

The Future of Social Media Policy in the NCAA

Vicki Blohm

TABLE OF CONTENTS

I. INTRODUCTION TO SOCIAL MEDIA AND NCAA REGULATIONS	277
II. CURRENT NCAA SOCIAL MEDIA RULES AND REGULATIONS . .	278
III. RECENT ENFORCEMENT OF NCAA SOCIAL MEDIA RULES	281
IV. SOCIAL MEDIA REGULATIONS AND THE FIRST AMENDMENT . . .	283
V. CURRENT MONITORING OF SOCIAL MEDIA USE	284
VI. PROPOSALS FOR CHANGE IN THE NCAA	288
VII. FUTURE DIRECTIONS FOR NCAA REGULATIONS	292
A. <i>Streamline Recruiting Contact Rules</i>	293
B. <i>Treat All Communications the Same</i>	293
C. <i>Permit Social Media Use by Students</i>	294
D. <i>Do Not Regulate Speech by Unaffiliated Persons</i>	294
E. <i>Formalize Rules Regarding Boosters</i>	295
VIII. CONCLUDING THOUGHTS	295

I. INTRODUCTION TO SOCIAL MEDIA AND NCAA REGULATIONS

The surge in social media use in recent years has forever changed the way in which we communicate with friends, colleagues, and other members of society.¹ As it becomes increasingly easy to instantaneously spread messages amongst large groups of people, any monitoring of that speech is made more difficult. The National Collegiate Athletic Association (NCAA) has long regulated the way in which its member institutions communicate with prospective athletes.² The changes that social media have brought to such communication, however, pose challenges to the NCAA's rules and

¹ Today, Facebook is second only to Google as the most frequently visited website globally. Twitter is the tenth most frequently visited website globally. *See Top Sites: The Top 500 Sites on the Web*, ALEXA, <http://www.alexa.com/topsites> (last visited Mar. 8, 2012).

² The NCAA has been regulating recruiting since the 1950s. *See Taylor Room, The History of College Football Recruiting Cheating—Part 4*, BARKING CARNIVAL (June 9, 2008), <http://barkingcarnival.fantake.com/2008/06/09/the-history-of-college-football-recruiting-cheating-part-4/>.

regulations. The result is confusion amongst member institutions regarding what is expected of them, seemingly harsh or arbitrary punishments imposed by the NCAA, and general outrage by commentators denouncing the status quo.

In addition to the confusion surrounding what is and is not appropriate use of social media under NCAA regulations is the growing concern that such regulations infringe on the First Amendment rights of those choosing to use social media for speech relating to athletics. This concern increases as more people who are not formally associated with the member institutions' athletic departments express opinions on athletic issues. Furthermore, questions of responsibility are raised when a member institution is punished for the actions of a person unaffiliated with its athletic department.

This article will first outline current NCAA rules and regulations regarding social media and contact with prospective student-athletes. It will then discuss examples of recent enforcement of the rules by the NCAA, before turning to a discussion of why the current rules are generally thought to be inadequate. Finally, this article will outline proposals for changes to the rules and suggest a direction for future NCAA social media policy.

II. CURRENT NCAA SOCIAL MEDIA RULES AND REGULATIONS

NCAA rules on the use of social media are only directed at recruiting.³ Thus, no restrictions on social media are currently imposed on contacts between an athlete and an agent, as long as no agreement, oral or written, is made.⁴ Recruiting rules are aimed at limiting intrusion into the lives of high school student-athletes by college coaches.⁵ For example, texting between coaches and prospects was prohibited after student-athletes complained of the cost imposed on them and their families.⁶

The main NCAA rule regarding messages sent to prospective student-athletes through online vehicles falls under the all-encompassing heading, "Electronic Transmission." That rule states: "Electronically transmitted correspondence that may be sent to a prospective student-athlete (or the prospective student-athlete's parents or legal guardians) is limited to elec-

³ See NCAA, 2011-2012 DIVISION I MANUAL.

⁴ Darren Heitner, *NCAA Clarifies Social Networking Rules for Agents*, SPORTS AGENT BLOG (May 27, 2011), <http://www.sportsagentblog.com/2009/05/27/ncaa-clarifies-social-networking-rules-for-agents/>.

⁵ *Recruiting*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting+Overview> (last visited Mar. 8, 2012).

⁶ *Id.*

tronic mail and facsimiles. All other forms of electronically transmitted correspondence (e.g., Instant Messenger, text messaging) are prohibited.⁷ Exceptions allowing all forms of electronically transmitted correspondence are provided following the signing of a National Letter of Intent,⁸ after May 1 of the prospective student-athlete's senior year in high school, provided the institution has received a financial deposit.⁹ Exceptions are also provided for communications that relate solely to an institutional camp or logistical issue.¹⁰

In 2009 the NCAA clarified that "e-mail is not limited to a traditional e-mail service," making it permissible for a member of an institution's athletic staff to send a private message to a prospective student-athlete through Facebook or other social networking websites.¹¹ However, posting on a prospective student-athlete's "wall" is not permitted, and the institution may not publically comment on the prospective athlete's potential contributions to the team or his or her likelihood of enrolling in the institution.¹² The NCAA allows a prospective student-athlete to be a "friend" of an athletic department staff member, but only after the date on which electronic correspondence becomes permissible.¹³ Tweeting is allowed as long as coaches do not directly contact recruits and do not discuss specific recruits, as doing so would otherwise be unacceptable under NCAA rules.¹⁴

Different, more stringent rules currently apply to Division III schools. Unlike in Divisions I and II, the use of social networking sites by athletic staff of Division III schools to contact prospective student-athletes is strictly prohibited.¹⁵ In January 2012, Division III loosened communication rules regarding text messaging, deeming that form of communication now "the

⁷ NCAA, *supra* note 3, § 13.4.1.2

⁸ *Id.* § 13.4.1.2.1

⁹ *Id.*

¹⁰ *Id.* § 13.4.1.2.2

¹¹ *Recruiting—Electronic Transmissions—Social Networking Web Sites (I)*, NCAA EDUC. COLUMN, Oct. 9, 2009 (on file with the author).

