

Law Office of
MARTIN J. GREENBERG, LLC

5555 N. Port Washington Rd., Suite 305
Milwaukee, WI 53217
414-271-4849 phone
414-271-1884 fax

Martin J. Greenberg
mjg@martygreenberglaw.com

Bryan M. Ward, Of Counsel
bmw@martygreenberglaw.com

February 1, 2023

Board of Trustees
Cowley College
125 S. 2nd Street
Arkansas City, KS 67005

Re: Dr. Randy Smith and Cowley College Athletics Department

Dear Sirs/Madams,

I. Introduction

By way of introduction, my name is Martin J. Greenberg. I have practiced law for over fifty (50) years with a concentration in the areas of sports law and real estate development, and have had many experiences representing coaches in contract negotiations and terminations. I was the founder of the National Sports Law Institute at Marquette University Law School, was a law professor there for fifty (50) years, and taught a course in representing professional athletes and coaches. My website, Greenberg's Coaching Corner, which is hosted by the Marquette University Law School, is a well-read source for legal and economic issues relative to the coaching industry and college athletics.

I am also experienced in collegiate abuse cases involving college coaches. I have written and lectured on abuse in college athletics. I was involved in a matter concerning the Penn State Women's Gymnastics pertaining to the coaches, a husband and wife team who transferred from Auburn University to Penn State University. As you may be aware, one coach chose to resign and the other was eventually fired by Penn State. That case involved an assistant coach who stepped forward and blew the whistle on the abusive tactics used by the coaches in the women's gymnastics program. This same assistant coach started a petition for Penn State to hire an independent investigator which was signed by over 1,400 people, many of whom are involved in the gymnastics community. The investigation by Penn State was a whitewash and was not conducted impartially nor objectively. I also represented a student-athlete on the Auburn Softball Team who essentially had a Title IX claim relative to the assistant coach creating an atmosphere of favoritism towards student-athletes who were willing to have sex with said coach. Additionally, I represented a student-athlete on the Rutgers Women's Swimming Team relative to alleged mental and physical abuse. These cases made national headlines. I have had more than twenty other experiences representing student-athletes relative to alleged abuse by their coaches.

I have been asked by Dr. Randy Smith to review actions taken by him in response to the lack of oversight by the Athletic Director. Accordingly, we are now in the process of investigating this situation and wish to offer some preliminary observations.

II. Background

Jason O'Toole ("O'Toole") was named as the Athletic Director of Cowley College in July of 2021. His prior role at Cowley College was as the Director of Student Affairs. Beyond being a student-athlete himself at Cowley College, it is unknown to me at this point whether or not O'Toole has any experience as an executive in an athletic department, which is a specialized area of employment.

Dr. Randy Smith ("Dr. Smith") was named Cowley College's President in July of 2022. Dr. Smith's curriculum vitae includes employment as not just a faculty member, but also a Dean, Vice President of Academic Affairs, and College President. For all intents and purposes, Dr. Smith appears to be well qualified for the job at hand.

In 2022, Dr. Smith was made aware of an incident on a wrestling trip in which two assistant coaches beat a student-athlete. He was able to confirm the incident. O'Toole took no action to discipline the two assistant coaches and instead threatened to withdraw athletic scholarships from student-athletes if they ever spoke out. Dr. Smith ultimately became aware that there were further issues with ongoing physical, emotional, and verbal abuse perpetrated against student-athletes in the wrestling program at the hands of the coaching staff. He requested that O'Toole perform his functions as the Athletic Director and clean house. O'Toole refused to perform his duties and made it clear to Dr. Smith, the President of Cowley College, that he would only ever side with the coaches.

Another incident involved the cheer team wherein the entire cheer team approached Dr. Smith and reported sexual comments from the coach, constant verbal abuse, foul language, punishment for talking to the Athletic Director and unreasonable practice marathon sessions. The student-athletes stated that O'Toole turned them away and did nothing. Again, Dr. Smith approached O'Toole and requested that he remedy the situation. After the holiday break, half of the cheer team did not resume their participation. Those student-athletes relayed to Dr. Smith that they had not received any communication or action from O'Toole after he promised Dr. Smith he would take care of the situation.

Most recently, a few weeks ago Dr. Smith was approached by the Student Affairs Director who requested that he meet with the volleyball team, but that they were afraid to be seen going to his office. She advised Dr. Smith that the volleyball team was being abused, and it had been going on for a couple of years. Dr. Smith arranged to meet with the team at his home so they would feel more comfortable coming forward and not have to be seen coming into his office. Dr. Smith had the student-athletes describe the constant yelling, verbal abuse, denial of access to water, marathon practices, and punishment for poor game performance. There is a case of grabbing of an arm and pulling during a game in anger. The student-athletes stated when they were injured, they were not given the time to see the trainer. One student-athlete stated the coach required her to practice before she was officially released by her physician after a surgery. The student-athletes stated they were not allowed to associate with any of the other athletic teams, as it would "distract" them. On road trips the coach would not allow cell phone use on the bus, or their phones would be taken away. The coach

would not allow cell phone use after 10pm on all evenings and he often required them to turn in their cell phones to him. They also produced four letters from last year's student-athletes detailing the verbal and emotional abuse, and in all of these cases the student-athletes said they were done with athletics - they didn't want to play anymore. They were demoralized, and not in a right frame of mind. They cried and stated they went into the college excited about the season and they came out never wanting to play again. The student-athletes told Dr. Smith they had approached the Athletic Director on two occasions to ask for relief and nothing was ever done. The Athletic Director told them he would speak with the coach, but nothing ever changed. They never received a response nor any action from the Athletic Director.

