

THE NCAA INFRACTIONS APPEALS COMMITTEE: PROCEDURE, PRECEDENT AND PENALTIES

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I. INTRODUCTION

The NCAA Infractions Appeals Committee¹ ("IAC") was formed in January of 1993 in an effort to create additional due process protection in NCAA enforcement proceedings.² At the time, there was an abundance of controversy revolving around the NCAA enforcement process. Four states passed legislation requiring the NCAA to meet the requirements of due process in their enforcement procedures.³ Prior to the implementation of the IAC, many schools were upset with the appellate process because they felt there was little chance of an institution getting relief through the appeals process because the appeal was adjudicated by the NCAA Council, the NCAA's policy-making body.⁴ Thus, the IAC was created to satisfy due process requirements and to give institutions a meaningful appellate procedure.⁵

The jurisdiction and authority of the five member⁶ committee stems from NCAA Bylaw 19.3.1, which states that the IAC can "hear and act upon appeals of the findings of major violations by the

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1. For the purpose of this article, only the Division I Infractions Appeals Committee [hereinafter IAC] will be analyzed. Division II has a Steering Committee which hears its appeals, and Division III has recently discussed creating a Division III appeals committee.

2. See Tony Barnhart, ATLANTA CONSTITUTION, Jan. 13, 1993 at D5 (stating that NCAA officials felt that the IAC would create more due process in enforcement proceedings). See also HOUSTON CHRONICLE, Jan. 10, 1993 at 10 (stating that IAC proposal was an effort to remove concern that the old appeals process was merely ratifying decisions); Douglas Lederman, *NCAA Proposes Major Changes in Enforcement*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 6, 1991 at A47 (stating that special committee of the NCAA proposed a major overhaul of the NCAA's investigation and enforcement procedure, including adding an appeals committee, to provide additional due process protection to institutions).

3. See Lederman, *supra* note 2, at 49. Legislation had been passed in Florida, Illinois, Nebraska and Nevada requiring the NCAA to meet the requirements of due process in their enforcement procedure. See *id.*

4. See *NCAA Mulls a Change in its Appeals Format* DES MOINES REGISTER, Jan. 10, 1993 at 12.

5. See *id.*

6. The IAC is composed of five members, with at least one member being from the general public and not connected with a college institution, conference, a professional sports organization, or the representation of coaches or athletes in any capacity. See NCAA Operating Bylaw 19.3.1.1 reprinted in Nat'l Collegiate Athletic Ass'n, 1998-99 NCAA Manual (1998) [hereinafter "NCAA Bylaw"]. The remaining members shall presently or previously be a staff member of an institution or conference, but shall not presently be on the NCAA Board of Directors. See *id.*

Committee on Infractions involving Division I members.”⁷ The power of the IAC as an adjudicatory body is somewhat structured. The IAC can only set aside a penalty imposed by the Committee on Infractions (“COI”) if the IAC determines the penalty to be “excessive or inappropriate based on all the evidence and circumstances.”⁸ The IAC can only reverse findings of fact or violation upon a showing of one of the following:

- (a) the committee’s finding is clearly contrary to the evidence presented to the committee;
- (b) the facts found by the committee do not constitute a violation of the Associations rules; or
- (c) a procedural error affected the reliability of the information used to support the committee’s finding.⁹

The IAC has not been held back by these guidelines, however, as it has stressed fairness and created precedent throughout its short-lived existence. The IAC has been able to do this because it is granted the ability in the NCAA Bylaws (“Bylaws”) to establish or amend enforcement policies and procedures.¹⁰ For example, at the time of its very first decision, the University of New Mexico (“UNM”) case, there was no provision in the Bylaws permitting the IAC to review penalties levied by the COI.¹¹ The IAC held, however, that “in reviewing the appeal of a penalty, the [IAC] will consider whether the penalty is appropriate or excessive based on the particular facts and circumstances of the case.”¹² This holding was later embodied in Bylaw 32.10.2. Thus, the IAC has established itself as a powerful reviewing body, with the ability to create and shape NCAA rules and enforcement procedures.

This article’s purpose is to provide a detailed analysis of the IAC’s authority, procedure, and decisions. Part II provides a brief summary of all fourteen decisions to date. Part III reviews the appellate pre-hearing procedure as established through IAC

7. See NCAA Bylaw 19.3.1. See also, NCAA Bylaw 19.1.2.3 which predates Bylaw 19.3.1 and states the same authority.

8. See NCAA Bylaw 32.10.2

9. See *id.*

10. See NCAA Bylaw 19.3.1.3 - 19.3.1.3.2. This power is subject to the review and approval of the membership at the following annual convention. See *id.*

11. See University of New Mexico Infractions Appeals Report, NCAA News Release at 4 (Nov. 9, 1993) [hereinafter New Mexico Report]. See also NCAA Bylaw 32.10.2.

12. See New Mexico Report, *supra* note 11, at 4.

decisions and NCAA Bylaws. Part IV looks at the appellate hearing procedure, focusing on the type of hearing which can be conducted and what evidence that can be presented. Part V deals with the substantive issues which the IAC has addressed and ruled on, particularly the areas of notice, institutional control, witnesses and evidence, and review of penalties. Finally, Part VI assesses the importance of the first fourteen IAC decisions and the future of the IAC.

II. CASE SUMMARIES

A. *University of New Mexico*

In the first appeal reviewed by the IAC in November 1993, the committee upheld penalties imposed against the University of New Mexico ("UNM"). The UNM case involved infractions in the men's track and women's gymnastics programs. In the track program the COI found that both the head coach and several representatives of the institution's athletics interests ("representatives") violated NCAA rules. In the men's track program, the COI found that representatives executed forms which guaranteed a substantial amount of financial assistance to seven foreign prospective track student athletes.¹³ Several representatives also provided lodging, meals and local transportation for a student-athlete and prospective student athlete during three weeks in the summer.¹⁴ The students were supposed to perform domestic duties in exchange for these benefits but the duties were insufficient to justify the benefits given.¹⁵ The head coach of the men's track team entertained a student-athlete at a restaurant with a representative and provided that student with a meal and local automobile transportation.¹⁶ The representative later lent funds to the student so he could participate in a track meet.¹⁷ The head track coach also permitted a student-athlete to participate on behalf of the institution at an NCAA sanctioned track meet, and provided school funds for expenses,

13. *See id.* at 2.

14. *See id.*

15. *See id.*

16. *See* New Mexico Report at 2.

17. *See id.*

while knowing that the student athlete was not eligible to compete.¹⁸ Finally, the COI found that UNM failed to exercise appropriate institutional control and monitoring over its men's track program.¹⁹

In the women's gymnastics program the head coach provided lodging and meals at his home, along with living expenses, to a prospective student-athlete.²⁰ He tried to justify these benefits by obtaining a document to establish the coach was the student-athletes legal guardian, which it did not.²¹ The women's gymnastics coach also participated in a fraudulent scheme in which a former student athlete took an SAT test and an English Proficiency test for a prospective student-athlete.²² The COI concluded that the former head coach operated the women's gymnastics program contrary to NCAA rules, provided false and misleading information to the institution regarding who took the aptitude tests for the prospective student-athlete, and encouraged a prospective student-athlete to misrepresent the facts to the institution about the taking of the aptitude tests.²³

UNM first argued that self-reported violations should have been considered by the COI in assessing a penalty. The IAC concluded that contrary to UNM's argument, the COI had taken into account the institution's self reports and cooperation in determining the penalty.²⁴ UNM next argued that the evidence did not support a finding of lack of institutional control over eligibility matters in men's track. The IAC concluded that the evidence of serious violations, the active role of two head coaches in the violations, and the violations committed by athletics representatives with the knowledge of the coaches, constituted a lack of institutional control in the track program.²⁵ UNM also argued that the penalty prohibiting the men's cross country team from competing in the post season was not supported by the evidence and thus excessive. To this the IAC stated that the penalty was imposed on the cross country team because ineligible student-athletes participated in cross country and because of the coach's disregard for NCAA rules. Thus,

18. *See id.*

19. *See id.*

20. *See New Mexico Report at 2-3.*

21. *See New Mexico Report at 3.*

22. *See id.*

23. *See id.*

24. *See id.* at 5. For further discussion of penalties in the UNM case, *see infra* notes 321-324 and accompanying text.

25. *See New Mexico Report at 6.*

given the facts and circumstances of the case, the penalty was neither excessive nor inappropriate.²⁶ Finally, UNM argued that the three-year probationary period was excessive. The IAC concluded that based on the evidence of the case the three-year probation period was not excessive.

B. Coastal Carolina University

The first appeal of a major sport was reviewed by the IAC in March 1995 and involved alleged violations by the Coastal Carolina University ("CCU") basketball program.

In the CCU case, the COI found numerous violations in the men's basketball program. The COI found that the former head coach was actively involved in the violations along with other members of the coaching staff. The former head coach provided improper benefits to prospective student-athletes by: paying one student's transportation costs to travel to the institution to enroll; providing free lodging and local transportation to a prospective student athlete; arranging for a prospective student-athlete to receive fraudulent academic credit; and, paying a prospective student-athlete's summer school tuition.²⁷ The head coach also gave extra-benefits to student-athletes by giving a partial qualifier money for tuition, providing meals and housing for a partial qualifier during his first year, paying for a student-athletes' airline tickets home during vacation periods, and arranging for free hotel lodging for a student-athlete's parents.²⁸

Additionally, the institution provided an excessive number of official visits, the head coach made impermissible recruiting contact during an NCAA quiet period, and the basketball staff violated NCAA rules by observing preseason pickup games.²⁹ Finally, the COI found that the university lacked institutional control over its men's basketball program.³⁰

On appeal, CCU made several contentions claiming that the COI's penalties warranted reversal. First, CCU asked the IAC to consider the penalties imposed by the institution's conference after the COI's penalties were announced. The IAC held it would not

26. *See id.*

27. *See* Coastal Carolina Infractions Appeals Report, NCAA News Release at 2 (March 3, 1995) [hereinafter Coastal Carolina Report].

28. *See* Coastal Carolina Report at 2-3.

29. *See id.*

30. *See id.*

consider penalties imposed by an institution's conference after the COI's penalties have been announced.³¹ Such evidence could be considered newly discovered evidence, however, and CCU could seek reconsideration of the penalty by the COI.³²

CCU next asked that it be permitted to return, for reconsideration, before the COI at the mid-point of their four year probationary period to seek termination of the four-year probationary term. The IAC specifically that they did not have jurisdiction to grant this relief.³³ The IAC specifically held that it has only the power to modify a probationary term imposed as a penalty, but does not have authority to direct the COI to reconsider penalties at some point in the future.³⁴

Finally, CCU requested that the IAC modify the four year probationary term imposed by the COI. The IAC, however, held that the four-year probationary term was neither excessive nor inappropriate given the facts of the case.³⁵

C. Former Head Baseball Coach at Southwest Texas State University

The IAC heard its first appeal of a former coach in April 1995 when it heard the appeal of the former baseball coach at Southwest Texas State University ("STSU"). The COI found that the former head baseball coach of STSU had violated the principles of ethical conduct by giving fraudulent academic credit to baseball student-athletes.³⁶ Specifically, the COI found that the head baseball coach violated NCAA rules by giving student-athletes A grades in class which they never attended.³⁷

Initially, he former head coach claimed that the COI lacked jurisdiction over the matter. However, the IAC held that this claim involved unethical conduct and was within the jurisdiction of the COI.³⁸ The former head coach then argued he did not violate Bylaw 10.1-(b) because he did not "arrange" for fraudulent academic

31. See Coastal Carolina Report at 6-7.

32. See *id.*

33. See *id.*

34. See *id.*

35. See Coastal Carolina Report at 8. For further discussion of the penalties in the CCU case, see *infra* notes 327-329 and accompanying text.

