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The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review

Josephine (Jo) R. Potuto

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The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review

*Josephine (Jo) R. Potuto**

ABSTRACT

This article takes a comprehensive look at how the NCAA is organized, describes the NCAA committee structure, and explains how the NCAA in its multitude of roles does its work. The article focuses particularly on the NCAA bylaw interpretation process and the policies, procedures, and scope of authority of the enforcement, infractions, and student-athlete reinstatement processes. In its description of the division of responsibility among enforcement, infractions and student-athlete reinstatement, the article emphasizes the independence of each. The article then assesses the functions and structure of the NCAA in light of the prerogatives of a private, multi-state association and the legal framework that informs its operation – primarily agency law, administrative law, constitutional law, and contract law. The article concludes that the NCAA governance structure is about as well conceived to achieve the goals of its members as is possible in an imperfect world.

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The National Collegiate Athletics Association (NCAA) is a private association of four-year post-high-school educational institutions that derives its authority from the member institutions that created it.¹ The NCAA is one of the most talked about and widely known private associations. In fundamental ways, though, it is also the least understood. This Article describes how NCAA Division I (Division I)² operates in its roles as legislator, interpreter, enforcer, and arbitrator of college athletics, and analyzes the legal framework that authorizes and informs its performance of these roles.

1. NCAA CONST. art. 4.02.1, *available at* http://www.ncaapublications.com/Uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf.

2. Division I institutions include the largest and best-funded research universities. They must comply with the Division I philosophy statement and all applicable criteria. NCAA CONST. art. 3.2.1; NCAA BYLAWS art. 20.9. They must sponsor thirteen sports for which the NCAA operates a post-season championship, NCAA BYLAWS art. 20.9.4, and for each of these thirteen sports award at least 50 percent of the maximum number of grants-in-aid permitted, NCAA BYLAWS art. 20.9.1.2. An athletics conference may be a member of the NCAA. NCAA CONST. art. 3.02.3.3. It may be a member of Division I if at least 50 percent of its member institutions meet Division I requirements. NCAA BYLAWS art. 20.1.2.

THE NCAA: WHO?

In all but title, the NCAA is multiples of multiples. It is the member institutions that have ultimate authority for what it does and that are divided into three divisions (I, II, III) and further divided into subdivisions within Division I.³

It is the national office, whose administrators guide, and sometimes set, the substantive agenda; operate programs and activities; and facilitate the work of the various boards, councils, cabinets, and committees. It is the Division I Board of Directors (DI Board of Directors), which is comprised of university presidents and chancellors, and has final authority over all aspects of Division I.⁴ It is the Division I Leadership and Legislative Councils⁵ that review national policy and have prime responsibility for the legislative agenda.⁶ It is the NCAA cabinets, which oversee areas of NCAA responsibility such as championships, amateurism, and academic standards.⁷ It is the various NCAA committees.⁸ These include the Division I Men's Basketball Committee,⁹ which administers the huge and hugely profitable men's basketball championship tournament, as

3. Division I institutions that sponsor football are either in the Football Championship Subdivision (DI FCS) (until 2007 known as DI AA) and play in the NCAA football championship or are in the Football Bowl Subdivision (DI FBS) (until 2007 known as DI A) and play in bowl games. NCAA BYLAWS arts. 20.01.2, 20.1.1.2, 20.4.1.1. Division I institutions without football are known, peculiarly, simply as Division I. DI FBS institutions must sponsor at least sixteen sports, at least eight of which must be women's sports, NCAA BYLAWS art. 20.9.7.1, and, in general, their football teams must play at least 60 percent of their games against other FBS teams and average at least fifteen thousand in paid attendance computed every two years on a rolling basis, NCAA BYLAWS art. 20.9.7.2. Their other teams must be in sports for which the NCAA has a post-season championship, NCAA BYLAWS art. 20.9.4, and meet minimum contest requirements, NCAA BYLAWS art. 20.9.4.3. A DI FBS conference must have at least eight DI FBS institutions. NCAA BYLAWS art. 20.02.6. The six equity conferences within DI FBS (Big 12, Big 10, Big East, PAC-10, SEC, ACC) operate the Bowl Championship Series (BCS).

4. NCAA CONST. arts. 4.01.1 (Structure), 4.2 (DI Board of Directors), 4.2.2 (Duties and Responsibilities); *see also* NCAA CONST. fig. 4-1 (DI Governance Structure).

5. NCAA CONST. arts. 4.5.2 (Leadership Council; Duties and Responsibilities), 4.6.2 (Legislative Council; Duties and Responsibilities).

6. NCAA councils, as well as cabinets, and committees, are comprised of faculty, administrators from member institutions, usually but not exclusively from athletics, and administrators from athletics conferences. NCAA staff serve as liaisons; they are not members.

7. NCAA BYLAWS arts. 21.7.5.1 (Academics Cabinet), 21.7.5.3 (Amateurism Cabinet), 21.7.5.5 (Championships/Sports Management Cabinet).

8. NCAA CONST. art. 4.9 (Committees/Cabinets). *See* NCAA BYLAWS art. 21 for a complete list of cabinets and committees and their areas of responsibility.

9. NCAA BYLAWS arts. 21.7.5.5.3 (Committees with Championships Administration and Sports Issues Responsibilities), 21.7.5.5.3.6 (Men's Basketball Committee), 31.1 (Administration of NCAA Championships).

well as other committees that monitor team student-athlete academic performance, initial and continuing eligibility of individual student-athletes, and the validation of academic records of prospective student-athletes.¹⁰ The Student-Athlete Reinstatement Committee (Reinstatement Committee) handles reinstatement to eligibility of student-athletes rendered ineligible by violations of NCAA rules.¹¹ The Division I Committee on Infractions (COI) hears and decides cases of institutional responsibility for major violations.¹²

Thus, to reference “the NCAA” as encompassing all boards, councils, cabinets, and committees in all three divisions and subdivisions, as well as national office staff, is to reach a level of imprecision equivalent to citing “the government” as covering the executive, legislative, and judicial branches of federal and state government. This imprecision fosters confusion about the NCAA and how it conducts business—confusion that the media and the public aggravate when they refer to “the NCAA” to mean only the Division I Football Bowl Subdivision (DI FBS). In turn, discussion of the “DI FBS” focuses predominantly on football and men’s basketball. The result is that the NCAA is often seen through the prism of two sports that in fundamental ways are unrepresentative of college athletics.¹³ Problems in these sports—whether widespread or sporadic, real, exaggerated, or simply perceived—constitute a familiar list: bloated coaches’ salaries, undue donor influence, acceleration of commercialization, criticism that student-athletes are not really students and/or that they are exploited, and overall perceptions that college athletics is corrupting the academic missions and integrity of colleges and universities.¹⁴ No doubt the DI FBS is a major player in the NCAA; its central status in Division I is reflected in its voting

10. NCAA BYLAWS arts. 14.1.2.1 (High School Review Committee), 14.1.2.2 (Student Records Review Committee), 14.3.1.5 (Initial-Eligibility Waivers), 14.4.3.6 (Waivers of Progress-Toward-Degree Rule), 23.1 (Committee on Academic Performance).

11. NCAA BYLAWS arts. 14.11.1 (Obligation of Member Institution to Withhold Student-Athlete from Competition), 14.11.2 (Ineligibility Resulting from Recruiting Violation), 14.12 (Restoration of Eligibility).

12. Major violations are all those violations not characterized as secondary. For a definition of secondary violations, see *infra* text accompanying note 130.

13. Football and men’s basketball are revenue producing; college play is the prime path to professional careers.

14. See, e.g., Frank G. Splitt, *Time for accountability in Sports: Corrupt Collegiate Athletics Overshadow Faltering Academic Mission*, NAT’L CATHOLIC REP., Nov 14, 2008.

priority on the DI Board of Directors and the Leadership and Legislative Councils,¹⁵ but it is not the whole enchilada.

THE NCAA: WHY?

Each institution is sole captain of its academic ship. It charts its academic mission through admissions standards; majors and degrees offered; standards for faculty hiring, promotion, and tenure; and the constituencies it serves. Each institution is also in charge of the rest of the ship's rigging, including campus life and student well-being. Competition among universities is a joint effort. The NCAA exists to do what no institution can do on its own: administer championships and regulate athletics competition so as to ensure a level playing field. NCAA bylaws and policies cover a myriad of substantive areas as well as competition rules and scheduling. They even cover academic matters—the bedrock, non-delegable responsibility of each institution. There are compelling reasons why this is so.

Off-Field Effects

NCAA policies and conduct by athletes off the field affect competition on the field. Were there no rules prohibiting payment to athletes,¹⁶ well-heeled institutions would have a decided recruiting advantage. Were there no rules restricting play and practice time,¹⁷ coaches willing to require student-athletes to spend all waking hours in athletics-related activities would have a competitive edge. Were there no rules setting up an enforcement and infractions system to find and punish cheaters,¹⁸ unscrupulous coaches and staff would have a field day.

15. NCAA CONST. arts. 4.2.1 (Board of Directors; Composition), 4.5.1 (Leadership Council; Composition), 4.6.1 (Legislative Council; Composition).

16. NCAA BYLAWS art. 16.02.3 (Extra Benefit). An extra benefit is any special arrangement by which a student-athlete, relative, or friend gets a benefit not authorized in NCAA bylaws. *Id.* The extra benefit rule requires that student-athletes be treated in the same way that students not athletes are treated. *Id.*

17. See NCAA BYLAWS art. 17 for coverage of play/practice requirements. During the season, a student-athlete is limited to four hours per day and twenty hours per week of mandatory countable athletically related activities. NCAA BYLAWS art. 17.1.6.1 (Daily and Weekly Hour Limitations – Playing Season). For the definition of countable activities, see NCAA BYLAWS 17.02.1.

18. *Id.* arts. 19 (Enforcement), 32 (Enforcement Policies and Procedures).

Diversity, Commonality, and Academic Bylaws

There is great diversity among Division I institutions. They are public and private, non-sectarian and religiously affiliated, large land-grant universities and small liberal arts colleges. Some have big budgets, influential alumni, and fat-cat donors. Others are urban commuter colleges with small budgets and a mission to serve the economically disadvantaged. Some offer extensive graduate and professional programs, others exclusively undergraduate education.

Despite their diversity, Division I institutions also share certain characteristics and responsibilities that help to explain the breadth of what the NCAA does. First, the institutional obligation to abide by NCAA bylaws neither is nor can be an abdication of an institution's ultimate responsibility to administer its athletic program.¹⁹ Second, institutions can neither cede their responsibility over things academic nor join an association perceived to discount academics. Third, the NCAA is the "public face" of college athletics. Because what it does—and what it is perceived to do—has impact at home, institutions need an association identified with student-athlete well-being²⁰ that upholds sportsmanship and ethical conduct. Finally, whatever the differences between and among institutions, within each there is common academic ground and a student population with similarly situated academic profiles.

Scope and Nature of Academic Bylaws

Coaches are under great pressure to win, particularly in the Division I FBS revenue-producing sports. They are hired, compensated, and fired based on their win-loss records. Because their teams play under competition rules that are uniform across institutions, coaches understandably want academic decisions regarding admissions and competition eligibility to be decided the same way. In the face of institutional diversity, uniformity of admissions and academic decisions can be achieved only by an untenable prioritization of athletics over academic interests.

To achieve uniformity of admissions criteria, institutions could differentiate between student-athletes and students who are not

19. The first NCAA Principle is that an institution must control its athletics program. NCAA CONST. art. 2.1. NCAA fundamental policy is that athletics competition must be part and parcel of the educational system. *Id.* art. 1.3.1.

20. *Id.* arts. 2.2-2.4 (Student-Athlete Well-Being, Gender Equity, and Sportsmanship and Ethical Conduct), 2.6 (Nondiscrimination), 2.9 (Amateurism).

athletes to admit the former under NCAA standards that at most institutions are less rigorous than institutional ones. Admissions criteria, although imperfect, are nonetheless predictors of future academic performance.²¹ In addition to fairness issues inherent in wholesale differential admissions treatment, then, preferences pre-admission may mean failures post-admission if student-athletes are graded on standards applied even-handedly both to them and to students not student-athletes. If, by contrast, academic standards are ignored for student-athletes post-admission, then they may receive passing grades for failing work,²² an exploitation of student-athletes and a subversion of academic integrity as well.

A second alternative would have institutions use NCAA initial eligibility standards in admissions decisions for students who are not athletes as well as for student-athletes. This alternative cedes admissions standards to an outside entity—and an athletics one at that—with the result that universities forfeit their core responsibility for academic matters.²³

Institutional diversity and resource disparities make uniformity across institutions difficult to achieve. Maintaining an even playing field requires some level of uniformity in academic requirements. The totality of NCAA bylaws is expected to leave unfettered each institution's autonomy to delineate its academic mission and yet, at the same time, also (1) uphold academic primacy,²⁴ (2) avoid giving a wholesale competitive edge to institutions that trade core academic values for athletics success, and (3) assure that the public face of college athletics signals neither disinterest in or, worse, disdain for student-athlete academic well-being. NCAA bylaws

21. Wayne J. Camera & Gary Exhternacht, *The SAT I and High School Grades: Utility in Predicting Success in College*, RES. NOTES, (July 2000), available at http://professionals.collegeboard.com/profdownload/pdf/rn10_10755.pdf; see also, Why SAT, SAT Website, <http://sat.collegeboard.com/why-sat> (last visited Mar. 25, 2010).

22. See *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992). In four years at Creighton, Ross, a basketball student-athlete, completed ninety-six credits of academic work with a D average; many of these credits did not count toward the 128 required to graduate. *Id.* at 412. Ross left Creighton with fourth grade language skills and seventh grade reading skills. *Id.* He then took a year of remedial high school education at Creighton's expense. *Id.*

23. Advocates for student-athlete admissions based on NCAA standards focus on what now are minimum standards. Competition equity also could be achieved by raising NCAA academic standards to equal those at institutions with high admission and degree-progress requirements. This alternative also interferes with institutional academic autonomy, but this time hits a different subset of member institutions. It also limits access to the economically and culturally disadvantaged and to minorities historically under-represented in higher education. See *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999).

24. NCAA CONST. art. 2.5 (Sound Academic Standards).

resolve these tensions imperfectly, but in the only way possible, through the establishment of minimum academic standards for admissions and progress-toward-degree.²⁵ These standards do not displace institutional ones; the latter always trump. A student-athlete inadmissible under institutional standards cannot attend that institution no matter that she is academically eligible for NCAA competition. A student-athlete academically ineligible for NCAA competition but admissible under institutional standards may attend that institution but may not compete.²⁶

SCOPE OF ARTICLE

This Article describes the Division I governance structure and the law governing private associations in their adoption, interpretation, enforcement, and adjudication of bylaws, practices, and policies. Part I discusses the legal parameters that govern associations such as the NCAA and the judicial deference accorded to their policies and decisions. Part II describes the NCAA's bylaw interpretation process by which the scope and meaning of bylaws are supplemented through action of the Legislative Interpretation Committee and NCAA staff. The focus of Part III is on the NCAA waiver process, which tempers the bright-line operation of bylaws to respond to unusual circumstances. Part IV returns to the law of private associations to examine the opportunities of NCAA non-members, including student-athletes and staff at member institutions, to challenge NCAA policies and decisions. Part V makes clear the specific functions and scope of responsibility of the COI, the Reinstatement Committee, and NCAA enforcement staff, whose work is the source of most litigation by non-members. Part VI concludes that the infractions, reinstatement, and enforcement processes are about as well-conceived to achieve the goals of NCAA member institutions as can be expected in an imperfect world but also includes several recommendations designed to improve implementation of these goals.

25. For information as to what is required, see NCAA BYLAWS arts. 14.4.1 (Progress-Toward-Degree Requirements) and 14.4.3 (Eligibility for Competition).

26. For NCAA initial eligibility standards, see NCAA BYLAWS 14.3.1.1.2 (Initial-Eligibility Index).

I. MULTISTATE ASSOCIATIONS AND DEFERENTIAL JUDICIAL REVIEW

The NCAA is a private association.²⁷ It is big, national, the focus of media and public attention, and scrutinized by legislators,²⁸ but nonetheless private. The significance of this fact is sometimes ill-understood in concept and is repeatedly misunderstood in its practical consequences. Simply put, a private association, like a private actor, is free to choose.

Private actors make choices from a panoply of available options. Their choices are not displaced because society as a whole believes (perhaps rightly) that other choices would be wiser or would produce more efficient results. Party choice also is affected by contract. Whether a simple, one-time interaction or a multi-layered, long-term agreement, a contract is an exchange of promises by which parties create mutual rights and duties, including how, under whose law,²⁹ where,³⁰ and by whom a contract is to be enforced.³¹ Courts apply contract terms consistent with party expectations.³² They look first to party intent to resolve ambiguous contract terms, then to the course of party conduct, and, finally, to usages of the trade.³³ Party

27. *NCAA v. Tarkanian*, 488 U.S. 179 (1988). Because it is a private actor, the NCAA is not obliged to meet constitutional minimum due process standards. Even so, NCAA processes would pass constitutional muster. *See id.*

28. *E.g.*, Hearing on Due Process and the NCAA Before the Subcomm. on the Const. of the H. Comm. on the Judiciary, 108th Cong. 35-42 (2004), *available at* <http://judiciary.house.gov/Legacy/95802.pdf>; *see also* Senate Finance Committee Hearing, December 5, 2006 (NCAA tax-exempt status); *Top Grades Without the Classes*, N.Y. TIMES, Dec. 20, 2006 (describing House Ways and Means Committee request for NCAA to justify its tax exemption consistent with its "cash-consuming, win-at-all costs athletics departments"); Brad Wolverton & Paul Fain, Senate Hearing Will Focus on Rising Tuition Costs and Potential Tax Abuses by Colleges, CHRON. HIGHER ED., Nov. 17, 2006 (describing Senate Finance Committee Hearing on NCAA Tax-Exempt Status).

29. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971); *see, e.g.*, *Pritchard v. Norton*, 106 U.S. 124 (1882); *see generally*, 2 ERNST RABEL, 2 THE CONFLICT OF LAWS: A COMPARATIVE STUDY 376-84 (1947).

30. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

31. *See, e.g.*, *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57 (2000); *see generally* E. ALLAN FARNSWORTH, CONTRACTS (4th ed. 2004) [hereinafter FARNSWORTH]. Courts follow contract terms unless bargaining was not at arms length, a claim unavailable to association members. *See id.*

32. RESTATEMENT (SECOND) OF CONTRACTS § 18 cmt. c (1981).

33. The parties even may agree that contract terms be interpreted according to trade association rules or by reference to the customs of a particular trade. *See, e.g.*, *London Assurance*

autonomy is not unbounded, however. Contracting parties may not agree to commit crimes or torts, and contracts must comply with federal or generally applicable state law,³⁴ as well as the public policies of fair dealing and good faith.³⁵

Formal associations, such as the NCAA, are fundamentally big contracts.³⁶ They develop not by happenstance but by a purposeful decision to pursue common goals collectively. The NCAA is a multi-subject contract entered into by more than a thousand members (335 in Division I alone).³⁷ NCAA members articulate the association's purposes and decide how it will operate, who may join, the rules governing what members are required to do, and the rules describing what is prohibited.³⁸ NCAA members must follow rules and policies collectively adopted; bylaws have direct impact only on them; and only members can change, repeal, or request waivers from them. An obligation of NCAA membership is that member institutions must monitor the conduct of those for whom they are responsible and sanction them for violations. In that way, staff members and student-athletes can be, and are, affected by NCAA bylaws. But the effect of

v. Companhia de Moagens do Barreiro, 167 U.S. 149 (1897); *Boole v. Union Marine Ins. Co.*, 198 P. 416 (Cal. Ct. App. 1921).

34. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). Generally applicable laws arise in a host of areas—among them, non-discrimination statutes, mandatory terms of employment such as minimum wages, maximum interest rates that may be charged in time-purchase agreements, and restraints of trade. If a particular NCAA bylaw operates as a restraint of trade under the federal antitrust laws, then a member institution may sue the NCAA on this basis. *See, e.g., NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

35. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205; Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); RESTATEMENT (SECOND) CONTRACTS § 205. For a case involving the NCAA where a court made explicit that review of bylaws was limited to assuring good faith and fair dealing, see *Oliver v. NCAA*, No. 2008 CV 762, 2009 WL 4827828, (Ohio Ct. Com. Pl. Feb. 2, 2009) (unpublished opinion). Courts have even upheld contract terms that transgress the tenets of good faith and fair dealing when the result is anticipated in explicit contract language. *E.g., VTR, Inc. v. Goodyear Tire & Rubber Co.*, 303 F. Supp. 773 (S.D.N.Y. 1969).

36. Alternatively, one may argue that the relationship between members of a private association and the association that they create is not contractual. In that case, scrutiny of provisions would be even more limited, restricted to assuring they were created according to associational rules and enforced as defined in those rules.

