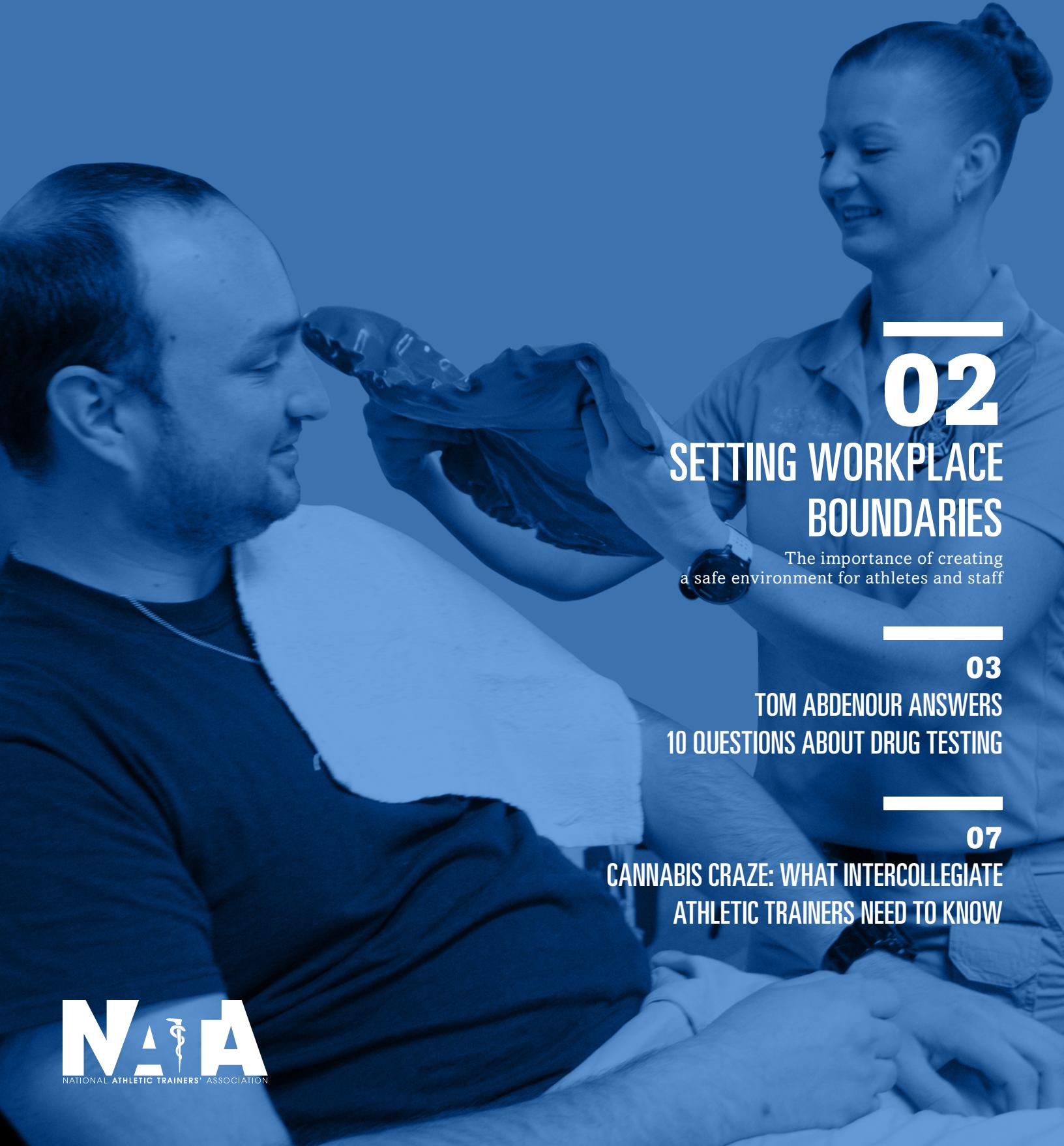


SPORTS MEDICINE

# LEGAL DIGEST

QUARTERLY LEGAL NEWSLETTER FOR THE NATIONAL ATHLETIC TRAINERS' ASSOCIATION

WINTER 2019



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## SETTING WORKPLACE BOUNDARIES

The importance of creating a safe environment for athletes and staff

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## TOM ABDENOUR ANSWERS 10 QUESTIONS ABOUT DRUG TESTING

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## CANNABIS CRAZE: WHAT INTERCOLLEGIATE ATHLETIC TRAINERS NEED TO KNOW





# Setting Workplace Boundaries

## How to recognize, prevent and educate others about sexual harassment, abuse

BY WHITNEY GRAVES, DAT, LAT, ATC, AND ZACHARY WINKELMANN, PHD, SCAT, ATC

**T**he media has highlighted sexual harassment and assault cases in the business sector, education and military. Unfortunately, there has also been coverage of sexual harassment in athletic training from the lens of the patient and provider.

Previous research involving both male and female athletic trainers explored the problems of sexual harassment and sex-related issues in the workplace that identified 25 percent of the respondent population (male and female athletic trainers from the southeastern region of the United States) had perceived or experienced sexual harassment.<sup>1</sup> As such, addressing sexual harassment in the athletic training clinical setting is an important issue for the athletic training professional.<sup>2</sup>

Athletic trainers need to understand the complex definitions of sexual harassment and how to identify and handle claims of sexual harassment in order to prevent it from happening and to prevent civil lawsuits of alleged sexual harassment.<sup>2</sup>

Various studies have acknowledged that defining sexual harassment is complicated and confusing because there is no common definition wide enough to cover the range of acts that makeup sexual harassment behaviors.<sup>3,4-10</sup>

For those who are unsure about the definition of sexual harassment, it is generally described as the harassment of any persons in a professional or social setting by another individual regardless of sex or gender.<sup>5,6</sup> The behavior in question involves lewd or obscene comments, unwanted sexual advances and/or inappropriate acts.