¹² *Id.*

¹³ *Id.*

¹⁴ *Social media and recruiting*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/Social+Media+and+Recruiting>(last visited Mar. 8, 2012).

¹⁵ *Hot Topic—Reminder About Using Social Networking Sites for Recruiting Within Division III (III)*, NCAA EDUC. COLUMN, Mar. 4, 2009 (on file with author).

norm.”¹⁶ In this same legislative session, however, a proposal to deregulate social media was withdrawn after receiving little support.¹⁷ Thus, a coach may not be “friends” with a prospective student-athlete on social media sites unless it can be shown that there is no athletic nexus for the friendship whatsoever.¹⁸ A limited exception to this strict social media policy allows Division III schools to publish general athletics information on social networking websites.¹⁹ The information must be general and not aimed at recruiting activities.²⁰ The information on the website may be posted by a coach, but the coach must not communicate with a prospective athlete through the website.²¹ Rather, the coach may make phone calls or use e-mail to correspond, provided it is within the permissible contact periods.²² Finally, Division III regulations provide for the possibility of a current student-athlete becoming “friends” with a prospective student-athlete, provided that a member of the athletic department has not directed interactions within that “friendship.”²³

The NCAA generally states that “technology can be used so long as it complies with the spirit and, where updated, the letter of already existing guidelines.”²⁴ With respect to Division III schools, however, the NCAA takes the position that, rather than anticipate new forms of communication, it will assume that use of all new technologies is prohibited until new legislation is enacted.²⁵ Moreover, recent enforcement actions raise doubts as to whether the NCAA will continue to comply with its stated position of generally allowing for the increased use and popularity of social media as a means of communication. While purporting to be receptive to such changes, the reality is that NCAA rules are unable to adequately address the

¹⁶ Gary Brown, *Text Messaging Adopted in Division III*, NCAA.ORG (Jan. 14, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/January/Text+messaging+adopted+in+Division+III>.

¹⁷ *Id.*

¹⁸ *See id.*

¹⁹ *Using Social Networking Sites within Division III (III)*, NCAA EDUC. COLUMN, Nov. 24, 2009 (on file with author).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Recruiting*, *supra* note 5.

²⁵ *Recruiting—Definitions and Applications—Electronic Transmissions (III)*, NCAA EDUCATIONAL COLUMN, Jan. 12, 2008 (on file with author).

current situations prospective student-athletes, coaches, and NCAA member institutions face.

III. RECENT ENFORCEMENT OF NCAA SOCIAL MEDIA RULES

Recently, the NCAA has stepped in to try to regulate the use of social media more actively. The University of North Carolina was recently sanctioned by the NCAA for a variety of infractions, including failure to “adequately and consistently monitor social networking activity that visibly illustrated potential amateurism violations.”²⁶ The NCAA defines a “failure-to-monitor” violation as less serious than a “lack-of-institutional-control violation,”²⁷ thereby resulting in less severe punishment for a “secondary” violation.²⁸ However, as discussed above, the NCAA doesn’t have any guidelines relating to social media outside the context of recruiting and says nothing about how a school should keep track of student-athlete use of social networking websites. The NCAA thus imposed sanctions for violating a non-existent rule.²⁹

North Carolina State University was warned of a recruitment rule violation when a freshman created a Facebook group called “John Wall PLEASE come to NC STATE!!!!”³⁰ The NCAA defines recruitment as “any solicitation of prospective student-athletes or their parents by an institutional staff member or by a representative of the institution’s athletic interests for the purpose of securing a prospective student-athlete’s enrollment and ultimate participation in the institution’s intercollegiate athletics program.”³¹ While it seems a stretch to consider a freshman student a “representative of the institution’s athletic interests,” the NCAA was willing to extend the definition due to the public nature of the plea. If such a broad interpretation is maintained, the effect on compliance could be far reaching.

²⁶ Tom Buchheim, *The NCAA Needs Social Media Guidelines*, FOURTH AND 140 (Sept. 22, 2011), <http://fourthand140.com/2011/09/22/the-ncaa-needs-social-media-guidelines/>.

²⁷ *Charging: Frequently Asked Questions*, NCAA.ORG (May 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Charging>.

²⁸ *Penalties: Frequently Asked Questions*, NCAA.ORG (May 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Penalties>.

²⁹ Buchheim, *supra* note 26.

³⁰ Mary Pilon, *Watch That Tweet! N.C.A.A., Colleges Wrestle with Social Media Recruiting Rules*, N.Y. TIMES COLLEGE SPORTS BLOG (Dec. 12, 2011, 7:00 AM), <http://thequad.blogs.nytimes.com/2011/12/12/watch-that-tweet-n-c-a-a-colleges-wrestle-with-social-media-recruiting-rules/>.