37. *See, e.g., Cal. Dental Ass'n v. Am. Dental Ass'n*, 590 P.2d 401 (Cal. 1979); *Jorgensen Realty, Inc. v. Box*, 701 P.2d 1256, 1258 (Colo. App. 1985).

38. The Supreme Court has stated clearly that a private association is the authoritative voice on the meaning of its rules and policies and that neither legislature nor court may substitute their judgment for that of the association. *Boy Scouts*, 530 U.S. at 653. The Court will look, however, to assure that an interpretation was not contrived to avoid what would otherwise be the imposition of law. *Id.* at 656.

the bylaws on them, no matter how dramatic, is achieved indirectly through institutional enforcement.³⁹

The totality of NCAA bylaws is akin to a legal system where shared normative and cultural understandings cover a wide range of subject areas with multi-varied and complex interrelationships. NCAA conduct bylaws regulate what member institutions, through staffs, boosters, and student-athletes, must, may, and may not do. Conduct bylaws govern recruiting, academic eligibility to compete, team academic performance, financial aid, awards and benefits, competition and championships, play and practice limits, amateurism, and commercialization.⁴⁰ Other bylaws structure boards, councils, cabinets, and committees. Still other bylaws vest committees with responsibility to interpret and enforce conduct bylaws, grant waivers from them, and sanction their violation (“conduct bylaw committees”). How and why the system works as it does is self-evident to those within it, but it is sometimes anything but to those outside it.

One example is illustrative: a basketball prospect recruited by Ohio State was ineligible for NCAA competition on two separate grounds involving two different violations: (1) he had played on a professional team⁴¹ and (2) Jim O’Brien, the then-head men’s basketball coach, had given him \$6,000.⁴² Under NCAA bylaws, ineligible students may request restoration of eligibility from the Reinstatement Committee. Ignorant of the violation involving the \$6,000, Ohio State sought the player’s reinstatement, focusing solely on the bar to eligibility that his professional team play created. When Ohio State learned about the \$6,000 payment, it fired O’Brien. What

39. See *supra* notes 4-12.

40. NCAA BYLAWS arts. 12 (Commercialization and Amateurism), 13 (Recruiting), 14 (Eligibility: Academic and General Requirements), 15 (Financial Aid); 16 (Awards, Benefits and Expenses for Enrolled Student-Athletes), 17 (Playing and Practice Seasons), 18 (Championships and Postseason Football), 23 (Academic Performance Program).

41. It was uncontroverted that when he received the money he already had signed a contract, played on a professional team, and was paid by the team. NCAA BYLAWS art. 12.1.2. An athlete loses amateur status when he or she

(a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport; . . . (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received; . . . (e) Competes on any professional athletics.

Id.

42. NCAA D1 COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 256 (Mar. 10, 2006) (The Ohio State University). O’Brien’s claim, rejected by the COI, was that the \$6,000 payment was not a violation because the athlete already was ineligible. *Id.* Institutional staff and boosters may not give cash to a prospect. NCAA BYLAWS art. 13.2.1 (Offers and Inducements).

followed was an infractions case⁴³ and also a breach of contract lawsuit that O'Brien brought against Ohio State.⁴⁴

The trial judge read the employment contract between O'Brien and Ohio State to mean that Ohio State anticipated retaining O'Brien as head coach even if he committed a major violation bearing on prospect eligibility and then failed to disclose what he had done at the very time Ohio State pursued a reinstatement request for the prospect.⁴⁵ Within college athletics, the way in which the judge interpreted the employment contract between O'Brien and Ohio State was inconceivable for an institution concerned about institutional control and its standing within the NCAA and among member institutions.

Of major significance to the application of contract principles to the NCAA is that the association is multi-state. Although federal law may intervene to revise or supplant party agreement (so long as the agreement does not infringe on a constitutionally protected right such as freedom of speech), state law may not be enforced against a multi-state association unless the law also (1) is generally applicable, (2) is not targeted at bylaws and policy decisions of the multi-state association, (3) is consistent with the strictures of the Dormant Commerce Clause, and (4) imposes no extra-territorial effects.⁴⁶ In such instances, there will be hard cases with respect to whether a state statute is generally applicable or impermissibly aimed at substituting state policy for that of a private association,⁴⁷ but the black letter rule is clear.

43. NCAA DIV. 1 COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 256. The Infractions Appeals Committee reversed aspects of the COI decision on a finding that some violations were time-barred. NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS REPORT NO. 256 (April 13, 2007). On May 9, 2007, the COI issued a Supplemental Report to Infractions Report No. 256.

44. *O'Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36 (Ohio Ct. Cl. 2006).

45. *O'Brien*, 130 Ohio Misc. 2d at 40 (“[T]he court is persuaded, given the contract language, that this single, isolated failure of performance was not so egregious as to frustrate the essential purpose of that contract and thus render future performance by defendant impossible.”).

46. Nor may members of a private association evade prosecution if their association has a criminal purpose. 18 U.S.C.A. § 1961 (West 2009).

47. The impact of federal rules and statutes on the NCAA raises different issues. If Congress were to enact a statute purposefully and specifically directed to NCAA processes, the statute would not threaten uniformity. The question would be whether the statute is a constitutional exercise of a specifically enumerated power under Article I, Section 8, of the United States Constitution. The most likely claimed source of congressional power would be the Commerce Clause. When what is governed is neither a channel nor instrumentality of commerce, the test for deciding whether Congress acts pursuant to this power is whether the (economic) activities in the aggregate have a substantial economic effect on interstate commerce. *Gonzalez v. Raich*, 545 U.S. 1 (2005); *United States v. Morrison*, 529 U.S. 598 (2000).

An association's bylaws and policies rarely are adopted unanimously; in associations, the majority necessarily rules. If an association member disagrees with a collective decision, the choices are to comply, resign from the association, or try to forge a new majority to reverse or change the decision.⁴⁸ Judicial review, particularly of a multi-state association such as the NCAA, should be limited to assuring that bylaws and policies are duly adopted and that conduct bylaws are enforced consistent with party expectation and relevant laws. At the very least, judicial review may be no broader than that applied to contracts—i.e., good faith and fair dealing.⁴⁹ If a court denies effect to a bylaw duly adopted pursuant to an

48. A union member objecting to terms in a collective bargaining agreement has these same choices. *E.g.*, Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984); George Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 897 (1975); Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351 (1984).

49. This scope of review has been applied by courts in cases specifically involving the NCAA. *See, e.g.*, *Cole v. NCAA*, 120 F. Supp. 2d 1060, 1071-72 (N.D. Ga. 2000); *Hall v. NCAA*, 985 F. Supp. 782, 784 (N.D. Ill. 1997); *NCAA v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001); *Bloom v. NCAA*, 93 P.3d 621, 624 (Colo. App. 2004). It has been applied in sports cases not involving the NCAA. *See, e.g.*, *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 542-43 (7th Cir. 1978); *Straub v. Am. Bowling Cong.*, 353 N.W.2d 11, 13 (Neb. 1984); *Tenn. Secondary Sch. Athletic Ass'n v. Cox*, 425 S.W.2d 597, 602 (Tenn. 1968). It has also been applied to other private associations. *See, e.g.*, *Angland v. Doe*, 263 F.2d 266, 268 (D.C. Cir. 1958); *NAACP v. Golding*, 679 A.2d 554, 559 (Md. 1996); *Rutledge v. Gulian*, 459 A.2d 680 (N.J. 1983); *Cal. Dental Ass'n v. Am. Dental Ass'n*, 590 P.2d 401 (Cal. 1979); *Grand Lodge, Knights of Pythias v. Taylor*, 84 So. 609 (Fla. 1920); *Levant v. Whitley*, 755 A.2d 1036, 1043 n.11 (D.C. 2000); *Van Valkenburg v. Liberty Lodge No. 300*, 619 N.W.2d 604, 607 (Neb. Ct. App. 2000); ; *Anderson v. Enter. Lodge No. 2*, 906 P.2d 962, 966 (Wash. Ct. App. 1995); *Reed v. Quatkemeyer*, 647 So. 2d 172, 173 (Fla. Dist. Ct. App. 1994); *Putka v. First Catholic Slovak Union*, 600 N.E.2d 797, 802 (Ohio Ct. App. 1991); *Jorgensen Realty, Inc. v. Box*, 701 P.2d 1256, 1258 (Colo. App. 1985); *Dayan v. McDonald's Corp.*, 466 N.E.2d 958 (Ill. App. Ct. 1984); *Bonneville Props., Inc. v. Simons*, 677 P.2d 1111, 1113 (Utah 1984); *Nat'l Grange of the Order of Patrons of Husbandry v. O'Sullivan Grange No. 1136*, 667 P.2d 1105 (Wash. Ct. App. 1983); *Moran v. Vincent*, 588 S.W.2d 867, 870 (Tenn. Ct. App. 1979); *Crutcher v. Order of Ry. Conductors of Am.*, 132 S.W. 307 (Mo. Ct. App. 1910); *Lone Star Lodge v. Cole*, 131 S.W. 1180 (Tex. Civ. App. 1910). Only in *California Dental* did a court fail to uphold the prerogative of the private association, holding that the association "plainly contravenes" its own explicit bylaw language. *See Cal. Dental Ass'n*, 590 P.2d at 403. In most jurisdictions, moreover, a member may make no claim for relief from an association's bylaws unless he also has injury to a legally cognizable property interest. *See id.*; *see also NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984); *Bd. of Regents v. NCAA*, 561 P.2d 499 (Okla. 1977). Courts consistently have held that student-athletes have no cognizable property interest in competition eligibility. *See, e.g.*, *Graham v. NCAA*, 804 F.2d 953, 955 (6th Cir. 1986); *Colo. Seminary v. NCAA*, 570 F.2d 320, 321 (10th Cir. 1978); *Bloom*, 93 P.3d at 624; *NCAA v. Yeo*, 171 S.W.3d 863, 865 (Tex. 2005) (stating that "the overwhelming majority of jurisdictions" find no due process constitutional right of students to participate in college athletics competition); *Hart v. NCAA*, 550 S.E.2d 79, 86 (W. Va. 2001).

association's rules⁵⁰ in favor of a competing position that the litigating member likes better, then the court has substituted the predilection of the minority for the decision of the majority.⁵¹ The result is anti-majoritarian and fundamentally disintegrative.

The anti-majoritarian and disintegrative effect is exacerbated in a multi-state association. If one state by statute or court decision may change or nullify a bylaw or policy of such an association, then its very existence is jeopardized. It could adjust its rules or policies in all states to follow the lead of the one state, thereby ceding its authority and prerogatives. Alternatively, it could forego critical uniformity and administer different rules state to state.⁵² This option likely is untenable for any multi-state association, and particularly lethal for the NCAA, whose prime job is to maintain a level playing field for athletics competition. As the Supreme Court acknowledged, "the integrity of the NCAA product cannot be achieved except by mutual agreement."⁵³ Mutual agreement produces uniform bylaws to be uniformly applied, a uniformity aptly described as "the heart of the NCAA."⁵⁴

In the context of the Dormant Commerce Clause, the Supreme Court has long recognized that uniformity is critical to the operation of instrumentalities in interstate commerce and has overturned state statutes that effectively regulate conduct in other states.⁵⁵ Dormant

50. If an association fails to follow its own procedures in adopting a rule or articulating a policy or practice, then a member may challenge that rule in Court. The basis of the challenge, however, is not an attack on the scope or meaning of a rule but a claim that the rule is invalid because of procedural defects in its adoption.

51. As with any legislative or quasi-legislative process, the fact that NCAA legislation was duly-adopted does not mean that its adopters acted with knowledge or made the best policy choice. As with any legislative or quasi-legislative process, institutions vote for different reasons. A legislature speaks with one voice but not all legislators are propelled by the same motive. If judicial deference to legislative or quasi-legislative decisions required orderly processes, uniformly knowledgeable voters, or unanimity of motive, there would never be deference.

52. A private association also may expel association members resident in a state that seeks to impose its policy choices on it. For a period of time, the California legislature engaged in such brinksmanship when considering the enactment of a student-athlete's bill of rights. *See Bill proposes to seek UC withdrawal from NCAA*, DATELINE UC DAVIS, June 27, 2003, http://www.dateline.ucdavis.edu/dl_detail.lasso?id=6548. Several sections of the bill were in direct conflict with NCAA fundamental principles and bylaws, including pay for play. *See id.*

53. *NCAA v. Bd. of Regents*, 468 U.S. 85, 85 (1984)

54. *NCAA v. Miller*, 10 F.3d 633, 640 (9th Cir. 1993).

55. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Edgar v. Mite Corp.*, 457 U.S. 624 (1982); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *Bibbs v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The Nevada Supreme Court overturned a statute intended to impose certain

Commerce Clause cases are directed at state legislative and executive action, not courts. A court that refuses effect to an NCAA bylaw purports to implement the NCAA's meaning as understood by its members, not to implement state policy as do the statutes in the Dormant Commerce Clause cases.⁵⁶ But the difference between legislative and court action is more semantic than actual. Court decisions bypassing the NCAA's interpretation of its bylaws either change their meaning or force NCAA re-adoption of bylaws to restate intent. They give litigating plaintiffs a result under NCAA bylaws different from that intended by the member institutions that adopted them. Sequentially, and more slowly than legislative action, court decisions also breed significant disuniformity.

A corollary to the right of private associations to adopt the rules by which they are governed is the right to control their enforcement and interpretation.⁵⁷ The authoritative voice on a rule's scope and meaning is the entity an association designates for that purpose, but in the routine operation of an association, not every question can be submitted for interpretation. An association's authoritative voice also necessarily includes the shared understanding of members and what is discerned from the everyday implementation of policy by those charged with implementation (in other words, the course of dealing and usage of the trade).

Private associations are not unique in controlling the scope and meaning of the rules they create. As a general rule, those responsible for the enactment of statutes and adoption of rules also are the authoritative source of their meaning.⁵⁸ In the hearing, rules-adoption, and interpretation processes, deference to the drafter is the order of the day.

procedural requirements on NCAA enforcement policies and infractions hearings due to its adverse effect on interstate commerce. *Miller*, 10 F.3d at 633.

56. Unless, that is, it finds that the bylaw offends the implied duties of good faith and fair dealing as delineated by state contract law.

57. See *infra* text accompanying notes 93-108.

58. See *infra* text accompanying notes 93-108.

II. THE LEGISLATIVE INTERPRETATION COMMITTEE AND INTERPRETATIONS PROCESS

It is often said that “[t]here are two things you don’t want to see being made—sausage and legislation.”⁵⁹ The Division I legislative process involves 335 active member institutions and thirty-one conferences.⁶⁰ Drafting and adoption of legislative proposals are done by those full time at universities or in the athletic enterprise, but far from full time in their investment and focus on NCAA legislation.⁶¹ In every yearly legislative cycle, proposals are submitted with little or no contemporaneous information about other proposals. There may be several proposals submitted on the same subject. Even when proposals cover the same subject with similar outcome and rationale, they may be variations on a theme. Later in the legislative cycle, amendments may be offered to some, but not all, of the same-subject proposals.⁶² Once adopted, proposals are squeezed into the manual of existing bylaws. Because they were written at different times, by different people, their language may be different from, or in part repetitive of, language of existing bylaws.⁶³

One need not embrace the extremes of nihilism or deconstructionism to acknowledge that language is not self-defining. All legal systems have mechanisms to provide controlling interpretations when the language of a statute or rule is challenged as insufficiently clear in application. Outside the NCAA model, a court typically is the adjudicative body that decides the meaning and scope of statutes and rules, and it does so⁶⁴ in the concrete circumstances of a litigated case.⁶⁵

59. See Fred R. Shapiro, *Familiar Words from Unfamiliar Speakers*, N.Y. TIMES, July 27, 2008, at MM16. The quote comes from a quip by John Godfrey Saxe, though it is frequently attributed to German Chancellor Otto von Bismarck.

60. E-mail from Stacey Osburn, Associate Director for Public and Media Relations, NCAA, to Josephine R. Potuto, Richard H. Larson Professor of Constitutional Law, University of Nebraska-Lincoln College of Law (Nov. 10, 2009, 10:10 EST) (on file with author).

61. See NCAA Bylaw Figure 5-1 (NCAA Division I Legislative Process) and Figure 5-2 (Legislative Activity Calendar for 2009-10).

62. NCAA Bylaw 5.3 (Amendment Process); NCAA Bylaw Figure 5-1 (NCAA Division I Legislative Process) and Figure 5-2 (Legislative Activity Calendar for 2009-10).

63. Compare NCAA CONST. arts. 6.4.2 (Representatives of Athletics Interests), 6.4.2.2 (Retention of Identity as “Representative”), with NCAA BYLAWS arts. 13.02.13 (Representative of Athletics Interests), 13.02.13.1 (Duration of Status).

64. The typical adjudicative body is a court. For administrative rules, the authoritative voice belongs to the hearing officer. In arbitrations, the arbitrator’s decision controls.

65. The ultimate authority on the scope and meaning of a statute is the legislature that enacted it. What a judicial opinion controls is the scope and meaning of a statute at a moment in

An unusual aspect of the NCAA model is that the body that resolves cases under the bylaws—the COI—is not the same body that renders authoritative interpretations. Instead, the interpretative function vests in the Board of Directors and Legislative Council, with operational authority to bind members in the Legislative Interpretation Committee⁶⁶ and the staff of the Academic and Membership Affairs Group (Membership Affairs Group).⁶⁷ Although this separation of adjudicative and formal interpretive functions is topsy-turvy compared to the traditional adjudicative model, it is integral to NCAA governance.⁶⁸ In the NCAA world, the bulk of NCAA compliance-related work is done on the campuses by institutional compliance staff.⁶⁹ While investigations of potential major infractions are certainly not an incidental aspect of the institutional control obligation of member institutions, they by no means are the bread and butter of the compliance job. Institutional compliance staff spend most of their time educating on permissible conduct and deciding whether contemplated action complies with NCAA rules. They regularly interact with the Membership Affairs Group. In matters of bylaw interpretations, the Membership Affairs Group reports to and takes its marching order from the Legislative Interpretation Committee. Staff interpretations and the Legislation Interpretation Committee are critical components of an NCAA structure that underscores institutional control and campus responsibility for rules compliance. In this system, it is only natural, and even necessary, to embrace a broader view of the permissible scope of interpretation than that which might seem appropriate in the traditional adjudicative model.

Bylaw interpretations are either “confirmations” or “determinations.”⁷⁰ A confirmation restates that which already is clear about the operation of a bylaw, while a determination resolves

time. If a court’s construction misstates legislative intent, a legislature can respond by amending the statute clarify intent.

66. NCAA CONST. art. 5.4.1 (Interpretations of Constitution and Bylaws).

67. For an illustration of the NCAA model, see NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 265 (May 1, 2007) (West Virginia University); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 163 11-12 (Dec. 17, 1999) (University of Notre Dame).

68. See NCAA CONST. art. 5.4.1.2 (Interpretation Process); see also NCAA D1 LEGISLATIVE REVIEW & INTERPRETATIONS COMM., POLICIES & PROCEDURES (Mar. 3, 2008), available at http://web1.ncaa.org/web_files/AMA/LRIC/LRIC%20policies%20and%20procedures%203-3-08.pdf.

69. Assisting institutions is the operating call to action of all NCAA staff, no matter where assigned. Membership Affairs staff are the staff most likely to be committee liaisons.

70. See generally *supra* note 68.

less clear issues in a way consistent with underlying intent.⁷¹ The resolution of a determination must be reasonably encompassed within explicit bylaw language.⁷² Legislative Interpretation Committee interpretations are official and final⁷³ once the Legislative Council reviews them.⁷⁴

A determination from Membership Affairs staff can issue before or after conduct has occurred. If a determination prohibits conduct, then an institution that knows of the determination is bound to follow it; if it fails to do so, it has committed a violation unless and until the interpretation is modified or reversed by the Legislative Interpretation Committee.⁷⁵ Because confirmations simply confirm that which is clear in a bylaw, confirmations that conduct is prohibited cover conduct whether it precedes or comes after the confirmation.⁷⁶ By contrast, determinations that conduct is rules-violative bind institutions only with regard to post-determination conduct.

III. NCAA WAIVER PROCESS

Life is like a tube of toothpaste. If you plug a hole in one spot, the toothpaste oozes out elsewhere. The best that may be done when drafting a rule is to identify its purpose, consider the potential consequences, good and bad, of alternative formulations, and implement the optimum resolution of competing interests that produces the least predicted toothpaste ooze—in other words, the

71. *Id.*

72. *Id.*

73. Legislative Interpretation Committee review of confirmations provided in quarterly reports does not constitute an official Legislative Interpretation Committee interpretation.

74. *See supra* note 68.