Dr. Smith then met with the assistant volleyball coach who confirmed the information he received from the student-athletes. The assistant coach was reluctant to speak up, but confirmed the treatment the student-athletes received at the hands of their coach. She stated the wrongful conduct had been ongoing and that she tried her best to shield the student-athletes, but that she was only the assistant coach and that she, too, was scared of the head coach.

Dr. Smith also met with the head volleyball coach who denied all allegations of abusive conduct and stated he genuinely cared for his student-athletes and went out of his way to serve them. The coach could not see anything he had done was wrong.

Dr. Smith approached the O'Toole and he confirmed he had spoken with the student-athletes. He stated that the team captain "had it in" for the coach and he didn't know why she was "trying to take him down," but that the coach needed to make some changes. O'Toole then advised Dr. Smith, who has over 25 years in higher education, that they both needed to support the coach. O'Toole denied any abuse, marathon practice sessions, etc.

It is clear to me from these three incidents that O'Toole has continued to perpetuate an environment in Cowley College's Athletic Department that fosters abusive treatment and that does not permit student-athletes an opportunity to advocate for their own health and well-being. These are not children lacking in vocabulary to describe what hurts, these student-athletes are young adults and often elite competitors that have been honing their sport for the better part of their lifetimes.

Dr. Smith has shown a willingness to step up for and advocate for student-athletes at Cowley College. He has even taken steps to provide student-athletes with counseling at the expense of the College, which I usually have to fight for when it comes to abuse cases. This kind of forward thinking is what takes athletic departments a step further in being able to better recruit and form cohesive teams. Long gone is the era of coaches throwing chairs.

By actively discouraging student-athlete reporting, O'Toole was creating a situation wherein the student-athletes had no choice but to move on to Step 4 of the Complaint Process to "Tell It To The President." In reality, Cowley College's Athletic Director should have been the one to take the complaints seriously. None of these instances should have been swept under a rug. There should have been investigations and I hope that Cowley College takes seriously the inaction of the former Athletic Director. I also hope to see plans and policies put into place that make it more difficult for issues of the health and wellbeing of student-athletes to be dismissed and ignored.

III. Codes of Conduct

A. Faculty and Staff Code of Conduct

The Faculty and Staff Code of Conduct states that the following:

Ethics and integrity are the responsibility of each individual. Every college employee, and any other person acting on behalf of the College, is responsible for behaving in a professional and courteous manner when engaging with their fellow employees, students, the Board of Trustees, and members of the public. Such behavior will exemplify ethical conduct consistent with the policies and core values of the College while upholding the reputation of the College.

B. 128.00 Non-Discrimination, Anti-Harassment, and Equal Employment Opportunities

Pursuant to Cowley College's Non-Discrimination and Anti-Harassment Code:

Cowley College strives to create and maintain a work environment in which people are treated with dignity, decency and respect. The environment of the College should be characterized by mutual trust and the absence of intimidation, oppression and exploitation. Employees should be able to work and learn in a safe yet stimulating atmosphere. The accomplishment of this goal is essential to the mission of the College. For that reason, Cowley College will not tolerate unlawful discrimination or harassment of any kind. Through enforcement of this policy and by education of employees, the College will seek to prevent, correct and discipline behavior that violates this policy.

All employees, regardless of their positions, are covered by and are expected to comply with this policy and to take appropriate measures to ensure that prohibited conduct does not occur. Appropriate disciplinary action will be taken against any employee who violates this policy. Based on the seriousness of the offense, disciplinary action may include verbal or written reprimand, suspension or termination of employment.

Pursuant to Cowley College's Anti-Harassment Code:

Harassment is a form of unlawful discrimination and violates Cowley College policy. Cowley College prohibits harassment, of any kind. Under this policy, harassment is verbal, written or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her race, color, religion, sex, national origin, age, disability, veteran status, sexual orientation, gender and identity expression, genetic information, marital status, political affiliation or any other characteristic protected by law, or that of his or her relatives, friends or associates, and that: a) has the purpose or effect of creating an intimidating, hostile or offensive work environment, b) has the purpose or effect of unreasonably

interfering with an individual's work performance, or c) otherwise adversely affects an individuals' employment opportunities.

Harassing conduct occurs when, in the employee's opinion, the conduct impairs his or her ability to perform his or her job. Acts of harassment may include (but not limited to); epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; bullying; denigrating jokes; and written or graphic material that denigrates or shows hostility or aversion toward an individual or group that is placed on walls or elsewhere on the employer's premises or circulated in the workplace, on College time, during College sponsored events, or using College equipment by e-mail, phone (including voice messages), text messages, social networking sites or other public means.

