

Navigating the Bylaw Maze in NCAA Major-Infractions Cases

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An unfamiliar number appears on your caller ID at work. After hanging up, you will wish the caller had been merely an IRS agent informing you of a personal audit. Instead, it is much worse. You are an employee of a National Collegiate Athletic Association (“NCAA”) member institution, and the call is from ESPN seeking an immediate response to an allegation of a major infraction of NCAA rules. If you have never been here before, you are about to enter an unfamiliar arena where the stakes are high and the public scrutiny intense.

Merely learning your *permissible* options will be challenging, time-consuming, necessary, and insufficient to achieve your desired results. The NCAA Bylaws require certain conduct and prohibit other conduct. They establish time deadlines and procedures. Navigating the Bylaw maze is no small task and is essential to determining your permissible options. In short, the Bylaws help to answer questions that start with “Can I” or “Must I.” But there is another set of questions that is equally important—questions that begin with “Should I.” The strategic questions. You can, but should you? You must do this, but should you do more, and how should you do it?

In a recent, outstanding article, Gene Marsh and Marie Robbins provided “some insight into compliance programs and the infractions process from the perspective of insiders,” but noted that their article

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was “not a ‘How to Guide’ for handling an infractions case from start to finish.”¹ In part, this Article picks up where Marsh and Robbins left off. Recognizing that no article can foresee every contingency, we kept the Article’s scope intentionally broad, hoping to use our experiences and perspectives from other areas of law both to educate those in the trenches (such as our call recipient) and to provoke thought about potential reform.² To answer the “Can I” questions mentioned above, we help the reader navigate the Bylaw maze. To evaluate the strategic “Should I” concerns, we rely upon both: (1) our institutional experience at Baylor University, including a recent case described by one former NCAA director as the “most extraordinary case he’s ever seen;”³ and (2) interviews by people who have been involved on all sides of recent major-infractions cases.⁴

We hope this Article will be particularly useful to lawyers involved in major-infractions cases. This hope arises from the different perspectives of this Article’s authors. Later, we will describe the NCAA enforcement process as a clash of cultures. It’s an adversarial process, but it differs in many ways from the systems in which adversarial disputes are normally resolved in this country—the civil and criminal justice systems. One author has extensive experience handling major-infractions cases. The other teaches courses in Federal Courts and Civil Procedure, and is, like many in the anticipated audience, still learning about the NCAA process. Hopefully, the content

¹ Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 670 (2003).

² Mike Rogers, one of the coauthors, served as chair of Baylor’s Compliance Investigation Committee during the recent high-profile infractions case discussed throughout the Article and has extensive competence with NCAA compliance matters. Details and insights contained in this Article, if not attributed to someone else, are based upon Rogers’s experience or investigation. For more information about the case see Jeff Miller & Lee Hancock, *Baylor Reveals Violations*, DALLAS MORNING NEWS, Feb. 27, 2004, at 1A; Jeff Miller, *Baylor Reveals More NCAA Violations*, DALLAS MORNING NEWS, Dec. 12, 2003, at 1A; Jeff Miller, *Baylor Coach, AD Resign*, DALLAS MORNING NEWS, Aug. 9, 2003, at 1A; Kevin Sherrington, *Truth Saves Baylor on Decision Day*, DALLAS MORNING NEWS, June 24, 2005, at 1C.

³ Telephone interview with Richard J. Evrard, Attorney, Sports Law Div., Bond, Schoeneck & King, PLLC, Overland Park, Kan. (Dec. 7, 2006). Mr. Evrard served as a member of the NCAA staff for seven years—as a member of the enforcement staff and later as director of legislative services—before he entered private practice.

⁴ Interviewees who graciously agreed to be interviewed were David Price, the NCAA’s vice president for enforcement services; Josephine R. Potuto, chair of the NCAA Division I Committee on Infractions, and a law professor and FAR at the University of Nebraska-Lincoln; Thomas C. Hosty, director of enforcement; and Richard J. Evrard, attorney, in Bond, Schoeneck & King, PLLC, a firm that specializes in infractions cases and compliance matters.

and structure of this Article, which focuses often on the differences between the legal system and the enforcement procedures, will help to speed up the learning curve and add perspective.

As we proceed, we resist the popular trend of uncritically and hyperbolically condemning the NCAA staff and enforcement procedures.⁵ To the lawyer or person familiar with the court system within the United States, the many procedural differences in NCAA enforcement proceedings often trigger surprise, disapproval, and ultimately criticism of the NCAA. But this initial reaction must be tempered. While human nature favors demonizing one's opponent, a generic reference to the NCAA is often misplaced; the NCAA is not a monolithic entity. It is a voluntary association of members with rules made by the membership. To the extent that individuals (such as the enforcement staff) exercise powers as full-time employees of the Association, it is only because the members have delegated that power to them. While it may be appealing to criticize the NCAA as a sinister monster, a more careful probe into the goals, obligations, and limitations of the NCAA is needed.

Given the limited nature of the NCAA's power, some procedural differences must exist in enforcement proceedings as compared to judicial proceedings. The NCAA cannot issue subpoenas. It has no contempt power. The sheriff will not arrive to enforce judgment. The NCAA depends upon self-policing. And yet, ensuring strict compliance is essential to ensuring a level playing field for those institutions that follow the rules. To accommodate these realities, some procedures are more rigid and others are more flexible than those found in the legal system. To be sure, improvement is possible and necessary, but it is not helpful to pretend that the rules are easier to fix than they are. After all, when the governed make the rules, one would expect that flawed—yet easily fixable—rules would be fixed. Thus, while we occasionally will criticize existing procedures and sug-

⁵ A wealth of material already exists that calls for reform of the NCAA enforcement process. This Article provides practical and strategic guidance to work within the existing enforcement system, with occasional recommendations for change. For more perspective on the various competing interests in the enforcement process and potential areas of reform, see K. Alexa Otto, *Major Violations and NCAA 'Powerhouse' Football Programs: What Are the Odds of Being Charged*, 15 J. LEGAL ASPECTS SPORT 39, 54 (2005), which draws a correlation between the amount of revenue a college football program generates and the likelihood that the school will face a major-infractions charge; and James Hopkins, Comment, *NCAA Penalties: Corporate Accountability for Coaches and Presidents*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179, 181 (2003), which suggests that many of the NCAA penalties punish uninvolved individuals rather than the wrongdoers.

gest reform, we will do so only with a balanced view of the practical realities.

The Article, which is limited in scope to Division I major-infractions cases, proceeds in three Sections. Section I provides a basic introduction to the NCAA enforcement structure and major-infractions cases and compares NCAA procedures to those commonly followed in United States courtrooms.⁶ Section II covers the investigative stage, including procedures, the duty to cooperate, and whether and how to conduct internal investigations.⁷ Finally, Section III covers the procedures and strategic considerations involved with adversarial proceedings before the Committee on Infractions (“COI”) and with deciding whether to appeal to the Infractions Appeals Committee (“IAC”).⁸

I. AN INTRODUCTION TO THE NCAA AND THE ENFORCEMENT PROCESS

The NCAA enforcement process is, to use a fancy Latin phrase, *sui generis*—meaning it is of its own kind. In this Section, to provide perspective on that process, we discuss two topics. First, we provide a very basic overview of the structure of the NCAA and the primary actors the institution encounters during the investigation and “trial.” Recent articles detail the NCAA structure,⁹ so we provide only the basics here and point the reader to those sources for a more detailed explanation. Second, we compare the NCAA enforcement process with adversarial proceedings in the United States legal system.

⁶ See *infra* Section I.

⁷ See *infra* Section II.

⁸ See *infra* Section III. Section III will address the decision whether to appeal, but it will not delve into the procedures involved with prosecuting an appeal to the IAC.

⁹ See Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 299–301 (1996); Mathew M. Keegan, Comment, *Due Process and the NCAA: Are Innocent Student-Athletes Afforded Adequate Protection from Improper Sanctions? A Call for Change in the NCAA Enforcement Procedures*, 25 N. ILL. U. L. REV. 297, 299–301 (2005); Alain Lapter, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255, 264–66 (2005); Katherine Elizabeth Maskevich, Comment, *Getting Due Process into the Game: A Look at the NCAA’s Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 301–03 (2005).

A. *The Enforcement Staff and the Committee on Infractions*

The NCAA is a member-governed, voluntary association of colleges¹⁰ originally formed to address safety issues in college football.¹¹ In the 100 years since its creation, the NCAA has grown in both the number of member institutions¹² and in the scope of the Association's authority.¹³ The Executive Committee is the guiding force of the NCAA, and that Committee sets the Association's policy agenda, identifies issues within the Association, and approves and oversees the budget.¹⁴ The Executive Committee consists of sixteen member-institution presidents and chancellors who are appointed by their divisions.¹⁵ The NCAA president and three other non-voting members also sit on the Executive Committee.¹⁶

While the Executive Committee functions as the policymaking authority, the COI will be our call recipient's ultimate adversary if the allegations reach the trial stage. Established in 1954, the COI governs the enforcement functions of the Association.¹⁷ As the Association's role in regulating intercollegiate athletics evolved and broadened, the need arose for a formal enforcement mechanism to ensure compliance with its rules.¹⁸ The COI serves in a judicial capacity, and the enforcement staff members act as investigators and prosecutors when adversarial proceedings reach the COI.¹⁹ While the enforcement staff and the COI both play roles in the enforcement process, the two are very different. The enforcement staff comprises full-time NCAA employees who investigate alleged infractions and handle the

¹⁰ Symposium, *The State of Division I College Athletics: Are We Playing by the Rules? A Debate over the Need for NCAA Regulation Reform*, 7 VAND. J. ENT. L. & PRAC. 439, 452 (2005).

¹¹ W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 219 (2006).

¹² *Id.* at 225 (stating that only thirty-nine institutions ratified the NCAA's constitution in 1906). Today, there are more than 1250 member schools. <http://www.ncaa.org> (follow "About the NCAA" hyperlink; then follow "membership" hyperlink).

¹³ See Carter, *supra* note 11, at 273–75.

¹⁴ NCAA, 2006–2007 Division I Manual, Const. art. 4.1.2 (2006) [hereinafter NCAA Manual].

¹⁵ *Id.* art. 4.1.1.

¹⁶ *Id.*

¹⁷ Heller, *supra* note 9, at 298.

¹⁸ *Id.*

¹⁹ Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 494 (1995).

daily demands of enforcement.²⁰ In sharp contrast, the COI comprises no full-time Association employees. Rather, it consists of a ten-member panel, made up of NCAA member representatives and members of the general public.²¹ The enforcement staff investigates and pursues alleged rule violations²² while the COI resolves issues of fact that pertain to alleged violations, determines when a violation has occurred, and imposes the penalties.²³

B. Comparing Enforcement Proceedings to U.S. Legal Proceedings

The NCAA enforcement process is perhaps described best as a clash of cultures. In many ways it is similar to a criminal proceeding. There are charges, a trial, and potential consequences that, to certain fans, might seem to deprive their beloved team of a competitive liberty. Because of these similarities, lawyer participants often expect to encounter principles and procedures that normally accompany adversarial judicial proceedings. The NCAA process is different, and the following subsections highlight the differences to provide context.

1. The Actors, Separation of Powers, and Due Process

In a criminal proceeding, the prosecutor plays for one team (the people) and tries to convince a detached referee (the judge) that the other team (the defendant) violated the rules of the game. Ethical rules prohibit any of the players from interacting with the referee *ex parte*.²⁴ By separating powers and keeping the referee detached, our criminal justice system advances the goals of impartiality and, importantly, the appearance of impartiality.²⁵

Although powers are not as separated in NCAA enforcement proceedings, one should not overstate the difference. At first glance, one might superficially observe that the enforcement process is different because the NCAA is both the prosecutor and the judge. But at that level of generality, the same could be said of a federal criminal proceeding—the U.S. government is also both the prosecutor and judge. Instead of painting so broadly, it is important to first realize

²⁰ Dan Matheson, Assoc. Dir., NCAA Enforcement Staff, The NCAA Major Enforcement Process, Presentation at NCAA Regional Rules Compliance Seminar in Dallas, Tex. (June 2006).

²¹ NCAA Manual, *supra* note 14, at Bylaw 19.1.1.

²² *Id.* at Bylaw 32.2.1.

²³ *Id.* at Bylaw 19.1.3.

²⁴ MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2002).

²⁵ See BENNET L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 13.14 (2d ed. 1999).

that there are separate bodies within the NCAA. The investigators are members of the enforcement staff, while the “judge” is the COI.²⁶ The enforcement staff members are full-time employees of the NCAA, while the members of the COI are not full-time employees, and instead are appointed by the Management Council.²⁷ Most of the decision-makers are representatives of the governed, not unlike a jury.²⁸

One subtle absence of separation shapes NCAA proceedings. In a typical criminal proceeding, the prosecutor acts as a buffer. The police zealously pursue criminals, but the prosecutor may refuse to prosecute the case that the police have so vigorously compiled. With the enforcement staff acting as both police and prosecutor, this quasi-detached buffer is removed.²⁹

Despite some separation between the COI and the enforcement staff “branches” of the NCAA, one procedure in particular creates an initial perception that the two branches are too closely aligned. After the preliminary conference,³⁰ which precedes the trial before the COI, the enforcement staff prepares a memorandum called the Enforcement Staff Case Summary, which summarizes the case for the COI.³¹ At first glance, the function of this document seems analogous to that of a bench brief. A bench brief—usually prepared by a judicial clerk—provides the court with a summary and thorough analysis of a case, including facts, applicable law, and the arguments advanced.³² In a criminal case, imagine the defense lawyer’s reaction to learning that the prosecutor prepared the bench brief the judge used to conduct the hearing. Neither adversary is particularly well-suited to provide an objective summary of the forthcoming adversarial proceeding. *If* this summary functioned as a bench brief, it would be troubling indeed.

