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Academic Misconduct, Athletics Academic Support Services, and the NCAA

Josephine (Jo) R. Potuto¹

I. INTRODUCTION²

ACADEMIC misconduct strikes at the heart of the mission of higher education. The reputations of those caught cheating can take a major hit—and rightly so.³ Being caught cheating can result in serious penalties for

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² I speak only for myself in this article. In particular, I do not speak for UNL, the Big 12 Conference, the COI, or the Division I Management Council. In discussing infractions cases, I provide only that information that is part of the public record or set forth in a published report. Infractions reports may be found on the NCAA website, <http://www.ncaa.org>. All citations to NCAA bylaws are to the 2005–06 Division I manual, effective August 1, 2005; the Bylaws are available at http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf.

³ There are reports claiming that a significant number of students cheat. Some reports even quote students as saying that cheating is an acceptable way to achieve academic success. *See, e.g.,* Patrick G. Love & Janice Simmons, *Factors Influencing Cheating and Plagiarism Among Graduate Students in a College of Education*, 32 C. STUDENT J. 539 (1998); *Crackdown on UNL Cheating is Welcome*, LINCOLN J. STAR, Sept. 11, 2005, at F4 (citing results of 2005 survey conducted by Center for Academic Integrity (Nashville) where twenty-five percent of students surveyed reported “serious” cheating in the year of survey and fifty percent reported cheating on writing assignments). Notwithstanding what may be a *sub silentio* student culture, the uniform assessment of faculty, university administrators, and the greater public is that cheating is a major academic transgression that speaks to the character of the cheater and undermines the

a student, including suspension or expulsion. It can result in serious penalties for a tutor or other staff member complicit in the misconduct, including being fired, and may forever blight an academic career.⁴ Given the pressures students feel to succeed and get good grades, it is likely that individual or sporadic instances of cheating will always occur. Moreover, there are bad actors in even the most well-administered system, including higher education, and bad actors may, for a time, escape detection or punishment. Even sporadic instances of cheating that involve participation by university faculty or staff are of a greater order of magnitude than instances of unassisted student cheating because they directly implicate the integrity and reputation of a university. Repeated instances of cheating, over time and especially by different actors, suggest a university systemic problem, as do repeated failures to find and appropriately punish academic misconduct.

In one sense, academic misconduct by a student-athlete is no different than that perpetrated by any other student.⁵ In that same sense, university systemic failures to detect and then deal with academic misconduct are not different in kind simply because student-athletes are involved. Likewise, staff or faculty complicity in student academic misconduct is exceptionally serious, regardless of whether it involves student-athletes. But, but, and more buts In a real and important sense academic misconduct by student-athletes *is* different. In the first place, academic misconduct receives heightened attention when the perpetrator is a student-athlete, particularly a high-profile student-athlete or one who competes in a revenue sport. A more fundamental difference is that faculty or staff complicity in student-athlete academic misconduct does not simply corrupt academic standards and values, but it does so in pursuit of an even greater corruption—valuing athletics competitive success over academic integrity and a fair and objective assessment of student academic performance.⁶ Finally, student-athlete

academic standards of the academy. Cheating not only has these effects—which are certainly bad enough—but it also trivializes the academic performance of other students in a class. Worse, where a grading curve is employed, cheating has the practical effect of lowering the grades of at least some of these students. I suspect that even students who claim that cheating is an appropriate way to achieve academic success would likely feel differently if asked to focus on the potential disadvantage to them produced by the cheating of others.

4 Faculty members have been fired when caught cheating. See, e.g., Jennifer Jacobson, *MIT Fires Biology Professor Who Admitted Faking Data*, CHRON. OF HIGHER EDUC., Nov. 11, 2005, at 13 (reporting that MIT fired a biology professor who admitted that he “fabricated and falsified data in a paper, several manuscripts, and grant applications”).

5 In fact, if a student-athlete acts alone, with no institutional involvement, neither he nor the institution has committed an NCAA violation unless the misconduct has some NCAA-related athletics consequence. See *infra* note 46. One such consequence would be that the misconduct resulted in a grade that kept the student-athlete eligible to compete. Another would be that the misconduct permitted her to retain her scholarship.

6 Sadly, academic misconduct cases involving members of the faculty, or coaches who have been authorized through faculty processes to teach courses for grades and academic credit, recur with depressing regularity. See *infra* notes 44, 61, 64–65, and 68–69 for a brief

academic misconduct raises a host of additional issues related to potential NCAA violations and carries a host of potential additional consequences to a student-athlete⁷ and to a university.⁸

The most basic tenet of any fair system is that decision-makers must provide even-handed treatment and act with neither prejudice nor prefer-

description of some of these cases.

7 Student-athlete academic misconduct is subject to sanction as a breach of honesty and sportsmanship principles or as ethical misconduct. NCAA Bylaw 10.01.1 provides that:

Individuals employed by (or associated with) a member institution to administer, conduct or coach intercollegiate athletics and all participating student-athletes shall act with honesty and sportsmanship at all times so that intercollegiate athletics as a whole, their institutions and they, as individuals, shall represent the honor and dignity of fair play and the generally recognized high standards associated with wholesome competitive sports.

NCAA Bylaw 10.01.1. NCAA Bylaw 10.1 provides in pertinent part that:

Unethical conduct by a prospective or enrolled student-athlete or a current or former institutional staff member (e.g., coach, professor, tutor, teaching assistant, student manager, student trainer) may include, but is not limited to, the following:

- (a) Refusal to furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so by the NCAA or the individual's institution;
- (b) Knowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete;
- (c) Knowing involvement in offering or providing a prospective or an enrolled student-athlete an improper inducement or extra benefit or improper financial aid;
- (d) Knowingly furnishing the NCAA or the individual's institution false or misleading information concerning the individual's involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation

NCAA Bylaw 10.1. Violation of either of these bylaws results in competition ineligibility. For a brief discussion of how student-athlete eligibility issues are handled, and of the student-athlete reinstatement process, see *infra* note 50 and accompanying text.

8 Reports of student-athlete academic misconduct feed into the general criticism of university treatment of student-athletes, including doubt that athletes "really" are students and concerns that they are exploited. See generally WILLIAM G. BOWEN ET. AL., RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003); WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLORING COLLEGE ATHLETICS (1995); JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE (2000); JAMES LAWRENCE SHULMAN ET. AL., THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1994).

ence.⁹ Certainly, university faculty and administrators would agree that detection, handling, and punishment of academic misconduct may not prefer a student-athlete miscreant or athletics staff member over non-student-athletes or non-athletics staff. Nonetheless, typical university processes may be insufficiently rigorous to satisfy NCAA regulatory requirements directed at assuring an even playing field across institutions or to satisfy both those enforcing NCAA rules and the general public that student-athletes are not getting preferential treatment.¹⁰

On most campuses, and certainly at major research universities, faculty prerogatives to structure and administer their classes are a central academic value and a core component of academic freedom.¹¹ The prime and certainly initial responsibility to deal with academic misconduct rests with the faculty member in whose class it occurs. She typically has wide discretion, including doing nothing, permitting the student to withdraw from class with no adverse grade consequence, lowering his grade, or failing him. Often, campus policy also affords her at least a degree of discretion in whether to forward the matter to an academic misconduct committee.

Faculty members are in the education business, not the investigation and punishment business. They typically focus on rehabilitation concerns in the particular case, not overarching policy, structural considerations, or cross-university interests. On every campus there is a cohort of faculty who, for matters of principle and occasionally for convenience, fail to report seri-

9 One of the most basic and fundamental NCAA principles is that, unless otherwise authorized through specific NCAA bylaws, student-athletes may not be provided special treatment by virtue of their status as student-athletes. See *infra* notes 26–27 and 54–60 and accompanying text for a discussion of the “extra benefit” rule. In addition, the NCAA Legislative Review Subcommittee (LRIS) has specifically directed that “in all cases in which a student-athlete knowingly engages in conduct that violates institutional policies, the institution is required in all cases to handle a student-athlete’s academic offense in accordance with its established academic policies applicable to all students, regardless whether the violation is reportable under Bylaw 10.1-(b) or whether the student-athlete was acting alone or in concert with others.” NCAA LRIS Agenda Supp. No. 8 (Feb. 22, 2001), *available at* http://www.ncaa.org/databases/reports/1/200102aacc/200102_aec_agenda_s08.pdf.

10 The COI provides “general guidance” to the enforcement staff. See NCAA Bylaw 32.2.2. Allegations of major NCAA violations are investigated by NCAA enforcement staff and heard by the COI. See *id.* at 19.01–19.7, 32.1–32.9.2.2. The NCAA Infractions Appeals Committee hears appeals from COI decisions. See *id.* at 32.10–32.11.5. For a schematic of the investigative, hearing, and appeals process, see NCAA DIVISION I MANUAL 459–60 figs. 32-1, 32-2 (2005–2006). For a general discussion of the investigative and hearing process, see Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667 (2003); Charles Alan Wright, *Responding to An NCAA Investigation, or, What to do When An Official Inquiry Comes*, 1 ENT. & SPORTS L.J. 19 (1984); Robin J.Green, Comment, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99 (1992).

11 See Am. Ass’n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretative Comments & Statement on the Assignment of Course Grades and Student Appeals*, in AAUP POLICY DOCUMENTS & REPORTS (9th ed. 2001).

ous academic misconduct. Their failure to report may contravene established campus policy and sometimes occurs even when there are repeated instances involving the same student. Another faculty cohort fails to report academic misconduct out of frustration with the process—frequently long and drawn out with fact-finders who can have extremely nuanced and exquisite approaches to evaluating the quality and sufficiency of evidence.

In sum, the typical university process permits both wide variance in grade consequence¹² and a fair degree of variance regarding which cases are processed by an academic misconduct committee.¹³ The end result is that a university system for dealing with student academic misconduct can appear to be inordinately protective of the interests of culpable individuals to the destruction of any orderly process of acquiring truth, punishing miscreants, and deterring future bad conduct.¹⁴ Add to this that public information about the process is most often wed to a high-profile student-athlete in the process, and the almost inevitable consequence is public outcry at what is perceived to be the pernicious influence of athletics on the integrity of university faculty and administrators and on the maintenance of even minimal academic standards.¹⁵ The oft-stated premise is that the proverbial tail is wagging the dog to the destruction, or at least corruption, of responsible academic behaviors and judgments.