36. See Former Head Baseball Coach at Southwest Texas State University Infractions Appeals Report, NCAA News Release at 2 (Apr. 11, 1995) [hereinafter Southwest Texas State Report].

37. See Southwest Texas State Report at 3.

38. See *id.* at 3.

credit. The IAC held that in order to give someone fraudulent credit, you must at some point arrange to do so.³⁹ Additionally, the IAC found that the student had received fraudulent credit.⁴⁰ Thus, the former head coach had violated the ethical conduct Bylaw. Next, the former head coach argued that the COI ignored mitigating evidence concerning the conduct of STSU's director of athletics. The IAC determined that the alleged conduct by the athletic director was not relevant to the determination of the violation found by the COI.⁴¹

Finally, the former head coach argued that statements made by the athletic director be considered as newly discovered evidence. The IAC referred the request for admission of newly discovered evidence to the COI for resolution. The COI determined that the statements were not relevant to any finding in this case and thus would not be admitted as newly discovered evidence. The IAC concurred with the COI's resolution of this issue.⁴²

D. University of Mississippi

In May, 1995, the COI heard the appeal of the University of Mississippi ("UOM"). The COI had found various violations in the men's football program. The violations included representatives of the institution's athletics interests ("representatives") making impermissible recruiting contacts with prospective student athletes.⁴³ Representatives also gave prospective student-athletes improper benefits, including transportation, entertainment at topless bars, meals, lodging, and clothing. One representative offered a prospective student-athlete an automobile in exchange for a commitment to attend UOM.⁴⁴ Student-athletes were also given improper benefits by representatives, including free clothes and a deferred pay-back loan.⁴⁵

The football staff was also responsible for several NCAA violations. The COI found that a member of the football staff offered a prospective student-athlete money and airline tickets in

39. *See id.* at 4.

40. *See id.* at 3.

41. *See* Southwest Texas State Report at 3.

42. *See id.*

43. *See* University of Mississippi Infractions Appeals Committee Report, NCAA News Release at 2 (May 1, 1995) [hereinafter University of Mississippi Report].

44. *See id.*

45. *See id.*

exchange for a commitment to the school.⁴⁶ A student-athlete was also allowed to use a staff members car, which is an improper benefit.⁴⁷ The COI concluded that there was a lack of institutional control over the football program, and unethical conduct by the former head coach, a former assistant, and a former athletics department staff member.⁴⁸

Initially, UOM argued that the COI's finding that a member of the football staff offered money and airline tickets was clearly contrary to the evidence presented to the committee. The IAC held that it would set aside a finding only upon a showing that information that might have supported a contrary result clearly outweighed the information upon which the COI based its findings.⁴⁹ In this case the IAC concluded that the finding that a member of UOM's football staff made impermissible offers to a prospective student-athlete was not clearly contrary to the evidence provided to the COI.⁵⁰

UOM then argued that certain penalties, specifically, the reduction (for two years) in the number of athletic-related financial aid awards in football and the reduction in the number of allowable expense-paid visits to the campus by prospective student athletes were too severe and were unwarranted given the circumstances. The IAC declined to set aside or modify the penalties imposed by the COI, reasoning that the imposition of significant penalties in the case was consistent with the goals and mission of the NCAA.⁵¹

E. Alcorn State University

Alcorn State University's ("ASU") football and men's and women's basketball programs were the subjects of the IAC's determination in July 1995. In that case, the committee examined allegations that the school lacked institutional control and the school's failure to monitor prospective student-athletes.

In the ASU case, the COI found various violations in the football program and the men's and women's basketball programs. The COI found that seven student-athletes were improperly certified because

46. *See id.*

47. *See* University of Mississippi Report at 2.

48. *See id.*

49. *See id.* at 8.

50. *See id.*

51. *See* University of Mississippi Report at 18. For further discussion on the penalty analysis in the UOM case, *see infra* notes 330-360 and accompanying text.

of a failure to adequately monitor prospective student-athletes' academic information and standardized test scores.⁵² The institution also failed to administer NCAA core-course requirements in certifying the eligibility of five student-athletes.⁵³ ASU's director of athletics failed to follow NCAA eligibility procedures, even when the NCAA gave the institution notice of potential eligibility issues involving two student-athletes.⁵⁴ Finally, there was unethical conduct by both the former men's basketball coach and two student-athletes.⁵⁵

ASU argued that two of the penalties: specifically, the reduction in the number of financial aid awards during the 1995-96 and 1996-97 seasons and the prohibition from post-season competition in men's basketball during the 1994-95 and 1995-96 season, should have been reduced. The IAC determined that the penalties were not excessive nor inappropriate based on the conduct and motives of the individuals involved.⁵⁶

F. *University of Alabama*

In November 1995, the IAC reviewed the appeal of the University of Alabama's ("UAB") football program. The committee reversed a finding by the COI for the first time and determined that procedural error made the punishment impermissible.

The COI had found that a member of UOA's football team had obtained six impermissible deferred payment loans, totaling over \$24,000.⁵⁷ These loans were facilitated by a representative of the institutions' athletics interests.⁵⁸ The COI concluded that if UOA had obtained the required documentation for the student-athletes purchase of disability insurance, at least one of the impermissible loans would have been revealed.⁵⁹ Additionally, the COI found that the institution lacked institutional control in the review, investigation and communication of information regarding the amateur status of

52. See Alcorn State University Public Infractions Appeals Committee Report, NCAA News Release at 2 (July 12, 1995) [hereinafter Alcorn State Report].

53. See *id.*

54. See *id.*

55. See *id.*

56. See Alcorn State report at 5-6.

57. See University of Alabama Public Infractions Appeals Committee Report, NCAA News Release at 2 (Nov. 30, 1995) [hereinafter University of Alabama Report].

58. See University of Alabama Report at 3.

59. See *id.*

another student-athlete.⁶⁰ This lack of communication resulted in an ineligible player participating in 11 regular season football games.⁶¹ Finally, the COI found that the university's faculty athletics representative violated NCAA standards of ethical conduct in providing false and misleading information to the NCAA eligibility appeals staff.⁶²

UOA and the accused faculty athletic representative appealed the unethical conduct finding based on a procedural error. The IAC determined that a procedural error, lack of adequate notice, affected the reliability upon which the COI based its finding that the faculty athletics representative acted unethically.⁶³ The IAC vacated the finding based upon this procedural error.⁶⁴

UOA then argued that the certain penalties imposed by the COI were excessive or inappropriate, specifically the third year of probation, the prohibition from participation in post season competition during 1995-96 season in football, and the reduction of the initial financial aid awards in football during the 1997-98 academic year. The IAC concluded that the third year of probation and the reduction in financial aid awards were excessive and inappropriate.⁶⁵ The IAC did uphold the prohibition from post season competition during the 1995-96 football season as a proper presumptive penalty for a major violation.⁶⁶

G. Former Head Basketball Coach at Baylor University

In May 1996, the IAC reviewed the first of several appeals dealing with fraudulent academic credit obtained by student-athletes from the Southeastern College of the Assemblies of God.⁶⁷ In this case the head men's basketball coach was charged with unethical conduct in the arrangement of fraudulent academic credit for prospective

60. *See id.*

61. *See id.*

62. *See* University of Alabama Report at 3.

63. *See id.* at 7-8.

64. *See id.* at 8. For a more detailed discussion of this issue *see infra* notes 253-258 and accompanying text.

65. *See id.* at 10. For further discussion of the IAC's reasoning *see infra* notes 330-360 and accompanying text.

66. *See* University of Alabama Report at 11. *See also*, NCAA Bylaw 19.6.2.1-(f) (dealing with presumptive penalties and when they are appropriate).

67. *See* Baylor University Public Infractions Appeals Committee Report, NCAA News Release at 3 (May 20, 1996) [hereinafter Baylor University Report].

student-athletes.⁶⁸ Specifically, the COI found that members of the coaching staff violated NCAA principles of ethical conduct by arranging fraudulent academic credit for four prospective student-athletes who were transferring from two-year colleges.⁶⁹ The coaching staff assisted these prospective student-athletes with their enrollment in correspondence courses and provided them with impermissible assistance with course work.⁷⁰ This impermissible assistance included supplying the answers to final examinations, course assignments, and papers.⁷¹ The COI concluded that the head men's basketball coach demonstrated a lack of control over the basketball program and his assistant coaches.⁷²

The former head men's basketball coach appealed the finding implicating him in the scheme to arrange for fraudulent credit for a prospective student-athlete based on a procedural error.⁷³ The coach alleged that the COI failed to consider certain evidence presented to it.⁷⁴ The IAC determined that certain evidence was not considered by the COI in making their findings concerning the head men's basketball coach.⁷⁵ While this evidence was not "new evidence," as a matter of procedural fairness the IAC remanded the matter back to the COI so that they could make their determination with the help of the information which they had not previously considered.⁷⁶

H. Florida State University

In October 1996, the IAC reviewed a COI finding against Florida State University's ("FSU") football program.⁷⁷ The violations involved the coaching staff's failure to properly monitor players.⁷⁸

In the FSU case, the COI found that on four occasions between 1992 and 1994 FSU representatives failed to take appropriate actions in response to information indicating that sports agents were

68. *See id.* at 2.

69. *See id.*

70. *See id.*

71. *See* Baylor University Report at 3.

72. *See id.*

73. *See id.* at 6-8.

74. *See id.* at 6-7.

75. *See* Baylor University Report at 7-8.

76. *See id.* at 8.

77. *See* Florida State University Public Infractions Appeals Committee Report, NCAA News Release at 1 (Oct. 1, 1996) [hereinafter Florida State University Report].

78. *See id.*

involved with student-athletes.⁷⁹ This involvement included a shopping spree at a local mall which was funded by a sports agent.⁸⁰ Although the amateurism violations occurred without the knowledge or participation of the institution, the COI found that the lack of investigation and monitoring on behalf of the institutional representatives led to the failure of the detection and prevention of the violations.⁸¹

First, FSU made several arguments on appeal. FSU argued that the COI's designation of a major violation for failure to monitor was not provided for in the NCAA contract with member institutions.⁸² FSU argued that the enforcement staff had concluded that this was a secondary violation, and the COI exceeded its authority in overruling the enforcement staff and finding this was a major violation.⁸³ The IAC held that the COI exercised its authority under 19.1.2.1 and 32.2.2.2 to ignore the recommendation of the group executive director for enforcement and reserved to itself the question of whether the violations at issue were major or secondary.⁸⁴ The IAC stated that "the authority to make that determination [whether a violation is major or secondary in nature] is vested in the [COI]."⁸⁵ Second, FSU argued that the COI's designation of a major violation was without precedent and improper.⁸⁶ This case was the first case in which the enforcement staff categorized a violation as secondary and the COI later determined that the violation was major.⁸⁷ The IAC held, however, that the precedents did not establish that the COI lacked authority to disprove an enforcement staff recommendation, and the COI had the final say in whether a violation was major or secondary.⁸⁸ Third, FSU argued that a lack of a NCAA definition of adequate monitoring made the major infraction holding inappropriate.⁸⁹ The IAC held that this argument did not make the COI's finding inappropriate.⁹⁰ The IAC stated that the majority of NCAA "rules have no clarification beyond the

79. *See id.* at 2.

80. *See id.*

81. *See Florida State University Report* at 2.

82. *See id.* at 4.

83. *See id.*

84. *See id.* at 5.

85. *See Florida State University Report* at 6.

86. *See id.* at 7.

87. *See id.*

88. *See id.* at 8.

89. *See Florida State University Report* at 8.

