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**NCAA Enforcement Staff and Member Institutions Protecting *Mutual* Interests:
Binding Arbitration in Coaching Contracts
by
Kristen Matha**

**Submitted in partial fulfillment of the requirements of the
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I. Introduction

The NCAA is a voluntary association comprised of 1,006 active members¹ in Division I, II, and III and 130 conference members.² The NCAA and its programs are predominately supported through a bundled-rights contract (integration of all broadcast mediums) with CBS Sports and ESPN to broadcast NCAA championships which as of 2006-2007 is projected to generate \$503,800,000 in revenue for the NCAA.³

Intercollegiate athletics generates tremendous revenue for both the NCAA and member institutions. As a result, a high profile and successful athletics program is associated with a highly compensated head coach. Modernly, the head coach may be the highest paid employee at the academic institution and ultimately the highest paid state employee.⁴

Accompanying the lucrative coaching contracts is a heightened expectation for winning. Ultimately, a school's identity is shaped by its athletics program and the recruitment of high-profile coaches has transcended the athletics department and has become a priority of college presidents.⁵ "College sports has become a big business with high financial stakes. If the coach is not bringing in enough revenue, or is not perceived positively by the alumni or public, a university may be forced to terminate his employment for fear of losing large amounts of money."⁶

¹ Members or membership is defined as "The colleges, universities and conferences that make up the NCAA." *available at* <http://www.ncaa.org>.

² National Collegiate Athletic Association, Pamphlet 10 (on file with the author). *See generally available at* <http://www.ncaa.org> (last visited Mar. 3, 2006) [hereinafter NCAA Pamphlet].

³ NCAA Pamphlet, *supra* note 2, at 14 (Most notably the NCAA Division I Men's Basketball Tournament).

⁴ Mike Fish, *More and More College Coaches are Make CEO Money*, (June 02, 2003), *at* http://sportsillustrated.cnn.com/basketball/college/news/2003/05/30/bkb_coaching_salaries/ (referencing former Iowa State head men's basketball coach Larry Eustachy as the highest paid public employee in the state and that his \$1.1 million yearly package was approximately four times what the university president earned).

⁵ Martin Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 MARQ. SPORTS L.J. 207, 211 (1991).

⁶ Mike Fish, *More and More College Coaches are Make CEO Money*, (June 02, 2003), *at* http://sportsillustrated.cnn.com/basketball/college/news/2003/05/30/bkb_coaching_salaries/.

Schools have much at risk when negotiating coaching contracts, especially navigating termination in the event of major rules violations. In addition both member institutions and the NCAA have faced judicial and legislative scrutiny over the enforcement practices concerning NCAA rules.⁷ Although NCAA enforcement and member institutions are considered adversaries during a major violation investigation they share a mutual interest in shielding the process from judicial involvement. The lack of control inherent in the judicial process, specifically the interpretation of NCAA rules and evidentiary standards, creates a problem for both member institutions and the NCAA. Member institutions that terminate a coach who has violated NCAA rules, prior to a finding by the NCAA Committee on Infractions (COI), potentially face a court that does not hold the violation justified the termination even though the COI ultimately requires it.⁸ Additionally, when the NCAA staff and the decisions by the COI are not the sole interpretation of NCAA rules the enforcement process is jeopardized and uncertainty is created for member institutions when taking actions to maintain institutional control. Accordingly, member institutions should negotiate mandatory binding arbitration clauses into coaching contracts in order to provide some level of control over the dispute with the coach.

The problems with judicial review of the NCAA enforcement process was evident in the Ohio State University major infractions case and subsequent legal action taken by former men's basketball head coach Jim O'Brien against the University. Specifically, the

⁷ See Due Process and the NCAA: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 108th Cong. S. Doc. No. 106 (2004) available at http://commdocs.house.gov/committees/judiciary/hju95802.000/hju95802_0.HTM.

⁸ See *O'Brien v. The Ohio State University*, Case no. 2004-10230, (Ct. of Claims of Oh. Feb. 15, 2006), available at <http://www.cco.state.oh.us> and OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, Mar. 10, 2006, available at <https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home>.

purpose of this paper is to analyze the recent Ohio State University (OSU) major infractions case⁹ which found former head men's basketball coach Jim O'Brien in violation of NCAA rules and ultimately barred him from intercollegiate coaching for the next five years and the judicial decision in favor of O'Brien against the University for breach of contract which found the violation not to be a material breach of the contract¹⁰. Further, I will address binding mandatory arbitration in college coaching contracts as a proposed solution for protecting the interests of member institutions and the NCAA enforcement process.

Section II of this paper will review the NCAA enforcement process in order to better understand a member institution's rationale when terminating a coach prior to the COI finding. Section III of this paper will review the court's decision in favor of O'Brien against OSU for breach of contract. Section IV of this paper will review the NCAA Division I Committee on Infractions decision against OSU and O'Brien. Section V of this paper will analyze the courts findings in opposition to the Committee on Infractions decision and its detriment to OSU and the NCAA enforcement process. Section VI of this paper will discuss the proposed solution of mandatory binding arbitration in coaching contracts and its benefits.

⁹ OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, Mar. 10, 2006, *available at* <https://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home> [hereinafter OSU Report].

¹⁰ O'Brien v. The Ohio State University, Case no. 2004-10230, (Ct. of Claims of Oh. Feb. 15, 2006), *available at* <http://www.cco.state.oh.us> [hereinafter O'Brien Decision].

II. NCAA Enforcement Process

I will briefly review the enforcement process in order to further analyze the decision making regarding self-imposed penalties by member institutions in response to an investigation and eventual COI hearing. Specifically addressing the knowledge the institution possess about alleged violations prior to the COI findings and the member institution's vested interest in being proactive during the investigative process. In addition, I will briefly review the Committee on Infractions and their role in setting rules precedent for the membership and enforcement staff and how this influences the actions of member institutions.

The NCAA is a voluntary association through which colleges and universities act on athletics issues at the national level.¹¹ The Association includes the membership, conferences, and the National Office and is self-governed by the membership.¹² The NCAA, member institutions, and conferences must operate within the NCAA manual¹³ which outlines the Association's constitution, operating bylaws, and administrative bylaws.¹⁴

¹¹ NCAA Pamphlet, *supra* note 2, at 1.

¹² NCAA Pamphlet, *supra* note 2, at 11.

¹³ Each division has its own bylaws. For the purposes of this paper all manual references are to the Division I manual.

