

## Legal Issues in

# COLLEGIATE ATHLETICS

A Report of Court Decisions, Legislation and Regulations Affecting Collegiate Athletics

### IN THIS ISSUE

#### 2 Maryland AG Files Antitrust Action against the Atlantic Coast Conference

*Maryland Attorney General Douglas F. Gansler has alleged in two legal actions that “the Atlantic Coast Conference (ACC) violated antitrust laws and other obligations by seeking to impose an excessive \$53 million withdrawal penalty for Maryland’s pending departure to the Big Ten Conference.”*

#### 3 Most Constitutional Claims in Duke Lacrosse Litigation Rejected

*The latest salvo in the never-ending battle arising from false rape allegations against members of the Duke University men’s lacrosse team in March 2006 was fired in December by the United States Court of Appeals for the Fourth Circuit in a decision in the civil litigation brought by the former players.*

#### 4 Setting Up a Comprehensive Concussion Policy, Procedure or Program in a College Environment

*To provide the best concussion care for the athlete it is in the best interest of a college’s athletic departments to develop a comprehensive concussion policy, procedures or programs (CPPP) that addresses all phases of the recovery process. Comprehensive CPPP should focus not only on the diagnosis and return to play following a concussion injury but also address the steps in between. This includes regular concussion education for recognizing concussion signs and symptoms. It also include the steps for returning to the school or classroom, and returning to physical activity.*

#### 5 Veteran Athletic Director Shares Wisdom That Comes from Nearly Four Decades of Excellence in Collegiate Athletics



*Perspective. That may be the most impressive quality that Clyde Doughty, Jr. possesses. Oh there are plenty of accomplishments we could point to but it’s his perspective that is the main reasons we reached out to Doughty for an interview. And boy are we glad we did.*

#### 7 A Continuing Nightmare – College Football Gambling and Fixing

*In 1992, Congress passed the Professional and Amateur Sports Protection Act, which sought to preserve the purity of athletic competition and to protect athletes by outlawing betting on high school, collegiate, and Olympic events. However, betting on sports has become a more serious problem that drug or alcohol abuse in educational institutions.*

#### 9 Legal Cloud Settles In Over the University of Texas after High-Profile Track Coach Resigns

*There are more questions than answers after University of Texas women’s track coach Bev Kearney, who coached her way to six national championships for the Longhorns, resigned earlier this month.*

#### 11 Class Action Status Sought in Concussion Case Against NCAA

*Chicago Attorney Joe Siprut is seeking class-action status on behalf of several former athletes, who are suing the NCAA for failing to create concussion policies that would have mitigated the damaging effects of the concussions they suffered.*

#### 12 Player Sues Louisville, Coach Over Revoked Scholarship

*Patrick Grant, a former football player at the University of Louisville (U of L), filed a lawsuit in Jefferson Circuit Court on December 21, 2012 against U of L and its Head Football Coach Charlie Strong claiming that the university breached its contract, and failed to act in good faith when it terminated his athletic scholarship.*

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#### 10 News in Brief

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**COLLEGIATE ATHLETICS**



**Maryland Attorney General Douglas F. Gansler**

## Maryland AG Files Antitrust Action against the Atlantic Coast Conference

**M**aryland Attorney General Douglas F. Gansler has alleged in two legal actions that "the Atlantic Coast Conference (ACC) violated antitrust laws and other obligations by seeking to impose an excessive \$53 million withdrawal penalty for Maryland's pending departure to the Big Ten Conference."

First, Gansler charged that the so-called "exit fee" is an illegal restraint of trade in violation of antitrust laws. Second, he moved to dismiss the ACC's "hastily filed" state court action in North Carolina, arguing that a North Carolina court "has no jurisdiction over the sovereign state of Maryland and its public universities."

Gansler said in a statement: "Our lawsuit calls the ACC's 'exit fee' what it really is—an antitrust violation and an illegal penalty. Our motion in North Carolina will ensure that a Maryland court will rule on the case."

On November 19, 2012, the University of Maryland announced that it would join the Big Ten Conference, beginning in 2014. As the lawsuit claims, the move "will not only provide financial

security for Maryland's athletic programs and will also enhance the University's educational and research opportunities through membership in the Committee on Institutional Cooperation, a premier academic consortium of the Big Ten universities and the University of Chicago."

Shortly after the announcement, the ACC sued in North Carolina state court to enforce a withdrawal penalty of \$52.26 million, "supposedly provided for in the ACC Constitution. Maryland has moved to dismiss that action because a court of a sister state cannot compel another sovereign state to submit to that court's jurisdiction."

The Attorney General's lawsuit in Prince George's County Circuit Court alleges that "the ACC violated Maryland antitrust laws, breached contractual obligations and tortiously interfered with the prospective economic advantage of the flagship campus of the University of Maryland System. The lawsuit seeks an injunction against enforcement of the exit fee, a declaratory judgment finding the fee unlawful and treble damages under the antitrust laws, along with other relief." ■

## Most Constitutional Claims in Duke Lacrosse Litigation Rejected

By Howard M. Wasserman

Professor of Law, FIU College of Law

The latest salvo in the never-ending battle arising from false rape allegations against members of the Duke University men's lacrosse team in March 2006 was fired in December by the United States Court of Appeals for the Fourth Circuit in a decision in the civil litigation brought by the former players.

