

# Navigating the Public Relations Minefield: Mutual Protection Through Mandatory Arbitration Clauses in College Coaching Contracts

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## I. INTRODUCTION

With the explosion in the popularity and media attention paid to intercollegiate athletics since the 1960s, the profession of college coaching has undergone a significant transformation.<sup>2</sup> Today's college coaches typically occupy the most prominent and highest profile positions at an institution, receiving more media attention for their achievements than any other employee, and significantly higher pay than the leading professor or even the president of the university.<sup>3</sup> Associated with this higher profile and increased compensation are the additional drawbacks of the 24-7 job status, high stress, and fleeting job security.<sup>4</sup> This has led many coaches to experience serious physical and mental collapses.<sup>5</sup> Additional stresses arise from the seemingly ever-expanding responsibilities of the head coach. No longer is the college coach paid simply to teach student-athletes in an effort to best compete and

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2. See generally MURRAY SPERBER, *COLLEGE SPORTS, INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY* (1990).

3. Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127 (2001). "In some instances, coaches earn nearly seventeen times the average salary of a full-time professor." *Id.* at 137.

4. *Id.*

5. *Id.* at 130 (describing health problems of Pat Kennedy and Mike Kryzewski, stress problems of Gary Williams, and alcohol problems of Phil Ford).

win games. In fact, some coaches suggest "they spend less than 20% of their working time actually coaching on the court or the field."<sup>6</sup> Now, in addition to actually instructing athletes in a particular sport, the college coach must be "a fund-raiser, recruiter, academic coordinator, public figure, budget director, television, radio, and internet personality, and alumni glad handler."<sup>7</sup> Coaches also find themselves at the center of debates and discussions about new sports facilities, marketed as recruiting tools and revenue generators.<sup>8</sup> Given the expansive list of responsibilities for the modern coach, it is no wonder that disputes will sometimes arise requiring satisfactory resolution. Because the coach and the university must balance the often divergent interests of the many stakeholders of an athletic program, it is important to consider methods of dispute resolution that can provide some level of control over a situation before it becomes a scandal. Accordingly, coaches, their representatives, and individual institutions should take steps to implement the use of alternative dispute resolution (ADR) to resolve disagreements. A contractual relationship between the parties involved in the dispute is a necessity for the implementation of these measures.<sup>9</sup>

There is no easy template to follow when drafting a coaching contract. Coaching contracts are highly sophisticated documents. However, because these contracts are individually drafted, it is quite possible to include mandatory arbitration clauses leading the parties in a dispute to ADR rather than the courts. In a highly frenetic coaching environment with extensive media coverage, resolving disputes between coaches and institutions outside of the spotlight of a courtroom setting can often provide substantial benefits to both the coach and the institution.

## II. BASICS OF ALTERNATIVE DISPUTE RESOLUTION

Mediation and arbitration appear to be most applicable to common disputes between coaches and institutions in intercollegiate athletics. Like the court system, these techniques seek the correct and fair decision in resolving disagreements, but are designed "to produce a more durable solution by restoring, preserving, or enhancing the parties' relationship."<sup>10</sup> This

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6. Martin J. Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 MARQ. SPORTS L. J. 207, 208 (1991).

7. *Id.*

8. *Id.*

9. Gil Fried & Michael Hiller, *Alternative Dispute Resolution Symposium: ADR in Youth and Intercollegiate Athletics*, 1997 BYU L. REV. 631, 634 (1997).

10. *Id.* at 635.

preservation of the parties' relationship is beneficial in settling various disputes, especially those in intercollegiate athletics that do not surround the termination of a coach's employment. However, although mediation offers benefits to the employment relationship between coach and school in the intercollegiate athletic setting, and although, like arbitration, mediation clauses can similarly be inserted into coaching contracts, this article will particularly focus on the importance of arbitration clauses in such contracts.

Arbitration involves a third-party to help settle a particular dispute. However, unlike mediation, arbitrators may or may not be a neutral party. While an individual arbitrator is usually neutral, arbitration will often include a combination of partial and impartial parties if it involves a panel.<sup>11</sup> The consideration of whether to design the arbitration process around the use of a panel of partial and impartial arbitrators or to use only a single neutral arbitrator can be greatly important. Neutrality and impartiality are essential in the role of the mediator.<sup>12</sup> However, these qualities can be equally important in arbitration, as they serve to inspire parties' confidence and trust in the arbitrator while also allowing the arbitrator to evaluate the problem more objectively than either of the parties.<sup>13</sup> Whether an impartial arbitrator or a combination arbitrator panel is employed in the process, arbitration is more structured than mediation, resembling an adjudicatory trial.<sup>14</sup> The arbitration process involves reasoned presentations of proofs by the parties to the decision-maker.<sup>15</sup> Although the proceeding does resemble a trial, procedural rules are typically relaxed and more informal, particularly relating to the nature of evidence and the discovery process.<sup>16</sup> Additionally, the arbitrator is not bound by the rigidity of substantive law.<sup>17</sup> In fact, "arbitrators are not bound by precedent."<sup>18</sup> The relaxation of these rules allows greater flexibility and the ability to decide matters based on equitable principles.<sup>19</sup> An essential principle of arbitration, and an important distinction from mediation, is the

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11. *Id.* at 638.

12. DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS* §§ 1.2.2-1.2.3 (1996).

13. *Id.*

14. EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE, CASES AND MATERIALS* 315 (2d ed. 2001).

15. *Id.*

16. *Id.* at 315-16.

17. *Id.* at 316.

18. *Id.*

19. Fried & Hiller, *supra* note 9, at 638.

finality of the process.<sup>20</sup> Arbitration can be binding or non-binding as determined by the contractual agreement.<sup>21</sup> Binding arbitration provides immunity to an appellate challenge in the court system, barring clear fraud by the arbitrator or inconsistency with public policy.<sup>22</sup> Arbitration can provide additional benefits to the parties that are not found in the courts. For instance, because confidentiality may be a concern to the parties, a confidentiality agreement can be signed prior to the beginning of the process guaranteeing that all information will remain private.<sup>23</sup> Furthermore, unlike judicial proceedings, arbitration proceedings are private and conducted in isolation from the public.<sup>24</sup> As a further distinction from the courts, only a few specific types of arbitration produce written decisions.<sup>25</sup> Rather, "[t]he normal arbitration ends silently with a cryptic written 'award' that is not disclosed to the public."<sup>26</sup> The final benefit is the flexibility in choosing an arbitrator. "Arbitrators are often selected because of their impartial expertise."<sup>27</sup> However, there are no laws requiring an arbitrator to possess any amount of expertise.<sup>28</sup> This flexibility allows the parties to choose whatever type of arbitrator that they desire while avoiding the lack of control that is inherent in the assignment of judges and juries in the courts. Additionally, courts have recognized the cost savings advantages of arbitration, noting that, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."<sup>29</sup>

Arbitration provides additional benefits to parties and to the wider legal system. For the parties, in addition to control over the process and the confidentiality of the proceedings, an arbitration case typically is resolved in considerably less time than typical litigation.<sup>30</sup> For courts and judges, arbitration provides some overdue relief to dockets. Some federal district

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20. BRUNET & CRAVER, *supra* note 14, at 317.

21. Fried & Hiller, *supra* note 9, at 638.

22. BRUNET & CRAVER, *supra* note 14, at 317.

23. *Id.*

24. *Id.* at 315.

25. *Id.* at 316.

26. *Id.*

27. BRUNET & CRAVER, *supra* note 14, at 318.

28. *Id.*

29. *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001).

30. Boyd Byers, *Mandatory Arbitration of Employment Disputes: The Whats, Whys and Hows*, 67 J. KAN. B.ASS'N 18, 20 (1998).

court judges have commented that "employment law cases are over-whelming their dockets."<sup>31</sup> By transferring many disputes to arbitration, the load of litigation is being considerably lightened.

