

# THE IMPACT OF SOCIAL MEDIA ON NCAA INFRACTIONS CASES

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Introduction .....	37
I. The Effect of Social Media Posts on Public Perception of Infractions Cases.....	39
II. Posting that Triggers Investigations .....	46
III. Postings that Provide Evidence of Infractions.....	49
IV. Postings that Constitute Violations.....	53
By Coaches.....	54
By Boosters/Representatives.....	57
By Student-Athletes.....	62
V. Practical Difficulties of Rules Enforcement.....	62
VI. Future Developments .....	66
Conclusion.....	68

## INTRODUCTION

The 2010-11 academic year was a tough one for intercollegiate athletics.<sup>1</sup> Indeed, in May 2011, *ESPN: The Magazine* christened the 2010-11 academic year as “[t]he most scandalous year ever in college sports.”<sup>2</sup> The vacation of USC’s national championship in football during the Reggie Bush era,

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<sup>1</sup> We insist that our college athletes be *student*-athletes, so it makes sense to examine issues in relation to academic years rather than calendar years.

<sup>2</sup> Ryan McGee, *The Most Scandalous Year Ever in College Sports . . . Until Next Year*, *ESPN: THE MAGAZINE*, May 30, 2011, at 52-53.

major infractions cases at UConn, Ohio State, and Tennessee, the apparent “shopping” of Cam Newton by his father, and the shakeup at the Fiesta Bowl over alleged illegal political contributions<sup>3</sup> truly made 2010-11 a year of infamy, at least in terms of the high-profile nature of the bad news.

Some scandals (the Fiesta Bowl fiasco, for example) did not involve violations of the NCAA rulebook, but most did. As *ESPN* put it, “no team inspired more headlines in college sports than the NCAA’s enforcement division.”<sup>4</sup> After serving for nearly ten years as a volunteer member of the NCAA Division I Committee on Infractions, I know the members of the enforcement “team” quite well. They have their hands full, and they face a variety of challenges in addressing the impacts of social media on infractions cases.

I observed approximately 100 major infractions hearings during my time on the committee, and seldom did social media, even broadly defined,<sup>5</sup> play a significant role. That is changing. While sports blogs and other media reports long have influenced public perceptions of infractions cases, electronic media are now beginning to emerge regularly at the heart of major cases. In a recent tongue-in-cheek “guide to smarter NCAA rule-breaking,” a *Sports Illustrated* writer provided the following examples:

North Carolina’s football program has a date with the NCAA’s Committee on Infractions because former defensive tackle Marvin Austin got too descriptive on Twitter. Jim Tressel is currently unemployed because of a series of e-mails. Bruce Pearl isn’t coaching basketball at Tennessee because

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<sup>3</sup> See *id.* at 54-58; Phil Taylor, *How Low Can You Go?*, SPORTS ILLUSTRATED, April 11, 2011, at 84, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1184185/index/index.htm>.

<sup>4</sup> McGee, *supra* note 2, at 52.

<sup>5</sup> A website entitled “The Social Media Guide” suggests a multitude of potential definitions of “social media.” Matthew Tommasi, *50 Definitions of Social Media*, THE SOCIAL MEDIA GUIDE <http://thesocialmediaguide.com/socialmedia/50-definitions-of-social-media>. The author of the article adopts the following definition: “user generated content that is shared over the internet via technologies that promote engagement, sharing and collaboration.” *Id.* The latest Merriam-Webster Dictionary definition states that social media are “forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos).” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media>.

someone snapped a photo of a recruit at Pearl's house, which was inconvenient since Pearl told the NCAA the recruit hadn't been at his house.<sup>6</sup>

While e-mail messages and photographs may be primitive in today's realm of social media, they are meant to be shared with others, and they often "go viral" through the use of social media. The point is that information is shared today in many ways, at breathtaking speed, with vast audiences—and that information can easily become the downfall of a collegiate athletics program.

This article will explore a variety of the impacts social media have on major NCAA infractions cases. The article begins with general observations regarding the effect of internet posts on the public's perception of infractions cases. It then discusses how internet posts can trigger investigations, provide evidence of rule violations, or even constitute violations themselves. The article concludes with a discussion of practical difficulties in the enforcement of NCAA rules and some comments about future developments in infractions cases that involve social media.

#### I. THE EFFECT OF SOCIAL MEDIA POSTS ON PUBLIC PERCEPTION OF INFRACTIONS CASES

Every fan is an expert, not only about how one's favorite team should develop and execute its game plan, but also about the weaknesses of opposing teams, the business of intercollegiate athletics, and the nature of sports in general. If fans are experts, sports "commentators," with newspaper columns, blogs, or other means of reaching a mass audience, surely must consider themselves *special* experts. A favorite subject of these commentators, because of its high-profile nature, is the NCAA rules enforcement process.

Any major infractions case<sup>7</sup> involving a prominent intercollegiate athletics program brings commentators out of the

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<sup>6</sup> Andy Staples, *Cheating for Dummies: Your Guide to Smarter NCAA Rule-Breaking*, SL.COM (July 5, 2011, 1:09 PM), [http://sportsillustrated.cnn.com/2011/writers/andy\\_staples/07/05/cheating-for-dummies/index.html](http://sportsillustrated.cnn.com/2011/writers/andy_staples/07/05/cheating-for-dummies/index.html).

<sup>7</sup> A "major" infractions case is one in which "major" violations are alleged by the NCAA enforcement staff and/or found by the Committee on Infractions. (For an explanation of the division of labor in NCAA infractions cases, see *infra* note 24.) The

woodwork. For example, a recent Google search for “Tennessee infractions case” yielded “about 1,300,000 results” in “0.17 seconds.” Some of these commentators are informed; however, many are not. So, any observer who wants to know how infractions cases truly are handled must read blog accounts and other reports with a critical eye and be willing and able to separate the wheat from the chaff.

The Cam Newton story provides a worthy example. The NCAA<sup>8</sup> received considerable heat for determining that Newton was eligible to compete in the 2010 Southeastern Conference football championship and the 2011 BCS National Championship, despite allegations that his father actively sought to “sell” Newton’s services to the highest bidder.<sup>9</sup> The NCAA’s student-athlete reinstatement staff made its decision on Newton’s eligibility because no evidence existed that Newton himself knew

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NCAA Manual defines a major violation as any violation that is not “secondary.” Nat’l Collegiate Athletic Ass’n, 2010-11 NCAA DIVISION I MANUAL, Bylaw 19.02.2.2 (2010), <http://www.ncaapublications.com/productdownloads/D111.pdf>. [Hereinafter, references to the rulebook will be to the “NCAA Manual” and citations to specific rules/bylaws will be to the bylaw number.] A secondary violation is one that is “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.” NCAA Manual, Bylaw 19.02.2.1.

<sup>8</sup> “The NCAA” is a voluntary association of over 1,000 colleges and universities with athletics programs. Its governance structure includes a paid staff at NCAA headquarters in Indianapolis and a host of committees comprised of volunteers from member institutions and the public. Many observers are quick to criticize “the NCAA,” however, the association gains power from its members and its governance structure vests considerable authority – including authority over the enforcement and infractions processes – in representatives of member institutions. Thus, the first step in comprehending the NCAA’s rules-enforcement world is to understand which entities or individuals have acted (or failed to act) on the association’s behalf.

<sup>9</sup> See, e.g., Andrew Sharp, *Cam Newton Wins Again, and It’s Time to Smile at the NCAA’s Best Story in Years*, SBNATION.COM, Dec. 6, 2010, <http://www.sbnation.com/ncaa-football/2010/12/6/1857918/cam-newton-investigation-ncaa-auburn-sec-championship> (“That [Cam Newton has] been allowed to stay on the field is a concession to conscious hypocrisy by the biggest hypocrites in sports.”); Gene Wojciechowski, *NCAA Spins Fairy-Tale Fodder*, ESPN.COM, Dec. 1, 2010, [http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski\\_gene&id=5872192&sportCat=ncf](http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=5872192&sportCat=ncf) (NCAA has created “a rules loophole the size of Jordan-Hare Stadium”). But see William C. Rhoden, *Blame the Father, and Spare the Son*, N.Y. TIMES, Dec. 2, 2010, <http://www.nytimes.com/2010/12/03/sports/ncaafotball/03rhoden.html> (NCAA made the right call on Newton’s eligibility).

of his father's efforts.<sup>10</sup> Commentators reasonably could question that decision, given allegations of a serious amateurism violation<sup>11</sup> and the fact that the NCAA enforcement staff had barely begun its investigation into potential rules violations.<sup>12</sup>

The decision on Newton's *eligibility to compete*, however, differs substantially from giving Auburn University (Newton's school at the time) or anyone else an infractions "pass." In other words, a critical distinction exists between the reinstatement of a student-athlete's eligibility and an infractions determination. They result from two separate processes, handled by two distinct groups within the NCAA.<sup>13</sup>

Some commentators correctly observed that the eligibility decision was simply a first step: the NCAA enforcement staff would continue its investigation into potential rule violations, and Auburn University would not be "off the hook" unless and until that investigation turned up no evidence of violations.<sup>14</sup> Other

<sup>10</sup> NCAA, *NCAA Addresses Cam Newton's Eligibility*, Dec. 1, 2010, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/December/NCAA+addresses+eligibility+of+Cam+Newton>.

