.<sup>85</sup> Moreover, accepting anything of value from agent can immediately and, perhaps, irretrievably cause a student-athlete to lose his or her amateurism status and eligibility. Thus, it would have been essential for Auburn's athletic department to maintain close scrutiny of persons approaching Newton about his potential professional career and to warn Newton of the relevant Bylaws and concerns.<sup>86</sup>

There are also several actions that an athletic and compliance department can and should take to assist a student-athlete considering turning professional. Before the season even begins, the school should consider whether the student-athlete should participate in the NCAA Exceptional Student-Athlete Disability Insurance ("ESDI") Program to protect against the risk of injury.<sup>87</sup> The school is permitted (and should) inquire of a professional sports organization about the student-athlete's professional prospects.<sup>88</sup> Basketball and hockey student-athletes are permitted to attend try-outs or draft combines provided they only receive "actual and necessary travel, and room and board expenses."<sup>89</sup> The university can also facilitate and control the process for interviewing agents and other advisors.<sup>90</sup> Additionally, NCAA Bylaws specifically contemplate and allow the use of a "Professional Sports Counseling Panel" to assist student-athletes in the process of turning professional.<sup>91</sup>

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85. See NCAA MANUAL, *supra* note 13, art. 12.3.1 (evidencing NCAA's strict prohibition against student-athletes' use of agents). See also *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio C.P., Erie Cnty 2009) (illustrating example in which NCAA suspended student-athlete for using agent while negotiating with MLB Club in considering whether to turn professional).

86. See NCAA MANUAL, *supra* note 13, art. 14.02.1 (evidencing the NCAA Academic Progress Rate requirement). Newton's early departure from Auburn also negatively affected Auburn's Academic Progress Rate which has the potential to bring sanctions from the NCAA, such as loss of scholarships or postseason ineligibility.

87. See Chris Deubert, et al., *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L.J. 553, 568-74 (2011) (discussing 'ESDI' program to protect student-athletes against injury).

88. See NCAA MANUAL, *supra* note 13, art. 12.2.4 (discussing recommendation that school should inquire into student-athlete's professional prospects after college).

89. See *id.* art. 12.2.1.3.1 (concerning basketball student-athletes); *id.* art. 12.2.1.3.2 (concerning hockey student-athletes).

90. See generally Deubert, *supra* note 87 (discussing how university can facilitate and control agent and advisor interview process for student-athletes).

91. See NCAA MANUAL, *supra* note 13, art. 12.3.4 (evidencing that universities can use "Professional Sports Counseling Panel[s]" in accordance with NCAA bylaws).

As Newton's story demonstrates, the greater the athlete, the greater the compliance risk and issues. Auburn and Newton ultimately weathered a tumultuous run through the NCAA rope ladder and came out clean on the other side. Auburn got its first national championship since 1957 and the Carolina Panthers chose Newton as the first overall pick in the 2011 NFL Draft. None of which would have been possible without Auburn Athletic Director Jay Jacobs and his staff's compliance with NCAA Bylaws.

### 1. *Student-Athlete Compensation and Rights of Publicity*

The structure and method by which the NCAA and athletic departments produce their revenue has been under constant legal attack. Notably, by virtue of the amateurism concept to which college athletics adheres, college athletics operate without directly compensating the most important part of the production: the student-athletes. Moreover, NCAA rules prohibit student-athletes from receiving income based on their athletic success. This imbalanced relationship has regularly sparked outrage from commentators and litigation from student-athletes.

The most important litigation ever concerning these issues is currently being waged and poses a threat to the fundamental structure of the NCAA and college athletics. In *O'Bannon v. NCAA*, Honorable Claudia Wilken of the United States District Court for the Northern District of California held that the NCAA's prohibitions on student-athletes receiving a share of the revenues that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage violates antitrust law.<sup>92</sup> The Court did not agree that the restrictions were necessary to preserve amateurism, maintain competitive balance, or to integrate academics and athletics.<sup>93</sup> The Court enjoined certain NCAA bylaws but

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92. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (holding that NCAA's prohibition against student-athletes receiving shares of revenue violates antitrust law). In related litigation, courts had previously determined that student-athletes have a right of publicity. See, e.g., In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013) (video game developer's use of likenesses of college athletes in its video games was not protected by First Amendment, and therefore former college football player's right-of-publicity claims against developer were not barred by California's anti-SLAPP statute); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013) (video game developer's use of likenesses of college athletes in its video games was not protected by First Amendment).

93. See generally *O'Bannon*, 7 F. Supp. 3d 955 (holding that NCAA restrictions were not necessary to preserve amateur athletics).

nevertheless permitted the NCAA to regulate how the revenues are paid to the student-athletes, including the timing and amount:

The Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws.

The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Although the injunction will permit the NCAA to set a cap on the amount of money that may be held in trust, it will prohibit the NCAA from setting a cap of less than five thousand dollars (in 2014 dollars) for every year that the student-athlete remains academically eligible to compete.<sup>94</sup>

The *O'Bannon* decision, pending appeal to the Ninth Circuit Court of Appeals, was a limited but powerful decision viewed as the beginning of larger changes to come.<sup>95</sup> Most analysts believe the lawsuit filed by Martin Jenkins, a former Clemson football player, is the greatest threat to the NCAA's business model.<sup>96</sup> Originally filed

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94. *Id.* at 1008 (quoting court's allowance of NCAA to regulate how revenues will be paid to student-athletes).

95. See Richard G. Johnson, *When a Loss is Really a Win and the Future of the NCAA*, SPORTS BUS. DAILY, Sept. 1, 2014, <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/01/Opinion/Richard-Johnson.aspx> (discussing importance of *O'Bannon* decision).

96. See Complaint, *Jenkins v. Nat'l Collegiate Athletic Ass'n*, No. 1:14-cv-02758 (N.D. Cal. Mar. 17, 2014), ECF No. 1 (evidencing that Martin Jenkins filed lawsuit against Clemson). See also, e.g., Steve Eder, *A Legal Titan of Labor Disputes Sets His Sights on the NCAA: Jeffrey Kessler Envisions Open Market for College Athletics*, N.Y. TIMES, Aug. 27, 2014, [hereinafter "Eder 1"], <http://www.nytimes.com/2014/08/28/sports/jeffrey-kessler-envisions-open-market-for-ncaa-college-athletes.html> (discussing recent case that Jeffrey Kessler filed on behalf of Martin Jones); Steve Eder, *How Kessler's Lawsuit Could Change College Sports*, N.Y. TIMES, Aug. 27, 2014, [hereinafter "Eder 2"], <http://www.nytimes.com/2014/08/28/sports/how-jeffrey-kesslers->

in the United States District Court for the District of New Jersey, the case was later transferred to Judge Wilken in California.<sup>97</sup> The *Jenkins* lawsuit aims for the heart of the NCAA – alleging that the NCAA’s rules prohibiting student-athletes from being paid is an antitrust violation.<sup>98</sup> The lawsuit’s stature is due not only to its allegations but also to its counsel. Jenkins’ lead attorney is Jeffrey Kessler of Winston Strawn LLP.<sup>99</sup> Kessler is one of the most prominent sports lawyers ever, having represented every professional sports league player association and having been involved in most of the seminal sports litigations.<sup>100</sup>

In September 2014, the NCAA moved to dismiss the Jenkins case, arguing that NCAA eligibility rules serve legitimate pro-competitive purposes of maximizing consumer demand for amateur student-athlete intercollegiate sports and integrating student-athletes into the academic communities of their schools.<sup>101</sup> A decision will not come for some time, but a decision in either direction will not end the legal attacks on the NCAA. Several other cases are pending and will likely continue to be filed as rulings chip away at the NCAA’s structure.

Athletic Directors must be aware of the litigations and related issues. Not only must Athletic Directors ensure compliance with evolving bylaws and court decisions, but Athletic Directors must also begin to plan for the future. Changes are coming which potentially will have considerable impact on the size and structure of college athletic departments. Those schools that have considered and planned for the changes will make the best adaptations and be positioned for success sooner.

Additionally, Athletic Directors should consider how the evolving policies and public opinion might affect recruiting. From a financial standpoint, schools might soon be able to offer compensation in some form to student-athletes. Athletic Directors

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lawsuit-could-change-college-sports.html (arguing that Martin Jenkins case is greatest threat to NCAA business model).

97. See Jenkins, *supra* note 99, 14-cv-2758 (N.D.Ca.), ECF No. 89.

98. See Eder 1, *supra* note 96 (evidencing that Jenkins lawsuit filed against NCAA argues that not paying colleges athletes is antitrust violation). See also Eder 2, *supra* note 96 (evidencing how Jenkins case aims at heart of NCAA).

99. See Eder 1, *supra* note 96 (evidencing that Jenkins lead counsel is Jeffrey Kessler). See also Eder 2, *supra* note 96 (illustrating that lead counsel for Martin Jenkins is Jeffrey Kessler).

100. See Eder 1, *supra* note 96 (discussing prominence of NCAA). See also Eder 2, *supra* note 96 (providing information regarding importance of Jeffrey Kessler in sports law).

101. See Jenkins, *supra* note 99, 14-cv-2758 (N.D.Ca.), ECF No. 102.



must determine the extent to which their athletic departments can be financially competitive. Additionally, Athletic Directors might try to offer student-athletes a package of promises that addresses their concerns to the extent possible within existing NCAA rules. For example, prior to the 2014-15 academic year, Indiana University announced its commitment to a “Student-Athlete Bill of Rights.”<sup>102</sup> The Bill of Rights includes ten principles: (1) providing scholarships which cover the full cost of attendance; (2) four year scholarships regardless of injury, illness or athletic performance; (3) an open invitation for student-athletes who leave school early to return and finish their degree; (4) comprehensive academic support; (5) comprehensive health, safety, and wellness; (6) comprehensive athletic support; (7) comprehensive leadership and skills development; (8) a culture of trust and respect; (9) a collective voice through the Student Athlete Advisory Committee; and, (10) cutting edge technology.<sup>103</sup> If Indiana sees a noticeable improvement in its recruiting efforts, you can expect other schools to adopt similar forward-thinking policies.

## B. Conference Issues and Responsibilities

It has long been recognized that sporting organizations must combine for certain purposes to enable them to conduct sporting contests.<sup>104</sup> Leagues or conferences permit sporting organizations, such as teams and colleges, to create uniform rules and regulations, schedule games reliably and engage in transactions for the collective benefit of all members, such as selling television rights. College sports are no different.

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102. See *IU Announces Unprecedented Student-Athlete Bill of Rights*, INDIANA HOOSIERS ATHLETIC NEWS, June 27, 2014, <http://www.iuhoosiers.com/genrel/062714aab.html> (discussing recent 10-point document which “sets forth university’s commitment to student-athletes during their time at IU and beyond”)

103. See INDIANA UNIVERSITY, INDIANA UNIVERSITY STUDENT-ATHLETE BILL OF RIGHTS (2013), available at [http://grfx.cstv.com/photos/schools/ind/genrel/auto\\_pdf/2013-14/misc\\_non\\_event/BillOfRights.pdf](http://grfx.cstv.com/photos/schools/ind/genrel/auto_pdf/2013-14/misc_non_event/BillOfRights.pdf) (providing text of ten principles).

104. See *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 331 (2d Cir. 2008) (arguing that “competition among the teams in their fields of play is to an extent dependent upon the teams’ cooperation with each other in various other respects”); *Clarett v. Nat’l Football League*, 369 F.3d 124, 136 (2d Cir. 2004); *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1251 (2d Cir. 1982) (arguing that to perform [certain] functions some sort of economic joint venture is essential); *Robertson v. Nat’l Basketball Ass’n*, 389 F.Supp. 867, 892 (S.D.N.Y. 1975) (arguing that some degree of economic cooperation which is inherently anti-competitive may well be essential for survival of ostensibly competitive professional sports league (citing *Flood v. Kuhn*, 316 F.Supp. 271, 275 (S.D.N.Y. 1970))); *Phila. World Hockey Club v. Phila. Hockey Club*, 351 F.Supp. 462 (E.D.Pa. 1972).



With a few exceptions, each NCAA Division I institution is a member of a conference for the sports in which it participates.<sup>105</sup> For example, the 127 FBS football teams have divided themselves into 10 conferences;<sup>106</sup> the 351 men's basketball teams have divided themselves into 32 conferences.<sup>107</sup> Considering the interlocking purpose and power of the conferences, legal issues necessarily follow about which Athletic Directors must be aware. Just as the NCAA has Bylaws governing its 1,300 member institutions, each collegiate conference has Bylaws governing its members. The Bylaws compliment the NCAA Bylaws and while also governing the relationship between the conference's member institutions.

The Bylaws of the Southeastern Conference ("SEC"), widely considered to be the conference with the best college football teams,<sup>108</sup> provide an interesting example.<sup>109</sup> Due to the competitiveness with which the schools must compete, the Bylaws contain aspirational statements concerning recruiting and academic integrity.<sup>110</sup> For example, SEC Bylaw 10.2.3 provides that, coaches and their personnel "shall avoid making any derogatory statements concerning another member institution's athletic program, facilities or educational opportunities."<sup>111</sup>

The SEC Bylaws also contain certain strict rules concerning recruiting. SEC Bylaw 13.9.1 limits each SEC member institution to

105. See *College Football Teams*, ESPN, <http://espn.go.com/college-football/teams> (last visited Nov. 25, 2014) (evidencing that Division I college football teams are split into conferences). Some exceptions to the rule are: Army, BYU, Idaho, Navy, New Mexico State, Notre Dame and Old Dominion compete as independents in football. See *id.* (evidencing that some college football teams compete as Independents). Further, New Jersey Institute of Technology competes as an independent in basketball. See *Men's College Basketball*, ESPN, <http://espn.go.com/mens-college-basketball/teams> (last visited Nov. 25, 2014) (evidencing that New Jersey Institute of Technology competes as independent in basketball).

106. See *College Football Teams*, *supra* note 105 (illustrating that college football teams are divided into 10 conferences).

107. See *Mens College Basketball*, *supra* note 105 (indicating that men's college basketball teams are divided into 32 conferences).

108. See Ira Boudway, *Why the SEC Dominates College Football, in Six Charts*, BLOOMBERG BUSINESSWEEK, Dec. 27, 2013, <http://www.businessweek.com/articles/2013-12-27/why-the-sec-dominates-college-football-in-six-charts> (evidencing that SEC considered to be best college football conference). See also Sharon Katz, *SEC Still the Best in College Football*, ESPN (Jan. 14, 2014), [http://espn.go.com/blog/statsinfo/post/\\_/id/82730/sec-still-the-best-in-college-football](http://espn.go.com/blog/statsinfo/post/_/id/82730/sec-still-the-best-in-college-football) (reporting that college football's best conference is widely considered to be SEC).

109. See SOUTHEASTERN CONFERENCE, SEC CONSTITUTION AND BYLAWS (2013-2014), available at <http://cdn.knoxblogs.com/evanseleven/wp-content/uploads/sites/7/2013/12/Constitution.pdf> (providing text of current SEC bylaws).

110. See NCAA MANUAL, *supra* note 13, arts. 10.2, 10.3 (containing aspirational statements regarding recruiting and academic integrity).

111. See *id.* art. 10.2.3 (providing example under SEC bylaws) .

signing 25 football prospective student-athletes to a National Letter of Intent (“NLI”).<sup>112</sup> The limits on NLIs arose out of a controversial practice referred to as “oversigning.” Oversigning occurs when a university signs more prospective student-athletes to NLIs than they have scholarships to offer.

Division I football programs are limited to 25 scholarships for freshmen.<sup>113</sup> However, NCAA Bylaws permit schools to sign 28 NLIs.<sup>114</sup> As a result, three prospective student-athletes who sign NLIs with a school, intending to play football there, may ultimately not be offered a scholarship. Schools might intentionally oversign players to prevent them from signing with a competing university. By the time the student-athlete is told he will not be offered a scholarship, it is often too late for him to go back and try to catch on with one of the other schools that had recruited him.

The SEC’s Bylaw limiting oversigning is sometimes called the “Houston Nutt Rule.”<sup>115</sup> In 2009, University of Mississippi football coach Houston Nutt signed 37 players to NLIs, far in excess of the amount of scholarships Mississippi could offer.<sup>116</sup> The SEC’s Bylaw helps to prevent prospective student-athletes from becoming innocent victims of the ferociously competitive SEC recruiting environment.

What if a school does not like its conference Bylaws or some other way in which the conference is operating? The school, subject to its contractual obligations, is then free to switch conferences. This concept is known as conference realignment and in recent years has become a phenomenon that has regularly and fundamentally altered the college sports landscape. Conference realignment touches on some of the most important legal and financial issues facing college Athletic Directors, including the purpose and effect of conference bylaws, membership decisions both from a conference and institution standpoint, and how to maximize revenues for the athletic department and university.

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112. *See id.* art. 13.9.1. (directing that SEC member institutions are limited to signing 25 National Letters of Intent (NLIs)).

113. *See id.* art. 15.5.6.1. (illustrating that Division I members are limited to signing 25 freshmen to scholarships).

114. *See id.* art. 13.9.2.3. (indicating that schools may sign up to 28 NLI’s).

115. Jon Solomon, *SEC Teams Adjust to ‘Houston Nutt Rule,’* AL.COM, [http://blog.al.com/solomon/2010/02/sec\\_teams\\_adjust\\_to\\_houston\\_nu.html](http://blog.al.com/solomon/2010/02/sec_teams_adjust_to_houston_nu.html) (updated Feb. 3, 2010, 11:56 AM) (illustrating that sometimes bylaw limiting oversigning is called “Houston Nutt Rule”).

116. *See id.* (discussing namesake for Houston Nutt Rule). In 2009, the University of Mississippi Football Coach signed thirty-seven students to NLIs, despite the fact that they could only offer twenty-five scholarships per NCAA bylaws. *See id.*

The allure of big time college athletics, and the money and prestige that comes with it, is generally too difficult for most universities to ignore. In August 2007, the Big Ten conference launched its own television network, Big Ten Network.<sup>117</sup> The decision by the Big Ten to create its own network was most likely spurred by a growth in professional sports teams' creating and owning their own regional sports networks from which they could draw considerable revenue, including the New York Yankees' YES Network,<sup>118</sup> the New York Mets' SNY Network<sup>119</sup> and the Boston Red Sox' NESN Network.<sup>120</sup>

Looking to grow its network and customer base, the Big Ten announced in December 2009 that it was looking to expand the conference.<sup>121</sup> At the time of the Big Ten's announcement, there was generally considered to be six elite conferences in college athletics: Big Ten, Pac-10, Big East, Big 12, ACC and SEC.<sup>122</sup> In football, the winner of each of these conferences received an automatic

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117. Press Release, Big Ten Conference, Big Ten Network to Officially Launch August 30, (July 2, 2007), *available at* <http://www.bigten.org/genrel/070207aaa.html> (discussing launch of Big Ten Network).

