



PART TWO

Formal NCAA and Member Institution Policies and Principles

The established policies and principles of the NCAA and its member institutions remain at the heart of ardent debates about athletes' rights and well-being, and this is the focus of part two. First, in chapter 2, Ellen J. Staurowsky examines the history of the National Letter of Intent and argues it is symbolic of the need for a college athlete players association. In chapter 3, Robert Scott Lemons addresses the NCAA amateur rule, arguing that the NCAA functions as the head of a cartel of colleges engaged in a sports-entertainment business and that amateurism rules protect the integrity of this cartel. Next, in chapter 4, Jennifer Lee Hoffman examines Title IX's gender-separate allowance, with special attention to underlying gendered and racialized discourses in the educational and commercial interests of college athletics reforms. In chapter 5, Whitney Griffin examines the evidence related to concussion definitions, assessment, management, and return to physical and cognitive activity. Chapter 6, by Gerald Gurney, provides a foundation for understanding the NCAA transfer rules, particularly for college athletes who have attended one four-year institution and wish to transfer to another. Chapter 7, by Steven J. Silver, covers due process in intercollegiate athletics. And in chapter 8, the final chapter in part two, Neal H. Hutchens and Kaitlin A. Quigley examine recent court rulings and the broader legal framework that governs collective bargaining at both public and private institutions. ■

The National Letter of Intent

A Symbol of the Need for an Independent College Athlete Players Association

Ellen J. Staurowsky

Kafkaesque: having a nightmarishly complex, bizarre, or illogical quality

(Merriam-Webster.com)

The first Wednesday in February marks a milestone in the recruitment of top high school football prospects. Known as National Signing Day (NSD), the widely covered event represents the opening of a window of time when a high school athlete can sign a binding agreement—a National Letter of Intent (NLI)—with a college or university that commits the athlete to that institution for at least one year and ensures a full athletic scholarship offer. While an athlete may take up to seven days to sign the NLI once issued, should an athlete delay beyond that seven-day period, he or she risks losing scholarship opportunities altogether as coaches move on to fill their classes and take athletes who are willing to sign. Thus, NSD usually follows a certain kind of script. Televised press conferences or signing shows feature athletes revealing news of their decisions, formalized with the signing of the NLI (Northeast Ohio Media Group, 2015).

In February of 2015, four-star high school football recruit Roquan Smith interrupted that usual script when he verbally announced that he was going to the University of California, Los Angeles (UCLA) to play but declined to sign the NLI on Signing Day. While other athletes were signing with UCLA, Smith waited as word circulated that the coach responsible for sparking his interest, defensive coordinator Jeff Ulbrich, was contemplating a career move to the National Football League. Four days after Signing Day, Ulbrich's acceptance of a job offer from the Atlanta Falcons was confirmed. With Ulbrich's departure, Smith reopened his recruitment. Had Smith signed the NLI on Signing Day, he would have been bound by the provisions in the letter, which expressly state that the agreement "remains binding if the coach who recruited you leaves the institution with which you

KEY TERMS

- ▶ National letter of intent
- ▶ National Signing Day
- ▶ Commit
- ▶ Contract of adhesion
- ▶ Kafkaesque

signed" (National Letter of Intent, 2015). His future would have been jeopardized, because he had no way of controlling who the new coach might be, what kind of defensive schemes that coach might run, and whether Smith would be seen as playing a key role under a new coach. And at a fundamental level, Smith's actions also point to the uncertain understandings recruits have about the agreements they are signing. Even with the letter's specified emphasis on the agreement being between the institution and the player, the relationship the player had was not with the institution but with the coach who had been tasked with getting the athlete to sign on the dotted line.

While Smith's refusal to sign the NLI, given what he was learning about the situation at UCLA, was novel, he was not alone. Detroit running back Mike Weber learned the day after he signed the NLI that the coach who recruited him to go to Ohio State University announced his departure for the professional ranks. Weber tweeted: "I'm hurt . . . I ain't gonna lie" (Helfand, 2015, para. 11). Du'Vonta Lumpkin, a player who had reached an agreement with the University of Texas, found out two days after signing that the position coach who had recruited him to become a Longhorn left for a job in Florida. Lumpkin observed, "Guess I've been lied to in my face" (Helfand, 2015, para. 12).

These cases illustrate the conundrum that big-time college athletes confront about their futures. On the surface, the NLI is presented as a document that neatly establishes a quid pro quo between an athlete and institution. As explained on the NLI website, when an athlete signs the NLI, the athlete agrees to attend the college or university he or she signs with for one academic year. In return, the athlete receives one year of athletics financial aid. A violation of the agreement on the part of the athlete results in the loss of one season of competition. The athlete must serve a one-year residency at another institution before being permitted to compete again ("What is the National Letter of Intent?", 2015).