Workplace sexual harassment can be further classified into two categories: quid pro quo harassment and hostile work environment harassment.<sup>5,6</sup> Quid pro quo harassment is when an employer or person of power makes employment or benefits contingent upon sex, sexual favors or sexual contact.<sup>5,6</sup>

A common example of this in the professional setting would be an assistant athletic trainer who is offered or receives a promotion in exchange for a sexual favor. Quid pro quo can often be identified

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## SETTING WORKPLACE BOUNDARIES, *continued from page 02*

by red flags such as a new employee advancing more quickly than other tenured employees, signs of favoritism when scheduling employees and performance evaluations that don't seem to match observed behaviors.<sup>11</sup>

In contrast, hostile work environment harassment is when other employees, including superiors, equals and subordinates, make uncomfortable or sexual comments, jokes or gestures that create an intimidating and hostile environment.<sup>5,6</sup> A common example of this would be a work environment that is considered offensive based on discussions related to one's sexual activity or sexually suggestive pictures being shared in the athletic training facility or with the athletic training staff.

Another example would be an assistant athletic trainer who is having an affair with the head athletic trainer who determines whether the assistant athletic trainers will receive a promotion or salary increase. Although both individuals may be involved in a consensual relationship, coworkers who do not receive the same benefits, promotions or salary increases may claim that the benefits were received based on the relationship and not on job performance.<sup>12</sup> This creates an adverse environment in which the victim, in this case the coworkers, perceives that he or she must engage in a sexual relationship with the head athletic trainer to receive the same benefits.<sup>13</sup> This form of a relationship is dangerous because, if the relationship ends, charges of sexual harassment could be made against either party.<sup>12</sup>

More recently, sports medicine professionals have intersected the mainstream media with reported cases of sexual assault from survivors. Sexual assault, as defined by the U.S. Department of Justice and different than sexual harassment, is "any type of sexual contact or behavior that occurs without the explicit consent of the recipient" and may include acts such as forced sexual penetration, child molestation and groping.

Specifically, sexual assault is without the consent of the other person and includes violence, threats and taking advantage of protected populations and incapacitated individuals.

An example of someone using their position as a health care provider and sexually abusing athletes under the guise of medical treatment is the well-known case of Larry Nassar at Michigan State University.<sup>14</sup> Nassar's cumulative criminal acts of sexual assault were the basis of the USA Gymnastics sexual abuse scandal, in which he was accused of molesting at least 250 girls and young women and one young man, including a number of well-known Olympic gymnasts, dating as far back as 1992.<sup>14</sup> He has admitted to 10 of the accusations. On Feb. 5, 2018, he was sentenced to an additional 40 to 125 years in prison after pleading guilty to three more counts of sexual assault.<sup>14</sup>

Specific to athletic training, sexual assaults may occur in athletic training facilities, in areas where patients receive therapy or treatments in various stages of undress, which can create opportunities for inappropriate behavior from the athlete who is the patient or from the person providing the treatment.

Athletic trainers need to ensure that comments, jokes, conversations and any type of physical contact with athletic training students, staff athletic trainers and student athlete patients are not perceived as offensive or unwelcome.<sup>15</sup> Many times, professional staff members or athletic training students fail to draw the line of respectability when engaging in jokes, stories or conversations that may contain inappropriate language.<sup>15</sup> Inappropriate behavior may be perceived as sexually harassing in nature if an individual feels uncomfortable or embarrassed about the content of the conversation or any related physical contact.<sup>1</sup>

Furthermore, misunderstandings do arise: Comments, conversations or incidental physical

## Q & A

### TOM ABDENOUR ANSWERS 10 QUESTIONS ABOUT DRUG TESTING

What is the role of athletic trainers when it comes to drug testing student or professional athletes? How do athletic trainers balance their responsibilities to the organization doing the testing and their responsibilities to counseling the athlete?

There are a multitude of questions about this issue, and *Sports Medicine Legal Digest* posed 10 of them to a true expert in the field: Tom Abdenour, DHSc, ATC, CES, a former athletic trainer for the Golden State Warriors and San Diego State University and a 2018 NATA Research & Education Foundation Service Award winner.

#### Q. What should be the athletic trainer's role in the drug testing process?

In a survey of athletic trainers, the respondents indicated that they did not view themselves as the individuals to be designated to implement the drug screening programs. Rather, the results of this study indicated that athletic trainers prefer to serve as the resource person for the organization of substance abuse and substance rehabilitation programs.

In general, athletic trainers should not be involved in the day-to-day testing of athletes, but should be part of a program that allows them to provide guidance to the athletes. Many drug testing programs refer the specimen collection to an outside agency, such as Drug Free Sports. In this case, the athletic trainer facilitates implementation of the testing, such as contacting athletes to be tested, organizing the collection station and assisting with other logistics of the program.

#### Q. Does this potential dual role, however, of being both the "police" and the trusted "counselor" affect ATs ability to carry out their overall role in the process and negatively impact their relationship with the athletes?