¹⁴ NCAA Bylaw 1.2, reprinted in Nat'l Collegiate Athletic Ass'n, 2005-2006 NCAA Division I Manual at 1 (2006) [hereinafter NCAA Manual]. The constitution section includes Name, Purpose, and Fundamental Policy; Principles for Conduct of Intercollegiate Athletics; NCAA Membership; Organization: Legislative Authority and Process; and Institutional Control. The operating bylaws section includes Ethical Conduct; Conduct and Employment of Athletics Personnel; Amateurism; Recruiting; Eligibility; Academic and General Requirements; Financial Aid; Awards, Benefits and Expenses for Enrolled Student-Athletes; Playing and Practice Seasons; Championships and Postseason Football; Enforcement; Division Membership; Committees; Athletics Certification; and Academic Performance Program. The administrative bylaw section includes Administrative Regulations; Executive Regulations; Enforcement Policies and Procedures; and Athletics Certification Policies and Procedures.

The mission of the enforcement program is to eliminate violations of NCAA rules and impose appropriate penalties if violations occur.¹⁵ The enforcement program consists of two elements: the NCAA enforcement staff (National Office) and the member institution. All representatives of member institutions are required to cooperate with the NCAA enforcement staff and the Committee on Infractions.¹⁶ In addition, the principle of institutional control holds the member institutions and conferences responsible for the conduct of the athletics program.¹⁷

A. Enforcement Staff

It is the responsibility of the NCAA enforcement staff to conduct investigations of alleged rules violations by member institutions.¹⁸ Once the enforcement staff becomes aware of alleged rules violation the staff enters an information gathering stage to determine if the alleged violation(s) are credible. The enforcement staff then must identify whether the alleged violations are secondary or major.¹⁹ A secondary violation is defined as, “a violation that is isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit”.²⁰ A major violation is defined as “all violations other than secondary violations are major violations, specifically including those that provide an extensive recruiting or competitive advantage”.²¹ If the violation is classified as major a more formal investigation begins and the member institution

¹⁵ NCAA Bylaw 19.01.1, reprinted in NCAA Manuel, *supra* note 14, at 343 (“Mission of NCAA Enforcement Program”).

¹⁶ NCAA Bylaw 19.01.3, (“Responsibility to Cooperate”) *see also* NCAA Bylaw 32.1.4 (“Cooperative Principle”), reprinted in NCAA Manuel, *supra* note 14, at 343 and 447.

¹⁷ NCAA Bylaw 6.01.1, (“Institutional Control”), reprinted in NCAA Manuel, *supra* note 14, at 49.

¹⁸ NCAA Bylaw 32.2.1, reprinted in NCAA Manuel, *supra* note 14, at 447.

¹⁹ NCAA Pamphlet, *supra* note 2, at 33.

²⁰ NCAA Bylaw 19.02.2, reprinted in NCAA Manuel, *supra* note 14, at 343.

²¹ NCAA Bylaw 19.02.2.1 reprinted in NCAA Manuel, *supra* note 14, at 344.

receives a “notice of inquiry” which outlines the nature and details of the investigation and the type of charges that appear to be involved.²² The outcome of the initial inquiry will either result in the termination of the investigation or a “notice of allegations”. The notice of allegations requests that the president of the member institution respond to the allegations and provide information concerning the alleged violations and any new violations that are uncovered in the process.²³

At this time the member institution has a strong understanding of the individuals involved, the nature of the allegations, and the time frame of the allegations. The member institution must conduct its own investigation into the allegations and has an opportunity to uncover related violations which are then self-report to the NCAA. It is important for the member institution to be proactive at this stage and take appropriate action against a coach, such as termination, if it is confirmed the coach acted inconsistent with NCAA rules. This is necessary in order to mitigate eventual sanctions by the COI and maintain institutional integrity with the public and media during the process.

B. Committee on Infractions

The Committee on Infractions (COI) is responsible for determining the facts related to an alleged violation and determines whether a violation has occurred.²⁴ If a violation has occurred, the COI is responsible for imposing penalties which may include a ban on postseason competition, probation, public reprimand, and reduction in athletics scholarships.²⁵ The COI will then issue a public infractions report that sets forth its

²² NCAA Bylaw 32.5.1, reprinted in NCAA Manuel, *supra* note 14, at 451.

²³ NCAA Bylaw 32.6, reprinted in NCAA Manuel, *supra* note 14, at 451.

²⁴ NCAA Bylaw 32.9.1, reprinted in NCAA Manuel, *supra* note 14, at 456.

²⁵ *Id.*

findings, its rationale, and the penalties (note all proceedings until this point are confidential).²⁶

The member institution and or an individual staff member may appeal a finding and or penalty pursuant to NCAA Bylaws.²⁷ An appeal may be granted if the Infraction Appeals Committee determines a penalty was excessive or inappropriate based on the evidence.²⁸ Further, the COI findings of fact may not be set aside unless the finding was clearly contrary to the evidence presented to the committee, the facts found do not constitute a violation of the Association's rules, or a procedural error affected the reliability of the information that was used to support the finding.²⁹

The COI, through its rationale, determines what is required from member institutions regarding rules compliance. In addition, it also establishes an evidentiary standard for enforcement practices based upon the findings it accepts. Past COI major infraction cases and the subsequent rationales act as precedent for rules compliance programs and creates a level of certainty of what is expected from a member institution when it is faced with a major infraction.

III. O'Brien v. The Ohio State University

I will review the Ohio Court of Claims and Committee on Infractions findings in order to analyze the discrepancies between the two decisions regarding NCAA rules interpretation, NCAA penalty structure, and evidentiary standards.

²⁶ NCAA Bylaw 32.9.2, reprinted in NCAA Manual, *supra* note 14, at 456.

²⁷ NCAA Bylaw 32.10.1 (institution), NCAA Bylaw 32.10.3 (staff member), reprinted in NCAA Manual, *supra* note 14, at 457.

²⁸ NCAA Bylaw 32.10.2, reprinted in NCAA Manual, *supra* note 14, at 457.

²⁹ NCAA Bylaw 32.10.3, reprinted in NCAA Manual, *supra* note 14, at 457.

A. Ohio Court of Claims Factual Findings

Jim O'Brien was hired to take over the OSU men's basketball program on April 12, 1997.³⁰ While at OSU, O'Brien found great success- leading the team to a Big Ten Championship, a Final Four birth, and garnering national coach-of-the-year honors during the 1998-1999 season.³¹ As a result of this success, OSU re-negotiated O'Brien's contract which resulted in a substantial increase in compensation and created a significant limitation on OSU's right to terminate his employment.³²

On April 24, 2004 O'Brien revealed to Andy Geiger, then OSU athletics director, that he had provided financial assistance to then prospective student-athlete Alex Radojevic in 1998.³³ O'Brien revealed this information because he became aware that the financial assistance to Radojevic would most likely become public due to a lawsuit filed by a woman concerning financial assistance to another OSU men's basketball student-athlete, Boban Savovic.³⁴ Consequently, on June 8, 2004 O'Brien was given a letter by Geiger notifying him of the University's intention to terminate his employment as head coach of the men's basketball program.³⁵

B. Court's Analysis of NCAA Rules Violation

OSU claimed that in providing Radojevic financial assistance O'Brien violated NCAA Bylaw 13.2.1 General Regulation which states,

an institution's staff member or any representative of its athletics interests shall not be involved, directly or indirectly, in making arrangements for or giving or offering to give

³⁰ O'Brien Decision, *supra* note 10, at 1.

