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NCAA HEAD COACH RESPONSIBILITIES LEGISLATION

*Joshua Lens**

A relatively recent change to NCAA legislation has placed increased responsibility and accountability on head coaches for NCAA violations within their programs. The legislation has caught numerous well-known and successful head coaches and universities in its crosshairs.

This Article examines the reasons for and ramifications of these revisions, particularly the legislation's rebuttable presumption of responsibility conferred on head coaches for actions of staff members. Based on NCAA documents and Committee on Infractions cases, the Article suggests action items for head coaches to undertake to help mitigate the likelihood of a head coach responsibilities allegation and finding. The Article explores procedural changes to the infractions process that would result in increased transparency about the NCAA Enforcement Staff's expectations of head coaches. This increased transparency would provide valuable information to head coaches that would assist them in promoting a compliant atmosphere and monitoring their staff members. Next, the Article compares head coach responsibilities legislation to the legal theory of respondeat superior. The analysis reveals that, while head coaches may be held vicariously liable for the actions of staff members, the ability to rebut the presumption of responsibility results in a more lenient standard than respondeat superior's imposition of strict liability on employers. Finally, the Article suggests removal of the legislation's rebuttable presumption and imposition of a strict liability standard as a means to increase the deterrent effect of head coach responsibilities legislation.

INTRODUCTION

A University of Louisville men's basketball staff member arranged striptease dances and sex acts for current and prospective student-athletes, some of whom were minors.¹ Assistant men's basketball coaches from the University of Arizona, Auburn University, Oklahoma State University, and the University of Southern California were all arrested and charged federally with fraud and corruption following an FBI investigation into the recruitment and exploitation of prospective student-athletes.² University of Mississippi ("Ole Miss") football staff members and boosters committed "[e]xtensive violations," primarily having to do with the recruitment of prospective student-athletes, in an "unconstrained booster culture."³ A Southern Methodist University ("SMU") men's basketball administrative assistant provided impermissible academic assistance to a highly recruited prospective student-athlete, which enabled him to receive fraudulent academic credit.⁴

Under NCAA head coach responsibilities legislation in effect since August 1, 2013, head coaches are presumed responsible for the actions of their staff members. Yet since that time, all of the above incidents occurred and serve as only a few examples of the myriad occasions where a sport staff member acted contrary to NCAA core principles. Why do staff members continue to engage in such activities? As these incidents increase in number and notoriety, can head coach responsibilities legislation better deter future incidents?

This Article provides a comprehensive explanation of NCAA head coach responsibilities legislation and its application. Part II describes the legislation and its rebuttable presumption, which provides head coaches a means to escape an allegation of a violation and resulting penalty. Part III reviews NCAA-suggested action items for head coaches to undertake to mitigate the likelihood of a Bylaw 11.1.1.1 allegation and incorporates analysis from Committee on Infractions ("COI") cases that discusses these action items. Head coaches—and their lawyers—facing charges of head coach responsibilities violations should find Part III useful when shaping a defense. Part IV begins by suggesting some procedural changes that would increase transparency of the Enforcement Staff's expectations of head coaches. Part IV goes on to compare head coach responsibilities legislation to the legal theory of respondeat superior, and details how head coach responsibilities legislation falls well short of respondeat superior's strict liability standard. In Part IV, the author advocates for a

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¹ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of Louisville Public Infractions Decision, 8 (June 15, 2017), https://www.ncaa.org/sites/default/files/2017INF_LouisvillePublicInfractionsDecisionF_20170615.pdf.

² Gary Parrish, Four College Basketball Assistant Coaches Hit with Federal Fraud, Corruption Charges, CBS SPORTS (Sep. 26, 2017), <https://www.cbssports.com/college-basketball/news/four-college-basketball-assistant-coaches-hit-with-federal-fraud-corruption-charges/>.

³ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of Mississippi Public Infractions Decision, 1 (Dec. 1, 2017), https://www.ncaa.org/sites/default/files/Dec2017COI_MississippiIIInfractionsDecisionPUBLIC_20171201.pdf.

⁴ See NAT'L COLLEGIATE ATHLETIC ASS'N, Southern Methodist University Public Infractions Decision, 2 (Sep. 29, 2015), http://thesportsesquires.com/wp-content/uploads/2014/05/smu_public_decision.pdf.

major change—eliminating the ability to rebut the presumption and thus removing a head coach’s means of escaping vicarious liability—and shows how it would increase both accountability and the deterrent effect and help lessen the number of scandals plaguing the NCAA.

I. NCAA HEAD COACH RESPONSIBILITIES LEGISLATION BACKGROUND, REBUTTABLE PRESUMPTION OF RESPONSIBILITY, AND PROCESS

A. *Background of NCAA Head Coach Responsibilities Legislation*

Until August 1, 2013, NCAA legislation afforded head coaches plausible deniability of activities within their programs.⁵ Previously, head coaches were presumed *knowledgeable* of actions of staff members who report to them.⁶ A head coach would rebut the presumption for his staff member’s violation when he showed he set a proper tone of compliance.⁷ By successfully rebutting the presumption of knowledge, the head coach would avoid having his staff member’s violation imputed on the head coach. Thus, the head coach would escape both liability for a head coach responsibilities violation and imposition of a penalty on the head coach. National media has pointed to national champion head coaches such as John Calipari (University of Kentucky men’s basketball) and Pete Carroll (former University of Southern California football) as two examples of head coaches who (successfully) claimed to be unaware of significant NCAA violations within their programs and thus escaped being held personally responsible for them.⁸

NCAA member schools grew tired of hearing the head coach, which the Committee on Infractions (“COI”) has described as a position of “authority and trust,”⁹ express shock and dismay that his rogue, rule-breaking assistant coach surprisingly committed a recruiting violation. “These [coaches] generally know every time somebody sneezes on their team,” said Tom Yeager, a nine-year COI member and 31-year commissioner of the Colonial Athletic Association.¹⁰ Former University of Southern California and current Florida Atlantic University head football coach Lane Kiffin recognized that people were tired of a head coach doing something and an assistant coach being the one punished.¹¹

⁵ Dennis Dodd, *Inside College Football: Hugh Freeze Faces an NCAA Issue Calipari, Carroll Avoided*, CBS SPORTS (Mar. 3, 2017), <https://www.cbssports.com/college-football/news/inside-college-football-hugh-freeze-faces-an-issue-calipari-carroll-avoided/>.

⁶ Gary Brown, *DI Board of Directors Approves Overhauled Enforcement Structure*, NCAA (Oct. 30, 2012), <https://www.ncaa.com/news/ncaa/article/2012-10-30/di-board-directors-approves-overhauled-enforcement-structure>.

⁷ *Id.*

⁸ Dodd, *supra*, note 5.

⁹ See NAT’L COLLEGIATE ATHLETIC ASS’N, Lamar University Public Infractions Decision, 8 (Sep. 22, 2016), https://www.ncaa.org/sites/default/files/Sep2016INF_LamarPublicInfractionsDecision_20160922.pdf. As explained in this written decision involving NCAA rules violations at Lamar University, the COI is an independent body of the NCAA charged with deciding infractions cases involving member institutions and their staffs.

¹⁰ Gregg Clifton, Paul Kelly, & Bethany Swaton Wagner, *New NCAA Rule Puts Premium on Head Coaches’ Accountability*, SPORTS BUSINESS JOURNAL (January 7, 2013), <https://www.sportsbusinessdaily.com/Journal/Issues/2013/01/07/Opinion/Clifton-Kelly-Wagner.aspx>.

¹¹ Pedro Moura, *Kiffin on New NCAA Enforcement Plans*, ESPN LOS ANGELES (Oct. 31, 2012), https://www.espn.com/blog/los-angeles/usc/post/_/id/15380/kiffin-chimes-in-on-new-ncaa-enforcement-plans.

NCAA President Mark Emmert became concerned that head coaches' temptations to break rules would increase if they believed they wouldn't get caught or the consequences wouldn't be harsh.¹² Temptations to act unethically and develop a win-at-all-costs mentality, have increased with the increasing commercialization of big-money college athletics.¹³ For some, this led to a risk-reward analysis when it came to violating NCAA rules.¹⁴

These realizations spurred movement to increase both accountability on head coaches and consequences for head coaches for rule violations in their programs.¹⁵ Thus, under NCAA legislation adopted by the membership, effective August 1, 2013, head coaches at Division I institutions are now presumed *responsible* (no longer merely "knowledgeable") for the actions of those who report to them.¹⁶ Under the revised legislation (NCAA Bylaw 11.1.1.1), whether the head coach knew of his assistant coach's action is irrelevant.¹⁷ Even when a head coach doesn't know of his assistant coach's action, the COI presumes he should have.¹⁸

The strengthening of the legislation was intended to lessen the ability of head coaches to turn a blind eye to a staff member's impermissible conduct to avoid possible punishment.¹⁹ The revision from presumption of knowledge to presumption of responsibility means plausible deniability is no longer a viable defense for a head coach with violations in his program.²⁰

In addition to the imposition of the presumption of responsibility, Bylaw 11.1.1.1 requires head coaches to promote an atmosphere of compliance and monitor the activities of those who report to them.²¹ These duties become increasingly relevant when serious violations of NCAA rules occur in a coach's program.

B. *Process for Determining a Violation of Head Coach Responsibilities Legislation – The Rebuttable Presumption*

As part of the larger enforcement overhaul effective August 2013, the NCAA introduced a four-tier rules violation hierarchy that ranged from severe breaches ("Level I") to incidental infractions ("Level IV").²² Levels I and II are considered major infractions and consist of breaches that seriously

¹² Brown, *supra*, note 6.

¹³ Clifton, Kelly, & Swaton Wagner, *supra*, note 10.

¹⁴ *Id.*

¹⁵ Brown, *supra*, note 6.

¹⁶ NCAA, 2017-18 DIVISION I MANUAL § 11.1.1.1 (2017) [hereinafter MANUAL].

¹⁷ Nicole Auerbach, *Coaches Recognize NCAA Demand to be More Accountable*, USA TODAY (July 11, 2013), <https://www.usatoday.com/story/sports/ncaab/2013/07/11/college-basketball-coaches-rule-monitoring-2510215/>.

¹⁸ Dodd, *supra*, note 5.

¹⁹ Clifton, Kelly, & Swaton Wagner, *supra*, note 10.

²⁰ Gregg Clifton & John Long, *NCAA Head Coaches Beware: You are 'Presumptively' Responsible for Acts of Assistant Coaches, Administrators*, JACKSON LEWIS COLLEGE & PROFESSIONAL SPORTS LAW BLOG, (Mar. 1, 2018), <https://www.collegeandprosportslaw.com/collegiate-sports/ncaa-head-coaches-beware-you-are-presumptively-responsible-for-acts-of-assistant-coaches-administrators/>.

²¹ Manual, *supra*, note 16.

²² Brown, *supra*, note 6. Note the NCAA has since eliminated the Level IV category.

undermine or threaten the integrity of the NCAA Constitution (e.g., academic fraud, recruiting inducements).²³

When a Level I or II violation is alleged to have occurred within a sport program, the NCAA Enforcement Staff conducts an investigation.²⁴ If the underlying Level I or II violation (e.g., recruiting) is substantiated, and a member of the athletics staff is involved, the Enforcement Staff must decide whether a Bylaw 11.1.1.1 allegation against the head coach is also appropriate.²⁵ The head coach is presumed responsible for the violation, regardless of which staff member committed the violation or whether the head coach had actual knowledge of it.²⁶

While some believe “[t]he buck” now stops with head coaches, the presumption of responsibility is rebuttable and thus allows head coaches to escape being held responsible for a staff member’s actions.²⁷ Thus, during the investigation of a Level I or II violation in a sport program, the Enforcement Staff will gather information regarding whether the head coach promoted a compliant atmosphere and monitored his staff.²⁸ If the head coach’s actions satisfy the Enforcement Staff’s expectations for promotion of a compliant atmosphere and monitoring, the head coach successfully rebutted the presumption of responsibility for the staff member’s violation(s) and the Enforcement Staff will not bring a Bylaw 11.1.1.1 allegation against the head coach.²⁹ If, however, the head coach’s actions fail to satisfy the Enforcement Staff’s expectations, the head coach fails to rebut the presumption of responsibility for his staff member’s violation and the Enforcement Staff will charge the head coach with a Bylaw 11.1.1.1 violation.