³¹ *Recruiting*, *supra* note 5.

The NCAA suspended Lehigh's Ryan Spadola for "retweeting" an allegedly inappropriate racial slur.³² The NCAA chose to make an example of the student-athlete, despite his apology³³ and the fact that it has no formal policy on student-athlete's use of social media.³⁴ This incident leaves unclear what the consequences would be had the comment not been "racially insensitive" in nature. It raises the question of whether, had this not been an "unsportsmanlike" comment, but rather a thoughtless post like those made by countless college students every day, the NCAA would have taken similar action.

As a result of the emphasis placed on inappropriate comments made on social networking websites, colleges and universities have begun to shy away from recruiting high school students who have displayed poor judgment with respect to their online activities.³⁵ Yuri Wright, one of the best high school cornerbacks in the country, was recently expelled from his high school after sexual and racially offensive comments were made on his private Twitter account.³⁶ Despite being "private," this account had at least 1500 followers, all of whom could see the offending messages.³⁷ As a result of the postings and expulsion, the University of Michigan stopped its recruiting efforts, and there was a question as to whether Rutgers would choose to host him on campus as originally scheduled.³⁸ Wright ultimately did make a final recruiting visit to Rutgers, but signed his letter of intent with the University of Colorado at Boulder.³⁹ While this episode did not eliminate Wright's chances of being recruited, the hesitation displayed by NCAA institutions indicates how important maintaining a good reputation in all aspects of a player's behavior is for a school, its compliance obligations, and its

³² Bradley Shear, *Student-Athlete Suspended From NCAA FCS Playoffs For a Retweet*, SHEAR ON SOCIAL MEDIA LAW (Dec. 13, 2011), <http://www.shearsocialmedia.com/2011/12/student-athlete-suspended-from-ncaa-fcs.html>.

³³ See Michael LoRe, *NCAA suspends Lehigh University wide receiver Ryan Spadola one game*, LEHIGH VALLEY LIVE.COM (Dec. 8, 2011), http://www.lehighvalleylive.com/lehigh/index.ssf/2011/12/ncaa_suspends_lehigh_universit.html.

³⁴ Tom Buchheim, *NCAA Fails to Lead (Again) on Social Media Policy*, FOURTH AND 140 (Dec. 27, 2011), <http://fourthand140.com/2011/12/27/ncaa-fails-to-lead-again-on-social-media-policy/>.

³⁵ Dallas Jackson, *Offensive Tweets Lead to Expulsion of Star*, RIVALSHIGH (Jan. 20, 2012), <http://highschool.rivals.com/content.asp?CID=1321024>

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Lindsay H. Jones, *Prep Football Star Yuri Wright Bringing Baggage to CU Buffs*, DENVER POST (Feb. 1, 2012), http://www.denverpost.com/colleges/ci_19865056.

public relations. Given the uncertainty of social media policies, and the public nature of conduct on social media platforms, more schools are now unwilling to take on the risk of a recruit with a known history of online indiscretions.

IV. SOCIAL MEDIA REGULATIONS AND THE FIRST AMENDMENT

The recent enforcement examples discussed above demonstrate that NCAA rules on social media do not adequately addressing the issues that arise for student-athletes, coaches, and member institutions today. The NCAA must act quickly to pass more comprehensive regulations to avoid the dangerous precedent of punishing member institutions and athletes for rules that have not been formally approved and implemented. In so doing, however, the NCAA must tread carefully, as regulations restricting the use of social media risk infringing on the rights of free speech and expression protected under the First Amendment.

The Supreme Court held in *Brentwood II* that an amateur athletic association's recruiting rules did not violate the First Amendment.⁴⁰ In *Brentwood II*, a high school football coach sent letters to eighth graders, inviting them to attend spring practice sessions.⁴¹ The high school athletic league to which the school belonged found this act to be a violation of its recruiting rules, which prohibited the use of "undue influence" on middle school students, and sanctioned the school accordingly.⁴² The Court found that the school had voluntarily chosen to join the athletic league, thereby accepting the obligation to "prevent the exploitation of children, to ensure that high school athletics remain secondary to academics, and to promote fair competition among its members."⁴³ Finding a distinction between rules that prohibit speech to the public at large and those prohibiting "direct, personalized communication in a coercive setting," the Court found that these recruiting regulations struck "nowhere near the heart of" the First Amendment's protections.⁴⁴

While announced in the context of high school sports, the *Brentwood II* case suggests that restrictions on speech made by athletic staff directly to prospective college student-athletes do not violate the First Amendment.

⁴⁰ *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad. (Brentwood II)*, 551 U.S. 291, 299 (2007).

⁴¹ *Id.* at 294.

⁴² *Id.* at 294–95.

⁴³ *Id.* at 296.

⁴⁴ *Id.*

Just as the high school had chosen to join the athletic league, the college or university has “chosen” to be part of the NCAA (despite the fact that it would be nearly impossible to participate in intercollegiate athletics without making the “choice” to join).⁴⁵ However, the opinion leaves open the possibility of finding a violation when the restrictions are less narrowly tailored. In *Brentwood II*, the Court addressed a coach directly contacting prospective players. By distinguishing this from “appeals to the public at large,”⁴⁶ the Court suggests the First Amendment would protect broad prohibitions on speech directed at a larger community. Furthermore, the focus on the “voluntary” nature of joining an athletic association⁴⁷ suggests that restrictions placed on those who are not voluntary members would also constitute a violation of the First Amendment.