The litigation involves three consolidated lawsuits—one case by the three players who actually were indicted, one case by two players who were investigated but not indicted (including Ryan McFadyen, the player who wrote the infamous email about killing a stripper), and one case by 38 players who were investigated but not indicted. A host of different defendants are named in the various cases, including Duke University and various Duke employees; former Durham District Attorney Mike Nifong; Durham police officers Mark Gottlieb and Benjamin Himan; a number of supervisory officers in the Durham government; the City of Durham; and the private laboratory that conducted DNA testing. The cases involve an overwhelming barrage of federal constitutional, state constitutional, and state tort claims.

### MAJORITY OPINIONS

This interlocutory appeal challenged the denial of motions to dismiss or for summary judgment by Gottlieb and Himan, the City of Durham, and the supervisory officials. We can break the court's decision into four phases.

First, the court rejected a Fourth Amendment malicious prosecution claim by the indicted players against Gottlieb and Himan. The independent decision by Nifong to seek an indictment (and the independent decision of the grand jury to indict) broke the causal connection between the officers' conduct in investigating and providing the DA with evidence and the unconstitutional prosecution. Absent allegations that the officers affirmatively misled or unduly pressured the prosecutor to seek that indictment (neither of which were present in the complaints), independent acts of others insulate the officers from liability.

Second, the court rejected Fourth Amendment claims against Gottlieb and Himan by both sets of unindicted players; these challenged the seizure of physical evidence (photographing and DNA testing), as well as a search of McFadyen's home and car. While the searches and seizures were conducted pursuant to warrants, plaintiffs alleged that the warrants flowed from the officers' dishonest affidavits in support of the warrant request. These claims

failed under the controlling standard of *Franks v. Delaware*, 438 U.S. 154 (1978), which requires 1) a showing that officers made false statements or omitted statements knowingly or intentionally or with reckless disregard for their truth and 2) a showing that those false statements were "material," meaning "necessary" to a neutral and disinterested magistrate's authorization of the search. While the plaintiffs did identify a number of knowingly false statements in the affidavits, the court held that the affidavits were sufficient to support a finding of probable cause even with the false statements excised, thus the false statements were not material and the claims failed on the second *Franks* prong.

Third, the court rejected Fourth Amendment claims against the City and various supervisory officers and a Fourteenth Amendment substantive due process claim against several officers who made public and media statements about the investigation. These claims all depended on the existence of a predicate constitutional by an individual officer; because neither Gottlieb nor Himan committed any constitutional violations, however, their supervisors and the entity cannot be liable. The one uncertainty as to this portion of the opinion was whether the Fourth Circuit even had appellate jurisdiction as to the City. The individual police officers and the supervisory officers all appealed the denial of a defense of qualified immunity, which is immediately appealable (even though the denial does not dispose of the case) under the "collateral order doctrine." But the City was not appealing a denial of qualified immunity, since municipalities do not enjoy that defense. Nevertheless, the court exercise pendent jurisdiction over the City's claims, because resolution of the individual qualified immunity appeals would "fully resolve" the City's liability.

The indicted players achieved one small victory. A two-judge majority did allow state law malicious prosecution claims by the indicted players to proceed against Gottlieb and Himan. Unlike the Fourth Amendment, under North Carolina tort law an independent decision by another actor (such as the DA or grand jury) does not always break the causal chain between the prosecution and the officers' investigation. Although the court expressed doubt in the plaintiff's "attenuated view" of causation, it insisted that plaintiffs on a state claim only must show that the defendant "instituted, procured, or participated in" a criminal proceeding; that standard was satisfied on the allegations of the complaint as to Gottlieb and Himan (although not as to a third police officer).

See MOST CONSTITUTIONAL on Page 11

## Setting Up a Comprehensive Concussion Policy, Procedure or Program in a College Environment

By Marco S. Boscolo, PhD, ATC, LAT

To provide the best concussion care for the athlete it is in the best interest of a college's athletic departments to develop a comprehensive concussion policy, procedures or programs (CPPP) that addresses all phases of the recovery process. Comprehensive CPPP should focus not only on the diagnosis and return to play following a concussion injury but also address the steps in between. This includes regular concussion education for recognizing concussion signs and symptoms. It also include the steps for returning to the school or classroom, and returning to physical activity.

Most colleges will have a concussion policy that adheres to international standards of care, as addressed by the 3rd International Concussion in Sports Consensus Statement (McCory, Meeuwisse, Johnston, Dvorak, Aubry, Molly, and Cantu, 2009), and standards as outlined in the 2012-2013 National Collegiate Athletic Association sports medicine handbook. These standards are sufficient for diagnosis and return to play, but do not sufficiently address the steps in between. Information for the development of comprehensive CPPPs are available at the ConcussionHub.com ([www.ConcussionHub.com](http://www.ConcussionHub.com)), at the REAP Concussion Management Program of the Rocky Mountain Children's hospital, and the Centers for Disease Control's Head Up: Concussion in Youth Sports program and Heads Up to Schools: Know you Concussion ABC's, websites.

A comprehensive college CPPP also benefits by having a simple program in place in which each head-related injury, from an eye laceration, a slip on the ice, or a concussion, is reviewed. This program is helpful because there are many instances when a concussion can slip

through the cracks as when an athlete gets injured outside of college athletics. Some athletes will try to deny or downplay that they have a concussion injury. They feel that the incidence causing the injury was not sufficient enough to cause "real" concussion. Or the athlete's motivation will be to play regardless of their injury. In either case a head-injury check should be in place in a comprehensive CPPP. This system will help identify a higher percentage of actual concussion injuries.