The NLI does much more than simply codify that arrangement. In the vast majority of cases, it further binds athletes to National Collegiate Athletic Association (NCAA) rules at a time when they have had little to no training in what the rules mean and how the rules structure works. The absence of an independent players association or representational body that negotiates the terms and conditions under which they practice and work results in a situation where the interests of others—the NCAA, conference, institution, program, coaches—are protected while players' interests may be undermined, overlooked, manipulated, or ignored entirely.

In the aftermath of Roquan Smith's refusal to sign, writer Zach Helfand raised the question of whether the NLI was the worst contract in American sports. While that is a question worth contemplating, a more central question might be what or who do the athletes enter into an agreement with when they sign the NLI. This chapter examines the history of the National Letter of Intent, who or what is behind the NLI, perspectives on fairness of the NLI contract, and the implications of the NLI for rights of college athletes.

HISTORY OF THE NATIONAL LETTER OF INTENT

College recruits have been described as the lifeblood of college and university teams. From the mid-1850s to the present, competition for their talent has been keen (Stancil, 2014). Persuading a sought-after prospect to sign with one school over another has inspired generations of coaches to press the limits of the rules governing when the recruitment process commences and ends, how and when contact with recruits occurs, and what incentives a recruit is offered to play at a particular school. The pursuit of competitive advantage and pressures to win fuel creative strategies that exploit loopholes and unclear areas of the rules and provide fertile ground for suspicions regarding whether coaches or interested parties, such as boosters, are cheating, gaming the system, or just outthrusting or outfoxing opponents (Staples, 2008).

In modern-day parlance, the tenuous nature of agreements struck between recruits, coaches, and programs is found in the language of the "commit" and "decommit." A recruit who has signed with a particular program becomes known as a commit, meaning that the recruit has signaled that the recruiting process is over and has made a commitment. A change of heart or attitude, a genuine misunderstanding, or personal circumstance may cause a recruit to decommit, to reverse course or back out of the deal in the hope of committing elsewhere. While current rules make such a reversal possible but difficult, it is the volatility within the player market that led to the creation of a document players sign called the National Letter of Intent.

The concept of the letter of intent emerged after World War II as the effects of the dawning television age, improvements in transportation systems, and means of communication influenced the scale and scope of college sport. Once reliant on players who could be found within the confines of a regional sweep of prospects, the expanse of territory coaches were willing to traverse in search of athletic talent expanded until it assumed national and international dimensions.

As that expansion occurred, some in the college sports community believed that programs and coaches should negotiate understandings among themselves so as to limit the amount of money schools were spending on recruiting and to establish times when recruiting would end. As a result, some conferences adopted an interconference letter of intent while others did not (Cuzzillio, 1989). The oversight of those letters was based within individual conference offices.

By 1962, college football was in the midst of another evolution, one in which coaches were increasingly taking to the highways and byways of America in automobiles and by plane to find and court the best football talent the nation had to offer. J. William Davis, a faculty member at Texas Tech University, a member of the Southwest Conference, a conference that abided by a letter of intent, was on a mission to reign in the bidding wars that coaches engaged in that led to players switching schools after their initial commitments. University of Oklahoma head football coach, Barry Switzer (not bound by an NLI program), was a favorite target

for frustration because of his penchant for getting athletes to sign with Oklahoma after signing with other schools (Sherrington, 2015).

After failed attempts to get support within the NCAA, Davis was successful in moving the Collegiate Commissioners Association (CCA) to create the voluntary National Letter of Intent Program (NLIP) (Sherrington, 2015). At the time the NLIP started in 1964, seven conferences and eight independent institutions agreed to participate ("Seven plus eight," 1964). By 2015, the program included 650 Division I and II participating institutions ("About the National Letter of Intent," 2015). Essentially, nearly all NCAA Division I and II institutions that award athletically related financial aid participate in the program. Responsibility for its administration eventually shifted out of individual conferences to the Southeastern Conference, where the NLIP was housed between 1995 through 2006 (Heitner, 2009).

WHO REALLY RUNS THE NLIP AND WHO ARE THE PARTIES TO THE LETTER OF INTENT?

For a recruit or average citizen, trying to determine who or what is behind the NLI is confusing to figure out. While the NCAA handles the daily operations of the NLIP, a role it assumed in 2007, when the association moved its headquarters from Overland Park, Kansas, to Indianapolis, it is the CCA that provides oversight for the program and is described as "the originating entity" ("A-Sun's Gumbart . . .," 2015). In the 2014–15 NLI, the only mention of the role these entities play and the relationship between the two is found in the statement "Administered by the NCAA on behalf of the Collegiate Commissioners Association (CCA)" (letter on file with author).