V. CURRENT MONITORING OF SOCIAL MEDIA USE

Social media is changing so quickly that regulations are barely able to keep up. In 2006, Loyola University Chicago chose to completely ban student-athlete use of Facebook and MySpace.⁴⁸ John Planek, the Director of Athletics, announced that this “virgin” technology simply poses too many potential hazards to student-athletes.⁴⁹ Just six years later, however, these social websites are considered anything but “virgin” and their use has proven undeterred by the potential dangers they pose to member safety, privacy, and reputation. Commentators today argue that imposing such a complete ban on student-athletes is a violation of their First Amendment

⁴⁵ The NCAA is not the only collegiate athletic association. For example, the United States Collegiate Athletic Association (USCAA) aims to provide a level playing field for traditional and non-traditional institutions of higher education with enrollment between 500 and 2500 students. See USCAA, *MARKETING PACKET*, http://www.theuscaa.com/USCAA_Marketing_Packet_-_2011_Updated.pdf (last visited Mar. 5, 2012). Similarly, the National Association of Intercollegiate Athletics (NAIA) organizes athletic programs of smaller colleges and universities across the United States, as well as a few outside of the US. See *About the NAIA*, NAIA.ORG, http://www.naia.org/ViewArticle.dbml?DB_OEM_ID=27900&ATCLID=205323019 (last visited Mar. 5, 2012).

⁴⁶ *Brentwood II*, 551 U.S. at 296.

⁴⁷ *Id.* at 295.

⁴⁸ Matt Maher, *You've Got Messages: Modern Technology Recruiting through Text-Messaging and the Intrusiveness of Facebook*, 8 *TEX. REV. ENT. & SPORTS L.* 125, 139 (2007).

⁴⁹ *Id.*

rights.⁵⁰ Outrage resulted when rumors spread that Urban Meyer, the new coach of the Ohio State Buckeyes football team, would impose a complete ban on his players' use of Twitter.⁵¹ However, the rumor was later found to be untrue, with players "tweeting" that the reports were "hearsay."⁵²

While the ban by Meyer was only rumored, individual coaches have taken steps to regulate the use of social media by their athletes. For example, Mike Anderson, former University of Missouri men's basketball coach, effectively banned the use of Twitter while the team is in season.⁵³ Doing so, he argues, not only keeps the athletes' focus on the game, but also avoids any bad press for the team and athletic department.⁵⁴ Additionally, Villanova Men's Basketball,⁵⁵ South Carolina Football,⁵⁶ and Iowa Football,⁵⁷ are just three more examples of teams who have chosen to ban social media use while in season.⁵⁸ Many schools' athletic conduct policies now make clear that participating in athletics is a "privilege," not a "right," and that student-athletes may be disciplined for behavioral choices made in their "pri-

⁵⁰ See, e.g., Bradley Shear, *The NCAA, Social Media Monitoring, Censorship, the First Amendment, the Supreme Court, and Video Games*, SHEAR ON SOCIAL MEDIA LAW (June 28, 2011), <http://www.shearsocialmedia.com/2011/06/ncaa-social-media-monitoring-censorship.html>.

⁵¹ Michael Schottey, *Urban Meyer Shows Lack of Leadership by Banning Ohio State Players from Twitter*, BLEACHER REPORT (Jan. 3, 2012), <http://bleacherreport.com/articles/1008495-urban-meyer-shows-lack-of-leadership-by-banning-ohio-state-players-from-twitter>.

⁵² *New Head Coach Meyer's Twitter Ban for Buckeyes Untrue*, FOX NEWS.COM (Jan. 3, 2012), <http://www.foxnews.com/sports/2012/01/03/new-head-coach-meyer-bans-buckeyes-from-using-twitter/>.

⁵³ Alex Ruppenthal, *College Coaches Finding Ways to Monitor Athletes' Social Networking Activity*, COLUMBIA MISSOURIAN (May 13, 2010), <http://www.columbiamissourian.com/stories/2010/05/13/college-coaches-finding-ways-monitor-athletes-social-networking-activity/>.

⁵⁴ *Id.*

⁵⁵ Mike, *Villanova Basketball Players Apparently Banned from Twitter*, VU HOOPS (Sept. 26, 2010), <http://vuhoops.com/2010/09/26/twitter/>.

⁵⁶ *Steve Spurrier Bans His team from Using Twitter*, AOL SPORTING NEWS (Aug. 4, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-08-04/steve-spurrier-bans-south-carolina-gamecocks-from-using-twitter>.

⁵⁷ *Ferentz Keeps Social Media on Lockdown*, KCRG-TV9 (Aug. 9, 2011), <http://www.kcrg.com/sports/local/Ferentz-Keeps-Social-Media-on-Lockdown-127343833.html>.

⁵⁸ See Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html>.

vate” lives.⁵⁹ These disciplinary policies can extend explicitly to use of the Internet and social networking websites.⁶⁰

Given the voluntary language contained within these conduct policies, a student-athlete will be hard-pressed to argue that the rules violate his or her First Amendment rights.⁶¹ The expectations are clearly outlined upon entering the athletic program, no outright ban is imposed on the use of social media, and the athlete, in choosing to use social networking websites, thus voluntarily agrees to abide by the conduct code.