I would say that it is a fair conclusion that your former Athletic Director and many of your athletic department staff have violated these policies. Nowhere in these policies do I see an exclusion made for the treatment of student-athletes. Many of your coaches have created environments that have threatened the health and well-being of their student-athletes. This also creates an environment that impairs the student-athletes ability to perform either in their respective sports or in the classroom.

IV. Negligent Hiring

Negligent hiring is when an employer fails to use due diligence in the hiring of an employee who then proceeds to injure a third-party during the course of their employment. This issue is becoming more and more important for colleges and universities to understand as abusive coaches typically follow a pattern that is easily recognizable if due diligence is completed in a manner which engages current and former student-athletes and staff that the coach worked with.

There are certain steps an employer must take to fulfill their due diligence when pursuing a candidate for a position that demands the level of responsibility that a head coaching position demands. Those steps include: (a) having the candidate fill out an application that includes questions regarding the disclosure of criminal convictions or civil proceedings for intentional torts; (b) make a reasonable effort to contact references supplied by the coach; (c) make a reasonable effort to contact previous employers; (d) driver's license record check; (e) background check by law enforcement; and (f) a thorough interview. In the case of coaches, because of the responsibility for the well-being of others, I would add that it behooves a university to contact previous student-athletes who were coached by the employment candidate.

Cowley College may have been negligent in the hiring of O'Toole along with many of its coaches and could have prevented what happened to the student-athletes already referenced and other student-athletes if they had undertaken appropriate due diligence. This is an area of liability that Trustees should endeavor to broaden their scope of references needed for new employees to take on trusted positions such as coach or athletic director.

V. Discussion of Sports Abuse

The NCAA has ten guiding principles listed in the Inter-Association Consensus Statement on Best Practices for Sports Medicine Management for Secondary Schools and College which are paraphrased below to provide an example of policies that can be adopted that help to assure independent, objective medical care for college student-athletes:

1. The physical and psychosocial welfare of the individual student-athlete should always be the highest priority of the athletic trainer and the team physician.
2. Any program that delivers athletic training services to student-athletes should always have a designated medical director.
3. Sports medicine physicians and athletic trainers should always practice in a manner that integrates the best current research evidence within the preferences and values of each student-athlete.
4. The clinical responsibilities of an athletic trainer should always be performed in a manner that is consistent with the written or verbal instructions of a physician or standing orders and clinical management protocols that have been approved by a program's designated medical director.
5. Decisions that affect the current or future health status of a student-athlete who has an injury or illness should only be made by a properly credentialed health professional (e.g., a physician or an athletic trainer who has a physician's authorization to make the decision).
6. In every case that a physician has granted an athletic trainer the discretion to make decisions relating to an individual student-athlete's injury management or sports participation status, all aspects of the care process and changes in the student-athletes' disposition should be thoroughly documented.
7. Coaches must not be allowed to impose demands that are inconsistent with guidelines and recommendations established by sports medicine and athletic training professional organizations.
8. An athletic trainer's role delineation and employment status should be determined through a formal administrative role for a physician who provides medical direction.
9. An athletic trainer's professional qualifications and performance evaluations must not be primarily judged by administrative personnel who lack health care expertise, particularly in the context of hiring, promotion and termination decisions.
10. Member institutions should adopt an administrative structure for delivery of integrated sports medicine and athletic training services to minimize the potential for any conflicts of interest that could adversely affect the health and well-being of student-athletes.¹

And, of course, Title IX provides a safe educational environment for all students. Title IX recognizes students with disabilities and provides for accessibility to accommodations. Title IX

¹ <http://www.ncaa.org/sport-science-institute/athletics-health-care-administration-best-practices-0>

protects students with disabilities from harassment and provides them procedural due process. Again, Cowley College may have crossed the line on all of these counts.

Dr. Smith unknowingly may have become associated with an athletic program where there is brewing scandal that is rife with alleged abusive and negligent behavior that was supported by the athletic director and crosses the line of acceptable coaching behavior. Some of the indications that this environment exists, and that lead to further investigation and to this conclusion would include:

- Mike Rice tactics;
- Ignoring of medical needs and refusal to provide accommodations;
- Alleged parents' complaints of crossing the line behavior; and
- Other student-athletes witnessing or experiencing the same or similar conduct.

Dr Smith is concerned for the student-athletes, for their health and wellbeing, and for Cowley College's reputation in the athletics' world. There is a huge imbalance of power when student-athletes are afraid to step forward with information regarding abuse because of fear of harassment, bullying, reprisal, loss of team position, and loss of scholarships at the hands of their own Athletic Director.