The COI has ultimate authority in determining the merit of the Enforcement Staff’s allegation.³⁰ It is the head coach’s responsibility to present information to a COI hearing panel demonstrating promotion of a compliant atmosphere and monitoring.³¹ In effect, when a head coach fails to rebut the presumption of responsibility in the eyes of the Enforcement Staff, the COI will conduct its own Bylaw 11.1.1.1 analysis to determine whether the head coach rebutted the presumption.

If the COI ultimately concludes a head coach fails to rebut the presumption and thus violated Bylaw 11.1.1.1, he is responsible for his staff member’s violation and may be suspended, pursuant to a “show-cause order,” for up to an entire season for a Level I (severe breach of conduct) violation

²³ *Id.*

²⁴ RESPONSIBILITIES OF DIVISION I HEAD COACHES: UNDERSTANDING RULES COMPLIANCE AND MONITORING, http://www.ncaa.org/sites/default/files/2018DIEnf_HeadCoachResponsibilites_20180411.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Bennett Speyer, *The Buck Stops Here: Head Coach Responsibility and Guidelines from the Boeheim Case*, SCHUMAKER SPORTS, (Jan. 25, 2016), <https://shumakersportsreport.com/2016/01/25/the-buck-stops-here-head-coach-responsibility-and-guidelines-from-the-boeheim-case/>.

²⁸ DIVISION I ENFORCEMENT CHARGING GUIDELINES, www.ncaa.org/enforcement/division-i-enforcement-charging-guidelines.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

and up to half of a season for a Level II (significant breach of conduct) violation.³² The level of the Bylaw 11.1.1.1 violation is presumed to correspond to the level of the underlying violation (e.g., a violation of Bylaw 11.1.1.1 resulting from underlying Level II violations is presumed to be a Level II violation).³³

Under the August 2013 enforcement overhaul, head coaches may also be suspended for identified Level III (breach of conduct) violations committed by assistant coaches or staff members (e.g., exceeding the permissible number of recruiting contacts with a prospective student-athlete, providing team gear, or other inducements to prospective student-athletes).³⁴ The assistant coach or staff member who committed the violation would also face suspension.³⁵

Responses of head coaches to the head coach responsibilities legislation and process have varied. Ohio State University head football coach Urban Meyer appreciates the legislation's deterrent effect; for example, believing that, for the first time, there is real fear of the NCAA's bylaws and penalties.³⁶ Other coaches have commented on the increased clarity. Baylor University head men's basketball coach, Scott Drew, for example, appreciates knowing the penalties as "[i]t makes things fairer, easier to understand and follow."³⁷ Others have focused on the fact that they can be held responsible for the actions of staff members. However, comments by Kiffin and Michigan State University head men's basketball coach, Tom Izzo, fail to acknowledge the ability to rebut the presumption of responsibility for a staff member's violation. Kiffin simply expressed concern that it's hard to know what his staff members and players are doing but the rules come with the job.³⁸ Izzo agrees "that if an assistant does something wrong, it should be on the head coach."³⁹ Izzo's comments align with the beliefs of the COI, as the COI has stated in its written case decisions that Bylaw 11.1.1.1 sets the standard of conduct for head coaches.⁴⁰

III. GUIDANCE FOR REBUTTING THE PRESUMPTION OF RESPONSIBILITY AND THUS MITIGATING THE LIKELIHOOD OF A BYLAW 11.1.1.1 CHARGE OR FINDING

Upon learning of the Bylaw 11.1.1.1's presumption of responsibility for head coaches, Meyer questioned whether some head coaches would feel urgency to implement changes within their programs until a big-name head coach at a premier program was penalized significantly.⁴¹ To one

³² Responsibilities of Division I Head Coaches, *supra*, note 24.

³³ See NAT'L COLLEGIATE ATHLETIC ASS'N, Jackson State University Public Infractions Decision, 6 (July 1, 2016), https://www.ncaa.org/sites/default/files/INF_JacksonStatePublicDecision_20160701.pdf.

³⁴ HEAD COACH RESPONSIBILITY AND SUSPENSIONS FOR CURRENT SECONDARY VIOLATIONS AND PROPOSED LEVEL III VIOLATIONS, (Oct. 10, 2012), http://www.ncaa.org/sites/default/files/Att4_Level+III+Head+Coach+Responsibility+and+Suspensions.pdf.

³⁵ *Id.*

³⁶ John Infante, *Head Coach Responsibility a Potential Gamechanger*, ATHNET, <https://www.athleticscholarships.net/2013/06/13/head-coach-responsibility-a-potential-gamechanger.htm>.

³⁷ Auerbach, *supra*, note 17.

³⁸ Moura, *supra*, note 11.

³⁹ Auerbach, *supra*, note 17.

⁴⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, Mississippi Valley State University Public Infractions Decision, 7 (Mar. 24, 2017), https://www.ncaa.org/sites/default/files/2017INF_MVSUPublicInfractionsDecision_20170324.pdf.

⁴¹ Infante, *supra*, note 36.

head football coach from a “Power Five Conference,” the recent finding of failure to monitor by Hugh Freeze—the first Power Five head football coach to be charged with a Bylaw 11.1.1.1 violation—served as a lesson on “the whole head coach control thing.”⁴² Recent cases involving Rick Pitino, Larry Brown, and Freeze should instill urgency.

What should a head coach do to attempt to rebut the presumption of responsibility for a staff member’s violation and thus mitigate the likelihood of a Bylaw 11.1.1.1 charge? What must a head coach show the COI in order to escape culpability for a Bylaw 11.1.1.1 charge against him?

Per the NCAA, there is no checklist or safe harbor of which head coaches may take advantage in order to satisfy Bylaw 11.1.1.1.⁴³ However, the NCAA has provided memos, documents, and guidelines that provide the following suggested action items: communication, monitoring, and documentation. If these action items are undertaken, they could mitigate the likelihood of a head coach responsibilities violation allegation or finding. Further, the COI has provided hints or outright suggestions for head coaches in published case decisions relative to these three action items.

A. *Communication*

In determining whether a head coach promoted a compliant atmosphere and monitored, the Enforcement Staff will consider the head coach’s overall communications that demonstrate his commitment to compliance.⁴⁴ For example, a head coach should meet with his staff members to discuss the head coach’s compliance expectations.⁴⁵ The head coach should memorialize this practical, yet important, step by incorporating a written document outlining, among other things, his commitment to ethical conduct and expectations and plans for regular communication between the coaching and compliance staffs.⁴⁶

A head coach should also maintain ongoing communication with his athletics director, compliance staff, and coaching staff regarding compliance expectations.⁴⁷ Interactions with the compliance staff should be regular and head coaches should ask before they act.⁴⁸ The COI affirmed the importance of head coaches constantly communicating with the compliance staff in the University of Pacific decision, described more in depth below.⁴⁹

⁴² Pete Thamel, *What Will Happen to Ole Miss, Hugh Freeze in NCAA Investigation? Experts Weigh In*, SPORTS ILLUSTRATED (Feb. 24, 2017), <https://www.si.com/college-football/2017/02/24/ole-miss-rebels-ncaa-investigation-hugh-freeze>.

⁴³ DIVISION I ENFORCEMENT CHARGING GUIDELINES, *supra*, note 28.

⁴⁴ *Id.*

⁴⁵ HEAD COACH RESPONSIBILITIES REGARDING COMPLIANCE WITH AND VIOLATIONS OF NCAA RULES, <https://msu.edu/~msuncaa/HeadCoachResponsibility%20Update%207.23.13.pdf>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ DIVISION I ENFORCEMENT CHARGING GUIDELINES, *supra*, note 28.

⁴⁹ Note, however, that even when a compliance staff member lauds the head coach’s commitment to compliance at the COI hearing and the COI’s written decision acknowledges appreciation of a head coach’s 22-year commitment to diligently filling out paperwork, attending on-campus compliance meetings, and sharing applicable legislation with his student-athletes, a head coach can still fail to rebut the presumption of responsibility for a violation in his program when he fails to identify an issue and clearly bring it to the compliance staff’s attention. *See* NAT’L COLLEGIATE ATHLETIC

It follows, then, that the Enforcement Staff and COI have particularly emphasized whether head coaches provide access to, or require staff members to attend, rules education sessions provided by the compliance staff.⁵⁰ Examples include the Saint Francis University and California State University, Sacramento cases. However, interaction between head coaches and compliance staff members is worthless if head coaches don't heed the education and guidance they receive. The Georgia University case is a case where this did not occur, and the COI penalized the head coach as a result. This Article describes these cases, which clearly establish the need for head coaches to interact with their university's compliance staff.

1. University of the Pacific (Decision Released September 20, 2017)

The University of the Pacific ("Pacific") case is the second and most recent occasion in which the Enforcement Staff charged a head coach with a violation of head coach responsibilities legislation and the COI concluded the head coach successfully rebutted the presumption.⁵¹ Underlying violations included an impermissible financial aid arrangement within the baseball program.⁵²

The head coach sought input and approval of the associate athletic director who oversaw financial aid before providing the impermissible financial aid.⁵³ The head "coach was unsure how the extra financial aid could be applied, so he did exactly what he should have done—he consulted with the associate athletic director who oversaw financial aid compliance."⁵⁴ The violation occurred due to a legitimate misunderstanding between the head coach and administrator.⁵⁵

The evidence showed, however, that the violation was an isolated departure from the head coach's previously compliant behavior.⁵⁶ Hearing testimony included the senior compliance officer, who stated that the head coach was very communicative with the compliance staff, asked questions, and was very engaged in compliance during his 12-year career at Pacific.⁵⁷

Because the COI concluded the head coach set a proper tone for compliance and monitored his staff, it concluded the head coach did not violate head coach responsibilities legislation.⁵⁸ Head coaches should take note of the importance of regular communication with the compliance staff, generally compliant behavior, and the importance of following proper protocols such as seeking guidance from the appropriate individual when questions arise.

ASS'N, University of Tennessee at Chattanooga Public Infractions Decision, 10 (Mar. 27, 2018), http://www.ncaa.org/sites/default/files/March2018INF.UTC-PUBLIC-DECISION_20180327.pdf.

⁵⁰ DIVISION I ENFORCEMENT CHARGING GUIDELINES, *supra*, note 28.

⁵¹ The first such case was the Wichita State University case, discussed *infra* page 26.

⁵² *See* NAT'L COLLEGIATE ATHLETIC ASS'N, University of the Pacific Public Infractions Decision, 26 (Sep. 20, 2017), https://www.ncaa.org/sites/default/files/Sep2017INF_PacificPublicDecision_20170920.pdf.

⁵³ *Id.* at 26-27.

⁵⁴ *Id.* at 27.

⁵⁵ *Id.* at 26-27.

⁵⁶ *Id.* at 27.