<sup>11</sup> See NCAA Manual, Bylaw 12.3.3 (prohibiting any individual from "represent[ing] a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid").

<sup>12</sup> The enforcement staff's investigation lasted 13 months, ending in October 2011. See *infra* note 14.

<sup>13</sup> "Reinstatement decisions are independent of the NCAA enforcement structure and typically are made once the facts of the student-athlete's involvement are determined. The reinstatement process is likely to conclude before an investigation closes." NCAA, *Differences Between Eligibility and Enforcement*, NCAA.ORG (May 9, 2011), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/resources/in+the+news/>. The distinction became very clear during a public meeting in the summer of 2011 of representatives of the Southeastern Conference. Gene Chizik, the head football coach at Auburn repeatedly pressed Julie Roe Lach, the NCAA Vice President of Enforcement, about why Auburn had not been given a clean bill of health by the NCAA enforcement staff in the Newton matter. After trying to deflect the inquiry, an apparently exasperated Roe Lach finally responded that Chizik and Auburn would "know" when the investigation into potential rules infractions was concluded, "[a]nd we're not finished yet." Pete Thamel, *N.C.A.A. Inquiry of Auburn Isn't Over, Exchange Reveals*, N.Y. TIMES, July 13, 2011, <http://www.nytimes.com/2011/07/14/sports/ncaafotball/ncaas-investigation-of-auburn-isnt-over-yet.html>.

<sup>14</sup> See, e.g., Darren Everson, *College Football's New Problem*, WALL ST. J., Dec. 3, 2010, <http://online.wsj.com/article/SB10001424052748703377504575650743412370442.html> (eligibility decision "hardly means Auburn is off the hook"). The NCAA enforcement

commentators incorrectly jumped to the conclusion that the eligibility determination “exonerated” Auburn University.<sup>15</sup> In such a high-profile case, readers would have been better informed had more commentators noted the critical distinction between reinstatement of student-athlete eligibility and an infractions determination.

Two other examples of news reports gone awry arose in the University of Memphis men’s basketball infractions case which involved an allegation that a prominent student-athlete<sup>16</sup> enlisted someone else to take an SAT test for him in order to gain admission to the University of Memphis.<sup>17</sup> Concerned about the authenticity of the student-athlete’s test scores, the testing agency ultimately voided the scores, rendering the student-athlete academically ineligible to compete (retroactively). As a result of the student-athlete’s ineligibility (and other violations within the program), the NCAA Division I Committee on Infractions vacated the men’s basketball team’s victories during a record-breaking 38-win season, including an appearance in the 2008 national championship game.<sup>18</sup> The university appealed the penalty, and during the early stages of the appellate process a sports columnist

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staff did complete its investigation in October 2011, finding no evidence of violations on Auburn’s part. Pete Thamel, *Auburn Is Cleared in Investigation Into Newton*, N.Y. TIMES, Oct. 12, 2011, <http://www.nytimes.com/2011/10/13/sports/ncaafotball/auburn-is-cleared-in-investigation-into-cam-newtons-recruitment.html>.

<sup>15</sup> See, e.g., Pete Fuitak, *CFN Analysis: Cam Newton Ruled Eligible*, COLLEGEFOOTBALLNEWS.COM, Dec. 1, 2010, <http://cfn.scout.com/2/1027298.html> (Auburn “exonerated”). Other commentators confused matters with internally inconsistent statements. See, e.g., Matt Zemek, *CFN Analysis: Cam Newton Ruled Eligible*, COLLEGEFOOTBALLNEWS.COM, Dec. 1, 2010, <http://cfn.scout.com/2/1027298.html> (eligibility decision “lets Auburn off the hook” even though “the NCAA’s investigation isn’t over yet”).

<sup>16</sup> The names of student-athletes and other “involved individuals” are never included in public infractions reports. Nonetheless, by the time those public reports are released, the media have long since identified the involved parties. The Memphis case, which resulted in the vacation of the Memphis men’s basketball team’s victories during the 2007-08 season, including its Final Four semifinal win, was widely reported with the student-athlete’s name. Thus, all but the most casual fan will know the identity of the involved student-athlete. The NCAA’s practice of withholding names in its public infractions reports, at least in certain circumstances, may be an anachronism, but nonetheless, I will preserve the “confidentiality” of the individual’s name.

<sup>17</sup> NCAA, Univ. of Memphis Public Infractions Report, Aug. 20, 2009, at 12-13, available at <https://web1.ncaa.org/LSDBi/exec/homepage> (click “Search,” then “Major Infractions”).

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

asserted that the NCAA had “issued a ruling on the University of Memphis’ appeal . . . but they aren’t telling anyone what that ruling is. . . . [I]t’s this sort of behavior that destroys any faith the public might have in the NCAA’s ability to police itself in a fair and reasonable manner.”<sup>19</sup>

This is a perfect instance of a blogger who felt the compulsion to speak—and to condemn “the NCAA” in broad terms—without taking steps to learn even the most rudimentary aspects of the enforcement process. The NCAA had not issued any ruling. The Committee on Infractions had simply submitted its response to the university’s appeal.<sup>20</sup> A hearing and ultimate ruling were still months away.

A comment on “ESPN Conversations” following the Memphis appeals decision, which upheld the vacation penalty, stated: “Total bull from the NCAA. A self-protecting ruling which ignores any form of logic, *even Vitale logic*. The NCAA has no credibility left after this decision.”<sup>21</sup> The italicized reference is to college basketball analyst Dick Vitale, who had been quoted in *USA Today* as saying, “My feeling is Memphis’ appeal of the decision has merit. The NCAA Clearinghouse indicated on several occasions that [the student-athlete] was eligible to play. Why have a clearinghouse if its word is meaningless?”<sup>22</sup>

With all due respect to Mr. Vitale, who certainly has earned his status as a college basketball guru, that analysis is awfully simplistic. The NCAA Clearinghouse, now the Eligibility Center, is responsible for certifying student-athletes as eligible to compete. The clearinghouse, however, can act only upon information that is available to it at the time in question. If the clearinghouse, for example, has no information that a student-athlete’s standardized test scores are anything but legitimate, it

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<sup>19</sup> Charlie Zegers, *NCAA Rules on Memphis Appeal but Won’t Announce Ruling*, ABOUT.COM, BASKETBALL (November 19, 2009), <http://basketball.about.com/b/2009/11/19/ncaa-rules-on-memphis-appeal-but-wont-announce-ruling.htm>.

<sup>20</sup> I wrote the response in my capacity as coordinator of appeals for the Division I Committee on Infractions. For an overview of the responsibilities of the coordinator of appeals, see NCAA Manual, Bylaw 19.1.1.4.

<sup>21</sup> *NCAA: Memphis Must Vacate Wins*, ESPN CONVERSATIONS (Mar. 22, 2010), <http://myespn.go.com/s/conversations/show/story/5018281> (emphasis added).

<sup>22</sup> Dick Vitale, *Self, Calipari May Again Be in Finale*, USA TODAY (Nov. 5, 2009), [http://www.usatoday.com/SPORTS/usaedition/2009-11-05-vitalecolumn2009\\_st\\_U.htm](http://www.usatoday.com/SPORTS/usaedition/2009-11-05-vitalecolumn2009_st_U.htm).

will reasonably certify the student-athlete as eligible to compete. In the Memphis case, as the public infractions report makes clear, the university had information that the student-athlete's test scores were in question, but that information had not been shared with the NCAA clearinghouse.<sup>23</sup>

These are just run-of-the-mill examples. Most high-profile infractions cases engender equally passionate, and often ill-informed, criticism of the NCAA, sometimes from observers who feel the enforcers were too *lenient* on the rule-breakers. Criticism, of course, comes with the territory, and those who work for or with the NCAA, as paid employees or volunteer committee members, must develop a thick skin. Nonetheless, the unfettered nature of social media posts can have a corrosive effect, and badly skew public perceptions of how the NCAA enforcement staff, the Committee on Infractions, and the Infractions Appeals Committee do their work.<sup>24</sup>

NCAA officials often are hamstrung in their efforts to combat misinformation about infractions cases. The NCAA's official policy is not to comment on ongoing infractions cases, even when misinformation sweeps the internet in the form of social media posts.<sup>25</sup> Even after the conclusion of the infractions case, seldom will NCAA officials comment, except through public infractions

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<sup>23</sup> NCAA, Univ. of Memphis Public Infractions Report, *supra* note 17, at 12.

<sup>24</sup> NCAA enforcement staff members are salaried employees of the NCAA. They are the investigators and "prosecutors," whose job is to investigate allegations of NCAA violations and to present evidence of violations to the Committee on Infractions, typically at an "infractions hearing." See NCAA Manual, Bylaws 32.2.1, 32.8.7. Members of the Committee on Infractions are unpaid volunteers whose job is to hear and evaluate evidence presented by all parties at an infractions hearing. *Id.* Bylaw 19.1.3; see also Josephine R. Potuto & Jerry R. Parkinson, *If It Ain't Broke, Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437 (2011). They act as the "trial judge" in an infractions case, finding violations (or not) and imposing penalties on rule-breakers. The Infractions Appeals Committee, also comprised of unpaid volunteers, then acts as an "appellate court," reviewing the judgments of the Committee on Infractions and either affirming or reversing those judgments. NCAA Manual, Bylaw 19.2.