#### A. The Statutory Basis for Arbitration

Arbitration and other forms of Alternative Dispute Resolution have taken on increased importance in the federal government since the enactment of the Administrative Dispute Resolution Act of 1990 (ADRA).<sup>32</sup> The ADRA requires all federal agencies to implement policies for the use of ADR.<sup>33</sup> However, the use of arbitration for resolving disputes is anything but a new phenomenon. In fact, the use of arbitration has a much richer foundation than the enactment of the ADRA in 1990. The Federal Arbitration Act (FAA), enacted in 1925, applies to all contracts with an arbitration clause, with the exception of those involving transportation workers.<sup>34</sup> The FAA was enacted to counter prior judicial opposition to arbitration agreements.<sup>35</sup> The act states:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any such contract.<sup>36</sup>

However, despite apparent statutory clarity on its face, confusion has existed as to exactly which disputes may or may not be settled by arbitration.

#### B. The Law of Arbitration in the Federal Courts

Until recently, even binding arbitration agreements could not be viewed as entirely binding or final. This uncertainty was based on the Supreme Court's ruling in *Alexander v. Gardner-Denver Corp.*, the leading arbitration case

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31. *Id.*

32. 5 U.S.C. § 571-583 (2005). The ADRA was amended in 1996. Additionally, the Alternative Dispute Resolution Act of 1998 requires all federal district courts to provide at least one form of ADR. 28 U.S.C. § 651 et. seq. (2005).

33. *Id.*

34. 9 U.S.C. § 1 et seq. (2005).

35. Byers, *supra* note 30, at 21.

36. 9 U.S.C. § 2 (2005).

since 1974.<sup>37</sup> In this case, the plaintiff's discrimination claim against his employer was denied by an arbitrator following the procedures of the grievance system outlined in his union's collective bargaining agreement.<sup>38</sup> The plaintiff then filed suit under Title VII of the Civil Rights Act of 1964.<sup>39</sup> The employer sought dismissal of the case based on the binding result of the arbitration proceeding.<sup>40</sup> The Court held unanimously that Alexander was entitled to have his claim heard by the federal courts.<sup>41</sup> The Court found "no suggestion in the statutory scheme that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction."<sup>42</sup> It rejected the possibility that a claimant could be required to elect between pursuit of arbitration and pursuit of a remedy in court.<sup>43</sup> It also rejected the employer's claim that the Plaintiff had waived his rights under Title VII by pursuing arbitration,<sup>44</sup> and the notion that the courts should defer to the factual findings of the arbitrator,<sup>45</sup> particularly since the record of arbitration proceedings is not necessarily complete and the usual rules of evidence do not apply.<sup>46</sup> Accordingly, *Alexander* led to the conclusion that a person claiming violation of statutory rights was entitled to have that claim heard by the courts, regardless of the decision of an arbitrator or arbitration panel.

However, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>47</sup> countered the conclusions drawn from *Alexander*. In *Gilmer*, the employer made the plaintiff sign an agreement to arbitrate all disputes he had with the firm.<sup>48</sup> Following discharge from employment, the plaintiff filed suit against his employer claiming violations of the Age Discrimination in Employment Act.<sup>49</sup> His employer filed a motion to compel the submission of the claim to arbitration, in accordance with his signed agreement.<sup>50</sup> The

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37. 415 U.S. 36 (1974).

38. *Id.* at 39, 42.

39. 42 U.S.C. §§ 2000e-2000e-17 (2005).

40. *Alexander*, 415 U.S. at 43.

41. *Id.* at 59-60.

42. *Id.* at 47.

43. *Id.* at 47-49.

44. *Id.* at 51.

45. *Alexander*, 415 U.S. at 55-59.

46. *Id.* at 57-58.

47. 500 U.S. 20 (1990).

48. *Id.* at 23.

49. *Id.*

50. *Gilmer*, 500 U.S. at 21.

Supreme Court ultimately upheld the appellate court's reversal of the district court's denial of that motion, sending the matter to arbitration.<sup>51</sup> The Supreme Court's opinion illustrates the law of arbitration coming full circle since the enactment of the FAA. The law has moved from the hostility to arbitration that existed before the passage of the FAA in 1925, to the tenuous position post-*Alexander*, to a position that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."<sup>52</sup> The Court also rejected the argument that compelling arbitration was inconsistent with the ruling in *Alexander*.<sup>53</sup> This was due to the fact that it would be unreasonable to have read the agreement in *Alexander* to authorize an arbitrator to resolve statutory issues, but rather, the arbitrator was limited to determining whether or not the agreement had been breached.<sup>54</sup> The Court also drew a distinction between a situation of collective bargaining, as in *Alexander*, and an arbitration agreement in an individual contract.<sup>55</sup> The fallout from *Gilmer* was that its language and reasoning could extend beyond an ADEA claim to "justify judicial enforcement of arbitration agreements against claims brought under other civil rights statutes."<sup>56</sup> The Court stated, "[it is] clear that statutory claims may be the subject of an arbitration agreement,<sup>57</sup> and agreements to arbitrate statutory claims are valid unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."<sup>58</sup>

Following *Gilmer*, it appeared that two cases governed the law of arbitration, namely *Gilmer* and *Alexander*. *Alexander* remained the leading case regarding arbitration arising out of situations of collective bargaining. In contrast, *Gilmer* was the leading case regarding individual contracts. However, neither case had fully clarified the issue, nor settled the question of how arbitration applied to employment contracts generally. The FAA, while broad in providing for enforcement of arbitration clauses in "contract[s] evidencing a transaction involving commerce,"<sup>59</sup> also specifically excludes certain contracts. It states, "nothing herein contained shall apply to contracts

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51. *Id.*

52. *Id.* at 26.

53. *Id.* at 33.

54. *Id.* at 35.

55. *Gilmer*, 500 U.S. at 35.

56. Byers, *supra* note 30, at 23.

57. *Gilmer*, 500 U.S. at 26.

58. *Id.*

59. 9 U.S.C. § 2.

of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>60</sup> *Gilmer* failed to clarify this exclusion. In one sense, this excludes all employment contracts from the statute, on the other hand, it applies only to workers themselves engaged in interstate commerce.<sup>61</sup> Because the Court found that the agreement in *Gilmer* was not an employment contract, it did not define the scope of the employment contract under the FAA.<sup>62</sup>

With the Supreme Court's decision in *Circuit City Stores, Inc. v. Saint Clair Adams*,<sup>63</sup> the question appears to have been answered. In *Circuit City*, the Court firmly established the enforceability of arbitration agreements in the employment setting, whether or not the agreements are part of collective bargaining with an employee union.<sup>64</sup> *Circuit City* involved an employment situation in which, associated with his hiring as a sales counselor, the respondent was required to sign an employment application containing the following mandatory arbitration clause:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort.<sup>65</sup>

Two years after being hired, Adams filed a complaint against circuit city in state court, alleging various discrimination and tort claims.<sup>66</sup> In response, Circuit City filed an action in federal court, seeking to stop the state court action and compel arbitration.<sup>67</sup> The district court halted the state action and ordered Adams to arbitration.<sup>68</sup> The Ninth Circuit Court of Appeals reversed

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60. *Id.* § 1.

61. Byers, *supra* note 30, at 23.

62. *Id.* at 24.

63. 532 U.S. 105.

64. *Id.*

65. *Id.* at 109-110.

66. *Id.* at 110.