118. See Andy Fixmer & Andy Soshnick, *YES Network Said to Extend Yankees Rights Through 2042*, BLOOMBERG BUS., Nov. 20, 2012, <http://www.bloomberg.com/news/2012-11-20/yes-network-said-to-extend-yankees-rights-through-2042.html> (describing current arrangement between YES Network and New York Yankees). The YES Network is a regional sports network launched in 2002 centered on New York Yankees baseball games. YES also broadcasts a variety of college and professional sports. Although the Yankees no longer own the YES Network, YES pays the Yankees approximately \$350 million a year for the rights to broadcast Yankees' games. See *id.*

119. See Mike Ozanian, *Mets Owners May Pay Themselves Big Dividend While Team's Fans Suffer*, FORBES, Oct. 6, 2012, <http://www.forbes.com/sites/mike-ozanian/2012/10/06/mets-owners-may-pay-themselves-big-dividend-while-teams-fans-suffer/> (discussing current arrangement between SNY Network and New York Mets). The SNY Network is a regional sports network launched in 2006 centered around New York Mets baseball games. SNY, like YES, also broadcasts a variety of college and professional sports. SNY is principally owned by the Mets and is valued at \$2.5 billion. See *id.*

120. See Fenway Sports Group, *Background on Fenway Sports Group*, NESN NETWORK, <http://nesn.com/about-fenway-sports-group> (last visited Nov. 25, 2014) (describing NESN Network as most watched sports network in New England). NESN is a regional sports network that is the primary broadcaster of Boston Red Sox and Boston Bruins games. NESN also broadcasts other regional sporting events. Fenway Sports Group, the parent company of the Red Sox, owns 80% of NESN. The Bruins own the other 20%. See *id.*

121. Press Release, Big Ten Conference, Big Ten Statement on Expansion (Dec. 15, 2009), *available at* <http://www.bigten.org/genrel/121509aaa.html> (providing text of Big Ten Network's intent to expand conference).

122. Michael Wilbon, *Small But Powerful, College Teams Can Make A Big Impression This Weekend*, WASH. POST, Sept. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/02/AR2009090203969.html> (reporting that at time of Big Ten Network's expansion, there were generally six conferences).

bid to the Bowl Championship Series, which from 1998-2013 were the preeminent and most lucrative college football bowl games. As of 2009, these six conferences (and their predecessors)<sup>123</sup> consisted of 67 schools<sup>124</sup> that generally dominated college athletics and college basketball and football in particular.<sup>125</sup>

However, the Big Ten set off a series of events that caused dozens of Division I universities to shift their conference affiliations in search of bigger paydays. For example, in 2008, the SEC, widely regarded as the best conference in college football, signed a 15-year deal with ESPN worth more than \$2 billion;<sup>126</sup> in 2011, the former Pac-10 and current Pac-12 announced plans to launch its own television network;<sup>127</sup> and, in 2012, the ACC signed a 12-year, \$1.86 billion contract with ESPN.<sup>128</sup> In each instance, the presidents of the universities with the support and guidance of their Athletic Directors voted and approved these television deals.

The end result was mass movement among the schools and the disintegration of the Big East. Although the Big East had historically been a strong basketball conference, it included seven catholic school members that did not play FBS football.<sup>129</sup> Having non-FBS playing members left the Big East at a considerable disadvantage in

123. See Chris Dufresne, *Merger Creates Dynamite Dozen*, L.A. TIMES, Aug. 27, 1996, [http://articles.latimes.com/1996-08-27/sports/sp-38013\\_1\\_big-west](http://articles.latimes.com/1996-08-27/sports/sp-38013_1_big-west) (evidencing importance of being part of one of six big conferences). Oklahoma State, Kansas State, Nebraska, Iowa State, Oklahoma, Kansas, Colorado and Missouri were originally in the Big Eight Conference. However, in 1996, they joined Texas A&M, Texas Tech, Texas, and Baylor to form the Big 12. See *id.*

124. See Mike Bostock, Shan Carter & Kevin Quealy, *Tracing the History of N.C.A.A. Conferences*, N.Y. TIMES, Nov. 30, 2013, <http://www.nytimes.com/newsgraphics/2013/11/30/football-conferences/?ref=sports> (providing history of NCAA Conferences). The conferences had the following amount of members: Big Ten: 11; Pac-10: 10; Big East: 10; Big 12: 12; ACC: 12; and, SEC: 12. See *id.* In 2009, the big six conferences consisted of a total of 67 schools. See *id.*

125. The last football national champion not to come from one of these six conferences was BYU in 1984, a member of the Western Athletic Conference. The last men's basketball champion not to come from one of these six conferences was UNLV in 1991, a member of the Big West Conference.

126. See *ESPN Signs 15-year Deal With SEC*, ESPN (Aug. 25, 2008), <http://sports.espn.go.com/ncaa/news/story?id=3553033> (evidencing that SEC and ESPN signed deal).

127. See *Pac-12 to Launch National Network*, ESPN (July 27, 2011), [http://espn.go.com/college-sports/story/\\_/id/6809599/pac-12-launch-national-regional-networks](http://espn.go.com/college-sports/story/_/id/6809599/pac-12-launch-national-regional-networks) (evidencing that Pac-12 had announced plans to start its own network).

128. See Chris Smith, *Did ACC Teams Get Ripped Off With New ESPN TV Contract?*, FORBES (May 9, 2012, 7:16PM), <http://www.forbes.com/sites/chrissmith/2012/05/09/did-acc-teams-get-ripped-off-with-new-espn-tv-contract/> (illustrating TV contract between ACC and ESPN).

129. The "Catholic Seven" is made up of the following schools: Georgetown, Providence, St. John's, Seton Hall, Villanova, DePaul, and Marquette.

attracting the type of television revenue that was now being generated. None of the other major conferences had non-FBS members. As a result, the Athletic Directors of the Big East institutions that played FBS football sought and took the opportunity to jump to other conferences with FBS play and a share of the lucrative television revenue those conferences were receiving.

Beginning in 2013-14, the Big East no longer existed in the form it had since its creation in 1979. The Big East schools that did play football formed the America Athletic Conference and recruited new institutional members from all over the country.<sup>130</sup> Meanwhile, the “Catholic Seven” began to operate under the Big East moniker, adding three other private universities to the conference: Butler, Creighton, and Xavier.<sup>131</sup>

The below chart shows the multitude of conference moves between 2011 and 2014:

| Conference | Schools Lost   | Schools Gained  |
|------------|--|---|
| Big Ten    | None.  | Nebraska (2011); Maryland (2014); and, Rutgers (2014).                              |
| Pac-10     | None.  | Colorado (2011); and, Utah (2011).  |
| Big East   | West Virginia (2012); Connecticut (2013); Louisville (2013); Syracuse (2013); Pittsburgh (2013); Notre Dame (2013); Rutgers (2013); South Florida (2013); Cincinnati (2013); and, Temple (2013). | Temple (2012) (football only); Butler (2013); Creighton (2013); and, Xavier (2013). |
| Big 12     | Colorado (2011); Nebraska (2011); Missouri (2012); and, Texas A&M (2012).  | TCU (2012); and, West Virginia (2012).  |
| ACC        | Maryland (2014).   | Notre Dame (2013); Pittsburgh (2013); Syracuse (2013); and, Louisville (2014).      |
| SEC        | None.  | Missouri (2012); and, Texas A&M (2012).   |

130. In 2014-15, the American Athletic Conference includes Cincinnati, Connecticut, Houston, Memphis, Southern Methodist, South Florida, Temple, Central Florida, East Carolina, Tulane, and Tulsa, covering in total nine states from Connecticut to Oklahoma.

131. Dan Wolken, *New Big East Adds Three, Signs Deal with Fox*, USA TODAY, Mar. 20, 2013, <http://www.usatoday.com/story/sports/college/2013/03/20/new-big-east-adds-xavier-butler-creighton-signs-tv-contract/2002227/> (explaining that Big East added three schools to its conference).

Chasing the money is not as simple as it seems. Conferences were, and became increasingly, wary of losing their most successful members to other conferences. In October 2011, West Virginia announced it was leaving the Big East beginning with the 2012-13 academic year.<sup>132</sup> However, the Big East required its members to provide 27 months' notice before leaving the conference.<sup>133</sup> West Virginia sued the Big East in West Virginia Circuit Court for breach of contract and breach of fiduciary duty and sought a permanent injunction against the Big East Bylaw requiring 27 months' notice.<sup>134</sup> On November 4, 2011, the Big East sued West Virginia in Rhode Island Superior Court (the Big East's headquarters is in Providence) alleging breach of contract and seeking to force West Virginia to comply with the 27-month waiting period.<sup>135</sup>

In February 2012, the Big East and West Virginia settled the lawsuits. Pursuant to the settlement, the Big East received approximately \$20 million, including: (1) a \$2.5 million withdrawal fee previously paid in October 2011; (2) a \$8.5 million settlement payment; and (3) approximately \$9 million in revenues West Virginia was due to receive from the Big East.<sup>136</sup> As a result, West Virginia was permitted to leave the Big East after the 2011-12 school year.

On the heels of the West Virginia litigation, the ACC sought to protect itself from similar defections. At a September 2012 meeting of the ACC Council of Presidents, the Council voted to amend the ACC Constitution to provide "that upon notice of withdrawal from the association of members, a withdrawing member shall be subject

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132. Pete Thamel, *West Virginia Wants Out, but Big East Won't Let Go*, N.Y. TIMES, Oct. 28, 2011, [http://www.nytimes.com/2011/10/29/sports/ncaafotball/west-virginia-accepts-invitation-joining-big-12.html?\\_r=0](http://www.nytimes.com/2011/10/29/sports/ncaafotball/west-virginia-accepts-invitation-joining-big-12.html?_r=0) (evidencing West Virginia's intent to leave Big East Conference to join Big 12).

133. *West Virginia Sues Big East Conference In Effort To Join Big 12 Immediately*, HUFFINGTON POST, Oct. 31, 2011, [http://www.huffingtonpost.com/2011/10/31/west-virginia-sues-big-east-conference-big-12\\_n\\_1068324.html](http://www.huffingtonpost.com/2011/10/31/west-virginia-sues-big-east-conference-big-12_n_1068324.html) (last updated Dec. 31, 2011) (illustrating Big East's rule that member institutions give them 27 months' notice of intention to leave conference).

134. *See id.* (describing lawsuit between West Virginia and Big East). *See also* Rutgers v. Am. Athletic Conf., No. 12-7898 (N.J. Super. Nov. 20, 2012).

135. Andrea Adelson, *Big East Sues West Virginia Over Bylaws*, ESPN (Nov. 5, 2011), [http://espn.go.com/college-sports/story/\\_/id/7190474/big-east-sues-west-virginia-enforce-27-month-waiting-period](http://espn.go.com/college-sports/story/_/id/7190474/big-east-sues-west-virginia-enforce-27-month-waiting-period) (reporting that Big East countersued West Virginia in Rhode Island Superior Court). The Big East's headquarters is in Providence, Rhode Island. *See id.*

136. *See* Steve Berkowitz, *Document Details West Virginia's \$20 Million Exit Fee to Big East*, USA TODAY, Feb. 15, 2012, <http://content.usatoday.com/communities/campusrivalry/post/2012/02/west-virginia-big-east-settlement-document-details/1#Uu0KjfbH2k> (discussing lawsuit between Big East and West Virginia).



to a withdrawal payment in an amount 'equal to three (3) times the total operating budget of the Conference (including any contingency included therein), approved in accordance with Section V-I of the Conference Bylaws, which is in effect as of the date of the official notice of withdrawal.'<sup>137</sup>

Maryland President Dr. Wallace D. Loh voted against the new withdrawal fee.<sup>138</sup> Maryland's decision not to vote in favor of the fee was almost certainly tied to its then ongoing discussions about leaving the ACC for the Big Ten. Indeed, On November 19, 2012, Maryland's Board of Regents voted to withdraw from the ACC to join the Big Ten starting in 2014.<sup>139</sup>

On November 26, 2012, the ACC initiated a lawsuit against Maryland in North Carolina Superior Court (the ACC's headquarters are in Greensboro), asserting one cause of action for declaratory relief.<sup>140</sup> The ACC sought a declaration that Maryland is subject to a withdrawal fee of \$52,266,342.<sup>141</sup> The annual operating budget of the ACC for the 2012-2013 year was \$17,422,114.<sup>142</sup> Thus, three times the operating budget equaled the \$52,266,342 withdrawal fee that the ACC alleged Maryland owed.

On January 18, 2013, Maryland responded by suing the ACC in Maryland Circuit Court seeking a declaration that the exit fee was an unenforceable penalty, for its approximately \$3 million share of conference revenue withheld by the ACC, and for damages for alleged violations of Maryland antitrust law and tortious interfer-

137. See Complaint at 14, *Atl. Coast Conf. v. Univ. of Md., Coll. Park*, 751 S.E.2d 612 (N.C. Super.Ct. App. Nov. 19, 2013) (No. 12CVS10736) (alleging ACC's fear that one of its member institutions would leave the conference). The ACC amended its constitution to provide itself more protection against institutions that decided to leave the conference. See *id.*

138. See Alex Prewitt, *Maryland President Wallace D. Loh Voted Against ACC's \$50 Million Exit fee, Says it's 'Not a Good Idea'*, WASH. POST, Sept. 13, 2012, [http://www.washingtonpost.com/blogs/terrapins-insider/post/maryland-president-wallace-d-loh-voted-against-accs-50-million-exit-fee-says-its-not-a-good-idea/2012/09/13/683ff014-fe12-11e1-8adc-499661afe377\\_blog.html](http://www.washingtonpost.com/blogs/terrapins-insider/post/maryland-president-wallace-d-loh-voted-against-accs-50-million-exit-fee-says-its-not-a-good-idea/2012/09/13/683ff014-fe12-11e1-8adc-499661afe377_blog.html) (evidencing that University of Maryland disagreed with new withdrawal fee that ACC had added to its constitution).

139. See Barry Svruga & Alex Prewitt, *Big Ten Expansion: Maryland Leaves ACC, Joins Conference in Financial Move*, WASH. POST, Nov. 19, 2012, [http://www.washingtonpost.com/sports/colleges/maryland-joins-big-ten-leaving-acc/2012/11/19/e24531dc-3268-11e2-9cfa-e41bac906cc9\\_story.html](http://www.washingtonpost.com/sports/colleges/maryland-joins-big-ten-leaving-acc/2012/11/19/e24531dc-3268-11e2-9cfa-e41bac906cc9_story.html) (discussing University of Maryland's decision to withdraw from ACC and join Big 10).

140. See generally Complaint, *Atl. Coast Conf.*, 751 S.E.2d 612 (No. 12CVS10736) (evidencing that ACC filed lawsuit against University of Maryland as result of its withdrawal from ACC).

141. See Complaint at 9, *Atl. Coast Conf.*, 751 S.E.2d 612 (No. 12CVS10736) (arguing that Maryland was subject to withdrawal fee of \$52,266,342).

142. See *id.* at 24 (demonstrating annual operating budget of ACC).



ence.<sup>143</sup> In a June 27, 2013 opinion, the Maryland Circuit Court dismissed Maryland's state antitrust claim without prejudice and stayed the case pending final judgment in the North Carolina lawsuit.<sup>144</sup>

Then, in November 2013, the Court of Appeals of North Carolina affirmed the Superior Court's prior denial of Maryland's motion to dismiss.<sup>145</sup> The Court of Appeals held that Maryland was not entitled to sovereign immunity.<sup>146</sup> The Court of Appeals held that sovereign immunity could not be used to permit a party to escape its contractual obligations.<sup>147</sup>

In January 2014, forced to respond to the lawsuit, Maryland counterclaimed against the ACC, alleging violations of antitrust law and seeking damages trebled to a total of \$157 million.<sup>148</sup> The case was settled in August 2014, with Maryland agreeing to let the ACC keep approximately \$31 million in payments it had withheld from Maryland.<sup>149</sup>

While most schools have moved conferences in search of greater revenue streams, the University of Texas remained in the Big 12 to maintain its revenue stream. In 2010, The Pac-10 invited Texas to join the conference, but, as a condition of membership, required Texas to share its media rights equally with the other

143. See *Maryland AG Sues ACC*, ASSOCIATED PRESS (Jan. 18, 2013), available at [http://espn.go.com/college-sports/story/\\_/id/8858267/maryland-attorney-general-files-suit-acc](http://espn.go.com/college-sports/story/_/id/8858267/maryland-attorney-general-files-suit-acc) (illustrating that University of Maryland countersued ACC in Maryland circuit court). Similarly, in December 2012, Rutgers, shortly after it announced it was leaving the Big East for the Big Ten, sued the Big East in New Jersey Superior Court alleging the \$10 million exit fee is an unenforceable penalty and that it should not have to comply with the 27-month waiting period commanded by Big East Bylaws. See *Rutgers*, Civ. Action No. 12-7898, slip op. at 1-2.

144. See Heather Dinich, *Small Victory for ACC in Suit vs. Maryland*, ESPN (July 1, 2013), [http://espn.go.com/blog/acc/post/\\_/id/57136/small-victory-for-acc-in-suit-vs-maryland](http://espn.go.com/blog/acc/post/_/id/57136/small-victory-for-acc-in-suit-vs-maryland) (discussing Maryland Circuit Court's dismissal of University of Maryland's antitrust claim against ACC).

145. See *ACC*, 751 S.E.2d 612 (providing evidence that North Carolina Court of Appeals affirmed Maryland's motion to dismiss).

146. See *id.* (finding that University of Maryland not entitled to sovereign immunity).

147. See *id.* at 619 (citing *Smith v. State*, 222 S.E.2d 412, 423-24 (N.C. 1976)) (illustrating that Court of Appeals found that Maryland could not argue sovereign immunity to escape contractual obligations).

148. See Heather Dinich, *Maryland Files Countersuit vs. ACC*, ESPN (Jan. 14, 2014), [http://espn.go.com/college-sports/story/\\_/id/10292759/maryland-terrapins-file-157-million-counterclaim-vs-acc](http://espn.go.com/college-sports/story/_/id/10292759/maryland-terrapins-file-157-million-counterclaim-vs-acc). (reporting University of Maryland's countersuit against ACC in North Carolina).

149. See Steve Berkowitz, *ACC, Maryland Settle for \$31.4M*, SALISBURY DAILY TIMES, Aug. 9, 2014, at C2 (reporting Maryland and ACC settlement of case in August 2014).

members, including television revenues.<sup>150</sup> At the time, Texas was in the process of creating its own television network, Longhorn Network, devoted to covering Texas athletic events.<sup>151</sup> The network, created in conjunction with ESPN, was to provide Texas with at least \$247.5 million over 20 years.<sup>152</sup> Texas, not wanting to share this revenue stream with other Pac-10 members, declined the Pac-10's invitation.<sup>153</sup> Instead, Texas remained in the Big 12, which permitted Texas to create the Longhorn Network and retain the related revenues.<sup>154</sup>

The Pac-12 pressed forward without Texas. In May 2011, the new Pac-12 announced a 12-year deal with ESPN and Fox worth \$3 billion.<sup>155</sup> The Pac-12 also announced that the schools would share the revenues equally, accounting to approximately \$21 million annually for each school.<sup>156</sup>

The revenue numbers are staggering. Conference affiliations have proven to be the path to those revenues. As a result, it is imperative that athletic departments and Directors maximize the revenue sources when the opportunity presents itself. In other words, it is imperative athletic departments and Directors flex their muscles within their conference (on and off the field), and be prepared to move to a new conference if necessary.

