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COLLEGE COACHING CONTRACTS REVISITED: A PRACTICAL PERSPECTIVE

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INTRODUCTION

College coaches are some of the highest of profile employees at any college or university. In many instances the pay that they receive outdistances the pay of the university's chancellor or most esteemed professor. Their athletic accomplishments receive more notoriety and media attention than the most celebrated lab discovery of the university's science department. For many coaches the job can be characterized as "24-7" due to the exponential growth in their responsibilities beyond conducting practices, teaching and coaching. And what a job — every coaching moment is surrounded by stress, and every decision, whether on or off the court, is subject to second-guessing and scrutiny and is the subject of an often vicious public debate. Moreover, a coach's job security is often conditioned on winning because wins are the equivalent of the bottom line, putting fans in the stands, bolstering alumni contributions, warranting lucrative TV and cable contracts, and persuading recruits to accept scholarship offers.

Today's coach engages in a very interesting workplace environment that lends itself to job insecurity. Long-term contracts mean nothing as buyouts for termination without cause provisions run rampant. As a result, the coach's contract may be the most important armor that the coach has in protecting his entry and exit in the job. College coaching contracts are sophisticated endeavors — no standard forms, no two that look the same, no union protecting their interests, and no data bank that correctly reports the intricacies of their packages. Many contracts, with

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important legal implications, are handily and expeditiously crafted. Those contracts require the input of an experienced and sophisticated lawyer to protect an unprotected class.

The purpose of this article is to first examine the job environment in which coaches operate, and second, to analyze the college coaching contract from a financial and legal perspective.

I. Job Environment

1. *Job Movement.*

When is a contract not a contract? Where is job security as fleeting as the last seconds of a basketball victory? In what field is an employment contract broken as easily as it is made? The answer to each is the world of college coaching.[1]

A person who becomes a college coach is put in a tenuous position in a very fragile environment. The first day of the job often must be spent planning for the last day of the job, and often the back end of the contract may be more important than the front end or the package. The college coaching field is characterized by frequent job turnover, movement and relocation. Statistics with respect to turnover are telling. The following chart presents the number of job changes both major basketball and college football over the last several years.

NCAA Basketball Coaching Changes[2]

Year	Number
2000	38*
1999	53
1998	59
1997	44
1996	48

NCAA Football Coaching Changes

Year	Number
2000	56
1999	45
1998	63
1997	52
1996	42

1. Martin J. Greenberg & James T. Gray, Sports Law Practice 522 (2d ed. 1998).
2. *Men's Basketball Coaching Changes*, USA Today, Apr. 18, 2000, at 9C.

* 2000-01 football season not complete.
Source: NCAA statistics

Head football coaches remain on their jobs for an average of only 2.8 years.[3] Eighty-seven of one hundred fifteen Division I-A football coaches have changed jobs in the last three years, according to Thom Park, a college coaches financial and contract consultant and Florida State University professor of sports administration.[4] Park has said that this high turnover forces athletic departments to write back-loaded contracts.

The Joe Paternos (thirty-five seasons) and Bobby Bowdens (twenty-six seasons) of the coaching world are the exception to the longevity rule. Only nine major college football coaches in history have spent more time at one school than Bowden's quarter century at Florida State University.[5] Only four have eclipsed Lavell Edwards' 29-year tenure at Brigham Young University.[6] Only one, Amos Alonzo Stagg, who spent 41 of his 57 years of coaching at the University of Chicago, surpassed Paterno's 35 years at Penn State.[7] If you take away these three icons (Paterno, Bowden and Edwards), the average tenure for football coaches in the National Collegiate Athletic Association's (NCAA) Division 1A entering the 2000-2001 season was barely four years (4.07 years to be exact).[8] Considerably more than half of those coaches, 67 of 115, have spent less than three previous seasons at their schools. Only Paterno, Bowden, Edwards and six others have stayed or survived as long as a dozen years.[9]

The general rule is to quickly fire a coach who is not winning. From the coach's perspective, that is the biggest obstacle to growing old on the job — ever increasing pressure not only to win, but also to keep winning in a high stakes sport that frequently foots the bill for a school's non-revenue producing sports.[10] What follows is a chart breaking down the tenure (length of service) of the 114 football coaches in the NCAA Division 1-A at their current schools for the 2000-2001 season.

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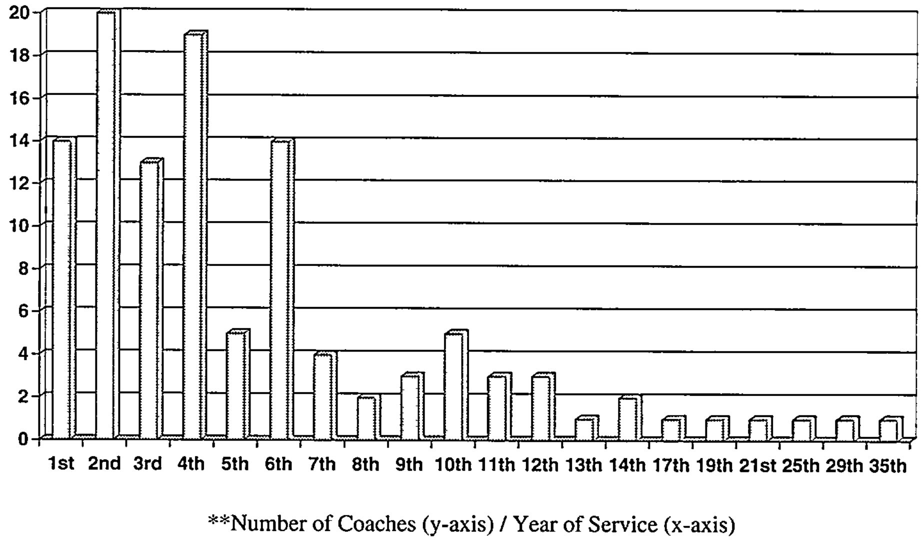
3. Dale Hofman, *IU Professor Throws Flag On Athletics*, MILWAUKEE SENTINEL, Sept. 7, 1990, at 21.
4. Patrick Finley, *Contract Tricks Help Lure Coaches to MU*, June 7, 2001, *available at* http://www.digmo.com/news/sl/premium/0607sportslocal22109.html.
5. Steve Wieberg, *Never Too Old to Have Fun: Coaches Find Fountain of Youth in College Football Achievements*, USA TODAY, Aug. 25, 2000, at 1C-2C.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

COACHING LONGEVITY[11]



2. *The Expanded Meaning Of Coach.*

Why are job movement, contract jumping, retirement and firing so characteristic of college coaching? The *Job-Related Almanac* indicates that a NCAA basketball coach has the fifteenth most stressful job out of the 260 jobs listed.[12] A coach is normally defined as "one who trains intensively by instruction, demonstration, and practice."[13] This definition certainly does not recognize the current job environment and employment conditions of the modern-day coach.[14]

The coach of the new century is required not only to be an instructor, but also to act as a fund-raiser, recruiter, academic coordinator, public figure, budget director, television, radio and internet personality, and alumni glad hander. A coach must also handle any other role that the university's athletic director or president may direct him to do in the best interest of the university's athletic program.[15]

In some cases coaches have experienced, as a result of their job, serious health problems related to stress and pressure:

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11. *Id.*
12. GREENBERG & GRAY, *supra* note 1, at 523.
13. *Id.*
14. *Id.*
15. *Id.*

a. Former Florida State coach Pat Kennedy has had repeated ulcers and mysterious illnesses during the season.[16]
b. Duke Coach Mike Kryzewski was forced to sit out an entire basketball season due to health problems.[17]
c. Maryland Coach Gary Williams missed the ACC tournament with a stress-related illness.[18]
d. In February 1994, Northwestern basketball coach Ricky Byrdsong's frustration over his team's 0-6 start in the Big Ten came to a head when he asked for an indefinite leave of absence and turned over his coaching duties to Assistant Coach Paul Swanson.[19]
e. Phil Ford, the Wooden Award winner in 1978, took a medical leave of absence in 1999 while an assistant coach at the University of North Carolina following his second DUI in two years.[20]

Mike Sertich, hockey coach at Minnesota-Duluth for eighteen years, and current hockey coach at Michigan Tech, has said, "[w]hen you look at all the guys that suffer from coaching burnout, run from the ghosts of the past and all the things which they can't control, it's little wonder why guys don't stay in the game long anymore and why the turnover is so great."[21]

3. *Athletic Arms Race - Bigger And More Revenue Generating Facilities.*

Coaches are an integral part of what is now called the "athletic arms race," a race to develop new sports facilities, that ultimately determines the life, stability and viability of college athletics, has become as much a part of the coach's job as on-court activities.[22]

Coaches are part of a vicious financial spiral. The success of their programs, which obviously equates to winning, is the financial bulwark for the support of the remainder of the athletic program. In many instances, football and basketball revenues are the underwriters for women's programs and minor sports. In order to be competitive and play

16. *Id.* at 522.
17. *Id.*
18. *Id.*
19. *Byrdsong Granted Leave of Absence*, UPI, Feb. 7, 1994, BC Cycle.
20. *N.C. Assistant Charged With Drunken Driving*, THE STUART NEWS/PORT ST. LUCIE NEWS, Sept. 29, 1999, at D3.
21. Todd D. Milewski, *A Second Chance*, March 8, 2001, *available at* http://www.uscho.com/m/?team=mtu.
22. Martin J. Greenberg, *Facilities "Arms Race,"* FOR THE RECORD, Apr./May 2001, at 4.

on a level playing field in the athletic arms race, new, state-of-the-art facilities that have the capability to generate higher revenues are now as much a part of the college game as they are a part of their professional counterparts. Luxury suites, club seats, enhanced seating, sponsorship, naming rights, strategic partnerships, and personal seat licenses are the name of the game for the future of college athletics.[23]

As a result, institutions of higher learning are experiencing an unprecedented boom in both the creation of new sport and support facilities and the renovation of old ones. During the 1990s, over $4 billion was spent on collegiate athletic facilities.[24] In the last seven years, spending on athletic facilities has increased 260% according to a NCAA study, and the spending is still accelerating.[25]

Nearly three dozen schools across the country have either recently completed or are in the midst of sports facility projects, which have created approximately 350,000 new seats.[26] Ten of the fifteen Division 1-A schools that averaged 75,000 fans or more for a football gave over the past four seasons have engaged in stadium expansion.[27] Nine out of twelve schools in the Big 12 conference have already undergone facilities renovation.[28]

Often projects are undertaken as part of a larger capital plan and are actually accomplished in stages. Today, renovation is more popular than new construction.[29] The other unique development is that schools are not just focusing the building boom on the traditionally big revenue sport: football. Instead, money is being put into hockey arenas, soccer fields, swimming complexes and training facilities.[30]

In many instances collegiate facilities are physically and functionally obsolete. Many stadiums and arenas are old and antiquated, potentially unsafe, and in need of substantial renovation or even replacement. Storied venues with historic significance simply do not meet the demands of corporate America, the media, and the new breed of fan. Effective facility design can actually contribute to a venue's financial success in ways previously unimagined.

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23. *Id.*
24. *Id.*
25. *Id.*
26. Jeff D. Opdyke, *An Athletic Arms Race: It's Bigger, Better Stadiums For Schools Aiming to Add Revenue, Lure Recruits*, WALL STREET J., Aug. 23, 2000, at B1.
27. *Id.*
28. *Id.*
29. Ken Davis, *Perkins' Vision: Stadium for New Millennium*, HARTFORD COURANT, May 7, 2000, at E3.
30. Greenberg, *supra* note 22, at 4.

Suddenly a general contractor, architect, or facility manager may be as important as a coach in luring top recruits to a campus. Recruits may see the physical act of construction as a symbol of a school's financial commitment to the further continuation and development of the athletic program.[31] This investment in state-of-the-art facilities may also give potential recruits the ability to attain their full athletic potential by providing them with top of the line training and practice facilities that allow them to reach peak physical conditioning.[32]

If a school does not have a state-of-the-art facility competitive with other universities, it may be unable to recruit the quality of athletes it needs to put a winning on the field.[33] As most coaches would state, the single biggest factor in winning at the college level is attracting the top athletic talent. Traditional values such as competition, loyalty, cooperation, and teamwork are still a major part of college athletics, but college sport today has become just as much about bowl games, alumni support, endowments, gate receipts, and cable TV contracts.

The increasing popularity of football has also created a greater demand for better and newer facilities. NCAA college football attracted more than thirty-nine million fans for the 1999 and 2000 seasons,[34] roughly four million more fans than the NCAA drew in 1995 and 1996.[35] In fact, twenty teams averaged 70,000 or more fans per game for the 2000 season.[36]

Current tax laws and booster support enhance the ability of a school to build a new facility. Contributors can claim sizeable deductions for the amounts paid for suites and seat licenses as charitable contributions.[37] Non-profit institutions are also empowered as arms of the state to issue tax exempt and subsidized low interest construction bonds.[38] Boosters, donors, corporate sponsors and the wealthiest benefactors are willing to pay millions in order to put their name on any part of a stadium or arena, which also can result in business or charitable deductions.[39] These factors have all contributed largely to the boom in construction. Universities are also given a competitive advantage in that

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31. *Id.*
32. *Id.*
33. *Id.* at 5.
34. Richard M. Campbell, *College Football Attracts Second-Highest Attendance Total*, THE NCAA NEWS, Jan. 15, 2001, at 1, 13.
35. *Id.*
36. *Id.*
37. Greenberg, *supra* note 22, at 6
38. *Id.*
39. *Id.*

they pay no income taxes on the revenue they take in from ticket sales, booster payments, television revenues, and corporate sponsorship fees.[40]

For generations universities have built sports programs because they foster school spirit and community involvement. A university does not sacrifice its primary educational mission, however, by merely building a new sports venue.[41] Many would argue that such a mission is actually enhanced when a new stadium or arena is complete.

4. *The Package.*

With the rise of college sports as a big business, college coaching has become a game of high stakes — one where money talks. The position of head coach may offer not only a salary with institutional fringe benefits, but also additional compensation opportunities that are generally referred to as the "package."[42] The package might include shoe, apparel and equipment endorsements, television, radio and Internet shows, speaking engagements, personal or public appearances, and summer instructional camps. In addition, the job may also mean such related perquisites as housing, insurance premiums, annuities, membership in health and country clubs, financial gifts from alumni and boosters, business opportunities, and the use of automobiles.[43]

The contract of Rick Neuheisel, University of Washington (UW) football coach, is a good example of this type of package because it illustrates the breadth of compensation in college athletics. Here are some of the highlights of Rick Neuheisel's contract with the University of Washington:

- *Base salary* - $225,000.00 - Neuheisel's base salary is $225,000.00.
- *Annuity* - $150,000.00. Neuheisel receives two payments of $75,000.00 a year - on January 10 and July 10.
- *Housing allowance* - $160,000.00. Neuheisel is paid in twelve equal installments on the 10th of each month. The contract states that the money is "for the purpose of acquiring and maintaining the employee's primary residence."
- *KOMO* - $125,000.00. Neuheisel receives this money for taking part in pre- and post-game shows as part of KOMO's radio deal with the university.
- *Fox Sports Northwest* - $100,000.00. Same as the KOMO deal.

40. *Id.*
41. *Id.*
42. GREENBERG & GRAY, *supra*, note 1, at 534.
43. *Id.*

- *Car coach program* - $20,000.00. This is the assigned value for Neuheisel being eligible to participate in the university's courtesy car coach program and assigned two vehicles that are to be used for official purposes at university expense. The university also provides a $2,000.00 annual mileage allowance.
- *Family travel allowance* - $25,000.00. Travel expenses are provided for Neuheisel's wife for all away football games, all post-season events in which the UW participates, and two additional business-related trips each fiscal year. In addition, the university grants to Neuheisel an annual budget of $25,000.00 for travel expenses for his family for travel related to University athletics. Neuheisel will technically be reimbursed for such travel, and any unexpended balance will be paid to Neuheisel.
- *Country club membership* - $5,000.00. Neuheisel receives a university-owned membership at Broadmoor Golf Club in Seattle.
- *Outside compensation* - $85,000.00. Neuheisel receives $60,000.00 annually from Nike and $25,000.00 from "other corporate opportunities."
- *Total* - $897,000.00. Neuheisel is guaranteed to receive this much money each season.
- *Incentives* - $100,000.00. There are two separate incentive clauses in his contract - $60,000.00 for meeting certain academic incentives and $40,000.00 for taking UW to a bowl game. The academic incentive calls for Neuheisel to receive $20,000.00 if UW has a graduation rate of 65-69%, $40,000.00 if the graduation rate is 70-74% and $60,000.00 if the graduation rate is 75% or higher. UW had a graduation rate of 57% last year.
- *Buyout clause* - Neuheisel will have to pay UW $100,000.00 if he takes another job before his contract is completed.
- *Termination pay* - Essentially, the contract is guaranteed for five years, but Neuheisel can be fired at any time. If he is fired "with cause" - such as for committing a serious NCAA violation - he would not be owed any money by the university. However, if he were fired "without cause," he would receive termination pay. If he is fired with one year remaining, he will receive 100% of his base salary, annuity, housing allowance and travel budget, roughly $560,000.00. If he were fired with two years left, he would receive 100% of that money the first year and 75% the next year. If he were fired with three or more years left, he would be paid 100% the first year, 75% the second year, and 50% the third year.

- *Negotiating with other schools* - Neuheisel must notify UW and receive permission from the university before negotiating with any other school or professional team about a coaching job. The contract states that permission "shall not be unreasonably withheld."
- *Relief of Colorado housing allowance* - As part of the contract, UW will pay off an $800,000.00 interest-only loan, which Neuheisel had received at Colorado in June of 1997 for buying a house. Neuheisel is to be paid $320,000.00 immediately, with three more payments of $160,000.00 each on January 10, 2001, January 20, 2002 and January 10, 2003.[44]

Gary Pinkel, head football coach at Missouri, has a new contract package containing the following elements:

- Base: $185,000.00
- Shoe: $ 60,000.00
- TV/Radio: $120,000.00
- Football camp: $70,000.00 (2001 and 2002)
- Special fund: $75,000.00
- Promotion of program: $60,000.00
- Country Club of Missouri membership
- Two courtesy cars
- Petty Cash: $15,000.00
- Higher budget revenue: $10,000.00
- Big 12 Title: $50,000.00
- Bowl game: $15,417.00
- New Year's Day bowl game: $38,834.00 (two months salary)
- BCS Bowl game: $46,250.00 (three months salary)
- National Title game: $100,000.00
- National Title victory: $250,000.00
- Seven wins: $10,000.00
- Eight wins: $15,000.00
- Nine wins: $20,000.00
- 10 wins: $25,000.00
- Attendance more than 60,000: $10,000.00
- Attendance more than 65,000: $25,000.00
- Academic standards: $25,000.00
- Toledo buyout: $50,000.00

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44. Bob Condotta, *Neuheisel Now Top-Paid Pac-10 Coach*, NEW TRIB., Aug. 18. 1999, at C1.

Total: Best case scenario: $955,000.00 (plus two cars, country club membership and petty cash)[45]

Eighteen college football coaches now earn more than a million dollars a year, while Steve Spurrier (Florida) and Bob Stoops (Oklahoma) make two million plus a year.[46] There were only two million-dollar coaches in the NCAA in 1997.[47] At top tier programs, football and basketball coaches earn far more than tenured professors do. In some instances, coaches earn nearly seventeen times the average salary of a full-time professor.[48]

Each time a school bumps up the package of one of its elite coaches, it creates a ripple effect in the coaching ranks inside and beyond the university. Compensation for coaches in other sports also goes up followed by pay increases for athletic directors, administrators and conference executives.[49] When the University of Nebraska hired Barry Collier as its head basketball coach at an annual base salary of $200,000.00, it was nearly $20,000.00 higher than the salary of the University of Nebraska's Chancellor, James Moeser, and nearly two and a half times the average salary of full professors at the university.[50]

The Knight Foundation Report, *A Call to Action* in June of 2001 addresses the salaries of coaches when it states:

> A glaring symptom of the arms race run amok is the salaries of so-called "star" coaches. At last count, some 30 college football men's basketball coaches are paid a million dollars or more a year. A few are nearing twice that or already there. The irony is not lost on the critics. A college provost points out that the school spent more money hiring the head football coach than it did hiring five department heads — combined. A trustee laments that his university signed the basketball coach to a salary three times greater than its president. Many players join the complaining chorus when they compare their scholarships to their coaches salaries and when their coaches break contracts and jump from team to team, just as their professional counterparts. Some dissatisfied players have begun to organize in an attempt to in-

45. Finley, *supra* note 4, *available at* http://www.digmo.com/news/sl/premium/0607sports local22109.html.

46. Dylan B. Tomlinson, *College Football: Keeping Best Coaches is Costly*, GAINESVILLE SUN, June 22, 2001, *available at* http://www.gatorsports.com/stories/062201/fbc3.shtml.

47. *Id.*

48. *College Coaches in Elite Sports Programs Can Earn Top Dollar*, PHILADELPHIA INQUIRER, Sept. 11, 2000.

49. *Id.*

50. Jim Rasmussen, *Coaches' Pay Causes Concern, UNL Chancellor: Rise in Salaries is Price of Staying Competitive*, OMAHA WORLD-HER., Apr. 9, 2000, at 1A.

crease their clout and have aligned with the United Steelworkers of America for help in doing so.[51]

5. *The Newly Defined Student Athlete*

The student athlete of today may be a different athlete than that of years past. The reverence paid to the coach as a father figure or surrogate parent may no longer be the case.[52] The student athlete who the coach has recruited, nurtured and potentially paved the path for a professional career, may be part of an insurrection, an insurgence, a boycott, a plaintiff in a defamation suit, or the focus of public disparagement. Recent revolts and insurrections by players have forced coaches out of their jobs.[53]

For instance, in 1998 basketball coach Tom Penders left after a ten-year tenure at the University of Texas, partly due to an insurgence of complaints to Athletic Director DeLoss Dodds from athletes about his abusive coaching style and lack of leadership.[54] Several players stated that "Penders had become nasty behind closed doors [and that he] and his staff could not fully develop talent."[55] Penders was often noted for saying, "I'm Irish. I get mad sometimes. If someone lobs a grenade at me, I throw it back."[56]

Other examples of coach and player controversies include the following:

- In January of 1989, San Jose University basketball players said they would not play for the team unless Coach Bill Berry was fired. They accused him of verbal abuse and mental cruelty.[57]
- In February of 1990, Drake University players staged a rebellion stating they would no longer practice or play for Coach Tom Abatemarco because of alleged verbal and mental abuse.[58]
- On November 18, 1992, Oklahoma canceled football practice because of a daylong meeting to clear the air between players and coaches. The Sooners refused to practice until coach Gary Gibbs

51. REPORT OF THE KNIGHT FOUNDATION: COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 18 (June 2001) [hereinafter A CALL TO ACTION].
52. GREENBERG & GRAY, *supra*, note 1, at 531.
53. *Id.*
54. *Id.*
55. *10 Years of Fanning the Flames*, AUSTIN AM.-STATESMAN, Apr. 3, 1998, at C1.
56. *Id.*
57. GREENBERG & GRAY, *supra* note 1, at 532.
58. *Id.*

explained why quarterback Steve Collins had not taken a snap after being promised he would share duties with Cale Gundy.[59]

- On November 21, 1992, sixty-six Morgan State football players signed a petition asking athletic director Joe McIver to fire coach Ricky Diggs, claiming Diggs was verbally abusive and showed favoritism. Morgan State canceled its season finale because players threatened a half time sit-in.[60]
- On October 12, 1992, University of South Carolina football players boycotted practice and voted to ask coach Sparky Woods to resign.[61]
- On September 22, 1992, displeased with Coach Chuck Stobart and a 0-3 record, eighty-four Memphis State football players boycotted practice.[62]
- On February 4, 1993, Army basketball coach Tom Miller was fired because of his poor relationship with players and school officials. Twice administrators had told Miller during the season that his outbursts were inappropriate.[63]

Other examples are more complicated.

In an extreme example, former California basketball coach Lou Campanelli sued the University of California seeking millions of dollars in damages in U.S. District Court in protest of his firing by the University over allegedly abusing some of his players.[64] Campanelli claimed that he was denied due process and was arbitrarily fired when school officials investigated player allegations.[65] The official reason given for his firing was that he had berated team members to the point where the future of the program was in jeopardy.[66] Campanelli's position as to why he was unfairly fired included: (a) that he was doomed from the start because he was forced to restructure his contract before the start of the season; (b) that he was never aware of any problems that led to his tenuous standing as coach; (c) that he had fulfilled the requirements of his contract and developed a successful and clean program; (d) that the publicity surrounding the firing had made it virtually impossible for him

59. *Id.* at 531.
60. *Id.* at 531-532.
61. *Id.* at 532.
62. *Id.*
63. *Id.* at 531.
64. *Id.* at 532.
65. *Id.*
66. *Id.*

to get another job; and (e) that the University intentionally damaged his ability to earn a living and caused him emotional distress.[67]

On October 28, 1993 U.S. District Court Judge Fern Smith dismissed the lawsuit explaining that the claim was barred by the 11th Amendment, which holds that state agencies are immune from suits in federal court.[68] However, Judge Smith stated that the University would have to fulfill the requirements of the buy-out clause in Campanelli's contract.[69] The clause required the University to pay him 100% of his annual salary for the next season, 75% the next year and 50% in the contract's final year, and suggested that the suit be brought in state court instead.[70] Judge Smith also stated that Campanelli could not claim that the University had violated his civil rights and publicly stigmatized him because officials never publicly explained the firing or criticized the coach.[71]

Campanelli had a five-year contract that ran through April of 1996 and paid him an escalating base salary that was at $113,610.00 a year when he was fired.[72] The University maintained that it simply exercised its right to cancel the contract because the buy-out clause allowed the University to terminate the contract at any time for no stated reason or hearing, as long as he was paid the buy-out percentages of his salary until 1996.[73] Smith stated that the decision could be re-evaluated if Campanelli could provide proof that specific university officials had made public statements about his firing that contained serious personal accusations.[74]

In February 1995, the Wisconsin Court of Appeals held that a statement made by a university basketball coach at a team meeting that a player was a disgrace to both the team and the school, was not slander per se.[75] The court said that the player must demonstrate special damages to successfully recover against the school.[76]

The player, Amy Bauer, was a member of the University of Wisconsin Madison women's basketball team and had been recruited by Assistant Coach Michael Peckham. During Bauer's junior season, the Women's Athletic Director told her that Peckham had been suspended

67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 533.
73. *Id.*
74. *Id.*
75. Bauer v. Murphy, 530 N.W.2d 1 (Wis. Ct. App. 1995).
76. *Id.* at 4.

because of an allegation that he was having an "inappropriate relationship" with Bauer. At a team meeting the same day, the director told the entire team the reason for Peckham's suspension and team members openly discussed the alleged relationship. When Bauer arrived later at the meeting, team members repeatedly questioned her, but she denied the allegations. The meeting progressed to an argument and ended with the head coach, Mary Murphy, calling Bauer a disgrace to the team and the university.[77]

Based on this comment, Bauer filed the suit against the coach for a number of claims, including defamation. The trial court granted the coach's motion for summary judgment because Bauer had failed to assert any special damages due to the conduct.[78]

The appeals court asserted that to prove slander (i.e. defamation by the spoken word) the plaintiff must allege and prove special damages. However, four categories of slander are actionable without alleging or proving special damages; (1) those imputing a criminal offense, (2) a "loathsome" disease, (3) conduct affecting the plaintiff's business, (4) sexual misconduct by a female plaintiff.[79]

Bauer argued that the words at the team meeting fell into the fourth category. The court ruled that the disgrace comment did not qualify because the comment was made directly after Bauer had criticized Murphy's coaching abilities.[80] The court also adopted the Massachusetts Supreme Court's view that the word "disgrace" is a word of general disparagement and is "equally discreditable to all persons."[81] Bauer's allegations failed to allege special damages to her, and the lower court's decision was therefore upheld.

