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A CONTEXTUAL STUDY OF THE NON-PROFIT DUTY OF OBEDIENCE: THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

Joseph M. Long∗

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∗ Assistant Professor of Business Law, Tillman School of Business, Mount Olive College, Mount Olive, NC. A sincere thank you to a number of true professionals who helped to make this final product better: Debra Burke, Jayne Zanglein, Kadence Otto, Alan Palmiter, and Nathaniel Growe. During the editing process for this article, the NCAA apparently revamped its website (actual quote from one editor), to the chagrin of me but more so to the editorial board of the Seton Hall Journal of Sports and Entertainment Law. I gratefully acknowledge the board's patience and diligence in completing this article.

> "Every vigorous game, from football to polo, if allowed to become more than a game, and if serious work is sacrificed to its enjoyment, is of course noxious. From the days when Trajan in his letters to Pliny spoke with such hearty contempt of the Greek overdevotion (sic) to athletics, every keen thinker has realized that vigorous sports are only good in their proper place. But in their proper place they are very good indeed."[1]

INTRODUCTION

President Theodore Roosevelt penned the above words when collegiate competition was new to American life.[2] Yet, over 100 years of collegiate competition have passed and his idea that college sports have a proper place is still an issue today.[3] Still poignant, his words raise a number of questions about the modern American structure of college sports. What is the proper place of collegiate athletics in American culture? What responsibility do the leaders within collegiate athletics have to keep college sports in its proper place? Are there legal guides to help us determine the answer? If so, what do the legal guides tell us? How may leaders within collegiate sports use such guides to dictate their own leadership behavior while continuing to serve a broad constituency which includes college athletes, fans, students, and other constituents connected with college sports? This article will begin a theoretical discussion of the possible answers in this context. Practical application must be, of course, left to the courts and practicing attorneys fortunate enough to handle such intriguing legal matters.

This article is divided into three main sections. First, the article will provide a brief description of the NCAA as a non-profit organization and its stated purpose. Second, the article attempts to explain the background and current legal status of the non-profit duty of obedience. Finally, this article will theoretically apply the non-profit duty of obedience principles to recent NCAA executive decisions, NCAA procedures, and the NCAA structure itself.

1. Theodore Roosevelt, *Foreword* to EDWARD, SECOND DUKE OF YORK, THE MASTER OF GAME (1904) *available at* http://www.theodoreroosevelt.org/TR%20Web%20Book/TR_CD_to_HTML68.html.
2. *Id.*
3. *Id.*

Although there are other organizations that govern collegiate athletic competition, the NCAA is the largest, most well-known, and most successful organization in that regard. Its decisions affect large higher education institutions, institutional employees, student- athletes, students, alumni, and others interested in a particular institution. Consider the recent Penn State University child sexual molestation cover-up.[4] The NCAA sanctions made national headlines. ESPN altered its television programming to cover the Penn State sex abuse scandal and the NCAA, including consecutive days of specific coverage.[5]

The impetus for this article arose from a couple of headlines about NCAA activities and its participation in charitable causes. The NCAA, the governing body for the majority of collegiate sports in the United States, has made a number of publicly promoted donations to various charitable institutions and programs. For example, in March of 2009, the NCAA donated $ 250,000 to the Southeastern Michigan branch of the United Way.[6] The donation in Detroit, Michigan, was actually related to the fact that NCAA Championship games were taking place there. NCAA donations have also been provided in response to well-publicized natural disasters, such as the Haitian relief effort.[7]

Around the same time, questions began to surface concerning the NCAA leadership and seemingly strategic relationships with various business interests concerning

4. Pete Thamel, *Sanctions Decimate the Nittany Lions Now and For Years to Come*, N.Y. TIMES, Jul. 23, 2012, http://www.nytimes.com/2012/07/24/sports/ncaafootball/penn-state-penalties-include-60-million-fine-and-bowl-ban.html?pagewanted=all&_r=0.

5. Dan Quinn, *Outlining ESPN's added Penn State television news coverage plans*, ESPN FRONT ROW (Jul. 23, 2012), http://frontrow.espn.go.com/2012/07/outlining-espns-added-penn-state-television-news-coverage-plans.

6. Sherri Begin Welch, *NCAA donates $ 250,000 legacy grant to fund childhood learning*, CRAIN'S DETROIT BUS. (Mar. 4, 2009), http://www.crainsdetroit.com/article/20090304/FREE/903049979/ncaa-donates-250-000-legacy-grant-to-fund-childhood-learning#.

7. *NCAA contributes $ 300,000 to relief effort in Haiti,* NCAA NEWS (Feb. 11, 2010), http://fs.ncaa.org/Docs/NCAANewsArchive/2010/aWide/ncaa_contributes_300_000_to_relief_effort_in_haiti.html; *NCAA, Habitat partner for hurricane relief*, HABITAT FOR HUMANITY (2005), www.habitat.org/newsroom/2005archive/ insitedoc010844.aspx (referring to a combined $ 1.5 million donation from NCAA Division II and the NCAA national office).

revenues.[8] These critics doubt the real intentions of those in the NCAA leadership. What motivations drove NCAA leadership decisions? NCAA leaders have vigorously defended their decisions and direction for the future of the organization. From a legal perspective, questions about the NCAA's leadership decisions may be scrutinized specifically. In doing so, a few legal questions must be considered and answered. Legally, what is the NCAA? Based upon its legal organization, what are the NCAA leaders' responsibilities? Given its organization, is there a legal framework within which the NCAA must operate? And, finally, is it possible to judicially dictate NCAA behavior based upon the identified guiding principles? This paper will attempt to answer those questions through an analysis of the NCAA's legal organization (non-profit) and legal precedents and analysis concerning similarly situated organizations.

I. THE NCAA AS A NON-PROFIT ORGANIZATION

The NCAA has and continues to produce a riveting and exciting history.[9] The National Collegiate Athletic Association ("NCAA") is registered with the Internal Revenue Service as a non-profit organization able to receive tax-deductible contributions.[10] Over 1,000 institutions are

8. *See generally* Taylor Branch, *The Shame of College Sports*, THE ATLANTIC MONTHLY (Oct. 2011), http://www.theatlantic.com/magazine/print/2011/10/the-shame-of-college-sports/8643/; David Steele, *NCAA holds firm to hypocritical system that brings huge profits*, SPORTING NEWS: FANHOUSE (Sept. 13, 2011), http://aol.sportingnews.com/ncaa-football/story/2011-09-13/ncaa-holds-firm-to-hypocritical-system-that-brings-in-huge-profits; Lester Munson, *Challenges for change in the NCAA*, ESPN COMMENTARY: COURTSIDE SEAT (Dec. 2, 2011), http://espn.go.com/espn/commentary/story/_/page/munson-111202/three-separate-lawsuits-force-reforms-ncaa; Victor Matheson, *NCAA basketball teams don't generate profits*, CHRISTIAN SCIENCE MONITOR (Mar. 19, 2010), http://www.csmonitor.com/Business/The-Sports-Economist/2010/0319/NCAA-basketball-tournament-teams-don-t-generate-profits; Chris Isidore, *Nothing but net: Basketball dollars by school*, CNN MONEY (Mar. 18, 2010), http://money.cnn.com/2010/03/18/news/companies/basketball_profits/index.htm?postversion=2010031807.