Upon accepting admittance to Cowley College, student-athletes have every reason to believe that Cowley College strictly complied with Cowley College's obligations under the NJCAA Constitution and Bylaws, including NJCAA principles regarding institutional control, responsibility, ethical conduct, and integrity. Specifically, that Cowley College would uphold and enforce NJCAA Code of Sportsmanship and Code of Conduct:

General Sportsmanship Expectations: A basic principle of NJCAA athletic competition is to develop and foster respect for fellow participants, coaches, officials and spectators. NJCAA Policies Manual - Sportsmanship applies to all athletic events involving NJCAA member institutions, conferences and/or regions. Sport rulebooks may apply rules and regulations that are more restrictive than those found in this section.

A. Players, coaches and team personnel will recognize their responsibility for proper conduct before, during and after every contest.

B. Coaches and Athletic Directors will recognize and assume responsibility for the behavior of themselves, players, staff, game management personnel and representatives of the respective NJCAA member institution.

The details regarding Sportsmanship continue to include a definition of "Violent Behavior:"

Violent behavior is defined as:

A.1.a. An act in which physical contact or an attempt to make physical contact occurs with the purpose to do damage, harm, intimidate, incite a fight or otherwise injure a player, coach, referee, spectator or game management personnel or damage property.

A.1.b. Engaging in hostile or abusive language or harassment that refers to race, religion, sex, sexual orientation and national origin and/or other threatening language.

Non-Violent unsportsmanlike behavior is defined by the NJCAA as follows:

Non-Violent

B.1. Definition - Non-violent unsportsmanlike behavior is defined as profanity, vulgar gestures, trash talking, taunting or abusive language directed at players, coaches, referees, game management personnel and/or spectators. The use of tobacco or alcohol during NJCAA sponsored events is prohibited within this rule.

The NJCAA has a specific Code of Conduct they require all member institutions to adhere to during NJCAA events:

Code of Conduct

A. Coaches and team personnel shall recognize the responsibility for proper conduct at any and all contests/competitions in which any NJCAA member college participates.

B. Coaches shall recognize and assume responsibility for the actions of themselves and the team members. Each coach who has participants competing in the event shall be responsible for informing each participant about the Code of Conduct.

Behavior

Coaches, players and institutional personnel must remember that they are representatives of an institution of higher learning, its faculty, administration and student body. As such, they are expected to conduct themselves in a manner which would reflect credit on their team, institution, region and the NJCAA. Student-athletes, coaches and institutional personnel who are representing the NJCAA or NJCAA member colleges are subject to all NJCAA rules, regulations and penalties as stated in the NJCAA Handbook as well as local, state and federal laws.

Inappropriate and unacceptable behavior by coaches, players or institutional personnel will not be tolerated before, during, or after contests; at the hotel or in public while representing their college. This Code of Conduct does not replace NJCAA Policies Manual – Sportsmanship of the NJCAA Handbook. Unacceptable forms of behavior include, but are not limited to:

1. Fighting
2. Taunting
3. Inappropriate celebration
4. Disrespectful attitude toward opponents, officials, tournament administrators
5. Use of profane and vulgar language
6. Use of drugs and/or alcohol, tobacco (including but not limited to e-cigarettes, vaping, etc.)
7. Disrespectful attitude toward host hotel personnel
8. Unlawful activities

9. Physical abuse or damage to college property or host hotel property.

Derogatory Comments

A. Players, coaches and institutional personnel shall not make any derogatory public comments regarding contests, competitions or game officials at any time; in print, broadcast social media, news releases or any other communications where comments may become public. The head coach will be responsible for any derogatory comment made by any player, coach or institutional personnel.

B. A coach shall not address or permit anyone from making uncomplimentary remarks to any game official before, during, and/or after any and all NJCAA member contests/competitions in which any NJCAA member participates.

The NJCAA also details how to report this behavior and gives details on the penalties for failure to report and/or comply with NJCAA policies. Given that the policies include time at guest hotels or anytime the teams are representing their respective colleges, we believe there may have been incidents of unsportsmanlike conduct that have not been reported to the NJCAA and that there may be violations of the theses policies.

Although Cowley College is not a member of the NCAA, it is worth noting that while the NCAA does not have a specific rule or bylaw relating to mental, physical and verbal abuse by coaches, they do employ what is generally referred to as “catch-all” provisions in their Constitution, including:

2.2.3 (Health and Safety) covers the health and safety of student-athletes and states that “[i]t is the responsibility of each member institution to protect the health of, and provide a safe environment for, each of its participating student-athletes.”

2.2.4 (Student-Athletes/Coach Relationship) focuses on the relationship between athlete and coaches and states that “[i]t is the responsibility of each member institution to establish and maintain an environment that fosters a positive relationship between the student-athlete and coach.”

3.2.4.16 (NCAA Independent Medical Care Legislation) requires active member institutions to “establish an administrative structure that provides independent medical care and affirms that unchallengeable autonomous authority of primary athletics health care providers (team physicians and athletic trainers) to determine medical management and return-to-play decisions related to student-athletes.”

