NCAA Rule Enforcement after *U.S. Department of Education v. NCAA*: Will there be a Chilling Effect on the Self-Reporting of Violations?

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INTRODUCTION

Collegiate athletics are meant to represent the purest form of sport. Athletes participate because they love the game; they are not paid vast sums of money like their professional counterparts. They selflessly sacrifice in the name of representing the universities they attend. Collegiate athletes learn valuable life lessons such as hard work, discipline, and integrity. However, as television revenues and media exposure reach record heights,[1] college athletes and their universities are tempted to break the rules. The National Collegiate Athletic Association (NCAA) acts as the governing body for almost all college athletics,[2] establishing and enforcing rules ranging from the recruiting of student-athletes to determining the amount of money a student-athlete may be allotted for meals on road trips.[3]

In *United States Department of Education v. National Collegiate Athletic Association*, the Seventh Circuit Court of Appeals affirmed the lower court's decision, holding that the NCAA was not entitled to a protective order for information requested by a Department of Education (DoE) subpoena. Ultimately, the court found that the NCAA's burden of compliance was speculative and outweighed by the government's investigative needs.[4] As a result, the court jeopardized the confidentiality of NCAA internal sources, resulting in a potential disruption of the NCAA's ability to conduct internal investigations that prevent (and punish) rule violations by member institutions.

Part II of this article provides a synopsis of the facts and procedural history of the case. Part III summarizes the analysis used by the Seventh Circuit to reach its conclusion that the NCAA did not meet the substantive requirements to warrant a protective order pertaining to information disclosed as a result of a DoE subpoena. Part IV questions the majority opinion and argues that the NCAA is not requesting the court to create a new area of privilege. Instead, the

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[1] Richard Sandomir, *N.C.A.A. Fans Courted With Free Webcasts*, N.Y. TIMES, March 14, 2006.

[2] The lone exception remains the National Association of Intercollegiate Athletics, which maintains a membership of approximately 360 universities and colleges. *See History of the NAIA* (last visited May 3, 2008) http://naia.cstv.com/genrel/090905aai.html.

[3] The NCAA is a voluntary association of about 1,200 institutions, conferences, organizations, and individuals that organizes the athletic departments of many colleges and universities in the U.S. Member schools vow to abide by the rules set forth by the NCAA. The mechanism to enforce the NCAA's legislation was created in 1952 after careful consideration by member-schools. Allegations of rules violations are referred to the NCAA's investigative staff. A preliminary investigation is initiated to determine if an official inquiry is warranted and then the level of the alleged violation is categorized based on its severity. The university is notified (unless they self-reported) and has the right to appear on its own behalf before the NCAA Committee on Infractions. *See About the NCAA* (last visited Mar. 10, 2008) http://www.ncaa.org [hereinafter, *About the NCAA*].

[4] *United States Dept. of Education v. National Collegiate Athletic Assoc.*, 481 F.3d 936 (7th Cir. 2007).

NCAA is merely asking for protections that are warranted under existing authority. Part V discusses social consequences of the decision, including a possible chilling effect on the self-reporting of NCAA violations by member-institutions. Part VI concludes that the court should have granted a protective order over documents and statements requested by the DoE to preserve the confidentiality of the whistleblower who reported the violations to the NCAA.

STATEMENT OF THE CASE

The NCAA creates and enforces the rules by which member institutions agree to abide.[5] The NCAA may impose heavy fines or sanctions on an institution that violates an NCAA rule, possibly leading to a severe competitive disadvantage.[6] Sanctions can include forbidding the violating school from participating in post-season competition[7] or reducing the number of scholarships the athletic department may provide. There are many levels of violations, and the NCAA seeks to levy punishment in accordance with the severity of the infraction.[8] However, a member school may minimize the impact of NCAA sanctions if it self-reports violations to the NCAA before they are discovered. It is this issue of self-reporting and the future viability of internal whistleblowers that was the integral focus of this case.[9]