150. See Andy Staples, *Texas' Longhorn Network Sparking Another Big 12 Missile Crisis*, SPORTS ILLUSTRATED (July 21, 2011), [http://sportsillustrated.cnn.com/2011/writers/andy\\_staples/07/21/longhorn-network-big-12/](http://sportsillustrated.cnn.com/2011/writers/andy_staples/07/21/longhorn-network-big-12/) (providing evidence that Univ. of Texas invited to join Pac-10 under condition that it share media rights with other conference members).

151. See *id.* (discussing University of Texas's intent to create its own Television Network).

152. See *id.* (illustrating that TV network could be lucrative).

153. See *id.* (explaining that University of Texas declined invitation from Pac-10 because it did not want to share revenue with other member institutions); Chuck Carlton, *Texas Turns Down Pac-10; Big 12 Schools Have Framework of Deal*, DALLAS MORNING NEWS, June 14, 2010, <http://www.dallasnews.com/sports/college-sports/baylor-bears/20100614-Texas-turns-down-Pac-10-2145.ece> (describing rationale behind University of Texas's refusal to join Pac-10).

154. See Staples, *supra* note 150 (illustrating that University of Texas decided to remain in Big 12, where it could create its own TV Network); Carlton, *supra* note 153 (describing benefit of Texas deciding to remain in Big 12).

155. See Diane Pucin, *New Pac-12 TV Deal Shows the Value of Sports*, LA TIMES, May 4, 2011, <http://articles.latimes.com/2011/may/04/sports/la-sp-pac-12-tv-20110505> (explaining Pac-12's TV deal between ESPN and Fox after University of Texas declined to join its conference).

156. See *id.* (explaining that all Pac-12 members would share revenues equally).

### C. University Rules, Regulations, and Responsibilities

Athletic departments are ultimately still just that, departments within a larger university. As such, Athletic Directors must ensure compliance with the university's own rules and regulations while also often playing a larger role within the university. Athletic Directors must be particularly mindful of how a university's rules and regulations affect the discipline of student-athletes and/or athletic department employees. Moreover, Athletic Directors are often called on to help raise money for the athletic department and for the university.

Unfortunately but not surprisingly, student-athletes, just like other students, occasionally break the law and/or university codes of conduct. How an athletic department and an athletic director deals with those situations is as perilous as it is important. On the one hand, there is great pressure in ensuring that student-athletes, particularly star student-athletes, remain in the lineup where they can bring glory and revenue to the school. Yet, it is also important that student-athletes be held to the same standards (if not higher) than other students, that they be held accountable for their actions, and learn to become responsible adults in accordance with the tenets of higher education.

One of the most infamous stories involving student-athlete conduct and the university's response concerned the 2006 Duke men's lacrosse team. At the time, the Duke lacrosse team was considered one of the best in the country and was coming off a season in which they were the runner-up in the NCAA Tournament. On March 13, 2006, the captains of the lacrosse team held a party at their off campus residence.<sup>157</sup> The players arranged for two strippers to entertain them at the party.<sup>158</sup> During the party, members of the almost entirely white Duke lacrosse team got into an argument with the strippers, both of whom were minorities.<sup>159</sup> The

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157. See Juliet Macur, *Lawyers for Lacrosse Players at Duke Say They Expect Indictment in Rape Case*, N.Y. TIMES, Apr. 13, 2006, [http://www.nytimes.com/2006/04/13/sports/sportsspecial1/13lacrosse.html?\\_r=2&gwh=3ACCB286CE305B02115991ADF1E73669&](http://www.nytimes.com/2006/04/13/sports/sportsspecial1/13lacrosse.html?_r=2&gwh=3ACCB286CE305B02115991ADF1E73669&) (reporting that members of Duke Lacrosse team held party at off-campus apartment).

158. See Duff Wilson & Jonathan D. Glater, *Files From Duke Rape Case Give Details but No Answers*, N.Y. TIMES, Aug. 25, 2006, <http://www.nytimes.com/2006/08/25/us/25duke.html?pagewanted=all> (illustrating that players hired strippers for party).

159. See *Race a Focal Point in Duke Scandal*, USA TODAY, Apr. 16, 2006, [http://usatoday30.usatoday.com/news/nation/2006-04-16-duke-race\\_x.htm](http://usatoday30.usatoday.com/news/nation/2006-04-16-duke-race_x.htm) (explaining significance of race in Duke Lacrosse scandal because players were predominantly white while strippers were minorities).

strippers left the party as racial slurs were allegedly exchanged.<sup>160</sup> Eventually, one of the strippers, Crystal Gail Magnum, reported to police that she had been raped at the party.<sup>161</sup>

From there, the case spiraled out of control. Mike Nifong, Durham County's District Attorney, pursued the case aggressively. The police arrested three Duke players and executed search warrants.<sup>162</sup> The community was in an uproar and the story generated national interest as the social and racial implications of the story hit the media's sweet spot.<sup>163</sup> In particular, the student body and community were concerned about what they perceived as a system that permitted privileged student-athletes to conduct themselves in abhorrent ways. Joe Alleva, Duke's Athletic Director, had to determine what to do about a lacrosse team whose season had just begun but had national championship aspirations. In early April, Alleva and the Duke administration cancelled the remainder of the season and accepted the resignation of 16-year coach Mike Pressler.<sup>164</sup>

In the months that followed it was slowly revealed that Magnum had fabricated her story and that Nifong had continued the investigation in an unethical and fraudulent manner.<sup>165</sup> In June 2006, the men's lacrosse team was reinstated.<sup>166</sup> Magnum was even-

160. See *Black Duke Lacrosse Player Says Race Has Played Issue in Alleged Rape Case*, FOXNEWS (Oct. 31, 2006), <http://www.foxnews.com/story/2006/10/31/black-duke-lacrosse-player-says-race-has-played-issue-in-alleged-rape-case/> (evidencing that lacrosse players used racial slurs).

161. See Juliet Macur, *Duke Players' Accuser Finds Way to Avoid News Media*, N.Y. TIMES, Apr. 3, 2006, <http://www.nytimes.com/2006/04/03/sports/othersports/03lacrosse.html?ref=dukelacrossesexualassaultcase> (explaining that one stripper at party complained that she had been raped).

162. See Shaila Dewan, *Third Duke Lacrosse Player Is Indicted in Rape Case*, N.Y. TIMES, May 16, 2006, <http://www.nytimes.com/2006/05/16/sports/sportsspecial1/16duke.html> (reporting that three Duke Lacrosse players were arrested and search warrants were executed).

163. See Erik Brady & Mary Beth Marklein, *A Perfect Storm: Explosive Convergence Helps Lacrosse Scandal Resonate*, USA TODAY, Apr. 26, 2006, [http://usatoday30.usatoday.com/sports/college/lacrosse/2006-04-26-duke-perfect-storm\\_x.htm](http://usatoday30.usatoday.com/sports/college/lacrosse/2006-04-26-duke-perfect-storm_x.htm) (describing how Duke lacrosse story gained media attention throughout United States).

164. See Duff Wilson & Viv Bernstein, *Duke Cancels Lacrosse Season and Initiates Critiques*, N.Y. TIMES, April 6, 2006, [http://www.nytimes.com/2006/04/06/sports/othersports/06duke.html?ref=dukelacrossesexualassaultcase&\\_r=1&gwh=808A54B0E03C0AD0351694B3B96A6363&](http://www.nytimes.com/2006/04/06/sports/othersports/06duke.html?ref=dukelacrossesexualassaultcase&_r=1&gwh=808A54B0E03C0AD0351694B3B96A6363&) (discussing consequences of allegations as Coach Pressler resigned and season was cancelled for remainder of season).

165. See Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES, Apr. 12, 2007, <http://www.nytimes.com/2007/04/12/us/12duke.html?pagewanted=all&> (suggesting that accuser had fabricated story and that investigation was carried out in unethical manner).

166. See Viv Bernstein & Juliet Macur, *Duke Reinstates Men's Lacrosse, With Warning That Party's Over*, N.Y. TIMES, June 6, 2006, <http://www.nytimes.com/>

tually revealed to be someone with a history of mental illness and substance abuse and criminal issues.<sup>167</sup> Nifong was relieved of his duties and eventually disbarred for his conduct.<sup>168</sup> Both accused and non-accused members of the Duke lacrosse team filed lawsuits against the city of Durham, Nifong, Duke, and others for the manner in which the investigation unfolded.<sup>169</sup> The lawsuit against Duke was settled on confidential terms in 2013.<sup>170</sup>

The Duke lacrosse case became a scandal of epic, and perhaps uncontrollable, proportions. Nevertheless, the important takeaway for an Athletic Director is make sure the school's teams are aware of their role on the campus, what behavior is acceptable and to try and prevent scandals before they can happen.

In 2013, Florida State University handled a similarly scandalous matter in a different way. On November 14, 2013, the Florida State

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2006/06/06/sports/sportsspecial1/06duke.html (discussing reinstatement of men's lacrosse at Duke).

167. See Susannah Meadows, *Duke Lacrosse Accuser Crystal Mangum's Tragic Life*, NEWSWEEK, Feb. 22, 2010, <http://www.newsweek.com/duke-lacrosse-accuser-crystal-mangums-tragic-life-75197> (discussing accuser's history of mental illness, substance abuse, and criminal convictions). In Nov. 2013, Mangum was convicted of second-degree murder for stabbing her boyfriend to death. See also North Carolina: *Woman in Duke Case Guilty in Killing*, N.Y. TIMES, Nov. 22, 2013, <http://www.nytimes.com/2013/11/23/us/north-carolina-woman-in-duke-case-guilty-in-killing.html> (discussing life of Duke lacrosse accuser).

168. See North Carolina Attorney General Agrees to Mike Nifong's Request to Be Removed From Duke Lacrosse Case, FOXNEWS, Jan. 13, 2007, <http://www.foxnews.com/story/2007/01/13/north-carolina-attorney-general-agrees-to-mike-nifong-request-to-be-removed/> (discussing prosecutor's removal from Duke Lacrosse case); Duff Wilson, *Prosecutor in Duke Case Disbarred by Ethics Panel*, N.Y. TIMES, June 17, 2007, [http://www.nytimes.com/2007/06/17/us/17duke.html?ref=dukelacrossesexualassaultcase&\\_r=1&gwh=6CDDFA69AACC12A02A2AEF9436D5ACB92&](http://www.nytimes.com/2007/06/17/us/17duke.html?ref=dukelacrossesexualassaultcase&_r=1&gwh=6CDDFA69AACC12A02A2AEF9436D5ACB92&) (reporting prosecutor was disbarred for actions on Duke case).

169. See Bob Van Voris, *Duke Lacrosse Players to Sue School Over Rape Probe*, BLOOMBERG, Feb. 21, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGFGx2r1QLQ4> (discussing accused and unaccused students' filing of lawsuit against City, prosecutor, and Duke for handling of investigation). In March 2013, the players confidentially settled their lawsuit with Duke. See Andrew Harris, *Ex-Duke Lacrosse Players End Lawsuit Against School*, BLOOMBERG (Mar. 1, 2013), <http://www.bloomberg.com/news/2013-02-28/duke-university-lacrosse-players-end-lawsuit-against-school.html>. In December 2012, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal of the players' federal law claims against Durham and its police department. See *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012). On March 31, 2011, the United States District Court for the Middle District of North Carolina ruled that most of the players' claims against Nifong could proceed. See *Evans v. City of Durham*, No. 1:07CV739, 2011 WL 10619638 (M.D.N.C. Mar. 31, 2011). The status of the case as against Nifong since that time is unclear from the publicly available docket. See *id.*

170. See *Duke, Former Lacrosse Players Settle Suit*, USA TODAY, Feb. 28, 2013, <http://www.usatoday.com/story/sports/college/lacrosse/2013/02/28/duke-2006-rape-allegations/1953607/> (reporting settlement of lawsuit between former players and Duke under confidential terms).

Attorney's Office announced they were investigating a sexual assault allegation against Jameis Winston, Florida State's star freshman quarterback.<sup>171</sup> At the time, Florida State was undefeated and Winston was having a tremendous season.<sup>172</sup> Fortunately, Florida State had established policies for dealing with such a situation. Florida State's Intercollegiate Athletics Policies and Procedures Manual dictated that a student-athlete would not be automatically suspended until he or she was charged with a felony.<sup>173</sup> Winston thus continued to play and win.

On December 5, 2013, it was announced that Winston would not be charged with any crime as a result of the investigation.<sup>174</sup> Winston went on to win the Heisman Trophy and Florida State capped an undefeated season with a national championship.<sup>175</sup>

The difference in approaches by Duke and Florida State highlights an important distinction about which any collegiate authority figure should be aware. Duke is a private institution while Florida State is public.

Public institutions are required to provide due process in accordance with the United States Constitution.<sup>176</sup> Due process generally entails notice of the allegations against you, the right to a hearing in front of a neutral decision maker, the opportunity to present favorable evidence and witnesses, the right to confront and

171. David M. Hale & Mark Schlabach, *Jameis Winston Part of Investigation*, ESPN (Nov. 14, 2013), [http://espn.go.com/college-football/story/\\_/id/9973046/jameis-winston-florida-state-seminoles-investigated-2012-sexual-assault-case](http://espn.go.com/college-football/story/_/id/9973046/jameis-winston-florida-state-seminoles-investigated-2012-sexual-assault-case) (discussing investigation into Jameis Winston about alleged sexual assault).

172. See Paul Myerberg, *Heisman Rankings: FSU's Jameis Winston in Front*, USA TODAY, Nov. 12, 2013, <http://www.usatoday.com/story/sports/ncaaf/2013/11/12/heisman-rankings-jameis-winston-johnny-manziel-aj-mccarron/3502097/> (discussing Jameis Winston and Florida State's historical season prior to allegations against Winston). Florida State had a record of 9-0, and Winston had thrown for 2,661 yards, 27 touchdowns and seven interceptions, and tallied 157 rushing yards to go with three rushing touchdowns. See *id.*

173. See FLORIDA STATE UNIVERSITY, INTERCOLLEGIATE ATHLETICS POLICIES AND PROCEDURES 201 (Dec. 9, 2009), available at [http://grfx.cstv.com/photos/schools/fsu/genrel/auto\\_pdf/policyprocedure\\_5410.pdf](http://grfx.cstv.com/photos/schools/fsu/genrel/auto_pdf/policyprocedure_5410.pdf) (discussing current policy that student-athlete not suspended until charged with felony).

174. See Mark Schlabach, *FSU's Jameis Winston Not Charged*, ESPN (Dec. 6, 2013), [http://espn.go.com/college-football/story/\\_/id/10082441/jameis-winston-not-charged-sexual-assault-investigation](http://espn.go.com/college-football/story/_/id/10082441/jameis-winston-not-charged-sexual-assault-investigation) (reporting that Jameis Winston would not be charged with sexual assault).

175. See Gerry Ahern, *Florida State Tops Auburn for BCS Championship on Late TD*, USA TODAY, Jan. 7, 2014, <http://www.usatoday.com/story/sports/ncaaf/2014/01/07/florida-state-auburn-bcs-national-championship-game/4345221/> (discussing Florida State's victory in BCS Championship game).

176. See generally *Goss v. Lopez*, 419 U.S. 565 (1975) (illustrating that public institutions are required to provide Due Process in accordance with Constitution); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) (same).



cross-examine the accuser or adverse witnesses, the right to an attorney and the right to an appeal.<sup>177</sup> In contrast, private institutions are not required to provide due process to its students. The relationship between a student and a private university is a matter of contract and private universities are generally only required to provide the protections afforded by the university's policies and regulations governing student conduct,<sup>178</sup> which generally do not include the type of due process protections afforded by the Constitution.<sup>179</sup>

Of course, schools must also be aware of university rules and regulations when it comes to the behavior of coaches. In recent years, numerous coaches have been terminated for conduct that violated the university's regulations and perhaps the law. In December 2009, Mike Leach, the winningest football coach in Texas Tech history and an attorney, was fired for allegedly ordering wide receiver Adam James, son of ESPN college football analyst Craig James, to stand in an equipment room after Jones had suffered a concussion.<sup>180</sup> Also in December 2009, Mark Mangino, the second

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177. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW*, sec. 6.1.2.1 (4th ed. 2010) (discussing what due process generally requires).

178. See *Dixon*, 294 F.2d at 157 (stating that "the well settled rule [is] that the relations between a student and a private university are a matter of contract."); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000) (holding that disciplined student's complaint governed by student handbook as matter of contract); *Holert v. Univ. of Chicago*, 751 F.Supp. 1294 (N.D. Ill. 1990) (stating that "university and its students have a contractual relationship; the terms of their contract are generally set forth in the university's catalogs and manuals"); *Russell v. Salve Regina Coll.*, 649 F.Supp. 391 (D.R.I. 1986) (arguing that "it is accepted law that relationship between student and university is contractual in nature" (citations omitted)); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721 (1st Cir. 1983) (pertaining to plaintiff's action seeking reinstatement from private university following disciplinary hearing governed by contract law); *Coveney v. Pres. & Trustees of Coll. of Holy Cross*, 388 Mass. 16 (Mass. 1983) (considering plaintiff's action seeking damages for alleged wrongful expulsion governed by student handbook).

179. See Dan Wetzel, *Maryland Guard Dez Wells Suing Xavier for Expulsion*, YAHOO! SPORTS (Aug. 20, 2013), <http://sports.yahoo.com/news/ncaab—maryland-guard-dez-wells-suing-xavier-for-expulsion-021302176.html> (discussing one former private school student-athlete that sued school for expulsion). In August 2013, Maryland basketball player Dezmine Wells sued Xavier University after he had been expelled for allegedly having sexually assaulted another student. Wells alleged that Xavier, a private university, breached its contract with Wells by failing to follow the hearing and appeal process outlined in the Xavier Student Handbook. See Complaint, *Wells v. Xavier Univ.*, 7 F.Supp.3d 746 (S.D. Ohio Aug. 20, 2013) (No. 1:13-CV-00575). Because Xavier is a private school, Wells could not assert a claim that his constitutional right to due process had been violated. See U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law").