6. *Importance Of Winning*

College sports have become a big business with high financial stakes. If the coach is not bringing in enough revenue, or is not perceived positively by the alumni or public, a university may be forced to terminate his employment for fear of losing large amounts of money.[82]

Coach Rich Haddad was fired as the basketball coach of Jacksonville, concluding a 6-21 season.[83] As Haddad said, "[w]inning is the bottom

77. *Id.* 2-3.
78. *Id.* at 3.
79. *Id.* at 3-4.
80. *Bauer*, 530 N.W.2d at 5.
81. *Id.* at 6.
82. GREENBERG & GRAY, *supra* note 1, at 528.
83. *Id.*

line. Schools are looking for coaches who run clean programs, graduate their players and win big. If you stumble in any area, you're in trouble. But winning big is the big factor. And that translates into money."[84]

Even winning does not guarantee job security. J. D. Barnett had a winning record, including two NCAA tournament appearances, a clean slate with the NCAA and a rollover five-year contact at Tulsa when he joined the roll call of fired basketball coaches in March of 1991.[85] Where did Barnett go wrong? Tulsa Athletic Director Rick Dickson said Barnett was fired for not making enough money for the school. He cited dwindling attendance, contributions and season ticket sales. He also cited the turnover in the assistant coaches and the student athletes not completing his program.[86]

There is no better way to illustrate the high financial stakes associated with winning than by looking at the dollars paid out for bowl game participation. Fifty College Football Association teams that played in 2000-2001 bowl games earned a total of $161 million.[87]

2000-2001 Bowl Schedule[88]

Bowl	***Date***	***Site***	***Projected (per-team) Payout***	***Teams/result***
Mobile Alabama	Dec. 20, 2000	Mobile, AL	$750,000.00	Southern Miss (8-4) 28, TCU (10-2) 21
Las Vegas	Dec. 21, 2000	Las Vegas, NV	$800,000.00	UNLV (8-5) 31, Arkansas (6-6) 14
Oahu	Dec. 24, 2000	Honolulu, HI	$750,000.00	Georgia (8-4) 37, Virginia (6-6) 14
Aloha	Dec. 25, 2000	Honolulu, HI	$750,000.00	B.C. (7-5) 31, Ariz. St. (6-6), 17
Motor City	Dec. 27, 2000	Pontiac, MI	$750,000.00	Marshall (7-5) vs. Cincinnati (7-4)
Galleryfurniture.com	Dec. 27, 2000	Houston, TX	$750,000.00	Texas Tech (7-5) vs. East Carolina (7-4)
Humanitarian	Dec. 28, 2000	Boise, ID	$750,000.00	Boise State (9-2) vs. Texas-El Paso (8-3)
Music City	Dec. 28, 2000	Nashville, TN	$750,000.00	West Virginia (6-5) vs. Mississippi (7-4)
Micronpc.com	Dec. 28, 2000	Miami, FL	$750,000.00	Minnesota (6-5) vs. NC State (7-4)
Insight.com	Dec. 28, 2000	Tempe, AZ	$750,000.00	Iowa State (8-3) vs. Pittsburgh (7-4)
Liberty	Dec. 29, 2000	Memphis, TN	$1.25 million	Colorado State (9-2) vs. Louisville (9-2)

84. *Id.*
85. *Id.*
86. *Id.*
87. *2000-2001 Bowl Schedule*, USA TODAY, Dec. 26, 2000, at 5C.
88. *Id.*

Bowl	***Date***	***Site***	***Projected (per-team) Payout***	***Teams/result***
Sun	Dec. 29, 2000	El Paso, TX	$1 million	Wisconsin (8-4) vs. UCLA (6-5)
Peach	Dec. 29, 2000	Atlanta, GA	$1.8 million	Georgia Tech (9-2) vs. LSU (7-4)
Holiday	Dec. 29, 2000	San Diego, CA	$1.9 million	Oregon (9-2) vs. Texas (9-2)
Alamo	Dec. 30, 2000	San Antonio, TX	$1.2 million	Northwestern (8-3) vs. Nebraska (9-2)
Silicon Valley	Dec. 31, 2000	San Jose, CA	$1.2 million	Fresno State (7-4) vs. Air Force (8-3)
Independence	Dec. 31, 2000	Shreveport, LA	$1.1 million	Miss. State (7-4) vs. Texas A&M (7-4)
Cotton	Jan. 01, 2001	Dallas, TX	$2.5 million	Kansas State (10-3) vs. Tennessee (8-3)
Outback	Jan. 01, 2001	Tampa, FL	$2 million	Ohio State (8-3) vs. South Carolina (7-4)
Gator	Jan. 01, 2001	Jacksonville, FL	$1.4133 million	Clemson (9-2) vs. Virginia Tech (10-1)
Florida Citrus	Jan. 01, 2001	Orlando, FL	$4 million	Michigan (8-3) vs. Auburn (9-3)

Bowl Championship Series[89]

Bowl	***Date***	***Site***	***Projected (per-team) Payout***	***Teams***
Rose	Jan. 01, 2001	Pasadena, CA	$13.5 million	Purdue (8-3) vs. Washington (10-1)
Fiesta	Jan. 01, 2001	Tempe, AZ	$13.5 million	Oregon State(10-1) vs. Notre Dame (9-2)
Sugar	Jan. 02, 2001	New Orleans	$13.5 million	Florida (10-) vs. Miami (FL) (10-1)
Orange	Jan. 03, 2001	Miami	$13.5 million	Oklahoma (12-1) vs. Florida State (11-1)

The NCAA's Final Four basketball tournament is also all about money and winning. The $70 million annual revenue from the tournament is allocated as follows:

- The unit of measurement is the share, and in 2001, each share is worth roughly $94,000.00.
- A conference gets one share for each team invited to the tournament and one additional share per victory up to four per team. In other words, Final Four participants pick up five shares for their league, and their performance this weekend can't change that.
- Distribution of finances is based on a conference's performance for the past six years, which means a good year keeps paying off and a bad one keeps rearing its head. A league's annual take is the value of the share times the number of shares accrued over the six-year period.

89. *Id.*

- This year, the ACC picked up 15 shares - five each by Duke and Maryland, two by North Carolina and one each by first-round losers Georgia Tech, Virginia and Wake Forest. Only twice in the eleven-year history of the formula has the conference done better. Only the Big Ten and the Pac-10 (17 shares each) top the ACC this year, and both have more members.
- By league revenue-sharing policies, the ACC's total of $7,050,000.00 is split equally nine ways. Each school will take home $783,333.33 from the 2001 tournament.[90]

Here is more proof that the rich in college athletics indeed get richer. Florida State announced in May of 1999 that it had renegotiated its contract with Nike Inc., coming to a new deal worth in excess of $20 million in product and financial compensation.[91] The new deal is an extension of the original 1995 contract valued in excess of $6 million over five years.[92]

The comprehensive contract with the Oregon-based company will keep the "Swoosh" on the shoes, clothing and equipment worn and used by the Seminoles' twenty intercollegiate athletic teams and their staff members through 2005.[93] Florida State's contract is believed to be one of the richest deals between a manufacturer and a college athletic department.[94] Nike has about one dozen comprehensive contracts with marquee college athletic programs around the country.[95]

Penn State University's the athletic department operates like an autonomous business with a $42 million budget.[96] It is responsible for raising and spending all of its own money.[97] It has its own CEO, a cadre of middle managers handling administration, marketing and ticket sales, and a well-oiled publicity machine.[98] Penn State spends twice as much on athletic scholarships ($5.5 million annually) as it does on academic aid for its top students.[99] The budget for its fourteen-person sports information staff - $578,479.00 - is bigger than the entire athletic budgets

90. Rob Daniels, *ACC Gets Fair Share of the NCAA Kitty the League Will Split $7,050,000 From This Year's NCAA Tournament Nine Ways*, GREENSBORO NEWS & REC., Mar. 29, 2001, at C3.

91. Bob Thomas, *Shoe Fits: FSU Likes Nike Deal*, FLA. TIMES-UNION, May 14, 1999, at C1.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

of many smaller colleges.[100] Additionally, Beaver Stadium has undergone seven expansions since it opened in 1960, doubling in size. It now has a capacity of about 94,000 - the fourth largest stadium in the nation.[101] The ticket price - $38.00 a game - makes it among the most expensive in the Big Ten, and after being adjusted for inflation, booster payments to secure season tickets have grown forty-six-fold since 1965.[102]

Last year, Penn State collected nearly $8.8 million from its football seating plan which rewards boosters based on the size of their tax deductible payments, and raised another $5 million in endowments and gifts for the athletic department.[103] This brought total donations to approximately $13.8 million, with nearly all of the money being tax-free.[104] As of July 2000, Penn State Athletic Department had an endowment of $18 million to fund scholarships and other projects. It had another $6 million in reserves available to cover emergencies and other expenses.[105] In fiscal year 1999, Penn State operated the fifth largest football program in the nation, taking in $25.4 million in revenue.[106] The program had expenses of $9.8 million and a surplus of $15.6 million, a 61% margin.[107] Ticket sales generated $15.6 million. Television and bowl games accounted for $5.6 million. Concessions brought in about $1 million and the rest came from corporate sponsorships, advertising, licensing, royalties and program sales.[108] The revenue figures did not include nearly $8.8 million that boosters and alumni paid to obtain season tickets. Including those donations, football accounted for a total of $34.2 million, 82% of the Athletic Department's $42 million in revenue.[109]

Further, the advent of major television and cable network contracts for the right to broadcast these events has created even more revenue for the NCAA and its constituent universities. CBS paid the NCAA $143 million for television rights to the NCAA College Basketball Tournament from 1991 to 1997, will pay $1.725 billion from 1998-2002, and

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

will pay $6 billion over eleven years starting in 2003.[110] The NCAA average annual payment from the contract will more than double from the 8 year $1.725 billion agreement in effect to 2002.[111]

All of this potential revenue presents today's coaches with a win at any cost dilemma. The pressure to generate revenues from television, gate receipts, sponsorship relationships, alumni donations and tournament participation has put the bottom line or balance sheet psychology on an equal basis with "wins and losses."[112]

In response to this perceived focus on winning and revenues derived from winning, the Knight Foundation Commission on Intercollegiate Athletics report makes the following recommendation:

> Revise the plan for distribution of revenues from the NCAA contract with CBS for broadcasting rights to the Division I basketball championship. No such revenue should be distributed based on commercial value such as winning and losing. Instead, the revenue distribution plan should reflect values centered on improving academic performance, enhancing athlete's collegiate experiences, and achieving gender equity.[113]

8. *Rules, Rules, Rules*

Today's coach operates in an environment controlled by the NCAA rules - voluminous, complicated and very often broken set of guidelines. In addition, the coach is also subject to conference and university rules. The purity of amateur athletics is sometimes shrouded by academic fraud, alumni indiscretions, assistant coaches acting beyond their authority, improper payments, travel irregularities, compliance deviations and the absence of University control.

According to the Knight Foundation Report, 57 out of 106 Division I-A institutions (54%) had to be censored, sanctioned, or put on probation for major violations of NCAA Rules in the 1980s.[114] In the 1990s, 58 out of 114 Division I-A college and universities (52%) were similarly penalized.[115] In other words, more than half of the institutions compet-

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110. Steve Wieberg, *Players Want Cut of $6 Billion TV Contract*, USA TODAY, Mar. 20, 2001.

111. Jill Lieber, *Blue Devil With a Cause*, USA TODAY, Nov. 22, 2000, *available at* http://www.usatoday.com/sports/basketba/skmfs15.htm.

112. GREENBERG & GRAY, *supra* note 1, at 531.

113. A CALL TO ACTION, *supra* note 51, at 28.

114. *Id.* at 12

115. *Id.*

ing at the top levels continue to break the rules. Wrongdoing as a way of life seems to represent the status quo.

The 2000-2001 NCAA Division 1 manual contains approximately 466 pages of rules, rules, and more rules.[116] Today's coach needs not only to be concerned with wins and losses, but also with academic eligibility, continuation and maintenance of amateur status, extra benefits, the activities of representatives of athletic interests, recruiting, expense reporting, and the principles of ethical conduct. The coach's job can be up for grabs on the basis of acts of third parties presumably beyond their control but for which they suffer the consequences. Presidents of universities get relieved of their jobs because of the uncontrolled actions of their athletic departments and boosters, and in some instances in situations for which the coach is deemed to have control but in reality may not.

Coaches contractually commit to recognize and comply with the laws, policies, rules, and regulations governing a university and its employees and the rules of the National Collegiate Athletic Association and the Conference. The coach is required to take all reasonable steps to ensure that all assistant coaches and any other employees for whom the coach is administratively responsible comply with the aforesaid policies, rules, and regulations.

Any failure to comply can result in the termination of the coach's contract. The contract will contain language indicating that the coach will be terminated for just cause on the basis of committing a deliberate or serious violation, material in nature, of any law, rule, regulation, constitutional provision or bylaw of the university, the Conference or the NCAA, which violation may, in the sole judgment of the university, reflect adversely upon the University or its athletic program, including any serious violation which may result in the University being placed on probation by the Conference or the NCAA. The contract should also contain language that punishes the coach when a member of the coaching staff or any other person under the coach's supervision undertakes any violations serious in nature and direction, for which violation was the result of the coach's failure to reasonably supervise the offending individuals.

Rules violations can have a dramatic effect on the career of the coach, the program and its future. Some examples are illustrative:

- Don James, University of Washington. Fifteen violations by boosters (improper loans to athletes, free meals, excess pay for

116. NAT'L COLLEGIATE ATHLETIC ASS'N, 2001-02 NCAA DIVISION I MANUAL (2001) [hereinafter NCAA MANUAL].

summer employment). RESULT: James resigned; 2 year absence from bowl games; 1 year loss of TV revenue; loss of 20 scholarships; loss of 75 on-campus recruiting visits.[117]

- Ron Abegglan, Weber State. Gave a player money to pay for correspondence courses, arranged loans for or gave athletes jobs, and allowed an athlete to stay in his home for a few days. Also introduced athletes to NBA personalities, gave one player bail money, had his son tutor a prospective player, and had his wife edit and type a player's class paper. RESULT: 4 years probation; loss of two scholarships; re-certification of athletics policies and practices; compulsive attendance at compliance seminar development of comprehensive compliance program. WSU imposed the following sanctions: cut Abegglan's salary by 25%; suspended financial incentives for 2 years, reduced the number of assistant coaches and reduced off-campus recruits.[118]
- Cal State Northridge Coach Ron Ponciano was fired on July 16, 1999 amid an internal university inquiry into alleged rules violations in the football program. President Louanne Kennedy said that the results so far show "serious and substantial" violations of NCAA and university rules that compelled the school to take action. The university sent Ponciano a non-retention letter, ending his tenure as coach that began in February 1998.[119]
- In April 1998, ULCA fired head basketball coach Jim Harrick for violating NCAA rules which including the coaching staff providing improper entertainment and benefits to a club coach whose team included prospective student athletes and the head basketball coach furnishing false and misleading information to university investigators. As a result, the school was put on three years probation and recruiting visits were reduced to six visits for the next two following seasons.[120]
- In April of 1998, Southeast Missouri State fired its head men's basketball coach for NCAA violations which included improper benefits to student athletes, including above-average wages for summer jobs, loan and cash payments for rent and furniture, as well as unethical conduct and recruiting violations. Penalties im-

117. GREENBERG & GRAY, *supra* note 1, at 569.

118. *Id.*

119. *Northridge Football Coach Fired*, LAS VEGAS REV.-J., July 17, 1999, at 7C.

120. Danny Robbins, *The Verdict Is In: Tech Gets Four Years' Probation, Postseason, TV Sanctions Avoided*, HOUSTON CHRON., Aug. 5, 1998.

posed upon Southeast Missouri State included three years' probation, reduction of another scholarship, show cause orders limiting job opportunities for former basketball coach and assistant coaches.[121]

- In January of 2000, Howard University fired men's basketball coach Kirk Saulny and his two paid assistant coaches for violating NCAA and university rules. "We cannot and will not tolerate any conduct inconsistent with NCAA bylaws and our own code of ethics and conduct," Vice President of Student Affairs, Ray Archer said. The rule violations were uncovered during an internal investigation of the program. The areas of inquiry included altering a transferor's transcript and conferring illegal benefits.[122]

II. Contracts - Legal And Financial Implications

College coaches need representation, in fact, they require a much more sophisticated form of contract negotiation than professional athletes do. A coaches' contract may range from a one-page letter of appointment subject to the University Employee Handbook with no protections - to an eighty-page document full of legalese and other types of protective and negotiated clauses.

Because of the lack of job security in coaching and the amount of money paid to coaches for their services, meticulously drafted employment contracts have become a necessity for both the coach and the university. According to Judson Graves,

> college athletics is big business. Whatever else they may be – master strategists, charismatic inspirers of young athletes, or national celebrities – today's college athletic coaches are big businessmen. In the high stakes, win at all costs atmosphere of major college athletics, job security for coaches can be as fleeting as last Saturday's victor, and complex, tightly drawn employment contracts have become a necessity for those coaches with enough negotiating leverage to obtain them. These relatively new entrants to the business world operate in a volatile atmosphere in which hiring and firings often occur in rapid sequence, and hard legal questions are being raised about the proper methods of enforcing their employment contracts when breaches occur.[123]

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121. *Id.*

122. Mark Asher, *Howard Fires Saulny, Staff; Basketball Coaches Violated Rules; 2 Players Ruled Ineligible*, The Wash. Post, Jan. 8, 2000, at D1.

123. Judson Graves, *Commentary: Coaches in the Courtroom: Recovery in Actions for Breach of Employment Contracts*, 12 J. Coll. & Univ. L. 545, 545 (1986).

Coaches should be protected by what can be thought of as a Coach's Contractual Bill of Rights, which includes legal analysis and advice as to (1) defined rather than omnibus duties, (2) term and the ability to roll over the contract, (3) the exclusion of reassignment or constructive termination clauses, (4) contractual guarantees in a stressful and unstable job environment, (5) creativity in financial structuring beyond the box including other potential perquisites, fringe benefits, outside income such as retention annuities, tuition waivers, complimentary tickets, club and golf club memberships, living accommodations, housing allowances, continuing education and conference attendance, moving and relocation expenses, automobile and expense accounts, rewards for success, (6) a recognition between the coach and university that the job and the success of the program is a joint venture, (7) a clearer definitional understanding of what is termination for just cause and a redefinition of what is just cause, (8) the entitlement of coaches to due process and constitutional guarantees, whether the college is state chartered or private, (9) better protections when the coach does not win and is terminated without cause, including lump sum settlements and no mitigation of damage provisions, (10) buyout provisions in the event the coach jumps or early terminates, (11) university support provisions especially in the area of technological and facility parity, (12) certain autonomy and authority with respect to operation of the program, and (13) financial commitments from the university to improve and upgrade the program.[124]

The process is one that is involved and time consuming, that requires an understanding of the operation of universities and, most importantly, an understanding of the intricacies and goals of the parties in obtaining a fair and protective contract.

As previously stated, there is no standard form of a college coach's employment contract. This section will discuss certain contract clauses and issues that are important to the coach's contract from both the university's and the coach's perspective.

Newly appointed head coaches are often so elated to get the "job" that, as long as the package numbers are respectable, they will execute the proffered contract without the advice of counsel. Universities "often negotiate coaching contracts in a frenzy, making impossible a careful 'in-

124. The author has developed this Bill of Rights through many presentations to college coaches and other groups.

vent-the-wheel' legal drafting job within the time constraints."[125] Further, "the 'general' terms of university coaching contracts often are negotiated by persons who lack knowledge of university's interests and how to protect them."[126] Consequently, lawyers become the beneficiaries of contracts that have already been negotiated and drafted resulting in a contract that fails to protect the parties' interests. Because of the complexity of the issues in today's coach's contract, those skilled in legal training and knowledgeable about the contractual provisions of coaching contracts should be involved both in the negotiation and drafting process.[127]

In 1987, Stoner proposed a model coach's contract in order to protect the university's interest.[128] In an accompanying article details were laid out as to how university and college attorneys should negotiate and draft college coaching contracts.[129]

As the unions in professional sports have negotiated the contract language for their players, so too should the associations representing college football and basketball coaches. They should take a more active role and interest in not only the format of their coaches' contracts, but also the economics of a coach's contract and what the coach and the representative should be negotiating.[130] A central and open source, such as a college coach's contract data bank, should be made available to the attorneys or agents representing the coaches so that statistical information is available to each representative.[131]

What follows is a discussion of certain clauses and provisions that are normally found in a college coach's contract, along with some specific examples.

1. *Duties and Responsibilities of Coach.*

Before a contract can list the specific duties of the coach, the coach must agree to devote his best efforts and full-time to the performance of all duties and responsibilities attendant to the position of head coach of

125. Edward Stoner, II, & Arlie Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J. COLL. & UNIV. L. 43, 44 (1989).

126. *Id.*

127. GREENBERG & GRAY, *supra* note 1, at 576.

128. National Association of College and University Attorneys (NACUA), Section of Athletics, 27th Annual Conference in Albuquerque, New Mexico (1987).

129. Stoner & Nogay, *supra* note 125.

130. GREENBERG & GRAY, *supra* note 1, at 576.

131. *Id.*

that university's particular athletic team.[132] Moreover, the coach must agree to abide by and to comply with the constitution, bylaws and interpretations of the NCAA and all NCAA Conference and university rules and regulations relating to the conduct and administration of that particular athletic program.[133] Beyond the general responsibilities and best efforts clause, the employment contract will normally list specific responsibilities.[134] For example, a head basketball coach's contract may list the following general responsibilities:

(A) Assume all of the support services that are necessary for coaching the sport (For instance, recommend competitive schedule, budget, necessary equipment, etc.);
(B) Conduct the program with integrity and in a financially responsible manner that reflects favorably upon the university as a whole;
(C) Maintain a level of performance in the program that is consistent with the goals established by the University;
(D) Provide for and encourage academic counseling for the student-athletes coached by him within the program as their individual circumstances may warrant;
(E) Provide individual and group training and instruction to team members at all practices;
(F) Prepare for and accompany teams to both home and away competitions;
(G) Possess a thorough and up-to-date knowledge of the sport;
(H) Assess talent of prospective student-athletes and recruit high caliber prospects that are capable of performing effectively against the University's scheduled opponents at the highest Division One Level;
(I) Answer all correspondence relative to the sport;
(J) Be available for various community and alumni speaking engagements;
(K) Promote and stimulate interest in the program among students and season ticket holders;
(L) Hire and fire, but only after consultation with the University's Director of Athletics, the Assistant Coaches for the Men's Varsity Basketball Program;
(M) Work effectively with the media;
(N) Perform related duties as assigned.[135]

The contract may also list more specific responsibilities:

132. *Id.* at 576-577.
133. *Id.* at 577.
134. *Id.*
135. *Id.*

(A) Supervise assistant coaches, including compliance with such coaches with Conference and NCAA rules and regulations;
(B) Participate in the instruction and coaching of student-athletes;
(C) Determine scouting schedules for high school and college games;
(D) Interview prospective players, their parents and coaches;
(E) Contact media, alumni and civic groups;
(F) Work to integrate sports into the whole spectrum of academic life to complement the University and its mission in the community;
(G) Work within the confines of rules, regulations, guidelines and policies of the University athletic department;
(H) Keep public statements complimentary to the athletic program and to the University;
(I) Make every effort, working in cooperation with and support of the University's faculty and administrative officials, to ensure that all student-athletes' academic requirements are met;
(J) Have complete knowledge of the rules and regulations governing intercollegiate athletic competition and maintain strict compliance therewith by the program;
(K) Apply effectively experience in recruiting, training and coaching of student-athletes;
(L) Be a disciplinarian but be fair, sympathetic and protective of student-athletes while motivating them to excellence;
(M) Maintain a mature and rational attitude, keep emotions in control and downplay defeats;
(N) Prepare players for each game and each season with dedication; and
(O) Establish and maintain a frequent and systematic program of personal communication with the University's student body.[136]

Another example delineates responsibilities between coaching duties, administrative duties, travel duties, recruiting duties, student affairs, alumni relations development and other, as follows:

DUTIES:

1. *Coaching Duties*

A. Full responsibility for coaching and training University's football team; for developing and conditioning all in-season

136. Stoner & Nogay, *supra* note 125, at 59-60.

and out-of-season sessions in fall and spring as deemed necessary and appropriate.

B. Has responsibility for psychological preparation of team in both pre-game and post-game; and for developing motivational approach to game.

C. Organize teaching procedure for football staff. Conduct team meetings and assignments as necessary.

D. Continue to develop comprehensive knowledge of football. Responsible for all football-related decision-making, delegating football staff authority, and setting team and staff objections.

2. *Administrative Duties*

A. Responsible for search and selection of qualified assistant coaching staff with approval of Director of Athletics; and to actively support and comply with the University's Affirmative Action program.

B. Direct and manage staff of assistant football coaches. Delegate and prioritize administrative responsibilities to assistants.

C. Conduct annual staff evaluations and recommend merit salary increases to Director for approval.

D. Must be fully knowledgeable and adhere to all rules and regulations of the NCAA, Big Ten Conference and University as amended from time to time.

E. Responsible for presenting to the Director and the Associate Director a projected annual budget in the areas of responsibility for approval. Accountable for expense control compliance and administration of annual budget. Implement Department operational procedures and policies to assist in budget development.

3. *Travel Duties*

A. Responsible for working with Associate Director/Business in making team and individual travel arrangements for competitions and off-campus practice, and for the conduct and appearance of the team when traveling as representatives of the University.

4. *Recruiting Duties*

A. Responsible for the national recruitment of top student-athletes, commensurate with the admissions qualifications of University who are capable of successfully competing at the Big Ten level. Maintain good relations with parents of prospective and current student athletes.

B. Manage and direct extensive on-campus recruiting program, developing sound relations with faculty and staff as appropriate.

5. *Student Affairs*

A. Demonstrate interest in academic progress of student athletes. Work closely with Director of Academic Services in solving and preventing academic problems.
B. Cooperate with team physicians and training staff regarding health care and decisions of practice and participation of student-athletes.

6. *Alumni Relations, Public Relations, and Development*

A. Responsible for the maintenance of sound alumni relations, and for promoting and participating in various alumni events.
B. Assist Director and Assistant Director of Development/Athletics in fund-raising efforts on behalf of the Department and the University as necessary.
C. Responsible for maintaining good public relations with the public news media, and working with the Department's Media Relations Director in promoting Northwestern University. Maintain amicable public relations with faculty, staff, students and media of the University; friends, alumni support groups and secondary school coaches.

7. *Other*

A. Report to the Director of Athletics and faithfully and diligently carry out other Department related duties as assigned.
B. Demonstrate a cooperative attitude toward all sports in the Intercollegiate and Recreational program.

In addition to a list of specific duties, the university will want to include a clause indicating that the coach will perform such other duties as are incident and consistent with his position, and as may be prescribed from time to time by the Athletic Director or President, or by mutual agreement between the parties.[137] From the university's perspective, a listing of specific duties is advantageous especially in attempting to enforce the termination provisions for just cause, i.e. failure to perform the duties and responsibilities specifically assigned.[138]

On the other hand, the coach will probably desire a broad responsibility statement such as "performance of such duties as are incidental to

137. GREENBERG & GRAY, *supra* note 1, at 578.
138. *Id.*

the position and as may be prescribed from time-to-time by mutual agreement between the parties."[139] This gives the coach room to argue against the university's potential charge that the coach has failed to perform the duties of the position.

2. *Term of Employment.*

This clause creates the term of employment, which is normally for a stated number of years. In general, coaching contracts are usually three to six years in length and some contain rollover provisions.[140] Several sample terms of employment provisions follow.

> *Employment and Term.* Subject to the conditions set forth in this letter, you are hereby employed as Head Football Coach at the University for the period beginning on _______ and ending ____ (the "Contract Term"). A current job description for the position of Head Football Coach is attached as Exhibit A. The job description will not be materially changed during the Contract Term without the mutual written consent of both you and the University.
>
> For a period of thirty (30) days following the last regularly scheduled football game of the ____ football season, the University will discuss with you the possibility of extending your contract beyond the initial five-year term. Both you and the University must agree any such extension to in writing. This agreement to discuss an extension in no way obligates the University to continue your contract beyond ____, 20____.
>
> *Term and Extension.*
>
> A. University agrees to employ Coach hereunder as Head Football Coach for a term commencing on _______ and ending on _______, subject to the extension and termination provisions set forth expressly herein ("Term"). Coach shall be considered a full-time University employee twelve (12) months of each year.
>
> B. This Agreement shall terminate without further notice to Coach at the conclusion of the Term specified above. Any extension or renewal of this Agreement must be expressly agreed to in writing, and is subject to written approval as provided for in this Agreement.

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139. *Id.*
140. *Id.* at 578-579.

Term of Employment, Compensation, and Benefits.

A. Subject to the provisions below for termination, the term of employment under this Agreement shall be for six years beginning on July 1, 1998 and continuing for the 1998-199 Contract Year (defined below) and for the next immediately succeeding five contract years.

B. As used in this Agreement, the term "Contract Year" is defined to mean the twelve month period commencing each July 1 and ending the following June 30. Each such Contract Year is designated by the calendar years in which it begins and ends (so that the Contract Year from July 1, 1998 through June 30, 1999, is referred to as the "1998-1999 Contract Year").

The case of *Roberts v. Wake Forest University*,[141] is instructive with respect to the term of an employment contract. Pursuant to an oral agreement, the plaintiff, Roberts, was hired to become the golf coach and associate athletic director at Wake Forest University. There was an oral agreement on salary, but there was no specific request as to a definite term of employment.[142] Golf coaches traditionally have a very long tenure. The plaintiff understood from circumstances surrounding his initial visit to the university that he would be given a reasonable amount of time to demonstrate that he could coach the golf team.[143]

Although the duration of his contract was not fixed, the plaintiff alleged that the parties intended employment to be for a substantial period, at least six years.[144] On December 2, 1977, after less than a year with the program, the president of the university requested plaintiff to relinquish his duties and accept other duties in the athletic program.[145]

The North Carolina court concluded that, "[e]mployment for an indefinite term is regarded as an employment at will which may be terminated at any time by either party."[146] In this case, the court indicated that the record fell far short of showing the intention of the parties for a fixed term of employment.[147] In addition, the plaintiff relied on the *Wake Forest University Personnel Policies and Regulation Manual* to support his argument that he was a permanent employee and could not be dismissed without cause.[148]

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141. 286 S.E.2d 119 (N.C. Ct. App. 1982).
142. *Id.* at 122.
143. *Id.*
144. *Id.* at 123
145. *Id.*
146. *Roberts*, 286 S.E.2d at 123.
147. *Id.*
148. *Id.* at 124.

Although the court admitted that the coach was a permanent employee, at least pursuant to the Manual, it also indicated that a permanent employee in a general sense means a position of some permanence as contrasted with a temporary employee.[149] Ordinarily, where there is no additional expression as to duration, a contract for permanent employment implies an indefinite hiring terminable at will. The *Roberts* case is a clear expression of the coach's need to define in writing the term of his intended employment contract, rather than let custom, usage, or the intentions of the parties bind the pathway of the future term of employment.[150]

Another interesting case with respect to the issue of term of employment is *Lindsey v. University of Arizona.*[151] In the spring of 1982, the University of Arizona attempted to locate a new coach for the men's basketball program. Ben Lindsey, who had successfully coached men's basketball at Grand Canyon College for several years, was ultimately chosen. Lindsey stated that at a meeting with the search committee, the members had stated that no one would be hired for the coaching position for less than three to four years. Lindsey also testified that during discussions with the University of Arizona athletic director, Dave Strack, Lindsey was told that it was the university's policy to give coaches a minimum of four years before being evaluated.[152] On July 6, 1982, Lindsey accepted a formal appointment as adjunct professor of physical education from 1982 to 1983.[153] A coaching contract, in the form of a letter to Lindsey from the University of Arizona President John P. Schaefer stated:

Dear Mr. Lindsey:

> You are requested to serve as Head Coach of Men's Basketball at the University of Arizona, effective July 1, 1982 and ending no later than June 30, 1983.
>
> It is the policy of the Arizona Board of Regents that an academic-administrative assignment is not a contract and that it can be terminated by the President of the University at any time.
>
> It is also policy that the assignment is renewable at my option and that renewal must be confirmed by a letter from my office. I would appreciate it if you would sign the enclosed copy of the letter to indicate your willingness to serve in this assignment.