During the 2004-2005 basketball season, the University of the District of Columbia (UDC) self-reported rules violations to the NCAA.[10] Without going into detail, the Seventh Circuit stated that the infractions included a misappropriation of federal funds in connection with the men's and women's basketball programs.[11] Upon learning of the alleged violations, the DoE launched its own investigation, separate and distinct from the NCAA's own investigation into the matter.[12] In the course of its investigation, the DoE issued a subpoena to the NCAA, requesting documents that UDC submitted in connection with its self-report of violations.[13] The DoE filed suit to compel the NCAA to deliver documents in accordance with the subpoena. In response, the NCAA requested a protective order from the court, hoping to require the DoE to give the NCAA notice five days prior to disclosing any of the documents to a third party. The lower court denied the NCAA's motion and the NCAA appealed on the matter of the protective order.[14] According to the lower court, any burden the subpoena placed on the NCAA was speculative,[15] and the importance of the DoE's investigation outweighed the NCAA's need for a protective order.

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[5] *See About the NCAA*, supra note 2.
[6] *Id.*
[7] *NCAA*, 481 F.3d at 937-38. In many instances, television and sponsorship revenue is created and distributed in accordance with post-season competition. If a school is removed from such competition, it can result in a loss of millions of dollars. *Id.*
[8] Joe Drape, *Facing N.C.A.A., the Best Defense Is a Legal Team*, N.Y. TIMES, March 4, 2007.
[9] *NCAA*, 481 F.3d at 937-38.
[10] *Id.* at 938.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

THE SEVENTH CIRCUIT'S REASONING

The Court of Appeals, in a unanimous decision written by Judge Richard Posner, found multiple reasons for rejecting the NCAA's request for a protective order prohibiting the dissemination of subpoenaed materials to outside sources. First, he noted a lack of judicially recognized privilege in this area. Next, Judge Posner doubted the NCAA's need for the protective order since the DoE benefits directly from the information provided and has its own incentive to maintain the confidentiality of the source, regardless of whether it is mandated to do so. Lastly, he found that the investigatory needs of the DoE outweigh any speculative concern that the NCAA may have pertaining to its own ongoing investigation.

Privilege

Judge Posner found no legally recognized privilege applicable to this case.[16] Therefore, in asking for a protective order, the NCAA was essentially requesting that the court invent a new area of privilege.[17] Judicially recognized forms of privileges, such as between an attorney and a client, prevent the government from using information in connection with an investigation.[18] The attorney-client privilege extends so far as to apply to an attorney's agents, which may include a private investigator. However, this privilege was inapplicable in the instant case because the whistleblower did not seek out an attorney who could then consult the NCAA.[19] As such, there was no privilege extended to a NCAA investigation in a situation with these facts.[20]

The court likens the NCAA's request for a protective order to that of a media reporter's request for a similar order while investigating a news lead.[21] However, no such privilege exists in this instance, either.[22] If the news media were able to conceal their sources from the government, it would certainly aid in their ability to conduct investigations.[23] Since no privilege is currently extended to news media, they do not have the luxury of protecting their sources. Similarly, the NCAA does not meet any of the judicially recognized forms of privilege, and its investigation, according to Judge Posner, is similar to that of a media outlet.[24]

Policy Justifications

Next, the court noted that if a court order were granted instead of allowing the NCAA to claim privilege, it would still hamper the government investigation.[25] This would permit the DoE to collect the materials pursuant to the subpoena, but restrict their use.[26] For instance, if the

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[16] *Id.* at 938.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* *See Branzburg v. Hayes*, 408 U.S. 665 (1972).
[23] *NCAA*, 481 F.3d at 938.
[24] *Id.*
[25] *Id.* at 939.
[26] *Id.*

DoE wanted to deliver the documents to the Department of Justice prosecutor in connection with a possible grand jury, the DoE and Department of Justice would likely face a lawsuit from the NCAA.[27] Clearly, this has a negative impact on the government investigation and would severely limit the government's ability to fully conduct its investigation. Thus, regardless of the outcome of the NCAA's prospective lawsuit, the restriction placed on government is unnecessary and unjustified.[28]

