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BREAKING BAD: AN EXAMINATION OF THE NCAA'S INVESTIGATION PRACTICES OVER THE LAST FORTY YEARS

RYAN APPEL

In response to the increasing number of infractions cases that have surfaced over the past several years¹ and heightened scrutiny from the general public and media², the National Collegiate Athletic Association ("NCAA") proposed changes to its enforcement model, which were developed in a working group led by the President of Oregon State University, Ed Ray. The proposed revisions addressed various aspects of the enforcement model, including, but not limited to, the current violation structure, the committee on infractions, and accountability standards for coaches and university officials.³ According to NCAA President Mark Emmert and chairman of the NCAA Board of Directors Gary Brown, the revisions were made to "restore public trust in college sports and the NCAA."⁴ On October 30, 2012, the Division Board I Board of Directors approved of the revisions⁵ and the changes became effective in August of 2013.⁶

Unfortunately, these changes do not address one of the NCAA enforcement model's most glaring issues: investigation procedures. This note will analyze corrupt investigation practices that the NCAA has exhibited in the past and propose a solution to restore the integrity of college athletics. Section II will describe the history of the NCAA and provide a description of the NCAA's enforcement procedures. Section III of this article will explore previous NCAA investigations, some of which ultimately led to lawsuits filed against the NCAA. Section IV will discuss both state and federal governments' attempts to regulate the NCAA

¹ See, NAT'L COLLEGIATE ATHLETIC ASS'N, FINAL REPORT: NCAA WORKING GROUP ON COLLEGIATE MODEL – ENFORCEMENT 1-2 (2012), available at http://www.ncaa.org/sites/default/files/Report_Final_101112.pdf [hereinafter *New NCAA Model*].

² See, Eric Prisbell, *NCAA Board Endorses Major Changes in Rules Enforcement*, USA TODAY (Aug. 2, 2012, 7:36 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-08-02/ncaa-board-endorses-changes-in-rules-enforcement-penalties/56714992/1>.

³ *New NCAA Model*, *supra* note 1, at 3-4.

⁴ *Id.* at 2.

⁵ Gary Brown, *DI Board of Directors Approves Overhauled Enforcement Structure*, NCAA (Oct. 30, 2012, 4:41 PM), <http://www.ncaa.com/news/ncaa/article/2012-10-30/di-board-directors-approves-overhauled-enforcement-structure>.

⁶ Jodi Balsam, *New NCAA Enforcement Structure Effective August 1, 2013*, OFFICIAL REV. (Aug. 9, 2013), <http://www.theofficialreview.com/new-ncaa-enforcement-structure-effective-august-1-2013/>.

through legislation, such as the newly proposed NCAA Accountability Act. Section V will propose new, transparent enforcement guidelines for the NCAA that integrate legal concepts and practices. Section VI will conclude this note.

II. BACKGROUND

a. History of the NCAA

The NCAA is a voluntary, unincorporated athletic association of higher education institutions that possesses the authority to create and promulgate regulations that govern its respective members.⁷ Currently, the NCAA has more than twelve hundred member institutions⁸ and oversees over four hundred thousand student athletes.⁹ Each member school ratifies and agrees to be bound by NCAA rules and regulations and to administer their athletic programs in accordance with such rules and regulations.¹⁰ The NCAA oversees almost all areas of college athletics, including but not limited to, amateurism and recruiting of student athletes.¹¹

The NCAA originated in 1905 and stemmed from Theodore Roosevelt's concern about safety in college athletics.¹² Essentially, President Roosevelt wanted to implement a rule-making body to prevent "commercialism, excessive physical injury to student athletes, and cheating by some participating schools."¹³ The NCAA first addressed amateurism and eligibility issues in the 1920's with the development of the Amateur Committee.¹⁴ Many of the cases that the Amateur Committee addressed centered on recruitment issues and subsidization of athletes.¹⁵ However, the NCAA did not develop a standard code of conduct for college athletes and university athletic programs until 1946.¹⁶

⁷ WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 276 (4th ed. 2009).

⁸ *Membership*, NCAA (last visited Apr. 10, 2014), <http://www.ncaa.org/about/who-we-are/membership>.

⁹ *Who We Are*, NCAA (last visited Apr. 10, 2014), <http://www.ncaa.org/about/who-we-are>.