⁵⁷ *Id.*

⁵⁸ *Id.*

2. Saint Francis University (Decision Released August 28, 2014)

Per the NCAA's online database "LSDBi," the COI's first crack at applying the revised Bylaw 11.1.1.1 was its decision involving Saint Francis University's football program.⁵⁹ The underlying violations resulted from the head football coach and three of his assistant coaches providing or arranging for provision of impermissible inducements and extra benefits (impermissible transportation, meals, and lodging) to four prospective or current football student-athletes and a parent of one of the student-athletes.⁶⁰ The value of the inducements and benefits totaled \$1,450.⁶¹

The COI processed the case as a Level II violation.⁶² Thus, though he wasn't solely responsible for the violations, the head coach was presumed responsible for them.

In its analysis of the head coach responsibilities allegation, the COI emphasized the importance of rules education in rebutting the presumption. "[T]he coaches violated long-standing, well-established rules...."⁶³ The coaches claimed a lack of awareness of rules, to which the COI countered that the coaches could have benefitted from attending departmental rules education sessions that they often chose not to attend.⁶⁴ In fact, the COI concluded the head coach failed to promote a compliant atmosphere by failing to require his entire staff to participate in monthly NCAA compliance education meetings.⁶⁵ Thus, the head coach failed to rebut the presumption that he was responsible for the violation within his program.⁶⁶ The COI concluded that the violation of Bylaw 11.1.1.1 was Level II.⁶⁷

3. California State University, Sacramento (Decision Released November 4, 2015)

Underlying violations in this case involving California State University, Sacramento include impermissible recruiting by a now former assistant coach.⁶⁸ The assistant coach documented the impermissible recruiting activities and provided write-ups of them to the head coach, who did not report them to administration.⁶⁹ The head coach also admitted to placing the assistant coach in a "bad situation" by instructing him to take pictures of prospective student-athletes.⁷⁰ By doing so, the assistant coach would likely engage in face-to-face communications during time periods when such

⁵⁹ LSDBi is the NCAA's public online database that includes information on NCAA legislation, NCAA legislative proposals, and major infractions cases. It can be found at <https://web3.ncaa.org/lstdbi/>.

⁶⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, Saint Francis University Public Infractions Decision, 1 (Aug. 28, 2014), <https://www.ncaa.org/sites/default/files/StFrancisPublicInfractionsDecision.pdf>.

⁶¹ *Id.* at 3.

⁶² *Id.* at 2.

⁶³ *Id.* at 7.

⁶⁴ *Id.*

⁶⁵ *Id.* at 4.

⁶⁶ Note the COI applied both the prior version of (then) Bylaw 11.1.2.1 and the revised version of Bylaw 11.1.1.1 in its analysis, as the revision occurred during the period of the relevant violations.

⁶⁷ See Saint Francis University, 4, *supra*, note 60.

⁶⁸ See NAT'L COLLEGIATE ATHLETIC ASS'N, California State University, Sacramento Public Infractions Decision, 1 (Nov. 4, 2015), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102454>.

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 10.

interactions violated NCAA recruiting rules.⁷¹ All parties agreed the assistant coach violated “foundational recruiting bylaws” and that the head coach was responsible for them⁷²

In its analysis of the Bylaw 11.1.1.1 charge, the COI reaffirmed the importance of head coaches providing staff members access to compliance rules education. “[T]he head coach acknowledged that he could have been better at providing his football program with rules education.”⁷³ The COI made this observation when listing the ways in which the head coach failed to promote a compliant atmosphere.⁷⁴ The COI determined that all violations were Level II.⁷⁵

4. University of Georgia (Decision Released December 16, 2014)

The University of Georgia enjoys an immensely successful swimming and diving program, due in large part to the contributions of its highly successful head coach, Jack Bauerle.⁷⁶ In a 2014 case, the COI concluded Bauerle provided an impermissible benefit to a male student-athlete and failed to promote an atmosphere of compliance.⁷⁷ The case is not one in which liability is imputed on the head coach for (in)action(s) of a staff member but is included in this article due to the COI’s strong emphasis on the importance of communication between a head coach and the compliance staff.

The underlying impermissible benefit violation occurred when Bauerle became concerned that the student-athlete may fail a course, rendering him ineligible to retain academic eligibility and compete.⁷⁸ Toward the end of the semester, Bauerle reached out to administrators to request that the student-athlete add an independent study course to create a “safety net” and ensure competition eligibility for the upcoming spring 2014 semester.⁷⁹ The senior associate athletic director for academics and eligibility instructed Bauerle that there was “nothing the head coach could do” and that adding an independent study course wasn’t recommended.⁸⁰

On the last day of the—and despite both guidance to the contrary and existence of a university policy prohibiting coaches from contacting instructors—Baurle propositioned a professor, who was a friend, to add a pass/fail independent study class to the student-athlete’s schedule for the current

⁷¹ *Id.*

⁷² *Id.* at 6, 8.

⁷³ *Id.* at 10.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1.

⁷⁶ Bauerle lists his favorite career achievement as being chosen as the head coach of the United States’ women’s swimming team for the 2008 Olympics. In his distinguished career, he has won seven team national championships, twelve Southeastern Conference championships, been chosen as the Southeastern Conference coach of the year 18 times, and the national women’s coach of the year seven times. Bauerle’s overall record ranks first among active NCAA coaches, first all-time in the Southeastern Conference, and third on the all-time list. Georgiadogs.com Home of Georgia Athletics, www.georgiadogs.com/sports/c-swim/mtt/jack_bauerle_668925.html.

⁷⁷ See NAT’L COLLEGIATE ATHLETIC ASS’N, University of Georgia Public Infractions Decision, 1 (Dec. 16, 2014), <https://www.ncaa.org/sites/default/files/UGA-Infractions%20DecisionPUBLIC.pdf>.

⁷⁸ *Id.* at 4. We would be remiss if we failed to point out that the irony that the student-athlete passed a math class and would have been eligible even without the special arrangement from his head coach. *Id.* at 6.

⁷⁹ *Id.* at 4.

⁸⁰ *Id.*

term.⁸¹ Bauerle and the friend/professor agreed that the student-athlete would receive an incomplete grade until the student-athlete completed the work during the following semester.⁸² The independent study course was an upper level course that had prerequisites that the professor agreed to waive.⁸³

However, the professor unintentionally and prematurely awarded a passing grade.⁸⁴ Upon learning of the arrangement between Bauerle and his friend/professor, university administration withheld both the student-athlete and head coach from competition indefinitely.⁸⁵ Thus, Bauerle—who had been part of the university’s community for over 40 years as a student-athlete and coach—missed what was scheduled to be his 500th career competitive team victory.⁸⁶

The COI concluded that this arrangement was “leveraged by (Bauerle’s) position on campus and/or his relationship with a faculty member.”⁸⁷ The COI ultimately categorized both the impermissible benefit (the special arrangement) and head coach responsibility violations as Level II.⁸⁸ With respect to the head coach responsibility violation, the COI stated:

A head coach should demonstrate a commitment to compliance by fostering regular and ongoing communications with athletics department staff. He or she should maintain constant dialogue with the compliance office to discuss key issues or concerns in a sport program and to ensure program resources.

He or she is expected to set the tone for what is and is not acceptable conduct. He or she is expected to lead by example.

The head coach’s decision-making with regard to the student-athlete in this case failed to demonstrate such leadership...During coaches meetings he received clear and direct instruction not to contact professors about student-athletes. And yet that is precisely what he did...The head coach acted contrary to institutional policy and contrary to the advice and caution provided by the staff responsible for athletic academic services and athletics eligibility certification. And he failed to consult with the compliance office. Quite simply, he should have allowed the academic and athletics compliance staff to address the student-athlete’s situation without his interference.⁸⁹

⁸¹ *Id.* at 1, 4-5.

⁸² *Id.* at 1-2, 5.

⁸³ *Id.* at 5.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 2.

⁸⁶ *Id.* at 2, 4.

⁸⁷ *Id.* at 11.

⁸⁸ *Id.* at 2.

⁸⁹ *Id.* at 10-11.

Penalties stemming from the head coach responsibilities violation included suspension of Bauerle from 50 percent of the following regular season and a one-year prohibition on any recruiting activities for the head coach.⁹⁰ More generally, the case provides strong language from the COI itself on the importance of “constant dialogue” between head coaches and compliance staff members.

B. *Monitoring*

In order to mitigate the likelihood of a Bylaw 11.1.1.1 charge or finding, the NCAA has also recommended monitoring of staff members as an action item that demonstrates a head coach’s commitment to compliance (note the redundancy here as Bylaw 11.1.1.1 explicitly requires head coaches to monitor staff members).⁹¹ Former University of Southern California Athletic Director, Pat Haden, described Bylaw 11.1.1.1’s monitoring obligation as a requirement to be “constantly vigilant.”⁹²

This monitoring obligation includes: (1) Actively looking for red flags of potential violations and asking questions of staff members⁹³; (2) Regular solicitation of feedback from staff members concerning the program’s overall compliance environment and biggest areas for potential mistakes or ethical traps⁹⁴; and (3) Ensuring staff members immediately notify the compliance staff about concerns or red flags.⁹⁵ The COI has reinforced the importance of these action items in several cases described in more detail below.⁹⁶

1. Head coaches should actively look for red flags of potential violations and ask questions of staff members.

The NCAA’s recommendation for head coaches to actively look for red flags of potential violations and ask questions of staff members was confirmed by the COI in cases involving Southeastern Louisiana University and the University of Louisville.

⁹⁰ *Id.* at 13.

⁹¹ DIVISION I ENFORCEMENT CHARGING GUIDELINES, *supra*, note 28.

⁹² Moura, *supra*, note 11.

⁹³ Note the NCAA separates looking for red flags from asking questions into separate recommendations but the author combines them into a single recommendation due to how closely they’re related.

⁹⁴ Note recommendation (2) seems similar to recommendation (1); however context clues lead the authors to believe (2) is directed more at general concerns (real and potential) as opposed to more narrow concerns contemplated by recommendation (1).

⁹⁵ DIVISION I ENFORCEMENT CHARGING GUIDELINES, *supra*, note 28.

⁹⁶ The author would be remiss without pointing out the University of Southern Mississippi case in which the now former head men’s basketball coach and his staff orchestrated and carried out a plan of academic fraud by which staff members traveled to the locale of many potential two-year transfer prospects and completed work on their behalf so as to gain collegiate eligibility. The COI noted that while, technically, the head coach monitored actions taken by his staff members, he did so as they engaged in academic fraud of which not only was he aware but that he orchestrated. The COI concluded that the head coach committed a Level I violation of head coach responsibilities legislation. The head coach received a ten-year show-cause order. NAT’L COLLEGIATE ATHLETIC ASS’N, The University of Southern Mississippi Public Infractions Decision (Apr. 8, 2016),

http://grfx.cstv.com/photos/schools/smiso/genrel/auto_pdf/2015-16/misc_non_event/public-infractions-report.pdf.

a. Southeastern Louisiana University (Decision Released April 9, 2015)

Violations within Southeastern Louisiana University's women's volleyball program included an assistant coach arranging for two prospective student-athletes to receive cost-free housing with current student-athletes during the summer prior to dormitories opening.⁹⁷ This violated NCAA legislation prohibiting staff members from arranging for financial aid or benefits to a prospective student-athlete (*e.g.*, free or reduced cost housing).⁹⁸ The COI categorized provision of the impermissible benefits a Level II violation.⁹⁹

When analyzing the Enforcement Staff's Bylaw 11.1.1.1 charge against the head coach, the COI noted the head coach did not take steps to ensure the prospects' housing complied with NCAA legislation.¹⁰⁰ Per the COI, this showed the head coach failed to "establish" (note the departure from the legislated term "promote") an atmosphere of rules compliance.¹⁰¹ Further, the head coach did not question the involved assistant coach about the prospects' living arrangements, meaning that the former head coach failed to monitor the activities of the assistant coach as required by Bylaw 11.1.1.1.¹⁰²

b. University of Louisville (Decision Released June 15, 2017)

Readers may be familiar with the facts of the case involving the men's basketball program at the University of Louisville. However, the case deserves a detailed look for several reasons. Due to its high-profile nature, several pre-COI hearing documents have been made public. These documents provide insight into the Enforcement Staff's beliefs on the monitoring requirement, including the aforementioned recommendations to actively look for red flags, ask questions of staff members, and regularly solicit feedback from staff members regarding the overall compliance environment.