67. *Id.*

68. *Circuit City Stores, Inc.*, 532 U.S. at 110.



the lower court, ruling that the Arbitration Act did not apply to employment contracts.<sup>69</sup> The Supreme Court noted that all other appellate courts had interpreted Section One of the Federal Arbitration Act as "exempting contracts of employment of transportation workers, but not other employment contracts."<sup>70</sup> The opinion noted the Court's recent opportunity to reaffirm the position that the "FAA was enacted pursuant to Congress' substantive power to regulate interstate commerce and admiralty, and that the Act was applicable in state courts and pre-emptive of state laws hostile to arbitration,"<sup>71</sup> a position which the Court noted it had previously considered and declined to overrule.<sup>72</sup> The Court also noted that if the statute intended all employment contracts to be beyond its scope, the separate exemption for employment of seamen, railroad employees, or any class of worker involved in interstate commerce would be unnecessary.<sup>73</sup> Additionally, Justice Kennedy noted that limiting interpretation of the FAA only to transactions involving commerce would be inconsistent with the Court's ruling in *Gilmer*.<sup>74</sup> Accordingly, post-*Circuit City*, the current law of the land is that the FAA applies to all employment contracts and any mandatory arbitration provisions in employment contracts will be enforceable, barring sufficient legal reason to suggest otherwise.

However, it should be noted that, although, as of the date of completion of this article, *Circuit City* and *Gilmer* remain good law, pending legislation introduced in the House of Representatives could change the entire framework once again.<sup>75</sup> The pending legislation seeks to amend the FAA to exclude all employment contracts from the arbitration provisions.<sup>76</sup> The bill also seeks to render all arbitration clauses unenforceable, unless part of a collective bargaining agreement or agreed to by the parties after a specific claim arises.<sup>77</sup> The bill is presented as a measure to protect the civil rights of workers, but as the *Circuit City* Court noted, "the Court has been quite specific in holding that

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69. *Id.*

70. *Id.* at 109.

71. *Id.* at 112.

72. *Id.* at 122.

73. *Circuit City Stores, Inc.*, at 113.

74. *Id.*

75. Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (June, 17, 2005). The bill was referred to the Subcommittee on Employer-Employee Relations on July 25, 2005. No further action has been taken to date. The Library of Congress, *Bill Summary and Status*, H.R. 2969 109th Cong. (July 25, 2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.02969>.

76. H.R. 2969.

77. *Id.*

arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."<sup>78</sup> It also reiterated its position in *Gilmer*, "by agreeing to arbitrate a statutory claim a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum."<sup>79</sup> Additionally, in *EEOC v. Waffle House, Inc.*<sup>80</sup> the Supreme Court preserved additional protection for employees when it recognized the enforceability of private arbitration agreements and clarified the role of the Equal Employment Opportunity Commission (EEOC) in litigating discrimination complaints subject to an arbitration agreement. In *Waffle House, Inc.*, the Court upheld the EEOC's right to seek all available remedies for job discrimination regardless of an employer-employee agreement to resolve disputes through binding arbitration.<sup>81</sup> The Court rejected any limitation upon the EEOC's right to enforce federal anti-discrimination laws: "[t]here is no language in the statute or . . . cases suggesting that the existence of an arbitration agreement between private parties materially changes the EEOC's statutory function or the remedies that are otherwise available."<sup>82</sup> While reaffirming the EEOC's independent right to seek remedies for job discrimination regardless of any agreements between the employer and employee, the Supreme Court acknowledged the longstanding federal policy favoring arbitration agreements.<sup>83</sup> Based on these guarantees of protection for the employee against the employer, it would seem that this resolution is not needed to protect the civil rights of workers, as this protection already exists.<sup>84</sup> This may lead to its ultimate defeat in the House, maintaining the current *Gilmer* and *Circuit City* precedents, but until then, all bets are off and it should be noted that the status of arbitration in employment contracts could be in flux.

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78. *Circuit City Stores, Inc.*, 532 U.S. at 123.

79. *Id.*

80. 534 U.S. 279 (2002).

81. *Id.*

82. *Id.* at 282.

83. *Id.* at 279.

84. This may be one reason that Ross Runkel, founder of LawMemo and Professor of Law Emeritus at Willamette University College of Law has called this bill "dead on arrival," remarking that "[t]here is not now, nor will there soon be, majority support for this bill in the House or in the Senate." Ross Runkel, Bill to exclude employment contracts from FAA, LawMemo.com, June 29, 2005, at [http://www.lawmemo.com/arbitrationblog/archives/2005/06/bill\\_to\\_exclude.html](http://www.lawmemo.com/arbitrationblog/archives/2005/06/bill_to_exclude.html).

### III. MANAGEMENT AND PUBLIC RELATIONS CONSIDERATIONS IN THE MODERN BUSINESS ENVIRONMENT

One of the hallmarks of a successful business is strong leadership that outlines clear management strategies.<sup>85</sup> Failures of leadership in providing direction can cast a dark cloud over an organization, hampering its ability to achieve stated goals.<sup>86</sup> This cloud has been described as a negative halo effect surrounding an organization.<sup>87</sup> When this infects an organization, managers are likely to distance themselves from company decisions, telling outsiders that they were not involved, that they disagreed with the decisions, or that someone else in another department was responsible.<sup>88</sup> As this overall feeling permeates the organization, managers tend to become secretive and isolated, destroying internal communication.<sup>89</sup> Leaders who fail to recognize the development of these characteristics may find it difficult to overcome the negative attitudes infesting the organization.<sup>90</sup> However, the successful manager will work to spark collaboration among workers throughout departments and divisions, leading to a restoration of confidence throughout the organization's stakeholders.<sup>91</sup> Given the significant business risk that may result from the development of the negative halo, organizations that frequently interact with today's modern media must remain particularly attuned to the possible development of this scenario, lest they be faced with the associated undesired consequences.

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85. See generally Arthur W. Samansky, *Successful Strategic Communications Plans are Realistic, Achievable, and flexible*, PUB. RELATIONS Q. (June 22, 2003), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:106982346&num=1&ctrlInfo=Round16%3Aprod%3ASR%3Aresult&ao=&FreePremium=BOTH>; Emma Daugherty, *Strategic Planning in Public Relations: A Matrix that Ensures Tactical Soundness*, PUB. RELATIONS Q. (March, 2003), at [http://www.findarticles.com/p/articles/mi\\_go1552/is\\_200303/ai\\_n7532103](http://www.findarticles.com/p/articles/mi_go1552/is_200303/ai_n7532103). The NCAA has also routinely used strategic plans as it looks ahead to its future. NCAA EXECUTIVE COMMITTEE, NCAA STRATEGIC PLAN FINAL DRAFT, 98th Annual NCAA Convention, Jan. 9-12, 2004.

86. Rosabeth Moss Kanter, *Leadership and the Psychology of Turnarounds*, 81 HARV. BUS. REV. 58 (June 2003).

87. *Id.* at 59-60.

88. *Id.* at 59-61.

89. *Id.* at 59-60.

90. *Id.* at 60-61.

91. *Id.* at 62-64.

## A. Responding to the Modern Media Environment

Management of public relations is an essential concern for any successful business. During the information age, these concerns have taken on heightened importance. Today's media environment, with the explosion of the Internet, the creation of the 24-hour news cycle in cable news, and a shift from objectivity to advocacy in reporting, has caused the public relations field to evaluate its strategies for interacting with the media.<sup>92</sup> The focus now must turn to counseling, media relations, and crisis communications.<sup>93</sup> The traditional framework of the morning newspaper and evening news has been replaced with an "all-encompassing information matrix that operates on a continuous basis."<sup>94</sup> As part of this continuous "all-encompassing information matrix," newspapers that once had limited print circulation now reach many times their prior audience via the Internet, with on-line Internet databases providing access to archives of articles spanning decades, all easily accessible to those frequenting web logs ("blogs") providing endless opinion and commentary from anonymous posters, some who are experts, but most having no expertise whatsoever.<sup>95</sup>

In this setting, the job of the public relations professional has become expansive. Given the ease of access to information, current and archived, the professional must be prepared to respond to questions about events involving or quotes by a long-departed employee five years after their occurrence. Therefore, it is essential to maintain near-immediate access to historical information and "comparative knowledge of [the] employer or client—how positions and procedures were formed and may have changed in response to current events, regulatory activity and changing corporate policy."<sup>96</sup> Failure to do so may hinder the ability to participate in and respond to initial news coverage. In the modern media setting, this can prove absolutely crucial, as issues are typically framed in the early stages and become increasingly difficult to reframe in subsequent news cycles.<sup>97</sup> Likewise, because blogs assist the proliferation of nonstop rumors, creating myths that prove extremely

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92. Gary B. Goldstein, *A Strategic Response to Media Metamorphoses*, PUB. REL. Q. (June 22, 2004), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:121149909&num=1&ctrlInfo=Round16%3Aprod%3ASR%3Aresult&ao=&FreePremium=BOTH>.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

costly in time, effort, and money to refute, the need for careful planning in this media environment is readily apparent.