<sup>25</sup> Much of that policy is dictated by an NCAA bylaw on confidentiality: "The Committee on Infractions, the Infractions Appeals Committee and the enforcement staff shall treat all cases before them as confidential until they have been announced in accordance with the prescribed procedures." NCAA Manual, Bylaw 32.1.1.

reports<sup>26</sup> and brief comments at news conferences held in conjunction with public release of the reports.<sup>27</sup>

The result of the NCAA's "no comment" policy often allows bloggers and other commentators to shape the discourse about an infractions case, even if their comments are ill-informed, hyperbolic, or portray the NCAA in a poor light. In my judgment, NCAA officials should rethink their stance, particularly as social media posts have become ubiquitous. More vigorous responses to clear misstatements and mischaracterizations might assist in educating the general public about what really happened in a major infractions case. In the meantime, the NCAA should continue its laudatory efforts to educate observers about the enforcement processes generally.<sup>28</sup> Finally, both commentators and casual observers should take care to base their perceptions of an infractions case on facts, rather than conjecture or the observations of a self-appointed "expert." Some of those "experts" are on target, but many miss the mark widely.

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<sup>26</sup> Both the Committee on Infractions and the Appeals Infractions Committee release public infractions reports, which are made available on the NCAA's website. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org>.

<sup>27</sup> The NCAA Manual provides that "[t]he chair or a member of the Committee on Infractions shall make the committee's public announcement related to major infractions when the committee determines that an announcement is warranted in addition to distribution of the written report." NCAA Manual, Bylaw 32.9.2.2. The Committee on Infractions typically does have its chair make such a public announcement and answer questions from members of the media. Moreover, at the end of each infractions hearing, the chair of the Committee on Infractions typically informs the parties that apart from the chair's comments at the news conference, there will be no further comments about the case from any members of the committee. The Infractions Appeals Committee does not make public comments in conjunction with the release of its reports.

<sup>28</sup> The NCAA's recent efforts have included hosting for two dozen journalists the "Enforcement Experience," a seven-hour, simulated enforcement staff investigation and infractions hearing. See Libby Sander, *NCAA Looks to Debunk Myths About Enforcement Investigations*, CHRON. OF HIGHER EDUC., May 10, 2011, <http://chronicle.com/article/NCAA-Looks-to-Debunk-Myths/127457>. A wealth of information exists on the NCAA's website for those who truly want to poke around and understand the processes, including news releases and short guides to such topics as the differences between student-athlete eligibility and rules enforcement. See *supra* note 13.

## II. POSTS THAT TRIGGER INVESTIGATIONS

An NCAA investigation into potential rule violations begins with information that comes to the attention of the enforcement staff. This information can come from a wide variety of sources, such as disgruntled student-athletes, anonymous tips, and “self-reports,” from NCAA institutions.<sup>29</sup> In 2007, David Price, former NCAA Vice President of Enforcement, stated that his staff typically received seven or eight tips a day regarding potential rules violations, and that many of those tips came from fans “trolling online message boards.”<sup>30</sup>

Imagine the breadth of information, both reliable and unreliable, available online today, including on social media sites. Surely the tweets, Facebook messages, and other internet posts of student-athletes, coaches, boosters, and others keep compliance officials<sup>31</sup> and other athletics personnel at NCAA institutions awake at night. This article will later address the types of posts that constitute violations themselves.<sup>32</sup>

It takes little imagination to realize that fans “trolling” social media sites could find information that would be of interest to institutional and conference compliance officials along with the NCAA enforcement staff. A recent, high-profile example illustrates this point. In June 2011, the University of North Carolina reported that it had received a Notice of Allegations from the NCAA enforcement staff,<sup>33</sup> alleging a variety of major

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<sup>29</sup> Most NCAA institutions, and certainly all of them with large, high-profile athletics programs, employ full-time “compliance” personnel whose principal responsibility is to ensure their programs’ compliance with NCAA rules. The compliance responsibility includes a duty to report known rule violations to the NCAA staff, and most major programs regularly report “secondary” violations, *see supra* note 7. Indeed, an institution that does *not* report secondary violations is suspect. According to the NCAA, its staff processed 3,468 self-reported secondary infractions in 2006. Brad Wolverton, *NCAA Says Infractions Cases Will Reach Record High This Year*, 54 CHRON. OF HIGHER EDUC. 5, Sept. 2007, at 28.

<sup>30</sup> Wolverton, *supra* note 29. Mr. Price reported that his investigators pursued “about one of every 15 leads.” *Id.*

<sup>31</sup> *See supra* note 29.

<sup>32</sup> *See infra* text accompanying notes 60-94.

<sup>33</sup> The NCAA enforcement staff issues a Notice of Allegations to the president or chancellor of a university after it conducts an investigation and determines that evidence exists to support a finding of a violation. NCAA Manual, Bylaw 32.6. Among other things, the notice specifies the rule violations that are alleged and requests the

violations in the university's football program.<sup>34</sup> Media reports indicated that the initial investigation was triggered by tweets on the Twitter accounts of two football student-athletes.<sup>35</sup> Those tweets could have led a reasonable reader to conclude that the student-athletes had received impermissible benefits from an agent a violation of NCAA amateurism rules.<sup>36</sup>

One of the principal objectives of a social media account, of course, is to disseminate information widely. People with many Facebook friends or Twitter followers typically are considered to be making the most of their social media opportunities. In the hands of a young student-athlete, whose athletic pursuits often are at the core of the individual's life, social media postings are likely to include regular details that could implicate NCAA rules from contacts with boosters or agents to academic eligibility to practice limitations. The same is true for the social media postings of coaches or other athletics personnel. A credible tip from an individual whose suspicions are raised by reading someone else's postings is sufficient to trigger an investigation into potential rules violations.

The consequences of an investigation can run deep. NCAA infractions cases often begin as investigations into one type of violation and morph into something entirely different, depending on where the evidence leads.<sup>37</sup> North Carolina learned that lesson. What began as an investigation into student-athletes' contacts

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president or chancellor to respond to the allegations, with "all relevant information which the institution has or may reasonably obtain." *Id.*, Bylaw 32.6.1.1.

<sup>34</sup> J.P. Giglio, *UNC Receives NCAA Letter Detailing Violations*, CHARLOTTE OBSERVER, June 22, 2011, <http://www.charlotteobserver.com/2011/06/22/2397408/unc-receives-ncaa-letter-detailing.html>.

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

<sup>36</sup> See, e.g., NCAA Manual, Bylaw 12.3.1.2 (prohibiting student-athletes from accepting benefits from a prospective agent).

<sup>37</sup> The NCAA enforcement staff provides a "Notice of Inquiry" to the president or chancellor of an institution at the beginning of any formal investigation. NCAA Manual, Bylaw 32.5. In addition to setting forth specific alleged violations, the notice also must contain "[a] statement indicating that other facts may be developed during the course of the investigation that may relate to additional violations." *Id.*, Bylaw 32.5.1-(g). Even toward the end of the investigation, when the enforcement staff issues its Notice of Allegations, the cover letter accompanying such a notice shall request "all relevant information which the institution has or may reasonably obtain, *including information uncovered related to new violations.*" *Id.*, Bylaw 32.6.1.1-(b) (emphasis added).

with agents now includes allegations of academic fraud, other extra benefits to student-athletes, improper “marketing” of student-athletes to an agent by an assistant coach, outside-income violations, unethical conduct by two former staff members, and the university’s failure to adequately monitor its football program.<sup>38</sup> The breadth and depth of the allegations undoubtedly played a role in the recent firing of the university’s head football coach and the resignation of its athletics director.<sup>39</sup>

One of the most interesting aspects of the North Carolina case is the NCAA enforcement staff’s allegation that the university’s failure to provide adequate monitoring of its football program includes the university’s failure to “adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program.”<sup>40</sup> I do not recall, in my experience on the Committee on Infractions, such an allegation in a major infractions case. Athletics department personnel long have cautioned student-athletes about internet posts, in part to encourage student-athletes to act as responsible and mature representatives of their universities. Undoubtedly, schools have also monitored their student-athletes’ online activities. The NCAA enforcement staff’s allegation in the North Carolina case, however, takes the matter a significant step further, essentially mandating monitoring—at least at a level that would detect clear rules infractions. Assuming this allegation finds its way into the enforcement staff’s case

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<sup>38</sup> Joe Giglio, *NCAA Alleges 9 Violations in Letter to UNC*, NEWS & OBSERVER (Raleigh, NC), June 21, 2011, <http://www.newsobserver.com/2011/06/21/1290991/unc-receives-notice-of-allegations.html>, including a verbatim description of the NCAA’s Notice of Allegations. The NCAA enforcement staff does not make public its Notices of Allegations, but schools under investigation often do, particularly public universities that face open-records requests from the media.