75. NCAA CONST. art. 5.4.1.2.1; NCAA D1 LEGISLATIVE REVIEW & INTERPRETATIONS COMM., POLICIES & PROCEDURES, *supra* note 68, at 8. So long as an institution is ignorant of an unpublished determination, it will not have violated a bylaw because of it. This is a porous shield, however. An institution still is bound to adhere to the underlying bylaw's policy and intent as reasonably discernible and to exercise due diligence in applying and interpreting NCAA rules. The fact of the interpretation means that some other institution was uncertain as to the bylaw's impact and sought interpretative assistance and the unpublished interpretation is evidence that an institution failed its due diligence before engaging in prohibited conduct. *See id.*

76. In fact, because a confirmation confirms that which already is clear and binding on all institutions, institutions are bound to understand conduct is a violation even were a confirmation never issued. The only claim available to an institution in such a situation, therefore, is that an interpretation erroneously was characterized as a confirmation. The situation with a determination is different. All institutions have constructive knowledge of a determination once announced on the Legislative Services Database ("LSDBi"). *See* LSDBi Homepage, <https://web1.ncaa.org/LSDBi/exec/homepage> (last visited Jan. 3, 2010).

fewest bad consequences or the fewest effects outside of intended scope and purpose. No matter how well conceived and drafted a rule is, inevitably a circumstance will arise that falls within the letter of the rule but was not intended to be covered by it. The particular eventuality may have been unforeseen, or it may have been anticipated and accepted as too complicated to fix in draft language without creating different, and worse, oozing. To deal with outlier situations, NCAA committees have authority to grant waivers from the application of a rule.⁷⁷ A waiver process is practical acknowledgment that no rule can cover all conceivable circumstances that may arise, that clear and concise language facilitates comprehension and makes less credible a claim that a rule was misunderstood in good faith, and that, at times, case-by-case, fact-specific review is a preferred way to determine whether exceptional circumstances are within a rule's intended scope. A process that permits the waiver of rules, however, does not include the authority to rewrite them.

Only a member institution may file a waiver request. The predominant class of waivers is those filed on behalf of student-athletes or prospects.⁷⁸ In requesting a waiver, university interests are aligned with the student's interests since each one benefits if the waiver is granted. By adequately representing its own interest, then, the university also represents that of its student.

Administration of waivers vests in the particular committee with jurisdictional authority to administer the bylaw for which a waiver is sought.⁷⁹ Waiver requests follow a typical pattern. The first round is handled by staff assigned to, and following guidelines set by, the applicable bylaw waiver committee. Although a student-athlete typically does not see a waiver request involving him, his written

77. See *infra* note 79.

78. For example, a student-athlete who seeks reinstatement of eligibility, continuing eligibility, or a medical hardship waiver relies on his institution to present his claim.

79. Committees with responsibility for particular bylaws consider waivers specific to the bylaws for which they have responsibility. Such bylaw responsibility includes waivers of team CAP rules, NCAA BYLAWS art. 23.1 (Committee on Academic Performance), validation of academic records of prospective student-athletes, *id.* arts. 14.1.2.1 (High School Review Committee), 14.1.2.2 (Student Records Review Committee), and initial and continuing eligibility of individual student-athletes, *id.* arts. 14.3.1.5 (Initial-Eligibility Waivers), 14.4.3.6 (Waivers of Progress-Toward-Degree Rule). Although the NCAA provides no general set of policies and procedures governing all committees, each committee has published policies and procedures governing its operations. For example, see NCAA Student Athlete Reinstatement, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/ncaa/NCAA/Legislation%20and%20Governance/Compliance/StudentAthlete%20Reinstatement/student_athlete_reinstatement.html (last visited Mar. 26, 2010)

statement is an included document. Should a waiver be denied, the institution may appeal the decision to the bylaw waiver committee. To appeal, the institution submits a written request, which is then supplemented by teleconference with representatives of the institution and members of the bylaw waiver committee. An involved student-athlete often participates in the teleconference, at least to answer committee questions.

A university sometimes does not seek a waiver, even if it believes there is a credible chance of success. Its reasons not to seek a waiver may reside in general university or athletics department policies, or in the interests of efficiency and reasonable allocation of staff time. A student-athlete's comparatively limited athletics ability, his past non-adherence to team rules, or the fact that incoming prospects adequately can replace him may also influence the university not to seek a waiver. Should a university not process a waiver, a student-athlete has no independent right to do so. In these circumstances, his quarrel is with the university, not the NCAA, particularly if the university's decision rests on grounds other than a conclusion that the waiver request likely would be denied.

IV. CONTRACT PRINCIPLES AND NCAA PROCESSES

Lawsuits challenging the impact on them of NCAA bylaws often are brought by student-athletes and sometimes by other NCAA non-members, including institutional staff members; boosters;⁸⁰ entities doing business, or seeking to do business, with the NCAA⁸¹ or a member institution; and entities in competition with the NCAA.⁸² A preliminary question in these cases is whether any of these parties have standing to challenge a bylaw or practice. For student-athletes and institutional staff members, the question is whether they are third-party beneficiaries of the contractual framework of NCAA

80. A booster, or in NCAA-speak a "representative of the institution's athletics interests," is an individual or entity who is known or should be known to an institution through participation in a booster group, donations, or other conduct intended to benefit student-athletes or an athletics program." NCAA BYLAWS art. 13.0.2.13 (Representative of Athletics Interests). "A" list boosters stay at team hotels, walk the sidelines, travel in official parties to away games, and have coaches' cell phone numbers. *See id.*

81. *Metro. Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004).

82. For example, a lacrosse stick manufacturer sued the NCAA claiming injury should the NCAA change the required head size of lacrosse sticks. *See Lacrosse Equipment Change Nets Lawsuit*, MLIVE.COM, Aug 29, 2008, available at http://www.mlive.com/news/grand-rapids/index.ssf/2008/08/lacrosse_equipment_change_nets.html.

bylaws. A third-party beneficiary is not a party to a contract (member of an association) but is a person whom the contracting parties (association members) intend to benefit.⁸³ Student-athletes are the only class of non-members with a colorable claim to third-party beneficiary status.⁸⁴ If a claim is predicated simply on a right to participate in athletics, a court should give it short shrift since there is no such cognizable property interest.⁸⁵

Nonetheless, student-athlete litigation often is not resolved in the NCAA's favor as readily as governing law would predict. In part, this is due to the tendency of fact finders, particularly but not exclusively juries, to sympathize with a student plaintiff against the big, bad, NCAA even in the face of governing state law clearly to the contrary.⁸⁶ More fundamentally, however, the difficulty is caused by NCAA bylaws that reflect a compromise between association core principles and sensitivity to student-athlete interests. The resultant compromises stake out ground not as easily defensible to a non-member judiciary as would be a clearcut and unwavering embodiment of core principle. A current example involves litigation that challenged NCAA amateurism bylaws, the *sina qua non* of intercollegiate athletics.⁸⁷

From time immemorial NCAA bylaws have treated a student-athlete's representation by an agent as a professionalizing act that disqualifies her from further intercollegiate competition. The purpose of such treatment is to prevent agent influence, with the attendant risk to the coach/student-athlete relationship, exploitation of student-athletes,⁸⁸ and overall disruption of efforts to treat elite student-athletes in revenue-producing sports no differently from other student-athletes. Instead of prohibiting all agent contact at any time,

83. RESTATEMENT (SECOND) OF CONTRACTS §§ 10.7-.9; *see, e.g.*, Parish Chiropractic Ctrs., P.C. v. Progressive Cas. Ins. Co., 874 P.2d 1049, 1056 (Colo. 1994).

84. If a student-athlete has third-party beneficiary status, then he may litigate an alleged denial even if the university does not. *See* Bloom v. NCAA, 93 P.3d 621, 622 (Colo. App. 2004) (institution joined as defendant with the NCAA).

85. *E.g.*, Graham v. NCAA, 804 F.2d 953, 955 (6th Cir. 1986); Colo. Seminary v. NCAA, 570 F.2d 320, 321 (10th Cir. 1978); Parish v. NCAA, 506 F.2d 1028 (5th Cir. 1975); *Bloom*, 93 P.3d at 621; Hart v. NCAA, 550 S.E.2d 79, 86 (W. Va. 2001).

86. *Compare, e.g.*, NCAA v. Yeo, 114 S.W. 3d 584 (Tex. App. 2003), *with* NCA v. Yeo, 171 S.W.3d 863 (Tex. 2005).

87. *Oliver v. NCAA*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009).

88. For examples of agent predators, *see, for example*, United States v. Piggitt, 316 F.3d 789 (8th Cir. 2003); United States v. Walters, 997 F.2d 1219 (7th Cir. 1993); Abernathy v. State, 545 So. 2d 185 (Ala. Crim. App. 1988). *See generally* DAN WETZEL & DON YAEGER, *SOLE INFLUENCE: BASKETBALL, CORPORATE GREED, AND THE CORRUPTION OF AMERICA'S YOUTH* (Grand Central Publishing 2000).

however, NCAA amateurism bylaws distinguish between lawyers working as lawyers for student-athletes (permitted)⁸⁹ and lawyers working as agents (prohibited), with a line between the two drawn at the point a lawyer is present during contract discussions with a professional sports organization. Andrew Oliver, a baseball pitcher at Oklahoma State University, challenged these bylaws in a lawsuit against the NCAA brought after he was rendered ineligible for competition because his lawyer was present during contract negotiations with the Minnesota Twins baseball team. The trial judge held that it violated public policy to prevent a student from having the assistance of counsel in contract negotiations and stated his concern with NCAA bylaws that permit student-athletes to hire lawyers but then “attempt to control what that lawyer does”⁹⁰ One could argue that the decision in *Oliver* failed to appreciate the legitimate concern of NCAA members with agent influence in the college game. But the reason the case arose at all is that NCAA bylaws failed to state an explicit, absolute policy prohibiting agent contact. Such an absolute policy is not nuanced and admits of no accommodation focused on student-athlete interests, but it is the policy most insulated from court reversal.⁹¹

Because rights of third-party beneficiaries are derivative of the rights of member institutions, they can be no broader or more extensive than the member’s.⁹² What, then, are the obligations of an association to members of that association?

An association’s first obligation is grounded in its obligation to adhere to its adopted procedures. What this means is that an association’s bylaws, practices, and policies may bind a member only when they have been duly adopted according to the bylaws of the association. Association bylaws govern not only the substantive rights and obligations of membership, but they also describe the process by which substantive bylaws are adopted, rescinded, or revised. Included within this description may be emergency procedures for adopting or revising bylaws. For the NCAA, this also includes the operation of the Legislative Interpretation Committee and staff interpretative processes and the process by which committees determine when waivers are to be granted.

89. NCAA BYLAWS Art 12.3.2 (Legal Counsel).

90. *Oliver*, 920 N.E.2d at 214.

91. *See id.*

92. FARNSWORTH, *supra* note 31, at § 10.9.

The second obligation of an association to its members is grounded in its obligation to enforce substantive obligations. Doomed to failure is a member's challenge to a policy decision embodied in a particular bylaw if the only ground is disagreement with the policy choice. To have any chance at success, then, a member must challenge bylaw administration and implementation.

Rules and bylaws may not be simply decorative. They must have functional import. They must be followed. Failure of an association to assure that bylaws duly adopted actually were implemented would be a clear breach of the duty owed to members and, in turn, a failure to act in good faith. It is the rare situation, however, in which an association fails completely to implement bylaws. Instead, the locus of challenges is on the *manner* of implementation.

A. Contract Principles: Waivers and Interpretations

1. Good Faith

Consider the contract principle of good faith in the context of NCAA waiver requests. An institution seeks a waiver from the application of an NCAA bylaw precisely because the bylaw prohibits what the institution seeks to do. Absent actual malice or bias in the denial of a waiver, it is hard to see how declining to waive a bylaw could breach good faith when the bylaw's language and purposes cover the very conduct for which waiver is sought.

Next, consider requests for interpretations of bylaws. An institution seeks a bylaw interpretation when it believes that black letter and underlying intent offer no clear direction as to scope and meaning in context. Only an obviously contrived articulation of the scope and meaning of a bylaw could begin to constitute a breach of good faith. Even in this case, a court's obligation to defer means that it should tread carefully in determining what is "obviously contrived," as that conclusion itself implicates NCAA interpretative authority.

2. Fair Dealing

At least in theory, bylaws may be interpreted or waived in such a blatantly targeted manner as to constitute a failure to deal fairly with—i.e., to act arbitrarily toward—a particular member institution. Recall, however, that NCAA bylaws, practices, and policies, including

the process of interpretation, are the collective decision of all member institutions.⁹³ Particular bylaws seen to benefit some institutions more than others are still the collective decision of all. If a member institution is unhappy with its treatment, it may resign from the NCAA or attempt to forge a new majority. Because of the diversity among NCAA members, duly-adopted bylaws need not, and likely could not, affect results with even-handed consequence to all institutions. Interpretations do not show animus, therefore, simply by enforcing bylaw meaning that has differential consequence. What must be shown is targeted animus in the interpretation. This is, and should be, an extremely high standard difficult for a plaintiff to meet.

NCAA bylaws embody compromise positions of competing policies. In turn, the wallpaper of all bylaws is a balance of competing policies. The combination of policy compromise in particular bylaws and the interworking of related bylaws may not consistently point to a particular policy end-point. Deference to an association necessarily includes deference to compromises duly adopted. Fair dealing must be evaluated in the grand scale of NCAA conduct, not by picking and choosing particular bylaws and policies across different subject areas.⁹⁴ Absence of fair dealing in the legislative articulation of policy, the application of bylaws, or grants of waivers from them, must mean inconsistency so random and gross that there is no rationale adequate to cover bylaws in their totality or to explain differences.

3. The Jeremy Bloom Case As Illustration

Assume that, pursuant to committee guidelines or staff discretion, NCAA staff decline to grant an institution's requested waiver. Assume that the institution appeals to the applicable bylaw waiver committee and that the committee upholds the staff decision. The university now brings suit to overturn the result. To assure that

93. The fact that governing bylaws are adopted by those to be governed by them likely triggers even more deference than the quite deferential standard otherwise afforded agency rulemaking. See 5 U.S.C.A. §§ 701-06 (West 2009). The Supreme Court dictates deference to agency interpretation of a statute it administers so long as the interpretation is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); see also Amanda Leiter, *Substance or Illusion? The Dangers of Imposing a Standing Threshold*, 97 GEO. L.J. 391, 416 (2009) ("*Chevron* deference . . . and the [Administrative Procedures Act's] arbitrary-and-capricious review standard give judges ample room to defer to, or simply decline to review, all but the most blatantly unlawful agency policy choices.").

94. To best effectuate party intent, contract terms are read in light of the contract in its entirety, not by treating particular provisions in a vacuum. See, e.g., *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004); RESTATEMENT (SECOND) OF CONTRACTS § 203.

a bylaw was applied in good faith, a court should first consider whether NCAA staff and committee followed designated procedures in handling the waiver and appeal. A court must then assure that NCAA processes and the decisions rendered thereunder constituted fair dealing with the institution.

A good illustration of how a court should review bylaws and policies of the NCAA involves a lawsuit brought by Jeremy Bloom, a student-athlete on the University of Colorado football team.⁹⁵ Before enrolling at Colorado, Bloom was a World Cup skier with offers to host a TV show, model clothes, and endorse products.⁹⁶ NCAA bylaws permitted him to be a professional skier and yet still be an amateur in football,⁹⁷ but they made him ineligible for competition if he pursued endorsements⁹⁸ or other paid business opportunities available to him because of his athletic ability. On Bloom's behalf, the university unsuccessfully sought an interpretation that his projected endorsements did not offend NCAA amateurism bylaws and also unsuccessfully sought a waiver to permit him to endorse products and yet remain eligible.

Bloom then sued,⁹⁹ claiming that the multitude of intersecting NCAA bylaws that underpin the NCAA amateurism principle¹⁰⁰ were so inconsistent as to be arbitrary in application.¹⁰¹ The Colorado

95. *Bloom*, 93 P.3d 621.

96. *Id.* at 622.

97. NCAA BYLAWS art. 12.1.2 (Amateur Status).

98. *Id.* art. 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete).

99. Bloom was denied a preliminary judgment by the trial judge on the ground that there was no reasonable likelihood he would succeed on the merits should a full trial be held; the Colorado Court of Appeals affirmed the trial judge's decision. *Bloom*, 93 P.3d at 623, 628.

100. Those applicable to consideration of Bloom's challenge included NCAA CONST. art. 2.9 (Principle of Amateurism); NCAA BYLAWS arts. 12.1.2 (Amateur Status), 12.3.1 (Use of Agents; General Rule), 12.4.1.1 (Athletics Reputation), 12.5.1.3 (Continuation of Modeling and Other Nonathletically Related Promotional Activities After Enrollment), 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete).

101. Although the Colorado Court of Appeals found none of Bloom's claims persuasive, it is instructive to consider its recitation of the various ways that the NCAA could be seen to be arbitrary. One example is the different approaches taken in bylaws. In *Bloom*, the court compared a sports-specific amateurism approach that permits a student-athlete to be a paid professional in one sport and yet an amateur in a different sport to an all-sports approach in bylaws making a student-athlete ineligible for all competition should he endorse products or engage in paid activities available to him because of athletics ability. See *Bloom*, 93 P.3d at 625-27. Another example is prohibiting student-athletes from engaging in conduct that their institution engage in. In *Bloom*, the court considered a prohibition on student-athlete product endorsements compared to institutional endorsements through student-athletes wearing logos during competition. *Id.* Yet another example is granting waivers to some student-athlete but not others when the underlying circumstances are similar. A final example is treating a waiver request from one institution with less care and attention than that given other institutions.

Court of Appeals reviewed the bylaws to see if the NCAA met its duties of good faith and fair dealing. It found a clear intent to prohibit student-athletes from engaging in endorsements and paid media appearances, and that the “various shades of gray within [an amateurism approach]” did not constitute an arbitrary application of a clear NCAA intent to prohibit student-athletes from engaging in such activities.¹⁰² The court indicated that any ambiguity in NCAA bylaws would have been enforced according to how the NCAA—not the court—interpreted them.¹⁰³

V. NCAA COMMITTEES AND PROCESSES: REINSTATEMENT; ENFORCEMENT; INFRACTIONS

First and foremost among the responsibilities that all member institutions impose on each member institution is institutional control.¹⁰⁴ Institutional control requires institutions to self-police and then to self-report if violations are uncovered.¹⁰⁵ If all institutions at all times had perfect ability and willingness to self-police and all institutions at all times had perfect trust and confidence in the self-policing of all other institutions and self-policing handled exclusively at the institutional level nonetheless achieved across all institutions a consistent approach to evaluation of the severity of violations and the appropriate penalties attendant on any such violations, then there would be no need for NCAA enforcement staff. In the real and competitive world of intercollegiate athletics, the presence of enforcement staff members provides critically important comfort to each institution that all institutions are being held to the same standard.

Several committees and staffs have responsibilities related to the reporting, investigation, and resolution of NCAA violations, either directly or collaterally. Prime among them are the COI, the Infractions Appeals Committee (IAC), the Reinstatement Committee, the Legislative Interpretation Committee,¹⁰⁶ and the enforcement staff.¹⁰⁷ These committees and their staffs operate independently of

102. *Id.*; see also *Bd. of County Comm’rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 467 (Colo. App. 1997).

103. *Bloom*, 93 P.3d at 626.

104. NCAA CONST. art. 2.1 (The Principle of Institutional Control and Responsibility).

105. *Id.* art. 2.8.1 (Responsibility of Institution).

106. For a description of individuals who have served on the COI, see *infra* note 198.

107. The Leadership Council typically makes appointments to Division I committees through nominations from conference offices. NCAA BYLAWS arts. 21.7.89.3 (Committees

one another and have different functions and responsibilities. In particular, the membership and role of the COI is distinct from the enforcement staff, and its investigation and presentation of infractions cases, and from the Reinstatement Committee and its staff and processes.¹⁰⁸ The enforcement staff report to the Division I vice president for enforcement. The student-athlete reinstatement staff report to the vice president for Membership Affairs. The COI staff report to the vice president for Division I.¹⁰⁹

A. Student-Athlete Reinstatement

Institutional staff members, boosters, student-athletes, and, in some circumstances, even prospects may commit NCAA violations.¹¹⁰ A violation that a student-athlete or prospect commits is handled through the reinstatement process.¹¹¹

A student-athlete who commits a violation is ineligible for competition unless and until he is reinstated to eligibility.¹¹² The

Reporting to Board of Directors; Committee on Infractions), 21.7.89.4 (Committees Reporting to Board of Directors; Infractions Appeals Committee). Appointments to the COI and the Division I Infractions Appeals Committee are made by the DI Board of Directors. *Id.*

108. The COI is also separate and distinct from the IAC and staff. IAC staff report to the NCAA vice president.

109. The vice president for Division I has responsibility for Division I governance and administrative matters.

110. Prospects can render themselves ineligible for competition at NCAA institutions by, among other things, signing a professional contract. NCAA BYLAWS art. 12.2.5. Violations committed by institutional staff members may also involve prospects. For example, a coach may make a prohibited contact with a prospect. *See generally* NCAA BYLAWS art. 13.1.