The case resulted from a men's basketball operations director both paying and arranging for current and prospective student-athletes on campus visits to engage in illicit activities with strippers and prostitutes.¹⁰³ The Enforcement Staff, and later the COI, characterized the operations director's provision of these services as: (1) unethical conduct by the operations director; (2) impermissible recruiting inducements for prospective student-athletes; and (3) impermissible benefits for current student-athletes.¹⁰⁴ The Enforcement Staff categorized each of the violations as Level I, a categorization the COI eventually confirmed.¹⁰⁵

⁹⁷ See NAT'L COLLEGIATE ATHLETIC ASS'N, Southeastern Louisiana University Public Infractions Decision, 8 (Apr. 9, 2015), <https://www.ncaa.org/sites/default/files/SELA%20PUBLIC%20Infractions%20Decision.pdf>.

⁹⁸ *Id.* at 14.

⁹⁹ *Id.* at 15.

¹⁰⁰ *Id.* at 17.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of Louisville Public Infractions Decision, 1 (June 15, 2017), https://www.ncaa.org/sites/default/files/2017INF_LouisvillePublicInfractionsDecisionF_20170615.pdf.

¹⁰⁴ *Id.* at 14.

¹⁰⁵ *Id.* at 15.

After it concluded its investigation, the Enforcement Staff alleged that legendary head men's basketball coach Rick Pitino¹⁰⁶ violated head coach responsibilities legislation as he was presumed responsible for the underlying violations and did not rebut the presumption:

Specifically, Pitino did not demonstrate that he monitored (the operations director), in that he failed to frequently spot-check the program to uncover potential or existing compliance problems, including actively looking for and evaluating red flags, asking pointed questions and regularly soliciting honest feedback to determine if monitoring systems were functioning properly regarding (the operations director's) activities and interactions with then men's basketball prospective and current student-athletes visiting and attending the institution.¹⁰⁷

In response to the charge against Pitino, the University of Louisville argued that Pitino fostered a culture of NCAA compliance within his program and exercised appropriate oversight of the operations director.¹⁰⁸ Further, the operations director's "furtive conduct was not detectable by reasonable monitoring practices, as [he] purposefully intended to avoid detection."¹⁰⁹

In Pitino's response to the Enforcement Staff's allegations, he cited examples of questions he asked that he believed fulfilled his monitoring obligation (*e.g.*, asking visiting prospective student-athletes what they did the night before).¹¹⁰ There were no red flags that put Pitino on notice of the operations director's illicit activities.¹¹¹ Pitino and Louisville argued that Pitino promoted compliance and effectively monitored the operations director and could not be held responsible for, or expected

¹⁰⁶ Pitino is the first coach in NCAA history to win a national championship at two different schools and the first to take three different teams to the NCAA Final Four. His winning percentage ranks him eleventh among active coaches. Pitino was inducted into the Naismith Memorial Basketball Hall of Fame in 2013. Louisville Cardinals Athletics, www.gocards.com/coaches.aspx?rc=338. Following the FBI investigation into college basketball, Pitino was terminated and filed a breach of contract lawsuit as a result of his termination. Michael McCann, *Does Rick Pitino Have a Case Against Louisville? Breaking Down His Lawsuit*, SPORTS ILLUSTRATED (Dec. 1, 2017), <https://www.si.com/college-basketball/2017/12/01/louisville-scandal-rick-pitino-lawsuit-analysis>.

¹⁰⁷ Louisville Courier-Journal, Notice of Allegations, <https://drive.google.com/viewerng/viewer?url=http://interactives.courier-journal.com/graphics/FINAL%2520NOTICE%2520OF%2520ALLEGATIONS%2520UNIVERSITY%2520OF%2520LOUISVILLE%2520%2528REDACTED%2529.pdf>.

¹⁰⁸ Louisville Courier-Journal, University of Louisville Response to Notice of Allegations, www.scribd.com/document/337562521/U-of-L-s-response-to-the-NCAA-s-NOA.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* However, to what specific and detailed *evidence* was Pitino able to point? Justin Sievert, *How Rick Pitino Will Form a Defense Against the NCAA*, SPORTING NEWS (Oct. 27, 2015), <http://www.sportingnews.com/ncaa-basketball/news/rick-pitino-louisville-basketball-ncaa-enforcement-process-head-coach-monitoring/1cfw6poi8p95117bnsdlc2j9te>.

¹¹¹ Louisville Courier-Journal, Rick Pitino Response to Notice of Allegations, <https://www.scribd.com/document/337562520/Rick-Pitino-s-Response-to-the-NCAA-s-NOA>. If the NCAA had credible evidence Pitino knew or should have known of the operations director's improper actions, it would have charged him with failure to promote a compliant atmosphere and/or unethical conduct. Jay Bilas, *The NCAA Completely Erred in How it Treated Rick Pitino*, ABC NEWS via ESPN, (Oct. 20, 2016), <http://abcnews.go.com/Sports/ncaa-completely-erred-treated-rick-pitino/story?id=42944242>.

to watch 24/7, a rogue staff member who purposefully violated NCAA rules.¹¹² Thus, Pitino contended the Enforcement Staff overreached by charging him.¹¹³

In response, the Enforcement Staff maintained that Pitino failed to fulfill “basic elements of a head coach’s obligation to monitor”: (1) conduct frequent spot checks; (2) actively look for red flags; (3) ask pointed questions; and/or (4) solicit honest feedback from the operations director about activities occurring under his supervision.¹¹⁴ “If Pitino saw no red flags in connection with [the operations director’s] interactions with then prospective and current student-athletes, it was because he was not looking for them.”¹¹⁵ The Enforcement Staff further argued that a head coach cannot completely delegate away responsibility for activities involving the operations director’s interactions with prospects and student-athletes or their activities in the dormitory.¹¹⁶ The Enforcement Staff alleged the head coach responsibilities violation as Level I “because the head coach failed to demonstrate that he monitored a member of his staff, resulting from underlying Level I violations.”¹¹⁷

The COI sided with the Enforcement Staff, concluding Pitino failed to monitor the operations director when Pitino: (1) created the residential environment where the violations occurred and trusted the operations director to follow NCAA rules; and (2) delegated monitoring of the operations director to assistant coaches without appropriate oversight.¹¹⁸

Pitino’s monitoring deficiency was evidenced by the fact that he created the living arrangements in which the violations occurred and entrusted the operations director without verifying his actions.¹¹⁹ Pitino essentially placed a peer of the student-athletes in a position of authority over both the student-athletes and visiting prospects and assumed all would behave appropriately in an environment that was essentially a basketball dormitory.¹²⁰ In such a setting, Pitino had a responsibility to “ensure” the operations director complied with NCAA rules.¹²¹ More specifically, a head coach may not simply trust an individual to know NCAA rules and do the right thing.¹²²

Further, by Pitino’s own admission, the coaching staff did not know what occurred in the dormitory at night.¹²³ When prospects came to breakfast the following morning, Pitino would ask them only “standard generic questions” about their time on campus.¹²⁴ “The head coach’s general

¹¹² B. David Ridpath, *NCAA Enforcement is Not Buying What Pitino and Louisville are Saying*, FORBES (Mar. 26, 2017), <https://www.forbes.com/sites/bdavidridpath/2017/03/26/ncaa-enforcement-is-not-buying-what-pitino-and-louisville-are-saying/#23c5cde349e1>.

¹¹³ Louisville Courier-Journal, *supra*, note 109.

¹¹⁴ Louisville Courier-Journal, *NCAA Enforcement Reply to Response to Notice of Allegations*, <https://drive.google.com/viewerng/viewer?url=http://interactives.courier-journal.com/docs/NCAA-response-REDACTED.pdf>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Louisville Courier-Journal, *supra*, note 113.

¹¹⁸ Louisville, *supra* note 113 at 19.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 20.

¹²³ *Id.*

¹²⁴ *Id.*

questions to prospects did not uncover the stripteases and prostitution that occurred in Minardi Hall.”¹²⁵ Similarly, Pitino’s inquiries of the operations director were limited to questions about how the prospect was enjoying his time on campus and where Louisville ranked on the prospect’s list.¹²⁶ Pitino failed to meet his responsibility to monitor the former operations director, and is thus responsible for his actions.¹²⁷

Second, Pitino claimed he delegated the monitoring of the operations director’s activities to assistant coaches.¹²⁸ However, the assistant coaches were unaware of this responsibility.¹²⁹ “If the head coach expected his assistants to monitor the former operations director, he did not communicate it to them clearly.”¹³⁰ Consequently, neither Pitino, who had ultimate responsibility, nor his assistant coaches monitored the operations director’s activities with visiting prospects on campus.¹³¹

Because Pitino failed to rebut his presumed responsibility for the conduct of the operations director, the COI concluded that Pitino committed a Level I violation of Bylaw 11.1.1.1.¹³² As a result of the case, the University of Louisville was forced to vacate its 2013 national title, the first time this has occurred in modern Division I men’s basketball history.¹³³ Head coaches familiar with this case should recognize their duty to ask probing questions of staff members designed to uncover potential or existing compliance problems.

2. Head coaches should regularly solicit feedback from staff members regarding the program’s overall compliance environment, gray areas, and potential traps.

In the Ole Miss case, the COI confirmed the Enforcement Staff’s recommendation that head coaches should regularly solicit feedback from staff members regarding the program’s overall compliance environment, gray areas, and potential traps. On February 22, 2017, the University of Mississippi (“Ole Miss”) released a video disclosing that it had received a Notice of Allegations (“NOA”) from the NCAA Enforcement Staff alleging violations within the Ole Miss football program.¹³⁴ The NOA alleged 21 violations within the program, including a Level I head coach

¹²⁵ *Id.* at 7.

¹²⁶ *Id.* at 20.

¹²⁷ *Id.*

¹²⁸ *Id.* at 21.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Jeff Greer, *Louisville Forced to Vacate 2013 Men’s Basketball Title After NCAA Denies Appeal*, USA TODAY (Feb. 20, 2018), <https://www.usatoday.com/story/sports/ncaab/2018/02/20/louisville-forced-vacate-2013-mens-basketball-title-after-ncaa-denies-appeal/355189002/>. There’s no word as of publication of this article whether the NCAA also required Pitino to remove the celebratory tattoo he received after winning the championship as part of a bargain with his players. Kyle Boone, *LOOK: With Louisville Vacating its 2013 Title, Rick Pitino May Regret this Tattoo*, CBS SPORTS (Feb. 20, 2018), <https://www.cbssports.com/college-basketball/news/look-with-louisville-vacating-its-2013-title-rick-pitino-may-regret-this-tattoo/>.