149. *Id.*
150. GREENBERG & GRAY, *supra* note 1, at 580.
151. 754 P.2d 1152 (Ariz. Ct. App. 1987).
152. *Id.* at 1154.
153. *Id.*

> Please return it to Faculty Records (Administration 507) within ten days.
>
> Sincerely,
>
> /a/ John P. Schaefer[154]

Lindsey signed the bottom of a copy of the Schaefer letter on July 7, 1982. Above his signature and date he noted, "I hereby accept the foregoing assignment."[155] Lindsey was to receive approximately $90,000.00 per year as compensation, including; a $49,115.00 annual salary, approximately $30,000.00 per year arising from a contract with a shoe company that Lindsey promoted, and an additional $10,000.00 anticipated from conducting a basketball camp and other benefits associated with the position.[156]

After Lindsey was hired, the university men's basketball team experienced its worst record in history (four wins and twenty-four losses). Sometime around March 15, 1983, the new athletic director, Cedric Dempsey, notified Lindsey that his appointment would not be renewed after June 30, 1983. The university provided Lindsey two checks totaling $49,115.00 as severance pay.[157] Lindsey brought suit, alleging breach of contract, fraud, intentional interference with contractual relations, and intentional infliction of emotional distress.[158]

The jury awarded Lindsey $215,000.00 for deprivation of three years of employment.[159] The appellate court indicated that:

> Despite the specific language contained in the letter from President Schaefer, Lindsey presented evidence from which the jury could have concluded that he would have the security of coaching for four years at the University of Arizona. An employer's oral representation may modify the terms of a contract and create a question of fact for the jury as to the terms of the contract.[160]

The court found that the evidence at trial was sufficient to sustain a verdict that the university had breached an express contract with Lindsey by terminating his employment before four years of employment elapsed.[161] Implicit in this finding is the holding that Lindsey accepted a one-year renewable contract, which the university promised to renew for

154. *Id.*
155. *Id.* at 1155.
156. *Lindsey*, 754 P.2d at 1155.
157. *Id.*
158. *Id.* at 1156.
159. *Id.*
160. *Id.* at 1157.
161. *Lindsey*, 754 P.2d at 1157.

three additional years. Thus, the appellate court held that the university violated an oral promise to renew Lindsey's contract for three additional years, and therefore affirmed the $215,000.00 trial court judgment.[162]

Obviously, oral promises inducing performance that may be in opposition to the stated letter of appointment were significant in the Lindsey case.[163] Discussions, promises, intentions, customs and usage's need to become part of the written document so that there is no mistake with respect to the term and conditions of employment.[164]

3. *"Rollover" Provisions.*

If the university is satisfied with the coach's performance after the completion of each season, the contract may be extended for an additional year. This means that at all times the remaining term of the contract at the commencement of each succeeding season is the same as the original term of the contract. This is commonly referred to as a rollover clause.[165]

To illustrate, Coach Jones has a five-year contract with a rollover provision. At the end of each season, the university, with Coach Jones' consent, has a right to extend the contract an additional year, provided the university is pleased with the performance of the coach. Thus, if the university continues to exercise its rollover provision, Coach Jones will have at all times a five-year contract.[166] Coach Jones may want the rollover provision to state that if the university does not extend the contract for two consecutive years, the coach has a right to terminate the contract without needing to comply with the release or buy-out provision.[167]

An example of a rollover contract provision suiting Coach Jones' needs is as follows:

> The term of this Agreement shall be for a period of five (5) years commencing on April 1, 1989 and ending on March 31, 1994. In addition thereto, the University shall have the right to extend the term of this Agreement with the prior written approval of the Coach for one (1) additional year following the completion of each Men's Varsity Basketball season (but in no event later than May 1st of each year) during the term of this Agreement. Upon the completion of each season, the Coach will meet with the Ath-

162. *Id.*
163. *Id.*
164. GREENBERG & GRAY, *supra* note 1, at 582.
165. *Id.*
166. *Id.*
167. *Id.*

letic Director of the University to review the season. Following such review, a decision shall then be made by the Athletic Director whether or not to exercise this one-year extension option for that year. In the event of a decision to exercise such extension option, then the University shall extend the term of this Agreement for an additional one (1) year in accordance with such decision. If this extension option is not exercised in a given year but is exercised in a subsequent year in the above-described manner, the University may in the event, with the Coach's consent, increase the term of such subsequent extension to a full five (5) year period from the effective date of said extension. In the event the term of the employment is not extended by the University in any two (2) successive years, then the Coach shall have the right to terminate his employment under and pursuant to this Agreement without the necessity of complying with the release provisions as more specifically described in paragraph 9.3 hereinafter.[168]

Another example of a rollover clause follows:

Annual Automatic Renewal of Contract for New Four Year Terms (Roll-over Clauses). On July1, 1995, and July 1of each year thereafter, the term of this Contract of Employment shall be automatically renewed for a new term of four (4) years, unless ninety (90) days prior to July 1, 1995, or ninety (90) days prior to July 1 of any year thereafter, the Director of Intercollegiate Athletics shall notify Coach in writing that this Contract will not be automatically renewed for a new term of four (4) years beginning on the following July 1. It is the intention of the parties by this section to provide for an automatic "roll-over" of the term of this Contract for a new term of four (4) years beginning on July 1, 1995, and on July1 of each year thereafter *unless* the Director of Intercollegiate Athletics shall at least ninety (90) days prior to any such July 1 give to Coach written notice that this Contract will not be automatically renewed for a new term of four (4) years. In the event the Director of Intercollegiate Athletics shall notify Coach at any time in accordance with the notice provisions stated above that this Contract will not be renewed for a new term of four (4) years, then there shall not be an automatic "roll-over" of the term of this Contract to a new four (4) year term and this Contract shall expire at the end of the contract term then in effect.

Generally, a rollover clause has four major drawbacks for the university. First, a university's notice of a decision not to extend the contract

168. Stoner & Nogay, *supra* note 125, at 47.

for the extra year could be considered by some to be a current breach of the contract, which might immediately entitle the coach to a certain number of years of severance pay or some other remedy.[169] Second, "[r]ollover clauses are typically poorly drafted because drafters write them in the euphoria of the moment."[170] Third, "[t]he rollover clauses require the university to give years of notice of its intention to let the contract expire."[171] Finally, "[r]ollover clauses are typically one-sided. While they bar the university from removing the coach without paying for the balance of the term, contracts with such clauses tend not to guarantee the university that the coach will not terminate the agreement and coach elsewhere."[172]

Therefore, rollover clauses can be written in four varieties; (1) where there is an automatic right of the university to rollover or extend, (2) where the rollover is subject to the mutual consent of the University and Coach, (3) where the rollover increases the term to the original term in the event that a rollover does not occur in one year, and (4) where the rollover provision is subject to the right on the part of the coach to terminate the contract in the event the rollover does not occur in successive years.

Some state institutions are prohibited from entering into contracts that bind the institution for more than a period of one year.[173] Often, even though those contracts are only binding for one year, there will be an expression between the parties of an intent to continue the employment relationship provided the terms of the original contract are met.[174] An example of such a clause is as follows:

> The term of this Employment Agreement shall be for one (1) year, commencing ______, ______, and terminating ______. The parties hereby acknowledge that the University is an agency of the State of ______ and that the laws of the State of ______ prohibit the University from entering into legally binding agreements for periods longer than one year. The parties also agree, however, that absent the occurrence of an event or events that would allow for termination of this Agreement in accordance with the provisions set forth in Article VI hereof or events beyond their control prohibiting such action, it is their intent to enter into successive

169. *Id.* at 48.
170. *Id.*
171. *Id.*
172. *Id.*
173. GREENBERG & GRAY, *supra* note 1, at 583.
174. *Id.*

one-year Agreements on substantially the same terms and conditions as this Agreement for the next _____ (_____) year(s).[175]

In *University of Arizona v. County of Pima*,[176] the University of Arizona attempted to utilize a "fiscal out statute" to nullify contentions of former University of Arizona head basketball coach Ben Lindsey that he had an employment contract with the state for longer than a one-year duration. Arizona Revised Statute Section 35-154 provides as follows:

> Unauthorized obligations, effect; liability
>
> A. No person shall incur, order or vote for the incurrence of any obligation against the state or for any expenditure not authorized by an appropriation and an allocation. Any obligation incurred in contravention of this chapter shall not be binding upon the state and shall be null and void and incapable of ratification by any executive authority to give effect thereto against the state.
>
> B. Every person incurring, or ordering or voting for the incurrence of such obligations, and his bondsmen, shall be jointly and severally liable therefor. Every payment made in violation of the provisions of this chapter shall be deemed illegal, and every official authorizing or approving such payment, or taking part therein, and every person receiving such payment, or any part thereof, shall be jointly and severally liable to the state for the full amount so paid, or received.[177]

This public statute is referred to as the "fiscal out statute."[178] The court interpreted the statute to operate as a condition subsequent, allowing the University of Arizona to avoid its obligations if prerequisite funding is not forthcoming. "Subject to this implicit condition, contracts for more than one year are valid and do not violate the statutory provision against financial obligation for which there is no appropriation."[179] While neither Arizona nor Lindsey had so pleaded, the court indicated that it could take judicial notice of the fact that the University of Arizona had maintained a men's basketball program after Lindsey's termination. Legislative funding for Lindsey's position must necessarily have been approved.[180] Thus, the court held that the University of Arizona was not prevented by statutory provision from promising a basketball coach a four-year period in which to rebuild the basketball program.

175. Stoner & Nogay, *supra* note 125, at 63.
176. 722 P.2d 352 (Ariz. Ct. App. 1986).
177. ARIZ. REV. STAT. § 35-154 (2000).
178. GREENBERG & GRAY, *supra* note 1, at 584.
179. *Univ. of Arizona*, 722 P.2d at 355, 356.
180. *Id.*

4. *Reassignment Provisions.*

A reassignment clause allows the university to remove a person as head coach without terminating the employment relationship by assigning the coach to a new title and different duties.[181] Often such a clause will contain a statement that the coach is not to be assigned to any job that is not consistent with his education and experience.[182] Several examples of reassignment clauses follow.

Reassignment.

The College retains the right to assign Employee to another position within the College that requires the performance of different duties during the term of this Agreement. In no event, however, will Employee be assigned to a position that is not consistent with his or her education and experience. If the College reassigns Employee, and Employee refuses to accept such reassignment, then the College may terminate this Agreement for cause pursuant to the terms and conditions for termination under Section 4.01(b) herein.

Coach Subject to Reassignment.

Throughout the term of this Employment Agreement, the coach shall use his best full time energies, efforts, and abilities to the exclusive benefit of the University. The parties understand, however, that the University retains the right to assign the Coach to other positions with different duties during the term of this Agreement. In no event, however, will the Coach be assigned to a position that is not consistent with his education and experience. If the University exercises its right to reassign the Coach temporarily and the Coach refuses to accept such reassignment, the University may terminate this Agreement pursuant to Section X hereof. In the event that the University exercises its right to reassign the Coach permanently, Coach may elect to terminate the contract.

Sometimes, reassignment provisions are contained in the University Employment Manual and pertain to coaching positions in that the positions may be classified as general faculty. An example follows:

Reassignment and Removals. Members of the general faculty may be removed from their position by one of the following four procedures: reassignment, adequate notice of termination (Standards for Notice above), by action for just cause, or by abolition of positions or financial stringency.

181. GREENBERG & GRAY, *supra* note 1, at 585.

182. *Id.*

a. Reassignment. Members holding a general faculty position may have their duties reassigned at any time. Reassignment is at the discretion of the unit manager and can involve removal from administrative title supervisory responsibilities, or reassignment to another department. Neither notice (as defined above) nor action for just cause is required to effect a reassignment. The University's responsibility under reassignment shall be to make available a substitute position or duties reasonably commensurate with the person's education, experience, and performance. Administrative reassignment normally has no effect on academic rank or the current faculty term of election.

An example of a reassignment clause can be found in former University of Wisconsin head football coach Don Morton's contract.[183] The clause is found under the heading of "Title and Duties During Appointment Term." The clause states that "During the Appointment Term, you shall hold the appointment title and duties of Head Coach in the University's football program, except that at any time during the Appointment Term with 30 days notice, the appointment title and duties as Head Coach may be terminated and another title and duties assigned."[184] If the coach refuses to accept such reassignment, the university may attempt to terminate the contract pursuant to the termination provisions.[185]

In essence then, if the university wishes to avoid an accusation by the coach that he was constructively discharged by such reassignment and shift the burden of refusing to accept reassignment to the coach. Such refusal to accept reassignment may be a just cause for the university to terminate the employment contract and, thus, limit the university's liability for liquidated damages.

Because universities have so much to lose, careful drafting of reassignment clauses must be undertaken to protect the university. Any language contained in the contract that gives the coach the apparent right to be the "Head Coach" during the term of the contract should be avoided. Such language could result in the coach bringing a suit for injunctive relief for the right to continue as head coach for the balance of the term of the contract. The coach could also contend that reassignment is, in legal fact, a constructive discharge, thus, entitling the coach to perform no duties at all and get paid pursuant to the terms of the contract. There is case law in the employment context that seems to show that when a

183. *Id.*
184. *Id.*
185. *Id.*

coach contracts to fill a particular position any material change in duties or significant reduction in rank could constitute a constructive discharge which, if found to be unjustified, is a breach of the contract.[186] The fact that the coach receives the same salary is immaterial because the status associated with the original position may well have been the primary inducement for making the contract.

The case of *McLaughlin v. Union-Leader Corp.*, also provides guidance for the construction of personal service contracts.[187] *McLaughlin* involved a five-year personal service contract of an advertising manager who worked for a New Hampshire newspaper. After the execution of the agreement, the newspaper installed a new advertising manager and placed McLaughlin on an "indefinite leave of absence" with pay.[188] When McLaughlin sued for breach of contract, the newspaper stopped paying his salary, asserting that McLaughlin had breached the contract by rendering inadequate performance.[189] The jury rejected the newspaper's argument and awarded McLaughlin a substantial verdict, which was upheld on appeal.[190]

The turning point of the case occurred when the court recognized a breach on the part of the newspaper, both in its refusal to pay McLaughlin's salary and its denial of the position he had contracted to receive.[191] To support it's holding, the court cited section 433 of the Restatement of Agency:

> If the [agent] . . . is to receive a fixed salary, a promise by the principal to furnish him with work is inferred from a promise to the employee only if it is found that the anticipated benefit to the agent from doing the work is a material part of the advantage to be received by him from the employment. This anticipated benefit may be the acquisition of skill or reputation by the employee or the acquisition of subsidiary pecuniary advantages, as in the case of the employment of public performers whose reputation will be enhanced by their appearance or diminished by their failure to appear beginners in a trade or profession, and those whose compensation is likely to be enhanced by receiving gratuities from outside sources.[192]

186. *Id.*
187. 116 A.2d 489 (N.H. 1955).
188. *Id.* at 491.
189. *Id.*
190. *Id.*
191. *Id.* at 492.
192. *McLaughlin*, 116 A.2d at 492-93.

In holding that the removal of McLaughlin from the position promised constituted a separate and distinct breach of contract, the New Hampshire court took a significant step toward recognizing certain employment positions as including far more than merely the opportunity to work for an employer and earn the agreed-upon compensation.[193]

Under this reasoning, preventing an employee from ascending to a sufficiently unique employment position (such as that of a coach) could constitute a separate breach of contract, and render the employer liable in damages, even if that employer continued to pay the full contract compensation.[194] Damages in such a situation could flow from the loss of the kinds of "subsidiary pecuniary advantages" and the "gratuities from outside sources" described in the *Restatement*.[195]

In sum, relieving an employee from a position could constitute a compensable loss in addition to the paid compensation to which the employee is clearly entitled under the contract. Moreover, in the area of major college coaching, the value of the lost "subsidiary pecuniary advantages" and "gratuities," such as alumni gifts, television revenues, endorsements, etc., could easily (and often does) exceed the combination of a base salary and related compensation paid by an employer.

To ensure maximum protection, the attorney for the head coach will seek to have a prohibition against reassignment included within the employment contract.[196] An example of a clause prohibiting reassignment is as follows:

> The university hereby acknowledges that the position in which the coach is hired is unique and requires special talents. The position as herein specified in this agreement is the only position for which the coach is hereby being employed. The university shall have no right pursuant to this agreement to reassign the coach to any other position of employment for the university during the term of this employment or any renewal therefor.[197]

Another issue that needs to be defined in any reassignment clause is the compensation that the coach will receive in the newly assigned position, if the position is actually accepted. For instance, does the coach receive only the guaranteed base salary plus university fringe benefits, or does the coach also receive those other compensation perquisites that are normally associated with the position of head coach?

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193. GREENBERG & GRAY, *supra* note 1, at 562-63.
194. *Id.* at 563.
195. *Id.*
196. *Id.* at 586.
197. *Id.*

The presence of a reassignment clause in a coach's contract has been used by a university as leverage with respect to buying out the remaining term of a contract.[198] Essentially, the university will reassign the coach. There will be some confusion or conflict with respect to the salary, fringe benefits and other compensation perquisites available to the coach by virtue of the reassignment. This will eventually lead to a negotiated settlement between the coach and the university with the university using the reassignment clause as leverage in such negotiations.[199]

Don Morton did not bring football fortunes to the University of Wisconsin. Morton was reassigned, pursuant to his contract, from the position of head coach to the position of assistant athletic director in the third year of his five-year contract.[200] The issue in the Morton case was not the reassignment clause, but the compensation that Morton would receive for the remaining two years of his contract term.[201] The university agreed that Morton had a right to his salary, university fringe benefits, plus a car and country club membership.[202] Morton, however, demanded the additional outside income, i.e., his radio and television shows and summer camps that were directly a result of his position of head coach.[203] Although the parties chose to battle their differences in the newspapers, and a lawsuit was Morton's game play, the parties eventually settled their differences with the university buying out the contract and Morton terminating his employment.[204]

In *Monson v. State of Oregon*,[205] Coach Monson brought a breach of contract claim following his removal as head men's basketball coach. On January 27, 1986, plaintiff signed a "Notice of Appointment and Contract," appointing him as an officer of administration, non-tenure related, with the rank of professor and title of head men's basketball coach, for the period July 1, 1987 to June 30, 1990, at an annual salary of $60,000.00. In October 1988, plaintiff signed another "Notice of Appointment and Contract" for the period July 1, 1990 to June 30, 1992. Both contracts provided that "[the] position is subject to the provisions of the Oregon Administrative Rules of the Oregon State Board of Higher Education and to other now existing administrative rules, regula-

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 587.
202. *Id.*
203. *Id.*
204. *Id.*
205. 901 P.2d 904, 905-909 (Or. Ct. App. 1995).

tions and policies of the University of Oregon relating to Officers of Administration which are incorporated by reference herein."[206]

Although none of his Notices of Appointment and Contract mentioned outside income, Monson earned additional income during his employment via a summer basketball camp, outside contracts with equipment sponsors such as Nike and Rawlings Sporting Goods, and through contracts and other agreements involving television and radio companies.[207] These included companies under contract with the university's Oregon Sports Network. The university arranged some of the contracts, but all of the opportunities for outside income made available to Monson were in connection with his duties as University of Oregon's head men's basketball coach. Monson also was given a complimentary country club membership and, after the first year, the use of two new courtesy cars.

Monson met with Bill Byrne, Athletic Director, on March 17, 1992, after the basketball season had ended. At that time, Byrne explained to Monson that the basketball program was not going in the direction that he wanted and that he was reassigning Monson from basketball coach to golf coach. Monson testified that he interpreted Byrne's concerns to be related to the program's finances and the team's win-loss record. Monson told Byrne that he was unwilling to be golf coach. At trial, Monson testified that accepting the position would have been "professional suicide."[208] After his meeting with Byrne, Monson left the campus and never returned or attempted to contact the athletic director, the vice-president, or the president of the university.

Shortly after the meeting, Monson received a letter from Byrne, dated March 17, 1992, confirming their conversation of that date and formally reassigning Monson to head men's golf coach and fund raiser. The letter stated that the university would honor the terms of Monson's contract, but that a change in leadership was needed "for the good of the department."[209]

In a letter to Monson dated April 29, 1992, Byrne offered to reassign Monson to a position as the university's compliance coordinator for NCAA rules and regulations.[210] Monson testified that, as with the golf coach position, had he accepted that position, he would have never been

206. *Id.* at 905.
207. *Id.*
208. *Id.* at 906.
209. *Id.*
210. *Monson*, 901 P.2d at 906.

able to get back into basketball coaching. After Monson failed to accept the new assignment by May 18, 1992, the university considered him to have resigned and paid him no further compensation. Monson testified that, as of that date, he had no unfulfilled contracts or agreements for outside income.

In July 1992, Monson filed a breach of contract action.[211] In his complaint, Monson alleged that he had signed written contracts employing him as head men's basketball coach through June 30, 1994. He argued that he had performed all conditions of the contracts and that,

> [o]n or about March 18, 1992, the defendant State of Oregon discharged Monson as coach at the University of Oregon to Monson's damage in the sum of $178,936.92 together with the sum of $221,066.00 as the value of the money and benefits plaintiff would have received form non-public sources if he remained in the position as coach, and together with the sum of $25,785.60 for the medical, dental and retirement benefits included within the contract but which benefits have been terminated, and all for which Monson demands judgment against defendant State of Oregon.[212]

At the close of Monson's evidence, the state moved for directed verdict on three grounds; (1) that the university had a contractual right to reassign Monson from his position as men's head basketball coach, (2) that the university validly exercised that right to reassign, and (3) that Monson demonstrated no contractual entitlement to receive from the university any of what's been referred to in the case as outside income.[213] The motion was denied, as was the states renewed motion for directed verdict at the close of all evidence.[214] The jury found for Monson and awarded him $292,087.83 in damages.[215]

On appeal, the Court of Appeals found that the university's removal of its head basketball coach, and offer to reassign him as golf coach or basketball rules compliance coordinator, did not violate his contract, which incorporated by reference an Oregon statute allowing university to reassign personnel in accordance with staff needs.[216] The court also held that the university's right of reassignment under the statute included not only the right to reassign for purpose of filling vacant positions but also the right to reassign based on the determination that the

211. *Id.*
212. *Id.* at 906-907.
213. *Id.* at 907.
214. *Id.*
215. *Monson*, 901 P.2d at 907.
216. *Id.* at 911.

staff member was no longer the most effective person for the position.[217] Therefore, even if the coach was reassigned for cause, it did not follow that reassignment decision was not in accordance with staff needs.

5. *Base Salary*

A base salary provision states the amount of money the institution is willing to pay the coach. Several examples follow:

> The base salary paid by the University to the coach for services and satisfactory performance under the terms and conditions of this Employment Agreement shall be at the rate of $_______ per year, payable in _____ installments by the University to the Coach on the _____ day of each calendar month during the term of this Agreement.

> Your salary will be paid at the rate of $180,000 per year, in equal monthly amounts on the last day of the month, prorated accordingly. The amount payable under this paragraph will be reviewed in May of each year in conjunction with a performance review conducted by the Director of Athletics, and upward adjustments, if any, will be made subject to the normal University process. Any new salary amount resulting from such review will be effective as of the first day of the next University fiscal year. The University's fiscal year begins on September 1.

Presuming that the coach's contract is long-term in nature, the contract should also address periodic increases in the base salary during the contract term.[218] In essence, the coach may be entitled to merit increases based upon periodic evaluations. Normally, these merit increases based on periodic evaluations will occur on the same basis as evaluations and increases available to other university coaches or employees within the coach's employment classification.[219] In some instances, the coach, depending upon his leverage, will negotiate a guaranteed minimum base increase.[220] The following example illustrates this point:

> The coach shall be eligible to be paid a merit increase or raise, which raise shall be determined by using the same procedures for evaluating and rewarding meritorious performance as used for other coaches of the coach's classification within the university system. Provided, however, that in no event shall the merit in-

217. *Id.* at 909-910.

218. GREENBERG & GRAY, *supra* note 1, at 589.

219. *Id.*

220. *Id.*

crease during each year during the term of this employment agreement be less than 5% of the previous year's base salary.[221]

The university may be faced with various limitations as to the extent of such salary in the sense that the coach is no more or less an employee of the university than any other university professor. Therefore, the salary granted a coach is scrutinized and must be justified in light of other coaches' salaries and in the interest of preserving the university's emphasis upon its academic purpose. Even so, many coaches nonetheless retain healthy base salaries despite concerns over the school's academic prestige. When you factor in the "package" (outside compensation) coaches are compensated on whole far in excess of the chancellor or the top full professor.[222] Steve Spurrier, University of Florida football coach, at approximately $2.1 million a year, is paid twenty-six times the average salary of a full professor at Florida.[223] Nick Saban, head football coach at LSU earns nearly seventeen times the average salary of a full LSU professor.[224]

What follows are some sample reported base salaries for head football and basketball coaches from various Division I schools as reported by the news media (the figures as herein expressed have not been verified or corroborated as being true or correct):

University of Wisconsin	Barry Alvarez	$500,000.00
Louisiana State Univ.	Nick Saban	$250,000.00
Univ. of Nebraska	Barry Collier	$200,000.00
Univ. of Georgia	Mark Richt	$160,000.00
Univ. of Georgia	Jim Harrick	$160,000.00
Univ. of Alabama	Dennis Franchione	$150,000.00
Iowa State	Larry Eustachy	$160,000.00
Oklahoma State	Eddie Sutton	$130,000.00
LSU	John Brady	$100,000.00
Tennessee	Jerry Green	$150,000.00
Syracuse	Jim Boeheim	$191,770.00
UCLA	Steve Lavin	$153,000.00
Univ. of Cincinnati	Bob Huggins	$150,000.00
Michigan State	Tom Izzo	$267,000.00
Purdue	Gene Keady	$200,000.00
Iowa	Steve Alford	$400,000.00
Oregon State	Ritchie McKay	$140,000.00

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*

Univ. of Kentucky	Guy Morriss	$170,000.00
Tennessee	Phillip Fulmer	$175,000.00[225]

Even assistant coaches are starting to earn six-figure salaries. Seven of Arkansas' nine assistant football coaches now earn at least $100,000 annually.[226] The University of Washington is preparing to aggressively match a national trend toward increasing the compensation for assistant football coaches. The proposed salaries for Washington's nine assistants average $130,000.00 annually, with coordinators Keith Gilberson and Tim Hundley topping the group at $170,000.00 a year.[227] For the first time, the assistants will be offered two-year deals instead of the traditional one-year contracts.[228]

Some contracts will contain a re-opener clause permitting the coach to renegotiate his compensation after a designated period of time. An example follows:

> The amount of the base salary and additional compensation set forth in Section 3.02(a)-(c)- of this Agreement will remain in effect for the first two contract years (1998-1999 and 1999-2000). No earlier than June 1, 2000, the parties agree that they will renegotiate in good faith this amount for the succeeding contract years. It is understood that only the base salary and additional compensation will be subject to renegotiations, and all other provisions will remain in effect during the entire term of this Agreement.

Some coaches' contracts will contain conditional compensation clauses subject to the approval of the university's budget and appropriations.[229] This clause will normally indicate that payment of the compensation as set forth in the contract is subject to approval of annual operating budgets by the university's governing body and appropriations

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225. Brian Dunleavy et al., *Bank Shots*, VILLAGE VOICE, Mar. 22-28, 2000, *available at* http://www.villagevoice.com/issues/0012/jockbeat/shtml; Wire Reports, *Pay Raises Expected for Summitt, Green, available at* http://www.groups.yahoo.com/group/LadyVolsbasketball/message/466; Mike DeCourcy, *UC Rewards Huggins with a Pay Raise*, CINCINNATI ENQUIRER, May 19, 2000, *available at* http://www.enquirer.com/bearcats/2000/05/19/uc_uc_rewards_huggins.html; Don Stewart, *Big Bucks in the Big Ten*, CENTRE DAILY TIMES, Apr. 29, 2001; *UK's Morriss to Earn Barely Half of Mumme's Salary*, Feb. 27, 2001, *available at* http://www.tsn.sportingnews.com/cfootball/articles/20010227/297908.html; Stan Crowley, *Fulmer Gets $200,000 Raise*, CHATTANOOGA TIMES, Jan. 1, 1999, *available at* http://www.chattimes.com/sports/sportsnews/today

226. Scott Cain, *New Hogs Assistants Check In At Top Dollar*, ARKANSAS DEMOCRAT-GAZETTE, Apr. 27, 2001, at C4.

227. *Id.*

228. *Id.*

229. GREENBERG & GRAY, *supra* note 1, at 589.

of sufficient funds to pay the coach's compensation.[230] An example of such a clause is as follows:

> The payment of all forms of compensation set forth in this agreement is subject to the approval of the annual operating budget by the university's governing body, and the sufficiency of appropriations or the availability of sufficient funds within the athletic department's budget to pay such compensation.[231]

6. *Fringe Benefits.*

The employment contract will also contain a provision for fringe benefits. Normally, the coach will be entitled to the standard university fringe benefits appropriate to the coach's university employment classification which may include group life insurance, health insurance, vacation with pay, TIAA/CREF, etc.[232]

In addition, there will be a provision covering reimbursement for expenses including all travel and out-of-pocket expenses reasonably incurred for the purposes of and in connection with the performance of the coach's duties. Reimbursement of expenses are normally made pursuant to and in accordance with standard procedures of the university upon presentation of vouchers or other statements itemizing such expenses in reasonable detail.[233] As additional compensation, the university may provide the coach with the use of an automobile during the term of the employment contract. Sometimes cars are provided through tradeout sponsorship deals (tickets and advertising). Luxury cars are now standard perks for coaches and athletic directors in big time programs. Dealers provide the cars in return for tickets and advertising.

Coaches at some schools get not one luxury car, but two. If the university provides a coach with an automobile, there should be a periodic auto replacement provision and a provision for the use of a university provided gasoline credit card.[234] Finally, the university should provide comprehensive liability insurance and be responsible for all costs of maintenance and repair with respect to the subject automobile.[235]

Other forms of fringe benefits may be offered to the coach depending upon his contractual leverage. They may include tuition waivers for his immediate family members, season and complimentary tickets to

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230. *Id.*
231. Stoner & Nogay, *supra* note 125, at 89.
232. GREENBERG & GRAY, *supra* note 1, at 590.
233. *Id.*
234. *Id.*
235. *Id.*

each of the university's team games including post-season games and tournaments, club memberships to either golf, country club or health club facilities, living accommodations and dependent travel.[236] For example, it was alleged that Jerry Tarkanian, former head men's basketball coach at the University of Nevada at Las Vegas received as a fringe benefit 234-season basketball tickets (with a face value of over $40,000) to dispose of at his will.[237] Joe B. Hall, former head men's basketball coach at the University of Kentucky, was alleged to have received more than 322 complimentary tickets and at one point faced criminal charges for selling those tickets for more than face value.[238]

Coaches are also provided with housing benefits. Clemson provided former head football coach Danny Ford with a home and made payment on his $280,000.00 mortgage for him.[239] Auburn head football coach Pat Dye lives rent-free in a $500,000.00 house.[240] Both head football and men's basketball coaches at the University of Arkansas have $10,000.00 housing allowances.[241] When Jackie Sherrill signed his Texas A&M contract he was promised as much as $75,000.00 toward the purchase of a new home.[242] When John Thompson considered leaving Georgetown for a coaching position at the University of Oklahoma, a group of Georgetown alumni purchased a $300,000.00 house in the District of Columbia and donated it to the University with the provision that Thompson be allowed to live in it for as long as he remained at Georgetown.[243]

It is extremely important for both the coach and the university to specifically list every fringe benefit provided as part of the employment relationship to avoid future assertions by the coach of any assumed fringe benefit that is not listed in the contractual arrangement.[244] An example of a coach's benefit package provision follows:

Employee Fringe Benefits

1. *General.* You are entitled to the University's customary staff employee benefits, including paid vacation, sick leave, the staff retirement plan (TIAA/CREF), health insurance, and

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*

group life insurance. if any benefit is based in whole or in part on compensation, such determination will be made solely on the salary provided for in Paragraph B.1. hereof, and not on any other items of income.