Every college athletic department setting will be a little different. Some departments will have an army of athletic trainers and sport medicine physicians, and others will just have one athletic trainer and a sports medicine physician. The design and implementation of a comprehensive high school CPPP should include all affected individuals. The athletic trainer, with their medical background, is a great resource in CPPP design and implementation as they regularly work and communicate with each of the aforementioned groups. The ConcussionHub.com has example polices available based upon the school's resources such as neurocognitive testing and availability of medical personal.

The recognition of concussions by others and the reporting of concussion by the athlete, parent, teammate, and or coach are influenced by the concussion education program that is in place at a college. A good concussion program will continually educate the athlete, parent, coach, and school personnel on concussion and concussion care. The more people know about concussions and their signs and symptoms the more likely they are to report them and get proper treatment. In addition, based on field experience, the more athletes know and trust their school's

athletic trainer, the more likely that they are to be honest and report their symptoms.

Treatment of a concussion generally involves rest and reduction of daily activities. Return to school and return to physical activities are typically gradual. Treatment is best directed by a physician with a background in sports medicine, or an athletic trainer working with a physician. The athlete or parent, and maybe the coach, may not be knowledgeable about concussion care. Educating the athlete, parent, and coach about the return to play process throughout the recovery period is needed as the athlete is eager to return to play. To help facilitate a smooth recovery after a concussion, a form explaining to the athlete, parent, and coach the signs and symptoms of a concussion, typical treatment for a concussion, and the steps they need to take to return to play steps should be provided.

In review, a comprehensive college CPPP should be designed to achieve the best athlete care possible. A comprehensive college CPPP includes preseason education, a concussion recognition program, post-concussion education on the treatment of a concussion injury, a head injury check program, consideration for the athlete's need to gradually return to daily activities such as school and physical activity, and an outline of the return to play process. ■

*Marco S. Boscolo is a high school outreach athletic trainer in a hospital setting. With Gibson Area Hospital he has developed ConcussionHub.com. He has worked as an athletic trainer for 13 years in the high school, collegiate, and United States Olympic Training Center settings. The views expressed here are those of the author and do not necessarily represent those of Gibson Area Hospital and Health Services.*

## Veteran Athletic Director Shares Wisdom That Comes from Nearly Four Decades of Excellence in Collegiate Athletics

*(Editor's note: Perspective. That may be the most impressive quality that Clyde Doughty, Jr. possesses. Oh there are plenty of accomplishments we could point to as well when it comes to the athletic director at New York Institute of Technology. But it's his perspective, and the lingering wisdom, that are the main reasons we reached out to Doughty for an interview. And boy are we glad we did.)*

**Question:** *When did you know you might be interested in being in athletics administration?*

**Answer:** In 1976 I came to NYIT as a recruited basketball student-athlete. I played on some great teams with some great guys during my four years of eligibility. Following my eligibility I still had a year to go to earn my degree so I worked to complete my degree in the athletics department for my head coach, Sam Stern, who was also the AD at the time. During that year I completely fell in love with the management of intercollegiate athletics and the ability to stay close to athletics while also having the opportunity to have a profound impact on the success of student-athletes and the department as a whole. After I earned my degree, Sam awarded me with my first full-time position as academic advisor to student-athletes. I found college administration through an opportunity granted to me by someone who believed in me; however, I seized that opportunity by doing what was necessary to learn everything I could about the environment and make sure the decision makers understand that I was serious about being part of the intercollegiate athletic environment.

**Q:** *What was your experience like as an academic advisor to student-athletes and how did that help prepare you for being an AD?*

**A:** Academics are the core of the educa-



tional mission. Athletics is a means to an end. Athletics provides visibility and brands the institution but you must recruit and retain academically minded student-athletes who must strive to excel in the classroom in order to meet visibility expectations. Our mission is as follows; academic excellence, social enhancement and quality athletic participation. The order of our mission is how we recruit student-athletes. Yes, we want to excel and realize success through athletic competition, but if we recruit an individual who understands the holistic approach of educational excellence the winning will take care of itself because that individual will have the discipline to be successful in all facets of life. During my time as academic advisor I learned to appreciate the value of properly educating, mentoring and advising young men and women. I quickly learned it is the foundation for what we do. Our current overall GPA for the NYIT athletic department is a 3.10, which is something I am very proud of. It means more to me than any championships that we can ever win, because I know the greatest championship is the one earned at the end of a college career and that is a degree.

**Q:** *You have been at one school for almost four decades. Why?*

**A:** Love is love and I love what I do and where I am. Why ask why. I work with the greatest people in the world. We are a small staff but we get the most out of everything we do. I always say, you can pay for a lot of things in life but you can't buy loyalty and I work with loyal, devoted and resilient individuals who have the student-athlete at the fore front of their agenda. I get to interact with classy individuals on campus who are student centered and believe in the mission of developing individuals through hard work and quality support. When I am down, they pick me up; when they are sad I try and make them happy. NYIT has been my home for over 36 years and it has allowed me to become the person that I am today. It has enabled me to understand that life is precious because success is fleeting but consistency with maintaining an even balance through the maze of life is essential; that maze consists of Joy and Pain, Sunshine and Rain. These are the life elements that I live by, never touching the sky but never scraping my nose on the

See VETERAN on Page 6

## Veteran Athletic Director Shares Nearly 4 Decades Worth of Wisdom

Continued From Page 5

ground either. Life is good and if I asked for more I would be selfish and that is not how NYIT raised me.