9. Warren K. Zola, *Transitioning to the NBA: Advocating on Behalf of the Student-Athletes for NBA & NCAA Rule Changes*, 3 HARV. JOUR. SP. & ENT. L. 159, 173 (2012) (providing a concise history of the NCAA as well as an explanation of NCAA functions).

10. Andrew D. Appleby, *For the Love of the Game: The Justification for Tax Exemption in Intercollegiate Athletics*, 44 J. MARSHALL L. REV. 179, 188-91 (2010); *Finances*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/

members of the NCAA.[11] Most of the members of the NCAA are also organized as non-profit organizations, including a number of publicly funded colleges and universities.[12] One of the highest profiled "charity" organizations and an inseparable aspect of modern American culture, the NCAA and the decisions by its leadership are reviewed and scrutinized constantly.[13] The NCAA and its members operate in a plethora of business areas.[14] In fact, Congressional members have shown concern that the NCAA's endeavors have become commercial and that its non-profit status should be reconsidered.[15]

While misconceptions exist as to whether NCAA sports are profitable enterprises,[16] there is no doubt that leaders of university athletics and NCAA personnel consider revenues an important component to the NCAA institution's perceived success.[17] Authors have argued for decades that

index.html. A search at the Internal Revenue Service website reveals the NCAA as a registered charity. IRS Exempt Organizations Select Check, http://apps.irs.gov/app/eos/pub78Search.do?ein1=44-0567264&names=&city=&state=All. . .&country=US&deductibility=all&dispatchMethod=searchCharities&submitName=Search.

11. *Membership*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new (last visited September 26, 2012) (providing a current list of NCAA , membership schools).

12. *Id.*

13. The New York Times has its own section of news releases and stories concerning the NCAA. *See* http://topics.nytimes.com/top/reference/timestopics/organizations/n/national_collegiate_athletic_assn/index.html.

14. *See The Official Store of NCAA Sports,* NCAA, http://www.shopncaasports.com. Through a deal with Thought Equity Motion, the NCAA has created "The Vault," where video clips and highlights of the final rounds of the NCAA Division I men's basketball tournament are available for viewing, linking, or downloading, with a syndication and licensing link towards the bottom of the page. *See* Vault, http://vault.ncaa.com/.

15. Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis For the Federal Regulation of The Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 599 (2008) (explaining the 2006 correspondence between Representative William Thomas and Myles Brand, former president of the NCAA, concerning the commercialism of NCAA football and men's basketball).

16. *See* Tae M. Phillips, *Un-Equal Protection: Preferential Admissions Treatment For Student Athletes*, 60 ALA. L. REV. 751, 752 (2009)(stating that "College athletics is one of the most successful and profitable enterprises in the United States."); *see also Behind the Blue Disk: Division I FBS Athletic Expenses and Revenues*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/behind+the+blue+disk/behind+the+blue+disk+-+fbs+athletic+revenues+and+expenses(containing data showing that expenses for athletics programs at Division I FBS institutions far outweigh revenues and also containing an explanation to the question, "If college sports don't make money, why do schools sponsor them?").

17. Pete Thamel & Richard Sandomir, *Why Would the NCAA Expand Its*

intercollegiate athletics is driven by commerce.[18] Some recent NCAA revenue numbers appear to support this idea, at least at the Division I level.

NCAA licensing deals have been estimated to be worth more than four billion dollars.[19] Such deals have raised a number of questions concerning the NCAA's status as a non-profit.[20] For fiscal year 2011 – 2012, the NCAA's budget shows 81% of total revenues, or $ 845,000,000, are generated from television and marketing rights fees.[21]NCAA members and their respective home cities participate in extensive bid processes to host NCAA Championship events.[22] Market-driven influences are openly acknowledged by the NCAA.[23] Today, NCAA partnerships with for-profit companies are commonly formed, and the NCAA also has become an owner in various for-profit business ventures.[24] Critics of the NCAA's current growth have stated that, although various parties benefit from their relationships with the NCAA, the

Tournament? It's About the Money, N.Y. TIMES (Mar. 13, 2010) , http://www.nytimes.com/2010/03/14/sports/ncaabasketball/14ncaa.html?ref=national_collegiate_athletic_assn (quoting NCAA senior vice-president for basketball and business strategies as saying, "The reality of this great event [the NCAA division I basketball tournament] is that it has buoyed us [the NCAA].")

18. Mathewson, *supra* note 15, at 597-98 (citing MURRAY SPERBER, COLLEGE SPORTS, INC: THE ATHLETIC DEP. VS. THE UNIVERSITY 1 (1990)).

19. Pete Thamel, *N.C.A.A. Fails to Stop Licensing Lawsuit*, N. Y. TIMES (Feb. 8, 2010), http://www.nytimes.com/2010/02/09/sports/ncaabasketball/09ncaa.html?_r=0.

20. Letter from Rep. Bill Thomas, Chairman, House Comm. on Ways and Means, to Myles Brand, President, NCAA (Oct. 2, 2006), *available at* http://www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

21. *Revenue*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Revenue.

22. *Championship Bid Process,* NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Championship+Bids/Championships+Bid+Information.html (last visited September 26, 2012).

23. *Behind the Blue Disk: Division I FBS Athletic Expenses and Revenues*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/behind+the+blue+disk/behind+the+blue+disk+-+fbs+athletic+revenues+and+expenses.

24. For example, www.iHoops.com is a joint venture with funding from the National Basketball Association and the NCAA. Press Release, iHoops.com, New Online Destination from the NBA and NCAA's Joint Youth Basketball Initiative Provides Parents, Coaches, and Players with the Skills and Knowledge to Succeed On Court and in Life (Oct. 26, 2009), *available at* http://www.ihoops.com/about/press-releases/20091026.htm.; *see also NCAA Invests in Largest Officiating Management Organization in Amateur Sports*, NCAA NEWS (Sept. 25, 2008), http://fs.ncaa.org/Docs/PressArchive/2008/Announcements/20080925_arbiter_eso_officiating_rls.html.

student-athlete is the only stakeholder who does not.[25]

Thus, as a non-profit organization, the NCAA must operate under specific non-profit guidelines. A brief history of non-profit organizations in the United States and a review of the legal guidelines for non-profit leaders are both important for the purposes of this paper. A discussion follows in the next section.

II. NON-PROFIT ORGANIZATION & LEADERSHIP

In the United States, non-profit organizations were traditionally organized as trusts for charitable purposes, such as assisting the poor.[26] In this regard, non-profit organizations are distinguished from their for-profit counterparts in that, whereas profit is the paramount concern of a for-profit corporation, the ultimate goal of effective non-profit governance is charitable.[27]

Yet, non-profit organizations are increasingly taking on the characteristics of their for-profit counterparts.[28] Since 1970, the American non-profit sector has grown four times faster than the rest of the economy.[29] Non-profit scandals surfacing in the 1990s brought issues of regulation and oversight to the attention of the general public, political officials, and scholars.[30] The public visibility of non-profits has increased as such organizations began seeking public exposure through advertising, press releases, corporate partnerships, and other forms of public relations.[31] Like their

25. Darren A. Heitner, *Money and Sports: Economic Realities of Being an Athlete*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 161, 161 (2012).