### B. Public Relations in a Sports Media Environment

This new media environment also fully encompasses the sports world. The field of intercollegiate athletic administration has shown a history of responsiveness to changes in media coverage during the past half century.<sup>98</sup> As media coverage of intercollegiate athletics has increased, universities and athletic departments have developed new ways to adapt to increased media attention. In response to the growth of college sports in the 1950s and 1960s, athletic departments have created a sports information department headed by someone in the new position of Sports Information Director.<sup>99</sup> The College Sports Information Directors of America or CoSIDA, established in 1957, has grown from original membership of a little more than 100 to current membership exceeding 1,800 members.<sup>100</sup> Like any public relations professional, the SID must interact with numerous interested parties, including coaches, athletes, administrators, alumni, donors, and the media.<sup>101</sup>

Despite the inherent demands associated with interacting with these groups, the typical department employs only four full-time staff members, relying heavily on the employment of undergraduate and graduate student interns.<sup>102</sup> However, with the inclusion of these student workers, the average department employs roughly 13 employees.<sup>103</sup> Furthermore, Division I-A institutions typically showcase larger Sports Information Departments than do Division I-AA programs.<sup>104</sup> However, despite their small size, these departments must be prepared to handle the media firestorm that may erupt in a moment of crisis or scandal.<sup>105</sup>

Crucial in managing any media crisis or scandal is the maintenance of control over the situation. As one case study has noted, the first 24 hours of a

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98. Steven McClung, *Collegiate Sports Information: A Profile of the Profession*, PUB. REL. Q. (June 22, 2002), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:89270355&num=1&ctrlInfo=Round16%3Aprod%3ASR%3Aresult&ao=FreePremium=BOTH>.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (This number does not include any secretarial staff employed in the department).

104. *Id.*

105. See generally ROBIN COHEN, *THE PR CRISIS BIBLE: HOW TO TAKE CHARGE OF THE MEDIA WHEN ALL HELL BREAKS LOOSE* (2000).

crisis can be the most important.<sup>106</sup> To achieve the greatest level of success, handling a crisis in sports should not fall exclusively on the Sports Information Director or the Sports Information Department. Rather, a media relations team should be established to assist in managing the situation, involving the Athletic Director, Compliance Director, Human Resources Manager, General Counsel's Office, Marketing Director, and the University President's office.<sup>107</sup> Collectively, this team should develop a response plan, even if the Athletic Director or the Sports Information Director ultimately acts as the spokesperson for the University.<sup>108</sup> It is also important to develop a fact sheet summarizing the situation.<sup>109</sup> This sheet can serve as a template for strategic planning for the makeshift management team and also as a source for maintaining openness with the media. Interaction with the media can be crucial as both the opportunity to frame the story, maintaining as much control as possible, and to communicate the institution's position to all of its stakeholders: university employees, coaches, students, alumni, fans, donors, the Conference officials, and the NCAA. Ultimately, when the media firestorm is spiraling out of control, maintaining control over the message is often the only solution to the problem. One of the greatest keys to maintaining control is being prepared to handle a situation before it arises. As one author has commented, "to be forewarned is to be forearmed,"<sup>110</sup> so the Sports Information Director must capitalize on any opportunity to be prepared and maintain control over a media crisis.

### C. Litigation Public Relations

Trial scenarios raise similar public relations crisis concerns. The stakes are certainly high in any trial situation, whether the risks are related to

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106. Brian-Alexander Domingo, *Stop Slammin' Sammy: A Theoretical Approach to the First 24 Hours of a Communication Crisis in Sports*, PUB. REL. Q. (Dec. 22, 2003), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:113305404&num=1&ctrlInfo=Round16%3AProd%3ASR%3AResult&ao=FreePremium=BOTH>.

107. *Id.*

108. *Id.*

109. *Id.*

110. G. A. Marken, *The PR Crisis Bible: How to Take Charge of the Media When All Hell Breaks Loose*, PUB. REL. Q. (June 22, 2003), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:106982338&num=1&ctrlInfo=Round16%3AProd%3ASR%3AResult&ao=FreePremium=BOTH>.

criminal charges or a civil action.<sup>111</sup> Public opinion about the result of a trial, more than the actual verdict, determines the long-term public relations impact of the trial's aftermath.<sup>112</sup> "Trials are media events, and media coverage impacts their importance."<sup>113</sup> Accordingly, the "no comment" statement that may often leave a lawyer's lips, exercising utmost control over the free flow of information, seeking to prevent harm to the client or the case, can have the entirely opposite effect from the public relations perspective.<sup>114</sup> From the public relations standpoint, not commenting might lead the public to believe that you are hiding some highly damaging information.<sup>115</sup> This illustrates a very delicate balance, as in a business sense, successful crisis management often requires attorneys and public relations professionals to walk hand-in-hand.<sup>116</sup>

This delicate balance is further illustrated when considering the very nature of the information that might be involved in a litigation scenario. Courtroom communication is highly regulated by the rules of evidence, with much evidence excluded as hearsay. However, what is excluded as hearsay in the court often tends to be most ballyhooed in the media.<sup>117</sup> In essence, litigation can present two battles, one in the court of law and the other in the court of public opinion.<sup>118</sup> However, as mentioned previously, maintaining control through strategic planning and foresight can help to avoid a crisis before it even develops.

#### IV. PUBLIC RELATIONS EXPLOSIONS IN INTERCOLLEGIATE ATHLETICS

Disputes between coaches and institutions are not uncommon and typically, although not exclusively, arise surrounding termination of a coach's

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111. Dirk C. Gibson, *The Paradoxical Nature of Litigation Public Relations*, PUB. REL. Q. (Mar. 22, 2003), at <http://www.highbeam.com/library/doc3.asp?DOCID=1G1:102287232&num=1&ctrlInfo=Round16%3AProd%3ASR%3AResult&ao=FreePremium=BOTH>.

112. *Id.*

113. *Id.*

114. Marken, *supra* note 110.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

employment at an institution.<sup>119</sup> Given the fervent and extensive coverage of sports by national newspapers, television networks such as ESPN, publications such as Sports Illustrated and The Sporting News, and Internet sites such as <http://www.espn.com>, <http://www.cnnsi.com>, and <http://www.cbssportsline.com>, image is often everything. Accordingly, to prevent scandal and to best manage a public relations crisis, it is crucial for a school to control the nature of and amount of information that is leaked to these outlets regarding internal disputes. The failure to maintain control over the dissemination of details of a dispute between a coach and institution can have serious consequences for both parties. For that reason, the vast majority of these cases settle out of court, as "[u]niversities just do not want to hang out their dirty laundry in public."<sup>120</sup> The following provide examples of internal disputes between coaches and institutions that became public relations crises.

Although these examples share characteristics faced by many institutions in crisis situations, they also indicate the impact of the negative halo effect on athletic departments and highlight the need to employ all the assets of a Sports Information Department to control information and limit expenses in both litigation and non-litigation situations.

