

MARCH 2023

DEVOTED TO  
LEADERS IN THE  
INTELLECTUAL  
PROPERTY AND  
ENTERTAINMENT  
COMMUNITY

VOLUME 43 NUMBER 3

THE *Licensing*  
*Journal*®

*Edited by Gregory J. Battersby and Charles W. Grimes*

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# *In Effort to Rein in NIL Collectives, the NCAA's Newest NIL Missive Upends U.S. Jurisprudence and Contradicts the NCAA's Prior NIL Missives*

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## **The Birth of NIL Collectives**

Following the NCAA's adoption of its interim name, image, and likeness policy effective July 1, 2021, NIL collectives have exploded and fundamentally reshaped major college athletics by becoming critical components of athletic success using novel techniques to compensate college athletes for their NIL. At some schools, athletes benefit from a single NIL collective, while others have multiple NIL collectives at their disposal.

The term "collective," which generally means a cooperative enterprise, has no particular legal significance. NIL collectives are simply business entities that supporters of a school's athletic teams (not the schools themselves) form under state laws to accept and generate revenue, which the collectives use to fund NIL opportunities for college athletes who opt-in and avail themselves of the collective's help and efforts to monetize their NIL.

Some NIL collectives use a subscription-based model, by which subscribing fans pay the collectives monthly or annual subscription fees in exchange for access to, interaction with, or memorabilia from their favorite school's athletes. Often, subscriptions are tiered, with higher-paying subscribers receiving more access, interaction, or memorabilia than lower-paying subscribers. Some collectives sell branded merchandise to raise revenue. Other collectives rely more heavily upon sponsorships and donations for revenue.

Since May 2022, the NCAA has attempted to rein in the efforts of NIL collectives, but its most recent NIL missive takes an authoritative and controversial step toward that goal.

## **The Bedrock of U.S. Jurisprudence—Innocent Until Proven Guilty**

In the United States, a fundamental principle of our criminal justice system is that the law presumes individuals to be innocent until proven guilty. Stated differently, the law presumes individuals accused of crimes to be innocent until the government proves to either a judge or jury beyond a reasonable doubt that the accused actually committed the crimes of which the government accuses them and, therefore, deserve criminal punishment. If the prosecution cannot prove its case to those standards, then the judge or jury must find the accused not guilty.

The presumption of innocence is often incorrectly thought to be enshrined as one of the U.S. Constitution's guarantees, but the presumption is not a specifically enumerated Constitutional guarantee and is, instead, a governing concept stemming from individuals' rights to due process under the Constitution's Fifth and Fourteenth Amendments guaranteeing that the government cannot deprive them of their lives, liberties, or properties without legal due process.

The presumption of innocence is not simply a dispassionate and theoretical concept. Instead, the presumption symbolizes what the U.S. has endorsed as the educated, enlightened, and fundamentally fair way to conduct governance, and it is critical to our jurisprudence system for three main reasons:

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1. It guards against, and defends individuals from, false accusations;
  2. It requires the government and government actors, like prosecutors, to make accusations of criminal conduct with discipline because the burden of proof is on the accuser—not the accused; and
  3. It prevents the accused from having the nearly impossible task of proving a negative—that is, proving that something did not happen. In sum, the presumption of innocence ensures that governing bodies do not abuse their powers, which is why the National Collegiate Athletic Association's latest NIL rules are so head-scratchingly problematic and hard to defend.

## **The NCAA's NIL Standard of Review and Burden of Proof - Guilty Until Proven Innocent**

Effective January 1, 2023, the NCAA adopted Bylaw 19.7.3., which creates a new standard of review and burden of proof for NIL activities that ignores and upends the presumption of innocence. The NCAA's presumption of guilt states:

19.7.3 Violations Presumed in Select Cases. In cases involving name, image and likeness offers, agreements and/or activities in which related communications and conduct are subject to NCAA regulation, the infractions process shall presume a violation occurred if circumstantial information suggests that one or more parties engaged in impermissible conduct. The enforcement staff may make a formal allegation based on the presumption. The hearing panel shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image and likeness activity complied with NCAA legislation.