Next, Judge Posner noted that even though the DoE is not required to maintain the confidentiality of the NCAA's sources, it actually benefits by doing so.[29] The DoE does not want to "kill the golden goose by promiscuously disclosing information it receives from the NCAA."[30] This would have the effect of deterring whistleblowers from coming forward.[31] However, the court further noted that the Department of Justice requires federal investigators to notify the Attorney General when there are reasonable grounds to believe that the federal criminal law has been violated.[32] However, the Seventh Circuit does not have the authority to override the DoE's requirement to report to the Department of Justice by creating a new privilege.[33]

The NCAA also argued that even if the DoE privately agreed to not disclose the whistleblower's identity, the Freedom of Information Act (FOIA) would require the government to provide public access to the records. Judge Posner rejected this theory, stating that the FOIA does not require government release of "records or information . . . [that] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution *which furnished information on a confidential basis*."[34] He concluded that the italicized portion of the quotation applied to this case, even though it was unclear whether the NCAA would have been considered to have furnished the information "on a confidential basis."[35]

Judge Posner further opined that the NCAA did not require a judicial protective order because "confidentiality is always a matter of degree."[36] A whistleblower who reports a violation to the NCAA might desire confidentiality to the extent the NCAA can guarantee it.[37] However, an informant should be aware that, by reporting the violations to the NCAA, the protection can only go so far.[38] If the whistleblower makes it clear to the NCAA that he wishes to remain anonymous to the extent the NCAA can do so, then the whistleblower may gain

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 939-940.
[31] *Id*. at 940.
[32] *Id., See* Attorney General Guidelines for Offices of Inspector General with Statutory Enforcement Authority, § VII, at 4-5 (Dec. 8, 2003).
[33] *NCAA*, 481 F.3d at 940.
[34] 5 U.S.C. §552(b)(7)(D) (emphasis added), *quoted in NCAA*, 481 F.3d at 940.
[35] *NCAA*, 481 F.3d at 940.
[36] *Id.* at 941.
[37] *Id.*
[38] *Id.*

protection under § 7(D) of the FOIA.[39] The NCAA could then remind the whistleblower that, while every effort will be made to maintain his/her anonymity, the possibility of a government investigation (and thus a potential loss of confidentiality to the extent necessary) may exist.

Judge Posner noted that the distinction between a judicial subpoena and an administrative one (as we have here) was unimportant. The district court focused much of its opinion in this case on this subtle difference and how it applied to the standard of review.[40] However, the Seventh Circuit believed that this was unnecessary because the DoE was operating well within the "substantive scope of its investigative powers."[41] The NCAA noted that an administrative subpoena, unlike a judicial one, may be quashed if compliance were "excessively burdensome so as to threaten the normal operation of the party's business."[42] However, Judge Posner rejected this theory, stating that the information subpoenaed in a case such as this will confer a greater public benefit than that "sought in a run-of-the-mill tort case, . . . [and thus] will have to demonstrate a greater burden of compliance in order to get it quashed."[43]

The Burden Placed on the NCAA

Lastly, the court concluded that the investigative needs of the DoE far outweighed the overall burden that the NCAA faced in complying with the subpoena.[44] The court believed that the need for a protective order was speculative at best, as the DoE was looking into a possible federal offense by UDC and had to be able to fulfill its duty to the general public. The DoE's need for the subpoenaed material was more important than the prospective confidentiality concern brought forth by the NCAA.[45]

Analysis of the Court's Reasoning

The court erred in its analysis because it failed to take the importance of internal investigations into account. The court should recognize a privilege pertaining to documents collected in the NCAA investigation because prior similar instances have allowed for it. Furthermore, the importance of internal investigations, and in particular, whistleblowers, should be acknowledged. Without the aid of these important informants, the DoE and other governmental agencies would likely remain unaware of purported violations in cases akin to that of UDC.