¹³⁴ University of Mississippi, athleticsworking.wp2.olemiss.edu/transcript/. At least one media member claims Ole Miss refuses to release the NOA, claiming it “does not possess or retain copy.” Matt Jennings, *Ole Miss Denies Media Requests to See Notice of Allegations from NCAA*, SEC COUNTRY (Mar. 19, 2017), <https://www.seccountry.com/mississippi/ole-miss-denies-foia-ncaa-noa>.

responsibilities violation charge against head football coach Hugh Freeze.¹³⁵ Freeze is the first Football Bowl Subdivision head football coach charged with violating modern head coach responsibilities legislation.¹³⁶ From the outset, there was strong curiosity and anticipation in the football coaching community regarding how the COI would handle Freeze.¹³⁷

Ole Miss defended Freeze from the start, pointing out that the head coach responsibilities “...allegation is not based upon personal involvement in violations by Coach Freeze but because he is presumed responsible for the allegation involving his staff that occurred between October 2012 and January 2016.”¹³⁸ Though Freeze’s name doesn’t appear in specific allegations, his career and reputation were on the line due to the actions of his staff and boosters of the program.¹³⁹

Pre-hearing filings by the Enforcement Staff, Ole Miss, and Freeze indicated “communication” about NCAA compliance would be central to the Bylaw 11.1.1.1 charge. In a statement released by Ole Miss, Freeze stated that he was “constantly communicating to our compliance office, the SEC office, and industry leaders to make sure we are using best practices when it comes to doing things the right way.”¹⁴⁰ More specifically, Ole Miss claimed to have “objective evidence, including phone and text records reflecting regular communications with compliance throughout Freeze’s tenure, Freeze’s inclusion of compliance issues and compliance staff members in football staff meetings, and multiple instances of self-reports of his staff’s violations.”¹⁴¹

The COI ultimately concluded Freeze committed a Level I violation of Bylaw 11.1.1.1 by failing to monitor his staff and its interactions with boosters surrounding the football program.¹⁴² In its analysis of the Bylaw 11.1.1.1 violation, the COI described Freeze’s actions regarding rules compliance (*i.e.*, inviting the compliance staff to football staff meetings, review of campus visit paperwork, revision of forms, and construction of a compliance manual) as “admirable.”¹⁴³ However, the COI repeatedly noted the extraordinarily high number of violations, as well as their nature—they included a wide range of staff members, high-profile recruits, and boosters.¹⁴⁴ Further, some of the

¹³⁵ *Id.*

¹³⁶ Dodd, *supra*, note 5.

¹³⁷ Thamel, *supra*, note 42. Freeze wasted no time in turning around the Ole Miss football program, inheriting a team coming off a two-win season and guiding it to 34 wins and four bowl game appearances (three wins) in his first four seasons. Ole Miss Athletics, http://www.olemisssports.com/sports/m-footbl/mtt/hugh_freeze_167023.html. Note Freeze resigned prior to the COI’s resolution of the case for reasons unrelated to it. Dennis Dodd, *Hugh Freeze is Gone, Ole Miss is Damaged, and the Rebels Have Themselves to Blame*, CBS SPORTS (July 21, 2017), <https://www.cbssports.com/college-football/news/hugh-freeze-is-gone-ole-miss-is-damaged-and-the-rebels-have-themselves-to-blame>.

¹³⁸ University of Mississippi, *supra*, note 134.

¹³⁹ Dodd, *supra*, note 5.

¹⁴⁰ University of Mississippi, *supra*, note 134.

¹⁴¹ University of Mississippi, https://www.scribd.com/document/354972496/2017-NOA-RESPONSE-With-Boosters-12-and-14-Redacted#fullscreen&from_embed. Note the irony in Ole Miss pointing to Freeze’s phone records as a defense now knowing that Freeze ultimately resigned after Ole Miss found a pattern of his improper phone calls during an investigation prompted by a one-minute phone call to an escort service, *supra*, note 43.

¹⁴² See NAT’L COLLEGIATE ATHLETIC ASS’N, University of Mississippi Public Infractions Decision, 45 (Dec. 1, 2017), https://www.ncaa.org/sites/default/files/Dec2017COI_MississippiIIInfractionsDecisionPUBLIC_20171201.pdf.

¹⁴³ *Id.* at 48.

¹⁴⁴ *Id.*

violations happened in Freeze's plain sight, yet he failed to identify them.¹⁴⁵ Freeze admitted he wasn't equipped to handle the "craziness" of the university's boosters and booster culture, but the COI countered that it was his responsibility to ensure his staff didn't use boosters to commit rules violations.¹⁴⁶

The "unconstrained booster culture" with which his staff was intimately involved proved to be Freeze's downfall in this case. Freeze recognized and acknowledged the abnormal culture, yet failed to question his staff about it. As a means to rebut the Bylaw 11.1.1.1 presumption of responsibility, the NCAA has suggested that head coaches solicit feedback from staff members concerning the program's overall compliance environment, gray areas, and potential traps.¹⁴⁷ Had Freeze done so, he may have been able to decipher and address the problems caused by his program's boosters. While the COI lauded Freeze for his promotion of a compliant atmosphere, it ultimately found a violation of head coach responsibilities legislation due to his lack of monitoring. Thus, head coaches would be wise to utilize an ongoing program self-assessment--including staff feedback--about the program's compliance environment, and then address any problem areas.

3. Head coaches must ensure their staff members immediately notify the compliance staff about concerns or red flags.

The NCAA has recommended that head coaches ensure those individuals associated with their programs immediately notify the compliance staff when concerns or red flags occur related to potential NCAA rules violations.¹⁴⁸ The COI has echoed this recommendation, concluding that head coaches fail to monitor when they don't stop and report known violations.¹⁴⁹ Recent cases where the COI has particularly emphasized that head coaches must notify the compliance staff about violations or red flags include cases involving Northeastern University, SMU, and the University of Hawaii, Manoa, all of which are described briefly below.

- a. Northeastern University (Decision Released October 9, 2014)

In a case involving Northeastern University's track and field and cross-country program, the underlying violations include the now former head coach knowingly providing impermissible transportation and lodging accommodations to two-year college prospective student-athletes, coaches, and administrators.¹⁵⁰ Two of the assistant coaches questioned the head coach about the permissibility of the arrangement.¹⁵¹ By failing to take steps to avert the violations or contact the compliance staff to report them after his assistant coaches' questions, the COI concluded that the former head coach

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Responsibilities of Division I Head Coaches, *supra*, note 24.

¹⁴⁸ *Id.*

¹⁴⁹ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of the Pacific Public Infractions Decision, 26 (Sep. 20, 2017), https://www.ncaa.org/sites/default/files/Sep2017INF_PacificPublicDecision_20170920.pdf; See also NAT'L COLLEGIATE ATHLETIC ASS'N, Grambling State University Public Infractions Decision, 13 (July 28, 2017), https://www.ncaa.org/sites/default/files/Jul2017INF_Grambling_PublicInfractionsDecision_20170728.pdf.

¹⁵⁰ See, NAT'L COLLEGIATE ATHLETIC ASS'N, *Northeastern University*, 4 (October 9, 2014).

¹⁵¹ *Id.* at 5.

failed to promote an atmosphere of compliance.¹⁵² The COI categorized the violation of head coach responsibilities legislation as Level I.¹⁵³

b. Southern Methodist University (Decision Released September 29, 2015)

In the case involving Southern Methodist University (“SMU”) and its men’s basketball program, the COI criticized Hall of Fame head coach Larry Brown¹⁵⁴ for failing to immediately notify the compliance staff about an NCAA compliance concern in his program.¹⁵⁵ Brown enjoyed immense success throughout his long career.¹⁵⁶ However, with that success came trouble.¹⁵⁷

The underlying violations centered on academic fraud and unethical conduct.¹⁵⁸ A prospective student-athlete who signed a National Letter of Intent to attend SMU required an additional academic course in the summer after high school graduation to meet NCAA initial eligibility standards.¹⁵⁹ An administrative assistant in the men’s basketball office took an interest in the prospect’s life and academic work.¹⁶⁰ At some point during the summer, the administrative assistant directly involved herself in the prospect’s academic coursework.¹⁶¹

The administrative assistant obtained the prospect’s username and password to his online summer course and personal e-mail account.¹⁶² She completed the prospect’s assignments and

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See NAT’L COLLEGIATE ATHLETIC ASS’N, Southern Methodist University Public Infractions Decision, 2 (Sep. 29, 2015), http://thesportsesquires.com/wp-content/uploads/2014/05/smu_public_decision.pdf. Note the COI also cited the men’s golf program with violations.

¹⁵⁵ Brown resigned in July of 2017 for reasons unrelated to this case. Brad Townsend, *Larry Brown Explains Why He Left SMU, Why He Announced One Day After Dallas Shootings*, Dallas News (July 8, 2017), <https://sportsday.dallasnews.com/college-sports/smumustangs/2016/07/08/larry-brown-confirms-resignation-smu-coach-says-contract-extension-simply-reached-school>.

¹⁵⁶ In 2002, Coach Brown was enshrined in the Naismith Basketball Hall of Fame. Brown is the only coach in NBA history to lead seven different teams to the playoffs. He has been named coach of the year for both college basketball and in the NBA and won championships at both levels. Basketball Hall of Fame, www.hoophall.com/hall-of-famers/larry-brown/.

¹⁵⁷ In his career, Brown was the head coach of three NCAA programs, all three of which were sanctioned by the NCAA during his tenure. Brown led the UCLA Bruins to the 1980 NCAA title game. Perhaps worse than losing the title game is that it was later discovered that Brown used two ineligible players, for which UCLA was placed on probation in 1981. Brown was named Coach of the Year in 1988 after leading the Kansas Jayhawks to a national title. An NCAA investigation after his departure from Kansas in 1989 unveiled that Brown gave a plane ticket to a potential transfer player for him to visit his ill grandmother. The NCAA banned Kansas from the 1989 tournament as a result. Kami Mattioli, *Looking Back on Larry Brown’s Tumultuous Coaching Career*, Sporting News (Sep. 29, 2015), <http://www.sportingnews.com/ncaa-basketball/list/larry-brown-ncaa-violations-sanctions-scandal-kansas-smu-ucla/52mj1c1sz5xh1qcxl3wllf29x>.

¹⁵⁸ Southern Methodist University, *supra*, note 154 at 2.

¹⁵⁹ *Id.* at 13. The record was unclear who paid for the course.

¹⁶⁰ *Id.* at 14. For example, when the prospect came to the basketball facilities to work out or play pick-up games, the administrative assistant would babysit the prospect’s toddler son in the basketball offices

¹⁶¹ *Id.*

¹⁶² *Id.*

exams.¹⁶³ In fact, the prospect had no awareness of the online course after his initial enrollment.¹⁶⁴ Further, when notified of impending interviews by NCAA Enforcement Staff members, the administrative assistant encouraged the prospect to fabricate a story.¹⁶⁵

The prospect and administrative assistant informed Brown that the student-athlete did not complete the work for his online course.¹⁶⁶ For over a month, however, Brown did nothing with that information.¹⁶⁷

The COI noted an absence in the record of steps Brown took to establish and ensure a culture of compliance.¹⁶⁸ In describing Brown's program generally, the COI stated, "he made some choices against his better judgment when it came to compliance issues in his program."¹⁶⁹

More specifically, these choices included not reporting possible violations and failing to provide specific guidance to his staff on rules compliance.¹⁷⁰ Further, Brown hired the administrative assistant and was her direct supervisor.¹⁷¹ They interacted on a daily basis.¹⁷² "Although the head men's basketball coach did not have any direct knowledge of or involvement in any of her misconduct, he never followed up on the admissions to him, by both her and the student-athlete, about the completion of work for the online course."¹⁷³ Brown failed to notify the compliance staff.¹⁷⁴ Brown found it impossible to discern who was telling the truth, nor did he have any specifics on his actions or processes that would have flagged concerns.¹⁷⁵

In specifically analyzing the head coach responsibilities charge against Brown, the COI stated that he exhibited no concern for or attention to rules compliance.¹⁷⁶ The COI described Brown's decision to not come forward with information about the administrative assistant completing academic coursework on behalf of the prospect as "unacceptable" and "a severe error."¹⁷⁷ "While he did not have any role in the commission of the violations of his staff, he is presumed responsible for their actions."¹⁷⁸ The COI categorized Brown's violation of Bylaw 11.1.1.1 as Level I.¹⁷⁹

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 15.