Following its adoption of the presumption of guilt, the NCAA published what appears to be the latest in a series of NIL guidance missives since adopting its interim name, image, and likeness policy effective July 1, 2021. The new missive is entitled "Standard of Review for Violations Related to Name, Image and Likeness Activities" and addresses the NCAA's presumption of guilt and related enforcement procedures. The missive states in relevant part:

When available information supports that the behaviors leading up to, surrounding, and/or related

to an NIL agreement or activity were contrary to NCAA Division I legislation and/or the interim NIL policy, the enforcement staff and NCAA Division I Committee on Infractions shall presume a violation occurred. To rebut the presumption of a violation, the institution must clearly demonstrate that all behaviors complied with NCAA legislation and interim NIL policy.

In summary, the NCAA's standard of review and burden of proof for NIL activities will be to presume violations have occurred if circumstantial evidence implies, infers, or suggests that one or more parties engaged in impermissible conduct under NCAA rules, and the accused will have to clearly demonstrate with credible and sufficient information that all its behaviors, communications, and conduct surrounding the NIL activities complied with NCAA rules.

## **The NCAA's Guilty Until Proven Innocent Processes and Procedures**

The NCAA's newest missive sets out the processes and procedures that apply in NIL related enforcement matters.

When the NCAA's enforcement staff learns of information relating to a potential violation of NCAA NIL rules, the enforcement staff will, in its sole discretion, either conduct a limited/expedited investigation or issue a letter of inquiry to a school.

If the NCAA's enforcement staff conducts an investigation, it will lead all investigative activities, including interviews and document requests, and include the school as appropriate pursuant to the NCAA's rules and internal operating procedures.

If the NCAA's enforcement staff sends a letter of inquiry to a school, it will (1) identify the information the enforcement staff believes supports its presumption of guilt, (2) note that the school has the burden to rebut the presumption of guilt by demonstrating a violation did not occur, and (3) provide a deadline for the school's response. Upon receiving the school's response, the enforcement staff may, in its discretion, conduct additional investigation.

The NCAA's enforcement staff will review the information obtained through its own investigation and/or the school's response to the letter of inquiry. The enforcement staff will allege a violation unless it concludes that, based on the information developed, the school rebutted the presumption of guilt that a violation occurred.

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## The NCAA Ties Its Presumption of Guilt to Circumstantial Evidence

The NCAA does not require direct evidence of guilt in NIL-related cases and, instead, ties its presumption of guilt to circumstantial evidence of guilt.

Direct evidence is direct proof of a fact, such as a confession or eyewitness testimony about what a witness saw, heard, or did. Circumstantial evidence is indirect evidence—that is, it suggests a fact by implication, inference, or suggestion, such as a crime scene’s appearance after the crime or a witness testifying that she did not see a murder occur, but she saw a defendant running from the murder scene.

Several media reports over the last year referenced NIL-related activities that seemed problematic, but, for unknown reasons, the NCAA’s infraction process could not produce the evidence to support an enforcement action to penalize a school for an NIL-related violation. The NCAA will likely argue that its presumption of guilt prevents these type situations in the future, because (1) it is not a government body but, instead, a member-based association comprised of the schools it regulates and can adopt whatever presumption benefits it the most under the circumstances, (2) the presumption of guilt will allow it to discover and disclose concerning activities and behaviors to its member schools faster than it could without the presumption of guilt, and (3) multiple pieces of circumstantial evidence combined can indeed favor one explanation over another explanation, which makes explaining what occurred in connection with an NIL activity easier.

Schools, on the other hand, who stand the most to lose due to the presumption of guilt, will likely argue that (1) the presumption of guilt is contrary to our country’s judicial philosophies, (2) the presumption of guilt absolves the NCAA of responsibility for acting without discipline, (3) even multiple pieces of circumstantial evidence combined is not proof and multiple explanations for what happened may still exist, (4) they are now subject to being pawns in someone else’s game that intentionally produces false accusations by disseminating inaccurate, incorrect, or misleading circumstantial information, including media reports or concerted social media campaigns by fans of another school, and (5) they are tasked with the unenviable, burdensome, and troublesome chore of proving a negative—that is, proving they did nothing in violation of NCAA rules.