90. *See id.*

language in the [NCAA] [m]anual and the rule interpretations.”⁹¹ Just because the NCAA has distributed a document clarifying the principles of institutional control, that did not mean that there is not a definite definition of adequate monitoring.⁹² Next, FSU further argued that the COI’s process was flawed by a procedural error.⁹³ Particularly, FSU argued that that the testimony of a former student was unprecedented and a violation of NCAA bylaws, among other arguments.⁹⁴ The IAC held that there was no NCAA bylaw restricting the COI’s authority to allow the attendance of additional witnesses, and on at least four other occasions the COI has allowed testimony by witnesses with no direct affiliation to the institution.⁹⁵ The IAC also held that the witness’s testimony was proper, there was adequate notice given of the witness’s appearance, and FSU had an opportunity to question the witness as well as call rebuttal witnesses.⁹⁶

Finally, FSU argued that the penalties imposed by the COI were excessive or inappropriate.⁹⁷ The IAC found that the only thing that FSU opposed was the fact that they were now exposed to the “repeat violator” rule because of the COI’s finding.⁹⁸ The IAC held that the repeat violator rule is not a penalty imposed for a major violation, and this being the only argument made by FSU, there was nothing for the IAC to consider under this portion of the appeal.⁹⁹

I. Former Assistant Basketball Coach at New Mexico State

In July 1996 the former assistant men’s basketball coach (“assistant coach”) at New Mexico State University (“NMSU”) appealed a lack of institutional control finding levied against him by the COI.¹⁰⁰ The IAC overturned the COI’s finding in December of 1996.¹⁰¹ The COI found numerous violations in the men’s basketball

91. *Id.*

92. *See id.*

93. *See* Florida State University Report at 10.

94. *See id.* For further discussion of this case in regard to witnesses *see infra* notes 301-318 and accompanying text.

95. *See id.* at 11.

96. *See id.* at 12-13.

97. *See* Florida State University Report at 17.

98. *See id.*

99. *See id.*

100. *See* Former New Mexico State University Assistant Men’s Basketball Coach Public Infractions Appeals Committee Report, NCAA News Release, at 2 (Dec. 20, 1996) [hereinafter New Mexico State University Report].

101. *See id.* at 10, 13.

program at NMSU involving the academic credit received by prospective student-athletes at Southeastern College of the Assemblies of God.¹⁰² Specifically, the COI found that the restricted earnings coach took examinations and completed papers for prospective student-athletes.¹⁰³ The restricted earnings coach also violated the principles of ethical conduct by providing false information to NCAA enforcement staff and by trying to conceal evidence in the case.¹⁰⁴ The COI named the assistant coach in the lack of institutional control finding because he was the recruiting coordinator and failed to adequately monitor the prospective students course work.¹⁰⁵ The COI concluded that this failure permitted the academic fraud to occur.¹⁰⁶

The assistant coach first argued that he was never given notice that he was being considered as part of an institutional control violation.¹⁰⁷ The IAC held that the assistant coach was not given adequate notice and thus, vacated the reference of the assistant coach in the institutional control finding.¹⁰⁸

The assistant coach also argued that even if there was adequate notice, an assistant coach could not be found to have violated the institutional control doctrine.¹⁰⁹ This was the first case in which the COI found an institutional control violation against an assistant coach.¹¹⁰ The IAC agreed with the assistant coach and vacated the finding.¹¹¹ The IAC held that the institutional control doctrine was intended to place responsibility on the institution's administration to establish procedures to ensure compliance.¹¹² This responsibility, however, was not meant to be extended to assistant coaches.¹¹³

102. *See id.* at 2.

103. *See id.*

104. *See* New Mexico State University Report at 2.

105. *See id.*

106. *See id.*

107. *See id.* at 6.

108. *See* New Mexico State University Report at 10. For further discussion of this case in regards to notice requirements, *see infra* notes 259-272 and accompanying text.

109. *See id.*

110. *See id.*

111. *See id.* at 13.

112. *See* New Mexico State University Report at 13.

113. *See id.* For further discussion on institutional control, *see infra* notes 273-300 and accompanying text.

J. Former Soccer Coach at Alabama A & M University

This case involved violations by the former head men's soccer coach at Alabama A&M University ("Alabama A&M").¹¹⁴ The COI found that the head coach had arranged for members of the soccer team to receive meals at the university cafeteria, even though they were not awarded board stipends as part of their athletics grants-in-aid.¹¹⁵ Additionally, the COI found that the head coach contributed to the lack of institutional control at Alabama A&M because his actions permitted student-athletes to live in university housing and receive meals when those benefits were not included in the students' grants-in-aid awards.¹¹⁶

The former head coach argued that procedural error affected the reliability of the information used to support the COI's finding.¹¹⁷ The head coach specifically argued that he was not given time to prepare and form a defense to the allegations made against him.¹¹⁸ The IAC found that the head coach was not told of the self report in his sport until he was requested by the institution to appear before the COI.¹¹⁹ Further, he was not provided with a copy of the self-report until seven days before the COI hearing.¹²⁰ At that time he had only four days to submit his response and three additional days to prepare his defense before the COI.¹²¹ Additionally, his efforts were hampered by the fact that the allegations involved events which had happened over a year ago, and he was not allowed access to important documents which were in his office in the athletic department.¹²² The IAC concluded that there were serious reliability issues with the information presented because of the procedure followed by the institution and the enforcement staff.¹²³ Thus, the IAC remanded the case to the COI for further consideration.¹²⁴

114. See Former Alabama A&M University Head Men's Soccer Coach Public Infractions Committee Report, NCAA News Release at 1 (Feb. 3, 1997) [hereinafter Alabama A & M University Report].

115. See *id.* at 2.

116. See *id.*

117. See *id.* at 3.

118. See Alabama A & M University Report at 4.

119. See *id.* at 6.

120. See *id.*

121. See *id.*

122. See Alabama A & M University Report at 6.

123. See *id.* at 9.

124. See *id.*

K. University of Maine, Orono

In February 1997, the committee reviewed a COI decision against the University of Maine, Orono ("UOM").¹²⁵ The COI found violations in the ice hockey, baseball, football, men's and women's track and cross country, women's soccer, women's field hockey, men's basketball and men's golf.¹²⁶ "The majority of the violations occurred in the ice hockey program."¹²⁷ The COI found that between 1986 and 1994 student-athletes received impermissible benefits from representatives of the institution's athletics interests ("representatives").¹²⁸ These benefits came through the sponsor-family program and involved free lodging and meals.¹²⁹ Additionally, hockey players received other extra benefits from representatives, including lodging, utilities, use of an automobile, a telephone card, and free admission to a professional baseball game.¹³⁰ There was also numerous recruiting violations in the hockey program between 1990 and 1995.¹³¹ The COI also found that during the 1993-94 and 1994-95 academic years, the school improperly certified seventeen (17) student-athletes in seven sports, and permitted them to compete while ineligible.¹³² Also during the 1990-91 through 1992-93 academic years, and in the Spring of 1994, the institution gave out thirty (30) retroactive financial aid packages to student-athletes.¹³³ Finally, the COI found that there was a lack of institutional control on the part of the institution and the head hockey coach.¹³⁴

UOM argued that the second year ban on postseason competition in men's hockey and the reduction of financial aid awards in football were excessive and inappropriate.¹³⁵ The IAC held that the second year ban on postseason competition in hockey was not excessive or inappropriate considering all the facts and circumstances present in this case.¹³⁶ The IAC also held that the

125. See University of Maine, Orono Public Infractions Appeals Committee Report, NCAA News Release at 1 (Feb. 13, 1997) [hereinafter University of Maine, Orono Report].

126. See *id.* at 2.

127. *Id.*

128. See *id.*

129. See University of Maine, Orono Report at 2.

130. See *id.*

131. See *id.* at 3.

132. See *id.* at 2.

133. See University of Maine, Orono Report at 3.

134. See *id.*

135. See *id.* at 4.

136. See *id.* at 10.

reduction by 13 in football scholarships for the 1997-98 academic year was not excessive or inappropriate based on the facts of the case.¹³⁷

L. University of California, Los Angeles

In November 1997, the IAC issued two decisions involving the softball team at the University of California, Los Angeles ("UCLA").¹³⁸ The first decision deals with the appeal by the institution ("UCLA I"). The second appeal was made by the Senior Associate Director of Athletics ("Senior AD") who was involved in the violations ("UCLA II").¹³⁹ Both cases arise from the same factual background.

The COI found that during the 1993-94 and 1994-95 academic years, UCLA exceeded the permissible number of financial aid awards allowed in softball.¹⁴⁰ This occurred because the institution "incorrectly counted three softball student-athletes against the financial aid limit[] in women's soccer, even though they did not meet" NCAA requirements for a multi-sport participant.¹⁴¹ The COI found that the Senior AD violated the principles of ethical conduct arranging a tryout with the women's soccer team halfway through the soccer season for softball student-athletes.¹⁴² The purpose of this tryout was to qualify three softball student-athletes as soccer student-athletes so they would not count against the softball financial aid limit.¹⁴³ The Senior AD also told a staff member to put the student-athletes names on the soccer game-day roster, even though those athletes had not practiced with or participated for the soccer team.¹⁴⁴ The COI found that these actions were meant to circumvent NCAA legislation and were unethical.¹⁴⁵ The COI also found that there was a lack of institutional control on behalf of the Senior AD and the institution.¹⁴⁶

137. See University of Maine, Orono Report at 11.

138. See University of California, Los Angeles Public Infractions Appeals Committee Report, NCAA News Release, at 2 (Nov. 7, 1997) [hereinafter UCLA I Report].

139. See Former Associate Director of Athletics Public Infractions Appeals Committee Report, NCAA News Release, at 1 (Nov. 7, 1997) [hereinafter UCLA II Report].

140. See *id.*

141. See UCLA I Report at 2.

142. See *id.* at Appendix A.

143. See *id.*

144. See *id.*

145. See *id.*

146. See UCLA I Report at 2.

In UCLA I, UCLA argued that the prohibition from participation in post season competition in softball in 1996-97 was excessive or inappropriate.¹⁴⁷ The IAC concluded that the COI properly weighed all of the factors in coming to this punishment, and that the postseason ban was neither excessive or inappropriate.¹⁴⁸

M. Former Associate Athletic Director at UCLA

In UCLA II, the senior AD argued that the finding of lack of institutional control against her was contrary to the evidence presented to the COI.¹⁴⁹ The IAC found that this finding was not contrary to the evidence.¹⁵⁰ There was evidence that the senior AD was severely deficient in her duties, and that these deficiencies constituted a lack of institutional control on her part.¹⁵¹

The senior AD then argued that the finding that she violated the principles of ethical conduct was contrary to the evidence presented.¹⁵² The IAC found that there was evidence which showed that the senior AD deliberately tried to circumvent NCAA legislation, and that these actions supported the unethical finding.¹⁵³ The IAC stressed that an ethical-conduct violation was only appropriate when the individual in question acts knowingly.¹⁵⁴ In this case the IAC was satisfied that the senior AD had acted knowingly and that there was sufficient evidence to support this determination by the COI.¹⁵⁵

Next, the senior AD argued that the show-cause penalty in which she was named was excessive or inappropriate.¹⁵⁶ The IAC concluded that since they had upheld the institutional control and unethical conduct findings that this penalty was not excessive or inappropriate.¹⁵⁷

Finally, the senior AD argued that she was not given proper notice that the lack of institutional control charge was directed at her, and thus this procedural error affected the reliability of the

147. *See id.* at 3.

148. *See id.* at 11.

149. *See* UCLA II Report at 4.

150. *See id.* at 11.

151. *See id.* For further discussion of the institutional control issue, *see infra* notes 273-300 and accompanying text.