Although the NLIP resides within the NCAA Eligibility Center and is administered as an office under that unit, something that is not explained on the NLI website,¹ the program itself is governed by the 34-member CCA through a group of four, five-member committees (the NLI Policy and Review Committee, DI Appeals Committee, DII Review Committee, and DII Appeals Committee) (Hosick, 2011; CCA, 2013). When the NCAA took over the operation of the program in 2007, then president of the NCAA, Dr. Myles Brand, was reported to have said, "We're just there to reconcile the books. We send out the letters, we collect the information and we turn it over to the schools. So we're doing the paperwork, we're not running it" (Davis, 2007). One might construe this to mean that the NCAA is running it . . . without running it.

There are scant traces of either the NCAA or the CCA on the National Letter of Intent website, a curious thing from the standpoint that typically the NCAA visibly brands everything it is associated with, including its subsidiaries. As a case in point, the Eligibility Center is clearly and obviously branded with the NCAA's recognizable blue disk and bears the NCAA's imprimatur in public

representations, as in the "NCAA Eligibility Center."² No such references are made to the NLIP. There are even fewer traces of the CCA to be found on the website or in the public domain.

All of this apparatus is brought to bear in executing a voluntary agreement that is supposed to be between the athlete and the institution, with the consequence that the athlete, upon signing, is bound to the institution. But is the agreement really between the athlete and the institution? The agreement itself is branded with the logo of the National Letter of Intent, not of the institution. And it is invalid if the athlete does not have an NCAA ID issued from the NCAA Eligibility Center.

For an athlete who wishes to be released from the agreement, the request must be submitted through the NLIP website, although the institution makes the determination if a release will be granted and under what terms. In a video tutorial that appears under the question "Can I Be Released From My NLI?" (2015) on the NLI website, athletes are informed that institutions have "complete discretion" in granting releases and are advised that athletes may appeal release decisions if not granted by demonstrating "extenuating circumstances." The video advises that coaching changes are not extenuating circumstances.

An athlete is subject to one of three outcomes when seeking a release from the NLI agreement. He or she may be granted a *complete* release, which means that no penalty is assessed and the athlete is free to reopen the recruitment process. A *no release* means that the penalty for violating the agreement remains in effect and that athlete must serve a year in residence and lose a year of eligibility, barred from competing in any sport for a year, and unable to speak with coaches from other programs. A third alternative is that the *recruiting ban is lifted*, however, the athlete is not granted a release from the agreement. In this third scenario, the athlete pays the penalty but is given the opportunity to speak with coaches from other schools. Note, however, the institution's decision is subject to appeal to the NLI.

In the *Administrative Guidelines and Interpretations* (2015–16) for the NLI, institutions are reminded that by virtue of their membership in the program, they relinquish their right to legally challenge the NLIP and the CCA. Since they relinquish their autonomy as institutions in the cause of membership, what does this do to the foundational relationship between athlete and institution, the purported basis for the agreement to begin with? As a matter of due process, if the agreement was truly between the athlete and the institution, as the athlete is told to believe, one might think that the channel for due process would first go up through the institution itself rather than forwarded to the "originating entity." And if, in fact, the CCA is the originating entity with authority to overrule the institution, might the agreement then be with the CCA and not the institution? Further, if it is not clear who the parties are who are contracting with an athlete, can the contract be valid?

THE CONTRACTUAL NATURE OF THE NATIONAL LETTER OF INTENT

In *Sports Law: Governance and Regulation* (Mitten, Davis, Shropshire, Osborne, & Smith, 2013) the NLI is described as one of several documents that define the contours of a contractual relationship that exists between college athletes who receive athletic scholarships and their institutions. There is a requirement that the NLI be accompanied with an offer of athletically related financial assistance that outlines the terms, conditions, and amount of the award (National Letter of Intent, 2015). The NLI is not valid unless both the letter itself as well as the financial offer are signed and returned to the institution within seven days after the letter is issued. An athlete could still attend an institution that offered admission and an athletic aid award without signing the National Letter of Intent.

According to the "Quick Reference Guide to the NLI" (2015), 43,000 athletes (Division I and II) signed an NLI in 2014–15. Each year, approximately 2 percent of athletes who sign NLIs request releases. For the 2013–14 recruiting cycle, 1,056 athletes requested releases; 94 percent of those seeking releases were granted complete releases; and 70 percent of releases sought were filed by Division I athletes. The highest number of requests for release came from football and baseball players as well as women's basketball and soccer players. Of the 20 appeals filed by athletes contesting an institution's no release decision, three were eventually granted complete releases ("Status Report . . .," 2015).

While the form itself includes a statement that the athlete understands that the agreement is with the institution and not a particular sport or coach and that the athlete is asked to acknowledge that he or she understands that it is not uncommon that coaches leave, a coaching change was listed as the top reason in 2014 for athletes being granted releases. There was a significant drop in the number of times that reason was invoked, however, between 2013 and 2014. In 2013, 154 athletes were granted releases because of coaching changes, compared to 110 athletes the following year. This may be due to efforts on the NLI website and in the NLI video that specifically note that coaching changes are not considered extenuating circumstances. Signees were also successful in obtaining releases citing these reasons: personal issues, financial hardship, desire to attend a different institution, and academic reasons.