26. Denise Ping Lee, *The Business Judgment Rule: Should It Protect Non-Profit Directors?*, 103 COLUM. L. REV. 925, 925 (2003).

27. Linda Sugin, *Resisting the Corporatization of Nonprofit Governance: Transforming Obedience into Fidelity*, 76 FORDHAM L. REV. 893, 894 (2007).

28. *Id.*

29. Peggy Sasso, *Searching for Trust in the Not-For-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability,* 50 U.C.L.A. L. REV. 1485, 1518 (2003).

30. *Id.* at 1518-19; *see also* Lee, *supra* note 26, at 928- 30 (discussing in great detail the history and evolution of the non-profit corporation in American society).

31. *See, e.g.*, Chris Daniels, *American Cancer Society Enters the Cause Branding Arena with 'Choose You' Initiative*, PR WEEK USA, June 2, 2010, *available at* 2010 WLNR 11272736; Kate Maddox, *Looking for the Right Fit: Marketers Search for Agency Partners That Can Provide Innovation and Efficiencies as well as Support That Goes Beyond Creative*, B TO B Vol. 95, Issue 1, Jan. 18, 2010, *available at* 2010 WLNR

corporate counterparts, marketing analysis for non-profits now focuses upon brand value.[32] As public awareness of non-profits increased, the sector became a significant and integrated aspect of the American economy.[33] Suggestions that non-profits engage substantially, if not excessively, in regular business activity have been made and are supported by structural and operational practices of some non-profit organizations.[34] Non-profit budgets now may extend beyond the billion dollar range.[35] In fact, the NCAA acknowledges that it receives significant revenue, but states that it spends it legally and appropriately, according to its mission.[36]

Towards the end of the 20th century, non-profit organizations began to receive revenues from operations not traditionally considered charitable, often becoming indistinguishable from their for-profit counterparts.[37] Today, a not-for-profit company may exist for a number of purposes, including charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals.[38]

For-profit corporations must maximize shareholder value and pursue profit. Non-profits seek other goals and fulfill specific societal needs. Thus, a legal framework for non-profits that resembles a for-profit structure obscures and

1221555; Tonya Garcia, *Committed to the Cause*, PR WEEK USA, Dec. 2, 2009, at 30, *available at* 2009 WLNR 24274490; *Nonprofit PR Awards Issue,* PR NEWS, Vol. 65, Issue 43, Nov. 9, 2009, *available at* 2009 WLNR 22445360.

32. Stephanie Strom, *An Analysis Ranks Brands of Non-Profits*, N.Y. TIMES (June 23, 2009), http://www.nytimes.com/2009/06/24/us/24charity.html?_r=1&ref=young_mens_christian_association.

33. Danné L. Johnson, *Seeking Meaningful Non-Profit Reform in a Post Sarbanes-Oxley World*, 54 ST. LOUIS U. L. J.187, 190-95 (2009-10) (providing an economic overview of the non-profit sector's influence and impact in the United States).

34. James J. Fishman, *Wrong Way Corrigan and Recent Developments in the Nonprofit Landscape: A Need for New Legal Approaches*, 76 FORDHAM L. REV. 567, 572, 590 (2007).

35. *See Organizational Profile,* YMCA (Sept. 27, 2012), http://www.ymca.net/organizational-profile/ (showing the popular non-profit organization, YMCA, as serving over 45 million people worldwide and revenues, contributions, and grants totaling over 6 billion dollars).

36. *Student Athlete Benefits*, NCAA, at http://www.ncaa.org/wps/wcm/connect/public/NCAA/Finances/Finances+Student+Athlete+Benefits.

37. Fishman, *supra* note 34, at 571.

38. *Id.* § 501(c)(3).

denigrates a non-profit's traditional purpose.

A. Non-Profit Leadership and Legal Duties

Currently, non-profit organizations are heavily self-regulated.[39] The Internal Revenue Service ("IRS") has become the primary government regulator of non-profit organizations.[40] When litigation is required, the attorney general in the incorporating state of the non-profit is the legislatively-designated party authorized to pursue legal action.[41] Yet, having the attorney general pursue alleged non-profit abuses may often involve or be perceived to involve political motivations, thereby creating another level of complexity for challenging non-profit director actions.[42] This places a significant responsibility upon non-profit leaders to adhere to their fiduciary obligations and take action within the guidelines of the respective non-profit mission statement.[43]

This does not mean, nor should it mean, that non-profit leaders may determine guidelines for their respective non-profit organization without boundaries. In fact, a well-written non-profit mission statement sets the boundaries quite clearly. It is the responsibility of the non-profit leaders to adhere to the particular mission as written. This concept is known as the duty of obedience and means that a non-profit leader is entrusted with carrying out the "purposes of the organization as expressed in the articles or certificates of incorporation."[44]

Due to the increased complexity of the non-profit sector, leaders in the non-profit sector must be attuned to the obligations and duties of their respective posts. Non-profit leaders must understand that their decisions directing non-

39. *See* Fishman, *supra* note 34, at 574, 580 (discussing the Internal Revenue Service's role in not-for-profit regulation).

40. *Id.* at 574.

41. *Id.* at 576; *see also* Mary Grace Blasko & Curt S. Crossley, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37, 48 (1993).

42. Blasko & Crossley, *supra* note 41, at 42-47.; *see also* Nicholas Confessore, *Cuomo Accuses Espada of Diverting Millions from Clinics*, N. Y. TIMES (Apr. 20, 2010), http://www.nytimes.com/2010/04/21/nyregion/21espada.html.

43. Blasko & Crossley, *supra* note 41, at 48.

44. Alan R. Palmiter, *Duty of Obedience: The Forgotten Duty*, 55 N.Y.L. SCH. L. REV. 457, 467 (2010/11).

profit action should be dictated by specific fiduciary duties related to the non-profit mission statement.[45] Non-profit leaders are limited in the scope of their actions by their respective non-profit's mission. State statutes may also set definitions for non-profit leader obligations.[46]

Fiduciary duties for non-profit leaders based upon the non-profit mission do exist, and, in fact, are becoming increasingly more important as parties begin to challenge, and courts are required to evaluate, non-profit actions. Some courts speak to the non-profit leaders' duty to abide by the mission statement as the most important concern.[47] Therefore, it is essential that non-profit leaders and decision-makers understand what fiduciary duties apply in their given non-profit roles, in particular the duty of obedience, not only to avoid possible litigious actions, but also to align themselves with the mission of the non-profit organization.

Directors and officers of non-profit organizations have been referred to as "care-takers" of their respective organizations, charged with advancing the organizations' interests above all other interests.[48] Such statutory and common law requirements are satisfactory for those leaders only worried about fulfilling legal requirements of their post. But, non-profit directors should be, and often times are, driven by standards well beyond the simple legal standards.[49]

B. Mission Fulfillment: The Ultimate Non-Profit Measure

Measuring success in a non-profit organization is slightly different from such measures used in for-profit corporations. Success of a non-profit organization is centered upon the concept of mission fulfillment.[50] A non-profit's success has a

45. *See generally* Bruce R. Hopkins, LEGAL RESPONSIBILITIES OF NONPROFIT BOARDS 2 (Boardsource ed., 2003).