152. *See id.* at 13-17.

153. *See* UCLA II Report at 13-17.

154. *See* UCLA I Report at 16

155. *See id.* at 17.

156. *See id.*

157. *See id.*

information used to support the COI's finding. The IAC held that there was sufficient notice given to the senior AD to make her aware that she was being considered as part of a lack of institutional control finding.¹⁵⁸ The IAC ultimately decided this issue on other grounds, however. Specifically, the IAC concluded that the senior AD had waived grounds for appeal by not addressing the issue in her notice of appeal or written appeal.¹⁵⁹

N. University of Texas at El Paso

In the most recent and perhaps most complex decision handed down by the IAC, the committee, in January 1998, considered violations by the University of Texas at El Paso ("UTEP") men's and women's basketball teams, football program, and women's rifle team.¹⁶⁰ The UTEP case was the latest to involve academic credit received by prospective student-athletes at the Southeastern College of the Assemblies of God.¹⁶¹ The COI found that between June and August of 1993, members of the women's basketball staff provided improper recruiting inducements to a women's and men's prospective student athlete by assisting them with their enrollment in correspondence courses.¹⁶²

The UTEP case also dealt with numerous violations of eligibility regulations.¹⁶³ The COI found that between 1994 and 1996, 27 student-athletes competed in contests away from UTEP's campus, even though they were enrolled in fewer than 12 credit hours and were therefore ineligible to participate in intercollegiate athletics.¹⁶⁴ Between 1992 and 1996, UTEP used a faulty method to calculate grade-point averages in certifying the eligibility of student-athletes.¹⁶⁵ On a number of occasions, student-athletes competed while ineligible.¹⁶⁶ The COI also found that in the 1996-97 academic year three non-qualifiers received impermissible financial aid.¹⁶⁷ Additionally, between 1992 and 1997, UTEP exceeded the

158. See UCLA I Report at 18.

159. For further discussion of this issue, see *infra* notes 269-272 and accompanying text.

160. See University of Texas at El Paso Public Infractions Appeals Committee Report, NCAA News Release, at 2 (Jan. 7, 1998) [hereinafter UTEP Report].

161. See *id.*

162. See *id.*

163. See *id.*

164. See UTEP Report at 2.

165. See *id.* at 2-3.

166. See *id.* at 3.

167. See *id.*

permissible number of financial aid awards in football by seven.¹⁶⁸ Finally, the COI concluded that there was a lack of institutional control.¹⁶⁹

UTEP first argued that three letters which were provided to the enforcement staff during the investigation were not brought to the attention of the COI.¹⁷⁰ The IAC held that the three letters did not constitute new evidence, and the exclusion of this evidence was not prejudicial to UTEP, as was the exclusion of evidence in the Baylor case.¹⁷¹

Aware of possible improprieties occurring during the violations hearings, UTEP next attempted to distance itself from the former associate director of athletics, who served as the principal spokesperson for UTEP before the COI.¹⁷² UTEP claimed that the individual in question presented unsubstantiated evidence and in some instances improperly suggested there was evidence to support certain claims.¹⁷³ The IAC held that as a general principle an institution is bound by the statements made by its representatives at NCAA infractions hearings.¹⁷⁴ If the school fails to challenge those statements at the hearing, the institution is bound by them absent contrary evidence produced at the hearing or later by newly discovered evidence.¹⁷⁵

UTEP then argued that the COI had committed a procedural error by allowing the enforcement staff to take considerable time in presenting evidence about an allegation which was later withdrawn.¹⁷⁶ UTEP argued that this extended testimony resulted in prejudice because of a reduction of the time they were afforded to present their case.¹⁷⁷ The IAC held that the allegation in question was serious and warranted the time spent to review it.¹⁷⁸ Additionally, the IAC held that there was no evidence to indicate that UTEP did not have a full opportunity to present arguments on every facet of its case at the hearing.¹⁷⁹

168. See UTEP Report at 3.

169. See *id.*

170. See *id.* at 6.

171. See *id.*

172. See UTEP Report at 6-7.

173. See *id.* at 7.

174. See *id.*

175. See *id.*

176. See UTEP Report at 8.

177. See *id.*

178. See *id.*

179. See *id.*

UTEP also argued that procedural error occurred because a member of the enforcement staff stated, during his opening remarks, that he felt that the repeat violator penalty should not be applied in this case.¹⁸⁰ No member of the COI commented on this statement during the hearing, and UTEP relied on this statement.¹⁸¹ If UTEP had known that the repeat violator legislation would be applied, it would have used different responses during the hearing.¹⁸² The IAC found that no procedural error had occurred.¹⁸³ It reasoned that the repeat violator provision automatically applies under the appropriate circumstances and no entity (including the enforcement staff and the COI) has the authority to ignore its application.¹⁸⁴

Next, UTEP argued that one finding of a violation should not have been considered as a major violation and that a procedural error occurred when it was not provided proper notice either in the official inquiry or at the pre-hearing conference of its inclusion in the case.¹⁸⁵ UTEP was not informed of the inclusion of this violation until it received the case summary from the enforcement staff just two weeks prior to the COI hearing.¹⁸⁶ The IAC, troubled by the adequacy of notice issue raised by UTEP, stated that it seriously considered vacating this finding.¹⁸⁷ The IAC specifically stated that given the shortness of notice, it would have been appropriate for the COI to accept the enforcement staff's recommendation that the violation be treated separately as a secondary violation.¹⁸⁸ The IAC did not vacate the finding, however, as it found the lack of notice did not affect the reliability of the information because the violation had been self reported by UTEP and the sole issue before the COI was whether the COI could identify it as a major violation.¹⁸⁹

Finally, UTEP argued that the two penalties imposed by the IAC: the five year probationary period and the reduction of 10 initial awards and 12 overall awards over a three year period in football, were excessive or inappropriate based on all the evidence and

180. See UTEP Report at 8.

181. See *id.*

182. See *id.*

183. See *id.*

184. See UTEP Report at 8.

185. See *id.* at 10-11.

186. See *id.*

187. See *id.*

188. See UTEP Report at 10-11.

189. See *id.*

circumstances.¹⁹⁰ The IAC held that the COI had correctly taken into account all of the aggravating and mitigating factors and based on the facts of the case, the five year probationary period was not excessive or inappropriate.¹⁹¹ The IAC did, however, reduce the football grant-in-aid penalty by one initial and one overall award in each of the 1997-98 and 1998-99 academic years.¹⁹² The IAC reduced this penalty because they were very impressed with the football coach's actions of questioning the interpretation provided by the university that resulted in the over-awards. The IAC felt that the football program deserved more credit than it was given for the football coach's actions and therefore reduced the penalty.¹⁹³

IAC SCOREBOARD

Year	Number of Cases Decided	Findings Vacated or Remanded to COI	Penalties Reduced or Vacated
1993	1	0	0
1995	5	1	1
1996	3	2	1 ^a
1997	4	1	0
1998	1	0	1
Totals	14	4	3

III. PRE-HEARING PROCEDURE

This section discusses how a party proceeds before the IAC, the materials reviewed by the IAC, and the steps necessary to protect and maintain an appellant's rights. The IAC has been rather strict in this area and strict adherence to procedural requirements by appellants

190. *See id.* at 18.

191. *See id.*

192. *See* UTEP Report at 19.

193. *See id.*

^aThe show cause penalty against the former assistant coach in the New Mexico State University case was vacated, not because the penalty was excessive or inappropriate, but because the findings on which the penalty was based were vacated.

is vital. Failure in this regard may result in a party's loss of the ability to appeal or argue certain issues.

In order to appeal a COI finding, a party must first submit a written notice of appeal to the NCAA Executive Director within fifteen days of public release of a COI report.¹⁹⁴ The IAC has interpreted this requirement strictly, and on at least one occasion has denied a party the right to appeal because the procedural requirements were not met.¹⁹⁵

For example, in the Coastal Carolina case,¹⁹⁶ the institution filed a timely notice of appeal, but a school staff member named in the COI findings did not.¹⁹⁷ The IAC held that it did not have the authority to hear the appeal because the appeal was: "a) not submitted through the institution; b) not submitted to the NCAA executive director; and c) submitted later than 15 calendar days from the date the institution received the COI's report."¹⁹⁸ Thus, the IAC refused to hear the staff member's appeal.

The next issue addressed by the IAC was what must be contained in the notice of appeal. Only Bylaw 32.10.1, dealing with notice of appeal by an institution, has any reference as to what must be contained in the written notice of appeal.¹⁹⁹ Bylaw 32.10.1 states a "member's notice of appeal shall contain a statement of the date of the public release of the committee's report and a statement indicating whether the institution desires to submit its appeal in writing only or whether the institution will be represented before the appropriate appeals committee" at the time the appeal is heard.²⁰⁰ Thus, there is no indication within the Bylaws as to what must be included in the notice of appeal in regards to the grounds for appeal.

The IAC has, however, addressed this issue in two recent cases. In the UCLA II case, the IAC stated that an "institution or individual must assert any and all bases for appeal in the notice of appeal or in the written appeal."²⁰¹ In the UCLA II case, the senior AD in her rebuttal to the COI's response raised for the first time the argument

194. See NCAA Bylaws 32.10.1 and 32.10.3. The first Bylaw deals with an appeal by an institution, the latter with an appeal by an individual staff member. See *id.*

195. See Coastal Carolina Report at 2.

196. See *infra.*, notes 196-199.

197. See Coastal Carolina Report at 2.

198. *Id.*

199. See NCAA Bylaw 32.10.1.

200. *Id.*

201. See UCLA I Report at 19.

that a procedural error affected the reliability of the COI's finding.²⁰² In response to the COI's argument that this ground for appeal had been waived, the IAC adopted the above quoted procedural requirement.²⁰³ The IAC concluded that if the grounds for appeal are not stated in the notice of appeal or the written appeal, they are waived and the bases for appeal cannot be later raised in a rebuttal or at the hearing before the IAC.²⁰⁴ The IAC might have taken a small step back, however, from this strict stance in the UTEP case. In the UTEP decision, the IAC stated that the institution or individual must make a "good-faith effort" to identify all issues being appealed in its notice of appeal.²⁰⁵ While the IAC again stated that "failure to raise an issue in the notice of appeal or in the appeal itself constitutes a waiver of that basis of appeal," the good-faith language might give institutions more leeway to include grounds for appeal in documents filed after the notice of appeal.²⁰⁶ Thus, the strict procedural requirement adopted by the IAC in the UCLA II case might have been softened in the UTEP case and institutions might now have more room to argue that they made a good-faith effort to identify all grounds of appeal and that additional grounds not included in the notice of appeal should still be considered by the IAC.

Along with the formal notice of appeal, the institution has thirty days to submit a response in support of its appeal to the IAC.²⁰⁷ An issue has been raised as to whether a party can waive a basis for appeal by not addressing the grounds in the brief in support of the appeal.²⁰⁸ In the FSU case, the institution asserted in its notice of appeal that the penalty imposed by the COI was, "excessive or inappropriate based on all the evidence and circumstances."²⁰⁹ FSU did not, however, address this ground for appeal in its brief in support of its appeal.²¹⁰ The COI argued²¹¹ that by not addressing this issue in its brief, FSU had abandoned the issue.²¹² While the IAC

202. *See id.* at 17.

203. *See id.*

204. *See id.* at 19.

205. *See* UTEP Report at 12.

206. *Id.*

207. *See* NCAA Bylaws, Figure 32-2.

208. *See* Florida State University Report at 17.

209. *Id.*

210. *See id.*

211. The COI is represented before the IAC by either the chair of the COI or another member of the COI. *See* NCAA Bylaw 32.11.1.

