
***Highway to NIL* Podcast: Examining the New NCAA Transfer Rules and Tampering**

Host: Cal Stein

Guests: Mike Lowe and Chris Brolley

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Cal Stein:

Hello, and welcome back to *Highway to NIL*, the podcast series that discusses legal developments in the name, image, and likeness, or NIL space. NIL, of course, affects colleges and universities all over the country, particularly those in Division I athletics.

In this podcast, we delve deep into the current NIL rules impacting colleges and universities and their compliance departments. My name is Cal Stein, and I am a litigation partner at Troutman Pepper. I come to you today with two *Highway to NIL* regulars, Mike Lowe and Chris Brolley.

Last episode, Chris and I discussed the recent proposed settlement in the *House* case, including the impact this settlement may have on college sports, should it ultimately become finalized and executed.

Today, while we continue to wait for that settlement process to work itself out, we're going to turn to a different topic. One that focuses on two things we have spent a lot of time talking about here on *Highway to NIL*. And those are, one, the transfer portal. And two, NCAA enforcement activity.

Where do those two topics intersect? Well, I would submit they intersect in a very specific but rarely seen, at least so far, NCAA violation that we're going to call tampering. Where, for example, a representative or booster of one school approaches or tries to persuade a student-athlete who is enrolled in another school to enter the transfer portal with the intent to join that person or booster school. That type of contact, or let's just call it what it is, that type of inducement is flatly prohibited.

And while we have seen tampering allegations at the professional level, we've only seen them intermittently and somewhat rarely at the college level, at least historically. And for good reason, the lack of transfer freedom that has historically governed college sports basically eliminated the possibility of tampering.

But with the recent policy decisions and court rulings that have all but eliminated transfer restrictions and make college sports look more and more like professional sports, lo and behold, we may see college sports succumbing to the tampering malady like we see in pro sports.

Today, we are going to explore the topic of tampering at the college level. But before we do, let's do our introductions. Mike, you want to go first?

Michael Lowe:

Thanks, Cal. And as always, a pleasure to join you on the program. Cal, as you know, I'm a partner at Troutman Pepper. And in addition to my litigation practice, I do a lot of work in the

investigation space both for corporate clients and for those in the NCAA space. That's probably due in part to my 25 years' experience as a federal prosecutor before I joined Troutman Pepper. My practice at Troutman Pepper also includes providing advice to clients in connection with NIL. Thanks again for having me.

Cal Stein:

Thank you for being here. Chris, I think most people, like Mike, know you. But go ahead and introduce yourself.

Chris Brolley:

Thanks Cal, Mike. I'm a litigation associate in our firm's Philadelphia office. And my practice primarily focuses on products liability, defense, and investigations. And like both you and Mike, I advise colleges and universities on NIL particularly regarding compliance with state laws, NCAA bylaws, and other NCAA policies regarding NIL activities.

Cal Stein:

Okay. As I discussed a moment ago, the primary reason we're even discussing tampering at the collegiate level is because of the recent changes to the transfer portal, that while those changes have no doubt been great for college athletes, they have, if we're speaking candidly, begun to turn the college transfer portal into something of a de facto form of free agency. The likes of which we see in pro sports.

Before we talk about tampering, and what it entails, and how it may be enforced, let's first talk about the current state of college athlete transfers to understand how we got from the traditional college sports landscape where, for decades, college athletes were governed by national letters of intent they signed coming out of high school that then controlled them for almost all of their college careers.

Chris, talk to us a little bit about the recent transfer portal changes that have brought us to this new frontier of de facto college-free agency.

Chris Brolley:

Before discussing the transfer portal on the new transfer rules, I think we should briefly touch on the old transfer rules, which were complex, but I think simple at the same time. I'll use NIL as a frame of reference for a certain time point. But prior to NIL being implemented, which I think we all know was back in July of 2021, if a student-athlete transferred to another school, the student-athlete had to sit out the full academic year. And the NCAA essentially justified this rule as looking out for the student-athlete, so that when the student-athlete transferred, they were encouraged to make decisions motivated by academics and not just athletics.

However, there were several exceptions to this rule, including, and I think we may all remember this, the well-known practice at the time of a school granting a written release allowing the student-athlete to compete right away elsewhere. However – and I think we all remember this as well, is many coaches would block former players from playing for specific schools for whatever reasons they deemed necessary.

With regards to the new transfer rules, late last year, several State Attorneys General and eventually the Department of Justice filed the lawsuit alleging that the NCAA transfer rule requiring the student-athletes to sit out that full year before being eligible to play violated United States Antitrust Laws.