¹⁶⁶ *Id.* at 15-16.

¹⁶⁷ *Id.* at 16.

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.* at 17.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 18.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 19.

¹⁷⁶ *Id.* at 37.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 38-39.

¹⁷⁹ *Id.*

c. University of Hawaii, Manoa (Decision Released December 22, 2015)

The underlying violations in the case involving the men's basketball program at the University of Hawaii, Manoa, included provision of an impermissible benefit (use of a vehicle) by a representative of athletics interest to a student-athlete.¹⁸⁰ The COI characterized the student-athlete's impermissible use of the representative's Porsche SUV as a Level II violation.¹⁸¹

The head coach's initial reaction upon learning that one of his student-athletes drove the representative's Porsche SUV was appropriate—he prohibited the student-athlete from driving the car and chastised both the student-athlete and representative.¹⁸² Per the COI, this demonstrated awareness there was at least a potential issue he should have reported to administration.¹⁸³

The COI emphasized that head coaches must affirmatively address potential rules issues within their programs.¹⁸⁴ The head coach's failure to report the impermissible benefit exacerbated the issue.¹⁸⁵ Thus, the head coach acted unethically and didn't promote a compliant atmosphere when he failed to report his knowledge of the student-athlete's use of the representative's Porsche SUV to administration.¹⁸⁶

The head coach also failed to promote a compliant atmosphere when he influenced team members to not report the violation.¹⁸⁷ In doing so, the head coach established that strict adherence to full rules compliance was not a high priority in his program.¹⁸⁸

The COI concluded that the former head coach's actions constituted a Level II violation.¹⁸⁹

In contrast to the head coaches in these three programs, Wichita State's baseball coach successfully showed that he required staff members to contact compliance personnel when issues arose, and the COI cited this fact when it concluded he did not violate head coach responsibilities legislation.¹⁹⁰ The Wichita State case is described more in-depth below.

¹⁸⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of Hawaii, Manoa Public Infractions Decision, 12 (Dec. 22, 2015), https://www.ncaa.org/sites/default/files/Hawaii_Public_Infractions_Decision_20151222.pdf. During the fall of 2012, NCAA Bylaw 16.11.2.3 prohibited a representative of athletics interests from providing use of an automobile. The current legislative reference is 16.11.2.2 in the 2017-18 DIVISION I MANUAL.

¹⁸¹ *Id.* at 15.

¹⁸² *Id.* at 17.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 18.

¹⁸⁵ *Id.* at 19.

¹⁸⁶ *Id.* at 16.

¹⁸⁷ *Id.* at 17.

¹⁸⁸ *Id.* at 18.

¹⁸⁹ *Id.* at 16.

¹⁹⁰ See NAT'L COLLEGIATE ATHLETIC ASS'N, Wichita State University Public Infractions Decision, 14-15 (Jan. 29, 2015), https://s3.amazonaws.com/sidearm.sites/wichita.sidearmsports.com/documents/2015/11/5/Wichita_State_Infractions_DecisionPUBLIC.pdf.

In sum, the COI has been clear that head coaches should create and utilize written procedures and systems for detecting and inquiring about instances of potential noncompliance. These written procedures and systems should require automatic and timely notification of the compliance staff.

C. Documentation

The NCAA also recommends that a head coach should document the ways he communicates and/or demonstrates a commitment to compliance and be able to produce documentation about compliance monitoring procedures.¹⁹¹ “We expect head coaches to provide practices and training and *written materials* (emphasis added) that instruct their assistant coaches how to act,” Oregon State President and former chair of the NCAA Executive Committee who chaired the Enforcement Working Group Ed Ray said.¹⁹²

The NCAA specifically identified the following areas for documentation:

- The program’s procedures and efforts for monitoring specific areas of compliance.¹⁹³ The COI has specifically stated it will consider whether a head coach developed written policies regarding potential elite student-athlete issues.¹⁹⁴ A focus should include potential gray areas.¹⁹⁵
- Monitoring efforts to ensure staff and student-athletes are complying in a timely manner with NCAA rules and compliance obligations.¹⁹⁶
- Reports to compliance of actual and potential NCAA rules issues.¹⁹⁷ A head coach’s policies should also contain anti-retaliation provisions to encourage staff members to report potential violations.¹⁹⁸
- The program’s procedures for monitoring and submission of documentation of specific areas of compliance (*e.g.*, practice hours, unofficial visits).¹⁹⁹
- Meetings with athletics director, compliance staff, and coaching staff at which compliance is part of the written agenda.²⁰⁰ Creighton University head men’s basketball coach Greg McDermott commented on the importance of documenting these meetings: “[t]he biggest

¹⁹¹ Responsibilities of Division I Head Coaches, *supra*, note 24.

¹⁹² Brown, *supra*, note 6.

¹⁹³ Responsibilities of Division I Head Coaches, *supra*, note 24.

¹⁹⁴ *See* NAT’L COLLEGIATE ATHLETIC ASS’N, Syracuse University Appeal Decision, 5 (Dec. 3, 2015), <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102540>.

¹⁹⁵ Clifton, Kelly, & Swaton Wagner, *supra*, note 10.

¹⁹⁶ Responsibilities of Division I Head Coaches, *supra*, note 24.

¹⁹⁷ *Id.*

¹⁹⁸ Clifton, Kelly, & Swaton Wagner, *supra*, note 10.

¹⁹⁹ Responsibilities of Division I Head Coaches, *supra*, note 24.

²⁰⁰ *Id.*

change needs to be in documentation, in terms of meeting with your staff, your boss, your compliance coordinator or your president....everything has to be documented.”²⁰¹

The now former head baseball coach at Wichita State University heeded this last recommendation and the COI cited it as a reason it concluded the head coach successfully rebutted the presumption of responsibility for one of his staff member’s violations. As the first case in which the COI reached this conclusion under the modern Bylaw 11.1.1.1, the Wichita State case deserves an in-depth analysis.

The underlying violation in the Wichita State case centered on 21 baseball student-athletes receiving impermissible extra benefits (ultimately a Level II violation) in the form of discounted apparel.²⁰² The now former head coach led the program for 36 years and enjoyed immense success during that time.²⁰³ The now former administrative assistant for baseball enjoyed a long tenure in the Wichita State athletics department and worked for the baseball program for several years.²⁰⁴ The head coach was the administrative assistant’s supervisor during her time with the baseball program.²⁰⁵

The administrative assistant “was involved with equipment and apparel procurement.”²⁰⁶

Under the terms of the agreement between the baseball program and its exclusive apparel provider, the program could purchase products at wholesale prices in addition to items purchased with a product allowance.²⁰⁷ The administrative assistant and the athletics equipment manager were the only individuals with authorization to order items.²⁰⁸ The apparel provider representative who serviced the account allowed the former administrative assistant to order personal items at a 50 percent discount through a VIP account.²⁰⁹

Prior to his departure (for reasons unrelated to this case), the head coach noticed a few of his student-athletes gathered around the former administrative assistant’s desk.²¹⁰ The administrative assistant told the former head coach that the student-athletes were ordering Christmas gifts.²¹¹ The head coach told her to “be sure [the student-athletes] pay for it themselves and are paying the same price ... you sell it to other people for, outsiders, whatever that is.”²¹² The head coach was left with

²⁰¹ Auerbach, *supra*, note 17.

²⁰² See NAT’L COLLEGIATE ATHLETIC ASS’N, Wichita State University Public Infractions Decision, 14-15 (Jan. 29, 2015), https://s3.amazonaws.com/sidearm.sites/wichita.sidearmsports.com/documents/2015/11/5/Wichita_State_Infractions_DecisionPUBLIC.pdf.

²⁰³ *Id.* at 2.

²⁰⁴ *Id.* at 3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 4.

²¹⁰ *Id.* at 6.

²¹¹ *Id.*

²¹² *Id.*

the impression that the student-athletes received no special consideration.²¹³ “He admitted that, in hindsight, he could have asked her further follow-up questions.”²¹⁴

Six months later, Wichita State hired its current head baseball coach.²¹⁵ Wichita State’s current head coach became concerned when he noticed a large number of packages delivered to the administrative assistant’s desk.²¹⁶ The current head coach notified administration, which conducted an investigation.²¹⁷ His fears ultimately proved true as twenty-one student-athletes ordered items through the VIP account, at a 50 percent discount.²¹⁸ The administrative assistant provided the student-athletes with her log-on information so they could access both her computer and VIP account.²¹⁹ The administrative assistant believed there was no NCAA violation because the student-athletes paid for the items they ordered; however, she did not verify this belief with the compliance staff.²²⁰

The Enforcement Staff alleged that the former head coach didn’t monitor the duties and activities of the administrative assistant regarding her use of the VIP apparel account.²²¹ Further, the Enforcement Staff alleged that the former head coach was responsible for the violations the administrative assistant committed.²²²

In its analysis of the Bylaw 11.1.1.1 allegation, the COI described at length the administrative assistant’s familiarity with and training in NCAA rules. The COI emphasized that the administrative assistant attended weekly baseball staff meetings, at which the staff discussed rules issues.²²³ She received departmental e-mails, memos, and newsletters regarding rules compliance issues, including a daily compliance e-mail update.²²⁴ She also attended an educational session on NCAA rules geared toward issues facing administrative assistants.²²⁵ The administrative assistant asked questions of the compliance staff.²²⁶ Other athletics department staff members considered the administrative assistant to be knowledgeable about NCAA legislation.²²⁷

“The Enforcement Staff acknowledged that the violations in this case were the only problems of any significance in the baseball program over the course of the former head coach’s tenure and represented a deviation from otherwise compliant practices.”²²⁸ The former head coach took NCAA

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 7.

²¹⁶ *Id.* at 2.

²¹⁷ *Id.* at 7.

²¹⁸ *Id.* at 5.

²¹⁹ *Id.* at 6.

²²⁰ *Id.* at 5.

²²¹ *Id.* at 14.

²²² *Id.*

²²³ *Id.* at 8.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 9.

²²⁷ *Id.* at 8.

²²⁸ *Id.* at 8.

compliance seriously, regularly attended rules meetings, and asked questions of the compliance staff.²²⁹ Athletic department staff members described how important NCAA compliance was to the former head coach.²³⁰ The COI “found that the former head coach ran his program in a manner consistent with NCAA rules and insisted that all others associated with the program also operate within NCAA rules.”²³¹ The program reported some secondary/level III violations, but had not had a major/level I or II violation previously.²³²

As far as the former head coach’s monitoring of the administrative assistant, he reviewed all purchase orders for his program.²³³ The COI concluded that the administrative assistant was a long-time trusted employee with a history of rules knowledge and compliance.²³⁴ The fact that the former head coach did not notice packages addressed to student-athletes doesn’t mean he was somehow negligent in his monitoring duties or that he turned a blind eye.²³⁵ When the former head coach observed student-athletes gathered around the administrative assistant’s desk and learned they were ordering Christmas presents, he appropriately reminded his long-time, trusted, rules-compliant-assistant to ensure that the student-athletes did not receive any benefit.²³⁶ “In hindsight, he should have asked further follow-up questions. However, his failure to do so in one instance does not negate decades of monitoring his assistant and setting the proper atmosphere for rules compliance in his program.”²³⁷

Thus, because the former head coach promoted a compliant atmosphere and monitored his administrative assistant, the COI concluded that the former head coach satisfied Bylaw 11.1.1.1 requirements and rebutted the presumption that he was responsible for the administrative assistant’s violation.²³⁸ Thus, head coaches would be wise to study and heed the COI’s written decision and its emphasis on providing access to adequate compliance training and including compliance-related items on written staff meeting agendas.²³⁹

The NCAA’s suggested action items—communication, monitoring, and documentation—seem reasonable for head coaches to implement in their programs. Yet, there have been only two instances in which the COI concluded a head coach successfully rebutted the presumption of responsibility for the actions of a staff member.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 9.

