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REPRESENTATION OF COLLEGE COACHES IN CONTRACT NEGOTIATIONS

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I. INTRODUCTION

When I tell people that I am a sports attorney, most of them initially assume that I just represent professional athletes. However, there are other individuals in the sports industry who are in need of legal representation. These individuals include college coaches, professional coaches and general managers. I specialize in representing coaches. I am a lawyer, but I have been referred to as an "outsider agent" and a "university strangler." I have been referred to in the *Chicago Sun-Times* as a "high-priced lawyer."¹ I have been accused of putting Marquette University basketball coach, Kevin O'Neill, up to a statement at a sports seminar sponsored by sports attorney Ed Garvey where O'Neill said that he would not wipe his nose on his contract because it was not worth the price of the paper.² I also have been accused of perpetuating the destruction of the Loyola-Marymount athletic department.

College coaches are an unprotected class of employees. They need representation. College coaches require a much more sophisticated form of contract negotiation than do professional athletes. Coaches do not have standardized contracts. The contracts range from a one page letter of appointment with no protection to an eighty page document full of legalese and other types of protective clauses. There is no "salary bank." A representative has no means of obtaining salary data on coaches easy. There is a world of privacy with respect to what coaches earn. That world only opens through Freedom of Information Acts and through a press that often wrongly reports the salary packages of coaches. Recently, the *Chicago Sun-Times* reported that Joey Meyer, DePaul University basketball coach and one of my clients, was seeking a \$2.5 million guaranteed contract.³ Unfor-

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1. Jay Mariotti, *Meyer's Contract Flap Might Be His Undoing*, CHI. SUN-TIMES, Oct. 6, 1992, at 95.

2. Charles Gardner, *O'Neill's Contract Extended*, MILWAUKEE SENTINEL, Oct. 24, 1992, at 1B.

3. Tony Ginnetti, *Meyer's Great Midwest Salary Saga*, CHI. SUN-TIMES, July 14, 1992, at 75.

tunately, those who reported the story did not read the contract and the incorrect reporting hurt DePaul University. The president of DePaul received telephone calls from alumni and boosters inquiring as to why they should be giving donations to the university when it could afford to pay its coach \$2.5 million.

II. NEGOTIATING WITH UNIVERSITIES

Dealing with universities is not like dealing with professional sports franchises. Representatives are dealing with academic institutions and organizations of higher learning. In the minds of college administrators and athletic department personnel, the only proper representative of a college coach is an alumnus. That is obviously a conflict of interest. I was involved in a contract negotiation where the athletic director would not deal with lawyers. The coach alone negotiated with the athletic director and vice president of student affairs, left the negotiation room and then called me for further direction in the negotiating process. The coach and vice president refused to recognize my existence.

Many universities look at coaches as nothing more than chattels. I had a recent experience where a very sophisticated lawyer in a large law firm told me that universities look at a coach's contract no differently than any other contract that the university may negotiate.

Oftentimes, newly appointed head coaches are so elated to get the job that they will execute the contract without advice of counsel, as long as the package is respectable in dollars. While the numbers may be respectable, the contract may also have rollover, reassignment, buy-out, termination with cause, and mitigation clauses. All of these clauses require the attention of a lawyer's expertise.

The longest I took to negotiate a contract was two years. Before I became involved, the coach had no written contract. He had some oral understandings, notes and memoranda, possibly an implied contract. It took two years to put the negotiated deal on paper. In his second year of coaching, well into the season, he had a 20-2 record. He contacted me and said, "You know I feel a little bit uncomfortable coaching at this university without a contract." I replied, "You ought to." He exclaimed, "Get me signed now." I called the athletic director and stated, "You've got an employee at will and we are moving. I've got a better deal - two times what you've got on the table." The athletic director responded, "You can't take him away from our university." I said, "You just watch me." Two days later, the contract I drafted was signed by the university. I am not permitted, by the way, to enter that state! However, every year thereafter, the athletic director has given me a social call, asking what it is that will make my coach

happy. One time I said, "Let's try a street this year." That year the university personnel had a street named after the coach.

I had another interesting experience when I was hired as a consultant to help structure an annuity deal for a Texas coach. The university representative and I discussed principles of law and a myriad of NCAA rules involving this particular issue. However, I discovered that I was of no particular use to this coach when one alumnus told me that I was in Texas and they do not follow the NCAA rules.