[39] According to the opinion in this case, the NCAA must always comply with a subpoena, but may be granted confidentiality by the government agency to the extent the law permits it. If the informant makes it clear to the NCAA that he/she would like to remain anonymous, then this likely would fall under the §7(D) exception of the FOIA and the government agency has the discretion whether or not to make the informant's identity available for public consumption. *See id.* at 940.
[40] *NCAA*, 481 F.3d at 941.
[41] *Id.*
[42] *Commodity Trend Service, Inc. v. CFTC*, 233 F.3d 981, 987 (2000), *quoted in NCAA*, 481 F.3d at 941-942.
[43] *NCAA*, 481 F.3d at 942.
[44] *Id.*
[45] *Id.*

Precedent

The NCAA argued to the trial court that compliance with the subpoena, absent basic confidentiality protections, would compromise the ongoing internal investigation.[46] In addition to factual information in support of its claim, David Price, the NCAA Senior Vice President for Enforcement, testified via affidavit about "the negative impact unprotected compliance with the [s]ubpoena would have on the NCAA and its fundamental enforcement activities, and the negative impact prior disclosures in similar circumstances have made."[47] The NCAA requested a basic protective order to ensure the confidentiality of its whistleblowers because recapturing sensitive materials after their public disclosure would be impossible. Such an order would provide practical relief by controlling the information and limiting its production to those parties who have subpoenaed the records.[48]

If the government is permitted to make unrestricted use of the materials provided in response to the subpoena, the identities of the whistleblowers will no longer be confidential.[49] This poses a particular threat to the investigatory process set forth by the NCAA. In order to promote universities to self-report rules infractions, which aid in the enforcement and deterrence effect of violations, the NCAA needs to protect the whistleblowers who come forward. Without such self-reporting, the NCAA opens itself up to cover-ups and far reaching scandals that may result in the crippling of collegiate athletics. Whistleblowers limit violations by bringing them to the immediate attention of the NCAA, which can react swiftly to punish and rectify the situation. Failing to protect their identities has the practical effect of eliminating the whistleblower's important role.

Precedent exists whereby courts provide protective orders of confidentiality to private organizations. This is done primarily because the harm has already occurred once the information is disseminated to the public. Protective orders, such as in *North Atlantic Instruments, Inc. v. Haber*, provide protective relief by controlling, to the extent possible, the use of documents collected in an investigation.[50] The NCAA is merely asking that the DoE restrict its use of the subpoenaed materials in order to provide anonymity to the whistleblowers. The NCAA is not objecting to delivering the DoE with the requested information; it is simply asking for protection with regard to how the DoE manages it.

Policy Justifications for Recognizing Privilege

Furthermore, the absence of a judicially recognized privilege does not prevent the court from providing the NCAA with a protective order to maintain confidentiality.[51] There are several instances where courts limit the use of subpoenaed or discoverable materials in order to

[46] Reply Brief of Appellant, The National Collegiate Athletic Association at 3, *United States Dept. of Education v. National Collegiate Athletic Assoc.*, 481 F.3d 936 (7th Cir. 2007) (No. 1:06-CV-01333).
[47] *Id.*
[48] *Id*. at 4.
[49] *NCAA*, 481 F.3d at 938.
[50] Reply Brief of Appellant at 4, *NCAA* (No. 1:06-CV-01333). *See North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999).
[51] Reply Brief of Appellant at 6, *NCAA* (No. 1:06-CV-01333).

maintain the confidentiality of the source.[52] For instance, in *Berst v. Chipman*, the court limited discovery under its supervisory powers even when a specific privilege did not apply.[53] The NCAA's fear in this case is even more significant because the DoE expressed its intentions to make further disclosures of relevant documents.[54]

Additionally, courts have ruled that a qualified privilege may be granted to communications made in good faith, relating to any subject matter, in which the disclosing party has an interest or a duty to protect the interest of another.[55] The privilege extends to those cases where the duty is not legal, "but where it is of a moral or social character of imperfect obligation . . . It is grounded in public policy as well as reason."[56] The court in *Pate v. Service Merchandise Company, Incorporated* further notes that certain conditional privileges may cover many types of interests, including a common or public interest.[57] The argument certainly may be made that a common interest privilege exists in the instant case. All parties are ultimately interested in achieving the same result: discovering the full extent of the administrative and legal violations and levying just punishment in connection with such a finding. Providing a whistleblower with basic confidentiality protections is a relatively harmless, yet crucial, action to take to ensure the future cooperation of internal informants who aid both NCAA and government investigations.