111. A unit of the enforcement staff—agents, gambling, and amateurism (AGA staff)—also investigates student-athlete violations. *See infra* text accompanying notes 257-58. On rare occasion the COI may make a finding of unethical conduct against a student-athlete. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 266 (May 10, 2007) (Temple University). It does not, however, assess penalties but instead refers the case to the Reinstatement Committee. *See id.*

112. Although a student-athlete's ineligibility runs from commission of the violation, a university may not learn of it until later. If he competed while ineligible, the ineligible competition is a second violation for which he, and the university, are responsible. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 294 (Mar. 6, 2009) (Florida State University). If the university had reasonable institutional control mechanisms in place, it will not be found to have lacked institutional control or failed to monitor in not discovering the underlying violation. According to the reinstatement staff, in only one percent of reinstatement cases is a violation so serious and the responsibility of the student-athlete so significant that reinstatement is denied. *Hearing on Due Process and the NCAA Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. 35-42 (2004), available at <http://judiciary.house.gov/Legacy/95802.pdf>. Most often, reinstatement is granted with conditions. *Id.* Every extra benefit violation requires disgorgement of the benefit. For benefits of \$100 or more a student-athlete also will have to sit out games; the number of games is gauged on the amount of the benefit. NCAA DIV. I STUDENT-

merits of this approach are obvious, particularly in a world devoid of subpoena power where a prime source of information about violations comes from institutional self-reports. In such a world, every good reason exists to create the strongest possible incentive for prompt self-reporting—and what better incentive than student-athlete ineligibility until a report is made and the matter resolved?

Reinstatement requests are processed in the first instance by reinstatement staff pursuant to guidelines from the Reinstatement Committee and with appeals heard by it. Violations run the gamut from a student-athlete competing before her formal certification as eligible,¹¹³ to her receipt of extra benefits,¹¹⁴ to her commission of academic fraud,¹¹⁵ to her competing while ineligible.¹¹⁶ The volume of requests is high and cases often are extremely time sensitive.

Institutions act through those for whom they are responsible. Every student-athlete violation, therefore, is also an institutional violation, and every reinstatement request must include, or be accompanied by, a report of institutional violation. Typically, a university makes one integrated submission to the student-athlete reinstatement staff, which then forwards it to the enforcement staff to review and process for institutional responsibility. Most often, the Director of Enforcement for Secondary Violations (the Director for Secondaries) handles the report,¹¹⁷ although on occasion the report is forwarded to the major case enforcement staff to process as a major infractions case.

ATHLETE REINSTATEMENT GUIDELINES, BYLAW 16.11.2.1 (2009). Academic fraud violations result in permanent ineligibility. NCAA DIV. I STUDENT-ATHLETE REINSTATEMENT GUIDELINES, BYLAW 10.1-(B) (2009). The presumptive withholding penalty for providing false and misleading information under Bylaw 10.1 is 50 percent of a season's competitions with a maximum penalty of permanent ineligibility. NCAA DIV. I STUDENT-ATHLETE REINSTATEMENT GUIDELINES, BYLAW 10.1-(D) (2009).

113. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 210 (June 17, 2003) (Rutgers University).

114. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 270 (Feb. 22, 2008) (University of Oklahoma).

115. *E.g.*, INFRACTIONS REPORT NO. 294, *supra* note 112; NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 221 (Sept. 30, 2004) (Stetson University); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 175 (July 16, 2002) (Howard University); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 175 (Nov. 27, 2001).

116. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 210 (June 17, 2003) (Rutgers University).

117. Certain secondaries are de minimis. *See* NCAA Division I - Level II Violations, http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Legislation%20and%20Governance/Compliance/Secondary%20Infractions/level_II_violations_D-I (last visited Jan. 6, 2010).

The reinstatement process operates full throttle under the NCAA cooperative principle¹¹⁸ and the obligation of member institutions to administer rules-compliant athletics programs.¹¹⁹ As with all committees other than the COI, the Reinstatement Committee and staff neither conduct investigations nor engage in independent fact finding. Instead, they assess a student-athlete's responsibility based on information that his institution provides and then decide whether—and, if so, how—he may be reinstated to eligibility.¹²⁰

What is assumed and expected in the reinstatement process is that a reporting institution has conducted an investigation sufficient to uncover full relevant facts and has presented them to the Reinstatement Committee with neither misrepresentation nor omission. Whether through inability, disinclination, or time pressure, compliance staff do not always do a thorough investigation and/or submitted a full and fully forthcoming reinstatement request.¹²¹

Reinstatement requests often need to be processed quickly because a game or meet is coming up. It is not uncommon for compliance units to be understaffed;¹²² often the first institutional action in response to uncovering major violations is to hire additional compliance staff.¹²³ Institutional compliance directors are not trained investigators. Their background and experience is in educating and advising on bylaws and assisting staff to be rules compliant. They do their jobs expecting co-workers to be truthful. They tend to accept answers uncritically and may fail to confirm information. They sometimes permit coaches and others to gather critical information, even when these coaches and others have a significant stake in the outcome of the investigation.¹²⁴ Their understandable reluctance to

118. NCAA BYLAWS arts. 19.0.1.3 (Responsibility to Cooperate); 32.1.4 (Committee on Infractions—Special Operating Rules; Cooperative Principle).

119. NCAA CONST. art. 2.8; *e.g.*, NCAA BYLAWS arts. 14.01.3 (Compliance with Other NCAA and Conference Legislation), 14.1.2.3.1 (Institutional Responsibility), 14.11.1 (Obligation of Member Institution to Withhold Student-Athlete from Competition).

120. *See supra* note 112. Student-athletes who commit gambling and academic fraud violations are permanently ineligible. *Id.*

121. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 262 (Oct. 12, 2006) (“[C]ompliance doesn’t sell tickets.”) (University of Kansas); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 191 (Dec. 21, 2001) (Marshall University).

122. INFRACTIONS REPORT NO. 262, *supra* note 121; NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 236 (June 23, 2005) (Baylor University).

123. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 278 (July 16, 2008) (Texas Southern University).

124. *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 287 (Nov. 25, 2008) (Indiana University); INFRACTIONS REPORT NO. 265, *supra* note 67.

harm team competitive strength may color their assessment of factual circumstances.

Good investigations, by contrast, require time, diligence, testing and confirming information, conducting investigations in ways designed to be impervious to tampering,¹²⁵ and doing it all with a healthy degree of skepticism. Even a trained investigator—let alone compliance directors in a time crunch—may not uncover the full circumstances surrounding a violation. If a compliance director lacks the time or training to do a thorough job, then her report may be full and fully forthcoming based on what she knows but not full and forthcoming based on what actually occurred. Reinstatement and other processes that operate on the cooperative model are bound to miss more violations and are more likely to understate the severity of these violations than would be the case in an investigative model.¹²⁶ But the basic structure—relying on institutional factfinding—is necessary despite its shortcomings.¹²⁷

Often, reinstatement requests are straightforward and require little investigation. It is inefficient and expensive to administer a process unnecessary in most cases to handle a minority where follow-up would uncover additional or more serious violations. At the very least, reinstatement staff would have to evaluate each case to determine with certainty that no follow-up is needed. Charged with the obligation independently to verify, reinstatement staff might err on the side of looking closely at cases where no follow-up is required for fear of missing some that on the surface seem complete. Even for the minority of cases where follow-up would uncover a greater scope and magnitude to violations than those reported by an institution, independent reinstatement investigations are problematic. Independent investigations might mean the equivalent of adding reinstatement investigative staff and conducting an adversarial hearing. Investigations and adversarial hearings are time-consuming. Infractions cases always take at least a year between onset of investigation and hearing and typically two or longer. In contrast,

125. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 176 (Oct. 24, 2000) (University of Minnesota) (regarding a coach who was told that student-athletes were to be interviewed regarding academic fraud met with each and advised them to lie).

126. See, e.g., INFRACTIONS REPORT NO. 287, *supra* note 124 (assistant compliance director testified she “can’t be a jerk with coaches and then turn around and educate them the next day”); INFRACTIONS REPORT NO. 265, *supra* note 67; INFRACTIONS REPORT NO. 191, *supra* note 121 (three self-reports filed; first two based on inadequate or non-existent investigations).

127. Nonetheless, reinstatement processes could be improved. See *infra* text accompanying notes 251-58.

competition seasons are short, as is the life span of a student-athlete's eligibility—four years of competition and five years in which to do it.¹²⁸ Any time delay, therefore, has acute significance.

There are critical differences between reinstatement and infractions processes, however, that justify the consequences of delay in the infractions process. The biggest difference is that the infractions process focuses on a continuing entity: the institution at which violations occurred. The institution was responsible for violations when they were committed. The institution reaped the competitive rewards. The institution incurs the penalties when they are imposed. Although there is no way to avoid all impact on non-culpable coaches and student-athletes, another difference between the reinstatement and enforcement/infractions processes is that, in the latter process, these impacts may be ameliorated. Coaches may leave to coach elsewhere. Prospects likely know of a pending infractions case before choosing where to commit.

B. The Enforcement Staff

The prime responsibilities of the enforcement staff are to investigate and process violations and to present cases for the COI to resolve. Units of the enforcement staff also perform two ancillary functions: enforcement of secondary violations and enforcement of agent, gambling, and amateurism (AGA) violations. Both units have responsibilities that align closely with the responsibilities of the Reinstatement Committee.

1. Agents, Gambling, and Amateurism

AGA jurisdiction runs to student-athletes who commit violations such as engaging in promotional activities, having prohibited agent contact, or gambling on college sports. AGA violations are always student-athlete or prospect violations. As a result, they always carry at least the potential of competition ineligibility.¹²⁹ As with all enforcement staff, AGA staff can conduct independent investigations.

128. NCAA BYLAWS arts. 14.2 (Seasons of Competition), 14.2.1 (Five-Year Rule).

129. Because of this, AGA and reinstatement staffs have regular interaction. AGA staff also have three to five joint investigations annually with the major case enforcement staff.

2. Secondaries

NCAA violations may be major or secondary. A secondary violation is one that (1) is either isolated or inadvertent, (2) is intended to provide or provides only a minimal recruiting, competitive, or other advantage, and (3) includes neither a significant recruiting inducement nor extra benefit.¹³⁰ Although the COI has authority over secondary as well as major violations, processing of secondaries has been delegated to the enforcement staff¹³¹ and is administered by the Director for Secondaries. It is rare for the Director for Secondaries to conduct an independent investigation, but he has the means and authority to do so. He also can request additional information from an institution before resolving a secondary case. Violations on the cusp between secondary and major are referred to the COI for a decision as to processing.¹³²

C. The Enforcement Process for Major Infractions Cases

The Vice President of Enforcement and the major case enforcement staff handle potentially major violations. The enforcement staff conducts investigations and is the moving party at COI hearings. Its role is something like that of police in investigating crimes or a prosecutor presenting cases in court. Something like, but not the same. Per NCAA bylaws, the role of the enforcement staff is not technically adversarial.¹³³ Although, obviously and necessarily, preparing an enforcement staff case summary and presenting a case to the COI entails a staff determination that there is sufficient information from which to believe that major violations were committed, the enforcement staff also is expected to alert the COI to exculpatory information.¹³⁴ When it believes it possible and warranted, it also assists institutions and involved individuals to gather information relevant to alleged violations.

Major case investigations typically begin with information that the enforcement staff receives from an institutional self-report, coaches at other institutions,¹³⁵ media stories, and even anonymous

130. NCAA BYLAWS art. 19.02.2.1. Multiple secondary violations collectively may constitute a major violation. *Id.*

131. *Id.* art. 19.5.1.

132. *See id.* art. 32.2.2.1.2 (Identification of Major/Secondary Violation).

133. *See generally id.* arts. 19 (Enforcement), 32 (Enforcement Policies and Procedures).

134. *See infra* notes 229-32.

135. For an example of a head coach providing information, see *infra* note 154.

tips. Sometimes, a story breaks because of disgruntled staff members or student-athletes.¹³⁶ When it develops reasonably reliable information that a violation may have been committed, the enforcement staff sends a Notice of Inquiry to the institution, which alerts it that a formal investigation has been initiated.¹³⁷ When the enforcement staff decides that there is sufficient information to support a finding of violation, it issues a Notice of Allegations.¹³⁸ Responses follow from the institution and involved individuals.¹³⁹ Next, the enforcement staff conducts prehearing conferences to narrow the issues in dispute.¹⁴⁰ The enforcement staff then produces its case summary, which is a list of particulars regarding each allegation and the most important information on which the staff relies in making the allegation.¹⁴¹

1. Meaning and Effect of the Cooperative Principle

In the criminal law system, police and prosecutors have subpoena power and the threat of contempt to compel cooperation. In civil trials, parties must cooperate with discovery, answer interrogatories, and submit to depositions.¹⁴² They are obliged to answer truthfully. If they fail to comply, they are subject to prosecution for perjury, contempt of court,¹⁴³ and limits on the

136. As reported in an Alabama infractions case, booster money was used to pay a high school coach between \$100,000 and \$200,000 in cash and an SUV to “deliver” a football prospect to the university. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 193 (Feb. 1, 2002) (University of Alabama). In the same case, boosters were reported to have provided \$20,000 to a prospective student-athlete and his family. *Id.* In a case involving the University of Michigan, a booster gave four student-athletes cash and benefits totaling more than \$600,000. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 208 (May 8, 2003). In yet another infractions case—this one involving Southern Methodist University and the only time the Infractions Committee imposed the so-called “death penalty,” *see* NCAA BYLAWS art. 19.5.2.3.2 (Repeat-Violator Penalties)—boosters made weekly cash payments to members of the football team. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT (Feb. 25, 1987); *see also* DAVID WHITFORD, A PAYROLL TO MEET: A STORY OF GREED, CORRUPTION, AND FOOTBALL AT SMU (1989).

137. NCAA BYLAWS art. 32.5.

138. *Id.* art. 32.6.

139. *See id.* art. 32.6.5 (Deadline for Responses).

140. *Id.* art. 32.6.6.

141. *Id.* art. 32.6.7.

142. FED. R. CIV. P. 26-31, 33.

143. FED. R. CIV. P. 37. Depositions also may be taken of non-parties. FED. R. CIV. P. 30-31. Attendance may be compelled by subpoena. *Id.* An individual who fails to comply may be held in contempt. FED. R. CIV. P. 45(e). *See generally* 7 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE chs. 30-37 (3d ed. 1999).

introduction of evidence and arguments they may make at trial if they do not comply.¹⁴⁴ In both criminal and civil systems, an individual may not be compelled to respond to requested information when a response would subject him to potential criminal prosecution.¹⁴⁵ In neither the criminal nor civil justice systems, however, are parties or witnesses obliged to volunteer information not asked or to clarify responses to avoid misunderstandings.¹⁴⁶ Routine legal advice directs parties to respond accurately but specifically and not to volunteer anything.

By contrast to both the criminal and civil justice systems, NCAA enforcement staff has neither subpoena or contempt power nor access to court-supervised discovery. All that NCAA staff has are the requisites of institutional control and the cooperative principle.

Institutional control means that an institution has the responsibility to investigate potential violations vigorously and expeditiously, to share inculpatory information with the enforcement staff, and to cooperate fully as the enforcement staff does its investigation. In turn, and pursuant to the cooperative principle, member institutions require that staff members and student-athletes agree to be bound by it. They also make a full effort to achieve cooperation by boosters and others associated with a program. The obligation of a staff member and student-athlete is to report potential violations,¹⁴⁷ to submit to interviews with the enforcement staff,¹⁴⁸ to

144. FED. R. CIV. P. 37(c).

145. U.S. CONST. amend. V. This right does not permit ignoring a subpoena for physical evidence, however, unless the act of production would be incriminating and testimonial. *See, e.g.,* *Braswell v. United States*, 487 U.S. 99 (1988); *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

146. A deposition of then President Bill Clinton illustrates the principle. Clinton had oral sex with an intern but denied having sexual relations under a judicial definition that failed to include oral sex. *See* Peter Tiersma, *Did Clinton Lie?: Defining "Sexual Relations,"* 79 CHI.-KENT L. REV. 927 (2004).

147. NCAA BYLAWS art. 30.3 (Certification of Compliance) (requiring staff members to certify that they have no knowledge of any NCAA violations at their institution). For the obligation of student-athletes, see NCAA CONST. art. 3.2.4.6 (Student-Athlete Statement); NCAA BYLAWS arts. 14.1.3.1 (Student-Athlete Statement; Content and Purpose), 30.12 (Student-Athlete Statement).

148. NCAA BYLAWS art. 10.1(a). Staff members and student-athletes commit unethical conduct by refusing to "furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so." *Id.*

respond truthfully,¹⁴⁹ and to cooperate fully with the enforcement staff in an investigation.¹⁵⁰

What NCAA staff cannot compel, therefore, staff and student-athletes are obliged to volunteer. Those obliged to volunteer information include both those alleged to have committed violations and those with information about them. This includes not only providing truthful answers to questions but also answering a question clearly intended but not explicitly asked and neither misstating, obfuscating, or creating a false impression through calculated omissions, nor influencing others to do so. Still, making a case exclusively on the cooperative principle is fraught with limitations. Some limitations are inevitable, some not so much.¹⁵¹

a. Those Subject to the Cooperative Principle

The enforcement staff cannot force a staff member or student-athlete to fulfill the obligations of the cooperative principle. Staff members and student-athletes may have committed violations themselves. Confessing to wrongdoing is never easy, particularly when the consequences may result in job loss or competition ineligibility. Many will deny involvement or admit only what already is known. Admitting carelessness is not much easier, particularly when failure to report a violation known or suspected also may be a violation.¹⁵² “Ratting out” a friend or co-worker or providing information that may adversely affect a team’s competitive success also do not make a hit parade of fun activities. Assistant coaches, in particular, may fear that cooperation translates to the end of their college coaching careers.¹⁵³ Violations in a high-profile athletics program or involving elite student-athletes trigger intense media and public scrutiny. Those with information may be reluctant to risk

149. *Id.* art. 10.1(d). Staff members and student-athletes commit unethical conduct by “[k]nowingly furnishing . . . false or misleading information concerning . . . involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation.” *Id.*

150. *Id.* art. 19.01.3 (Responsibility to Cooperate).

151. For what might ameliorate investigative difficulties, see *infra* text accompanying notes 242-46.

152. NCAA BYLAWS art. 10.1.

153. This worry is not unfounded. In an infractions case involving Baylor University, an assistant coach taped meetings with the head coach at which violations were discussed. His information formed part of the COI record. INFRACTIONS REPORT NO. 236, *supra* note 122. He has not found another job in college coaching.

harassment of themselves or family, or to face skepticism regarding their credibility or motives.¹⁵⁴

When the enforcement staff has sufficient information from which to conclude that an institution or individual is not cooperating, the enforcement staff may allege violations stemming from that failure—lack of institutional control, failure to monitor, failure to cooperate, and unethical conduct as a result of refusing to provide information or knowingly providing false or misleading information.¹⁵⁵ The enforcement staff also may allege additional substantive violations or treat as an admission an involved individual's failure to respond.¹⁵⁶ There are limits on doing any of this, however.

Alleging additional violations may be something of a toothless tiger. This is particularly true with staff members who may choose to move on to careers outside of NCAA member institutions or with student-athletes soon to be gone from an institution. In any event, the enforcement staff may have little solid basis for concluding that a violation was committed, or how. Focusing in particular on an allegation of failure to cooperate, the enforcement staff may be unable to show that an individual is withholding information or the nature of the information withheld. An individual's information may not go to the heart of a violation but provide only context. The information may be difficult or impossible to corroborate. The individual may report information gleaned at second- or third-hand. There is a natural reluctance to charge or penalize an individual for failure to cooperate when she herself is not suspected of culpability, particularly when the quality of her information is unknown.

Certainly this information might still be important. It could provide leads and point the enforcement staff to those with direct and better information or become significant when grouped with information from other sources. It is also true that all investigations

154. The travails of Phillip Fulmer, the head football coach at the University of Tennessee, offer an apt example. Fulmer assisted the enforcement staff in an infractions investigation. A booster whose conduct was described in the infractions report sued the NCAA and Fulmer for defamation. *See, e.g.,* Doug Segrest, *Fulmer Gets Subpoena*, BIRMINGHAM NEWS, July 25, 2008, at 6D. NCAA bylaws attempt to mitigate these effects by requiring closed infractions hearings and directing staff to refrain from public comments. Often facts of an investigation get out, through independent media interviews with witnesses, public action taken by an institution (firing a coach, for example), and institutional responses released to the media under open records statutes. Names in these documents may be redacted, but there often is sufficient information from which to identify individuals.