²⁶ The NCAA also includes an appellate body—the IAC—with authority to review the decisions of the COI and the penalties imposed in major-infractions cases. NCAA Manual, *supra* note 14, at Bylaw 19.2.1; *see infra* Section III.B.

²⁷ NCAA Manual, *supra* note 14, at Bylaw 19.1. The COI consists of ten members: seven from member institutions or conferences, and at least two from the general public. *Id.* at Bylaw 19.1.1.

²⁸ *Id.*

²⁹ For completeness, it should be noted that the vice president for enforcement serves some filtering role, perhaps comparable to the chief of police. *Id.* at Bylaw 19.1.2.1 (directing the vice president for enforcement to determine whether the charge is a secondary or major infraction).

³⁰ *See infra*, Section II.A.2.

³¹ NCAA Manual, *supra* note 14, at Bylaw 32.6.7.

³² Julia A. Follansbee, *The Ninth Circuit: An Inside Perspective*, 22 MONT. LAW. 9, 18 (1997).

But reality differs from the initial perception. The document is not a bench brief, but is instead more analogous to a *reply brief* by the enforcement staff. The document's official title is the "*Enforcement Staff Summary Case Statement*,"³³ thus reflecting that it is the *staff's* view of the summary of the case as it stands. The staff files the Notice of Allegations,³⁴ the institution files its response,³⁵ the parties attend the preliminary conference,³⁶ and then after the parties have joined issues, the staff writes its reply in the form of the Enforcement Staff Case Summary.³⁷ This is how both the COI³⁸ and the enforcement staff³⁹ view the document. Also, according to an interview with Thomas C. Hosty of the enforcement staff, the staff generally allows the institution to review the summary and accepts suggestions regarding how the contended points are framed.⁴⁰ Also important is that the Enforcement Staff Case Summary is not part of the record on appeal.⁴¹ Finally, the COI's reputation for preparedness should alleviate any lingering concern. If the COI were a less prepared tribunal—if, for example, the COI members relied heavily upon the summary while only skimming the Notice of Allegations and the institution's response—the case summary might play a more prominent role. To the contrary, the COI was described by one tough critic as "the best prepared and toughest tribunal you will ever face. In our case, they had read the case summary, the institution's response, and the exhibits to the response. And they asked questions about all of the above."⁴²

Another difference in COI proceedings is the lack of formal due process protection.⁴³ As part of the United States Constitution, the

³³ NCAA Manual, *supra* note 14, at Bylaw 32.6.7 (emphasis added).

³⁴ *Id.* at Bylaw 32.6.1.

³⁵ *Id.* at Bylaw 32.6.5.

³⁶ *Id.* at Bylaw 32.6.6.

³⁷ *Id.* at Bylaw 32.6.7.

³⁸ Telephone interview with Jo Potuto, Chair, NCAA Div. I COI (Jan. 2, 2007).

³⁹ Telephone interview with Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Interview with William D. Underwood, President, Mercer Univ., in Waco, Tex. (Nov. 24, 2006). President Underwood, a former member of the Baylor law faculty, represented Baylor in three separate infractions hearings, including the recent men's basketball case.

⁴³ Relatedly, while the Bylaws grant the right to counsel, NCAA Manual, *supra* note 14, art. 32.3.6, unlike a criminal defendant, if a person cannot afford counsel, one will not be appointed for him or her. For a discussion of an accused's right to have an attorney appointed to him in a criminal proceeding, see *Miranda v. Arizona*, 384 U.S. 436, 469–473 (1966).

Due Process Clause of the Fourteenth Amendment only limits state action.⁴⁴ Because the NCAA is not a state (nor a state actor), the Due Process Clause does not constrain it directly.⁴⁵ Although its private-actor status prohibits redress in the courts for violations of due process under the U.S. Constitution, Bylaw 19.4.1⁴⁶ provides due-process-like protection, granting member institutions accused of major violations the right to fair notice and a meaningful opportunity to appear and defend.⁴⁷ The difference is that the COI—not the courts—determines whether the notice was fair and the opportunity meaningful.⁴⁸

In summary, while the Bylaws contain some structural and procedural protections against concentrated power and unfair proceedings, adversarial proceedings under the Bylaws differ from criminal prosecutions, which are constrained by the U.S. Constitution, and which are shaped by procedures tailored to the criminal justice system of a sovereign with powers that exceed those of the NCAA. Powers are separated, but not completely. More cooperation exists. And as shown in the next subsection, more cooperation is expected of an accused institution. Some process is due under the Bylaws, but not constitutional due process. Moving forward, keep these differences in mind as we consider strategic choices. In simplest terms, when the adversary has more power and access to the decision-maker, a strategy that features cooperation and civility deserves even greater consideration than it would in the criminal system, which features more rigid separation between a potentially aggravated opponent and the referee.

2. The Duty to Cooperate

In an NCAA enforcement proceeding, you have no right to remain silent. In fact, you have the duty to incriminate yourself if you

⁴⁴ CHOPER ET AL., CONSTITUTIONAL LAW 1203–07 (9th ed. 2001) (discussing the limited application of the Fourteenth Amendment to “state action” and outlining the contours of that doctrine).

⁴⁵ NCAA v. Tarkanian, 488 U.S. 179, 199 (1988). The Supreme Court’s decision to exclude the NCAA from due process analysis has drawn tremendous attention from commentators. See, e.g., Lapter, *supra* note 9, at 295–97.

⁴⁶ NCAA Manual, *supra* note 14, at Bylaw 19.4.1.

⁴⁷ Cf. Illinois v. Allen, 397 U.S. 337, 338 (1970) (“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.”). This right stems from the Sixth Amendment’s Confrontation Clause, made applicable to the States through the Fourteenth Amendment. *Id.*

⁴⁸ See NCAA Manual, *supra* note 14, at Bylaw 32.8.7 (giving the COI discretion to determine the hearing procedure).

are guilty. In stark contrast to the criminal justice system, the Bylaws impose an affirmative obligation to cooperate with an investigation and to assist in developing full information, whether exculpatory or against the institution's interest.⁴⁹ For example, when preparing a client for a deposition, skilled trial lawyers know that sound advice is to inform the witness to answer only the question asked and not to volunteer information.⁵⁰ No lawyer tells her client to volunteer smoking-gun evidence when opposing counsel does not request it. Contrast that with a common instruction given by NCAA enforcement staff members to witnesses. Staff members often start the interview by not only warning the witness that lying constitutes unethical conduct (a violation of the highest order),⁵¹ but also by giving the witness an example of what constitutes an acceptable, cooperative answer:

I want you to cooperate fully and to volunteer any information relevant to the question. For example, if I ask you whether you received a free T-Shirt on your visit, and you received a sweatshirt or *any other free items of apparel*, I expect you to volunteer that information.⁵²

This example from an interview is representative of what is expected during all phases of an investigation. Similarly, unlike a party to civil litigation, an institution with an incriminating document must disclose it—even if it is not requested—as the Bylaws impose a continuing duty to self-police and report violations.⁵³ This duty to disclose ensures that the COI can consider all relevant information, and is quite different from most civil proceedings in the United States, where the adversarial system is entrenched. The institution, in its defense of an NCAA infractions case, has a duty similar to the *Brady v. Maryland*⁵⁴ disclosure requirement imposed only on the prosecution in our criminal-justice system. Under *Brady*, a prosecutor must disclose to the accused all evidence material to guilt or punishment, whether exculpatory or not.⁵⁵ The *Brady* disclosure requirement is justified because the prosecutor's ultimate interest is to uphold jus-

⁴⁹ *Id.* at Bylaws 19.1.3, 32.1.4.

⁵⁰ Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1331 (1978).

⁵¹ See NCAA Manual, *supra* note 14, at Bylaw 10.1(d) (designating dishonest communication with the NCAA regarding a possible rules violation as unethical conduct).

⁵² The instruction that appears in the text is a paraphrased example from on-campus interviews at Baylor.

⁵³ See *supra* note 49 and accompanying text.

⁵⁴ 373 U.S. 83 (1963).

⁵⁵ *Id.* at 87.

tice, not to obtain a conviction.⁵⁶ This same principle of full disclosure and its greater purpose also apply to NCAA members, who agree to embrace the NCAA policies and rules as their own.⁵⁷

This counterintuitive duty to cooperate repeatedly surfaces and must shape the lawyer's view of the entire enforcement process. A lawyer accustomed to the civil justice system might ask how she can fulfill the duty of zealously representing the client while aggressively and intentionally uncovering facts that show the client violated the Bylaws. Surely the uncover-the-truth mindset is merely stated with a wink and a nod, right? It would be a mistake to so view it. The institution has agreed to be part of a voluntary association, one that imposes the duty to cooperate and self-police. The institution has promised to do both. The client is the institution, and the lawyer's job is to help the institution fulfill its promise; the client is not the accused person, the targeted sport program, or the fans.⁵⁸ Zealous advocacy is not a permissible justification for rationalizing misrepresentations or shirking the obligation to honor an institution's promises to self-police, investigate, and disclose.

An additional incentive also exists: willing cooperation may mitigate penalties if any are later imposed.⁵⁹ For example, Baylor avoided the likely imposition of the "death penalty"—a total ban on men's basketball competition for a set time period⁶⁰—because of the university's cooperation and sincere and frank approach to the internal in-

⁵⁶ *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁵⁷ See NCAA Manual, *supra* note 14, at art. 1.3.2.

⁵⁸ During our interview with Rick Evrard, he emphasized the importance of independence, noting that his firm is generally hired by the institution's chief executive officer or general counsel, and will not be tied to any program, coach, or athletics director. Interview with Richard J. Evrard, Attorney, Sports Law Div., Bond, Schoeneck & King, PLLC, in Overland Park, Kan. (Dec. 7, 2006).

⁵⁹ University cooperation in an investigation is one of seven factors considered to determine whether a post-season ban is appropriate. Keegan, *supra* note 9, at 327 n.246 (citing *Infractions Case Appeal: University of Mississippi*, NCAA Register, May 1, 1995, at § VI.B (a 1995 infractions case appeal by the University of Mississippi)); see also NCAA Manual, *supra* note 14, at Bylaw 32.2.1.2 ("Self-disclosure shall be considered in establishing penalties, and, if an institution uncovers a violation prior to its being reported to the NCAA and/or its conference, such disclosure shall be considered as a mitigating factor in determining the penalty.").

⁶⁰ The term "death penalty" does not appear in the Bylaws. See generally NCAA Manual, *supra* note 14. Rather, that term is used colloquially to describe what is referred to in the Bylaws as program suspension for a defined time period.

vestigation.⁶¹ The NCAA likewise has embraced a renewed commitment to cooperate rather than intimidate.⁶²

The duty to cooperate, of course, does not mean the lawyer will never, or even infrequently, serve in an adversarial role. Sometimes, the candid search for the truth will result in disagreement about what is found. That is, perhaps the enforcement staff and the institution will go to trial before the COI to dispute facts and the lawyer will enter adversarial mode, not to hide the truth, but rather to advocate to the COI that the candid investigation has revealed facts that do not match up with the charges. For example, during a case involving Baylor's football program in 2000, an aggressive internal investigation raised serious questions about the facts supporting the primary allegations.⁶³ Ultimately, Baylor prevailed before the COI, convincing the COI that the source of allegedly improper payments was not as alleged—a classic case of “who done it.”⁶⁴ Or, the staff and institution might agree on what events transpired, but disagree about whether those events constitute the violation alleged. For example, institutions frequently challenge a violation's classification as major rather than secondary—putting the lawyer in an adversarial role to argue that the facts and the law do not match up.⁶⁵ Or perhaps later in the process, the lawyer might represent the institution on appeal to argue that the sentence imposed by the COI does not fit the violation.⁶⁶ Thus, while the process starts cooperatively, with both the enforcement staff and the institution pursuing the same goal of finding out what happened, the lawyer's adversarial role may arise at several stages after the investigation.

3. Other Features

A brisk preview of other important features of the enforcement process follows. The enforcement staff possesses the power to grant

⁶¹ Eric Hoover, *NCAA Penalizes Baylor U. for Multiple Rules Violations*, CHRON. HIGHER EDUC., July 8, 2005, at 33 (quoting Gene A. Marsh, then-chairman of the Division I COI).

⁶² See Brad Wolverton, *The New Face of Enforcement*, CHRON. HIGHER EDUC., Nov. 11, 2005, at 39. It should be noted, however, that merely cooperating will not result in “extra credit,” since an institution has an absolute obligation to cooperate. E-mail from Jo Potuto, Chair, NCAA Div. I COI, to Mike Rogers, Professor of Law, Baylor Law School (Jan. 31, 2007, 10:21 P.M.) (on file with authors). The credit for cooperating comes from going the “extra mile.” *Id.*

⁶³ See *infra* note 116 and accompanying text.

⁶⁴ See *infra* note 116 and accompanying text.

⁶⁵ See *infra* note 118 and accompanying text.

⁶⁶ See Hoover, *supra* note 61, at 33 (the Baylor University men's basketball team avoided the death penalty in the recent 2005 major-infractions investigation).

use immunity in some situations.⁶⁷ Few formal evidentiary rules apply in adversarial proceedings before the COI, and the existing rules are broad enough to be fairly characterized as allowing in the evidence the COI wants to consider, which essentially then makes all evidence “admissible.”⁶⁸ The doctrine of *respondeat superior* does not apply. Instead, the Bylaws impose a much broader obligation that makes institutions responsible for all persons who are representatives of the institution’s athletics interest. Thus, no frolic-and-detour or course-and-scope-of-employment exceptions exist in enforcement proceedings as they would if any entity were being sued for actions of its agents in a civil court.⁶⁹

4. In Context: High Stakes, Unfamiliar Game

Bylaw 19.5 lists the potential penalties for major violations.⁷⁰ Those penalties range from severe to devastating. And even before a formal investigation begins, preliminary allegations of a major infraction will start the wolves howling and consume the university. The media will flood the campus and hound officials with inquiries. The allegations will often dominate public discussion—both within the institution’s community and externally. Just as importantly, rapacious competitors will seize the allegations as a negative recruiting advantage.