2. *Tickets, Club.* During such time as you are an employee of the University, you will receive fifty (50) tickets to all University football games. You are also required to obtain a membership at a club to be mutually agreed upon, which club will be within a twenty-mile radius of the Evanston campus of the University. The University will pay the initiation fee, dues, assessments, and all business-related expenses at such club as long as you are an employee in good standing.

3. *Automobile.* University will provide, at Coach's option and subject to the consent of the Athletic Director, either 1) an automobile for Coach's use in the performance of his duties (insurance, fuel and maintenance will be provided by University); or 2) an annual automobile allowance of $6,000.00. If Coach elects to have University provide the automobile, the automobile will be of the same quality as that provided to the Athletic Director.

4. *Dependent travel.* Travel will be provided for Coach's spouse to all University football games played outside the ______area on the team plane, on a space available basis. Commercial travel will not be provided unless the team travels on regular commercial flights. Travel will be provided for Coach's spouse and dependent children (as defined in Federal tax law) to any football bowl game in which University participates. Travel will be provided by team plane, school charter or commercial travel, as determined by University. One hotel room will be provided for the family and meal allowances for each family member, in amounts as determined by the Athletic Director.

5. *Moving and Housing Expenses.* (a) The University will pay directly or reimburse you for your moving expenses, provided such expenses are arranged through the University and the University's approved moving company is used. The University will provide, or reimburse expenses for, temporary housing in the area for you and your family as necessary to aid in relocation.

(b) The University will make you a forgivable, interest-free housing loan of $250,000.00. The full loan amount will be paid to you upon your furnishing the Director of Athletics with a signed contract for the purpose of a primary residence in Missouri for you and your family. Your obligation to repay the loan principal will be forgiven in increments as follows:

(1) if you voluntarily terminate your employment or are terminated for cause before January 31, 2000, you will repay the University the full loan amount of $25,000;
(2) if you voluntarily terminate your employment or are terminated for cause on or after January 31, 2000 but before January 31, 2001, you will repay the University $20,000 of the loan amount;
(3) if you voluntarily terminate your employment or are terminated for cause on or after January 31, 2001 but before January 31, 2002, you will repay the University $15,000 of the loan amount;
(4) if you voluntarily terminate your employment or are terminated for cause on or after January 31, 2002 but before January 31, 2003, you will repay the University $10,000 of the loan amount;
(5) if you voluntarily terminate your employment or are terminated for cause on or after January 31, 2003 but before January 31, 2004, you will repay the University $5,000 of the loan amount;
(6) if you voluntarily terminate your employment or are terminated for cause on or after January 31, 2004, you will not repay the University any part of the loan amount.

Any repayment due hereunder will be paid in full within thirty (30) days of the date on which you voluntarily terminate your employment or are terminated for cause. In the event you are terminated without cause, the entire loan amount of $25,000 (or any remaining portion thereof) will be forgiven.

6. *Additional Insurance.* Upon receipt of an invoice or other appropriate documentation, the University will pay you annually an amount equal to the yearly premium for a one million dollar ($1,000,000) term life insurance policy for each of the years you are the Head Football Coach. This annual payment will be in addition to the life insurance ordinarily made available to staff of the University.

7. *Tuition Remission.* As an employee of University, you are entitled to those benefits available to all staff members under the University's qualified tuition reduction plan. In addition to the benefits under that plan, the University agrees to provide you with such necessary additional benefits as will result

> in the following: a) the tuition, for your daughter, Joan, while she is attending University full time in an undergraduate degree program during the Contract Term, shall be remitted in full by the University for a total of not more than 2-1/2 academic years (or until she completes an undergraduate education, if sooner), provided, however, that the University will have no obligation to pay tuition in excess of the tuition charged for a full-time student at Miami University during the relevant time period and provided further that the University will have no obligation to pay tuition for Joan to the extent that she receives tuition remission through Miami University; and (b) your son, John, is admitted to an undergraduate degree program at any college or university during the Contract Term, his tuition shall be paid for or paid in full by University for a total of not more than four (4) academic years, provided, however, that the University will have no obligation to pay tuition in excess of the tuition charged for a full-time student at University during the relevant time period. The tuition benefits provided for in this paragraph are not available for enrollment in summer academic terms.
>
> University will have no obligations under this paragraph unless you are an employee of the University during the period of John's and/or John's enrollment in their respective undergraduate degree programs. Should your employment cease voluntarily in the middle of one of Joan's or John's academic terms, you will repay the University on a pro rata basis for any amounts already paid by University for that or any succeeding term. You will also repay the University in the event University has inadvertently overpaid under this paragraph any amounts due for prior terms.

7. *Moving-Relocation Expense Allowance.*

The coach is bound to incur expenses in his move from his old employment to his new coaching position. The coach's representative should negotiate for a moving-relocation expense allowance. The allowance should cover some, if not all, of the following moving-related expenses: house-hunting expenses, travel expenses, expenses for moving household goods and personal effects including packing, storage and insurance.[245] The allowance should also cover temporary lodging, extraordinary costs incurred to dispose of former residence, such as a mortgage prepayment penalty, costs incurred in the buy-out of an ex-

245. *Id.* at 591.

isting leasehold obligation, and costs such as attorney fees, commissions or other expenses incurred in the purchase of the new residence, etc.[246] The contract clause should either cap out the total amount of dollars that the university is willing to expend on such allowance or specifically list without limit those expenses for which the moving-relocation expense allowance applies.[247]

8. Bonuses.

Bonus clauses in employment contracts are supplemental compensation as an incentive based upon a coach's performance.[248] These incentives may come in the form of a predetermined set amount or in the form of percentages of either the coach's base salary or of the net revenues received by the university as a result of post-season play. What follows is a listing of bonus types:

1. Signing bonus (execution of original employment contract or renewal contract)
2. Participation in post-season tournaments or Bowl games
3. Regular season win/loss record
4. Regular season or conference championship
5. End of year conference championship tournament
6. Home game attendance
7. Graduation rates or grade attainment levels
8. Length of service based on years of employment (annuity)
9. Administrative performance bonus[249]

Steve Spurrier, University of Florida football coach, received a $275,000.00 signing bonus when he agreed to a new contract several years ago.[250] Performance bonuses are often calculated to be a pre-determined amount if the condition generating the bonus is achieved as a percentage of the coach's income. Several examples follow:

> ***Bonus.*** If the football team is selected to participate in a post-season bowl game, you will receive as additional compensation a bonus based on a percentage of your salary as set forth in Exhibit B. The bonus is earned upon qualification or selection and is payable, less any deductions required by law, within thirty (30) days after the determining selection.

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246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. Mark Long, *UF Inks Spurrier For Six Years, $ 12 Million*, UNIV. WIRE, Sept. 9, 1997.

Bowl Bonus Amounts. (Exhibit B)

a. 7.5% if the football team (that is, no bonus will be due if you are coaching, e.g. in a collegiate all-star bowl) appears in any bowl game that has a payout of less than $1,000,000.00;
b. 10% if the football team appears in a bowl game that has a payout of $1,000,000.00 or more;
c. 12% if the football team appears in a Bowl Championship Series (BCS) bowl or is the Big Ten conference champion or co-champion.

The above bonus amounts are not cumulative; for example, if the football team plays in a BCS bowl and that bowl has a net payout to the University of $1,000,000.00 or more, your bonus will be 12%, not 22% (12" + 10%). Further, bonus amounts will be calculated solely on the salary you receive in accordance with Paragraph B.1 and not on any other items of income.

Exceptional Performance Bonuses. In addition to the annual salary to be paid to Coach as provided in this Contract, the University will pay to Coach an exceptional performance bonus for each season in which the University's Men's Basketball Team under his direction as Head Basketball Coach is invited to and does participate in the NCAA post-season championship tournament. Such exceptional performance bonus shall be paid to Coach within forty-five (45) days after completion of such tournament and shall be calculated upon the final standing or position of the team in the tournament as follows:

a. One-twelfth of then current annual salary as provided in Section 2 of this Contract in the event the team is invited to participate in the NCAA post-season championship tournament; or
b. One-sixth of then current annual salary as provided in Section 2 of this Contract in the event the team achieves a position as one of the four teams in the semi-final round of the NCAA post-season championship tournament (the so-called "Final Four"); or
c. $50,000 in the event the team wins a national championship.

Administrative Performance Bonus. Each fiscal year during the term of this Agreement, and provided Coach is a full-time employee of the University on the final day of such fiscal year, Coach shall be entitled to a bonus (not to exceed ten percent (10%) of Coach's Base Salary for such fiscal year) equal to the product of (i) .10, and (ii) the positive difference between (a) the annual budget for the men's intercollegiate basketball during such fiscal year, and (b) the expenditures and expenses for such program during the fiscal year. The parties acknowledge and agree that the Director in his sole discretion shall determine the amount of and items constituting such budget, and that the increase in the amount of such budget shall relate to the rate of inflation, as measured by the Consumer Price Index for the preceding year. The bonus shall be paid on or before September 15, of the next fiscal year.

University Athletics Academic Excellence Incentive Program

1. Coach will receive a bonus, calculated and payable on August 31 of each year in which a bonus under this section is due and payable, for promoting academic excellence in the football program as follows:

1.1 For the graduation of 100% of signed recruits within five years, a bonus of 10% of his annual base salary.

1.2 For the graduation of 90% or more and less than 100% of signed recruits within five years, a bonus of 5% of his annual base salary.

2. Bonuses will be calculated and payable beginning in the fifth year of Coach's employment as head football coach, based upon the class entering University in fall, 2001, and each year thereafter based upon succeeding classes. Transfer students will be considered with the class they have joined.

3. Coach must be then employed as head football coach at each time of calculation and payment for this program to be applicable and for the bonus to become due and payable.

4.2 Bonuses

In any year of this contract, University will pay to Coach bonuses, as set out in Appendix 3, for the following accomplishments:

4.2.1 University finishes first or ties for first in the ACC regular season football standings

4.2.2 University wins the post season Bowl Championship Series National Championship Bowl Game

4.2.3 University participates in the post season Bowl Championship Series National Championship Bowl Game

4.2.4 University participates in a post season Bowl Championship Series Non-Championship Bowl Game (top four bowls: Orange, Sugar, Rose, and Fiesta)

4.2.5 University participates in a post season Non-Bowl Championship Series Bowl Game

4.2.6 University participates in a pre-season Bowl Game

4.2.7 For success in the University Athletics Academic Excellent Incentive Program, as set forth in Appendix 2.

4.2.8 Any other condition deemed sufficient by University -a bonus to be determined.

More than one bonus may be earned in each contract year (except that Coach shall not be paid a bonus under both 4.2.2 and 4.2.3 above). Unless otherwise directed by the Athletic Director, the competitive bonuses described in 4.2.1 through 4.2.6 will be paid on the January 31, following the season in which the bonus was earned. Academic incentive bonuses described in 4.2.7 will be paid on August 31, of each year in which such a bonus is due and payable, and subject to the terms as set forth in Appendix 2.

The popular coach will most certainly be in demand for personal appearances and speaking engagements by local and national alumni and booster groups. The coach and university will normally negotiate a specific number of appearances to be made by the coach as part of his salary compensation package.[251] Appearances over and above the base minimum should result in the coach being compensated in the form of additional compensation or bonus.[252] A sample clause is as follows:

> As part of the compensation as herein stated, coach shall be required to participate in at least ____ alumni-booster personal appearances or speaking engagements. The university shall be responsible for incurring all expenses with respect to the making of such speeches or appearances. In the event that in any contract year the coach is required to make in excess of the minimum amount of personal appearances or speaking engagements as required herein, coach shall receive as additional compensation $______ per speaking engagement or pubic appearance. This paragraph shall not in any way prohibit the coach from separately entering into agreements or making public appearances on his own behalf and not for the university wherein the coach is compensated from a third party other than the university, all as provided by the outside employment provisions of this contract.[253]

A sample of some reported bonuses for current and former coaches includes the following:[254]

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251. GREENBERG & GRAY, *supra* note 1, at 592.
252. *Id.*
253. *Id.*
254. *Id.*

INDIVIDUAL	SCHOOL	BONUS
Neil McCarthy	New Mexico State	$50,000.00 if team has GPA over 2.0
Angela Beck	Nebraska	One month salary for NCAA tournament appearance. Two months salary for Final Four appearances. $50,000.00 for national title. $1,600 for every 500-person increase in attendance
Rick Neuheisel	Colorado	$10,917 for bowl appearance; $21,833 for non-alliance New Year's Day bowl appearance; $32,750 for New Year's Day bowl alliance; $65,000.00 for alliance top ten finish; $76,417 for alliance national title
John Calipari	Umass	35% of NCAA tournament profits, $50,000.00 if team wins Atlantic-10 regular season title. Percentage of tickets sales
Bob Huggins	Cincinnati	$10,000.00 if Bearcats reach the first round of NCAA tournament; an additional $20,000.00 for reaching the 2nd round, $25,000.00 for the Sweet Sixteen, $30,000.00 for the Elite Eight, $40,000.00 more for a Final Four appearance, $50,000.00 for championship game appearance, and another $75,000.00 for a tournament win
Joe Harrington	Colorado	$10,000.00 for NIT appearance; $20,000.00 for Big XII Title and NCAA appearance, $25,000.00 for making the 2nd round, $30,000.00 for Sweet Sixteen, $35,000.00 for Elite Eight, $40,000.00 for Final Four, $50,000.00 for NCAA championship
Lon Kruger	Univ. of Florida	$1,000.00 if 40% of scholarship players graduate; $2,000.00 if 50 % of scholarship players graduate; an extra month's salary in any year that 60% of scholarship players earn degree
Bill Frieder	Arizona State	$14,000.00 for winning NCAA tournament; $10,000.00 for improving academic performance of players; $30,000.00 if season home attendance exceeds 11,000.00
Dan Monson	Univ. of Minnesota	$25,000.00 if squad compiles a 2.8 GPA
Glen Mason	Univ. of Minnesota	$75,000.00 if more than 75% of players graduate; and $25,000.00 for graduation rate of 60-75%.
Nick Saban	LSU	$50,000.00 bonus for winning a national championship; $30,000.00 for attending the Southeastern Conference game; $50,000.00 for taking LSU to a bowl championship series game (Sugar, Orange, Fiesta or Rose Bowl); $25,000.00 for any other bowl appearance; $25,000.00 merit increase if LSU's graduate rate places it among the top 6 SEC schools and an additional $25,000.00 if LSU is among the top two

Jim O'Brien	Ohio State	33.3% of his base salary for a national title; 20% for a Big Ten tourney title, 20% for an NCAA berth, 10% for a Big Ten title; 10% for a Sweet 16 appearance; 10% for making the Final Court, and 10% for winning NCAA coach of the year honors

9. Additional Retirement Benefits and Retention or Loyal Bonuses.

Retirement benefits separate from the university's fringe benefits in the form of an annuity are popular today in college coaching. Such benefits are used as additional incentives to the coach, not only in recognition of his accomplishments, but also in hope of retaining the coach for the full term of his contract.[255] There are two methods for providing additional retirement benefits.[256]

Under the first method, the university can purchase an annuity, which the coach owns. As the university pays premiums, the coach includes those premiums in income.[257] The advantage for the coach is that the earnings are tax deferred until they are withdrawn.[258] The advantage of annuities are that if the interest or earnings are allowed to compound on a tax-deferred basis, there can be a substantial increase in the net worth of the annuity in a very short period of time.[259] Annuities are normally purchased through insurance companies and take on such form as straight or life annuity, joint and survivorship annuity, refund annuity, deferred annuity and variable annuity to name a few.[260] It is suggested that the coach seek assistance of not only a financial advisor, but also a life insurance agent when attempting to structure an annuity that fits his economic and retirement situation.

Under the second method, the university agrees to pay a retirement benefit as deferred compensation.[261] The university can use a commercial annuity to accumulate funds to pay the deferred compensation benefits, but the university must own the annuity and the retirement benefits.[262]

There are special income tax considerations that must be kept in mind when negotiating deferred compensation for university coaches.

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255. *Id.*
256. *Id.*
257. *Id.* at 594.
258. *Id.*
259. *Id.* at 595.
260. *Id.*
261. *Id.*
262. *Id.*

Section 457 of the Internal Revenue Code imposes limitations on the amount that an employee of a tax-exempt organization can defer under a nonqualified deferred compensation plan.[263] As a general rule, an employee of a tax-exempt organization, such as a university, will be taxed on any amount he defers if the "amount of compensation deferred" exceeds $7500.00.[264] While the rule is defined in terms of the amount that the employee actually defers, the Internal Revenue Service has taken the position that the limitations of section 457 also apply to nonqualified retirement plans that do not involve elective deferrals by the employee.[265] Consequently, additional retirement benefits provided as an incentive would be includible in the coach's income currently if the section 457 limit is exceeded.[266]

Presumably, in cases where the coach does not actually defer current compensation but rather the university agrees to pay an additional retirement benefit, the "amount of compensation deferred" would be determined by calculating the present value today of the benefit that is promised in the future.[267] In those situations where the university agrees to set aside a specified amount for the benefit of the coach, the amount set aside would be the "amount of compensation deferred."[268]

The limits imposed by section 457 can be exceeded without targeting current taxation on the deferred amount if there is a substantial risk of forfeiture on the right to receive the benefits.[269] Section 457 defines substantial risk of forfeiture as a condition requiring the future performance of substantial services by an individual.[270] In a case where the university wants to provide a substantial nonqualified retirement benefit, taxation of the promised benefit can be postponed until retirement.[271] However, the right of the coach to receive the benefit must be conditioned on his continuing to perform services for the university until the time when benefits are due.[272]

Since it is not likely that the coach will provide substantial services after retirement, the risk of forfeiture will lapse and the coach will be taxed on the present value of the future benefits or the value of the ac-

263. *Id.*
264. *Id.*
265. INTERNAL REVENUE NOTICE 87.13, 1987-1 C.B. 432, QSA 26 (1991).
266. *Id.*
267. *Id.*
268. *Id.*
269. I.R.C. § 457 (f) (1991).
270. I.R.C. § 457(h)(3)(b).
271. *Id.*
272. *Id.*

count set aside for his benefit at the time he retires.[273] Because of the acceleration of the income tax, it is necessary to structure the payments so that there is a balloon payment at retirement that will permit the coach to pay the tax and still receive the retirement income desired.[274] As subsequent payments are made, a portion of the payment will be tax-free to the coach as representing the amount on which he already paid tax.[275]

Former Auburn University head football coach Pat Dye's financial package was augmented by a retirement plan, including an annuity of $1 million at age 65.[276] Nolan Richardson, whose Arkansas basketball team made the 1990 Final Four, obtained a $1 million annuity to make certain of his stay at Arkansas.[277] Xavier University is reported to have given former basketball coach Pete Gillen an annuity or insurance policy worth $1 million after he rejected overtures to fill the coaching vacancy at Virginia.[278] Denny Crum, the former head men's basketball coach at the University of Louisville, obtained a lump-sum payment of $1 million in 1993 when he fulfilled the obligations of his long-term contract with the school.[279] If Rick Pitino stays for the entire term of his new contract at the University of Louisville, he will receive a $5 million loyalty bonus.[280]

Several examples of funded-deferred compensation plans conditioned on the coach stay for the term follow:

> During each month following (i) the month in which this Agreement is executed (ii) through the last month in which Coach shall act as head football coach of the University's men's varsity intercollegiate football team (including any extension(s) of this Agreement unless the parties shall otherwise agree), the University, in addition to the salary payable to Coach, shall afford Coach with an additional amount at a rate of $____ for the first such month and $____ per month for each subsequent month. However, such additional monthly amounts shall be deferred and shall not become payable until the last day of the term of this Agreement or any subsequent agreement extending the term of Coach's employment as head football coach of the University's

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273. *Id.*
274. *Id.*
275. I.R.C. § 457(f)(1)(B) (1991).
276. MURRAY SPERBER, COLLEGE SPORTS INC. 164-165 (1990).
277. GREENBERG & GRAY, *supra* note 1, at 596.
278. *Id.*
279. Jerry Wizig, *Conference USA Notes*, HOUSTON CHRON., Nov. 8, 1996, at 5.
280. *Pitino's Contract Includes $5 Million Loyalty Bonus*, SPORTING NEWS, Mar. 29, 2001.

men's varsity intercollegiate football team. Any such deferred amounts accrued through the date when they become payable shall be forfeited by Coach in their entirety if Coach shall not be employed by the University as head football coach of its men's varsity intercollegiate football team on the date such amounts are payable. Forfeiture shall not occur, however, if the reason for Coach's failure to be such head football coach on a date the deferred compensation becomes payable was Coach's death, termination for disability, or involuntary termination without cause as defined in this Agreement. In the event of Coach's death prior to a date on which such deferred amounts would otherwise have become payable, the deferred amounts accrued prior to Coach's death shall become payable on the date of Coach's death. Should Coach fail to designate a beneficiary in accordance with the preceding sentence or should the beneficiary not be living at Coach's death, all such amounts shall be payable to Coach's estate. Coach shall designate to the University in writing a beneficiary or beneficiaries to receive such payment in the event of his death. In the event of Coach's termination for disability prior to a date on which such deferred amounts would otherwise have become payable, the deferred amounts accrued prior to Coach's termination without cause shall be paid to Coach upon his termination without cause. The deferred amounts shall not accrue any interest during the period of deferral; shall not be taken into account for purposes of computing salary increases under this Agreement or for purposes of the University's contribution to _____ or any other pension or employee benefit plan on behalf of Coach; shall be paid to Coach without interest within 30 days after the date on which they become payable; and shall be subject on the date they become payable to withholding of taxes and all payroll taxes in accordance with applicable law on the date the deferred compensation becomes payable. All deferred compensation payable to Coach by the University shall be a general unsecured obligation of the University to him. The University shall not be required to set aside or accumulate any funds to pay such obligations, nor shall Coach have any claim against any funds which the University, as a matter of sound fiscal planning determine by it, may elect to set aside or accumulate to fund such obligation when it becomes payable. If the University elects to set aside or accumulate funds to satisfy its obligation, such election, and any funds set aside or accumulated, shall not create, or be construed to create, a trust of any kind or a fiduciary relationship between the University and Coach. Any funds set aside or accumulated shall remain, at all times, part of the University's general assets. Coach's rights to deferred amounts under this Agreement shall not be senior to claims of the University's general creditors, nor may such rights or the deferred amounts to be assigned, encumbered, pledged, or otherwise transferred by Coach. In the event that the Internal Revenue Service or the ______ State Department of Revenue determines that any deferred amounts under this Agreement are includible in Coach's income for purposes of income taxation notwithstanding the fact that Coach has not received such deferred amounts, the University shall pay to Coach an amount equal to the additional federal and state income taxes (including any penalties and interest) which Coach must pay as a result of the inclusion of such amounts in his income. The first such payment shall be made within 30 days of the date it shall be determined that any deferred amounts are includible in Coach's income for purposes of income taxation, and any subsequent such payment(s) shall be made on or before April 15th following any subsequent years in which that determination shall require that deferred amounts be included in Coach's income for purposes of income taxation. The University shall have no right to recover any such amount(s) paid to Coach if Coach ultimately does not receive the deferred amounts that were included in his income for income tax purposes. However, if Coach shall ultimately receive any deferred amounts, the University may deduct from the deferred amounts payable an amount equal to any amount(s), without interest, paid to Coach pursuant to the preceding two sentences.[281]

Deferred Compensation. University will establish and maintain on its books a deferred compensation bookkeeping reserve account ("Deferred Compensation Account") on your behalf. The Deferred Compensation Account will be credited in the amount of $500,000.00 effective December 1, 2000 and subsequently adjusted for the rate of return on the University's Balanced Growth Fund ("Pool 750") as if the $500,000.00 had been placed in Pool 750 on December 1, 2000. The University will credit the Deferred Compensation Account with an additional $100,000.00 on December 1, of each succeeding year through and including December 1, 2005 (the "Vesting Date"). These additional amounts will likewise be adjusted for the Pool 750 rate of return. The Deferred Compensation Account will remain an asset of the University and subject to University creditors, and you will not have a secured interest in such account or be able to assign or alienate such account until you vest.

281. GREENBERG & GRAY, *supra* note 1, at 596 n.354.

> Subject to the conditions contained in this agreement, on the Vesting Date you will be entitled to all of the contributions credited to the Deferred Compensation Account, plus adjustments thereon; provided, however, that you will have no vested right to any part of such compensation unless you are still an employee of the University as of the close of business on the Vesting Date. This amount, less any deductions required by law, will be payable to you by the University within thirty (30) days of the Vesting Date. If your employment terminates for any reason prior to the close of business on the Vesting Date, you will not become entitled to any deferred compensation amount, except as otherwise provided for under Paragraph F.2. Notwithstanding the foregoing, in the event you die or become permanently disabled such that you are unable to perform the duties of Head Football Coach (as determined by the University or the University's insurance carrier) while you are still so employed and prior to the Vesting Date, you or your estate will be entitled to the amount credited to the Deferred Compensation Account as of the date of your permanent disability or death.

Barry Alvarez, head football coach for the University of Wisconsin, signed an amendment to his contract on April 30, 1994, which reportedly guaranteed him a $1 million bonus if he stayed at the University for the next fifteen years.[282] The deal vested Alvarez with three separate bonuses based on five-year increments. He was free to leave the University at any time under the terms of his contract but he would forfeit a bonus payment if he should leave during one of the five-year periods. The Mendota Gridiron Club, the booster arm of the football program, raised the money from private sources and UW alumni. The funds will remain in a UW Foundation account and be distributed by the athletic department in accordance with NCAA rules. Alvarez could only lose the bonus if he left early, or if he ran afoul of NCAA rules, criminal laws, or if UW fired him for cause. The University could have liability for the payments to Alvarez if it were to fire him without cause prior to the completion of a five-year increment.

What follows are the recitals and the establishment of a Trust under a deferred compensation agreement between the Mendota Gridiron Club, Inc. and the University of Wisconsin Foundation for Barry Alvarez.

> *TRUST UNDER DEFERRED COMPENSATION AGREEMENT:*

282. *Id.* at 600.

MENDOTA GRIDIRON CLUB & UNIVERSITY OF WISCONSIN FOUNDATION

RECITALS

WHEREAS, MGC has adopted a nonqualified deferred compensation plan In a Deferred Compensation Agreement effective April 30, 1994 (hereafter, "Deferred Compensation Agreement"), between itself and Barry Alvarez (hereafter, "Alvarez"); and

WHEREAS, MGC has incurred or expects to incur liability under the terms of such Deferred Compensation Agreement with respect to Alvarez, the sole individual participating in such Deferred Compensation Agreement; and

WHEREAS, MGC wishes to establish a trust (hereafter, "Trust") and to contribute to the Trust assets that shall be held therein, subject to the claims of MGC's creditors until paid to Alvarez and his beneficiaries in such manner and at such times as directed by MGC: and

WHEREAS, it is the intention of MGC that this Trust shall constitute an unfounded arrangement and shall not affect the status of the Deferred Compensation Agreement as an unfounded plan maintained for the purpose of providing deferred compensation for a select group of management or highly compensated employees for purposes of Title I of the Employee Retirement Income Security Act of 1974; and

WHEREAS, it is the intention of MGC to make contributions to the Trust to provide itself with a source of funds to assist it in meeting its liabilities under the Deferred Compensation Agreement.

NOW, THEREFORE, the parties do hereby establish the Trust and agree that the Trust shall be comprised, held, and disposed of as follows:

ARTICLE 1:
ESTABLISHMENT OF TRUST

1.1 The sums deposited by MGC with Trustee shall constitute the principal of the Trust to be held, administered, and disposed of by Trustee as provided in this Trust Agreement.

1.2 The Trust hereby established shall be revocable by MGC.

1.3 Upon MGC's transfer of funds to Trustee, Trustee shall establish as many Football Fund accounts as MGC shall direct. For purposes of this Trust Agreement, these Football Fund accounts shall be collectively referred to as "the Trust."

1.4 MGC intends the Trust to be a grantor trust, of which MGC is the grantor, within the meaning of subpart E, Part I, subchapter J, chapter 1, subtitle A of the Internal Revenue Code of 1986, as amended, and shall be construed accordingly.

1.5 The principal of the Trust, and any earnings thereon shall beheld separate and apart from other funds of MGC and shall be used exclusively for the uses and purposes of Alvarez and MGC's general creditors as herein set forth; provided, however, that Trustee shall rely exclusively upon written directions from MGC in accordance with this Trust Agreement as to the disposition of any Trust funds. Alvarez and his beneficiaries shall have no preferred claim on, nor any beneficial ownership interest in, any assets of the Trust. Any rights created under the Deferred Compensation Agreement and this Trust Agreement shall be mere unsecured contractual rights of Alvarez and his beneficiaries against MGC. Any assets held by the Trust will be subject to the claims of MGC's general creditors under federal and state law in the event of Insolvency, as defined in Section 3.1. herein.

1.6 MGC, in its sole discretion, may at any time, or from time to time, make additional deposits of cash or other property in trust with Trustee to augment the principal to be held, administered, and disposed of by Trustee as provided in this Trust Agreement. Neither Trustee, nor Alvarez, nor any beneficiary of Alvarez shall have any right to compel such additional deposits.

