

Social Media Issues and Student Athletes

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- I. NCAA Interpretation: University of North Carolina¹
 - A. Student-athlete tweets showed possible NCAA violations
 - B. UNC self-reported, but found in violation of “failure to monitor”
 - C. No “blanket duty to monitor” social media sites
 - D. Duty to monitor publically available social media sites “may arise as part of an institution’s heightened awareness when it has or should have a reasonable suspicion of rules violations”
 1. Have to keep your eyes open
 2. If know or should know of possible rules violations, check public social media.

- II. What Can / Should University Administrators Do?
 - A. Monitor: pro’s / con’s / what to monitor?
 1. “Friend” student-athletes on Facebook?
 - a. Danger – now seeing non-public information
 - b. Obligation to report
 - c. Legal for coaches to require student-athletes to “friend” them?
 - B. “Follow” on Twitter?
 1. Public information
 2. Inform student-athletes
 - C. Discipline? Suspend? Kick off team? Non-renew scholarship?
 1. Fourth Amendment (reasonable expectation of privacy)
 - a. Claimant must have a subjective expectation of privacy and “an objective expectation of privacy that society accepts and legitimizes” *Katz v. United States*, 389 U.S. 347, 360-361 (1967)
 - b. “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995)

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<http://i.turner.ncaa.com/dr/ncaa/ncaa/release/sites/default/files/files/NC%20Public%20Infractions%20Report%20031212.pdf>

- (stating explicitly, “school athletes have a reduced expectation of privacy.”)
- c. There is no constitutionally-protected “right” or “entitlement” to participate in interscholastic athletics. Participating in athletics is a privilege and not a right. *Alerding v. Ohio High School Athletic Ass’n*, 779 F. 2d 315 (6th Cir. 1985); *Menke v. Ohio High School Athletic Ass’n*, 2 Ohio App. 3d 244, 246 (Ohio App. 1981)
 - d. To be safe . . . explicitly inform student-athletes that their web content is not private and is subject to being searched
2. Electronic Communications Privacy Act (“ECPA”)
 - a. Prevents an entity from “intentionally access[ing] without authorization . . . and thereby obtain[ing]” an electronic communication from an electronic communication service while it is in storage.
 - b. Consent of the student-athlete should defeat this claim
 - c. Employment case determined that “purported authorization was coerced.” *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420, No. 06-5754(FSH), at *3 (D.N.J. Sept. 25, 2009)
 - d. Voluntary nature of athletics (as opposed to employment) should allow authorization to be viewed as voluntary and not coerced.
 3. First Amendment
 - a. Generally, content-based speech restrictions are “presumed to be unconstitutional.” *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995). Constitutionally protected speech rights extend to “the playing field.” *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 513 (1969)
 - b. Need to show a compelling government interest in regulating speech (except “fighting words,” obscenity, defamation/libel/slander, child pornography, etc. are not typically protected categories of speech)
 - c. A “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint” is not enough for a prohibition on speech. *Id.* at 509.
 - d. Free speech rights cannot “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” and cannot collide with the rights of others. *Id.* at 509.
 - e. Courts recognize a difference between student-athlete speech while in the classroom and their speech relating to their sports team. *Wildman v. Marshalltown*, 249 F. 3d 768 (8th Cir. 2001). In athletics, a public school’s duty consists of providing “an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team. *Id.* at 771.
 - f. OK to regulate student-athlete speech / discipline a student-athlete if it is needed to uphold team chemistry.

- g. *Lowery v. Euverard*, 497 F. 3d 584 (6th Cir. 2007) (cert. denied)
 - i. Several football players were removed from the team because they publicly challenged the coach’s authority by writing a letter saying that they hated the coach.
 - ii. Sixth Circuit sided with coaches and high school. “The immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal . . . Execution of the coach’s will is paramount.” *Id.* at 589.
 - iii. The court allowed the speech restriction to prevent a “substantially negative effect on a [sports] team,” to uphold “team unity,” to prevent a team from “break[ing] apart,” and to maintain “team chemistry.” *Id.* at 593, 595.
 - iv. The court stressed that student-athletes participate in their sports voluntarily, explaining that the case is NOT “fundamentally about the right to express one’s opinion, but rather the ability of the government to set restrictions on voluntary programs it administers.” *Id.* at 599
 - v. Student-athletes still have fundamental rights to express religious or political views.
 - vi. Penalties must be limited to disciplinary action from the athletics team. Cannot be suspended from school – just dismissed from the team.
 - vii. OK to regulate speech / discipline a student-athlete if posting violates criminal law
 - viii. OK to regulate speech / discipline a student-athlete if posting indicates potential violation of NCAA rules (violation of reasonable team rules might be OK)
- h. *T.V. v Smith-Green Community School Corp.*, No. 1:09-CV-290-PPS (N.D. Ind. 2011).
 - i. Photos were speech – humorous speech
 - ii. Photos didn’t cause a “substantial disruption” to school activities
 - iii. Policy allowing punishment for conduct that “brings discredit or dishonor” on the school or student is too broad and vague
 - iv. 25% of season suspension was overturned

D. Establish Reasonable Team Rules?

- 1. No cases
- 2. Probably supportable – examples - No drinking during season; no tweeting X minutes before game, during game and X minutes after game; no hazing activities;
- 3. Probably less supportable – examples – Can’t do anything embarrassing to you or the institution; can’t use profanity

- E. Total Ban? Unwise. Difficult to prove institution has a legitimate, content-neutral interest in totally banning student-athlete social media.
- F. Educate
 - 1. Emphasize best practices – “If you wouldn’t want your grandmother to read it, don’t post it.”
 - 2. Specific NCAA rules applicable to them – can’t endorse businesses, can’t comment on recruit’s visit, etc.
 - 3. Safety issues – don’t post your location

III. The Ohio State University’s Student-Athlete Social Media policy

- A. Make clear – participating in athletics is a privilege, not a right, so student-athletes have no right to expect privacy in what they post on social media
- B. Explain that you may be monitoring their public posts and that you may need their passwords to access non-public information if necessary for an investigation
- C. Explain the reason for the policy – to ensure compliance with NCAA or other governing rules and to foster a positive team culture
- D. Make clear that the policy does not prohibit any constitutionally-guaranteed rights (can speak freely regarding religion, politics, academics, etc.)
- E. Have student-athletes sign it
- F. Be involved with policy creation – your clients will instinctively want to include impermissible items

*Good resource: Eric D. Bentley, *He Tweeted What? A First Amendment Analysis of the Use of Social Media by College Athletes and Recommended Best Practices for Athletic Departments*, JOURNAL OF COLLEGE AND UNIVERSITY LAW, Vol. 38, No. 3, pp 451-479 (2012).

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