Having provided the context needed to appreciate the forthcoming nuances, we now step back and start with our phone call from the introduction. As we proceed, we will examine what the lawyer can do, and debate what she should do, with focus on the lawyer’s roles as both investigator and advocate. Always looming will be the seeming tension between the ethical duty of zealous representation and the enforcement staff’s expectation of full cooperation. And we will detour often to tell stories for context, whether necessary, helpful, or just plain interesting.

⁶⁷ NCAA Manual, *supra* note 14, at Bylaw 32.3.8; Frequently Asked Questions About the NCAA Enforcement Process (Nov. 16, 2005), http://www.ncaa.org/enforcement/faq_enforcement.html (question fourteen related to immunity for coaches and athletes).

⁶⁸ NCAA Manual, *supra* note 14, at Bylaw 32.8.7.4; *see infra* Section III.A.

⁶⁹ The university is responsible for its staff members and for any individual or organization that promotes the school’s athletics program. NCAA Manual, *supra* note 14, at art. 2.1.2. Liability even exists for the actions of some outside, independent individuals or organizations. *Id.* at arts. 6.4.1–2.

⁷⁰ *Id.* at Bylaw 19.5.

II. THE INVESTIGATIVE STAGE

In our introductory hypothetical, ESPN seeks immediate comment about a major-infractions allegation. Such calls are troublesome, of course, because they often catch the recipient off guard, requiring a response before any opportunity for investigation. “The story airs at 6 P.M.,” a news reporter might state during a 4:45 P.M. phone conversation. Information about potential violations can reach the institution in several ways. It could be, as hypothesized, a media member seeking comment. Other times, information about a potential violation first reaches the institution from the NCAA, as it is not uncommon for a rival fan or institution to allege violations directly to the NCAA, which then triggers the enforcement staff’s duty to investigate.⁷¹ Or, commonly, the infractions process begins when an institution self-reports a potential violation after having received a tip from persons connected with the institution or after having uncovered a violation through its own ongoing monitoring efforts.⁷² Regardless of how the information reaches the institution, the information cannot be ignored. This Section details the many decisions that accompany how to investigate potential violations.

On a cautionary note: during the infractions process generally, but especially during the investigation, the institution must be aware of other legal obligations regarding students and student-athletes. For example, institutions must navigate academic privacy laws⁷³ and sunshine laws.⁷⁴ Also, the institution should consider the work product doctrine, which shelters the findings of an attorney’s investigation in preparation for her client’s trial from discovery inquiries,⁷⁵ state

⁷¹ *Id.* at Bylaw 32.2.1.

⁷² *See id.* at Bylaw 32.2.1.2 (establishing that self-disclosure shall be considered in establishing penalties). Even in regard to a secondary violation, self-reporting demonstrates the institution’s integrity and evidences the level of institutional control. Wendy Guthrie, Editorial, *Handling of Violations Reveals Character*, NCAA NEWS, Oct. 23, 2006, at 4.

⁷³ Lynn M. Daggett, *Bucking up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute*, 21 SEATTLE U. L. REV. 29, 29 (1997) (“As a condition of receiving federal education funds, [the Family Educational Rights and Privacy Act] requires schools to provide parents of minor pre-college students, and adult and college students, access to their school records, confidentiality in those records, and an opportunity to challenge their accuracy.”).

⁷⁴ John F. O’Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 719 (2004) (noting that open records and meetings acts in all fifty states provide transparency to governmental functions).

⁷⁵ David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 150 (2000).

and federal criminal statutes, the potential for civil liability, such as defamation and breach of contract suits,⁷⁶ and eligibility issues.⁷⁷

In this Section, we will proceed ostensibly perhaps a bit out of order to provide the context necessary to make the preliminary decisions. First, we detail how the Bylaws regulate investigations and establish formal procedures such as the Notice of Inquiry and the Notice of Allegations. Then, having outlined what's to come, we return to some of the details and strategic choices—all considered within the context of the duty to cooperate and self-police. Finally, we will add perspective and illustration by telling a small part of our own war story, the all-too-familiar men's basketball case at Baylor University that dominated headlines.

A. *Formal Procedures*

As noted, we address only major-infractions cases.⁷⁸ The Bylaws define major infractions as “[a]ll violations other than secondary violations . . . specifically including those that provide an extensive recruiting or competitive advantage.”⁷⁹ Conversely, “[a] secondary violation is a violation that is isolated or inadvertent [sic] in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage[,] and does not include any significant recruiting inducement or extra benefit.”⁸⁰ Secondary violations are frequently processed through the institution's conference and involve different, less formal procedures.⁸¹

⁷⁶ For example, former Ohio State University men's basketball Head Coach Jim O'Brien recovered nearly \$2.5 million for wrongful termination. *O'Brien v. Ohio State Univ.*, No. 2004-10230, 2006 WL 2615550, at *2 (Ohio Ct. Cl. Aug. 18, 2006). The university fired O'Brien after self-reporting to the NCAA a violation O'Brien committed, but eleven months before the university received a Notice of Allegations from the NCAA. *O'Brien v. Ohio State Univ.*, No. 2004-10230, 2006 WL 571043, at *4-5 (Ohio Ct. Cl. Feb. 15, 2006). The University has appealed the decision, and eighteen other universities and three Division I conferences filed supporting briefs. Press Release, Ohio State Univ., Ohio State Files Brief in O'Brien Appeal (Nov. 20, 2006), <http://www.osu.edu/news/newsitem1525>.

⁷⁷ A separate body within the NCAA, distinct from the COI or enforcement staff, makes decisions regarding initial eligibility. See Gary R. Roberts, *Resolution of Disputes in Intercollegiate Athletics*, 35 VAL. U. L. REV. 431, 439 (2001); see also *infra* Section II.A.3.

⁷⁸ Major-infractions cases proceed differently from secondary cases in several ways. For example, the enforcement staff is bifurcated. Part of the staff is assigned solely to process secondary violations. Matheson, *supra* note 20.

⁷⁹ NCAA Manual, *supra* note 14, at Bylaw 19.02.2.2.

⁸⁰ *Id.* at Bylaw 19.02.2.1.

⁸¹ *Id.* at Bylaw 32.4.1-32.4.4. See, for example, the different procedures for appealing penalties imposed by the enforcement staff for secondary violations at Bylaw

When the enforcement staff receives notice of a potential major infraction, the Bylaws impose a duty to investigate⁸² according to the procedures established by the COI.⁸³ The Bylaws require that the enforcement staff make “reasonable efforts” to process infractions matters in a timely manner⁸⁴ and that any enforcement staff member with an actual or apparent conflict of interest must recuse himself from the matter.⁸⁵ The enforcement staff is empowered to conduct preliminary interviews before it proceeds to the first formal step, the Notice of Inquiry.⁸⁶ Bylaw 32.3 also defines additional procedural requirements and protections that apply during the investigation:

- presence of institutional representatives during on-campus interviews;⁸⁷
- avoiding conflicts with academic schedules;⁸⁸
- ability to grant limited immunity;⁸⁹ and
- recording interviews and record keeping.⁹⁰

The next three subsections detail three major parts of investigations. The first two subsections, covering the Notice of Inquiry and the Notice of Allegations, discuss two formal procedures that mark major events during the investigative stage. The third subsection discusses the myriad uses of self-reports.

1. The Notice of Inquiry

After its preliminary investigation, if the enforcement staff has developed “reasonably reliable information” that an institution has violated the rules, and determines that the matter requires further investigation, the enforcement staff must issue a Notice of Inquiry.⁹¹ The enforcement staff sends the Notice of Inquiry to the institution’s

32.4.4, and the direction that the enforcement staff should promptly handle secondary matters by correspondence with the institution, at Bylaw 32.2.2.1.3.

⁸² *Id.* at Bylaw 32.2.1.1.

⁸³ *Id.* at Bylaw 32.2.1.

⁸⁴ *Id.* at Bylaw 32.3.2. The enforcement staff recently increased its size and reorganized to speed along cases. Gary T. Brown, *Re-enforcement*, NCAA NEWS, June 21, 2004, at 1.

⁸⁵ NCAA, Manual, *supra* note 14, at Bylaw 32.3.3.

⁸⁶ *Id.* at Bylaw 32.2.2.1.1.

⁸⁷ *Id.* at Bylaw 32.3.4.1.

⁸⁸ *Id.* at Bylaw 32.3.4.2.

⁸⁹ *Id.* at Bylaw 32.3.8.

⁹⁰ *Id.* at Bylaw 32.3.9.

⁹¹ NCAA Manual, *supra* note 14, at Bylaw 32.5.1. Major-infractions cases (or potential cases at this point in the process) garner media attention even at this early stage. See Brian Davis & Gary Jacobson, *NCAA Looking into Violations: OU Could Receive Penalties for the Actions of Bomar, Quinn*, DALLAS MORNING NEWS, Oct. 14, 2006, at 6C.

chief executive officer (“CEO”) and advises the CEO that the enforcement staff will engage in an investigation.⁹² The Notice of Inquiry is not an allegation or charge; rather, it merely informs the institution of a formal investigation and triggers certain procedural requirements. The Notice of Inquiry must contain, to the extent possible, eight categories of information:

- the involved sport;
- the approximate time period during which the alleged violations occurred;
- the identity of involved individuals;
- an approximate time frame for the investigation;
- a statement indicating that the institution and involved individuals may be represented by legal counsel at all stages of the proceedings;
- a statement requesting that the individuals associated with the institution not discuss the case prior to interviews by the enforcement staff and institution except for reasonable campus communications not intended to impede the investigation of the allegations and except for consultation with legal counsel;
- a statement indicating that other facts may be developed during the course of the investigation that may relate to additional violations; and
- a statement regarding the obligation of the institution to cooperate in the case.⁹³

Two time limits guide the enforcement staff.⁹⁴ The staff must inform the institution of the status of the inquiry within six months from when the CEO receives the Notice of Inquiry from the enforcement staff.⁹⁵ And, if the inquiry has not been processed to conclusion within one year after the CEO receives the Notice of Inquiry, the staff must review the status of the case with the COI, and the COI will determine whether further investigation is warranted, with notices being sent to the institution at six-month intervals.⁹⁶

⁹² NCAA Manual, *supra* note 14, at Bylaw 32.5.1.

⁹³ *Id.* at Bylaw 32.5.1(a)–(h).

⁹⁴ In a recent presentation on enforcement procedures, Dan Matheson, the NCAA associate director of enforcement, noted that these deadlines were adopted to facilitate the association’s goal to limit investigations to one year (from start until the Notice of Allegations or summary disposition letter). Matheson, *supra* note 20. From 2000 to 2003, the average investigation lasted more than eighteen months. *Id.* After the NCAA adopted the timelines, the investigations dropped to slightly more than eight months on average—a ten-month difference. *Id.*

⁹⁵ NCAA Manual, *supra* note 14, at Bylaw 32.5.1.1.

⁹⁶ *Id.* at Bylaw 32.5.1.2.

Depending upon the information developed, the investigation following the Notice of Inquiry will yield one of two results. First, the enforcement staff might proceed to issue its formal charges in the form of a Notice of Allegations.⁹⁷ Or, if the information warrants, it may drop the charges and notify the institution that the matter is closed.⁹⁸ The standard for whether the Notice of Allegations should be issued is vague and practically circular, directing the staff to issue a Notice of Allegations when the information developed is “sufficient” to warrant a Notice of Allegations,⁹⁹ and to drop the investigation when the information is not of “sufficient substance” to warrant a Notice of Allegations.¹⁰⁰ The enforcement staff is obligated to issue a Notice of Allegations when it “believes there is sufficient information to conclude that the Committee on Infractions could make a finding.”¹⁰¹

This standard is facially problematic and should be amended because it does not comport with current or desirable practice. The Bylaws require that the staff *shall* issue a Notice of Allegations if the COI “*could* make a finding.”¹⁰² Literally then, if the staff believes there is a one in a thousand chance that the COI will make a finding, it *shall* proceed with formal charges and the resource expenditure that accompanies the trial. Complicating this matter is the requirement that the staff determines whether the COI *could* make a finding, but the Bylaws do not define what the burden of persuasion is at the COI trial.¹⁰³ The Bylaws do not clarify how likely a finding must be or what constitutes information “sufficient” enough to reach a finding. Not surprisingly, the enforcement staff exercises more discretion than the Bylaws suggest exist, generally following an informal policy of only bringing charges when it thinks the COI will likely find a violation, and being especially careful before bringing charges of unethical conduct since those charges bring a lasting stigma even if no finding is made.¹⁰⁴

We suggest two potential amendments. First, the Bylaws might simply be amended to change the “shall” to a “may,” thus recognizing

⁹⁷ *Id.* at Bylaw 32.6.1.

⁹⁸ *Id.* at Bylaw 32.5.2.

⁹⁹ *Id.* at Bylaw 32.6.1.

¹⁰⁰ *Id.* at Bylaw 32.5.2.

¹⁰¹ NCAA Manual, *supra* note 14, at Bylaw 32.6.1.1.1.

¹⁰² *Id.* (emphasis added).

¹⁰³ *See infra* Section III.A.

¹⁰⁴ Telephone interview with David Price, Vice President for Enforcement Servs., NCAA & Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

that the enforcement staff has discretion to consider practicalities, likelihood of success, and wise resource allocation when the COI *could* make a finding. Or second, if the Bylaws are going to impose a *duty* on the enforcement staff to issue a Notice of Allegations under certain circumstances, perhaps the standard could be borrowed from the law of materiality in the Securities Regulation context: The enforcement staff must issue a Notice of Allegations when it discovers evidence that would cause a reasonable person to conclude that such evidence creates a substantial likelihood that the COI would make a finding.¹⁰⁵ Thus, evidence that supports a very low percentage chance of a finding by the COI would not meet the proposed standard.