And in December of 2023, a West Virginia federal court placed a temporary hold on the NCAA's rule limiting student-athletes from transferring and waiting a year before competing in any games. As we know, the NCAA ultimately agreed to suspend these transfer rules as a case proceeded in court.

However, in response to this litigation, in April of this year, the NCAA adopted a package of rule changes allowing transferring student-athletes to be immediately eligible at their new school regardless of whether they transferred previously. Essentially, the rules remove the restriction limiting the number of times that the student-athlete could transfer. However, the student-athlete could not transfer mid-year and play for a second school in the same season. They would essentially just now be allowed one transfer per season.

I think noteworthy is the fact that, just the other day, the end of May, the justice department proposed a consent decree, which if approved by the court would enjoin the NCAA from enforcing the transfer eligibility rule and from adopting any similar rules in the future. Even though the NCAA just recently amended its rules early this year, if the consent decree were approved, the NCAA would be enjoined from adopting any similar rules in the future.

Cal Stein:

Thanks, Chris. Okay. Mike, let's talk about the current rules. Nuts and bolts. How do transfers happen right now? What is permitted? What is not? Talk to us about the nuts and bolts of transferring right now.

Michael Lowe:

Okay, Cal. And I'm going to break it down into the different types of student-athletes. First, I'm going to talk about undergraduate student-athletes. And there are basically two ways for an undergraduate student-athlete to be immediately eligible to transfer. And the first is they have to have left their prior school while they were still academically eligible and in good standing. Meaning they weren't subject to disciplinary suspension or dismissal. And the second is they have to meet their progress toward degree requirements at the new school before completing.

Okay, now let's talk about graduate student-athletes. They could be immediately eligible to transfer if they would have to earn a degree from their previous school. They would have to leave while they were still academically eligible. And they would have to be enrolled as a full-time postgraduate student while continuing to satisfy their minimum academic standards.

Beyond that, there's still the requirement that student-athletes are required to enter the transfer portal within the appropriate sports notification of transfer windows. And there's a couple of exceptions to that. But generally speaking, there are windows and you have to go into the portal during those windows. And the idea behind that is you're emphasizing the transparency to the student-athletes and the coaches for recruiting purposes, for roster management, and for financial aid planning.

Now, I mentioned there are some exceptions to the transfer windows. And one of the most common ones is the departure of a head coach. And the second would be the discontinuation of a sport at a school. I mean, obviously, if you're playing a particular sport and your school no longer is going to offer that sport, there should be an exception for you to be able to go to a new school outside of a transfer window.

The NCAA is taking the position that their new rules are a practical approach to transfer eligibility. And the question is, is this a practical approach? Or, really, did the NCAA just see the writing on the wall with the pending antitrust litigation? And as you know, we at Troutman Pepper have been following the antitrust litigation that's going on with respect to NCAA largely driven by the State Attorneys General. And it's hard to really say what the NCAA's motivations really are. But certainly, the litigation has to play a large role on how they reach their decisions.

Cal Stein:

Yeah. No question about that, Mike. I completely agree. All right. Now that we understand the transfer portal and the transfer rules. Where we've been? What's changed? And where we currently are? Let's shift now and talk about tampering. Now, tampering is prohibited by NCAA bylaw 13.1.1.3, which prohibits any communication with an enrolled student-athlete.

Now it should be noted that while communication is impermissible, not every instance is going to rise to a level that constitutes tampering. And let's look at an example that may help illustrate this distinction. In May of this past year, 2024, the NCAA and one of its member institutions reached a negotiated resolution that acknowledged tampering occurred in connection with the institution's football program. Those tampering charges centered on the head coach who impermissibly had contact with two student-athletes from other schools. Those student-athletes were not yet in the transfer portal when the coach contacted them.

On one occasion, the head coach participated in a 17-minute phone call with one of the student-athletes. Then 4 days later, that student-athlete entered the transfer portal and enrolled at the institution. Note the timing. That, I have to believe was critical to the NCAA taking the position that this particular communication was not just impermissible under the bylaws, but that it also rose to the level of tampering.

The second instance occurred when the head coach sent two text messages to another student-athlete again enrolled in another school in which the coach requested that student-athlete's game film. The student-athlete in this case indicated that he wasn't interested in transferring and had not entered the transfer portal.

This is just one example. But I think it illustrates what we all think is going to be coming with the relaxation or, if you wanted to say, outright elimination of transfer restrictions. That is more opportunities for tampering and more incentive for coaches and boosters to have early impermissible contact with student-athletes at other schools.