**Q:** *How has the job of AD changed since the year you took over in 1988?*

**A:** Has it ever; the demands have tripled in the sense of development, sponsorship and fund raising. We are all chasing the same dollar, thus the need to bring in outside revenue, even at a DII level, is critical to the sustainability of the department. We are in an arms race, a recruiting war for the best student-athletes; therefore, it is the responsibility of the administration to constantly improve the infrastructure so that we are competitive and provide the coaches with the ability to attract, recruit and retain quality student-athletes who then become active and dedicated alumni. Additionally, the compliance agenda within the NCAA has become more involved. The oversight from a rules and regulation perspective is extremely involved thus demanding a considerable amount of human resource hours to be in compliance. The social issues have changed as well. A good administrator fully knows that the one constant in life is change and in order to remain successful one must adapt to change. Our youth have different perspectives on life, they teach me what they see and I help them focus on their vision. I never shove history down their throat but talk about it in a way to have them understand why things are the way they are and how they need to capture the here and now in order to reach their position of self-actualization.

**Q:** *What do you like most about being an AD?*

**A:** The people; plain and simple. I have met some of the greatest folks from across the country. I am not talking about

folks we see on ESPN or read about in the Times, but everyday folk that are the mainstream of America, the backbone of America. I also get to be engaged with a new set of young people every single year, what a blessing. To see them come in with sleep in their eyes and leave here wide eyed and ready for the world provides me with the strength and enthusiasm to keep doing what I do. I have been here so long that I am now experiencing a second and third generation of folks whose parents I went to school with or were a part of this environment. As I tell them when I see them after they leave the confides of this environment, you are now part of the tax paying American society, welcome to the real world. The greatest commodity in our society is people and sometimes we forget that. I for one will never ever give up or give into the dark side of life and the negativity it breeds. People are why I am in this business; they motivate me, engage me, support me, scold me, lift me and keep me focused to see that we, as an athletic department, continue to pay it forward.

**Q:** *Is it easier today than it was when you started for an African American to rise to the level of AD? Why?*

**A:** More opportunities. When I first started in the business there were no programs geared towards the development of minorities, heck there were little organized programs for anyone for that matter. It was simply the "old boys' network." I remember walking into my first ECAC convention at Cape Code in Hyannis, MA. I was so nervous my tie was shaking. I walked in the room and my fear meter went to level 20 on the 10 meter because in that room there was nothing but old white men. After competing in a very diverse intercollegiate environment while as a student-athlete,

the administration of intercollegiate athletics was anything but diverse. I wanted to leave that room but I told myself that they are going to have to kick me out because I was not running out. What I realized very quickly is that the greatest thing about fear was fear itself and I soon learned they weren't that much smarter than me. I also was not going to let down the folks at NYIT who granted me the opportunity to represent them and I was especially not going to let down my mother who battled as a single mom to make sure I had the necessary resources to be successful. Today there are outstanding programs of mentorship, graduate assistantship, minority initiatives, camps and clinics that work with women and minorities so that they are provided with skill building as to enhance their portfolios with the tangible and intangible assets so they are competitive for positions within this very competitive environment.

**Q:** *What people have had the biggest influence on you as an AD and why?*

**A:** In 1976 my HS basketball coach Sheldon Schneider sent me to NYIT because he thought it would be the best place for me academically, athletically and socially. Understanding my situation at home, his decision proved to be a valuable one for me. For the past 14 years Coach Schneider has managed the recreational and intramural activities for this department. I am with him every day and his insight and words of wisdom and encouragement are extremely valuable to me as I manage my life. Sam Stern; my college coach and AD; without him believing that I could be what I wanted to be by giving me my start in this business I would not be here today sitting in the chair he once

See VETERAN on Page 8

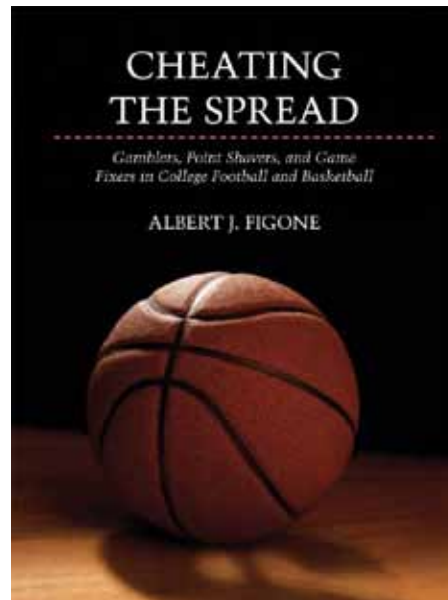
## A Continuing Nightmare – College Football Gambling and Fixing

*(What follows is an excerpt from *Cheating the Spread: Gamblers, Point Shavers, and Game Fixers in College Football and Basketball* by Albert J. Figone. The Book can be purchased at Amazon. Com at <http://www.amazon.com/Cheating-Spread-Gamblers-Football-Basketball/dp/0252078756>)*

In 1992, Congress passed the Professional and Amateur Sports Protection Act (also known as the Bradley Act, after its sponsor, Senator Bill Bradley), which made sports betting illegal in all states except Nevada, Oregon, and New Jersey. The act sought to preserve the purity of athletic competition and to protect athletes by outlawing betting on high school, collegiate, and Olympic events. However, in the subsequent two decades, betting on sports has become a more serious problem that drug or alcohol abuse in educational institutions from elementary schools to college campuses. Included in this alarming trend are bookmaking operations run by between one and fifty students on college campuses.

...