III. COLLEGE COACHING - A GLAMOUR JOB?

Coaching is a tenuous position in a very fragile world. It is the fifteenth most stressful job according to the *Job Related Almanac*.⁴ The coach, at least the coaches that I remember when I was playing ball, was somebody who taught the game - a teacher. Today, that is not the type of client I represent. Coaches have become fundraisers, recruiters, television personalities, alumni gladhandlers and anything else that the athletic director or university president wants him to be. NCAA rules are voluminous. The *NCAA Manual* is more complicated than the Internal Revenue Code. Those rules are made to be broken, which creates job security issues. Coaching is a job where you are hired to be fired. The back end of the deal is as important as the front end of the deal. The first day of the job must be spent planning for the last day of the job, which I guarantee will someday arrive. Based on statistics for the last twelve years, approximately 15% of college basketball coaches will change jobs every year.⁵

University presidents have been getting fired because of the uncontrolled actions of their athletic departments and boosters. However, a new concept has developed in the NCAA. That concept is the regaining of control of athletic departments by presidents of universities. Some of my professorial counterparts, some of the people I negotiate with, fail to recognize what this is all about. College football and basketball is a business in the 1990s. It is part of sports business and coaches, at least at the highest level, are high-money individuals.

IV. STRUCTURING THE PACKAGE

It is important to consider how one structures the package for a coach. The first important issue is money. Representatives of coaches have to real-

4. Phil Axelrod, *No Coach's Job is Safe*, BASKETBALL WEEKLY, May 2, 1989, at 4.

5. K. State Coach Packs Bags for Job in Sunshine State, BASKETBALL WEEKLY, May 1, 1990, at 15.

ize that universities do not provide these outrageous dollars that people are reading about in the newspaper. Instead, coaches are getting what we call a "package." Basically, the "package" is composed of three monetary components:

1. University pay - what the coach gets in salary and fringe benefits.
2. Outside income - this deals with whether a coach is an employee or an independent contractor, or retains some type of proprietary interest in the enterprise. Examples of outside income include radio and television deals, endorsements, camps, speeches and the like.
3. "Pepper Rodgers" income or perquisites - these are monies that are paid to the coach by virtue of him being the coach. Examples of perquisites might include a house, country club memberships, car, etc.

When a typical package for a high-paid coach is taken apart, 50% to 80% of the total package is actually from *outside* sources. There was a recent report in the *Chicago Tribune* about Lou Hensen, the University of Illinois basketball coach.⁶ In 1991, his salary was approximately \$96,000. In addition, he was paid \$70,000 for a basketball camp, \$100,000 for a shoe contract, \$51,000 for a radio and television deal and \$3,500 for an equipment contract. Georgia Tech basketball coach, Bobby Cremins, earned \$500,000 in 1990 - 80% of that was from outside sources.⁷ By comparison, Georgia Tech's president received a total package of \$170,000.⁸ The highest paid professor's package at George Tech was \$140,000.⁹

According to NCAA Bylaw 11.2.2, a coach must get prior written consent from the university's chief executive officer before he may enter into outside income deals.¹⁰ Institutional control over outside income may engender the next acrimony between coaches and their superiors. In 1991, a group of other college and university people met to study how to make improvements in college athletics. As a result, the Knight Foundation Commission Report was drafted. To give you the flavor and tone of that report, Rev. Theodore Hesburgh, President Emeritus of the University of Notre Dame and Co-Chair of the Knight Foundation Commission on Intercollegiate Athletics, referred to coaches as "power coaches," "the CEOs

6. Ed Sherman, *U. of I. Pays President Less Than 2 Coaches*, CHI. TRIB., May 15, 1991, at C1.

7. David Davidson, *Cremins at \$500,000; He, Ross Get Bulk of Income Outside Tech Salaries*, ATLANTA CONSTITUTION, Sept. 8, 1991, at E1.

8. *Id.*

9. *Id.*

10. 1991-92 NCAA DIVISION I BYLAWS art. 11.2.2.

of multimillion dollar athletic enterprises that can become laws unto themselves.”¹¹ The report states that where the university’s facilities, functions and names are used, those outside contracts should be negotiated directly by the university. For example, if a shoe contract requires the athletes to wear certain shoes, the contract should be negotiated directly by the university. This is the case at Ohio State with football coach John Cooper, and at the University of Wisconsin with basketball coach Stu Jackson. In fact, the University of Wisconsin has taken control of negotiating Stu Jackson’s outside income. Jackson is guaranteed \$160,000 in outside income per year. In addition, if the university is successful, Jackson gets one-half of anything above the \$160,000 as part of an entrepreneurial sharing arrangement. For example, if the university obtains \$200,000, then Jackson is entitled to an additional \$20,000 ($\$200,000 - \$160,000 = \$40,000 / 2 = \$20,000$).