The 2 percent who contested the agreement may not be reflective of the actual number who wished to pursue alternatives but were discouraged either by the process or concern about negative consequences if they sought a release and were unsuccessful. Such a scenario would have placed them at odds with a coaching staff and program that they would have to live with after disclosing this dissatisfaction.

The high participation rates in the NLIP should also not be construed to represent the preferences of athletes. The "benefit" of the program is said to be the cessation of recruiting and relief from the pressures of being sought after by

coaches. As Tom Yeager, the commissioner of the Colonial Athletic Association opined, "Recruiting is a pressure-packed thing, and the NLI is a ceasefire on recruiting" (Schwarb, 2014). That said, being bound to terms and conditions of a contract when the athlete is not in a position to bargain seems to be a fairly high price to pay just to get coaches to stop calling and contacting them.

The letter itself is also suggestive that the document is weighted to the benefit of the athletic establishment, not the athlete. Once athletes receive the NLI, they confront two options—accepting the terms as they are and signing, or not signing. There is no opportunity for negotiation. As such, the NLI fits the definition of a contract of adhesion, a form of agreement drafted by one party to which another party is afforded no other alternatives apart from rejection or acceptance. As Doyle (2015) wrote, "The NLI's boilerplate language harms student-athletes due to the unequal bargaining power between the parties." Peter Rush, an attorney who represented former University of Colorado and world-class moguls skier Jeremy Bloom in a lawsuit against the NCAA, has argued that the NLI is not enforceable and could be challenged on the grounds of unconscionability (Davis, 2007). Citing a legal definition, Davis noted that "a contract is 'unconscionable' if it did not result from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion" (para. 11).

CONCLUSION

The atmosphere of Signing Day contrasts sharply with the stark reality embodied in the National Letter of Intent. Michael Lee, a Michigan labor lawyer, observed, "Signing day is portrayed as Christmas morning, everyone opening their presents, everyone counting up what they brought in and then people ranking who had what. When in effect, many young people have just signed away their legal, if not constitutional rights" (Wetzel, 2001, para. 6).

The fact that the NCAA, the CCA, and the schools that are members of the NLIP are so willing to present a carefully constructed united front in their dealings with college athletes, offering them no opportunity to negotiate, is a lesson to consider when contemplating the rights of college athletes. The obvious exploitation of the power imbalance evident in the interlocking relationships that exist among the college sport entities (NCAA, CCA, schools, coaches) speaks to the value placed on college athletes and their humanity. The business practices employed are designed to control and bargain for college athletes as commodities who have no rights.

Roquan Smith's refusal to sign the NLI when he was being misled by the coaching staff at UCLA was a form of resistance, an assertion of personal agency, a push back against a system that would have comfortably moved on, trading in deception merely as a matter of business. Neither Smith nor Mike Weber nor Du'Vonta Lumpkin should have to fend for himself in trying to navigate this

Kafkaesque bureaucracy, which is “nightmarishly complex, bizarre, and illogical.” Their treatment, which mirrors that of many college athletes, calls for representation, a players association independent of the college sport entities who have constructed the maze that college athletes attempt to survive. A players association external to the system would create a counterweight, offering the possibility for greater balance, greater leverage to effect change, and a source of advocacy to help athletes understand the forces that they are up against in accessing their rights.

QUESTIONS FOR DISCUSSION

1. If the NLI were truly voluntary, as NCAA and CCA officials assert, and if that was fully understood by athletes and their parents, why do the number of signees go up every year?
2. According to the NCAA's principle of amateurism, athlete participation is a matter of “avocation,” meaning that it is done voluntarily and for fun. How does the encouragement to sign a letter of commitment that ultimately binds athletes to a set of rules that they did not negotiate and that they may feel they have no alternative but to sign (despite proclamations to the contrary) reconcile with that?
3. In your view, is the NLI the worst contract in American sports?

Notes

1. On the homepage of the National Letter of Intent website, there are links to the NCAA and to the NCAA Eligibility Center that appear discreetly at the bottom of a column on the right hand side of the page. There is no attempt, however, to explain that the NLI is an office under the Eligibility Center. A small, nondescript CCA logo appears on the homepage at the bottom of the lefthand column. See <http://www.nationalletter.org/>. Unless visitors go to the “About the National Letter of Intent” page, they would not be able to determine the connections between the NLIP, the CCA, and the NCAA.

2. The NCAA Eligibility Center can be accessed at <http://www.ncaa.org/student-athletes/future/eligibility-center>. The National Letter of Intent site can be accessed at <http://www.nationalletter.org/>

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