46. *See, e.g.,* IND. CODE § 23-17-13-1 (2010); IDAHO CODE ANN. § 30-3-80 (Michie 2010); N.C. GEN. STAT. § 55A-8-30(a)(1)-(3) (2009) (duties of directors); N.C. GEN. STAT. § 55A-8-41 (2009) (duties of officers); S.C. CODE ANN. § 33-31-830 (2009).

47. *See* Palmiter, *supra* note 44 (citing Summers v. Cherokee Children & Family Servs., 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002)) ("non-profit directors must be 'principally concerned about the effective performance of the nonprofit's mission.'").

48. Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575, 593 (Sup. Ct. 1999).

49. Sugin, *supra* note 27, at 894.

50. Sasso, *supra* note 29, at 1499. *See also* Bishop v. Evangelical Lutheran Good

direct relationship to its leaders' adherence to the non-profit's mission.[51] In other words, the non-profit charter should direct all leader decisions and, ultimately, the organization's outcomes. Non-profit success, therefore, should be defined as an organization's ability to comply with the defined mission.

As simple as this may sound, mission fulfillment may not actually be that easy. First, there is a definitional issue for non-profit leaders. Missions may be subject to interpretation by various constituencies and may be difficult to define.[52] Second, there may be various interpretations of success for a non-profit. Perceived success (for example, lucrative contracts or well-intentioned donations) may actually derail an organization's ability to fulfill its mission. It is imperative, then, that non-profits have a clearly defined mission, providing leaders with specific guidance on non-profit goals. A not-for-profit organization must also define its primary stakeholders[53] and have directors and officers that obey the mission in all decisions made for the not-for-profit and its stakeholders in light of a particular situation. Sometimes, a primary stakeholder will be specifically set forth in the non-profit's mission statement and may allow a particular, named individual standing.[54] For example, in the NCAA mission statement, the constituent named is the "student-athlete."[55] In explaining the NCAA's purpose in relation to this mission statement, current NCAA president Mark Emmert stated that, "We must be student-centered in all that we do."[56] No

Samaritan Society, 179 P.3d 1248, 1252 (N.M. Ct. App. 2008), *rev'd on other grounds,* 212 P.3d 361 (N.M. 2009) (adopting Sasso's definition and stating "Mission fulfillment, not profitability, is a measure of success of a non-profit organization.").

51. Sasso, *supra* note 29, at 1485.

52. *Id.* at 1499-1500.

53. *Id.* at 1501.

54. *See, e.g., History,* THE CHILDREN'S MIRACLE NETWORK HOSPITALS, http://www.childrensmiraclenetworkhospitals.org/About (referring specifically to children); *About Us*, KANSAS CHILD WELFARE AGENCY, http://www.youthville.org/AboutUs/Default.aspx (stating that the organization's focus is upon children, specifically, "Giving children back their childhood.").

55. Allen L. Sack, *How to Evaluate NCAA Success in Attaining its Stated Mission. Implications for Athletes' Rights and Social Justice*, 4 J. OF INTERCOLLEGIATE SPORT 5, 5 (2011); The Citadel Newsroom, *NCAA Mission Statement* (Mar. 6, 2007), *available at* http://www.citadel.edu/root/ncaa_mission (stating that the information from this Citadel news release is based upon information found at the website www.ncaa.org).

56. *Office of the President: On the Mark,* NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/On+the+Mark (last visited Sept. 27, 2012).

other constituent is mentioned, as will be discussed in more detail below.

C. The Non-Profit Duty of Obedience

The duty of obedience is a duty applicable to non-profit leaders. The simplicity of this concept often causes non-profit leaders to overlook this particular duty. but it is crucially important for non-profit success.[57] Historically, the duty of obedience has remained vaguely defined, but attention to this fiduciary duty is promoting clarity.[58] Despite this, some argue that the non-profit duty of obedience has been a mainstay of non-profit case law.[59] Interestingly, some recent court decisions have recognized the duty of obedience for for-profit corporate directors as well.[60]

The duty of obedience requires directors and officers to act in accordance with the charitable purpose of their organization found in the corporate charter, often referred to as "mission fulfillment."[61] Non-profit leaders are obliged to adhere to whatever mission statement governs their organizations and to work to fulfill that mission.[62] As a recent law review article has noted, the dissenting opinion in *Shorter College v. Baptist Convention of Georgia*[63] (discussed later in this article) addresses "mission fulfillment" in the non-profit context.

57. Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, 34 J. CORP. L. 43, 48 (2008).

58. Jeremy Benjamin, *Reinvigorating Nonprofit Directors Duty of Obedience*, 30 CARDOZO L. REV. 1677, 1679 (2009).

59. Palmiter, *supra* note 44, at 468.

60. Gearhart Industries, Inc. v. Smith Intern, Inc., 741 F.2d 707, 719 (5th Cir. 1984); Floyd v. Hefner, 556 F.Supp.2d 617, 633-34 (S.D. Tex. 2008) (citing *Gearhart*). Bankruptcy courts also recognize a duty of obedience of bankruptcy trustees. In re Chapell, No. 09–31411, 2010 WL 986400 at *6 (Bankr. S.D. Tex. 2010); In Re White, 429 B.R. 201, 213 (Bankr.S.D. Tex. 2010)(quoting *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. Ct. App. 2004) which held that "three broad duties stem from the fiduciary status of corporate officers and directors; namely, the duties of obedience, loyalty, and due care."); In Re Novak, 383 B.R. 660, 671 (Bankr. W.D. Mich. 2008).

61. Benjamin, *supra* note 58, at 1680; Terri Lynn Helge, *Policing the Good Guys: Regulation of the Charitable Sector Through a Federal Charity Oversight Board*, 29 CORNELL J.L. & PUB. POL'Y 1, 11 (2009); *See also* Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715N.Y.S.2d 575, 593 (N.Y. App. Div. 1999).

62. Benjamin, *supra* note 58, at 1703.

63. Shorter College v. Baptist Convention of Georgia, 614 S.E.2d 37 (Ga. 2005).

In addressing duties in a non-profit context, the dissent opined that:

> It is axiomatic that the board of directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the 'duty of obedience.' It requires the director of a not-for-profit corporation 'to be faithful to the purposes and goals of the organization' since '[u]nlike business corporations, whose ultimate goal is to make money, nonprofit corporations are defined by their specific objectives.[64]

Very often, non-profit organizations will generate and consider altruistic or "good" ideas. Leaders of the non-profit organization must filter such ideas through the non-profit mission statement before pursuing a well-intended idea. If the idea for action does not "fit" with a non-profit's particular mission statement, that particular idea should be left for another organization or individual to pursue. The duty of obedience protects the variation of expression that the nonprofit sector offers.[65] It should not be legally acceptable for a non-profit to attempt to diversify charitable resources to other goals, no matter how noble or laudable.[66] "Founders of nonprofits decide which societal concerns need attention and charter their organizations with the purpose of addressing those concerns."[67] Other concerns of society, regardless of their noble nature, should not interfere with the chartered purpose of the not-for-profit.