<sup>39</sup> Kelly Parsons, *On Heels of Davis’ Firing, Dick Baddour Announces Resignation*, DAILY TAR HEEL, July 28, 2011, [http://www.dailytarheel.com/index.php/article/2011/07/thorp\\_baddour\\_answering\\_questions\\_on\\_davis039\\_dismissal](http://www.dailytarheel.com/index.php/article/2011/07/thorp_baddour_answering_questions_on_davis039_dismissal). Nor should it surprise anyone that the firing of a popular head football coach just days before the start of preseason practice would lead to a new website, [www.fireholdenthorp.com](http://www.fireholdenthorp.com), calling for the firing of the chancellor. Ken Tysiac, *Thorp Targeted Online by Upset UNC Fans*, NEWS & OBSERVER (Raleigh, NC), August 3, 2011, <http://www.newsobserver.com/2011/08/03/1386989/thorp-target-at-unc.html>.

<sup>40</sup> Giglio, *supra* note 38.

summary submitted to the Committee on Infractions,<sup>41</sup> it will be interesting to see how the committee reacts. At the very least, the committee will have to determine whether imposing such a burden, in light of the vast array of internet posts, is fair to schools with limited compliance resources.

The North Carolina case is just one example of a case in which social media posts triggered an NCAA investigation. Many others are likely to follow, and university officials would be well-advised to pay attention to the social networking activities of their student-athletes and others associated with the athletics enterprise. Extra vigilance in this arena may prevent significant surprises when rules-compliance issues surface.

### III. POSTS THAT PROVIDE EVIDENCE OF INFRACTIONS

Just as social media posts may trigger investigations, they also may provide the NCAA enforcement staff with solid evidence of rule violations. Indeed, it seems likely that as student-athletes and others feel compelled to share even the most mundane details of their lives on the internet, infractions cases increasingly will be built around social media posts.

In the North Carolina case, for example, the Twitter tweets of the two student-athletes involved in alleged improper activity with an agent easily could provide the best evidence of rule violations, particularly if the involved individuals are not forthcoming during the investigation.<sup>42</sup> Once an incriminating

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<sup>41</sup> The NCAA bylaws require the enforcement staff to prepare, in advance of every infractions hearing, “a summary of the case that indicates the status of each allegation and identifies the individuals on whom and the information on which the staff will rely in presenting the case.” NCAA Manual, Bylaw 32.6.7. After a Notice of Allegations is submitted to the university, the university and any “involved individuals,” *id.*, Bylaw 32.1.5, have an opportunity (indeed, an obligation) to respond. Based on that response, and give-and-take between the enforcement staff and the university, the shape of the case, including the enforcement staff’s allegations, may change significantly before the case is presented to the Committee on Infractions.

<sup>42</sup> NCAA Bylaw 32.1.4 “imposes an affirmative obligation on each *institution* to assist the enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof.” NCAA Manual, Bylaw 32.1.4 (emphasis added). In developing relevant information, institutional staff members (and/or the NCAA enforcement staff) invariably will question, or seek to question, student-athletes involved in potential rule violations. Current student-athletes have an incentive to cooperate and be truthful if they wish to retain, or regain, their eligibility to compete. Former student-athletes and other

statement is loose on the internet, it is almost impossible to retract.

The recent Tennessee infractions case provides another relevant example. That case first came to light publicly on December 9, 2009, when the *New York Times* published an article reporting that the NCAA was investigating the University of Tennessee for questionable football recruiting practices.<sup>43</sup> The *Times* article reported that “[a] significant part of the investigation is focused on the use of recruiting hostesses who have become folk heroes on Tennessee Internet message boards for their ability to help lure top recruits.”<sup>44</sup>

Whether or not the *Times* article was accurate in its characterization of the recruiting hostesses as internet “folk heroes,” it certainly took little time after publication for some of the young women—or their organization, “Orange Pride”<sup>45</sup>—to become well-known in cyberspace. The *Times* article did not identify any of the Orange Pride members implicated in the investigation, but it did report that “the country’s top running back recruit last year, who is a freshman at Tennessee, was pictured on a social networking site last year with a hostess. Other Tennessee hostesses have publicly conversed with prospects through Facebook and MySpace.”<sup>46</sup> One can imagine, of course, how long it took to track down names of Orange Pride members with this information. Within hours, bloggers had posted names, photos from Twitter and MySpace (including a photo of one

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individuals not employed by the institution, such as agents or boosters, have no similar incentive. Cooperation from these individuals often is difficult to obtain, particularly because the NCAA enforcement staff has no subpoena power.

<sup>43</sup> Pete Thamel & Thayer Evans, *N.C.A.A. Puts Tennessee’s Recruiting Under Scrutiny*, N.Y. TIMES, December 9, 2009, <http://www.nytimes.com/2009/12/09/sports/ncaafotball/09tennessee.html>.

<sup>44</sup> *Id.*

<sup>45</sup> According to a statement issued by the University of Tennessee, Orange Pride is a student admissions group whose members serve as ambassadors for the university, including hosting prospective student-athletes and their families. The group includes both women and men. Univ. of Tennessee, *Statement from University of Tennessee Regarding NCAA Review*, Dec. 9, 2009, <http://www.utsports.com/sports/m-footbl/spec-rel/120909aad.html>.

<sup>46</sup> Thamel & Evans, *supra* note 43.

Orange Pride member with the star running back), and innuendo about the activities of hostesses in recruiting top prospects.<sup>47</sup>

Two days after the *New York Times* article, a writer for *SI.com* posted his own article with a photo showing two Orange Pride members posing with two standout football prospects after a high school game.<sup>48</sup> As luck would have it, the *SI.com* writer happened to be at the game and snapped the photo himself.<sup>49</sup> In the photo, one of the young women, dressed in Tennessee orange, is holding a large poster/sign identifying the recruits by name: “Miller & Willis have our Hearts.”<sup>50</sup>

Many collegiate athletics programs use students, both men and women, to serve as hosts or hostesses for prospects coming to campus on official visits.<sup>51</sup> Typically, such hosts/hostesses are considered “representatives” of the university’s athletics interests and are forbidden from engaging in recruiting efforts off campus.<sup>52</sup> Thus, the appearance of the young women with the sign at Byrnes High School (a high school football powerhouse, incidentally<sup>53</sup>) in

<sup>47</sup> See, e.g., JJ, *Lacey Pearl Earps Pictures and Orange Pride Info* (Dec. 9, 2009), <http://www.zimbio.com/Lacey+Pearl+Earps/articles>. There is nothing special about this posting, or the author, whoever “JJ” is. It just happens to be the first article to pop up, among 32,400 results, when one Googles “Tennessee infractions Lacey Earps.” The posting, made the same day the *New York Times* article was published, states, “Lacey Pearl Earps is the first name that’s been dug up as bloggers do their own investigations into the hostesses used in the University of Tennessee’s recruitment program. . . . One picture uncovered by bloggers is that of Lacey Pearl Earps with UT freshman running back Bryce Brown.” *Id.*

<sup>48</sup> Andy Staples, *Photo Reveals Vols Recruits Had Contact with Hostesses at Game*, *SI.COM*, Dec. 11, 2009, [http://sportsillustrated.cnn.com/2009/writers/andy\\_staples/12/11tennessee-recruiting/index/html](http://sportsillustrated.cnn.com/2009/writers/andy_staples/12/11tennessee-recruiting/index/html).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Official visits are those financed by the institution. There are numerous NCAA bylaws regulating the number and conduct of official visits. See NCAA Manual, Bylaw 13.6. A prospective student-athlete may make unofficial visits to campus “at his or her own expense an unlimited number of times.” *Id.*, Bylaw 13.7.

<sup>52</sup> NCAA Manual, Bylaws 13.01.4 (Recruiting by Representatives of Athletics Interests), 13.02.14-(c) (defining Representative of Athletics Interests), 13.6.7.5 (Student Host).

<sup>53</sup> See Staples, *supra* note 48 (the *SI.com* writer attended the high school football game because “[t]he following week, Byrnes was set to play Fort Lauderdale St. Thomas Aquinas in a matchup of the No. 1 and No. 2 high school teams in the nation”); Thamel & Evans, *supra* note 43 (Byrnes High “generally has one of the best teams in the country”).

Duncan, South Carolina (about a three-hour drive from Knoxville, Tennessee) naturally raised concerns about possible NCAA recruiting violations. In an infractions case the NCAA enforcement staff, in an attempt to prove impermissible recruiting activities, reasonably would be inclined to use the photo circulating the internet as Exhibit A.

Another violation in the Tennessee case occurred in men's basketball and revolved around the impermissible presence of recruits at a gathering at the head coach's home.<sup>54</sup> As reported in the Committee on Infractions' public infractions report, this violation came to light when

the enforcement staff received an anonymous letter containing a photograph of the former head men's basketball coach and prospect 1 standing together. Hand-written on the page on which the photograph was printed was the following question: Is having [prospect 1] a 2010 high school recruit in your home an NCAA violation?"<sup>55</sup>

The photograph became damning evidence after the coach lied to investigators by denying any knowledge of the prospect being at his home.<sup>56</sup> Had the photo been posted on a blog or social networking site (by the prospect or someone else), rather than being sent by letter to the NCAA enforcement staff, it would have been another example of a social media post at the heart of the enforcement staff's case.

