

Howard E. Manning, Jr.  
Superior Court Judge  
Wake County Courthouse  
P. O. Box 351  
Raleigh, N.C. 27602

[REDACTED]  
[REDACTED]  
Fax Only Memo

August 9, 2012

To: Hugh Stevens & Amanda Martin at [REDACTED]  
Marc Bernstein at [REDACTED]  
Jonathan Sasser at [REDACTED]

Subject: The News and Observer Publishing Company, et al. versus  
Richard A. Baddour, Director of Athletics for the University of North  
Carolina, et al. 10CVS1941 Orange County Superior Court

**Re: ORDER re: Motion to Compel, Motion to Quash and Motion for  
Protective Order – Coach Davis' Personal Cell Phone Billing Statements.**

Lady and Gentlemen:

I have carefully reviewed the matters raised at the hearing on July 17, 2012 relating to Coach Davis' personal cell phone records as well as the briefs for both sides. Here is my decision:

1. Coach Davis' Motion to Quash the Subpoena is granted.
2. Plaintiffs' Motion to Compel is denied.
3. Coach Davis' Motion for Protective Order is allowed, subject to the following terms and conditions.
  - (a) The only real issue left is what to do about Coach Davis' personal cell phone billing statements that reflect phone usage related to Coach Davis' work as UNC head football coach (calls that would be public record if made on a UNC paid for and furnished cell phone). I have read the Governor Ritter decision of the Supreme Court of Colorado and with all due respect for that Court, do not believe that our government officials, including University officials and coaches, are entitled to use the personal cell phone "dodge" to evade the North Carolina Public Records law. If Chancellors of the UNC system are doing this thinking that they can avoid public scrutiny of their cell phone records by using their personal cell phones to conduct public business, they need to re-think their decision.

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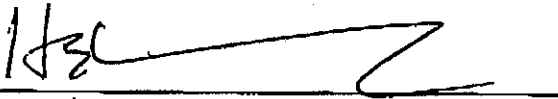
**Making such a decision in the first place to avoid the public records law, in my view, raises an issue of sound judgment.**

- (b) In this respect Coach Davis' "offer" through counsel for an "in camera" eyes only review by counsel of his personal cell phone billing records is reasonable and certainly cost-effective considering the gallons of 'white-out' used by UNC and its lawyers so far in this matter.**
- (c) A protective order which protects Coach Davis' private calling records for non-public/job related calls is appropriate.**

Counsel for Coach Davis is to prepare an Order reflecting the foregoing and submit to counsel for review as to form and thereafter submit the proposed Order to the Court for review.

Thank you.

This 9th day of August, 2012



Howard E. Manning, Jr.  
Superior Court Judge Presiding

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Subject: The News and Observer Publishing Company, et al. versus  
Richard A. Baddour, Director of Athletics for the University of North  
Carolina, et al. 10CVS1941 Orange County Superior Court

Re: Memorandum re Decision on Plaintiffs' Motion for Summary Judgment and  
Defendants' Motion for Summary Judgment heard on July 19, 2012 in Wake  
County Superior Court (Rule 2.1 case)

Lady and Gentlemen:

I have carefully considered your arguments, briefs and have read and re-read the decisions, deposition excerpts and other materials relating to the arguments raised at the hearing on July 19. At the close of the hearing the Court took the matter under advisement.

This Memorandum does NOT address the separate issue(s) concerning former UNC Football Coach Davis with respect to plaintiffs motion to compel and Davis' motion to quash relating to his private cell phone billing statements.

Procedural Background –

There were initially six (6) categories of records requested under the public records requests by the plaintiffs that were at issue:

At the hearing on April 15, 2011, counsel for both sides, acknowledged that the University defendants ("UNC") had complied with two (2) out of the six. They were:

Names of all individuals or organizations that provided impermissible benefits to any UNC football players.

Names of recipients of athletic scholarships.

The remaining four (4) categories were:

1. All documents and records of any investigation conducted by the University related to any misconduct by any UNC-CH football coach and UNC-CH football player, any sports agent, any UNC-CH booster and/or any UNC-CH academic tutor.
2. Unredacted phone numbers on telephone bills for phones provided to and used by defendants Baddour and Davis and by former associate football coach John Blake. (did not include personal cell phone issue)
3. Parking tickets issued by UNC-CH relating to 11 players.
4. Names, employment dates and salaries of all individuals employed as tutors/mentors for UNC-CH student athletes since January 1, 2007, including any documents mentioning former tutor Jennifer Wiley.

