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1988 Ruling Casts A Shadow On Current NCAA Investigations

Law360, New York (December 19, 2013, 6:36 PM ET) -- Before John Calipari, Rick Pitino and other presently successful college basketball coaches, there was "the Shark." Jerry "Tark the Shark" Tarkanian held an impressive run as the men's basketball coach at the University of Nevada at Las Vegas (UNLV) in the '80s and early '90s. However, in the midst of his success, which included a national championship in 1990, he constantly was in the eye of National Collegiate Athletic Association investigations. Adverse findings of the NCAA and UNLV's subsequent implementation of recommended sanctions on Tarkanian resulted in a historic legal battle. The end result was a ruling with implications for every NCAA investigation involving disciplinary or adverse actions with athletics personnel.

This month marks 25 years since Justice John Paul Stevens led a 5-4 U.S. Supreme Court ruling that held the NCAA was not a state actor as a result of a state university implementing disciplinary measures at its recommendation. In the case, *NCAA v. Tarkanian*,^[1] the NCAA's committee on infractions found 38 rules violations by UNLV's personnel, 10 of which involved Tarkanian. The NCAA placed UNLV's basketball program on probation for two years and issued a "show cause" notice requiring the university to present reason as to why additional penalties should not be imposed if it failed to sever its relationship with Tarkanian during the probationary period.

At the time of the litigation, Tarkanian held a tenured faculty position at UNLV and therefore owned a property right which could be deprived by a state actor — the university — under the proposed sanction. Despite this background and UNLV's disagreement with the findings of the committee on infractions, UNLV notified Tarkanian of its intent to terminate his relationship with the athletics function during the probationary period. In a series of legal proceedings that succeeded at the state level, Tarkanian argued the NCAA was a state actor as UNLV had for practical purposes delegated its oversight function and authority to the NCAA.

As it did in 1988, a current review of the case raises close issues of acting under state authority and required due process. A state university is unquestionably a state actor and tenure is a recognized property right, which would ordinarily invoke due process concerns. However, the Supreme Court maintained the NCAA was a private actor in part because (1) UNLV had not delegated its authority to the NCAA, (2) the NCAA was acting on behalf of its collective membership, and thus was adverse to and not in partnership with UNLV, (3) in theory, UNLV could have rejected the NCAA's recommendation and even renounced its membership in the NCAA as a whole, and (4) the NCAA enjoyed no governmental powers to conduct its investigation, such as ability to subpoena witnesses or impose contempt sanctions.

Please excuse the snickering on that last point from Coral Gables, Fla. As was revealed earlier this year, the NCAA acted similar to an entity with subpoena power in attempting to

obtain testimony from a private litigation for use in its investigation of the University of Miami. The improper actions of the NCAA enforcement staff were highly criticized, leading to the ouster of its vice president of enforcement and the NCAA subsequently giving a great amount of deference to the self-imposed actions of the university to close its investigation.

The Miami investigation and outcry following the Penn State consent decree highlight a real concern for all Division I, II and III athletic programs after the Tarkanian decision — if the NCAA is not bound to provide due process, what protections are there for an institution, its leadership and athletics personnel under an investigation? The answer is a complicated one that often requires legal counsel to assess where the NCAA has exceeded the scope of its authority and failed to follow the rules established for its member institutions. For example, universities need to be aware of how the NCAA's relatively light slap on the wrist from the Johnny Manziel investigation has importance, but does not set precedential value, for activities of other student athletes.

Given the great risk to the reputation and resources of schools subject to NCAA investigation, it is wise to take proactive measures, which at minimum should include the following:

- Irrespective of whether an allegation is discovered internally or from a NCAA inquiry notice, it is essential that every university protect itself by conducting an independent investigation. Often the initial concern may be the tip of the iceberg for a larger problem and having guidance from outside counsel to analyze and detail such problems is critical. The investigation should be charged with providing findings and recommendations for the office of the president and the general counsel, in addition to the athletics department, to help minimize the likelihood of surprises from NCAA interviews conducted on campus. In certain instances, such advice should be provided directly to the board of trustees, particularly where there is an allegation of lack of institutional control.
- As the NCAA has recently changed its enforcement structure to a four-tier penalty model that provides for greater accountability of athletics personnel, immediately consider whether separate representation should be used by persons central to an investigation, including a student athlete. Even in instances where the institution may initially be supportive of the central figure of an inquiry, facts later developed in the investigation may often change such position.
- Documentation and materials provided to the NCAA (or athletic conferences) are not generally entitled to a claim of privilege. It is important to seek advice on the manner in which certain sensitive items are disclosed, particularly if the NCAA itself may later be subject to discovery or regulatory inquiry related to the investigation.
- Consider self-reporting violations and voluntary implementation of certain penalties, but only after a thorough investigation substantiating evidence of a rules violation. The NCAA bylaws require meaningful consideration of both remedial and punitive measures taken by the member institution as a mitigating factor in the penalty phase.

- Have human resources pull the employment agreements of all key athletics personnel for review and update for current compliance. Recently enacted NCAA Bylaw 11.1.1.1 mandates new responsibilities and supervisory duties for head coaches, which should be reflected in all current contracts. There has been recent interest in the terms of employment agreements for athletics personnel from entities ranging from state attorney generals to the IRS.

The iconic image of Tarkanian on the sidelines was his plain white towel, often draped over his shoulder or held in his mouth in a tense moment of a contest. The tension off the court, however, will be the concern of presidents and athletic directors of many institutions with the NCAA serving notice of its intent to make athletics personnel more culpable for future violations. A good New Year's resolution would be to have a compliance audit of the athletics function with legal counsel to insure that an ounce of prevention is worth a pound of cure.

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[1] 488 U.S. 179 (1988).

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