V. CONTRACT CLAUSES

There are several important clauses that must be considered when negotiating coaches’ contracts. One important clause is the term of the contract. The term of these contracts is usually three to five years. There are some reasons for the length of that term, including recruiting, stability of the program, and security. However, many of these contracts have what is called a “rollover” or “rolling horizon” provision. There are basically three forms of this provision. First, there is what is called the “automatic rollover.” If a coach has a five-year contract and one year expires, the contract automatically goes back to five years. Therefore, at all times, the coach has a five-year deal. Second, there is what is called a “consensual rollover.” This involves a situation where the parties decide if they are going to re-up to the original term of the contract sometime after each season is completed. Third, there is what I call “free agent rollovers.” If the parties do not renew the contract for two successive seasons, for instance, then release and buy-out provisions do not apply. The coach is a free agent anytime the parties do not rollover for two successive years.

Another interesting clause is what is known as the “reassignment” clause. This is a new era for the University of Wisconsin football team under head coach Barry Alvarez. They have won a few games the last couple of years. The prior Wisconsin coach, Don Morton, had a losing record. However, Morton had a very interesting contract. It stated that he was employed as the head football coach. It also said that during that appointment and, at anytime, he could be terminated as head coach and given

11. Rev. Theodore Hesburgh, *No More Sacred Cow: Put Sports in Proper Place*, THE SPORTING NEWS, Mar. 25, 1991, at 6.

another duty and title as so assigned. This is called a "reassignment" clause. Essentially, it states that a coach can be assigned to a new position, such as head of the gym or head of the latrine committee, without being terminated by the university. Now some lawyers are going to say, "That just doesn't sound right. They hired him as a coach. That sounds in employment law like a constructive discharge. Because he was hired for a particular position, they have now materially changed the duties of that position and there has been a significant reduction in the rank of his position." In reality, when the university assigns the coach to latrine duty, what is he going to say - "I am not trained for cleaning toilets. I'm a head coach"? If the coach does not take this position, the university will likely reply, "Well, then you're fired if you don't take that job."

This situation actually arose with Don Morton.¹² Because he had no other job, Morton decided to take the latrine job. He thought, "I'll get my salary, my fringe benefits, my car and my country club membership." However, Morton was missing his radio and television deals, his endorsement income and his camps, which totalled \$170,000 in income. Morton essentially said, "I'll be happy to clean toilets for the remaining three years for the *total* package." What ultimately happens when a situation like this arises? There is some type of financial settlement, because no college, except for Washington State University, will hang out their dirty laundry in public.¹³

Another important area a representative must consider is bonuses. I look at NFL football contracts, with the slotting system, and the only thing intellectually stimulating about the contract is how one writes the bonuses. Bonuses can be used in college coach's contracts. I have had a little luck with the use of signing bonuses. I have had some luck with bonuses based upon wins and losses, tournament appearance bonuses, and attendance bonuses. I have also had some luck with graduation rate bonuses, and with annuities. Some examples:

1. Lon Kruger, University of Florida - \$1,000 bonus if 40% of his players graduate; \$2,000 bonus if 50% graduate.¹⁴
2. Bill Frieder, Arizona State University - \$14,000 for winning the NCAA Tournament; \$10,000 for improving academic performance; \$30,000 if attendance increases to an average of 11,000 per year.¹⁵

12. See Martin J. Greenberg, *College Coaching Contracts: A Practical Perspective*, 1 MARQ. SPORTS L.J. 207, 246 (1991).

13. See MICHAEL SPERBER, *COLLEGE SPORTS, INC.* 165 (1990).

14. SPORTS INDUSTRY NEWS, June 1, 1990, at 165.

15. SPORTS INDUSTRY NEWS, Mar. 24, 1989, at Data Page.

3. Jerry Tarkanian, formerly with the University of Nevada at Las Vegas - best deal in the country and a million dollar job. I know because I had a client that could have had the job, but he turned it down. Tarkanian's contract entitled him to 10% of Final Four revenues if the team got that far. In fact, the team did get that far and Tarkanian netted about \$140,000 in bonuses.¹⁶

There is a trend in the use of an annuity with balloon payments if the coach remains at the university. One of the ways universities are attempting to get coaches to stay is by "hanging out a carrot" or providing "a golden parachute" at some point in time. University of Louisville basketball coach Denny Crum and Xavier University basketball coach Pete Gillen both have annuity provisions in their contracts.¹⁷ If they stay at their respective schools for ten years, they will each be entitled to about a \$1 million rainbow. The trick is getting that far without being terminated.

What does "termination for just cause" mean? The *NCAA Manual* states that if a coach has committed deliberate and serious violations, he can be terminated, or if his staff commits violations for which they were under his control or direction, he can be terminated. The language in the remainder of the contract can be interpreted in an endless variety of ways. "Moral turpitude" clauses are an example of such ambiguous clauses. One of my clients wanted me to find out if the following acts constitute "moral turpitude":

1. What happens if he goes to a bar after the game, drinks too much and urinates on the street?
2. What happens if he gets drunk and has sex with a consenting child?
3. What happens if he is caught beating his wife?
4. What happens if his vulgarity is quoted?