IMPLICATIONS

Chilling Effect: A Brief Historical and Definitional Background

The term "chilling effect" was first coined in the mid-1900s[58] and has been used by judges and scholars primarily in the First Amendment (free speech) context.[59] A chilling effect occurs "when individuals seeking to engage in lawful activity are deterred from doing so by a governmental regulation not specifically directed at that activity."[60] For example, an individual may be chilled from donating money to particular organizations for fear that the organization's list of donors may become public record.[61] Not only is the individual whose actions are "chilled" harmed as a result, but society as a whole incurs a loss which results from the individual's freedoms being inhibited.[62] The extent of the chilling effect generally depends on

[52] *Id.*
[53] *Id.* at 7, *Berst v. Chipman*, 653 P.2d 107, 187 (Kan. 1982).
[54] Reply Brief of Appellant at 7, *NCAA* (No. 1:06-CV-01333).
[55] *Pate v. Service Merchandise Co., Inc.*, 959 S.W.2d 569 at 576 (Tenn. App. 1996) (quoting *Southern Ice Co. v. Black*, 189 S.W. 861 (1916)).
[56] *Id.*
[57] *Id.*
[58] It is believed that Justice Frankfurter first used the term in his opinion in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952). Gayle Horn, ONLINE SEARCHES AND OFFLINE CHALLENGES: THE CHILLING EFFECT, ANONYMITY AND THE NEW FBI GUIDELINES, 60 New York University Annual Survey of American Law 735, at 751(2005).
[59] *Id* at 749.
[60] *Id.* at 750.
[61] *Id.*
[62] *Id.*

the level of public humiliation or stigmatization the individual will feel for speaking out or acting in accordance with his/her true beliefs and moral conscience.[63]

Chilling Effect: On Whistleblowers

A chilling effect seems imminent, given the opinion handed down by the Seventh Circuit. This decision removes any guarantee of confidentiality that the NCAA may attempt to provide should the government step in with a subpoena.

Lawsuits

Without the promise of confidentiality, whistleblowers have to fear multi-million-dollar lawsuits filed against them should they attempt to inform the NCAA about possible infractions.[64] Not only do whistleblowers face lawsuits from those institutions they disclose information about, they face issues of their own job security. In *Dagnan v. Fulmer*, the report involved Phillip Fulmer,[65] the head football coach at the University of Tennessee, reporting possible violations of another school. However, one must also look at the likely possibility of a whistleblower reporting infractions committed by his/her own university.

The NCAA has seen the negative impact that exposing the identity of a whistleblower can have. Coach Fulmer informed the NCAA of possible violations committed by the University of Alabama.[66] The NCAA delivered this information to a grand jury as part of a subpoena. Soon after, Fulmer and the NCAA were hit with a $60 million defamation lawsuit.[67] As Judge Posner noted in *NCAA*, the incentive to self-report was "diminished not only by the threat of a defamation suit but also by the fact that, the fewer whistleblowers there are, the less likely violators of the NCAA's rules are to be caught and the less incentive they have to turn themselves in."[68] The NCAA used this argument to show the need for a confidentiality protection. Without the protective order, the DoE has the right to disclose the identity of the informant, thus discouraging the self-policing nature of the NCAA's member institutions.

