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PREPARING FOR THE STORM: THE REPRESENTATION OF A UNIVERSITY ACCUSED OF VIOLATING NCAA REGULATIONS

Greg Heller*

I. Introduction

A. Overview

The status of intercollegiate athletics in today's society is at a crossroads. At one extreme, the athletes and teams that participate in major college sports are put on a pedestal by the general public and alumni of their respective universities, while the schools for which they play potentially earn millions of dollars in revenue as a result. At the same time, there is a sweeping call for reform in college athletics. As a result of various scandals at high profile universities, the National Collegiate Athletic Association (NCAA or Association) has conducted investigations and issued penalties, resulting in a negative image of major college athletics.

While both of these images exist in big-time college sports today, it is evident that a university has a great deal at stake. The reputation and integrity of an institution, in addition to the potential revenues that may be earned, are at risk when a school is under investigation by the NCAA. Over the last ten years, an area of sports law has developed concerning the representation of a university in the wake of an NCAA investigation. While there are currently few attorneys involved in this type of practice, the current trend in major college sports indicates a potential greater demand for legal counsel in this area. For an attorney who is representing a university charged with violating NCAA rules, there are many issues of which to consider and be aware. This article is a comprehensive review of some of those issues that an attorney should be familiar with when representing a university that is concerned about potential NCAA violations and penalties.

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B. Structure of Article

This article will review a number of issues that an attorney should be aware of upon being retained by a university. The first of these issues, discussed in Part II, concerns the current status of major college sports and the background and role of the NCAA.

In Part III, this article will address the NCAA enforcement process and the procedures and regulations involved therein. In addition, this section will review some recent examples of schools investigated and the penalties imposed to give the practicing attorney a current impression of the sanctions that schools are faced with. Part III concludes with a look at how the NCAA, athletic administrators and student-athletes view the enforcement process. In Part IV, several areas of the law that may be applicable to an NCAA enforcement situation will be reviewed, including such areas as constitutional and statutory due process, antitrust and contract law.

Part V will analyze the role of the University in an NCAA compliance matter. This section, in addition to Part III, was compiled based on interviews with various athletic administrators at several universities, in addition to speaking with a former student-athlete from a major college basketball program. Due to the delicate nature of this article's subject matter, these individuals will remain anonymous.

In Part VI, the role of the attorney in preparing a response to NCAA allegations is reviewed. This section includes interviews with attorneys who have significant experience in this area of law. Finally, this article will provide some practical guidance to a hypothetical situation, in addition to offering some conclusions regarding the representation of a university charged with NCAA violations.

II. Major College Sports and the NCAA

A. The Business of College Sports Today

In order to effectively represent a university accused of violating NCAA regulations, it is important for an attorney to be familiar with the current nature of the "business" of college sports. The popularity of major college athletics, specifically men's basketball and football, is readily apparent in today's society. Men's basketball and football generate millions of dollars in revenue and are watched by millions of people in per-
son and on television. In 1995, nearly twenty-four million people attended Division I men's basketball games, not to mention the millions more that watched on television. At Indiana University, there is nearly a ten year waiting list for season tickets to men's basketball games and at the University of Notre Dame, thousands of alumni are dependent upon a lottery system, in order to obtain football tickets to see their alma mater's football team play. In fact, men's college basketball has become so lucrative that CBS agreed to pay the NCAA $1.725 billion dollars over eight years for the rights to televise the three week NCAA men's basketball tournament.

The creation of new and bigger conferences is also leading to increased revenues for the schools involved in such an expansion. As a member of the new Big Twelve Conference, the University of Colorado could receive about twenty-five percent more in annual revenue than it does now as a member of the Big Eight Conference. It is anticipated that the new Big Twelve will generate nearly $40 million dollars in revenue in its first year, in the wake of a five-year television contract worth $100 million dollars for football and an $18.5 million dollar contract for basketball.

These new collegiate conferences are not the only ones benefiting from the popularity of college athletics, as the older, traditional conferences and the non-revenue sports at universities are benefiting as well. The nine member Atlantic Coast Conference (ACC) is a traditional power in college athletics. That conference recently announced television and football bowl revenues that will produce almost $6 million dollars per year for each member school over the next five years. In addition, non-revenue college sports are obtaining more exposure as well, as CBS announced it will also cover the men's Division II basket-

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3. Telephone Interviews with Indiana University and University of Notre Dame Ticket Offices (Oct. 1995).
4. Bogaczyk, supra note 1. The previous deal between the NCAA and CBS averaged slightly less than $143 million dollars per year, while this extension increases that average to $215.6 million dollars annually. Id.
5. Michaelis, supra note 1.
6. Id.
ball final, the track and field championships, women's gymnastics and two College World Series baseball games.\(^8\)

Naturally, with the enormous popularity of major college sports and the large revenues involved, universities are interested in obtaining a share of that money. Therefore, it is important for a school to avoid being placed on NCAA probation. The effects of probation on a university, and the resulting penalties on post-season play and television appearances, can potentially cost a school millions of dollars.\(^9\) The University of Maryland recently reported that their athletic department lost $4 million dollars in television revenue, due to their men's basketball program receiving NCAA sanctions.\(^10\) In addition, a university's reputation is at stake during an NCAA investigation. Consequently, for an attorney to effectively assist a university in avoiding these consequences, it is not only important to understand the "business" of college athletics, but it is also important to understand the role, organizational structure and purpose of the NCAA in college athletics.

### B. The NCAA

1. **History**

   The modern day NCAA was founded in 1906 as the Intercollegiate Athletic Association of the United States (IAAUS).\(^11\) Renamed the NCAA in 1910, it was formed in response to a specific problem in college athletics, namely the increasing deaths and injuries in college football. One of the first steps taken by the NCAA was to create rules and regulations for the game of college football.\(^12\) From this successful implementation, the NCAA began to formulate and implement rules in other areas, slowly expanding to cover every area of college athletics.\(^13\)

   In 1919, facing the problem of member institutions not adhering to the rules, the NCAA implemented a policy encouraging other schools not to schedule those members for competition.\(^14\) This problem eventually led to the creation of the Committee on Infractions in 1954. The creation of the Committee on Infractions gave the NCAA some legiti-

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10. *Id.*
12. *Id.* at 489-90.
13. *Id.* at 491.
14. *Id.*
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macy and spurred growth, as it now had a mechanism in place with investigative powers and powers to punish member institutions without the approval of two-thirds of the NCAA membership. In 1950, there were approximately 350 schools and 12 conferences active in the NCAA. Today, there are nearly 1000 schools and 110 conferences active within the Association.

2. Organizational Structure and Purpose

The NCAA is a voluntary, unincorporated association with member schools located in every state in the country. Although it is an unincorporated entity, the NCAA’s organizational structure resembles a corporation. The ruling body of the Association is the NCAA Council, which has the power to set policy, interpret the organization’s constitution and bylaws, and exercise unreviewable discretion pertaining to sanctions against member institutions. The NCAA Council, which consists of a president, secretary-treasurer and forty-four representatives from various institutions, is considered the “Board of Directors” of the NCAA. The actual rule-making of the Association is determined by delegates from each institution, who are sent by their schools each year to the NCAA convention.

The working power of the NCAA is controlled by the people who make up the Executive and Infractions Committees. The individuals who are a part of the Executive Committee are in charge of the financial matters of the Association, in addition to the organization and administration of the NCAA’s championship events. The Infractions Committee is delegated with enforcement power from the NCAA Council, and is therefore in charge of overseeing the investigation of member institutions when an alleged violation occurs. The actual investigation, and subsequent reports concerning member institutions, is conducted by the NCAA’s enforcement staff, and not the Committee on Infractions.