³¹ O'Brien Decision, *supra* note 10, at 5.

³² O'Brien Decision, *supra* note 10, at 5.

³³ O'Brien Decision, *supra* note 10, at 6 (\$6,000 to assist Radojevic's family pay for medical/funeral expenses for his family who were in the former Yugoslavia during the civil war).

³⁴ O'Brien Decision, *supra* note 10, at 6.

³⁵ O'Brien Decision, *supra* note 10, at 7-8.

any financial aid or other benefits to the prospect or the prospect's relatives or friends, other than expressly permitted by NCAA regulations...³⁶

O'Brien, however, maintained that the financial assistance to the Radojevic was not an NCAA violation because Radojevic was a professional athlete at the time the loan was made.³⁷

O'Brien became aware of Radojevic's professional status in late September or early October of 1998 after receiving a letter from a Yugoslavian professional basketball team indicating Radojevic had signed a contract and received monetary compensation from the organization.³⁸ However, O'Brien withheld this information from OSU's compliance office and signed Radojevic to a National Letter of Intent in November of 1998.³⁹ In February of 1999 the NCAA became aware that Radojevic had signed a professional basketball contract in 1996 and notified OSU.⁴⁰ OSU declared Radojevic ineligible and filed an application for reinstatement which was denied and an appeal that followed was also denied.⁴¹ Ultimately Radojevic never enrolled at OSU and was selected as the 12th pick in the 1999 NBA draft.⁴²

C. NCAA Rules Interpretation- Expert Testimony

Both O'Brien and OSU presented expert witnesses to testify about whether O'Brien's financial assistance to Radojevic was an NCAA violation.

David Swank, professor of law at the University of Oklahoma, former member of the NCAA Executive Committee, and former chairman of the NCAA Committee on

³⁶ O'Brien Decision, *supra* note 10, at 12.

³⁷ O'Brien Decision, *supra* note 10, at 15.

³⁸ O'Brien Decision, *supra* note 10, at 2.

³⁹ O'Brien Decision, *supra* note 10, at 3.

⁴⁰ O'Brien Decision, *supra* note 10, at 4.

⁴¹ *Id.*

⁴² *Id.*

Infractions, was called by O'Brien.⁴³ Swank testified that in his opinion O'Brien's financial assistance to Radojevic was not an NCAA violation because he was not a prospective student-athlete at the time of the loan.⁴⁴ Swank believed that Radojevic irrevocably lost his amateur status when he signed a professional contract, citing NCAA Bylaw 12.1.1:

Amateur Status states:

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team per Bylaw 12.02.4, even if no pay or remuneration for expenses was received;
- (f) Subsequent to initial full-time collegiate enrollment, enters into a professional draft (see also Bylaws 12.2.4.2.1 and 12.2.4.2.3); or
- (g) Enters into an agreement with an agent.⁴⁵

and therefore was ineligible for intercollegiate athletics competition when he signed a professional contract in 1996.⁴⁶

Dan Beebe, Senior Associate Commissioner of the Big Twelve Conference, former enforcement officer, and former director of enforcement, was called by OSU.⁴⁷ Beebe testified⁴⁸ that in his opinion the loan to Radojevic was in violation of NCAA Bylaw 13.2.1⁴⁹ in conjunction with NCAA Bylaw 13.02.1[1] which states:

⁴³ O'Brien Decision, *supra* note 10, at 15-16.

⁴⁴ O'Brien Decision, *supra* note 10, at 16.

⁴⁵ NCAA Bylaw 12.1.1, reprinted in NCAA Manual, *supra* note 14, at 70.

⁴⁶ O'Brien Decision, *supra* note 10, at 17.

⁴⁷ O'Brien Decision, *supra* note 10, at 19.

⁴⁸ O'Brien Decision, *supra* note 10, at 18-19.

⁴⁹ NCAA Bylaw 13.2.1 ("General Regulation"), reprinted in NCAA Manual, *supra* note 14, at 102.

An institution's staff member or any representative of its athletics interests shall not be involved, directly or indirectly, in making arrangements for or giving or offering to give any financial aid or

A prospective student-athlete ("prospect") is a student who has started classes for the ninth grade. In addition, a student who has not started classes for the ninth grade becomes a prospective student-athlete if the institution provides such an individual (or the individual's relatives or friends) any financial assistance or other benefits that the institution does not provide to prospective students generally. An individual remains a prospective student-athlete until one of the following occurs (whichever is earlier):

- (a) The individual officially registers and enrolls in a minimum full-time program of studies and attends classes in any term of a four-year collegiate institution's regular academic year (excluding summer); or
- (b) The individual participates in a regular squad practice or competition at a four-year collegiate institution that occurs before the beginning of any term; or
- (c) The individual officially registers and enrolls and attends classes during the summer prior to initial enrollment and receives institutional athletics aid.⁵⁰

Further, Beebe testified that because Radojevic had not met any of the above requirements (a-c) he was still considered a prospective student-athlete in 1998 even though he became a professional in 1996.⁵¹ Therefore O'Brien's financial assistance constituted an impermissible recruiting inducement.

The court determined that Beebe's interpretation of NCAA Bylaws was based on a "literal interpretation" of NCAA Bylaw 13.2.1 and an extremely "broad" definition of the term "prospective student-athlete" in NCAA Bylaw 13.02.1[1].⁵² The court concluded that Swank's view represents a more "practical" application of NCAA rules.⁵³ However, the court noted that the evidence presented showed that the NCAA enforcement staff adopted the "literal interpretation" having cited O'Brien for the alleged recruiting violation.⁵⁴ The court concluded that it is not the appropriate body to decide whether O'Brien committed a major infraction but found that O'Brien had reasonable

other benefits to the prospect or the prospect's relatives or friends, other than expressly permitted by NCAA regulations.

⁵⁰ NCAA Bylaw, 13.02.11("Prospective Student-Athlete"), reprinted in NCAA Manuel, *supra* note 14, at 88.

⁵¹ O'Brien Decision, *supra* note 10, at 19.