155. *See* NCAA CONST. arts. 2.1, 2.8; NCAA BYLAWS arts. 11.1.2.1 (Responsibility of Head Coach), 19.01.3, 10.1(a), 10.1(d).

156. NCAA BYLAWS art. 32.6.2 (Notice to Involved Individuals).

suffer if there is a shared, known “scofflaw” attitude among those interviewed. Nonetheless, the threat of an allegation and a finding of violations may have significant impact on an individual. That being so, in most cases the enforcement staff is right to pause before making such allegations. It is easy to say that an individual failing to cooperate is the one with the key in the ignition that triggers the allegations. It is not always as easy to act accordingly.

b. Those Not Subject to the Cooperative Principle

Whatever the limits are to investigation by cooperative principle, they are magnified when information is sought from those with no formal relationship with a member institution or the NCAA, such as agents, representatives of professional teams, reporters, prosecutors,¹⁵⁷ and families of student-athletes. No penalty that the COI imposes can affect an agent with whom a student-athlete signs a contract or who pays a student-athlete to sign a contract. Similarly, no penalty can affect a family member of a student-athlete, although in a particular case the family member’s conduct may be attributable to the student-athlete. Those not bound by the cooperative principle can thumb their noses with impunity when the enforcement staff comes calling even as they share their stories with the media.

2. What Use, Subpoena Power?

Whether a private association should be able to make individuals once or currently formally associated with a member institution cooperate in investigations on threat of jail time is debatable, and ideally there should be no such authority. Whether a private association should be able to make individuals never formally associated with it cooperate in investigations is almost always overreaching pure and simple. Even if subpoena power was afforded in only limited instances, aligning with the government might produce different, or broader, judicial review of the infractions process in general, with attendant costs and delays. Were the NCAA to test the waters, however, what help would result?

The COI imposes penalties for non-cooperation after a case is brought and findings are made. By contrast, subpoena power is

157. See, e.g., U.S. DEP’T OF EDUC., OFFICE OF INSPECTOR GEN., FORMER BARTON COUNTY BASKETBALL COACH PLEADS GUILTY (2005), available at <http://www.ed.gov/about/offices/list/oig/invreports/ks122005.html>; John Branston, *Kickoff, At Last*, MEMPHIS FLYER, Jan. 21, 2005, available at <http://www.memphisflyer.com/memphis/kickoff-at-last/Content?oid=1115889>.

enforceable at the front end of an investigation, offering more investigative leads and a better opportunity to build a full case. Forcing witnesses to divulge information through a subpoena backed by a threat of jail is, in theory, quite a power. But other investigative tools, such as wiretaps, likely would be much more help.¹⁵⁸

Statutory authority likely will permit use of subpoena power only in precisely defined and limited circumstances. These circumstances may turn out to exclude “strangers” to the NCAA process. Even if they are included, a statute likely will require that issuance of a subpoena be based on a quantum of credible information that the individual has relevant information. A critical need in investigations, however, is to obtain information where the requisite factual basis underlying the suspicion cannot be shown.

The end result is that any subpoena power granted would be limited, and those limits run to some of the same investigative difficulties that the cooperative principle poses. It also is inconceivable that NCAA enforcement staff would push to its legal limit any subpoena authority granted to it. Subpoena power would be used sparingly not only because its use likely would be dependent on a showing of reasonable cause that a witness has relevant information, but because any broader use would both appear, and be criticized, as a witch hunt. Its use would be most limited where most needed—against those not associated with universities, or no longer associated with them. The more sparing NCAA subpoena authorization is, and the more sparing its actual use, the more politically palatable and justifiable such subpoena power is. The more sparing its authorization and actual use, the fewer problems it would actually solve.

D. The COI

The jurisdictional responsibility of the COI is to hear and resolve cases of institutional culpability¹⁵⁹ for the commission of major violations¹⁶⁰ of NCAA bylaws.¹⁶¹ The COI does not investigate alleged

158. See INFRACTIONS REPORT NO. 208, *supra* note 136. The violations occurred in 1996 but there was insufficient evidence to proceed until an FBI sting operation that included wiretaps. *See id.* at 2.

159. The COI does not handle student-athlete reinstatement matters or impose penalties on student-athletes.

160. The COI does not resolve secondary violations unless processed as part of a major case. The COI hears appeals in secondary violations when the penalty imposed is a fine. NCAA BYLAWS art. 32.4.4.

major violations, conduct pre-hearing witness interviews, engage in pre-hearing factfinding, or participate in pre-hearing conferences. It neither sees nor reviews information that the enforcement staff, institution, coaches or staff members alleged to have committed major violations surfaced unless that information is made a formal part of the hearing record.¹⁶² NCAA staff liaisons to the COI work exclusively with it. They are not members of the enforcement staff. COI deliberations and case-relevant discussions are confidential within the COI. Although self-enforcement and the cooperative principle are part of the infractions process, what sets the COI apart from all other NCAA committees is that it conducts in-person, adversarial hearings and makes its own factual findings based on the record before it.¹⁶³ It also writes full infractions reports explaining the reasons for its findings and penalties.¹⁶⁴

1. Limitations of the Cooperative Principle and Obligations of the COI

The COI takes seriously its obligation to act independently from the enforcement staff and to treat fairly institutions and involved individuals who appear before it. The COI has, in various cases, reduced major allegations to secondaries,¹⁶⁵ found major violations against an institution but not against an individual,¹⁶⁶ and failed to

161. An important responsibility of the COI is to administer the NCAA enforcement program. *See id.* art. 19.1. Administration of the enforcement program includes proposing legislative changes to the infractions and enforcement process, *id.* arts. 19.1.3(b) (Duties of Committee), 19.3, establishing investigative guidelines, *id.* art. 32.3.1 (Conformance with Procedures), and overseeing and supervising the secondary violations process, *id.* arts. 19.5.1 (Penalties for Secondary Violations), 32.3.1.1 (Investigative Procedures; Consultation with Committee on Infractions). The COI also may grant limited immunity from findings of involvement in major violations. This includes preserving competition eligibility for a student-athlete when the information otherwise might result in loss of eligibility. *Id.* art. 32.3.8.

162. NCAA Bylaw 32.8.8 (Posthearing Committee Deliberations).

163. Ancillary to its responsibility to resolve cases, the COI oversees scheduling of cases before it and resolves procedural issues, including those directed at the conduct of enforcement staff. Procedural matters must be raised prior to or during an infractions hearing or else they are waived. They are resolved at the hearing, *see, e.g.*, INFRACTIONS REPORT NO. 265, *supra* note 67, or in a separate hearing preceding the hearing on the merits, *see, e.g.*, INFRACTIONS REPORT NO. 256, *supra* note 42.

164. Two other COI responsibilities are to determine whether cases offered for processing through summary disposition may be so resolved or require a full hearing, NCAA BYLAWS art. 32.7, and to appear before the IAC to respond to appeals. This latter function is handled by the two COI coordinators of appeals. *Id.* art. 19.1.1.4.

165. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 171 (Mar. 24, 2000) (Murray State University).

166. INFRACTIONS REPORT NO. 287, *supra* note 124.

find some¹⁶⁷ or all¹⁶⁸ violations that the enforcement staff alleged. The COI also takes seriously its responsibility to protect the interests of rules-compliant institutions that are not before it who look to the COI to craft penalties that adequately assess the seriousness of violations, support efforts of diligent compliance directors, and effectively deter violations.¹⁶⁹ The COI has added findings of institutional control¹⁷⁰ and institutional failure to monitor,¹⁷¹ and in some cases has stated clearly that it would have made such a finding had the enforcement staff brought the allegation.¹⁷²

2. Conduct of Hearings

As is the case with administrative and other hearings that are not formal trials, the rules of evidence do not apply at an infractions hearing. In the absence of subpoena power to compel direct witness testimony, reliance on hearsay is unavoidable. Some information comes directly from coaches and other staff members present at the hearing. For other information, the COI relies on summaries that the enforcement staff, institution, and involved individuals provide. At most hearings there is no factual dispute between an institution and the enforcement staff, and often there is little or no factual dispute between them and involved individuals.¹⁷³ As a rule, the focus of disagreement is on the weight to be afforded information, inferences that may be drawn, who has the prime responsibility for violations, and what penalties are appropriate. To decide whether violations have been committed, the COI evaluates, among other things, (1) the internal consistency, cohesiveness, and logic of an individual's

167. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 248 (Feb. 1, 2006) (Florida A&M University).

168. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT M255 (Chicago State University) (case dismissed after hearing with no findings of violations).

169. The COI can add allegations to those presented by the enforcement staff and can make findings additional to those alleged. NCAA BYLAWS art. 19.4.3 (New Findings). When the COI believes that new findings may be appropriate, it gives notice to the institution or individual, provides an opportunity at the hearing to discuss the additional violation, and provides an opportunity post-hearing for a response in writing. Depending on the nature of the additional violation, the COI also may provide an opportunity for a supplemental hearing. *See id.*

170. *E.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 192 (Jan. 31, 2002) (University of Kentucky).

171. *E.g.*, INFRACTIONS REPORT NO. 287, *supra* note 124; INFRACTIONS REPORT NO. 278, *supra* note 123.

172. *E.g.*, INFRACTIONS REPORT NO. 193, *supra* note 136, at 5.

173. When there is disagreement about what an interview subject said, or meant, the COI will review the interview transcript and/or listen to a tape of the interview.

information on each subject about which she provides information, (2) the consistency of that information compared to other information provided by the same individual, (3) the consistency of an individual's information measured against the whole of the information in the record, (4) the credibility of individuals providing information, including whether they have any motive to obfuscate, lie, or withhold information, (5) any corroborating documentary or physical information, and, of course, (6) whether any party disputes the accuracy of the information.

Additionally, the use of confidential source information is a necessary component of an effective enforcement system and likely particularly so where there is no subpoena power. Without such information, many fewer major infractions cases would be identified and the commission of many major violations would go undiscovered, to the detriment of all those institutions and individuals who act with integrity and in compliance with the rules. Reliance on confidential sources is fundamentally no different from a confidential informer used in a criminal case or a law firm's use of a private investigator to follow confidential investigative leads that ultimately produce information admissible in court. The confidential source's information typically serves only as a directional signal, leading investigators to individuals with information both concrete and relevant to a charge. It is that information, and the identification of those individuals, that are provided to institutions and involved parties and on which and on whom the COI relies in making its findings. In a rare case, information from a source will be provided to the COI without attribution when that source is known to the institution and to the involved individual against whom the information will be used. In such a case, the COI will consider carefully the extent to which an institution and involved parties had a meaningful opportunity to "vet" the information.

3. Institutional and Individual Culpability

One of the least understood aspects of the infractions process concerns institutional responsibility for violations. Because universities act through individuals for whom they are responsible, when one such individual commits a violation so too does the university. It does not matter that an institution neither knew nor in the exercise of due diligence could have known of the violation. The university's responsibility arises out of its relationship with the rules-

violating individual.¹⁷⁴ Who committed the violation and whether an institution could have prevented or uncovered it, however, are relevant to assessment of penalties.

Substantive violations are one thing; they are defined in specific conduct bylaws. Lack of institutional control, however, is a separate violation that arises out of affirmative institutional failure to take appropriate steps to assure rules compliant behavior on the part of those for whom the institution is responsible.¹⁷⁵ These run the gamut from a president or chancellor to a booster unknown to an institution.¹⁷⁶ Except in unusual circumstances, there always is a lack of institutional control when violations are committed by a high-level administrator with responsibility for a program and the authority to administer it.¹⁷⁷ There also is a lack of institutional control when a member institution, through due diligence, should have known about the commission of violations regardless of who committed them.

Because an institution acts through individuals, findings of institutional culpability necessarily also mean individual culpability.¹⁷⁸ COI penalties, however, run directly only to an institution. When individual culpability is significant because of the nature of the violations or the manner in which they were committed, the COI may choose indirectly to penalize a culpable individual through the show cause process.¹⁷⁹ In that event, an institution employing such an individual, or seeking to employ him, must impose

174. Institutional responsibility tracks the law of respondeat superior in which employers are liable for intentional torts of employees that arise out of the employment relationship when the employee acts, or intends to act, in furtherance of the employer's interests. 17 CAUSES OF ACTION 647 § 2 (2009). To some degree, institutional responsibility in NCAA processes also tracks agency principles. These are based on the general notion that it is unfair for an enterprise to benefit from work of its agents and yet not be responsible when they cause harm. RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (1958). Under general agency law, a principal is not responsible when an agent acts solely in his own self interest. *Id.* By virtue of the institutional control mandate, NCAA institutions are responsible for the conduct of staff and others beyond what agency principles dictate.

175. Institutional control requires member institutions to operate rules-compliant athletics programs by monitoring to assure compliance, self reporting non-compliance, cooperating fully in any investigation, and taking appropriate corrective action. NCAA CONST. art. 2.7. Failure to monitor is a component of institutional control.

176. INFRACTIONS REPORT NO. 193, *supra* note 136, at 3.

177. *Cf.* *St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986).

178. It is possible, however, to have sufficient information from which to make a finding of violation against an institution, but not against a particular individual. It also is possible for the collective conduct of several to equal a major institutional violation, but the separate conduct of each to be insufficient for a finding of a major violation.

179. NCAA BYLAWS art. 19.02.1 (Show-Cause Order), 19.5.2.2.1 (Disciplinary Measures).

penalties as directed by the COI or show cause why it did not, with the possibility of penalties being imposed on it for failure to follow the show cause order.¹⁸⁰ For all staff members against whom findings of violations are made, moreover, whether accompanied by a show cause order, a file is maintained in the office of the COI. COI staff will share an individual's infractions history on request from a member institution at which he is employed or which seeks to employ him.

a. Institutional Responsibility and Institutional Control: Comparative Illustrations

Take the case of Assistant Football Trainer who pays Student-Athlete \$100,000.¹⁸¹ No one at his university knows about this payment. The university conducted more than adequate NCAA rules education for coaches and staff. It implemented compliance procedures reasonably calculated to prevent violations. Compliance staff followed them and also did adequate follow-through. Despite all of this, the university committed the violation of paying Student-Athlete because Assistant Football Trainer committed it. There is, however, no failure to monitor or lack of institutional control by the university.¹⁸²

Now take the same payment, but this time made by Head Football Coach. Again, the university did everything right. Again, it committed the violation because Head Football Coach committed it. But the difference in university responsibility is as different as the relative positions on the institutional food chain between Assistant Football Trainer and Head Football Coach. Although a finding of lack of institutional control is unlikely, it is not out of the realm of possibility and will depend on other elements of the case.

In a final hypothetical, Head Football Coach again makes the \$100,000 payment to Student-Athlete. This time, Head Football Coach got the money from Associate Athletics Director who, in turn, got it from institutional accounts. Athletics Business Manager knew of the illicit withdrawal. Assistant Football Coach knew how the

180. See, e.g., INFRACTIONS REPORT NO. 287, *supra* note 124; INFRACTIONS REPORT NO. 270, *supra* note 114.

181. Assistant Football Trainer is heir to a fortune worth millions. He is a big fan of the football team.

182. To maintain institutional control, member institutions are required to operate athletics programs that comply with all applicable bylaws, monitor their athletics programs to assure compliance, self-report instances of non-compliance, cooperate fully in any investigation, and take appropriate corrective actions. NCAA CONST. art. 2.7. Failure to monitor is one component of institutional control.

money was used and reported it to Compliance Director. Compliance Director talked to Head Football Coach, who denied making the payment. Compliance Director neither checked records nor conducted additional interviews. In this third case, again, the institution has committed the violation of paying Student-Athlete because Head Football Coach committed it. Institutional responsibility for the payment is magnified because of the involvement of Associate Athletics Director and Athletics Business Manager and the absence of adequate investigation by Compliance Director. In this third case there also is a gross lack of institutional control.

Student-Athlete in all three cases was the starting quarterback on the football team. He considered entering the professional football draft and was projected to be a high first-round draft pick. The \$100,000 kept him in college for another year, a year where the team under his leadership won its conference championship and a bowl game. The quarterback was runner-up for the Heisman Trophy.

Paying a student-athlete is a big, big deal, especially when done to assure that he will remain in school and continue to compete, paying him \$100,000 is even bigger, paying that amount to a star quarterback is even bigger again. There is no denying that the violation was substantial.

The responsibility of the Infractions Committee is to make findings and impose penalties that reflect the magnitude of the violations in a particular infractions case as well as the degree of institutional culpability. The responsibility of the Infractions Committee also is to pay heed to the interests of all member institutions not before it by, among other things, imposing penalties that more than offset any competitive or other advantage gained by rules-violative conduct. In the three illustrations above, the degree of institutional culpability varies but the competitive advantage gained is substantial, and a constant. Even in the first situation, where the institution did everything right (except its hiring of Assistant Football Trainer) there needs to be at least a vacation of wins and likely additional penalties assessed. As is obvious, there is an inevitable tension between the interests of an institution or an individual involved in a particular infractions case and the interests of the membership as a whole.

b. Nature of Violations

Just as in the criminal justice system, NCAA violations can be characterized as *malum in se* or *malum prohibitum*.¹⁸³ *Malum in se* violations by their nature shout their illicitness (for example, murder and rape in the criminal justice system; academic fraud or knowingly competing an ineligible player in the NCAA context). No actor credibly may claim that he did not know or should not have known that *malum in se* conduct was prohibited. *Malum prohibitum* violations are regulatory (for example, speed limits in the criminal justice system, recruiting calendars in the NCAA context). Even though a driver may not know that the speed limit in a residential neighborhood is twenty-five miles per hour, she is expected to know that there is a speed limit and also expected to find out what it is.¹⁸⁴ In the NCAA world, there is not just an expectation but an affirmative obligation to know, understand, and comply with NCAA bylaws.¹⁸⁵ A coach not only knows that there are dead periods in recruiting,¹⁸⁶ for example, but she is obliged to know precisely when they begin and end. Lack of knowledge, even if true, is a breach of the obligations of NCAA membership. Except in the rarest of circumstances, the COI will reject a claim that not knowing the details of a particular regulatory bylaw excuses its commission.¹⁸⁷ Moreover, any such mitigation will relate only to a coach or staff member, not a member institution.¹⁸⁸

c. Assessment of Culpability

Culpability for a particular substantive violation depends both on commission of the act (*actus reus* in the criminal justice system) and the mental state (*mens rea*) with which the act was committed.

183. See, e.g., AM. JUR. CRIM. LAW § 25 (2010).

184. In the criminal law, there may be an exceptional case where a regulatory violation is so far outside what may be anticipated as to be a due process notice problem. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957).

185. Such obligations similarly are enforced in regulatory schemes where a specialized agency oversees compliance. See generally WAYNE R. LAFAYE, CRIMINAL LAW §§ 3.3, 5.5 (4th ed. 2003).

186. During a dead period, a coach may neither leave campus for any recruiting purpose nor have on-campus contact with a prospect. NCAA BYLAWS art. 13.02.4.4.

187. If commission of a violation clearly was inadvertent and neither produced nor was intended to produce a significant extra benefit or other advantage, it will have been processed as a secondary violation.

188. See, e.g., INFRACTIONS REPORT NO. 265, *supra* note 67.

Like the criminal law treatment of principals and aiders/abettors, there may be varying degrees of culpability for NCAA actors engaged in concerted activity.

Consider a case in which Husband shoots and kills Wife immediately upon catching her in bed with Paramour. Witness told Husband of Wife's affair and gave Husband a loaded gun. Husband immediately raced home and shot Wife. The evidence at trial was that Witness harbored animus toward Wife, told others before her death that he would find a way to have her killed, and told others after her death that he manipulated Husband into doing the deed. On these facts, Witness acted with purpose to have Wife killed. He also is complicit in the act of killing because he both instigated it and gave Husband the gun. Purpose to kill, plus the act of killing results in first degree-murder. Husband, however, acted under extreme emotional distress. His crime may be voluntary manslaughter, not murder.

NCAA violations are clearly different in kind from crimes, and even more so from crimes such as murder. What is common both to crimes and NCAA violations is how degrees of culpability are assessed. Building on the above example, consider a case where Head Coach gives cash to Assistant Coach and directs her to give it to Student-Athlete. Student-Athlete confirms both receipt of the cash from Assistant Coach and that Head Coach told her it was from him. According to Assistant Coach, Head Coach told him, falsely, that the cash was Student-Athlete's and that she left it behind in Head Coach's office. Head Coach acted with purpose to provide an extra benefit and also is complicit in the act of providing it. Money to Student-Athlete plus purpose equals a major extra benefit violation, one made more serious due to the use of Assistant Coach. Assistant Coach's extra benefit violation is less serious—perhaps secondary as to him—if, that is, the COI credits both his rendition of the facts and that he was fooled.¹⁸⁹ Student-Athlete, however, committed a major violation by accepting the money. The institution is responsible for the acts of Student-Athlete and both coaches; its responsibility is greater than that of any individual culpable actor and in no event is it less than that of Head Coach. Furthermore, even if it cannot be known with certainty which coach committed the violation, the institution still is

189. For the definition of a secondary violation, see *supra* text accompanying note 130. Should Assistant Coach be found to have committed a major violation, penalties running to his involvement will be mitigated. *See id.*

responsible so long as the evidence is sufficient to show that one of the coaches committed it.