Mike and Chris, I know we have all thought about and have our own thoughts on the transfer portal and tampering. We've discussed them a lot amongst ourselves. Let me see if I can tee up some of these topics for us for our discussion here today. And, Mike, I'll start with you. As I mentioned a moment ago, not every communication with an enrolled student-athlete is going to be tampering. But as we saw in the example I just gave, some will. My question is what do you

think are some of the factors that the NCAA is likely to consider in determining whether an impermissible communication rises to the level of tampering?

Michael Lowe:

Well, Cal, the first thing we have to remember is that it's not that there's a blanket prohibition on any communications. It's only when the student-athlete is not in the transfer portal, right? What the NCAA is trying to prohibit is students that are enrolled at an institution that haven't entered a portal and being contacted by people affiliated with other schools to try to induce them to transfer.

Certain things the NCAA will probably look at are whether or not there was actually an end result. What did the communication lead to? Was there a transfer? Was there an entry into a portal? They're going to look to see if there were any inducements or any benefits involved in connection with the communication. Was there a pre-existing relationship between the parties? Did the student-athlete have a relationship with the coach from whether he or she had played at the school previously or from before they were in school? They're going to look at the timing and the sequence of events.

Perfect example, right? You gave that description of the 17-minute phone call and then entering the transfer portal four days later. Those are some pretty compelling facts that certainly would suggest at a minimum that there was tampering. They're going to look to see if there was prior violations or accusations of tampering with the same party or the same school. They're going to look at the frequency of the impermissible contact. They're going to look at how the contact occurred. What method of communication? And they're going to look to see whether or not there were any third parties involved in the communications. Establishing a proof of the tampering can obviously be very difficult. As anyone involved in this space knows, tampering accusations fly between schools. They're really hard to prove.

One of the things we have to keep in mind, and which the NCAA certainly does, is that discussions often take place through indirect means, such as through intermediaries like high school football coaches, boosters, friends of the athlete, or others that are not associated with the program directly. And so, obviously, proving that there was some kind of tampering given that set of facts can be difficult.

What the NCAA does is it relies upon coaches at the schools to reach out directly and make the accusations of tampering. However, as you would expect, that can be difficult to get such evidence. Because, oftentimes, coaches and assistants are worried that they're going to ruin their prospects for future or present jobs if they're basically tattle taling on their fellow coaches, especially considering the prevalence with which this kind of stuff really does go on behind the scenes. The lack of communications between coaches and the NCAA necessarily leads to a difficult task for NCAA investigators, which is how to come up with the evidence to prove a tampering violation?

Cal Stein:

Yeah. No question about that. But I also think there's no question that they're going to try. They're going to look into it as evidenced by that settlement I discussed a few minutes ago that just recently occurred in May.

I know, Mike, you've talked about this on a number of episodes. The NCAA hired all this investigation and enforcement personnel. They're not just going to pay them to sit around and doing nothing. Tampering is a place that they can go and that we expect them to go. And I think the factors you identified are a really good road map for the types of cases they're going to try to pursue.

Michael Lowe:

Yeah, Cal, I can't agree with you more. I mean, obviously, as more and more of the NCAA's ability to enforce its rules gets eviscerated by court rulings, and consent judgments, and new rules being adopted, there's still going to be an effort by NCAA to enforce some rules. And I think tampering is not going to go away. And tampering is going to be sort of the future battleground where enforcement activities are being undertaken by NCAA.

Cal Stein:

Okay. Let's shift to another discussion topic. Chris, there's no doubt that the relaxation of the transfer portal is good and has been a good thing for student-athletes. It allows for greater and easier movement between schools opening up myriad opportunities including, perhaps most importantly, the ability to maximize NIL earnings. But there are some who are actually very concerned about the perhaps unintended consequences of that relaxation, including tampering. What do you make of that?

Chris Brolley:

Yeah. I think there are several within the sports collegiate landscape that have expressed some concern that tampering is already happening. I think before getting into that, I think I should discuss a little bit about what the NCAA transfer portal actually is. The transfer portal is essentially an online system that allows college athletes to declare their intent to explore transferring to another institution, which then allows the NCAA to monitor, verify, and track the transfer landscape allowing for some transparency.

What happens in the transfer process is the student-athlete declares their intent to enter the transfer portal. The institution then has 48 hours to release the student-athlete's information into a database connecting the student-athlete with recruiters from other schools. The athletes can then either transfer to another school or choose to remove their name from the portal and opt not to be contacted by other coaches or schools.