⁵² O'Brien Decision, *supra* note 10, at 20.

⁵³ *Id.*

⁵⁴ *Id.*

cause to believe that he had committed an infraction.⁵⁵ Although, the court found O'Brien had reason to believe he had committed an infraction the court interpreted Section 5.1 and Section 5.5 of the contract to allow O'Brien to retain his employment even though he committed a major violation, because it did not frustrate his performance of the contract.⁵⁶ The relevant portions of the contract are set out below:

5.1 Terminations for Cause- Ohio State may terminate this agreement at any time for any cause, which, for the purpose of this agreement, shall be limited to the occurrence of one or more of the following:

...(b) a violation by Coach (or a violation by a men's basketball program staff member about which Coach knew or should have known and did not report to appropriate Ohio State personnel) of applicable law, policy, rule or regulation of the NCAA or the Big Ten Conference which leads to a 'major' infraction investigation by the NCAA or the Big Ten Conference and which results in a finding by the NCAA or the Big Ten Conference of lack of institutional control over the men's basketball program or which results in Ohio State being sanctioned by the NCAA or the Big Ten Conference." (note non-relevant sections of Sec. 5.1 have been excluded from this footnote)

5.5 Suspension of other Disciplinary Action - If Coach is found to have violated any law, policy, rule or regulation of the NCAA, the Big Ten Conference or Ohio State, Coach may be subject to suspension or other disciplinary or corrective action as set forth in the applicable enforcement procedures (subject to the provisions of Section 5.6 hereof)⁵⁷

D. Severity of Violations

The court assessed the potential harm from NCAA sanctions that OSU may face as a result of O'Brien's violation. OSU argued that O'Brien breached the employment agreement and deprived it of the benefit of the contract in the following ways: subjected it to NCAA sanctions; adversely affected OSU's reputation in the community; and breached the trust between O'Brien and OSU's athletic director.⁵⁸ For the purposes of this paper I will only discuss the sanctions portion of this argument. The court

⁵⁵ O'Brien Decision, *supra* note 10, at 20-21.

⁵⁶ O'Brien Decision, *supra* note 10, at 40.

⁵⁷ O'Brien Decision, *supra* note 10, at 23, 40

⁵⁸ O'Brien Decision, *supra* note 10, at 26.

determined that O'Brien's payment to Radojevic minimally impacted OSU's possible NCAA sanctions.

The court provided the following rationale:⁵⁹

- The court was uncertain about the extent of harm the Radojevic matter would have on potential NCAA sanctions because the notice of allegations listed seven violations in the basketball program (six of which were related to former student-athlete Boban Savovic).
- The court believed the availability of the four-year statute of limitations defense to OSU with respect to the Radojevic matter was a potential mitigating factor for sanctions.
- The court believed OSU's self-imposed sanctions minimally debilitated the men's basketball program.⁶⁰

In addition the court concluded the financial assistance was made for humanitarian purposes and not to gain an improper recruiting advantage (inducement).⁶¹

Ultimately the court concluded that "the evidence shows that the NCAA sanctions and the injury to [OSU's] reputation that can be fairly attributed to the loan are relatively minor".⁶²

E. Damage to OSU

The damages portion of the lawsuit is scheduled to commence on April 12, 2006 unless a settlement is reached.⁶³ The Ohio Court of Claims indicates that O'Brien's lawsuit is for \$9.5 million which includes the \$3,484,205 OSU would have paid him when he was terminated with five years left on his contract plus damages.⁶⁴ In addition to the monetary damages OSU may face, the integrity of the athletics program has been

⁵⁹ O'Brien Decision, *supra* note 10, at 26-27.

⁶⁰ O'Brien Decision, *supra* note 10, at 27-28. The court determined that the post-season ban implemented for the 2004-05 season was mitigated by the fact that the team was unlikely to receive a post-season tournament invitation and that the reduction of two scholarships for the 2005 recruiting class was not that significant because the 2005-06 recruiting class is expected to be one of the best in school history.

⁶¹ O'Brien Decision, *supra* note 10, at 36.

⁶² O'Brien Decision, *supra* note 10, at 37.

⁶³ *O'Brien-OSU Dispute Due Back in Court Next Month*, The Columbus Dispatch, Mar. 4, 2006 available at http://www.dispatch.com/print_template.php?story=dispatch/2006/03/04/20060304-C4-02.html.

⁶⁴ *Id.*

harmed. Geiger testified at the trial that OSU's reputation has been "irreparably harmed" and that a "cloud hangs over [the] basketball program".⁶⁵ In addition Geiger stated that the "the adverse publicity nationally that the program has received has done damage that will take years to repair".⁶⁶

F. Evidentiary Standard

The court determined a "threshold" issue in the case was whether to admit the deposition testimony of Radojevic by the NCAA enforcement staff.⁶⁷ The court concluded the testimony was "riddled" with inadmissible hearsay and lay opinions and that the statements lack credibility.⁶⁸ The court also noted that the depositions were taken by the NCAA enforcement staff who has taken an adversarial position against O'Brien in the underlying NCAA allegations.⁶⁹ The court ultimately held that the testimony was inadmissible.⁷⁰ In addition, part of Bebe's expert testimony was based upon reviewing interview summaries authored by the enforcement staff which was disregarded by the court due to their being no credible evidence presented in the case to support the finding.⁷¹

IV. Ohio State University Public Infractions Report

On December 9, 2005 and February 3-4, 2006 representatives from OSU appeared before the NCAA Division I Committee on Infractions to address allegations of rules violations in the areas of recruiting, extra benefits, academic fraud, ethical conduct

⁶⁵ O'Brien Decision, *supra* note 10, at 28.

⁶⁶ *Id.*

⁶⁷ O'Brien Decision, *supra* note 10, at 9.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ O'Brien Decision, *supra* note, at 19 *see* fn.5.

and rules compliance monitoring.⁷² Specifically, the men’s basketball team, men’s football team, and women’s basketball team faced allegations with the men’s basketball team facing the majority of the violations. For the purposes of this article I will focus on the violations concerning the financial assistance provided to Alex Radojevic by former head men’s basketball coach Jim O’Brien.

A. Committee on Infractions Findings of Fact

The Committee on Infractions and the Ohio Court of Claims findings of fact were substantially similar. The (COI) in agreement with OSU and the enforcement staff found that O’Brien impermissibly agreed to provide financial assistance to Radojevic.⁷³ The COI also found that O’Brien became aware of Radojevic’s professionalism and withheld this information from the compliance office.⁷⁴ Further, O’Brien, with this knowledge, participated in the institution’s petition for reinstatement of Radojevic’s eligibility and ultimately urged the institution to appeal the decision and participated in the teleconference for the appeal.⁷⁵ In addition, the COI in agreement with OSU and the enforcement staff agreed that the violation was not barred NCAA Bylaw 32.6.3, the statute of limitations.⁷⁶

B. NCAA Rules Violations

Unlike the court, the COI found O’Brien’s action was a clear violation of NCAA rules. O’Brien argued on the same basis as he did in court and maintained that the financial assistance was not a NCAA violation because Radojevic had professionalized

⁷² OSU Report, *supra* note 9, at 1.