Consider another example. Due to their misunderstanding of a rule regarding the number of telephone calls that may be made weekly to prospects,¹⁹⁰ all coaches on a staff have committed violations. The violations of each are inadvertent; considered individually by each, the violations also are not so numerous as to be a recruiting advantage. Collectively, however, there was an advantage gained. Each coach's violations may be secondary, but the institution has committed a major violation.¹⁹¹ If, moreover, the coaches' collective misunderstanding was due to failure of rules education or misinformation from the compliance director, then institutional responsibility increases and may constitute a lack of institutional control—or at least failure to monitor.

4. The COI and Judicial Review

The infractions hearing process is a form of dispute resolution alternative to the traditional judicial model (alternative dispute resolution or ADR).¹⁹² It is akin to arbitration in that it works from a formal agreement of the parties.¹⁹³ Arbitration agreements designate the arbitrator to be used, the specific disputes subject to arbitration, and the procedures to be employed. Similarly, NCAA bylaws designate the COI to handle institutional violations and describe the COI's role, membership, functions and procedures.¹⁹⁴ As with decisions of arbitrators, COI decisions are binding on the parties.

Whether formally called arbitration, ADR is most appropriate when there is a continuing relationship among parties, particularly if disputes likely will arise regularly and frequently, and more so if there is a large body of rules to be applied for which a close understanding of the enterprise and its common understandings is useful, if not critical.

ADR is hardly unique to the NCAA. For example, it is employed in university disciplinary proceedings, in trade associations,

190. *E.g.*, NCAA BYLAWS art. 13.1.3.1 (Time Period for Telephone Calls – General Rule).

191. Multiple secondary violations may add up to a major one. *Id.* art. 19.02.2.1.

192. See Clyde W. Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004).

193. NCAA member agreement comes through their adoption of bylaws governing the enforcement and infractions processes and the obligations of membership.

194. Parties may agree to use arbitrators that are certified by the American Arbitration Association. Arbitrators can be standing committees established to handle disputes such as the Court of Arbitration for Sport (CAS) and the International Council of Arbitration for Sport (ICAS). They also can be factfinding panels appointed case by case.

housing associations, and fraternal associations.¹⁹⁵ Arbitration is the dispute resolution process of choice in collective bargaining agreements,¹⁹⁶ including salary disputes in professional sports leagues. It also is used to resolve disputes arising out of national team and Olympics competition and for drug-testing appeals.¹⁹⁷

The one immutable characteristic of adjudicative bodies is that they are neutral. Neutrality comes in different shapes and sizes, however.¹⁹⁸ In university disciplinary proceedings, hearing bodies typically are composed of other staff and faculty.¹⁹⁹ When agreements cover a world of subject matter involving numerous rules and policies

195. See *infra* note 200.

196. See U.S. DEPT. OF LABOR, ANTHRACITE COAL STRIKE COMM'N, REPORT TO THE PRESIDENT ON THE ANTHRACITE COAL STRIKE OF MAY-OCTOBER, 1902 (1903). Among others, arbitration also is employed for claims involving securities. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Supreme Court specifically rejects the claim that arbitration is inferior to courts in protecting rights of litigants. See, e.g., *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 121 S.Ct. 513 (2000).

197. See *supra* note 194. Cases can get complicated. An example is the case of Matt Lindland. *Lindland v. U.S. Wrestling Ass'n*, 230 F.3d 1036 (7th Cir. 2000). Lindland wrestled against Keith Sieracki for a spot on the United States Olympic team. *Id.* at 1037. The referee awarded the match win to Sieracki. *Id.* Lindland protested to the United States Wrestling Protest Committee, which denied his claim. See *id.* He then appealed the Protest Committee's decision to an arbitrator who reversed the decision and ordered a rematch. *Id.* Lindland won the rematch. *Id.* at 1037-38. Thereafter, a second arbitration concluded with a decision in favor of Sieracki. AM. ARBITRATION ASS'N, CASE NO. 30 190 00483 00, FINDINGS, CONCLUSIONS AND AWARD (2000), available at http://assets.teamusa.org/assets/documents/attached_file/filename/5766/Sieracki_v_USA_Wrestling_Inc_2000.pdf. Lindland sued, and the Seventh Circuit affirmed the first arbitrator's decision, which should have resulted in Lindland making the Olympic team. See *Lindland*, 230 F.3d at 1040. Sieracki sought review by the CAS on grounds that included a "breach of natural justice." COURT OF ARBITRATION FOR SPORT, MINUTES OF HEARING, SEPTEMBER 21, 2000 ¶ 7 (2000). Lindland obtained an injunction ordering Sieracki to comply with the Seventh Circuit decision. Sieracki withdrew his appeal in response to the injunction. *Id.* ¶¶ 8-9. Lindland competed on the United States team and won a silver medal. See Mitch Sherman, *Gardner Cheered in Lincoln*, OMAHA WORLD HERALD, Sept. 28, 2000, at 27.

198. In collective bargaining agreements, including professional sports salary disputes, it is typical to designate an arbitrator separate from both parties. On the other end of the spectrum, the Supreme Court found no due process violation in an administrative law judge serving three separate roles—advocate for each of the parties and also as the decision-maker. See *Richardson v. Perales*, 402 U.S. 389 (1971).

199. This is the case even though public universities are state actors subject to the strictures of minimum due process. Use of member hearing bodies occurs in trade associations. See, e.g., Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Eric A. Feldman, *The Tuna Court: Law and Norms in the World's Premier Fish Market*, 94 CAL. L. REV. 313 (2006). In prison disciplinary proceedings, the hearing body may be comprised of prison officials, even wardens. See *Wolff v. McDonnell*, 418 U.S. 539, 571 (1974).

of an association, a hearing officer typically will have expertise in the subject area as well as in the shared customs of the enterprise.²⁰⁰

Decisions of arbitrators are afforded great deference by courts.²⁰¹ An illustration of just how great this deference is can be found in the case of Eastern Associated Coal Company, where Eastern attempted to fire an employee for “just cause,” as defined by the employment contract.²⁰² The employee drove a heavy truck-like vehicle on public highways. On two separate occasions, he tested positive for marijuana use. Both times, he was fired. Both time an arbitrator reinstated him based on the terms of his employment agreement. Eastern went to court twice in an attempt to overturn the arbitrator. On review of the second case, the Supreme Court unanimously held that mutually agreed terms in a collective bargaining agreement may include designation of who is to decide the meaning of contract terms.²⁰³ In the instant case, the parties agreed that an arbitrator would decide what constituted “just cause” under the agreement. As a result, the employer got what it bargained for—the arbitrator’s interpretation—despite the fact that the interpretation was not what it had hoped.²⁰⁴

Deference to an arbitrator’s interpretation of the terms of an agreement is by no means unique. The law acknowledges that the body with jurisdictional authority to adopt rules and policies is the authoritative voice on their meaning and scope. Federal courts sitting in diversity apply state law as the state would apply it, not the law

200. There also is a growing body of commentary questioning whether corporate governance is best effected by independent directors rather than shareholders. *See, e.g.*, Eric M. Fogel & Andrew M. Geier, *Strangers in the House: Rethinking Sarbanes-Oxley and the Independent Board of Directors*, 32 DEL. J. CORP. L. 33 (2007); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465 (2007).

201. Under the Federal Arbitration Act, an arbitrator’s decision can be vacated only if it came about through corruption or fraud, if the arbitrator was biased or refused to hear relevant evidence, or if the decision was outside the jurisdiction of the arbitrator. 9 U.S.C. §§ 10(a), 11 (2006); *see also* Hall St. Assocs, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). This includes decisions involving sports arbitration. *See, e.g.*, Major League Baseball Players Ass’n v. Garvey, 532 U.S. 504 (2001). These grounds are exclusive for actions brought under the Federal Arbitration Act. *Id.* Federal court jurisdiction under the Act is triggered when the underlying claim is federal. *See* Vaden v. Discover Bank, 129 S. Ct. 1262 (2009).

202. E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000).

203. *Id.*

204. The Supreme Court decided, also unanimously, that the arbitrator’s decision violated no overarching public policy. *Id.*

they think makes most sense.²⁰⁵ When a New Jersey court hears a case based on California law, it applies the law as articulated by the California courts; it does not decide what California law should be.²⁰⁶ The Supreme Court, hearing a case on appeal from a state court that involves both state and federal questions, accepts as dispositive the state court determination of state law.²⁰⁷ Under the Administrative Procedure Act, a court hearing an appeal from an agency hearing decision defers to agency expertise and reverses only when a decision exceeds statutory authority, is unconstitutional, or is arbitrary or capricious.²⁰⁸

Deference to a COI decision was an undercurrent in contract litigation between Ohio State University and Jim O'Brien.²⁰⁹ Although the trial judge did not like how the COI construed certain bylaws in the Ohio State infractions case,²¹⁰ it nonetheless was clear that the COI was the authoritative voice on their meaning: "Ultimately, the determination whether [O'Brien] committed a major infraction of NCAA rules and what sanctions, if any, may be imposed upon [Ohio State University] will be made by the NCAA Committee on Infractions and not this court."²¹¹

205. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

206. *E.g.*, *Durfee v. Duke*, 375 U.S. 106 (1963).

207. Under the Supremacy Clause, federal constitutional law and statutes enacted pursuant to congressional legislative power trump inconsistent state statutes or rules. *E.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *United States v. Locke*, 529 U.S. 89 (2000). However, the Supreme Court does not revisit a state court's construction of state law. *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875).

208. The reviewing court sets aside agency actions, findings, and conclusions if they are:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (2) contrary to constitutional right, power, privilege, or immunity;
- (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (4) without observance of procedure required by law;
- (5) unsupported by substantial evidence in a case subject to certain provisions of the APA or otherwise reviewed on the record of an agency hearing provided by statute; or
- (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706 (2006).

209. *See supra* text accompanying notes 41-45 for a discussion of the infractions case.

210. *O'Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36 (Ohio Ct. Cl. 2006).

211. *O'Brien v. Ohio State Univ.*, No. 06AP-946, 2007 WL 2729077, at *16 (Ohio Ct. App. Sept. 20, 2007).

XI. FROM CONCEPT OPTIMUM TO IMPLEMENTATION OPTIMUM

NCAA processes are about as well conceived to achieve NCAA objectives as can be managed in an imperfect world. There are things that may be done, however, to move closer to optimum implementation.

A. Improving the Infractions Process

The COI is a prime actor in NCAA processes to assure that institutions and those for whom they are responsible comply with NCAA rules. It also is a focal target of criticism and, increasingly, a defendant in lawsuits. It is imperative that COI processes best reflect the needs and predilections of member institutions in creating the COI and in vesting it with authority to handle institutional violations. It is equally imperative that COI members, alone and collectively, embody a level of end-line responsibility, experience, background and gravitas so as to warrant the significant confidence vested in them by virtue of service on the COI.

1. Treatment of Institutional Cooperation

Although cooperation is a duty of membership, currently the COI is obliged by the IAC to specify the degree to which an institution cooperated in an infractions case and then to mitigate penalties, if warranted, based on the degree of cooperation.²¹² At the most fundamental level, giving such penalties credit for investigative cooperation minimizes the gravity of a violation and permits institutional retention of some part of the benefit achieved through its

212. See, e.g., NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS APPEALS REPORT NO. 208 (Sept. 25, 2003) (University of Michigan); NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS APPEALS REPORT NO. 175, at 32 (July 16, 2002) (Howard University) (“[Institutional cooperation] must be a significant factor and given substantial weight.”); NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS APPEALS REPORT NO. 192 (Sept. 17, 2002) (University of Kentucky); NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS APPEALS REPORT NO. 111 (May 1, 1995) (University of Mississippi). In an infraction case involving the University of Oklahoma, the Infractions Appeals Committee also suggested that the COI should specify the weight afforded to institutional cooperation. NCAA DIV. I INFRACTIONS APPEALS COMM., INFRACTIONS APPEALS REPORT NO. 270 (Feb. 22, 2008). As stated by the COI in a report to the DI Board of Directors, noting and giving credit for cooperation is wrong in principle and more than problematic in implementation. REPORT ON COMM. ON INFRACTIONS IMPOSITION OF PENALTIES FOR REVIEW AND ACTION (Oct. 10, 2008), available at http://web1.ncaa.org/web_files/DI_MC_BOD/DI_BOD/2008/October/05,%20BOD,%20penaltiesmemotoshep.pdf.

commission. It risks prioritizing effort at the back end—investigating a violation—over vigilance at the front end—administering an effective compliance program. Giving penalties credit, moreover, contradicts a general operating rule in the philosophy of deterrence—to deter, a penalty must do more than merely correct for any injury created or advantage gained by a violation. Giving penalties credit also penalizes rules-compliant institutions and complicates the jobs of diligent campus compliance directors working to maintain a campus rules-compliant environment.

There are also significant implementation problems with giving penalties credit for institutional cooperation. The COI neither investigates cases nor interacts with institutions during investigations. The information on which it bases a finding of a violation comes from the enforcement staff case summary, responses from the institution and involved individuals, and the discussion at the infractions hearing. It is in the nature of these hearings, however, that information relevant to institutional cooperation is brief, conclusory, and inadequate to permit discrete judgments distinguishing between degrees of cooperation or the degree to which penalties mitigation is warranted.²¹³ In consequence, only extraordinary institutional cooperation can give rise to penalties credit.

An institution that believes cooperation will result in mitigation of penalties has raised expectations that lead to disgruntlement with penalties imposed and more appeals than otherwise would be taken. Even though the enforcement staff tells institutions that it neither speaks for the COI nor controls how the COI will view a case and assess penalties, institutions nonetheless routinely expect that enforcement staff satisfaction with their efforts will translate into penalties mitigation. It is likely that no institution feels that the enforcement/infractions process was completely fair, but raised expectations only exacerbate discontent.

Giving penalties credit for institutional investigative cooperation also may trigger claims that personnel actions taken by an institution against staff were influenced by the desire to mitigate COI penalties. The COI then is in the undesirable position of questioning institutional motives in admitting culpability and perhaps even the factual basis for an admission.

213. There is even less basis for the IAC to find a penalty so excessive as to be an abuse of discretion. *See* NCAA BYLAWS art. 32.10.4.1 (Basis for Granting an Appeal: Penalties).

The potential for institutional cooperation credit also leads to increased NCAA litigation risk as the enforcement staff and/or the COI may be pointed to as the allegedly responsible (or co-responsible) entity for the personnel decision. Neither the COI nor the enforcement staff can speak with authority as to the reasons motivating institutional personnel actions, and, in fact, it is possible that neither would endorse the action taken. Defending a lawsuit always means lawyer fees and litigation costs. The COI must do what it believes is right based on the record before it and the threat or actuality of a lawsuit should not deter its informed and thoughtful decision-making. For the reasons set forth above, however, giving credit for investigative cooperation on the merits is a bad idea. At the very least, it is a debatable policy choice. That it increases litigation risk, therefore, should tip the scales against its use.

There is a concern that failure to give penalties credit for cooperation eliminates one of the few tools that the enforcement staff has to spur institutional cooperation and aggravates the political difficulties that senior institutional administrators may face with various constituencies in getting a full and complete investigation done. Without discounting either concern, it is likely that no more than a few institutions will fail to take seriously their obligation to investigate thoroughly even in the absence of a penalties mitigation incentive, as it is in an institution's interests to weed out cheaters and staff members whose work is below par. For those institutions that drag their metaphorical feet, a stick should be wielded in lieu of the carrot. In other words, the enforcement staff can and should allege institutional failure to cooperate when it occurs. This allegation should be an effective impetus to institutional cooperation, particularly if the enforcement staff is aggressive in making the allegation when full cooperation is not forthcoming, or is forthcoming but slow.²¹⁴ Yet another spur comes from the COI's independent obligation to inquire of institutions should the record suggest that they did not do all they could or should have done to investigate violations or to assist the enforcement staff in its investigation. If the COI is not persuaded that a full investigation was done, it has several options: (1) it can enhance penalties for violations found, (2) it can direct the staff to do further investigation with the possibility of

214. Delay can be significant not simply because of the impact on an enforcement staff investigation. It may have impact on an involved individual. It also increases the overall time for a case to go from notice of inquiry to COI decision and report. Institutions evaluating the process will not know that delays were caused by a dilatory institution and not staff inefficiencies.

alleging further violations, or (3) it can itself make additional allegations and finding of violations.²¹⁵

Because of the position that the IAC has taken with regard to crediting and noting institutional investigative cooperation,²¹⁶ the COI cannot on its own effect a change in current practice. What is needed is explicit bylaw language that eliminates (or at a minimum narrowly restricts the use of) penalties credit for institutional investigative cooperation.

2. Let the Punishment Fit the “Crime”

There are at least two needed reforms to how the Infractions Committee assesses penalties that may be implemented by the Infractions Committee with no need for legislative authority²¹⁷—ratcheting up the penalties imposed in infractions cases and imposing penalties based on the magnitude of the entire case rather than only imposing penalties tagged to the particular violations committed (as, for example, limiting team play/practice for a play/practice violation).

A prime, but by no means exclusive, reason for increasing penalties is that at present they are less severe than those imposed by Team CAP for failure to meet the academic progress rate. Deficient academic performance is a bad thing, committing major infractions no less so. It is unacceptable for Team CAP penalties for academic deficiencies to be more severe than those imposed by the Infractions Committee for major rules violations.²¹⁸

It is clear, moreover, that only certain penalties are perceived by coaches and others as substantial and, thereby, announce to them the seriousness of the violations committed. For coaches, what matters most is vacation of wins from their individual records and show cause orders by which restrictions on their athletically related

215. For instances when additional violations were found, see *supra* notes 156-63 and accompanying text.

216. *E.g.*, Infractions Appeals Committee Report No. 294 (Florida State University 2010) at 11.

217. Other penalties, such as a ban on television appearances, likely require some formal action by the NCAA membership. A TV ban currently is authorized; NCAA BYLAWS art. 19.5.2.2(g) (Disciplinary Measures), 19.5.2.5 (Television Appearance Limitations); and would be a significant penalty perceived as such. Because the COI has not imposed this penalty for several years, however, prudence dictates that the membership in some form reaffirm support for its imposition.

218. NCAA BYLAWS art. 23.02.1 (Academic Progress Rate). A complete description of the process by which teams are penalized is found in NCAA BYLAWS art. 23 (Academic Performance Program).

duties follow them to a new hiring institution.²¹⁹ Of those penalties currently imposed on institutions, loss of scholarship, loss of competition opportunities, particular post-season, and vacation of wins matter most.²²⁰ The COI needs to modify its practice of imposing penalties as a “tit for tat” focused on the nature of particular violations. A case is major because violations were committed intentionally or because they are numerous. A case is major because it results in a competitive or other advantage to an institution. In all but extraordinary circumstances, a major case also should result in penalties commensurate with the magnitude of the case taken as a whole.²²¹

3. Settlement Decisions

In a multi-member association, litigation decisions can be difficult to manage. Lawyer work product and lawyer-client communication require confidentiality, but there also is an obvious need to have the members direct litigation decisions. In walking this line, NCAA senior administrators give full information to the NCAA executive committee; which makes client litigation decisions, including settlements, on behalf of all members; and provide some level of information to the DI Board of Directors and Leadership and Legislative Councils.

NCAA settlement decisions are based on the same criteria as in other contexts involving institutional litigants. These include the cost to litigate, the cost to settle, the centrality of the subject matter of litigation to the operation of the enterprise, the impact of litigation loss on continuing operations, and the risk that a settlement will generate more litigation. The COI receives regular reports on the progress of litigation involving it, but it does not routinely have formal input in litigation decisions. Consistent with other NCAA litigation, the membership as a whole is treated as the client and the COI has no special status. This process needs tweaking.

The COI is the most familiar with the various components of a case and what occurred. It is in the best position to assess the impact of a settlement on future cases and on how it does its work. It may suggest settlement language that will better protect those interests

219. NCAA BYLAWS art. 19.5.2.2 (e) and (l).

220. NCAA BYLAWS art. 19.5.2.1 (e) and (f); NCAA BYLAWS art. 19.5.2.2 (e), (h), (i), and (j).

221. NCAA BYLAWS art. 19.5.2.2. (c).

than that which otherwise might result. In addition, committee service involves a considerable amount of time and work, all of it on a volunteer basis. A settlement that undoes all that work because a litigation decision is focused too heavily on the economic advantage of settling may have adverse effect on COI processes and member morale. COI perspective and predilections need not be dispositive, but its views should be heard. It also should be informed as to how competing factors were assessed in coming to a litigation decision, especially one to settle.