¹⁰ GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 157 (3d ed. 2002).

¹¹ GLENN M. WONG, *ESSENTIALS OF AMATEUR SPORTS LAW* 5 (2d ed. 1994).

¹² Alain Lapter, Article, *Bloom v. NCAA: A Procedural Due Process Analysis and the Need for Reform*, 12 *SPORTS LAW. J.* 255, 264 (2005).

¹³ *Id.* (footnote omitted).

¹⁴ Glenn Wong et al., *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 *VA. SPORTS & ENT. L.J.* 47, 49 (2009) [hereinafter Wong, *IAC History*].

¹⁵ *Id.*

¹⁶ *Id.*

It was then that the NCAA promulgated “Principles for the Conduct of Intercollegiate College Athletics.”¹⁷ The principles encompassed “old amateur ethos” connected to “financial aid, recruitment, academic standards for athletes, institutional control and the principle of amateurism itself.”¹⁸ They were adopted at the NCAA’s 42nd Convention in 1948 and would soon thereafter be referred to as the “Sanity Code.”¹⁹

To complement the newly established Code, the Executive Committee of the NCAA created the Constitutional Compliance Committee (“CCC”) to interpret the Sanity Code and to determine whether certain practices violated or adhered to the code.²⁰ At that time, there was only one penalty for violations: expulsion from NCAA through the vote of its members at an annual NCAA convention.²¹ This remedy proved to be ineffective.²² In 1950, seven universities were caught violating the Sanity Code.²³ During the 1950 NCAA Convention, none of those seven universities were expelled.²⁴ Because of the concern about the severity of the expulsion, the Sanity Code was repealed the following year.²⁵ In addition, the CCC was also replaced by the Committee on Infractions (“COI”).²⁶ In 1973, the NCAA member universities voted to create new entity to alleviate the workload and reduce responsibilities of the COI: the Enforcement Staff.²⁷

b. The Enforcement Staff and the Committee on Infractions

The Enforcement Staff is a group of full-time NCAA employees.²⁸ It is responsible for investigating a member institution’s “failure to comply with NCAA legislation or to meet the conditions and obligations of membership.”²⁹ The Enforcement Staff gathers information about

¹⁷ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 69 (2006).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Wong, *IAC History*, *supra* note 14, at 49.

²² *See, id.*

²³ *Id.* at 49-50.

²⁴ *Id.*

²⁵ *See*, Crowley, *supra* note 17, at 69.

²⁶ *See*, GLENN M. WONG, *ESSENTIALS OF SPORTS LAW* 185 (4th ed. 2010).

²⁷ *See, id.*

²⁸ Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major-Infractions Cases*, 37 SETON HALL L. REV. 749, 755 (2007); *see also* NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA BY-LAWS 311-27 (2013-2014 ed.) [hereinafter *NCAA Bylaws*].

²⁹ *See*, WONG, *supra* note 26, at 185.

potential violations independently from the COI and presents information that it collected to the COI at a formal hearing.³⁰

The COI, on the other hand, presides over infraction hearings, issues penalties against institutions or individuals that violate NCAA bylaws, and supervises the enforcement program and procedures.³¹ The NCAA recently increased the size of the COI from ten to twenty-four members in response to the increasing number of infractions cases that have surfaced over the past several years.³² In contrast to the Enforcement Staff, none of the twenty-four committee members are full-time NCAA employees.³³ In order to ensure that the COI is diverse, members of the COI are categorized into seven different representative groups: (1) current or former university presidents, (2) current or former university athletic directors, (3) former NCAA coaches, (4) representatives from conference offices, (5) university staff or faculty, (6) athletic administrators with compliance experience, and (7) members of the general public with formal legal training who are not associated with a collegiate institution, conference, or professional sports organization and who do not represent coaches and athletes.³⁴

c. The Enforcement Process

The Enforcement Staff triggers the NCAA enforcement process with an investigation.³⁵ It typically receives information about possible violations from multiple types of sources such as member institutions, media reports, and anonymous sources.³⁶ However, it may only initiate investigations “when it has reasonable cause to believe that the institution may have violated NCAA rules.”³⁷ Factors that the Enforcement Staff considers in making its reasonable cause determination include the source’s reliability and credibility.³⁸ The Staff then makes a preliminary

³⁰ See, *id.* at 185; *NCAA Bylaws*, *supra* note 28, at 317–18.