There are a number of stated purposes of the NCAA. Among these purposes are the following: (1) to initiate, stimulate and improve intercollegiate athletics programs for student-athletes; (2) to uphold the prin-

15. Id. at 492.
17. NCAA v. Miller, 10 F.3d 633, 635 (9th Cir. 1993)
18. Broyles, supra note 11, at 493.
19. Id.
20. Id.
21. Id.
22. Id. at 493-94.
ciple of institutional control of . . . all intercollegiate sports; (3) to encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism; (4) to formulate . . . rules of play governing intercollegiate athletics; (5) to supervise . . . and . . . establish eligibility standards for regional and national athletics events under the auspices of this Association; (6) to legislate . . . upon any subject of general concern to the members related to the administration of intercollegiate athletics; and (7) to study . . . all phases of competitive intercollegiate athletics . . . whereby the colleges and universities . . . can maintain their athletic programs on a high level.23

While there are several stated purposes of the NCAA, the basic purpose "is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."24 As evidenced by this purpose, it is important for the practicing attorney to understand that although there is a great deal of money at issue in college sports, the NCAA is anxious and determined to maintain its amateur distinction. It is interesting to note that while this clear line of demarcation between college and professional sports has been maintained by the NCAA, the Association had distributed over $119 million dollars in revenue to its Division I member schools as of September 1995.25 In addition, the NCAA has a projected operating revenue of nearly $221 million dollars for the 1995-96 year.26 Clearly, an attorney representing a university charged with NCAA violations must understand that although amateurism ideals are involved, there is an enormous amount of money at issue.

In addition to the stated purposes of the Association, the NCAA Constitution also sets forth the role of the university in achieving those goals. Under this legislation the member institutions are not only required, but "obligated to apply and enforce" NCAA rules and procedures.27 A university's chief executive officer, in most cases the school's president, is ultimately responsible for the compliance of the university with NCAA rules. The scope of this responsibility includes actions of the university's staff members (e.g., athletic department personnel), in addition to the actions of "any other individual or organization engaged in

activities promoting the athletics interests of the institution," (e.g., alumni or boosters of the university). When an institution fails to fulfill this obligation, the enforcement procedures of the Association are applied to that institution. It is in this instance when an attorney would be utilized, and therefore, it is critical for an attorney in this situation to have a working knowledge of the NCAA enforcement process.

III. The NCAA Enforcement Process

A. Introduction

When representing a university accused of violating NCAA rules, one of the most important areas of NCAA legislation that an attorney must be familiar with is the enforcement process. It is through the enforcement process that an institution may be subject to the penalties and sanctions which produce the damaging effects to an athletic department and university's financial situation and reputation. By understanding the procedures and issues involved in this process, an attorney is better able to understand the scenarios a university will encounter along the way. In addition, understanding this process will allow an attorney to better prepare his or her own response to the NCAA on behalf of the school.

B. Processing of a Typical NCAA Infractions Case

1. Getting Started

The NCAA enforcement process, similar to the processes involved in various other types of administrative law situations, can be detailed and complicated. It is the "mission" of the NCAA enforcement program to eliminate violations of NCAA rules and to impose appropriate penalties should violations occur. The enforcement process and procedures are primarily set forth in articles nineteen and thirty-two of the NCAA's administrative bylaws. The Committee on Infractions is ultimately responsible for the administration of the enforcement program. However, the NCAA's enforcement staff is in charge of its daily operation. The enforcement process begins when the NCAA's enforcement staff receives information indicating that a possible rules violation has been committed by a member institution.

In order for the enforcement staff to initiate an investigation, the information it receives must lead it to have reasonable cause to believe

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that a member is or has been in violation of its obligations as a member of the Association.\textsuperscript{31} Information is received by the enforcement staff from a number of different sources. One source of information comes from third parties, such as fans, opposing schools or former student-athletes, either by phone or by written correspondence to the NCAA office.\textsuperscript{32} The enforcement staff will take a proactive approach as well in obtaining information. Often times, the enforcement staff will see an article in a newspaper, alleging that a school has violated NCAA rules, or they will contact high school or college coaches and inquire about any possible rules violations that they may know about.\textsuperscript{33}

The initial determination of whether to proceed with the information is based on the staff member's own discretion as to the reliability and credibility of the source.\textsuperscript{34} There are a number of factors that are considered in the exercise of this discretion and in making this determination. The staff member will consider whether the source has negative feelings toward a university for a particular reason or whether any other ulterior motives exist that might render the information unreliable.\textsuperscript{35} However, this does not deter the enforcement staff from questioning these types of individuals. In the past, the enforcement staff has started its investigation with individuals who probably do not like the accused institution and will question "just about anyone you could possibly imagine might know something about the matter."\textsuperscript{36} One former NCAA investigator has stated that "ultimately everything has to be the product of a tip or a squealer."\textsuperscript{37}

In addition, the NCAA administrative bylaws make the staff members responsible for "basic information gathering," in determining the reliability of the allegation.\textsuperscript{38} After conducting this basic information gathering, if the matter is considered "clearly... isolated and of relative insignificance," then it is handled promptly by correspondence with the

\textsuperscript{31} NCAA BYLAWS art. 32.2.1.1, reprinted in 1994-95 NCAA MANUAL 456 (1994).
\textsuperscript{32} Telephone Interviews with Mark Jones (Oct. 16, 1995). Mr. Jones is a member of the NCAA's enforcement staff and was very helpful in answering questions about the NCAA and its enforcement process.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{38} NCAA BYLAWS art. 32.2.2.1.1, reprinted in 1994-95 NCAA MANUAL 456 (1994).
institution and the matter is dismissed. If, however, the information received indicates a more serious violation has occurred and is determined to be reasonably reliable, then the matter is assigned to an enforcement representative for investigation.

After the information is received and initially evaluated by a staff member, and subsequently assigned to an enforcement representative for investigation, a memorandum is prepared, detailing all of the relevant information about the alleged violation and the source from which it was received. The memorandum is then forwarded to the directors of the enforcement staff to be evaluated. After reviewing the staff member's memorandum, the directors (usually the assistant executive director) will come to one of three possible conclusions concerning the matter.

The first possible conclusion is that the alleged violation is major in nature, and that the information is considered to be reasonably substantial and reliable enough to warrant further inquiry. A major violation is defined as "all violations other than secondary violations . . . specifically including those that provide an extensive recruiting or competitive advantage." An example of a major violation is paying student-athletes to enroll at a particular university.

The second determination that the assistant executive director could come to is that the violation is secondary in nature, and that the information is reasonably substantial and reliable enough to continue the enforcement process. A secondary violation is defined as "one that provides only a limited recruiting or competitive advantage and that is isolated or inadvertent in nature." Some examples of a secondary violation would include a situation where an athlete competed before he or she signed an appropriate eligibility form or if a team had an impermissible logo on a uniform. The third conclusion that the assistant executive director could reach is that the information and allegations are not reliable and do not warrant any further inquiry.