Boosters at the University of Florida, in their desperation to win SEC titles in football and basketball, became so egregious in violating NCAA precepts that speculation was rampant that the football program would receive the death penalty, as had Southern Methodist University in 1983. When Florida sought a new president in 1983, its applicant pool numbered 357; six years later, after the resignation of president Marshall Criser, only 67 people applied for the job. One of the three finalists for the position, Malcolm Gillis, a Florida alumnus and dean of Duke's graduate school, withdrew his name and cited as the primary reason "fundamental and longstanding"



problems in intercollegiate athletics. Adding to these problems in the Florida football program were the numbers of players wagering on sports, including betting on their own team. In October 1989, starting quarterback Kyle Morris and his backup, Shane Matthews, were suspended for one year for betting on sports with student bookies in Athens, Georgia. Two walk-ons, quarterback G. A. Mangus and receiver Brady Ackerman, were also removed from the team, presumably for gambling. An anonymous letter sent to athletic director Bill Arnsperger describing the betting of Morris and Matthews "wasn't really detailed, but it did have facts," according to Arnsperger. "The writer knew what he was talking about." Morris had indicated that he believed that the Georgia bookies "handled a lot of action from a lot of students."

In the late spring of 1992, Rhode Island state police uncovered a student-run gambling ring at the University of Rhode Island and at Bryant College, a nearby private business school. This ring appeared eerily similar to organized

crime, as it included bookmakers, runners, toll-free numbers, and enforcers for collecting debts. Since September 1991, the group of students had generated income of one hundred thousand dollars per week from gamblers, including student-athletes. Two University of Rhode Island basketball players were dismissed from the team for gambling on college and professional games.

Despite the increasing number of suspensions, removals from teams, and undoubtedly unreported incidents of athletes gambling, college football players increasingly took calculated risks to gamble on sports. On 10 July 1995, University of Maryland senior quarterback and potential all-American Scott Milanovich was suspended for eight games (reduced to four on appeal) for gambling on college sports; three other players were also suspended, including star receiver Jermaine Lewis, who was barred for one game. The message from the NCAA was that gambling by college athletes would not be tolerated, but that message went unheeded on many occasions.

At a news conference in early December 1998, a week after the sentencing of the participants in the 1994-95 Northwestern University basketball scandal, Scott R. Lassar, U.S. attorney for the Northern District of Illinois announced the indictment of four Northwestern football players on charges related to game fixing during the 1994 season. The players included leading rusher Dennis Lundy, wide receiver Chris Gamble, and cocaptain Michael Senters. Also indicted later was Gregory Gill, a former Wildcat football player who had graduated in 1993. Lassar stated at the news

See A CONTINUING on Page 8

## A Continuing Nightmare – College Football Gambling and Fixing

Continued From Page 7

conference that “these four defendants fumbled their opportunity to participate in intercollegiate athletics and maintain the integrity of athletic competition.... Then, they fumbled again and again when they had the obligation to come clean and testify truthfully before a grand jury.”

The four-year federal investigation of the football players was connected to the investigation of the Northwestern basketball players for game fixing and the arrest of former Wildcat football player-bookmaker Brian Ballarini. From the fall of 1993 to late 1994, while he was a reserve quarterback, Ballarini accepted wagers on a regular basis from approximately fifteen individuals, including both male and female athletes at Northwestern. In at least two games, Lundy, Senters, and Gamble placed bets with Ballarini on Northwestern to lose by more than the point spread. Ballarini accepted wagers on credit and allowed individuals to defer paying a losing bet until after their next bet, in effect loaning them money to place on bets. He also imposed a surcharge, or vigorish, of 10 percent on losing bets.

Lundy was charged with three counts of perjury for giving false testimony to grand juries. In a game against the University of Iowa on 12 November 1994, Northwestern had the ball on Iowa’s 1-yard line in the third quarter, behind 22 points. Lundy had bet that the Wildcats would lose by more than 6 points; if Northwestern scored, the deficit would be cut to 15 points with plenty of time left. Lundy fumbled the handoff, and Iowa recovered and went on to win by 36 points. A year later, on 2 November 1995, Lundy testified before the grand jury that he “got hit on the arm real good and the ball just came out.” Film replays, however, showed that he had not been touched on the play. Lundy’s teammates were aware of his gambling habits, and many of them resented his attitude. Cornerback Rodney Ray, suspecting that the fumble had been intentional, confronted Lundy in a heated exchange overheard by an assistant coach. University officials began an investigation, and head coach Gary Barnett suspended Lundy for the last game of the season, against Penn State. Lundy was also charged with falsely

denying that he bet with Ballarini and an unnamed individual that Northwestern would lose by more than the spread against Ohio State on 1 October 1994 and against Notre Dame on 3 September 1994. The final indictment against Lundy charged him with giving false testimony about the allegation that he regularly placed bets with Ballarini on college and professional sports. In early May 1999, after pleading guilty to the perjury charges, each of which carried a maximum penalty of five years and a \$250,000 fine, Lundy was sentenced to one month in jail and two years of probation, his sentence reduced because he provided evidence against the other three Wildcat players and because he had begun speaking to athletes at other colleges about the dangers of gambling. He stated that gambling “started kind of innocent. I kind of got into it. I would win one day. I would lose the next. Winning and losing. It overrode anything else I was doing. It just kind of swallowed up my life for two years.” He warned other athletes, “You don’t want to end up where I am now.” ■