At the hearing, counsel for plaintiffs advised the Court that the first (1) category was not able to be resolved at that time pending the Court's decisions on categories 2, 3 and 4 above, or words to that effect.

Accordingly, category 1 was not part of the arguments before the Court at the hearing, only categories 2, 3 and 4 – phone records, parking tickets and student/tutors/mentors of student athletes.

The primary defense by UNC as to all three of these categories is FERPA.

On April 19, 2011 this Court announced its Decision as to each category: 2, 3 & 4 in summary form which was followed by an Order entered on May 13, 2012 in Orange County Superior Court reflecting the following:

2. The unredacted phone numbers on telephone bills for phones provided to and used by defendants Baddour and Davis and former coach Blake are to be provided by UNC. The fact that a student's telephone number appears on these telephone bills is public record. The telephone number is not protected by FERPA. FERPA does not provide a student with an invisible cloak so that the student can remain hidden from public view while enrolled at UNC. The telephone number is not part of the education record protected by FERPA. It should be noted that the production of telephone records does not include the CONTENT of any of the telephone conversations.

3. The parking tickets, if any, issued by UNC relating to 11 players. The parking tickets issued by UNC public safety, if any, to 11 players are not education records protected by FERPA. While section 6-3 of Article VI, Parking Control of

the UNC Ordinance relating to parking on the campus of UNC permits, after repeated offenses, may result in referral to an appropriate agency for disciplinary action, the receipt of a parking ticket, in and of itself, is not subject to disciplinary action and thus, is not protected educational information under FERPA. If a parking scofflaw were to reach the repeated stage and was referred to disciplinary action, such disciplinary action would be covered under FERPA. However this remote possibility does not constitute a sufficient "threat" to cloak every student with invisibility about the number of parking tickets he or she receives. Parking tickets are subject to civil not criminal penalties.

4. The names, employment dates and salaries of all individuals employed as tutors/mentors for UNC athletes. There is a distinction here that must be addressed. Non-student tutors/mentors employed by UNC to assist UNC athletes are not protected by FERPA but would have rights under the law and regulations governing personnel and employees. Active UNC students/graduate students/etc. that are employed by UNC and their employment is contingent on their being students at UNC, are protected by FERPA and their records are "education records." Accordingly, FERPA protects those UNC student tutors/mentors but not non - UNC student mentors/tutors. UNC must, within the guidelines of the personnel laws and regulations, disclose the non - UNC student tutors/mentors but UNC does not have to disclose the UNC student tutors/mentors information as it is protected by FERPA.

The foregoing decisions were final decisions by the Court on those issues. It is the Court's understanding that UNC complied with the Court's Order of May 13, 2011, and furnished the documents and data requested.

With the entry of the Court's May 13, 2011 Order reflecting the foregoing, there remained issues relating to category number 1 above, to wit: documents and records relating to the University and NCAA investigation into allegations of misconduct by any UNC-CH football coach(es) and UNC-CH football player, any sports agent, UNC-CH booster or any UNC-CH academic tutor.

By letter of October 11, 2011, counsel for plaintiffs "clarified" their requests for "certain documents and records of the University's investigation related to any misconduct in UNC's football program." (Category 1). These requests are set forth below and, with the exception of the Coach Davis personal cell phone records issue, are all that remain for the Court to decide in the cross motions for summary judgment now pending.

The one unresolved remaining category of records and documents has come down to the following:

1. With respect to any outside law firms retained by the University:

- a. copies of any engagement letter or other written instrument reflecting the contractual arrangement between the University and the firms
  - b. copies of all bills sent by either firm
  - c. copies of all communications from the University to the firm
  - d. copies of the recordings in the possession of the Bond firm
2. All Statements of Fact submitted to the NCAA
  3. All Reinstatement Requests
  4. An unredacted copy of University's September 19 submission to the NCAA

The plaintiffs and the UNC defendants agree that the material facts are undisputed and that this matter can be decided on cross motions for summary judgment.

