

# Being Bad Is Not a Crime

*Amundsen Davis Commercial Litigation Alert*  
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Anyone that follows sports was shocked by the indictment of several prominent basketball coaches. Apparently it is virtually undisputed that they arranged for a shoe manufacturer with ties to their school to pay families of top prospects large sums of money to convince the athletes to choose their school. They were indicted for mail fraud. Criminal fraud, boiled down to its essence, is stealing by lying. The undisputed facts notwithstanding; the coaches moved to dismiss the indictments claiming they committed no crime.

Here is what is shocking. They may be right. The coaches point out that they received no financial benefits from the arrangements and the schools which employed them suffered no harm and were benefited by the inflow of top players. The players and the shoe company also suffered no harm. Absent any harm, how can there be a fraud? Moreover, everyone, except for the school administration and the NCAA, who were not involved with the transactions, knew exactly what was happening. Hence no lie.

For fans of the coaches, do not look for their return to college basketball. Their actions appear to be a spectacular and indefensible breach of NCAA rules. If the coaches' activity were allowed, NCAA Division I basketball would become the NBA's minor league overnight. Breaking NCAA rules is not always a crime, however.

The problem is that mail fraud is not a good fit for the bad actions of the coaches. The coaches were not fraudsters, they were bribers. Commercial bribery is either not criminal at all or a slippery slope fraught with difficulty.

Bribery is paying someone to abuse their official duties. For government officials of every level, the analysis is easy: If an official takes anything of value in exchange for assisting a person with a function, the official is bound to perform, we have bribery and both parties may be guilty.

The bribe recipients, the players' families, had no duty preventing them from accepting the money offered by the shoe companies. Likewise, the bribe givers, the shoe companies, had no duty not to pay the players' families. Only the coaches, the bribe arrangers, had a duty to the NCAA and the schools avoid transactions such as those questioned.

The college basketball bribery scandal is a colorful example of a phenomenon that occurs often in the business world. People breach rules, often important rules, but in doing so don't break the law.

Particularly in today's society, these situations create very sticky problems for businesses. The public may not tolerate a company or its employees breaking the rules. Conversely, punishing a company or its employees for actions that are not illegal, particularly if the rules at issue are often bent, evaded or broken in the industry, can lead to litigation. No one wants to "do the right thing" and get sued for it.

Treading the often narrow path requires a non-emotional response (often in the face of emotional driving factors in the public eye) and mastery of the actual facts. This means several things. First, turning a blind eye to rule breaking is probably a worse idea today than it has ever been. Second, investigating rule breaking probably requires a more detailed, more aggressive, and less biased investigation than ever. Finally, communicating the result of the investigation must be carefully planned.

Whether they are a bad guy or a misguided would-be do gooder, you can't let your company be run by its craziest point of contact. The only way to avoid that result is to know what actually happens.

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