10. Outside or Supplemental Income Sources.

Contrary to popular belief, a successful coach's life-style is not conducive to long vacations, lazy afternoons during the off-season and three hours of fun and excitement on game day during the season.[283] The majority of successful coaches are either on the road recruiting, in the film room strategizing, or performing the multitude of duties concomitant to their job. Equally misconceived is the notion that all college coaches earn top salaries. Again, the majority earns only modest incomes.[284]

For this reason, there are clauses within the framework of the contract that provide coaches with the opportunity to supplement their income through outside sources. Outside income significantly affects the economics of high visibility college sports. Coaches of successful football and basketball programs often make more money from outside in-

283. *Id.* at 601.
284. *Id.*

come than they do from their base salaries and value of fringe benefits, which may be restricted either by law or budgetary limitations.[285]

NCAA Bylaw 11.2.2 requires that contractual agreements, including letters of appointment between full-time and part-time coaches in institutions, shall include the stipulation that the coach is required to annually obtain prior written approval from the chief executive officer to receive all athletically-related income and benefits from sources outside the institution.[286] The coach's request for approval shall be in writing and shall include the amount and the source of income.[287] Income sources outside the university include, but are not limited to, income from annuities, sports camps, housing benefits (including preferential housing arrangements), country club memberships, complimentary ticket sales, television and radio programs and endorsement or consultation contracts with athletic shoes, apparel or equipment manufacturers.

The purpose of this requirement is to monitor the sources of a coach's outside income and to increase and maintain university control over intercollegiate athletic programs. The rule also was intended to have university presidents informed of possible conflicts of interest and commercial influences on coaches.

Generally, the university will require that the coach follow certain requisite conditions prior to engaging in any outside business or entrepreneurial endeavor.[288] First and foremost, the university will require that its interest and the obligations owed to it by the coach remain primary. This is based on the fiduciary relationship between the university and the coach and the duty of loyalty owed by each to the other.[289] This covenant is an attempt to avoid inferior performance in the coach's duties resulting from conflicts of interest and compromises.[290]

Second, the coach is subject to all NCAA rules regulating the coach's sources of income. In this way, the coach's independent judgment cannot be persuaded by outside interest groups.

Third, the university will normally retain the right of final approval before the coach is allowed to enter into such agreements.[291] However, the university's right of approval may not be used to unreasonably deny the coach's justifiable request or income expectancies.

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285. *Id.*
286. NCAA MANUAL, *supra* note 116, at 57.
287. *Id.*
288. GREENBERG & GRAY, *supra* 1, note 601.
289. *Id.*
290. *Id.*
291. *Id.*

The coach may or may not retain all of the proceeds that result from outside sources. The issue of whether the income belongs to the university or the coach should be specifically designated in the contract. Presumably, if the coach acts independently of the university, he will retain the proceeds from such outside sources. If, on the other hand, the university supplies the means or personnel to assist the coach, it may require a certain percentage of the proceeds or a predetermined fee. The university will also want a statement that such outside employment is independent of the university's employment, and the university will have no responsibility or liability for any claims arising from the performance of this outside employment.

Finally, the contract, as well as state law, may require the coach to report annually in writing to the President of the University through the Athletic Director, on or before a date certain of each year, all athletically-related income from sources outside the University. Such reporting includes, but is not limited to, income from annuities, sports camps, housing benefits, complimentary ticket sales, or television and radio programs. Endorsement or consultation contracts with athletic shoe, apparel, or equipment manufacturers or sellers and the University will also require reasonable access to all records of coach necessary to verify such report.

What follows is a sample university reporting letter:

Dear Coach:

Enclosed is your reappointment letter agreement for 1992-93. Although its terms are generally self-explanatory and vary little from your 1990-91 agreement, there are some items that I have been specifically asked to call to your attention by the Chancellor and University counsel:

OUTSIDE INCOME REPORTS. Paragraph 10 of your agreement requires you to report your athletically related outside income annually, both for compliance with NCAA Bylaw 11.2.2 and for compliance with the State's ethics law applicable to employees of the University found in Chapter 8 of the Administrative Code. There are two separate forms for this reporting. The report required to meet the NCAA requirement is one of the forms provided to you with the Division's "Policy on Outside Activities and Interests and Employment Perquisites." Once completed, this report must be submitted to me and forwarded to the Chancellor. The other form is sent to all employees by the University and must be submitted to me for forwarding to the Vice Chancellor's office by April 30 each year.

Both forms require that all sources of outside income be identified whether the amount equals or exceeds $5,000.00 or not. The Division form requires that the amount be listed; the University form only asks that you check if the amount is in excess of $5,000.00 from a single source. Outside income that is required to be reported on the Division "Form A" is income from a non-University source that is paid in exchange for your performance of a service for the payer. This includes not only situations where you might be considered an employee of the non-University source of the income, but also payments for services as an independent contractor or from an ownership interest in the business. Some typical sources of outside income are television and radio programs (for which the agreement is between the individual, rather than the University, and the station), endorsements and advertisements for athletic apparel, equipment companies or other businesses, and speaking fees. Clinics and sports camps owned and operated by a coach rather than the institution are also potential sources. This income is distinguished and reported differently from employment perquisites paid for by non-University sources such as club members or for use of an automobile. These will be discussed in more detail later.

Please also note that contracts and arrangements that you may have individually with outside sources to compensate you for services you perform for the outside entity may not obligate the University in any way. There are two general reasons for this: (1) You do not have contracting authority on behalf of the University, and (2) this may constitute the use of one's University position for personal gain, which presents an ethical problem under ____ law.

USE OF THE UNIVERSITY NAME AND LOGOS. Paragraph 10 of your agreement (and NCAA Bylaw 11.1.4) also provides that my advance consent is required in order to use the University's name and logo, either directly or by implication, in any commercial endorsement or other outside activity for which you are personally compensated. Although some limited uses will be permitted, those which might appear to be an endorsement by the University of a particular product or service and those for which the University might be entitled to a licensing royalty for such use will not.

EMPLOYMENT PERQUISITES. These are goods and services or payments provided by non-University sources as additional compensation for the performance of University duties and not for the provision of any service to the payer. Under the Division policy, these may be permitted, but only with advance written consent. This is so they are approved as part of your overall compensation package. In the absence of such approval, their receipt may present an ethics problem under ____ law. These items are also reported annually on Division "Form B" which form may also be used to seek approval.

CAMP INCOME. Currently, all our camps are institutionally owned and operated and coach's services to camps are part of the University duties for which the University compensates you. (This would be distinguished from a camp that you might own and operate as your own business using other facilities, in which case it would be reported as outside income and/or an outside ownership interest.) This compensation is reported on your W-2 form. It appears, however, that if you indeed do work camps that it will be necessary to amend your agreement to provide for this. If so, we should be able to have these amendments available within the next 2 months.

You have recently received copies of the Division "Policy of Outside Activities and Interests and Employment Perquisites" and the relevant forms. Please, if you have not already done so, complete and return Form A and Form B. The University reporting form will be sent at a later time for submission before April 30, 1992.

Sincerely:

The employment contract of Barry Alvarez, football coach at the University of Wisconsin, is subject to:

1. Policy on outside athletically-related employment income and benefits, university employment perquisites and benefits, use of university's name and logos, and outside activities and interests for Division of Intercollegiate Athletic Personnel; and
2. Unclassified Staff Code of Ethics, Ch. UWS-8, Wisconsin Administrative Code. UWS-8 Code of Ethics requires a reporting by the unclassified staff members of outside activities where the staff member earns, for such activities $5,000 or more in a year from a single source.

What follows is a report of Alvarez's outside athletically related income and benefits for the period July 1, 2000 through June 31, 2001.

SECTION A(I)[292]	BUSINESS ACTIVITY	TIME COMMITMENT	EST. AMOUNT
TV Show	Alvarez Productions	12 ½-hour shows (season)	$240,000.00
TV Show sponsor	Ameritech	1 hour	$15,000.00 (1 year)
Radio Shows	13 Local Sponsors: - Avenue Bar - Gordon Flesch - Kline Cleaners - Inn Towner Hotel - Bachmann Pools & Spas - Pedros Mexican Restaurant - Ahrens Cadillac Olds - Midland Builders - Capital Computer Supply - Cleary Building Supply - Planning Associates, Inc. - Mendota Gridiron Club - M&I Bank	12 ½-hour shows (season)	$45,500.00
Radio Show	Learfield Communications	Pre and post game show during season. Network daily shows during season	$33,000.00.00
Radio Show	Team Radio	12 5-min. shows during season	$10,000.00.00
Radio Show	WKLH-Milwaukee	13 10-min. interviews at home	$11,200.00
Radio Show	WLUM-Milwaukee	13 10-min. interviews at home	$13,000.00.00

SECTION B(1)

TYPE OF PERQUISITE	NAME OF BUSINESS	EXPLANATION/REASON	EST. AMOUNT
Merchandise Allotment	Reebok	Staff clothing allowances	$3,500.00
Coach of the Year Award	Victor Awards	Won Coach of the Year	$13,000.00
Coaches Consulting Agreement	Reebok	$140,000.00	
Advisory Board	Wilson	$1,000.00	
Country Club Mem.	Departmental Special Acct.	Head Coach Benefit	$5,580.00
Additional Tickets	Mendota Gridiron Club	Add'l football tickets beyond immediate family	$1,008.00
Extraordinary Achievement for Football	Departmental Special Acct.	Bowl Bonus	5-10-15% Salary

The Knight Foundation Report recommends that "agreements for coaches' outside income be negotiated with institutions, not individual

292. Don Walker, *Outside Income Sweetens Pot*, MILWAUKEE J. SENTINEL, Feb. 16, 2001, at 1C.

coaches. Outside income should be apportioned in the context of an overriding reality: Advertisers are buying the institution's reputation no less than the coaches'."[293]

11. Shoe, Apparel, And Equipment Contracts.

Shoe contracts are generally negotiated between the coach and the shoe company. In most cases, the company will pay the coach a certain sum of money as a consultant and provide a supply of shoes, warm-up togs and gym bags in exchange for the coach's team players wearing the shoes. The benefits are readily apparent to the shoe company as high-profile teams advertise the company's product during every game. At almost every major collegiate program, a shoe company contracts to have its shoes worn by the coach and team members. When considering the hundreds of thousands of dollars television broadcasters are demanding for 30-second commercial slots, the consultant fee for 25 games at 40 minutes a game is a bargain. In a typical shoe contract provision, the coach will want the university's agreement that the coach may require the athletic team to wear the shoes during competition. In addition, the coach will also want the university to consent that he may be permitted to wear, promote, endorse or consult with the shoe, apparel, or equipment manufacturer concerning the design or marketing of such shoe, apparel or equipment without such activities being in violation of the employment agreement.[294]

While arrangements directly with the coach have been the norm, some reported coach shoe and apparel deals include:

School/Company	*Coach*	*Approx. Amount*
Oklahoma State	Eddie Sutton	$151,500.00
Tennessee	Jerry Green	$120,000.00
UCLA	Steve Lavin	$195,000.00
Michigan State	Tom Izzo	$235,000.00
Tennessee	Phillip Fulmer	$250,000.00[295]

A sample shoe, apparel and equipment contract clause with the coach follows:

> *Shoe and Apparel Contracts.* Subject to the provisions of Section 5.03.a hereof, coach may retain any monies offered by shoe or

293. A CALL TO ACTION, supra note 51, at 27.

294. GREENBERG & GRAY, *supra* note 1, at 606.

295. Dunleavy et al., *supra* note 225; Stan Crowley, *Fulmer Gets $200,000 Raise*, CHATTANOOGA TIMES, Jan. 1, 1999, *available at* http://www.chattimes.com/sports/sportsnews/today/Friday/January11999/CTSports.

> apparel manufacturers or sellers in exchange for an agreement that the university men's basketball team shall wear its shoes or apparel during competition or that coach shall wear, promote, endorse or consult with the manufacturer or seller concerning the design and/or marketing of such shoes or apparel, providing that such agreements are in writing, do not extend beyond the term of this Agreement, would be coterminous with coach's termination of employment as Head Coach of the university men's basketball team, and are subject to the approval of the university's Athletic Director.

Shoe companies also have multi-sport contracts with the university to outfit several sports (usually football and men's and women's basketball) and all-school, all-sport, all-the-gear-you-can-imagine deals with marquee programs.[296]

The University of North Carolina has a five-year, $7.1 million contract with Nike for its entire athletic program.[297] For the right to outfit UCLA athletes, Adidas America, Inc. has paid the school's athletic department more than $19 million over a six-year period beginning in July of 1999. Adidas will pay the school $11.15 million in cash and provide about $8 million worth of shoes, uniforms and equipment, all emblazoned with the company's logo.[298] The University of Florida has a five-year deal worth $9 million with Nike covering football along with men and women's basketball. Under terms of its contract with Nike, Florida receives more than $1.2 million a year in cash, $400,000.00 worth of Nike products, and an additional $150,000.00 in cash and products. That makes their agreement one of the most lucrative sponsorship deals in college sports, worth seven times the amount Florida received from Nike in 1990.[299] Texas signed a $22 million, seven-year deal with Nike in 2000.[300]

Not all universities permit the coach to contract directly with shoe or apparel companies. For instance, rather than having contracts directly with shoe companies, coaches at the University of Virginia have the athletic department handle the Cavaliers' endorsement contracts by seeking

296. Amy Moritz, *The Sneaker Advantage In Deals With Apparel Companies, Big 4 Can't Walk With the Major Players*, BUFFALO NEWS, Mar. 6, 2000, at 85.

297. *Id.*

298. Greg Sandoval, *UCLA Gets $19-Million Adidas Deal Bruins: Six-Year Deal Will Bring the School More than $11 Million in Cash*, LOS ANGELES TIMES, Sept. 11, 1998, at C4.

299. Gilbert M. Gaul & Frank Fitzpatrick, *College Sports: What Was Sacred Is Now Up For Sale*, PHILADELPHIA INQUIRER, Sept. 14, 2000.

300. Adam Thompson, *A Groundbreaking Deal*, DENVER POST, June 26, 2001, at D1.

bids.[301] In fact, the Virginia's Attorney General's office issued an opinion that any coach at a state university who accepted promotional money from athletic shoe companies was violating the state conflict-of-interest laws.[302]

Furthermore, under Big Ten rules, shoe and apparel contracts between coaches and vendors must include the university. For instance, the University of Minnesota guarantees Dan Monson that he will make at least $210,000.00 from shoe contracts and basketball camps. If Monson falls short of that amount, the university makes up the difference.[303]

What follows are several sample university-controlled shoe endorsement provisions:

> *Shoes, etc.* (a) You agree to be bound by the existing department-wide endorsement/sponsorship agreement between the University and Adidas American, Inc. ("Adidas") dated August 10, 1997. Further, you agree that upon termination of said agreement, the University will have ninety (90) days from the termination date to enter into another such department-wide agreement, either with Adidas or with any other manufacturer, seller, or product vendor of any shoe, apparel, or equipment company, and that you will be bound by the same; provided, however, that the University guarantees you an annual minimum amount of $90,000.00.00 under any such department-wide agreement. The amount payable under this section shall be considered for increase by the University if there are substantial changes in positive University revenues as a result of a new or renegotiated department-wide endorsement agreement.
>
> (b) In the event the University does not enter into a department-wide agreement with 90 days following termination of the existing agreement with Adidas, you may retain any monies offered to you by shoe, apparel, or equipment manufacturers or sellers or their produce vendors in exchange for an agreement that the University's football team will wear their shoes, apparel or equipment or utilize their products during the competition or that you will wear, promote, endorse, or consult with the manufacturer or seller concerning the design and/or marketing of such shoes, apparel, equipment, or products, provided that such agreements are in writing, do not extend beyond the term of this agreement and are coterminous with your termination of employment. You will

301. GREENBERG & GRAY, *supra* note 1, at 608.

302. *Id.*

303. Doug Grow, *Hmmm, What Does New Coach's Contract Tell Us?*, STAR TRIB. (Minneapolis, MN), Aug. 1, 1999, at 2B.

furnish the Director of Athletics with written copies of any proposed agreements and will obtain the Director's approval prior to entering into any such agreements as are contemplated in this paragraph. The approval of the Director of Athletics will not be unreasonably withheld. Further, in the event any such agreement you enter into under this subparagraph (b) provides you with less than $90,000.00.00 annually, the University will pay you such additional amounts as are necessary to bring your endorsement/sponsorship compensation to the level of $90,000.00.00 per year.

(c) In the event the University does not enter into a department-wide agreement within 90 days following termination of the existing agreement with Adidas and in the further event you do not enter into any agreement of your own pursuant to the preceding subparagraph (b), the University will pay you $90,000.00.00 annually under this provision. Should you subsequently enter into (an) approved endorsement/sponsorship agreement(s), the University's obligation under this subparagraph (c) will be reduced by the amount of compensation you receive from such agreement(s).

4.5 Compensation for Equipment Endorsement Contracts.

As full compensation for participation in the program of Equipment Endorsement contracts, as provided in section 5.5, University will pay to Coach the sum of $155,000.00 per year, payable in equal monthly installments. The parties acknowledge and agree that the compensation for such services is deemed to accrue over the annual term; except as otherwise provided in section 4.10.2, in the event of termination of this contract other than on its termination date, Coach shall be entitled to payment only of the accrued amount due on the date of termination.

5.5 Equipment Endorsement Contracts.

5.5.1 University provides a program for its Department of Athletics under which it enters into contracts for the endorsement of equipment and products by its coaches. University will enter such contracts on behalf of its athletics program and will provide compensation for the Men's Head Football Coach.

5.5.2 Coach will make appearances and endorsements as required by the contract entered by the Department of Athletics or as reasonably required by University.

5.5.3 If the Director of Athletics determines that a particular endorsement opportunity does not fit within the overall program of the department, he may permit the coach to enter

> into such contracts, under such conditions as the Director of Athletics prescribed. All such contracts must comply with the University Policy on Endorsement Agreements then in effect. No other equipment or endorsement contracts will be entered by Coach.

12. *Radio, Television, Internet.*

Common to any sporting enterprise is the media attention it attracts. Radio, television and Internet talk-show programs offering direct contact between the coach and the fans are a lucrative source of income for coaches.[304]

There are various alternatives as to how these show contracts are structured and negotiated. First, the coach may negotiate with a radio or television station independently of the university. The coach would receive the compensation from such show with the university not being responsible for any amounts due under such agreement. A second alternative may include an agreement between the university and a particular radio or television broadcaster for the production of a show in conjunction with its athletic program. The coach is paid directly by the media representative. The coach in these instances should require a minimum dollar guarantee with respect to such shows each year.[305]

A further alternative is where the university itself owns all rights to the program and controls the production and marketing. The coach may be required under such university-controlled and produced shows to assist in procuring sponsors and to make commercial endorsements on behalf of program sponsors. The coach will normally participate in the financial success of such a program on a negotiated basis and normally receive a talent fee or have an entrepreneurial stake in the outcome of the production. If the university controls production and marketing of its television and radio programming, it may require the coach not to appear in any competing radio or television program during the season, except routine news media interviews.[306]

While the structuring of radio and television deals may take different formats, some coaches are reported to enjoy enormous profits from their enterprises.[307] Here are some examples:

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304. GREENBERG & GRAY, *supra* note 1, at 604.
305. *Id.*
306. *Id.*
307. *Id.*

Eddie Sutton	Oklahoma State	$216,000.00
John Brady	LSU	$100,000.00
Jerry Green	Tennessee	$220,000.00
Quin Snyder	Univ. of Missouri	$120,000.00
John Calipari	Univ. of Memphis	$135,000.00
Bob Huggins	Univ. of Cincinnati	$140,000.00
Barry Alvarez	Univ. of Wisconsin	$240,000.00
Guy Morriss	Univ. of Kentucky	$230,000.00
Pat Summitt	Univ. of Tennessee	$220,000.00
Phillip Fulmer	Univ. of Tennessee	$400,000.00[308]

Several sample television/radio contract provisions follow:

> *Media Compensation.* The University shall guarantee the payment to Coach of Sixty Thousand and No/100 Dollars ($60,000.00.00) per each fiscal year until June 30, 1994 and Eight-Five Thousand and No/100 Dollars ($85,000.00.00) per each fiscal year commencing on July 1, 1994 and thereafter (the "Media Guarantee Amount") for appearances by Coach on radio, television or other media; provided, however, that the Director in his sole discretion shall increase the amount of such payment to reflect inflation, the growth in media markets or any other factor. Payment of said guarantee is contingent upon Haskins cooperation with the University in arranging and carrying out media contracts; including, but not limited to, Coach appearance on a pregame or a post-game show. On or before December 31 of each year, Coach shall deliver to the University a written certification of all compensation earned by or paid to Coach from any source during the year for appearing on any media. In the event Coach has been paid less than the Media Guarantee Amount, Coach shall pay the University such overage. The University and Coach, as the case may be, shall make such payment on or before January 30 of the following year.
>
> 4.6 Compensation for Radio and Television Appearances.
>
> As full compensation for successful completion of radio and television appearances, as provided in section 5.6, University will pay to Coach the sum of $100,000.00 per year, payable in equal monthly installments. The parties acknowledge and agree that the compensation for such services is deemed to accrue over the annual term; except as otherwise provided in section 4.10.2, in the event of termination of this contract other than on its termination date, Coach shall be entitled to payment only of the accrued amount due on the date of termination.
>
> 5.6 Radio and Television Appearances.

308. Dunleavy et al., *supra* note 225.

Coach will make himself available for and perform radio and television appearances on a schedule to be determined by University, as provided in this section. Scheduling the appearances it he responsibility of University and Coach is entitled to his full compensation upon being prepared to perform if University fails to provide all or part of the program of radio and television appearances.

5.6.1 Radio appearances.

Coach will make himself available for and perform radio appearances on a schedule to be determined by University. Such appearances may include, but are not limited to, the following: a three to five minute pre-game show before each University Football game; a weekday, evening, or one-hour call-in program during the football season; and a three to five minute post-game show prior to attending the post-game press conference.

5.6.2 Television appearances.

Coach will make himself available for and perform television appearances on a schedule to be determined by University. Such appearances may include, but are not limited to, the following: twelve half-hour television shows, ordinarily to be taped in a television studio on Sunday mornings; and a "bowl show" in the event University participates in a bowl game.

Nick Saban's $1.2 million yearly contract includes wording that allows the university to control his presence on the Internet much like the university handles review on television shows. It is contemplated that the University would have a regular on-line chat with Saban, much like a weekly radio call-in show. LSU's control of Saban on the Internet has added additional revenues to Saban's contract.[309] As universities are now controlling the coaches' radio and television appearances, one might add Internet to the contractual mix.

13. Endorsements.

As a result of their high public profile and stature, coaches may often times attract product or [service] endorsement offers, especially if the coach is enjoying enormous popularity among boosters and the public. Basically, three important ingredients can combine to create a marketa-

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309. Thomas O'Toole, *Net Gains- Future is Now For LSU, New Coach Saban*, COMMERCIAL APP., Dec. 3, 1999.

ble coach: (1) television or media exposure; (2) a creative personality; and (3) a big win. Typically, the university will require that the coach not utilize his university association with any product endorsement. However, the coach will require that he be permitted to identify himself as the coach of the particular athletic team.[310]

Former North Carolina State head basketball coach Jim Valvano is a prime example of an individual who used endorsements to create a lucrative supplemental income. After his team won the NCAA national basketball championship in 1983, Valvano was hailed as one of the top-rated coaches and strategists in the game. His reputation as a colorful speaker and unique personality soared, and his comfort in front of a camera combined to make him an endorsement gold mine. As a result, Valvano came out with his own line of clothes called "Coach "V's", authored an Italian cookbook, and served as spokesman for Ronzoni Pasta. This was in addition to numerous other product endorsements, (car companies, Washington Speakers Bureau, corporate art, etc.) that allegedly earned him as much as $750,000.00 a year.[311]

A sample commercial endorsement clause follows:

> *Commercial Endorsement.* Subject to the provisions of Section 5.03.a hereof, the University and Coach agree that Coach may undertake commercial endorsements of products and services in which he identified himself as the Head Coach of the University's men's basketball team but that he may not otherwise associate the University's name with an endorsement and provided that all such endorsements must cease at the termination of this Agreement.

14. Summer Camps.

Another source of income for the coach is summer athletic camps and clinics. The first issue to be considered is whether the university or the coach is the sponsor of such camps. Normally, the coach will want the opportunity to use the university's facilities in connection with a summer camp without cost or at a minimum cost. Another vital question is which party is to provide and pay for the camp's liability insurance.[312]

Murray Sperber, in his book, *College Sports, Inc.*, provides the following commentary on the profits many coaches earn from their summer camps:

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310. GREENBERG & GRAY, *supra* note 1, at 605.
311. *Id.*
312. *Id.* at 609.

Unlike intercollegiate athletics, with its tremendous start-up costs and huge ongoing expenses, camps can be established and run on a small amount of capital. Because costs tend to be low — thanks to the university — summer camp profits for many coaches are outstanding, in many cases doubling their annual salaries. Coaches run their camps in one-week sessions, for as many as ten weeks during a summer; campers who board pay an average of $200.00 to $300.00 a week; day campers, $150.00 to $250.00. Bill Frieder, when at Michigan, is reported to have grossed over $350,000.00 for his 1986 basketball summer camps. Charles "Lefty" Driesell, the former coach at Maryland, resigned from his coaching job after his star player, Len Bias, died from a cocaine-induced seizure; Driesell, however, insisted on keeping his camps at the university and, in 1986, had 875 kids pay $264.00 each for a $231,000 gross. Moreover, in his settlement agreement with Maryland, the school continued its $20,000.00 subsidy to defray Driesell's dorm and facility bill. Even when Driesell moved to James Madison University, he got to keep his Maryland camps and subsidies.[313]

Reported income from summer camps include:

Jerry Green – Univ. of Tennessee	$80,000.00
Steve Lavin – UCLA	$35,000.00
Quinn Snyder – Missouri	$70,000.00 first two years; $45,000.00 for next three years[314]

Several contract clauses detailing camp provisions follow:

Camp. You or your principal assistant coaches will be allowed to organize a and direct a "Football Camp" on the Northwestern University campus each year during the summer beginning in the summer of 1999, for a term to be mutually agreed upon. You or your principal assistant coaches may retain any monies earned in the conduct of such camps after all costs mentioned below are fully paid. The University will make the facilities for the camp available to you on the same terms as University facilities are made available to other coaches for similar camps. In the conduct of the camp, you will be responsible for the hiring, compensation, and direction of all personnel. Nothing herein will preclude your conducting off-campus or "satellite" camps. With respect to all such camps, whether on-campus or not, you will indemnify the University against liability for all losses, costs, damages, or expenses arising from any claims, including any alleging bodily in-

313. SPERBER, *supra* note 276, at 180.
314. Dunleavy et al., *supra* note 225.

jury, resulting from or in any manner connect with the operation of the camps. In addition, you will obtain comprehensive general liability insurance with coverage in a form acceptable to the University and in a minimum amount of three million dollars ($3,000,000.00). The University will be named as an additional insured on said policy.

Camp. As additional consideration for the services to be rendered by the Coach hereunder, the University shall make available to Coach for summer basketball camps the use of the University gyms and facilities at a rate not to exceed $3.00 per camper per week and will charge Coach lodging and food costs for the campers at normal University rates. The $3.00 per camper per week shall include the use of the University's gym and related facilities, including the locker room, swimming pool and the like and shall further include any and all insurance required for the purposes of operating such summer basketball camps.

Schools and Camps. During the summer months between the end of one academic year and the beginning of the next academic year of the University, Coach shall be authorized in accordance with schedules to be approved by the University Administration to organize and conduct basketball schools, camps and clinics which utilize University buildings, facilities, equipment, materials and services; provided, that any such school or camp conducted by Coach shall comply with all University administrative requirements relating to athletic schools and camps and shall pay to the University such charges and fees as shall be from time to time established by the University Administration for use of University buildings, facilities, equipment, materials and services. The authorization granted above in this section to organize and conduct schools and camps is given pursuant to Section 3.4.5 of the Bylaws of the Board of Regents. Such authorization shall extend to each assistant coach under Coach's supervision and shall continue and be effective throughout the duration of this Contract.

On-Campus Summer Camp. The College has the exclusive right to operate summer youth basketball camps on its campus using College facilities. Employee shall continue to participate in the College's summer basketball camps, compensation therefore will be established by agreement with the College consistent with past practice and shall be in addition to the base salary set forth in Section 5.01 hereof.

5.3 Football Camp

While employed under this contract as Head Football Coach, Coach may conduct a football camp for not more than four weeks each summer, utilizing University property, including but not limited to, practice football fields, gym (if available, as a backup facility), dormitories and dining hall, pursuant to terms and conditions to be agreed to by Coach, the Director of Athletics and the Treasurer of the University or other official designated by the President of University. The terms and conditions must be consistent with those established by the University for the operation of camps. Schedules must be in accord with University scheduling policies. The following conditions apply:

5.3.1 Plans for management, staffing and conduct of the camp will be submitted in writing to the Director of Athletics for approval not later than October 1 of the year preceding the year of the camp. University may make reasonable requirements in writing from any of those items and must approve the plan before the camp may be advertised or operated.

5.3.2 University must be insured, at Coach's cost, by liability insurance affording coverage for University for the camp in an amount as University reasonably determines to be necessary for its protection.

5.3.3 Coach will pay room, bed, board, staffing, facility rentals, and other expenses of the camp and will pay University its standard overhead charge for camps.

5.3.4 The President and the Director of Athletics of University may make a reasonable determination to cancel the camps on the basis that:

5.3.4.1 conducting the football camp would be seriously adverse to the overall interests of University; or

5.3.4.2 there is a substantial and overriding University need for the required facilities during the time planned for the camps.

5.3.5 In the event the camp cannot be held on campus, it may be held in another location with the prior approval of the Director of Athletics.

5.3.6 If in a future year, University determines that it should manage and contract athletic camps on the campus, University will employ and compensate Coach in the football camp in a basis which substantially equals his return in the management of his own camp at University. Coach agrees to that arrangement.

15. Income from Speeches and Written Material.

The contract should permit the coach to deliver speeches, make public appearances, grant media interviews, write and release books and magazine articles, and receive the compensation generated by such activities. The coach will also want permission to utilize publicly his associations with the university as coach. The university, however, will want some type of limiting clause that the coach will represent the university in a professional manner and not bring any discredit or disrespect upon the university in such spoken and written materials.[315]

Success breeds success on the RUBBER CHICKEN CIRCUIT. Southern Cal head coach Larry Smith, who made only $97,000.00 in base salary, was guaranteed $150,000.00 annually from the USC Speakers Bureau. He earned $6,000.00 for each speaking engagement.[316] Terry Donahue of UCLA also earned $6,000.00 for every speaking engagement, while former Pitt head coach, Mike Gottfried, earned $5,000.00.[317] Lou Holtz, while at Notre Dame, however, was the king of college football coaches when it came to speaking engagements.[318] He commanded $18,000.00 per speech and accepted as many as thirty speaking dates during the off-season.[319] Companies interested in retaining Holtz must book him six months in advance.