#### *A. Nolan Richardson v. University of Arkansas*

In a widely publicized lawsuit following his termination as head basketball coach at the University of Arkansas,<sup>121</sup> Nolan Richardson lost in an \$8.86 million discrimination case against the university. In this matter, U.S. District Court Judge William R. Wilson Jr. "said he understood why the fired coach felt the way he did. But he also said that the university could buy out his contract, not because of his race or his racial comments." Richardson sought back pay, lost compensation, and \$2 million in damages.<sup>122</sup> In his lawsuit Richardson alleged that he was terminated because he was black and outspoken.

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119. See generally *Perdue v. Univ. of New York*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998) (resolving a dispute between the school's former women's basketball coach and women's sports administrator alleging gender discrimination and retaliation).

120. Martin J. Greenberg, *Representation of College Coaches in Contract Negotiations*, 3 MARQ. SPORTS L. J. 101, 108 (1992).

121. Scott Cain, *Richardson Called Shot – Ultimatum Brings About Termination*, ARK. DEMOCRAT-GAZETTE, Mar. 3, 2002, at 1C (describing dispute between the University of Arkansas and former basketball coach).

122. The Two-Minute Drill, *Coach Loses \$8.86 Million Discrimination Case*, 1 COLLEGE ATHLETICS & THE LAW 2 (August 2004).



Central to the dismissal of the case was Richardson's "diatribe" of February 23, 2002, following a game against Kentucky, when "he claimed that he answered to no one and that the university could buy him out."<sup>123</sup> The university argued that Nolan had "undermined" the program and should have been fired for what was determined to be unprotected speech.<sup>124</sup> There was widespread coverage on the airwaves and in newspapers of Nolan's statement, "if they go ahead and pay me my money, they can take the job tomorrow."<sup>125</sup> The court noted that the remarks, according to the university, "showed a lost interest and lack of commitment to [the university], undermined public confidence and support for the program, and had a negative impact on recruiting for all [university] sports."<sup>126</sup> With these explanations, [Arkansas had] met its burden of articulating a legitimate reason for the termination."<sup>127</sup>

The *Richardson* case is hardly unique in illustrating the financial impacts and negative publicity faced by virtually all athletic departments in litigation situations arising out of the termination of a coach. However, the holding that Arkansas had met its burden of proving that a legitimate reason existed for the firing also represents judicial recognition of the impact that the negative halo can have in numerous aspects of intercollegiate athletics

### B. Tyrone Willingham and the University of Notre Dame

The firing of Tyrone Willingham as head football coach at the University of Notre Dame, on Tuesday, November 30, 2004, although not resulting in litigation, provides an important example of the destructive impact of the negative halo effect on the numerous stakeholders of a major Division I athletic program.<sup>128</sup> Great media attention has been paid to this story, questioning the fairness of the termination.<sup>129</sup> Fans, students, university

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123. Cain, *supra* note 121, at 1C.

124. *Richardson v. Sugg*, 325 F. Supp.2d 919 (E.D.Ark., 2004).

125. *Judge Dismisses Richardson Suit, Says Stated Reasons for Firing were Legit*, 5 LEGAL ISSUES IN COLLEGIATE ATHLETICS 1 (Aug. 2004); *Richardson*, 325 F. Supp. 2d at 937.

126. *Richardson*, 325 F. Supp. 2d at 937.

127. *Id.*; *Judge Dismisses Richardson Suit* . . . , *supra* note 125, at 6.

128. Associated Press, *Notre Dame Fires Coach Tyrone Willingham*, REDORBIT.COM (Nov. 30, 2004), at [http://www.redorbit.com/news/general/107229/notre\\_dame\\_fires\\_coach\\_tyrone\\_willingham/](http://www.redorbit.com/news/general/107229/notre_dame_fires_coach_tyrone_willingham/); Associated Press, *Notre Dame Fires Willingham*, MSNBC.COM (Dec. 3, 2004), at <http://msnbc.msn.com/id/6620521/>.

129. *Id.*; Associated Press, *Golden Dome More Tarnished These Days*, MSNBC.COM (Dec. 29, 2004), at <http://www.msnbc.msn.com/id/6725031/>; Lou Somogyi, *One Year Ago Today...* NOTRE DAME FIGHTING IRISH FOOTBALL (Nov. 30, 2005), at <http://www.blueandgold.com/content/?aid=896>.

employees, and alumni were split on the decision. Students had scheduled a protest demanding the firing of Willingham prior to the announcement of his termination.<sup>130</sup> Following the announcement by Athletic Director Kevin White and incoming University President, Reverend John Jenkins, outgoing Notre Dame President Reverend Edward "Monk" Malloy publicly criticized the decision and noted that he was appalled and against the decision to fire Willingham.<sup>131</sup> Malloy continued,

[i]n my 18 years, there have been only two days that I have been embarrassed to be president of Notre Dame: Tuesday and Wednesday of last week, because I felt we had not abided by our precedent . . . which was a five-year window for a coach to display the capacity to be successful within our system. Notre Dame will get a coach. I hope that that person does well, but I think the philosophical shift we have taken is a significant one. I'm not happy about it and I do not assume responsibility for it. I think it was the wrong move.<sup>132</sup>

Additionally, Malloy's assistant Chandra Johnson, "the school's highest-profile black administrator," shaved her head in protest of the firing.<sup>133</sup> Johnson remarked "[t]he process was flawed. There weren't enough people in the conversation. And there was little or no consideration of the ramifications of the decision."<sup>134</sup> Willingham was the first African-American head coach in any sport at Notre Dame and had been hired in the aftermath of a widely publicized fiasco following the hiring of George O'Leary as head coach of the Irish, a tenure that lasted five days after revelation of inconsistencies in O'Leary's resume.<sup>135</sup>

The new public relations crisis that resulted from this coaching change presented additional difficulties for Notre Dame in managing competing interests of its various stakeholders. The public responses of the university president and a senior administrator criticizing the decision of the Athletic Director, Board of Trustees, and incoming president highlighted dissension in the ranks. This showcased anything but a consistent PR position from Notre Dame. Without a strong, uniform message from those managing the situation

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130. Associated Press, *Notre Dame Fires Coach Tyrone Willingham*, *supra* note 128.

131. Avani Patel, *Malloy Rips Irish Decision*, CHI. TRIB., Dec. 9, 2004, §4, at 1.

132. *Id.* at 1, 6.

133. Associated Press, *Notre Dame Aide Shaves Head in Protest*, MSNBC.COM (Dec. 13, 2004), at <http://www.msnbc.msn.com/id/6687454/>.

134. *Id.*

135. Associated Press, *Notre Dame Fires Coach Tyrone Willingham*, *supra* note 128 & Associated Press, *Notre Dame Fires Willingham*, *supra* note 128.

for an institution, it becomes increasingly difficult for any athletic department to maintain control over information as a crisis continues.

### C. Assistant Coaches

Public relations issues can also arise in dealing with the termination of assistant coaches.

#### 1. *Joe Moore v. University of Notre Dame*

The Tyrone Willingham termination was not the first time that Notre Dame has faced public relations turmoil in the replacement of a football coach. In 1996, when new Notre Dame head football coach Bob Davie decided not to retain Joe Moore as one of his assistants, the decision turned into crisis for the program, the athletic department, and the institution.<sup>136</sup> Moore sued Davie, the University of Notre Dame, and Fan Action, Inc., owner and publisher of Blue and Gold Illustrated, for age discrimination and defamation.<sup>137</sup> Joe Moore alleged that Davie told him that he was "too old" and would not be able to continue coaching.<sup>138</sup> The university claimed that the termination was due to his failure to live up to the standards of Notre Dame because he intimidated and abused players and excessively used offensive language.<sup>139</sup> The case was widely publicized<sup>140</sup> and affected the Notre Dame football program on many levels.<sup>141</sup> The school was forced to spend significant funds

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136. *Moore v. Univ. of Notre Dame*, 968 F. Supp. 1330 (N.D. Ind. 1997); *Moore v. Univ. of Notre Dame*, 22 F. Supp. 2d 896 (N.D. Ind. 1998); see also RICHARD LIEBERMAN, PERSONAL FOUL: COACH JOE MOORE VS. THE UNIVERSITY OF NOTRE DAME (2001).