From the descriptions of the treatment uncovered by Dr. Smith it is clear there may be an abusive environment in your athletic department. We hereby demand that you self-report to the NJCAA the allegations as contained in our position statement which we believe are violations of NJCAA rules. An independent investigation should be conducted by a third-party who has the requisite qualifications to undertake an investigation into mental and physical abuse allegations and NJCAA rules. This person should have no prior relationship with the parties involved, including the College, whose firm has not been a beneficiary of compensation from the College, and who has no vested interest in the outcome. This person should also not act under the guise of a risk manager for

the College. The investigator further must have an understanding of bullying and Cowley College and their employee's failures in regards to their student-athletes.

In 2020 there was a lawsuit started in the US District Court – Northern District of California, San Jose Division, entitled *Aldrich, Bevins, and Johnson vs. the NCAA, et al.*, case number 5:20-CV-01733. Some of the paragraphs in the lawsuit could have the name Cowley College instead of the NCAA as the party defendant. As a result of its inactivity, the NCAA is now facing the following allegations:

4. The NCAA had and has a duty to protect the health and safety of student-athletes, and has promulgated rules that require it to “adopt legislation to enhance member institutions’ compliance with applicable gender-equity laws.”

7. Despite its duty to promulgate legislation to augment gender equity and protect the health and safety of its student-athletes, the NCAA has failed to implement or enforce rules prohibiting sexual abuse, harassment, or relations between NCAA coaches and student-athletes.

8. NCAA student-athletes – chasing aspirations that may include Olympic participation or a professional career, mandated to meet certain standards both athletically and academically, and typically experiencing living away from home for the first time – include some of the most vulnerable individuals (regardless of gender) in our society.

9. Student-athletes arrive at college with the expectation that they will become the best athlete they possibly can be under the supervision of educated, skilled, and fully vetted athletics department personnel looking out for their best interests. The student-athletes trust and believe in these individuals because they are taught to do so from a young age, and accord their coaches and trainers deference, respect, and unquestionable loyalty.

10. This trust –coupled with the NCAA’s failure to implement and enforce rules prohibiting sexual relations and abuse by athletic department personnel of student-athletes and failure to impose significant sanctions that would incentivize schools to report abuse and deter perpetrators – has created a national epidemic perpetuating a cycle of sexual abuse, similar to that seen in the Catholic Church.

11. Rather than create a system that requires member institutions to report coaches who are perpetrators to the NCAA, the NCAA has created a system that permits the perpetrators to move unchecked among schools, prioritizing the protection of athletic revenue, alumni donations, and tuition that schools receive at the expense of students-athletes.

12. Student-athletes who are sexually abused by their coaches are “‘likely to adapt to the victim role, [...] repeating it in other relationships, each time losing more of her self-respect and enthusiasm for life.’ Too afraid of the authority figures to become angry, she instead suffers from depression, fear, anxiety, shame, and overwhelming guilt.” A victim of a coach’s abuse may quit the team, give up her scholarship, or transfer schools, losing valuable time and engagement in her education and social development. She may engage in self-harm, self-medicate with drugs and alcohol, and self-destruct through eating disorders, cutting, burning, or attempting suicide.

13. By this lawsuit, Plaintiffs come forward to seek to hold the NCAA accountable in two ways: changes to its policies and practices to ensure that it fulfills its obligation to protect student-athletes from sexual abuse by athletic department personnel now and in the future, and compensation for those who have already been subject to sexual abuse as a result of the NCAA's failure to do so previously.

The class action lawsuit alleges the following causes of action: Gross Negligence, Negligence, Breach of Fiduciary Duty, Negligent Misrepresentations and Omissions, Breach of Contract, Breach of Implied Contract, Breach of Contract as Third-Party Beneficiaries, Civil Battery, Assault, False Imprisonment, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Ratification.

Another interesting case comes from the State of Illinois which is captioned as *Dr. Jenny H. Conviser and Ascend Consultation in Health Care, LLC vs. DePaul University*, Cook County Case Number 2020L004282. Herein we have quoted from a case against DePaul University with respect to the conduct unbecoming of their Head Softball Coach:

DePaul University's leadership and Title IX Office is conflicted and terminally under the sway of its lucrative Athletics Department ("DePaul Athletics"), with an improper revolving door and/or dual-hatted relationship between and among it, the Title IX and General Counsel's Offices. That way of operating warps the University leadership's values and moral compass, making it more interested in protecting their own interests and the valuable "DePaul Blue Demons" brand, than in protecting the student-athletes well-being and others entrusted to it. And as it relates to DePaul's softball team, another conflict exists between the Title IX Office and the Athletics Department that further warps its behavior. The softball coach's sister is the Director of DePaul Athletics, and as a result the softball coach acted with impunity and created an abusive cult. There is no other way to explain DePaul's wrongful actions in: (a) covering up the physical abuse of a female coach at the hands of its legendary softball coach, Eugene Lenti ("Lenti"), and (b) retaliating against the whistleblower (as well as punishing the victim of Lenti's assault), after its leading mental health care provider of 13 years, Plaintiff Dr. Jenny Conviser, was involved in properly reporting Lenti's misconduct to DePaul and its Title IX Office.