Some coaches have contractual provisions that require University promotion, appearances, and public speaking as part of the contract and for which the coach is paid directly by the university. For example: Quin Snyder has a promotional fee of $60,000.00 in his contract wherein he is required to promote University of Missouri nationally.[320]

A sample speech appearance clause follows:

> *Income from Speeches, Appearances and Written Materials.* Subject to the provisions of Section 5.03.a hereof, Coach shall be entitled to deliver, make and grant public speeches, public appearances and media interviews and to write and release books and magazine and newspapers articles or columns in connection with his position as Head Coach of the University men's basketball team. Coach agrees to represent the University professionally in all such matters.

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315. GREENBERG & GRAY, *supra* note 1, at 608.
316. *Id.* at 609.
317. *Id.*
318. *Id.*
319. *Id.*
320. Shannon Conner, *Deal Is Done: MU Pays New Basketball Coach Snyder $545,000*, ST. LOUIS POST-DISPATCH, June 19, 1999, at 11.

16. Termination Clauses.

Termination clauses are generally the most difficult to negotiate in the employment contract. Termination controversies between coaches and universities have drawn and will continue to draw great attention from the media. A coach's contract will almost always contain "termination for just cause" provisions empowering the university to terminate the contract at any time at its sole discretion if there is a determination by the university that the coach has committed a violation. The NCAA requires that contractual agreement between a coach and a university includes a stipulation that the coach may be suspended for a period of time, without pay. Also, that the coach's employment may be terminated if the coach is found to be involved in deliberate and serious violations of NCAA regulations.

The Knight Commission reported in 1991 that approximately one-half of all Division I-A institutions (the 106 Universities and universities with the most competitive and expensive football programs) were the object of sanctions of varying severity from the NCAA during the 1980s.[321] It seems that university sports have become a panoply of rules and interpretations. The Knight Commission Report indicated that

> [s]ome rules have been developed to manage potential abuse in particular sports, in particular schools, or in response to particular circumstances of individual athletes. Whatever the origin of these regulations, the administration of intercollegiate athletics is now so overburdened with legalism and detail that the NCAA Manual more clearly resembles the IRS Code than it does a guide to action.[322]

Even the simplest of rules may taint the coach and trigger sanctions in his contract. The Knight Commission requested that the NCAA apply itself to the task of simplifying and codifying complex NCAA rules and procedures.

> Any man or woman on the street should be able to understand what the NCAA does, how it works, how it makes its decisions and, in particular, how it determines its sanctions. As it stands, not only can the average person not answer those questions, but also very few presidents, athletic directors, coaches or student-

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321. Report of the Knight Foundation: Commission on Intercollegiate Athletics, Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics 6 (March 1991).

322. *Id.* at 8.

athletes can predict what it (NCAA) is likely to do in any given circumstance.[323]

The coach will need to protect himself with respect to the required "termination for just cause" provision. The coach may want to require that, in order for termination for just cause to exist, (1) the coach must have committed a *major* violation, and did so knowingly or intentionally in violation of those rules, and (2) such rules violation be determined or adjudicated by an unbiased third party or a court of law.[324]

There is a second category of just-cause provisions calling for termination of the head coach if a member of the coaching staff commits a serious violation of NCAA rules, providing that such acts were either under the control or direction of the head coach. In essence, the head coach becomes responsible for the acts of his coaching staff. Although a principal/agent-respondent superior relationship may exist, once again, the head coach needs to protect himself by specifying that the acts of assistants would have an effect on his employment only if the coach had actual knowledge of such violations or directed that such violations occur. The same should hold true with respect to student athletes who also can violate the rules of the NCAA.[325]

Finally, there are provisions for immediate termination in the event the head coach refuses to perform any of the duties that are reasonably related to his position and/or where such duties cannot be performed because of death, disability or illness that would make the head coach unavailable to perform such duties. Terminations for just cause clauses are normally accompanied by a clause exonerating the university from any further liability for salary benefits or other compensation after termination.[326]

By their very nature, termination for just cause provisions should be negotiated between the parties. A statement of what constitutes grounds for termination is necessary. The coach will also want to establish some independent dispute resolution process such as a due-process hearing, an arbitration hearing, or a third-party mediator for determining whether grounds for termination exist. If the university retains the right to make such determinations unilaterally, the coach's interests may be compromised.[327]

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323. *Id.* at 29-30.

324. GREENBERG & GRAY, *supra* note 1, at 616.

325. *Id.*

326. *Id.*

327. *Id.*

A typical termination or suspension for just cause provision follows:

TERMINATION OR SUSPENSION FOR CAUSE.

(a) The University may terminate or suspend the employment of an athletic staff member for adequate cause. For the purpose of this policy, the terms "adequate cause" and "cause" shall be synonymous and shall mean any one or more of the following:

(1) Neglect or inattention to performance of duties of University employment, after reasonably specific written notice of such neglect or inattention has been given to the athletic staff member by the Athletic Director, and the athletic staff member has continued such neglect or inattention during a subsequent period of not less than ninety (90) days; or

(2) material, significant or repetitive violation or breach of any governing athletic rule or of any University regulation; or

(3) Conviction for violation of a criminal law (excluding minor traffic or non-criminal offenses); or

(4) Fraud or dishonesty in the performance of duties of University employment; or

(5) Fraud or dishonesty in the preparation, falsification, or alteration of

- (i) documents or records of the University, the NCAA, or the Conference;
- (ii) documents or records required to be prepared or maintained by law, governing athletic rules, or University regulations; or
- (iii) other documents ore records pertaining to recruitment of any student-athlete, including, without limitation, expense reports, transcripts, eligibility forms, or compliance reports; or permitting, encouraging or condoning any such fraudulent or dishonest act by any other person; or

(6) Failure to respond accurately and fully within a reasonable time to any reasonable request of inquiry relating to the performance of duties of University employment or relating to performance of duties of any prior employment at another institution of post-secondary education which shall be propounded by the University, the NCAA, the Conference, or other governing body having supervision over the intercollegiate athletics program of the University, or such other institution of post-secondary education; or which shall be required by law, governing athletic rules, or University regulations; or

(7) Counseling or instructing any coach, student, or other person to fail to respond accurately and fully within a reasonable time to any reasonable request of inquiry concerning a matter relevant to any intercollegiate athletics program of the University or other institution of post-secondary education which shall be propounded by the University, the NCAA, the Conference, or other governing body having supervision over the intercollegiate athletics program of the University or such other institution of post-secondary education; or which shall be required by law, governing athletic rules, or University regulations; or

(8) Soliciting, placing or accepting a bet on any intercollegiate athletic contest, or permitting, encouraging, or condoning any such act by any other person; or

(9) participating in, condoning or encouraging any illegal gambling, bookmaking, or illegal betting involving any intercollegiate athletic or professional athletic contest, whether through a bookmaker, a parlay card, a pool, or any other method of organized gambling; or

(10) Furnishing of information or data relating in any manner to football, basketball or any other sport to any individual who the athletic staff member knows or reasonably should know is a gambler, bettor, or bookmaker, or an agent of any such person; or

(11) Use or consumption of alcoholic beverages in such degree as to significantly and materially impair the ability of the athletic staff member to perform his or her duties of University employment; or

(12) Sale, use or possession of any narcotics, drugs, controlled substances, steroids or other chemicals, under circumstances where the sale, use or possession of any such item is prohibited by law or by any governing athletic rule; or

(13) Permitting, encouraging or condoning the sale, use or possession by any student of any narcotics, drugs, controlled substances, steroids or other chemicals, under circumstances where the sale, use or possession of any such item is prohibited by law or by any governing athletic rule; or

(14) Failure to fully cooperate in the enforcement and implementation of any drug testing program established by the university for student-athletes; or

(15) Subject to any right of administrative appeal within the NCAA or Conference, the making or rendition of a finding or

determination by the NCAA, the Conference, or any commission, committee, council or tribunal of the same

(i) of one or more major, significant or repetitive violation of any governing athletic rule; or

(ii) of any such major, significant or repetitious violation by others which were permitted, encouraged or condoned by the athletic staff member, or about which violation the senior athletic staff member knew or reasonably should have known and failed to act reasonably to prevent, limit, or mitigate; or

(16) Failure to report promptly to the Athletic Director any known violation of any governing athletic rule or University regulation by an assistant coach, a student or other person under the direct control or supervision of the athletic staff member; or

(17) Failure to report accurately all sources and amounts of athletically related income as required by governing athletic rules.

(18) Violation by Employee of any of the other terms and conditions of this Agreement not remedied after ten (10) days' written notice thereof to Employee.

(19) Any conduct of Employee in violation of any criminal statute, or involving moral turpitude or disregard of the civil rights of others.

(20) Conduct of the Employee seriously prejudicial to the best interests of the University or its athletic program or which violates the University's mission.

(21) Prolonged absence from duty without the consent of the employee's reporting superior.

(22) Any cause adequate to sustain the termination of any other University coach of the Coach's classification.

(23) An indictment is filed against the Coach charging commission of a felony.

Most coach's contracts provide for automatic termination in the event of the coach's death or disability. A sample clause follows:

Automatic Termination upon Death or Disability of Employee. This Contract shall terminate automatically if Employee dies, becomes permanently disabled or becomes totally disabled within the meaning of the University's disability insurance for employees of Employee's classification in excess of three (3) months so that Employee qualifies for salary continuation benefits. "Permanently disabled" shall mean physical or mental incapacity of a nature which prevents Employee, in the sole and absolute judgment of the University, from performing Employee's duties and obligations.

i. If this Contract is terminated because of Employee's death, Employee's salary and all other benefits shall terminate as of the calendar month in which death occurs, except that Employee's personal representative or other designated beneficiary shall be paid all such death benefits, if any, as may be contained in any benefit plan now in force or hereafter adopted by the University and due to Employee thereunder.

ii. If this Contract is terminated because Employee becomes totally disabled or permanently disabled, in lieu of the guaranteed base salary and any other form of compensation under the Contract, Employee shall receive disability income and any other benefits provided under the University's insurance program.

In some instances a coach's contract is guaranteed against death or disability. An example of a "guaranteed contract" provision is as follows:

Notwithstanding anything to the contrary, the compensation as stated in Paragraph 4 shall be deemed to be a Guaranteed Base Salary. "Guaranteed Base Salary" as used herein shall mean that Coach shall be paid said Base Salary as hereinbefore stated through the term of this Agreement regardless of and in the event that the Coach shall die or become partially and/or totally disabled so that the services as hereinbefore referenced cannot be performed pursuant to the terms hereof. The intention as hereinstated is that the Base Salary as from time to time increased and determined during each year of the term of this Agreement shall be deemed to be guaranteed and paid as a contractual obligation of the University for the entire term of this Agreement as extended. It shall be the University's sole financial responsibility to fund the guarantee as herein contemplated either with its own financial resources and/or the purchase of such insurance policies as to guarantee the payment as herein required.

Finally, if the coach is dismissed for cause, the contract should state the effect of dismissal, including cessation of compensation and fringe benefits as of the end of the month in which such termination occurs. The university will also want to indicate that it has no liability for loss of any collateral business opportunities or any other benefits, perquisites, or income resulting from the job as a result of said termination.[328] A sample no liability provision follows:

> In the event this Employment Agreement is terminated for just cause, all obligations of the University to make further payments and/or to provide any other consideration hereunder shall cease as of the date upon which such termination occurs. In no case shall the University be liable to Employee for the loss of any collateral business opportunities or any other benefits, perquisites or income resulting from activities, including, but not limited to, camps, clinics, media appearances, apparel or shoe contracts, consulting relationships or from any other sources. Employee shall be entitled to continue Employee's health insurance plan and group life insurance at Employee's own expense for up to eighteen (18) months from the effective date of termination, or the minimum period provided by law, if longer, however, Employee will not be entitled to any other employee benefits, except as otherwise provided herein or required by applicable law.

From a coach's perspective, specific acts constituting just cause for termination need to be strictly defined rather than couched in broad-based statements. Such clauses as willful fraud, moral turpitude or habitual intoxication may have a different meaning to different parties. Therefore, these terms, if used in the employment agreement, should be specifically defined in terms of specific prohibited acts.

Several contracts contain clauses that would dictate termination of the coach in the event that acts of moral turpitude were undertaken. In each instance, the coaches' representation asked for exclusion of that clause on the basis that the words "moral turpitude" are ambiguous, difficult to legally define, and ultimately require an independent trier of fact.

At one institution, university counsel indicated that moral turpitude clauses are standard fare and that the university would not remove the subject clause. It took approximately one year to define what the words "moral turpitude" meant, without ultimate success. Some of the questions proposed were: 1) What happens if the coach goes to a bar after the game, drinks too much and urinates on the street? 2) What happens if the coach gets drunk and has sex with a consenting adult? 3) What happens if the coach is caught beating his wife? 4) What happens if the coach uses vulgarity and it is quoted? 5) What happens if the coach makes public statements with respect to his dislike of gays or lesbians? 6) What happens if the coach cheats on his income tax returns? Do any

328. *Id.* at 620.

of these acts constitute moral turpitude under the meaning of the moral turpitude termination for cause provisions?

Specific acts giving rise to a termination for just cause should be scrutinized and strictly defined. Frequently, the university will propose a "morals" clause. Morals clauses are difficult to negotiate and even more tricky to draft.

For example, consider how a general clause prohibiting moral turpitude might be applied in two different contexts. (1) A written report in the form of a letter to university counsel concerning a coach's alleged intoxication at a private function. The coach is employed by a parochial institution located in a small, southern town. (2) Rumors of the exact same conduct, however, the employer is a state institution located in an urban community. Because a finding of just cause is both facts intensive and consequentially severe, the inclusion of a due process procedure is critical.

In negotiating termination for just cause provisions, the definition of "just cause" is factual in nature (such as moral turpitude, prejudicial conduct, prolonged absences, willful fraud, complicity in an immoral act, habitual intoxication, etc.) and, therefore, needs to be determined by an impartial hearing examiner. A due-process procedure should be established for purposes of an objective and impartial hearing to determine whether termination for just cause exists. Such a procedure should include a statement of the charges against the coach, right to a hearing, opportunity for a coach to be present and to provide a defense, the right to have an attorney present, and/or such other procedures as governed by normal university grievance procedures.

Affording a coach some opportunity to a hearing and the right to challenge the university's charges for termination for cause is especially significant if a state institution is involved since the termination itself may be considered "state action" subject to due process provisions. In virtually all litigation in which an individual argues that his constitutional rights have been violated, the court can grant relief only if it finds that there has been state action, *i.e.*, some sort of participation by a government entity sufficient to make the particular constitutional provision applicable.

When head football coach Earle Bruce was fired by Ohio State University and filed a $7.45 million lawsuit against the institution, one contention was that his unlawful termination involved state action and, therefore, his constitutional rights were violated.[329] These included denial of due process and equal protection of the law and deprivation of property without just compensation.

Several examples of a due-process procedure follow:

(a) Employment may be suspended for a period of time, without pay, or terminated, with immediate cessation of salary payments and fringe benefits, for cause. Cause for suspension or termination shall be a violation by a Coach, or a violation by a coach under that Coach's supervision of which that Coach was aware or was of a character or extent that the Coach should have been aware, of any of the rules, regulations or policies of the Big Ten Conference or the National Collegiate Athletic Association, as modified from time to time.

(b) Prior to suspension or termination, an Employee (i) shall be provided with written notice of contemplated suspension or termination, a statement of the reasons and facts in support thereof and (ii) shall have five calendar days from receipt of such notice to deliver a written request for a hearing on the contemplated action. Written requests shall be delivered to the Office of the Chancellor. If no written request is received by the Chancellor as provided herein, a contemplated suspension or termination shall become final five calendar days following the Coach's receipt of such notice.

(c) Upon receipt of a written request for hearing, the Chancellor will appoint a three-person hearing board, composed of two individuals from the Athletic board and one other University coach, to consider the matter and hear reasons for and against the contemplated action. The Coach has the right to appear before the hearing board, with a representative if he desires, to comment on the reasons given for the contemplated action and to present reasons against it. The hearing board shall not be bound by formal or technical rules of evidence. It will send written findings of fact and recommendations on the matter to the Chancellor or, if the Chancellor designates someone else, his designee. The Chancellor or his designee may seek counsel from the Athletic Board, shall consider the matter and notify, in writing, the Coach, the Director of Intercollegiate Athletics and the hearing board of the decision, which shall be final.

Post-termination Hearing.

329. *Id.* at 624.

(a) If the employment of an athletic staff member is terminated or cause under this departmental policy, the athletic staff member upon written request delivered to the Athletic Director shall have the right to a post-termination hearing within a reasonable time after termination of his or her employment.

(b) The post-termination hearing will be conducted by a panel of three academic-administrative employees of the University selected by the Chancellor. Such hearing will be reported by a qualified court reporter, and a transcript of such hearing shall be prepared, at the expense of the University. The athletic staff member shall at his or her option have the right to have a personal attorney present at such hearing, to call witnesses on his or her behalf, and to cross-examine witnesses. The formal rules of evidence applicable in the courts of the State of Nebraska shall not be applicable in any such hearing; however, the hearing panel shall only give probative effect to evidence, which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The hearing panel may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

(c) After the conclusion of the hearing, the hearing panel shall promptly make a written recommendation for decision of the case to the Chancellor and provide a copy of such written recommendation to the athletic staff member. As soon thereafter as possible, the Chancellor, or his or her designated representative, shall inform the athletic staff member of the decision of the Chancellor relating to termination of the athletic staff member's employment. The decision of the Chancellor shall be final and there may be no further administrative appeal of such decision with the University of Nebraska.

Due Process. Prior to any contemplated suspension or termination of Employee, University shall be required to provide Employee with written Notice of contemplated suspension or termination of employment and a statement of the reasons and factual basis and support therefor. Employee, from the date of receipt of said written Notice, shall have five (5) calendar days from receipt thereof to deliver a written Request for a hearing on the contemplated action. Written Request shall be delivered to the office of the Chancellor or President of the University. If no written request is received by the Chancellor or President as provided herein, a contemplated suspension termination shall become final five (5) calendar days following the Employee's receipt of said Notice. Upon receipt of a written Request for

> hearing, the Chancellor or President shall appoint a three (3) person Hearing Panel composed of the Chief Judge of the County in which the main office of the University is located, the President of the local Bar Association who in turn shall select a third arbitrator to consider the matter and hear reasons for and against the contemplated suspension or termination. The Employee shall have the right to appear before the Hearing Panel with a representative, if he desires, including legal representation, to comment on the reasons given for the contemplated action and to present evidence. The Hearing Panel shall not be bound by formal or technical rules of evidence but shall be governed by the arbitration rules of the American Arbitration Association. The decision of the Hearing Panel shall be final and conclusive as to the employment status of the Employee. Employee shall be afforded any and all necessary due process including the right to hire counsel, call witnesses, conduct discovery, examine documentation and cross examine witnesses so that Employee is given a fair and unbiased hearing as to his employment status. The cost of arbitration shall be borne by the University.

In his book, *College Sports, Inc.*, Murray Sperber indicates that although a university may have cause to dismiss a coach, and even though that coach may cause an NCAA investigation and ensuing penalties, universities prefer to settle their differences with a breaching coach rather than fire him outright.[330] This is the case even though the university is absolved from its obligations if the coach violates NCAA rules.

For example, when Mike White finally resigned after years of incurring NCAA sanctions and negative publicity for the University of Illinois, the school rewarded him with $300,000.00 settlement.[331] Barry Switzer settled with the University of Oklahoma for $225,000.00 during its not so recent troubles.[332] After the NCAA put Texas A&M on probation for over twenty-five violations during Jackie Sherrill's regime, the school waved goodbye to this football coach and AD with a $684,000.00 cash settlement and a house.[333] And when Danny Ford resigned in 1990 at Clemson, with the NCAA cops at the gates, he was rewarded with a settlement that may have topped $1.1 million.[334]

Because of the potential for litigation that may ensue after a coach is terminated for "just cause" and the coach's probable contesting of the

330. SPERBER, *supra* note 276, at 165.
331. GREENBERG & GRAY, *supra* note 1, at 621.
332. *Id.*
333. *Id.*
334. *Id.*

facts, the representatives of the coach and the university may want to simply ease the burden of a continued dispute. If there is a proceeding for just cause, the university and the coach may mutually agree to a resignation format with the payment of some termination fee or liquidated damages.

Central Michigan basketball coach Keith Dambrot was fired in early April, 1993, several days after a student newspaper published a racial remark Dambrot made about a black assistant coach during a post-game pep talk to his team.[335] Dambrot told players, "I wish we had more niggers on this team" and referred to assistant coach Derrick McDowell as "a nigger," the student newspaper reported.[336] He admitted making the remarks, but said that his players understood that the word was used to describe "strong character and toughness" in black and white players.[337] "Everyone present understood the context in which the term was used, and no one in our locker room who heard me was offended or complained," Dambrot said in a prepared statement. Dambrot was suspended without pay for four days beginning April 1, 1993.[338] School officials said they believed the suspension was adequate punishment, but changed their minds and fired Dambrot after numerous complaints from students, faculty, and alumni.[339]

Dambrot filed a lawsuit, but was unsuccessful. In 1995, the Court of Appeals for the Sixth Circuit affirmed the firing, despite Dambrot's contention that the use of the offensive language was within his First Amendment rights.[340] After an analysis of the various tests that are used to determine whether speech is protected, the Appellate Court noted that:

> Dambrot's use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teachers. Unlike the classroom teacher whose primary role is to guide student through the discussion and debate of various viewpoints in a particular discipline, Dambrot's role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach's will is paramount. Moreover, the coach controls whom

335. *Id.*
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995).

> plays and for how long, placing a disincentive on any debate with the coach's ideas which might have taken place. While Dambrot argues and we accept as true that he intended to use the term in a positive and reinforcing manner, Dambrot's total message to the players is disturbing.[341]

The University of Minnesota (University) is suing former men's basketball coach Clem Haskins for the return of over $1.5 million paid to Haskins to "buy out" the remainder of his contract.[342] Minnesota is bringing the suit based on four legal grounds: 1) fraudulent inducement; 2) breach of fiduciary duty; 3) breach of contract; and 4) unjust enrichment. The University is pursuing this suit because of alleged major NCAA violations committed by Haskins while he was the head men's basketball coach at the University.

Haskins was hired as the head men's basketball coach at the University in 1986. The University hired him due to his strong stance on running a basketball program free of NCAA violations. In July 1992, Haskins and the University entered into a 10-year coaching contract. The contract provided for termination under both "just cause" and "unjust cause:"

> TERMINATION
>
> Section 3.1. The University's Right to Terminate for Just Cause. The University may terminate this Agreement, suspend salary payments or take other disciplinary action as it deems appropriate for just cause. "Just cause" as used in this Agreement shall mean the following:
>
> A. A major violation of a rule of a Governing Association involving Haskins; or
>
> B. A major violation of a rule of a Governing Association by an assistant men's basketball coach which Haskins knew about or two (2) separate major violations of a rule of a Governing Association by an assistant men's basketball coach which Haskins should have known about; or
>
> C. The commission of a felony and the conviction therefore by Haskins; or
>
> D. A substantial failure to perform the duties required in Section 1.2 hereof due to the gross negligence or willful misconduct of Haskins; or
>
> E. The occurrence of all of the following events:

341. *Id.* at 1189.

342. First Amended Complaint, Bd. Of Regents of the Univ. of Minnesota v. Haskins, Case No. 00-12750 (Jan. 25, 2001).

1. Multiple secondary violations of rules of a Governing Association by Haskins; and

2. A written warning to the University from the Governing Association of a lack of institutional control resulting from the multiple secondary violation of rules of a Governing Association by Haskins described in Section 3.1 (e)(1) above; and

3. A written notice to Haskins from the Director informing Haskins of the written warning to the University from the Governing Association described in Section 3.1 (E)(2) above; and

4. A subsequent secondary violation of a rule of a Governing Association by Haskins relating to a lack of institutional control.

Determination of violation of a rule of a Governing Association shall require a finding by the Governing Association.

Section 3.4. The University's Right to Terminate without Just Cause. The University shall have the right to terminate Haskins' employment without just cause upon ninety (90) days written notice to Haskins. In such event, Haskins shall be entitled to the compensation described in Sections 2.1 (Base Salary) and 2.5 (Media Compensation) of this Agreement for the remaining term of this Agreement, the payment under Section 2.2 (A) (Deferred Compensation) of this Agreement and the benefits described in Section 2.6 of this Agreement and the University shall have no further liability in connection herewith.

Section 3.5. Limited Liability. In no event shall the University be liable for the loss by Haskins of any bonuses, benefits, perquisites, or income, including, but not limited to, those arising out of or relating to consulting relationships, camps, clinics, amounts payable under Sections 2.3, or 2.4, or from any other sources whatsoever, that may ensue as a result of the University's breach or termination of this Agreement, unless otherwise expressly stated herein. The University shall be liable for amounts referenced in Section 3.4 of this Agreement.[343]

In 1999, the Minneapolis and St. Paul media reported allegations made by a University of Minnesota employee named Jan Gangelhoff. The allegations contended that the University of Minnesota men's basketball team was involved in widespread academic fraud. She reported that she had been involved in the furtherance of the fraud for many years and that Haskins had paid her $3,000.00 to provide improper aca-

343. Employment Agreement Between Clem Smith Haskins and Regents of the University of Minnesota, Exhibit A to First Amended Complaint, *Haskins*, Case No. 00-12750.

demic support to members of the men's basketball team. The improper academic support included the tutoring of players and the writing of academic papers for players. Haskins denied all knowledge of any improper activity concerning the men's basketball program when interviewed by the University of Minnesota.

On March 9, 1999, the University hired two attorneys to act as independent investigators. These attorneys were to independently investigate the allegations made by Gangelhoff and determine whether there had been any academic fraud involving the men's basketball team and Haskins.[344]

Prior to the final report by the independent investigators, the University entered into a "buy out" agreement with Haskins.[345] This agreement was formed under the provisions in Haskins' contract for termination for "unjust cause." Under the "buy out" agreement, the University agreed to pay Haskins more than $1.5 million and Haskins agreed to cooperate with the University's investigation. Other terms of the "buy out" agreement also specified that if Haskins did not fully cooperate with the University's investigation, the University had the right to require specific performance through court action.

Haskins continued to deny Gangelhoff's allegations throughout the continuing investigation to both representatives of the University and the NCAA. In July 2000, the University learned that Haskins had earlier that month admitted to NCAA investigators that he had paid Gangelhoff $3,000.00 for her help in furthering academic fraud for the men's basketball team.[346] In November 2000, the University submitted a report to the NCAA outlining numerous violations in the men's basketball program.[347]

The university contends that Haskins' continued denials of any knowledge or involvement in academic fraud throughout the investigation was a direct breach of the "buy out" agreement.[348] The university is claiming that Haskins' involvement in the ongoing academic fraud and his payment of $3,000.00 to Gangelhoff were major violations of NCAA

344. *Minn. Lawyers May Have Known About Allegations*, ATLANTA J. & CONST., March 13, 1999, at 4E.

345. Agreement and Release, Exhibit B to First Amended Complaint, *Haskins*, Case No. 00-12750.

346. Eddie Timanus, *Haskins Records Show Payment To Minn. Tutor*, USA TODAY, Aug. 2, 2000, at 1C.

347. Randy Furst & Dennis Brackin, *Haskins Appeals Coaching Ban*, STAR TRIB. (Minneapolis, MN), Nov. 23, 2000, at 11C.

348. First Amended Complaint, *Haskins*, Case No. 00-12750, Count IV, para. 73-78.

rules and therefore, under the terms of his contract, created a foundation for termination for "just cause."[349] The University also points to numerous other major NCAA violations committed by Haskins. These allegations include instructing members of the men's basketball team to lie to investigators when questioned about the academic fraud allegations and providing misrepresentations and omissions to the NCAA compliance officer.[350]

The university may still have to compensate Haskins even if this suit is successful. Under the provisions of Haskins' contract, Haskins is still entitled to compensation for deferred compensation even if terminated for "just cause."

> Section 2.2 Deferred Compensation. The University shall pay to Haskins or his estate the sum of Five Hundred One Thousand Seven Hundred Seventy-Eight and 12/100 Dollars ($501,778.12) on June 30, 2002, subject to the following:
>
> A. If, during the term of this Agreement, Haskins' employment with the University is terminated by the University in accordance with Section 3.1 of Section 3.4 (subject to sub-paragraph C below), Haskins dies or Haskins becomes disabled, the University shall pay to Haskins or his estate the amount in column C of the chart below corresponding to the date of Haskins' termination by the University, death or disability in column A of the chart below. Such amount shall be payable within sixty ()60) days of the date of termination, death or disability.
>
> B. If, during the term of this Agreement, Haskins' employment with the University is terminated by Haskins (other than by Haskins' death or disability), the University shall pay to Haskins or his estate the mount in column C of the chart below corresponding to the date of termination by Haskins in column B of the chart below. Such amount shall be payable within sixty (60) days of the date of termination.

349. *Id.* para. 9-29.
350. *Id.* para. 30-33.

Column A Date of Termination by University, Date of Haskins' Death, Haskins' Disability	*Column B* Deferred Termination by Haskins	*Column C* Compensation Amount
	prior to 7/01/04	$ 32,754.00
prior to 7/01/04	7/01/94 - 6/30/95	$ 55,919.00
7/01/94 - 6/30/95	7/01/95 - 6/30/96	$101,674.00
7/01/95 - 6/30/96	7/01/96 - 6/30/97	$155,475.00
7/01/96 - 6/30/97	7/01/97 - 6/30/98	$212,503.00
7/01/97 - 6/30/98	7/01/98 - 6/30/99	$278,629.00
7/01/98 - 6/30/99	7/01/99 - 6/30/00	$348,722.00
7/01/99 - 6/30/00	7/01/00 - 6/30/01	$423,821.00
7/01/00 - 6/30/02	7/01/01 - 6/30/02	$501,778.12

C. Notwithstanding anything to the contrary contained herein, if, during the term of this Agreement, Haskins' employment with the University is terminated as a result of the conviction of Haskins of a felony arising from events that occur in connection with the performance by Haskins of his duties hereunder, the University shall have no obligation to pay the deferred compensation hereunder.