**Decision as to each category.**

1. a. copies of any engagement letter or other written instrument reflecting the contractual arrangement between the University and the firms (outside law firms retained by the University). - At the hearing, counsel represented to the Court that there were no engagement letters or other writings reflecting the contractual arrangement between the University and the firms. **Accordingly, this issue is off the table as there is no such data or document.**

Decision relative to attorney-client issues, FERPA and public records law affecting attorneys' fee statements (bills), communications from UNC to the Bond law firm and copies of recordings of student athlete interviews in possession of the Bond firm. Categories 1(b), (c), and (d).

**Attorney-client privilege and Public Records law.** The North Carolina Public Records law protects written communications to a state agency that are:

**made within the scope of the attorney-client relationship by any attorney-at-law serving such governmental body, concerning any claim against or on behalf of the governmental body or the governmental entity for which the body acts, or concerning the prosecution, defense, settlement or litigation of any judicial action, or any administrative or other type of proceeding to which the governmental body is a party or by which it is or may be directly affected. G.S. 132-1.1(a).**

The North Carolina Public Records law also excludes "trial preparation material":

**Any record, wherever located and in whatever form, that is trial preparation material within the meaning of G.S. 1A-1, Rule 26(b)([5]), any comparable material prepared for any other legal proceeding,**

**and any comparable material exchanged pursuant to a joint defense, joint prosecution, or joint interest agreement in connection with any pending or anticipated legal proceeding. G.S. 132.9.9(h)(2).**

Plaintiffs contend that since all of the communications at issue in this case related to the NCAA investigation of the football program at UNC, that membership in the NCAA is voluntary, and that the only "sanction" for violation of NCAA rules is disqualification, sanctions about the football program or a fine, that an NCAA investigation into the football program and violations of NCAA rules uncovered therein, are not in the nature of any "claim" or other proceeding covered by G.S. 132-1.1(a). Accordingly, "none of the communications between the University and its outside law firm related to the NCAA are protected by the attorney-client privilege" under the public records statute. (Pls. Memo page 12).

Plaintiffs further contend, in the alternative, that even if the NCAA investigation and its potential sanctions for misconduct under the NCAA rules constituted a "claim" under the public records law, UNC as a public agency is entitled only to a privilege "in the advice it receives from its counsel. Communications from the University to its outside counsel are not privileged." (Pls. Memo page 12)

Finally, plaintiffs demand that the legal bills from the Bond firm or outside counsel sent to UNC should be produced, except for those portions which constitute "legal advice from outside" counsel. On this question, the Court concludes as a matter of law that attorneys' fee statements (bills) are subject to the attorney - client privilege to the extent that those statements contain legal advice, litigation strategy or other client confidential data such as strategy or legal research. To the extent attorneys' fee statements contain the name of the client, the amount of the fee, the hourly rate by lawyer, and the general work purpose, and the amount of costs and expenses incurred by the law firm, those items and similar items are not privileged and must be disclosed. *Chaudhry v. Gallerizzo, 174 F.3d 394 (4<sup>th</sup> Cir. 1999)*

With respect to the request for all communications from UNC to the outside firm and all copies of recordings in the possession of the outside firm as well as internal communications about the matter from in-house counsel and staff acting at their directions, the Court concludes as a matter of law: (1) that the NCAA investigation into the UNC football program is an administrative or other type proceeding to which UNC is a party under G.S. 132.1.1(a) and is covered by the public records law with respect to attorney-client privilege and trial preparation materials; (2) that communications from in-house UNC counsel, corporate counsel, or an outside law firm, to the client (UNC) are not public records and are exempt from disclosure per G.S. 132.1.1(a). (3) that communications from in-house UNC counsel to outside counsel are privileged, attorney-client communications and are exempt from disclosure under G.S. 132.1.1(a) and (4) communications prepared by UNC staff at the direction of in-house or outside

counsel for submission to in-house or outside counsel in connection with the NCAA investigation and UNC's response to the investigation are "trial preparation material" as defined in G.S. 1A-1, Rule 26(b)(5) and are precluded from disclosure under G.S. 132.1.9(h)(2)

As a result of this determination, the Court declares that the copies of recordings of interviews prepared in connection with the NCAA investigation at issue and in the possession of the Bond (outside firm) are covered as (a) attorney-client privileged communication and (b) trial preparation material under the public records law sections cited above.

The foregoing has determined all categories of documents covered under section 1, outside firms retained by the University.