212. *See* Florida State University Report at 17.

decided this issue on other grounds,²¹³ they did state that the COI's argument that the issue had been abandoned was "not without merit."²¹⁴ Thus, although the IAC has not specifically held that a party can waive an issue by failing to address it in their brief, parties have been put on notice that the IAC could so rule if the issue is revisited.

Once the COI receives the institution's response in support of its appeal, the COI is provided thirty days in which to submit their own response.²¹⁵ This response must be in the form of an expanded infractions report, including a list of violations found, penalties proposed, factors considered in deciding the case, and corrective actions taken by the institution or conference, among other things.²¹⁶ This expanded report must be provided to the institution prior to the time of its appearance before the IAC.²¹⁷ The appellants then have fourteen days to file a rebuttal to the COI's expanded report.²¹⁸ In considering the appeal, the IAC will review the notice of appeal, the transcript of the COI hearing, additional briefs and responses filed by the appellants, the COI's expanded report, and rebuttals filed by the appellant.

Thus, it can be inferred from the decisions discussed above that the IAC will interpret all procedural requirements very strictly. Failure by an appellant to comply with any of the requirements for a valid appeal could very well result in forfeiture of the right to appeal on certain grounds or altogether. The IAC has been very consistent in enforcing these requirements, and it can be anticipated that the IAC will continue to be strict in the future.

IV. HEARING PROCEDURE

The hearing procedures are set out in the NCAA Bylaws and the IAC has made several decisions interpreting these bylaws.²¹⁹ The IAC has broad power to establish the procedure to be followed during

213. *See id.*

214. *See id.*

215. *See* NCAA Bylaws, Figure 32-2.

216. *See* NCAA Bylaw 32.10.5. Other materials included in the expanded report are 1) a statement of the origin of the case; 2) related factor appropriate for consideration in judgment of the case; 3) any additional information presented to the COI during its consideration of the case that the COI deems relevant to the appeal; and 4) a transcript of any hearing conducted by the COI.

217. *See* NCAA Bylaw 32.10.6.

218. *See* NCAA Bylaws, Figure 32-2.

219. *See* NCAA Bylaws 32.11.1-11.3.

the actual hearing, but these procedures must be consistent with established policies.²²⁰ The first issue addressed by the IAC on hearing procedure arose in the UCLA II case, in which the IAC decided what type of hearing the senior AD was entitled to.²²¹

In UCLA II, the senior AD, in her notice of appeal, requested an in-person hearing before the IAC.²²² The senior AD did not appear in person before the COI, thus there was an issue of whether she was entitled to an in-person hearing before the IAC.²²³ The ability of an individual to appeal stems from Bylaw 19.7.3, which states that a staff member who participates in a hearing before the COI and is involved in a finding may appeal that finding to the IAC.²²⁴ In 1995, the IAC adopted a policy which deemed an individual to have participated for the purpose of Bylaw 19.7.3 if they appeared personally at the COI's hearing or submitted a "written response for review during the [COI's] hearing."²²⁵ This new policy, however, did not address what type of appellate review an individual who had not appeared before the COI, but who had submitted a written response, was entitled to.²²⁶ The two available options being either an in-person hearing or an appeal on the written record.²²⁷ The IAC allowed the senior AD's request for an in-person hearing in this particular case, but on very narrow grounds.²²⁸ The IAC granted the in-person hearing in this case because the senior AD was not given notice that failure to appear before the COI in-person "would result in a forfeiture of her right to an in-person hearing before the IAC."²²⁹ The IAC noted, however, that there were potential problems which could arise from allowing an in-person hearing for an individual who did not appear before the COI.²³⁰ Thus, it can be inferred from the UCLA II case that in future cases the IAC will not allow an in-person hearing for an individual who does not appear before the COI, provided that the person is properly notified that failure to appear results in a forfeiture of the right to an in-person hearing.

220. See NCAA Bylaw 32.11.3.

221. See UCLA II Report.

222. See *id.* at 4.

223. See *id.*

224. See NCAA Bylaw 19.7.3.

225. See UCLA II Report at 6.

226. See *id.*

227. See *id.*

228. See *id.* at 8.

229. See UCLA II Report at 6-7.

230. See *id.* at 6.

The actual procedure of an IAC hearing is addressed in Bylaw 32.11.1.²³¹ If the institution elects to only appeal in writing, the COI's report shall be considered "without an appearance of a COI representative."²³² If the institution chooses to be represented in person before the IAC then they "are permitted a reasonable time to make its oral presentation to supplement the institution's written appeal."²³³ It should be noted that an institution will be bound by the oral representations of its representative at the hearing before the COI.²³⁴ In the UTEP case, UTEP tried to distance itself from unsubstantiated statements made by its representative at the COI hearing.²³⁵ The IAC held, however, that the institution was bound by these statements because it did not challenge these statements during the hearing before the COI.²³⁶ Thus, the IAC concluded that an institution is bound by any unchallenged statements made by its own representatives unless there is contrary evidence produced at the COI hearing or later by newly discovered evidence.²³⁷

Once the member of the institution gives his or her oral presentation, a representative of the COI is then allowed a reasonable time to orally present the COI's report.²³⁸ The IAC, in making their decision, must consider the statements and evidence presented at the hearing, and may, at their discretion, question representatives of the institution, the COI, or any other person appearing before it to clarify the facts related to the appeal.²³⁹ The evidence which the IAC will hear includes "all the information that was presented to the" COI.²⁴⁰ Thus, the IAC "will consider both the information upon which the [COI] based its finding and all other information that was presented to the committee, including information that might have supported a contrary result."²⁴¹ The IAC has stressed, however, that they will not conduct an infractions hearing *de novo*, and will not consider information which was not

231. See NCAA Bylaw 32.11.1.

232. NCAA Bylaw 32.11.1-(b).

233. NCAA Bylaw 32.11.1-(a). This bylaw only states that an institution has the right to make an oral presentation, but it is assumed that an individual appellant would also have this right.

234. See UTEP Report at 7.

235. See *id.* at 6.

236. See *id.*

237. See *id.*

238. See NCAA Bylaw 32.11.1(a).

239. See NCAA Bylaw 32.11.2.

240. See University of Mississippi Report at 7.

241. *Id.* at 7-8.

made available to the COI.²⁴² Information not submitted to the COI is considered “new evidence” which must be referred back to the COI for its review.²⁴³

Once all the evidence has been presented, the parties are excused and the IAC deliberates and reaches its decision.²⁴⁴ The appeal is decided by a majority vote of the IAC members present and voting.²⁴⁵ The IAC may either accept the COI’s findings and penalties “or alter either one or both.”²⁴⁶ Any decision of fact or violation by the IAC is considered “final, binding and conclusive, and shall not be subject to further review by the Management Council or any other authority.”²⁴⁷

As with the pre-hearing procedure, the IAC is very strict with its procedural requirements during the hearing stages. Thus, failure to properly secure an in-person hearing will result in forfeiture of that right, as long as proper notice is given. Once the hearing begins, however, the IAC is relatively lax with the hearing procedure, and can adjust the hearing procedure to ensure that all the relevant facts are brought to the IAC’s attention.²⁴⁸

V. ISSUES ADDRESSED BY THE IAC

A. *Lack of Notice*

The IAC has had to address the issue of lack of notice in a number of different cases. This issue revolves around the COI making a particular finding without notifying the university or the individual that they were even considering that charge as a possible violation. This in turn affects the institutions or individuals’ ability to present a defense to that finding because they never knew they had to present rebuttal evidence pertaining to that charge.

While the NCAA is not bound by the due process clause of the U.S. Constitution, the NCAA has recognized that as a matter of policy, the enforcement program should provide those protections

242. See *id.* at 8. See also Baylor Report at 7-8 (stating “absent unusual circumstances the IAC will not consider information not made available to the COI when it made its findings”).

243. See NCAA Bylaws 19.02.3 and 32.10.7.

244. See University of Mississippi Report at 5.

245. See NCAA Bylaw 32.11.1-(c).

246. *Id.*

247. NCAA Bylaw 32.11.5.

248. See *supra* notes 219-248, dealing with hearing procedure.

that are necessary to ensure fairness to the parties.²⁴⁹ Numerous NCAA bylaws emphasize the importance of notice, specifically Bylaw 19.5.1 states: “a member under investigation for major violations shall be given . . . notice of any specific charges against it and the facts upon which such charges are based.”²⁵⁰ The IAC has noted that the COI itself has stated that it has the “responsibility to provide to institutions and individuals ‘appropriate due process.’”²⁵¹ The IAC has held that “[a]dequate notice is a fundamental principle of due process.”²⁵²

This proper notice issue was first raised in the University of Alabama case after the COI made a finding of unethical conduct against the former faculty athletics representative (“athletics representative”).²⁵³ The UOA and the athletics representative asked the IAC to set aside this finding based on the grounds that the lack of notice that unethical conduct was at issue, affected the reliability of the information that was used to support the finding.²⁵⁴ The IAC found that the athletics representative was never formally charged with possible unethical conduct, nor was the athletics representative advised during the COI hearing that a possible unethical conduct violation was at issue.²⁵⁵ The communications sent by the COI to the institution and the representative did not include actual notice of an unethical conduct charge.²⁵⁶ The IAC also stated that “notice and an opportunity to defend are especially important in cases involving a possible violation of Bylaw 10 (ethical conduct).”²⁵⁷ Thus, the IAC vacated the unethical finding, concluding that this procedural error, lack of adequate notice, affected the reliability of the information used to support the finding.²⁵⁸

249. See University of Alabama Report at 7.

250. NCAA Bylaw 19.5.1.

251. New Mexico State University Report at 9.

252. *Id.*

253. See University of Alabama Report at 5.

254. See *id.*

255. See *id.* at 6. The first actual mention of unethical conduct was in the COI’s report. See *id.*

256. See *id.* at 8. The COI argued that they had provided adequate notice that an unethical conduct charge could be made. See *id.* at 6. Particularly, the COI claimed that in their communications they had advised the institution that they are “empowered under Bylaws 19.5.3 (new findings) and Bylaw 32.7.5.6 “scope of inquiry” to find violations resulting from information developed or discussed during the hearing.” *Id.* The IAC, however, found these communications to be inadequate to provide actual notice. See *id.* at 6-7.

257. See University of Alabama Report at 7.

258. See *id.* at 8. The IAC did state, however, that the applicability of this finding and its effect on Bylaws 19.5.3 and 32.7.5.6 were limited to the facts of this particular case. See *id.*

This issue was revisited in the New Mexico State University case, in which a former assistant men's basketball coach ("assistant coach") was named in a lack of institutional control violation.²⁵⁹ The assistant coach claimed that he was not given notice prior to or during the COI's hearing that a lack of institutional control finding was being considered against him.²⁶⁰ The COI countered that they were empowered to make this finding under Bylaws 19.5.3 and 32.7.5.6, which gives the COI the power to find violations based on information produced at the hearing.²⁶¹ The COI claimed that if they were not allowed to make this finding, then the bylaws in question would be rendered meaningless.²⁶²

The IAC saw this case as arising from a particular set of circumstances. Those circumstances being a situation wherein the COI hears evidence during the hearing which leads it to believe a violation has occurred, but for which there has been no formal allegation made.²⁶³ The IAC held that in this situation the COI, at a minimum, "should provide notice of its intent to consider that issue as an allegation and provide an opportunity to respond at that time."²⁶⁴ The IAC added that if a determination that a violation has occurred arises for the first time during the COI's deliberations, "the individual or the institution must be given an opportunity to respond before a violation can be found."²⁶⁵ The IAC concluded that if the institution or individual receives no indication that a charge is being considered by the COI, and is given no opportunity to present a defense to the charge, adequate notice has not been given.²⁶⁶ The IAC stated that this finding does not render Bylaws 19.5.3 or 32.7.5.6 meaningless. The COI is allowed to find violations based on evidence developed during the hearing or deliberations, but due

This issue, regarding notice and the Bylaws discussed above, was resolved in the New Mexico State University Report. *See supra* notes 109-113 and accompanying text.