40. Id.
41. Telephone Interview with Jones, supra note 32.
42. Id.
44. Telephone Interview with Jones, supra note 32.
46. Telephone Interview with Jones, supra note 32.
2. The Preliminary Inquiry

Once it is determined that the information concerning the alleged violation is reasonably substantial, the enforcement staff will begin a preliminary investigation into the matter. When this occurs, the NCAA will send a letter of preliminary inquiry to the president of the suspected university. The NCAA bylaws state that the letter of notice should contain, "whenever possible," the following information: (1) the involved sport; (2) the approximate time period during which the alleged violations occurred; (3) the identity of involved individuals; (4) an approximate time frame for the investigation; (5) a statement indicating legal counsel may be retained; (6) a request that the allegations not be discussed among involved individuals at the institution prior to the preliminary investigation; (7) a statement indicating that other facts may arise; and (8) a statement that the institution is required to cooperate.

The goal of the preliminary inquiry is to make a thorough investigation of all charges against an institution that are reasonably reliable and reasonably substantial. The enforcement staff is allotted a reasonable time (up to six months) in order to determine whether the more serious official inquiry should take place. During the preliminary inquiry, the enforcement staff will attempt to speak with all involved parties in person, and may meet with the university's president to discuss the allegations in more detail. It is at this stage that schools will often times intervene to find out the truth about the allegations on their own. This may be accomplished by their own staff members conducting an investigation, or in a more serious matter, through an investigation conducted by outside legal counsel.

3. Results of Preliminary Inquiry

After the preliminary inquiry is completed by the NCAA staff, it will notify the involved institution as to the status of the allegations. This usually occurs within six months of the institution receiving the preliminary notice. However, the enforcement staff may receive a time extension. There are three possible conclusions of the preliminary inquiry concerning the status of the allegations. The first possibility is that the

47. NCAA Bylaws fig. 32-1, supra note 30.
48. NCAA Bylaws art. 32.2.2.4, reprinted in 1994-95 NCAA Manual 457 (1994).
50. NCAA Bylaws art. 32.2.2.4, reprinted in 1994-95 NCAA Manual 456 (1994).
51. Telephone Interview with Jones, supra note 32.
52. Id.
53. NCAA Bylaws art. 32.2.2.4.2, reprinted in 1994-95 NCAA Manual 457 (1994).
enforcement staff has determined that the case should be closed for a lack of evidence, and the case is dismissed. This decision is subject to review and approval by the Committee on Infractions.

The second possible conclusion is that the allegations are true and they are secondary in nature. In this instance, an appropriate penalty is imposed by the assistant executive director for enforcement and approved by a designated member of the Committee on Infractions. The institution is then notified of the penalty, if any, and the institution may appeal to the Committee on Infractions.

The third possible conclusion that the enforcement staff could reach after a preliminary inquiry is that the allegations are confirmed and they are believed to be major in nature. If this conclusion is reached by the enforcement staff, there are two options that the university may pursue within the enforcement process. The first option is that the institution may disagree with the findings and be subject to an official inquiry. The alternative option is that the university and the NCAA may elect to participate in the summary-disposition process.

4. Summary-Disposition Process

The option of using the summary-disposition process is relatively new, and is usually chosen when the university agrees with the findings of the enforcement staff. It was created in order to expedite the NCAA enforcement process. In this situation, members of the involved institution and the enforcement staff meet and prepare a written report concerning the allegations. The report, which is submitted to the Committee on Infractions, should set forth: (1) the proposed findings of fact; (2) a summary of information on which the findings are based; (3) a stipulation that the findings are substantially correct; (4) the findings that are violations of NCAA regulations, and (5) a statement of unresolved matters, insignificant to the outcome of the case.

In addition to the written report, the school must submit self-imposed penalties and may submit a statement of mitigating factors. Mitigating factors may include whether an institution self-disclosed the

54. NCAA Bylaws fig. 32-1, supra note 30.
55. Id.
56. Id.
57. Id.
58. Telephone Interview with Jones, supra note 32.
59. Id.
violations or may relate to the seriousness and reasons for the violation (e.g., for humanitarian purposes). While the enforcement staff is involved in the preparation of the summary-disposition report, it is important to note they are not involved in the imposition of the penalties on the institution.62

If the Committee on Infractions accepts the proposed findings and penalties, it will forward a written report to the institution indicating this acceptance and publicly announce the resolution of the case.63 If the Committee on Infractions does not accept the findings or penalties, a full hearing takes place and the Committee forwards a written report to the institution detailing the findings and penalties that are to be imposed, and the resolution of the case is then publicly announced.64 The institution may accept this decision, or appeal to the NCAA Infractions Appeals Committee, whose decision is final.

If the Committee on Infractions accepts the findings of the summary-disposition report, but not the self-imposed penalties, then the institution and the involved individuals may elect to participate in a full hearing or an expedited hearing. At the conclusion of this hearing (where additional information and mitigating factors may be introduced), the Committee on Infractions prepares a written report concerning the final decision on the findings and the penalties. This report is forwarded to the institution and the resolution of the case is then publicly announced. The institution may also appeal this decision to the NCAA Infractions Appeals Committee.65

5. The Official Inquiry

If the institution does not agree with the enforcement staff after the preliminary inquiry, the institution will most likely not select the summary-disposition process, and will be subject to an official inquiry. Notice of an official inquiry will be directed to the president of the university, and will contain information concerning the matter under inquiry, and request cooperation so that the facts may be discovered.66

The letter of official inquiry may request that the university's representatives appear before the Committee on Infractions, and if the institution refuses to appear, the Committee's decision as to findings and

62. Telephone Interview with Jones, supra note 32.
64. NCAA Bylaws fig. 32-1, supra note 30.
65. Id.
penalties is not appealable. In addition, the letter will include a statement of the alleged NCAA regulations that were violated, and the identity of the individuals whom the enforcement staff will rely upon in supporting these allegations. There is a four-year statute of limitations, subject to exceptions, pertaining to the allegations contained in the official letter of inquiry.\footnote{67}

In response to the official inquiry, the institution and the NCAA conduct investigations and prepare written responses to the allegations set forth. It is in this situation where an attorney may be retained, depending on the nature of the situation. In preparing its written response, the NCAA bylaws set forth that the NCAA’s primary investigator in the matter will be made available to the institution, in addition to “reasonable access” to all pertinent information that will be relied upon by the enforcement staff at the infractions hearing.\footnote{68} This is the NCAA’s method of providing discovery to accused institutions, and has received a great deal of criticism due to the difficulty and impracticability in utilizing these resources.\footnote{69}

The university has ninety (90) days from receipt of the letter of official inquiry in which to submit its written response.\footnote{70} This may be one reason why outside counsel is retained prior to an institution receiving a letter of official inquiry, due to the limited amount of time in which to reply. After the university’s response is submitted, the enforcement staff has thirty (30) days to prepare its own case summary.\footnote{71}

This summary is made available to the institution at a pre-hearing conference with the enforcement staff.\footnote{72} At the pre-hearing conference, representatives from the institution and the NCAA explain their respective sides to one another, and determine what issues they disagree about. After the pre-hearing conference, each side is allowed to amend their initial response, prior to the hearing before the Committee on Infractions.\footnote{73}

\begin{itemize}
\item[67.] NCAA BYLAWS art. 32.5.1.1, 32.5.1.2, 32.5.1.3 & 32.5.2, \textit{reprinted in} 1994-95 NCAA MANUAL 459 (1994).
\item[68.] NCAA BYLAWS art. 32.5.3 & 32.5.4, \textit{reprinted in} 1994-95 NCAA MANUAL 460 (1994).
\item[70.] NCAA BYLAWS art. 32.5.10, \textit{reprinted in} 1994-95 NCAA MANUAL 460 (1994).
\item[71.] NCAA BYLAWS art. 32.5.11, \textit{reprinted in} 1994-95 NCAA MANUAL 460-61 (1994).
\item[72.] Telephone Interview with Jones, \textit{supra} note 32.
\item[73.] \textit{Id.}.
\end{itemize}
6. Hearing Before Committee on Infractions

A university is usually required to appear for a hearing before the Committee on Infractions when allegations are of major violations. However, if the enforcement staff does not request its presence, a university may elect to have the matter resolved upon the written record. The hearing procedures have come under a great deal of criticism as lacking in due process safeguards. The hearings are usually informal, with no right to confront witnesses and no formal rules of evidence imposed, although the Committee may exclude any evidence it deems unreliable. The hearing proceeds with the enforcement staff presenting its case first, followed by the institution. Questions are asked to each side by the Committee throughout these presentations. The hearing is really a discussion of the allegations in the official inquiry and additional issues are not brought up. The proceedings are tape-recorded and often times recorded by a court reporter.