12 Consider a class in which the final grade is computed from five written assignments, all weighted equally. Assume that a student turns in a plagiarized paper. One faculty member might assign it a grade of zero, calculate the total points for all five papers, and then divide by five. A second faculty member might exclude the paper from the overall grade, calculate the total points on four papers, and divide by four. A third faculty member might exclude the paper from the overall grade, require that the student submit an un plagiarized paper in its place, and grade that paper with the other four. A fourth faculty member might use one of these approaches and then lower the resulting overall grade by one letter grade, or lower the overall grade by two, or . . . you get the idea. Although I have not surveyed university policies, I would be surprised to find many—if any—that dictate a uniform grading policy to handle cheating, because there are too many variables that can dictate a grade decision and there is, and should be, great deference accorded the judgment of the faculty member whose class it is.

13 Even in those cases where many or most faculty members might believe that a particular faculty member was too lenient, either in grade consequences or in failing to report academic misconduct, or both, they still might defend the faculty member's freedom to make the decision. The challenge is to protect the critical base principle of academic freedom while assuring appropriate and consistent treatment of academic misconduct cases.

14 The perception—or reality—that the academy does not follow up strong words with strong action goes beyond how student academic misconduct is treated. *See, e.g.*, Thomas Bartlett & Scott Smallwood, *Just Deserts*, *CHRON. OF HIGHER EDUC.*, Apr. 1, 2005, at 26 (discussing investigations of professors accused of plagiarism); Thomas Bartlett & Scott Smallwood, *Professor Copycat*, *CHRON. OF HIGHER EDUC.*, Dec. 17, 2004, at 8 (discussing plagiarism among members of the academy).

15 A recent incident, although not one involving academic fraud, underscores this point. A student-affairs committee at the University of Southern California imposed a three-semester penalty on a football student-athlete. Apparently, news of the penalty became known and generated criticism. The committee then increased the penalty to three years. *See* Scott Wolf, *USC Notebook: Group Adds to Wright Penalty*, *L.A. DAILY NEWS*, Aug. 24, 2005, at S6.

The marriage of the typical university approach and perspective for handling academic misconduct with the NCAA regulatory approach and perspective is, to say the least, not a natural one. The nature, scope, and meaning of NCAA regulations and obligations are foreign to most faculty and academic administrators. Yet at least at the start, and often well into an academic inquiry involving student-athletes, these faculty and administrators are the ones making the decisions. Their typical approach is to treat academic matters involving student-athletes no differently from their treatment of these matters when non-student-athletes are involved. This is an approach that often leads directly past “go” and smack into the middle of an NCAA major infractions case.¹⁶

Institutional control is a bedrock NCAA principle.¹⁷ Among other things, institutional control requires the following: that universities comply with NCAA rules; that they monitor their programs to ensure rules compliance; that they are vigilant in detecting potential violations; that they investigate any potential violations promptly and thoroughly; that they self-impose punitive and corrective measures upon finding a violation; that they report information regarding potential violations to NCAA enforcement staff; and that they cooperate with NCAA staff in any infractions investigation.¹⁸ Institutional control also means that an institution is responsible for the rules compliance of its staff, student-athletes, and boosters.¹⁹

16 *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, NICHOLLS STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 232 (2005); NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF GEORGIA PUBLIC INFRACTIONS REPORT, No. 224 at 21 (2004) [hereinafter *GEORGIA INFRACTIONS REPORT*] (COI “quite troubled” that department chair “failed to provide careful and regular oversight” of basketball class taught by assistant coach with basketball players enrolled).

17 Section 2.8.1 of the NCAA Constitution reads as follows:

Each institution shall comply with all applicable rules and regulations of the Association in the conduct of its intercollegiate athletic programs. It shall monitor its programs to assure compliance and to identify and report to the Association instances in which compliance has not been achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate corrective actions. Members of an institution’s staff, student-athletes, and other individuals and groups representing the institution’s athletics interests shall comply with the applicable Association rules, and the member institution shall be responsible for such compliance.

NCAA CONST. § 2.8.1.

18 “The cooperative principle imposes an affirmative obligation on each member institution to assist the NCAA enforcement staff in developing full information to determine whether a possible violation of NCAA legislation has occurred and the details thereof.” NCAA Bylaw 32.1.4.

19 NCAA Bylaw 6.4.2 defines a booster as:

[I]ndividuals, a corporate entity (e.g., apparel or equipment manufacturer) or other organization when a member of the institution’s executive or athletics administration or an athletics department staff mem-

The first and overriding obligation of those associated with a university and athletics program is to protect the integrity of the program. The best way to do this is to predicate that program on an expectation that cheating will occur and to undertake any investigation of potential violations with an expectation that violations may be uncovered. Proceeding with such expectations by no means suggests that cheating actually is occurring or is likely to occur or that there is doubt regarding the integrity and professional behaviors of staff members or others.²⁰ Proceeding this way simply is eminently prudent from a rules-compliance standpoint. It not only is the most effective way to uncover what occurred, but it permits identification of the “soft” spots where monitoring is needed and where prophylactic measures should be undertaken.

Although eminently prudent, this approach is not easy. Often those investigated are long-time staff members or others with substantial association with an athletics department. They will resent a hands-off investigation that gives no credit to past good behavior. Those not targeted by an investigation may be uncomfortable being interviewed about friends and co-workers. They also may feel that such an investigation is disloyal and unfair to staff. Relationships may be irreparably breached by such an investigation, particularly if no wrong-doing is discovered. Hurt feelings may exist and persist no matter how carefully explanations are provided as to why the investigation must proceed in this way.

Although this approach is not easy, any other approach may provide a lesson better not learned. Certainly that was the conclusion reached by

ber has knowledge or should have knowledge that such an individual, corporate entity or other organization:

...

(b) Has made financial contributions to the athletics department or to an athletics booster organization of that institution;

(c) Has been requested by the athletics department staff to assist in the recruitment of prospective student-athletes or is assisting in the recruitment of prospective student-athletes;

(d) Has assisted or is assisting in providing benefits to enrolled student-athletes; or

(e) Is otherwise involved in promoting the institution’s athletics program.

NCAA Bylaw 6.4.2. The influence of boosters on athletics programs is by no means an uncommon phenomenon. *See* NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF ALABAMA PUBLIC INFRACTIONS REPORT, NO. 173 (2002); *see also* Mike Fish, *A Tiger of a Trustee*, ESPN.COM, Jan. 13, 2006, <http://sports.espn.go.com/ncf/news/story?id=2285976>.

²⁰ Indeed, if those beliefs or doubts exist, then the department by definition “should know” of potential academic misconduct, and its failure to investigate or to employ more rigorous oversight may constitute lack of institutional control.

USA Today in its post-mortem assessment of its failure to uncover evidence that long-time reporter Jack Kelley had fabricated stories. As explained by *USA Today*, the paper's investigation of Kelley honored the fact that he was a trusted employee and presumed his innocence. In retrospect, the paper concluded that this approach was a mistake and that the investigation "should have been grounded on an unrestricted search for any and all wrongdoing on Kelley's part, not on a presumption that he was innocent."²¹

Even with infinite funds and an unbounded willingness to maintain a strong and rigorous compliance and oversight program, it likely still is not possible to eliminate all possibility of a bad actor's ability to act badly, at least in the short run.²² The fact that no system operates perfectly is no excuse for failing to implement a carefully constructed one.²³ Conversely, an institution with an effective oversight system in place and functioning has gone a long way to demonstrate institutional control, despite any academic misconduct that occurs.

In the following analysis, I discuss athletics academic services, including NCAA rules that govern them, and offer guidelines that a university might implement to achieve appropriate oversight of, and adequate response to, a potential academic misconduct episode.²⁴ Because tutors and tutorial ser-

²¹ Craig Moon, *Publisher Outlines Policies on Inquiries*, USA TODAY, Apr. 22, 2004, at 10A.

²² The Committee on Infractions has said just that:

An institution cannot be expected to control the actions of every individual who is in some way connected with its athletics program. The deliberate or inadvertent violation of a rule by an individual who is not in charge of compliance with rules that are violated will not be considered to be due to a lack of institutional control:

[I]f adequate compliance measures exist;

[I]f they are appropriately conveyed to those who need to be aware of them;

[I]f they are monitored to ensure that such measures are being followed; and

[I]f, on learning that a violation has occurred, the institution takes swift action.

NCAA DIVISION I COMMITTEE ON INFRACTIONS, PRINCIPLES OF INSTITUTIONAL CONTROL I (1996), available at http://www1.ncaa.org/membership/governance/division_i/infractions_appeals/Principles_of_Institutional_Control.pdf.

²³ It has elsewhere been said, and aptly, that "the perfect is enemy to the good." VOLTAIRE, *CONTES* 119 (n.p., 1780).

²⁴ This article does not address how to conduct an investigation of suspected academic misconduct. For specific guidance, see Stephanie Hannah, *Internal Inquiries: Academic Fraud* (unpublished manuscript, on file with author) (presented at 2001 National Collegiate Athletic Association Regional Compliance Seminar).

vices often are the hot points for academic misconduct, I also provide a list of special considerations to govern their conduct.

II. ATHLETICS ACADEMIC SERVICES²⁵

NCAA Bylaw 16.02.3 specifies that a student-athlete may not receive “any special arrangement by an institutional employee” unless it is otherwise authorized by NCAA legislation or available generally to non-student-athletes.²⁶ Provision of academic services is an exception to the extra-benefit prohibition that specifically authorizes athletics departments to set up separate and special academic services for student-athletes and to employ academic counselors, tutors, and other support staff whose reporting lines are to the director of athletics.²⁷ Athletics academic services include advice

²⁵ Evidence that athletics academic services have “arrived” is that their practitioners now have a professional organization, the National Association of Academic Advisors for Athletics. See generally National Association of Academic Advisors for Athletics, <http://www.nfoura.org/index.php> (last visited Oct. 12, 2006).

²⁶ The full bylaw language reads as follows:

An extra benefit is any special arrangement by an institutional employee or a representative of the institution’s athletics interests [booster] to provide a student-athlete or the student-athlete’s relative or friend a benefit not expressly authorized by NCAA legislation. Receipt of a benefit by student-athletes or their relatives or friends is not a violation of NCAA legislation if it is demonstrated that the same benefit is generally available to the institution’s students or their relatives or friends or to a particular segment of the student body (e.g., foreign students, minority students) determined on a basis unrelated to athletics ability.

NCAA Bylaw 16.02.3 (alteration added); see also *id.* at 16.12.2.

²⁷ NCAA Bylaw 16.3.1.1 provides that:

Member institutions shall make available general academic counseling and tutoring services to all student-athletes. Such counseling and tutoring services may be provided by the department of athletics or through the institution’s nonathletics student support services. In addition, an institution may finance other academic support services that the institution, at its discretion, determines to be appropriate and necessary for the academic success of its student-athletes including, but not limited to, the following:

- (a) Tutoring expenses;

....

(d) On-campus student development and career counseling (including the provision of related materials of little or no commercial value to student-athletes) utilizing outside resources;

....