The Tennessee case provides several lessons. First is the ease by which a social media post may provide evidence of a NCAA rules infraction. Second is the speed by which a multitude of people can discover or learn about the most minute details of an allegation. Perhaps lost in most people's analysis is the impact social media may have on individuals involved in an infractions case. The Orange Pride members implicated in the Tennessee case may have been characterized as "folk heroes," but they also have been portrayed, undoubtedly unfairly, in the most unflattering

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<sup>54</sup> NCAA, Univ. of Tennessee, Knoxville Public Infractions Report, Aug. 24, 2011, at 1, available at <https://web1.ncaa.org/LSDBi/exec/homepage>. (click "Search," then "Major Infractions")

<sup>55</sup> *Id.* at 1-2.

<sup>56</sup> *Id.* at 2.

terms in the internet posts of many “commentators.”<sup>57</sup> Finally, the internet and other media attention given to the initial Tennessee allegations (regarding Orange Pride recruiting activities) harks back to the principal point of Section I of this article<sup>58</sup>: public perception of the case was influenced wildly by what people read, in publications like the *New York Times*, but primarily in social media posts. The allegations were hyped to no end, but in the final analysis, the Committee on Infractions determined that the Orange Pride violation constituted nothing more than a secondary infraction, and a very minor part of the Tennessee case.<sup>59</sup>

#### IV. POSTS THAT CONSTITUTE VIOLATIONS

Despite the ubiquity of social media, the NCAA rulebook actually says very little about them. Facebook, MySpace, and Twitter (let alone other communication tools such as Skype, disposable cell phones, or G-chat) are not mentioned in the bylaws. What the bylaws do say is in the context of recruiting:

Electronically transmitted correspondence that may be sent to a prospective student-athlete (or the prospective student-athlete’s parents or legal guardians) is limited to electronic mail and facsimiles. . . . All other forms of electronically transmitted correspondence (e.g., Instant Messenger, text messaging) are prohibited.<sup>60</sup>

In today’s world, limiting recruiters to email and faxes seems almost quaint.<sup>61</sup> Phone calls, of course, also are permitted, but even they seem old-fashioned as a means of communicating with young people more accustomed to texting or sending messages via

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<sup>57</sup> See *supra* note 47 (indicating 32,400 results from a Google search of “Tennessee infractions Lacey Earps”). Trust me, many of the comments are despicable.

<sup>58</sup> See *supra* notes 7-28 and accompanying text.

<sup>59</sup> NCAA, Univ. of Tennessee, Knoxville Public Infractions Report, *supra* note 54, at 11-13.

<sup>60</sup> NCAA Manual, Bylaw 13.4.1.2 (bylaw cross-reference omitted).

<sup>61</sup> Another bylaw, cross-referenced in Bylaw 13.4.1.2, addresses recruiting contact with a prospective student-athlete prior to a competition. Coaches “may not send electronic correspondence to a prospective student-athlete while he or she is on call for competition at the competition site.” *Id.*, Bylaw 13.1.6.2-(f). If the student-athlete is on call, but not at the competition site, coaches may send electronic correspondence, provided it is “sent directly to a prospective student-athlete (e.g., the front desk of the hotel, the prospective student-athlete’s personal fax machine).” *Id.*

a social networking platform such as Facebook. On the other hand, promoting student-athlete welfare remains a primary goal of the NCAA membership, and the rules must be designed in furtherance of that goal.<sup>62</sup> Texting, for example, is prohibited “because of the potential cost to prospective student-athletes.”<sup>63</sup>

Considerable tension exists between the existing rules and the recruiting objectives of coaches who seek to meaningfully participate in their recruits’ world of communication. The next subsection of this article addresses some issues faced by coaches in achieving rules compliance in this brave new world. Following that discussion, the article examines potential rule violations that result from the posts of fans and student-athletes.

### *By Coaches*

To date there has not been a major violation found against an institution or a coach for conduct stemming from the use of social media.<sup>64</sup> Infractions that have occurred have been processed, both by institutions and the NCAA enforcement staff, as secondary violations. Typically, misuse of social media fits well within the definition of a secondary violation—one that is “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit.”<sup>65</sup>

One of the most common secondary violations appears to result from coaches inadvertently posting messages on the Facebook walls of recruits. Communicating with prospects can be a delicate endeavor because the use of email to contact recruits is permitted under the bylaws, the functional equivalent, using Facebook’s email function, for example, also is permissible. In

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<sup>62</sup> The NCAA Constitution includes “The Principle of Student-Athlete Well-Being” as one of its fundamental tenets: “Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.” *Id.*, Bylaw 2.2.

<sup>63</sup> NCAA, *Recruiting*, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting>.

<sup>64</sup> As noted previously, however, the NCAA enforcement staff at least preliminarily has alleged a failure to “adequately and consistently monitor social networking activity” of student-athletes as part of a “major” failure-to-monitor allegation against the University of North Carolina. *See supra* text accompanying notes 40-41.

<sup>65</sup> *See supra* note 7.

recruiting guidance on its website, the NCAA national office has indicated that schools and coaches “can email during permissible contact periods . . . even from social media platforms such as Facebook.”<sup>66</sup> Coaches must be vigilant, however, to ensure that their messages to recruits are posted into the recruits’ private, “direct message” boxes rather than to their “public” Facebook walls.

A few recent examples illustrate the problem. In December 2010, *USA Today* reported that Tennessee head football coach Derek Dooley had sent a message to a recruit from his mobile phone that inadvertently posted on the recruit’s Facebook wall.<sup>67</sup> The post, sent through Facebook’s email function, resulted in a secondary violation against Tennessee and education for Coach Dooley “in the use of the Facebook application on his mobile phone.”<sup>68</sup> The University of Virginia self-reported a secondary violation in 2010 stemming from head football coach Mike London’s post on a recruit’s Facebook wall. According to the university, Coach London “was under the impression that he sent [the prospect] an e-mail.”<sup>69</sup> Similarly, both the University of Florida and the University of Mississippi committed secondary violations in 2010 when assistant coaches improperly posted on Facebook walls of recruits.<sup>70</sup> In the University of Mississippi case, the assistant coach posted two photos on a recruit’s wall, thinking he was “posting into the recruit’s direct message box.”<sup>71</sup>

Another area of potential trouble for coaches is posting messages on their own social media pages. The NCAA national office has included clear guidance on its website that “NCAA rules do not allow comments about possible recruits on an institution’s social media page or a page belonging to someone affiliated with

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<sup>66</sup> NCAA, *Recruiting*, *supra* note 63.

<sup>67</sup> Erick Smith, *Derek Dooley’s Facebook Post Results in NCAA Violation for Tennessee*, USA TODAY, Dec. 21, 2010, <http://content.usatoday.com/communities/campusrivalry/post/2010/12/tennessee-derek-dooley-facebook-nick-oleary-ncaa-violation/1>.

<sup>68</sup> *Id.*

<sup>69</sup> Doug Doughty, *College Notebook: London Commits Secondary Violation*, ROANOKE TIMES, May 6, 2010, <http://www.roanoke.com/sports/college/wb/245838>.

<sup>70</sup> Jeremy Fowler, *Florida Football Misuses Facebook, Commits Four Minor NCAA Violations*, ORLANDO SENTINEL, July 12, 2010, [http://articles.orlandosentinel.com/2010-07-12/sports/os-florida-ncaa-violation-facebook-070100712\\_1\\_facebook-recruit-ole-miss](http://articles.orlandosentinel.com/2010-07-12/sports/os-florida-ncaa-violation-facebook-070100712_1_facebook-recruit-ole-miss).

<sup>71</sup> *Id.*

the institution.”<sup>72</sup> This limitation is a natural extension of a bylaw generally prohibiting comments regarding recruits prior to their signing of a National Letter of Intent or receipt of an institution’s written offer of admission and/or financial aid. Before those dates, an institution “may not comment generally about the prospective student-athlete’s ability or the contribution that the prospective student-athlete might make to the institution’s team; further, the institution is precluded from commenting in any manner as to the likelihood of the prospective student-athlete’s signing with the institution.”<sup>73</sup>

The rules apply to coaches’ Twitter accounts as well as to Facebook walls and other social media platforms. Many coaches and institutions have their own Twitter accounts, and regular tweets about one’s athletics program can play a significant role in recruiting. Coaches, however, must be careful not to overstep permissible bounds. The clearest guidance in this arena also comes from the NCAA national office’s website:

Tweeting is permissible as long as coaches are not using it to contact individual prospective student-athletes and are abiding by the standard recruiting rules such as not discussing specific recruits or contacting them when it is not permissible.<sup>74</sup>

Several coaches have run afoul of the proscription against commenting about specific prospects on social media sites. One case that garnered national attention involved Lane Kiffin during his brief tenure as head football coach at Tennessee. A 2009 article in *USA Today* reported that the University of Tennessee self-reported a secondary violation when an assistant coach posted on Coach Kiffin’s Twitter and Facebook accounts the following comments: “I was so excited to hear that J.C. Copeland committed to play for the Vols today!”<sup>75</sup> Unfortunately for Tennessee, the

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<sup>72</sup> NCAA, *Social Media and Recruiting*, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Issues/Recruiting/Social+Media+and+Recruiting>.