After the presentations have been made, the Committee will convene and privately discuss the matter. Upon reaching a decision, the Committee will submit a written report to the president of the accused institution, setting forth its findings and penalties. The college can appeal the decision to the Infractions Appeals Committee, however no decision has been entirely overturned to this date.

C. Recent Examples of NCAA Enforcement Decisions

In order for a practicing attorney to better understand the current nature of the enforcement process, this section reviews some recent cases involving institutions where penalties were imposed or where violations are currently alleged.

75. See generally Miller and James, supra note 69; Broyles, supra note 11; Ronald Thompson, Due Process and the National Collegiate Athletic Association: Are There Any Constitutional Standards?, 41 UCLA L. Rev. 1651 (1994).
76. Telephone Interview with Jones, supra note 32.
77. Id.
78. Id.
79. Id. It should be noted that the University of Alabama, who participated in the summary-disposition process, recently had its penalties reduced from three years probation to two years and had several scholarships restored. This was considered a rare victory over the NCAA in an appearance before the Committee on Infractions Appeals Committee. However, the Alabama football team is still ineligible for post-season play this year, which will cost the university millions of dollars in revenue. See Steve Wieberg, NCAA Gives 'Bama Good, Bad News, USA Today, Dec. 1, 1995, at 1C.
The New Mexico State men's basketball program is currently faced with allegations of violating NCAA rules. In a recent letter of inquiry, the NCAA charged New Mexico State with eleven violations, dealing mainly with academic eligibility fraud. More specifically, it was alleged that players were given tests and papers in order to gain fraudulent eligibility through correspondence courses at two schools in the Southeast. These violations could bring probation, restrictions on recruiting and a reduction of scholarships to the men's basketball program. A finding that such violations occurred would also have a tremendous effect on the reputation of the university, in addition to a potential loss of revenue if it is banned from post-season tournament play.

The NCAA recently imposed penalties on the University of Alabama regarding its football program. The legendary Crimson Tide football program was recently placed on probation for "NCAA rules violations involving a lack of institutional control, failure to properly investigate and report NCAA violations, impermissible loans, unethical conduct, and use of an ineligible student-athlete in its football program." Alabama faces a one year ban on post-season competition and reductions in football scholarships for two years, in addition to the potential lost revenue and damage to its reputation. This case was handled under the summary-disposition process, and constitutes the first time a school has appealed under this process. Alabama was recently successful in part of its appeal, where its probation was reduced by one year and several scholarships were restored. However, the university is still ineligible for post-season play and will miss out on an enormous amount of money in bowl revenues.

The NCAA enforcement process affects small schools and non-revenue sports as well. Southwestern Louisiana was recently placed on two years probation for violations committed by their baseball program. In this case, the Southwestern Louisiana baseball coach was alleged to have used at least $6500 in personal funds to supplement the scholarships of four players. In addition to the two years probation, the baseball pro-

81. Id.
82. Id.
84. Id.
85. Id.
86. USA TODAY, supra note 79.
88. Id.
gram had its scholarship allotment reduced, was prohibited from post-season play for one year and the head coach was forced to resign.89

D. NCAA's Review of Enforcement Process

Some insight into the views of the NCAA enforcement staff may be useful to the practicing attorney when representing an accused university. While there are many critics of the NCAA's enforcement process, the people involved in its administration believe it is a necessary process.90 In most instances, an institution will cooperate during the enforcement process, maintaining a position consistent with their duties as a member of the Association.91

Occasionally, due in some part to a lack of subpoena power, the enforcement staff has difficulty in obtaining cooperation from individuals not employed by the institution.92 In this instance, the NCAA will encourage the university to persuade the individual to cooperate. This is often effective because an institution is not only responsible for its own actions, but also for the actions of those people who act for the benefit of the university (e.g., boosters, alumni).93 The primary goal of the enforcement staff in the enforcement process is to maintain the integrity of its investigation, thereby facilitating the hope that the university cooperates in its responsibility in maintaining its own integrity.94

This observation is consistent with the views of a former NCAA employee, who made the point that there does not appear to be any better mechanism than the NCAA's process to monitor universities.95 Despite the criticism that the system has received, there is at least one legal commentator and several athletic administrators who agree with this notion.96 In addition, it was pointed out that what may really be needed are more investigators, due to the increasing pressure to cheat in college

89. Id.
90. For critics, see generally Miller and James, supra note 69 and Broyles, supra note 11.
91. Telephone Interview with Jones, supra note 32.
92. Id.
93. In most cases, the people not associated with the university are the ones most eager to cooperate. Id.
94. Id.
95. Interview with Ms. Kathryn Statz (Sept. 1995). Ms. Statz is a former eligibility representative of the NCAA. She is currently the assistant athletic director for compliance and Senior Women's Administrator at Marquette University, where she is also a part-time law student. Ms. Statz was very helpful in the preparation of this article.
96. See generally Robin J. Green, Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations, 42 DuqL J. 99 (1992); Interviews with Athletic Administrators from various Division I Universities (Oct. 1995). The majority of these interviews were conducted by telephone and included conversations with administrators at universities from
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sports today. Additionally, it is apparent that the cases which reach the enforcement stage of the process deserve to be there. By reading the local sports page, there are a number of examples that substantiate this view.

E. Athletic Administrators Review of Enforcement Process

It is also important for an attorney retained by a university to understand the view of the athletic administrators concerning the NCAA enforcement process. Generally, the athletic administrators that were interviewed for this article opined that the NCAA process was a necessary system. Most of them had not been through the entire process, but felt the NCAA was the proper organization to administer it. In addition, it appeared that these administrators often times cooperated with the NCAA in enforcement, primarily through self-disclosure involving secondary violations.

F. A Student-Athlete's View of the Enforcement Process

Finally, it is also important for the practicing attorney to understand the student athlete's view of the NCAA and the enforcement process. After speaking with a former student-athlete from a major college basketball program, some interesting points were recognized. While the enforcement process itself may be necessary in order to prevent schools from cheating, the overbroad scope of the rules makes it nearly impossible for a university to not be in violation at some point. Under the current rules structure, one could potentially find some type of violation at nearly every institution. In this same light, the point was introduced that the NCAA and its member institutions need to be more realistic in the drafting of their rules in order to more adequately facilitate the
needs of the student-athletes. Several legal commentators have argued this same point as well.