- (g) Use of computers and typewriters. Use of institutionally

regarding selection of major and courses, scheduling assistance, life skills instruction,²⁸ and career counseling.²⁹ Often, they also are the clearinghouse for psychological counseling. Of course, a major component of academic services is providing tutorial help.³⁰

Many universities have established academic support services within athletics.³¹ This is particularly true of Division IA universities,³² whose members have the most well-funded athletics departments and provide the largest number of athletics scholarships and other services to student-athletes. Many of the universities in the so-called Big Six Conferences³³

owned computers and typewriters on a check-out and retrieval basis; however, typing/word processing/editing services or costs may not be provided, even if typed reports and other papers are a requirement of a course in which a student-athlete is enrolled;

(h) Use of copy machines, fax machines and the Internet, including related long-distance charge, provided the use is for purposes related to the completion of required academic course work;

(i) Course supplies (e.g., calculators, art supplies, computer discs, subscriptions) provided such course supplies are required of all students in the course and specified in the institution's catalog or course syllabus;

(j) Cost of a field trip, provided the field trip is required of all students in the course and the fee for such trips is specified in the institution's catalog; and

(k) Nonelectronic day planners.

NCAA Bylaw 16.3.1.1.

28 Life skills are an increasingly important component of student-athlete academic services. The Big 12 Conference, for example, monitors provision of life skills training among member universities. Life skills cover a wide range of activities including diversity training, employment interviewing skills, learning good study habits, dressing for success, and learning to change a tire on a car.

29 See NCAA Bylaw 16.3.1.

30 *Id.*

31 The NCAA Division I certification process includes adhering to NCAA Bylaw 22.2.2.2, which provides, among other things, that information regarding academic support be clearly communicated to student-athletes and that the needs of student-athletes with learning disabilities must be accommodated. *Id.* at 22.2.2.2.

32 NCAA member institutions are divided into three divisions (and subdivisions within). The criteria for Division I are set forth in NCAA Bylaw 20.9; the additional criteria are set forth in NCAA Bylaw 20.9.6. Among other things, they include requirements that a Division IA institution sponsor at least sixteen varsity sports, one of which must be football and at least eight of which must be women's sports; that in a rolling two-year period, an institution provide at least 153 grants-in-aid in football; and that an institution offer annually either a minimum of 200 grants-in-aid or that it expend at least \$4 million in grants-in-aid. *Id.* at 20.9, 20.9.6.

33 These are the Big 12 Conference, Big 10 Conference, Big East Conference, Atlantic Coast Conference, Southeastern Conference, and Pacific 10 Conference. These conferences are comprised exclusively of Division IA institutions.

have special programs to provide academic support to student-athletes located and funded by athletics departments.

In large part, NCAA regulations specifically authorize provision of academic services within athletics departments out of a practical recognition that the matrix of NCAA academic requirements (and the heightened institutional responsibility that it imposes) may best be traversed by individuals with targeted training and experience. A short rendition of some of these requirements underscores the point. Student-athletes must be and remain enrolled in at least twelve hours each semester.³⁴ They must designate a degree program by the beginning of their third year.³⁵ From that point, they must make progress toward their degree, meaning that each year they must complete twenty-five percent of their degree-applicable academic work³⁶ with a minimum grade point requirement.³⁷ They cannot keep on this pace by loading up on summer hours.³⁸ There are also issues with regard to switching majors. Academic degree programs differ in their requirements—required courses, minimum grade in required courses, maximum number of electives, number of required credits, etc. In consequence, a student-athlete can meet progress toward a degree in one major but not meet progress toward a degree if she switches majors. Failure to comply with these and other academic eligibility requirements repeatedly lands universities in major infractions cases.³⁹

34 See NCAA Bylaw 14.1.8.2. The twelve-hour requirement means that a student-athlete who drops below twelve hours during a semester is ineligible to compete from that point forward and at least until the end of the semester. Most universities employ special monitoring systems through registration and records that both tag all student-athletes and flag any class withdrawals. For a case in which a student-athlete competed after dropping below twelve credit hours, see, for example, NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF UTAH PUBLIC INFRACTIONS REPORT, No. 209 (2003) (explaining that the violation also formed part of a finding of lack of institutional control).

35 See NCAA Bylaw 14.4.3.1.4.

36 See *id.* at 14.4.3.2. In other words, a student-athlete must complete twenty-five percent of her degree-applicable work prior to the beginning of her third year (fifty percent prior to fourth year; seventy-five percent prior to fifth year). At the end of the fifth year, then, the expectation is that she will have completed her academic program and will graduate. *Id.*

37 See *id.* at 14.4.3.3.

38 See *id.* at 14.4.3.1(a)–(b).

39 There is a long list of cases involving violations of academic eligibility requirements, including major infractions cases involving lack of institutional control where there were a host of violations (both “paper” and substantive). See, e.g., NCAA DIV. I COMM. ON INFRACTIONS, STONY BROOK UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 234 (2005) (reporting fifty-three student-athletes in fourteen sports in a two-year period involving violations of NCAA Bylaws 14.01.1, 14.1.4, 14.1.5, 14.5.6, 14.5.5.2.10–(d), 14.4.3.1.4, 14.4.3.1, 14.4.3.2, 14.4.3.4.4, 14.3.2.1, 14.4.3.2, and 14.4.3.3); NCAA DIV. I COMM. ON INFRACTIONS, RUTGERS UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 210 (2003) (reporting at least forty student-athletes in fifteen separate sports in a four-year period involving violations of NCAA Bylaws 14.3, 14.4.3, 14.4.3.1.3, 14.4.3.1.4, 14.4.3.2, 14.01.2, 14.01.2.1, 14.1.6.2, and 14.5.1).

There likely are additional reasons for NCAA authorization of academic support services within athletics departments. In part, the specific authorization may be seen as a check on recruitment of student-athletes focused only on athletics ability. In part, the specific authorization likely results from the high visibility of academic fraud involving student-athletes and the impact these scandals have on the involved student-athletes and their institutions as well as on the public perception of intercollegiate athletics. In part, the specific authorization may also reflect the perception that there may be a higher percentage of student-athletes, in comparison to students generally, who are considered at risk to fail college-level academic work. Few universities have resources to maintain services for all students, or even all students whose predictors show that they are academically at risk, at the level that at least some athletics departments can provide to student-athletes. Another consideration for locating academic services within athletics departments, therefore, is that it permits more student-athletes to be helped than likely would be the case if student-athletes resorted to general university academic support services.

Notwithstanding the reasons proffered for permitting athletics departments to provide academic services, their location there is not without controversy.⁴⁰ There is a strong equity argument that student-athletes should not be provided better academic assistance than similarly situated students even if the end result is to gravitate to the lowest common denominator and simply to deprive student-athletes of these services because the university has insufficient resources to equalize treatment at a higher level. There is also criticism that these programs perpetuate notions of student-athlete entitlement or fail to foster integration of student-athletes into general cam-

⁴⁰ See generally REPORT FROM THE PRESIDENTIAL TASK FORCE ON THE FUTURE OF DIV. I INTERCOLLEGIATE ATHLETICS, THE SECOND-CENTURY IMPERATIVES: PRESIDENTIAL LEADERSHIP—INSTITUTIONAL ACCOUNTABILITY 55 (2006), available at http://www2.ncaa.org/portal/legislation_and_governance/committees/future_task_force/final_report.pdf (recommending that athletics academic advisors report directly to the university office of academic affairs, not to the director of athletics); COAL. ON INTERCOLLEGIATE ATHLETICS, ACADEMIC INTEGRITY IN INTERCOLLEGIATE ATHLETICS: PRINCIPLES, RULES, AND BEST PRACTICES, GUIDELINES FOR THE OFFICE OF ACADEMIC ADVISING FOR ATHLETES (2005), available at <http://www.neuro.uoregon.edu/~tublitz/COIA/AID.pdf> [hereinafter COIA GUIDELINES]. COIA is an alliance of academic senates of approximately forty Division I universities; its guidelines are intended “not to prescribe what schools must do, but to suggest issues that schools need to consider and approaches that may with adaptation fit local needs . . .” *Id.* at 1. A number of universities have adopted resolutions endorsing the principle that academic services for student-athletes should be fully integrated within university programs. See, e.g., UNIV. OF MO. FACULTY COUNCIL ON UNIV. POLICY, RESOLUTION ON THE ROLE OF INTERCOLLEGIATE ATHLETICS IN AN ACADEMIC ENVIRONMENT (2003), available at <http://facultycouncil.missouri.edu/resolutions/athletics.html>; COAL. ON INTERCOLLEGIATE ATHLETICS, BIG 10 RESOLUTION ON INTERCOLLEGIATE ATHLETICS (2001), available at <http://www.neuro.uoregon.edu/~tublitz/COIA/BigTen.html>; PAC-10 CONFERENCE, PAC-10 SENATES JOINT RESOLUTION ON ATHLETICS (2001), <http://www.neuro.uoregon.edu/~tublitz/COIA/Pac10.html>.

pus life.⁴¹ Finally, there is the suspicion that athletics academic services do not discourage, and may actively facilitate, student-athlete cheating and institutional complicity in that cheating.⁴² This suspicion seemingly is reinforced by repeated instances of student-athlete academic misconduct involving tutors, tutorial programs, or situations in which “stand-ins” for tutors act in defiance of academic norms.⁴³ The fact of the matter, however, is that these episodes are by no means confined to institutions where academic services are provided within athletics departments.⁴⁴

While I acknowledge the merits of these latter arguments, I believe that the stronger case is made in defense of such programs—so long as the right people are in charge of them and appropriate controls and safeguards are in place. I say this not only because of the expertise needed to navigate NCAA rules, but because locating these services in athletics departments properly includes accountability for student-athlete academic progress within the responsibilities of athletics directors. In any event, NCAA requirements of institutional control and issues of student-athlete competition eligibility arise whether academic services are provided to student-athletes outside athletics departments or within.

41 COIA GUIDELINES, *supra* note 40; SPECIAL COMM. ON ATHLETICS REFORM, BOULDER FACULTY ASSEMBLY, A PROPOSAL FOR REFORM OF INTERCOLLEGIATE ATHLETICS AT THE UNIVERSITY OF COLORADO AT BOULDER (2004), *available at* <http://www.colorado.edu/FacultyGovernance/STCOM/ATHLCOMM/athletic-ref.html>; *see also* KNIGHT COMM. ON INTERCOLLEGIATE ATHLETICS, NEW BEGINNING FOR THE NEW CENTURY (1993); KNIGHT COMM. ON INTERCOLLEGIATE ATHLETICS, A SOLID START (1992); KNIGHT COMM. ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE (1991). Knight Commission reports are available at http://www.knightcommission.org/images/uploads/1991-93_KCIA_report.pdf. *See also* AM. ASS'N OF UNIV. PROFESSORS, THE FACULTY ROLE IN THE REFORM OF INTERCOLLEGIATE ATHLETICS (2002), *available at* <http://www.aaup2.org/statements/REPORTS/athleticreform.htm>.