Practically, a third result of the investigation is also common. Information developed during the investigation may reveal to the staff and institution that the violation occurred. The progress toward summary disposition then might begin, even before the issuance of the formal Notice of Allegations.

A brief pause is needed to orient ourselves. Somehow, whether through self-reporting or otherwise, the NCAA has received some information. After a quick look around, the enforcement staff decided to investigate and issued a Notice of Inquiry. Then, after investigating further, the enforcement staff decides whether to pursue formal charges in the form of a Notice of Allegations. Formal adversarial proceedings begin if the COI issues a Notice of Allegations.¹⁰⁶

2. The Notice of Allegations

The Notice of Allegations resembles formal charges. The staff must send the Notice of Allegations to the CEO (with copies to the FAR and athletics director).¹⁰⁷ The Notice of Allegations must list the Bylaws alleged to have been violated and the details of each allegation,¹⁰⁸ and the cover letter accompanying the notice must:

- inform the president or chancellor of the matter under inquiry and request the cooperation of the institution in obtaining all

¹⁰⁵ *Cf.* TSC Indus. Inc. v. Northway, Inc., 426 U.S. 438, 445 (1976) (noting that some circuits define materiality in securities fraud actions to include any facts that a reasonable shareholder might consider important).

¹⁰⁶ One commentator notes that once a Notice of Allegation issues, it would be rare for a hearing to completely exonerate the institution. Roberts, *supra* note 77, at 437. Baylor once succeeded in joining that rare class, having successfully obtained a no-violation finding from the COI in 2000 after an investigation into the Baylor football program.

¹⁰⁷ NCAA Manual, *supra* note 14, at Bylaw 32.6.1.

¹⁰⁸ *Id.* at Bylaw 32.6.1.2.

the pertinent facts and provide specific information on how to investigate the allegation;¹⁰⁹

- request the president or chancellor to respond to the allegations and to provide all relevant information which the institution has, or may reasonably obtain, including information uncovered related to new violations;¹¹⁰
- request the president or chancellor and other institutional staff to appear before the committee at a time and place determined by the committee;¹¹¹
- inform the president or chancellor that if the institution fails to appear after having been requested to do so, it may not appeal the committee's findings of fact and violations, or the resultant penalty;¹¹²
- direct the institution to provide to any present or former institutional staff member(s) who were notified in writing of an allegation in which they were named by the enforcement staff, and any present or former student-athletes whose eligibility could be affected based on involvement in an alleged violation, the opportunity to submit in writing any information the individual desires that is relevant to the allegation in question;¹¹³ and
- inform the president or chancellor that the enforcement staff's primary investigator in the case will be available to discuss the development of its response and assist in locating various individuals who have, or may have, important information regarding the allegations.¹¹⁴

After the institution receives the Notice of Allegations, whether or not the institution chooses to fight the charges, it will prepare a written response.¹¹⁵ The response may deny all charges, or it may admit all charges and serve as a step toward summary disposition. More commonly, the response will more closely resemble an answer filed in federal court litigation, admitting the truth of some facts or allegations and disputing some facts and "legal" conclusions. Typically, this response will assert one or more of four common claims:

¹⁰⁹ *Id.* at Bylaw 32.6.1.1(a).

¹¹⁰ *Id.* at Bylaw 32.6.1.1(b).

¹¹¹ *Id.* at Bylaw 32.6.1.1(c).

¹¹² *Id.* at Bylaw 32.6.1.1(d).

¹¹³ NCAA Manual, *supra* note 14, at Bylaw 32.6.1.1(e).

¹¹⁴ *Id.* at Bylaw 32.6.1.1(f).

¹¹⁵ *See id.* at Bylaw 32.6.5.

(1) the evidence is insufficient to support the facts alleged;¹¹⁶ (2) the undisputed facts do not amount to a violation;¹¹⁷ (3) the violation alleged is secondary rather than major;¹¹⁸ and (4) the cumulative violations do not constitute a loss of institutional control.¹¹⁹ This response must be on file with the COI and the enforcement staff within ninety days of the institution's receipt of the Notice of Allegations, unless the COI grants an extension.¹²⁰

¹¹⁶ In 2000, Baylor successfully argued to the COI that there was insufficient evidence to support the allegation that an assistant football coach provided a recruiting inducement to a potential player. The COI accepted this argument and dismissed the allegation under Bylaw 32.7.6.2, which states that "the committee shall base its findings on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." Committee on Infractions, Baylor University Public Infractions Report (Dec. 21, 2000), <http://www.ncaa.org/releases/infractions/2000/2000122101in.htm>.

¹¹⁷ The University of Utah made this argument in a 2003 case in which the enforcement staff alleged academic fraud. A student tutor employed by the athletic department wrote a paper for two football players who each turned in the paper as his own. The tutor was not assigned to either of the athletes who received the paper, nor was she designated as a writing tutor. The writing instructor noticed the duplicate papers and gave each student a failing grade and reported the incident, and the athletic department fired the tutor. The institution insisted that the tutor acted as a friend to the student-athletes, rather than in her capacity as a tutor, and also emphasized that the University took prompt action when officials discovered what happened. The COI disagreed, and held the institution responsible for academic fraud. Committee on Infractions, University of Utah Public Infractions Report (July 30, 2003), <http://www.ncaa.org/releases/infractions/2003073001in.htm>.

¹¹⁸ Baylor set forth this argument in the 2000 enforcement case when post-eligible athletes on the men's tennis team subsidized rent payments to fellow athletes. Despite the University's claim that the coach merely suggested the athletes make the payments—a secondary violation—the COI found that the athletes felt they had to make the payments at the coach's insistence—a major infraction. Committee on Infractions, Baylor University Public Infractions Report (Dec. 21, 2000), <http://www.ncaa.org/releases/infractions/2000/2000122101in.htm>.

¹¹⁹ The University of Oklahoma successfully argued that improper telephone contacts by the men's basketball coaching staff did not constitute a loss of institutional control, but rather that the individual violations warranted the lesser charge of failure to monitor. Committee on Infractions, University of Oklahoma Public Infractions Report (May 25, 2006), http://www2.ncaa.org/portal/media_and_events/press_room/2006/may/20060525_ouklahoma_infractions_report2.pdf. The COI rejected a similar argument from the University of Kansas regarding its football and men's basketball teams. Committee on Infractions, University of Kansas Public Infractions Report (Oct. 12, 2006), http://www2.ncaa.org/portal/media_and_events/press_room/2006/October/20061012_kansas_infractions_report.pdf.

¹²⁰ NCAA Manual, *supra* note 14, at Bylaw 32.6.5. The authority of the COI to grant an extension is yet another reason to strike a cooperative tone. Baylor and the NCAA agreed to a structured deadline schedule in which Baylor was to provide hundreds of pages of response in pieces, with the full submission completed before a final deadline. This allowed Baylor officials additional time to construct the university's response, but also provided something for the enforcement staff to work on in

The adversarial process continues with the preliminary conference, which must occur within thirty days of an institution's submission of its response.¹²¹ This conference (which is sometimes conducted by phone¹²²) is attended by institutional representatives and the enforcement staff, and its purpose is to "clarify the issues to be discussed in the case during the hearing [before the COI], make suggestions regarding additional investigation or interviews that should be conducted by the institution to supplement its response and identify allegations that the staff intends to withdraw."¹²³ It is also worth noting that due to the informality of the investigative process (as compared to discovery in civil litigation) the prehearing conference often produces surprises and may reshape the case. For example, an institution may prepare for the hearing having disputed a fact only to learn at the prehearing conference that a witness has unexpectedly admitted a fact or suddenly found a document. In such situations, the procedures are flexible enough to allow the institution to amend its response.¹²⁴ Following the prehearing conference, the enforcement staff prepares the NCAA Enforcement Staff Summary Case Statement, which is discussed earlier in this Article.¹²⁵

An institution may choose not to fight the charges, however, and may choose the summary disposition procedures *if* the institution is not a "repeat violator," as the Bylaws define that term.¹²⁶ If, as we suggested, the Notice of Allegations is analogous to formal charges, the summary disposition procedure is analogous to a plea bargain, but with an important difference.¹²⁷ The difference is that when an institution chooses summary disposition, it must agree to the charges but

the interim. In addition, this prevented any delay in the hearing date because the enforcement staff began work far before the ultimate deadline.

¹²¹ NCAA Manual, *supra* note 14, at Bylaw 32.6.6.

¹²² The enforcement staff also has the capacity to conduct the preliminary conference via videoconferencing. E-mail from Thomas C. Hosty, Director of Enforcement, NCAA, to Mike Rogers, Professor of Law, Baylor Law School (Feb. 21, 2007, 10:16 A.M.) (on file with authors).

¹²³ NCAA Manual, *supra* note 14, at Bylaw 32.6.6.

¹²⁴ *See id.* at Bylaw 32.6.5.

¹²⁵ *Id.* at Bylaw 32.6.7; *see supra*, Section I.B.1.

¹²⁶ NCAA Manual, *supra* note 14, at Bylaw 32.7.1. The Bylaws define a repeat violator as an institution that commits a major violation "within five years of the starting date of a major penalty." *Id.* at Bylaw 19.5.2.3.1. The relevant time is the commission of the violation, not when an investigation begins or hearing takes place. *Id.*

¹²⁷ In a plea bargain, a prosecutor and defendant strike an agreement that the defendant will plead guilty to an offense—usually a lesser offense or just one of multiple charges—and the prosecutor agrees to pursue a lesser sentence or drop additional charges. BLACK'S LAW DICTIONARY 531 (2d pocket ed. 2001).

not to the penalty.¹²⁸ When an institution chooses summary disposition, it coordinates with the enforcement staff to file a written report that contains proposed, agreed-upon findings of fact; a summary of information upon which those findings are based; a stipulation that the proposed findings are substantially correct; a stipulation that the findings violate NCAA legislation; and if applicable, a statement of unresolved issues that are not considered substantial enough to affect the outcome of the case.¹²⁹ Nothing in the written report requires an agreed-upon stipulation of the penalty. Instead, the institution and involved individuals submit proposed penalties within the guidelines set forth in the Bylaws' penalty structures, along with a statement discussing any mitigating factors. The enforcement staff is not involved in the penalty-proposal process.¹³⁰

The COI then reviews the joint report and reaches one of three conclusions. First, if it accepts the findings, conclusions, and penalties, it prepares a written report, submits the report to the institution, and then publicly announces the resolution.¹³¹ Second, the COI may reject the findings, which essentially removes the case from summary disposition and triggers a full hearing before the COI.¹³² Finally, if the COI accepts the findings but rejects the institution's proposed penalties, the institution and involved individuals may elect to participate in an expedited hearing during which the only issue will be the penalty.¹³³ If the institution participates in an expedited hearing, it can later appeal the penalty to the Infractions Appeals Committee.¹³⁴

As to whether to accept the joint report, the COI serves much more than a ministerial role. The COI has two obligations: (1) fairness to the institution and (2) fairness to other member institutions that will be harmed if the infracting institution is allowed to avoid a thorough investigation of its conduct.¹³⁵ For this reason, the joint report must not only contain admissions and agreement, but it must

¹²⁸ See NCAA Manual, *supra* note 14, at Bylaws 32.7.1.2–3.

¹²⁹ *Id.* at Bylaw 32.7.1.2.

¹³⁰ See Heller, *supra* note 9, at 306–07.

¹³¹ NCAA Manual, *supra* note 14, at Bylaw 32.7.1.4.1.

¹³² *Id.* at Bylaw 32.7.1.4.2.

¹³³ *Id.* at Bylaw 32.7.1.4.3. It should be noted that, ordinarily, an institution will be given a second—but not a third—chance at proposing penalties if the COI rejects the first attempt. Interview with Richard J. Evvard, Attorney, Sports Law Div., Bond, Schoeneck & King, PLLC, in Overland Park, Kan. (Dec. 7, 2006).

¹³⁴ Heller, *supra* note 9, at 306. See also NCAA Manual, *supra* note 14, at Bylaw 32.7.1.4.3.

¹³⁵ Telephone interview with Jo Potuto, Chair, NCAA Div. I COI (Jan. 2, 2007).

also convince the COI that the investigation has been thorough and that the COI is effectively maintaining the level playing field for the other member institutions whose interests it protects.¹³⁶

Before turning to the strategic questions involved with the investigative stage, a brief note is needed on another potential step in the process which is not explicitly provided for in the Bylaws.

3. Self-Reports

Although not a formal procedure under the Bylaws, there is a document—the self-report—that can be prepared and filed by the institution before the Notice of Allegations process begins at the NCAA headquarters in Indianapolis. Once an investigation begins in earnest and the enforcement staff and institution have established a cooperative relationship (before or after a Notice of Inquiry), the institution should weigh the merits of filing a self-report. If the choice is made to file one, the institution should tell the staff right away. During our interview with representatives of the enforcement staff, they explained that, while they appreciate the institution's willingness to file a self-report, the staff wants to stay involved in the process.¹³⁷ By keeping the staff involved in the process, an institution will not only garner goodwill and credit for cooperation and self-reporting, it will also prevent duplicative steps that will likely arise if the enforcement staff is not part of the investigation.