IV. LEGAL THEORIES APPLIED TO THE NCAA

A. Introduction

When an institution accused of violating NCAA rules hires an attorney, there are usually two possible approaches that the university desires in its representation. One approach, which is the primary focus of this article, is that of problem-solving, in which the outside counsel conducts an independent review of the institution’s athletic department and determines if any violations have occurred. A second, more adversarial approach exists when an attorney is retained to challenge the imposition of a ruling or penalty by the NCAA. This section briefly reviews some areas of law that may be useful to an attorney retained in order to pursue the second approach, although those retained in order to conduct an independent investigation should be aware of these areas as well.

B. Due Process Argument

1. Constitutional Requirement

Over the past twenty years, a number of lawsuits have been brought against the NCAA and its enforcement procedures. In several of these cases, the NCAA’s enforcement process has been challenged as lacking in due process safeguards, in violation of the Fourteenth Amendment of the United States Constitution. A due process analysis consists of two parts, the first being what rights are protectible as “life, liberty and property,” and the second part as to what process is “due.”

In order for a due process claim to be successful with regard to an NCAA scenario, one would have to demonstrate that the NCAA, as a state actor, deprived the individual or institution of a liberty or property

103. Id.
104. See generally Broyles, supra note 11; Miller and James, supra note 69; Ray Yasser, A Comprehensive Blueprint for the Reform of Intercollegiate Athletics, 3 Marq. Sports L.J. 123 (1993).
105. Telephone Interview with Michael Slive (Oct. 13, 1995). Mr. Slive is an attorney who used to represent universities accused of violating NCAA regulations. He is currently the Commissioner of Conference USA. Mr. Slive was very helpful in answering questions about this area of law.
106. Green, supra note 96, at 102.
108. Green, supra note 96, at 105.
right without providing due process safeguards. The liberty and property interests claimed by individuals at universities under investigation by the NCAA are many. A coach terminated because of NCAA rules might claim a liberty interest in his employment, while a student-athlete who is declared ineligible might claim a liberty interest in engaging in sports or in pursuing a professional career. In addition, an institution might claim a property interest in the money it would have received from post-season play or from television appearances.

After determining what protected interest is at stake, the analysis looks to what process is due to protect such an interest. The United States Supreme Court has applied a balancing test in determining what procedural safeguards are required before an individual can be deprived of life, liberty or property. In order to determine if a challenged procedure violates due process safeguards, a balancing of three factors must take place. These factors are (1) the private interest at stake, (2) the risk of an erroneous deprivation of such an interest, and (3) the state actor's interest and additional burdens involved in providing such due process safeguards. The notion of what exactly meets due process requirements is flexible and calls for “such procedural protection as the particular situation demands.”

Essentially, there are recognized protectible interests that an institution, coach or student-athlete may have, and there is an identifiable standard via Mathews v. Eldridge to determine if due process has been provided. However, the issues of a protected interest and the requisite due process procedures do not arise if the NCAA is not classified as a state actor. The United States has specifically stated in NCAA v. Tarkanian that the NCAA is not a state actor subject to constitutional due process claims.

The Court held that because the NCAA was a voluntary, private organization and because the University of Nevada-Las Vegas (UNLV) retained plenary power to withdraw from the NCAA, then the NCAA’s rules do not derive from state power, and therefore the NCAA is not a

109. Id. at 106.
110. Id. at 109.
111. Id. at 110.
112. Id. at 112 (citing Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)).
113. Id. at 113.
114. Id.
state actor.\textsuperscript{117} While it may be possible to demonstrate that an institution, coach or student-athlete has a protectible interest in the wake of NCAA procedures, based on \textit{Tarkanian} such an argument would be futile, because the NCAA is not viewed as a state actor, subject to providing due process safeguards. In addition, although the Court did not reach the question of whether the NCAA's enforcement procedures meet due process requirements, at least two lower courts have stated a belief that they do pass constitutional scrutiny.\textsuperscript{118}

2. Requirements of State Statutes

In response to the \textit{Tarkanian} case, several states passed legislation requiring the NCAA to provide certain procedural safeguards to member institutions from those particular states.\textsuperscript{119} Another avenue of relief from the NCAA enforcement process that has been pursued is pursuant to these statutes. In the case of \textit{NCAA v. Miller}, it was determined that such an avenue of relief would be unsuccessful, as the state statute imposing due process safeguards was declared unconstitutional.\textsuperscript{120}

In \textit{Miller}, the action arose when UNLV was charged with NCAA rules violations and asserted its rights pursuant to a Nevada statute, which required the NCAA to provide certain procedural safeguards in its enforcement procedures that it previously had not provided.\textsuperscript{121} The NCAA sought a declaration that the Nevada statute was unconstitutional, and also sought an order enjoining the application of the statute to the infractions proceeding.\textsuperscript{122} The Ninth Circuit Court of Appeals upheld the Federal District Court's decision in favor of the NCAA, holding that the Nevada statute was in violation of the Commerce and Contract Clauses of the United States Constitution.\textsuperscript{123} While there has been criticism of this decision, it appears that a challenge of NCAA procedures through current state legislation would not be successful.\textsuperscript{124}

\begin{footnotesize}
\textsuperscript{117} Id. at 455-56.
\textsuperscript{120} NCAA v. Miller, 10 F.3d 633 (9th Cir. 1993).
\textsuperscript{121} Id. at 637.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} For criticism, see generally Young, supra note 119. For an analysis of state legislation that might pass Constitutional scrutiny, see generally Thompson, supra note 75.
\end{footnotesize}
C. Antitrust Argument

Another attempted avenue of relief from NCAA action has come through the antitrust laws. There are two lines of reasoning in the cases that have evaluated whether NCAA conduct violates antitrust law.125 The first line of reasoning is that because collegiate, non-commercial activity is not the type of action subject to antitrust regulation, the NCAA is not subject to antitrust attack, especially in the area of eligibility rules. Courts in these types of cases have generally held that even if the NCAA was subject to antitrust laws, rules relating to eligibility standards do not violate them.126

A second view that courts have taken is that the NCAA is subject to antitrust review when setting eligibility rules, but that it has not violated them in doing so.127 Cases decided under this second view have generally reasoned that such rules do not violate antitrust laws because they are necessary to achieve the purposes of the NCAA and any anti-competitive effects are incidental to this goal.128 In order to pursue antitrust relief, a party would bring a claim under Section 1 of the Sherman Act, which generally prohibits any means of restraining trade or commerce, or Section 2 of the Act, which specifically prohibits monopolies.129 If a practice is not deemed to be presumptively unreasonable, which indicates a per se violation of the Sherman Act, then a “rule of reason” analysis is applied to combinations or agreements (such as within the NCAA) in order to determine if they constitute an unreasonable or undue restraint of trade.130

The NCAA has been subject to defending an antitrust claim on more than one occasion with respect to the imposition of NCAA sanctions on a member institution.131 In both McCormack v. NCAA and Justice v. NCAA, the court upheld the imposition of NCAA sanctions against a member institution.132 In both of those cases, the court applied the rule

127. Id.
128. Id.
129. Id. at 488.
130. Id.
132. Id.
of reason to NCAA regulations (specifically eligibility rules) and held that the challenged restrictions were reasonable.\textsuperscript{133}

The United States Supreme Court has commented on the reasonableness of NCAA regulations as well. In \textit{NCAA v. Board of Regents}, while holding that an NCAA restraint via a football television package was a violation of Section I of the Sherman Act, the Court indicated that most of the NCAA regulations are justifiable.\textsuperscript{134} In declaring that most NCAA regulations are pro-competitive, the Court stated that it was "reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore pro-competitive because they enhance public interest in intercollegiate athletics."\textsuperscript{135} From this language, it is evident that an antitrust challenge of the NCAA enforcement process is an unlikely avenue of success, although some legal commentators have recently indicated a view that it could be the best avenue to pursue in order to invoke a reform of intercollegiate athletics.\textsuperscript{136}