²³⁴ *Id.*

²³⁵ *Id.* at 15.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* Wichita State did not escape penalty as the impermissible extra benefits still resulted in a Level II violation. Penalties included a year of probation, a \$5,000 fine, and a vacation of wins.

²³⁹ But note that discussing compliance issues during staff meetings and at coaching retreats is insufficient to rebut the presumption when a head coach acknowledges letting his staff get “out of control” and has personal involvement in Level I violations in his program. See NAT’L COLLEGIATE ATHLETIC ASS’N, University of the Pacific Public Infractions Decision, 26 (Sep. 20, 2017), https://www.ncaa.org/sites/default/files/Sep2017INF_PacificPublicDecision_20170920.pdf.

IV. INCREASING EFFECTIVENESS OF HEAD COACH RESPONSIBILITIES LEGISLATION WITH SUGGESTED PROCEDURAL AND SUBSTANTIVE CHANGES

The modern Bylaw 11.1.1.1 has been in effect for four and a half years yet, as evidenced by a list of just a few recent examples in the Introduction, continued transgressions by assistant coaches and staff members call into question its effectiveness. If the NCAA, its member universities, and head coaches are serious about reducing the number of serious violations, it's time to reevaluate how Bylaw 11.1.1.1 can be used to further that goal.

There is great potential for Bylaw 11.1.1.1 to serve as a vehicle to “cleaning up” major violations in college athletics. Two subtle modifications to the infractions case process could result in increased transparency of the Enforcement Staff's expectations of head coaches. Alternatively, a substantive change to the legislation—removal of the rebuttable presumption—would maximize both its deterrent effect and the accountability on head coaches and staff members for their decisions and actions. Each of these two suggested changes are examined more closely below.

A. Increasing Transparency by Modifying the Infractions Process

A major goal for the COI, NCAA, NCAA member universities, and university personnel should be rules compliance. We all can agree that universities and their head coaches would both appreciate and benefit from as much education and information as possible on both the Enforcement Staff and COI's analysis and application of Bylaw 11.1.1.1. Two simple steps, outlined below, would increase transparency and provide universities and head coaches with Enforcement Staff expectations on actions items that, if undertaken by head coaches, would assist head coaches in adequately promoting a compliant atmosphere and monitoring their staff and thus compliance with Bylaw 11.1.1.1.

Recall that the Enforcement Staff analyzes a potential head coach responsibilities allegation as follows: (1) a Level I or II violation occurs in the sport program, and (2) the head coach is responsible unless he rebuts the presumption by promoting a compliant atmosphere and monitoring his staff.²⁴⁰ In doing so, the Enforcement Staff considers the facts and information provided by the head coach.²⁴¹ When the Enforcement Staff concludes the head coach failed to rebut the presumption of responsibility, the Enforcement Staff alleges a violation of Bylaw 11.1.1.1, the outcome of which is decided by the COI when it processes the case.²⁴² Thus, information from instances in which the Enforcement Staff alleged a Bylaw 11.1.1.1 violation is readily available via an NCAA website that contains links to all COI written decisions.²⁴³

Further, when the Enforcement Staff alleges a Bylaw 11.1.1.1 violation, it's included within the NOA directed to the university. It's become common for media members to make Freedom of Information Act requests to schools to obtain these notices or for schools to release them to the public. For example, Ole Miss has a webpage about both its 2016 and 2017 cases in which it provides

²⁴⁰ Responsibilities of Division I Head Coaches, *supra*, note 24.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ See <https://web3.ncaa.org/lstdbi/>.

the NOAs and other documents.²⁴⁴ Thus, the public—including head coaches at other universities—may find out when a head coach is charged with a Bylaw 11.1.1.1 violation and the reason(s) the Enforcement Staff made the allegation. This information, coupled with the COI's subsequent analysis of the allegation, can be useful to head coaches by showing them information and analysis in instances where a head coach faced a Bylaw 11.1.1.1 allegation.

But what about those cases where, during the investigation of a staff member's violation, the Enforcement Staff concluded that the head coach's actions successfully rebutted the presumption? Wouldn't it be more valuable for head coaches to have information from real-life cases on what other head coaches did to successfully rebut the presumption in the eyes of the Enforcement Staff and thus avoided the charge altogether? Every head coach would prefer to successfully rebut the presumption in the eyes of the Enforcement Staff and avoid the allegation prior to the Enforcement Staff issuing an NOA for the underlying violation(s). Doing so could prevent a head coach from having to appear in front of the COI to show how he promoted a compliant atmosphere and monitored staff. Having information from cases where head coaches were able to successfully rebut the presumption would enable head coaches to learn directly from real-life examples about what they should do to avoid the allegation.

For example, on September 16, 2016, the COI released its written decision on a case involving a UCLA football staff member.²⁴⁵ Underlying violations included Level II recruiting and ethical conduct violations he committed.²⁴⁶ Because a football staff member committed Level II violations, UCLA's head football coach was presumed responsible. Because the COI's written decision lacks any mention, let alone analysis, of Bylaw 11.1.1.1, the Enforcement Staff presumably concluded the head coach successfully rebutted the presumption and thus didn't charge him with a Bylaw 11.1.1.1 violation. But we don't know how or why the head coach was able to successfully rebut the presumption. In not making this analysis public, head coaches and universities miss out on a prime opportunity to learn from a case in which the head coach—by his actions—successfully rebutted the presumption.

Another example is the recently processed University of South Florida case. On September 29, 2017, the COI released its written decision in which it describes underlying violations including provision of recruiting inducements and unethical conduct by an assistant men's basketball coach.²⁴⁷ The COI concluded the case included both Level I and II violations.²⁴⁸ Despite these violations occurring in the men's basketball program, the COI's written decision does not mention or analyze a Bylaw 11.1.1.1 charge. Thus, the head coach successfully rebutted the presumption in the eyes of the Enforcement Staff. However, the public—including university coaches and administrators—is unaware of the actions the head coach took to rebut the presumption. Thus, head coaches are unable to learn about Enforcement Staff expectations on how to rebut a Bylaw 11.1.1.1 presumption.

²⁴⁴ See, athleticsworking.wp2.olemiss.edu.

²⁴⁵ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of California, Los Angeles Public Infractions Decision, 3 (Sep. 16, 2016), https://www.ncaa.org/sites/default/files/2016INF-PublicInfractionsDecisionUCLA_20160916.pdf.

²⁴⁶ *Id.*

²⁴⁷ See NAT'L COLLEGIATE ATHLETIC ASS'N, University of Southern Florida Public Infractions Decision, 1 (Sep. 29, 2017), https://www.ncaa.org/sites/default/files/Sep2017INF_SouthFloridaPublicInfractionsDecision_20170919.pdf.

²⁴⁸ *Id.* at 2.

While information gleaned from the Wichita State and Pacific cases about actions the head coaches performed that promoted a compliant atmosphere and fulfilled monitor obligations is helpful, those two cases stand as the lone examples since the revision of Bylaw 11.1.1.1 where the Enforcement Staff alleged a Bylaw 11.1.1.1 allegation that the COI rejected.

There are simple ways to increase transparency of Enforcement Staff expectations. In every case involving a sport program facing a Level I or II violation, the Enforcement Staff undertakes a Bylaw 11.1.1.1 analysis. For each NOA for a violation within a sport program, the Enforcement Staff should include a static section in which it provides this analysis. In a case in which the head coach successfully rebutted the presumption, the section could include detailed information about the head coach's documented actions that promoted a compliant atmosphere and by which he monitored his staff. Doing so increases transparency of the Enforcement Staff's analysis and demonstrates a head coach's commitment to compliance. This information would be extremely valuable to fellow head coaches and encourage them to undertake those actions the Enforcement Staff considered and deemed adequate to rebut the presumption.

NOAs are typically only made public in high profile cases and/or where the media requests them from a public university. Thus, to further systematize and increase transparency, the COI could include the Enforcement Staff's Bylaw 11.1.1.1 analysis section in its written decision, all of which are made public. This would provide another outlet by which universities and head coaches could learn from other cases.

Interestingly, a recent case hints that the COI may also appreciate information on the Enforcement Staff's analysis of potential Bylaw 11.1.1.1 charges. In its December 7, 2016 written decision in California State University, Northridge, case, the COI disclosed that in light of some of the head coach's answers during the hearing, the COI formally inquired of the Enforcement Staff "its intentions regarding head coach responsibility."²⁴⁹ The underlying violation centered on academic misconduct and provision of impermissible academic benefits by a men's basketball director of operations.²⁵⁰ The COI inquired of the Enforcement Staff's intentions because it "was concerned about the head coach's potential responsibility in the case because he knew that the former director of basketball operations had access to the student-athletes' online portal accounts."²⁵¹ After receiving the COI's formal inquiry, the Enforcement Staff re-interviewed the head coach and "could not identify any more steps he could have taken to further rebut the presumption of head coach responsibility."²⁵² But what were those steps? Again, it would be beneficial for head coaches, university administrators, and their attorneys to have more information on the actions the head coach took that satisfied the Enforcement Staff and thus rebutted the presumption. Describing these presumption-rebutting actions in the NOA for the COI (and public) to be able to read would have saved the Enforcement Staff from the COI's inquiry and would have saved all parties the time and expense of another interview of the head coach.

²⁴⁹ See NAT'L COLLEGIATE ATHLETIC ASS'N, California State University, Northridge Public Infractions Decision, 3 (Dec. 7, 2016), https://www.ncaa.org/sites/default/files/2016INF_CSUNPublicInfractionsDecision_20161207.pdf.

²⁵⁰ *Id.* at 1.

²⁵¹ *Id.* at 12.

²⁵² *Id.* at 3.

B. *Eliminating the Ability of Head Coaches to Rebut the Presumption of Responsibility for their Staff Members' Actions*

1. The analogy to tort law

The NCAA and its member universities could have made head coach responsibilities legislation even more stringent had they not included the ability to rebut the presumption of responsibility. Tort law recognizes vicarious liability, which is “liability for the tort of another person.”²⁵³ More specifically, vicarious liability means that one who is not at fault can still be liable for the tort of another. The most common form of vicarious liability is respondeat superior, under which an employer is liable for the torts its employee commits within the scope of employment. Thus, a bus company is liable when its employee negligently drives a bus and injures a pedestrian. The pedestrian can sue both the bus company and employee and then choose to recover her damages from the bus company.