Enforcing and monitoring these strict player conduct rules, however, remains difficult. Compliance offices, already understaffed and overwhelmed, are simply incapable of supervising what each and every student-athlete posts or tweets online. Some coaches are choosing to leave the policing efforts to their team captains.⁶² This hands-off approach has worked well for most schools, but may not be sufficient in the eyes of the NCAA should it seek to sanction a school for “failure to monitor.” In response, several companies have seized the business opportunity that active regulation of social media activity provides. These companies send direct solicitations to school compliance officers, offering monitoring of every student-

⁵⁹ ICE MILLER, LLP, “Welcome Back—Please Behave!” *Regulating the Off-Field Behavior of Student-Athletes*, ICE MILLER.COM, http://www.icemiller.com/enewsletter/LICA_Article_Student_Athlete_Off_Field.htm (last visited Mar. 5, 2012).

⁶⁰ See, e.g., THE MISSOURI STATE UNIVERSITY STUDENT-ATHLETE CODE OF CONDUCT, *available at* http://www.missouristate.edu/assets/policy/Op6.06_Student-Athlete_Policy.pdf; Ohio Athletics Student-Athlete Code of Conduct, *available at* <http://www.ohiobobcats.com/compliance/compl-student-ath-code-conduct.html>.

⁶¹ While students “do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Indep. Cmty. School Dist.*, 393 U.S. 503, 506 (1969), schools are permitted to implement reasonable policies for social media use and may ask students to agree to those policies upon entering. See, Bradley Shear, *NCAA Student-Athlete Social Media Bans May Be Unconstitutional*, SHEAR ON SOCIAL MEDIA LAW, (Aug. 11, 2011), <http://www.shearsocialmedia.com/2011/08/ncaa-student-athlete-social-media-bans.html>. When such a policy is signed voluntarily, it is likely that the student has willingly waived his or her right to claim infringement of First Amendment rights, just as schools that choose to join an athletic league voluntarily agree to its recruiting rules, even if speech is curtailed. See *Tenn. Secondary Sch. Athletic Ass’n v. Brentwood Acad. (Brentwood II)*, 551 U.S. 291, 299 (2007).

⁶² See Ruppenthal, *supra* note 54 (University of Missouri track coach Rick McGuire relies on his captains to talk to a teammate when an inappropriate internet post is made).

athlete for up to four cents per athlete, per day.⁶³ Even such small fees, however, can quickly add up for athletic programs.

For example, UDiligence advertises that it searches student social network profiles for profanity, racial slurs, sexual comments, or mention of drugs or alcohol.⁶⁴ It can also search for “keywords” to detect impermissible contact between student-athletes and agents, runners, or boosters.⁶⁵ A second company, Varsity Monitor, markets its service as a protection against actions that could negatively affect an athlete’s “Personal Brand” or endanger his or her future career.⁶⁶ The company Jump Forward released its Social Media Monitoring Solution at the 2012 NCAA Convention.⁶⁷ This platform claims to bring together all parts of the athletic department, including compliance, equipment, financial aid, and admissions, making it easier to monitor all athletic activity, not just social media use, through one streamlined account.⁶⁸ All three companies advertise the number of high profile institutions that have already chosen to subscribe to their services.⁶⁹

These companies argue they are not trying to play “big brother,” but rather are helping students maintain their reputations over the long term.⁷⁰ Nevertheless, such monitoring opens the schools up to free speech and privacy concerns, as well as Title IX liability, if all parties are not treated equally.⁷¹ Furthermore, critics worry that treating discrete groups of college

⁶³ Catherine Ho, *Companies Tracking College Athletes’ Tweets, Facebook Posts Go After Local Universities*, WASH. POST (Oct. 16, 2011), http://www.washingtonpost.com/business/capitalbusiness/companies-tracking-college-athletes-tweets-facebook-posts-go-after-local-universities/2011/10/10/gIQAyHZ9oL_story.html.

⁶⁴ *What We Find*, UDILIGENCE.COM, <http://www.udiligence.com/what-we-find.aspx> (last visited Mar. 8, 2012).

⁶⁵ *Id.*

⁶⁶ See VARSITYMONITOR.COM, <http://varsitymonitor.com/> (last visited Mar. 8, 2012); see also Patrick Thedinga, *Varsitymonitor.com—The Student Athletes Worst Enemy*, FLOTRACK (Jan. 20, 2012, 1:23 AM), <http://www.flotrack.org/blog/40903-varsitymonitorcom-the-student-athletes-worst-enemy>.

⁶⁷ *JumpForward Releases its Social Media Monitoring Solution at the 2012 NCAA Convention*, PRWEB.COM (Jan. 9, 2012), <http://www.prweb.com/releases/2012/1/prweb9087563.htm>.

⁶⁸ See JUMPFORWARD.COM, <http://jumpforward.com/> (last visited Mar. 8, 2012).

⁶⁹ See VARSITYMONITOR.COM, <http://varsitymonitor.com/> (last visited Mar. 8, 2012); JUMPFORWARD.COM, <http://jumpforward.com/> (last visited Mar. 8, 2012); UDILIGENCE.COM, <http://www.udiligence.com/> (last visited Mar. 8, 2012).