\textbf{D. Contract Argument}

While an antitrust attack on NCAA regulations may not be very successful, the doctrine of equitable estoppel may be considered when the NCAA has not uniformly applied its rules. In the case of \textit{Trustees of the State Colleges and Universities v. NCAA}, a California state appellate court affirmed a lower court's decision which permanently enjoined the NCAA from imposing sanctions against California State University Hayward (CSUH).\textsuperscript{137} The action arose when the NCAA declared two CSUH athletes ineligible and imposed sanctions on the institution for allowing them to continue to compete. CSUH challenged the proposed penalties because it had relied on an interpretation from the NCAA, which indicated that the athletes were not in violation of the NCAA rule in question.\textsuperscript{138}

\textsuperscript{133} \textit{McCormack}, 845 F.2d at 1344; \textit{Justice}, 577 F.Supp. at 382-83. For a more detailed discussion of the \textit{Justice} decision, see \textit{Kobin}, supra note 125, at 492-96.


\textsuperscript{135} \textit{Id.}


\textsuperscript{138} \textit{Id.} at 191.
The court invoked the doctrine of equitable estoppel, in holding that the imposition of penalties by the NCAA was an action in violation of the parties contract, created via the NCAA Constitution and Bylaws.\textsuperscript{139} A court may intervene in the internal affairs of a private, voluntary association to nullify substantial disciplinary action taken against a member in violation of its constitution and bylaws.\textsuperscript{140} As a result of the NCAA providing a rule interpretation to CSUH and subsequently imposing penalties despite CSUH’s reliance on that interpretation, the court affirmed the lower court’s decision and estopped the NCAA from imposing the penalty of probation against CSUH.\textsuperscript{141}

It should be noted that the success of CSUH in this case was primarily because the NCAA applied its rules in an arbitrary and unfair manner, in providing a rules interpretation to CSUH and then subsequently penalizing them for relying on it. The NCAA has apparently been more careful in the administration and application of its rules in recent years, as this avenue of relief is seldom utilized for NCAA sanctions. An argument of equitable estoppel would probably only be successful where the NCAA has arbitrarily applied its rules.

However, a New Mexico state court recently ruled in favor of University of New Mexico basketball recruit Kenny Thomas, granting a preliminary injunction against the NCAA’s denial of eligibility for the freshman.\textsuperscript{142} The NCAA had said that the player was ineligible because of a ninth grade science course he completed, which the NCAA believed did not meet its curriculum requirements. The New Mexico state court ruled that the NCAA apparently did not give adequate notice about what constitutes a core course, and Thomas is currently eligible to play.\textsuperscript{143} A notice based argument may be an additional avenue of relief under contract law.

V. THE ROLE OF THE UNIVERSITY

A. Introduction

An attorney representing a university also needs to have a working knowledge of the role of a university’s personnel involved in such a process. Most institutions have a compliance coordinator who is responsible for the institution’s adherence to NCAA regulations. In order to effec-

\textsuperscript{139} Id.
\textsuperscript{140} Id. at 192.
\textsuperscript{141} Id. at 193-94.
\textsuperscript{142} MILWAUKEE J.-SENTINEL, Nov. 11, 1995, at 2C.
\textsuperscript{143} For The Record, USA TODAY, Nov. 9, 1995, at 11C.
tively represent a university in NCAA matters, an attorney should be familiar with the responsibilities of this individual. The compliance coordinator provides guidance on a daily basis with regard to complying and interpreting NCAA legislation.

In addition, the practicing attorney should be familiar with the role a university's president has in such a situation, along with some reasons why institutions retain, or consider retaining, outside counsel in the wake of NCAA investigations.

B. Role of the Compliance Coordinator

The individual in charge of a university's NCAA compliance plays a vital role in keeping an institution free from NCAA penalties and the problems that coincide with them. Several universities have employees in their athletic department who are in charge of monitoring the school's compliance with NCAA legislation on a daily basis. Some of these individuals have law degrees, while several institutions list a legal background as a requirement for employment, due to the complexity of NCAA legislation. These individuals have a variety of responsibilities and perform a number of functions in the performance of their jobs.\textsuperscript{144}

The functions that compliance coordinators perform include, but are not limited to: (1) the monitoring of the internal systems of the athletic department; (2) the monitoring of financial aid awarded; (3) the monitoring of recruiting; (4) the monitoring of coaches' conduct regarding NCAA compliance; (5) the establishment and implementation of NCAA rules education programs for student-athletes; (6) the monitoring of eligibility issues; and (7) the monitoring of the national letter of intent program.\textsuperscript{145}

Compliance coordinators are generally exposed to situations where NCAA rules may have been violated on a fairly regular basis. This exposure is usually in the form of a secondary violation, whereby the compliance coordinator reports such a violation to the NCAA.\textsuperscript{146} An example of a secondary violation that has been self-reported is when a student-athlete has competed when he or she was not enrolled full-time.\textsuperscript{147} The NCAA defines a secondary violation as isolated and inadvertent, with the key distinction being that the event is inadvertent. Sometimes, an

\begin{itemize}
\item \textsuperscript{144} Interviews with Athletic Administrators, \textit{supra} note 96.
\item \textsuperscript{145} \textit{Id}.
\item \textsuperscript{146} \textit{Id}.
\item \textsuperscript{147} \textit{Id}.
\end{itemize}
isolated event could still be major in nature, such as a basketball recruit receiving $25,000 to attend a particular university.\textsuperscript{148}

Often times, a compliance coordinator will receive information of a secondary violation from coaches or student-athletes. After conducting some information gathering, a determination is made as to the nature and seriousness of the violation, and a corrective action is determined. The compliance coordinator may sometimes consult with the athletic director regarding such a situation, and then submit the violation and a proposed corrective action to the NCAA. Compliance coordinators also rely on their own experience, in addition to the \textit{NCAA News}, which lists all secondary violations and corrective actions taken when proposing an appropriate corrective action.\textsuperscript{149}

If the potential violation is more serious in nature, and potentially a major infraction, the university's president or general counsel will probably play a larger role in the determination of corrective action. It is in this situation where outside counsel may be retained. The determination of whether to involve the president or general counsel is generally left to the compliance coordinator, who will usually do so when the violation is purposeful in nature, and does not meet the criteria of a secondary violation.\textsuperscript{150}

A university will most likely begin its own investigation of a matter upon learning of its occurrence. An institution will not wait until it receives a preliminary letter of inquiry before beginning its own investigation into a potential violation, if it already knows of its occurrence. If the university has knowledge of a potential violation, NCAA legislation imposes a duty upon it to investigate. A compliance coordinator will substantiate the allegation in much the same way the NCAA would, making certain that there is some basis in the claim before beginning any type of investigation.\textsuperscript{151}

\textbf{C. The Role of the University President}

The president of a university is ultimately responsible for the actions of the athletic department or individuals associated with it.\textsuperscript{152} If an institution is accused of violating NCAA regulations, its president should

\begin{footnotes}{\footnotesize
\textsuperscript{148} \textit{Id.}  \\
\textsuperscript{149} \textit{Id.}  \\
\textsuperscript{150} \textit{Id.}  \\
\textsuperscript{151} \textit{Id.} The compliance coordinator would most likely not involve the institution's conference or the NCAA, until they could first confirm the violation on their own. \textit{Id.}  \\
\textsuperscript{152} NCAA Const., \textit{supra} note 28.
\end{footnotes}
have a plan of action in response. For most college presidents, the actual use of such a plan is a "once-in-a-lifetime experience."\textsuperscript{153}

Such a response mechanism should, in most cases, consist of two functions. One function in responding to an NCAA official letter of inquiry should consist of appointing someone to investigate the alleged violations.\textsuperscript{154} It is in this role that an attorney may be utilized. The second function of the response mechanism should provide for an appraisal of the investigator's evidence, in providing a decision-making role as to how the institution should proceed.\textsuperscript{155} This function is often undertaken by the president, or some type of faculty representative or committee.\textsuperscript{156} The decision of who to appoint to facilitate these functions is probably one of the most important decisions a university president will make in responding to NCAA allegations.