³¹ See, WONG, *supra* note 26, at 185.

³² *New NCAA Model*, *supra* note 1, at 10.

³³ *Id.*; see also Rogers & Ryan, *supra* note 28, at 755.

³⁴ *New NCAA Model*, *supra* note 1, at 10.

³⁵ Katherine Elizabeth Maskevich, Comment, *Getting Due Process into the Game: A Look at the NCAA’s Failure to Provide Member Institutions with Due Process and the Effect on Student-Athletes*, 15 SETON HALL J. SPORTS & ENT. L. 299, 308 (2005).

³⁶ *Enforcement Process: Investigations*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/enforcement/enforcement-process-investigations> (last visited Apr. 6, 2014).

³⁷ Maskevich, *supra* note 35, at 308.

³⁸ *Id.*

inquiry and determines whether the allegation is substantial.³⁹ If it is determined that the allegation is substantial, the Enforcement Staff will send a letter to the president of the university in question (“Official Inquiry”), which notifies the institution that an investigation has commenced.⁴⁰

After the university in question has received an Official Inquiry, the Enforcement Staff may initiate its investigation on the member institution’s campus or outside of the campus.⁴¹ These investigations usually include interviews of individuals that may be involved with or have knowledge of a potential violation.⁴² Any individual that is interviewed is permitted to have a lawyer present and must be informed that the purpose of the interview is to determine whether the interviewed individual has knowledge of or involvement with the potential NCAA violations.⁴³ Because the NCAA lacks subpoena power, the NCAA often experiences difficulty in obtaining interviews with individuals that do not fall under the NCAA’s jurisdiction, such as agents, former student athletes, and former university employees. To corroborate the interviews, Enforcement Staff members collect supporting documentation, including, but not limited to, compliance files, phone records, and e-mails, from sources such as member institutions and interviewees.⁴⁴

If the Enforcement Staff believes that it has discovered enough evidence of a violation, a notice of allegation (“Notice of Allegation”) is sent to the member institution. The Notice of Allegation includes the alleged violations; the details of the allegations; the possible level of each violation; the available hearing procedures and opportunity to answer the allegations; and factual information that the Enforcement Staff relied on in making its determination.⁴⁵

After a member institution responds to the Notice of Allegation, the case is sent to the COI. The COI will only hear and review cases that involve Level I or Level II violations.⁴⁶ A Level I violation is the most severe of the NCAA four violation categories and applies to severe

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Enforcement Process: Investigations*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/enforcement/enforcement-process-investigations> (last visited Apr. 6, 2014).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *NCAA Bylaws*, *supra* note 28, at 318.

⁴⁶ *Id.* at 311.

breaches of conduct.⁴⁷ The new model defines severe breaches of conduct as behavior that “seriously undermines or threatens the integrity of any NCAA Collegiate Model. . .including any violation that provides or is intended to provide a substantial or extensive recruiting, competitive, or other advantage, or a substantial or extensive impermissible benefit.”⁴⁸ Severe breaches of conduct include the following: lack of institutional control, academic fraud, and failure to cooperate with an NCAA investigation.⁴⁹ If an infraction falls under Level I, the violating member institution may suffer daunting consequences such as post-season bans, scholarship restrictions, and financial penalties.⁵⁰

Level II violations apply to “significant” breaches of conduct.⁵¹ This type of breach includes behavior involving “more than a minimal but less than a substantial or extensive impermissible benefit” and “more than a minimal but less than substantial or extensive” recruiting or competitive advantage.⁵² In addition, conduct that may compromise any NCAA enduring value may also constitute a Level II violation.⁵³ More simply put, Level II violations are milder forms of Level I violations, or the result of repeated Level III violations.⁵⁴ Moreover, if a university is guilty of committing multiple Level II violations, the Level II violations may be grouped together and elevated to a Level I violation.⁵⁵

After the COI is notified of a potential Level I or Level II violation, it assigns the case to a hearing panel of five or seven COI members.⁵⁶ The hearing panel then conducts a hearing to determine whether violations of the NCAA regulations occurred and to determine appropriate penalties if necessary. At the hearing, parties or their respective legal counsel must present “material, relevant information necessary for the hearing panel to reach an informed decision, including information that corroborates or refutes an allegation.”⁵⁷ Upon the conclusion of a hearing, the hearing panel prepares a final written infractions decision on behalf of the COI

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 312.