Obviously, with the transfer portal, there have been several violations. But if we look back from the month and years of January 2015 to October 2018, there were approximately six potential violations of tampering. However, from October 2018 to May 2021, which is right before NIL was implemented, there were approximately 26 potential tampering violations with six resulting in charges.

It seems that in the age of NIL, more and more players and/or coaches appear to be trying to skirt the transfer rules and pushing the boundaries of tampering. Just recently, a college basketball player was accused of having his representatives look for a new team during the season where he also asked for a transfer fee in the process. And while it's unclear whether tampering occurred in this instance, the student-athlete's representatives were allegedly

negotiating with other programs in the middle of the season, which, as we've discussed earlier, is a big no-no. And if true, this would be one of the more obvious examples or cases of tampering.

And so, while many are concerned with the new transfer rules, it appears the loudest voices are usually the college coaches who have been directly impacted by player transferring. And I think rightfully so, you expect to recruit a player, to develop the player, to coach the player up, and go on two, three, four seasons until that player goes to the professional ranks. But coaches have essentially been at the forefront of calling for the old transfer rules to be reinstated. However, I think it's quite convenient that coaches can freely come and go as they please without having to sit out here.

Cal Stein:

Yeah. That's long been the argument in favor of more expansive transferring ability on the part of the student-athletes. But you raised some really interesting points there.

All right. Let's shift again and now look into the future. As we've discussed very recently, a combination of NCAA rule changes and other legal settlements and legal proceedings have resulted in the further relaxation of transfer rules, perhaps even the elimination of the most basic transfer restrictions, which has opened the door for more transfers and easier transfers. Mike, let's talk about what you think about these new rules and how they're going to impact tampering going forward.

Michael Lowe:

Well, there's a few schools of thought on this, Cal, one of the schools of thought, which is advocated by people like Jason Belzer, who's the founder and CEO of SANIL, which is a company that manages collectives at 45 schools. That school of thought believes that if you remove the restrictions and you allow athletes to transfer an unlimited number of times and play at their new schools immediately, then there's really no reason for the schools to follow any rules. And if you subscribe to that viewpoint, then you're going to think that a lot of student-athletes will possibly be hurt because they will have poor representation. And every student is basically going to be an open-market free agent.

Then there are others like Auburn coach, Hugh Freeze, who subscribed to the view that the rule should revert back to their pre-2020 language that doesn't allow players to be immediately eligible at their new schools unless their coach was recently fired or if they are classified as a graduate student. And people like Coach Freeze think that this will eliminate tampering, because people are not going to come to take players if they have to sit out a year.

Personally, I think that with respect to tampering, the new rules – well, let me say it this way. Anytime time you start removing restrictions and making things easier for people and you remove safeguards, there's more likely to be misconduct. And I say that as someone who, as a federal prosecutor for 25 years, was involved in investigating and prosecuting violations of the federal laws.

When it's easier and when there's an incentive for someone to do something that is prohibited by, in this case, a rule, I think it's more likely that it'll happen. When you're saying that you're

making it more palatable for a student-athlete to transfer, because, number one, they won't have to sit out; number two, they can bounce around from institution to institution; and, number three, you have all this NIL money that's out there. Then I think there's a stronger incentive on the part of people, whether they're affiliated with the school or a collective, to try to get students who are valuable commodities, if you want to look at it that way, to change schools to go play for their school. By their school, I'm not saying necessarily it's the school themselves. But people who have an interest in seeing an athlete come to that particular school. I think I tend to agree with the view that tampering will likely increase. I still think proving tampering is going to be hard. And I continue to believe that this is where NCAA will focus a lot of their resources.

Cal Stein:

Yeah. I tend to agree. I mean, it's really in my view all about incentive, right? Once you start removing restrictions and making it easier for student-athletes to transfer and compete immediately, you have skewed the incentives towards tampering even though it's against the rule. I tend to agree with you. I think the more restrictions that are eliminated or lessened, the higher the likelihood and the higher the volume of tampering cases we're going to see.

Chris, there are a lot of legal decisions, and injunctions, and settlements that are flying around here. It's hard to keep them all straight. But I want to go back for a minute to December. There was a pretty important injunction issued in December that bears directly on the transfer portal, right? And I think you mentioned this earlier. I just want to go back. Can you take us through that?

Chris Brolley:

Yeah. I think there are several reasons why the NCAA amended its transfer rules. And I think part of the reason is from that injunction from the West Virginia Federal Court that temporarily suspended the NCAA's rules, which they ultimately, as I indicated earlier, just recently amended to allow a free transfer or to allow students to freely transfer without having to sit out a year.