\textbf{D. Retaining Outside Counsel}

When a university receives an official letter of inquiry or is responding to rumors of possible NCAA violations, there are a number of reasons why outside counsel is retained. An attorney is most likely retained only upon the occurrence of a potential major violation.\textsuperscript{157} As mentioned earlier, most universities have designated compliance coordinators who handle compliance on a day to day basis.

One reason that an outside attorney is retained is because most universities do not have the resources to adequately respond to allegations of major NCAA violations.\textsuperscript{158} A typical response to an official letter of inquiry is likely to be hundreds of pages in length.\textsuperscript{159} In addition, numerous interviews are usually conducted and a great deal of time is consumed in preparing a written response.\textsuperscript{160} Most institutions do not have the resources to complete such a task.

\begin{thebibliography}{99}
\bibitem{153} Charles Alan Wright, \textit{Responding to An NCAA Investigation, or, What To Do When An Official Inquiry Comes}, 1 \textsc{Entertain.} \& \textsc{Sports} L.J. 19, 20 (1984). Mr. Wright was the Chairman of the NCAA Committee on Infractions from 1978-83. He contacted several presidents from Division I universities in preparing his paper. \textit{Id.}
\bibitem{154} \textit{Id.} at 22.
\bibitem{155} \textit{Id.} at 23.
\bibitem{156} \textit{Id.} a 23-24.
\bibitem{157} Interviews with Athletic Administrators, \textit{supra} note 96.
\bibitem{158} \textit{Id.}
\bibitem{159} Wright, \textit{supra} note 153, at 31.
\bibitem{160} Telephone Interview with Michael Glazier (Oct. 14, 1995). Mr. Glazier is a partner in the law firm of Bond, Schoeneck, & King. The Kansas City office of the firm, where Mr. Glazier is located, is dedicated solely to the representation of universities in NCAA compliance matters. Mr. Glazier is a former member of the NCAA enforcement staff and is con-
Another reason that a university will retain outside counsel is because of the need for an independent review of the program. When an independent attorney conducts an investigation of a university’s athletic department, he or she gives the investigation a greater appearance of integrity. This is another reason why a university’s compliance coordinator may not be utilized in this role. It is often difficult for an individual to recognize or report his or her own mistakes, or the mistakes of coworkers or others close to the athletic department.

In addition to a lack of resources and independence, an institution might elect to retain outside counsel, instead of its own in-house counsel, because of the skills that are needed for such a task. A university’s own attorneys are usually skilled in such things as HEW investigations, student discipline, land conveyances and contracts.

VI. The Role of Outside Counsel

A. Overview

There are typically two approaches that an institution may ask an outside attorney to pursue on behalf of the school in the wake of allegations of NCAA violations. One approach is adversarial and may involve the legal theories discussed earlier in this paper. A second method, which is the main focus of this paper, involves a problem-solving approach.

An attorney that is retained for this purpose is hired by a university to conduct an independent investigation of the allegations and to prepare a written response to forward to the NCAA. Despite this problem-solving approach, it does not mean that an attorney retained for this reason will not challenge any of the NCAA’s allegations or that the process will not become adversarial in any manner. There is a distinct possibility that an independent attorney will not agree with the allegations made about the university. However, it is a more cooperative approach, with its main goal to restore institutional control to the university.

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161. Interviews with Athletic Administrators, supra note 96.
162. Id.
163. Wright, supra note 153, at 23.
164. Telephone Interview with Slive, supra note 105.
165. Id.
166. Telephone Interview with Glazier, supra note 160.
167. Id.
This is accomplished by conducting a thorough investigation and analyzing all of the facts in light of NCAA legislation.

**B. Conducting the Investigation and Preparing a Report**

The decision to retain outside counsel is usually considered when an institution first learns about a potential major violation committed by its athletic program. An institution learns of a potential violation in a manner similar to the NCAA enforcement staff. This information could be revealed by the institution’s own personnel, newspaper articles or correspondence with the NCAA. An attorney is usually brought in prior to the university receiving an official letter of inquiry, though the exact timing varies from case to case.

When an attorney is retained by a university to investigate alleged NCAA violations, he or she usually reports directly to the institution’s president. This arrangement gives the investigation an appearance of integrity and independence, which is essential in establishing the credibility of the attorney’s report. If the outside counsel reported to the athletic director, it may give an appearance of impropriety and would defeat the purpose of hiring an outside party. The first step an attorney should take is to meet with the university’s president and administration and get a clear understanding of the charges.

When conducting an investigation, an attorney should act more like a fact-finder than a defender of the university’s reputation. After meeting with the university administration, the next step is to compile a list of all of the primary sources of information and speak with them. It is important to remember that there may only be one opportunity to speak with a person necessary to the investigation. Therefore, an attorney should be thorough in asking questions. In addition, when interviewing individuals about the allegations, it is common to hear conflicting stories and answers. An attorney must weigh the credibility of each individual in making a determination as to the facts of a case.

168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
part, approximately fifty percent of the accusations made against a university are able to be verified with reliable evidence.178

Essentially, an attorney should conduct the investigation in much the same way as a member of the NCAA enforcement staff conducts his or her investigation. The most successful attorney in this field was once employed by the NCAA and his familiarity with NCAA processes and procedures is one of the reasons that he has been retained by several universities.179 One thing that his particular firm offers is that it "knows where to look" because it has worked with the NCAA several times before and knows "how the system works."180 When conducting an investigation, an attorney must be familiar with NCAA regulations and procedures in order to be of use to an institution in preparing an independent report.

After the investigation is completed, the next step is to prepare a report concerning the evidence that has been gathered.181 The report should be prepared by applying the relevant NCAA legislation to the evidence that has been obtained throughout the investigation. The report should either confirm or deny the allegations made against a university by drawing independent conclusions obtained from an analysis of the information in the investigation.182 Reports that are prepared for a university in response to NCAA allegations are often times hundreds of pages in length.183 After the report is presented to the NCAA, an attorney will sometimes be required to appear before the NCAA and present the institution’s case pursuant to the NCAA enforcement process.184

C. Skills Involved

There are a number of skills that are essential in order to effectively represent a university alleged to have violated NCAA legislation. An attorney must be detail-oriented, have meticulous writing skills and be
able to clearly state and use facts advantageously.\textsuperscript{185} Problem-solving skills are also essential, as indicated by a leading attorney in this area who said "I do not think of myself foremost as a lawyer, I think of myself as solving problems in athletics and higher education."\textsuperscript{186} In addition, when conducting an investigation an attorney must have a sense of curiosity in order to pursue every possible lead.\textsuperscript{187} Finally, when appearing before the NCAA Committee on Infractions, an attorney must possess advocacy skills and be able to think quickly.\textsuperscript{188} It has been suggested by one commentator that a trial attorney would be best suited for this type of work.\textsuperscript{189}

\section{D. Other Factors}

Currently, there are a relatively small number of individuals or firms which represent the majority of universities accused of violating NCAA regulations. For the most part, these individuals are either former employees of the NCAA or have worked in intercollegiate athletics previously.\textsuperscript{190} It is their experience with the NCAA and its procedures that makes them so invaluable to their clients. The NCAA, while not claiming to favor these individuals, has nonetheless worked with them before and has an obvious sense of respect and trust for their work.\textsuperscript{191} It makes sense for a university to retain an individual with this type of relationship and knowledge of the NCAA.