⁷³ OSU Report, *supra* note 9, at 3-4.

⁷⁴ OSU Report, *supra* note 9, at 5.

⁷⁵ *Id.*

⁷⁶ OSU Report, *supra* note 9, at 4.

himself prior to the agreement and subsequent transfer of cash.⁷⁷ In addition, O'Brien maintained that even if it was a violation it was barred by the statute of limitations.⁷⁸

The COI determined that Radojevic was a prospective student-athlete⁷⁹ at the time of the agreement and the provision of cash.⁸⁰ Specifically, the COI found that "NCAA bylaws, and their consistent application, are clear that at one and the same time an individual may be a prospect and also have engaged in conduct, including loss of amateur status, that renders him ineligible".⁸¹ Further the committee regarded O'Brien's argument "as based, in the best light, upon a fundamental misapprehension of NCAA bylaws and confuse eligibility issues with prospect status".⁸² Ultimately, the COI found that O'Brien provided Radojevic with an impermissible recruiting inducement in violation of NCAA bylaw 13.2.1⁸³, "General Regulation" concerning offers and inducements to prospective student-athletes.⁸⁴

C. Severity of Violation

The COI found O'Brien's violation to be severe and, unlike the court, did not find any mitigating factors. The COI was particularly concerned with "the pattern by both former coaches⁸⁵ of failing to provide critical information in a timely fashion to the institution as well as providing such information only when clear that it otherwise would

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NCAA Bylaw 13.02.11 ("Prospective Student Athlete"), reprinted in NCAA Manuel, *supra* note 14, at 88.

⁸⁰ OSU Report, *supra* note 9, at 6.

⁸¹ OSU Report, *supra* note 9, at 6-7.

⁸² OSU Report, *supra* note 9, at 6.

⁸³ NCAA Bylaw 13.2.1, reprinted in NCAA Manuel, *supra* note 14, at 102.

⁸⁴ OSU public report p. 3

⁸⁵ Then OSU assistant men's basketball coach Paul Biancardi was also implicated in the transfer of cash to Radojevic and other violations.

become known”.⁸⁶ Further the COI noted that O’Brien’s financial assistance to Radojevic was contrary to “one of the most fundamental of all NCAA principles- that cash cannot be provided to a prospect or to his friends or family.”⁸⁷

The COI stated that the failure to disclose Radojevic’s professionalism during the reinstatement hearings was a “critical” component in the NCAA eligibility decision and that O’Brien’s omission was misleading.⁸⁸ The COI went on to state that “this conduct falls far short of the NCAA cooperative principle and the expectation that institutions and their staff will be forthcoming regarding violations.”⁸⁹

The COI found that O’Brien’s humanitarian reasoning did not mitigate the violation and that this “explanation neither excused the violation nor explains continued active recruitment of the prospect.”⁹⁰

The COI also determined that NCAA Bylaw 32.6.3 Statute of Limitations⁹¹ was not applicable to this violation because it met two exceptions to the rule:

- (b) permits processing of all violations that constitute a pattern, even those that otherwise would be barred by the four-year statute of limitation; and

⁸⁶ OSU Report, *supra* note 9, at 2.

⁸⁷ OSU Report, *supra* note 9, at 7.

⁸⁸ OSU Report, *supra* note 9, at 11.

⁸⁹ *Id.*

⁹⁰ OSU Report, *supra* note 9, at 6.

⁹¹ NCAA Bylaw 32.6.3 (“Statute of Limitations”), reprinted in NCAA Manuel, *supra* note 14, at 452.

Allegations included in notice of allegations shall be limited to possible violations occurring not earlier than four years before the date the notice of inquiry is forwarded to the institution or the date the institution notifies (or, if earlier, should have notified) the enforcement staff of its inquiries into the matter. However, the following shall not be subject to the four year-limitation:

...

- (b) Allegations in a case in which information is developed to indicate a patter of willful violations on the part of the institution or individual involved, which began before but continued the four-year period; and
- (c) Allegations that indicate a blatant disregard for the Association’s fundamental recruiting, extra-benefit, academic or ethical-conduct regulations or that involve an effort to conceal the occurrence of the violation. In such cases, the enforcement staff shall have a one-year period after the date information concerning the matter becomes available to the NCAA to investigate and submit to the institution an official inquiry concerning the matter.

- (c) permits the processing of blatant violations not earlier discoverable to assure that violators are answerable for violations whose concealment prevented discovery, and earlier processing.⁹²

The COI found that O'Brien acted willfully in his efforts to provide an impermissible inducement to Radojevic. In addition, the COI recognized a pattern between violations concerning Radjojevic and Savovic and considered them "inextricably linked".⁹³

Although the specific violations pertaining directly to [Radojevic] fell outside the applicable four-year period, these violations, and those concerning [Savovic], are part of a pattern of violations that are inextricably linked. Among other things, the pattern includes the following

- Both prospects are from the same Serbian community, and in fact, knew each other in Serbia.
- The intermediary was the point person for each in his recruitment by the institution. His conduct included accompanying the former assistant coach to meet [Savovic] when he arrived for his official visit and acting as a conduit for the former assistant coach in forwarding \$6,000 payment to [Radojevic's] family.
- Both prospects were recruited during the 1997-98 recruiting season.
- Both prospects were in Columbus, Ohio, in summer 1998.
- Both prospects were put in contact with [athletics] representative.
- Both prospects received impermissible inducements, including free housing and meals, from [athletics] representative 1. She provided impermissible benefits to [Savovic] during the entire time he was enrolled at the institution.⁹⁴

Finally, the COI found O'Brien in violation of ethical conduct principles pursuant to NCAA Bylaw 10.1(c), "Unethical Conduct" which includes "knowing involvement in offering or providing a prospective or an enrolled student-athlete an improper inducement or extra benefit or improper financial aid..."^{95 96}

Specifically the COI found,⁹⁷

The former head coach acted contrary to the principles of ethical conduct, inasmuch as he did not on all occasions deport himself in accordance with the generally recognized high

⁹² OSU Report, *supra* note 9, at 11.

⁹³ OSU Report, *supra* note 9, at 12.