The majority of athletic trainers feel that their association with the drug screening process can potentially place them in the dual role of police and counselor, but that relationship

## INTEGRITY IN PRACTICE WEBPAGE

Like all health care professionals, ATs enter into a social contract with the public to assure them that they will provide trustworthy patient-centered care. The AT upholds the social contract by adhering to the standards of professional practice, including the NATA Code of Ethics, and engaging in evidence-based practice and continuous education. As such, the highest priority is the patient and quality care, which includes the recognition of the signs and symptoms of sexual abuse and awareness of our legal obligations. The Integrity in Practice webpage of the NATA website, [www.nata.org/practice-patient-care/risk-liability/integrity-in-practice](http://www.nata.org/practice-patient-care/risk-liability/integrity-in-practice), features information about sexual abuse awareness, mandatory reporting and duty to report.

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## SETTING WORKPLACE BOUNDARIES, *continued from page 03*

contact by athletes, student staff or professional staff members that were not meant to be sexually harassing may be perceived as such. Failure to provide a safe environment free from sexually harassing behavior of any type, from athletes or staff, may result in allegations of sexual harassment, possible disciplinary action, civil lawsuits and termination of employment.<sup>1</sup>

### Setting Boundaries and Following Duty to Report

One of the most important and continual processes of an athletic trainer's daily practice is maintaining rapport with patients. It is vital that athletic trainers are setting and following professional boundaries that protect the patient and themselves from potentially uncomfortable situations and legal wrongdoings.

An athletic trainer's practice must be guided by the NATA Code of Ethics ([www.nata.org/membership/about-membership/member-resources/code-of-ethics](http://www.nata.org/membership/about-membership/member-resources/code-of-ethics)) and workplace policies to protect their patients in accordance with state and federal law.<sup>16, 17</sup> One way to do this is to create and provide a safe environment with patient advocacy at the forefront of medical decisions. The athletic trainer must remain vigilant in recognizing possible sexual harassments or assaults.

It is also imperative to act on any knowledge or suspicion of abuse. Child abuse can include both physical and mental injury that causes

impairment of the minor. Moreover, sexual abuse or exploitation occurs when an adult (parent, legal guardian or person responsible for the child) engages in acts or willfully allows others to commit sexual offenses to a child. It is a legal and ethical responsibility for athletic trainers to report any sexual abuse of children.<sup>16, 18</sup>

As of January 2018, it is the mandatory duty to report suspected child abuse to the appropriate adult or agency that is authorized to interact with any minor or amateur athlete at a facility under the jurisdiction of a national governing body.<sup>18</sup> The Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act was passed at the federal level to protect young athletes from sexual abuse. The NATA Code of Ethics also outlined athletic trainers' duty to report in a 2018 response to the Nassar case. (See the info box on p. 03 for more information.)

It is key that, as athletic trainers, we begin having this discussion with patients exhibiting signs of sexual abuse. Thirty percent of sexual abuse cases are never reported and a shocking 90 percent of child sexual abuse survivors know their perpetrator in some way. Common signs of sexual abuse include extreme compliance or defiance, changes in appetite, difficulty walking or sitting, pain with urination and avoidance behaviors.

Additionally, the act states that an individual who is required to report, but fails to do so, is subject to criminal penalties.<sup>18</sup> Athletic trainers

## Q&A, *continued from page 03*

does not negatively affect their rapport with their athletes. Athletic trainers' opinions regarding the drug screening process and the importance of education in deterring drug use are somewhat dependent upon the athletic trainer's involvement in the drug screening process.

### Q. Should ATs be organizers of the drug testing program, responsible for the collection of specimens and dealing the laboratories that do the actual testing? Why or why not?

In general, athletic trainers possess a stronger desire to serve as resource persons who organize substance abuse education programs rather than to be directly involved in specimen collection. The role for ATs should be as on-site facilitators of the program particularly when working with an outside source that collects the specimens.

### Q. Should ATs be involved in the development of the drug testing program?

It makes sense to consult an AT when an athletic program is implementing a drug testing program, but they should not be the principal organizers of the program. Input should come from medical, administration and legal resources when developing a program.

### Q. Should the AT be involved in the treatment and rehabilitation of athletes who would be considered drug abusers?

Athletes should be given adequate notice when their drug tests come back positive, and there should be a right to appeal the results before any steps are taken regarding treatment and rehabilitation. Athletic trainers may be able to recommend substance abuse professionals either mandated or recommended by the drug testing program.

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## SETTING WORKPLACE BOUNDARIES, *continued from page 04*

should also be aware of their mandated duty to report sexual abuse regardless of the patient's age.

An immediate notification to the state's child protective services or the local law enforcement agency of any suspected abuse is mandatory and serves as part of the duty to uphold the ethical and legal principles of governing agencies. If an athletic trainer is the one suspected of committing sexual abuse or assault, the individual also has a duty to report to NATA and the Board of Certification Inc.<sup>18</sup> Since laws vary from state to state, athletic trainers have a duty to check with their state's mandatory reporting laws for the specifics and interpretation, including penalties for failing to report.

In the workplace, athletic trainers must be mindful of employer policies that prohibit all harassment with specific recognition of sexual harassment. There is also the need to take the actions a step further with the employer and employees creating a culture of respect, ongoing professional development related to sexual harassment and clear leadership expectations related to proper relationships, respectful communication and anti-retaliation behaviors.

Athletic trainers in all settings should consider being a patient advocate. Those in the secondary school and college/university settings should especially look out for predatory behaviors. Often times, sexual assault begins with individuals who work to gain patient trust while ensuring control. For example, an athletic trainer bargaining with a secondary school student athlete about their return-to-play process with the student athlete believing they are gaining a reward from the trusting relationship could be a precursor to future abusive behaviors. The act, often referred to as grooming, is a means to sexually pursue someone over time as they believe the student athlete's trust will keep their inappropriate behaviors suppressed. Grooming includes secrecy around relationships and can often begin with subtle contact such as patting someone on their shoulders.