The facts here are both simple and horrifying. Plaintiff heard from credible sources that Lenti, the brother of DePaul's Athletics Director (Jean Lenti Ponsetto ("Lenti Ponsetto")), was out of control and verbally and physically abusing his female players on a regular basis, including regularly punching them about their bodies, and calling them "f----g whores." Dr. Conviser dutifully reported what she heard to DePaul Athletics and the Title IX Office, putting her squarely in the cross hairs of the Athletics Director Lenti Ponsetto out to protect her brother. DePaul, compromised by its internal conflicts of interest, and upon information and belief, never conducted an independent investigation of Lenti's bad behavior, nor admonish him. With the benefit of 20/20 hindsight, this event proved to be the beginning of the end for Dr. Conviser's career at DePaul.

What happened next shocks the conscience. DePaul, knowing that Dr. Conviser's team was involved in the reporting of Lenti's physical attack, turned the tables on Dr. Conviser, as the University went into "cover up" mode in five steps. Step 1: Let Lenti slip out the back door and "retire," likely with his pension, and certainly with his reputation intact. He was then able to resurface and secure a lucrative position at Auburn University, with that institution presumably none the wiser about Lenti's assault on one of his coaching staff. There is no record of DePaul informing Auburn of Lenti's misconduct, nor that DePaul properly reported the incident to the U.S. Center for SafeSport as required. That was left to Dr. Conviser to do, and she did as required by the U.S. Center for SafeSport's Code. Step 2: Fire the rest of Lenti's coaching staff, including, incredibly, the victim of his latest physical attack. Step 3: Terminate Dr. Conviser's professional relationship with the University, repudiate its contract with her company, Ascend, and stop referring any patients to her. Step 4: Defame Dr. Conviser and put her reputation in a false light by falsely telling others in the DePaul community that Dr. Conviser deterred athletes under her care from reporting instances of abuse, therefore putting athletes in harm's way. In an act of "gaslighting," DePaul also accused Dr. Conviser of getting her "facts wrong," attempting to wrongly portray her as merely a befuddled, unhinged vendor with an ax to grind. And finally, Step 5: protect the Athletics Department brand and prioritize "winning" at all costs, including covering up for an out-of-control coaching culture where star coaches abuse their power of trust over student-athletes and inflict harm on them, knowing that they will not be held accountable by the University.

Despite Lenti's Mount Rushmore-like stature at DePaul and having his sister as his boss to back him, Dr. Conviser had no choice, morally, legally and ethically, but to ensure that Lenti was reported to the University's Title IX Office when she learned of his frequent misconduct.

Dr. Conviser had a heightened concern about these issues because she understands that when coaches exert a manipulative cult of personality and use their power as if they were above reproach it is generally because they believe that they will not be held accountable by the university. This is especially the case here as Lenti was protected by his sister Lenti Ponsetto, and by the conflicts of interest between and among the University's Title IX Office, Office of the General Counsel, and DePaul Athletics. Such a culture, left unchecked, exerts physical and psychological harm on the student-athlete community.

It is also commonplace for universities, such as DePaul, with successful and lucrative athletics programs, to put their own self-interest and interest in "brand protection" above the fiduciary duties that administrators owe to the student-athletes placed in their care.

Here, DePaul, under the sway of DePaul Athletics, chose to look the other way, ignore Dr. Conviser's prior warnings, and in turn failed to discipline Lenti at all, allowing his

reign of terror to continue, culminating with him physically assaulting a female coach on his team.²

We applaud Dr. Conviser's willingness and frankness to speak out. All too often the advice and expertise of sports psychologists are ignored and swept under the rug to preserve the status quo at colleges and universities. Our student-athletes deserve better. Dr. Conviser's complaint goes on to allege Retaliation, Title IX, 20 U.S.C. Sections 1681, *et seq.*, Breach of Contract/Implied Covenant of Good Faith and Fair Dealing, Indemnification, Defamation *Per Se*, Defamation *Per Quod*, False Light, and concludes by demanding a jury trial.

The DePaul case shows an administrative failure to act pursuant to the rules and regulations to the detriment of student-athletes. In this particular case, former Athletic Director O'Toole was well aware of the issues in multiple athletic department programs. Either no action was taken, the investigation was white-washed, or the risk management of the university was more important than the health and well-being of the student-athletes. In any event, we believe O'Toole has failed in his duty to your student-athletes.

As Trustees it is incumbent upon you to look to the future and work to protect the legacy of Cowley College. Part of this planning will need to an adjustment on how you view coaching and the liability the College could face at the hands of a bad coach. You currently have a President that is aware of the implications a bad coach could have and is working towards correcting the harmful environment that has perpetuated at Cowley College for who knows how many years.

With all the information available, it is obvious that a coach's behavior towards their team has an incredible impact on the mental health and safety of their student-athletes. Unfortunately, in recent years headlines have highlighted this impact as story after story of student-athletes taking their own lives pours forth. As the information develops on the causes of the decline of the mental health of these student-athletes, I can only hope that as a legal practitioner, as well as a father and grandfather, that these universities make any and all necessary changes to their rules and regulations to assist in the prevention of loss of life. Our mental health is just as important as our physical wellbeing. Unfortunately, in the United States our access to mental health services has been lacking for decades. I have hope that these younger generations are working to change that, and we need to support their efforts to fully care for themselves.