## Veteran Athletic Director Shares Nearly 4 Decades Worth of Wisdom

Continued From Page 6

occupied. He provided me with an opportunity that I can never repay. The late, great Dr. William “Buck” Lai, who I mentored under for 4 years prior to becoming AD; he taught me a great deal about organization and networking. Former NYIT president Dr. Matthew Schure who selected me as AD in 1988 and stood by me in good and bad times along with vice presidents Dr. Maryse

Prezeau and Dr. King Check. Not only are they my mentors, they are my friends. Perhaps my greatest influence is my children. They keep me grounded and motivated and they push me to greater levels of success. They have all grown up on the NYIT campus and consider it their home also. When I feel like giving up, and I have at times, I think of them and I give myself five

minutes to feel sorry for myself and then I hit the road running. Finally all of the student-athletes, coaches, and administrators that I have been blessed to work with. Each of them will always hold a special place in my heart because without them my life would not be what it is today and that simply is a Wonderful Life! ■



## Legal Cloud Settles In Over the University of Texas after High-Profile Track Coach Resigns

There are more questions than answers after University of Texas women's track coach Bev Kearney, who coached her way to six national championships for the Longhorns, resigned earlier this month.

The resignation was fueled by the athletic administration's decision to place Kearney on paid leave in November shortly before she was to receive a raise that would have bumped her salary, plus bonuses, from \$270,000 a year to \$397,000 a year.

According to a report in the *Austin American Statesman*, UT's decision was fueled by a revelation that Kearney had engaged what she termed to be a "consensual intimate relationship" with an "adult student-athlete" in 2002.

There is a provision in UT's Handbook of Operating Procedures, created in 2001, which states: "In the event that a consensual relationship exists or begins to develop, the individual in the supervisory, teaching or advisory position shall immediately notify his or her immediate supervisor of the relationship and cooperate with that supervisor in making the arrangements necessary to resolve the conflict of interest."

Kearney has maintained that she did not know the provision existed.

Meanwhile, Patti Ohlendorf, the university's vice president for legal affairs, told the *Statesman*: "In the case of a head coach and a student-athlete on his or her team, the university's position is that that cannot be condoned in any event. 'It can't happen' is what the university's position is on that."

"We believe Bev is a good person. Bev has done a lot for the university over the years," she continued. "We think this is a terrible mistake, and I know it's something she regrets. But it's

not the type of thing that can happen between a coach and a student-athlete on the team."

Between the time she was placed on paid leave and the announcement of her resignation, Kearney retained Austin attorney Derek A. Howard to represent her legal interests in the controversy.

Howard sounded like he was gearing up for a legal fight in his comments to the *Statesman*: "We believe that Ms. Kearney has been subjected to a double standard and has received far harsher punishment than that being given to her male counter-parts who have engaged in similar conduct. It is a shame that this remarkably talented female African-American coach, who has devoted her life to helping others, is being bullied and scapegoated by the University of Texas."

Further, he told *The Daily Texan* that a lawsuit might look not only at relationships between other UT head coaches and their student athletes, but also between faculty members and their students as well.

### SKELETONS IN THE CLOSET

Given that most large universities have some skeletons in their closet, there may be elements of truth to Howard's allegation, which could lead to some form of settlement.

Clearly, the dance has begun. Kearney told the *Statesman* "she might be forced to sell her house and liquidate some of her possessions to help support those close to her." Kearney added "the vulnerability of having to ensure my daughter has a roof over her head and food on her table supersedes anything that has happened to me, whether fairly or unfairly."

She continued: "I love Austin, I love

the University of Texas, I love my community. I feel like I've served it with all my heart and my soul. More than anything else, I apologize to all those entities if in any way anything that I have done has brought any embarrassment to anyone.

"I have no ill will toward anybody. No matter what happens, no matter how everything has played out or will play out in the future, I refuse to look back on my career here at Texas, which has consumed a major part of my life, with any type of remorse, any type of resentment, any type of anger. I have loved my time and I feel like I've given of myself and I have represented this institution with integrity and with the pride that it so desires and deserves."

Based on a recent interview with CNN, she sounded like she believes the university turned on her.

"I think the one thing that I hired an attorney for is not to deny, because the moment it was brought to my attention, I openly admitted to its existence, and so it was never to deny, it was just to guarantee I was given equal treatment because I had grown to not trust the university that I served in terms of equal treatment."

Kearney also seemed to imply that she was out for more than just money.

"I don't want anybody to lose their job. I don't want to create harm to anyone but I do want to bring to light that you don't get to arbitrarily administer your rules and decide who is punished at what levels because of something that you don't like, because you never know if it's because of that particular situation or is it because of the fact that you may be harboring some type of ill will towards that individual." ■

## News in Brief

### LEACH CLEARED OF PLAYER ABUSE

The Pac-12 Conference has cleared Washington State University Head Football Coach Mike Leach and his assistant coaches of player abuse. The impetus for the investigation was a November 10 letter to news media written by former receiver Marquess Wilson, who had quit the team a week earlier. Wilson alleged that the staff had physically, emotionally and verbally abused him and other players. The conference's decision came on the heels of an internal investigation conducted by the law firm of Bond, Schoenek and King. The firm reportedly interviewed 20 players, coaches, parents and other athletic department staff. The Pac-12 did recommend that WSU establish a workout/conditioning policy to be approved by WSU Athletic Director Bill Moos for future use, and that the school should pay closer attention to an NCAA bylaw limiting the number of hours the team can practice.