⁵⁰ *Id.* at 322.

⁵¹ *Id.* at 312.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 313.

⁵⁷ *Id.* at 319.

and sends the decision to the president of the institution involved.⁵⁸

After the COI issues an infraction report, the institution then has the option to appeal the hearing panel's findings within fifteen days of the release of the hearing panel's decision.⁵⁹ The appeal is heard by the Infractions Appeals Committee ("IAC")⁶⁰, which is appointed by the NCAA board of directors.⁶¹ The IAC is comprised of five COI members, one of which must be a member of the general public that does not have a connection to a collegiate institution, conference, professional or similar sports organization, or represent coaches or athletes in any capacity.⁶²

Individuals and institutions accused of Level I and Level II violations may also elect, in conjunction with the Enforcement Staff, to summary disposition procedures as a way to settle a matter and propose penalties.⁶³ During the summary disposition process, the accused institution, individuals, and Enforcement Staff jointly submit a written report to the chairman of the COI that includes proposed findings and proposed penalties of fact.⁶⁴ The report must also describe a summary of information that the findings were based on, identify the violation of NCAA bylaws that took place, indicate that all parties agreed on the overall level of the case, and list any agreed-upon aggravating and mitigating factors.⁶⁵ In addition, the report must include the Enforcement Staff's stipulation that the investigation, if conducted by the institution, was complete and a stipulation that the proposed findings are substantially correct and complete. Once it has received the written report, the COI will determine whether the findings and proposed penalties are adequate.⁶⁶ If the COI determines that the findings and proposed penalties are inadequate, then the case will be subject to the hearing procedures enumerated above.⁶⁷

⁵⁸ *Id.* at 320.

⁵⁹ *Id.* at 325.

⁶⁰ *Id.* at 325.

⁶¹ *Id.* at 315.

⁶² *Id.*

⁶³ *Id.* at 317.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 317-18.

II. PERSONAL FOULS: AN EXAMINATION OF THE ENFORCEMENT STAFF'S PAST MISCONDUCT

This section explores the unethical conduct exhibited by the Enforcement Staff from 1976 to the present day and lawsuits that stemmed from such conduct. These lawsuits were filed by former college coaches whose careers were hindered as a result of the unprincipled investigation practices. The causes of action for said cases include, but are not limited to, violation of due process rights, defamation, negligence, and tortious interference with contractual relations.

a. *University of Nevada, Las Vegas*

Jerry Tarkanian was a prominent basketball coach that battled with the NCAA for decades. He began his Division I college coaching career at California State University, Long Beach ("Long Beach State") in 1968.⁶⁸ In 1973, after building Long Beach State into a basketball powerhouse, he left to become the head basketball coach at University of Nevada, Las Vegas ("UNLV").⁶⁹ After his departure, the NCAA submitted an Official Inquiry to Long Beach State.⁷⁰ The Enforcement Staff then commenced an investigation and presented its findings to the COI at a hearing that was held without an opportunity for Tarkanian or UNLV to cross-examine the NCAA's witnesses.⁷¹ The COI found that Long Beach State was guilty of twenty-three NCAA infractions. Subsequently, Long Beach State was placed on three years of probation and was banned from the 1974 NCAA basketball tournament.⁷²

⁶⁸ A.D. Hopkins, *Jerry Tarkanian*, LAS VEGAS REV.-J. (Sept. 12, 1999, 2:00 AM), <http://www.reviewjournal.com/news/jerry-tarkanian>.

⁶⁹ *Id.*

⁷⁰ Univ. of Nev. v. Tarkanian, 594 P.2d 1159, 1160 (1979). Long Beach State was founded in 1949, making it nineteen years old when Tarkanian arrived on campus. *Our History*, CAL. STATE UNIV. LONG BEACH, <http://www.csulb.edu/about/history/> (last visited Apr. 6, 2014). One of Tarkanian's former players, Ed Ratliff, believes that the NCAA assumed that Tarkanian was cheating because of his immediate success at a young institution like Long Beach State. Sam Gardner, *Hall of Famer Has a Nice Ring to Tark's Former Players*, FOX SPORTS (Dec. 17, 2013, 12:30 PM), <http://msn.foxsports.com/college-basketball/story/hall-of-famer-has-nice-ring-to-tark-s-former-players-121713>.