While self-reporting has traditionally been standard procedure in secondary cases, it has become a more common practice in major cases. A comprehensive self-report can serve as a key component to a strong institutional response. This step assures credit for the violations self-discovered and reported by the institution. The self-report advances efficiency in many respects, as the staff will turn the violations self-reported into allegations requiring a response, and the response will essentially be reworking the self-report.¹³⁸ The decision regarding whether to self-report revolves largely around the same concerns discussed in the next subsection, namely whether the institution has the time and internal resources to prepare the self-report

¹³⁶ *Id.*

¹³⁷ Telephone interview with David Price, Vice President for Enforcement Servs., NCAA, & Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

¹³⁸ Of course the staff will add to the Notice of Allegations any violations discovered but not self-reported.

or whether it has the resources to hire an outside firm that specializes in NCAA compliance matters.¹³⁹

Part and parcel to a self-report that admits violations is the imposition of sanctions by the institution. The COI will accept the self-imposed sanctions and will add additional penalties if it believes the institution did not adequately penalize itself. Some institutions choose to wait on penalties and argue for leniency at the hearing, rather than risk over self-penalization. While the fear of over self-penalization is worth consideration, it ultimately does not justify withholding the penalties for two reasons. First, the COI looks favorably upon institutions who self-impose penalties.¹⁴⁰ Second, the COI has made clear that over self-penalization is not irrevocable. For example, in the most recent case involving the University of Kansas, the COI regarded sanctions self-imposed upon the women's basketball program as "wholly disproportionate" considering the violations.¹⁴¹ The COI implied that it would have rescinded the self-imposed sanctions had they not already been executed on the program.¹⁴²

What penalties to self-impose? The starting place is the major-infractions database¹⁴³ and the Bylaws.¹⁴⁴ What are the potential penalties, and what penalties has the COI imposed in similar cases? Here is another area where an outside consultant can help by providing dispassionate expertise.¹⁴⁵ An institution's conference commissioner also provides another source for dispassionate recommendations.

¹³⁹ Some of these firms recommend a package of services that include both a factual investigation and filing of a self-report.

¹⁴⁰ In Baylor's recent basketball case, for example, self-imposed sanctions later served as a mitigating factor when the COI imposed penalties. Committee on Infractions, Baylor University Public Infractions Report (Jun. 23, 2005), https://goomer.ncaa.org/wdbctx/LSDBi/LSDBi.MajorInfPackage.ProcessMultipleBylaws?p_Multiple=0&p_PK=602&p_Button=View+Public+Report&p_TextTerms=ThisIsADummyPhraseThatWillNoBeDuplicated&p_TextTerms2=ThisIsADummyPhraseThatWillNotBeDuplicated&p_Division=1 [hereinafter Baylor Infractions Report—2005] ("[O]nce the violations finally came to light Baylor University took decisive and meaningful action to stop the violations and to punish itself and the involved individuals The committee has carefully evaluated the university's self-imposed penalties and corrective actions.").

¹⁴¹ Committee on Infractions, University of Kansas Public Infractions Report (Oct. 12, 2006), http://www2.ncaa.org/portal/media_and_events/press_room/2006/october/20061012_kansas_infractions_report.pdf.

¹⁴² *Id.*

¹⁴³ A publicly accessible version is available at <http://www.ncaa.org>.

¹⁴⁴ NCAA Manual, *supra* note 14, at Bylaw 19.5.2.

¹⁴⁵ Joe Drape, *Facing N.C.A.A., The Best Defense Is a Legal Team*, N.Y. TIMES, Mar. 4, 2007, at 1.

Corrective measures tied to violations should also be developed and reported to the staff and COI. For example, the recent case involving excessive phone calls to prospects made by former basketball coaches at the University of Oklahoma led to the development of a state-of-the-art telephone monitoring system.¹⁴⁶

If the investigation reveals conduct that has rendered a student-athlete ineligible, certain action is mandatory. Usually ineligibility is caused by a prospect's receipt of an improper recruiting inducement or an enrolled student-athlete having been provided an impermissible extra benefit. If the violation is *de minimis* (\$100 or less), mere reimbursement (a donation to charity equal to the amount of the impropriety) and notification solve the problem.¹⁴⁷ If the violation is not *de minimis*, the more structured reinstatement process is indicated.¹⁴⁸ An institution in violation should work with the institution's compliance staff. Reinstatement requests should be grist of the mill for them. Most importantly, and not standard practice, talk to and copy the enforcement staff regarding the reinstatement issue. This is a necessary part of cooperation and information sharing during a major case.¹⁴⁹

In summary, awaiting judgment from the COI is never pleasant. However, the institution's position is certainly stronger if it has helped the enforcement staff by investigating and filing a self-report, penalized itself for its sins, formulated and adopted its own corrective measures, and addressed eligibility issues that have arisen.

B. Representing the Institution During the Investigative Stage

From responding to ESPN's phone call to choosing whether to use summary disposition, choices arise throughout this process. This Section explores many of the common choices, and a few not so common, in light of the uniqueness of the enforcement proceedings

¹⁴⁶ See Associated Press, *Oklahoma to Meet with NCAA Regarding Violations*, ESPN.com, Jan. 4, 2006, <http://sports.espn.go.com/ncb/news/story?id=2280677>.

¹⁴⁷ See, e.g., NCAA Manual, *supra* note 14, at Bylaws 13.5, 13.6.6, 13.8, 16.01.1.1.

¹⁴⁸ *Id.* at Bylaw 14.12.

¹⁴⁹ If the ineligible student-athlete competed in a NCAA competition (any game or match) won by the institution, the issue of vacating the result is raised, particularly if the violation is serious enough to result in the loss of competition for the student-athlete. For example, the NCAA vacated all titles earned and records achieved by the Texas Christian University track teams (including individual achievements) that involved ineligible student-athletes. Committee on Infractions, Texas Christian University Public Infractions Report (Sept. 22, 2005), http://www2.ncaa.org/portal/media_and_events/press_room/2005/september/20050922_texaschristian_report.pdf. The NCAA also ordered all mention of the vacated achievements rescinded. *Id.*

and the duty to cooperate. To be sure, the situation is contentious; the reader represents an accused institution and bad things will happen to the institution if the charges stick. At times, the person representing the institution (we refer to this person as a lawyer, if just to avoid rhetorical congestion) will assume a traditional adversarial role. But not always, and it would be a mistake to cynically view the role of truth seeker, for this is not the adversarial legal system and the consequences for those who hide the ball (or at least try not to find it) counsel strongly in favor of a sincere effort to honor the institution's promise to self-police.¹⁵⁰ The COI may sanction an institution specifically for a poor internal investigation, even when the enforcement staff cannot prove additional violations.¹⁵¹ The University of Kentucky found itself in this unfortunate situation in the mid-1980s after the local newspaper reported on alleged violations in the men's basketball program.¹⁵² The COI publicly reprimanded the university and imposed a three-year monitoring plan because the university's self-investigation was "inadequate."¹⁵³ Specifically, the COI chastised Kentucky for accepting "[g]eneral denials . . . with little, if any, follow-up questioning . . . or independent investigation of facts."¹⁵⁴ The COI also admonished the university's written interview requests to former student-athletes, which "seemed to suggest, as a viable option, that refusal to be interviewed would be a satisfactory response."¹⁵⁵ The enforcement staff admitted, and the COI agreed, that the evidence did not support a violation other than this failure to cooperate.¹⁵⁶

1. The Beginning

The phone caller is seeking immediate comment on a potential violation. Perhaps the story will print tomorrow or air in a few hours. What should the response be? The first response should have already occurred. At the risk of stating the obvious, the first step is to avoid the precarious situation that requires the call recipient to make a time-pressured and unguided decision about how to respond. Inves-

¹⁵⁰ An institution's failure to cooperate constitutes an ethical violation, one of the most severe charges that the NCAA can levy against an institution. See NCAA Manual, *supra* note 14, at Bylaw 10.1.

¹⁵¹ *Id.*

¹⁵² Committee on Infractions, University of Kentucky Public Infractions Report (Mar. 3, 1988), http://goomer.ncaa.org/wdbctx/lbdbi/LSDBI.lbdbi_menu.home.page.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

tigation procedures should be in place long before the phone rings.¹⁵⁷

The institution should carefully draft a written policy in the relatively carefree pre-allegation period—before the onset of stress-related medical conditions that are sure to plague university officials once the chaos ensues. The plan should determine who will lead future investigations and should pave the road for a rapid, thorough, and accurate response.

A written investigation policy allows a university to move quickly once an allegation is made. Moving quickly is essential (of course not at the expense of accuracy or thoroughness). The media will be pounding the institution. In the recent past, this meant the daily printing of a negative story and airing of unpleasant television sports reports at six and ten o'clock. Now, if the case is high profile, articles are posted or updated multiple times daily on the internet, message boards and internet web logs overflow with gossip, and twenty-four hour television and radio get in their licks continuously.

Written investigation procedures also help send the message to witnesses that the investigation is business, not personal. Because the FAR or other institutional representatives involved in the investigation will know many of the witnesses (coaches, athletics department staff members, etc.), there is a prospect of damaging relationships unnecessarily or excessively. It is helpful to truthfully say, "Coach, I don't like asking those questions, but it's my job. We have written procedures. The president assigned this responsibility to me before these issues existed." Thus, it's not personal, just part of the system.

Also, a plan that fails to name the investigator may leave the institution vulnerable to internal and external pressures to select a particular investigator whose motivation does not coincide with the best interests of the university.¹⁵⁸ For example, the recommended investigator might be motivated by money or a desire to garner publicity, or she may not be experienced in NCAA investigations. Perhaps the greatest concern is that an investigator, selected by a university and thrown to wolves after allegations have been made, may desire to exonerate the institution regardless of the facts. The media will scruti-

¹⁵⁷ Michael Rogers, Editorial, *Investigations: Act Before the Wolves Howl*, THE NCAA NEWS, Oct. 23, 2006, at 4.

¹⁵⁸ Another critical factor is to whom the investigator will answer. A diluted chain of command can be as ineffective as not having designated an investigator. Since the institution's president or CEO is ultimately accountable, the investigation will be most effective if all reports are funneled directly to the president. Telephone interview with Richard J. Eyrard, Attorney, Sports Law Div., Bond, Schoeneck & King, PLLC, Overland Park, Kan. (Dec. 7, 2006).

nize the decision, perhaps cynically analyzing the choice. Institutional leaders should carefully consider merit, impartiality, and perceived impartiality before the phone rings.

Use of an internal investigation team poses additional issues that also are best addressed before allegations surface. To engender respect internally and externally, the team must have members of stature within the university community who will accept the vilification that will accompany an affirmative finding of violations. Tenure helps.¹⁵⁹ Some team members should have expertise in investigations, preferably on NCAA matters, and they must not be set on seeing their names in the paper. Regardless of whom the institution taps to lead the investigation,¹⁶⁰ the choice should be made before the wolves begin to circle.

Additional issues that an institution should make during peacetime and include in the plan are:

- Who will be the media spokesperson?
- Who will form the institution's internal investigation team if the institution employs that option?
- How will internal and outside investigation teams interact if the institution uses both?
- What checks will be established to ensure university policies are followed?
- How will the investigation team handle infractions if any are discovered?
- Who will serve as the liaison with the conference office?¹⁶¹

While it is relatively easy to identify the choices an institution should resolve with the plan, few bright-line answers exist as to the correct choices. The following subsections address some considerations, starting with who should conduct the investigation.

2. Who Investigates?

Once a credible allegation of a violation has reached the institution—whether through the enforcement staff, ESPN, or an internal source—who should investigate? Three choices emerge, though they are certainly not mutually exclusive. The first choice is for the insti-

¹⁵⁹ For example, Baylor's investigation team originally included three tenured law professors with prior infractions investigation experience.

¹⁶⁰ See *infra* Section II.B.2 for further discussion on who should lead the investigation.

¹⁶¹ While some commissioners will play a more active role than others, all conference commissioners will want the institution to keep them informed. The commissioner is invited to make a statement at the COI hearing.

tution to step aside and allow the enforcement staff to investigate, while of course honoring the duty to cooperate. The second choice is for the institution to conduct its own internal investigation. Finally, the institution might choose to hire an outside specialist in compliance issues.¹⁶² As noted, the options are not mutually exclusive, and the best choice usually involves a combination of action, cooperation, and consultation. Even if the institution investigates itself, it will be wise to heavily involve the enforcement staff at every stage, and perhaps to use a specialty firm or third party for certain issues. Similarly, if the institution hires outside counsel to conduct the investigation, the institution would be wise to stay involved in the process rather than merely wait for a report months down the road.

Why would an institution want to conduct its own internal investigation, or at least stay intensely involved throughout the process, when the Bylaws only impose a duty to cooperate? First, at the penalty stage, the institution will receive credit for self-reporting violations.¹⁶³ While this potential credit is welcome, a more practical point is that helping to uncover the truth, and reporting it, will produce a favorable rapport with the enforcement staff, and will give positive fodder at the hearing, where the institution can demonstrate that it aggressively discharged its cooperative responsibility.¹⁶⁴ Also, conducting or staying intimately involved in the investigation gives the institution the opportunity to take corrective measures to fix the problems as they arise¹⁶⁵ and to self-impose appropriate penalties along the way, both of which will be favorably received when being grilled before the COI. A less obvious benefit also attaches: witnesses may be more forthcoming when interviewed by a representative of the institution, as opposed to being interviewed by an enforcement staff member from Indianapolis. Some people (perhaps not just Texans) will not open up to strangers. The enforcement staff will need access to the institution's "local knowledge," including policies, procedures, and personnel. Who has custody of the coaching staff's cell phone records? Where is the academic standard in question published? Who has expertise? Supplying local knowledge is an important reason for continued involvement in the investigation, and if an internal investigation is the chosen route, local knowledge should allow the investigation to get off to a fast start.

¹⁶² See *supra* note 145.

¹⁶³ NCAA Manual, *supra* note 14, at Bylaw 32.2.1.2.

¹⁶⁴ But see *supra* note 62.

¹⁶⁵ See, e.g., Associated Press, *supra* note 146.

From an advocacy perspective, self investigation, or at least staying actively involved, allows an institution to ensure witnesses are not mistakenly confessing to violations that did not occur. For example, during one interview, a Baylor employee misunderstood a question or had a memory lapse and told the enforcement staff that Baylor provided no rules education. The FAR was present at the interview and asked whether the employee had attended university or conference events where compliance rules had been discussed. The employee quickly remembered and was able to provide details about periodic rules-education meetings and luncheons. Staying involved saved, at the very least, a confusing sequence of clarifying events and, at most, the institution being penalized for false information.