⁷⁰ See Ho, *supra* note 63.

⁷¹ *Id.*

students differently in ways that affect their privacy may set bad precedent for what is considered acceptable monitoring and regulation in the future.⁷²

Regulation of non student-athletes poses an entirely different set of problems. It is impossible to argue that these students have consented to increased regulations by choosing to attend their particular school. This is particularly true of public universities, which, as government entities, must safeguard their students' constitutional rights. Thus, regulating speech in the way that recent sanctions suggest the NCAA expects its member institutions to do may be impossible under First Amendment protections. Even if such regulations were permissible under the First Amendment, however, it is implausible to suggest that a school's compliance department would be capable of detecting all posts made by students that might concern athletics.

VI. PROPOSALS FOR CHANGE IN THE NCAA

A few formal proposals for change to current contact rules have been submitted to the NCAA. The first Division I proposal was submitted on June 30, 2011 and recommends streamlining the allowed communications with prospective student-athletes after a given date by eliminating the exceptions carved out for men's and women's basketball and football and eliminating the distinctions between before- and after-visit contacts.⁷³ The proposal states that current regulations regarding text messages and cell phone use are out-dated and impose huge monitoring burdens on coaches and compliance officers.⁷⁴ The NCAA Men's Basketball Issues Committee supported this proposal, Women's Basketball Issues and Football Issues committees took no position, and the Recruiting and Athletics Personnel Issues Cabinet opposed its adoption.⁷⁵ The proposal was under consideration, but tabled until the April 2012 meeting.⁷⁶

⁷² Bob Scalise, Nichols Family Director of Athletics, Harvard Univ., Remarks to Professor Carfagna's Sports and the Law: Representing the Professional Athlete class at Harvard Law School (Jan. 5, 2012).

⁷³ *Recruiting—Telephone Calls and Electronic Correspondence—No Limits on or After First Permissible Date*, NCAA LEGISLATIVE SERVICES DATABASE 2011-30 (proposed June 30, 2011).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

A second Division I proposal was recommended for adoption by the Recruiting and Athletes Personnel Issues Cabinet on September 14, 2011.⁷⁷ If adopted, the rule would create an exception to the prohibition on e-mail contact before a certain date for automated e-mails generated by, for example, accepting a Facebook friend request.⁷⁸ Coaches have argued that they need such an exception because a coach's failure to respond to a friend request might strain the potential relationship between a recruit and the coach. Additionally, there is no permissible method in which the coach may contact the prospect to explain the lack of response.⁷⁹

In Division II, sixteen legislative proposals were adopted in January 2012, three of which will serve to liberalize recruiting regulations.⁸⁰ Provisions 2012-11, 12, and 13 provide for a common start date – June 15 prior to the student's junior year – for all in-person, telephonic, and electronic forms of contact.⁸¹ There will be no limit on the number of contacts, except in cases where contact is prohibited by a Division II recruiting calendar.⁸² Supporters of the change praise the new rules for the increased opportunity for coaches and prospective student-athletes to communicate and for the reduced burden of oversight in compliance offices.⁸³

While these proposals reflect a step towards reducing the burdens of the current rules on communication, they by no means solve the problem posed by social media. In a post on the NCAA Bylaw Blog, John Infante states,

To fix the rules, we must first acknowledge a couple of things. We must acknowledge that trying to differentiate between different forms of text communication is no longer possible. We must acknowledge that these are the tools prospects want coaches to use to get in touch with them. And we must acknowledge that these tools put prospects in control of who con-

⁷⁷ *Recruiting—Recruiting Materials—Electronic Transmissions—Exception—Social Media Platforms—Automated Notifications*, NCAA LEGISLATIVE SERVICES DATABASE 2011-38 (proposed July 8, 2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *DII approves 16 legislative proposals*, NCAA.COM (Jan. 17, 2012), <http://www.ncaa.com/news/ncaa/article/2012-01-17/dii-approves-16-legislative-proposals>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

tacts them through confirming friends, blocking users, and other privacy controls.⁸⁴

Infante argues that the NCAA must do away with the fiction that a Facebook message or Twitter direct message is equivalent to an e-mail. New technologies are mixing the various forms of communication. For example, Google Voice mixes phone calls and text messages with e-mail.⁸⁵ In this post, Infante suggests that the only viable option for regulating recruiting contact is controlling the time that the contact occurs.⁸⁶ He suggests allowing unrestricted communication after a given date, but admits that the idea has drawbacks, because it favors those families who are better prepared to deal with college coaches and earlier scholarship offers and commitments.⁸⁷

Others suggest that the NCAA look to the social media policies currently in place in other institutions to guide development of its own.⁸⁸ Tom Buchheim, a sports blogger who focuses on social media issues, is disappointed that the NCAA is choosing not to develop a firm policy on networking websites and is instead leaving that responsibility to its member institutions.⁸⁹ He suggests using the comprehensive policy in place in the NHL, or in many corporations, as a starting point.⁹⁰ The NHL imposes a “blackout period” on the use of social media, beginning two hours prior to face-off and ending when players have completed their post-game media obligations.⁹¹ The policy makes clear that players and personnel will be held responsible for their social communications, and that disciplinary actions may be taken for any statements that adversely affect the League, the club, or another member of a club.⁹² This policy of focusing on the timing

⁸⁴ John Infante, *Facebook Provides New Challenge to Recruiting Rules*, NCAA.ORG (Nov. 29, 2010), <http://www.ncaa.org/blog/2010/11/facebook-recruiting-rules/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Buchheim, *supra* note 34.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *NHL Institutes New Social Media Policy*, NHL.COM (Sept. 15, 2011), <http://www.nhl.com/ice/news.htm?id=588534>.