To illustrate, consider *Manhattan Eye, Ear & Throat Hospital v. Spitzer*.[68] The New York non-profit organization Manhattan Eye, Ear & Throat Hospital ("Manhattan Eye") was chartered for a few specific purposes including operating and maintaining a hospital and post graduate school in the City, County, & State of New York for various medical purposes.[69] In 1999, under heavy economic pressure and after

64. Joseph Anthony Valenti, *Know the Mission: A Lawyer's Duty to a NonProfit Entity During An Internal Investigation*, 22 ST. THOMAS L. REV. 504, 519-20 (2010) (citing *Shorter*, 614 S.E.2d at 43) (alteration in original, citation omitted).

65. Benjamin, *supra* note 58, at 1682.

66. Helge, *supra* note 61(quoting DANIEL L. KURTZ, BOARD LIABILITY: A GUIDE FOR NONPROFIT DIRECTORS 85 (1988)).

67. Benjamin, *supra* note 58, at 1682.

68. Manhattan Eye, Ear & Throat Hosp. v. Spitzer, 715 N.Y.S.2d 575 (N.Y. Sup. Ct. 1999).

69. *Id.* at 577.

concluding that only the not-for-profit hospital's real estate was valuable, the Manhattan Eye Board decided to close its hospital, terminate its residency programs, and sell the real estate where the hospital was located.[70] Testimony indicated that the proceeds from the sale would be used to "transform [Manhattan Eye] from its historical role as a teaching specialty hospital into free standing D&T [sic] centers in underserved areas of New York City."[71] The Court found that Manhattan Eye's agreement to sell the property was for a "worthwhile use," as Manhattan Eye had agreed to sell to a world renowned cancer treatment and research center.[72] Yet, the Court refused to allow the transaction to take place. In finding that the Manhattan Eye real estate upon which the hospital was located could not be sold in the manner proposed, the Court found that the Manhattan Eye directors had not shown that the purpose of the corporation would be promoted through the sale.[73] The Court found that the sale price was the factor influencing the Board's decision to sell and not the mission of the organization.[74] Concluding that the proposed sale of the Hospital and its real estate could not take place, the court found that the proposed sale clearly did not support the purpose of the organization.[75] *Manhattan Eye* demonstrates how a court may review a Board of Directors' decisions in light of the non-profit mission statement and, importantly, nullify the Board of Directors' decision.

Some authors argue that a strong duty of obedience is essential for the continued success of the nonprofit sector overall, helping to maintain the public trust that is essential to their existence.[76] It has also been argued that the duty of obedience is the most fundamental of duties, for both for-profit and non-profit entities.[77] Since the duty of obedience requires directors and officers to advance the mission and

70. *Id*. at 578-80.
71. *Id*. at 582.
72. *Id*. at 591.
73. *Id.* at 592.
74. *Manhattan* Eye, 715 N.Y.S.2d at596 (stating that, "A careful evaluation of whether there was a basis for changing the corporate [Manhattan Eye's] purpose [] should have determined the need to sell, not vice versa.").
75. *Id*. at 597.
76. Benjamin, *supra* note 58, at 1683.
77. Atkinson, *supra* note 57, at 48-49 (arguing that the both the duties of loyalty and care are derivative from the more fundamental duty of obedience).

goals of the organization,[78] the directors must act loyally and carefully. Essentially, if non-profit directors and officers obey the not-for-profit charter (fulfill the mission), then it is logical that such obedience will be done both loyally and carefully.[79]

D. Lessons of Shorter College: The Duty of Obedience & Statutory Obligations

In *Shorter College v. Baptist Convention of Georgia,*[80] the court was confronted with a non-profit organization attempting to reallocate assets to save the existence of the College. The Board of Directors faced an accreditation issue, wherein the involvement of the Baptist Convention of the State Georgia at the Board level was seen by the accrediting body as a threat to Shorter College's academic independence.[81] To maintain its accreditation and continue under its then existing mission,[82] the Board voted to reorganize the College and transfer all of its assets to a foundation, thus creating the independence needed for accreditation.[83] The Board referred to this course of action as "dissolution," and the majority opinion focused upon the use of this word by the non-profit directors.[84] The majority and dissenting opinions disagreed as to which legal standard should be applied to non-profit directors.[85]

Although, it may seem that *Shorter College* is not a particularly strong case to discuss the duty of obedience, it is important to notice that legal outcomes may vary despite adherence to the duty of obedience. In *Shorter College*, the majority opinion grappled with whether, during the dissolution of a corporate entity, a legal distinction exists between a for-profit and a non-profit organization.[86]

78. Johnson, *supra* note 33, at 199.
79. *See* Atkinson, *supra* note 57, at 49 (stating that "[t]o benefit those designated by another, one must be both loyal and careful.").
80. 614 S.E.2d 37 (Ga. 2005).
81. *Id.* at 37-38.
82. *Id.* at 43. (stating that Shorter College's mission was "to provide quality higher education. . .integrat [ing] Christian values within a nurturing community . . . .").
83. *Id.* at 38.
84. *Id.*
85. *Id.*
86. *Shorter College,* 614 S.E.2d at 39.

Interpreting the language of the Georgia statutes governing non-profit organizations, the majority held that, at least for dissolutions, there is no distinction between non-profit and for-profit organizations.[87] Further, the majority opined that, in spite of the fiduciary duties of non-profit leaders, statutory requirements must be met for a non-profit organization to "dissolve" legally.[88]

A person reading *Shorter College* may conclude that non-profit leaders may be statutorily restrained from operating within the duty of obedience. The Shorter College Board of Directors appeared to have abided by the duty of obedience, and the majority opinion even recognizes this fact stating that, "The Board's intent was the preservation of the assets of the College and the *continuation of its existence* . . . ."[89]

In fact, the conflict in the lawsuit did not concern the Board's fiduciary duty, but whether the Board followed the correct statutory procedures for its goal.[90] The majority opinion acknowledged that, "the Board fully complied with this standard of conduct [the standard of good faith], acting in good faith belief that it was responding to a threat to the accreditation of the College."[91] The dissent agreed with the majority on this point.[92] The disagreement from the dissent was simply the application of the for-profit dissolution standard to non-profit organizations in Georgia.[93]

The dissent further explained a non-profit board's duties, including the duty of obedience, and concluded that, "By taking the actions it did, the Board addressed the accreditor's concerns over GBC's (Georgia Baptist Convention) influence, removed the barrier to reaccreditation, and thereby furthered the College's mission of 'providing quality higher education.'"[94] Thus, the dissent specifically addresses the Board of Director's ability to follow the Shorter College mission.

87. *Id*. at 39-40.
88. *Id*. at 40 (stating that, "The question is whether the transaction was in fact a legally valid 'dissolution' and, in that regard, the specific wording used by the General Assembly, not general concepts of equity, is the controlling factor.").
89. *Id*. at 38 (emphasis added).
90. *Id.* at 41(stating that "The transfer was not pursuant to a valid dissolution accomplished pursuant to OCGA § 14-3-1406(5)").
91. *Id.* at 41.
92. *Shorter College*, 614 S.E.2d at 41 (Fletcher, J., dissenting).
93. *Id.* at 41-42.
94. *Id.* at 43.