<sup>73</sup> NCAA Manual, Bylaw 13.10.2.

<sup>74</sup> NCAA, *Social Media and Recruiting*, *supra* note 72.

<sup>75</sup> Kelly Whiteside, *Tennessee Football Tweets Bring NCAA Whistle-Blowing*, USA TODAY, May 21, 2009, [http://www.usatoday.com/sports/college/football/sec/2009-05-20-vols-twitter\\_N.htm](http://www.usatoday.com/sports/college/football/sec/2009-05-20-vols-twitter_N.htm)

prospect's "commitment" was only verbal, and came before he signed a National Letter of Intent.<sup>76</sup>

To date, most social media violations by coaches appear to be both isolated and inadvertent, the result of coaches trying to understand new ways of communicating. As the rules become clearer, however, there will be less tolerance for violations. Compliance personnel should be well-attuned to the issues surrounding the use of social media, and hopefully they are continually educating their coaches on permissible and impermissible uses. I would not be surprised to see major infractions alleged against institutions and coaches in the future, either for coaches' intentional violations or for their repeated secondary violations. Under NCAA bylaws, "[m]ultiple secondary violations by a member institution may collectively be considered as a major violation."<sup>77</sup>

#### *By Boosters/Representatives*

In the past few years, the social media activity of fans and boosters of particular athletics programs has generated considerable attention.<sup>78</sup> That activity typically takes one of two forms, both related to efforts to convince top recruits to attend the fan's favorite school. First, fans often reach out directly to recruits by sending "friend requests" to the recruits' Facebook or MySpace accounts. If the recruit accepts a friend request, what typically occurs next is a steady stream of messages urging the recruit to attend the fan's alma mater or other school in which the fan has a

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<sup>76</sup> *Id.* Secondary violations are not announced publicly by the NCAA, but the article quoted an NCAA spokesman as stating that "other secondary violations related to electronic transmissions and social networking sites" had come to the enforcement staff.

<sup>77</sup> NCAA Manual, Bylaw 19.02.2.1.

<sup>78</sup> See, e.g., Dave Seminara, *Social Media and the NCAA – A Recruit's Friend, A Team's Fan and a Headache for Colleges*, N.Y. TIMES NEWS SERVICE, Apr. 17, 2011, <http://www.nytimes.com/2011/04/18/sports/ncaabasketball/18recruiting.html?pagewanted=all>; Ben Volin, *Social Networking Sites Aren't Supposed to Be Recruiting Grounds – But They Are*, PALM BEACH POST, Jan. 24, 2009, [http://www.palmbeachpost.com/sports/content/sports/epaper/2009/01/24/a1c\\_facebook\\_0125.html](http://www.palmbeachpost.com/sports/content/sports/epaper/2009/01/24/a1c_facebook_0125.html); Steve Yanda, *Fans' Recruiting Pitches Are Catching On*, WASH. POST, Oct. 16, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/15/AR2008101503083.html>.

particular interest.<sup>79</sup> Second, fans create their own social media groups and sites, similarly urging recruits to attend specific institutions.<sup>80</sup>

Both uses of social media are potentially problematic in the NCAA infractions world. NCAA bylaws generally prohibit “representatives” of an institution’s athletics interests from making recruiting contacts with prospective student-athletes.<sup>81</sup> Is the fan employing social media to reach out to a recruit an institutional “representative”? Arguably so – the NCAA Manual states:

A “representative of the institution’s athletics interests” is an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization who is known (or who should have been known) by a member of the institution’s executive or athletics administration to:

- (a) Have participated in or to be a member of an agency or organization promoting the institution’s intercollegiate athletics program;
- (b) Have made financial contributions to the athletics department or to an athletics booster organization of that institution;
- (c) Be assisting or to have been requested (by the athletics department staff) to assist in the recruitment of prospective student-athletes;

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<sup>79</sup> The *Washington Post*, for example, reported the experience of a high school offensive lineman in North Carolina who was ranked the No. 39 recruit in the country by Rivals.com. After the student-athlete accepted a “friend request” on his MySpace account from a student at the University of West Virginia, he “received a message from the . . . student almost daily.” Yanda, *supra* note 78. The student-athlete said he received “three or four MySpace messages . . . per day from fans of different schools,” including some messages disparaging rival schools. *Id.*

<sup>80</sup> See, e.g., Volin, *supra* note 78. Volin reported that “almost 4,600 Ohio State fans joined a Facebook group to try to entice quarterback prospect Terrelle Pryor to the Buckeyes, which he eventually did. Also formed were groups called, ‘Make Terrelle Pryor an Oregon Duck’ (2,496 members), ‘Terrelle Pryor PENN STATE WANTS YOU!!!!’ (1,834 members), ‘Wolverines for Terrelle Pryor’ (1,639 members) and ‘Terrelle Pryor to West Virginia’ (542 members).”

<sup>81</sup> NCAA Manual, Bylaw 13.1.2.1 (with a handful of specific exceptions, “in-person . . . contact [with a prospective student-athlete], as well as correspondence and telephone calls, by representatives of an institution’s athletics interests is prohibited”).

(d) Be assisting or to have assisted in providing benefits to enrolled student-athletes or their families; or

(e) Have been involved otherwise in promoting the institution's athletics program.<sup>82</sup>

Depending on the circumstances, a fan/booster who attempts to persuade a prospective student-athlete to attend a particular institution could fit several of the above categories. For example, a fan/booster could be "assisting . . . in the recruitment of prospective student-athletes" or "otherwise . . . promoting the institution's athletics program." Arguably, a social media group formed for a recruiting purpose could be an "organization" promoting an institution's athletics program.

A key part of the "representative" definition, however, is that the individual is a person "who is known (or who should have been known) by a member of the institution's executive or athletics administration" to have engaged in one of the above-mentioned activities. To what extent *should* athletics department staff members know about the social media activities of their students, alumni, or other fans? To date, the NCAA national office seems to have taken the position that a member institution need not actively seek out information relating to boosters' social media efforts. If that information comes to the attention of university officials, however, they should take measures to ensure that the social media activity does not cross permissible bounds. In a recent newspaper article an NCAA spokesman was quoted as follows: "*If a school comes across an instance of this happening, it is expected that they would reach out to those . . . fans and boosters and reinforce the ground rules related to communicating with recruits.*"<sup>83</sup>

On the other hand, the allegations in the North Carolina case may signal an expectation by the NCAA enforcement staff that schools make a more proactive effort to monitor social networking

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<sup>82</sup> *Id.*, Bylaw 13.02.13.

<sup>83</sup> Seminara, *supra* note 78 (emphasis added) (quoting an email message from Cameron Schuh, NCAA associate director of public and media relations); *see also* Yanda, *supra* note 78 (quoting Stacey Osburn, NCAA director of public and media relations: "*If a school found out this was going on, it would have to self-report it [as a secondary violation]*") (emphasis added).

activity. As noted previously, the enforcement staff's allegation that the University of North Carolina failed to provide adequate monitoring of its football program includes the university's failure to "adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations within the football program."<sup>84</sup> The North Carolina allegations arose in a different context (amateurism violations) and presumably are focused on the university's alleged failure to monitor the social networking activity of its *student-athletes*. A similar rationale, however, may extend to more active monitoring of other individuals who are "visibly" promoting the university's athletics program. An NCAA spokesperson has been quoted as saying that

if a school were to report a violation regarding fan usage of social networks to contact recruits, the NCAA would try to answer two questions: Did the university in question have a *system in place to monitor this type of activity*, and was the university responsible in any way for encouraging the [individuals] to contact recruits"<sup>85</sup>

Some institutions have taken affirmative steps to shut down social media sites that have potentially violated NCAA recruiting rules, but often those efforts are met with little success. When administrators at Penn State asked its students to close down a Facebook group aimed at enticing quarterback prospect Terrelle Pryor to Penn State, only about a third of its approximately 1,000 members left the group.<sup>86</sup> When Duke compliance officials asked the creator of the "John Wall Come to Duke!" Facebook group to stop its activities, he changed the group's name to "Wohn Jall Come to a School in Durham" and the group kept posting.<sup>87</sup> Other schools have been more successful: when Syracuse University asked the 500-member group "Supporters for DaJuan Coleman to Stay in Syracuse" to shut down its site, the group complied.<sup>88</sup>

To date, the NCAA enforcement staff seems to be looking simply for a good-faith effort on the part of member institutions,

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<sup>84</sup> See *supra* notes 40-41 and accompanying text.

<sup>85</sup> Yanda, *supra* note 78 (emphasis added).

<sup>86</sup> *Id.*

<sup>87</sup> Seminara, *supra* note 78 (noting as well that another Facebook group promoting the University of Kentucky was named "John Wall, I'll Pay You to Come to KU").