⁷¹ Univ. of Nev., 594 P.2d at 1161.

⁷² *Id.*; see also Rick Telander, *The Shark Gets a Ruling with Bite*, SPORTS ILLUSTRATED, OCT. 10, 1977, at 26, available at <http://si.com/vault/article/magazine/MAG1135754/index.htm>; Chris Dufresne, *These Forty Niners Still Looking to Strike Gold*, L.A. TIMES (Mar. 8, 2012), <http://articles.latimes.com/2012/mar/08/sports/la-sp-0309-long-beach-basketball-20120309/2>.

Tarkanian's family believes that the NCAA followed him to UNLV.⁷³ During Tarkanian's first season at UNLV, the Enforcement Staff launched an investigation of the UNLV men's basketball program for a number of violations.⁷⁴ One of the charges involved academic fraud. The NCAA alleged that Jerry Tarkanian told a professor to give one of his players, David Vaughn, a "B" in the professor's class.⁷⁵ According to the NCAA investigator, the professor informed the investigator that Vaughn rarely attended the class and that he was afraid of losing his job if he did not give Vaughn a "B."⁷⁶ The professor denied making such a statement to the investigator.⁷⁷ In fact, he attempted to contact the COI to dispute the statement, but they refused to listen to him.⁷⁸ The professor then hired an attorney and gave a sworn affidavit, which stated that he did not make the alleged statement and that Vaughn earned his "B."⁷⁹ In addition, the professor's attorney interviewed several students, all of whom claimed that Vaughn regularly attended the class.⁸⁰

Another questionable tactic employed during the UNLV investigation involved the NCAA's interrogation of Rodney Parker, a New York playground coach that paired high school players with college basketball programs.⁸¹ The NCAA asserted that Tarkanian and his staff had "done something with Rodney" to land recruit Rudy Jackson, who ultimately decided to enroll at Wichita State.⁸² Therefore, David Berst, an NCAA investigator, interviewed Parker and did not take notes or record the interview.⁸³ After the interview, Berst claimed that UNLV paid for Parker to attend the Dapper Dan Roundball Classic ("Roundball") in Pittsburgh, Pennsylvania. Unbeknownst to Berst, Parker secretly tape recorded the entire interview. The tape revealed that Parker paid his own way to Roundball every year. Tarkanian and his attorney flew to the NCAA headquarters in Kansas City to play Parker's tape recording and disprove

⁷³ Sam Borden, *A Rebel's Methods Go Mainstream*, N.Y. TIMES (Jan. 3, 2013), http://www.nytimes.com/2013/01/04/sports/ncaabasketball/college-basketball-catches-up-to-jerry-tarkanians-rebel-ways.html?pagewanted=all&_r=0.

⁷⁴ JERRY TARKANIAN WITH DAN WETZEL, *RUNNIN' REBEL: SHARK TALES OF "EXTRA BENEFITS," FRANK SINATRA, AND WINNING IT ALL* 202 (2012).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 203.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Berst's accusation.⁸⁴ Upon their arrival, the NCAA informed Tarkanian and his attorney that "You can't play the tape because David Berst is not on trial, UNLV is."⁸⁵

Three years after the launch of the investigation, the COI submitted an Official Inquiry to the president of UNLV.⁸⁶ The Official Inquiry asserted Tarkanian violated NCAA legislation.⁸⁷ After the hearing, the COI determined that UNLV and its players committed thirty-eight violations.⁸⁸ It also concluded that "Tarkanian had either contacted or arranged for others to contact principals involved in the infractions investigation in an effort to discourage them from reporting violations to the NCAA or to cause them to give untruthful information to the university's investigators."⁸⁹

UNLV appealed twenty-seven of COI's findings and argued that the evidence that UNLV produced during their own investigation proved that no violations occurred.⁹⁰ The university also attacked the investigation procedures and the integrity of the two individuals who conducted the investigation.⁹¹ However, UNLV lost its appeal.⁹²

To reprimand UNLV for the violations, the NCAA imposed sanctions, including probation.⁹³ In addition to imposing sanctions, the COI requested that UNLV "show cause why additional penalties should not be imposed against UNLV if it failed to discipline Tarkanian by removing him from the athletic program during its probation period."⁹⁴ In other words, the NCAA threatened to impose more sanctions on UNLV if the university did not remove Tarkanian as its men's basketball coach. In response, the president of UNLV relieved Tarkanian of his duties.⁹⁵

In 1977, Tarkanian filed suit in Nevada state court against UNLV, its president, and its regents.⁹⁶ Because UNLV was a public university,

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Univ. of Nevada, 95 Nev. at 391.