⁹² *Id.*

of social media use by players and personnel is substantially similar to those in place in both the NFL and NBA.⁹³

The NCAA believes that it must regulate social media in order to maintain a level playing field for recruiting consistent with current rules.⁹⁴ However, Ronnie Ramos, the managing director of communications at the NCAA, pushes back against those commentators who believe it must develop a comprehensive policy. He says that, as a membership organization rather than a league, the NCAA cannot unilaterally impose restrictions on social media.⁹⁵ Rather, the member institutions must develop the rules, and the NCAA may enforce them.⁹⁶ Ramos emphasizes that, given the public nature of social media comments, it is hard to do anything that will not be detected, so student-athletes have largely followed the rules.⁹⁷ The group that causes greater concern is boosters, because boosters are not directly affected if they break the rules.⁹⁸

But even the NCAA has recently come to recognize that its policies regarding electronic correspondence need to change.⁹⁹ The three Divisions are independently reaching similar conclusions on easing up on rules regarding electronic communications.¹⁰⁰ These changes largely center around the regulation of text messages, with proposals to treat them as equivalent to e-mail.¹⁰¹ While Division I and Division II member institutions are also considering making social-networking contacts equivalent to e-mail, Division III schools refuse to consider such an inclusion, based largely on privacy considerations for student-athletes.¹⁰²

⁹³ Maria Burns Ortiz, *Guide to Leagues' Social Media Policies*, ESPN.COM (Sept. 27, 2011), http://espn.go.com/espn/page2/story/_/id/7026246/examining-sports-leagues-social-media-policies-offenders.

⁹⁴ Meaghan Edelstein, *How the NCAA Stays on Top of the Social Media Game*, Interview with Ronnie Ramos, NCAA Managing Director of Communications, MASHABLE SOC. MEDIA (Jan. 9, 2011), <http://mashable.com/2011/01/09/ncaa-social-media-rules/>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Gary Brown, *NCAA to Evaluate Text Regulations: Rules Regarding Texting Recruits Back on Table to Discuss*, NCAA.COM (Sept. 22, 2011), <http://www.ncaa.com/news/ncaa/article/2011-09-22/ncaa-evaluate-text-regulations>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

As these proposals indicate, commentators cannot agree on where reform is most needed. The NCAA continues to focus on traditional methods of contact and permissible contact periods and believes that it cannot create a comprehensive policy regarding the use of social networking websites. John Infante argues for more explicit sanctioning of social media during those contact periods.¹⁰³ Others look at the use of social media by student-athletes after matriculation.¹⁰⁴ No one, however, addresses regulation of students not affiliated with the athletic program. This omission likely reflects the belief that such regulation is simply implausible. In fact, prior to the sanctions imposed on UNC and those threatened against NC State, such wide-reaching regulation by the NCAA likely hadn't even been considered possible.

VII. FUTURE DIRECTIONS FOR NCAA REGULATIONS

NCAA rules continue to increase in complexity. Some athletic compliance offices no longer feel capable or competent to appropriately monitor and enforce all the rules and regulations expected of them.¹⁰⁵ As a result, schools are experimenting with restructured compliance departments.¹⁰⁶ Ohio State is considering moving its compliance office to a central group that also oversees research and medical compliance, pulling compliance out of the athletic department entirely.¹⁰⁷ Oregon is adding a new position to its compliance office that requires candidates to possess four years of law enforcement or investigative experience.¹⁰⁸ West Virginia has hired an employee with experience at the NCAA, law firms and the US government to work for the football team and serve as the liaison between the team and the compliance and admissions offices.¹⁰⁹ While these changes have the potential to enhance compliance, by formalizing compliance they might also deter self-reporting of potential violations or disrupt the relationships that exist

¹⁰³ See Infante, *supra* note 84.

¹⁰⁴ See *supra*, notes 88-93.

¹⁰⁵ Jake Trotter, *The NCAA and Social Media*, ESPN RECRUITING NATION (Jan. 30, 2012, 11:10 AM), http://espn.go.com/college-sports/recruiting/football/story/_/id/7510010/social-media-makes-mark-recruiting.

¹⁰⁶ John Infante, *Ohio State, Oregon, and West Virginia Plotting the Future of Compliance*, NCAA.ORG BYLAW BLOG (Jul. 10, 2011), <http://www.ncaa.org/blog/2011/07/ohio-state-oregon-and-west-virgina-plotting-the-future-of-compliance/>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

between coaches, players, and the compliance staff. Furthermore, these changes do not address the underlying problem of overly complicated and burdensome rules and regulations, but are merely attempts by struggling compliance offices to cope with those burdens. The NCAA must act to simplify its rules.