42 COIA GUIDELINES, *supra* note 40, § 5.3.11. (“Historically, academic dishonesty associated with tutoring has been a problem with some athletics programs . . .”).

43 *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF MINNESOTA PUBLIC INFRACTIONS REPORT, No. 176 (2000) [hereinafter MINNESOTA INFRACTIONS REPORT].

44 *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, NOTRE DAME UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 163 (1999) [hereinafter NOTRE DAME INFRACTIONS REPORT] (tutors for student-athletes provided by department of academic services). These episodes are not confined to tutors, as there are several infractions cases that involve participation by professors in student-athlete academic misconduct, sometimes even initiating it. *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, HOWARD UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 175 (2001) [hereinafter HOWARD INFRACTIONS REPORT] (at least three separate professors gave academic credit to student-athletes who neither attended class nor did any course work); NCAA DIV. I COMM. ON INFRACTIONS, MARSHALL UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 191 (2001) [hereinafter MARSHALL INFRACTIONS REPORT] (professor provided advance copy of final examination to football student-athletes).

III. NCAA RULES, ACADEMIC MISCONDUCT, AND EXTRA BENEFITS

Obviously, universities and their athletics departments can only act through individuals. For purposes of NCAA responsibility, universities and athletics departments are responsible for the conduct of student-athletes, boosters, and staff members.⁴⁵ When a tutor provided by a university (full- or part-time, temporary or permanent, paid or unpaid) commits an NCAA violation, then, through that tutor, the institution also has committed a violation.⁴⁶

Academic misconduct brings competition ineligibility to a student-athlete, and, if the complicit tutor or counselor also is a student-athlete, then for her as well.⁴⁷ Even where there is minimal institutional culpability (uni-

45 Although not explicitly articulated, the theory of responsibility is akin to that of respondeat superior. For a discussion of the theory, see *Thatcher v. Brennan*, 657 F.Supp. 6, 8-11 (S.D. Miss. 1986) and *Malorney v. B&L Motor Freight, Inc.*, 496 N.E.2d 1086, 1088-90 (Ill. App. Ct. 1986). The university may also be responsible in its own right. See *infra* notes 51-52 and accompanying text.

46 If this principle were not already clear, the NCAA Legislative Review Subcommittee (LRIS) issued an official interpretation stating that, for purposes of academic misconduct under NCAA Bylaw 10.1-(b), an institutional staff member is "any individual who performs work for the institution or the athletics department, even if the individual is a student at the institution (e.g., student manager, student trainer) and/or does not receive compensation from the institution for performing such services (e.g., volunteer coaches, undergraduate assistant coaches and graduate assistant coaches)." LRIS, Item Ref. 7 No. 3, Type LA Col. (Mar. 26, 2001). In addition, the LRIS confirmed certain NCAA reporting obligations as follows:

a. The subcommittee confirmed that an institution is required to report a violation of Bylaw 10.1-(b) any time an institutional staff member (e.g., coach, professor, tutor, teaching assistant) is knowingly involved in arranging fraudulent academic credit or false transcripts for a prospective or enrolled student-athlete, regardless of whether the institutional member acted alone or in concert with the prospective or enrolled student-athlete.

b. The subcommittee confirmed that an institution is required to report a violation of Bylaw 10.1-(b) any time a student-athlete, acting alone or in concert with others, knowingly becomes involved in arranging fraudulent academic credit or false transcripts, regardless of whether such conduct results in an erroneous declaration of eligibility.

c. If a student-athlete commits an academic offense (e.g., cheating on a test, plagiarism on a term paper) with no involvement of an institutional staff member, the institution is not required to report a violation of Bylaw 10.1-(b), unless the academic offense results in an erroneous declaration of eligibility and the student-athlete subsequently competes for the institution.

Id.

47 A major component of institutional responsibility is to assure that a student-athlete does not compete unless he meets all applicable eligibility requirements and is certified as

versity neither knew nor had reason to know of the misconduct), academic misconduct by or on behalf of student-athletes will adversely affect the athletics department. Team wins achieved with the participation of an ineligible student-athlete may be vacated, trophies returned, and championships negated.⁴⁸ There may be limits on the number of scholarships available to be awarded,⁴⁹ with a potential long-term impact on competitive success. There also may be consequences independent of NCAA sanctions. The most obvious one is that a student-athlete's ineligibility for competition⁵⁰ may have an impact on team competitive success and morale. There also may be media and other distractions attendant on whether, and the extent to which, NCAA processes will result in sanctions. The more integral the student-athlete is to team performance, the more the impact on competition success; the more high-profile the student-athlete, the more media attention and other distractions for the team. Another critical effect is that the perception of the integrity of an athletics department may be harmed, resulting in long-term damage to the department and its relationship to the greater university community.

Of course, the effect on a department and institution is much more direct and damaging when the misconduct is neither occasional nor sporadic; when there is involvement by staff members, particularly when the directly

eligible. NCAA Bylaw 14.01.1. Eligibility requirements include, but are not limited to, NCAA, conference, and institutional rules regarding good academic standing. *See id.* at 14.01.2.1.

⁴⁸ *See id.* at 19.5.2.2(e).

⁴⁹ *See id.* at 19.5.2.2(c).

⁵⁰ When a university concludes that a student-athlete has committed a violation, that student-athlete is automatically ineligible. He remains ineligible until (and unless) the university reports the violation to the NCAA student-athlete reinstatement staff and his eligibility is reinstated. Student-athlete reinstatement staff do not conduct fact-finding; instead, they accept the conclusions provided by a university. Most often, reinstatement is dependent on fulfillment of conditions. Detailed information regarding the student-athlete reinstatement process, as well as student-athlete reinstatement decisions (with names of institution and student-athlete withheld), may be found on the NCAA website, <http://www.ncaa.org>. *See generally* Milton R. Schroeder, Address Before the American Law Institute's 74th Annual Meeting (May 20, 1997), in AM. LAW INST., 74TH ANNUAL MEETING, PROCEEDINGS 1997 AT 163 (1998). The student-athlete reinstatement process handles reinstatement requests involving violations of NCAA Bylaw 10 (ethical conduct), NCAA Bylaw 12 (amateurism), NCAA Bylaw 13 (recruiting), NCAA Bylaw 14 (eligibility), NCAA Bylaw 15 (financial aid), NCAA Bylaw 16 (extra benefits), and NCAA Bylaw 18.4.1.5 (use of banned drugs). *See infra* note 59 and accompanying text (describing the student-athlete reinstatement process for extra-benefit violations).

Student-athlete reinstatement staff report to the student-athlete reinstatement committee, composed of individuals representing member institutions and conferences, which sets guidelines for staff processing of reinstatement requests and hears appeals from staff decisions. The committee reports to the NCAA Division I Academic/Eligibility/Compliance Cabinet which, in turn, reports to the Division I Management Council. *See* NCAA, DIVISION I MANUAL 31 fig. 4-1 (2005–2006). The COI hearing process is independent of student-athlete reinstatement.

culpable actors include faculty or high-level administrators; or when faculty or high-level administrators, while not directly involved, appear to have been purposely looking the other way⁵¹ Likely for institutional purposes, and certainly for NCAA purposes, university responsibility reaches beyond active connivance or willful ignorance.⁵² The university is also responsible if the violations would have been prevented, or uncovered more quickly, had administrators not been asleep at the switch or had there been systems in place reasonably calculated to prevent academic misconduct and reasonably calculated to discover it promptly.⁵³

The culpability of a tutor, or other athletics academic staff member, does not begin and end with academic misconduct; there is also the matter of the NCAA extra-benefit rule.⁵⁴ Extra-benefit transgressions are by no means confined to tutors,⁵⁵ athletics academic staff, or athletics staff outside academic services. There are repeated instances where university administrators, including presidents and deans,⁵⁶ and members of the

51 When misconduct occurs through the actions of high-level administrators, through official policy, either overt or detectable from a clear pattern of conduct, or from conduct that the university knew or should have known was taking place, the university is culpable for its own conduct that constitutes specific violations and not merely on a theory of respondeat superior. For a discussion of such responsibility in the context of Section 1983 (civil rights) litigation, see, for example, *Canton v. Harrison*, 489 U.S. 378 (1989) (official policy includes failure to train); *St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 480–83 (1986) (single decision of high official can be official policy); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691–94 (1978) (city responsible for official policy, not on theory of respondeat superior). In addition to such culpability for particular violations, a university may also be responsible for failing to exercise institutional control. See NCAA Bylaw 19.5.2.1(f)(3).

52 In criminal trials, willful ignorance (sometimes referred to as “conscious avoidance”) is sufficient to show intent. See, e.g., *United States v. Cincotta*, 689 F.2d 238, 244 (1st Cir. 1982).

53 See *supra* note 51.

54 See NCAA Bylaw 16.01.1, which describes particularly in the context of extra benefits the general rule regarding the effect of a violation on a student-athlete’s eligibility:

A student-athlete shall not receive any extra benefit. Receipt by a student-athlete of an award, benefit or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible for athletics competition in the sport for which the improper award, benefit or expense was received. If the student-athlete receives an extra benefit not authorized by NCAA legislation, the individual is ineligible in all sports.

NCAA Bylaw 16.01.1

55 An area where tutors are particularly prone to provide extra benefits is in the free provision of typing services. See *infra* note 102 and accompanying text. But tutors may also violate extra benefit bylaws in the same ways as anyone else. See, e.g., NOTRE DAME INFRACTIONS REPORT, *supra* note 44 (involving extra benefit issue).

56 See, e.g., NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF SOUTH CAROLINA PUBLIC INFRACTIONS REPORT, No. 244 (2005) (reporting that dean “unilaterally” reinstated student-athlete after second suspension for academic reasons in contravention of explicit published policy); NCAA DIV. I COMM. ON INFRACTIONS, GARDNER-WEBB UNIVERSITY PUBLIC INFRACTIONS

faculty,⁵⁷ failed to follow established procedures regarding, among other things, course drop/add, change of grade, and change of program *because* the student was a student-athlete and/or *because* his athletics eligibility or financial aid was at risk.⁵⁸ While academic misconduct is always a serious matter, extra benefits can run the gamut from, for example, purchase of a sandwich⁵⁹ to provision of hundreds of thousands of dollars.⁶⁰ The impact on a student-athlete, her team, her tutor, the athletics department, and the greater university (and the relationship between these latter two) also can run the gamut from a case carrying little detrimental impact to a full-blown major case leading to substantial NCAA sanctions, loss of jobs, and a media feeding-frenzy.⁶¹ And certainly institutional responsibility works no differently in the extra-benefit context: the university is on the hook for what the

REPORT, No. 217 (2004) [hereinafter GARDNER-WEBB INFRACTIONS REPORT] (noting that president responsible for grade change said, “[i]n retrospect, . . . I do recognize that such intervention, without broader consultation, can create suspicion, controversy and perhaps have NCAA rules consequences”); NCAA DIV. I COMM. ON INFRACTIONS, ST. BONAVENTURE UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 216 (2004) (explaining that at instigation of president, student-athlete was withdrawn from course without his consent seven weeks after campus withdrawal deadline).