Basically, the majority and the dissent disagree as to the procedural aspects of the Board's decision, but they do not disagree that the Shorter Board was adhering to, and seeking to fulfill, the mission of Shorter College. What *Shorter College* shows us is that a mission-true agenda needs to abide by statutory regulations or procedural hurdles, and legal guidance could be invaluable to a Board of Directors attempting to accomplish the mission of the organization while simultaneously averting all legal potholes.

Now that we have reviewed the concept of the duty of obedience in general, the next exercise is to analyze NCAA leadership decisions within this context. This section will begin by attempting to clearly understand the mission of the NCAA. Is it clearly defined? Who is the constituency? Are there ambiguities in its language or application? This next section will review actual NCAA leadership decisions in light of the NCAA mission as understood here.

III. THE NCAA MISSION: STUDENTS FIRST & ATHLETICS AS AVOCATION

The mission of the NCAA is defined as follows: "Our purpose is to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[95] The NCAA's mission statement thus directs all NCAA actions towards creating a system of intercollegiate athletics competition where the educational experience of the student-athlete is paramount.[96] As one NCAA official has stated, the NCAA "puts our money where our mission is . . . supporting student athletes so they can be successful in the classroom and in life."[97] The NCAA mission specifically names a single constituency, "student-athletes," and specifically states its

95. *Answers: Where does the money go?*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Eye+on+the+Money (last visited Sept. 26, 2012) (Quoting the NCAA's chief operating officer, Mr. Jim Isch).

96. *Id.*; *see also*, *Academics*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/academics/index.html.

97. *Answers: Where does the money go?*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Eye+on+the+Money (last visited Sept. 26, 2012) (quoting the NCAA's chief operating officer, Mr. Jim Isch).

ultimate concern, "the educational experience" of its constituency. This mission, which has been referred to as "educational primacy," requires that a student-athlete's academic status take precedent over her athletic status.[98] Former NCAA president Myles Brand captured the essence of this statement when he stated that NCAA sports are "dissimilar" to professional sports in that "those who participate in our (NCAA) athletic events are students, *and students first*."[99] Fulfilling the NCAA's mission would involve conducting NCAA and membership athletic business in a manner that places the educational experience of student-athletes as the foremost concern. It would follow that all members of the NCAA, who have voluntarily joined, would be required to adhere to this specific mission.

Further, the NCAA states that, at all levels of competition, student-athletes participate in intercollegiate athletics as an avocation.[100] An avocation is defined as "subordinate occupation pursued in addition to one's vocation especially for enjoyment."[101] Synonyms for "avocation" include "diversion" and "distraction."[102] Thus, it would follow that the NCAA believes that intercollegiate athletics should be a diversion from the rigorous academic pursuits of its student-athletes and that fulfilling its mission would maintain athletics at a level akin to an avocation for the student-athletes.

98. Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 609-10 (2002) (quoting John R. Allison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures and Process Promote Educational Primacy for the Student Athlete?*, 44 U. KAN. L. REV. 1, 5-6 (1995)).

99. Dr. Miles Brand, *State of the Association Speech: Leadership and Challenges: The Roles of Intercollegiate Athletics in Universities*, NCAA (Jan. 12, 2008), http://fs.ncaa.org/Docs/PressArchive/2008/Announcements/Myles%2bBrands%2b2008%2bState%2bof%2bthe%2bAssociation%2bSpeech.html (emphasis added).

100. *The Principles of Amateurism,* NCAA DIVISION I MANUAL 2012-2013–(DI MANUAL), NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Art. 1, § 2.9 (2012) *available at* https://www.ncaapublications.com/s-13-Manuals.aspx; *The Principles of Amateurism,* NCAA DIVISION II MANUAL 2012-2013–(DII MANUAL), NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Art. 1, § 2.9, (2012) available at https://www.ncaapublications.com/s-13-Manuals.aspx; *The Principles of Amateurism,* NCAA DIVISION III MANUAL 2012-2013–(DIII MANUAL), NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Art. 1, § 2.9 (2012) *available at* https://www.ncaapublications.com/s-13-Manuals.aspx

101. "Avocation," MERRIAM-WEBSTER DICTIONARY (2012).

102. *Id.*

The question arises as to whether, despite the NCAA's immense public presence and the pressures of commerce, the NCAA directors and officers adhere to the NCAA's mission. Have NCAA decisions and actions sustained intercollegiate athletics as an avocation at all levels? This question must be asked, and answered, at every decision-making point for NCAA directors. One overall response is too simplistic for an organization of the NCAA's size. Thus, to understand the principle of mission fulfillment, an analysis of each separate decision is necessary.

In relation to the non-profit duty of obedience, a few examples of recent NCAA actions will be analyzed. It is important to note that the analysis of the decisions is limited to whether there was obedience to the NCAA mission. Ethical decisions by the NCAA directors and officers may be analyzed subsequently, but not here. This is a strict analysis of obedience to the mission.

IV. NCAA LEADERSHIP DECISIONS: IN THE CONTEXT OF THE DUTY OF OBEDIENCE

This article would not be complete without addressing the duty of obedience in the context of the NCAA. To do so, a large aspect of NCAA procedure must be considered and examined. Division III athletics and three recent actions by the NCAA (implementation of the Academic Progress Reports ("APR"), becoming a partner and investing in the for-profit endeavor iHoops.com, and donating $ 300,000 dollars to UNICEF for the Haitian relief fund) will each be scrutinized and a determination will be made as to whether the NCAA adhered to their duty of obedience in each respective situation.

A. NCAA Division III: Athletics as Avocation

The NCAA maintains three divisions of competition each with separate requirements and regulations.[103] NCAA Division III consists of universities and colleges who have agreed "not [to] award financial aid to any student on the

103. *See About the NCAA,* NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa.

basis of athletics leadership, ability, participation or performance."[104] Further, Division III members must "place special importance on the impact of athletics on the participants rather than on the spectators and place greater emphasis on the internal constituency (e.g., students, alumni, institutional personnel) than on the general public and its entertainment needs."[105] These rules do not restrict students from receiving scholarships and financial assistance for other reasons (i.e., academic, home county or town, ethnic origin, gender, etc.), so long as the award is not based upon athletic performance.

The inability of Division III members to provide athletic-related financial aid, in the form of scholarships, grant-in-aid, or other financial incentives, to student-athletes as well as the focus upon the participants of the sport, rather than the other constituents, are the main characteristics of Division III NCAA sports.[106] An analysis of the creation of Division III athletics under a duty of obedience standard reveals that the NCAA board of directors and officers acted in accord with the standard, and that they kept the educational experience of student-athletes as the paramount concern of Division III athletics.

Division III athletes must maintain their grades in accordance with the relevant academic standards so that they remain eligible for competition, while also seeking financial resources to pay for their college education. Division III regulations explicitly provide that intercollegiate athletics are to be pursued only as an avocation while a student pursues his or her undergraduate degree.