It is vital that athletic trainers observe these behaviors from parents, coaches and colleagues and address these behaviors when they appear. It is also strongly suggested that when providing care to consider asking for permission to touch them for an exam. The comfort with a physical exam is a central component of patient-centered care with the patient being informed of what they should expect. Simply reporting an injury does not mean consent to treat, and part of the consent process for an exam should include notifying the patient of what they should expect, including being touched (palpitations, selective

tissue test, etc.), during the exam. (See the info box on p. 04 for more information.)

### Understanding Prevention Strategies

Athletic trainers are empowered and encouraged to document and advance any reports of sexual harassment or assault directly to their supervisors and local authorities, if necessary.<sup>16, 19</sup>

It is important to remember that duty to report is based on the suspicion of abuse; evidence is not required.<sup>20</sup> It is recommended that athletic trainers take a proactive approach in working with employers and school systems to establish a protocol for employees to report suspected or known sexual abuse or assault of their patient, child or adult affiliated with the organization.<sup>20</sup>

When the athletic trainer or staff member observes a clear and blatant offensive act or verbal comment, the offender should be immediately corrected and the message conveyed that such behavior will not be tolerated.<sup>1</sup> The negative consequences related to violating sexual harassment policies should be enforced and documented throughout the tenure of an employee or student athlete.

The reason for the importance of documentation of reported incidents is to track and monitor the behaviors for problematic and habitual tendencies over time. Athletic departments should consider creating an anonymous reporting structure for survivors of sexual assault and harassment as a means to promote such documentation.

All NATA members also have access to the NATA Liability Toolkit, available at [www.nata.org/practice-patient-care/risk-liability#liability](http://www.nata.org/practice-patient-care/risk-liability#liability), to help employees and employers assess the risk for both professional and general

## Q&A, *continued from page 04*

### Q. How important is drug education when dealing with student athletes and/or professional athletes?

Athletic trainers' opinions regarding the drug-screening process and the importance of education in deterring drug use are somewhat dependent on the athletic trainer's involvement in the drug screening process. In general, athletic trainers possess a stronger desire to serve as resource persons who organize substance abuse education programs rather than to serve as administrators of the sampling process.

### Q. How should ATs work with coaches in terms of drug testing?

Coaches need to respect the drug testing process, and most of them certainly do. The drug testing process needs to be 100 percent objective and should be protected from any external interference.

### Q. Compare the effectiveness of randomized testing versus testing for a reasonable suspicion of drug use.

There is a place for both protocols. Randomized testing is effective and has been successfully implemented at many levels of competition. Testing for reasonable suspicion has a role in some programs, as well. This testing must be predicated on accurate information at the time for a valid reason. Consequences of a positive test resulting from reasonable suspicion are possibly greater than the penalties associated with a random test.

### Q. In general, does drug testing serve as a deterrent?

For some athletes, it does serve as an effective deterrent. However, a small percentage of those who have an initial positive test have been cited for repeat violations.

## RELATED RESOURCES

- **Experiences With and Perceptions of Workplace Bullying Among Athletic Trainers in the Secondary School Setting**
- **Experiences With Workplace Bullying Among Athletic Trainers in the Collegiate Setting**
- **Perceptions of Workplace Bullying Among Athletic Trainers in the Collegiate Setting**

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misconduct. The NATA Liability Toolkit is broken up into multiple sections. One section covers regulation and risk management, which analyzes if an athletic trainer is acting under their scope of practice and any other regulating agencies. If an athletic trainer is not working under the scope of practice, the general liability or professional liability coverage could be null and void.

In addition, the athletic training environment should be assessed to determine whether or not an atmosphere of sexually harassing behavior (or behavior that may be misinterpreted as sexually harassing) exists.<sup>12</sup> This environment will also need to be evaluated to determine if a pattern of sexually harassing behaviors has been allowed to invade the clinical setting.<sup>12</sup>

Previous research suggests the need for sexual harassment training in athletic training programs.<sup>20</sup> This study found that more than 50 percent of male and female athletic training students had not received sexual harassment training, whereas 75 percent of all respondents stated that they knew what resources were available to report issues of sexual harassment.<sup>20</sup> The odds of a person not knowing what resources were available to report harassment and not having training were six times higher than those who had training and did not know what resources were available.<sup>20</sup>

There is a great need for sexual harassment training in athletic training programs. Athletic training students and faculty need to know what sexual harassment is and who to report it to. They should not feel threatened by reporting any instances of harassment.<sup>20</sup> It is essential that athletic trainers pay specific attention to sexual misconduct, and athletic trainers should discuss, in advance, the process of any treatment that includes touching a patient and should be prepared to have a secondary individual in the room to observe treatment.<sup>19</sup>

Following recent allegations and convictions from the Michigan State University sexual abuse scandal, a chaperone policy was enacted to assist in providing care in a safe manner that protects both the patient and athletic trainer. We encourage athletic training facilities to adopt a similar policy for sensitive exams, including genitourinary and pelvic assessments, to create a safe place for the exchange of health care.