57 See, e.g., *infra* note 65 and accompanying text.

58 See *id.*

59 Giving a sandwich to a student-athlete would be a secondary, not major, violation. See NCAA Bylaw 19.2.2 (defining a violation as secondary if it is “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant recruiting inducement or extra benefit. Multiple secondary violations by a member institution may collectively be considered as a major violation.”). Secondary violations most typically are processed by NCAA enforcement staff, not the COI; secondary violation reports are posted on the NCAA website (with university and student-athlete names withheld). Certain “de minimus” secondary violations are handled by an expedited process managed by athletics conferences. See *id.* at 32.4.1. A schedule of these violations may be found at <http://www.ncaa.org>.

As with any other violation, a student-athlete who receives an extra benefit is ineligible until reinstated through the student-athlete reinstatement process. See *supra* note 50 and accompanying text. To be reinstated, a student-athlete must disgorge herself of the benefit by donating to a charity or other non-profit of her choice. She may also be required to miss competition. The subcommittee on student-athlete reinstatement has provided a schedule of penalties for stand-alone extra-benefit violations (no institutional knowledge or culpability beyond negligence; no ethical conduct issues; no gambling; no agents) as follows: \$100 to \$299, ten percent of competitions; \$300 to \$500, twenty percent; \$501+, at least thirty percent. NCAA Bylaw 12.1.1.1.6 violations (preferential treatment) are treated more leniently. For a full discussion of the penalty schedule and treatment of secondary violations, see Minutes of Subcommittees on Student-Athlete Reinstatement (Dec. 4, 2005).

60 See e.g., NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF MICHIGAN PUBLIC INFRACTIONS REPORT, No. 208 (2003) (booster provided more than \$600,000 to a least four student-athletes).

61 The most recent example of such a case occurred at Baylor University. See e.g., NCAA DIV. I COMM. ON INFRACTIONS, BAYLOR UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 236 (2005).

tutor does and faces a potential finding of lack of institutional control if the tutor's misconduct could have been prevented or detected more promptly had there been appropriate oversight and monitoring in place.

IV. ACADEMIC MISCONDUCT AND TUTORS⁶²

A. *Academic Misconduct Described*

Academic misconduct can take various forms. It can be changing a grade in a transcript or other grade report.⁶³ It can be obtaining academic credit when no work was done in the class⁶⁴ or obtaining an unearned grade change.⁶⁵ It can be recalculating a grade point average contrary to university policy.⁶⁶ It can be taking an examination for someone else.⁶⁷ It can be obtaining examination questions illicitly in advance of an examination⁶⁸ and/or being

62 Tutoring of student-athletes is provided by academic counselors—full-time staff members of athletics academic services who have various academic responsibilities (eligibility checks, assistance in course selection, etc.), including tutoring—as well as by individuals who work part-time or by the hour exclusively as tutors. Most of the discussion in this article applies to both academic counselors and tutors, but with more force to tutors. Unless otherwise stated, I refer to “tutors” as inclusive of both.

63 NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF MEMPHIS PUBLIC INFRACTIONS REPORT, No. 245 (2005) (student-athlete provided false transcript).

64 GEORGIA INFRACTIONS REPORT, *supra* note 16 (sham course taught by coach with no attendance or announced grade policy and no way to assess student performance); NCAA DIV. I COMM. ON INFRACTIONS, CALIFORNIA STATE UNIVERSITY NORTHRIDGE PUBLIC INFRACTIONS REPORT, No. 220 (2004) [hereinafter CALIFORNIA STATE INFRACTIONS REPORT] (student-athlete received credit for two classes although he neither attended class nor did any coursework); HOWARD INFRACTIONS REPORT, *supra* note 44 (two student-athletes received grades of “A” for course although they neither attended class nor did any coursework and, in fact, did not know they had been enrolled; student-athlete received grades of “A” in two summer school courses although he neither attended classes nor did any coursework and, in fact, was home for the summer).

65 CALIFORNIA STATE INFRACTIONS REPORT, *supra* note 64 (professor changed student-athlete grade from “D” to “I”—with the understanding that the grade would revert to “D”—so that student-athlete could retain scholarship); NCAA DIV. I COMM. ON INFRACTIONS, NORTHERN ARIZONA UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 182 (2001) [hereinafter NORTHERN ARIZONA INFRACTIONS REPORT] (professor changed grade one year after the final grade was first submitted for the course).

66 GARDNER-WEBB INFRACTIONS REPORT, *supra* note 56 (student-athlete regained eligibility after president ordered his grade recalculated in contravention of university policy—vice-president of academic affairs refused to violate policy, saying “I wouldn’t do this in a thousand years.”).

67 NCAA DIV. I COMM. ON INFRACTIONS, SOUTHERN METHODIST UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 178 (2000) (assistant football coach assisted prospect to find individual to take ACT for him; assistant football coach agreed to pay test-taker if prospect qualified).

68 CALIFORNIA STATE INFRACTIONS REPORT, *supra* note 64 (instructor provided advance copy of final examination); MARSHALL INFRACTIONS REPORT, *supra* note 44 (professor provided

provided the answers.⁶⁹ It can be manipulating the timing of grade reports to delay or otherwise affect when poor or failing grades will be included in grade point averages and other computations.⁷⁰ It can be submitting the work of another for academic credit.⁷¹ It can be plagiarism.

B. Plagiarism⁷²

Plagiarism should be distinguished from inappropriate copying. To plagiarize, an individual must appropriate someone else's work without his consent and without attribution with the purpose to claim that work as her own.⁷³ While the paradigmatic example is the word-for-word lifting of language without using quotation marks (or by failing to block-indent), plagiarism also includes:

advance copy of final examination to football student-athletes).

69 CALIFORNIA STATE INFRACTIONS REPORT, *supra* note 64 (instructor provided answer sheet completed by another student); NCAA DIV. I COMM. ON INFRACTIONS, NEW MEXICO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, NO. 130 (1996) [hereinafter NEW MEXICO STATE INFRACTIONS REPORT] (coaches provided answers to course assignments and final examinations to six prospective student-athletes).

70 NORTHERN ARIZONA INFRACTIONS REPORT, *supra* note 65. In the Northern Arizona case there was a series of grade changes, each instigated by the student-athlete. He was rendered ineligible on September 17 after an incomplete grade from the summer was changed to a letter grade. The grade change was not recorded until September 20, after he competed on September 18. Then on September 21 he persuaded a professor to raise a grade by two letter grades in a course he had taken the prior semester. The result was that he again was certified as eligible to compete. On September 29 the professor reduced the September 21 grade change by one letter grade; the change was not posted until October 5 and the athletics department learned of it on October 12. The student-athlete competed on September 25, October 2, and October 9. On October 29 the student-athlete persuaded a professor to record four weeks early a grade for the current semester. The university again certified the student-athlete as eligible but did not seek his reinstatement through the NCAA student-athlete reinstatement process. The student-athlete competed while ineligible on October 30, November 6, November 20, and November 27. The COI "noted a trend in which the recording of upward changes in rendering the student-athlete eligible took much less time than did downward adjustments . . ."). *See id.*

71 NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF KENTUCKY PUBLIC INFRACTIONS REPORT, NO. 192 (2002) (recruiting coordinator wrote paper or parts of papers for three student-athletes); NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF SOUTHERN CALIFORNIA PUBLIC INFRACTIONS REPORT, NO. 186 (2001) [hereinafter SOUTHERN CALIFORNIA INFRACTIONS REPORT] (tutors in student-athlete academic services researched, wrote, and typed papers that were submitted by student-athletes for course grades); NOTRE DAME INFRACTIONS REPORT, *supra* note 44 (tutor wrote papers for football student-athlete she met while tutoring other student-athletes in exchange for \$20 to \$30).

72 The organization and sources provided here regarding plagiarism derive in part from a July 5, 1994, unpublished monograph by Seton Hall Law College Associate Dean Charles Sullivan. The problem of plagiarism has given rise to software, such as Safe Assignment, that faculty may use to check papers they suspect are plagiarized.

73 *See* BLACK'S LAW DICTIONARY 1187 (8th ed. 2004).

[R]epeating another's sentences as one's own, adopting a particularly apt phrase as one's own, paraphrasing someone else's argument as one's own, or even presenting someone else's line of thinking in the development of a thesis [as] one's own.⁷⁴

The operative question is whether the writer has taken from another an original idea, line of argument, organizational plan, or scheme of presentation. If yes, then the writer must cite his source.

Tutors are most susceptible to academic misconduct by doing a student's work for her. While it is not technically plagiarism when that happens, obviously it still is academic misconduct.⁷⁵ Consent by the person whose work it is does not condone, erase, or excuse the misconduct. It simply means that two are at fault and that two are in trouble. A tutor also can participate in academic misconduct in ways that are less obviously culpable, particularly when working on a written assignment.

C. Inappropriate Copying

Inappropriate copying is not plagiarism if there is proper attribution. But certainly it will still result in a failing grade if there is too little evidence of the student's own work.

V. GUIDELINES FOR ADMINISTERING A TUTORIAL PROGRAM FOR STUDENT-ATHLETES

Institutions and athletics departments are set up in different ways, responding to differences in mission, culture, history, and the demographics and dynamics of the student population and faculty. Particularly in a diverse environment, the thing most true of one-size-fits-all models is that they do not fit all. I therefore make no claim that the guidelines set forth here are the only way to achieve effective oversight, or that they are the best way to achieve effective oversight at all universities and in all contexts. Instead, the guidelines are intended to pinpoint situations where some type of process is needed and to suggest what type of process would be adequate.

Certainly the overriding value to be preserved in any model of student-athlete academic services is, and must be, academic integrity—in tutoring, more generally in athletics academic services, and more generally still in the institutional academic treatment of student-athletes. A critical objec-

74 K.R. ST. ONGE, *THE MELANCHOLY ANATOMY OF PLAGIARISM* 53 (1988) (quoting the Modern Language Association Handbook for Writers of Research Papers). See generally Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property and the Law*, 80 CAL L. REV. 513 (1992).