In line with the Division III model of athletics, the Knight Commission's 2010 report concerning the NCAA makes three recommendations, the third of which states that university athletics should "treat college athletes as students first and foremost – not as professionals."[107] Division III athletics, at least through its rules and regulations, has created such an environment. Given that one of the core values of the NCAA's

104. *Division III Philosophy Statement (c),* DIII MANUAL, *supra* note 100, p. vii.
105. *Id.*
106. *Division III Philosophy Statement (b),* DIII MANUAL, *supra* note 100.
107. *Restoring the Balance: Dollars, Values, and the Future of College Sports*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, 10 (2010), *at* http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf.

mission is to "make the educational experience of the student-athlete [] paramount,"[108] the NCAA Board of Directors should consider adopting the Division III regulations across all divisions.

As Theodore Roosevelt stated, "Athletic sports are excellent when treated as what they should be, a healthy pastime; they become harmful if indulged in to excess, and if their importance in relation to the serious work of life is misestimated."[109] The Division III model places college sports in its proper place, that is, as an avocation secondary to the academic endeavors of its participants.

B. The Haitian Relief Donation: An Intrinsically Good Idea[110]

On Tuesday, January 12, 2010, an earthquake of a magnitude of 7.0M_w struck Haiti about 25 km from the capital city of Port-au-Prince.[111] The earthquake caused between 200,000 and 250,000 deaths[112] and displaced more than one million people.[113]

In February, the NCAA donated $300,000 to UNICEF to be used in the Haitian relief effort.[114] Since the NCAA made

108. *Answers: Where does the money go?, supra* note 97.

109. *Annual Message as Governor, Albany, NY, Jan. 3, 1900*, THE THEODORE ROOSEVELT WEB BOOK, 32, *available at* http://www.theodoreroosevelt.org /tr%20web%20book/TR_CD_to_HTML69.html,

110. For an overview of the Haitian earthquake, aftermath, and relief effort, see *Haiti*, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesand territories/haiti/index.html (last visted Nov. 15, 2012).

111. *Earthquake Hazards Program, Magnitude .0 – Haiti Region,* UNITED STATES GEOLOGICAL SURVEY (Jan. 12, 2012), http://earthquake.usgs.gov/earthquakes/ eqinthenews/2010/us2010rja6/.

112. Marc Lacey, *Estimates of Quake Damage In Haiti Increase By Billions*, N. Y. TIMES (Feb. 16, 2010), http://www.nytimes.com/2010/02/17/world/americas/17haiti.html ; David Pratt, *Desperate People Still Need Help to Rise From the Rubble*, THE HERALD (May 14, 2010), http://www.heraldscotland.com/comment/guest-commentary/desperate-people-still-need-help-to-rise-from-the-rubble-1.1027570.

113. *Editorial: Basics for Haiti*, N.Y. TIMES, May 20, 2010, at A7.

114. Matt Kirsch, *Haverford College Haiti relief effort goes deep,* NCAA (Aug. 6, 2010), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/August+latest+news/Haverford+College+Haiti+relief+effort+goes+deep (stating that a home run derby held by the baseball team at Haverford College raised $ 11,727, which was "in addition to the $300,000 the NCAA made to UNICEF to help with that organization's relief efforts in Haiti in the weeks after the natural disaster."). Another article that specifically focuses upon the NCAA's $ 300,000 donation to UNICEF was the impetus for this discussion. But, at the time, the author could not

the donation with NCAA funds, a duty of obedience analysis of the board of director's decision must be conducted. Under a duty of obedience analysis, I would conclude that the donation should not have been made, no matter the altruistic, positive nature of the donation. The NCAA leadership acted outside of the scope of its mission statement. The donation does not involve ensuring fair competition or making the educational experience of student-athletes the paramount concern. It addresses an enormous need for the Haitian people in a time of unprecedented crisis for that nation.

However, the act of donating to even this worthy cause does not necessarily fulfill the mission of the NCAA. Unfortunately, no matter how well-meaning the decision to donate may have been, the Haitian donation violates the fiduciary obligations limiting the NCAA Board of Directors' actions.

A donation to a charitable cause can be both intrinsically and extrinsically good. Ethically, without restraints, a donation to a charitable cause is good (although using this word may cause a number of philosophical arguments). But, non-profit directors and officers are restrained from using non-profit resources by the particular mission of their organization. Acting outside of the mission guidelines detracts from the non-profit purposes.

C. IHoops.com

In the fall of 2009, a website called "iHoops" was launched.[115] The iHoops.com venture is an online community owned and operated by a limited liability company called Youth Basketball On-Line, LLC.[116] The founding partners of iHoops.com are the NCAA, the National Basketball Association ("NBA"), Adidas, and Nike.[117] The iHoops.com logo is trademarked to NBA Properties, Inc.[118] The NCAA

find that particular article on the NCAA website.

115. Anthony Schoettle, *NCAA, NBA launch ihoops*, INDIANAPOLIS ECONOMIC DIGEST (Nov. 27, 2009), *available at* http://findarticles.com/p/articles/mi_go1582/is_20091123/ai_n45187579/.

116. *iHoops.com: The Official Youth Basketball Organization of the NCAA and NBA,* IHOOPS.COM, http://www.ihoops.com.

117. *About,* IHOOPS.COM, http://www.ihoops.com/about/.

118. U.S. Trademark Nos. 77754679, 77754667, 77754641, 77754645, 77754601,

owns fifty percent of Youth Basketball On-Line, LLC.[119]

The mission of iHoops.com is "to establish structure and development programs to improve the quality of youth basketball in America in order to enhance the athletic, educational, and social experience of the participants."[120] Press releases tout the website as an educational endeavor and credit the late NCAA president Myles Brand as having education as his major concern when promoting the NCAA's involvement.[121] The iHoops.com website offers, among other things, information about improving basketball skills, practice drills, a link to the NCAA eligibility website, an iHoops web community, as well as news and features.[122] The website also contains a selection of arcade games sponsored by ESPN.[123] In the context of fiduciary duties for non-profit directors and officers, one must analyze the NCAA's ownership and funding of Youth Basketball On-Line, LLC through the duty of obedience. Does the decision to be a founding partner of iHoops.com & Youth Basketball On-Line, LLC and infusing money into this endeavor conform to the NCAA mission?

The first step in a duty of obedience analysis is to determine the mission of the not-for-profit organization. Given that the educational experience of the student-athlete is the NCAA's paramount concern, what does iHoops.com do for the educational experience of student-athletes? It is a stretch to say that it assists student-athletes at the collegiate level in any way.

The iHoops.com mission addresses youth basketball. Youth basketball involves those persons participating in basketball prior to entering a university or college. Thus, youth basketball does not concern the current student-athlete and does nothing to enhance the educational experience of current student athletes.

This reason alone justifies a conclusion that the NCAA

77754662, 77754565, 77754636, 77754606, 77754672, & 77754615 (First use Oct. 26, 2009).

119. Schoettle, *supra* note 115.

120. *About iHoops*, IHOOPS.COM, http://www.ihoops.com/about/.

121. Schoettle, *supra* note 115.

122. *iHoops.com*, IHOOPS.COM, http://www.ihoops.com/.

123. *Mini-hoops,* IHOOPS.COM, (Mar. 12, 2012) http://www.ihoops.com/locker-room/games/mini-hoops..

directors and officers have not adhered to the NCAA's mission and have breached the fiduciary duty of obedience. Even the corporate, for-profit structure of Youth Basketball On-Line, LLC, draws concern. The NCAA has invested in a for-profit company. The for-profit company's mission does not mesh with the mission of the NCAA as its intended constituency and the obligations thereto are different. Furthermore, a number of iHoops.com features are for obvious commercial purposes, the arcade area being the most glaring example.