All the issues that remain to be decided are the requests under Items 2, 3 & 4 dealing with Statements of Fact to NCAA, Reinstatement Requests and an unredacted copy of the UNC September 19, 2011 submission to the NCAA.

**Decision on Statements of Fact and Reinstatement Requests and UNC's Response to NCAA.**

Plaintiffs and defendants agree (which is unusual) that student-athlete information relating to academics (grades, courses, honor court proceedings, crip course information, and investigations into the true academic side) are covered by FERPA. At the hearing, counsel for plaintiffs was crystal clear that plaintiffs are not seeking (although the Court is sure they would like to have) that type of information in this matter because it is protected by FERPA. It is quite gratifying to have a clear stated delineation in this area from plaintiffs' counsel. Plaintiffs' argument regarding the NCAA investigation into impermissible benefits to student athletes from coaches, big-time alumni and other supporters of the football program is that this information is not an "educational record" and is not protected by FERPA.

The Court agrees with plaintiffs' position with regard to information relating to the violation of NCAA rules relating to a student-athlete who participates in and receives impermissible benefits such as plane tickets, jewelry, clothing, shoes, automobiles, payments to cover parking tickets, monetary gifts, free meals, etc., and so forth.

Just as in the case of parking tickets, this kind of misbehavior has nothing to do with education. This kind of behavior (impermissible benefits –non-academic) does **not** relate to the classroom, test scores, grades, SAT or ACT scores, academic standing or anything else relating to a student's educational progress or discipline for violating the educational rules or honor code, all of which are clearly protected by FERPA.



The Statements of Facts, according to the defendants' memorandum submitted in response to the motion for summary judgment and defendants' own motion for summary judgment, are described as follows:

**Statements of fact are detailed recitations of the facts, frequently in list form, surrounding the alleged improprieties of particular student-athletes. The University submitted Statements of Facts to the NCAA's Academic and Membership Affairs ("AMA") group to receive the NCAA's opinion as to whether a rules violation had occurred. Therefore, each list of facts is followed by the University's assessment of those facts under the applicable NCAA principles. These assessments rely heavily on the facts themselves. (UNC memo p22)**

**The plaintiffs are correct that Statements of Facts are customarily "anonymized" so that AMA cannot be prejudiced in its review by the identity of the student. (UNC memo p. 23)**

The Court views the Statements of Facts "process" as described in the record as one similar to presenting information to a grand jury in a criminal case in that the AMA receives and reviews the Statement of Facts on an individual student athlete and responds to UNC as to whether or not a rules violation has occurred.

If a rules violation has occurred and the student-athlete's conduct is such that he or she is suspended from eligibility to participate in college athletics, the student-athlete and UNC must thereafter formally request approval to reinstate the student-athlete's eligibility to participate in the athletics program from which the student-athlete was suspended or worse by the NCAA.

**A Reinstatement Request is a document developed by the University and submitted to the NCAA to request approval to reinstate a student-athlete's eligibility to participate in college athletics. A Request typically consists of a four-page form that identifies the student using his name, year in school, remaining eligibility and other personal information. The form then incorporates the contents of an attached letter that is similar in function and content to a Statement of Facts.**

**Unlike a Statement of Facts, however, a Reinstatement Request is not anonymized. It expressly identifies each student by name and therefore undoubtedly "contain[s] information directly related to a student." (UNC memo p 26)**

If there is no rules violation resulting in suspension by the AMA, there is no need for there to be a Reinstatement Request submitted on behalf of the

student-athlete and the Statement of Facts remains anonymous or to use the "new" word created by the academic community and NCAA—"anonymized."

The Court wants to make it clear, once again, that information relating to the truly academic issues pertaining to student-athlete academic misbehavior, the "quality of education" grades, courses and so forth is off limits and protected from disclosure by FERPA.

The only issue that is in play here is for **misconduct relating to impermissible benefits in violation of NCAA Rules** by student-athletes and their non-student donors, fans, agents and professional athlete friends who bestow impermissible benefits upon them in violation of NCAA Rules. This does not apply to academic issue violations.