4. Committee Composition

The work of the COI is among the most important done by any NCAA committee, cabinet, or council: it has substantial import for institutions and involved individuals alleged to have committed violations and substantial import for institutions looking to it to uphold competitive equity and protect against an onrush of cheating and other behaviors injurious to student-athletes and institutional integrity. Appearing before the COI are senior institutional administrators, including presidents, chancellors, regents, and general counsel. Power coaches appear. Experienced lawyers appear. The latter may be unfamiliar with infractions hearings processes and urge, sometimes at great length, that processes comport with those with which they are familiar. COI cases periodically end in litigation. Litigation awards may be substantial. The NCAA also may incur substantial attorney fees even in cases where ultimately no NCAA liability is found.

a. Who?

There are eight COI members who hear and decide cases; an additional two members are coordinators of appeals to the IAC.²²² There are no stated bylaw criteria for membership on the hearing committee except that at least two members must be women and two must be members of the public unaffiliated with a member institution.²²³ Service on the COI is not simply a matter of knowing “the stuff” and putting in the requisite time. These are critically necessary but far from sufficient conditions. COI members entrusted to deal with sensitive and important subject matter need to have the

222. NCAA BYLAWS art. 19.1.1 (Composition of Committee).

223. *Id.*

gravitas and stature that lends credence to decisions rendered. Prior to the Tarkanian²²⁴ reforms, members of the COI always were prominent in their fields, with end-line, significant, and broad-based responsibilities and experience. There must be continued assurance that members have the experience that comes with superior analytical skills, such as professors with tenure, athletic directors, and general counsels of universities.” Embodying these criteria in bylaw language would guarantee continued adherence to them and also to avoid the inefficiency that comes with conferences nominating for COI service individuals with no possibility of being appointed.²²⁵

b. For How Long?

Most committee appointments are for four-year terms with re-appointment to another four years.²²⁶ On most NCAA committees, members represent the conference that nominates them; if a committee member switches jobs to an institution in another conference, she may serve another four and four. A member of the COI, by contrast, represents neither conference nor institution. The initial appointment is for a three-year term, with two three-year re-appointments.²²⁷

Term limits assure the periodic injection of new perspectives on the COI.²²⁸ They also reduce issues of a member’s continuing tenure

224. *NCAA v. Tarkanian*, 488 U.S. 179 (1988). Tarkanian, the head men’s basketball coach at the University of Nevada, Las Vegas (UNLV), was suspended by UNLV after the COI found that he had committed major violations. He sued the NCAA, claiming he was denied due process in the infractions hearing. Although Tarkanian did not prevail in the litigation (the Supreme Court held that the NCAA is not a state actor and, therefore, under no requirement to provide due process at hearings), the NCAA subsequently appointed a “blue-ribbon” panel to evaluate the enforcement and infractions processes. REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVISE THE NCAA ENFORCEMENT AND INFRACTION PROCESSES (1991) (on file with the author). The committee was chaired by former solicitor general Rex Lee and had as members a former Chief Justice of the Supreme Court and a former U.S. attorney general. Most of the recommendations thereafter were adopted. *Compare* NCAA BYLAWS art. 19.2 (1993), *with* NCAA BYLAWS art. 19.2 (1994).

225. Although unstated criteria in the past has resulted in individuals with the requisite experience serving on the COI, absence of such explicitly stated criteria means that conferences have not limited nominations to such individuals. Stating the criteria explicitly therefore also would avoid inefficiencies in the committee nominating process.

226. *E.g.*, NCAA BYLAWS arts. 21.2.1.2 (Term of Office), 21.4.6 (Term of Office).

227. *Id.* art. 19.1.1.3 (Term of Office).

228. Another benefit is that wholesale and abrupt change in the COI, caused by resignations before the end of terms, will not result in few experienced members serving. These resignations result in skewed composition in the long term as too many will complete their terms at the same time.

on the committee despite any problems with her. Were bylaws to be amended to permit reappointment after three three-year terms but only after a three-year interval, both interests would be met and the downsides to term limits also avoided.²²⁹ Term limits also carry significant disadvantage as they deprive groups of members no matter how valuable and have negative impact on the experience of a group. These consequences can be aggravated if members resign before completing their full terms. A salutary reform to COI term limits would be to permit reappointment after three three-year terms, but only after a three-year interval. This option preserves the opportunity to assure requisite experience on the COI but permits the decision to be made unfettered by a natural reluctance to refuse to reappoint a sitting member who seeks to continue to serve.

B. Improving the Enforcement Process

There was a growing feeling up to and through the time of the *Tarkanian* reforms that the enforcement and infractions processes operated in ways that were fundamentally unfair to member institutions and staff.²³⁰ One offshoot of the *Tarkanian* case was that NCAA infractions processes were reformulated to provide minimum due process procedural protections.²³¹ Another offshoot involved rethinking the role of the enforcement staff so that it became more user-friendly.²³² A change in enforcement staff role identity and approach was an important reform at the time.²³³ Because an institution and involved individuals are obliged to cooperate and to tell all, the theory was that the enforcement staff should have some reciprocal duty to cooperate. It is well past time to rethink this approach.

There are advantages to a system in which the enforcement staff works in tandem with institutions under investigation for commission of major infractions. In principle, such a system is fully consistent with the overarching mission of NCAA staff to assist member institutions. Of prime importance to institutions is that working with the enforcement staff to uncover facts honors their

229. Left to the sound discretion of the membership would be decisions whether to reappoint a particular member after a three-year interval in light of other candidates for service and the overall configuration of the COI.

230. See generally, *supra* note 224 discussing *Tarkanian* reforms.

231. *Id.*

232. *Id.*

233. *Id.*

integrity. It signals that they still are trusted members in their association notwithstanding the commission of violations. Cooperative investigations also offer institutions an outside lens into evaluating the seriousness of what occurred.

In practice, cooperative investigations are efficient. They can facilitate a quest for all relevant facts while at the same time not impede the enforcement staff from making independent fact assessments and deciding what allegations are warranted. Duplicative effort is avoided, or at least minimized. For individuals being interviewed—including those who are not suspected of committing violations—burdens on their time may be alleviated. The gain for the enforcement staff is that institutional shared responsibility of an investigation may bring more diligent institutional effort, or at least a more open, and thus less defensive, attitude toward NCAA enforcement staff. Institutional compliance staff is better situated to find and arrange for staff and student-athlete interviews. They are the ones who, in any event, will need to gather relevant records and other documents. They know and understand campus personalities and may offer guidance as to how best to approach individuals. These acknowledged advantages cannot be discounted. Nonetheless, they are outweighed by the disadvantages.

When the enforcement staff first put on its cooperative hat, coach participation in infractions hearings was nonexistent. Before *Tarkanian*, a coach might not have known she was under investigation or even that a finding was made that she had committed violations.²³⁴ That day has long since passed. An enforcement staff investigation in which institutions are heavily involved has practical consequences for coaches and has the appearance of prejudging circumstances in favor of institutions. In addition, cooperative investigations pose a risk that the enforcement staff may lose objectivity and identify too closely with institutional staff. Not calling adversarial that which clearly is adversarial, moreover, fosters misunderstanding, or at least permits claims of misunderstanding, of just what the enforcement staff's role is. There also may be institutional unhappiness that the COI is not sufficiently deferential to conclusions jointly reached by the institution and enforcement staff after a cooperative investigation effort.

To describe the risks and disadvantages in investigations that are cooperative is not to suggest that the enforcement staff abdicates its role to make an independent assessment of the facts and to bring

234. See generally sources cited *supra* note 224.

allegations that those facts warrant. Nor is it to suggest that the enforcement staff operates to the detriment of coaches or that investigations are biased against them. On the contrary,²³⁵ the enforcement staff does a laudable investigative job, acts with independence and integrity, and makes every effort to be evenhanded with institutions and involved individuals. Describing the risks and disadvantages also is not to imply that coaches and involved individuals are similarly situated with institutions in ways of import to the efficient processing and security of an investigation. There clearly are differences between coaches and other involved individuals and institutional staff who are not the subject of an investigation when it comes to incentives to subvert or delay an investigation, influence witness recollection or statements, or otherwise act in bad faith.

No wholesale departure from current practice is required. The enforcement staff still could alert the COI to exculpatory information regarding allegations, choose to assist institutions and involved individuals to locate witnesses and facilitate interviews, and conduct joint investigations with institutions, just with more care as to when joint actions are appropriate. What must be clear and explicitly stated in the Division I manual is that the primary role of the enforcement staff is adversarial and its willingness to assist and cooperate with institutions and involved individuals is secondary to the main job.

1. Maintaining Distance

Enforcement staff members naturally feel good about institutional staff members with whom they work closely and who spend long hours to facilitate their investigation. They naturally feel bad about building a case against an institution out of information acquired only through the assistance of institutional staff. This is particularly true regarding allegations such as failure to monitor and lack of institutional control that point to shortcomings in compliance staff, the very ones with whom the enforcement staff works most closely. The risks to the process are that enforcement staff cooperation with an institution may be seen to compromise their independent judgment or to lead to preferential treatment for institutions to the detriment of the interests of coaches and other involved individuals. Most institutional staff members are dedicated

235. Compare, e.g., *NCAA v. Yeo*, 114 S.W.3d 584 (Tex. App. 2003), with *NCAA v. Yeo*, 171 S.W.3d 863 (Tex. 2005).

to doing their jobs well and ethically. But even good people make mistakes, may be cowed by a strong personality, or on occasion succumb to temptation and do bad things. The risk to the process is that the enforcement staff will exalt (or be perceived to exalt) effort and diligence of compliance staff in investigating violations over failure of effort and diligence in preventing and uncovering them. The risk is that the enforcement staff will give too much credit for good intentions and not enough demerits for inadequate follow-through. Because the enforcement and infractions processes operate in a world where competitive equity needs are paramount, lenient treatment for one institution has consequence for others. Too close a working relationship with one institution risks myopia regarding how decisions may bear on, or be perceived to bear on, institutions not under investigation.

2. A Rose by Any Other Name: Calling the Process Adversarial

NCAA bylaws describe the role of the enforcement staff and the procedures by which it does its job.²³⁶ Nowhere in the bylaws is the job explicitly described as adversarial; only by necessary inference from its role as investigator and presenter of cases to the COI does its role become clear. Calling the process adversarial would not by itself increase the distance between the enforcement staff and institutions, but it would move in that direction.

It is one thing for the enforcement staff, where possible, to attempt to assist both institutions and involved individuals to locate witnesses or otherwise to track down information. It is mere sophistry, however, to describe as non-adversarial an enforcement staff's investigation, its allegations, its collection of evidence in support of violations, its determination that involved individuals lied or obfuscated, or that institutional staff failed to meet the requisites of monitoring and control.

The enforcement staff's presentation to the COI in support of its allegations of violations is also adversarial. Clearly and necessarily, the enforcement staff takes an adversarial posture in investigation when it encounters reluctance to provide information, when it is concerned about the security of information if shared with an institution or involved individual, or even when it tests information already provided to assure it is complete and accurate. However much the enforcement staff and institution work together, in the end, the

236. See generally NCAA BYLAWS arts. 19 & 32.

enforcement staff must bring allegations and present the information that supports them. In essence, if not in name, doing so makes the process adversarial. This is no less true even though in most cases the institution agrees that violations occurred.

Calling the process adversarial avoids involved individuals—and, at times, institutions—misunderstanding the role of the enforcement staff. Currently, hearing time, and sometimes quite a bit of it, is devoted to arguments that an allegation should be dropped because the enforcement staff failed in what is argued, wrongly, as its duty to track down all investigative leads and interview all witnesses with potential exculpatory information. The underpinning of the criticism is that it is the obligation of the enforcement staff, and not institutions and involved individuals, to make the case for exculpation or mitigation. Obviously, the same enforcement staff that decides violations were committed and that presents evidence in support of this fact also cannot have an equal responsibility to refute that evidence. NCAA bylaws need to say that clearly.

Another problematic aspect of viewing an enforcement staff role as cooperative, and not adversarial, is the extent to which doing so prevents proactive investigation of institutions and coaches. It may never be politically feasible for the enforcement staff to mirror the police by, for example, formally targeting repeat institutional offenders or by using undercover agents. Under the present articulation of its role, however, even other initiatives—sharing information with the police so that they might use their full investigative tools and then, in turn, share information with the enforcement staff—may go untried.²³⁷

237. Among these might be sharing with law enforcement information of violations that threaten the integrity of the college game where the absence of subpoena power and investigative tools such as wiretaps prevents the enforcement staff from making a case. The enforcement staff currently does some things. It identifies “top prospects” in various sports and interviews them about the recruitment process. E-mail from David Price, NCAA, Vice President for Enforcement, to Josephine R. Potuto, Richard H. Larson Professor of Constitutional Law, University of Nebraska-Lincoln College of Law (Nov. 30, 2009, 18:11:14 CST) (on file with author). The AGA enforcement staff attends summer basketball events at least in part to observe agent and coach interaction and to build relationships with coaches, agent/runners, scouting services, and media representatives. E-mail from Rachel Newman Baker, to Josephine R. Potuto, Richard H. Larson Professor of Constitutional Law, University of Nebraska-Lincoln College of Law (Nov. 30, 2009, 22:22:29 CST) (on file with author).

3. Remember the Coaches

Infractions cases frequently involve allegations that coaches and other involved individuals committed violations.²³⁸ Yet, the enforcement staff interacts with them neither in the same way nor on the same time line as it does with institutions.

There are various and good reasons for the differences. A constant in all investigations is that the side making the case necessarily works in advance and independent of the side responding. To avoid collusion among those investigated, their corruption of evidence and influencing of witnesses, investigators seek to complete an investigation before sharing information with those under investigation. An institution suspected of committing major violations starts on the investigative side of the ledger by investigating whether violations occurred and only moves to the defensive side when it responds to a Notice of Allegations. In many cases, an institution will have begun an investigation before the enforcement staff comes to campus. At least at the beginning of its investigation, then, the enforcement staff's investigation is intertwined with that of the institution; its initial steps may be to confirm information already provided. In addition, the enforcement staff needs to work with an institution, at least to arrange interviews and to review and collect documentary evidence. In contrast, an individual will likely not have independently begun an investigation until receipt of the notice of allegations that names him as having committed violations.

Another significant difference between the enforcement staff's investigation of institutions and of coaches is that an institution acts through its staff but also is independent from them. An institution under investigation may have staff members who are involved individuals but will have many more staff members who are not. A coach under investigation for violations is always an involved individual.

Yet another difference is that an institutional presentation necessarily is more encompassing than that of an involved individual. The institution is responsible for all violations; the individual is involved only in certain allegations. The institution must provide full documentation of its processes and corrective actions. An involved individual has no such need.

238. See generally, e.g., *O'Brien v. Ohio State Univ.*, 139 Ohio Misc. 2d 36 (Ohio Ct. Cl. 2006).

With that said, there are various and good reasons for being wary of a process in which one of the parties has early involvement with an investigation while the other does not. Often, allegations are finalized and relevant information is determined before an institution submits its formal response to a Notice of Allegations and on occasion even before a Notice of Inquiry issues.²³⁹ The result is that an institution may have investigated violations and formulated its position for months or even years before the Notice of Allegations issues. While a coach or other involved individual has general knowledge of an investigation and may begin his independent investigation at any point, the reality is that much of his investigation will be conducted in the ninety-day response period that begins after the Notice of Allegations issues.²⁴⁰ Different treatment does not mean unfair treatment. Nonetheless, coaches often argue that different treatment is unfair treatment.

A much more significant issue with how an investigation proceeds is that, by the time the Notice of Allegations issues, the enforcement staff has developed a fairly firm picture of the violations that were committed, by whom, and how. As a result, it can be difficult for a coach to inject his views into the process and particularly difficult for him to identify what relevant information may have been missed that he—or the enforcement staff in pursuit of a full picture—needs to pursue. Although the enforcement staff may go to considerable effort to assist a coach to locate and interview witnesses and pursue relevant information, the post-investigation timing of the assistance is an impediment. In requesting assistance, moreover, a coach often may not be able to specify with concreteness what information he hopes to obtain, making it unlikely for the investigators to grant him assistance.²⁴¹ This problem, combined with the perception that there is uneven treatment, points to a general

239. The process by which an infractions investigation begins is set forth in NCAA BYLAWS art. 32.5. A notice of inquiry issues once the enforcement staff has “reasonably reliable information” that violations have been committed. NCAA BYLAWS art. 32.5.1. A notice of allegations reflects the enforcement staff’s conclusion there is sufficient information on which findings of major violations may be made. *Id.* art. 32.6.1.1.1. Universities and individuals charged with the commission of violations then have ninety days to submit written responses. *Id.* art. 32.6.5. The enforcement staff thereafter conducts pre-hearing conferences designed to narrow remaining issues. *Id.* art. 32.6.6. The enforcement staff then issues its case summary. The case summary sets forth the current allegations, the evidence on which the enforcement staff relies, and, briefly, the position of the parties. *Id.* art. 32.6.7. The case then goes to hearing before the COI. *See id.*

240. When it is not, the COI may grant extensions. *Id.* arts. 32.6.5, 32.6.8.

241. *See* INFRACTIONS REPORT NO. 265, *supra* note 67, at app. 3.

need to revisit the role of the enforcement staff to assure that it lands at the appropriate policy place with regard to when and in what circumstances it works with an institution to acquire the facts to be used to build its case. A couple of matters seem clear.

When initiating an investigation, NCAA enforcement staff often know compliance staff from the member institutions and are generally familiar with the good work that the great majority of compliance directors do. That familiarity emphatically does not lead the enforcement staff to exonerate institutional staff without inquiry. Nonetheless, prior familiarity, combined with working with staff on a particular case, requires extra vigilance to avoid the appearance of pre-judging behavior to be rules-compliant and monitoring to have been sufficient.²⁴² Additionally, the enforcement staff needs to be particularly sensitive to situations where compliance staff and an involved individual are both parties to a circumstance relevant to a finding of violation or when there is a factual dispute about the level of monitoring activity. In these situations, compliance staff members are adversaries to involved individuals when articulating the facts of a violation and, thus, compliance staff should not be present during interviews related to the violation.²⁴³ Other institutional staff also should not be present or, if present, must be admonished not to disclose what was said to the compliance staff person whose information is contested.

Finally, care should be exercised in the inclusion of information in an enforcement staff case summary. In its response to a Notice of Allegations, an institution will describe and summarize information relevant to its conclusion that a violation was or was not committed. In preparing its case summary, the enforcement staff does likewise. In many cases, much of the information will be the same. There may be a temptation, therefore, for the enforcement staff to adopt as its own the facts set forth in the institution's response, including inferences drawn from them. Because it is and must be the exclusive responsibility of the enforcement staff to make the case for violations and to stand behind the allegations and the evidence supporting them, any such practice raises questions. Were the enforcement staff to follow such a practice, it should only rely on the institutional response when it can independently confirm the accuracy of the information so that it has an independent basis for concluding that it is credible. To protect the record, moreover, the enforcement staff should include an

242. *Id.*

243. *Id.*

explicit statement regarding its independent confirmation that the information is accurate and that it supports findings of violations. Even so, to avoid the perception of bias, the practice should only be employed when there is no involved individual in a case.

4. Limited Subpoena Power

As discussed previously, the general use of subpoena power is inappropriate to the NCAA's enforcement and infractions processes and would be of little assistance to the enforcement staff in investigating a case. There are two possible exceptions where subpoena power may be helpful and not unduly intrusive.

One exception is when an individual with significant information has brought a civil lawsuit, spoken to the media, or otherwise made public statements about institutional violations. Because he already voluntarily has shared the information, any argument about the intrusiveness of NCAA enforcement processes is diminished. A second exception runs to former student-athletes and staff members no longer employed by an NCAA institution who may have been complicit in violations, either through committing them or by failing to report them when they still had a formal institutional association. When they were at the institution, they were obliged to be rules-compliant and to report when they had information about violations. It seems not unreasonable to use subpoena power to hold them to an obligation on which they defaulted.

5. Failure to Cooperate as its Own Case

The cooperative principle is a foundational obligation of NCAA membership. Institutional failure to cooperate in an investigation is not only among the most serious institutional violations but also is independent of any conduct violations that may have been committed. Because appropriate fact circumstances so far have not arisen, however, to failure to cooperate has not been the sole foundation of a major infractions case.

Should an institution stonewall or be half-hearted in assisting the enforcement staff to obtain information from boosters, former student-athletes, and others, a case may never be made. Recalcitrance translates into a double bonus—no finding of culpability for the underlying conduct violations and no finding of failure to cooperate. An institution should not be able to avoid violations by committing another, perhaps greater, violation. Instead, when it has reasonable cause to believe an institution is not cooperating, the

enforcement staff should allege and bring a failure to cooperate case on its own footing. It should not matter that the enforcement staff can only speculate as to the scope and nature of conduct violations it seeks to investigate when its inability to gather information is stymied by an institution's breach of its membership obligations.