A. *Streamline Recruiting Contact Rules*

The NCAA should adopt proposal number 2011-30, aimed at streamlining recruiting contact rules.¹¹⁰ While intended to reduce the intrusive impositions of college coaches on the lives of high school athletes, the strict contact periods cause more stress than they alleviate. Rather than enabling prospective student-athlete to talk to college coaches during times the student finds convenient, he or she is forced to wait for designated weeks of the year, during which the coach is likely overwhelmed with contacts, and therefore may be unable to dedicate the time and energy necessary to adequately address each student's questions or concerns. To reduce the confusion and stress caused to both athletic staff and recruits, prospective student-athletes should be permitted to correspond with college coaches freely after a given date. Following Division II's lead,¹¹¹ the date chosen could reasonably be during the summer before the prospective student-athlete begins his or her junior year of high school.

B. *Treat All Communications the Same*

It is simply no longer feasible to treat different forms of typed communication differently. NCAA rules should permit all forms of contact following the established contact date. Teenagers no longer view phone calls, fax, or even e-mail to be their primary forms of communication. Traditionalists oppose such changes, arguing that texting is an "unprofessional" method of "wooing" a prospective student-athlete.¹¹² Nevertheless, rather than forcing prospects to use methods of communication with which they are less comfortable, coaches should be permitted to contact prospective student-athletes in the ways the student-athlete considers most convenient. Should a coach feel that electronic communication is inappropriate for recruiting purposes, he or she can choose to use other methods of contact.

¹¹⁰ See *Recruiting*, *supra* note 77.

¹¹¹ See *supra*, notes 80-82.

¹¹² Brown, *supra* note 99.

C. Permit Social Media Use by Students

Once enrolled in a member institution, the NCAA should allow individual institutions to govern the use of social media by its students. Should a coach choose to impose a ban on social media leading up to a big game, doing so should be in his or her discretion, not dictated by the wishes of the NCAA. The effect that an NCAA-wide restriction would have on student-athlete speech would be disproportionate to the benefits gained for its goals of good sportsmanship or fair play. This hands-off approach by the NCAA also better reflects the world outside of college sports. It is important for students to learn that their actions do have consequences. Once out of school, there will be no strict rules regulating what a former student-athlete can and cannot do or say. He or she must be given an opportunity to learn that nothing done on the internet is private, and actions have real repercussions in the media, from future employers, or with graduate school admissions officers.

D. Do Not Regulate Speech by Unaffiliated Persons

Similarly, the NCAA should not attempt to regulate speech by students unaffiliated with the athletic program. While the NCAA argues that it must monitor all communications in order to maintain a level playing field for recruiting,¹¹³ the damage done to the First Amendment rights of students far exceeds the incremental benefit obtained for recruiting. Such regulation could be challenged under the Supreme Court's holding in *Brentwood II*, as being insufficiently tailored to athletic recruiting activities, and as infringing on "appeals to the public at large."¹¹⁴

¹¹³ The "NCAA Position" is:

"The recruiting process must balance the interests of prospective student-athletes and the Association's member institutions. The NCAA recruiting bylaw is designed to promote equity among member schools in the recruitment of prospective student-athletes and to shield the recruited individuals from undue pressures that may interfere with their scholastic or athletics interests." <http://www.ncaa.org/wps/wcm/connect/public/Test/Issues/Recruiting/> (last visited March 26, 2012).

¹¹⁴ *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 296 (2007).

E. Formalize Rules Regarding Boosters

Boosters pose the most difficult problem, as they are more formally affiliated with the athletic program than the average student, but are not subject to direct discipline from the athletic department or sanctions from the NCAA.¹¹⁵ Boosters can, however, have an influence on a prospective student-athlete's choice of school, and thus should be subject to some limitations on the method and timing of their contact with students. The NCAA must articulate rules regarding when and how booster contact is appropriate, similar to the rules on permissible timing of contact suggested above for coaches and other athletics staff. Member institutions should be made explicitly responsible for educating boosters on these rules, what types of behavior are appropriate, and the potential consequences to the team or the athletic department should a booster fail to comply. If the NCAA feels that boosters from a particular school are not in compliance, the NCAA should issue a warning to the school, allowing it the opportunity to address the problem internally, before formal disciplinary action is taken by the NCAA. While such a policy may not deter all inappropriate influence by boosters and may not result in the articulation of bright-line rules, this policy would be far clearer to member institutions and boosters than the current situation. Implementing these basic guidelines may also help to expose where the true gaps in regulations lie, allowing for further development of rules and regulations in the future.

VIII. CONCLUDING THOUGHTS

The NCAA must address regulation of social media. It cannot allow the confusion that currently exists regarding what behavior will and will not be appropriate to continue. And it certainly cannot continue to sanction schools for violating rules it has not articulated.

Social networking websites are the preferred method of communication for today's high school athletes. To prevent undue intrusion into these high school student's lives, a stated goal of recruitment regulation by the NCAA,¹¹⁶ college coaches seeking to recruit these students must be permitted to use the form of communication that is most convenient for the prospects.

The NCAA must streamline and simplify its rules on contacting prospective student-athletes. All typed forms of communication must be

¹¹⁵ See Edelman, *supra* note 94.

¹¹⁶ *Recruiting*, *supra* note 5.

treated equivalently, and less emphasis should be placed on permissible contact periods. Such changes would reduce the burdens currently on compliance offices, allowing officers to spend their time addressing potentially more severe compliance violations.

The NCAA social media status quo is unsustainable. The NCAA and its member institutions must act to clarify and reform their social media policies. The sooner they do so, the better.