Haskins shall pay all levies and taxes imposed by any governmental agency in connection with the deferred compensation and benefits paid to Haskins hereunder.[351]

If a coach violates any rules governing recruiting or player eligibility, the coach may not only be subject to NCAA penalties and termination of his contract but also to a possible breach of contract action by the university. In essence, the university could sue a coach for expectation damages including consequential damages, which would include all revenues lost as a result of the NCAA sanction imposed due to the coach's violation of rules.

In order for a university to receive consequential damages it must demonstrate 1) the damages were caused by the coach's breach of contract, 2) the amount of damages within a reasonable degree of certainty, and 3) the damages sustained were within the contemplation of the parties at the time of agreement.[352] It is likely the university would be able to fulfill this burden of proof. The university should be able to show that

351. Employment Agreement Between Clem Smith Haskins and Regents of the University of Minnesota, Exhibit A to First Amended Complaint, *Haskins*, Case No. 00-12750.

352. Kevin Stangel, *Comment: Protecting Universities' Economic Interests: Holding Student-Athletes And Coaches Accountable For Willful Violations Of NCAA Rules*, 11 MARQ. SPORTS L. REV. 137, 154 (2000).

damages were caused by the coach's violation of NCAA Rules through the investigative report. Secondly, the university should be able to prove damages with certainty by showing its lost television revenues, revenue or inability to participate in post-season play. Finally, it would seem obvious that both the university and the coach could reasonably foresee that a violation of the NCAA Rules would lead to penalties, thus the university may be able to protect its economic interest by recovering consequential damages.

The coach's contract will also reserve to the university the right to terminate the coach's employment for reasons other than those set forth in the termination for "just cause" provision or for no reason at all. However, termination without cause is usually based upon the coach's win-loss record, failure to beat a conference opponent, failure to obtain post-season invitations or appearances, attendance, lack of attendance, loss of favor with boosters, program elimination or financial exigency. This termination provision is more concerned with defining the university's financial liability than the reasons for termination. Thus, when the coach is terminated without cause, the issue centers on the determination of the amount of damages that the coach will receive, the nature of the damages, and the method of payment. A number of options are available, including:

1. A negotiated stated amount.
2. The coach's base salary or other compensation items for the remainder of the contract term.
3. The percentage of the base salary and other compensation packages for the remainder of the agreement.
4. De-escalating amount depending upon the year of the agreement and the termination therefor.
5. A lump sum settlement.[353]

What benefits the coach will receive after a premature termination should be strictly defined in the contract. If liquidated damages are agreed to, the university will want a provision indicating it will not be liable for the loss of any collateral benefits, perquisites or income resulting from activities such as, but not limited to, camps, clinics, media appearances, apparel, shoe contracts, consulting relationships, or from any other sources that may ensue as a result of the university's termination

353. *Id.*

of the agreement without cause or because of the coach's position as such.[354]

Rodgers v. Georgia Tech Athletic Association[355] is the leading case as to whether a coach may recover monetary damages for breach of contract including consequential loss of collateral opportunities. Georgia Tech removed Franklin C. "Pepper" Rodgers from his head football coaching position on December 18, 1979, two years before the expiration of his contract. Rodgers' initial contract was in the form of a letter dated April 20, 1977 with the Association, a nonprofit corporate entity separate from the university, but responsible for the university's varsity athletic program.

Rodgers' contract provided that, in addition to regular compensation, as an employee of the Association, he would be entitled "to various insurance and pension benefits and perquisites" as he became eligible therefore.[356] After termination, the Association had continued to pay Rodgers his normal monthly salary plus pension and insurance benefits. Rodgers' suit, which was for damages in excess of $496,000.00.00, was for "perquisites" over and above the normal compensation covered under his coaching contract.[357]

Rodgers argued that he was entitled to twenty-nine perquisites that he grouped into two categories.[358] The first category included items provided directly to him by the Association but discontinued when he was fired. The second category included items provided through sources other than the Association by virtue of his position as head football coach. What follows is a list of those perquisites as included in the appendix to the case:

A. Benefits and Perquisites Received by Rodgers Directly from Georgia Tech Athletic Association:

(1) gas, oil, maintenance, repairs, other automobile expenses;
(2) automobile liability and collision insurance;
(3) general expense money;
(4) meals available at the Georgia Tech training table;
(5) Eight season tickets to Georgia Tech home football games during fall of 1980 and 1981;

354. *Id.* at 623.
355. 303 S.E.2d 467 (Ga. Ct. App. 1983).
356. *Id.* at 470.
357. *Id.*
358. *Id.*

(6) two reserved booths, consisting of approximately 40 seats, at Georgia Tech home football games during fall of 1980 and 1981;
(7) Six season tickets to Georgia Tech home basketball games for 1980 and 1981;
(8) four season tickets to Atlanta Falcon home football games for 1980 and 1981;
(9) four game tickets to each out-of-town Georgia Tech football game during fall of 1980 and 1981;
(10) pocket money at each home football game during fall of 1980 and 1981;
(11) pocket money at each out-of-town Georgia Tech football game during fall of 1980 and 1981;
(12) parking privileges at all Georgia Tech home sporting events;
(13) the services of a secretary;
(14) the services of an administrative assistant;
(15) the cost of admission to Georgia Tech home baseball games during spring of 1980 and 1981;
(16) the cost of trips to football coaches' conventions, clinics, and meetings and to observe football practice sessions of professional and University football teams;
(17) initiation fee, dues, monthly bills, and cost of membership at the C Capital City Club;
(18) initiation fee, dues, monthly bills, and cost of membership at the Cherokee Country Club;
(19) initiation fee and dues at the East Lake Country Club.

B. Benefits and Perquisites Received by Rodgers from Sources Other Than the Georgia Tech Athletic Association by Virtue of Being Head Coach of Football:
(1) profits from Rodgers' television football show, "The Pepper Rodgers Show," on Station WSB-TV in Atlanta for the fall of 1980 and 1981;
(2) profits from Rodgers' radio football show on Station WGST in Atlanta for the fall of 1980 and 1981;
(3) use of a new Cadillac automobile during 1980 and 1981;
(4) profits from Rodgers' summer football camp, known as the "Pepper Rodgers Football School," for June 1980 and June 1981;
(5) financial gifts from alumni and supporters of Georgia Tech for 1980 and 1981;
(6) lodging at any of the Holiday Inns owned by Topeka Inn Management, Inc. of Topeka, Kansas, for the time period from December 18, 1979 through December 31, 1981;

(7) the cost of membership to Terminus International Tennis Club in Atlanta for 1980 and 1981;
(8) individual game tickets to Hawks basketball and Braves baseball games during 1980 and 1981 seasons;
(9) housing for Rodgers and his family in Atlanta for the period from December 18, 1979 through December 31, 1981;
(10) the cost of premiums of a $400,000.00.00 policy on the life of Rodgers for the time period from December 18, 1979 through December 31, 1981.[359]

These perquisites were not defined in Rodgers' contract. The Association moved for summary judgment arguing that (1) it had met its contractual obligation by continuing to pay Rodgers as required under the contract, (2) it could not be held responsible for Rodgers' collateral opportunities with third-party providers, and (3) it could not be held liable for actions of individuals not related to the contract who decided to cease providing Rodgers gratuitous items when his position as head coach was terminated.[360]

The trial court granted the Association's motion for summary judgment dismissing Rodgers' suit in its entirety.[361] According to Judson Graves:

> Had this decision gone unchallenged, it would have essentially preserved the traditional view described previously. This view would limit the breaching employer's liability to the amount of direct compensation and related compensatory benefits (such as pension contributions, for example) which the employee would have received for the balance of the term of employment had the contract not been terminated early.[362]

Rodgers' appeal, and the appellate decision "broke new ground in Georgia and that may help litigants elsewhere do the same, in expanding the elements of damages potentially recoverable in these coaches' contract cases."[363]

The court of appeals held that some perquisites may be recoverable even though received by Rodgers from third parties not controlled or related to the defendant, if the defendant knew that relieving Rodgers of his position may occasion their loss.[364] In essence, the court of appeals

359. GREENBERG & GRAY, *supra* note 1, at 559-560.
360. *Id.* at 560-61.
361. *Rodgers*, 303 S.E.2d at 469.
362. Graves, *supra* note 123, at 553.
363. *Id.*
364. *Rodgers*, 303 S.E.2d at 471.

found that perquisites could be recovered if all of the following elements were met:

> 1. The damages must be traced solely to the breach;
> 2. The damages must be capable of exact computation;
> 3. The damages must have arisen naturally and according to the usual course of things from such breach; and
> 4. The damages must be such as the parties contemplated them as a probable result of the breach.[365]

As a result, the court of appeals' decision excluded certain damages as a matter of law, while other categories of damages were remanded for a jury trial on the merits.[366]

Of the twenty-nine perquisites that Rodgers tried to collect, eight were thrown out by the court and the other twenty-one were sent to the jury to decide if they were perquisites that were recoverable under the contract and under the elements as previously stated.[367] According to Graves the importance of the case is that the *Rodgers* decision:

> . . .acknowledged some collateral losses may be recovered if proven with specificity. In a special class of cases, extraordinary damages may be recoverable by an employee if the employment position provides a unique status, presents the employee with special opportunities to further one's name and reputation, and to earn money substantially over and above salary and fringe benefits.[368]

The liquidated damage provision will also indicate that the damages are bargained-for damages, constitute a reasonable and adequate consideration to the coach, and shall not be construed to be in the nature of a penalty.

Another issue is the coach's obligation to mitigate damages, *i.e.*, obtain reasonably comparable employment or other employment for purposes of offsetting the damages agreed to be paid by the university. If other employment is obtained, a question will arise as to whether the liquidated damages agreed to be paid by the university cease or if the university's obligation is modified to be the difference between the amount agreed upon and the amount received from the new employer, if any.

Most universities recognize their continuing liability under the contract and continue to pay the coach throughout the contract term or buy

365. *Id.* at 472-73.
366. *Id.* at 474.
367. *Id.* at 475.
368. Graves, *supra* note 123, at 554.

out the contract for a lump sum. It has been suggested that a lump-sum buy-out at the time of the termination, based on the present value of the future payments to become due, is the proper measure of damages rather than the installment method. The theory is that, since the breach is complete upon contract termination, complete damages are then due as well.

When negotiating the buy-out or the liquidated damages provision of a termination without just cause, consideration should also be given to continuation of some collateral benefits such as continued health insurance for a certain time and the payment of moving expenses.

Examples of a termination without cause provision follow:

> (1) The University has the right to terminate the Head Coach's employment under this Agreement at any time without cause, in which event the University will pay the Head Coach:
>
> (a) an amount equal to three years Base Salary at the time of termination, or an amount equal to his Base Salary for the unexpired term of this Agreement, whichever is less. Acceptance by the Head Coach of this amount will constitute full settlement of any claim that the Head Coach might otherwise assert against the University, or any of its agents or employees.
>
> (b) Except for the obligation to pay the Head Coach his Base Salary as set forth in Section 4.01(a), all obligations of the University (to the extent not already accrued or vested) to the Head Coach shall cease as of the effective date of such termination. In no case shall the University be liable for the loss of any Additional Compensation, collateral business opportunities or any other benefits, perquisites or income resulting from activities such as, but not limited to, camps, clinics, media appearances, television or radio shows, apparel or shoe contracts, consulting relationships or from any other source that may ensue as a result of the University's termination without cause of the Head Coach's employment under this Agreement.
>
> (c) All obligations of the Head Coach under this Agreement or otherwise associated with his employment by the University shall cease as of the effective date of such termination.
>
> (2) The University shall have the right to terminate the Employment Agreement prior to its normal expiration without cause. Termination without cause shall mean termination of this Agreement on any basis other than those set forth in Section 6.01.b above. Termination by the University without cause shall be effectuated by delivering to Employee written notice, which notice shall be effective upon the earlier of the date set forth for

termination in such notice or ten (10) days after receipt of such notice by Employee. If the University exercises its right under Section 6.01 to terminate this Agreement without cause, Employee shall be entitled to damages only as provided for below.

(3) If the University terminates this Agreement without cause prior to its expiration, the University shall pay to Employee, as liquidated damages, the following amount: The Coach's current base salary for a one-year period after termination.

The University's obligation shall be paid on a bi-weekly basis prorated over the balance of the term of this Agreement and shall be subject to the Employee's duty to mitigate the University's obligation. Failure to timely pay such liquidated damages shall constitute a breach of this Agreement and such sum shall be recoverable in any court of competent jurisdiction. Employee will be entitled to continue his health insurance plan at his own expense for up to eighteen (18) months from the effective date of termination but will not be entitled to any other employee benefits except as required by applicable law. In no case shall the University be liable for the loss of any collateral business opportunities or any other benefits, perquisites, or income resulting from activities, including, but not limited to, camps, clinics, media appearances, apparel or shoe contracts, consulting relationships or from any other sources that may ensue as a result of the University's termination of this Agreement without cause.

The parties hereto have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that termination of this Agreement by the University without cause prior to its natural expiration may cause Employee to lose certain benefits, supplemental compensation or outside compensation relating to her employment at the University, which damages are extremely difficult to determine with certainty or fairly or adequately. The parties further agree that the payment of such liquidated damages by the University and acceptance thereof by Employee shall constitute adequate and reasonable compensation to Employee for the damages and injury suffered by Employee because of such termination by the University. The foregoing shall not be, nor be construed to be, a penalty.

(4) Employee agrees to mitigate the University's obligations to pay liquidated damages and to make reasonable and diligent efforts to obtain comparable employment, such as a coaching position at a University that competes on a level comparable to that of the University or with a professional team as soon as reasonably possible after termination of this Agreement by the Univer-

> sity without cause. After employee obtains such new employment, the University's financial obligations under this Agreement shall cease.

Examples of termination without cause provisions more favorable to the coach are as follows:

> (1) *Termination Without Cause.* In the event of the Employee's termination by the University for reasons other than as previously set forth in this Agreement during the term of this Agreement, including any extensions therefor, the Employee shall be entitled to the remainder of any Annual Salary plus the University's contribution to TIAA-CREF (retirement plan) owed under and pursuant to the terms of this Agreement plus 50% of the then scheduled radio and T.V. income as hereinbefore referenced to be paid on the same date as if Employee was still employed under and pursuant to this Agreement for the term under which said amount shall be paid. In addition, the University shall continue to provide Employee after such termination with such medical and health insurance benefits for the balance of the term of this Agreement, including any extensions therefor or until Employee obtains other full-time employment with replacement policies, whichever is the lesser period. It is the intention of this paragraph that in the event Employee should be terminated without cause that Employee would continue to receive the compensation and benefits as herein specified for the full remaining term of this Agreement without any obligation to mitigate damages and, in addition to compensation he may be receiving from other employment, even if the employment is similar to the employment as herein stated. In the event Employee is terminated without cause, Employee shall be entitled to conduct the summer camp and receive all benefits therefrom pursuant to paragraph 8 of this Agreement during the summer subsequent to said termination. In no case shall the University be liable for loss of any collateral business opportunity or other benefits, perquisites or income from any sources that may ensue as a result of the University's termination of this Agreement.

> (2) *Termination Without Cause.* In the event the University terminates the employment contract at any time without cause, the University will not be liable for consequential damages of any kind, including but not limited to loss of collateral business opportunities or loss of other income from any sources, that might ensue as a result of such termination, and the University's financial obligation to Employee shall be limited to paying, as liquidated damages and not as a penalty, Employee's compensation as defined in Paragraphs B.1, B.2, and C.3 of the employment con-

tract, together with related Employee benefits as defined in Paragraphs D.1 through D.4 (exclusive of club membership) for the remainder of the Contract Term as defined in Paragraph A. In addition, should the University terminate this agreement without cause prior to the Vesting Date, Employee shall be entitled to the full amount of deferred compensation provided for in Paragraph B.4.

This paragraph and the obligations contained hereunder shall not be subject to any obligation on the part of Employee to mitigate damages or to reduce the contractual obligations or agreements of the University. A liquidated damage amount is an "as bargained for" amount for and in consideration of the other terms and provisions of this Agreement, including the buyout provision as contained herein. The payments hereunder pursuant to the amount as determined shall constitute a continued obligation of the University regardless if Employee obtains other employment as a football coach or other football related employment or any other kind of employment. Regardless of any amounts earned and regardless of the source, no amounts will be offset against the liquidated damages agreed to be paid by the University for the remaining term of the contract if Employee is terminated without cause. The intent of this paragraph is to guarantee Employee that in the event he is terminated without cause, that Employee will be paid the compensation as enumerated herein for the remaining term of his contract on a guaranteed basis without the affirmative obligation to mitigate damages or the obligation to offset any other sources of income.

Employee shall be paid on the same date with respect to the compensation as listed above as if Employee was still employed under and pursuant to this agreement for the remaining term therefor.

There are instances where the coach will challenge his intended dismissal prior to its natural term. In some instances the intended termination will be met with a challenge in that the coach will take the position that the university is in breach of its contract and will request a reconfirmation of the Employment Agreement. Reasons for the challenge may include the following:

1. *Fraudulent Inducement.* Fraudulent inducement to contract and breach of contractual covenants and promises such as promises with respect to increased pay, job security, duration of employment, and no necessity to win.
2. *Disparate treatment.* While other coaches in other programs were given generous and genuine opportunities to build their

programs, and while the University has staked its career on the principal of diversity, the termination of a minority coach may appear as an engagement of disparate treatment.

3. *Impossibility of Performance as a defense to Termination.* If the coach is operating in a job environment that is polluted by NCAA violations and the University fails to undertake institutional control before enduring a coach's tenure; a coach could potentially argue that it was impossible to perform at the level he ascribed to attain by virtue of the University's failure.
4. *Failure to Evaluate.* Most handbooks and contracts require the Athletic Director or President to evaluate the coach's performance. However, when there is a failure to evaluate a position, it could be argued that there has been a failure to set any standards of performance or to direct the coach in the improvement of his continued performance.
5. *Good Faith.* The University violated all contractual covenants of fair dealing and good faith and failed in good faith to set objective standards with respect to the coach's performance.
6. *Constitutional violations for state-supported universities.* There may be both United States and state constitutional arguments relative to due process and equal protection violations.

Where these types of disputes arise in the University's termination challenge, often the ultimate result will be negotiations relative to a settlement rather than a court proceeding. The settlement in many instances may produce, if the claims are legitimate, an amount greater than that specified in the liquidated damage provision as contained in the termination without cause provision.

Several sample settlement agreements follow:

SETTLEMENT AGREEMENT

THIS AGREEMENT is entered into by and between _______ (hereinafter referred to as "Coach") and University (hereinafter referred to as "University") a State-supported institution of higher education acting by and through its authorized officials.

WHEREAS, Coach was employed at University as Football Coach under Contract dated ___________ and

WHEREAS, pursuant to Section XI of said Contract, the University has the right to terminate the Employment Agreement without cause subject to the respective rights of the parties set forth in Section XI, and this right to terminate was exercised by the University on ______________; and

WHEREAS, certain claims have been raised by Coach regarding his employment; and

WHEREAS, for reasons satisfactory to the parties hereto, the parties desire to settle any and all claims relating to Coach's employment and termination of employment.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, Coach and University hereby agree to the following terms of settlement in full satisfaction of all claims or potential claims which have been, or could be, asserted by Coach against University, its officers, agents or employees, arising out of his employment at University or the ending of that employment:

I. WARRANTIES

A. Each party warrants and represents to the other that it has been fully informed and has full knowledge of the terms, conditions and effects of this Agreement.

B. Each party warrants and represents to the other that no promise or inducement has been offered or made except as herein set forth, and that this Agreement is executed without reliance upon any statement or representation by any other party or its agent.

II. OBLIGATIONS

A. University will

1. Pay to Coach the sum of one hundred ninety thousand dollars within 30 days of the execution of this agreement. The parties shall mutually agree upon the actual date of payment.

2. Provide Coach with the use of a car until ____. The car shall be equivalent in make and style to that provided during his employment as Head Football Coach, and will be provided under the same provisions regarding maintenance, insurance and fuel as existed during his employment as Head Football Coach.

3. Honor the liquidated damages obligation set forth in Section M of the Employment Agreement dated ___________, in the amount of the salary remaining under the term of said contract, such amount to be paid on a schedule to be mutually agreed upon, subject to the mitigation obligation of Coach also set forth in said contract.

B. Coach:

1. Agrees to the terms of the release specified in paragraph IV of this Agreement.

2. Agrees that he will in good faith mitigate the University's obligation under Section XI of the Employment Contract dated ___________.

3. Agrees that he will not engage, directly or indirectly, in any correspondence, telephone or email contact or off campus contact involving prospective student-athletes, or the parent(s) or coach(es) of such prospective student-athletes, who have, prior to the effective date of this Settlement Agreement, either

(a) verbally committed to University, or

(b) been offered an athletic scholarship by University unless that prospective student-athlete also has been offered an athletic scholarship by Coach's new employer on or before ___________.

RELEASE

Coach hereby releases, acquits and forever discharges the State of _______; the Board of Governors of The University; the University, all current and former officers, agents and employees of the above-named entities (in both their official and individual capacities); and all successors of the above-named entities from all claims, actions, causes of action, demands, rights, damages, costs, sums of money, accounts, covenants, contracts, promises, attorney fees and all liabilities of any kind or nature whatsoever at law, in equity, or otherwise, which Coach ever had, now has or may have for all events and occurrences from the beginning of the world to the date of this Agreement.

COMPROMISE OF DISPUTED CLAIMS AND COSTS

Each party understands and agrees that this settlement is in compromise of doubtful and disputed claims; that no covenant herein is to be construed as an admission of liability on the part of any party hereby released; that each party hereby released denies any liability for such claims; that each party intends merely to avoid dispute resolution processes and buy peace and, except as specifically provided *for* in this Agreement, each party will bear its own costs, including attorney fees.

EFFECT OF AGREEMENT

This Agreement shall be binding upon and inure to the benefit of the parties and their agents, officers, employees, successors, assigns, heirs, executors, and administrators.

SEVERANCE AGREEMENT AND GENERAL RELEASE

THIS AGREEMENT is made and is effective as of _______, by and between ___________ (hereinafter "University") and ___________(hereinafter "Employee").

WHEREAS, Employee has notified the University of his resignation as Head Men's ____ Coach of the University effective __________; and

WHEREAS, the University wants to recognize Employee's tenure at the University, settle all claims between the parties and finalize the termination of his employment and relationship with the University; and

WHEREAS, Employee wants to finalize the termination of Employee's employment, settle all claims between the parties and accept the severance benefits offered by the University under the terms of this Agreement;

NOW, THEREFORE, the parties to this Agreement, in consideration of the mutual promises contained in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, agree as follows:

1. Employee has submitted written notice of his resignation (attached as Exhibit A) stating that it is effective as of ____ (the "Resignation Date"). Said date was the last day Employee reported for work at the University.

2. On or around ________, the University paid Employee a lump sum amount equivalent to ____ days of pay at his current weekly salary as payment for his accrued vacation time through his Resignation Date. In addition, the University shall pay Employee severance pay from mid-day on March 1, 2000, through June 30, 2000, or until he has secured other regular employment, whichever occurs first, an amount equivalent to his weekly salary as of the Resignation Date. The first payment shall be made within five business days of the expiration of the revocation period set forth in Paragraph 10 of this Agreement, and will include payment for all payroll periods elapsed since the Resignation Date through the last full payroll period ending prior to the expiration period of the revocation with appropriate state and federal taxes and withholding deductions made. The remaining severance pay shall be paid in accordance with the University's payroll with appropriate state and federal taxes and withholding deductions made. The University shall also pay its portion of the monthly premium for Employee's group health insurance through the University for coverage during the period in which Employee receives severance pay. Thereafter, Employee will have the option to continue group health care coverage at his own cost as provided for terminated Employees as required by law. However, February 10, 2000 will be deemed the date of the "Qualifying Event" under the provisions of applicable state law governing insurance continuation rights. No other fringe benefits Employee received prior to his

termination will be paid by the University after February 10, 2000. The parties agree the severance and accrued vacation payments Employee receives shall be deemed wages payable for each week (for the weeks beginning February 11, 2000 and ending the week ending June 30, 2000) he receives severance pay for unemployment insurance purposes. Employee shall notify the University within three days of his accepting regular work or becoming self-employed. Severance payments shall cease as of the day Employee begins regular work for a new employer.

3. Employee's benefits under the University Retirement Plan, including any accruals for any period in 2000, shall be governed by the provisions of that plan.

4. The University will provide Employee with a letter of reference which addresses the positive aspects of Employee's job performance while an employee of the University, but which does not mask the circumstances of Employee's resignation. A copy of this letter of reference will become part of Employee's personnel file and shall be available for use by Employee in future employment search situations.

5. Employee agrees to promptly return to the University any documents or property and copies of any documents or property in his possession pertaining to the University's business. Employee shall not copy or cause to be copied any of the records of the University or its sponsored corporation or organizations.

6. Employee agrees not to retaliate against or harass any officer, director or employee of the University or other sponsored corporation or organization. Employee further agrees that he will not communicate in any manner, anything negative regarding the University or other sponsored corporations or organizations or any of their officers, directors, agents, employees, or act in any way or communicate anything that may jeopardize the University's or its other sponsored corporation's or organization's relationships with their students, employees or the community that they serve.

7. In consideration for the amounts to be paid to Employee pursuant to Paragraph 2 of this Agreement, Employee hereby fully and forever discharges and releases the University, its past and present affiliated corporations or business entities and its past and present employees, agents, attorneys, representatives, officers and directors, from any and all actions, causes of action, claims, demands, damages, costs, expenses and compensation on account of; or in any way growing out of; any and all known and unknown damage resulting to or to result from Employee's employment

and/or termination of his employment at the University, but not including acts committed after the date of this Severance Agreement and General Release.

By way of example only and without in any way limiting the generality of the foregoing language, Employee's release shall include any claims for relief or causes of action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e, *et seq.*; the Americans With Disabilities Act of 1991, 42 U.S.C. ' 12101 *et seq*; the Rehabilitation Act of 1973, as amended, 29 U.S.C. secs. 791, 793 and 794; the Civil Rights Enforcement Statutes, 42 U.S.C. secs. 1981 through 1988; the Employee Retirement Income Security Act of 1974, 29 U.S.C. sec. 1001, *et seq.*; the National Labor Relations Act; 29 U.S.C. sec 151, *et seq.*; the Fair Labor Standards Act of 1938, 29 U.S.C. ' 201 *et seq.*; the Occupational Safety and Health Act of 1970, 29 U.S.C. ' 651 *et seq*; the Family and Medical Leave Act of 1993, 29 U.S.C. ' 2601 *et seq.*; the Sherman Act, as amended, 15 U.S.C. '1 *et seq.*; the Clayton Act, as amended, *'15* U.S.C. '12 *et seq.*; the Wisconsin Fair Employment Laws, ' 111.33, *et seq.*; the Wisconsin Family and Medical Leave Act, ' 103.10, Wis. Stats.; and any other federal, state or local statute, ordinance, or regulation dealing in any respect with discrimination or termination of employment, and, in addition, from any claims, demands, or actions brought on the basis of alleged wrongful or retaliatory discharge, breach of an oral or written contract, misrepresentation, defamation, interference with contract or intentional or negligent infliction of emotional distress, damage to business or professional reputation, conspiracy, negligence, invasion of privacy, or any other intentional tort or negligence claim or contract claim of any sort under the common law of any state or other jurisdiction.

Employee intends in executing this Agreement that it shall be effective as a bar to each and every claim, demand, and cause of action Employee may have at the time of the execution of this Agreement.

8. Employee shall not disclose information related to University's or its other sponsored corporation's or organization's operations or any student or personnel information he has received as an Employee of the University to persons other than to properly authorized University employees and agents at any time after his resignation without the prior written consent of the University unless required by law. Employee shall not act in any way to impugn the reputation of the University, its agents or employees, jeopardize the University's relationships with students or use or

disclose directly or indirectly University's confidential business information, including trade secrets, student lists and personnel information he has learned of as an employee of the University for a period of two years after his termination. Furthermore, Employee shall cooperate with the University as may be necessary for University operations after termination of his employment, including, but not limited to, personnel matters.

9. Employee acknowledges that he has had sufficient time to read this Agreement and consider his acceptance of this Agreement and voluntarily enter into this Agreement with full knowledge of its meaning and consequences and with the specific intention of resolving all outstanding matters pertaining to Employee's employment and termination of his employment at the University. In entering into this Agreement, he is relying on his own judgment and knowledge and not on representations or statements made by the University, its employees or agents. Employee is aware of his right to consult an attorney before he enters into the Agreement. Employee shall have 21 days to consider whether to accept this Agreement.

10. For a period of seven days following the execution of this Agreement, the Employee and Spouse may revoke this Agreement. Furthermore, this Agreement will not become effective or enforceable until the revocation period has expired. No severance payments will be made until this Agreement has been executed and not revoked within the seven days allowed by law.

11. The parties' participation in this Agreement is not to be construed as an admission of any wrongdoing or liability whatsoever by or on behalf of the Employee or the University, its employees or agents.

12. This Release is intended for the sole purpose of resolving the issues between the parties concerning Employee's employment and separation of his employment from the University. It is not intended for any other purpose and shall not be used by any other party for another reason.

13. Employee shall not disclose the existence of or the terms of this Agreement to any third party without the written consent of the University except for the purposes of enforcing this Agreement, to their attorneys and accountants for legal, financial and tax advice concerning this Agreement or providing information to appropriate governmental agencies.

14. In the event of breach of any provision of this Agreement, the party not in breach shall be released from its obligations under this Agreement and shall be entitled to seek judicial enforcement

of this Agreement against the breaching party. The breaching party shall be liable to the other party for any and all attorneys' fees incurred in enforcing this Agreement.

15. If; for any reason, a court of competent jurisdiction finds any provision of this Agreement to be illegal or unenforceable, the offending provision will be deemed amended to the extent necessary to conform to the applicable law, or, if it cannot be so amended without materially altering the parties' mutual intent to facilitate the settlement of all claims released in Paragraph 7 without involving the University in administrative or legal proceedings, then this Agreement will be null and void. If this Agreement becomes null and void, then the University will have no obligation to Employee under this Agreement.

16. This Agreement shall be construed and enforced in accord with the laws of the State of Wisconsin. It constitutes the entire agreement between the parties.

The undersigned further state that they have carefully read the foregoing Agreement, know the contents thereof and sign the same under their own free will, being duly authorized to do so.

Recent buyouts of Division I head football coaches include the following:

Bill Curry, University of Kentucky. Total amount: $610,000.00. Fired near end of the 1996 season. The university paid out the remaining two years of his annual $305,000.00-a-year contract.