It is vital that athletic trainers create a safe environment for athletes and staff. It's also important to recognize, prevent and educate others about sexual harassment and sexual abuse, and to take action when suspicions arise. \$

#### References:

1. Velasquez BJ. Study of sexual harassment issues in physical education and athletics at colleges and universities. 1997;3441.
2. Shingles RR, Smith Y. (2008). Perceptions of sexual harassment in athletic training. *Athletic Training Education Journal*. 2008;3(3):102-107.
3. Webb SL. Shockwaves: The Global Impact of Sexual Harassment. New York: Master Media Limited, 1994.
4. Bursik K. Perceptions of sexual harassment in an academic context. *Sex Roles*. 1992;27:401-412.
5. Douglas JM. Sexual harassment, part H. National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter. 1992; 19:4.
6. Douglas JM. Sexual harassment, part II. National Center for the Study of Collective Bargaining in Higher Education and the Professions Newsletter. 1992;20:2.
7. McKinney K. Contrapower sexual harassment: the effects of student sex and type of behavior on faculty perceptions. *Sex Roles*. 1992;27:627-643.
8. Douglas JM. Sexual harassment, part I. National Center for the Study of Collective Bargaining In Higher Education and the Professions Newsletter. 1992;19:3.
9. Gallop J. Sex and sexism: feminism and harassment policy. *Academe*. 1994;80:16-23.
10. Rubin LJ, Borgers SB. Sexual harassment in universities during the 1980s. *Sex Roles*. 1990;23:397-411.
11. i-Sight. Quid Pro Quo Sexual Harassment: What you need to know in 2019. [i-sight.com/resources/quid-pro-quo-sexual-harassment/](http://i-sight.com/resources/quid-pro-quo-sexual-harassment/). Accessed April 15, 2019
12. Velasquez BJ. Sexual harassment: a concern for the athletic trainer. *J Athl Train*. 1998;33(2):171-6.
13. Raymond B, Raymond M. Confronting the unwelcome: sexual harassment. *PT Magazine*. 1997;42:48.
14. The New York Times. Larry Nassar is indicted on sexual assault charges in Texas. [www.nytimes.com/2018/06/29/sports/larry-nassar-is-indicted-on-sexual-assault-charges-in-texas.html](http://www.nytimes.com/2018/06/29/sports/larry-nassar-is-indicted-on-sexual-assault-charges-in-texas.html). Accessed April 15, 2019.
15. Masteralexis LP. Sexual harassment and athletics: legal and policy implications for athletic departments. *J Sport and Social Issues*. 1995;19:141-155.
16. National Athletic Trainers Association. Risk and Liability [www.nata.org/practice-patient-care/risk-liability](http://www.nata.org/practice-patient-care/risk-liability). Accessed March 20, 2019
17. National Athletic Trainers Association. Statement on Handling Sexual Abuse. [www.nata.org/blog/todd-christman/statement-handling-abuse](http://www.nata.org/blog/todd-christman/statement-handling-abuse). Accessed April 15, 2019.
18. National Athletic Trainers Association. Practice & Patient Care. [www.nata.org/practice-patient-care/risk-liability/integrity-in-practice](http://www.nata.org/practice-patient-care/risk-liability/integrity-in-practice). Accessed Oct. 31, 2019.
19. Arneim DD, Bonacci JA, Kauth WO, Prentice WE. Principles of athletic training. McGraw-Hill. 2000.
20. Mansell J, Moffit DM, Russ AC, Thorpe JN. (2017). Sexual Harassment Training and Reporting in Athletic Training Students. *Athletic Training Education Journal*. 2017;12(1): 3-9.

#### BONUS BLOG CONTENT

+ Learn more about how to create a safe workplace on the NATA Now blog, [www.nata.org/blog](http://www.nata.org/blog).

#### Q&A, *continued from page 05*

#### Q. How has drug testing and the athlete's awareness of the consequences of testing positive for drugs changed in the last 10 years?

Despite living in a hyper-information age, protecting an athlete's privacy regarding a positive drug test is still sacrosanct. Privacy of all things relating to an athlete's health are more difficult to preserve in the social media world we live in now. However, if athletes are aware of a teammate's discipline for a drug program violation, it does reinforce the governing organization's approach that substance abuse in sports is a significant concern. \$

#### CASE SUMMARY

#### ATHLETIC TRAINER UNLAWFULLY DENIED HEARING IN SEXUAL MISCONDUCT CASE

A female athletic trainer employed in a hospital sports medicine department allegedly engaged in a consensual sexual relationship with a patient – a 19-year-old male high school student.

When her attorney, instead of herself, appeared before the athletic training board for the hearing called by the state professional licensing agency, the board voted to sanction the athletic trainer by default.

The board placed the athletic trainer on indefinite suspension for at least seven years and ordered that prior to petitioning for reinstatement, she would have to provide the board proof of successful completion of a course related to ethical boundaries in a patient-practitioner relationship.

The athletic trainer claimed that the board's order violated her federal constitutional and statutory rights, but a court dismissed her petition for judicial review. After several court rulings against her, the athletic trainer filed suit in the state Court of Appeals.

The athletic trainer argued that she wasn't statutorily required to be present at the hearing in front of the board and that she had the right, through her attorney, to oppose the board's

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## Cannabis Craze: What Intercollegiate Athletic Trainers Need to Know

BY JEFF G KONIN, PhD, AT, PT, AND TIM NEAL, MS, AT, ATC  
NATA PROFESSIONAL RESPONSIBILITY IN ATHLETIC TRAINING COMMITTEE

**I**n the past decade, there has been a rapidly progressive movement toward the legalization of medicinal marijuana (THC), recreational marijuana (THC) and cannabidiol (CBD). This has many athletic trainers asking questions about not only the efficacy of such usage, but also how this impacts patient education, institutional and conference policy and drug testing results. Let's begin by discussing the impact of marijuana on the intercollegiate setting.

To date, the National Collegiate Athletic Association (NCAA) and its member schools share the responsibility for drug education and drug testing among all student athletes. The NCAA has tested for marijuana usage since 1986. In 2017, the NCAA published a presentation, "What Student Athletes Need to Know

About Marijuana,"<sup>1</sup> that summarized a 2014 study from *The New England Journal of Medicine* identifying short- and long-term and adverse effects of heavy marijuana use on various body systems.