259. *See* New Mexico State University Report at 2.

260. *See id.* at 6.

261. *See id.* at 7. Bylaw 19.5.3 states:

If a member appears before the committee to discuss its response to the official inquiry, the hearing shall be directed toward the general scope of the official inquiry but shall not preclude the committee from finding any violation resulting from information developed or discussed during the hearing.

NCAA Bylaw 19.5.3. Bylaw 32.7.5.6 presents an almost identical statement. *See* Bylaw 32.7.5.6.

262. *See* New Mexico State University Report at 9.

263. *See id.*

264. *Id.*

265. *See id.*

266. *See* New Mexico State University Report at 9.

process and fairness require that the COI provide adequate notice before such a finding can be made.²⁶⁷ Thus, the COI's finding of lack of institutional control against the assistant coach was vacated by the IAC.²⁶⁸

While the IAC has never specifically defined what "adequate notice" is, it did find that the COI had given adequate notice in the UCLA II case.²⁶⁹ In the UCLA II case, there were several communications by or to the senior athletic director that led to the conclusion that she had received proper notice that violations were being considered against her.²⁷⁰ While the IAC ultimately decided the issue on other grounds, it did state that it did not agree with the senior AD's argument that she had not been given adequate notice.²⁷¹ Although the IAC has not expressly stated what is needed for proper notice, the COI should make a serious effort to provide notice of all charges being considered to all parties in future cases. This warning particularly applies when the COI uses its powers under Bylaws 19.5.3 and 32.7.5.6, as the IAC will vacate any finding in which a party receives no indication that a charge is being considered against them. As the IAC stated in the NMSU case, this does not limit the COI's power to use the new finding bylaws, but it does force the COI to notify the party when it is considering a new charge.²⁷²

B. Institutional Control

The IAC has, to date, made two decisions affecting the interpretation and application of the institutional control doctrine.²⁷³ The principle of institutional control stems from the NCAA constitution, Article 2.1.²⁷⁴ This article states: "it is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association."²⁷⁵ The scope of this doctrine requires institutions to

267. *See id.* at 9-10.

268. *See id.* at 10.

269. *See* UCLA II Report at 18.

270. *See id.*

271. *See id.*

272. *See* New Mexico State University Report at 9.

273. *See* NCAA Const., art. 2.1.1- 6, reprinted in Nat'l Collegiate Athletic Ass'n, 1998-99 Manual 3 (1998).

274. *See id.* The regulation of institutional control is dealt with in detail in the NCAA Constitution Article 6. *See id.*

275. *See id.* at Article 2.1.1.

take "responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution."²⁷⁶ While institutional control has been a long standing principle within the NCAA, no violations of the principle were discovered until the mid-1970's.²⁷⁷ Since that time, however, lack of institutional control findings have been very common in major infractions cases.²⁷⁸

The application of the institutional control doctrine has been broad, and it has been up to the COI to define the scope of the doctrine.²⁷⁹ This broad interpretation has led the COI to publish the "Principles of Institutional Control, as prepared by the NCAA Committee on Infractions," to help define and explain the case law involving institutional control.²⁸⁰ While it is clear that the "fundamental focus for institutional control is on the institution and not the individuals within the institution," the COI has made several lack of institutional control findings against individuals, usually head coaches.²⁸¹ According to the IAC, "those findings have blurred the line between 'institutional control' and individual violations."²⁸²

The NMSU case was the first case in which the COI found an institutional control violation against an assistant coach.²⁸³ The former assistant men's basketball coach ("assistant coach") argued that he served at the direction of the head coach and should not be "expected to assume responsibility for creating and maintaining an atmosphere for compliance."²⁸⁴ The IAC concurred with the assistant coach's argument, stating that "the primary responsibility for establishing a positive compliance atmosphere rests with the head coach."²⁸⁵ This position was established in the COI's "Principles of Institutional Control" document, and the IAC saw no reason to overturn that position.²⁸⁶

The IAC then gave its interpretation of the scope of the

276. *Id.* at Article 2.1.2.

277. *See* New Mexico State University Report at 11.

278. *See id.* at 11-12. So common, in fact, that of the 191 cases involving major infractions since 1985, only 37 have involved major violations without a finding of lack of institutional control. *See id.* at 12.

279. *See id.* at 12

280. *Id.*

281. New Mexico State University Report at 12.

282. *Id.*

283. *See id.*

284. *Id.* at 13.

285. *See* New Mexico State University Report.

286. *See id.*

institutional control doctrine: "the principle of institutional control is intended to place responsibility on the institutional administration to establish reasonable procedures, to provide sufficient personnel and support to make these procedures functional, and to monitor the procedures in a reasonable manner."²⁸⁷ The IAC was hesitant to apply this doctrine to any individual, but acknowledged that there was a history of applying institutional control to head coaches.²⁸⁸ While the head coach could be classified as a department head, responsible for the supervision of others in his or her department, such distinction could not be placed on an assistant coach.²⁸⁹ Therefore, the IAC determined that it was somewhat reasonable for a head coach to be named in a lack of institutional control finding, but that they could not extend this logic to assistant coaches.²⁹⁰ Thus, the IAC vacated the finding of lack of institutional control against the assistant coach.²⁹¹

The IAC has also addressed the issue of whether an administrator needs to have actual knowledge of a violation to be named in a lack of institutional control finding.²⁹² In UCLA II, the senior AD argued that a lack of institutional control finding against her was clearly contrary to the evidence because the evidence showed that the senior AD did not know of the violation until after it had occurred.²⁹³ The senior AD also argued that in other infractions cases involving incorrect squad lists, administrators without knowledge of the mistake were "never found responsible for lack of institutional control as an individual."²⁹⁴ The IAC held, however, that this view misconstrued the precedents interpreting the institutional control doctrine.²⁹⁵ The IAC stated that the institution and the athletics department personnel who have supervisory responsibility, including head coaches, have an obligation to take "a primary role in ensuring the compliance with NCAA rules."²⁹⁶ If an individual fails to satisfy this obligation and this failure "contributes to a violation of the rules, it is possible depending upon the facts and circumstances, for an

287. *See id.*

288. *See id.*

289. *See* New Mexico State University Report.

290. *See id.*

291. *See id.*

292. *See* UCLA II Report at 10-11.

293. *See id.* at 10.

294. *Id.*

295. *See id.*

296. UCLA II Report at 10-11.

individual to be found to have demonstrated a lack of institutional control, even though he or she did not receive actual knowledge of that violation until well after it had taken place.”²⁹⁷ In this particular case, the COI concluded that the senior AD had failed to fulfill certain job responsibilities, and that this failure, in turn, resulted in a lack of institutional control.²⁹⁸ Thus, based on the facts of the case,²⁹⁹ the IAC concluded that the institutional control finding was not contrary to the evidence, even if the senior AD did not have knowledge of the violations until after they occurred.³⁰⁰

C. *Witnesses and Evidence*

This section deals with challenges to the COI’s procedures in conducting their hearings. In the Florida State University case, FSU claimed that a procedural error in the COI’s process denied them a fair hearing.³⁰¹ The procedural error being that the COI allowed the testimony of a former FSU student who was allegedly involved in the violations and who had communicated these violations to FSU’s compliance officer.³⁰² FSU made several arguments, the first being that this appearance was “unprecedented and a violation of NCAA Bylaws.”³⁰³ The IAC reviewed the NCAA Bylaws that address with who may appear before the COI, and determined that there was no bylaw which restricted the COI’s ability to hear testimony from additional witnesses which it deemed necessary.³⁰⁴ The IAC also found that on at least four other occasions the COI had heard testimony from individuals who were not directly affiliated with an institution.³⁰⁵ The IAC concluded that the attendance of this witness was within the COI’s authority to set the procedure in their hearings.³⁰⁶

297. *See id.* at 11.

298. *See id.*

299. Among the deficiencies that the COI found in the senior AD’s job performance was that the senior AD had failed: to distribute NCAA rules and interpretations to coaches; to read the applicable legislation; to review the NCAA Manual when questions regarding the applicable legislation were asked; to monitor the financial aid awarded in softball. *See id.*

300. *See id.* at 11.

301. *See Florida State University Report* at 10.

302. *See id.*

303. *Id.*

304. *See id.* at 10-11.

305. *See Florida State University Report* at 11.

306. *See id.* *See also*, NCAA Bylaw 32.7.5 (granting the COI the authority to set the exact procedure at the hearing).

FSU next argued that the testimony should not have been allowed because it was biased and prejudicial.³⁰⁷ This argument brought into issue the evidence on which the COI base their findings.³⁰⁸ According to Bylaw 32.7.6.2, the COI must base their findings on information “that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.”³⁰⁹ It should be noted that the IAC has previously acknowledged that “NCAA enforcement proceedings are not judicial proceedings.”³¹⁰ This means that formal rules of evidence do not apply, testimony is not taken under oath, the COI does not make specific findings of fact when it finds a violation, and the COI is not required to consider the weight of the evidence.³¹¹ The evidence must only meet the requirements set out in Bylaw 32.7.6.2. In the FSU case, the IAC concluded that the COI properly considered evidence from the witness in question and the institution’s compliance officer and made their decision accordingly.³¹²

Finally, FSU argued that the appearance of the witness “was improper because they did not have an opportunity to cross-examine or summon rebuttal witnesses.”³¹³ In addressing this issue, the IAC returned to the fact that COI hearings are not formal judicial proceedings.³¹⁴ The IAC stated that there is no cross-examination of witnesses, but that Bylaw 32.7.5.7 allows the COI to question witnesses, and allows for questions and information to be exchanged between and among participating parties.³¹⁵ The IAC found that the COI had questioned the witnesses which appeared before it, and FSU could have, under Bylaw 32.7.5.7, “proposed questions to the witness or requested that the COI question the witness regarding any

307. See Florida State University Report at 11.

308. See *id.*

309. See *id.* See also, NCAA Bylaw 32.7.6.2 (stating what evidence the COI can base its findings on).

310. University of Mississippi Report at 7.

311. See *id.*

312. See Florida State University Report at 11-12.

313. *Id.* at 13. FSU also argued that the witness was improper because they were not given proper notice that the witness was going to appear. See *id.* at 12. This issue was resolved based on the unusual facts of the case, wherein this case was heard within 12 days of the official notice being sent at the request of FSU. See *id.* at 13. Because of the unusual circumstances involved in this case, the IAC determined that the notice given within two days of the hearing was adequate. See *id.*

314. See *id.*

315. See *id.*

matter.³¹⁶ FSU also did not request that other witnesses be permitted to testify or that they be allowed to submit rebuttal materials.³¹⁷ Thus, the IAC found that FSU was given an adequate opportunity to question the witnesses and present rebuttal evidence, but they failed to take advantage of this opportunity.³¹⁸

The above issues highlight the difference between the NCAA's enforcement process and the judicial process utilized by courts of law throughout the United States. The evidence presented to the COI does not have to comply with formal rules of evidence, and the testimony is not taken under oath. The only requirement that the evidence must meet is that it be credible and persuasive. Because of this low evidentiary standard, before the COI, it is clear why it is difficult for the IAC to overturn one of their findings. Thus, it is virtually impossible for the IAC to say that the COI based its findings on improper evidence. Also, the proceedings before the COI do not comply with the requirements of a judicial proceeding, as cross-examination of witnesses and rebuttal witnesses are not standard practice. The IAC will, however, ensure that the COI hearing is fair, as parties will be allowed to present questions to witnesses and present rebuttal evidence if they so choose.