The Women's Sports Foundation identifies five types of typical abusive behavior in their position paper entitled "Addressing the Issue of Verbal, Physical and Psychological Abuse of Athletes." They include:

1. Verbal Abuse – naming calling, hurtful comments regarding performance, swearing at players or game officials, and comments meant to demean a person's integrity.
2. Psychological or Emotional Abuse – having unrealistic goals or expectations of athletes, keeping athletes from participating in games or practices because of assumed limits or underdeveloped skills, issuing threats, or continually making demeaning statements.

² <https://zumpanopatriciosprofessional.lexblogplatform.com/wp-content/uploads/sites/780/2020/04/JC-v-DePaul-Filed-Complaint.pdf>

3. Physical Abuse – when coaches use any type of hurtful touch causing physical pain, the use of excessive exercise, denial of fluids, and/or imparting unreasonable requests as a form of punishment or a way of creating team discipline.

4. Bullying – includes deliberate, repeated and sometimes health-endangering mistreatment of one or more persons (the target(s)) by a perpetrator (the bully) whose destructive actions are fueled by the bully’s need to control the target.

5. Hazing – any activity expected by existing team members or coaches themselves of someone joining a team or to maintain full status on a team that humiliates, degrades or risks emotional and/or physical harm, regardless of the person’s willingness to participate.

The Women’s Sports Foundation takes the position that the “use of derogatory language and intentionally hurtful statements from coach to athlete or among athletes is wrong because coaches and sponsoring schools have a professional responsibility for the players.”

Based upon the above definitions, it appears certain that several of your coaches could be deemed to have engaged in abusive behavior given the definitions as propounded by the Women’s Sports Foundation. Not only does this type of negative environment have long term psychological and physical consequences for the student-athletes, the failure of the administration of Cowley College to openly investigate parental and student-athlete concerns continues to create a safe harbor for abusive coaching practices and leaves Cowley College open to liability.

I have a website through the Marquette University Law School entitled “Greenberg’s Coaching Corner.” For the last several years I have focused some of my efforts on coaches’ misconduct, especially in the area of crossing the boundaries and dishing out “tough love.” I have spoken on the subject as well as counseled parents of student-athletes who have suffered abuse from their coaches. Coaching abuse has become an important issue in the world of collegiate athletics with the revelations of the antics of Mike Rice of Rutgers University, Beckie Francis of Oakland University, Bill Gibbons of Holy Cross University, Kelly Greenberg of Boston University, Doug Wojcik of the College of Charleston, and the list is growing. My position on this subject is strongly stated in an article I published entitled “Zero Tolerance: Abuse Must End, An Opinion.” That opinion states:

1. Physical and verbal abuse and bullying should be grounds for immediate termination with cause. Every university needs to adopt a zero tolerance policy. Abusive behavior by high-profile university employees toward student-athletes doesn’t merely merit a time-out and second chance, it merits dismissal.

2. The NCAA must take a stronger stance and provide rules sanctions for such kinds of conduct. NCAA student-athletes subject to an abusive coach should be allowed to immediately transfer without loss of eligibility.

3. Coaching contracts should include specific language making physical and verbal abuse and bullying a basis for termination for cause. “It is unjust for coaches to be fired, for true cause, and

then have the ability to collect money for the remainder of their contract term due to poor contract drafting — especially in cases where abuse is the foundation for the termination.”

4. Abusive coaching may have worked for another generation, but not now. Administrators who tolerate, are indifferent to, or who conceal this type of behavior must face the firing squad. Every time a university looks the other way or issues a dismissive punishment, it's like dispatching an abuser back into the home of a domestic violence victim.

5. Whistleblowing must be encouraged, not discouraged. Abuse and anti-bullying laws must include coaches at all levels, with stiffened penalties for apathy, concealment, or non-reporting.

6. Not only are the allegations of an abusive coach a public embarrassment, but also costly. Abusive coach scandals involve crisis communication expenses, investigation expenses, attorney fees, buyouts for the coach, and settlements for the student-athletes, which can become extremely expensive for the university.

“The difference between a demanding coach and an abusive coach is not a thin line that someone can drift over if he or she loses focus for a second before peeling back to the other side. It's a wide gap -- a mile wide -- and it takes a long time for a coach to get from one side to the other and back again.”

“Good coaches are like magicians, turning self-doubt into confidence. They don't try to separate and chase away those perceived as weak -- because dividing the weak from the strong is herding, not coaching. Good coaches shoot arrows around the feet of their players, keeping them on edge while teaching them how to dance.”

7. Universities need to be more concerned with protecting their student-athletes from an abusive coach than protecting themselves from legal action. Abuse is not good coaching, even when it results in winning. Placing winning games or revenues above sportsmanship, decency, fairness, and ethics is out of the question.

8. Coaches can make or break the student-athlete's college experience. Stop screaming and start teaching. Our student-athletes deserve a healthy environment to learn and grow.