180. See *Leach Fired Short of Tech's Bowl Game*, ESPN, Dec. 31, 2009, <http://sports.espn.go.com/ncf/bowls09/news/story?id=4781981> (discussing rationale behind Texas Tech firing coach).



winningest coach in Kansas history, was forced to resign after an investigation by the Kansas athletic department revealed that Mangino had consistently treated players, staff, and university employees with an inappropriate and abusive manner.<sup>181</sup> In January 2010, Jim Leavitt, the winningest football coach in South Florida history, was fired for having allegedly struck a player during half-time of a game.<sup>182</sup> As a last example, in April 2013, Rutgers basketball coach Mike Rice was fired after practice footage was publicized in which Rice was shown verbally abusing players, using anti-gay slurs, and hurling basketballs at players.<sup>183</sup>

Those cases shined a negative spotlight on each school's athletic department and Athletic Director. Questions inevitably came wondering how it is that an institution of higher learning could employ, and gainfully employ, persons with such questionable character, particularly when these were individuals theoretically responsible for ensuring the growth and maturity of young men. Not surprisingly, the Leach, Leavitt, and Rice cases all resulted in various forms of litigation.<sup>184</sup> In the Rice case, Rutgers Athletic Director, Tim Perneti, a celebrated former Rutgers football player, was also forced to resign.<sup>185</sup> The perceived mistake Perneti made

181. *See Mangino out at Kansas*, ESPN (Dec. 4, 2009), <http://sports.espn.go.com/nfc/news/story?id=4711389> (discussing how Kansas forced coach to resign after evidence surfaced that he had been abusive).

182. *See Leavitt Fired as South Florida Coach*, ESPN (Jan. 8, 2010), <http://sports.espn.go.com/nfc/news/story?id=4807719> (reporting that one coach was fired for striking player during half time).

183. *See Steve Eder & Kate Zernike, Rutgers Leaders Are Faulted on Abusive Coach*, N.Y. TIMES, Apr. 3, 2013, <http://www.nytimes.com/2013/04/04/sports/ncaabasketball/rutgers-fires-basketball-coach-after-video-surfaces.html?pagewanted=1&r=0> (reporting Rutgers coach was fired for being verbally abusive).

184. *See Mike Leach Files Lawsuit Against ESPN*, ESPN (Nov. 25, 2010), <http://sports.espn.go.com/nfc/news/story?id=5847181> (discussing Mike Leach's lawsuit against ESPN). In January 2011, a Texas state court dismissed Leach's lawsuit on immunity grounds. *See Leach v. Texas Tech Univ.*, 335 S.W.3d 386 (Tex. App. 2011). *See also* Brian Bennett, *Fired Leavitt Files Suit, Seeks Millions*, ESPN (Mar. 15, 2010), <http://sports.espn.go.com/nfc/news/story?id=4996720> (reporting that Leavitt, after being fired, filed suit against South Florida). In January 2011, Leavitt settled his lawsuit against South Florida for \$2.75 million. *See Greg Auman, USF Settles Ex-Coach Jim Leavitt's Lawsuit at \$2.75 Million*, TAMPA BAY TIMES, Jan. 11, 2011, <http://www.tampabay.com/sports/college/usf-settles-ex-coach-jim-leavitts-lawsuit-for-275-million/1144945>. *See also* Jeff Borzello, *Report: Ex-Rutgers F Derrick Randall Suing School, Mike Rice*, CBSSPORTS, Dec. 9, 2013, <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24369905/report-exrutgers-f-derrick-randall-suing-school-mike-rice> (reporting that former Rutgers Forward had sued Rutgers and Mike Rice after scandal).

185. *See Kate Zernike & Steve Eder, Rutgers Tries to Calm Furor as More Officials Quit*, N.Y. TIMES, Apr. 5, 2013, <http://www.nytimes.com/2013/04/06/sports/ncaabasketball/athletic-director-tim-pernetti-is-out-in-rutgers-abuse-scandal.html> (evidencing that Rutgers Athletic Director forced to resign due to scandal).

was that he had previously only suspended Rice for three games—as opposed to terminating him—and not disclosing the extent of Rice’s conduct.<sup>186</sup>

An important but perhaps less desirable role of Athletic Directors is fundraising. As discussed earlier, only 23 of the top 100 athletic departments operate at a profit. Thus, in the ever-increasing arms race of college athletics, every dollar obtained outside of a university’s own budget is important. While some schools are blessed to have tremendously wealthy and generous donors, such as when T. Boone Pickens donated \$165 million to Oklahoma State athletics in 2006,<sup>187</sup> most Athletic Directors are forced to work tirelessly during capital campaigns to secure as many small donations as possible for the department. Athletic directors and head coaches will often hold luncheons or dinners for which donors can “buy a plate” to have the opportunity to network and hear the Athletic Director or coach speak. Many universities, particularly FBS institutions, require “donations” on top of the actual season ticket price in order to be considered for season tickets.<sup>188</sup> For example, the University of Arkansas announced that the “Razorback Seat Value Plan,” a fundraising initiative that awards priority seating at football games based on donations to the athletic department, raised \$6.5 million dollars.<sup>189</sup>

Athletic Directors not only feel pressure to secure donations, but also to perform once they are received. Big expectations often come from big donations or gifts. Bill Moos, ex-Athletic Director at Oregon, assigned an employee whose chief responsibility was engaging Phil Knight, the creator of Nike and a powerful alumnus.<sup>190</sup> For sure, falling out with donors can have disastrous consequences on an Athletic Director’s career.<sup>191</sup> Donors will also often have a

186. See *id.* (discussing rationale for requesting that Athletic Director resign).

187. See Steve Wieberg, *Tycoon’s \$165M Gift to Oklahoma State Raises Both Hope and Questions*, USA TODAY, Feb. 21, 2007, [http://www.usatoday.com/sports/college/2006-08-15-pickens-oklahoma-state-donation\\_x.htm](http://www.usatoday.com/sports/college/2006-08-15-pickens-oklahoma-state-donation_x.htm) (indicating that one donor’s significant donation to Oklahoma State).

188. See generally Matt Jones, *UA Fundraising Drive Raises \$6.5 million for Athletics*, ARKANSAS ONLINE (July 11, 2011), <http://www.arkansasonline.com/news/2011/jul/11/ua-fundraising-drive-raises-65-million-athletics/> (discussing how athletic departments entice individuals to donate to particular sports programs).

189. See *id.* (discussing University of Arkansas “Razorback Seat Value Plan”).

190. See Michael Rosenberg, *Nike’s Phil Knight has Branded Oregon into National Power*, SPORTS ILLUSTRATED (Jan. 7, 2011), [http://sportsillustrated.cnn.com/2011/writers/michael\\_rosenberg/01/06/oregon.knight/index.html#ixzz1WWisEmdh](http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/01/06/oregon.knight/index.html#ixzz1WWisEmdh) (discussing Oregon’s plan to engage alumnus Phil Knight once he had given large donations).

191. See *id.* (advancing that losing donors can have disastrous effect on Athletic Director’s career).

voice in who will be hired as an Athletic Director. As Oklahoma State President David Schmidly said when he was looking to replace Athletic Director Harry Birdwell in 2005, “Why wouldn’t you want an Athletic Director that your top donor likes?”<sup>192</sup>

In sum, Athletic Directors with a proper perspective understand the important role the athletic department can play within a university, and the scrutiny that comes along with it. Athletic Directors must work to ensure the athletic department acts as a respectable and responsible citizen of the campus and displays a positive face to the public at all times.

#### D. Compliance with Title IX

Title IX, passed in 1972, prohibits “any education program or activity receiving Federal financial assistance” from discriminating on the basis of sex.<sup>193</sup> In 1974, the then-United States Department of Health, Education and Welfare<sup>194</sup> enacted regulations that specifically applied Title IX to “interscholastic, intercollegiate, club [and] intramural athletics.”<sup>195</sup> The regulations further clarified that Title IX prohibits any person from being “treated differently from another person” in the intercollegiate athletics context on the

192. See Wieberg, *supra* note 187 (discussing how donors have voice in choosing Athletic Directors).

193. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1972) (prohibiting discrimination on basis of sex). Specifically, Title IX states the following: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (1972). All NCAA member institutions receive federal financial assistance and thus are subject to Title IX. See NAT’L COLLEGIATE ATHLETIC ASS’N, GENDER EQUITY, available at <http://www.ncaa.org/sites/default/files/S-A%2BPamphlet.pdf> (last visited Nov. 25, 2014) (discussing facts about Title IX in relation to NCAA). Federal financial assistance may be received directly or indirectly. For example, colleges indirectly receive federal financial assistance when they accept students who pay, in part, with federal financial aid directly distributed to the students. See also *Grove City College v. Bell*, 465 U.S. 555, 564 (1984); *Bob Jones Univ. v. Johnson*, 396 F.Supp. 597, 603 (D. S.C. 1974), *aff’d*, 529 F.2d 514 (4th Cir. 1975).

194. See DEP’T OF HEALTH AND HUMAN SERVS., HISTORICAL HIGHLIGHTS, available at <http://www.hhs.gov/about/hhshist.html> (last visited Nov. 25, 2014) (providing historical highlights of Department of Health and Human Services, in particular evidencing that it was called “Department of Health, Education and Welfare”). In 1979, the Department of Health, Education, and Welfare was divided into the Department of Education and the Department of Health and Human Services. See *id.*

195. 45 C.F.R. § 86.41(a) (1975) (illustrating that certain regulations enacted by Department of Health, Education and Welfare applied Title IX to intercollegiate and intramural athletics).

basis of sex.<sup>196</sup> Moreover, the regulations declare that a recipient of federal funding which operates intercollegiate athletics must “provide equal athletic opportunity for members of both sexes.”<sup>197</sup> There is an immense amount of data, research, and case law on Title IX. Here, we try to summarize the most important aspects of Title IX about which an Athletic Director should be aware.

The positive effects of Title IX are undeniable. Before the passage of Title IX, women composed only 7% of the total number of athletic participants in high school and 16% in college.<sup>198</sup> In the 2009-10 academic year, 45.6 % of Division I student-athletes were female.<sup>199</sup> Moreover, the total number of female intercollegiate student-athletes has risen from approximately 30,000 before Title IX to more than 190,000 in 2011-12.<sup>200</sup>

Nonetheless, compliance with Title IX can be confusing and difficult. In 1979, the Department of Education’s Office for Civil Rights (“OCR”) published a Policy Interpretation of Title IX to assist academic institutions with athletic programs in complying with Title IX.<sup>201</sup> OCR identified three areas in which a university must demonstrate compliance:

1. Compliance in Financial Assistance (Scholarships)  
Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to

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196. 45 C.F.R. § 86.41(a) (directing that athletes cannot be treated differently from one another on basis of sex).

197. 45 C.F.R. § 86.41(c) (providing that members of both sexes must be provided with equal opportunity).

198. See WONG, *supra* note 177, at 316 (evidencing that Title IX had a great impact on high school and university female athletics).

199. See NAT’L COLLEGIATE ATHLETIC ASS’N, GENDER EQUITY REPORT 2004-2010, 8 (2012), available at <http://www.ncaapublications.com/productdownloads/GEQS10.pdf> (providing statistics regarding female participation in university athletic programs).

200. See SHARP Center for Women & Girls, *Progress and Promise: Title IX at 40 Conference*, WOMEN’S SPORTS FOUNDATION, Feb. 2013, available at <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/title-ix-at-40-conference> (demonstrating positive impacts of Title IX forty years after its enactment).

201. See U.S. DEP’T OF EDUCATION’S OFFICE OF CIVIL RIGHTS, A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS (Dec. 11, 1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> (providing text of Dep’t of Education’s policy interpretation). See also 44 C.F.R. § 714.13 (incorporating policy interpretation promulgated in Code of Federal Regulations); U.S. DEP’T OF EDUCATION, READING ROOM (eFOIA Index), <http://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX-Pubs> (providing list of Dep’t of Education publications, including policy interpretation on Title IX).

the number of male and female participants in the institution's athletic program.

2. Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

3. Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.<sup>202</sup>

This directive from OCR has generally become known as the Three Prong Test and is still applicable today.

In addition, the OCR outlined three factors in considering whether an institution adequately accommodates the interests and abilities of both sexes as required by Prong Three:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments?
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex?
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have

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202. See A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS, *supra* note 201 (identifying three areas in which universities must demonstrate compliance with Title IX).

been fully and effectively accommodated by the present program?<sup>203</sup>

Importantly, an institution only has to satisfy one of these criteria to demonstrate it is accommodating the interests of male and female students in compliance with Title IX.<sup>204</sup> Nevertheless, it is clear that determining whether a university has complied with Title IX relies on subjective criteria that may be further comprised of innumerable data points. Not surprisingly then, there has routinely been litigation over whether a school was in compliance with Title IX.<sup>205</sup>

Today, institutions should fairly easily be able to satisfy the first two Prongs of examination: compliance in financial assistance and compliance in other program areas.

To demonstrate compliance in financial assistance, a university must allocate its scholarship dollars roughly equivalent to the proportion of student-athletes of each gender.<sup>206</sup> Thus, if 50% of a school's student-athletes are male, male student-athletes should receive 50% of the total scholarship dollars.<sup>207</sup> However, where there is an unexplained disparity of more than 1%, there is a strong presumption that the university is not in compliance.<sup>208</sup> A common

203. See *id.* (discussing how universities can adequately comply with third area).

204. See U.S. DEP'T OF EDUCATION, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> (clarifying that each institution need only satisfy one of three criteria in order to demonstrate that it is complying with Title IX).

205. See, e.g., *Favia v. Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colorado State University*, 814 F.Supp. 1507 (D. Colo. 1993); *Boucher v. Syracuse University*, 164 F.3d 113 (2d Cir. 1999); *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Choike v. Slippery Rock Univ. of Pa. of the State Sys. of Higher Educ.*, No. 06-cv-622, 2006 WL 2060576 (W.D. Pa. July 21, 2006); *Miller v. Univ. of Cincinnati*, No. 05-cv-764, 2008 WL 203025 (S.D. Ohio Jan. 22, 2008).

206. See WONG, *supra* note 177, sec. 8.1.1.2 (demonstrating that universities must allocate its scholarship dollars equivalent to proportion of student-athletes).

207. See WONG, *supra* note 177, sec. 8.1.1.2 (explaining that if 50% of student athletes are male and other 50% are female, then scholarship dollars must be equally proportioned); see also U.S. DEP'T OF EDUCATION, DEAR COLLEAGUE LETTER: BOWLING GREEN STATE UNIVERSITY, (July 23, 1998), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> [hereinafter "Bowling Green State University"] (providing example of how U.S. Government handles complaints regarding discrimination in allocating athletic scholarships).

208. See WONG, *supra* note 177, sec. 8.1.1.2 (illustrating when disparity of more than 1%, strong presumption of non-compliance).



acceptable explanation for a disparity is the difference in out-of-state versus in-state tuition.<sup>209</sup>

To demonstrate compliance in other program areas, the OCR examines 11 components:

- (1) provision and maintenance;
- (2) Scheduling of games and practice times;
- (3) Travel and per diem allowances;
- (4) Opportunity to receive academic tutoring and assignment and compensation of tutors;
- (5) Opportunity to receive coaching and assignment and compensation of coaches;
- (6) Provision of locker rooms and practice and competitive facilities;
- (7) Provision of medical and training facilities and services;
- (8) Provision of housing and dining facilities and services;
- (9) Publicity;
- (10) Provision of support services; and
- (11) Recruitment of student-athletes.<sup>210</sup>

Proper systems should enable an athletic department to provide equally to the different program areas. An athletic department should track and record the various relevant data for each of the 11 components and then compare that between the men's and women's teams, particularly where there is a team for each gender. For example, the athletic department should ensure that the men's and women's basketball teams have an equal amount of off days between games, that the teams' games are roughly the same times, that the teams have the same amount of tutors, that the availability and assignment coaching staffs are roughly equal in nature,<sup>211</sup> that the teams get to play and practice in the same facilities, that the teams have the same access to trainers and medical staff, that the

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209. See Bowling Green State University, *supra* note 207 (arguing that universities can argue that disparity between female and male scholarships can be based on in state versus out of state tuition).

210. See WONG, *supra* note 177, sec. 8.1.1.2 (discussing 11 components that OCR examines to demonstrate compliance). See also OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUCATION, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL (1990), available at [http://fs.ncaa.org/Docs/gender\\_equity/resource\\_materials/AuditMaterial/Investigator%27s\\_Manual.pdf](http://fs.ncaa.org/Docs/gender_equity/resource_materials/AuditMaterial/Investigator%27s_Manual.pdf) [hereinafter "TITLE IX INVESTIGATOR'S MANUAL"] (providing that OCR examines eleven components that can demonstrate compliance).

211. See TITLE IX INVESTIGATOR'S MANUAL, *supra* note 210, at 58 (evidencing that athletic departments are required to ensure equal access to all aspects of athletic programs). So long as the female student-athletes are being provided equal access to coaching, the coaches do not need to be compensated equally. See *id.*

teams have the same access to housing and dining facilities, that the public relations department pays equal attention to each team, and that prospective recruits are treated equally when visiting the campus.

Moreover, the OCR accepts disparities in the 11 components above based on certain factors, such as the unique nature of the particular sport, special circumstances of a temporary nature, the need for greater funding for crowd control at more popular athletic events, and, differences that have not yet been remedied but that an institution is voluntarily working to correct.<sup>212</sup>

Probably the most difficult area to demonstrate is whether an institution adequately accommodates the interests and abilities of both sexes, Prong Three. In April 2010, OCR advised that asking the following three questions will help determine whether the interests of both sexes are being accommodated:

1. Is there unmet interest?
2. Is there sufficient ability to sustain a team in the sport?
3. Is there a reasonable expectation of competition for the team?<sup>213</sup>

These questions beg the question of how they can be answered. OCR and the NCAA generally recommend the use of surveys to students of the underrepresented sex (generally women) to determine their interest in athletics.<sup>214</sup> However, it is important that the survey response rate be sufficiently reliable. In *Barrett v. West Chester University of Pennsylvania of the State System of Higher Education*, the United States District Court for the Eastern District of Pennsylvania held that a 39 percent survey response rate was too low to validate the survey and, therefore, the school could not rely on the results to demonstrate compliance with the equal accommodation prong.<sup>215</sup>

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212. See WONG, *supra* note 177, sec. 8.1.1.2 (evidencing that OCR accepts disparities in scholarships under certain situations).

213. See NAT'L COLLEGIATE ATHLETIC ASS'N, EQUITY AND TITLE IX IN INTERCOLLEGIATE ATHLETICS: A PRACTICAL GUIDE FOR COLLEGES AND UNIVERSITIES 20 (2011), available at <http://www.ncaapublications.com/productdownloads/EQTII2.pdf> [hereinafter "EQUITY AND TITLE IX IN INTERCOLLEGIATE ATHLETICS"] (providing three questions that will help determine whether interests of both sexes are being accommodated).

214. See *id.* (illustrating that NCAA and OCR generally recommend that athletic programs survey underrepresented sexes about their interest in athletics).