137. *Moore*, 968 F. Supp. at 1332.

138. *Id.*; see also LIEBERMAN, *supra* note 136, at 12-18.

139. *Moore*, 968 F. Supp. at 1333; see also LIEBERMAN, *supra* note 136, at 30-33.

140. Associated Press, *Former Coach Files Suit Against Notre Dame*, LUBBOCK AVALANCHE-JOURNAL (Feb. 28, 1997), at <http://www.lubbockonline.com/news/022897/notre.htm>; Associated Press, *Notre Dame Discrimination Suit Begins*, THE MINNESOTA DAILY (July 10, 1998), at <http://www.mndaily.com/daily/1998/07/10/sports/ap10sc/>; Associated Press, *Notre Dame Guilty of Discrimination*, HANNIBAL COURIER-POST (July 16, 1998), at <http://www.hannibal.net/stories/071698/NDdiscrimination.html>; Cappy Gagnon, *Holtz Is Gone, Let's Move On*, 33 THE OBSERVER 47 (Nov. 8, 1999), at <http://www.nd.edu/~observer/11081999/Viewpoint/1.html>; *Notre Dame Reacts to Age Discrimination Case: Irish Athletic Director Makes Statement* (July 15, 1998), UNIVERSITY OF NOTRE DAME OFFICIAL ATHLETIC SITE, at <http://und.ocsn.com/genrel/071598aaa.html>; *Questions and Answers: Pertaining to the Joe Moore vs. University of Notre Dame Lawsuit* (July 30, 1998), UNIVERSITY OF NOTRE DAME OFFICIAL ATHLETIC SITE, at <http://und.ocsn.com/genrel/073098aaa.html>; see also LIEBERMAN, *supra* note 136, at 85-89.

141. See generally Lieberman, *supra* note 136.

in defending the lawsuit and satisfying the judgment entered against it.<sup>142</sup> Additionally, the extensive coverage created a great deal of embarrassment and bad publicity for Notre Dame in the sports news environment. Furthermore, the revelation of Davie's statements that he "hated and despised" the man he replaced, beloved head coach Lou Holtz, and his speculation that Holtz was having "mental problems" at the end of the 1996 football season did not please most Notre Dame fans, students, and alumni,<sup>143</sup> creating a dark cloud that would hang over Davie's tenure as head coach.

## 2. *Murphy v. University of Cincinnati*<sup>144</sup>

In another termination case involving an assistant coach, former Cincinnati assistant swim coach Robin Murphy challenged her termination, alleging sexual discrimination, violative of Title VII of the Civil Rights Act. Like *Moore*, the *Murphy* case involved charges of discrimination. However, unlike *Moore*, Murphy was unsuccessful in pursuit of her claim. The Supreme Court refused Murphy's request to hear an appeal of the Sixth Circuit's ruling that she had failed to show either that she was qualified to continue as an assistant swim coach or that she was treated any worse than a similarly situated male coach.<sup>145</sup> Although the University of Cincinnati was successful in this case, it was, nonetheless, forced to expend funds in defending itself in litigation and to counter the negative publicity of claims that its athletic department was sexist.

### D. *Learning from Public Relations Mistakes*

Each of the previous examples shares characteristics common to most situations involving the termination of a coach. When termination leads to litigation, limiting costs and expenses associated with going to court becomes important for both the coach and the institution. As the situation gains publicity and the media coverage gains steam, it becomes increasingly important for both parties to maintain some control over information, whether in a litigation or non-litigation setting. Although this may not always be easy or even possible, structured plans for handling the situation are crucial. In

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142. *Id.*

143. *Id.* at 205-206.

144. *Murphy v. Univ. of Cincinnati*, 72 Fed. Appx. 288 (6th Cir. 2003).

145. The Two-Minute Drill, *Supreme Court Refuses to Hear Sex Bias Appeal*, 1 COLLEGE ATHLETICS & THE LAW 2 (Aug. 2004).

many of these situations, arbitration may be one tool available to both parties to assist in managing a crisis and maintaining control over the situation

## V. ARBITRATION IN ATHLETICS

The suggestion of using arbitration in an athletics context is anything but novel. Arbitration is currently prominent in professional sports and is found in most collective bargaining agreements.<sup>146</sup> A variety of cases involving grievance arbitration have been settled in the National Football League.<sup>147</sup> As in the NFL, grievance arbitration in major league baseball has proven to be a common and effective method of dispute resolution.<sup>148</sup> In addition, baseball's "last best offer" salary arbitration system has been well-documented.<sup>149</sup> The use of these systems in baseball has resulted in fewer cases actually being decided by arbitrators, with the majority of the cases being settled by the parties involved.<sup>150</sup>

Arbitration is also becoming more common in the world of amateur sports. The passage of the Ted Stevens Olympic and Amateur Sports Act<sup>151</sup> has opened amateur sports in America to ADR by endorsing the submission of sports disputes to the American Arbitration Association for resolution. Arbitration of disputes in international competition has also become more prevalent due to the expansion of the role of the Court of Arbitration for Sport<sup>152</sup> in resolving issues involving eligibility and doping in sanctioned competitions.

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146. Fried & Hiller, *supra* note 9, at 639.

147. See generally Sharpe v. Nat'l Football League Players Ass'n, 941 F. Supp. 8 (D.C. Cir. 1996); Nat'l Football League Players Ass'n v. Pro-Football, Inc., 857 F. Supp. 71 (D.C. Cir. 1994).

148. See generally Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504 (2001); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976); Gregg v. Nat'l League of Prof'l Baseball Clubs, 2002 U.S. Dist. LEXIS 12916 (E.D. Pa. Mar. 13, 2002).

149. See generally ROGER I. ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* (2000); BRUNET & CRAVER, *supra* note 14 at 525; Frederick Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW. J. 183 (1994).

150. Fried & Hiller, *supra* note 9, at 640.

151. Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. §§ 220501-220512 (2005).

152. See generally Richard H. McLaren, *The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes*, 35 VAL. U. L. REV. 379 (2001); Melissa R. Bitting, Comment, *Mandatory, Binding Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security"?* 25 FLA. ST. U. L. REV. 655, 663 (1998).

### A. The Necessity of Contract

The link between the examples of arbitration in sports described above is the potential for a contractual arbitration provision, whether the contract is the result of collective bargaining or negotiation between individual parties. This is the threshold requirement of considering arbitration as a dispute resolution method in any industry. "[A]rbitration is a creature of contract,"<sup>153</sup> and the agreement to arbitrate is one of the hallmarks of the process.<sup>154</sup> The essential requirement of a contractual relationship between the parties is easily satisfied by the employment contracts executed between college coaches and institutions, thus satisfying the prerequisite for consideration of arbitration clauses.<sup>155</sup>

### B. College Coaching Contracts

As the previous examples have illustrated, the majority of public relations crises associated with disputes between coaches and institutions arise out of termination of the employment contract. For this reason, both coaches and institutions should be prepared for this situation. "Coaching is a job where you are hired to be fired. The back end of the deal is as important as the front end of the deal. The first day of the job must be spent planning for the last day of the job."<sup>156</sup> Part of the preparation for the "inevitable firing" is recognition of what restrictions may impact the contractual relationship between the coach and institution. In addition to complying with state and federal law, coaches must also comply with NCAA bylaws, conference rules, and university regulations.<sup>157</sup> Within this framework, one key to understanding the basic nature of a college coaching contract is to recognize the importance of the package. The package refers to the combination of a coach's salary, institutional fringe benefits, and additional compensation opportunities.<sup>158</sup> These fringe benefits may include "shoe, apparel and equipment endorsements, television, radio and Internet shows, speaking engagements, personal or public appearances, and summer instructional camps. It may also include prerequisites such as housing, insurance premiums, annuities,

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153. STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 59 (2002).