Recent trends advocating for the use of cannabis include using CBD, which doesn't contain THC, the psychoactive component of the plant itself. Additionally, under physician recommendation, low amounts of THC have been considered to establish homeostatic conditions within the body rather than act as a performance enhancer.

Historically, marijuana has been on the NCAA's banned substance list and recognized as a street drug, in the same category as cocaine and amphetamines. Previously, when tested positive, the penalty has been a mandatory one-year suspension from participation with a subsequent second positive drug test resulting

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### UNLAWFULLY DENIED, *continued from page 06*

intended punishment, even if she was not disputing the facts in the case.

The court notes that, in general, a party in particular legal matters in the state who fails to attend certain hearings may be held in default or the matter may be dismissed.

However, after citing a variety of legal cases that were decided on this issue, the court ruled that the athletic trainer was denied due process by the board's action. In this case, the court decided, the athletic trainer's license is of paramount importance because it is required for her to pursue the work she had invested years preparing to perform.

The state professional licensing agency's original complaint alleged that the athletic trainer engaged in a course of lewd or immoral conduct in connection with delivery of services to the public and engaged in improper sexual conduct with an athlete in her professional care.

The athletic trainer, due to the embarrassment she felt regarding the allegations, as well as the intention of a high-ranking official to display nude photographs she had exchanged with the student, chose to send her attorney to appear on her behalf at the hearing in front of the athletic training board.

The court stated there was no apparent governmental interest that would justify a disregard of procedures set forth by the legislature; rather, the court said those procedures must be followed, especially when such an important private interest is at stake.

The court concluded, the board's default order following the hearing, at which the athletic trainer's counsel appeared, deprived the athletic trainer of her opportunity to be heard at a meaningful time and in a meaningful manner, which is the fundamental requirement of due process.

Therefore, the appeals court reversed the lower court's granting of the motion dismissing the athletic trainer's claim, and instructed the board to provide her with an administrative hearing concerning her complaint. §

in a loss of all remaining eligibility. There has also been an emphasis on reducing the penalty for a positive marijuana test and instead implementing a counseling or mental health approach for the student athlete. The argument in favor of this approach was that marijuana wasn't seen as a performance enhancing substance, but rather as a recreational street drug.<sup>2,3</sup>

Recently, the NCAA reduced the penalty for a positive marijuana test from one year to 50 percent of one's sport season, with a subsequent second positive test resulting in a one-year suspension from participation.

***There has also been an emphasis on reducing the penalty for a positive marijuana test and instead implementing a counseling or mental health approach for the student athlete.***

As noted by the NCAA, healthy college students who smoked marijuana chronically and habitually revealed adverse physiological changes. However, proponents of the use of medicinal marijuana and/or CBD don't advocate chronic or habitual intake. In fact, as it relates to any use of THC for medicinal purposes, a low dosage is recommended and monitored, quite possibly less than the threshold for drug testing purposes. Low dosage THC and/or CBD has been shown to provide temporary improvements to healthy individuals with ailments, such as pain and inflammation, wherein symptoms return to one's baseline after treatment is stopped.<sup>4</sup>

Proponents of cannabis use have stated that there are, in fact, medical benefits associated with the use of CBD, as opposed to THC, which is historically attributed to the "high" feeling that one experiences. CBD is now found in topicals, edibles, tinctures and other forms that has led to a false assumption by some that if it is not inhaled, then it should be fully acceptable to use.

It is important to note that while some CBD products are advertised and promoted as containing pure CBD and no THC, this may not be the case as inadequate labeling and non-lab tested CBD products have shown to contain trace THC in commercially sold products. Therefore, using CBD doesn't ensure avoiding a positive drug test for marijuana. Quick

response (QR) codes on labels can assist with identifying the ingredients in a product.<sup>5</sup>

CBD is promoted to decrease pain and inflammation, decrease migraines, reduce anxiety and successfully manage many other health ailments. Cannabis has also been said to better one's performance under pressure by decreasing anxiety that often comes with pre-game jitters or a first-time return to sport from an injury.<sup>6</sup>

Some believe that forms of cannabis can aid risky behaviors that allow athletes to push themselves to their highest limits, absent of the fear associated with competition and challenges. A

was similar to that used by professional football and basketball. The NCAA made it clear that the elevated threshold is not an endorsement of the use of cannabis.

By rule, therapeutic use exemptions (TUE) for banned substances may be granted. However, the NCAA doesn't provide for a TUE for marijuana, even when it is noted for a documented medicinal purpose. One challenge to granting TUEs for medicinal purposes is that marijuana remains illegal on a federal level, and states that have approved such usage under the recommendation of an approved physician all have different laws defining what conditions qualify for usage. In nearly all cases, conditions are chronic and/or terminal in nature and unrelated to a short-term condition, which may be seen in athletics.

As an athletic trainer, what does this mean for you? What role do you have in educating student athletes about cannabis? What are the legal aspects associated with advice that you give?