With the foregoing in mind, the Court's decision on the remaining issues follows:

**Statement of Facts.** UNC is to produce in its original form each Statement of Facts related to any football player involved in the NCAA investigation at issue that is based on allegations of impermissible benefits (non-academic issues) received by the football player and **which resulted in a decision by the NCAA to declare the student athlete ineligible to play intercollegiate football at UNC as a result.**

Put another way, this includes all Statement of Facts NOT based on an purely academic issue violations (such as failing to make the minimum grade point average for eligibility) which disclosure by UNC to the NCAA resulted in the UNC football player **being declared ineligible to play football or subjected to other sanctions by the NCAA for the impermissible benefits rules violation.**

This disclosure order does not include any Statement of Facts in which **allegations of impermissible benefit (non-academic) violations were reported but which did not result in the NCAA declaring the football player ineligible or subject to other sanctions by the NCAA.**

Likewise, this does not include any Statement of Facts produced in redacted form that were submitted to the NCAA as a result of non-academic issues, such as eligibility based on poor GPA, low grades and lack of hours, valid courses, etc.

Reduced to essentials, if the Statement of Facts relates to alleged impermissible benefits violations (non-academic violations) and the NCAA did not sanction or declare the student-athlete ineligible for the alleged violations, UNC does not have to produce those Statements of Facts as there has been no violation of impermissible benefits sufficient to result in any sanction or declaration of ineligibility. If the Statement of Facts resulted in the imposition of sanctions or

declaration of ineligibility by the NCAA, they are to be produced in unredacted form.

**Reinstatement Requests on the basis of impermissible benefits (not academic problems related to eligibility)** – It is the Court's understanding that the only time that a Reinstatement Request is required is when the student-athlete (football player in this matter) has been found to be in violation of NCAA rules and declared ineligible. To attempt to become eligible again, the student-athlete has to file a Reinstatement Request. The ground(s) for this Reinstatement Request can be (1) on the basis of academic performance (bad grades, or no grades, etc.) which is protected under FERPA or (2) on the basis of impermissible benefits violations, which information the Court has determined should not be protected under FERPA and should be produced without redaction or other cover up process.

Accordingly, the Court directs UNC to produce any Reinstatement Requests generated as a part of the NCAA investigation at issue here, that resulted from a football player (student-athlete) being declared ineligible to participate in the football program as a result of violations of impermissible benefits rules (non-academic issue violations), and being required to apply through a Reinstatement Request to attempt to regain eligibility to participate in collegiate football. These Reinstatement Requests should dovetail with the Statement of Facts that must be disclosed for impermissible benefits violations as discussed above.

Reinstatement Requests on the basis of academic performance issues such as low GPA, academic courses, etc., are not to be disclosed and are protected by FERPA as academic record.

#### **UNC's September 19, 2011 Response to the NCAA.**

UNC defined this document in its memorandum as follows:

On September 19, 2011, the University responded to the NCAA's allegations. The document – Response to Notice of Allegations, Case Number 357 (“Response to the NCAA”) – includes a 111 page detailed discussion of all issues that were under investigation, i.e., the academic issues and issues related to improper benefits and contacts with agents. The University publicly released this document, including 983 pages of exhibits, in redacted form the same day it was submitted to the NCAA – September 19, 2011. That is, the document did not even exist until nearly a year after the Plaintiffs' Complaint in this case. (UNC's Memorandum page 27)

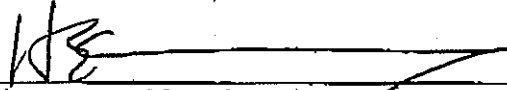
The issues surrounding this behemoth of a document present the Court with a Gordian knot. The Court will deal with this as Alexander did with the Gordian knot itself — slice it. Here's the decision.

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Simply put, the **Personnel Act** and **FERPA** redactions related to student-athlete academic issues and protection of employees covered by the Personnel Act, are to remain in redacted form. However, those portions of the Response to the NCAA that relate to student-athlete impermissible benefits violations resulting in sanctions and ineligibility are not protected as discussed above and as to that information, the cloak of secrecy must be lifted and the sun let in for all to see.

**NOTE TO COUNSEL.** The foregoing decisions grant summary judgment in part to both parties on the various issues covered above. The parties are directed to confer and prepare an Order reflecting the decisions above for the Court's review and entry. The parties are directed to bear their own costs except that plaintiffs may be entitled to some award of attorneys' fees by statute. That issue is to be handled, if there is one, by separate Order and hearing if necessary.

This 9<sup>th</sup> day of August, 2012

  
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Howard E. Manning, Jr.  
Superior Court Judge Presiding