75 MINNESOTA INFRACTIONS REPORT, *supra* note 43 (secretary in athletics academic counseling office produced 400 pieces of coursework of varying lengths for at least eighteen student-athletes).

tive is to put a program in place designed not only to comply with NCAA regulations but to minimize opportunities for NCAA violations. Other clear and critical objectives are to implement a program that is both workable at a particular institution and has the confidence of the faculty at that institution.

Student-athletes, coaches, and others engaged in the intercollegiate athletics enterprise are no less worthy citizens than the rest of the university population or, for that matter, the population at large. For better or worse, however, their conduct typically receives heightened attention. Combine this with the disposition of media to go after and “scoop” negative off-field stories⁷⁶ and the result is a perception that college athletics is rife with scandal and with student-athletes admitted to college lacking the ability to do college-level academic work.⁷⁷

Competition is the *sine qua non* of athletics. There are many positive values that come from striving to do one’s best and from measuring one’s accomplishments against those of others. But student-athletes and coaches often are under heavy pressure to win. Occasionally cheating occurs on the court (or field or track or in the pool).⁷⁸ More typically, when the pressure to win devolves into cheating, it happens with regard to NCAA requirements designed to assure student-athlete well-being or an even playing field—among others, recruiting,⁷⁹ extra benefit,⁸⁰ financial aid,⁸¹ and those academic requirements that are preconditions to competition eligibility.

The pressures from intercollegiate varsity athletics competition may be different in degree, if not in kind, from those felt by other students to succeed in the classroom as entrée to a career. Individuals who work with student-athletes certainly understand that the student-athletes they tutor must meet minimum academic requirements. They are not immune to feeling pressure to assure that student-athletes stay academically eligible to compete.

A. *Criteria for Tutors*

1. *Who.*—Tutors need to be conversant in the subjects they will tutor. But this is simply a necessary condition, not a sufficient one. Tutors also must

⁷⁶ The proof is in the pudding: Words do not permit speaking sensibly of a media “scoop” when the news story deals with the excellence of student-athletes or about academic achievements.

⁷⁷ *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992); see *Jackson v. Drake Univ.*, 778 F.Supp. 1490 (S.D. Iowa 1991).

⁷⁸ NCAA DIV. I COMM. ON INFRACTIONS, JACKSON STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, No. 172 (2000) (head track coach had ineligible student-athlete compete under the name of an eligible student-athlete in one meet and under the name of a different eligible student-athlete in another meet).

⁷⁹ See NCAA Bylaw 13.

⁸⁰ See *id.* at 16.

⁸¹ See *id.* at 15.

have the character and maturity to maintain a professional tutoring relationship and to learn and follow NCAA rules.

Tutors must keep a professional distance from those tutored. Boundaries are both harder to identify and harder to respect when there is a personal relationship. This means no socializing; no giving or receiving gifts, even *de minimus* ones; no meeting outside the area designated for tutorial services. Personal relationships between a tutor and a student-athlete he is not tutoring are also problematic. This relationship almost inevitably will involve socializing with other student-athletes and doing so outside those functions sponsored and attended by athletics staff.

In general, undergraduate students should not be employed as tutors.⁸² When compared to graduate students or professionals, they are less mature, more likely to identify with those tutored because they are closer in age, and likely more sympathetic to the pressures of the classroom and to get good grades. Undergraduates also have less invested in a career and the responsibilities that go with it than do graduate students. They also may have less to lose as there probably will be greater willingness to forgive their errant conduct than that of a graduate student or professional. All considerations attendant to hiring another undergraduate apply hundredfold when the undergraduate is a student-athlete. While there may be times when a jurisdiction by necessity will dictate use of an undergraduate to be employed as a tutor (because no one else is available and sufficiently conversant with the subject matter), there should be no necessity sufficient to permit another student-athlete to act as a tutor.

2. *Where.*—Tutors need to identify and have loyalty to institutional norms. But loyalty runs to people at least as much as it runs to principle. Among the first things that happens in brainwashing is that prisoners are separated from each other and interrogated individually. The lone holdout in a jury typically acquiesces in the group decision.⁸³ All things being equal, a tutor by himself is more susceptible to pressure to help a student-athlete cheat than is a tutor housed with other tutors. The lesson: tutorial activities should take place in an area set apart and designated for them.

Keeping tutorial services together has several other salutary effects. First, it emphasizes the work nature of the tutorial relationship and lessens the possibility that something other than a professional relationship will develop. Second, it likely minimizes play time. The third and fourth consequences of housing tutors together are that there is enhanced opportunity for the academic staff to monitor tutors and enhanced opportu-

82 SOUTHERN CALIFORNIA INFRACTIONS REPORT, *supra* note 71 (noting the inadvisability of using undergraduates as tutors and listed their use as one of several factors leading to a finding of failure to monitor student-athlete academic services).

83 Hans Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719 (1971).

nity for tutors and student-athletes to monitor each other. Recall the axiom that a watched pot never boils. Where boiling is the goal, looking away is the thing to do. In dealing with tutorial services, however, cheating (boiling) emphatically is not the goal. Here then watching is imperative, as the watched tutor does not cheat.

An important corollary to housing tutors together is that tutors should not office near or with a particular team. Doing so not only isolates them from other tutors—inadvisable in itself—but it also tends to increase identification with coaches and teams, with the byproduct being an increased possibility of cheating.⁸⁴ Moreover, when tutors and teams are housed or have an office near each other, there will be inevitable coach-tutor contacts. The result is that monitoring will be more difficult as an observed coach-tutor contact may have an innocent explanation.

3. *How Assigned.*—The director of tutorial services should be wary about handling the assignments of tutors to student-athletes.⁸⁵ Student-athletes may complain that their assigned tutor is inferior to a tutor assigned to others. A more significant issue is that the director subjects herself to the suspicion that a tutorial assignment was done with bad motive. Should such an assigned tutor later be found to have cheated, the director of tutorial services will be in an uncomfortable, if not untenable, position.⁸⁶

On a related note, in most athletic departments, academic counselors are assigned to work with specific teams. One advantage is that scheduling times to meet with student-athletes is easier to manage as the counselor is not dealing with a host of team practice/competition schedules around which she must work. In addition, many squads are small in size; having more than one counselor per team may be quite cumbersome and involve complicated assignments. Much more important, the new NCAA academic reforms focus on team academic success.⁸⁷ Scholarship reductions, exclusion from post-season competition, and other penalties will be assessed on teams with deficient academic performances. Having one academic

84 MINNESOTA INFRACTIONS REPORT, *supra* note 43 (academic counselor wrote head men's basketball coach, "[the director of athletic academics] is technically my boss, but the reality is that I report to you and am fiercely loyal to you").

85 There may be instances in which there is no tutor in a subject area, or the tutors with expertise are unable to take on additional student-athletes. When this occurs, the director of tutorial services necessarily may be involved in locating a tutor, and she also will in effect have made the tutorial assignment.

86 There are likely many ways to provide tutors to student-athletes without being the *deus ex machina* of the pairing. One way is to utilize a card or computer file organized by subject that is readily accessible to student-athletes seeking tutors.

87 The academic performance program is set forth in NCAA Bylaw 23. An academic progress rate (APR) is calculated per team based on points allocated for each scholarship student-athlete (one point each semester that a student-athlete meets minimum NCAA academic requirements and one point per semester that she stays in school). *See generally id.* at 23.

counselor per team permits more efficient tracking of the academic performances of all team members. Notwithstanding these and other advantages of assigning a single advisor to work with a team, however, caution should be exercised in doing so, as there is a significant countervailing advantage—minimizing opportunities for cheating.⁸⁸ When more than one counselor works with a team, they can provide support for each other in withstanding any attempt to persuade them to stretch or break tutorial rules or to engage in academic misconduct. At the same time, a rational coach is likely to be deterred from attempting to exert undue influence, as with each additional counselor the risk increases that someone will report the conduct.

4. *Coaches⁸⁹ Are a Special Category.*—A tutor (as contrasted with an academic counselor) never should make contact with or speak to a coach with regard to the work or academic progress of a student-athlete. Any such contact should be between the student-athlete's academic counselor and coach, as this insulates the tutor from the pressure that a coach may exert.⁹⁰ This rule does not suggest that an academic counselor is immune to pressure or that it is in the nature of coaches to exert undue pressure. What it does suggest is that a counselor, as a full-time staff person, should be the one who interacts with a coach and, by virtue of his full-time status, may be in a better position to withstand any pressure that may be brought to bear.

5. *Faculty Are a Special Category.*—Neither coaches nor tutors (as contrasted with academic counselors) should intercede with a faculty member on behalf of a student-athlete. The issue for a coach is that, however unfair or unreasonable, some faculty will treat his contact as pressure on them to make an unwarranted grade change or other "accommodation." Tutors are not full-time professional staff and their prescribed duties relate exclusively to working with student-athletes, not interceding on their behalf with faculty even about the scope, meaning, or timing of assignments. Any faculty contact should be handled, if at all, by the appropriate academic counselor, by the director of student-athlete academic services, or by the FAR. But these others also should be extremely reluctant to intercede, as even from them a faculty member may feel undue pressure or in any event resent what may be seen as intrusion in the teacher-student relationship.

88 See COIA GUIDELINES, *supra* note 40, at 5.2.15 (noting that single advisor should not work with entire team).

89 The majority of coaches are interested in the well-being of student-athletes and make every effort to comply with the rules. In the case of NCAA rules and institutional control, however, the behaviors of the few augur strict monitoring of the many. It may not be fair, but it is prudent. Even a counselor should be cautious. See *id.* at 5.2.14 ("significant imbalance of power between coach and advisor" dictates that advisor should not report to coach).

90 See, e.g., CALIFORNIA STATE INFRACTIONS REPORT, *supra* note 64 (coach influenced another coach to engage in academic misconduct); SOUTHERN CALIFORNIA INFRACTIONS REPORT, *supra* note 71 (coach pressured tutor to engage in academic misconduct).

Interceding on behalf of a student-athlete also raises the specter of favored status, as students not student-athletes rarely have counselors or other advocates readily available to them. While on occasion favored treatment may be simply an acknowledgment of the different situations in which student-athletes find themselves, interceding with a faculty member is not one of those situations.

6. *Training.*—I have taught criminal procedure to law students, federal judges, and practitioners, and also have written on the subject. I have discussed with law students what is outside the scope of ethical and permissible prosecutorial conduct (if not also unlawful or unconstitutional). At one time, I thought that appropriate conduct flowed ineluctably from an understanding of these principles and a recognition of their policy underpinnings and merit. Then I took a sabbatical in a prosecutor's office and discovered how overwhelming is the seductive pull to win. That experience led me to restructure my criminal procedure class to devote additional time and attention to discussing ethical behavior in the context of real-world situations and to forewarn students of the seductive pull of winning by specifically discussing the temptations they might face and need to withstand. This lesson is not unique to trial lawyers.