⁸⁷ *Id.*

⁸⁸ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 185 (1988).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 186 (1988).

⁹⁵ *Id.* at 187.

⁹⁶ Univ. of Nevada v. Tarkanian, 95 Nev. 389, 394 (1979).

Tarkanian sought a declaration that he had been denied procedural and substantive due process of law.⁹⁷ Ultimately, the Supreme Court of Nevada held that NCAA was a necessary party and should be joined to the lawsuit.⁹⁸ In July of 1979, Tarkanian amended his complaint to include the NCAA as a defendant.⁹⁹

One of the primary issues in the case was whether the NCAA acted under the color of state law.¹⁰⁰ The Supreme Court of Nevada held that the NCAA was a state actor in this case. The Supreme Court of the United States, however, granted certiorari and determined that the NCAA was not a state actor and therefore Tarkanian was not denied his due process rights.¹⁰¹ Because the Supreme Court was only asked to address the state-actor question, the Court did not determine whether Tarkanian's NCAA hearings were constitutionally inadequate.¹⁰²

Tarkanian's fight against the NCAA did not end with the Supreme Court's decision. In 1992, Tarkanian and his wife filed another complaint in Nevada state court against the NCAA, claiming that the NCAA wrongfully attempted to force Tarkanian out of college basketball.¹⁰³ More specifically, he claimed the organization manufactured evidence against his basketball programs.¹⁰⁴ In 1998, the NCAA paid Tarkanian \$2.5 million dollars to settle his lawsuit.¹⁰⁵ Although the NCAA did not admit guilt, NCAA President Cedric Dempsey admitted that the case against Tarkanian produced changes in the NCAA investigation procedures,¹⁰⁶ and he issued a statement apologizing to Tarkanian:

The NCAA regrets the 26-year ongoing dispute with Jerry Tarkanian and looks forward to putting this matter to rest. Obviously, Jerry Tarkanian has proven himself to be an excellent college basketball coach, and we wish him and his family continued success for the remainder of his career. We know that

⁹⁷ *Id.* at 394.

⁹⁸ *Id.* at 399.

⁹⁹ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 188 (1988).

¹⁰⁰ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 611 (1997).

¹⁰¹ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 201 (1988).

¹⁰² *Id.*

¹⁰³ Nat'l Collegiate Athletic Ass'n v. Tarkanian, 113 Nev. 610, 611 (1997).

¹⁰⁴ *Tarkanian wins \$2.5 million settlement from NCAA*, CNN/SPORTS ILLUSTRATED (Apr. 2, 1998), http://sportsillustrated.cnn.com/basketball/college/news/1998/04/02/tarkanian_ncaa/.

¹⁰⁵ *Id.*

¹⁰⁶ Richard Sandomir, *Maverick Coach Wins Battle and Collects from N.C.A.A.*, N.Y. TIMES, Apr. 3, 1998, at A1

this dispute has caused distress for all concerned. We sincerely hope that by resolving this conflict, wounds can begin to heal.¹⁰⁷

While satisfied with his monetary award, Tarkanian expressed that the NCAA “can never, ever, make up for all the pain and agony they caused [him].”¹⁰⁸ The NCAA investigated Tarkanian for seven years and failed to prove a single major violation.¹⁰⁹

b. University at Buffalo, State University New York

University at Buffalo, State University of New York (“SUNY Buffalo”) hired Timothy Cohane as the head coach of its men’s basketball program in 1993.¹¹⁰ When Cohane first began his tenure at SUNY-Buffalo, the men’s basketball program was not a member of a league; however, after a few years, the men’s basketball team joined the Mid-Atlantic Conference (“MAC”).¹¹¹ On August 3, 1999, a MAC employee informed the NCAA about an alleged infraction involving the SUNY-Buffalo men’s basketball team.¹¹² In 1999, *before* the NCAA launched an investigation, the NCAA told SUNY-Buffalo that Cohane committed a major NCAA infraction and should be forced to resign.¹¹³ On that same day, Cohane was forced to resign.¹¹⁴