⁹⁴ *Id.*

⁹⁵ NCAA Bylaw 10.1 ("Unethical Conduct"), reprinted in NCAA Manual, *supra* note 14, at 53.

⁹⁶ OSU Report, *supra* note 9, at 31.

⁹⁷ OSU Report, *supra* note 9, at 32.

standards of honesty and sportsmanship normally associated with the conduct and administration of intercollegiate athletics due to this involvement in or knowledge of...offering and providing a recruiting inducement to [Radojevic].

D. Damage to OSU

In addition to OSU's self-imposed penalties⁹⁸ the COI imposed the following penalties related specifically to the men's basketball recruiting violations⁹⁹:

- (a) public reprimand and censure;
- (b) the number of expense-paid visits recruits may make to the campus is limited to three during the 2006-07 academic year which is a reduction of one from the average of four visits per year during the last four years
- (c) the institution must reimburse monies received for participation in the 1999, 2000, 2001 and 2002 NCAA Division I Men's Basketball Tournament (The Columbus Dispatch reported that the repayment amounts to almost \$800,000.¹⁰⁰)
- (d) the institution will vacate its team record and the record of the former head coach will be reconfigured to reflect the vacated records which will be recorded in all publications in which men's basketball records for the 1998-99 through the 2001-03
- (e) former head coach is subject to a five-year show-cause penalty (which would limit athletically related duties of the head coach at any institution) if he seeks employment or affiliation in an athletically related position at an NCAA member institution.

E. Evidentiary Standard

The evidence that was not allowed in the court proceeding was accepted by the COI. The COI, OSU, and enforcement staff were in substantial agreement on the facts

⁹⁸ OSU Report, *supra* note 9, at 42. OSU imposed the following self-imposed penalties: withheld the men's basketball team from postseason competition following the 2004-05 season, terminated former head coach on June 8, 2004, reduced number of scholarships in men's basketball by two for the 2005-06 recruiting class.

⁹⁹ OSU Report, *supra* note 9, at 42-43 and NCAA, *Ohio State University and Former Men's Basketball Coaches Penalized for Infractions*, (March 10, 2006), available at http://www2.ncaa.org/portal/media_and_events/press_room/2006/march/20060310_osu_infractions_rls.html.

¹⁰⁰ *NCAA Sanctions*, The Columbus Dispatch, (March 11, 2006), available at <http://www.columbusdispatch.com/bball/bball.php?story=dispatch/2006/03/11/20060311-A1-00.html>.

surrounding the recruiting inducement O'Brien made to Radojevic.¹⁰¹ Further, Radojevic's testimony, taken by the enforcement staff, was used as a basis for the "Committee Rationale" which is drafted by the COI to substantiate their findings.¹⁰²

V. Judge Joseph T. Clark's Misapprehension of NCAA Rules

I will review the courts rational in determining that the Radojevic matter minimally impacted OSU's potential NCAA sanctions, which is in conflict with the COI findings, and how the findings were detrimental to both the NCAA enforcement process and to OSU. Judge Clark's holding that O'Brien's performance was "sufficient" under the contract completely disregards the fundamental principle of the NCAA- namely fair play.¹⁰³ In addition it ignores OSU's primary responsibility of institutional control and that its athletics program operates within the rules determined by the membership. Judge Clark writes, "the court is persuaded, given the contract language, that this single, isolated failure of performance was not so egregious as to frustrate the essential purpose of that contract and thus render future performance by [OSU] impossible".¹⁰⁴ However, this was anything but a single, isolated event and as the COI penalties demonstrate, was an egregious violation on behalf of O'Brien.

Specifically, I will criticize three parts (infra p. 14) of Judge Clark's decision which minimize the impact of O'Brien's actions to the detriment of OSU and NCAA rules.

¹⁰¹ OSU Report, *supra* note 9, at 4

¹⁰² OSU Report, *supra* note 9, at 9 (referencing Radojevic's testimony regarding the timeframe for the cash payment).

¹⁰³ O'Brien Decision, *supra* note 10, at 11

¹⁰⁴ O'Brien Decision, *supra* note 10, at 42

A. The court was uncertain about the extent of harm the Radojevic matter would have on potential NCAA sanctions because the notice of allegations listed seven violations in the basketball program (six of which were related to former student-athlete Boban Savovic).

First, the financial assistance O'Brien provided to Radojevic would constitute a major violation standing on its own. A major violation is defined as those "providing an extensive recruiting advantage" which would encompass a head coach giving a prospective student-athlete \$6,000. If this were the sole violation found by the COI it would have warranted a show-cause order which, essentially bars a coach from employment at an NCAA member institution for a specified period of time and specifically requires,

...a member institution to demonstrate to the satisfaction of the Committee on Infractions for not taking appropriate disciplinary or corrective action against an institutional staff member or representative of the institution's athletics interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee.¹⁰⁵

Therefore, if the member institution terminated the coach's employment prior to the finding by the COI, it would be reasonable, if not expected, because the show-cause order would be anticipated following a severe violation.

Second, the financial assistance provided to Radojevic, which was the basis of O'Brien's termination, became public through a lawsuit filed by a woman seeking to recoup financial assistance she provided to former OSU student-athlete Boban Savovic from an OSU booster. The Savovic violations and O'Brien's financial assistance to Radojevic constituted the alleged violations against the OSU's men's basketball program.

¹⁰⁵ NCAA Bylaw 19.02.1 ("Show-Cause Order"), reprinted in NCAA Manuel, *supra* note 14, at 343

Although the basis of O'Brien's termination was the Radojevic matter it cannot be understood in a vacuum when analyzing the extent of NCAA penalties against OSU. A major violation investigation begins with an initial allegation which will uncover other violations within the specific sport or athletics program as a whole. In fact, the member institution has an obligation to report information of new violations that are uncovered while conducting an internal investigation of the initial alleged violation.¹⁰⁶ At the time O'Brien admitted to Geiger that he provided financial assistance to Radojevic it would constitute a major violation while the violations concerning Savovic constituted alleged violations.

The outcome of the alleged violations and any unknown violations are interrelated to the known Radojevic matter and build upon each other to form the ultimate findings of the COI and penalty structure. The court failed to recognize that the Savovic and Radojevic violations were interrelated and analyzed the Radojevic matter apart from the remaining violations when addressing its affect on potential COI sanctions. The COI, however, recognized that the Savovic and Radojevic violations were interrelated and those violations mutually impacted the severity of the COI sanctions.

B. The court believed the availability of the four-year statute of limitations defense to OSU with respect to the Radojevic matter was a potential mitigating factor for sanctions.