Again, this is not to say that the iHoops venture is a bad idea, funded by a for-profit company without a specific, conflicting mission statement. The website is well-structured, easily navigable, and may provide hours of information and entertainment for its visitors. In fact, iHoops.com may fulfill the mission of its parent for-profit company, Youth Basketball On-line, LLC. Aside from the mindless ESPN arcade games, visitors to the site may learn some valuable tips, skills, or ideas. However, it is insufficient for non-profit leaders to claim their decisions are positive or negative without the context of the given mission of the non-profit organization. The decisions must fulfill the specific mission of the non-profit organization. For this reason, iHoops.com was an ill-advised endeavor for the NCAA, and the decision to participate as a founding member deviates from the director's duty of obedience.

D. The Academic Progress Rates ("APR"): A Mission-True Agenda

At all levels of competition within the NCAA, student-athletes are challenged to balance academics and athletics.[124] A number of athletes participating in intercollegiate athletics cannot maintain the NCAA required academic standards or have received inappropriate assistance to do so.[125] Such

124. Lynch, *supra* note 98, at 605.

125. *Id.*; *see also* Ray Glier, *A Divided Legacy for Ex-Coach*, ATLANTA J. CONST. (July 4, 2010), http://www.ajc.com/photo/sports/a-divided-legacy-for-ex-coach/pcLJ7 (describing 2003 NCAA violations by the University of Georgia men's basketball team); Alexander Wolff, *Odd Man Out*, SPORTS ILLUSTRATED (Feb. 11, 1991), http://sportsillustrated.cnn.com/vault/article/magazine/MAG1118852/index.htm. (reviewing the University of Kentucky's men's basketball team and its 1989 NCAA violations); Lynn Zinser, *N.C.A.A. Penalizes Florida State for Academic Fraud*, N.Y.

activity effectively eliminates the "student" from the phrase "student-athlete."

In 2005, to combat academic issues with student-athletes participating in NCAA-sanctioned sports, the NCAA mandated that all Division I-A members collect and provide data related to the academic performance of each respective member's student-athletes participating in all NCAA-sanctioned sports.[126] Based upon the data received from each member institution, the NCAA gives an APR Score up to 1000.[127] The APR measures a variety of academic performance-related areas each school term.[128] Any total score below 930 for a specific sport, or for the institution as a whole, subjects the institution or a particular institution's team, to a number of possible sanctions.[129] The Committee on Academic Performance is charged with evaluating the APR program as it affects member institutions.[130]

A duty of obedience analysis of the NCAA's decision to implement the APR Score shows that the NCAA directors and officers were fulfilling the mission of the NCAA with this action. The NCAA directors demonstrated that the educational experience of the student-athlete was its paramount concern and that institutions that did not require academic performance of their student-athletes would be penalized. [131] Since implementation of the APR, compliance

TIMES (Mar. 6, 2009), http://www.nytimes.com/2009/03/07/sports/ncaafootball/07ncaa.html.

126. *Academic Progress Rates*, NCAA, http://www.ncaa.org/wps/wcm/connect/public/ncaa/academics/division+i/academic+progress+rate.

127. *Id.*

128. *Behind the Blue Disk: Division I Academic Progress Rate (APR)*, NCAA PUBLICATIONS (Nov. 18, 2009), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk/Behind+the+Blue+Disk+-+Division+I+Academic+Progress+Rate+(APR).

129. *Id.*

130. Michelle Brutlag Hosick, *Committee on Academic Performance considers APR penalty structure-changes to Academic Performance Program*, NCAA (Feb. 25, 2011), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/February/Committee+on+Academic+Performance+considers+APR+penalty+structure+changes.

131. Steve Megaree, *It's Academic: NCAA Reveals APR Sanctions*, RIVALS.COM (May 6, 2009), http://www.rivals.com/content.asp?CID=943457 (stating that in 2009 the University of Georgia Tech, Indiana University, and The Ohio State University all lost men's basketball scholarships and the universities of Minnesota and Mississippi lost football scholarships for not meeting APR standards).

with academic performance standards for NCAA member institutions has risen[132] The NCAA continues to support and fund institutions in its efforts to improve the academic performances of its respective athletes.[133] It has even taken steps to work with specific institutions to help improve overall student-athlete academic performance.[134] Although APR-related penalties, as written, appear to be enough deterrent to prevent significant academic violations by NCAA members, significant academic dishonesty issues have surfaced at some preeminent "academic" institutions.[135] In the recent case at the University of North Carolina at Chapel Hill, the NCAA informed the university that no NCAA violations had occurred and no academic sanctions would be imposed.[136]

So, although the implementation of the APR standards was a positive executive decision under a duty of obedience analysis, critics have begun to challenge the NCAA's enforcement of its academic standards.

CONCLUSION

As non-profit organizations, in particular the NCAA, continue to grow, receive greater resources, and generate greater revenues, it is legally important for non-profit leaders to abide by their respective mission statement. The non-profit fiduciary duty of obedience requires non-profit leaders to do so. As *Manhattan Eye* and *Shorter College* demonstrate, judicial review of non-profit action may involve a duty of obedience evaluation. More importantly, courts may use the principles concerning the duty of obedience to nullify non-

132. *Most Division I Teams Post Top Grades*, NCAA: LATEST NEWS (June 9, 2010), http://fs.ncaa.org/Docs/PressArchive/2010/20100609+apr+release.htm.

133. *Id.*; *Executive Committee funds pilot to help limited-resource schools boost APR,* NCAA (Aug. 3, 2012).

134. Michelle Brutlag Hosick, *NCAA working with HBCUs to clear APR barriers*, NCAA (May 24, 2011), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/May/NCAA+working+with+HBCUs+to+clear+APR+barriers

135. Bill Pennington, *Cheating Scandal Dulls Pride in Athletics at Harvard*, N.Y. TIMES (Sept. 18, 2012), http://www.nytimes.com/2012/09/19/sports/ncaabasketball/harvard-cheating-scandal-revives-debate-over-athletics.html?pagewanted=all.

136. Dana O'Neill, *Get a taste of this NCAA baloney*, ESPN COMMENTARY (Aug. 8, 2012), http://espn.go.com/college-sports/story/_/id/8243779/north-carolina-tar-heels-academic-scandal-exemplifies-ncaa-hypocrisy (stating that the type of questionable academic issues raised at the university are the exact type of issues the NCAA should be regulating).

profit leadership decisions. In the context of college sports, the public-and legal-interest in the NCAA, its leaders and its decisions will no doubt increase. Legal challenges to NCAA decisions and sanctions may become more frequent than they already are. NCAA leaders must be able to justify their decisions in light of the non-profit standards, including the duty of obedience. With a mission statement that treats athletics as an avocation and the student-athlete's educational experience as the paramount concern, NCAA leaders must decide the proper place for college sports within, and only within, this framework. Collegiate athletics as an avocation is more than a statement. It is a mission statement that the NCAA leadership is obligated to obey.