6. Former Student-Athletes,²⁴⁴ Disassociation, and Institutional Obligations

The enforcement staff's potential use of the subpoena power against a former student-athlete who refuses to cooperate with an investigation faces countervailing policy considerations regarding whether use of subpoena power ever is appropriate. These considerations do not apply to a penalty of disassociation, which is a penalty that bans a former student-athlete from any contact²⁴⁵ with a specific athletics program or staff.²⁴⁶ As with institutions and the failure to cooperate, disassociation has been imposed only in the context of a major infractions case brought on the basis of conduct violations. Independent of bringing a major infractions case, however, the enforcement staff should direct an institution to disassociate a former student-athlete who refuses to cooperate in an investigation on the exclusive basis of that refusal.

The way it would work is that the enforcement staff would make contact with a former student-athlete. If she refused to be interviewed, the enforcement staff would give notice that it will allege a failure to cooperate whose consequence will be institutional disassociation until she interviews with the enforcement staff. If she still declines to cooperate, the enforcement staff will bring the allegation and send it both to the former student-athlete and

244. For ease of discussion, this Article refers only to former student-athletes. What is said, however, applies equally to former staff members and, to some extent, to boosters. Boosters have neither a duty to cooperate nor a right to associate with an athletics program. Just as with former student-athletes and staff, their failure to cooperate should result in disassociation even if a major infractions case cannot be brought.

245. Contact with a team can include invitation to athletics events, provision of tickets by staff, walking the sidelines at a game, formal recognition during a game, and attending alumni functions.

246. When a former student-athlete is being investigated for the commission of a violation while a student, what additionally should be considered is treating the failure to respond to the allegation as an admission by silence of that violation. If she competed while ineligible because of the violation, her individual records could be vacated as well as team records for those contests. Her relationship to the institution and obligation when there to have been rules-compliant should permit such a result. A full airing of what might be done, and how, requires more analysis than I can do here.

institution. The only showing the enforcement staff would need to make is that it has reason to believe a former student-athlete has information about violations committed while she was a student-athlete at the institution and that the former student-athlete has refused to cooperate. As with any other NCAA process, the right to respond to the allegation vests only in the institution.

There are three alternatives for what comes next. If the institution met its obligation under the cooperative principle to try to get the former student-athlete to cooperate and does not challenge the disassociation directive, it can disassociate the former student-athlete and the case is over. If it met its obligation under the cooperative principle but believes disassociation is unwarranted, it can appeal the enforcement staff's disassociation directive to the COI on an expedited record. To effectuate the second of these alternatives, explicit bylaw authority may be needed. If the institution did not meet its obligation under the cooperative principle, then a failure to cooperate allegation should be brought against it, and the major infractions case against the institution and the former student-athlete will be heard at the same time.²⁴⁷

The threat of disassociation may prompt cooperation in only a few cases. Nonetheless, those few are better than none. Disassociation, moreover, is at least a public expression that the enforcement staff does all that it can to investigate possible NCAA violations.

7. Approach to Secondaries

When a coach engages in intentional rules-violative conduct regarding a well-understood bylaw, there should be a virtually irrebuttable presumption that the conduct was intended to gain a recruiting or competitive advantage. Consider recruiting in particular. In a world bound by finites, coaches can devote only so much time to recruiting. A coach who intentionally exceeds contact limits will do so with elite athletes predicted to be difference makers. What coaches repeatedly say is that successful recruiting is all about building relationships. For that reason, and also to protect student-athlete well-being, NCAA bylaws limit the number of "contacts"²⁴⁸ a

247. As a non-member, a former student-athlete would have no right to appear at the hearing.

248. In NCAA parlance, "contact" is a term of art and means a "face-to-face encounter." NCAA BYLAWS art. 13.02.3 (Contact). It is not a phone call or electronic message or an

coaching staff may have with a prospect and his family, and during what periods he may have them.²⁴⁹ Collectively,²⁵⁰ coaches say that a prohibited additional in-person contact is a significant recruiting advantage. If, by virtue of the violation, a prospect is prevented from attending an institution,²⁵¹ the institution should suffer scholarship loss in addition to loss of the prospect. If the prospect still may attend the institution, then the institutional penalty should be even greater. If governing bylaws regarding secondary violations do not presently permit sufficiently substantial penalties, then there needs to be legislative change to make this happen, with the opportunity for an institution to appeal to the COI should it believe that the penalties are too severe. The appeals process would track the appeals process used in secondary cases when the penalty imposed is a fine.

C. Improving Reinstatement

Even in an imperfect world, aspects of the reinstatement process need to be improved. It is critical that all member institutions feel confident that each member institution submitting a reinstatement request has conducted a careful review of the underlying facts and submitted a full and fully forthcoming fact rendition in support of the reinstatement request. They also need to know that behaviors providing recruiting or competitive advantage are treated with sufficient severity to deter the behavior. When a student-athlete competes while ineligible because of bad information or soft treatment, all other teams in the sport are affected. Coaches also may be affected as their win/loss records predict raises and even whether they retain their jobs.²⁵²

Contrary to these needs, the current reinstatement process produces serious and perverse consequences by rewarding obfuscation and deception. Universities with staffs who play by the rules are

observation of a prospect's athletics performance. In this Article, I use it more generally to cover all these.

249. See, e.g., *id.* arts. 13.1.2.1 (Permissible Recruiters; General Rule), 13.1.3.1 (Time Period for Telephone Calls—General Rule), 13.1.4 (Recruiting Calendars), 13.1.6 (Contacts).

250. And singly, except when a particular coach is the one who committed the violation. Then, the tune sung is different.

251. For the reason why this might happen, see *infra* text accompanying notes 252-58.

252. See, e.g., James Brandenburg, *WKU Fires Head Football Coach David Elson*, WBKO.COM, Nov. 10, 2009, <http://www.wbko.com/news/headlines/69568572.html>; Tabby Soignier, *Western Kentucky's Rocky Transition to FCS Ends in Coach's Firing*, MONROE NEWS STAR, Nov. 10, 2009, available at <http://www.thenewsstar.com/article/20091110/SPORTS/91109025/1006/sports>.

adversely, albeit indirectly, affected by soft reinstatement treatment as they are unlikely to benefit from soft treatment. Similarly, those who perform thorough investigations and submit full and fully-forthcoming reports are most likely to be disadvantaged competitively because they are more likely to present facts that adversely affect a player's competition eligibility.

A major cause of these consequences is that the current reinstatement process assigns penalties based solely on the degree of student-athlete culpability. This approach is inadequate because it ignores (1) the substantial competitive or recruiting advantage that may have been gained, or perceived to have been gained, (2) the degree of intentional coach involvement, (3) the message sent to—or at least received by—coaches at other schools about the rewards of rules non-compliance, and (4) the concomitant difficulties posed to compliance staff.

The current reinstatement approach is most problematic when applied to recruiting. When a prohibited recruiting contact takes place, the coach has committed a violation in which a prospect was involved. Either, neither, or both may have intended the violation. The recruiting advantage, however, is a constant. As a penalty for a prohibited contact, the reinstatement committee has authority to bar a prospect from attending the coach's institution while leaving her free to attend any of the other 335 Division I institutions. The Reinstatement Committee virtually never imposes this penalty, believing that it unfairly hinders a student's choice of university and athletics program. Reinstatement staff members seem to accept unquestionably a prospect's claim that the prohibited contact had no impact on his choice of institution or that the prospect did not know that the contact was a violation. Yet, prospects, particularly elite ones, know, or at the very least should know, the contact rules. They learn them from their high school coaches, NCAA recruiting information, and coaches at NCAA institutions who follow contact rules and seek to keep the recruiting field level.

Assume that a prohibited contact with an elite prospect takes place and a university submits a reinstatement request. On the basis of the report, the reinstatement staff decides that the prospect was an innocent party in the rules-violative contact and reinstates his eligibility. The prospect signs with the university. The recruiting, and ultimately competitive, advantage gained will be perceived to be high. Both the coach who engaged in the prohibited contact, and certainly all other coaches, will believe that the rules-violative behavior paid off big time.

The Reinstatement Committee differs from other committees in its exclusive focus on a student-athlete's culpability as a gauge for whether a penalty that affects that student-athlete should be imposed. The COI imposes scholarship reductions that limit the number of student-athletes who may receive athletics aid, prohibits post-season competition, and otherwise limits team competition opportunities.²⁵³ The length of time from commission of violations to the infractions hearing means that penalties most often affect student-athletes who were not on the team when violations were committed.²⁵⁴ Among other penalties, Team CAP may reduce total team scholarships for sub-par team academic performance.²⁵⁵ A student-athlete denied a scholarship because of such a team penalty may have a 4.0 cumulative grade point average. In both COI and Team CAP situations, the athletics opportunities of student-athletes are negatively affected. Even should they transfer, their competition eligibility may be adversely affected.²⁵⁶

Deterrence is often difficult to calculate. Penalties, and the conduct triggering them, often are not widely known or understood. Coaches closely follow prohibited recruiting contact cases. These cases often receive a great deal of public attention. When a coach intentionally has an impermissible recruiting contact with a prospect, the prospect should be prohibited from attending the institution that made the contact. One such decision would send shock waves through recruiting circles and would go a long way to ending the conduct. If, however, reinstatement decisions retain an exclusive focus on student-athlete culpability, then there needs to be a rethinking of institutional penalties to be assessed in secondary cases and much closer scrutiny of an athlete's claims that he did not know there was a violation and that the violation had no effect on his decision to attend an institution, with any modicum of doubt resolved against the prospect. Most importantly, there must be consistency of action between reinstatement and enforcement staffs and better coordination.

253. INFRACTIONS REPORT NO. 236, *supra* note 122.

254. This approach also is true for other institutional actors. The coach who paid money to a prospect will be long gone from an institution by the time penalties arrive that limit coach activities in the sport.

255. See NCAA BYLAWS art. 23.2.1.2.2 (Financial Aid, Playing and Practice Seasons and Recruiting Limitations).

256. NCAA BYLAWS art. 14.5 (Transfer Regulations).

1. Standard Form

One way to establish consistency of action, and also to achieve a better basis for decision, is the use of a standard reinstatement/secondary report form for submission with all reinstatement requests and secondary violation reports. Both the Reinstatement Committee and the secondary enforcement staff rely on institutional submissions, reinstatement fully and secondary enforcement predominantly. Both staffs should work together to determine what information should be provided. Use of a standard form not only would assist in consistency of action and approach, but it also would ameliorate the negative consequences of relying on institutions for information on which decisions are made. Universities often submit reinstatement requests or secondary self-reports that do not provide full information as to the circumstances, fail to disclose conflicts in the underlying information, or omit the names of those who were interviewed. The form should elicit at least the following:

1. A list of all individuals known or reasonably believed to have information regarding a violation, together with information as to which of these individuals was interviewed, and by whom.
2. An identification of any disagreements between and among those interviewed with regard to the circumstances of a violation, together with a summary of the conflicting positions and an explanation of how the institution decided which version to believe.
3. Where there is both student and staff member involvement, a statement of the comparative responsibilities of the student-athlete and staff member and an explanation of how that conclusion was reached.
4. A list of all prior violations the coach or individual committing the current violation has committed in the same general category as the current violation and whether it occurred at the submitting institution or at another NCAA member institution (together with a signed attestation from the individual whose violation it is as to the completeness and accuracy of the list).
5. A list of all prior violations that the coach or individual committing the current violation has committed over the prior five years at the submitting institution or at another NCAA member institution (together with a signed attestation from the individual whose violation it is as to the completeness and accuracy of the list).
6. A list of all prior similar violations that staff members of the team or athletics program have committed.
7. A signed written statement by each individual involved in a violation describing the circumstances of its commission.
8. A signed attestation by the compliance staff member responsible for the investigation and factual conclusions that the investigation was thorough and that the report contains no known material factual omissions or misstatements.

2. Reporting Line

A second, more fundamental, reform would return the reinstatement staff reporting line to the Division I Vice President for Enforcement from its more recent placement under the Vice President for Membership Affairs. Although reinstatement staff currently have authority to ask for additional information or to clarify information submitted,²⁵⁷ their placement in enforcement could assure they are better trained to spot potential problems, identify what follow-up is needed, and avoid myopia caused by an exclusive focus on student-athlete culpability. Return of reinstatement to enforcement would enhance needed consistency between the reinstatement and enforcement/infractions processes regarding the gravity of violations and their treatment.

Reinstatement decisions can generate a great deal of publicity. Often, they are attributed to the COI, which, in turn, means criticism of the COI for perceived leniency or for being biased against certain institutions or arbitrary in its treatment of like cases. This generates much negative publicity about the inconsistency of "NCAA" treatment of violations. The NCAA likely will never be regarded favorably, but everything that reasonably can be done to correct misimpressions should be done; a positive image is a critical prior step to public support.

3. Reinstatement and AGA

Both reinstatement and AGA staffs deal with student-athlete and prospect violations. AGA staff members are trained in investigations. Training apart, AGA staff members often have direct contact and interaction with individuals who are providing information and are therefore well situated to assess these individuals' credibility. They also may have information additional to, or even different from, that which an institution provides, as well as "behind the scenes" information about the general recruiting scene in particular sports. Finally, AGA staff members have a perspective that extends beyond what officially is provided in a reinstatement request.

Jurisdictional separation of reinstatement and enforcement, including AGA, does not require turning a blind eye to the best evidence of student-athlete culpability. In reinstatement cases

257. Reinstatement staff also make no independent decision that a violation occurred; that, too, is the responsibility of the institution. NCAA BYLAWS art. 14.12.1.

involving AGA violations, reinstatement staff routinely should consult with AGA staff and rely on their conclusions as to the likelihood of prospect knowledge. Conversely, AGA staff should ascertain from the reinstatement staff the information that would assist it in evaluating a case, the questions it would like answered, and the documents the reinstatement staff would like acquired.

Even a continued focus on student-athlete interests, moreover, does not mean that the Reinstatement Committee must purposefully avoid information that bears on competitive equity. Time-sensitive reinstatement decisions may limit how much AGA fact-finding can assist reinstatement staff. Where there is doubt as to student-athlete culpability, however, that doubt should be resolved before a student-athlete is made competition-eligible. Moreover, AGA staff works under time constraints that require AGA staff time to conclude an investigation, on average, in three months;²⁵⁸ some cases are resolved in twenty-four hours.²⁵⁹ Even if an AGA case is not fully resolved, AGA staff may still have information weighing on student-athlete eligibility or on the credibility of particular individuals. In a close working relationship with reinstatement staff, AGA staff might structure their investigations to acquire the information most critical to a reinstatement decision ahead of other information. In any event, many reinstatement cases are not time sensitive. A student-athlete's competition season may be over, he may be injured, or he may have academic eligibility issues with which to deal.

4. What Price for Non-Transparency?

Yet another factor that affects the credibility and functioning of reinstatement staff and the Reinstatement Committee relates to how penalties are administered. The Reinstatement Committee delegates to reinstatement staff the initial responsibility to evaluate and impose penalties in reinstatement cases consistent with committee guidelines. Under current practice, reinstatement staff may depart upward or downward from the penalty guidelines. For departures upward there is a party—the member institution—that may appeal to the Reinstatement Committee. Here, transparency is assured and the Reinstatement Committee determines when exceptions are

258. Average time determination is based on the enforcement staff case management major case tracking system. The database has been up and running for two years and includes all AGA and major cases handed in that period. Telephone Interview with Rachel Newman-Baker, AGA Director (June 27, 2009).

259. *See id.*

warranted. Departures downward, however, inure to the benefit of the member institution. Here, no appeal is taken, and the Reinstatement staff decision is only reviewed after the fact. If the Reinstatement Committee disagrees with a downward departure, then the particular decision is archived and the staff will not again depart from guidelines in this particular way. The decision in the case now archived remains unchanged, however. The result is that a particular institution and student-athlete not only received a deal not sanctioned by policy but are also the only ones to benefit from such a deal. This is a failure of transparency that breeds distrust.

Reinstatement of student-athletes to eligibility can have an obvious impact on team competitive success. Institutions are deeply concerned that their athletes be treated fairly on the facts of their own situation and also equally with student-athletes at other institutions. Reinstatement decisions often involve high-profile athletes or high-profile situations. There is critical need for transparency to promote confidence among member institutions that reinstatement cases are treated similarly. Equally, there is critical need for representatives of member institutions, and not NCAA staff, to set policy.

For all of these reasons, reinstatement staff should not have authority to depart downward from guidelines. If the staff believes a downward departure is warranted, it should make that recommendation, together with reasons and information regarding like cases, to the Reinstatement Committee.

D. Improving the Interpretations Process

The requisites of institutional control, combined with a large, complex body of bylaws to be administered, make clear the need for an NCAA interpretations process to assist campus compliance directors. Bureaucracy begets bureaucracy, however. An accessible staff and committee structure trigger increased requests for interpretations. A regularized interpretation system leads to a comfort level with interpretations. In any interpretative process, there is a line between reasonable interpretation of legislative language and that which effectively amends the language. It is a fine line, and there may be disagreement when it is reached and crossed, but the line is there. In the NCAA system, with broadly described need for interpretations, the comfort level with the process inclines toward interpretations more likely to cross the line into legislation.

NCAA bylaws are adopted by a formal and regularized process intended to promote full discussion of competing interests before

legislation is adopted. The process may not be pretty, but it produces member “buy-in” important to an association that depends on member cooperation. The issue is not that staff and Legislative Interpretation Committee interpretations are unreasonable assessments of legislative intent that fail to pay heed to the intended scope of a bylaw. Instead, the issue is that, on occasion, they do so only by stretching and straining bylaw language to accommodate intent, often in a context not anticipated by the original drafters or in relation to bylaws adopted later for different purposes.

Courts owe deference to duly adopted NCAA bylaws.²⁶⁰ The process of duly adopting bylaws encompasses the authority of the Legislative Interpretation Committee. If the Legislative Interpretation Committee interprets bylaws so broadly as not to be encompassed within a reasonable reading of bylaw language, in a real sense it is accurate to say that such interpretations are effectively sanctioned by NCAA member institutions and consistent with the mutual obligations they owe one another. Nonetheless, such interpretations give rise to absence of adequate notice arguments by coaches, student-athletes, and others cited for conduct whose characterization as rules-violative is dependent on an interpretation, as well as claims that violations were inadvertent. Interpretations not reasonably embodied in the plain language of a bylaw and that materially change that plain language pose implementation problems for the COI and increase the potential for litigation.²⁶¹ They are asking for trouble, therefore, despite the fact that they fall within the contemplated scheme of NCAA governance and the fact that judicial deference is due that scheme.

The Legislative Council has control and oversight to assure interpretations are appropriately cabined. Currently, Legislative Interpretation Committee interpretations are presented to it as action items in a committee report. Unless a member institution alerts a Council member to potential problems with an interpretation, it will be approved with little or no discussion.²⁶² The process is efficient, as

260. See *supra* text accompanying notes 47-54.

261. See, e.g., INFRACTIONS REPORT NO. 265, *supra* note 67.

262. On occasion, interpretations have been reversed by the Division I Management Council. Compare, e.g., NCAA DIV. I MGMT. COUNCIL, OFFICIAL INTERPRETATION: SIX CREDIT-HOURS REQUIREMENT FOR A GRADUATE STUDENT-ATHLETE (I) (Apr. 17, 2007) (revising an interpretation of NCAA BYLAWS arts. 14.4.3.1(c), 14.4.3.5(c)), with Letter from Josephine (Jo) R. Potuto, Richard H. Larson Professor of Constitutional Law and NCAA Faculty Athletics Representative, Univ. of Neb.-Lincoln, to Leeland Zeller, Assoc. Dir. of Membership Servs., NCAA (Mar. 1, 2007) (on file with author) (requesting rescission of an official interpretation of

it is only the unusual case in which an interpretation strays too far. Nonetheless, in this area, efficiency should give way to a more careful and regularized process of oversight. Interpretations should be widely and effectively disseminated to member institutions and conferences in advance of a Legislative Council meeting so that all members have a realistic opportunity to review interpretations in advance of their formal adoption. In addition, the Legislative Council should appoint a subcommittee to review and report on interpretations before formal approval.

VII. CONCLUSION

The Division I manual sets forth a complex and interrelated body of conduct bylaws adopted by member institutions pursuant to which they choose to be governed. Other bylaws create committees with operational authority to administer conduct bylaws and cover the processes for adopting, interpreting, and enforcing them and granting waivers from their operation. NCAA governance in general and the legislative interpretation, student-athlete reinstatement, enforcement, and infractions processes in particular are well conceived to do the work of the NCAA. They are easily explained and easily understood with reference to parallel processes in the greater legal world. That judicial deference is the operative rule of law for private associations such as the NCAA is clear. That NCAA processes on the merits deserve such deference equally is clear.