But I think there are also several factors that went into play kind of forcing the NCAA's hand to amend these rules. And I think the first one is another injunction against NCAA, which as listeners of this podcast and followers of NIL are aware, the Tennessee Federal Court's injunction against the NCAA, which now allow schools to offer student-athletes compensation to enroll or continue to be enrolled at the school. The injunction broadly prevents the NCAA from enforcing any rules that would hinder a student-athlete and prospective student-athlete from negotiating compensation for NIL.

I also think the rise and prevalence of the ability for third-parties, boosters, and collectives to contact and communicate with prospective or current student-athletes for the purpose of negotiating NIL compensation has led to the rise or the NCAA's need to amend their transfer rules. And I think the ability to negotiate NIL agreements. Those same third-parties, boosters, and collectives can now negotiate NIL agreements with these perspective or current student-athletes before they actually commit to a specific school, which includes student-athletes who are in the process of transferring.

I think the above factors that I just discussed have increased the speed at which we are now seeing players transfer, which can see a rise in potential tampering. And as, Mike, you

discussed earlier, with the NCAA facing its existential crisis, I think it's likely we see an increasing amount of enforcement actions involving recruiting and tampering.

Cal Stein:

All right. Let's introduce our last topic here. And this podcast, we started it after all talking about NIL. It's right there in the name. And since then, we've kind of expanded to talk about a lot of other critical changes in college sports that affect NIL. But I want to get back to our roots so to speak on this last topic.

Mike, I think these new transfer and tampering rules will have a major impact on NIL as we know it. What do you think about that?

Michael Lowe:

Well, I agree with you, Cal. I think, ultimately, they're all inextricably intertwined, which is a legal phrase that those of us who've been through law school are probably very familiar with. But it's true. NIL, transfer rules, tampering rules, you can't separate them. Because, ultimately, what's driving a lot of the decision-making now on the part of the student-athletes is where can I go that I'm going to get the most visibility, the most NIL money, and sort of set myself up for the next phase of my life. Realizing that not all student-athletes make it to the major leagues, whatever sport we're talking about. And so, trying to maximize value while still a marketable commodity.

I think as we've discussed, the more you make it easier for student-athletes to take advantage of the flexibility to maximize their NIL value, the more they will. And the more they will, then the more the people who seek to induce transfers will try to skirt the tampering rules.

The NIL rights are a complex issue that a lot of student-athletes struggle over. They need oftentimes help to really understand them. And I know that's something that NCAA is concerned about and is trying to remedy, so that the sort of cloud under which student-athletes operate trying to understand these things is taken away and everything gets a little bit more clear.

But you have to consider things like the potential conflicts of interest. When you have the monetization of NIL rights, it necessarily introduces potential conflicts of interests and ethical considerations. I mean, whose interests are being served? The athletes certainly want to prioritize their own interests. The boosters and collectives are trying to bring athletes to the schools that they support. And the NCAA still has this overriding interest of ensuring that student-athletes are students as well as athletes.

Personally, I think that the emphasis on NIL in the current college sports landscape is likely to widen the gap between high-profile athletes and those from smaller schools or non-revenue sports who are likely going to struggle to attract similar attention and financial opportunities. But the student-athletes are the ones that this NIL regime is designed to benefit. And they clearly are. And when you look at it from their perspective, many student-athletes played college careers helped generate enormous revenues for their schools only to find themselves injured or unable to make it in the pros.

And so, the NIL regime, as it stands now, is a way for those student-athletes to monetize what they're doing. Where this all winds up? It's really hard to say, Cal. I mean, I think from my

personal perspective, it's an exciting time to be an attorney in this space. I think if you're someone who is part of an athletics department at a school, it's a really scary time to be in this space, because the rules evolve.

We do these programs. We write these articles. And between the time we record something and the time it gets finalized, there may be a whole new lawsuit or a whole new rule. But as an attorney, I think it's exciting. I think for student-athletes, it's exciting. And how it shakes out in the future remains to be seen.

Cal Stein:

Yeah. Very well said. And that's something we've heard over and over and over from the folks at universities that we are working with and who come to us for help. Everything is changing. It's changing quickly. And it requires some real attention to detail and real immediate attention when these issues do arise.

And with that, we're out of time here today. So, I do want to bring this discussion to a close. I really want to thank you both, Mike and Chris, for joining me on the podcast. And I also want to thank everyone for listening. If you have any thoughts or any comments about this series or about this episode, I invite you to contact any of us at our troutman.com email addresses. You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening. And stay safe.

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