215. See *Barrett v. W. Chester Univ. of Pa. of the State Sys. of Higher Educ.*, No. 03-cv-4978, 2003 WL 22803477 (E.D. Pa. Sept. 4, 2003) (holding that schools cannot rely on 39% response rate to survey because that amount too low to validate survey results). In 2005, then-President George W. Bush instituted a new policy that allowed schools to use a simple survey of women as an evaluation of

Schools face difficult choices if it is determined there is unmet interest. The most controversial way in which schools have tried to comply with Title IX is by cutting men's programs and therefore equalizing the level of participation and expenditures between the genders. As a result, there have been several "reverse discrimination lawsuits." Most recently, in 2006, James Madison University decided to eliminate seven men's teams and three women's teams to bring the school into compliance with Title IX.<sup>216</sup> A coalition of coaches, student-athletes, fans, booster clubs, parents, and alumni formed Equity in Athletics, Inc. ("EIA"), a Virginia non-profit corporation to challenge the Title IX regulations and James Madison.<sup>217</sup> The United States District Court for the Western District of Virginia, and then the United States Court of Appeals for the Fourth Circuit, rejected EIA's challenge to the Three Prong Test and cited cases from Circuit Courts of Appeal across the country that have determined that schools are permitted to eliminate men's programs in order to comply with Title IX.<sup>218</sup>

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whether females were being given equal opportunity to participate. The policy combined non-responses with negative responses, giving institutions an easier way to avoid providing equal athletic opportunities for females. In 2010, President Barack Obama repealed the policy.

216. See *Equity in Athletics, Inc. v. U.S. Dep't of Educ.*, 291 Fed.Appx. 517 (4th Cir. 2008) (illustrating that, in some cases, schools need to remove athletic teams to be in compliance with Title IX).

217. See *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 90 (W.D. Va. 2007) (discussing formation of Equity in Athletics, Inc.).

218. See *Equity in Athletics, Inc.*, 504 F. Supp. 2d at 101 (citing that "[e]very court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case)."). See also *Neal v. Bd. of Tr. of the Cal. State Univ.*, 198 F.3d 763, 769-770 (9th Cir. 1999); *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n. 15 (1st Cir. 1993) [hereinafter "*Cohen I*"] ("[t]itle IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another route, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the overrepresented gender while keeping opportunities stable for the underrepresented gender (or reducing them to a much lesser extent)."); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (stating that "[w]e recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs . . . . Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population."); *Kelley v. Bd. of Trustees*, 35 F.3d 265, 272 (7th Cir. 1994) (stating that "And despite plaintiffs' assertions to the contrary, neither the regulation nor the policy interpretation run afoul of the dictates of Title IX."); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir.2002) (holding that decision to eliminate men's athletic programs did not violate Title IX, since "[t]he statute

Additionally, the United States Court of Appeals for the Second Circuit recently rejected a clever attempt to enlarge the definition of female sports for Title IX purposes. In *Biediger v. Quinnipiac*,<sup>219</sup> Quinnipiac women's volleyball players challenged the school's 2009 decision to eliminate their team as a violation of Title IX and further argued that the school's decision to create, and count for purposes of Title IX, a 30-person "competitive cheerleading" squad violated Title IX.<sup>220</sup> The United States District Court for the District of Connecticut found that "in terms of the team's operating budget, benefits, services, and coaching staff, competitive cheerleading was generally structured and administered by Quinnipiac's athletics department in a manner consistent with the school's other varsity teams."<sup>221</sup> However, there were significant differences that led the courts to find that the cheerleading squad could not be counted for purposes of Title IX. First, there were no uniform rules for competitive cheerleading.<sup>222</sup> Additionally, the courts found that Quinnipiac's cheerleading squad competed against "a motley assortment of competitors, including collegiate club opponents who did not receive varsity benefits, collegiate sideline cheerleading teams, and all-star opponents unaffiliated with a particular academic institution, some of whom may still have been high school age."<sup>223</sup>

Title IX compliance will always be best achieved through hard work, attention to detail, and a desire to ensure equal participation in athletics by both genders. Fortunately, the NCAA regularly publishes very useful guidance on Title IX compliance. In 2012, the NCAA published *Equity and Title IX in Intercollegiate Athletics – A*

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focuses on opportunities for the underrepresented gender, and does not bestow rights on the historically overrepresented gender, and it is well-established that classification by gender is not a per se violation of Title IX"); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002) (stating that "[A]lthough Title IX does not require proportionality, the statute does not forbid it either. And the gender make-up of athletic participation is certainly relevant to a determination of whether a school is in compliance with Title IX."); *Equity in Athletics, Inc.*, 291 Fed.Appx. at 523 (collecting same cases).

219. See *Biediger v. Quinnipiac*, 691 F.3d 85 (2d Cir. 2012) (illustrating challenge to 2009 decision that eliminated Quinnipiac Volleyball team as violation of Title IX).

220. See *id.* (challenging Quinnipiac's decision to eliminate women's volleyball team under Title IX).

221. See *id.* at 103 (illustrating that Quinnipiac was in compliance if competitive cheerleading counted under Title IX).

222. See *id.* at 104 (directing that competitive cheerleading does not count under Title IX).

223. See *id.* (illustrating that Quinnipiac's cheerleading squad did not solely compete against NCAA teams).

Practical Guide for Colleges and Universities.<sup>224</sup> The NCAA's manual is a comprehensive and comprehensible guide for all Title IX issues and is a must read for any Athletic Director. Additionally, the NCAA mandates that each athletic department contain a Senior Woman Administrator,<sup>225</sup> who is generally responsible for advancing the interests of female student-athletes and ensuring the institution is complying with the spirit of Title IX.

There is no area of athletic department administration more susceptible to legal wrangling than Title IX compliance. It is important that an Athletic Director be educated on the issue, and then proactive, rather than reactive, on compliance.

### E. Negotiating Contracts

As discussed throughout this article, college athletic departments operate with tens of millions of dollars in cash flow. Any organization engaged in that level of business must ensure that it is memorializing its agreements in well-written and enforceable contracts, and that it and its counterparties are complying with their contractual obligations. We discuss the issues with contracted parties of most importance to Athletic Directors: employment, marketing, apparel, facilities, and consultants.

Coaching contracts will of course be among the most consequential and scrutinized contracts an Athletic Director will be involved in negotiating. While hiring a coach is complicated enough simply from a competition standpoint, the economics make it even more problematic. To lure the most attractive coaches to their institution, Athletic Directors and the institutions have to be willing to provide the coach with a contract commensurate with the market, including in terms of salary, duration, and benefits.<sup>226</sup> Not surprisingly, in 2013, in forty states, the highest paid public employee was either the head coach of the state university's men's basketball or football team.<sup>227</sup>

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224. See EQUITY AND TITLE IX IN INTERCOLLEGIATE ATHLETICS, *supra* note 213 (showing that NCAA publishes this guide on compliance).

225. See NCAA MANUAL, *supra* note 13, art. 4.02.4.

226. See Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2009) (arguing that to attract best coaches schools need to provide most competitive contract).

227. See Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013), <http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228> (illustrating that state's highest paid employees are typically coaches).

In an ideal world, the coach wins, the contract is fulfilled, and then the parties extend the contract upon mutually agreeable terms. However, the landscape of college coaching contracts is far from ideal. There are two particular (and obvious) ways in which college coaching contracts can become problematic: (1) the coach does not win and is fired or (2) the coach does win and might leave the university.

Coaching contracts—like any contract unless otherwise specified—are generally guaranteed. In other words, the coach is generally entitled to receive the compensation promised by the contract and for the duration promised by the contract. Thus, even if the coach has a dismal record after three years of a five-year contract, he or she is entitled to the contracted compensation for years four and five of the contract, even if terminated after year three. Nevertheless, the school still has to hire a new coach and thus would end up paying two coaches at the same time, one of whom would no longer be performing any services for the university.

There are a couple of different ways universities try to deal with paying a terminated coach. The best outcome is to not pay the coach at all. However, this remedy is generally reserved for situations where the coach was terminated “for cause,” i.e., violated some provision of the contract such as a morals clause<sup>228</sup> or a clause requiring the coach to comply with NCAA Bylaws. For example, in June 2003, the University of Washington fired football coach Rick Neuheisel one season after he signed a contract extension through 2007 that was to pay him as much as \$1.8 million annually.<sup>229</sup> Neuheisel was fired after it was revealed that he and three friends had participated in past NCAA men’s basketball tournament pools and won over \$12,000.<sup>230</sup> NCAA Bylaws prohibit coaches and student-athletes from gambling on college sports,<sup>231</sup> but do not specifi-

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228. See, e.g., *Mendenhall v. Hanesbrands, Inc.*, 856 F.Supp. 717 (M.D.N.C. 2012) (providing example in which Pittsburgh Steelers running back Rashard Mendenhall stated claim for breach of contract against clothing company which attempted to terminate endorsement contract based on morals clause as result of controversial statements made by Mendenhall). A morals clause is a clause in which the parties agree that one party can terminate the contract if the other party engages in some type of criminal or morally questionable behavior.

229. See WONG, *supra* note 177, sec. 9.2.5 (providing example of Rich Neuheisel’s termination for violating morals clause).

230. See *id.* (providing rationale that Neuheisel violated morals clause).

231. See NCAA MANUAL, *supra* note 13, art. 10.3 (evidencing that NCAA bylaws prohibit coaches and student-athletes from gambling on college sports).



cally address such pools.<sup>232</sup> Neuheisel claimed the university gave him permission to participate in the pool.<sup>233</sup> Neuheisel sued for breach of contract when Washington refused to pay him his contracted salary on the ground that he was fired with cause.<sup>234</sup> The case was ultimately settled for a reported \$4.5 million,<sup>235</sup> about half of the approximately \$9 million Neuheisel was set to earn under the contract.<sup>236</sup>

Assuming the coach has done everything asked of him or her besides win, the school will undoubtedly have to pay some money. Coaching contracts generally include liquidated damages provisions specifically stating that amount owed to the coach depending on the date of termination. Schools and coaches often negotiate buyouts of the remaining amounts on the contract to avoid litigation of the amounts owed.<sup>237</sup> Those negotiations are not always successful and litigation is not uncommon.<sup>238</sup>

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232. *See id.* (advancing that although coaches and student-athletes are prohibited from gambling on college sports, pools are not specifically addressed in NCAA bylaws).

233. *See* WONG, *supra* note 177, sec. 9.2.5 (explaining that Neuheisel claimed university gave him permission to participate in pool).

234. *See id.* (evidencing that Neuheisel sued Washington for breach of contract).

235. *See id.* (evidencing that Neuheisel's case was settled for \$4.5 million).

236. *See* O'Brien v. The Ohio State Univ., No. 2004-10230 2006 WL 571043 (Ohio Cl. Ct. Feb. 15, 2006) (providing similar case to *Neuheisel*). Similarly, in 2004, Ohio State fired men's basketball coach Jim O'Brien after he admitted to giving \$6,000 to Alex Radojevic, an Ohio State recruit, to help Radojevic's family in war-torn Serbia in 1999. O'Brien sued for breach of contract. Although the Court of Claims of Ohio found that O'Brien likely committed an NCAA violation in breach of his contract, O'Brien's failure to report the violation was not a material breach that would give Ohio State cause for termination. *See id.* O'Brien was ultimately awarded about \$2.5 million in damages.

237. *See* *Auburn Fires Gene Chizik*, ESPN (Nov. 25, 2012), [http://espn.go.com/college-football/story/\\_/id/8674097/gene-chizik-fired-auburn-tigers](http://espn.go.com/college-football/story/_/id/8674097/gene-chizik-fired-auburn-tigers) (discussing common trend to negotiate buyouts of remaining amounts on contracts to avoid litigation). In 2012, following a 3-9 season, including a 0-8 record in SEC games, Gene Chizik was fired by Auburn University. Auburn Athletic Director Jay Jacobs made the decision to fire Chizik without cause, resulting in a \$7.5 million buyout being owed to Chizik. *See id.* Jacobs also dismissed a number of Chizik's assistant coaches, who were also entitled to buyout payments, pushing the total cost of Auburn's move to \$11.09 million. *See id.* *See also* *Tennessee Dismisses Derek Dooley*, ESPN (Nov. 20, 2012), [http://espn.go.com/college-football/story/\\_/id/8648445/derek-dooley-tennessee-volunteers-return-another-season](http://espn.go.com/college-football/story/_/id/8648445/derek-dooley-tennessee-volunteers-return-another-season) (providing example in which Tennessee bought out Athletic Director Dooley's contract). Derek Dooley was fired shortly before Chizik in November of 2012, during a season in which he led the University of Tennessee to a 4-7 record, including an 0-7 SEC mark. Tennessee Athletic Director Dave Hart dismissed Dooley without cause, which triggered a \$5 million buyout payment to Dooley. *See id.*

238. *See* *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751 (6th Cir. 1999) (affirming summary judgment for school on lawsuit against former coach concerning contract's liquidated damages provision); *Northeastern Univ. v. Brown*, No.

A tricky issue exists over whether a coach resigns or is terminated. In some cases, where a coach resigns voluntarily, he or she might not be entitled to any further compensation. However, if the coach is terminated, the remaining compensation is generally due. But sometimes the school might force the coach to resign, which on the one hand protects the coach's reputation but also puts the coach at risk of relinquishing amounts owed on the contract.

After the 2013 football season, longtime University of Texas football coach Mack Brown announced his resignation, which was reportedly forced by Texas President Bill Powers.<sup>239</sup> At the time, Brown's contract ran through the 2020 season with approximately \$5 million in annual compensation.<sup>240</sup> Brown's contract with Texas contemplated two departure scenarios.<sup>241</sup>

First, concerning Brown's possible resignation, the contract provided:

#### REASSIGNMENT

If Brown voluntarily relinquishes his duties as Head Football Coach during the term of this agreement, he will be reassigned to another significant position within the University with compensation set at a minimum of \$500,000 annually and to be determined consistent with State law.

Second, concerning Brown's possible termination, the contract provided:

#### TERMINATION

The performance of Brown as head football coach will be subject to periodic review by the Director and, at the discretion of the Director, Brown may be terminated as head football coach. If terminated, Brown will be compensated according to the following terms:

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20040827F, 2004 WL 616225 (Mass. Super. Mar. 11, 2004) (granting Northeastern preliminary injunction against former coach).

239. See Tim Polzer, *Report: Texas President Forced Mack Brown to Resign*, SPORTS ILLUSTRATED (Dec. 24, 2013), <http://tracking.si.com/2013/12/24/mack-brown-forced-resign/> (discussing Mack Brown's resignation, which was reportedly forced on him by President).

240. See Carter Strickland, *Texas Approves Mack Brown Extension*, ESPN (Jan. 26, 2012), [http://espn.go.com/college-football/story/\\_/id/7507768/texas-long-horns-approve-mack-brown-contract-extension](http://espn.go.com/college-football/story/_/id/7507768/texas-long-horns-approve-mack-brown-contract-extension) (evidencing that Mack Brown's contract ran through 2020 season at approximately \$5 million per year).

241. See *Mack Brown's Contract with UT*, STATESMAN, available at <http://media.cmgdigital.com/shared/news/documents/2013/12/26/mackContract13.pdf> (providing text of Mack Brown's contract at University of Texas).

| <u>Date of Termination</u> | <u>Total Compensation</u> | <u>Number of Annual Payments</u> |
|----------------------------|---------------------------|----------------------------------|
| 1/26/12 – 12/31/12         | \$3,500,000               | 5 (x \$700,000)                  |
| 1/1/13 – 12/31/14          | \$2,750,000               | 4 (x \$687,500)                  |
| 1/1/15 – 12/31/16          | \$2,250,000               | 3 (x \$741,667)                  |
| 1/1/17 – 12/31/17          | \$2,000,000               | 3 (x \$666,667)                  |
| 1/1/18 – 12/31/18          | \$1,500,000               | 2 (x \$750,000)                  |
| 1/1/19 – 12/31/19          | \$1,000,000               | 2 (x \$500,000)                  |
| 1/1/20 – 12/31/20          | \$ - 0 -                  |                                  |

Which situation, however, did Brown's departure fall into? Not surprisingly, the lines were blurred and Brown sought a buyout greater than the \$500,000 he was at least entitled to pursuant to the Reassignment clause.<sup>242</sup>

One method by which universities can mitigate the damage from a terminated coach is by an offset clause. An offset clause provides that in the event a terminated coach is hired by another institution, the amounts owed to the coach by the terminating institution are lessened by the amounts being paid to the coach by the new institution. For example, in 2007, the University of Alabama signed Nick Saban to an eight-year contract worth approximately \$32 million to be the school's head football coach.<sup>243</sup> Saban's contract included the following provision:

Offset Against Liquidated Damages. It is agreed that the Liquidated Damages paid by the University pursuant to Section 5.01(e) hereof shall be offset and reduced on a monthly basis by the gross compensation earned by [Saban] personally or through business entities owned or controlled by [Saban] from employment as a head or assistant coach or as an administrator either at a college or university or within a professional sports organization.

Thus, assuming Alabama had fired Saban after the fourth year of the contract (which they did not do), they were still obligated to pay him the approximately \$4 million a year owed on his contract for the remaining four years of the contract.<sup>244</sup> But if Saban had hypothetically returned to his first head coaching job at Toledo at a

242. See *Mack Brown Negotiating Deal*, ESPN (Dec. 28, 2013), [http://espn.go.com/college-football/story/\\_/id/10203648/texas-longhorns-coach-mack-brown-negotiating-more-money-buyout-report-says](http://espn.go.com/college-football/story/_/id/10203648/texas-longhorns-coach-mack-brown-negotiating-more-money-buyout-report-says) (evidencing that Mack Brown sought buyout).

243. See *Nick Saban Contract*, University of Alabama, available at <http://www.al.com/alabamafootball/resources/saban-contract.pdf>.

244. See *id.* sec. 5.01(e) (outlining obligations under Saban contract).

hypothetical salary of \$2,500,000 annually, the amount Alabama would have been obligated to pay Saban would be decreased from \$4,000,000 to \$1,500,000 annually.

The next scenario that must be contemplated is where the coach is successful and becomes an attractive candidate to other institutions or professional leagues. How to handle this scenario has received increased scrutiny in recent years as universities have committed millions of dollars in salaries and resources to coaching staffs only to see the coaches leave at the first opportunity for more prestigious employment.<sup>245</sup> Universities have essentially begun including two types of clauses in coaching contracts to either prevent these departures or to minimize the economic harm to the university in the event of a departure.

First, a university might include a liquidated damages clause in the coach's contract, which will require the coach to pay an agreed-upon sum of money to the school in the event the coach leaves, i.e., terminates his or her contract, prior to its completion. For example, the University of Kentucky and head basketball coach John Calipari agreed to the following provision:

8. Termination by Coach. In the event Coach terminates this Agreement (unless such termination results from University's material breach of this Agreement), Coach shall make the payment of liquidated damages within ninety (90) days as follows:

- (a) Three Million Dollars (\$3,000,000) if the termination occurs any time within the first (1st) year of this Agreement;
- (b) Two Million Dollars (\$2,000,000) if the termination occurs any time within the second (2nd) year of this Agreement;
- (c) One Million Dollars (\$1,000,000) if the termination occurs any time within the third (3rd) year of this Agreement;
- (d) Five Hundred Thousand Dollars (\$500,000) if the termination occurs any time within the fourth (4th) year of this Agreement;

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245. See Karcher, *supra* note 226 (discussing issue of what athletic programs should do in event that coaches are offered more prestigious employment at length). See also Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127 (2001) (discussing issue of what athletic programs should do in event that coaches are recruited for more prestigious employment).