Teaching tutorial ethical standards is no different from good teaching. It is important for tutors to understand the reasons for the rules and not simply memorize them. Understanding permits the learner to extrapolate to new and different situations and makes remembering easier.⁹¹ It is important to deal with concrete, real-world situations rather than to provide arid rules or soar in the stratosphere of generality.⁹² It is important to gauge

⁹¹ See generally John D. Bransford & Marcia K. Johnson, *Consideration of Some Problems of Comprehension*, in VISUAL INFORMATION PROCESSING 400 (William G. Chase ed., 1973); Roy O. Freedle & Jonathan Fine, *Prose Comprehension in Natural and Experimental Settings: The Theory and its Practical Implications*, in HANDBOOK OF APPLIED LINGUISTICS: MAJOR THRUSTS OF RESEARCH AND THEORY (Sheldon Rosenberg ed., 1982); Thomas N. Huckin, *Cognitive Approach to Readability*, in NEW ESSAYS IN TECHNICAL AND SCIENTIFIC COMMUNICATIONS: RESEARCH, THEORY, PRACTICE (Paul V. Anderson et al. eds., 1983); J.M. Mandler & N.S. Johnson, *Remembrance of Things Parsed: Story Structure and Recall*, 9 J. VERBAL LEARNING & VERBAL BEHAVIOR 111–51 (1977).

⁹² For example, what is the appropriate scope of assistance to a learning-disabled student-athlete who has trouble reducing thought to writing? May a tutor read her draft paper back to her and make corrections (including replacing full sentences) at her direction? A host of problematic situations can arise when, against policy, a tutor has contact with a student-athlete being tutored outside the tutorial services area or when a tutor develops a personal relationship with a student-athlete being tutored. For example, must a tutor and student-athlete go out to dinner separately during a break in a lengthy tutoring session? As a second example, may a tutor give a student-athlete a ride if a tutorial session ends late, the weather is inclement, and the student-athlete will be walking home? As a third example, consider a tutor who has tutored student-athletes in Italian for two years. At a party she meets a student-athlete, one she neither tutored nor even knew prior to the party. She begins dating him and he asks her to assist him in his Italian class. This arrangement is not set up through the athletics aca-

the experience level of the tutors and to play to that level. It is important to vary the presentation, both to reach different learning styles⁹³ and to keep things interesting. It is important to have group discussion so ideas may be shared and group identity and intra-group support may be fostered. Among the most important things to do are to repeat the message periodically and particularly at high-pressure times.

*a. Repeat and Reinforce.*⁹⁴—Repetition makes a concept more familiar and easier to remember. Repetition also brings experience. We do least well handling a problem when confronted with it for the first time with no prior thought and no preparation. Thus the often-repeated advice to a patient needing surgery is to find a surgeon who has performed that surgical procedure thousands of times and to go to a hospital where that procedure is regularly done. No one would advise a patient to have her surgery done by a new resident on his first day on a surgery rotation at a hospital where the procedure is rare. No one, that is, who wants the patient to survive.

b. High-Pressure Times.—Compliance directors at major Division IA schools typically provide monthly rules education sessions to coaches. They also reinforce the rules at particular “hot” times. In those sports with specific recruiting seasons, for example, compliance directors each year provide a specific refresher on recruiting rules before coaches leave campus to recruit. There are certainly high-pressure moments for academic performance—midterms, paper deadlines, finals—as well as for athletics performance—big games, championships. At these moments student-athletes confront heavy time demands as well as the pressure to succeed; in turn, these may be the moments when they are most tempted to cheat, and to attempt to involve tutors in that cheating. These are also the moments

demic tutoring services. May she tutor him? May she continue tutoring other student-athletes (student-athletes neither on his team nor ones with whom he socializes) now that she is dating him? As two final examples, suppose a tutor and student-athlete belong to the same church group. Must the tutor forgo attending a church function at which the student-athlete will be present? What should he do if he attends a church function and to his surprise encounters the student-athlete? These examples, and a host of others, illustrate the practical realities that tutors may face. Talking out potential situations ahead of time decreases the likelihood that a tutor may be caught off-guard. I owe these examples to Kim Shellpeper, the UNL Director of Tutorial Services, and her staff.

93 Some of us learn best through classroom instruction, while others learn best by reading. Some of us learn best by seeing; others are better listeners. Increasingly, many of us respond best to high-tech audio-visual presentations. All of us benefit when more than one sense is engaged.

94 There are a number of ways to repeat the message. These include periodic formal group sessions, tutorial manuals that state the rules, and informal training sessions. For example, UNL Tutorial Services recently began disseminating a weekly newsletter, *The Tutor Tribune*, that contains, among other things, repeat messages on tutoring rules.

when repeat instruction on academic integrity and ethical behavior is most necessary.

7. *Monitoring and Oversight.*—It has been said that the Constitution of what was the Union of Soviet Socialist Republics was a model of delineation and protection of individual liberties critical to democratic government—among them freedom of speech, freedom of the press, and the right to a fair trial. Yet few would tout the government of the Soviet Union as a model of democracy in action. A critical component of an athletics academic tutoring program, therefore, is effective oversight and monitoring to assure that what is written down is what is done.⁹⁵ At a bare minimum, there must be supervision and periodic observation of what occurs during tutorial sessions. Doing so offers the possibility to detect academic misconduct or to nip it in the bud. Equally, if not more important, knowledge by tutors and student-athletes that someone is looking independently will limit instances of academic misconduct. Appellate review functions in much the same way.

Another necessary aspect of monitoring is to maintain current and complete records of the hours that tutors work and the student-athletes they tutor and periodically to review these tutoring records for patterns that might predict trouble.

There can be no institutional control of athletics academic services, of course, unless a university has in place, follows, and provides oversight of, a well-thought-out system for academic services. But even doing all this may not be enough. It is also important to be able to show that all this was done.⁹⁶ For example, it is not enough for a supervisor periodically to patrol the tutorial services area. She also needs to note that, and when, she did it.⁹⁷

At least once every ten years the NCAA must certify a university as in compliance with NCAA bylaws, particularly in the areas of rules compliance, academic integrity, and commitment to equity and student-athlete well-being.⁹⁸ As part of the certification process, at least once every three years there must be an audit of student-athlete academic services.⁹⁹ Even the best-conceived system may be improved by review by an “outside

95 According to an English proverb, “There is many a slip ‘twixt the cup and the lip.”

96 If a tree falls in the forest and no one is there, does it make a sound?

97 A relatively simple way to accomplish this is to have a time sheet in the tutorial services area.

98 See generally NCAA Bylaws 22.01–22.5.

99 The requirement for a comprehensive audit is set forth as part of the NCAA Division I Athletics Certification Process in Operating Principle 2.2, Academic Support. NCAA Div. I, ATHLETICS CERTIFICATION SELF-STUDY INSTRUMENT 16 (2006–2007). The audit must be done by academic authorities outside of athletics and must include review of tutoring, academic advising, and monitoring of missed class time.

eye." Outside audits also serve to reassure faculty and others that a program is appropriately run. The "outside eye" may be an entity outside the university or a university entity outside athletics. A faculty athletics committee or subcommittee of a faculty senate may be optimally placed to conduct such audits.

There also are many other ways to obtain information about the tutoring program, information that may improve the quality of the tutoring provided, highlight "soft spots" in the monitoring system, and uncover information about violations. There should be exit interviews of student-athletes who have exhausted their competition eligibility, are transferring, or are graduating. A concomitant monitoring mechanism is to conduct exit interviews with tutors who leave. An easy additional monitoring effort is to establish a "report box" where student-athletes and tutors can anonymously provide suggestions to improve tutorial services, complaints about (or praise for) tutors or the tutorial program, and information regarding violations of policy or suspected cheating instances.

Sad to say, the ways that cheating occurs are myriad and in flux. The director of tutorial services and her staff need to keep informed and current. One way is to discuss with the campus academic services office cheating cases encountered there. Another way is to review infractions cases involving student-athlete academic misconduct, particularly as they relate to tutors and tutorial services. Monitoring is much more effective the better informed one is about what to look for.

B. Tips for Tutors

1. The Tutor's Golden Rule: Help, Not Do.—A tutor is a participant in a student's learning process. It is immensely rewarding to see a student grow in skills and understanding and to have had a hand in that growth. It is similarly rewarding to have assisted a student to master a subject area, garner a good grade, graduate, or, in the case of a student-athlete, be eligible to play. But a tutor must be crystal clear about his role. It is to guide the student-athlete to achieve, *not* to do her work for her. Here, a sports analogy helps—the tutor is the coach, not the player. There is nothing wrong in having a fan's interest in a student-athlete's athletics success so long as that fan's interest does not end in cheating.

The tutor's golden rule could not be more obvious or uncontroversial—a tutor does not do a student's work for him. To act differently is to make learning, and the discipline of learning, irrelevant to a college education. Only a comparatively few student-athletes will make a living in professional sports. Student-athletes who trade their academic work, which can prepare them to make a living and for life after (and beyond) athletics, on the hope of a professional sports career have made a very bad deal for themselves. This is certainly true in all those situations where no such ca-

reer develops, but it also is true even for those favored few who succeed as professionals. Sooner or later even they must leave the professional sports world.

Although the tutor's golden rule is easy to state, it is not as easy to apply, as the line between permissible assistance and cheating is contextual and relates to the nature and extent of the assistance. This is particularly true with regard to writing assignments.¹⁰⁰

There are three particular situations that are at least yellow warning lights signaling caution:¹⁰¹ too many hours spent between a tutor and a student-athlete on a particular writing assignment; working with a student-athlete under extreme deadline pressure; and working with a student-athlete who either is not prepared or is ill-prepared to do an assignment.¹⁰²

2. A Tutor Should Not Self-Sacrifice.—A student-athlete is responsible for his academic success or failure, not his tutor. If a student-athlete procrastinates to the very last minute, that is his choice and his responsibility. A tutor is not obliged to put his life on hold to help. When the rush is on, the pressure increases. With increased pressure comes more temptation to bend academic rules or to outright break them. Student-athletes do not miss practices and still expect to compete. They do not miss practices and expect to

¹⁰⁰ Increasingly, good writing seems to be a lost art. See Sam Dillon, *What Corporate America Can't Build: A Sentence*, N.Y. TIMES, Dec. 7, 2004, at 23. In acknowledgment of the decline in writing skills, the College Board established the National Commission on Writing; Information about the Commission and its work may be found at <http://www.writingcommission.org>. Most major universities offer writing workshops and other support services aimed at helping teachers to teach writing. Athletics academic services are well advised to make use of these services in instructing tutors.