Here are a few steps to take in minimizing your risk associated with the cannabis craze:

- **Become educated.** Learn about the basic differences between CBD, THC and hemp. This would be no different than learning about any other topical lotion or cream, pharmaceutical or other physical agent that you play a role in administering in your setting.
- **Know the laws.** Know the federal laws that clearly regulate and state that THC is illegal at the national level. Know your state laws and their statutes on recreational marijuana, medicinal marijuana, hemp (0.3 percent THC) and CBD.
- **Know your practice act.** Only medically trained physicians can recommend medicinal marijuana. Because it is illegal at the federal level, none are allowed to prescribe. Therefore, you, as an athletic trainer, are not allowed to do either or else you would be practicing medicine. Remember the individual is always responsible for what he or she puts in or on one's body, but you will be called upon for advice and you have a responsibility to provide accurate, appropriate and legal feedback.
- **Know how to read labels.** Know, first, that you can't trust what you read on any label, and know, second, that some labels won't have any proven lab certification verifying the ingredients of a substance. QR codes can be helpful in identifying ingredients.
- **Identify resources and educate.** Be prepared to proactively provide student athletes

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## CANNABIS CRAZE, *continued from page 08*

with factual reference materials and trustworthy websites from which to learn.

### • **Develop and/or review drug education and testing policies.**

Now is a good time to assess your current policy and compare it to your practice act, state and federal laws pertaining to marijuana, league rules and school philosophy. Be sure to have comprehensive input from all stakeholders, including that from your legal team.

### • **Stay current.**

Review and revise your policy and educational materials frequently. The laws, league rules, cultural beliefs, research findings and public perception are changing rapidly. Be sure to remain actively involved with the most recent facts.

As the issue of marijuana use starts to evolve, it is a prudent measure for the certified athletic trainer to stay abreast of all legal and compliance issues regarding student athlete use, and how to best navigate this ever-expanding use by student athletes recreationally and medicinally. ♀

### References:

1. Smeyers@ncaa.org. What Student-Athletes Need to Know About Marijuana. NCAA.org - The Official Site of the NCAA. <http://www.ncaa.org/sport-science-institute/topics/what-student-athletes-need-know-about-marijuana>. Published October 24, 2018. Accessed October 29, 2019.

2. Murschel M. NCAA leaders push to stop drug testing, suspensions at championship events. orlandosentinel.com. <https://www.orlandosentinel.com/sports/os-marijuana-football-changes-20151018-story.html>. Published October 19, 2015. Accessed October 29, 2019.
3. Ware MA, Jensen D, Barrette A, Verne A, Derman W. Cannabis and the Health and Performance of the Elite Athlete. *Clin J Sport Med*. 2018;28(5):480-484. doi:10.1097/jsm.0000000000000650.
4. Lee G, Grovey B, Furnish T, Wallace M. Medical cannabis for neuropathic pain. *Curr Pain Headache Rep*. Feb 1;22(1):8. 2018.
5. VanDolah HJ, Bauer BA, Mauck KF. Clinician's Guide to Cannabidiol and Hemp Oils/ *May Clin Proc*. Sept;94(9):1840-1851. 2019.
6. Childs E, Lutz JA, de Wit H. Dose-related effects of delta-9-THC on emotional responses to acute psychosocial stress. *Drug Alcohol Depend*. Aug;177:136-144. 2017.
7. Dover G & Amar V. Development and validation of the Athlete Fear Avoidance Questionnaire. *JAT*. 50:6, 634-642. 2015.
8. Heustis M, Mazzoni I, Rabin O. Cannabis in sport: anti-doping perspective. *Sports Med*, Nov 41(11):949-66. 2011.
9. National Institute on Drug Abuse. Marijuana. NIDA. [www.drugabuse.gov/publications/drugfacts/marijuana](http://www.drugabuse.gov/publications/drugfacts/marijuana). Accessed October 29, 2019.
10. Smeyers@ncaa.org. NCAA increases THC testing threshold. NCAA.org - The Official Site of the NCAA. [www.ncaa.org/about/resources/media-center/news/ncaa-increases-thc-testing-threshold](http://www.ncaa.org/about/resources/media-center/news/ncaa-increases-thc-testing-threshold). Published June 20, 2019. Accessed October 29, 2019.

## CANNABIS-RELATED DEFINITIONS

- **Cannabis:** A flowering plant originating from central Asia comprised of mainly three species (*cannabis sativa*, *cannabis indica* and *cannabis ruderalis*); comprised of more than 100 cannabinoids.
- **Tetrahydrocannabinol (THC):** One of the most commonly known cannabinoids; responsible for producing psychoactive effects.
- **Cannabidiol (CBD):** One of the most commonly known cannabinoids; can be used in many forms; does not produce psychoactive effects.
- **Hemp:** A form of cannabis; containing less than 0.3 percent of THC; federally regulated as an agricultural product.

# The Judicial System in the U.S.: A Primer on Case Law

It's always good to get back to basics. Below are five keys to understanding case law:

**Key 1:** The first key to understanding case law in the United States is to recognize that we have both a federal and a state system of government, each with its own judicial systems, responsible for establishing what is called case law.

The federal system is based on the three branches of government established under the Constitution. The executive branch, which includes the various federal departments, administers the laws passed by the legislative branch (Congress). The judicial branch, made up of district courts (lowest level), appellate courts (intermediate level) and the Supreme Court (highest level), interprets the law, rendering judicial decisions. The Supreme Court is comprised of nine justices appointed for life. The structure of the federal appellate system is

generally geographic. The country is divided into multistate areas called circuits, each of which has a single appellate court.

The state system of courts is similar. There are trial-level courts and some form of appellate court. Typically, there are only two levels (unlike the federal system with its three tiers): the trial court and the state Supreme Court. In addition, many states have courts of limited jurisdiction, which means that they are trial courts that are empowered to hear only certain types of cases, such as those for divorce actions only, will and estate matters only or civil actions seeking \$5,000 or less only.