(e) If the termination occurs anytime during the fifth (5th) year of this Agreement or thereafter, Coach will not be required to pay the University any liquidated damages.<sup>246</sup>

The alternative to a liquidated damages clause is what is sometimes referred to as a “loyalty bonus.” A loyalty bonus is generally a lump sum payment made to the coach if the coach stays for a certain number of years. For example, Rick Pitino signed a contract to become the men’s basketball coach at the University of Louisville in 2001.<sup>247</sup> Pitino’s contract called for a \$5 million bonus if he completed the six-year contract,<sup>248</sup> which he did.<sup>249</sup>

Not surprisingly, some of the most important contractual issues with which an Athletic Director must handle involve attempting to maximize revenue streams for the university. Marketing is one area where universities seek to create revenue. Marketing revenue generally comes about where a corporation agrees to pay the university a sum of money in exchange for naming rights to facilities or events, signage at facilities and events, or the right to use the university’s name or logos in association with the corporation or its products.

Universities generally hire marketing firms specializing in this type of work to help market and maximize revenue from the school’s inventory of sponsorship opportunities. These firms also work to sell radio and television rights on behalf of the school. Perhaps the most powerful firm in this arena is IMG College.<sup>250</sup> IMG College represents 83 Division I institutions, the NCAA, and eight conferences in efforts to generate revenue on behalf of those groups.<sup>251</sup> In 2009, Ohio State sold its media and marketing rights

246. See WONG, *supra* note 177, Exhibit 9.2 (presenting copy of Calipari’s contract).

247. See, e.g., *Pitino Says ‘Yes’*, SPORTS ILLUSTRATED (Mar., 21, 2001), available at [http://sportsillustrated.cnn.com/basketball/college/news/2001/03/21/pitino\\_louisville/](http://sportsillustrated.cnn.com/basketball/college/news/2001/03/21/pitino_louisville/) (providing example of Louisville coach that was provided with loyalty bonus for signing contract for men’s basketball).

248. See WONG, *supra* note 177, sec. 9.2.5 (explaining loyalty bonus that Coach Pitino received).

249. Pitino led Louisville to the 2013 National Championship and is still Louisville’s coach as of the date of publication.

250. See IMG COLLEGE, <http://www.imgcollege.com/> (last visited Nov. 25, 2014) (providing webpage for most powerful marketing firm).

251. See IMG, *Our Properties: Colleges and Universities*, IMG COLLEGE, <http://www.imgcollege.com/our-properties/colleges-universities> (last visited Nov. 25, 2014) (evidencing that IMG College represents Division I universities).

to IMG College for a guarantee of \$110 million over 10 years,<sup>252</sup> providing Ohio State with a considerable and reliable source of revenue.

An Athletic Director must be vigilant in ensuring that the school's marketing partner is creating the revenue the Athletic Director believes it should. In April 2013, Rutgers' then-Athletic Director Tim Perneti chose to pay \$7 million to its marketing firm, Nelligan Sports Marketing, to end their 13-year partnership and buy out the remaining four years on the Rutgers-Nelligan contract.<sup>253</sup> Perneti had previously put Nelligan on notice that it was "underperforming" on its contract.<sup>254</sup> A few months later, Rutgers signed an 11-year, \$65 million contract with IMG College.<sup>255</sup>

Another important source of potential revenue for athletic departments is apparel. Companies such as Nike, Adidas, Reebok, and Under Armour battle fiercely for the opportunity to cloak a school's student-athletes and coaches in their gear. From an Athletic Director's perspective, not only can the athletic department receive free uniforms and equipment, the apparel company might also pay for the right to be the official apparel company of the university.

The most interesting examples of apparel contracts in collegiate athletics are the contract between Nike and the University of Oregon and the contract between Under Armour and the University of Maryland.

Oregon track coach Bill Bowerman and Phil Knight, a former Oregon runner, formed Nike in the 1960s.<sup>256</sup> Since that time, Ore-

252. See *Ohio State Inks Marketing, Media Rights Deal with IMG Sports*, SPORTS BUS. DAILY, Mar. 30, 2009, <http://www.sportsbusinessdaily.com/Daily/Issues/2009/03/Issue-133/Sponsorships-Advertising-Marketing/Ohio-State-Inks-Marketing-Media-Rights-Deal-With-IMG-College.aspx> (reporting that Ohio State sold its marketing and media rights to IMG).

253. See Tom Luicci, *Rutgers Paid \$7 Million to End Marketing Deal with Nelligan Sports*, N.J.COM (Apr. 10, 2013), [http://www.nj.com/rutgersbasketball/index.ssf/2013/04/rutgers\\_to\\_pay\\_7\\_million\\_to\\_ex.html](http://www.nj.com/rutgersbasketball/index.ssf/2013/04/rutgers_to_pay_7_million_to_ex.html) (evidencing that Rutgers decided to end its partnership with Nelligan Sports and bought out last four years of contract); Brendan Prunty, *A Big Deal for Rutgers: Partnership with IMG College will be Worth \$65 Million Over 11 Years*, N.J.COM, July 25, 2013, [http://www.nj.com/rutgersfootball/index.ssf/2013/07/a\\_big\\_deal\\_for\\_rutgers\\_partnersip\\_with\\_img\\_college\\_will\\_be\\_worth\\_65\\_million\\_over\\_11\\_years.html](http://www.nj.com/rutgersfootball/index.ssf/2013/07/a_big_deal_for_rutgers_partnersip_with_img_college_will_be_worth_65_million_over_11_years.html) (discussing Rutgers' new partnership with IMG Sports).

254. See Luicci, *supra* note 253 (evidencing that Nelligan Sports had been put on notice that it was "underperforming").

255. See Prunty, *supra* note 253 (discussing Rutgers' new deal with IMG Sports).

256. See Richard Goldstein, *Bill Bowerman, 88, Nike Co-Founder, Dies*, N.Y. TIMES, Dec. 27, 1999, <http://www.nytimes.com/1999/12/27/sports/bill-bowerman-88-nike-co-founder-dies.html> (discussing formation of Nike in 1960s).



gon and Nike have had a mutually beneficial relationship, which includes Oregon's receipt of Nike gear and hundreds of millions of dollars in donations from Knight.<sup>257</sup> In 2009-10, Oregon athletics received more than \$2 million in gear and \$500,000 in cash from Nike.<sup>258</sup> Moreover, both Nike and Oregon have drawn attention for the inventive, unique, and stylish (and sometimes absurd) football uniforms created by Nike.<sup>259</sup> Since approximately the mid-2000s, the Oregon football team has worn a newly styled uniform for every game,<sup>260</sup> drawing considerable media attention to the program.

Under Armour was founded in 1996 by Kevin Plank, a former University of Maryland football player.<sup>261</sup> In 2008, Maryland and Under Armour signed a five-year deal worth \$17.5 million,<sup>262</sup> creating a relationship similar to that of Oregon and Nike. Under Armour began to outfit the entire Maryland athletic department with equipment and apparel, including new and unique uniforms for the football team.<sup>263</sup> In 2014, Maryland and Under Armour signed a ten-year extension worth a reported \$34 million.<sup>264</sup>

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257. See Rachel Bachman & Brett Hunsberger, *Phil Knight's Influence Transforms University of Oregon Athletics*, THE OREGONIAN, May 4, 2008, <http://www.oregonlive.com/sports/oregonian/index.ssf?base/sports/1209711308201850.xml&coll=7&thispage=2>; <http://uniformcritics.com/football/college/oregon-ducks/> (discussing relationship between University of Oregon and Phil Knight of Nike).

258. See Rachel Bachman, *University of Oregon, Under Order From State Attorney General, Releases Terms of Nike Deal*, THE OREGONIAN, [http://blog.oregonlive.com/behindducksbeat/2010/05/university\\_of\\_oregon\\_under\\_ord.html](http://blog.oregonlive.com/behindducksbeat/2010/05/university_of_oregon_under_ord.html) (May 3, 2010, 8:53 PM) (revealing Oregon Athletics' receipt of gear and cash from Nike).

259. See *Oregon Ducks Football Uniforms*, UNIFORM CRITICS, <http://uniformcritics.com/football/college/oregon-ducks/> (last visited Nov. 25, 2014) (illustrating Oregon Ducks uniforms created with help of Nike).

260. See Eric Adelson, *Uniform Rotation Revolutionized by Oregon Ducks has Jumped the Shark*, YAHOO! SPORTS (Sept. 21, 2012), <http://sports.yahoo.com/news/ncaaf—uniform-rotation-revolutionized-by-oregon-has-jumped-the-shark.html> (indicating that since start of partnership, Oregon Ducks have had particularly stylish uniforms).

261. See David Colman, *Muscling Into the Mainstream*, N.Y. TIMES (Aug. 6, 2008), <http://www.nytimes.com/2008/08/07/fashion/07ARMOUR.html?page-wanted=all> (discussing founding of Under Armour).

262. See *Under Armour Inks 5-Year, \$17.5M Deal With Univ. of Maryland*, SPORTS BUS. DAILY, Sept. 3, 2008, [http://www.sportsbusinessdaily.com/Daily/Issues/2008/09/Issue-239/Sponsorships-Advertising-Marketing/Under-Armour-Inks-5-Year-\\$175M-Deal-With-Univ-Of-Maryland.aspx](http://www.sportsbusinessdaily.com/Daily/Issues/2008/09/Issue-239/Sponsorships-Advertising-Marketing/Under-Armour-Inks-5-Year-$175M-Deal-With-Univ-Of-Maryland.aspx) (reporting five year deal between University of Maryland and Under Armour).

263. See Alex Prewitt, *Maryland Football Unveils New Red "Pride" Uniforms*, WASHINGTON POST, Sept. 19, 2013, <http://www.washingtonpost.com/blogs/terrapins-insider/wp/2013/09/19/maryland-football-unveils-new-red-pride-uniforms/> (discussing how Under Armour began outfitting entire University of Maryland athletic department).

264. See Andrew Emmer, *University of Maryland Signs 10-Year Extension with Under Armour*, TESTUDO TIMES, Jan. 6, 2014, <http://www.testudotimes.com/2014/>

The next set of contracts for an Athletic Director to be mindful of concerns stadiums, arenas and similar facilities. If a school is fortunate enough to own its stadiums and arenas, the school can turn the facility into a revenue source by renting the facility out for other events, such as concerts. To do so, schools often contract with a facility management firm that specializes in operating arenas and in securing events at the arenas, such as SMG,<sup>265</sup> Global Spectrum,<sup>266</sup> or AEG Facilities.<sup>267</sup> These firms also help manage the multitude of contractual arrangements necessary to operate a facility, including, but not limited to employees, vendors, and concessionaires.

Some schools, however, do not own the facilities in which they play. In which case, the Athletic Director may be responsible for negotiating leases permitting the school's athletic teams to play in a particular stadium or arena. For example, in 2003, the Philadelphia Eagles and Temple University reached a 15-year contract for Temple's football team to play at the Eagles' 68,000-seat Lincoln Financial Field.<sup>268</sup> Since that time, Temple football has had mixed success on the field,<sup>269</sup> but has suffered annual losses of approximately \$2.5 million, causing speculation that Temple should look to build its own football stadium.<sup>270</sup>

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1/6/5280562/maryland-under-armour-deal-contract (discussing new 10-year deal in 2014).

265. See SMG: WORLDWIDE ENTERTAINMENT AND CONVENTION VENUE MANAGEMENT, <http://smgworld.com/> (last visited Nov. 25, 2014) (illustrating example of facilities management firm that creates additional revenue for schools through other uses of athletic venues).

266. See GLOBAL SPECTRUM, <http://www.global-spectrum.com/region/en/index.aspx> (last visited Nov. 25, 2014) (providing example of facilities management firm).

267. See *Facilities*, AEG WORLDWIDE, <http://www.aegworldwide.com/facilities/facilities> (last visited Nov. 25, 2014) (providing example of facilities management firm).

268. See *Lincoln Financial Field*, OWLSPORTS.COM, [http://www.owlssports.com/sports/2009/8/31/FB\\_0831092543.aspx](http://www.owlssports.com/sports/2009/8/31/FB_0831092543.aspx) (last visited Nov. 25, 2014) (explaining deal between Eagles and Temple to allow Temple's football team to play at Lincoln Financial Field).

269. Temple has posted a 45-87 record since 2003, and compiled six straight losing seasons between 2003 and 2008. Between 2009 and 2011 the Owls posted a 26-12 record, but fell to just 6-17 the following two years (2012-13). See TEMPLE UNIVERSITY, 2013 TEMPLE FOOTBALL MEDIA GUIDE: RECORDS 226 (2013), available at [http://owlssports.com/documents/2013/8/1/201-260\\_Records\\_ALL.pdf?id=2657](http://owlssports.com/documents/2013/8/1/201-260_Records_ALL.pdf?id=2657) (listing team and individual Temple Football records from 1894 through 2012 season).

270. See Jere Longman, *After Years of Failure, an Awakening at Temple*, N.Y. TIMES, Sept. 23, 2010, <http://www.nytimes.com/2010/09/24/sports/ncaafootball/24temple.html?pagewanted=all> (demonstrating that after football success, Temple should build its own football team).

Another interesting example is that of the University of Massachusetts (“UMass”) football team. After considerable success at the FCS level,<sup>271</sup> UMass joined the FBS level beginning with the 2012 season.<sup>272</sup> The lease negotiated by UMass was essential to UMass’ promotion. UMass reached a deal with Kraft Sports Group<sup>273</sup> to play its football games rent-free for five years in Gillette Stadium, the home of the New England Patriots.<sup>274</sup> In exchange, Kraft Sports Group would split the game revenues with UMass.<sup>275</sup> Without the rent-free arrangement, the transition to FBS football likely would have proven too expensive for UMass.

The last area of contracts we discuss concerns outside consultants. As in any industry, from time-to-time athletic departments require the expertise of an individual or a firm that exceeds the skill or knowledge of the athletic department’s employees. Not surprisingly, athletic departments hire outside consultants concerning several of the important topics already discussed herein.

For example, colleges increasingly use search firms to help them fill head coaching vacancies.<sup>276</sup> Search firms such as Carr Sports Associates, Inc., Korn/Ferry International, and Parker Executive Search charge fees upwards of \$90,000 to help athletic depart-

271. See Bill Pennington, *Big Dream, Rude Awakening*, N.Y. TIMES, Dec. 29, 2012, [http://www.nytimes.com/2012/12/30/sports/ncaafotball/universities-chase-big-time-glory-in-fbs.html?pagewanted=2&\\_r=1&&pagewanted=all](http://www.nytimes.com/2012/12/30/sports/ncaafotball/universities-chase-big-time-glory-in-fbs.html?pagewanted=2&_r=1&&pagewanted=all) (discussing UMass’s rise to FBS football, as well as other similar programs). UMass regularly qualified for the Division I-AA playoffs, making six appearances and winning six conference championships between 1990 and 2007. The Minutemen won the 1998 Division I-AA championship, and returned to the championship game in 2006 against Appalachian State. See No. 3 *UMass Plays For 2nd NCAA Football Title Against No. 1 App State*, UMASS ATHLETICS (Dec. 11, 2006), available at <http://www.umassathletics.com/sports/m-footbl/spec-rel/121106aab.html>.

272. See Jack Carey, *UMass Football to Join FBS, Mid-American Conference*, USA TODAY, Apr. 20, 2011, [http://usatoday30.usatoday.com/sports/college/football/2011-04-20-umass-football-move\\_N.htm](http://usatoday30.usatoday.com/sports/college/football/2011-04-20-umass-football-move_N.htm) (discussing UMass’s jump from FCS to FBS football).

273. See THE KRAFT GROUP, [http://www.thekraftgroup.com/sports\\_entertainment/](http://www.thekraftgroup.com/sports_entertainment/) (last visited Nov. 25, 2014) (outlining The Kraft Group’s organization and assets—the New England Patriots, New England Revolution, and Gillette Stadium—and Gillette Stadium as venue for “bringing world class events to New England”).

274. See *Kraft Offering Gillette Stadium Rent-Free Is Key to UMass Move*, SPORTS BUS. DAILY, Apr. 11, 2011, <http://www.sportsbusinessdaily.com/Daily/Issues/2011/04/21/Colleges/UMass.aspx> (discussing deal in which UMass can play at Gillette Stadium rent free for five years).

275. See *id.* (illustrating that in exchange for free rent, UMass will split profits with Kraft).

276. See Dana O’Neil, *Need a Coach? There’s a Firm for That?*, ESPN (Aug. 2, 2013), [http://espn.go.com/mens-college-basketball/story/\\_/id/9524814/search-firms-take-lead-filling-head-coaching-vacancies-college-athletics](http://espn.go.com/mens-college-basketball/story/_/id/9524814/search-firms-take-lead-filling-head-coaching-vacancies-college-athletics) (explaining that colleges often use firms to fill head coach vacancies).

ments fill high profile coaching vacancies.<sup>277</sup> The search firms are generally more aware of the fluid and rapidly moving market for the coaches and can also work to obtain information that their university-clients might not be able to obtain.<sup>278</sup> In addition, the search firms also perform background checks on the candidates in an attempt to avoid the embarrassments that come from hiring a coach who has lied about his or her resume or has engaged in unsavory behavior.<sup>279</sup>

Athletic departments are also increasingly hiring outside consultants to help their student-athletes deal with the amateur-to-professional transition process, including the selection of agents. Cornerstone Sports Consulting, run by Joe Mendes, a former NFL team and league executive and talent evaluator, was one of the first firms to offer these services.<sup>280</sup> These types of consultants help the athletic departments bridge the gap to the professional ranks to better gauge student-athletes' potential and, perhaps most importantly, handle the agent process. The consultants can serve as the intermediary between a student-athlete and an agent to ensure that the process does not overwhelm the student-athlete and that the agents are conducting themselves appropriately.

Lastly, schools also hire outside consultants to investigate and help resolve possible NCAA Bylaw violations. Two law firms in particular have established themselves as experts in this area: Bond, Schoeneck & King, PLLC,<sup>281</sup> and Ice Miller LLP.<sup>282</sup> These firms have a long history of understanding NCAA Bylaws, the way in

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277. See *id.* (explaining that colleges often use firms to fill head coach vacancies).

278. See *id.* (advancing benefit of using search firms).

279. See John W. Fountain & Edward Wong, *Notre Dame Coach Resigns After 5 Days and a Few Lies*, N.Y. TIMES, Dec. 15, 2001, <http://www.nytimes.com/2001/12/15/sports/notre-dame-coach-resigns-after-5-days-and-a-few-lies.html> (evidencing benefit of search firms completing background checks of potential candidates for vacancies). In 2001, Notre Dame football coach George O'Leary resigned only five days into the job after it was revealed O'Leary had exaggerated his accomplishments as a football player at the University of New Hampshire and falsely claimed to have earned a master's degree in education from New York University. See *id.*

280. See CORNERSTONE SPORTS CONSULTING, <http://www.cornerstonesports.com/team.html> (last visited June 15, 2010) (discussing this firm's intent to offer services to universities for amateur athletes). See also Liz Mullen, *Some Agents Question Former NFL Exec's Role with Schools*, SPORTS BUS. J. (Aug. 24, 2009), [www.sport-businessjournal.com/article/63356](http://www.sport-businessjournal.com/article/63356) (highlighting that some firms offer services to universities to help their amateur athletes).