The university representative and I spent two years trying to list all of the acts that would constitute moral turpitude.

The representative and I also had some interesting discussions with respect to the words "detrimental to the best interest of the university." Now, there is no commissioner in college athletics who looks out for what coaches are doing. Sometimes it gets awfully one-sided; therefore, the crafting and drafting of termination clauses are as important as putting together the package.

Next, there is the issue of termination *without* cause. Basically, coaches get terminated for not winning. If a team is not winning, complaints go to

16. Ira Berkow, *Sports of the Times*, N.Y. TIMES, Apr. 1, 1990, § 8, at 6.

17. SPERBER, *supra* note 13, at 194.

the university president's office, donations decrease, television contracts disappear and everybody is depressed because the program just is not right. Who is to blame? The university will say to the coach, "We just don't want you here." I have experienced about three forms of settlement in this area. Today, the use of a lump-sum settlement is very popular. For example, if the coach has three years remaining on his contract, the university may say, "Here's 'X' amount of dollars." The university calculated the 'X' amount of dollars by taking the present value of the future benefits of the contract. They have a mathematician figure out what they need to pay the coach to get rid of him. The second way of doing this is to continue the contractual pay. If the coach was making \$200,000 a year, the university may elect to continue to pay him. However, this may be subject to mitigation of damages. The coach has to get out and attempt to obtain another job so that the university does not have the responsibility of continuing to pay the \$200,000. Then, of course, there is payment without mitigation. Take a five year deal, for example. If the university fires the coach after the first year, they are stuck for four years. University counsels have realized this problem. Representatives of coaches are going to have some difficulty in this negotiation. The best that I have ever done is five years on a five-year rollover, with no mitigation, and the university provided salary, fringe benefits and 40% of the package amount.

Another clause a representative may encounter is the "Pepper Rodgers" clause. Basically, it states that when a university gets rid of a coach, it will pay him for his contracted salary and fringe benefits. However, the university does not want any responsibility for the opportunities of the position or for the perquisites of the job and, therefore, it limits its damages.

Probably the most famous termination case in this area involved Earl Bruce, former Ohio State football coach. He was a winner and a good coach. Then he offended somebody. When Ohio State said goodbye to him, he answered with a \$7.45 million lawsuit for breach of contract, slander, and wrongful discharge.¹⁸ Bruce also raised constitutional issues - state action, equal protection, denial of due process, and deprivation of property without compensation. Bruce settled for \$471,000.¹⁹ As a matter of fact, whether there is a case or not, most of these cases settle. Universities just do not want to hang out their dirty laundry in public.

Representatives must also consider the university's perspective. Marquette University has come out of an antiquated era and signed a long-term,

18. *Earl Bruce v. The Ohio State University*, No. 87-CV11-7430 (Franklin County, Ohio, 1987).

19. *Id.*

extremely sophisticated contract with its present basketball coach, Kevin O'Neill. As I stated in the beginning of this article, this is the same coach that said publicly at Ed Garvey's seminar, "I won't wipe my nose on the contract. It's not worth the price of the paper." However, Marquette got smart because they wanted to keep O'Neill. O'Neill is a person who once got into a gorilla suit in order to get one recruit. He is successful in getting all the players he goes after. Marquette wants to make certain that he's around for a long time. If O'Neill elects to leave, *he* pays. He has what is called a buy-out provision in his contract - "stay or pay." I suspect some very good lawyers would argue that these provisions are not liquidated damage clauses because they are penalties. However, that issue has not yet been decided by a court.

VI. CONCLUSION

One day, Coach O'Neill came into one of my classes. I asked him, "Coach, what do you do to protect yourself as a coach in the university environment?" He said eight things:

1. A coach had better get a lawyer.
2. All compensation must be in writing; nothing oral. Handshake deals or promises of fulfillment by the president and the athletic director are now days of the past.
3. The day of the long-term contract is gone. Three to five years is normal. There are not going to be any more coaches like Ray Meyer (former basketball coach at DePaul University) who stay at one school for years. Jumping around is the name of the game.
4. Do not trust anyone. Contract negotiation is a business deal and, ultimately, a business deal involves a written agreement.
5. Because NCAA Rules may mean an end to your career, document all activities on a daily basis by use of a diary. Keep a close eye on your assistants.
6. Limit your liability with respect to the acts of others, especially, student-athletes and assistant coaches.
7. College athletics is big business and universities should not be limiting the outside income of coaches.
8. Finally, coaches had better plan for termination because the day they get hired guarantees that someday they will get fired.²⁰

20. Kevin O'Neill, Remarks at Marquette University Law School (Mar. 26, 1991).