The retention of outside counsel to conduct an independent investigation can cost a university hundreds of thousands of dollars.\textsuperscript{192} A successful representation takes several months to effectively investigate the allegations and prepare a written response, which can result in enormous attorneys' fees. Oklahoma State University has paid nearly $1 million dollars in three recent cases.\textsuperscript{193}

The successful representation of a university is not necessarily measured in the type of penalty imposed by the NCAA.\textsuperscript{194} While the fans may want the least severe penalty possible, the bottom line for a univer-

\begin{thebibliography}{9}
\bibitem{185} Id.
\bibitem{186} Looney, \textit{supra} note 178, at 43.
\bibitem{187} Telephone Interview with Glazier, \textit{supra} note 160.
\bibitem{188} Id.
\bibitem{189} Wright, \textit{supra} note 153.
\bibitem{190} Looney, \textit{supra} note 178.
\bibitem{191} Id.
\bibitem{192} Tolley, \textit{supra} note 99.
\bibitem{193} Looney, \textit{supra} note 178.
\bibitem{194} Telephone Interview with Slive, \textit{supra} note 105.
\end{thebibliography}
sity is to preserve its integrity as an institution. In most cases, if an attorney's investigation and report uncover the truth about the problems in a university's athletic department, the investigation will be considered a success, regardless of the penalty imposed.

One final factor to consider as outside counsel for a university is the possibility of the interests of the university being in conflict with athletes or coaches who may be accused of wrongdoing in an allegation. On at least one occasion in the representation of a university, an attorney has been criticized for selling "coaches down the river to make the schools look good," and of offering players "up to the NCAA Gods." An attorney should recognize that these conflicts of interest may exist and confrontations may arise, but he or she should remain objective and consistent with the ultimate goal of determining the truth of the allegations and the applicability of the relevant NCAA legislation. While these confrontations may be inevitable, coaches are increasingly hiring their own attorneys in order to alleviate this situation.

VII. HYPOTHETICAL APPLICATION

A. Hypothetical Situation

You have just received a call from the President of State U., the local university in your city. The President of the university is concerned about a recent newspaper article concerning State U.'s men's basketball team. The newspaper article reported that two of State's basketball players have received gifts from local merchants, specifically clothes, the use of automobiles and cash. The President of State U. has asked you to conduct an investigation and prepare a report in response to these allegations.

A complete report in response to the hypothetical situation presented above would take several months to complete and consist of several hundred pages. While this section will not produce a complete report, it will set forth some guidelines in the preparation of such a report, including an outline of applicable NCAA legislation and relevant legal arguments.

195. Telephone Interview with Glazier, supra note 160.
196. Looney, supra note 178, at 43.
197. Id.
198. Brown, supra note 179.
1. Conducting the Investigation

The first step that an attorney should take in the representation of "State U." is to meet with the president of the institution. It should be made clear that the attorney will report directly to the president in order to maintain the integrity and independence of the investigation and subsequent report. When meeting with the president, the attorney should compile a list of all relevant parties included in the allegations and of all the people who may have knowledge about the allegations. The attorney should make sure that he or she has the president’s full cooperation and commitment to the truth.

When conducting the investigation, the attorney should contact the newspaper reporter, the individuals named in the article and any other relevant parties. The attorney should remember to be thorough when interviewing these parties and should take clear notes and tape-record conversations when consent is received from a person to do so. After conducting all of the necessary interviews, the attorney should prepare a summation of all of the relevant facts which can be determined from the interviews. The attorney should remember to weigh the credibility of each person interviewed when determining the facts of this situation.

2. Preparing the Report

After completing a thorough investigation, the attorney should prepare a report in response to the allegations. The report should set forth the relevant facts believed to be true, based upon the evidence obtained from the investigation. It should set forth, as best as possible, the relevant interviews conducted in the investigation and the details of such interviews. In addition, the report should apply these facts to the relevant NCAA legislation to determine if any violations have occurred. While it is not possible to determine the relevant facts of the hypothetical situation without a real life investigation, the following is a review of the NCAA legislation which may be applicable to this situation.

3. Applying NCAA Legislation

*Allegation: State U. student-athletes have received cash, merchandise and the use of automobiles from local merchants.*

Assuming that the investigation found this allegation to be true, the following areas of NCAA legislation may be applicable:

1. The beginning step of this process is Article 1.3.2 of the NCAA Constitution, which sets forth the basic obligations of State U., indicating that by its membership in the NCAA, State
U. has agreed to apply and enforce all relevant NCAA legislation.\(^{199}\)

2. The next applicable section is Article 2.1 of the NCAA Constitution, which sets forth the principle of institutional control and responsibility.\(^{200}\) These first two sections are the general provisions which bring State U. under the control of the specific NCAA legislation that follows.

3. The specific rules that are violated in State U.'s hypothetical situation are covered in Article 16 of the NCAA Bylaws. This section sets forth that the items received in the hypothetical—cash, merchandise and the use of automobiles—are impermissible awards.\(^{201}\) These items may also violate the amateurism requirements of Article 12, which will affect the student-athletes' eligibility under Article 14 of the NCAA Bylaws.\(^{202}\) State U. is responsible for ensuring that NCAA legislation is not violated. Therefore, not only might the student-athletes be declared ineligible, but State U. may face sanctions as well. This will be dependent on the outcome of the investigation and the determination of State U.'s knowledge of the situation.

4. Applicable Legal Theories

It appears from the facts of the hypothetical that there is not a clear avenue of legal relief. If the NCAA had provided an erroneous interpretation of NCAA rules or specifically permitted the allegations involved, then a contract/equitable estoppel argument may be useful. It does not appear that a due process or antitrust argument would be beneficial to State U. in this situation. The president of State U. is most likely interested in a thorough investigation and comprehensive written report to respond to the allegations and probably would not seek legal relief in this situation.

VIII. Conclusion

The representation of a university accused of violating NCAA regulations is an exciting and growing area of sports law. Universities faced with the possibility of NCAA sanctions have a great deal at stake, both financially and in the reputation and integrity of their institution. An

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199. NCAA Const., supra note 27.
attorney who represents a university in such a situation must be prepared to weather the theoretical storm involved in such a process.

The adequate preparation for such a task should include a working knowledge of several areas. This should include a familiarity with the business aspects of college sports and the organizational structure and purpose of the NCAA and its enforcement process and procedures. An attorney must also be familiar with the relevant areas of law applicable to the NCAA, in addition to understanding the role of the university in such a process. Finally, the attorney who represents a university in NCAA matters should understand his or her role as outside counsel and the issues involved in such a representation. Such preparation will enable an attorney to successfully assist a university in preparing for the storm surrounding allegations of NCAA violations.