### JACKSON STATE UNIVERSITY AD NOW FACES 3 SUITS

Jackson State University Athletic Director Vivian Fuller, who was sued last fall by her former secretary for sexual harassment and retaliation, now faces other lawsuits. That plaintiff, Lolita Ward, has company — male co-workers Dalandus Henderson and Frederick Robinson. Henderson and Robinson claimed that, after witnessing Fuller's behavior, they talked with the EEOC and were subsequently fired. They claim retaliation, and that they were subjected to a hostile environment. Each of the plaintiffs are seeking back pay, as well as being reinstated to their old positions.

### UNIVERSITY OF NEBRASKA TO ADD SAND VOLLEYBALL

The University of Nebraska has announced that it will add sand volleyball as a women's intercollegiate sport, beginning with the spring 2013 competition season. The addition of sand volleyball gives the Huskers 24 intercollegiate programs, including 14 women's teams and 10 men's teams. Sand volleyball is the first sport Nebraska has added since women's rifle began competition in the 1998-99 season. Sand volleyball was approved as an NCAA Emerging Sport for women in 2009 and began play in the 2011-12 school year. Fifteen schools sponsored varsity teams in the spring of 2012, the first season of competition for Division I schools. Nebraska Director of Athletics Shawn Eichorst said in a statement that "Coach Osborne and Coach Cook had discussions about the possibility of adding sand volleyball over the past few months and things came together quickly in recent weeks."

### NCAA WITHDRAWS SUPPORT FOR ITS SCHOLARLY COLLOQUIUM

After a six-year run, the NCAA has withdrawn financial support for its Scholarly Colloquium on Intercollegiate Athletics. James L. Isch, the NCAA's chief operating officer, made the announcement at a meeting of the colloquium's Executive Board earlier this month. Isch reportedly cited poor attendance at the annual conference, a lack of profitability of the colloquium's journal (*the Journal of Intercollegiate Sport*), and a failure to impact public policy. David K. Wiggins, a professor at George Mason University and chair of the colloquium's Executive Board, was critical of the move, telling the *Chronicle of Higher Education*: "Anything that is critical of the organization (NCAA), they just can't deal with it. They have no idea or sense about academic freedom at all."

### COACH HIRES ATTORNEY AFTER MINNESOTA STATE UNIVERSITY, MANKATO DECLINES TO REINSTATE HIM

Todd Hoffner, the former head football coach at Minnesota State University, Mankato, won't be reinstated to his previous position, even though he was cleared of pornography charges. Instead, Hoffner, who was investigated after videos of his naked children dancing were found on his university-issued cellphone, was named the assistant athletic director for facilities development. Hoffner has retained attorney Chris Madel to explore legal options. In December, a judge found that the videos were not pornographic, and were "nothing more than innocent child's play."

### PENN STATE RESPONDS TO EX-ASSISTANT'S WHISTLEBLOWER AND DEFAMATION LAWSUIT

Lawyers for Penn State University have asked a judge to throw out a whistleblower and defamation lawsuit filed by a former assistant football coach, Mike McQueary, who alleged that he saw Jerry Sandusky assault a boy in a locker room shower in the early 1990s. McQueary claimed in October that PSU President Graham Spanier made him a scapegoat after Sandusky, a retired assistant football coach, was arrested on child molestation charges in 2011. PSU answered that complaint earlier this month by alleging that the lawsuit was too vague and does not meet legal standards to support claims of defamation and misrepresentation. "It is not enough that the alleged victim of a statement be embarrassed or annoyed, he must have suffered the kind of harm which has grievously fractured his standing in the community of a respectable society," according to the university.

## Most Constitutional Claims in Duke Lacrosse Litigation Rejected

Continued From Page 3

### CRITICIZING THE PLAINTIFFS

While joining the “fine opinion” for the court, Judge J. Harvie Wilkinson added a blistering concurring opinion. He sharply criticized the plaintiffs for seeking “to raise every experimental claim and to corral every conceivable defendant,” producing “a case on the far limbs of law and one destined, were it to succeed as a whole, to spread damage in all directions.” Wilkinson criticized the plaintiffs and their lawyers for overreaching in the dramatic numbers of claims asserted (23 by the indicted players, 32 by the large group of unindicted players, and 40 by the two unindicted players), the “sweeping scope” of the litigation, and the “overwrought” nature of the claims and the allegations. This comports with the views expressed by the district court judge in this litigation; in granting in part and denying in part the various motions, the lower court noted the unwieldy scope of the litigation and encouraged the parties “to make every effort to reduce the volume of filings and to avoid unnecessary rhetoric, and to proceed on the remaining claims in a direct, professional manner, without requiring unnecessary involvement from the Court.”

It remains to be seen whether that criticism and advice will be heeded.

Meanwhile, this litigation is far from over. The state-law malicious prosecution claims against Gottlieb and Himan return to the district court and should proceed to discovery. They join some unappealed federal and state claims that remain alive against other defendants, including Nifong (who failed to

appeal the denial of his qualified immunity defense), a nurse at Duke University hospital, and the DNA laboratory. As Judge Wilkinson pointed out, more than six years have passed since the criminal charges against the three players were dismissed. And this March will mark seven years since the infamous team party that started this all. Nevertheless, the case marches on. ■

*Howard M. Wasserman joined the Florida International University College of Law faculty in 2003. He graduated magna cum laude from the Northwestern University School of Law, where he was an associate articles editor of the Law Review and was named to the Order of the Coif. Following law school, he clerked for Chief Judge James T. Giles of the United States District Court for the Eastern District of Pennsylvania and Judge Jane R. Roth of the United States Court of Appeals*



*for the Third Circuit. He also has been a visiting professor at Saint Louis University School of Law and Florida State University College of Law. Professor Wasserman teaches civil procedure, evidence, federal courts, civil rights, and First Amendment; his scholarship focuses on the freedom of speech and on the role of procedure and jurisdiction in public-law and civil-rights litigation. He can be reached at [wasserma@fiu.edu](mailto:wasserma@fiu.edu)*

## Class Action Status Sought in Concussion Case Against NCAA

**C**hicago Attorney Joe Siprut is seeking class-action status on behalf of several former athletes, who are suing the NCAA for failing to create concussion policies that would have mitigated the damaging effects of the concussions they suffered.