Although conducting significant portions of the investigation internally can save the institution substantial legal fees, serious consideration should be given to the ensuing time commitment. A major-infractions investigation is not a tens-of-hours time commitment. Hundreds of hours might not cover it.¹⁶⁶ And the total time spent investigating will increase without involvement of some investigators with enforcement expertise.

Public scrutiny is yet another important consideration. The public and media will likely be skeptical of an “internal” investigation, as perception is shaped by traditional adversarial notions and, for some, cynicism will jade claims of truth-seeking and open cooperation by a representative of the accused. Because of this perception, presentation and investigator selection is paramount. The investigators must be beyond reproach, both actually and apparently. They must not only be able to ask the tough questions, but must also be perceived as willing and able to do so. Here again, having established procedures in place will help, both with execution and perception.¹⁶⁷

One suggestion for considering public perception and investigator choice is to think in terms of levels. The institution gets one point, if you will, of credibility for every level the investigator is removed from the accused. So, if the basketball program is targeted, the investigator should be outside the basketball program. Next, the investigator should be outside the athletics department. Then, perhaps from outside the university to outside counsel. But even this fi-

¹⁶⁶ For a discussion of the time and resources that the enforcement staff dedicates to the investigation process, see *Frequently Asked Questions About the NCAA Enforcement Process* (Nov. 16, 2005), http://www.ncaa.org/enforcement/faq_enforcement.html, where question fifteen relates to the length of an infractions investigation.

¹⁶⁷ See *supra* Section II.B.1.

nal level will not satisfy the darkest of cynics, as now the investigator is being *paid* by the accused.

Before choosing a purely internal investigation, the institution should also consider the benefits from having an outside specialist involved, either as the lead investigator or as an assistant. An old adage in the law states that “a lawyer who represents himself has a fool for a client.”¹⁶⁸ Although the self-representing lawyer knows the law and the facts, perception is often skewed by self-interest. Along with providing expertise, outside counsel will be better able to view this case from an objective perspective. Moreover, having outside experts involved in the investigation adds credibility to the investigation in the eyes of both the enforcement staff and the media. Your authors submit that the proper question is rarely “should I involve outside counsel?” and is instead “should I hire them to conduct the investigation with our assistance or should I involve them to assist in our investigation?”

3. Conducting the Internal Investigation

As noted, choosing whether to investigate internally should not be viewed as mutually exclusive to either involving outside counsel or the enforcement staff. The institution might hire an outside consulting firm to be involved in the process, to perform certain tasks, or simply to provide perspective. And importantly, when approaching an internal investigation, the institution should not take the mindset that this investigation is independent of the enforcement staff. Rather, the wise institution is the one that keeps the enforcement staff apprised of the investigation and coordinates interviews and other events with the enforcement staff. A follow-up investigation will be much shorter if the institution involves the NCAA staff.¹⁶⁹

The goal of an internal investigation should be to leave no holes to fill. A less-than-thorough internal investigation will save the institution no money or time, as the enforcement staff will reproduce the investigation if it is unsatisfied with its thoroughness or procedures.¹⁷⁰ By coordinating the investigation and regularly communicating with the enforcement staff, the institution likely will garner goodwill and

¹⁶⁸ See *Kay v. Ehrler*, 499 U.S. 432, 437–38 (1991).

¹⁶⁹ Even when an institution chooses to investigate internally and file a self-report, it should notify the enforcement staff and allow the staff to participate. See *supra* Section II.A.3.

¹⁷⁰ Telephone interview with David Price, Vice President for Enforcement Servs., NCAA, & Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

prevent duplicative investigatory steps.¹⁷¹ The compliance staff, to put it mildly, is dedicated to its role in uncovering the truth—and it is a mistake and a waste of time to conduct an investigation that leaves holes. They fill these holes regularly, and any person involved in an internal investigation must dispose of any notion of hiding (or trying not to find) the truth. If done properly, the internal investigation yields several benefits, not the least of which will be operating on an accelerated schedule and obtaining credit for self-reporting a violation if one is found.

In our experience, the enforcement staff has usually been flexible and accommodating with regard to communication and coordination. In the recent Baylor basketball case, the University cooperated by scheduling interviews of major witnesses at mutually convenient times, making institutional employees available upon request, and furnishing interim self-reports and transcripts of interviews with which the enforcement staff was not involved. Communication efforts between the University and the enforcement staff involved hundreds of telephone conferences, faxes, and e-mails. This communication continued even while the University prepared its response and the enforcement staff drafted the case summary for the COI. Because of the University's excellent working relationship with the NCAA staff (including the enforcement staff and the staff assigned to the COI), Baylor received a much-needed extension to the deadline for the response to the Notice of Allegations. The extension, granted by the COI involved a structured timetable that allowed Baylor to separately file its response to each of the fourteen allegations included in the Notice of Allegations. This formatted extension provided Baylor with the additional time needed to complete a thorough response, but also allowed the assistant director of enforcement to begin preparing the case summary before the final extended deadline.

A final, practical consideration deserves attention. The investigation process we have described is often sensitive, with severe potential consequences for persons and programs.¹⁷² Very careful consideration must be given to the strained relationships that will likely result and whether the person chosen for the investigation holds a

¹⁷¹ *Id.*

¹⁷² The sensitivity of the investigation also requires that officials maintain confidentiality to protect the investigation's integrity. The investigation team must be aware of the need to protect information and be willing to do so in the face of requests, including those from the board members or coaches.

position that can afford strained relationships.¹⁷³ For example, should the institution's compliance staff be part of the investigation team? Perhaps not.¹⁷⁴ The institution needs coaches and players to be comfortable with the compliance staff. Communication needs to remain open. This need, along with the compliance staff's rules-education function, might be harmed by a compliance staff member's presence on the investigation team that "cost the team" scholarships or worse. Similar considerations caused serious reflections to whether one author could continue to serve as the FAR after participating in Baylor's investigation.

4. Investigative Procedures

Whether the investigation is internal or enforcement-staff led, several procedural issues arise that differ from discovery in civil or criminal proceedings. One problem is access to documents when preparing for the COI hearing. When the enforcement staff conducts interviews or gathers other information to be used in an enforcement case, it must provide the institution with access to the interview transcripts or other evidence.¹⁷⁵ But a very practical problem attaches to this access: An institution only has access to the documents at the NCAA national office or at the site of a custodial agent.¹⁷⁶ For example, in Baylor's recent basketball case, a local law firm served as the custodial agent. Documents could neither be removed from the office nor copied, and this remote access unnecessarily burdened preparation for the hearing. In particular, one witness offered muddled testimony that at times seemed to contradict itself. It was onerous for university officials to sufficiently analyze the nuances of the testimony, which related to numerous contested allegations, and to reach conclusions without a transcript in front of them—notes on the more than eighty pages of testimony were often insufficient. Institutional representatives had to make repeated trips to the custodial agent's office to reread the transcript and take further notes while facing the pressure of an impending deadline. Pre-

¹⁷³ University of Nebraska Chancellor Harvey Perlman recently hinted at the potential for strain while commending the university's FAR Josephine Potuto, noting that she has "a strong enough personality to avoid being co-opted by the [athletics] department but [is] politically savvy enough to work well with them." Harvey Perlman & Josephine R. Potuto, *Mission: Alignment. Nebraska Chancellor, FAR Discuss Various Complexities of Presidential Control*, THE NCAA NEWS, Apr. 11, 2005, at 5.

¹⁷⁴ This concern was raised and discussed at a meeting of the directors of compliance for the Big 12 Conference in Dallas in November 2006.

¹⁷⁵ See NCAA Manual, *supra* note 14, at Bylaws 32.3.9, 32.3.10.

¹⁷⁶ *Id.* at Bylaw 32.3.10.

cious time was diverted from serious response efforts to administrative tasks such as coordinating visits with the custodial agent's schedule. We suggest that the NCAA easily could remedy this additional distraction by creating a secure digital database of recorded testimony, since it already must keep records of all interviews.¹⁷⁷

Several other procedural mechanisms are also potentially problematic during an investigation. The lack of subpoenas, the lack of a confrontation right, and the staff's ability to grant use immunity create an opportunity for "witnesses" to tattle and run without being tested under cross-examination.¹⁷⁸ This combination enables an interviewed student-athlete to testify without fear of penalty *and* without fear of the story being tested by adversarial questioning. A notable example occurred during the recent investigation into Baylor's men's basketball program, when the enforcement staff offered immunity to a former student who had just transferred to another member institution. The staff conducted the interview off campus without informing Baylor officials. The University learned of the interview after it occurred. The transcript was later placed with the custodial agent. Not only did the student have immunity from penalty and cross-examination, he didn't even have to face the institution he accused. The information gleaned from this interview was not particularly harmful to the institution's case, but the procedure is unfair, and it is easy to imagine more damaging testimony, perhaps given by a disgruntled former player or employee.

The *availability* of a less-than-equal investigative process illustrates why cooperation and candor with the enforcement staff is vital. The enforcement staff members want to find the truth. On this note, the NCAA's Vice President for Enforcement David Price confirmed that the goal of an investigation is not to find a violation but rather the truth.¹⁷⁹ If the investigation appears shady or not forthcoming, the enforcement staff will likely use all available tools without much sympathy when an uncooperative institution cries unfairness. But by

¹⁷⁷ *Id.* at Bylaws 32.3.9, 32.3.9.2. There was a development in this area just before publication. According to Thomas C. Hosty, NCAA director of enforcement, a "secured custodial website," which has been in the works for two years, is now operational. E-mail from Thomas C. Hosty, Dir. of Enforcement, NCAA, to Mike Rogers, Professor of Law, Baylor Law School, and to Rory Ryan, Assistant Professor of Law, Baylor Law School (Feb. 6, 2007, 10:48 A.M.) (on file with authors). The enforcement staff expects the website to be "fully operational by April 2007 with all major cases." *Id.*

¹⁷⁸ See NCAA Manual, *supra* note 14, at Bylaw 32.3.7.

¹⁷⁹ Telephone interview with David Price, Vice President for Enforcement Servs., NCAA, & Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

maintaining goodwill and illustrating that the institution is both keeping the staff informed and honoring its commitment to self-police, the institution will create a cooperative environment. The staff surely realizes that it is unfair, for example, to allow a witness to tattle under immunity and run off without being subject to any adversarial testing. And the staff knows that the Bylaws permit this event. But our experience has shown that the staff does operate as though it works on a conviction-based commission and will generally use discretion when investigating a cooperative, transparent institution. Indeed, during our interview, Director of Enforcement Thomas C. Hosty stated a point so simple that it might be overlooked: "If an institution feels something is unfair, tell the enforcement staff."¹⁸⁰ Basically, common sense informs this strategy: if you develop a good relationship with the staff, they won't endeavor to treat you unfairly. But of course, to the extent that the procedures *are* unfair, prosecutor/investigator discretion is no answer to refusing reform. Procedural rules should define boundaries for prosecutorial discretion, not the other way around.

C. *War Story*

The story of Baylor's tragic and all-too-infamous recent men's basketball case is illustrative of the choices and procedures, as well as the importance of strategic decision-making, during a major-infraction investigation. Numerous allegations of violations and the tragic murder of a student-athlete propelled Baylor—already a repeat violator—into the crosshairs of the NCAA enforcement staff and the national media.¹⁸¹ This Section illustrates how the University's pre-existing investigation plan and the University's rapid adaptation as the case evolved allowed the University to effectively manage the case. To be sure, the institution failed in myriad compliance and control issues. But the investigation itself was commended, and likely kept Baylor from the death penalty.¹⁸²

Much of Baylor's strategic plan, in place already when the allegations surfaced, served the university well.¹⁸³ And when the plan did

¹⁸⁰ *Id.*

¹⁸¹ The student's death was not attributed to the institution's violations, but it defined the public's perception of the scandal.

¹⁸² Hoover, *supra* note 61, at 33.

¹⁸³ The investigation guidelines were drafted during the summer of 2001 by the FAR. Following review by Baylor's compliance stakeholders, the university president adopted the guidelines and appointed the investigation committee in October 2001. Investigation, Determination, and Reporting Procedures for Baylor University, *available at* <http://www.ncaa.org> (follow "The NCAA News" tab; then follow "NCAA News

not meet Baylor's needs, the investigation committee modified its approach. Initially, the plan designated an investigation team, which included three tenured law professors with prior experience conducting an NCAA investigation. The involvement of tenured professors sheltered the committee from potential intimidation when the case touched on highly sensitive issues. For example, the Baylor committee discovered donations made by leading members of the University community, including past and present regents. The committee flushed out the underlying facts despite the sensitive nature of potential allegations of wrongdoing, and ultimately the investigation revealed that the prominent donors did not violate NCAA legislation.¹⁸⁴ While the plan directed the investigative committee to conduct the investigation, the plan also involved outside counsel experienced in infractions cases and a consulting attorney who specialized in such cases.¹⁸⁵

The pace of the investigation, as is common, played a crucial role in case management. While Baylor's plan provided for a speedy investigation, the constant barrage of media updates and the quickly approaching basketball season propelled the investigation into warp drive. The use of an internal investigation committee allowed the investigation to proceed almost around the clock. The committee worked long hours, seven days a week for two months, which led to prompt results. Men's basketball Head Coach Dave Bliss resigned within nineteen days of when the investigation began. Also, within two weeks of opening the investigation, the need for serious self-imposed sanctions became apparent.¹⁸⁶ Almost with each day of interviews and document review, the issues to be resolved multiplied, the seriousness of the case deepened, and the committee became increasingly concerned over the possible imposition of the death penalty. When the investigation confirmed that the former head coach had paid thousands of dollars in educational expenses of two student-athletes, the committee recommended self-imposed sanctions, including the release of all players to allow transfers to other institutions. Two other characteristics of an internal committee also expe-

Archive" hyperlink; then follow "2006" hyperlink; then follow "Editorial"; then follow "Baylor University Investigation Determination and Reporting Procedures - Oct 23, 2006 NCAA News" hyperlink).