281. See *Collegiate Sports*, BOND, SCHOENECK & KING, available at <http://www.bsk.com/practices/4-collegiate-sports> (illustrating example of law firm that can help in area of NCAA Bylaw investigations).

282. See *Collegiate Sports and NCAA Compliance*, ICE MILLER, <http://www.icemiller.com/industries/collegiate-sports-and-ncaa-compliance/> (last visited Mar. 12,

which the Bylaws are interpreted and applied by the NCAA, and representing universities before the COI and IAC. Consequently, these firms are adept at analyzing an athletic department's operations to ensure compliance with NCAA Bylaws and helping university's resolve problems where there has been noncompliance.

#### IV. THE QUALIFICATIONS, DEMOGRAPHICS AND CAREER PATHS OF A DIVISION I ATHLETIC DIRECTOR

In order to identify any trends in the population of FBS Athletic Directors over the last 20 years, information has been collected from a variety of sources for three sample school years: 1989-90, 1999-00, and 2013-14. The data regarding the Athletic Directors appears to support the hypothesis that universities are moving toward hiring individuals who have significant business experience, either in an athletic department or in another industry. Other trends also appeared in the data, with the overarching theme that experience in sport is appearing to become less important overall.

##### A. Collegiate Playing Experience

How important is college athletics playing experience for an Athletic Director? In 1989-90, it seemed to be very important; 88% of FBS Athletic Directors played a sport in college. More recently, it still seems to be an important factor with 57% of the Athletic Directors in 2013-14 having collegiate playing experience. However, as this 31 percentage point decrease demonstrates, it may not be as important as it once was.

The decline in college playing experience of Division I Athletic Directors appears to have been continual over the twenty-year period. The percentage of Athletic Directors with collegiate playing experience in 1999-00 dropped to 70%, before it again fell to 57% for the 2013-14 school year. The sharp decrease appears to be consistent with the general perception that Division I athletic departments are beginning to focus more on business-related qualifications of potential applicants. That is not to say that college athletes are discriminated against in the hiring process, or even that they no longer benefit from a form a preferential treatment. According to the NCAA, there are over 450,000 NCAA athletes ranging across all three divisions.<sup>283</sup> The National Center for Education

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2014) (providing example of law firm that can help in area of NCAA Bylaw investigations).

283. See *Who We Are*, *supra* note 11 (outlining that there are 450,000 NCAA athletes across three divisions).

Statistics estimates that there will be roughly 18.2 million students enrolled in degree granting institutions in the fall of 2012.<sup>284</sup> Therefore, of the general population with at least some college experience, roughly 2% have had athletic experience at the collegiate level. This is far less than the two-thirds of Athletic Directors with such experience.

### B. Collegiate Coaching Experience

Coaching experience in college has long been considered one of the potential stepping-stones to becoming an Athletic Director. Some of the most recognizable names in college sport administration, such as Barry Alvarez and Debbie Yow, were long time coaches prior to becoming Athletic Directors.<sup>285</sup> In 2013-14, 20% of Athletic Directors were a college head coach at some point in their careers.

However, the prevalence of head coaching experience among Division I Athletic Directors has decreased by more than half since 1989-90, when 63% of those Athletic Directors who were sampled had head coaching experience. This decline was consistent over the three periods studied; about half of the Athletic Directors in 1999-00 had head coaching experience prior to becoming an Athletic Director.

The number of years of coaching experience (head and assistant) also dropped over the sample period, although not significantly. In 1989-90, the 63% of Athletic Directors who had head coaching experience averaged 11.78 years as a coach.<sup>286</sup> By 1999-00, when only half of the Athletic Directors had head coaching experience in the collegiate ranks, the number of years they had coached remained roughly the same at 11.53. Despite the precipitous drop of Athletic Directors with coaching experience in 2013-14, the experience they had remained roughly level at 11.39 years.

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284. NAT'L CENTER FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010, 282 (2011) (listing number of students enrolled in degree granting institutions).

285. Barry Alvarez is the current Athletic Director at the University of Wisconsin. Alvarez became Athletic Director in 2004, but was also Wisconsin's head football coach from 1990-2005, during which time he led the Badgers to 118 wins and three Rose Bowl victories. Debbie Yow is the current Athletic Director at North Carolina State University. Yow has been an Athletic Director since 1990 (beginning with Saint Louis University), after a successful ten-year women's basketball coaching career.

286. This number is inclusive of both head coaching positions and assistant coaching positions, and only factors in those Athletic Directors who were head coaches at some point prior to becoming an Athletic Director.



Looking at recent hiring patterns further reinforces this trend. 151 current Athletic Directors were hired by Division I schools between 2009 and 2014, but only nine were first-time Athletic Directors with head coaching experience.

| Collegiate Coaching Experience | College Head Coach | Average Years Coached |
|--------------------------------|--------------------|-----------------------|
| 1989-1990                      | 63%                | 11.78                 |
| 1999-2000                      | 50%                | 11.53                 |
| 2013-2014                      | 20%                | 11.39                 |

### C. Past Athletic Director Experience

In this section, we identify two trends: (1) that the percentage of Athletic Directors with previous job experience has grown steadily over the twenty-year period and (2) that the average number of years of prior experience increased over the same time frame. These two trends may be at least partially explained by the changing nature of FBS athletics and the athletic departments of the member institutions. The growing disparity among the “elite” NCAA members, both interdivisional differences and intradivisional differences, is at its greatest point in the history of collegiate athletics. As a result, the importance of remaining at the top of the Division I FBS pyramid, at least as it relates to revenue generation, has never been greater. This places increased pressure on the university, and thereby the Athletic Director, to deliver on-the-field performance and financial results. These pressures, which have only increased over the twenty-year period, have likely forced universities to look towards Athletic Directors with proven track records of success at other institutions.

For example, Gene Smith is currently the Athletic Director of one of the largest athletic programs in the nation at the Ohio State University. Before taking the reins at Ohio State, Smith spent time at Eastern Michigan, Iowa State, and Arizona State University.<sup>287</sup> Then-President Karen Holbrook recognized his past experience was an important factor in his hiring at such a critical juncture, stating, “Ohio State is hiring a well-respected A.D. with a track record of success in all facets of athletics management and student-athlete

287. See *Player Bio: Gene Smith*, OHIO STATE BUCKEYES, [http://www.ohio-statebuckeyes.com/genrel/smith\\_gene00.html](http://www.ohio-statebuckeyes.com/genrel/smith_gene00.html) (last visited Sep. 6, 2011) (providing resume of Gene Smith).

achievement. He is a nationally respected A.D. who will be a tremendous leader for our program."<sup>288</sup>

In 1989-90, 35% of Division I Athletic Directors had previous Athletic Director experience. The average number of years of experience for those Athletic Directors was only 7.38. When taking this number in conjunction with the 63% of Athletic Directors who were previously coaches, it suggests that many athletic departments may have been more concerned with previous experience coaching a sport than administering a department.

By 1999-00, both the percentage of Athletic Directors with experience and the length of that experience increased. 44% of the Division I Athletic Directors had previous experience. The years of experience also rose, up 1.35 to 8.73 years. Some Athletic Directors spent a significant amount of time at one institution before moving on, such as Laing Kennedy, who spent 11 years as the Athletic Director at Cornell before taking the same position at Kent State.<sup>289</sup> Others moved around more frequently. Ron Wellman was the Athletic Director at Wake Forest in 1999-00, after spending five years at Illinois State, one year at the University of Minnesota-Mankato, and four years at Elmhurst College.<sup>290</sup>

Finally, in 2013-14, the percentage of Athletic Directors with previous experience increased to 39%. That is, 39% of the Athletic Directors were in at least their second stint. However, the total years of past experience increased to 10.41 years.

It is interesting to note that over this same amount of time, the average number of years an Athletic Director had been in his or her current position remained roughly level over the twenty-year sample. In 1989-90, Athletic Directors had been on the job for an average of 6.35 years. This number slipped to 6.10 years in 1999-00, but then rose again to 6.796 by 2013-14. This suggests that while schools appear to be hiring more Athletic Directors with previous experience, they do not seem to be shortening those Athletic Directors' tenures.

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288. See Steve Helwagen, *Smith Introduced as OSU's Eighth AD*, FOX SPORTS (Mar. 5 2005), <http://ohiostate.scout.com/2/357408.html> (reporting Gene Smith as Athletic Director of Ohio State).

289. See *Laing Kennedy*, KENT STATE ATHLETICS, <http://kentstatesports.com/staff.aspx?staff=89> (last visited Sep. 6, 2011) (providing that some Athletic Directors spend long time periods at one institution before moving on).

290. See *Wake Forest's Ron Wellman Named to NCAA Men's Basketball Committee*, DEMON DEACON ATHLETICS (Feb. 20, 2009), <http://wakeforestsports.cstv.com/sports/m-baskbl/spec-rel/022009aab.html> (providing example of one Athletic Director that moves on more frequently).

| Previous AD experience | % with experience | Avg. Total Years of experience | Years as AD |
|------------------------|-------------------|--------------------------------|-------------|
| 1989-1990              | 35%               | 7.38                           | 6.35        |
| 1999-2000              | 44%               | 8.73                           | 6.10        |
| 2013-2014              | 39%               | 10.41                          | 6.79        |

#### D. Business Experience

The percentage of Athletic Directors with some business experience has grown substantially over the last twenty years. For purposes of this Article, “business experience” is defined to include private sector business experience or growth through the ranks of the athletic department in development, marketing, fundraising, or other business-related positions.

It is difficult, if not impossible, to identify a single reason for trends that take place over twenty-plus-years. However, it is likely that the increased growth in revenues discussed throughout this Article has instigated the need for candidates with significant business experience backgrounds both in and outside the athletic department. In aggregate, only 36% of those Athletic Directors surveyed in 1989-90 had business experience. This increased to 60% in 1999-00. By 2013-14, 93% of the Athletic Directors have had some sort of business experience prior to serving as an Athletic Director. This is a total increase of almost 140% over the 1989-90 numbers.

The availability of information for Athletic Directors in 2013-14 allowed a closer examination into the breakdown of this business experience. For example, 83% of the Athletic Directors in 2013-14 had some prior “business track” experience. That is, the individual spent time within an athletic department in a position that entailed business-like responsibilities, as identified earlier. For example, before Lawrence (Bubba) Cunningham became the Athletic Director at the University of North Carolina, he spent 15 years at Notre Dame as an assistant Athletic Director, business manager, and ticketing and marketing manager.<sup>291</sup> Kirby Hocutt had a similar experience at Oklahoma and Kansas State prior to being named Athletic Director at Baylor.<sup>292</sup>

291. See *Bubba Cunningham*, TULSA, [http://www.tulsahurricane.com/genrel/cunningham\\_bubba00.html](http://www.tulsahurricane.com/genrel/cunningham_bubba00.html) (last visited Sep. 3, 2011) (providing example of Athletic Director who has prior business experience).

292. See *Tom Collins*, BALL STATE UNIVERSITY (Dec. 9, 2006), [http://ball-statesports.com/ViewArticle.dbml?DB\\_OEM\\_ID=14200&ATCLID=717909](http://ball-statesports.com/ViewArticle.dbml?DB_OEM_ID=14200&ATCLID=717909) (providing example of one individual who had business experience before becoming Athletic Director). Tom Collins was hired in Development at Arizona State Uni-

Another 17% of the Athletic Directors in 2013-14 went from unrelated business to the athletic department in a role other than Athletic Director. For example, Tom Wistrill was the vice president of sales and marketing for VarsityOnline.com and a general manager of the St. Louis Quest (women’s professional volleyball) prior to moving into college athletics at Wisconsin where he was the general manager of Badger Sports Properties.<sup>293</sup> Steve Orsini spent 10 years in administration with the Dallas Cowboys before taking a position as an associate Athletic Director, working his way through Georgia Tech and the United States Naval Academy before becoming SMU’s Athletic Director.<sup>294</sup>

Finally, 10% of Athletic Directors moved directly from a non-athletic department position outside the university to the position of Athletic Director. Perhaps the most familiar of these hires is Dave Brandon, who became the Athletic Director at the University of Michigan in 2010 after stepping down as the chairman of the board, chief executive officer, and manager of pizza giant Domino’s. He was not completely disconnected from the University, however, as he also served on the Board of Regents for the University of Michigan from 1998-2006. President Mary Sue Coleman specifically referenced Brandon’s business experience as a reason for his hire, stating that Brandon’s “widely acclaimed leadership skills, business acumen, long-term involvement with the university and personal knowledge of the challenges and rewards of being a student athlete, David Brandon is an ideal candidate for Athletic Director.”<sup>295</sup>

| <b>Business experience</b> | <b>Bus. to AD</b> | <b>Bus. within dpt.</b> | <b>Bus. to dpt. (non-AD)</b> | <b>Total bus. to AD</b> |
|----------------------------|-------------------|-------------------------|------------------------------|-------------------------|
| 1989-1990                  | -                 | -                       | -                            | 36%                     |
| 1999-2000                  | -                 | -                       | -                            | 60%                     |
| 2013-2014                  | 10%               | 83%                     | 17%                          | 93%                     |

versity in 2013. See Press release, Sun Devil Athletics, He’s Back! Welcome Back T.C.! (July 23, 2013), available at [http://www.thesundevils.com/ViewArticle.dbml?DB\\_OEM\\_ID=30300&ATCLID=208783760](http://www.thesundevils.com/ViewArticle.dbml?DB_OEM_ID=30300&ATCLID=208783760) (discussing hiring of Tom Collins at Arizona State University).

293. Wistrill was also the commissioner of two NCAA Division II conferences in the 1990s.

294. See *Steve Orsini*, SMU MUSTANGS, [http://www.smumustangs.com/genrel/orsini\\_steve00.html](http://www.smumustangs.com/genrel/orsini_steve00.html) (last visited Sep. 13, 2014) (providing resume of Steve Orsini).

295. See Kim Broekhuizen, *David Brandon Named Athletic Director*, UNIVERSITY OF MICHIGAN, <http://www.ur.umich.edu/update/archives/100105/brandon> (last visited Sep. 3, 2011) (discussing naming of David Brandon as Athletic Director).

### E. Education

The prevalence of Athletic Directors with a graduate degree has also been on the rise over the last twenty plus years. This is not unexpected, as both the number and percentage of American workers with college or post-graduate degrees is also rising. By 2013-14, 80% of the Athletic Directors had at least one graduate degree. 6% of the sample received a law degree, and another 11% had either a Ph.D. or Ed.D. Moreover, more than 14 % of Athletic Directors had multiple graduate degrees. One Athletic Director, Terry Don Phillips of Clemson, provides an example of all of these categories. After graduating from Arkansas with his bachelor's degree, Phillips obtained a J.D. from Arkansas and both a master's degree and a Ph.D. from Virginia Tech.<sup>296</sup>

In 1999-00, only 52% of the Athletic Directors surveyed had received a graduate degree. 10% of the Athletic Directors with a graduate degree had a law degree, i.e., 5% of all Division I Athletic Directors had a law degree. 7% of Athletic Directors had multiple graduate degrees, and 5% had a Ph.D. Ted Leland, Stanford's former Athletic Director, highlights several of the aforementioned categories. After graduating with a bachelor's degree from the University of the Pacific, he went on to receive a master's degree in physical education from the same school.<sup>297</sup> He then attended Stanford, where he obtained a Ph.D. in education and sports psychology before working his way through Athletic Director positions at University of the Pacific and Dartmouth College before becoming Athletic Director at Stanford.<sup>298</sup> In contrast, Gene Bleymaier, most recently of San Jose State, received a J.D. from Loyola before embarking on a career that saw him sit as Athletic Director at UCLA for 19 years by 1999.<sup>299</sup>

In 1989-90, 23% of Division I Athletic Directors had earned a graduate degree. Of those with graduate degrees, 7% (or 2% of the total) had a law degree and 22% (5% of the total) received a

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296. See Terry Don Phillips, CLEMSON TIGERS, <http://www.clemsontigers.com/ViewArticle.dbml?ATCLID=205529939> (last visited Sep. 13, 2014) (indicating that some Athletic Directors receive graduate degrees, or even PhDs).

297. See Dr. Ted Leland, PACIFIC TIGERS ATHLETICS, [http://www.pacifictigers.com/genrel/leland\\_ted00.html](http://www.pacifictigers.com/genrel/leland_ted00.html) (last visited Sep. 13, 2014) (providing example of one Athletic Director that received graduate degree prior to becoming Athletic Director).

298. See *id.* (discussing further academic accomplishments of Athletic Director, D. Ted Leland).

299. See Gene Bleymaier, BOISE STATE UNIVERSITY ATHLETICS (Aug. 9, 2006), [http://www.broncosports.com/ViewArticle.dbml?DB\\_OEM\\_ID=9900&ATCLID=536787](http://www.broncosports.com/ViewArticle.dbml?DB_OEM_ID=9900&ATCLID=536787) (providing example of Athletic Director that received J.D.).

Ph.D. Chet Gladchuck, the Tulane Athletic Director for the 1989-90 school year, received a master’s degree in sport administration from UMass after graduating with a bachelor’s degree from Boston College.<sup>300</sup> However, many Athletic Directors did not obtain a graduate degree in an area related to sports or education. For example, Doug Single received a master’s degree in political science from Stanford prior to rising through the ranks of college athletic administration to become SMU’s Athletic Director.<sup>301</sup>

The steady rise in education level of Athletic Directors is consistent with the pattern of overall increase in educational attainment in the United States, albeit on a higher level relative to the general population. In 2005, the census released information that suggested roughly 27.6% of the U.S. population 25 and older received a bachelor’s degree or higher, and 9.6% of that same population attained a master’s degree, professional degree, or doctorate degree.<sup>302</sup> These numbers increased from the initial 2000 census levels by over three percentage points and half a percentage point, respectively.<sup>303</sup>

| Education | Graduate | J.D. | Ph.D./Ed.D. |
|-----------|----------|------|-------------|
| 1989-1990 | 23%      | 2%   | 5%          |
| 1999-2000 | 52%      | 5%   | 5%          |
| 2013-2014 | 80%      | 6%   | 11%         |

### F. Age

The average age of Division I Athletic Directors has slowly increased over the sample period. It is important to note that the age may not have been directly available for all sample Athletic Directors. As a result, indirect methods of obtaining an estimate were used, such as adding 22 years to the individual’s birth year to reach

300. See *Chet Gladchuck*, CBS INTERACTIVE, [http://www.navysports.com/genrel/gladchuk\\_chet00.html](http://www.navysports.com/genrel/gladchuk_chet00.html) (last visited Sep. 13, 2014) (illustrating example of Athletic Director that received masters degree).