154. BRUNET & CRAVER, *supra* note 14, at 384.

155. GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 80-86 (2d ed. 1994).

156. Greenberg, *supra* note 120, at 103.

157. Greenberg, *supra* note 3, at 146-147.

158. For a general description of the concept of the package in college coaching contracts see Greenberg, *supra* note 157, at 134-138.

membership in health and country clubs, financial gifts from alumni and boosters, business opportunities, and the use of automobiles.<sup>159</sup> In addition to a description of relevant rules and the makeup of the package, the well-crafted coaching contract will include numerous clauses outlining many or all of the following: 1) the Duties and Responsibilities of the Coach; 2) the Term of Employment, including any extension or rollover provisions; 3) Reassignment Provisions; 4) Performance Bonuses; 5) Retirement Benefits; and 6) Retention or Loyalty Bonuses.<sup>160</sup> The contract will also likely contain Termination Clauses outlining the "back end" separation between the parties.<sup>161</sup> These can often prove to be the most difficult clauses to negotiate. Several of these clauses will allow the institution to terminate a coach for instances of "moral turpitude."<sup>162</sup> This language can be beneficial for the institution, giving it wide latitude to define moral turpitude. However, for this reason, a coach should push for specific definition of acts that qualify for termination under the contract.<sup>163</sup> The contract likely will also more specifically spell out financial buyouts of the contract by either side and provisions for either termination with cause or termination without cause by the institution.<sup>164</sup> In addition, the contract may contain an arbitration clause designed to handle any and all disputes, whether arising out of termination or otherwise.<sup>165</sup> In many ways, this can be one of the most important clauses in the contract, providing significant benefits to both parties.

### C. Sample Mandatory Arbitration Clauses

There are a variety of ways in which arbitration clauses may be drafted in contracts. Certain factors are extremely important in the formulation of any ADR clause.<sup>166</sup> The most important consideration is the need to word the clause generally to avoid leaving out possible disputes, while remaining specific enough to address particular issues,<sup>167</sup> to give both broad and narrow

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159. *Id.* at 134.

160. *See generally* Greenberg, *supra* note 3, at 151.

161. *Id.* at 209-239.

162. *Id.* at 215.

163. *Id.* 216-217.

164. *See generally id.* at 231-254.

165. *Id.* at 257-258; BRUNET & CRAVER, *supra* note 14, at 183.

166. BENNETT, *supra* note 153, at 75-88 (outlining important basic concerns prominent in the construction of an arbitration clause).

167. Fried & Hiller, *supra* note 9, at 649.

definition to the scope of the clause.<sup>168</sup> It is also beneficial for the clause to illustrate the procedures to be used and the law to be followed, as well as to include a privacy and confidentiality clause.<sup>169</sup> Additionally, neutrality can be an important concern, since coaches are accustomed to participating in a sport governed by an impartial umpire or referee.<sup>170</sup> Creating a dispute resolution system that mirrors this custom can prove most successful. However, in drafting the contract, each side can work together to design a system with which they feel most comfortable. This system can consist of an agreement on the pre-selection of a neutral arbitrator, or an agreement to submit to arbitration by a panel, with one partial arbitrator chosen by each side and the third neutral arbitrator chosen by the other two arbitrators, the model typically followed in labor disputes.<sup>171</sup> The parties may instead elect to use a panel selected in some other manner through mutual input. This selection could include setting specific requirements for the arbitrator, including level of experience as an arbitrator generally or in specific types of disputes.<sup>172</sup>

One example arbitration clause reads:

Any controversy or claim arising out of or relating to this CONTRACT, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial (or other) Arbitration Rules [including the Emergency Interim Relief Procedures], and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.<sup>173</sup>

Sample arbitration clauses from employment contracts of professional coaches contain substantially similar language, although they go a step further, accounting for allocation of costs and attorneys fees.

Any dispute arising out of this Employment Agreement shall be submitted to, and settled by, arbitration in accordance with the rules of the American Arbitration Association. The decision of the arbiter shall be final and judgment thereon may be entered in any court of

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168. BRUNET AND CRAVER, *supra* note 14, at 502-504.

169. *Id.*

170. *Id.* at 507-508.

171. Adam Epstein, *Alternative Dispute Resolution in Sport Management and the Sport Management Curriculum*, 12 J. LEGAL ASPECTS OF SPORT 153, 158 (2002).

172. *Id.*

173. *Id.* at 170.



competent jurisdiction. The losing party shall pay the reasonable attorney's fees and costs of the prevailing party.<sup>174</sup>

Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered in such arbitration may be entered in any Court having jurisdiction thereof. Whether or not consistent with the rules of the AAA, the prevailing party in a dispute arising between the parties to this Agreement shall be entitled to his (its) reasonable attorneys' fees and costs in connection therewith.<sup>175</sup>

A sample clause from a college coaching contract is also similar, although it contains a provision first directing the parties to mediation. A mediation provision can carry many benefits similar to arbitration, but is not the primary focus of this article.

In the event a dispute arises with regard to the terms or performance of this contract:

- a. The parties will endeavor to resolve the dispute between them and without rancor, each bearing any expenses it may incur.
- b. Disputes not resolved between the parties which remain unresolved for a period of three weeks, will be submitted to a mediation service, such as the Carolina Conciliation Services Corporation, for up to three hours of mediation (unless the parties agree to more). The mediator will be asked to deal with appropriate allocation of the costs of the mediation including reasonable attorneys' fees.
- c. If the dispute is not resolved by mediation, the parties will submit the dispute to binding arbitration in Charlotte, North Carolina in accordance with the rules of the American Arbitration Association then in effect, unless the parties mutually agree on a different arbitrator.<sup>176</sup>

Also of note in this clause is the stated goal of resolving disputes without rancor. Admittedly, this may be an unattainable goal in many disputes, but it

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174. Professional Sports Franchise, Head Coach's Employment Agreement A 10 (1997) (unpublished sample contract, on file with author).

175. Professional Sports Franchise, Head Coach's Employment Agreement B 19 (2002) (unpublished sample contract, on file with author).

176. ACC University, Contract of Employment as Head Football Coach 11 (2002) (unpublished sample contract, on file with author). See also Greenberg, *supra* note 3, at 257-258.

can at least denote a shared attitude between the parties to maintain an amicable working environment, particularly if the dispute does not involve termination of the coach.

Additionally, because privacy can be of essential importance,<sup>177</sup> clauses can be included in the contract requiring confidentiality. In addition to limiting the dissemination of details of a dispute between the parties, this can be beneficial in keeping the terms and conditions of the employment arrangements confidential.<sup>178</sup> Furthermore, when a coach is terminated, the institution will want the coach to immediately relinquish control of certain information that was developed by the coach in his employment on behalf of the institution.<sup>179</sup>

One sample Confidentiality Agreement reads:

University Documents, Records, and Property. All documents, records, materials, equipment or other property, including without limitation, personnel records, recruiting records, team information, athletic equipment, films, statistics, keys, credit cards and any other material, data or property, furnished to Coach by the University or developed or acquired by Coach on behalf of the University or at the expense of the University or otherwise in connection with Coach's employment by the University are and shall remain the sole property of the University. Within ten (10) days of termination of Coach's University employment, whether by resignation, expiration of this Contract, or action by the University for cause, Coach shall cause any such materials in his possession or control to be delivered to the University.<sup>180</sup>

A second sample clause refers to protection of information related to details of the coaching contract.