D. Penalties

The most common issue raised before the IAC has been that of penalties. As stated previously, the IAC has limited power to overturn a finding of fact or violation.³¹⁹ The IAC does have the power, however, under NCAA rules to set aside a penalty if the IAC "determines that the penalty is excessive or inappropriate based on all the evidence and circumstances."³²⁰ The factors which the IAC will consider in determining whether a penalty is appropriate have increased as the IAC has made more decisions. For this reason it is

316. Florida State University Report at 13.

317. *See id.* at 14.

318. *See id.*

319. *See infra* note 9 and accompanying text (discussing IAC's limited ability to set aside determinations of fact and violations).

320. NCAA Bylaw 32.10.2. *See also* University of New Mexico Report at 4 (discussing IAC's ability to hear appeal of penalty assessed by the Committee on Infractions). At the time the IAC heard its first appeal, the UNM case, there was no provision in the NCAA Bylaws permitting the IAC to review penalties levied by the Committee on Infractions. *See id.* The IAC in the UNM case held, however, that "in reviewing the appeal of a penalty, the [IAC] will consider whether the penalty is appropriate or excessive based on the particular facts and circumstances of the case." *Id.* This holding was later embodied in Bylaw 32.10.2.

necessary to discuss the individual cases in detail to illustrate how the IAC has come to its current set of guidelines in determining the adequacy of a penalty.

In its first decision involving the University of New Mexico, the IAC listed the factors it would consider in determining whether a penalty assessed by the COI was inappropriate or excessive.³²¹ These factors included: "the nature, number and seriousness of the violations, the conduct and motives of the individuals involved in the violations, and what the institution has done to correct the problem."³²² In upholding the three year probationary period assessed by the COI, the IAC held that a number of factors supported a determination that the penalty was appropriate.³²³ These factors included:

- 1) the case involved major, serious and intentional violations;
- 2) the head coaches of the various sports were actively involved in and primarily responsible for the violations;
- 3) some of the violations were particularly egregious in that the head coach involved tried to justify flagrant and deliberate violations of clearly understood NCAA rules on the basis of his own personal judgment;
- 4) the violations involving the use of fraudulent admission credentials constituted violations of the NCAA's most basic principles; and
- 5) the violations provided UNM with significant competitive advantages in the respective sports.³²⁴

The UNM decision set the ground work for how the IAC would address penalty issues, but as time progressed the IAC started to weigh additional factors in considering the appropriateness of penalties.

In the Coastal Carolina University case, the IAC returned to the issue of penalties.³²⁵ CCU appealed a four year probationary term imposed by the COI.³²⁶ The IAC initially discussed the significance of

321. See University of New Mexico Report at 4.

322. *Id.*

323. See *id.*

324. University of New Mexico Report at 7.

325. See Coastal Carolina University Report.

326. See *id.* at 6.

the probation penalty, before addressing whether the penalty was excessive or inappropriate.³²⁷ The IAC stated that they did consider imposing a three year probation period instead of the four year period assessed by the COI, but that given the facts and circumstances of this particular case the penalty was appropriate.³²⁸ The IAC justified this decision by stating,

1) the case involved a large number and variety of major violations in the men's basketball program; 2) the head coach in that sport was involved actively in, and primarily responsible for, the violations; 3) a number of the violations in this case involved academic fraud, unethical conduct and a pervasive lack of institutional control in the men's basketball program; 4) the four year probationary term imposed in this case [did] not appear to be disproportionate when compared with the probationary periods imposed in other cases with similar characteristics.³²⁹

Thus, in the CCU decision, the IAC added to the original factors discussed in the UNM decision, by considering the proportionality of the penalty in comparison with previous penalties instituted in like situations.

In the University of Mississippi case, the IAC took even more factors into consideration to determine if the penalties imposed were inappropriate or excessive.³³⁰ The procedure used in the penalty analysis in the UOM case was the most thorough to date, and is similar to the process which the IAC currently uses to review penalties. The IAC retained the four factors developed in the New Mexico and Coastal Carolina decisions, but went into much greater detail in defining and discussing these four factors.³³¹ The IAC first noted that the nature, number and seriousness of the violations committed by UOM called for severe penalties.³³² The IAC then expounded on the second factor dealing with the conduct and motives of the individuals involved in the violations.³³³ The IAC

327. *See id.* at 8.

328. *See id.*

329. Coastal Carolina Report at 8-9.

330. *See* University of Mississippi Report at 10-18.

331. *See id.* at 11. These four factors include,

- 1) the nature, number and seriousness of the violations; 2) the conduct and motives of the individuals involved in the violations; 3) corrective actions taken by the institution; and 4) comparison of the penalty or penalties imposed.

Id. The IAC particularly expounded on the factor involving the conduct and motive. *See id.* at 11-12.

332. *See id.* at 11.

333. *See id.* at 11-12.

broke this factor down into the following considerations,

a) whether one or more of the individuals held a position that carried supervisory responsibility; b) whether the violations involved a basic NCAA principle, such as academic integrity; c) whether the conduct amounted to a flagrant violation of clearly understood rules; and d) whether the violations constituted improper attempts to gain recruiting and competitive advantage.³³⁴

The IAC stated that the violations in this case

1) involved the head football coach; 2) involved basic NCAA principles of amateurism and ethical conduct; 3) the conduct in this case constituted flagrant violations of clearly understood NCAA rules; and 4) the violations were intended to gain recruiting and competitive advantages.³³⁵

Thus, the IAC concluded that the conduct and motives of the individuals involved warranted the severe penalties imposed.³³⁶

The IAC then moved on to the corrective actions taken by UOM.³³⁷ The IAC noted that "corrective actions, although an obligation of NCAA membership are an important component of the NCAA enforcement program. . . [and] it is for that reason that the committee considers what the institution has done to correct the problem to be of particular significant in considering an appeal of penalties."³³⁸ The IAC concluded that while UOM had made significant corrective actions, the facts of this particular case warranted the significant penalties imposed, even with the actions taken by UOM.³³⁹ As for the fourth factor, the IAC admitted that there was no formula for a comparison of penalties because of the

334. University of Mississippi Report at 11.

335. *Id.* at 11-12.

336. *See id.* at 12.

337. *See id.* at 12-13.

338. University of Mississippi Report at 13.

339. *See id.* at 12-13. UOM did take significant corrective actions, such as terminating the "employment of the head football coach, accepting the resignation of the athletic director, disassociating several representatives of its athletics interests, and increasing its efforts to educate its staff, students and alumni regarding NCAA rules." *Id.* at 12. These actions were considered as mitigating factors in determining the penalty given, but in this case there was a unique aggravating factor that led the IAC to conclude that the penalties were appropriate. *See id.* This aggravating factor was that the UOM had been found guilty of very similar violations, under the same athletic administration, in 1986. *See id.* at 12. The COI stated that if UOM had instituted and developed a compliance program after the 1986 violation these new violations would never have happened. *See* University of Mississippi Report at 13. Thus, while the corrective actions taken were commendable, they did not outweigh the fact that these violations would not have occurred if UOM had taken appropriate actions after the 1986 finding. *See id.*

uniqueness of each individual case.³⁴⁰ The IAC did conclude, however, that this case warranted the harsh penalties imposed because it was one of the most serious cases of violation in recent years.³⁴¹

The IAC also considered three new factors upon the urging of UOM.³⁴² These additional factors were, “1) the institutional cooperation in the investigation; 2) the impact of the penalties on innocent student-athletes and coaches; and 3) NCAA policies regarding fairness in the equitable resolution of infractions cases.”³⁴³ Out of these three new factors the IAC gave the most weight and consideration to the institutional cooperation.³⁴⁴ The IAC reasoned that because NCAA infractions procedures were not judicial in nature, and did not include elements such as subpoena power and testimony under oath, institutional cooperation was an essential element of the NCAA’s enforcement program.³⁴⁵ The IAC noted that although cooperation is an obligation of NCAA membership, where an institution meets this obligation fully and makes every effort to take part in the enforcement process, that cooperation must be rewarded.³⁴⁶ According to the IAC, “failure to adequately reward this effort would be “ a disincentive to the fullest possible institutional cooperation.”³⁴⁷ Thus, complete and thorough cooperation will be given “substantial weight in determining and imposing penalties.”³⁴⁸ The IAC stressed the importance of cooperation as a mitigating factor, and even stated that they felt the COI did not give UOM’s cooperation appropriate weight in this situation.³⁴⁹

The next factor considered by the IAC was the impact of the penalties on innocent student-athletes and coaches.³⁵⁰ This consideration focused on NCAA bylaw 19.01.1, which states that the mission of the NCAA enforcement program is to “eliminate

340. See University of Mississippi Report at 13.

341. See *id.* at 14. UOM tried to argue that the penalties imposed by the COI were the harshest penalties imposed in recent years. See *id.* The COI responded, and the IAC concurred, with the argument that these were some of the harshest penalties imposed in years because this was one of the most serious cases in recent years. See *id.*

342. See *id.*

343. See *id.* at 14-16.

344. See University of Mississippi Report at 14-15.

345. See *id.* at 15.

346. See *id.*

347. *Id.*

348. University of Mississippi Report at 15.

349. See *id.*

350. See *id.*

violations of NCAA rules and impose appropriate penalties should violations occur.”³⁵¹ The bylaw also states “an important consideration in imposing penalties is to provide fairness to uninvolved student-athletes, coaches, administrators, competitors and other institutions.”³⁵² The IAC acknowledged that it was the duty of the COI to balance its duty to eliminate infractions with a consideration of its effect on innocent parties.³⁵³ The IAC stated, however, “it would be impossible for the COI to carry out its functions and responsibilities under Bylaw 19.01.1 without having some effect on innocent students and coaches.”³⁵⁴ The IAC stressed that the primary mission of the COI was to eliminate violations and impose appropriate penalties.³⁵⁵ The IAC concluded that the COI acted appropriately in this circumstance in carrying out its primary mission by properly balancing its functions and responsibilities under Bylaw 19.01.1.³⁵⁶

The final consideration which the IAC discussed in the UOM case was that of “NCAA policies regarding fairness in, and equitable resolution of, infractions cases.”³⁵⁷ The IAC concluded that, given the flagrant violations present in this case and the similarity between this case and the violations in the football program in 1986, the imposition of severe penalties was consistent with the mission and primary goals of the NCAA enforcement program.³⁵⁸ In so deciding, the IAC reasoned that the significant penalties levied in this case sent a clear message to the school, its athletic department, and any representatives of its athletic interests, that any further violation of NCAA rules will result in “great harm” to the school and the football program.³⁵⁹ The IAC concluded that the NCAA enforcement program requires consideration of both the aggravating factors and the mitigating factors in setting a penalty. While the IAC stated that appropriate weight was not given to the mitigating factor of UOM’s cooperation in the investigation, it concluded that given the overwhelming number of aggravating factors present, the penalties

351. NCAA Bylaw 19.01.1.

352. See University of Mississippi Report at 16.

353. See *id.*

354. See *id.*

355. See *id.*

356. See University of Mississippi Report at 16.

357. *Id.* at 16. UOM argued in its appeal “that the penalties imposed on them by the [COI] did not constitute an equitable resolution of the case.” *Id.* at 17.