Although this defense was available to OSU, O'Brien's financial assistance to Radojevic was a willful and blatant and therefore met the two exceptions to the statute of

¹⁰⁶ NCAA Bylaw 32.6.1.1 ("Contents of the Notice of Allegations Cover Letter"), reprinted in NCAA Manuel, *supra* note 14, at 451.

... (b) Request the chief executive officer to respond to the allegations and to provide all relevant information which the institution has or may reasonably obtain, including information uncovered related to new violations. The responsibility to provide information continues until the case has been concluded.

limitations, rendering the defense moot. See the Committee on Infractions' conclusions infra. Part IV.B p. 16.

C. The court believed OSU's self-imposed sanctions minimally debilitated the men's basketball program.

The court determined that the post-season ban implemented for the 2004-05 season was mitigated by the fact that the team was unlikely to receive a post-season tournament invitation and that the reduction of two scholarships for the 2005 recruiting class was not that significant because the 2005-06 recruiting class is expected to be one of the best in school history.¹⁰⁷ This conclusion fails to recognize that uninvolved student-athletes who had nothing to do with O'Brien's NCAA violations are being penalized. This is a great detriment to the team and each individual player who is unable to compete in the post-season- whether that is the NCAA Division I Men's Championship Tournament or the National Invitation Tournament.¹⁰⁸ The court rationale was based on the testimony of Michelle Willis, OSU a senior associate athletics director, who stated that at the time the post-season ban was imposed (December 9, 2004), she did not believe the team was good enough to receive a post-season tournament invitation.¹⁰⁹ However, the OSU men's basketball team finished with a 23-12 record with a key victory over then undefeated University of Illinois, who was ranked number one in the country.¹¹⁰ This would have more likely than not merited a post-season tournament invitation.

¹⁰⁷ O'Brien Decision, *supra* note, 9 at 27-28.

¹⁰⁸ See Matthew Keegan, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N. ILL. U.L. REV. 297 (2005) (discussing the detriment to uninvolved student-athletes during a ban on postseason competition).

¹⁰⁹ O'Brien Decision, *supra* note 10, at 27.

¹¹⁰ Ohio State University Men's Basketball 2004-05 season results, *available at* <http://ohiostatebuckeyes.collegesports.com/sports/m-baskbl/archive/osu-m-baskbl-sched-2004.html>.

In addition, to discount the self-imposed scholarship reduction for the men's basketball program on the basis that the 2005-06 recruiting class is projected to be one of the best in program history is extremely speculative. The variables that affect a recruiting class, which include but are not limited to injury, ineligibility, NBA draft eligibility, transferring, are so numerous that it is illogical to minimize OSU's self-imposed sanction.

The corrective actions that OSU imposed once it became aware of O'Brien's financial assistance to Radojevic and interrelated violations with Savovic were in accordance with their responsibility as a member to the NCAA responding to a major infraction. However, the termination of O'Brien may potentially cost them millions of dollars and has also irreparably impaired the reputation of the athletics department. Further, OSU's self-imposed sanctions were an effort to mitigate potential penalties imposed by the COI, but were actually minimized by the court and seemingly detrimental to their case against O'Brien.

D. Future Impact of O'Brien Lawsuit

This case may be a sign of increased litigation by college coaches who are fired as a result of NCAA rules violations.¹¹¹ Specifically, coaches will challenge in court the admissibility of evidence against a coach gathered by the enforcement staff even though this evidence is accepted by the COI. In the O'Brien case the court explicitly denied the admission of certain testimony given by Radojevic which was prepared by the enforcement staff. See the Ohio Court of Claims' conclusions *infra*. Part III. B p. 15. However, this same testimony was used as rational for the COI findings against O'Brien

¹¹⁰ See *Neuheisal settles for \$4.5 million from UW, NCAA*, (Mar. 8, 2005), at <http://sports.espn.go.com/ncf/news/story?id=2007123/>

¹¹¹ *Id.*

and former OSU assistant coach Paul Biancardi. See the Committee on Infractions' conclusions *infra*. Part. IV E p. 20.

The COI imposed a five year show-cause order against O'Brien and a show-cause order against Biancardi which prohibits him from engaging in any recruiting activities from March 10, 2006 until October 1, 2007.¹¹² At the time of the public report Biancardi was employed as head men's basketball coach at Wright State University (Wright State). The COI required Wright State to appear before the COI to show-cause why it should not be penalized if it does not prohibit him from engaging in all recruiting activities for the specified time period. Consequently, Biancardi resigned from Wright State three days following the COI public infractions report.¹¹³ A joint statement issued by Wright State and Biancardi read, "Paul Biancardi will no longer be employed as head coach of men's basketball at Wright State University...As a result of the Ohio State University public infractions report by the NCAA, Wright State University believes it is in everyone's best interest for the coach to move on to other opportunities."¹¹⁴

The court's and NCAA's differing evidentiary standard could implicate procedural and substantive due process challenges to show-cause orders and eventual termination of a coach's employment at a member institution. However, the United States Supreme Court has held that the NCAA is not a state actor in *Tarkanian v. National Collegiate Athletic Association*.¹¹⁵ Further, the holding in *Tarkanian* was

¹¹² OSU Report, *supra* note 9, at 43,

¹¹³ *Biancardi Resigns as Head Coach*, (Mar. 13, 2006), at <http://www.10tv.com/Global/story.asp?S=4625843&nav=LUESMuat>.

¹¹⁴ *Id.*

¹¹⁵ *Tarkanian v. Nat'l Collegiate Athletic Ass'n*, 488 U.S. 179 (1988).

recently reaffirmed in 2001 following the Supreme Courts decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.¹¹⁶

The NCAA enforcement staff's ability to obtain information about alleged violations may also be hindered as a result of this case and an increasing trend of litigation following termination due to violation of NCAA rules. The NCAA only has the power to require individuals who are currently employed at a member institution to submit testimony.¹¹⁷ The NCAA does not have a subpoena power and therefore terminated coaches who know they will not return to intercollegiate coaching have a greater disincentive to provide information to the enforcement staff in order to protect legal interests against member institutions.

VI. Proposed Solution- Arbitration in Coaching Contracts

The NCAA is an autonomous, self-governing, private organization that retains the power to write rules and take actions that affect the member institutions and institutional actors. The NCAA's constitution, bylaws, and procedures govern the organization and create a contract between the organization, member institutions, and institutional actors. This contract provides the organization with the authority to establish rights, privileges and obligations of membership. As such, it is important that the COI's major infraction

¹¹⁶ *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001).

¹¹⁷ NCAA Bylaw 10.1 ("Unethical Conduct"), reprinted in NCAA Manuel, *supra* note 14, at 53.

...(a) refusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individuals institution

NCAA Bylaw 19.01.3 ("Responsibility to Cooperate"), reprinted in NCAA Manuel, *supra* note 14, at 343.