<sup>88</sup> *Id.*

recognizing that it is “impossible,” in the words of one university compliance official, to effectively monitor “the proliferation of what goes on with the Internet.”<sup>89</sup> In the Penn State case, for example, the NCAA enforcement staff ended its investigation into the Terrelle Pryor Facebook group, despite the university’s limited success in shutting down the group’s site, because university officials had taken reasonable steps to halt the group’s activity.<sup>90</sup> As Penn State’s compliance coordinator put it, “the NCAA understands how difficult this can be, and everyone’s pretty reasonable when these things arise.”<sup>91</sup>

Enforcement difficulties aside, NCAA membership schools, with the encouragement and support of the NCAA national office, should take steps to address the impacts of boosters’ use of social media to “recruit” prospects. Most schools undoubtedly send compliance brochures or newsletters to known boosters, but those efforts seem to have had little effect on fans’ willingness to push the envelope. While some prospective student-athletes may revel in the attention of hundreds, or even thousands, of new-found “friends,”<sup>92</sup> other evidence suggests that student-athlete welfare may be jeopardized when social media contacts are left unchecked.<sup>93</sup> Moreover, in some instances, a very real recruiting advantage may be obtained through flattery (or worse, the disparagement of rival institutions), particularly when dealing with impressionable 17- and 18-year-old minds.

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<sup>89</sup> Yanda, *supra* note 78 (quoting Mike Karwoski, associate athletic director for compliance at Notre Dame); *see also* Volin, *supra* note 78 (quoting Bill Smith, assistant athletics director of new media at the University of Arkansas: “How can you stop Joe Student? You can’t, unless you want to get into a whole lot of IP tracking”).

<sup>90</sup> Yanda, *supra* note 78.

<sup>91</sup> *Id.* (quoting John Bove, Penn State compliance coordinator).

<sup>92</sup> Apparently Austin Rivers, now a freshman basketball player at Duke, won the sweepstakes last year as perhaps “the most visible high school athlete in the nation with more than 18,000 Facebook fans, more than 23,000 Twitter followers and YouTube highlight clips that have been viewed nearly a million times.” Seminara, *supra* note 78.

<sup>93</sup> *Id.* (citing several prospects who were overwhelmed by the volume of contacts, including one who shut down all of his social media accounts as a result); *see also* Yanda, *supra* note 78 (quoting a recruit’s “aggravation” at the bombardment of “friend/fan” advice: “a lot of people expect you to go here or go there, but I’m trying to make this decision on my own”).

*By Student-Athletes*

Typically, social media posts by student-athletes do not constitute rule violations by themselves. More common is the post that implicates the student-athlete, and thus his institution, in other wrongdoing. The tweets of the student-athletes in the North Carolina case provide a good example: the underlying conduct involves alleged impermissible contact with an agent; the tweets simply communicated that conduct to a broad audience.<sup>94</sup>

The recent Ohio State case, however, presented the possibility of one scenario in which a student-athlete post could constitute a violation. Several student-athletes allegedly received improper benefits by selling memorabilia – bowl or conference championship rings, uniforms, etc. – for cash or exchanging the memorabilia for goods or services, including tattoos. Had a student-athlete offered to sell memorabilia via a social media site, presumably such action would constitute the same violation.

#### V. PRACTICAL DIFFICULTIES OF RULES ENFORCEMENT

The practical difficulties of enforcing NCAA rules related to the use of social media should be apparent from the preceding discussion. The primary goal, of course, should be to prevent violations from occurring in the first place, and the principal lines of defense in that effort are (1) education and (2) integrity. Much of the education responsibility falls to compliance officials at NCAA member institutions, who must communicate continually to student-athletes, coaches, and fans/boosters the appropriate and inappropriate uses of social media. Even the best efforts of compliance personnel, however, will be thwarted by individuals who disregard the rules – or even those who feel justified in walking a fine line between “bending” and breaking the rules.<sup>95</sup>

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<sup>94</sup> See *supra* text accompanying notes 35-36.

<sup>95</sup> A good example, also in the context of communicating with recruits, came several years ago in a case involving the University of Colorado. A head coach in that case characterized his recruiting methods as “creative” rather than rules-violative. He contended, for example, that he did not engage in impermissible “contacts” with recruits when he parked his car in the street in front of their homes, called them on his cell phone, and asked them to come to the front door, look outside, and carry on a phone conversation with the coach sitting several yards away. NCAA, University of

The NCAA is a self-policing association, and rules enforcement begins at the membership schools. All of those schools have finite resources<sup>96</sup>—the most obvious practical constraint on effective rules enforcement (aside from trying to control the behavior of individuals who are either ignorant or disdainful of the rules). The problem is particularly acute in the social media arena, where *monitoring* is the key to compliance and the sheer volume of social media contacts can be overwhelming.

The North Carolina case<sup>97</sup> puts the problem into clear focus. The NCAA enforcement staff has requested from the university a summary of the university's "efforts to monitor the social networking activity of football student-athletes."<sup>98</sup> The ramifications of that request may strike fear in the heart of every compliance officer in the country. Are they on notice that if they do not monitor all of the "social networking activity" of all of their student-athletes (typically in the hundreds) they may be vulnerable to a "failure to monitor" charge if some of that activity "visibly illustrate[s]" potential rules violations?<sup>99</sup>

The resource implications of such a task are evident. Compliance officers already have a full plate of issues without imposing an additional burden of monitoring every text message or other electronic communication of their student-athletes. Moreover, if such monitoring is expected, it seems likely that both First Amendment and basic privacy issues will surface. Those issues are beyond the scope of this article, but extensive intrusion into student-athletes' personal lives by "state actors" (at least

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Colorado, Boulder Public Infractions Report, Oct. 8, 2002, at 1-3, 12-14, <http://web1.ncaa.org/LSDBi/exec/homepage> (click "Search" then "Major Infractions").

<sup>96</sup> Some schools, of course, have far more resources than others and can afford sizable compliance staffs. One must remember, however, that the NCAA has over 1,000 member institutions, the vast majority of which struggle to balance the budgets of their athletics departments. Even for the 120 schools in the FBS (Football Bowl Subdivision) conferences, the resource picture is relatively bleak. A 2010 report from the well-respected Knight Commission on Intercollegiate Athletics concluded that only seven intercollegiate athletics programs generated enough revenue to have had an operating profit in each of the previous five years. Curtis Eichelberger, *Knight Panel Says Collegiate Sports Spending May "Destabilize" Education*, BLOOMBERG.COM, June 17, 2010, available at <http://www.bloomberg.com/news/2010-06-17/knight-panel-says-sports-spending-may-destabilize-education.htm>.

<sup>97</sup> See *supra* notes 33-41 and accompanying text.

<sup>98</sup> Giglio, *supra* note 38.

<sup>99</sup> See *supra* text accompanying notes 40-41.

those officials at public universities) may implicate significant private interests protected under both federal and state constitutions.

At least one NCAA member institution considered resolving the monitoring problem by prohibiting its student-athletes from even *accessing* social media sites. In May 2006, the athletics director at Kent State University, prompted by concerns about student safety, ordered all student-athletes to delete their Facebook profiles by August 1.<sup>100</sup> He reversed the decision two months later, but kept in place two significant restrictions: (1) the student-athletes had to limit access to their Facebook profiles to known “friends,” and (2) the student-athletes had to permit coaches and academic counselors to access and monitor their profiles to ensure compliance with the university’s “code of expected behavior” for student-athletes.<sup>101</sup>

Other universities have resorted to the use of special software to monitor the social networking activities of their student-athletes, which has led to the development of a cottage industry focused on serving athletics departments.<sup>102</sup> It remains to be seen what the NCAA enforcement staff (or the Committee on Infractions, if the failure to monitor allegations in the North Carolina case reach the committee) will expect in terms of monitoring. In the meantime, however, free speech advocates seem to be watching the situation carefully.<sup>103</sup>

While practical difficulties certainly are an issue in monitoring both student-athletes’ and coaches’ social media activity, at least those individuals are under some “control” of the university. Imagine the difficulty of monitoring the activities of

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<sup>100</sup> Whitney McFerron, Student Press Law Center, *University Lifts Facebook Ban for Student Athletes*, July 10, 2006, <http://www.splc.org/news/newsflash.asp?id=1299>.

<sup>101</sup> *Id.*

<sup>102</sup> Jon Solomon, *What to Do About Social Media? Colleges Tackle How to Monitor What Athletes Are Saying*, BIRMINGHAM NEWS, July 24, 2011, [http://www.al.com/sports/index.ssf/2011/07/what\\_to\\_do\\_about\\_social\\_media.html](http://www.al.com/sports/index.ssf/2011/07/what_to_do_about_social_media.html) (describing Mississippi State as the “pilot program” for software company Centrix Social and noting that UDiligence lists numerous high-profile universities as clients). The Centrix Social program generates email-warning messages to compliance officials whenever key words are discovered in student-athletes’ social media postings. *Id.*

<sup>103</sup> *See, e.g., supra* note 100 (noting the concern of the litigation coordinator for the ACLU of Ohio about the potential “chilling effect” on the speech of student-athletes).

university “representatives.” As noted previously,<sup>104</sup> NCAA bylaws provide for a relatively broad definition of a representative of a university’s athletics interests, so keeping tabs on fans/boosters who promote an athletics program through social media presents special challenges. Even if university officials knew who all of their “promoters” were,<sup>105</sup> they would need substantial resources to track their social media activity.