*Confidentiality.* Neither party nor their agents will disclose the terms and conditions of this Employment Agreement to any person or entity whatsoever. The parties agree that it would be difficult to measure the damage to either party from a breach of this paragraph. Accordingly, the parties agree that if either breaches this paragraph, the other party shall be entitled, in addition to all other remedies it may have at law or

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177. BRUNET & CRAVER, *supra* note 14, at 315-316.

178. Greenberg, *supra* note 3, at 256.

179. *Id.* at 256.

180. *Id.* at 256-257.

in equity, to an injunction or other appropriate orders to restrain any further breaches.<sup>181</sup>

Although neither of these sample clauses specifically refers to the details related to any arbitration hearings, that does not necessarily preclude the protection of such information. By their nature, arbitration proceedings do provide a level of protection of information, as they take place in a private setting and the resulting opinions do not become part of the public record.<sup>182</sup> Nonetheless, confidentiality clauses can provide an additional layer of protection by including specific references to potential disputes and arbitration proceedings. However, regardless of the degree of confidentiality sought in any agreement, both parties must recognize any potential Open Records Laws that might supercede or preempt such a clause.<sup>183</sup> However, Open Records Laws notwithstanding, with its ability to limit many costs associated with litigation and to limit the amount of information made public about a dispute between a coach and institution, arbitration can prove to be an attractive alternative to litigation for both parties

## VI. CONCLUSION

Ultimately, successful management of athletic departments, as in any business, is best achieved through strong leadership that outlines strategic plans designed to control departmental responses to demands from interested internal and external parties. These plans for control may encompass a variety of responses to demands in numerous areas.

### A. Financial Issues in Intercollegiate Athletics

Cost control represents one extremely important management concern for all businesses, but this is particularly true in intercollegiate athletics. However, public perception about the amount of money involved in the modern day big business of intercollegiate athletics can be misleading.<sup>184</sup> Popular perception is that intercollegiate athletics has become a huge revenue generating industry, with universities annually making millions from their athletic programs. This is hardly surprising, given the trend of stadium expansion and construction of athletic facilities that has swept through many

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181. Professional Sports Franchise, *supra* note 175, at 8.

182. Epstein, *supra* note 171, at 158.

183. Greenberg, *supra* note 6, at 231-234; Greenberg, *supra* note 3, at 256.

184. See generally SPERBER, *supra* note 2.

campuses,<sup>185</sup> and considering that the NCAA averages more than half a billion dollars annually from its contract with CBS to broadcast the men's basketball tournament, and that the payouts from the college football bowl games exceeds \$184 million.<sup>186</sup> However, despite the assumption that athletic departments are earning large revenues resulting in a period of extreme profitability, the data of the Knight Foundation and the Sebago Associates study commissioned by the NCAA indicates otherwise.<sup>187</sup> Rather than experiencing profits, institutions are struggling as rising revenues are being consumed by greater expenses, resulting in only 15% of Division I and II athletic departments operating in the black.<sup>188</sup> This has led to athletic departments taking funds from the institution's general revenue in the attempt to satisfy its expenses.<sup>189</sup> Accordingly, because most athletic departments are operating at a loss, the possibility of incurring significant costs in attorneys' fees, court costs, and associated litigation expenses in the event of an employment dispute with a coach is an important concern. Because arbitration provides an opportunity to limit expenses for both parties,<sup>190</sup> inclusion of arbitration clauses in the coaching contract can provide a measure of control for both the coach and the institution in managing costs.

### B. Paying the Price for Public Relations Problems

When a dispute between coach and institution erupts into an athletic media crisis, it can prove substantially costly for both parties in financial and public relations terms. Given the economic framework in which coaches and athletic departments operate, minimizing expenses becomes paramount. This becomes especially true during public relations turmoil. In these moments, a public relations management strategy is essential for success. That strategy may vary from situation to situation, but the hallmark of any management strategy is a plan or framework that helps to maintain a level of control while events are seemingly spinning out of control. Employing arbitration or other methods of

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185. Greenberg, *supra* note 3, at 133. Some data indicates that the trend toward facility expansion and construction is not endemic, but the raw numbers show that many major programs are spending large amounts on such projects. Robert E. Litan et al., *The Empirical Effects of Collegiate Athletics: An Interim Report*, SEBAGO ASSOCIATES, Aug. 2003, at 6.

186. Steve Wieberg, *NCAA's Extra Funding Benefits Athletes*, USA TODAY, Dec. 23, 2003, at C01.

187. KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (June 2001); Litan, *supra* note 185, at 7.

188. *Id.* at 17.

189. *Id.* at 18.

190. *See Circuit City Stores, Inc.*, 532 U.S. at 105.

alternative dispute resolution can provide such assistance in certain disputes between coaches and schools.

The dispute between Nolan Richardson and the University of Arkansas resulted in substantial litigation costs for both the coach and the school. Similarly, the University of Notre Dame and University of Cincinnati were forced to expend significant funds in litigating disputes with assistant coaches. Each of these expenditures highlights the importance of taking steps to manage costs in the midst of a public relations crisis. Had these disputes been decided in arbitration rather than in the courts, both sides might have lessened their litigation expenses.

However, each of these incidents also carried other non-financial costs for both the institutions and the coaches. Richardson and Moore have not resurfaced in college coaching. The University of Arkansas faced less-than-flattering questions about its difficulty to graduate men's basketball players. The University of Notre Dame was forced to deal with both the embarrassment of the Joe Moore lawsuit and the testimony of new head coach Bob Davie's criticisms of beloved former head coach Lou Holtz. Finally, Cincinnati was forced to attempt to recover its image after allegations that its athletic department operated in a sexist manner.

Additionally, the case of Tyrone Willingham at the University of Notre Dame raised a cloud that included allegations that Notre Dame was racist in giving its first African-American head coach only 3 seasons to succeed. In the fallout from the termination, the comments of Monk Malloy and the actions of Chandra Johnson have revealed classic symptoms of the negative halo effect, creating an institutional divide that must be countered by management, in addition to management of the actual legal and public relations fallout. Although not all of these examples ended in court, they nonetheless illustrate the legal and public relations risks faced by coaches and institutions. Although not a guarantee to solve each of these problems, using arbitration may often alleviate some of the negative results faced by schools and coaches in disputes.

### C. Negotiating for the Arbitration Clause

Because of the potential benefits to both parties, it is important for coaches and institutions to agree to arbitration provisions during contract negotiations. In any contract negotiation not based on a standard form contract, the final product will be the result of a give and take exchange between the two sides. This should be no different in the situation of the college coaching contract. Particularly, given the extensive nature of the package in its description of

benefits, compensation, fringe benefits, and perquisites, ample room exists for exchange and compromise between the two parties. Generally, neither party may intend to agree to all of the proposals from the other side, but when considering the possibility of arbitration under the agreement, the benefits to both sides may be too great to simply be lost due to posturing in negotiations. Both the coach and the institution stand to benefit in terms of litigation expenses and speed of resolution when opting for arbitration. Also, when agreeing to arbitration, coaches retain the statutory protections provided to them under the law, allowing coaches like Richardson, Murphy, and Moore to continue raising Title VII and ADEA claims, while gaining input into the process in which those claims are adjudicated. Similarly, because of greater inside knowledge of the specific arbitration process, institutions can predict with greater certainty the outcome of an arbitration dispute, allowing for better overall management through more successful strategic planning and risk management. Each side stands to benefit from the protection provided by the confidentiality and protection of information possible in arbitration. A coach may be better protected against an unpopular stigma widely reported in the sports media that will hamper his or her possibility of career advancement, while an institution may be able to exercise greater control over information, preventing scandal that negatively impacts the long-term success of the program. Therefore, by including mandatory arbitration clauses in all coaching contracts, schools and parties can exercise additional control in an attempt to avoid excessively embarrassing situations such as those encountered by the institutions and coaches described, thus creating a more cooperative working relationship as the two parties strive to meet mutual goals and objectives.

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