¹⁸⁴ Baylor University, Baylor Self Report (on file with the authors).

¹⁸⁵ Kirk Watson, a partner in the Austin office of the Texas law firm Hughes & Luce, LLP, served as outside counsel during the investigation.

¹⁸⁶ The self-imposed sanctions later served as a mitigating factor when the COI imposed penalties. Baylor Infraction Report—2005, *supra* note 140; *see also* Hoover, *supra* note 61, at 33.

dated the investigation. First, the committee possessed local knowledge, such as where to locate certain information and documents. Second, the committee acted with the full authority of the university president.

As to self-imposing sanctions, we did not think it was strategically sound to wait until a self-report could be prepared. A self-report would take months, and we already knew we had a nasty major case. Our student-athletes were in hell, and we didn't think a change in leadership, although necessary, was enough. We needed to accept responsibility by imposing a severe penalty. The key self-imposed penalty was offering a release to each of our players coupled with the promise to seek an Administrative Review Subcommittee ("ARS")¹⁸⁷ waiver so they could be immediately eligible to play upon transfer. Our three best players transferred and (due to the waivers) made significant contributions on NCAA tournament teams that season; two were conference players of the year. Our top prospect was released from his national letter of intent and went elsewhere. This sanction was creative; it combined a severe penalty to the basketball program coupled with a major student-athlete well-being component. It may be the primary reason our basketball program was not suspended. Before the COI we argued that suspending the program would result in making us start over a second time. By the time of the hearing, we had only one basketball student-athlete recruited by the former staff (a young man of excellent character who graduated in less than four years), a new director of athletics, and a new coaching staff. We had also added additional sanctions and corrective measures at the time of filing the self-report—six months after the initial sanctions were self-imposed. Should we have self-imposed additional penalties? While we could have, the prevailing thought was that we were in the ballpark already, and it was tough to overcome the sentiment that the COI was going to do *something* extra, and so the institution wanted to leave the COI room to act.

The cooperative relationship formed with the enforcement staff was also important. First, the COI considered Baylor's cooperation when it imposed penalties.¹⁸⁸ Gene Marsh, then chairman of the COI, suggested that Baylor's cooperation likely saved the basketball program from the death penalty: "We were there, we considered this to be a death-penalty case, then we stepped back and looked at the

¹⁸⁷ A subcommittee of the NCAA Management Council, the ARS has authority to review a staff application of the bylaws when no other committee, subcommittee, or conference has authority to do so. NCAA Manual, *supra* note 14, at art. 5.4.1.4.

¹⁸⁸ Hoover, *supra* note 61, at 33.

cooperation of the school, its honest and, frankly, very blunt approach to describing what their problems were.”¹⁸⁹ As importantly, the cooperation earned the enforcement staff’s trust, which yielded tangible benefits during the investigation. For example, early in the week following Coach Bliss’s resignation, the investigation committee received a call from the enforcement staff inviting the committee to participate in the interview of an assistant coach. The staff said that the coach had knowledge of violations, but the staff had not been apprised of specific details. The coach began the interview by stacking cassette tapes on the conference room table, and the rest of the day was spent listening to the tapes, which included conversations secretly recorded by the former assistant coach. Their content stunned all investigators, Baylor, and the NCAA. One tape revealed Coach Bliss prompting a student-athlete to give false testimony to the investigation committee. It was a despicable cover-up attempt that fortunately did not succeed.¹⁹⁰ While the new information was devastating, Baylor was fortunate that the enforcement staff invited Baylor investigators to participate in the interview. But for the cooperation that led to Baylor’s inclusion in the interview, the media would have been briefing the University on this huge story of a failed cover-up attempt, rather than vice versa. Also, Baylor solidified its credibility with several regular media outlets covering the story by quickly informing them of this dramatic development.¹⁹¹ Finally, at the suggestion of the enforcement staff, the advance warning allowed Baylor to re-interview the student to correct his story before the news story broke.

The investigation committee also encountered issues unaddressed by the plan, particularly regarding communication with the media. For credibility and accuracy reasons, the committee undertook to handle its own media relations. A media conference was held on the first Friday of the investigation to reveal that the University had hired outside counsel and to disclose the identities of the committee members and the investigation procedures.¹⁹² While the University president was in charge, the committee decided it was best that

¹⁸⁹ *Id.*

¹⁹⁰ Coach Bliss described the cover-up attempt as “despicable” during the COI hearing. See Baylor Infractions Report—2005, *supra* note 140. He apologized and asked the COI to punish him, rather than Baylor. *Id.*

¹⁹¹ See, e.g., Lee Hancock & Jeff Miller, *Baylor Says Bliss Behind Cover-up; Assistant Taped Coach Telling Others to Lie About Payments*, DALLAS MORNING NEWS, Aug. 16, 2003, at 1A.

¹⁹² Press Release, Baylor University, University Issues Statement on Basketball Investigation (July 25, 2003), <http://www.baylor.edu/pr/news.php?action=story&story=5344>.

he not be constantly linked to the investigation. The president only addressed the media on matters of great importance, such as the resignation of Coach Bliss and the ordering self-imposed sanctions. The committee briefed the media on discoveries of significance and endeavored to give a “heads-up” to the administration when items of interest were likely to appear in the media.

As to our assessment of the projected time commitment involved with conducting the internal investigation and preparing self reports, we were overly optimistic. To be blunt, we were just plain wrong. We made this mistaken assessment as several issues surfaced near the end of the summer of 2003. Due to the timing, we knew that we had five weeks without classes to investigate (so much for a vacation). We mistakenly believed that we could substantially complete the investigative phase during those five weeks. Unfortunately, we soon learned that the issues initially known represented the tip of a very large iceberg. While a great deal was accomplished during the first month, there were serious violations yet to be uncovered, and the new issues to sort through seemed to be a rapidly renewable resource. When classes began, the number of hours available for the committee to investigate diminished and the time commitment shrank. At that point, we had to rely more on outside counsel, particularly in reference to conducting out-of-town interviews. The first phase of the investigation ended in February 2004, and we thereafter filed a self-report.¹⁹³ We learned, the very hard way, not to underestimate the time required to investigate and report the known issues, and that the prospect of uncovering new issues must factor into the decision whether to delegate some investigative responsibilities to outside consultants.¹⁹⁴

In summary, the mere presence of allegations creates an unfavorable environment. That environment, with its outside pressures and media presence, makes time essential and decision-making difficult. Have a plan. Formulate it during peacetime. Who will investigate? Be sure that the investigators are chosen carefully, for the stakes are high and the investigative stage requires a team with integrity, experience, and agility. Who will address the media? Where?

¹⁹³ For details of the self-report, see Jeff Miller and Lee Hancock, *Baylor Adds Sanctions School Inquiry Finds More NCAA Abuses in Basketball Program Under Bliss*, DALLAS MORNING NEWS, Feb. 27, 2004, at 1A.

¹⁹⁴ See Frequently Asked Questions About the NCAA Enforcement Process (Nov. 16, 2005), http://www.ncaa.org/enforcement/faq_enforcement.html (question fifteen related to the length of an infractions investigation). “In many instances, information is developed during a case which leads to the discovery of additional possible infractions, which broadens the scope of an investigation, necessitating more time to fully explore these additional issues.” *Id.*

While a plan will not make the experience pleasant, it sure helps to stand before the media one hour after the news breaks and confidently announce that you have a plan in place. The plan will help you act effectively and efficiently—both traits that will give the institution a stronger presence should the case proceed to the NCAA’s version of trial and appeal.

III. TRIAL AND APPEAL, NCAA STYLE

The NCAA’s version of trial and appeal is different, and the differences will readily appear to most lawyers. Before addressing the formalities and differences, we offer some perspective on procedural differences and the balance between efficiency and accuracy.

For the most part, the days of dueling to resolve disputes are behind us.¹⁹⁵ We often overlook how remarkable it is that even our most contentious disputes are resolved in courtrooms, with the parties accepting the pronouncement of an unarmed judge and considering the dispute as finally settled. When we entrust significant disputes to peaceful, formal adversarial resolution, consistent application of meaningful procedural protections is essential to enhancing both the truth-finding function and the public’s perception thereof. But perfect truth-seeking cannot be the only goal, lest dockets would move so slowly that this system of dispute resolution would crumble.¹⁹⁶ In other words, at some point, if efficiency in resolution always cowered to a more perfect search for the truth, despite diminishing returns, the truth-seeking function would be impaired at the macro level. The resources and ancillary powers of the tribunal and its sovereign also impact what procedures are both available and desirable.

Accordingly, the procedures are not the same in every dispute-resolution setting. Trial procedures differ from those in arbitrations, which differ from those in honor code hearings at a law school. Procedures differ among state and federal courts and even among courts within the same sovereign. Accuracy and fairness are the ideals in each setting, but for the system to be effective and workable, those ideals must be balanced against efficiency and resource limitations. As an obvious example, while the procedural protections available to

¹⁹⁵ Alison L. LaCroix, *To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code*, 33 HOFSTRA L. REV. 501, 501–02 (2004).

¹⁹⁶ Courts have consistently acknowledged the importance of judicial efficiency and have balanced that interest with the judiciary’s role to seek justice. *See, e.g.*, *Stutson v. United States*, 516 U.S. 193, 197 (1996).

a capital-murder defendant might also advance the truth-seeking function of a proceeding to determine the validity of a speeding ticket, extending such protections would be shortsighted and ultimately unworkable.

Adversarial proceedings before the NCAA are not excepted from this balance. While truth-seeking and fairness are of course the primary targets, a limited resource pool and the NCAA's status as an association—not a sovereign entity—limit the procedural protections available and desirable. For example, the NCAA cannot administer oaths or hold persons or institutions in civil or criminal contempt. Similar to how NCAA investigatory procedures differ from pretrial proceedings in the civil and criminal justice systems, the NCAA version of trial and appeal is both similar to and different from the trial-and-appeal process in the courts. In this Section, we will briefly discuss proceedings before the NCAA's tribunal for major-infractions cases, the COI. Then, we will discuss our final topic, the decision whether to appeal.

A. COI Procedures

Assuming the parties have not opted for summary disposition,¹⁹⁷ the COI must hold a hearing to determine the existence of an alleged violation and to impose appropriate penalties.¹⁹⁸ This hearing ensures that imposing punitive sanctions in adversarial proceedings will not be undertaken without notice and an opportunity to be heard.¹⁹⁹ The COI meets “approximately six times per year with each meeting typically lasting two to three days, during a weekend.”²⁰⁰ For simplicity we'll refer to the COI proceeding as the “trial.” The COI will consider the charges presented by the prosecution (the enforcement staff), consider evidence, both documentary and witness testimony, make factual findings, and impose an appropriate sentence if it finds violations.²⁰¹

Many familiar procedural protections available in criminal judicial proceedings apply, in some form, at this trial. For example, pre-

¹⁹⁷ See *supra* Section II.A.

¹⁹⁸ NCAA Manual, *supra* note 14, at Bylaw 32.8.1.

¹⁹⁹ See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416–18 (2003).

²⁰⁰ Frequently Asked Questions About the NCAA Enforcement Process (Nov. 16, 2005), http://www.ncaa.org/enforcement/faq_enforcement.html (question “How does the Process Work?”). The COI often conducts two hearings per meeting. See *id.*

²⁰¹ See *id.*

hearing ex parte presentation of evidence is prohibited.²⁰² A requirement similar to the *Brady* doctrine²⁰³ of presenting all material information applies,²⁰⁴ but instead of imposing the disclosure duty only on the prosecution,²⁰⁵ both the enforcement staff and the accused institution must “ensure that the committee has [the] benefit of full information concerning each allegation, whether such information corroborates or refutes an allegation.”²⁰⁶ Individuals requested to appear have a right to counsel²⁰⁷ and may be excluded during parts of the trial not relating to them.²⁰⁸ Finally, judges with conflicts of interest should be recused, either by self-identification or upon request of the institution.²⁰⁹

Although the trial proceeds less formally than one might in your local federal courthouse, it has the same flavor. The enforcement staff, as the prosecution, presents its opening statement, followed by the defense.²¹⁰ This usually occurs on a count-by-count basis.²¹¹ Then, the enforcement staff puts on its case-in-chief, followed by the defense.²¹² Closing arguments follow, with the institution closing before the enforcement staff.²¹³ Similar to a trial judge, the COI retains discretion to control the exact procedures followed during the hearing.²¹⁴

Although the overall structure is familiar, many of the details, such as notice requirements, admissibility of evidence, examination

²⁰² NCAA Manual, *supra* note 14, at Bylaw 32.8.3; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(b)(7) (2004).

²⁰³ *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963); *see also supra* notes 52–55 and accompanying text.

²⁰⁴ NCAA Manual, *supra* note 14, at Bylaw 32.8.4.

²⁰⁵ *Brady*, 373 U.S. at 87–88.

²⁰⁶ NCAA Manual, *supra* note 14, at Bylaw 32.8.4.

²⁰⁷ *Id.* at Bylaw 32.8.6.

²⁰⁸ *Id.* at Bylaw 32.8.6.3.1; *cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 267 (Vernon 2006) (allowing the court to exclude witnesses from the hearing so they do not hear the testimony of other witnesses).

²⁰⁹ NCAA Manual, *supra* note 14, at Bylaw 32.1.3.

²¹⁰ *Id.* at Bylaw 32.8.7.1.