I have also implored the NCAA to take action in an open letter to the President of the NCAA, Mark Emmert, in which I stated:

And herein lies the difficulty with internal investigations by university personnel, especially situations wherein the coaches are husband and wife and work to protect each other by virtue of non-reporting. The investigations simply end in a whitewash, and are typically conducted in a manner that actively protects the name and reputation of the university, the program, its revenues, and its administration.

The coach-athlete relationship involves an inherent imbalance of power. The sports establishment has long been well aware of the alleged conduct and abuses undertaken by such sports legends as Woody Hayes and Bobby Knight. Maybe this form of conduct has been ongoing for a long time, but it has been just

recently exposed. Abuse may not be isolated in college sports. While abuse is inexcusable, it is certainly understandable why a coach could cross the lines in college athletics, with its “win now” culture, with a premium on chasing the revenues and star system recruits, with the coaching carousel and security of the job, and with the expectations of job performance and the stress that goes with it.

Rice's public disgrace offers a fair warning to the coaching fraternity that coaching buffoonery will no longer be allowed. Coaching techniques characterized by “in your face,” “dominate your enemy,” and “win at all costs” are probably from a past era. Physical and verbal abuse and bullying should be grounds for immediate termination with cause. Every university needs to adopt a zero-tolerance policy. The NCAA needs to take the leadership in this area. To date, nothing or little has been done. Abusive behavior by high-profile university employees toward student-athletes doesn't merely merit a time-out and second chance, it merits dismissal.

[. . .]

Student-athletes, as you can see, are a vulnerable group at a university. Abusive coaches who win typically have strong support from the university and the community. Because of the atmosphere of fear that abusive coaches can create, student-athletes “avoid speaking up for fear of being seen as a complainer or a troublemaker, injuring their opportunity to play. The player's parents fear speaking up for fear of making a bad situation worse for their son or daughter, or invite censure from other parents who support the program.”³ This however means that the situation never gets addressed and the abuse continues because of the silent consent of those who fear the coach. For many student-athletes, abusive coaching practices “cause psychological trauma, which has a cumulative effect on the person and may not be noticed until significant emotional damage has already occurred. Many athletes want to quit a sport in which they are very talented in order to avoid the coach.”⁴ Student-athletes having to “give up,” so that they can preserve their physical and mental health, is a situation that the NCAA should be actively invested in preventing.

Unfortunately, as was the case with Brown [Penn State Assistant Coach], there is currently little or no affordable recourse. Student-athletes who are on scholarship with parents who are barely paying for their child's academic matriculation can hardly afford to fight a university, its legal counsel and large law firms in these types of cases. There must be penalties and sanctions built into the system wherein if abuse is found it becomes an automatic monetary claim against the university in which the coach will be required to financially participate.

³ Carl E. Pickhardt, Ph.D., “Adolescents and Bullying Coaches,” *Psychology Today*, Jan. 30, 2012.

⁴ Dr. Jack Singer, “The Long Term Effects of Abusive Coaching Practices,” *Dr.JackSinger.com*, October 22, 2015.

Some Thoughts:

1. I wrote the above words to President Emmert in 2016. Based upon the lawsuits cited here, I think it is clear that what I said was true, colleges and universities are now financially participating.
2. Further, colleges and universities are making student-athlete abuse a basis for cause for firing in their coaching contracts.
3. We have been made aware that there may be many violations of Title IX that have occurred or are currently occurring within the athletic department and will be investigating the same.
4. Given that Cowley College has an Anti-Retaliation policy that “prohibits retaliation against any individual who reports discrimination or harassment, files a charge of discrimination or harassment, opposes a practice believed to be unlawful discrimination, or assists, testifies or participates in an investigation,” we believe that Dr. Smith may have whistleblower protections. There may be further protections under Title IX as well that we will be investigating.
5. It appears that Dr. Smith has been exemplary in working to resolve the situation and protecting the student-athletes from the apparent abuses. His actions not only helped the student-athletes but served to protect the College from potential legal action that certainly could arise and devastate the College. Employees that perpetuate an environment where possible abuse is allowed to run rampant should not be tolerated.
6. In my opinion given the current information at hand, Dr. Smith has done his duty to protect the College and the student-athletes as he should. It appears that his actions have drawn severe criticism from the community. His actions seem to have drawn what may be unjustified criticism from those who are supportive of O’Toole, an athletic director who may not have been the best qualified person for the job.
7. From Dr. Smith’s actions, it is clear that he is working to mitigate risk exposure of Cowley College in line with what I would consider the duties of a college President. Failure to do so would potentially leave Cowley College open to prolonged and ongoing legal battles that could mar the reputation of your institution.
8. Given the contacts I’ve made over the years with US Today and other national news outlets, I believe that a case of a President stepping up and doing the right thing for student-athletes would a welcome change in pace to the stories they usually speak to me about.

Thank you for your regard in this matter. With kind regards, I remain

Sincerely,

A handwritten signature in black ink, appearing to read "Martin J. Greenberg". The signature is written in a cursive style with a large, looping flourish at the end.

Martin J. Greenberg

MJG/daw

cc: Dr. Randy Smith