One of the plaintiffs is Adrian Arrington, a former defensive back at Eastern Illinois University. The 26-year-old plaintiff alleged in a lawsuit in 2011 that NCAA officials knew as early as 2003 that multiple concussions could lead to health problems, yet chose not to require concussion policies until 2010. Arrington

claimed he endured five concussions. On several times, he alleges, the team doctor cleared him to return to play one day after his injury.

“The lawsuit claims that after Arrington’s first three concussions, Eastern’s team doctor told him he could get back on the field the next day,” according to a story in the Chicago Tribune. “The team sent him to a neurologist only after he started to experience seizures, he alleges, and even then he continued to play, suffering two more concussions before leaving the team near the end of

his senior season.”

In response to a NCAA mandate in 2010, EIU reportedly created a five-step process for athletes to return to play. The policy states that the student athlete must be symptom-free for 24 hours before taking the first step — light aerobic exercise — and that only one step can be taken per day. The protocol also calls for athletes to reveal after each step whether any of their symptoms have returned. Siprut has stated that one issue he has with the policy is the lack of an objective standard to determine whether the athlete has improved.

## Player Sues Louisville, Coach Over Revoked Scholarship

By Ellen Rugeley

**P**atrick Grant, a former football player at the University of Louisville (U of L), filed a lawsuit in Jefferson Circuit Court on December 21, 2012 against U of L and its Head Football Coach Charlie Strong claiming that the university breached its contract, and failed to act in good faith when it terminated his athletic scholarship.

The suit, which alleges that Grant was asked to cover up an attack perpetrated by two of his teammates and that the university and Coach Strong failed to live up to their end of a bargain, requests that the court issue a declaratory judgment stopping the cancellation of Grant's athletic scholarship and grant him compensatory damages for his perceived wrongs. The suit also seeks a jury trial.

The attack leading to the lawsuit took place on October 24, 2010 at Papa John's Cardinal Stadium when, according to police, 18-year-old twin brothers Jacob and Isaac Geffrand, who were Grant's teammates at the time, attacked Grant over a football dispute.

According to Derwin Webb, Jacob Geffrand's attorney, they exchanged words and the "altercation" had to do with football. "There weren't any issues as far as females or anything like that, just some concerns about practice," Webb told the local media.

The suit alleges that the Geffrands beat Grant so badly that "he required immediate, urgent care and nearly lost his left eye, the bones around it being fractured.

"His eye was bulging too. His treating physician was required to probe around the eyeball without any anesthesia in order to determine the extent of Patrick's

injuries." The plaintiff also underwent two surgeries, which included the removal of bone fragments from his face, and the insertion of facial implants to rebuild his face.

Webb agrees that it was a serious incident, but believes that it has been blown

**"That scholarship would allow Patrick to continue in school in pursuit of a graduate degree in his chosen field: criminal justice," notes the suit.**

out of proportion. "To my knowledge he was not within an inch of losing his sight, but there were some injuries that were sustained and those injuries from what I understand have been corrected," said Webb.

The Geffrand brothers were kicked off the football team and charged with first-degree assault, however, a grand jury declined to indict the brother's on the assault charges in July.

The alleged assault itself was not the only wrong Grant suffered. According to Grant, he was asked to conceal the situation surrounding his injuries immediately after the attack occurred, and on the way to the hospital the team's trainer told Grant to "lie and cover up the fact that his injuries were at the hands of his teammates. Out of fear and desire to play, Patrick lied as instructed, telling the doctor that he was horsing around in the locker room and hit his eye on a locker door."

Grant returned to play football later in the season but had to quit after suffering complications from a "hard hit" he took in practice, and was told by a doctor that he should no longer play football but was allegedly promised by Strong that his scholarship would be renewed.

"In apparent recognition of Patrick's dedication to the football team and everything he suffered at the hands of his teammates and his willingness to play by the 'rules' set by Coach Strong and his staff," Strong promised Grant that his 2011-2012 athletic scholarship would remain in place, according to Webb.

"That scholarship would allow Patrick to continue in school in pursuit of a graduate degree in his chosen field: criminal justice," notes the suit.

However, that scholarship was allegedly terminated on January 4, 2012 and when Grant complained that the cancellation broke an agreement, Coach Strong, "simply ended the call and hung up the phone."

Of importance to the lawsuit is when the scholarship was cancelled. According to the ByLaw Blog, written by John Infante, a former compliance officer at NCAA Division I schools: "If the scholarship was cancelled mid-year, the odds that the cancellation violated NCAA rules are higher. Mid-year cancellations must be for specific reasons in the NCAA bylaws or for violating a term of the scholarship agreement. Any cancellation or non-renewal requires the student-athlete to be provided written notice from the financial aid office and a hearing opportunity."

Kenneth Klein, U of L athletics spokesman, said officials do not comment on pending litigation.

Grant is represented by Louisville attorney Gregg Hovious. ■