358. See *id.* at 18.

359. See *id.*

imposed by the COI were not excessive or inappropriate.³⁶⁰

The next case dealing with penalties involved the University of Alabama.³⁶¹ The UOA decision is an extremely important decision, as it was the first IAC decision that reduced the penalties imposed by the COI.³⁶² In the UOA decision the IAC looked at the following factors, "the nature, number and seriousness of the violations; the conduct and motives of the individuals involved; corrective action taken by the institution; proportionality of the penalties; institutional cooperation in the investigation; impact of the penalties on innocent student-athletes and coaches; and the purposes of the NCAA enforcement program."³⁶³ The IAC mainly focused on the proportionality of the penalties imposed in this case as compared with the New Mexico and Mississippi cases.³⁶⁴ The IAC reasoned that in those cases there were "numerous or repeated violations, active participation of head coaches or other staff members in those violations, violations that were flagrant and deliberate and violations of recruiting rules that were intended to provide the institution a competitive advantage."³⁶⁵ In the UOA case, however, the IAC determined that while the lack of institutional control was serious, it did not present the above-mentioned elements were absent from this case.³⁶⁶ This factor, in combination with UOA's corrective action and full cooperation by the UOA, warranted a reduction of the penalties.³⁶⁷

The next two IAC decisions dealing with penalties serve as a good

360. See University of Mississippi Report at 18.

361. See University of Alabama Report. The infractions report of Alcorn State is intentionally omitted from this section of the analysis. In the Alcorn State decision the IAC took a step back in their penalty analysis and only looked at the conduct and motives of the individuals involved, and did not go through all the factors as developed in the University of Mississippi report. As cases which follow the Alcorn State decision revert back to the full analysis of penalties, this case is omitted as an anomaly.

362. See University of Alabama Report at 10.

363. *Id.* at 10. While the IAC noted that they did consider these factors, they did not go into all the factors in detail. Instead, they focused on a few of the factors in reducing the penalties. See *id.*

364. See *id.*

365. See *id.*

366. See University of Alabama Report at 10.

367. See *id.* The IAC reduced the penalties that went above and beyond the presumptive penalties specified by Bylaw 19.6.2.1. See *id.* The penalties reduced included the "third year of probation and the reduction of the number of initial financial aid awards in football by nine" in 1997-98. *Id.* The IAC upheld the penalty that prohibited the UOA from participating in postseason competition during the 1995-96 academic year, as it was a presumptive penalty that could be imposed upon the finding of a major violation. See *id.* at 10-11.

summary of the procedure which the IAC follows in determining the sufficiency of the penalties imposed by the COI.³⁶⁸ The IAC will look at the factors it has developed through the above mentioned cases, and then decide whether these factors are mitigating or aggravating, depending on the facts of the particular case.³⁶⁹ The IAC will then weigh all of the mitigating and aggravating factors and decide whether the penalties imposed were excessive or inappropriate.

The IAC will first look at the "nature, number, and seriousness of the violations."³⁷⁰ While the number of violations, including the "scope, frequency, and duration of those violations," is a relevant factor in determining the appropriateness of the penalties, it is not necessarily a dispositive one.³⁷¹ Other considerations include what NCAA bylaws were broken, and whether those violations involve basic NCAA principles.³⁷² Additionally, the IAC will also look at who was involved in the NCAA violations.³⁷³ If the violations involved a person in a position of responsibility within the athletic department or team, such as a head coach, then this will weigh against the university in trying to reduce the penalties imposed.³⁷⁴

The IAC will then look at the "conduct and motive of the individuals involved in the violations."³⁷⁵ The factors which the IAC considers in assessing the conduct and motive of the particular individuals can be broken up into four simple questions. These questions are:

- a. Whether the violations involve one or more individuals who held a position with supervisory responsibilities;
- b. Whether the violations involve a basic NCAA principle;
- c. Whether the conduct amounts to flagrant violations of clearly understood rules; and
- d. Whether the violations constituted improper attempts to gain

368. See University of Maine, Orono Report; see also UCLA I Report.. In both of these cases the IAC goes into great detail in considering the penalty factors.

369. See UCLA I Report at 7-8; see also University of Maine, Orono Report at 10.

370. University of Maine, Orono Report at 6. In the UCLA case this factor was described as "the scope and duration of the violations." UCLA I Report at 4.

371. See UCLA I Report at 5.

372. See *id.*

373. See University of Maine, Orono Report at 6.

374. See *id.*

375. *Id.*

recruiting or competitive advantages.

An affirmative answer to any one or a combination of these factors will be considered an aggravating factor and will be weighed against the university trying to reduce the penalties imposed by the COI.³⁷⁶

The next factor considered by the IAC is the institution's cooperation.³⁷⁷ While fully cooperating with the investigation will serve as a mitigating factor, failure to cooperate with an investigation would be a serious aggravating factor.³⁷⁸ The IAC has stated that it is "imperative that the imposition of penalties recognize those institutions that go the 'extra mile' to determine the truth and, in doing so, uncover violations."³⁷⁹ Thus, if the institution has fully cooperated with the investigation, this will serve as a mitigating factor which will be weighed against the aggravating factors in determining whether the penalty imposed was excessive or inappropriate.³⁸⁰

Going hand in hand with the above factor is the corrective actions taken by the institution.³⁸¹ "Eliminating violations of NCAA rules is one of two primary goals of the NCAA enforcement program. . .[f]or that reason, corrective actions taken by an institution are an important component of the enforcement program."³⁸² If the university takes substantial steps to ensure compliance, reduce the possibility of future violations, and voluntarily imposes penalties on itself, these actions will be seen as mitigating factors.³⁸³ While mitigating factors will not negate major violations, they will help lighten the possible penalties imposed.³⁸⁴

Another factor the IAC will take into consideration is the impact

376. See University of Maine, Orono Report at 7 (stating combination of head coach involvement; violation of basic NCAA principles of institutional control and cooperation; and the competitive and recruiting advantage created by the violations, warranted the severe penalties imposed); see also UCLA I Report at 6-7 (stating that UCLA's argument that this factor weighed in their favor was without merit because all three individuals involved in the violation carried supervisory responsibility; the violations involved basic NCAA principles of institutional control and ethical conduct; the rule violated was easily understood; and, the violations resulted in recruiting and competitive advantages).

377. See *id.* at 8.

378. See UCLA I Report at 10.

379. See University of Maine, Orono Report at 9.

380. See *id.*

381. See UCLA I Report at 5-6.

382. See *id.*

383. See *id.*

384. See *id.* at 6.

of the penalties on innocent student-athletes and coaches.³⁸⁵ While this factor has been considered by the IAC in a number of decisions, it has not been afforded much weight in determining the appropriateness of penalties.³⁸⁶ The IAC has recognized that certain penalties may adversely effect student-athletes and coaches, but "it is virtually impossible to avoid some adverse impact on student-athletes in cases of a serious nature involving significant recruiting and competitive advantages."³⁸⁷ Thus, while the IAC continues to look at this factor, it is of little relevance when the IAC is dealing with cases involving major violations.

Finally, the IAC will look at the proportionality of the penalties imposed.³⁸⁸ This factor does not necessarily fit into a mitigating or aggravating category, but will be looked upon separately on a case by case basis by the IAC.³⁸⁹ Under this factor, the IAC will look at the penalties imposed in the current factual situation in comparison with penalties imposed in similar cases.³⁹⁰ The IAC stresses that "because each case presents its own set of facts and circumstances, this comparison cannot be made by mechanically applying a formula."³⁹¹ To be successful using this factor the institution must try and compare the facts of their case to another infractions case and show that the penalties they received are disproportionate to their actions.³⁹²

The IAC's latest decision, involving the University of Texas, El Paso, is significant because it added another factor to the IAC's penalty reviewing process, but also because it marks the second time, to date, that the IAC has reduced a penalty imposed by the COI.³⁹³ First, the IAC decided that the institution's history of violations will also be considered in determining whether a penalty is excessive or inappropriate.³⁹⁴ The IAC stated that this seventh factor is built in to the enforcement penalty system through the repeat-violator provisions of Bylaw 19.6.2.3.1.³⁹⁵ Thus, as of the UTEP decision, the

385. See UCLA I Report at 6-8; see also University of Maine, Orono Report at 9-10.

386. See University of Maine, Orono Report at 9-10.

387. See *id.* at 10.

388. See *id.* at 9; see also UCLA I Report at 17-18.

389. See University of Maine, Orono Report at 9.

390. See UCLA I Report at 8.

391. See *id.* at 7 (quoting University of Mississippi Report at 13).

392. See University of Maine, Orono Report at 9.

393. See UTEP Report at 17, 19.

394. See *id.* at 17.

395. See *id.*

IAC will consider the following seven factors:

- 1) the nature, number and seriousness of the violations;
- 2) the conduct and motive of the individuals involved in the violations;
- 3) corrective actions taken by the institution and its cooperation in the investigation;
- 4) the proportionality of the penalties;
- 5) the impact of the penalties on innocent student athletes and coaches
- 6) the purpose of the NCAA enforcement program; and
- 7) the institution's history of violations.³⁹⁶

In the UTEP case, the IAC, for the second time in its brief history, reduced the penalties imposed by the COI.³⁹⁷ In the UTEP decision, the IAC reduced the grants-in-aid penalties in football by "one initial and one overall award in each of the 1997-98 and 1998-99 academic years."³⁹⁸ The IAC reduced this penalty because they were very impressed that the football coach questioned, on three separate occasions, an improper rules interpretation provided by the institution.³⁹⁹ The IAC felt that the football program deserved more credit than it was given for the football coach's actions and therefore reduced the penalty.⁴⁰⁰ The IAC did not specifically reference which factor they used in reducing this penalty, but it can be assumed that based on the unique facts of this case the IAC concluded that the conduct and motive of the head football coach did not warrant the penalties imposed.

The above discussion on penalties reveals that the IAC has developed, and continues to develop, criteria for assessing the

396. *See id.*

397. *See* UTEP Report at 19.

398. *Id.* at 19.

399. *See id.* at 18. In the UTEP case the football coach questioned the rules' interpretation, even though it was favorable to him, provided by the institutions which resulted in the over-awards and thus the violation. *See id.* The coach doubted the validity of the interpretation and attempted to affirm its validity on two additional occasions before accepting it. *See id.* When changes were made in the institutions athletics department it was determined that this interpretation was incorrect, and the institution self-reported the violation. *See id.*

400. *See id.* at 19.

appropriateness of penalties. Thus, institutions who are considering appealing penalties imposed by the COI must keep abreast of the IAC's standards and decide whether they believe they have a valid case for a reduction of their penalties. As of the UTEP decision, it appears that the IAC will look at each situation on a case by case basis and apply whatever factors it deems appropriate in determining whether the penalties imposed are excessive.

VI. CONCLUSION

The IAC was originally created to provide more due process in NCAA enforcement proceedings. In its first fourteen decisions the IAC has done just that, ensuring that NCAA procedures are fair and equitable to all parties. The common thread that runs through all of the IAC decisions is fairness, whether it be in procedural requirements, substantive findings, or penalties. The IAC, which was criticized early in its existence as just another NCAA rubber stamp, has evolved into a legitimate reviewing body which has, and will continue to overturn findings of the COI that they find to be unfair or contrary to NCAA legislation.

The UTEP decision could prove to be a turning point in the history of the IAC. The first thirteen decisions of the IAC exemplify the slow growth of the IAC's power during its first five years of existence. While the IAC has upheld fairness and vacated several findings of the COI in its first thirteen decision, it has been reluctant to reduce penalties assessed by the COI. It seems that the IAC's authority and confidence is growing, however, and this could lead to more findings and penalties being challenged by the IAC in the future. This decision could be the start of a period in which the IAC creates its own identity and begins to realize its power and importance in the enforcement process. Thus, the UTEP decision could mark the second stage in the history of the IAC, represented by the IAC using its expanding role to influence and shape the NCAA enforcement process.