Both sides have valid arguments as to why the presumption of guilt is a good or bad concept, but the

NCAA has determined, for better or worse, that inferences, implications, and suggestions are sufficient to disregard its members’ due process considerations relating to NIL activities.

## The NCAA Seemingly Contradicts Its Own NIL Guidance

In addition to introducing its presumption of guilt relating to NIL activities, the NCAA’s newest NIL missive attempts to clarify and distinguish between certain impermissible and permissible NIL-related activities. Rather than clarifying its rules, however, the NCAA contradicts a profound and far-reaching position it had taken in prior NIL missives.

The NCAA’s glaring contradiction involves the abilities of prospects to avail themselves of NIL opportunities and engage in NIL activities. The new missive states that NIL collectives cannot (1) contact prospects or prospects’ families about potential NIL opportunities prior to prospects *signing* with the institution or (2) announce or enter into verbal or written NIL agreements with prospects prior to the prospects *enrolling* at an institution.

These two new positions blatantly contradict and conflict with prior NIL guidance the NCAA has issued, including the following:

- Under a November 2021 NIL missive, the NCAA said that prospects may engage in the same types of NIL opportunities available to current student athletes under the NCAA’s interim NIL policy without impacting their NCAA eligibilities, if the opportunities are not recruiting inducements or substitutes for pay-for-play.
- Under the November 2021 NIL missive, the NCAA said that individuals can enter into NIL agreements with boosters if the activity accords with state laws and school policy, is not an impermissible inducement, and does not constitute pay-for-play.
- In an October 2022 NIL missive, the NCAA said that schools can (1) engage NIL collectives to inform student athletes about NIL opportunities that school knows about, (2) provide student athlete contact information to NIL collectives, (3) introduce student athletes to collective representatives, and (4) arrange space for NIL collectives and student athletes to meet on campus or in school facilities.

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To recap, the November 2021 missive stated unequivocally that prospects can engage in the *same* NIL opportunities as enrolled student athletes, if the opportunities are not recruiting inducements or substitutes for pay-for-play; and the October 2022 missive affirmed that NIL collectives can talk to prospects about NIL opportunities, even on campus and in school facilities.

However, under the NCAA's newest NIL missive, the NCAA now posits that, even if the NIL activity is not a recruiting inducement or a substitute for pay-for-play and otherwise accords with state laws and school policies, NIL collectives cannot (1) contact prospects about NIL opportunities prior to the prospects *signing* with the school or (2) announce or enter into verbal or written NIL agreements with prospects prior to their *enrollments* at school. Therefore, despite previously stating that prospects may engage in the same type NIL opportunities in which enrolled student athletes can engage, the NCAA now says they cannot. The NCAA neither attempted to explain its divergent treatment of prospects and enrolled student athletes nor even acknowledged the inherent conflicts between its own rules.

The effects of the NCAA's conflicting and contradictory rules are compounded by the NCAA's inconsistent terminology and timing sequences. Depending upon which NCAA statement one reads, the NCAA ties an NIL activity's permissibility to prospects *signing*,

*committing*, or *enrolling* at schools. We do not know if the NCAA has carelessly used inconsistent terminology (which is a common problem with the NCAA rulebook generally) or intentionally tied the permissibility of certain NIL activities to different actions and time sequences, but the result is the same—abject confusion for schools, athletes, and NIL collectives.

## Conclusion

The NCAA has made no secret that it wants uniform federal legislation enacted to remove NIL regulation from its plate, which makes one wonder if the NCAA's presumption of guilt and conflicting and contradictory positions on NIL activities are nothing more than calculated and shrewd tactical moves designed to force Congress to act (in other words, is the NCAA crazy like a fox?). Alternatively, the NCAA's presumption of guilt and conflicting and contradictory positions on NIL activities could simply be another example of the NCAA's ineffectual regulation of NIL, which will likely serve as an unwitting invitation for NIL collectives and athletic prospects to sue the NCAA for illegally limiting their rights. This author's sense is that the court system will ultimately and inevitably answer the question, after giving the NCAA the benefit of initially presuming its innocence.

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