Recognition of those difficulties has led the NCAA national office, at least to date, to approve a more *reactive* approach to monitoring in this context—that is, if a school learns of a fan making direct contact with a prospect or setting up a social media site to encourage a prospect to attend the school, university officials are expected to urge the fan to discontinue the activity.<sup>106</sup> The North Carolina case, however, could signal that the enforcement staff will expect more proactive monitoring across the board—not only of student-athletes, but of all individuals connected to the university.

Finally, technological advances surely will continue to make rules enforcement difficult in the social media area. New methods of communication are being developed continually, and none of us can predict how young people will communicate even in the next year or two. In that environment, the NCAA always will be playing catch-up, particularly when its rulemaking (and rule-*changing*) process is slow and cumbersome.<sup>107</sup> Factor in other technology-related issues, such as hackers or establishment of social media accounts in others’ names, and the uncertainties will pose vexing problems, both for schools trying to monitor social media activity and for investigators trying to build an infractions case.

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<sup>104</sup> See *supra* notes 81-82 and accompanying text.

<sup>105</sup> Recall that the definition of a representative includes not only those *known* by administrators to be engaged in recruiting or other promotional activities, but also those “*who should have been known*” to be engaged in such activities. NCAA Manual, Bylaw 13.02.14 (emphasis added).

<sup>106</sup> See *supra* note 83 and accompanying text.

<sup>107</sup> The NCAA values its culture as voluntary *membership* organization, and rule changes are typically approved by the NCAA Board of Directors after a full vetting with the membership. The process is participatory, but often slow.

## VI. FUTURE DEVELOPMENTS

It seems unlikely that the NCAA will be able to maintain its current distinctions among different means of electronic communication. For example, a coach may email a prospect, but not text, so, according to NCAA national office guidance, “if a coach becomes aware that a recruit has elected to receive direct messages as text messages on a mobile device, the coach must cease communicating with the recruit through the social networking site.”<sup>108</sup> That kind of distinction seems fraught with problems: How will a coach “become aware” of the specifics of a recruit’s cell phone plan, and will communications with the recruit before the coach’s awareness still be considered violations? In addition to creating confusion, current bylaw distinctions impose resource burdens on NCAA enforcement staff members, who could be spending their time more productively than by dealing with inadvertent violations that likely have minimal recruiting impact.

The Southeastern Conference has gone one step further, calling recently for a “reset” on recruiting rules generally.<sup>109</sup> SEC Commissioner Mike Slive stated that it is time to:

move away from the idea that recruiting rules are designed to create a level playing field. There are significant differences between institutions in resources, climate, tradition, history, stadiums and fan interest and many other things that make the idea of a level playing field an illusion. Rules limiting text messaging and phone calls won’t alter that.<sup>110</sup>

Of course Commissioner Slive is correct – it is illusory to think that some rules, such as those restricting texting or social media contacts, level the playing field. On the other hand, might abandonment of rules limiting contacts with recruits result in even greater disparity, allowing those schools with the most resources to take advantage of new recruiting opportunities in ways that are unavailable to institutions with fewer resources?

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<sup>108</sup> NCAA, *Social Media and Recruiting*, *supra* note 72.

<sup>109</sup> *Mike Slive Proposes Athletics Reforms*, ESPN.COM, July 20, 2011, [http://espn.go.com/college-football/story/\\_/id/6787539/mike-slive-sec-proposes-reforms-college-sports](http://espn.go.com/college-football/story/_/id/6787539/mike-slive-sec-proposes-reforms-college-sports).

<sup>110</sup> *Id.*

Commissioner Slive made no mention of another major rationale behind recruiting rules: student-athlete welfare. NCAA guidance makes clear, for example, that texting with recruits was banned “because of the potential cost to prospective student-athletes.”<sup>111</sup> When the ban took effect in 2007, of course, the cost of texting was more acute – most cell phone plan providers charged by the text, which could add substantial charges to users’ monthly bills. In the last few years, however, as texting has rocketed to a predominant means of communication, particularly among young people, providers have moved to plans with unlimited text messages.

Aside from the cost, one of the principal concerns underlying most recruiting restrictions is the fear of an undue burden on prospective student-athletes. Any prospect who is inundated with recruiting messages, whether from coaches or fans/boosters making direct contact (by phone, through prospects’ Facebook or MySpace accounts, or by other means), is not going to be as focused on school or other responsibilities. Anecdotal evidence suggests that some prospective student-athletes do feel overwhelmed by excessive recruiting attention, particularly through social media.<sup>112</sup> So any efforts toward a “reset” on recruiting rules must be balanced with an appropriate regard for the impacts on prospective student-athlete welfare.<sup>113</sup>

Even if we do not see a “reset” on recruiting rules generally, it is inevitable that rule changes will be forthcoming that will have an impact on infractions cases. A general prohibition against all electronic correspondence except email and faxes<sup>114</sup> is simply untenable in today’s world. The NCAA membership recognizes that recruiting of prospective student-athletes is a necessary component of the intercollegiate enterprise; the only way for that recruiting to be meaningful and effective is to allow athletics personnel to communicate with recruits in *their* communications world.

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<sup>111</sup> NCAA, *Recruiting*, *supra* note 63.

<sup>112</sup> See *supra* note 93 and accompanying text.

<sup>113</sup> On the other hand, perhaps dealing with excessive recruitment attention simply is good preparation for later life; we dinosaurs who still work regularly with email have learned that survival in the workplace requires liberal use of “delete” functions.

<sup>114</sup> NCAA Manual, Bylaw 13.4.1.2.

Whatever the rules may be in the next few years, coaches, student-athletes, and athletics “representatives” will be expected to abide by them. To date, the NCAA enforcement staff has been lenient in enforcing existing rules, giving individuals time to adjust to rapidly changing technology and processing virtually all “social media infractions” as secondary violations. That period of tolerance may be drawing to a close. The NCAA leadership has signaled a clearer focus on enforcement of rules and holding accountable those who break the rules.<sup>115</sup> Social media issues have been with us for several years; compliance staffs should be well-attuned by now to the pitfalls involved in the use of social media, and admonitions either have been or should have been communicated to all constituents. The allegation of a major violation for failure to monitor the football program in the North Carolina case—in part for failure to monitor social networking activity—suggests that the enforcement staff will expect a more proactive approach to monitoring in the future.

One final development is certain in the future—social media will play an ever-increasing role in both triggering investigations and providing evidence of violations. As noted previously, the former NCAA Vice President of Enforcement reported that many tips come to the attention of the enforcement staff via fans “trolling online message boards.”<sup>116</sup> Fans are not the only ones trolling. A current Director of Enforcement was quoted recently as saying much of the enforcement staff’s case information comes from online message boards, blogs, and social media sites: “It’s pretty amazing actually how much information you can get off somebody’s Facebook page.”<sup>117</sup>

## CONCLUSION

I participated in an infractions hearing not long ago in which a coach admitted that calls from his cell phone were made under

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<sup>115</sup> See, e.g., Mark Emmert (NCAA President), *Cheating Will Not Be Tolerated* (Sept. 1, 2011), available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Emmert+Cheating+will+not+be+tolerated>.

<sup>116</sup> See *supra* text accompanying note 30.

<sup>117</sup> Solomon, *supra* note 102 (quoting Chris Strobel, NCAA Director of Enforcement in charge of secondary infractions).

impermissible circumstances to two prospective student-athletes. The calls, he explained, were accidental, most likely the product of “pocket dialing,” when one sits on a cell phone or otherwise bumps the buttons on a pocketed phone, resulting in a speed dial to the recipient.<sup>118</sup> While I did not find the coach’s explanation to be particularly credible, the episode did serve as a useful reminder that the ways in which we communicate with each other have changed dramatically over the last several years. It was not too long ago, for example, that the word “texting” was not in our vocabulary, let alone “sexting.”

The upshot of these changes is that we have entered new frontiers of communication, and the NCAA enforcement and infractions processes are not immune from the uncertainties that accompany change. The NCAA rules on communicating with recruits were developed with full recognition that “the social media world is constantly changing and developing.”<sup>119</sup> As a result, it is inevitable that the rules will change to reflect a new reality—one in which faxes, email, and even phone calls may be obsolete. But the rule-changing process is a slow one, reflecting an admirable NCAA ideal that governance comes from the bottom up, after all of the membership has had an opportunity to participate. We should be patient, therefore, to let the process work its course, but look forward to the not-too-distant future when new rules relating to the use of social media define what constitutes an NCAA violation.

In the meantime, we move headlong into an environment in which social media impact infractions cases in other significant ways—triggering investigations, providing evidence of infractions, and influencing public perception of particular infractions cases. One case that bears watching is the North Carolina case, in which the enforcement staff for the first time has cited lack of social media monitoring as part of a major infraction allegation. What happens in that case could provide a clearer view of the roles social media play in the lives of student-athletes and in the processing of a major infractions case.

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<sup>118</sup> See <http://urbandictionary.com/define.php?term=pocket-dial>.

<sup>119</sup> NCAA, *Social Media and Recruiting*, *supra* note 72.