Vicarious liability is different from independent negligence. The bus company, for instance, may also be at fault—maybe it failed to do a reasonable background check when it hired the bus driver. The bus company could then be liable for its own fault, its own unreasonable conduct. Vicarious liability exists, however without that fault. Vicarious liability is “based upon the principle that [the employer] must stand good for the wrong of another person.”²⁵⁴

It may be difficult to see why the employer should be liable for the employee’s torts. It’s not as if the employer instructed the employee to drive negligently; if that was the case, the employer’s liability would be uncontroversial. Under respondeat superior, the employer is liable “even though [it] did not command those acts and could not foresee them in any specific way” and may sometimes be liable “even for torts committed by [employees] in violation of specific directions or rules.”²⁵⁵ Respondeat superior liability is a form of tort liability known as strict liability—the employer is liable even though it was not at fault.

The analogy to head coaches is not difficult to see. Instead of bothering with a rebuttable presumption, the NCAA could have made head coaches vicariously accountable for their assistant coaches’ NCAA violations. The assistant coach is assuredly an employee of the head coach. And any recruiting violation is within the assistant coach’s scope of employment.

The NCAA head coach rules, however, are markedly different from respondeat superior in one important way—the ability to avoid NCAA’s version of liability. A coach does not violate the rule if he can show that he promoted an atmosphere of compliance and monitored his staff. Of course, that atmosphere and monitoring didn’t actually do enough to prevent or catch the assistant coach’s recruiting violation. But under the NCAA rule, a coach can avoid a head-coaching responsibility violation if he can show the atmosphere and monitoring. Arguably, head coaches can still turn a “blind eye” as long as they affirmatively encourage compliance and monitor. No similar way out of

²⁵³ DAN B. DOBBS, *THE LAW OF TORTS*, HORNBOOK SERIES, § 333, 905 (2000).

²⁵⁴ *Id.* § 333, 906.

²⁵⁵ *Id.* § 334, 907.

respondeat superior exists in tort law; the employer is liable for the employee's tortious conduct even though the employer is not at all at fault for that conduct.

There may be rational reasons that the NCAA didn't choose to impose strict liability on head coaches like tort law imposes on employers. For one, many theories supporting respondeat superior do not translate to the head coaching context. One main theory is to ensure compensation by providing a deep-pocket defendant. A plaintiff should be able to sue the employer because the employer is more likely to be able to pay any damages owed to the injured plaintiff, better ensuring that the injured plaintiff will be compensated. Relatedly, risk spreading theory supports vicarious liability. The employer is better able to cover any losses by increasing prices or obtaining insurance. And thus, the plaintiff should be able to recover damages from the employer. No injured victim exists in the situation where an assistant coach violates NCAA rules. Obviously then, neither the deep pocket nor risk spreading theories would support strict accountability for the head coach.

At the same time, the deterrence related-theories supporting respondeat superior do apply to the NCAA context. One of those theories is risk avoidance. If an employer is forced to pay damages resulting from his employee's tortious conduct, the employer is incentivized to discover ways to minimize those tortious acts and thereby minimize harm. Arguably, the fact that NCAA legislation permits a head coach to rebut his violation by showing promotion of compliance and monitoring creates this same incentive. But the level of incentive still differs. An employer has every incentive to thoroughly vet, train, and supervise its employees because that employer *will* be liable for its employees' torts. A head coach may have less incentive because his showing a vague promotion of compliance and an unspecified amount of monitoring means he likely won't be found to be responsible as the head coach.

Another reason for respondeat superior that applies very easily to the head coaching context is basic fairness. "[S]ome risks are more or less typical or characteristic of the activity," like a car accident caused by a bus driver.²⁵⁶ Realistically, the "bus company can be statistically certain that bus injuries" will occur.²⁵⁷ Even though not morally at fault for those injuries, "the bus company employer should accept the burdens that go with the benefits of its operation and hence should be responsible for the bus driver's negligence as a matter of justice or fairness."²⁵⁸

Just like risk avoidance and risk enterprise theory, fairness supports strict liability for a head coach. Unfortunately, there is little doubt that assistant coaches will violate NCAA rules—intentionally or unintentionally. If it's a recruiting rule, the program and the head coach may benefit. For instance, an assistant coach may accidentally contact a prized recruit too many times and the recruit then chooses the school. That recruit then makes the school's football team. NCAA rule violations will happen, and if not discovered, as most are not, the head coach will benefit. In fairness, maybe the head coach should have to bear the burden of the discovered NCAA violations that happened on his watch even if he promoted compliance and monitored.

²⁵⁶ *Id.* § 334, 909.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

One additional note about respondeat superior is necessary based on damages available. Respondeat superior makes an employer liable for the compensatory damages caused by the employee's tortious conduct—compensatory damages being the damages based on the injury that the plaintiff suffered. This reflects the deep-pocket defendant theory underlying respondeat superior—ensuring that the injured plaintiff is able to collect compensation. A violation of NCAA rules does not create an injured plaintiff seeking compensation; thus, a finding of a violated NCAA rule is very different than a finding of tort liability, which creates compensation.

But tort law does recognize another remedy possibly more analogous. The NCAA punishes coaches for violating NCAA rules, and tort law punishes tortfeasors for tort liability through damages known as punitive damages. If a defendant commits the tort with an evil intent, the jury can also punish the defendant by making him also pay the plaintiff some amount of punitive damages.²⁵⁹

Although all states recognize the employer's strict liability (via respondeat superior) for compensatory damages, not all similarly recognize strict liability for punitive damages.²⁶⁰ Some do. Until recently, a majority of states applied respondeat superior to punitive damages meaning an employer could be punished despite its lack of fault.²⁶¹ Under this thought, "the legal malice of the servant is the legal malice of the corporation."²⁶² Currently, a small majority of states allow an employer to be liable for punitive damages based on respondeat superior only 1) if the employee who committed the tort was "managerial," or 2) the employer was at fault—it authorized the tortious conduct, it recklessly hired or retained the employee, or it ratified the tortious conduct.²⁶³

Applying this rule to NCAA rule violations, the head coach should be held responsible for his assistant coach's NCAA violations only if the assistant coach is managerial (there is no definition of managerial in the Restatement) or the head coach was actually at fault—it authorized the violation beforehand, ratified the violation after, or was at fault in hiring or retaining this assistant coach. These conducts were likely not present if the head coach fostered an atmosphere of compliance and monitored, but that depends on how the NCAA defines promotion of atmosphere and monitoring.

2. Practical benefits to eliminating the rebuttable presumption

As stated above, the culture of college athletics is such that a head coach knows whenever someone close to his programs sneezes. Deterrence-related theories such as risk avoidance and risk enterprise that support respondeat superior liability in tort law apply seamlessly to the head coaching context, as does basic fairness. If the NCAA and its constituents want to get the most out of head coach responsibilities legislation, it's time to eliminate the rebuttable presumption and impose strict liability on head coaches for the actions of staff members.

By doing so, risk enterprise and deterrence theories would play into head coaches' hiring decisions. Head coaches would be less likely to hire individuals with a checkered past or who they

²⁵⁹

²⁶⁰ This idea is a bit strange. Punitive damages are available only when a defendant is especially at fault—acted willfully, maliciously, fraudulently. That fault is not present in pure respondeat superior.

²⁶¹ Michael F. Sturley, *Vicarious Liability for Punitive Damages*, 70 LA. L. REV. 501, 513 (2010). Still significant minority.

²⁶² *Mayo Hotel Co. v. Danciger*, 288 P. 309, 313 (Okla. 1930).

²⁶³ Restatement (Second) of Torts, § 909 (1977).

don't know well in order to lure recruits or help with recruiting. Rather, head coaches would be more likely to conduct a thorough background review of potential hires and avoid those with shaky reputations.

Relatedly, risk enterprise and deterrence theories would affect decisions and actions of assistant coaches and universities. Assistant coaches would be less likely to engage in potentially impermissible conduct, knowing it's going to be automatically imputed to the head coaches who hired them. Universities and head coaches would be less inclined to hire an assistant coach whose actions previously resulted in a head coach's suspension or termination.

More practically, even when a head coach promotes a compliant atmosphere and monitors his staff, the underlying violation still occurred. Ironically, none other than Pitino made this point in his breach of contract lawsuit.²⁶⁴ Even diligent efforts to promote a compliant atmosphere and monitor do not guarantee compliance.²⁶⁵ For example, even though the COI determined Wichita State's head baseball coach promoted a compliant atmosphere and monitored his administrative assistant, he still provided the impermissible benefits to student-athletes.²⁶⁶ Because the underlying violation still occurred, why take the head coach off the hook if the NCAA and its member universities are serious about lessening the number of violations within college athletics?

Another practical reason to eliminate the rebuttable presumption is that the COI doesn't utilize it much.²⁶⁷ Per LSDBi, since August 1, 2013 (the effective date of the modern Bylaw 11.1.1.1), the COI has found a Bylaw 11.1.1.1 violation in 21 of 23 cases where the Enforcement Staff made the allegation.²⁶⁸ The NCAA is quick to point out that there is no checklist or "safe harbor" of action items that, if undertaken by a head coach, absolves him of vicarious liability for a violation within his program.²⁶⁹ However, the existence of the rebuttable presumption may be seen as something of a safety blanket for head coaches. Thus, they may be more apt to permit or encourage risks in their programs. As can be seen from the UCLA and USF cases described above, the Enforcement Staff applies the rebuttable presumption frequently,²⁷⁰ but the COI does not. If the COI barely uses it, the rebuttable presumption should be eliminated in order to increase the deterrent effect of Bylaw 11.1.1.1.

²⁶⁴ <https://drive.google.com/viewerng/viewer?url=https://interactives.courier-journal.com/docs/Pitino-v-ULAA-Verified-Complaint.pdf>.

²⁶⁵ *Id.*

²⁶⁶ Do we really want the Enforcement Staff's time devoted to tedious undertakings such as reviewing sport staff meeting agendas for inclusion of compliance-related items to determine whether a head coach promoted a compliant atmosphere?

²⁶⁷ And who can blame the COI given the difficulty of deciding whether a head coach adequately promoted a compliant atmosphere and monitored, both of which are very vague terms?

²⁶⁸ The rate at which the COI agrees with an Enforcement Staff's Bylaw 11.1.1.1 allegation is in line with alleged violations of other NCAA bylaws, as the NCAA recently stated that the COI finds a violation 90% of the time an Enforcement Staff makes one. <http://www.ncaa.org/enforcement/latest-enforcement-memo-conference-commissioners>.

²⁶⁹ Responsibilities of Division I Head Coaches, *supra*, note 24.

²⁷⁰ For reasons that are typically unknown to the public and, more importantly and unfortunately, universities and head coaches. See discussion in section V, part A *infra* page 42.

VI. CONCLUSION

Head coach responsibilities legislation puts head coaches' careers and reputations on the line with the imposition of vicarious—but not strict—liability on head coaches for major violations within their programs. Bylaw 11.1.1.1 bestows an affirmative duty on head coaches to promote a compliant atmosphere and monitor their staff members.²⁷¹ The NCAA has released documents providing suggested action items—communication, monitoring, and documenting--head coaches may undertake to rebut the presumption of responsibility when a Level I or II violation occurs within a head coach's program. Further, as the COI has processed several cases involving Bylaw 11.1.1.1 allegations since it was last revised, we're able to get a sense of the COI's expectations of head coaches. A couple of minor tweaks in the infractions process could increase transparency and provide head coaches and universities with valuable information on Enforcement Staff expectations of head coaches. However, if the NCAA, its member universities, and university personnel are serious about decreasing the number of major violations, removing the ability of head coaches to rebut the presumption of liability for violations in their programs and thus holding them strictly liable would help do so.

²⁷¹ USM, *supra*, note 236, at 26. Some schools have hired compliance personnel who work very closely with a designated sport program. These individuals can assist with things like documenting but the burden is still on head coaches to do more than just hire a professional with NCAA compliance expertise. Infante, *supra*, note 37.