Job Security

Without a guarantee of confidentiality, the whistleblower has to worry about job security and whether this action will result in him/her having to find a new profession, since it is unlikely

[63] *Id.*
[64] *Dagnan v. Fulmer*, No. 163126-3 (Knox Cty., Tenn., Chancery Ct., Nov. 21, 2005).
[65] Coach Fulmer is a high-profile football coach who has a well-known reputation across the country. He led the University of Tennessee to the National Championship in 1998 and also was honored as the National Coach of the Year. *See Phillip Fulmer – Head Coach Bio* (last visited Mar. 10, 2008) http://www.utsports.com/football/coachbio.aspx?id=10852.
[66] *See Attorney alleges conspiracy between NCAA, Fulmer* (last visited May 6, 2008) http://sports.espn.go.com/espn/print?id=1719629&type=HeadlineNews&imagesPrint=off.
[67] *Dagnan*, No. 163126-3 (Knox Cty., Tenn., Chancery Ct., Nov. 21, 2005).
[68] *NCAA*, 481 F.3d at 939.

that any other university would be willing to hire an administrator who willingly reports his/her university to the NCAA (and possibly to governmental authorities) for sanctions.[69]

Chilling Effect on Self-Reporting

From the NCAA's perspective, this decision potentially diminishes the NCAA's ability to catch and punish member institutions for committing violations. With self-reporting a key component of the NCAA's enforcement mechanism, the resulting chilling effect may negatively impact its ability to police its own rules. Furthermore, since the NCAA is generally more lenient with regard to institutions which self-report violations, this practice is in jeopardy. This leaves the door open to more severe scandals in college athletics.

Without whistleblowers, rules violations may go on for years before they are discovered, if they are in fact uncovered at all. Depending on the nature of the violation, whistleblowers may be fearful that their disclosures could be viewed by non-NCAA parties at a later date, resulting in a wide range of possible consequences including, but not limited to, a defamation lawsuit and/or loss of job. If an athletic department administrator was aware of an NCAA violation taking place at his/her school, he/she would think twice about reporting it, absent basic confidentiality protections from the NCAA and any subsequent organization with which the NCAA complies. As a result of this opinion, rules violations will likely go unreported and possibly undetected. Ultimately, this may mean that an alleged violation of federal law, as in the UDC case, may go unnoticed if whistleblowers are not provided anonymity.

Result: A Less Productive NCAA Means the Government Receives Less Important Information

Perhaps most importantly, how will the chilling effect created by this decision impact government investigations into NCAA member institutions? While the predominate government interest was the underlying justification for the opinion, it may in fact have a directly adverse effect on the government's investigations. Ignore for a moment the significant number of NCAA violations that take place each year. While most of them do not involve the legal system, there are select examples, such as the UDC case, where gross violations of federal law are alleged. In these instances, it is not the federal, state, or local authorities uncovering the scandal. Instead, it is the NCAA, in large part due to its self-policing culture, which is able to detect, investigate, and ultimately punish member institutions that violate its rules and, more importantly, the law.

The government has every right to intervene where appropriate and conduct its own investigation where matters of law are in question. However, the government should take a long look at whether it wants to bite the hand that feeds it. Without the NCAA doing much of the legwork, administrative agencies would have no knowledge of these situations. Providing

[69] Perhaps the most notable whistleblower in the world of collegiate athletics was Linda Bensel-Meyers. A former professor at the University of Tennessee, Bensel-Meyers reported what she believed were academic violations in the Volunteer athletic program. She has since left the university to teach at Denver University. After reporting her findings at Tennessee, Bensel-Meyers was "met with institutional threats and public attacks on her character." *See* Tom Farrey, *'It transformed my whole life'* (last visited May 7, 2008) http://sports.espn.go.com/espn/print?id=1632218&type=story.

confidentiality to important informants serves the interests of all parties involved. Indirectly discouraging whistleblowers from coming forward and reporting NCAA and potentially legal violations is not a productive practice for the courts. Encouraging those in a position of knowledge to come forward with valuable evidence is in the best interest of the government. Creating a chilling effect by failing to provide basic confidentiality protections for informants clearly inhibits the goals of all interested parties, particularly the government.

CONCLUSION

Failing to grant the NCAA's request for a protective order may have long-standing repercussions. The NCAA has a history of self-regulation which may be in jeopardy if whistleblowers are not guaranteed anonymity. The court may be doing a disservice to the DoE because valuable information that the NCAA collects during investigations may no longer be available to the DoE's investigatory arm.