¹⁰¹ Additional cautionary situations include a tutor who spends a great deal of time with one student-athlete and a tutor who tutors exclusively student-athletes from one team.

¹⁰² When working on written assignments with a student-athlete, a tutor can be aided in not "crossing the line" by imagining that the director of student-athlete tutorial services is sitting next to her as she tutors and by being prepared to identify with precision those particular contributions that were hers. A tutor should also imagine that sentences, phrases, ideas, or edits provided by her will be highlighted when a paper is submitted. She has "crossed the line" if she would be reluctant to have the student-athlete submit the paper so highlighted for a grade. In particular, a tutor should not (i) supply ideas or dictate organization (but should draw out ideas and structure by asking questions or discussing thesis purpose); (ii) rewrite a paper or correct grammatical errors, bad phrasing, or areas needing substantive improvement, (but should identify areas a student-athlete should revisit); or (iii) divide research between him and the student-athlete, or do all or part of an internet or library card catalogue search. Finally, a tutor should obtain permission before typing a paper or part of a paper for a student-athlete as there is risk that he will not simply type but may assist with substance. Moreover, NCAA rules treat the provision of free typing to a student-athlete as a prohibited extra benefit that is excused neither by the fact that the tutor may be a better typist nor that time is of the essence. See NCAA Bylaw 16.3.1.1 (g); see e.g., NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF ARKANSAS PUBLIC INFRACTIONS REPORT, No. 142 (1997) (at no cost to the two student-athletes, men's basketball advisor typed 20 of 24 lessons required for two courses and also had four other lessons professionally typed and edited).

do as well as they would have done had they practiced. The same principle applies regarding academic work, and student-athletes must understand this. A tutor should not proceed to work on a research paper or class assignment if the student-athlete's research or preparation is inadequate. The tutor needs to walk away. She must not succumb to claims that there is no time to get prepared because the assignment is due. This is the student-athlete's problem, not the tutor's.

A tutor may sympathize with the plight of a student-athlete in danger of failing a course, flunking out, losing a scholarship, or becoming ineligible to compete. But there can be *no* inducement and *no* reason good enough for a tutor to sacrifice her self-respect or her integrity in a misconceived effort to "help" a student-athlete by cheating. In this context, moreover, the ethical choice is also the pragmatic one: protecting one's own self-interest. Any secret known by more than one person is no secret. If a tutor helps a student-athlete to cheat, she takes the chance that the student-athlete will fail to keep the cheating secret or be unable to withstand questioning about it. In this context, selfishness is a virtue.

A tutor involved in academic misconduct obviously is subject to university discipline. But university processes typically release information neither about a disciplinary decision nor even that a misconduct hearing was held. In consequence, a tutor caught cheating may find it possible to preserve her reputation and future job prospects and at a minimum is not likely to see her name and transgressions portrayed prominently by local and even national media.

A tutor involved in student-athlete academic misconduct is subject to investigation by the NCAA enforcement staff and hearing before the COI in addition to a university's academic processes. Unlike university processes, the chances are good that there will be significant media coverage and that a tutor's involvement will be made public.¹⁰³ In consequence, the impact on reputation and job prospects will affect even the tutor not planning a career in athletics administration. For a tutor who has such aspirations, the consequences are much more severe,¹⁰⁴ particularly if the COI imposes a show-cause order.¹⁰⁵ In that event, a university seeking to hire her must

¹⁰³ Although in its published infractions report the COI identifies individuals only by position (head football coach, secretary in basketball office, tutor), the media typically names names.

¹⁰⁴ Every member institution upon request will be told if a particular individual was named in a major infractions case.

¹⁰⁵ NCAA Bylaw 19.02.1 reads as follows:

A show-cause order is one that requires a member institution to demonstrate to the satisfaction of the Committee on Infractions (or the Infractions Appeals Committee per Bylaw 19.2) why it should not be subject to a penalty (or additional penalty) for not taking appropriate disciplinary or corrective action against an institutional staff member or

appear before the COI to satisfy that there will be appropriate corrective measures in place to monitor her conduct; obviously this is an additional disincentive to her being hired.

3. *A Tutor Should Ask, or Tell.*—Remember Humpty Dumpty. Once the egg is broken, there is no going back—not with all the King’s horses and all the King’s men. Remember the caution often told—an ounce of prevention is worth a pound of cure. If a tutor feels uncomfortable about what he is doing or what he is being asked to do, then he may have crossed over into inappropriate tutorial behavior.¹⁰⁶ If a student-athlete (or someone acting on her behalf) makes a seemingly harmless but nonetheless unusual request a tutor’s antennae should go up.¹⁰⁷

Certainly a tutor should report immediately any request by a student-athlete that the tutor disregard the rules or that the tutor help him cheat, including requests to write a paper for him; to talk to a coach or an instructor for him; or to meet him outside the authorized tutoring area. But a tutor’s responsibilities extend to behaviors less clearly illicit that she may observe or overhear. If a tutor has a doubt, she should report. She has neither the expertise nor job responsibility to resolve the doubt herself.

The director of tutorial services has expertise in tutoring and in teaching tutorial skills, not in conducting investigations, in the intricacies of NCAA rules, or in assuring rules compliance. Nor will she necessarily appreciate the nuances of student classroom performance or faculty assessment of tutorial conduct. She should not suppress questions or attempt to go it alone when a tricky issue appears.¹⁰⁸ Moreover, what may be only marginally questionable viewed by itself may take on quite a different cast when combined with other information.¹⁰⁹ An NCAA infractions investiga-

representative of the institution’s athletics interests identified by the committee as having been involved in a violation of NCAA regulations that has been found by the committee.

NCAA Bylaw 19.02.1

106 Among the things that should be reported are approaches by coaches.

107 NEW MEXICO STATE INFRACTIONS REPORT, *supra* note 69 (assistant coach brought tutors math problems and what he said was practice exam so student-athletes could see how work should be done; problems and exam submitted in class for grades).

108 There are practical issues that can occur. For example, a faculty member may believe that a student-athlete submitted a plagiarized paper. She may choose to talk to the director of student-athlete academic services rather than (or prior to) following campus policies for dealing with academic misconduct. When this happens there is only one correct response: to advise the faculty member to follow campus policy and to deal with the student-athlete no differently from students who are not athletes. The director of tutorial services also should notify the FAR because, where faculty are concerned, an old adage is true—it takes one to know one. While the FAR should also hesitate to intervene, there are occasions where he will be obliged to query the faculty member about whether she is affording preferential treatment to the student-athlete because she is a student-athlete.

109 The director of tutorial services also has neither the expertise nor job responsibility

tion is no fun for anyone; a finding of culpability can taint everyone. Such findings—and their accompanying sanctions—will affect non-culpable student-athletes on a team if the team suffers scholarship losses, vacation of wins, or preclusion from a championship. The findings and sanctions similarly will affect student-athletes who later join a team, as scholarship limits imposed as punishment will continue to hinder a team's competitive success. All these student-athletes will be innocent victims. First loyalty should go to them, the university, and those it employs.

If tutors are to heed their instincts, report suspicious behavior, and, when in doubt, ask before acting, then they need to have someone accessible to respond to their questions and concerns. This means that a supervisor should be physically present when tutoring sessions occur. It also means that the director and other supervisory staff should provide tutors with their home and cell phone numbers. A tutor may have seen or heard something that did not initially concern him. With time to reflect, however, he may decide it is worth mentioning. Tutorial services should make this easy to do and easy to do promptly. Delay may mean a violation proceeds apace. Delay also may mean that the tutor talks herself out of reporting the incident at all. The phone numbers of the FAR and the compliance director also should be provided as a tutor may want, and should have the option of talking privately to someone outside tutorial services or the athletics department.

4. Bright-line Answers Are Unlikely: Be Diligent, Act Reasonably.—The bottom line is that a tutor should use common sense. While actual misconduct may be proved by direct evidence (the tutor confesses that he helped a student-athlete cheat), more typically misconduct is proved inferentially on the facts and circumstances and the reasonable inferences that may be drawn from them (goldfish is missing from fishbowl and water trail leads to cat who is wiping mouth and whiskers). With student-athletes, there is an entire structure of compliance devoted to assuring that they comply with NCAA rules. This is not a structure a tutor should challenge, as the chances are good that he will lose.

5. Tutors Need to Know and Follow Rules; So Should Student-Athletes.—Of course student-athletes know that cheating is wrong. But they may not know all that constitutes cheating (as, for example, that unattributed paraphrasing might be plagiarism).¹¹⁰ It is important to assure that student-ath-

to determine whether an NCAA rules violation has occurred, or what steps need to be taken to investigate. He needs to report all such information to the director of compliance or the FAR, or, better yet, to both.

¹¹⁰ See e.g., Nicole J. Auer & Ellen M. Krupar, *Mouse Click Plagiarism*, 99 LIBRARY TRENDS 415 (2001) (confusion over what constitutes plagiarism aggravated by "libertarian nature of the Internet where commentary is free-wheeling and anti-establishment").

letes know and understand the rules. It is equally important to emphasize that cheating makes a grade meaningless. Here too analogies to athletics competition can help. For any true competitor, winning is meaningless if the referee is bribed and similarly meaningless if a runner's course is half the distance that his competitors must run.

The things student-athletes should be told about cheating go beyond explaining the nuances of cheating, reiterating that cheating is wrong, working to have student-athletes internalize ethical academic behavioral norms, or reminding them of the severe consequences cheating can have on their college academic careers and athletics eligibility. To very loosely paraphrase Woody Hayes, when a student-athlete asks a tutor to help him cheat, three things can happen to the tutor, two bad and one uncomfortable. First, a tutor can succumb to the entreaty and cheat, thereby sacrificing his integrity and risking his career and reputation. Second, a tutor can refuse to cheat but ignore tutoring policy by failing to report the student-athlete. In this circumstance, the tutor may experience guilt and the fear (or reality) of being found out and sanctioned for not reporting. She also must live with the possibility of—and her corresponding responsibility for—cheating by that student-athlete, either unaided or with the help of a different tutor. Third, a tutor can refuse to cheat and report the student-athlete to the director of tutorial services, an uncomfortable choice even though clearly the correct one. A student-athlete must be made to understand that seeking illicit help from a tutor victimizes that tutor, whether he succumbs or not.

VI. CONCLUSION

Academic misconduct is serious, and damaging to the academic mission. Academic misconduct by a student-athlete may catch the attention of the public. Involvement of tutors or other staff members heightens the seriousness and brings more attention. It also brings to the table a separate world of NCAA bylaws and standards of behavior and operation. Universities need to devise and maintain a system reasonably calculated to monitor, prevent, and detect cheating, particularly as it involves complicity by tutors, other athletics department staff, or faculty. A university ignores this responsibility at considerable peril to its reputation and to the competitive success of its athletics program.