Ron Cooper, University of Louisville. Total amount: $1 million. Fired after the 1997 season by new U of L athletics director Tom Jurich. Base salary was $107,122, plus $58,917 from radio and television appearances. According to his contract, U of L was required to pay about $310,000.00 to buy out the final two years of the contract. Jurich said school officials also considered the income Cooper would have received from his radio and television package, from various clothing, shoe and promotional deals and from the estimated amount of the coach's deferred compensation package.

Jim Donnan, Georgia. Total mount: $2.1 million. Fired after third season. Was paid for the three years remaining on a six-year contract. That figure included $494,000.00 for three years of his base salary of $164,800, and more than $1.3 million for 2-1/2 yeas in compensation for his radio and television package, Nike endorsements and camp revenue. Donnan also received $300,000.00, plus interest, from an annuity that paid him $100,000.00 per year for each winning season. It was also reported on April 18, 2001, that the University of Georgia Athletic Board approved an addendum to the settlement with former football coach Jim Donnan that will pay him an additional $255,250. The additional $225,250 was a commitment made by Adams to Donnan in the summer of 1998. Donnan had turned down an offer from North Carolina to remain with Georgia, and his contract was re-negotiated. But, according to Adams, six months after Donnan turned down UNC there was still no signed contract.

Mike DuBose, Alabama. Total amount: $1 million. Fired after the 2000 season. Was under contract through 2004 but will be paid his $525,000.00-a-year salary plus benefits through January 2002. Alabama athletic director Mal Moore said that DuBose wasn't to receive any "lump sum payment."

Gerry DiNardo, LSU. Total amount: $600,000.00. Fired after the 1999 season. Was paid the remaining four years of his $150,000.00 annual salary but did not receive the rest of his package, which included $300,000.00 annually in radio and television appearances and $135,000.00-a-year in endorsements.

John Cooper, Ohio State. Total amount: $1.8 million. Fired in 2000 after 13 years. Buyout consisted of $1 million from the athletic department's emergency reserve fund and $800,000.00 from several other non-restricted department accounts.

Paul Hackett, USC. Total amount: $800,000.00. Fired after the 2000 season. Was paid out the remaining two years of a five-year contract he signed in 1997.[369]

Coaches and schools often disagree on how much is owed on a deal and whether it includes all or a portion of income from radio and TV shows, shoe contracts and other job-related endorsements.

17. Income Tax Ramifications

In some instances, the coach will challenge the university's decision to terminate either with or without cause. Often, the coach will assert as a defense to termination, breach of contract on the part of the university, age or race discrimination, defamation, intentional or negligent interference with contract, impossibility of performance and the like. The question becomes, in the event of a settlement between the parties and a release agreement, what are the income tax ramifications of those payments made pursuant to a termination settlement. Obviously, any pay-

369. *Recent Buyouts Of Division I Head Football Coaches*, LEXINGTON HERALD-LEADER, March 3, 2001.

ments made pursuant to a termination without cause (liquidated damage provision) would be income pursuant to the employment contract.

Some general rules with respect to excludability follow:

1. Gross income does not include the amount of any damages received on account of personal injuries or sickness. I.R.C. §104(a)(2). The term damages received (whether by suit or agreement) means an amount received through prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution. Treas. Reg. § 1.104-1(c). In order for damages to be excludable from gross income under I.R.C. §104(1)(2), the taxpayer must demonstrate that: (1) the underlying cause of action is based upon tort or tort-type rights, and (2) the damages are received on account of personal injuries or sickness.

2. Where amounts are received pursuant to a settlement agreement, the nature of the claim that is the actual basis for settlement and not its validity controls whether such amounts are excludable from gross income under section I.R.C. §104(a)(2). The critical question is in lieu of what was the settlement amount paid.

3. Where a settlement agreement does not allocate the lump-sum payment among the taxpayer's various claims, a court will examine the nature of each claim in turn for purposes of income tax excludability.

4. For purposes of income tax excludability under I.R.C. 90-202, §104(a)(2), recovery under the Age Discrimination in Employment Act of 1967, Pub. L. No 81 Stats. 602, is not based upon tort or tort-type rights.

5. To the extent a lawsuit settlement payment is in exchange for a taxpayer's tenure, the settlement proceeds are not excludable from gross income under I.R.C. §104(a)(2).

6. To the extend that any payment to settle a lawsuit was for breach of contract, the settlement proceeds are not excludable from gross income under I.R.C. §104(a)(2).

7. To the extent that any payment to settle a lawsuit was for punitive damages, then the proceeds are not excludable from gross income under I.R.C. §104(a)(2).

8. When a settlement agreement includes both contract and tort claims, and the claims are not specifically apportioned, the courts may not be in a position to apportion the settlement payment among the various possible claims for income tax excludability purposes.

9. Generally, when a settlement deals with a number of claims and does not allocate the proceeds to specific claims, and there is no evidence that a specific claim was meant to be singled out, the United States Tax Court considers the entire amount taxable.

10. Where a settlement agreement lacks express language stating that the payment is (or is not) made on account of personal injury, the most important fact in determining how I.R.C. §104(a)(2) is to be applied is the intent of the payer in making the payment. In the absence of an express settlement agreement, the payer's purpose in making the payment is the most important factor.

11. Taxpayers bear the burden of proving that a specific portion of settlement proceeds are paid to settlement tort or tort-type claims for personal injuries and are thus excludable from gross income under I.R.C. §104(a)(2), U.S. Tax Ct. R. 142(a).

18. Buyout - Opt Out - Release Provisions

Generally, an employer cannot obtain specific performance of a personal service contract.[370] This is so primarily because courts will not force a person to engage in activity against his will, regardless of a contractual obligation to perform. When this rule is applied in the area of coaches' contracts, the result is that neither the university nor the court can require a coach to work, even if the coach is contractually bound to do so. Moreover, courts are reluctant to issue injunctions compelling employment because of the inherent logistical problems in effectively supervising and enforcing such decrees.[371] Courts have historically viewed this form of affirmative relief as violating public policy and the Thirteenth Amendment of the United States Constitution, since it subjects individuals to a form of involuntary servitude.[372]

Similarly, a coach cannot force a university to allow him to work if the university decides to terminate his position or to replace him with another coach. The university, therefore, may remove the coach from his position at any time, with or without a valid reason. However, the university may have to compensate the coach with monetary damages if the coach challenges the premature contract termination.

In the context of coaching contracts, the relationship between the university and the coach becomes somewhat unbalanced. While the

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370. GREENBERG & GRAY, *supra* note 1, at 628.
371. *Id.*
372. *Id.*

coach has clear contractual remedies against the university for breach of contract, the same may not be true if the coach decides to terminate performance. The advantage may lie with the coach "who can breach the contract and leave the relationship with virtual impunity."[373] The problem is even more acute when the university, in attempting to enforce its contract, tries to prove precisely how it has been monetarily damaged by the coach's termination of the contract.[374] Moreover,

> In theory, at least, an employer is clearly entitled to bring an action for damages against any employee in breach, and coaches are no exception. In such cases the recoverable damages are normally measured by the cost to the employer of obtaining equivalent services elsewhere, plus consequential damages. Some cases indicated that in assessing such damages, the market value of the lost services must be measured against that of the substitute services procured by the employer to remedy the breach.[375]

Although these criteria may seem simple and reasonable, a judge or jury may find it impossible to determine the market value of coaches' contracts. Additionally, most premature terminations are met with animosity on at least one side, and litigation could serve merely to prolong those negative public relations and cast a shadow over the institution's athletic program for years. It may prove difficult to estimate — or compensate for — the vast array of payments and fringe benefits a coach may have been receiving prior to the breach. For these reasons, many institutions avoid litigation, even if the coach is the breaching party. Graves concludes that "[a]s a result, most employees, and certainly most coaches, have historically been able to leave their employment virtually at will despite their prior contractual commitments."[376]

On the other hand, a university may attempt to obtain equitable relief by acquiring an injunction to prohibit a "contract jumping" coach from working for another entity. For example, in 1973, Charles "Chuck" Fairbanks contracted with the New England Patriots to act as general manager and head coach. A later agreement specified that employment should continue until January 1983 and also read:

> 10(b) Fairbanks shall not render services directly connected with football during the period of his employment other than for the Patriots except with the express written permission of the Patriots, which permission shall not be unreasonably withheld. . . .

373. Graves, *supra* note 123, at 548.
374. *Id.*
375. *Id.* at 548-549.
376. *Id.* at 549.

(d) Fairbanks shall not render services to another entity not connected with football during the period of employment except with the express written permission of the Patriots, which permission shall not be unreasonably withheld.[377]

In 1978, Fairbanks was approached by persons affiliated with the University of Colorado. They tried to convince him to leave the Patriots to become the Colorado head football coach. The Patriots sought a court injunction enjoining Colorado from contracting with Fairbanks while he was still under contract with the Patriots.[378]

The District Court in Colorado entered a preliminary injunction enjoining the University of Colorado, its regents, president, athletic director, and certain fans from contacting Fairbanks for the purpose of hiring him for the university.[379]

On appeal, the first district upheld the preliminary injunction forbidding Colorado from soliciting Fairbanks' services reasoning that Fairbanks' services were unique and the loss of his services would cause irreparable harm to the Patriots, and money damages would be difficult to determine. The court also held that the contractual provisions that required Fairbanks, while under contract with the Patriots, to refrain from contracting for "services directly connected with football. . .[or with] another entity not connected with football," covered entities not in direct competition with the Patriots.[380] Therefore, the clause also prohibited Fairbanks from entering into an employment agreement with the University of Colorado.

A similar situation arose regarding Michigan State University's attempt to hire George Perles, then under contract with the Philadelphia Stars of the former United States Football League. In response to the university's action, the Stars sued the university for $1 million.[381] The case ultimately ended in a settlement, with the university paying $175,000.00 in order to obtain Perles' services and protect itself from legal liability.[382]

In many instances, a coach's contract will contain a unique service clause to protect the university from a breaching coach. By agreeing to this clause, the coach acknowledges that he has a special, unique and

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377. New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196 (1st Cir. 1979).

378. *Id.*

379. *Id.* at 1198.

380. *Id.* at 1199-1202.

381. SPERBER, *supra* note 276, at 164-165.

382. *Id.*

exceptional skill, and that the university's need for continuity in its coaching — as well as any further acquisition of coaching experience — will reflect that uniqueness.

The contract will also require the coach to agree that the loss of his services, prior to the expiration of the contractual term and without the university approval, will cause an inestimable loss to the university, which cannot be adequately compensated for by money damages. Finally, the coach will be required to promise not to accept employment under any circumstances as a coach at any other institution, or with any professional league, or with any other competing entity, without first obtaining permission from the university.

These clauses are necessary because a university may be unable to obtain a negative injunction due to the "difficulty of proving a coach exceptional, difficulty in proving irreplaceability or irreparable harm, difficulty in proving money damages and difficulty in proving that the coach would not be unreasonably burdened."[383]

Because of the university's inability to force the coach to work, and because of the possibility of protracted litigation, adverse publicity, a cloud over the athletic department, and presumably, a relationship that has deteriorated, most universities will allow their restless or ambitious coaches go without further ado. That is unless, of course, the contract contains some type of financial "buy-out" or "release" clause.

There are various formats of buyout or release clauses:

> 1. *Absolute Prohibition Against Termination or Release.* The parties hereby agree that coach has special and unique knowledge, skills and ability as a coach which, in addition to his continuing acquisition of coaching experience here at the University, as well as the University's special need for continuity in its program, render the coach's services unique. Coach recognizes that his promise to work for the University for the entire term of this Agreement is the essence of this Agreement to the University. Coach also recognizes that that the University is making a highly valuable investment in Coach's continued employment by entering into this Agreement and it's investment would be lost were he to resign or otherwise terminate his employment with the University prior to the expiration of the term of the Agreement. As a result therefor, Coach is required to fulfill the term of this Agreement and specifically promises not to seek, negotiate or accept employment under any circumstances during the term of this

383. Stoner & Nogay, *supra* note 125, at 6.

Agreement, whether it is in the designated sport or in any other field.

2. *Consent Required - No Penalty.* The Coach agrees, and hereby specifically promises, not to actively seek, negotiate for or accept employment, under any circumstances, without first obtaining the written permission of the Chancellor and Athletic Director, which permission shall not be unreasonably withheld, as a Football Coach at any institution of higher education which is a member of the NCAA or for any professional team participating in any professional league or conference in the United States or elsewhere requiring performance of duties prior to the expiration of this Agreement or any extension thereof. If, after discussions, Coach wishes to accept employment elsewhere as defined above, Coach must first obtain a release of this Agreement from the Chancellor and Athletic Director.

It is agreed that permission to discuss another position, and the release of this Agreement, will be pursued in good faith, and that the University will not unreasonably withhold its approval of a release or require Coach to pay a penalty upon termination.

3. *Liquidated Damages - Lump Sum Payment.*

(a) You recognize that your promise to work for the University for the Contract Term is of the essence of this agreement. You also recognize that the University is making a valuable investment in your employment by entering into this agreement and that its investment would be lost if you were to resign or otherwise terminate your employment with the University before the end of the Contract term. You further agree that if you breach this agreement by resigning or otherwise terminating your employment with the University during the football playing season or the football recruiting season as defined by the NCAA, the University will suffer additional damages beyond its lost investment, including but not limited to a possible adverse effect on recruiting. You therefore agree that should you breach this agreement by resigning or otherwise terminating your employment during the football playing season or football recruiting season, you will pay the University as liquidated damages the sum of $1,500,000.00. For purposes of this paragraph, the football playing season concludes at the end of the last regularly-scheduled game of the football season or, if Northwestern is selected to play in a post-season bowl game, at the end of that post-season bowl game.

(b) Notwithstanding the provision of subparagraph (a), if you breach this agreement by resigning or otherwise terminating your employment during the football playing season or football recruiting season within the "Termination Window," then you will pay the University liquidated damages according to the schedule set forth in subparagraph (c). The "Termination Window" for purposes of this provision means; ______________.

(c) If you breach this agreement by resigning or otherwise terminating your employment at a time outside of the football playing season or football recruiting season or during the applicable Termination Window, you will pay the University the following amounts as liquidated damages in lieu of the $1,500,000.00 set forth in subparagraph (a):

(1) if you terminate this agreement prior to the end of the 2002 football season, including any bowl game in which University is selected to play following that season, the sum of $1,000.00,000.00.

(2) If you terminate this agreement prior to the end of the 2003 football season, including any bowl game in which University is selected to play following that season, the sum of $500,000.00; and

(3) If you terminate this agreement prior to the end of the 2004 football season, including any bowl game in which University is selected to play following that season, the sum of $250,000.00.

(d) It is understood and agreed that it is difficult or impossible to determine with certainty the damages that may result from such a breach of this agreement by you and that the liquidated damages provision of these subparagraphs are not to be construed as penalties, but as an attempt by you and the University to establish adequate and reasonable compensation to the University in the event you breach this agreement by resigning or otherwise terminating your employment before the end of the Contract Term.

4. *Liquidated Damages upon Termination by Coach*:

If Coach terminates this Agreement under Article V, Section B.2. above, Coach shall pay to University, as liquidated damages, an amount equal to Coach's Salary plus Fifty Thousand Dollars ($50,000.00.00) through the then-current Term or for one (1) year, whichever amount is less. Such liquidated damages shall be due and payable within sixty (60) days after the effective date of termination of this Agreement. Coach will be entitled to continue his health insurance plan at his own expense for up to thirty-six (36) months from the effective date of termination but will not be entitled to any other employee benefits except as otherwise provided herein or required by applicable law. As permitted by Wisconsin law, Coach may secure a conversion policy for his UW group term life insurance. In no case shall University by liable for the loss of any collateral business opportunities or any other benefits, perquisites or income from any other sources that may ensue as a result of Coach's termination of this Agreement.

The parties have bargained for and agreed to the foregoing liquidated damages provision, giving consideration to the fact that University will incur administrative, recruiting, and resettlement costs in obtaining a replacement for Coach in addition to potentially increased compensation costs if Coach terminates this Agreement while serving as Head Football Coach, which damages are extremely difficult to determine with certainty or fairly or adequately. The parties further agree that the payment of such liquidated damages by Coach and acceptance thereof by University shall constitute adequate and reasonable compensation to University for the damages and injury suffered by it because of such termination by Coach. The foregoing shall not be, nor be construed to be, a penalty.

5. *De-escalating Payment - Voluntary Termination by Coach.* In the event Coach voluntarily terminates his employment with the University during the term of this Agreement, the University shall be discharged of any and all further obligations of this Agreement with respect to the obligation to pay and/or provide the benefits as herein specified to Coach. In the event the Coach desires to voluntarily terminate this Employment Agreement and take another position as a Division One Coach, Coach will be required to buy out the terms of this Agreement and pay the University according and pursuant to the following schedule:

a. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the first year of employment hereunder, Coach shall pay to the University 80% of the Annual Salary for the remaining term of this Agreement.

b. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the second year of employment hereunder, Coach shall pay to the University 60% of the Annual Salary for the remaining term of the Agreement.

c. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the third year of employment hereunder, Coach shall pay to the University 40% of the Annual Salary for the remaining term of the Agreement.

d. Without regards to the rollover provisions as herein contained, if Coach desires to terminate the terms of this Agreement after the fourth year of employment hereunder, Coach shall pay to the University 20% of the Annual Salary for the remaining term of the Agreement.

e. Without regards to the rollover provisions as herein contained, if coach desires to terminate the terms of this Agreement after the fifth year of employment hereunder, no buy-out shall be required.

At the sole option and discretion of the Coach, said buy-out payments may be made in lump-sum within ten (10) days after notification of voluntary termination and/or on May 1st of each year of the term of this Agreement with respect to the amount owed by Coach. It is understood that this buy-out provision shall only apply to the original term of this Agreement and shall not include and/or apply to any extensions of the original term hereof.

Some coaches will sign a contract that includes specific language stating that they have the right to terminate their position (opt out clause) with the university in the event a specific named school offers a position of head coach.[384] For instance, it was rumored that when Lou Holtz signed a contract with the Minnesota Gopher football team, it had clause that would permit him to terminate that contract in the event he was offered the head football coaching job at the University of Notre Dame.

In essence, the contract advisor is negotiating an opt-out clause wherein the coach is permitted to terminate his employment pursuant to the contract without further obligation to the university. Termination is based on a condition subsequent where if a specific and identified job was offered during the coach's term of the employment contract with the university.

The timing of the termination by the coach is also often addressed in the contract. In some instances a larger amount of liquidated damages is imposed if the Coach terminates during the season, post season or recruiting periods. What follows are several time-related termination provisions:

(1) Employee may terminate this Employment Agreement during its term by giving the University thirty (30) days advance no-

384. Bob Lattenville, *Put Me In, Coach: A Game Plan for Negotiating and Drafting College Coaching Contracts*, FOR THE RECORD, Dec./Jan. 2000, at 3.

> tice of the termination of her employment with the University. While Employee is assigned the position of Head Coach of the University's women's basketball team, such termination by the Employee must occur at a time outside the basketball playing season and the basketball recruiting season as defined by the NCAA, with the exception of thirty (30) immediately following the last regularly scheduled game of the basketball season so as to minimize the impact of such termination upon the University's women's basketball program.
>
> (2) Employee may terminate this Contract during the term hereof by giving the University thirty (30) days advance written notice of the termination of Employee's employment with the University. Such termination must occur at a time outside the regular playing season and recruiting season, as defined by the NCAA, with the exception of the five (5) days immediately following the last regularly scheduled game of the applicable intercollegiate sport's season, so as to minimize the impact of such termination upon the Program. Simultaneously with such notice, Employee shall provide the University with written notice of Employee's employment plans following the termination of this Contract.

Gerry DiNardo resigned as Vanderbilt's head football coach to become the head football coach for Louisiana State University. Vanderbilt brought a breach of contract action against DiNardo.[385] The district court entered summary judgment for Vanderbilt awarding $281,886.43 pursuant to a damage provision in DiNardo's employment contract with Vanderbilt.[386]

On December 3, 1990, Vanderbilt and DiNardo executed an employment contract hiring DiNardo to be Vanderbilt's head football coach. Section 1 of the contract provided that:

> The University hereby agrees to hire Mr. DiNardo for a period of five (5) years from the date hereof with Mr. DiNardo's assurance that he will serve the entire term of this Contract, a long-term commitment by Mr. DiNardo being important to the University's desire for a stable intercollegiate football program. . . Mr. DiNardo recognizes that his promise to work for the University for the entire term of this 5-year Contract is of the essence of this Contract to the University. Mr. DiNardo also recognizes that the University is making a highly valuable investment in his continued employment by entering into this Contract and its investment

385. Vanderbilt Univ. v. DiNardo, 174 F.3d 751 (6th Cir. 1999).

386. *Id.* at 753.

> would be lost were he to resign or otherwise terminate his employment as Head Football Coach with the University prior to the expiration of this Contract. Accordingly, Mr. DiNardo agrees that in the event he resigns or otherwise terminates his employment as Head Football Coach (as opposed to his resignation or termination from another position at the University to which he may have been reassigned), prior to the expiration of this Contract, and is employed or performing services for a person or institution other than the University, he will pay to the University as liquidated damages an amount equal to his Base Salary, less amounts that would otherwise be deducted or withheld from his Base Salary for income and social security tax purposes, multiplied by the number of years (or portion(s) thereof) remaining on the Contract.[387]

DiNardo questioned the enforceability of the liquidated damage provision and the award of liquidated damages under the original contract.

Under Tennessee law, contracting parties may agree to the payment of liquidated damage which refers to an amount determined by the parties to be justly compensated for damages should a breach occur.[388] In Tennessee, a provision will be considered one for liquidated damage, rather than an unenforceable penalty, if it is reasonable in relation to the anticipated damage for breach measured prospectively at the time the contract was entered into and not grossly disproportionate to the actual damages.[389]

The United States Court of Appeals affirmed the District Court ruling that the employment contract contained an enforceable liquidated damage provision and the award of liquidated damages under the original contract.[390]

19. Support of Program.

The coach will also want a covenant and commitment requiring the university to provide academic, economic and other forms of support to the athletic program at least equal to the level of support given to other athletic programs by other universities in the athletic conference to which the university is a member. Included in academic support would be: (1) academic counselors, (2) tutoring, and (3) other educational ser-

387. *Id.* at 753-754.
388. *Id.* at 755.
389. *Id.*
390. *DiNardo*, 174 F.3d at 757-758.

vices.[391] Included in economic support would be: (1) maintenance and improvement of physical facilities (*i.e.*, office facilities, locker room facilities, dining and dormitory facilities, as well as training and exercise facilities), (2) budgets sufficient to hire and retain the maximum number of assistant coaches, (3) budgets necessary to cover expenses associated with first-class recruiting, and (4) awarding of the maximum number of scholarships to athletes permissible under NCAA rules. A coach will also want to be involved in the scheduling of games subject to the final authority being reposed in the university's athletic director.[392] The coach should also require the program to be on technological and facility parity with other schools in the conference.

20. Scheduling and Assistant Coaches.

There will be some negotiation between the university and the coach with respect to the coach's authority relative to the hiring and firing of personnel, to the scheduling and rescheduling of games with respect to the university's program, and to input into other decisions that affect the program. While the coach will request control over the hiring and firing of his own assistants and the scheduling of the games, the athletic director will probably want the right of approval or the right to participate in the scheduling or hiring process itself.[393]

A sample clause follows:

PARTICIPATION IN DECISIONMAKING

> The parties recognize that many factors will influence the Coach's ability to perform successfully his duties under this Employment Agreement. Therefore, it is agreed that the Coach will be entitled to participate and have input into the following activities:
>
> A. The Coach shall have the opportunity to advise appropriate decision makers with respect to the selection and hiring of individuals for the following positions, should such selection and hiring occur while the Coach is the Head Coach of the football program: the Sports Information Director; the Director of Sports Medicine/Football Trainer; the Strength Coach for the football program; all support staff in the football office; the Equipment Manager; and the Director of Athletics.

391. GREENBERG & GRAY, *supra* note 1, at 631.
392. *Id.* at 631-32.
393. *Id.* at 632.

B. the Coach shall have the opportunity for input into the design and development of any and all facilities owned by University which are for the exclusive or partial use of the football program.

C. the Coach shall be responsible for scheduling games for the football program, subject to the approval of the Director of Athletics, which approval shall not be unreasonably withheld.

21. *Confidentiality - Records.*

To the extent permitted by law and not prohibited by state open-record laws or freedom of information acts, the university and the coach will want the terms and conditions of the employment arrangements to be kept confidential. Each party will agree to refrain from disclosing the terms and conditions of the employment agreement without the prior written consent of the other. That is, unless, of course, disclosure is required by applicable state law. In addition, the parties will probably want a confidentiality agreement concerning disagreement and non-disclosure to third parties and the submission of any disagreements to some form of arbitration procedure. Any public announcement with regard to the employment contract shall be jointly agreed to concerning the agreement itself and/or any extensions or modifications.[394]

The university will also want the coach, upon termination, to immediately cause certain information developed as a result of the position of head coach to be delivered to the university as the sole and confidential property of the university. Such materials, without limitation, may include personnel records, recruiting records, team information, films, statistics, and any other memoranda or data furnished to the coach by the university or developed by the coach on behalf of the university as a result of the position of coach.[395]

A sample record retention clause follows:

University Documents, Records, and Property. All documents, records, materials, equipment or other property, including without limitation, personnel records, recruiting records, team information, athletic equipment, films, statistics, keys, credit cards and any other material, data or property, furnished to Coach by the University or developed or acquired by Coach on behalf of the University or at the expense of the University or otherwise in connection with Coach's employment by the University are and shall remain the sole property of the University. Within ten (10)

394. *Id.* at 633.
395. *Id.*

days of termination of Coach's University employment, whether by resignation, expiration of this Contract, or action by the University for cause, Coach shall cause any such materials in his possession or control to be delivered to the University.

22. *Arbitration.*

During the course of the contract period there may be disputes between the university and coach arising out of or concerning the scope, interpretation or provisions of the employment contract. Obviously, if there is a dispute with respect to the contract, both parties have legal remedies, including injunctions against further continued breach, specific performance, if any, or damages arising out of such breaches.[396]

An alternative, other than utilization of the courts, is arbitration or some other form of dispute resolution procedure where the disputes are submitted to an impartial third party. Obviously, any such clause would need to define the disputes to be so submitted, the party to act as the objective third-party arbitrator, the rules under which the arbitration would be conducted, and the agreement that the decision of the arbitrator shall be binding without further ability to appeal. Although the utilization of the courts may be a leverage factor, a dispute resolution device may be more efficient and ultimately more ultimately equitable for both parties.[397]

A sample mediation and arbitration provision follows:

6. Mediation and Arbitration

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

6.1 The parties will endeavor to resolve the dispute between them and without rancor, each bearing any expenses it may incur.

6.2 Disputes not resolved between the parties which remain unresolved for a period of three weeks, will be submitted to a mediation services, as the Carolina Conciliation Services Corporation, for up to three hours of mediation (unless the parties agree to more). The mediator will be asked to deal with appropriate allocation of the costs of the mediation including reasonable attorneys' fees.

6.3 If the dispute is not resolved by mediation, the parties will submit the dispute to binding arbitration in _____(state) in ac-

396. *Id.* at 634.
397. *Id.*

cordance with the rules of the American Arbitration Association then in effect, unless the parties mutually agree on a different arbitrator.

3. *Conclusion*

College sports are a business, but so is the relationship between a university and its coach. As such, that relationship should be treated in the strictest contractual and legal sense.[398] Overall, the job of putting a contract together for a college coach is a difficult and vitally important one, for the proper contract can protect the coach, and also provide the university with assurance that it has created the best possible relationship with the coach it wants.

In addition to the twenty-one specific areas covered in this article, the following are several concluding thoughts to keep in mind as one begins to assess the relationship between the coach and university:

1. A coach's contract is his most important protective armor in a job environment of fatalities.
2. There are certain family protection issues, such as termination without cause, death or disability, that deserve guarantees.
3. Put aside the disease of job elation, make certain that not only the numbers and package are right but also the contract is also right.
4. Statistics don't lie in a job environment characterized by a continuously high ratio of turnover, exit provisions must be particularly emphasized.
5. The modern day coach is everything to everybody. Your duties must be specifically delimited and described in the areas of coaching, administration, travel, student affairs, alumni relations, and development.
6. The position is unique. It is the only position for which you were hired and for which you will be fired. Reassignment is a word that is not a part of your contract or Webster's dictionary.
7. The trend appears to be following the Knight Commission recommendation that outside income be controlled by the university through university-wide contracts. More of your future negotiation will be directly with your Athletic Director than with third parties or out-sources.
8. The place in which you play may hold the key to player recruiting and being on budget.

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398. *Id.*

9. Your contract needs to address the issue of facilities parity in the world of the athletic arms race.
10. Get a sophisticated lawyer that has experience and understands the specialty of coach's employment contracts.
11. Unbiased due process is the basis of the American dispute resolution system and it belongs in coaching as well.
12. Terminations for cause provisions are brutal. If you can't explain it in common English, delete it.
13. If you plan to jump, be prepared to pay.
14. This is a business. Partnerships work best.
15. Because NCAA Rules can end your career, document all activities on a daily basis.
16. College athletics is all about big business. Ride the crest while you have the opportunity, make hay while the sun shines.
17. Plan for termination. It's going to happen regardless of your record or how good you are.
18. Contract negotiations are a business deal and ultimately adversarial.
19. Limit your liability with respect to the acts of others, especially student athletes and assistant coaches.
20. You are a highly paid executive. Thom Park has said that financial engineering and planning is an absolute and integral part of your economic process.
21. The University will expect you to have a team of sophisticated representatives who will assist you during the process, said Bill Carr, former Athletic Director at Florida and Houston.
22. Contractual support of and for the program is as important as the term of your contract and may be its equivalent.
23. Universities are willing to recognize that future pay should be based on performance and success. Bonuses for student and athletic successes are part of your contract.
24. Coaching is not an overnight affair. It takes time to build programs.
25. Rollover provisions give universities some financial pause to summarily fire you without cause.
26. Be creative. The sky is the limit with respect to structuring financial perquisites.
27. Coaches are part of a continuing education process in underlining the importance of athletics to the University and dispelling the thought that power coaches are the CEOs of multi-million dollar athletic enterprises and become laws unto themselves.

28. The big time in money in college coaching brings financial security but also brings expectations.
29. There is no cushion for short-term failure.
30. Winning is the name of the game.