**Key 2:** The second key to understanding case law is to appreciate that very few cases actually reach the Supreme Court, which only agrees to hear a limited number of cases each term, beginning Oct. 1 every year. Generally, these cases

deal with important issues of federal statutory or constitutional law and civil rights of individuals, often when two or more circuits have adopted contradictory rules.

**Key 3:** The third key to understanding case law involves understanding the powers of the federal government versus state governments. The federal powers include the regulating of commerce, providing for national defense, taxing and spending funds, conducting foreign affairs and enforcing civil rights. Under an amendment to the Constitution, all powers not delegated to the federal government are reserved to the states. This power includes making laws governing the health, welfare and morals of the state's citizens.

In addition, state laws govern contracts, personal injury, property damage and other injuries; real and personal property; wills, trusts and

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inheritances, and corporations. State law also includes common law, a doctrine imported from the British legal system. The common law is a body of law developed by the courts, not the legislature. It involves primarily wrongful actions called torts, contracts and property. If you're dealing with a case in such an area of law, the rule often will be found not in a statute, but in a prior court decision involving a similar fact pattern. Statutes have largely preempted the field, and when a statute governs a matter, it takes priority over common law rules. There are still many instances, however, in which the only source of guiding rules is the common law.

**Key 4:** The fourth critical key to understanding case law involves the principle called *stare decisis*. Under that principle, if a circuit court has established a rule or interpreted a statute in one

way, then all district courts within that circuit are bound to apply that rule when the same fact situation arises. The circuit court, however, is not bound by the rules established by other circuits. In theory, there could be a different rule of law on a single subject in each federal circuit around the United States, assuming that each appellate court has addressed the same issue. And that could lead ultimately to a decision by the Supreme Court.

Similarly, federal courts, including the Supreme Court, also follow the principle of *stare decisis* by citing precedent. However, in some instances, because of changing circumstances, the Supreme Court may decide to overturn a previous ruling or reverse a particular policy. The most notable example of this occurred in 1954, when the Supreme Court concluded in *Brown v. Board of Education* that the doctrine

of "separate but equal" has no place in public education since "educational facilities are inherently unequal," thus effectively overturning a practice that had been in place for decades.

**Key 5:** The fifth key factor to keep in mind when discussing case law is that for a case to be decided by a judge or a jury, in either federal or state court, someone has to file a lawsuit. The lawsuit could be filed by the government seeking to protect civil rights, a private individual alleging an improper action by a government or a company, or an association or corporation, alleging that some illegal action occurred.

As you might expect, this article really is only a primer. The judicial system and case law in the United States are complicated. If you're an athletic trainer embroiled in a significant legal matter, it's good idea to retain legal counsel. ¶

## CASE SUMMARY

### COURT DENIES STUDENT ATHLETE'S EXPLANATION FOR POSITIVE DRUG TEST

A collegiate student athlete tested positive for drug use in the second of three random drug tests administered by the National Collegiate Athletic Association (NCAA). The athlete requested and received two administrative appeals in which he contended that the positive test results of the urine test were false due to a combination of factors, including heavy drinking, sexual activity the night before the test and his use of nutritional supplements.

Following the unsuccessful appeals, the college complied with the NCAA regulations and suspended the athlete from intercollegiate athletic competition for one year. The athlete then sued the college's board of trustees, seeking an injunction to prevent the college from enforcing the suspension. The athlete also claimed that by requiring him to submit to the NCAA's drug testing program, the college violated his right of privacy.

The trial judge concluded that the athlete was entitled to the preliminary injunction because test results were flawed. The board of trustees and the NCAA appealed.

On appeal, the court ruled that the trial judge erred in finding that the drug test results were flawed. The appeals court noted that the trial

judge's ruling was based largely on the testimony of the NCAA's own expert, who agreed that a more accurate drug testing procedure than the one used in this case has been preferable to preclude any false positive results due to the influencing factors of sex, alcohol and over-the-counter dietary supplements.

However, as the appeals court pointed out, the NCAA expert also stated that sexual activity and the consumption of alcohol doesn't increase the T/E ratio, which would create a false positive. While admitting that re-testing would produce more accurate results in some situations, the expert was clear that such re-testing was unnecessary in the present case.

In addition, the court asserted neither of the athlete's own two experts could cite any study to support the proposition that sexual activity elevates the T/E ratio. Significantly, both experts stated that sex and alcohol alone couldn't have caused the significant increase in the student athlete's T/E ratio. Both experts testified that the nutritional supplements taken by the athlete likely contained testosterone.

In addition, the court noted, the team's physician, who tested the athlete's blood and found no evidence of a person using anabolic steroids, didn't administer the test contemporaneously but performed it about one month after the athlete submitted the urine sample to the NCAA. While the blood test indicated normal testosterone

levels, evidence of testosterone use may be undetectable after this length of time, according to the court.

The appeals court determined that there was no factual basis for the trial judge's conclusion that the test results were flawed. The athlete also admitted to taking nutritional supplements that likely contained testosterone. The pattern established by the athlete's three drug tests indicated that he had been exposed to testosterone, and the court concluded that the trial judge was clearly wrong in finding that the test results were flawed.

The appeals court also nixed the athlete's constitutional argument based on invasion of privacy. Drug testing has become a highly visible, pervasive and well-accepted part of athletic competition, particularly on intercollegiate and professional levels, the appeals court noted. It is a reasonably expected part of the life of an athlete, especially one engaged in advanced levels of competition where the stakes, and corresponding temptations, are high, the court explained.

The court added the student athlete's reasonable expectation of privacy is further diminished by two elements of the NCAA's drug testing program: advance notice and the opportunity to consent to testing.

The court therefore reversed the trial's ruling in favor of the student athlete and denied the athlete's request for injunction. ¶