All representatives of member institution shall cooperate fully with the NCAA enforcement staff, Committee on Infractions, Infractions Appeals Committee and Management Council to further the objectives of the Association and its enforcement program.

decisions are the sole interpretation of NCAA rules in order to maintain certainty within the membership. In addition, the differing evidentiary standard in the courts and the COI hearings is detrimental to member institutions because the factual basis for the University's employment termination decision may be valid in the COI hearing and not admissible in a court of law. Utilizing mandatory binding arbitration in coaching contracts may limit these consequences and preserve the interpretation of NCAA rules to the Association (member institutions, conferences, and National Office).

A. Arbitration in Athletics Disputes

Arbitration is utilized in professional sports and is found in the collective bargaining agreements of professional baseball, football, basketball, and ice hockey.¹¹⁸ In addition, the Ted Stevens Olympic and Amateur Sports Act¹¹⁹ endorsed the use of arbitration to resolve Olympic and amateur sports disputes.¹²⁰ The issues in professional sports that are generally resolved using arbitration consist of injury grievances, non-injury grievances, and salary arbitration.¹²¹ Further, the American Arbitration Association has administered proceedings pertaining to administrative issues facing sports organizations, specifically disputes over partnership proceeds, termination of sports executives, the sale of a franchise, and payments under executive or partnership agreements.¹²² The binding arbitration clause included in the coaching contract may be as broad or as narrow as the parties require- either resorting to arbitration for all disputes

¹¹⁸ Brent Morberg, *Comment: Dispute Resolution in Intercollegiate Athletics*, 4 TEX. REV. ENT. & SPORTS L. 181, 187 (2003).

¹¹⁹ Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501-220512 (2002).

¹²⁰ American Arbitration Association, Sports Arbitration, *available at* <http://www.adr.org/SportsOlympic>.

¹²¹ American Arbitration Association, Sports Arbitration, *available at* <http://www.adr.org/SportsOlympic>.

¹²² *Id.*

under the contract or only those concerning NCAA rules violations.¹²³ An example clause that would encompass the entire contract reads:

Any unresolved controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial (or other) Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.¹²⁴

Arbitration would present several benefits to NCAA member institutions and the enforcement process when resolving employment disputes in the wake of a coach committing a major violation. Specifically, arbitration procedural rules are typically more relaxed and informal with regards to evidence and discovery than the courts.¹²⁵ This would allow for evidence gathered by the institution and enforcement staff to be considered admissible both in the COI hearing and the employment dispute with the coach. Additionally, the arbitrator is not bound by the substantive law and binding arbitration provides immunity to appellate challenge in the court system (unless fraud by the arbitrator or inconsistency with public policy).¹²⁶

Arbitration also enables the parties maintain a confidential proceeding. Unlike the courts, the arbitrator does not produce a written decision and the outcome will be in the form of an award that may not be disclosed to the public.¹²⁷ Confidentiality is beneficial to the enforcement process and ensures the COI findings and rationale are the sole interpretation of the facts and applicable NCAA rules. Confidentiality is also beneficial for the member institution from a public relations standpoint. “The failure to

¹²³ Brent Morberg, *Comment: Dispute Resolution in Intercollegiate Athletics*, 4 TEX. REV. ENT. & SPORTS L. 181, 196 (2003).

¹²⁴ Adam Epstein, *Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum*, 12 J. LEGAL ASPECTS OF SPORT, 153, 157 (2002).

¹²⁵ Brent Morberg, *Navigating the Public Relations Minefield: Mutual Protection Through Mandatory Arbitration Clauses in College Coaching Contracts*, 16 J. LEGAL ASPECTS SPORT 85, 87 (2006).

¹²⁶ *Id.* at 87-88.

¹²⁷ *Id.* at 88.

maintain control over the dissemination of details of a dispute between a coach and institution can have serious consequences for both parties.”¹²⁸

Arbitration allows for the parties to choose their arbitrator(s) which will minimize the lack of control inherent in the judicial process.¹²⁹ Arbitrators can be selected for both their legal expertise and their knowledge of the amateur sport system and sport-related issues.¹³⁰ This enables the member institution to select an arbitrator who has experience and expertise with NCAA rules, campus compliance, and the NCAA enforcement process. Arbitration may also limit the expenses associated with litigating (attorney’s fees and court costs) an employment dispute.¹³¹

VII. Conclusion

The underlying premise of the paper is to address the inconsistencies between the decisions of the Ohio Court of Claims and the NCAA Committee on Infractions concerning the Ohio State University and Jim O’Brien dispute. As I have stated, these inconsistencies are detrimental to both the Universities that comprise the NCAA and the NCAA enforcement process. The benefits of binding arbitration for intercollegiate athletics are numerous and these benefits have been demonstrated both in professional sports and the Olympics.

Professor Paul T. Haagen, Duke University School of Law, stated that the O’Brien court decision has put member institutions on notice and that “institutions should be incredibly careful about putting themselves in a position in which a judge, doing what

¹²⁸ *Id.* at 101.

¹²⁹ *Id.* at 88.

¹³⁰ Hilary Findlay, *Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making*, 16 *MARQ. SPORTS. L. REV.* 73,75 (2005).

¹³¹ Brent Morberg, *Navigating the Public Relations Minefield: Mutual Protection Through Mandatory Arbitration Clauses in College Coaching Contracts*, 16 *J. LEGAL ASPECTS SPORT* 85, 113 (2006).

a judge is supposed to do, will hold them liable for things they believe with good reason — whether or not it's sufficient reason — that they need to do.”¹³² Further, Professor Michael McCann, Mississippi College School of Law, stated that the court's conclusion that a clear NCAA violation did not constitute a material breach of O'Brien's employment contract...“By implication, the judge seems to be diminishing the importance of NCAA recruiting rules, and the idea that a rule violation should not constitute a material breach could — in theory — create deleterious incentives for coaches when recruiting players.” The impact of the O'Brien case will have on future employment terminations in light of major violations is uncertain, but member institutions must rethink coaching contracts and termination decisions.

Member institutions will continue to be proactive during a major investigation, which may lead to the termination of a coach prior to a Committee on Infractions finding, in order to mitigate NCAA sanctions. As a result, arbitration may be a more controlled process than the courts and will provide flexible evidentiary standards and relaxed procedural rules that will specifically address the nature of the enforcement process and collegiate athletics.

¹³² Sports Law Blog, *Jim O'Brien v. Ohio State University: Materiality, Honesty & Breach of Contract*, available at <http://sports-law.blogspot.com/2006/02/jim-obrien-v-ohio-state-university.html>.