301. See Bob Logan, *Northwestern AD Single Resigns*, CHICAGO TRIBUNE, July 31, 1987, [http://articles.chicagotribune.com/1987-07-31/sports/8702250865\\_1\\_northwestern-alex-agase](http://articles.chicagotribune.com/1987-07-31/sports/8702250865_1_northwestern-alex-agase) (illustrating example of Athletic Director that received Master’s Degree).

302. See EDUCATIONAL ATTAINMENT BY SEX: 2000, MATRICES PCT64 AND PCT65, IN CENSUS SUMMARY FILE 4, U.S. Dep’t of Commerce (2000), available at [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_00\\_SF4\\_QTP20&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF4_QTP20&prodType=table) (illustrating percentage of Americans who have attained higher education).

303. See *id.* (evidencing that numbers increased three percent between 2000 and 2005).



the undergraduate graduation date. In 1989-90, the average age stood at 51.78 years. In the sample, the oldest Athletic Director was Bob Devaney of Nebraska at roughly 74 years of age,<sup>304</sup> followed by Bill Flynn of Boston College at 73.<sup>305</sup> The youngest was Gene Smith, currently at Ohio State and then of Eastern Michigan, who was only 33 at the time.<sup>306</sup>

A decade later, the average age of Athletic Directors appears to have increased a little over a full year to 53.23. Frank Broyles was the oldest of the sample at age 74, having been the Athletic Director at Arkansas for a quarter century.<sup>307</sup> The youngest was the 35-year old Rance Pugmire at Utah State.<sup>308</sup>

Finally, in 2013-14 the average age of Athletic Directors was 52.72. Bill Battle was the oldest Athletic Director in the sample at the age of 73.<sup>309</sup> Overall, there was just under a one-year increase in the average age from 1989-90 to 2013-14.

### G. Gender and Race

Diversity has long been a hot button issue in athletics at both the professional and college levels. The data surveyed shows that neither gender nor ethnicity fluctuated significantly over the twenty-year study, although both improved slightly.

The percentage of women Athletic Directors appears to have remained roughly constant over the last ten years. In 2013-14, males comprised of 90% of the sample, down from 95% in the 1999-00 Athletic Director positions. Some of the longer tenured female Athletic Directors in 2013-14 included Sandy Barbour (10

304. See *Hall of Fame Coach Bob Devaney*, NEBRASKA HUSKERS (July 1, 2007), [http://www.huskers.com/ViewArticle.dbml?DB\\_OEM\\_ID=100&ATCLID=45](http://www.huskers.com/ViewArticle.dbml?DB_OEM_ID=100&ATCLID=45) (providing information for Bob Devaney, oldest university coach).

305. See *Wake Today, Funeral Tuesday for Former A.D. Flynn*, BOSTON COLLEGE, June 30, 1997, [http://www.bc.edu/bc\\_org/ivp/pubaf/archive/flynnobit.html](http://www.bc.edu/bc_org/ivp/pubaf/archive/flynnobit.html) (evidencing that Bill Flynn, Athletic Director of Boston College, was second oldest Athletic Director).

306. See *Player Bio: Gene Smith*, OHIO STATE BUCKEYES, [http://www.ohio-statebuckeyes.com/genrel/smith\\_gene00.html](http://www.ohio-statebuckeyes.com/genrel/smith_gene00.html) (last visited Sep. 6, 2011) (evidencing that youngest Athletic Director was Ohio State's Gene Smith).

307. See *Arkansas AD Frank Broyles Will Resign at End of Year*, USA TODAY, Feb. 18, 2007, [http://www.usatoday.com/sports/college/2007-02-17-broyles-resignation\\_x.htm](http://www.usatoday.com/sports/college/2007-02-17-broyles-resignation_x.htm) (discussing Broyles' retirement after fifty years as AD).

308. See Lucinda Dillon Kinkead, *USU's Pugmire Placed on Leave*, DESERET NEWS (Feb. 20, 2004), <http://www.deseretnews.com/article/590044551/USUs-Pugmire-placed-on-leave.html> (discussing administrative leave of Utah State University's AD pending DUI investigation).

309. See *Bill Battle*, ALABAMA ATHLETICS, [http://www.rolltide.com/genrel/bill\\_battle\\_844031.html](http://www.rolltide.com/genrel/bill_battle_844031.html) (last visited July 2, 2014) (providing information of oldest Athletic Director in 2013-2014).

years at Cal Berkeley),<sup>310</sup> Jean Lenti Ponsetto (12 years at DePaul),<sup>311</sup> and Kathy Beauregard (17 years at Western Michigan).<sup>312</sup> Deborah Yow also has four years of experience at NC State, although she has significant experience at St. Louis University (four years) and Maryland (sixteen years).<sup>313</sup> This is, however, a small improvement over the 1989-90 sample, when it was 99% male.

Race has seen similarly small improvements over the last twenty years. In 2013-14, the percentage of white Athletic Directors dropped from 95% to 80%. African-Americans were the bulk of this minority increase, comprising 13.5% of the sample (and 84% of the minority Athletic Directors). From 1989-90, there was no discernible change in the racial diversity of the position, when it was also 95% white. The only Hispanic in the sample was Rudy Davalos of Houston.<sup>314</sup> Gene Smith of Eastern Michigan (now at Ohio State) was one of the few African-Americans.<sup>315</sup>

While there have been signs of increased diversity of Athletic Directors over the last twenty years, it is still well off most population indicators. Whether or not the diversity of the position continues to increase at a trickle-like pace remains to be seen.

| Gender and Ethnicity | % Male | % White | % Black |
|----------------------|--------|---------|---------|
| 1989-1990            | 99%    | 95%     | N/A     |
| 1999-2000            | 95%    | 95%     | 4%      |
| 2013-2014            | 90%    | 80%     | 13.5%   |

310. See *Sandy Barbour*, CAL BEARS, [http://www.calbears.com/genrel/barbour\\_sandy00.html](http://www.calbears.com/genrel/barbour_sandy00.html) (last visited Sep. 3, 2011) (providing example of female Athletic Director).

311. See *Jean Lenti Ponsetto*, DEPAUL UNIVERSITY ATHLETICS, [http://www.depaulbluedemons.com/genrel/lentiponsetto\\_jean00.html](http://www.depaulbluedemons.com/genrel/lentiponsetto_jean00.html) (last visited July 2, 2014) (providing example of female Athletic Director).

312. See *Kathy Beauregard*, WESTERN MICHIGAN UNIVERSITY, [http://www.wmubroncos.com/ViewArticle.dbml?DB\\_OEM\\_ID=4600&ATCLID=121351](http://www.wmubroncos.com/ViewArticle.dbml?DB_OEM_ID=4600&ATCLID=121351) (last visited Sep. 3, 2011) (providing example of female Athletic Director).

313. See *Deborah A. Yow*, NC STATE WOLFPACK, [http://www.gopack.com/genrel/yow\\_deboraha.01.html](http://www.gopack.com/genrel/yow_deboraha.01.html) (last visited Sep. 2, 2011) (providing example of female Athletic Director).

314. See *College Athletics: Rudy Davalos Honored by NACDA*, SAN MARCOS DAILY RECORD, April 29, 2010, <http://www.sanmarcosrecord.com/sports/x537287967/College-Athletics-Rudy-Davalos-honored-by-NACDA> (evidencing that Rudy Davalos is one of few Hispanic Athletic Directors).

315. See *Player Bio: Gene Smith*, OHIO STATE BUCKEYES, [http://www.ohio-statebuckeyes.com/genrel/smith\\_gene00.html](http://www.ohio-statebuckeyes.com/genrel/smith_gene00.html) (last visited Sep. 6, 2011) (evidencing that Gene Smith was one of few African-American Athletic Directors).

## V. CAREER TRACKS

The data surveyed over the last twenty years shows that some traits, such as business experience, appear to have become more important over the years while others, such as head coaching experience have lessened. However, there are some patterns that suggest Athletic Directors are more likely to take certain career tracks over others.

It is important to stress that these career tracks are not all-inclusive or designed to capture every way in which an individual has or can become an Athletic Director. Instead, they are “big picture” trends taken from the hundreds of Athletic Directors over a twenty-year period. Each school is in a different place with a different path envisioned for both its short and long term future, particularly when hiring an Athletic Director. For example, as the revenues produced by college athletics grow, so does the importance of having an Athletic Director who has experience in dealing with areas such as revenue generation, cost control, and fiscal management. It is also more likely that schools will look at candidates with strong business or fundraising backgrounds if the university wants to begin or continue a capital campaign.

### A. Collegiate Playing Track

The twenty plus year period over which the samples were taken show that the percentage of Athletic Directors who were college athletes dropped from 1989-90 to 2013-14. Nonetheless, still at least two-thirds of the Athletic Directors in 2013-14 were athletes in college. The most popular sport amongst Athletic Directors was by far football; nearly half (47%) of the Athletic Directors with college playing experience played football. Basketball was a distant second place, with 8% having taken the court for their alma mater. Of those who were athletes, 81% went on to obtain a graduate degree, roughly the same percentage as the general Division I Athletic Director population.

It is notable that playing experience and coaching experience seem to be linked, with 26% of Athletic Directors with playing experience also having head coaching experience. This is unsurprising, given the obvious link between playing a sport and coaching a sport (particularly at a high level, such as in the FBS). Also of note is that at least seven of the nine female FBS Athletic Directors have collegiate playing experience, suggesting that the women who have entered college administration, and successfully become Athletic

Directors, have done so through first exposing themselves to the process as an athlete.

However, even though many of the Athletic Directors with collegiate playing experience have coached, business experience is still important on this track. Sixty-four of the 77 Athletic Directors with playing experience (86%) obtained some sort of business background before becoming an Athletic Director. The majority of those with business experience—86%<sup>316</sup> work their way up through the athletic department ladder and expose themselves to business decisions along the way. Another 18.8% of those with business experience worked in business outside the athletic department before moving laterally to a position such as assistant or associate Athletic Director before eventual promotion to Athletic Director.<sup>317</sup> Finally, 12.5% moved from business outside the athletic department directly to Athletic Director.<sup>318</sup>

It is possible that candidates with student-athlete experience are preferred because of their familiarity with the rules, structure, and processes of the NCAA, conferences and athletic departments. It is also possible that the potential applicants for Division I Athletic Director positions are self-selecting. That is, college athletes are more likely than non-athletes to prefer a career in the college athletic field. Regardless, it appears that obtaining a graduate degree is an important step on the path to becoming an Athletic Director through the collegiate athlete track, with over three in every four doing so.

## B. Collegiate Coaching Track

Although the number of Athletic Directors who were college head coaches has declined over the twenty-plus-year period, it still represented a significant percentage of the Athletic Directors in 2013-14. In fact, from 1989-90 to 2013-14, the number of Athletic Directors with previous collegiate head coaching experience fell by roughly a third. Still, about one in every five Athletic Directors had head coaching experience at the collegiate level in 2013-14.

Interestingly, those Athletic Directors who were part of the coaching track in 2013-14 averaged just over 57 years of age, which

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316. This is 74% of the Athletic Director population with collegiate playing experience, or 53.8% of the total Athletic Director population.

317. This is 15.6% of the Athletic Director population with collegiate playing experience, or 10.1% of the total Athletic Director population.

318. This is 10.4% of the Athletic Director population with collegiate playing experience, 6.7% of the total Athletic Director population.

is almost five years over the average of all Athletic Directors that year. This is not surprising for two reasons: (1) the coaching path usually takes a little over a decade, with the average number of years coached at 11.1 (including time as an assistant); and, (2) over two-thirds (69%) of Athletic Directors with coaching experience had some sort of business experience prior to becoming an Athletic Director. Also unsurprising is that all but one of these Athletic Directors got this business experience by working in the athletic department before eventually being promoted internally or hired as an Athletic Director elsewhere. In 2013-14, one Athletic Director that obtained business experience outside the athletic department was Terry Holland of East Carolina.<sup>319</sup> Even he was not disconnected from the university setting, however, as he spent three years as the special assistant to the president of the University of Virginia from 2001-04.<sup>320</sup>

A number of Athletic Directors who took the coaching track also spent some time in academia on both sides of the podium. Four-fifths (80%) of the Athletic Directors who took the coaching track have a graduate degree. On the other side, at least 17% taught a college course at one time in their career.

A recent notable example of an individual who took the coaching track is Barry Alvarez at Wisconsin. Alvarez spent 26 years coaching collegiate football, including 15 as the head coach at Wisconsin.<sup>321</sup> In 2004-05, Alvarez replaced Pat Richter as the Athletic Director and remained the football coach until 2005, when he retired as a coach and began devoting all his efforts to the Athletic Director position.<sup>322</sup>

A number of Athletic Directors (at least 27%) have also spent time as an assistant college coach. Florida International University Athletic Director Pete Garcia is one such example, having spent over 11 years as an assistant coach.

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319. *Terry Holland Named One of the 100 Most Influential Sports Educators*, EAST CAROLINA PIRATES (Oct. 17, 2007), <http://www.ecupirates.com/genrel/101707aab.html> (illustrating that Terry Holland had business experience prior to becoming Athletic Director).

320. *See id.* (illustrating that Terry Holland had worked as special assistant to President prior to becoming Athletic Director).

321. *See Barry Alvarez*, WISCONSIN ATHLETICS, [http://www.uwbadgers.com/genrel/alvarez\\_barry00.html](http://www.uwbadgers.com/genrel/alvarez_barry00.html) (last visited Sep. 3, 2011) (showing that Barry Alvarez spent 26 years coaching collegiate football, 15 of which were at Wisconsin).

322. *See id.* (evidencing that Barry Alvarez retired as coach in 2005 to devote efforts to Athletic Director position).

### C. Business Track

The data suggests that individuals with some sort of business experience have become more prevalent in FBS Athletic Directorships over the twenty-year period from 1989-90 to 2013-14. More than 18 out of every 20 Athletic Directors (89.3%) had some kind of business experience prior to being named the Athletic Director. This career track encompasses a wide range of potential paths, from in-house experience in the athletic department (e.g., marketing, ticket sales, fund raising, development, etc.), to external experiences (e.g., law practice, entrepreneurial experience, finance, etc.). Unsurprisingly, those with business experience also had a high rate of graduate degrees at 79%.

A vast majority (83%) of the Athletic Directors on this path in 2013-14 had business experience within the athletic department. For example, Bill Moos spent time as an assistant and associate Athletic Director and the director of development at Washington State prior to becoming the Athletic Director at the same school.<sup>323</sup> Other Athletic Directors moved around prior to their current position, such as Warde Manuel at UConn, who spent seven years as Athletic Director at Buffalo (2005-12), 10 years at Michigan (associate Athletic Director from 2000-05, assistant Athletic Director for operations from 1998-2000, and executive staff assistant from 1996-98) after gaining experience from Georgia Tech (assistant Athletic Director of academic affairs and athletic advisor) and a first stint at Michigan (coordinator of the Wade H. McCree, Jr., Incentive Scholars Program from 1990-1993).<sup>324</sup>

Some of the most high profile recent hires have had significant external business experience. Dave Brandon, for example, was chairman of the board, chief executive officer, and manager of Domino's Pizza prior to accepting a position as Athletic Director at the University of Michigan.<sup>325</sup> Pat Haden, now the Athletic Direc-

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323. *Washington State University Athletic Director Bill Moos*, WASHINGTON STATE COUGARS, <http://www.wsucougars.com/ViewArticle.dbml?ATCLID=207914978> (last visited Sep. 3, 2011) (providing example of Athletic Director with other business experiences within university athletics).

324. *See Warde Manuel*, UNIVERSITY OF CONNECTICUT HUSKIES, [http://www.uconnhuskies.com/genrel/manuel\\_warde00.html](http://www.uconnhuskies.com/genrel/manuel_warde00.html) (last visited Sep. 13, 2014) (demonstrating an Athletic Director that moved around).

325. *See Dave Brandon*, MGOBLUE.COM, [http://www.mgoblue.com/genrel/brandon\\_dave00.html](http://www.mgoblue.com/genrel/brandon_dave00.html) (last visited Sep. 13, 2014) (providing example of Athletic Director with prior business experience).



tor at USC, worked as a color commentator for CBS and NBC and was a partner in the private equity firm Riordan, Lewis & Haden.<sup>326</sup>

There was not a significant deviation in the average age of Athletic Directors who took a business track, with both those Athletic Directors who worked their way up the athletic department and those who went straight from an outside business to the position of Athletic Director both averaging roughly 53 years of age. Interestingly, those who worked in external businesses and then moved laterally into the position of assistant or associate Athletic Director were slightly younger at about 51 years of age.

#### D. Academia

The percentage of Athletic Directors who have had experience in academia has remained steady over the twenty-year period at roughly 9%. While not as prevalent as the playing, coaching, or business tracks, the fact that the percentage has remained consistent over the course of the twenty years suggests it is still a viable path.

Those Athletic Directors who took this track were also slightly older than the average at over 55.49 years old. Also, 25% of the Athletic Directors with experience in academia also had head coaching experience at the collegiate level. 71.4% also had business experience, all of them through the athletic department.

Examples of Athletic Directors who may be considered to have taken a path in academia include Sheahon Zenger and David Williams III. Zenger, the Athletic Director at the University of Kansas, spent time as an educator while coaching and also working in the athletic department.<sup>327</sup> More traditionally, David Williams III is the vice chancellor for university affairs and athletics at Vanderbilt, but is also the general counsel and secretary for the University and a professor of law.<sup>328</sup>

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326. See *Pat Haden*, USC TROJANS, [http://www.usctrojans.com/genrel/haden\\_pat00.html](http://www.usctrojans.com/genrel/haden_pat00.html) (last visited Sep. 13, 2014) (providing example of Athletic Director with prior business experience).

327. See *Dr. Sheahon Zenger*, CBS INTERACTIVE, <http://www.kuathletics.com/staff.aspx?staff=174> (last visited Nov. 25, 2014) (illustrating Sheahon Zenger's experience prior to becoming Athletic Director).

328. See *David Williams III*, VANDERBILT UNIVERSITY LAW SCHOOL, [http://law.vanderbilt.edu/faculty/faculty-detail/index.aspx?faculty\\_id=198](http://law.vanderbilt.edu/faculty/faculty-detail/index.aspx?faculty_id=198) (last visited Sep. 3, 2011) (indicating that David Williams is also Vice Chancellor and Professor of Law, as well as Athletic Director).

## VI. CONCLUSION

The role of an Athletic Director is complicated, multi-faceted, and extremely stressful. Moreover, the state of college athletics is currently in tumult, creating further confusion, work, stress, and uncertainty for today and tomorrow's Athletic Directors. Nevertheless, the position is as desired as it is demanding. This Article analyzed the duties and characteristics of an Athletic Director while providing guidance to prospective Athletic Directors.

The data demonstrates that the demographics of Athletic Directors have changed dramatically over the last twenty years. Less coaching experience and more business experience are the primary trends, likely due in part to the huge increases in revenues Division I FBS athletic programs are generating. Athletic Directors are also more likely to have graduate degrees and past Athletic Director experience, suggesting that universities are looking for a proven track record of success given the increasingly high stakes. There is no mistaking that college athletics is big business and Athletic Directors increasingly must have the skills and competencies to operate and grow that business on behalf of their universities.