²¹¹ Telephone interview with Jo Potuto, Chair, NCAA Div. I COI (Jan. 2, 2007). Typically, the enforcement staff numbers the counts early in the process. *Id.* It does not renumber them to put closely related counts together. *Id.* To promote efficiency, the COI proceedings often group related counts together for trial. *Id.* For example, if only counts three and seven involve an assistant coach, the COI might group those counts together so that the coach does not have to sit through several unrelated counts. *Id.*

²¹² NCAA Manual, *supra* note 14, at Bylaws 32.8.7.2–3.

²¹³ *Id.* at Bylaw 32.8.7.1; *cf.* FED. R. CRIM. P. 29.1 (listing the order of closing statements as prosecutor, defendant, then prosecutor again).

²¹⁴ NCAA Manual, *supra* note 14, at Bylaw 32.8.7.

of witnesses, and burdens of proof are different. First, the COI hearing is different from a criminal trial because the institution can be convicted of an offense that was not charged in the charging instrument (i.e., the Notice of Allegations).²¹⁵ The Bylaws provide that the hearing “shall be directed toward the allegations set forth in the Notice of Allegations but *shall not preclude the committee from finding any violation resulting from information developed or discussed during the hearing.*”²¹⁶ This language is potentially troubling—a lawyer can envision scrambling to mount a defense when the prosecution’s last witness raises a new allegation of a major infraction—but the IAC has sensibly interpreted it to not intrude upon an institution’s right to notice and a meaningful opportunity to be heard.²¹⁷ The IAC has determined that the institution must be given notice and a meaningful opportunity to be heard on *all charges*, including those first raised during the hearing.²¹⁸ Thus, while the enforcement staff gets the benefit of essentially amending the indictment to charge new conduct, the COI must control the proceedings to ensure that the timing does not impair the institution’s ability to mount a defense.

Another difference is evidentiary requirements. When lawyers think of evidentiary restrictions, they usually think of fighting with a judge to keep a jury from seeing certain evidence. Obviously, excluding prejudicial evidence during a bench trial is less meaningful, since even if the evidence is excluded, the fact-finder will nevertheless have viewed the prejudicial evidence anyway, if only to determine its inadmissibility. Such is also the case with the COI, where the COI itself determines admissibility, resolves disputed facts, and draws conclusions about whether the determined facts constitute Bylaw violations.²¹⁹ Very few rules of admissibility apply even ostensibly in a COI hearing. The COI can receive all oral and documentary evidence, but may “exclude information that it determines to be irrelevant, immaterial or unduly repetitious.”²²⁰ In another provision, the Bylaws

²¹⁵ *Id.* at Bylaw 32.8.7.5. A prosecutor has limited authority to amend an indictment once the trial begins. UNIF. R. CRIM. P. 231(g)(2). This section expressly applies to information, but is incorporated into the rules regarding an indictment. UNIF. R. CRIM. P. 232(b). The prosecution may only proceed with the court’s permission and may not add additional or different criminal charges or otherwise prejudice the rights of the defendant. UNIF. R. CRIM. P. 231(g)(2).

²¹⁶ NCAA Manual, *supra* note 14, at Bylaw 32.8.7.5 (emphasis added).

²¹⁷ See Kenneth J. Martin, *The NCAA Infractions Appeals Committee: Procedure, Precedent and Penalties*, 9 SETON HALL J. SPORT L. 123, 152 (1999).

²¹⁸ *Id.*

²¹⁹ NCAA Manual, *supra* note 14, at Bylaw 32.8.8.

²²⁰ *Id.* at Bylaw 32.8.7.4.

define admissible evidence in equally vague terms: “The committee shall base its findings on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.”²²¹ Neither of these rules provides a meaningful restriction on admissibility. True admissibility restrictions keep fact-finders from considering potentially persuasive evidence when making a finding.²²² The NCAA Bylaws essentially tell the fact-finder to consider persuasive evidence and discard the rest, thus skipping the step of asking which evidence may be considered for its persuasiveness.

There is, however, one important rule of evidentiary admissibility that applies to COI hearings. The enforcement staff may not present information from anonymous sources to the COI:

[T]he enforcement staff shall present only information that can be attributed to individuals who are willing to be identified. Information obtained from individuals not wishing to be identified shall not be relied upon by the committee in making findings of violations. Such confidential sources shall not be identified to either the Committee on Infractions or the institution.²²³

While the enforcement staff may use the information obtained to advance its investigation (just as a prosecutor may use hearsay evidence to advance her investigation), such information is not admissible in a proceeding before the COI. Of course for this restriction to be meaningful, the enforcement staff must be honorable,²²⁴ for once the information is presented to, and rejected by, the COI, the “jury” has been tainted.

Although the no-anonymous-source rule protects against conviction based on certain kinds of untestable evidence, the best protection—a formal right to confrontation and cross-examination²²⁵—does not apply.²²⁶ Except for accused individuals, few witnesses attend the hearings. Even when they do, the COI does all the questioning.

²²¹ *Id.* at Bylaw 32.8.8.2.

²²² See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.1 (3d. ed. 2003).

²²³ NCAA Manual, *supra* note 14, at Bylaw 32.8.7.4.1.

²²⁴ Your authors are aware of no instances in which the COI has violated this no-presentation rule.

²²⁵ The Supreme Court of the United States has recognized the truth-seeking role that cross-examination plays. “[N]o one experienced in the trial of lawsuits . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth . . .” *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

²²⁶ Martin, *supra* note 217, at 158 (citing News Release, NCAA, *Florida State University Public Infractions Appeals Committee Report* at 14 (Oct. 1, 1996)).

While the institution and enforcement staff may request that the COI ask certain questions, the accused institution has no right to question the witnesses at the hearing. The tone of the IAC's report in the Florida State case²²⁷ suggests that the institution does have the right to *have the appropriate questions asked*, but the Bylaws make clear that the institution has no right to have its lawyers ask the questions. While it would perhaps be difficult to explain to a layperson why this "procedural" matter is a disadvantage, lawyers skilled in cross-examination recognize that proposing general matters of interest to a panel so that the panel can inquire is not an adequate substitute for the credibility-testing crossfire.

The next omission needs attention. The Bylaws do not define a burden of persuasion. A procedure teacher's nightmare. Bylaw 38.8.2 defines the permissible basis of the COI's findings,²²⁸ and Bylaw 32.8.7.4 discusses evidentiary admissibility. But the Bylaws do not require a burden of persuasion.

The burden of persuasion has two components, the risk of non-persuasion and the standard of proof. The risk of nonpersuasion refers to the consequence that flows if a burden of persuasion is not met. The party that bears the burden of persuasion carries the risk of nonpersuasion: if the standard of proof is not met, the issue is decided against the party that bears the burden. The standard of proof refers to the quality of convincingness: "beyond reasonable doubt," "by clear and convincing evidence," and "by the preponderance of the evidence" are all standards of proof.²²⁹

Who bears the risk of nonpersuasion? Does the institution bear the burden of disproving the charges? What is the standard of proof? While all of our interviewees suggested that the enforcement staff has the burden, the Bylaws contain no mention of this burden.

We briefly offer three potential solutions, while leaving the debate about the best choice to another article. First, the Bylaws might define the standard of proof as "by a preponderance of the evidence." Governing most civil cases, this standard simply means "more likely than not," and is a much lighter burden for the plaintiff to bear than the "beyond a reasonable doubt" standard that governs

²²⁷ *Id.*

²²⁸ NCAA Manual, *supra* note 14, at Bylaw 32.8.8.2 ("The committee shall base its findings on information presented to it that is determines to be credible, persuasive, and of a kind on which reasonably prudent persons rely in the conduct of certain affairs.").

²²⁹ Lawrence B. Solum, *Presumptions and Transcendentalism—You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 691–92 (1994).

criminal convictions.²³⁰ While an extended discussion of whether this burden is appropriate is beyond the scope of this Article, it is worth noting that the “preponderance of the evidence” standard might be too low a hurdle for a “prosecution” in which an employee of the institution that makes the rules is the prosecutor in the institution’s tribunal. In that regard, the NCAA proceedings are more analogous to criminal proceedings, in which a prosecutor is an employee of the United States, in a United States court, alleging that the defendant violated United States laws. Second, while the “beyond a reasonable doubt” burden from criminal law is too heavy, perhaps the appropriate balance is “clear and convincing evidence,” which translates simply into a “high degree of probability.”²³¹ This burden would provide a middle ground, accounting for the quasi-criminal nature of the proceeding but also accounting for the limited resources of the Association. Or third, perhaps the burden of persuasion should be “preponderance of the evidence” for all counts, but with a heightened burden accompanying charges of unethical conduct, which carry the most stigma and the harshest penalties.²³²

Regardless of what burden of persuasion is chosen, one should be defined. The COI must determine whether a violation occurred. “Whether” is not a workable standard. If twenty people tell a judge that a car ran a red light, the judge cannot say he knows whether the light was red, but he is pretty sure. Enter the burdens of persuasion, which are necessary devices to determine “facts” based on recreated events from documentary and witness testimony. They tell us just how pretty sure the judge must be.

After the COI hears the case presentation, its members meet privately to resolve disputed facts and to determine whether those facts constitute violations—usually on the Sunday after the weekend hearing.²³³ During deliberations, the COI may determine that new evi-

²³⁰ 2 EDWARD J. IMWINKELRIED, ET AL., COURTROOM CRIMINAL EVIDENCE § 2916 (2005) (noting that juries in a criminal trial must determine the validity of the essential facts beyond a reasonable doubt, even though a lesser burden may apply in limited circumstances); see also 1 LEONARD SAND, ET AL., MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL ¶ 4.01 (2006) (model instruction 4-1).

²³¹ IMWINKELRIED, *supra* note 230, § 2916.

²³² The enforcement staff itself is cognizant of the stigma that attaches to even *allegations* of unethical conduct, and is therefore careful to ensure substantial information exists before advancing such a prosecution. Telephone interview with David Price, Vice President for Enforcement Servs., NCAA & Thomas C. Hosty, Dir. of Enforcement, NCAA (Jan. 3, 2007).

²³³ NCAA Manual, *supra* note 14, at Bylaw 32.8.8; telephone interview with Jo Potuto, Chair, NCAA Div. I COI (Jan. 2, 2007).

dence is needed and request such evidence.²³⁴ If the COI determines that a violation occurred, it imposes the appropriate penalty or, in extreme cases, recommends to the Management Council that the institution's membership be suspended or terminated.²³⁵ Unanimity is not required for any aspect of the determination.²³⁶ Rather, unless fewer than eight COI members are present and voting, only a simple majority is needed to find a violation.²³⁷ The COI then follows the By-law procedures for notifying the institution and public of the COI's action.²³⁸ Then, assuming the worst, the institution must decide whether to appeal the decision to the IAC.²³⁹

B. The Decision to Appeal

Proceedings before the IAC are in many ways analogous to those before an appellate court, such as on issues of timing, preservation of error, grounds for appeal, and scope of appeal.²⁴⁰ While we will leave this comparison for another article, one issue related to the appeals process correlates well with our previous discussion: should the institution appeal?

In determining whether to appeal to the IAC, some obvious considerations arise: What are our chances of winning? How much will it cost? *What* will we win if we win? These considerations must be balanced against one another. For example, if an institution can potentially prevail on reversing a death penalty sentence, the institution might choose to suffer the cost, even for a relatively slight chance of winning. Conversely, if the institution has a strong chance of prevailing, but is appealing only a minor penalty or a slight reduction in a major penalty, perhaps the cost is not worth it.

But looming around this balance is the issue of closure. A major-infractions case often, if not usually, inspires a media frenzy. In Baylor's recent major case, the law-school parking lot (the media headquarters) was consistently occupied by dozens of media vans. In that situation, every development in the case was news. This frenzy accompanies the case until the COI hearing. Then come the findings, including the damaging printed copy of all the bad things that occurred. Very practically, before choosing to appeal, the institution

²³⁴ NCAA Manual, *supra* note 14, at Bylaw 32.8.8.1.

²³⁵ *Id.* at Bylaw 32.8.8.3.

²³⁶ *Id.* at Bylaw 32.8.8.4.

²³⁷ *Id.*

²³⁸ *Id.* at Bylaws 32.9.1–32.9.2.

²³⁹ *See infra* Section III.B.

²⁴⁰ *See* NCAA Manual, *supra* note 14, at Bylaws 32.10.1–11.5.

must ask whether it wants to prolong the frenzy until the IAC hearing and then rinse and repeat when the IAC issues its ruling. Having exhausted considerable funds and time, and having already suffered the recruiting and relational consequences of the major-infractions process, an institution will sometimes determine that, even in the face of a potentially meritorious argument, the most meaningful relief is to remove itself from the sports page. The urge to fight a minor injustice or to be vindicated might yield to the desire for a clear parking lot.

IV. CONCLUSION

With the first allegation of a major infraction, a unique and high-stakes process begins. This process and its procedures are unique, bearing some resemblance to traditional adversarial proceedings in the court system, yet molded to the NCAA's structure and limited powers. Many novel questions arise during this process, of both the can-I-do-this and the should-I-do-this varieties. To answer—indeed, even to identify—many of these questions, a facial review of the NCAA Bylaws provides an incomplete picture. Experience provides a needed perspective.

Our primary goals have been to combine different perspectives in analyzing permissible and desirable options and to suggest where the current system needs improvement. The perspective represented in this Article is not the same one either of us had when we began writing. It evolved as we debated the issues from our different perspectives and as we interviewed the chair of the COI, the president of enforcement, a director of enforcement, and a leading consulting attorney in the field.

The end product, we hope, will appeal to a broad audience. To those in the trenches, we hope to have provided a rough map of how to proceed through the Bylaw maze to avoid missteps, and perhaps more importantly, to help avoid errors of omission that arise when lack of experience serves as a barrier to identifying helpful options. As we sketched the map of what is a permissible and desirable path, we identified problem areas. By analyzing these areas with a fair view of the practical realities, we hope to continue to trigger discussion among experts in the field and those with policymaking authority within the Association.

And hopefully neither we nor our readers will acquire additional, hands-on perspective anytime soon.