The next year, the NCAA commenced its investigation into Cohane’s men’s basketball team led by Tom Hosty and Stephanie Hanna, two Enforcement Staff members.¹¹⁵ Several members of the basketball team, some of whom exhausted their eligibility to play at the collegiate level, refused to cooperate with the Enforcement Staff; in response, SUNY-Buffalo threatened to withhold players’ degrees if they did not cooperate

¹⁰⁷ JERRY TARKANIAN WITH DAN WETZEL, *RUNNIN’ REBEL: SHARK TALES OF “EXTRA BENEFITS,”* FRANK SINATRA, AND WINNING IT ALL xvi (2005).

¹⁰⁸ *Tarkanian wins \$2.5 million*

¹⁰⁹ James Potter, *The NCAA As State Actor: Tarkanian, Brentwood, and Due Process*, 155 U. PA. L. REV. 1269, 1304 (2007).

¹¹⁰ Complaint at 2, *Cohane v. Nat’l Collegiate Athletic Ass’n.*, WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹¹¹ *Cohane v. Nat’l Collegiate Athletic Ass’n.*, 2005 WL 2373474 at *1 (W.D.N.Y. Sept. 27, 2005) *aff’d* in part, *rev’d* in part sub nom.

¹¹² Complaint at 6, *Cohane v. Nat’l Collegiate Athletic Ass’n.*, WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

with the NCAA.¹¹⁶

The Enforcement Staff presented its case to the COI in 2001.¹¹⁷ In developing its case, it primarily relied upon affidavits provided by SUNY officials.¹¹⁸ After conducting its hearing, the COI found that Cohane held impermissible basketball tryouts, that the SUNY-Buffalo exceeded coaching staff limitations, that SUNY-Buffalo players received impermissible benefits, and that minor secondary violations were committed.¹¹⁹ It also found that Cohane committed an ethical conduct violation during his interview with the COI because he was “evasive, deceptive and not credible” and “contrary to the principles of ethical conduct.”¹²⁰

One of the punishments issued by the COI was a show-cause penalty against Cohane.¹²¹ In short, if Cohane sought employment in an athletic capacity at a NCAA member institution between March 21, 2001 and December 2, 2002, he and his prospective employer would be required to appear before the COI and the COI would determine whether the member institution should be subject to the NCAA’s show-cause procedures.

Cohane immediately appealed the COI’s decision.¹²² The IAC was troubled by the Enforcement Staff’s behavior in conducting its investigation.¹²³ In its report that was issued eight months after the COI’s report, the IAC found that the Enforcement Staff “investigators did not interview all persons who, the Infractions Appeals Committee believe[d], had relevant information” to the investigation.¹²⁴ Such individuals included three of the four players accused of participating in impermissible tryouts, the SUNY-Buffalo athletic director, and the SUNY-Buffalo compliance officer.¹²⁵

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Cohane 2005 WL 2373474 at *1.

¹¹⁹ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *University at Buffalo, State University of New York*, 1 (Mar. 21, 2001) [hereinafter *SUNY Infractions Report*].

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Former Head Men’s Basketball Coach University at Buffalo, State University of New York Public Infractions Committee Appeal Report*, 1 (October 21, 2001) [hereinafter *SUNY Appeals Report*].

¹²⁴ *Id.*

¹²⁵ *Id.*

The IAC also took issue with the COI's conduct as well.¹²⁶ The IAC found that the former head coach's conduct during the hearing was not an ethical conduct violation:

We believe that it is important to state clearly that a person's assertion of innocence, however vigorous, against charges of violations should not ordinarily be the subject of an unethical conduct finding. In this case, the Infractions Appeals Committee does not believe the former head coach's conduct in presenting his defense should in any way give rise to an ethical conduct violation.¹²⁷

While the IAC affirmed the COI's violations, it terminated Cohane's show-cause penalty on the date that it issued its report.¹²⁸

In 2004, Cohane filed a complaint in federal court against several individuals and entities, including but not limited to the NCAA, SUNY-Buffalo, Tom Hosty, and Stephanie Hanna.¹²⁹ Cohane asserted that his due process rights were violated by Hosty, Hanna, and the NCAA, all of whom were state actors because they acted in concert with State officials employed at SUNY-Buffalo during the investigation.¹³⁰ While the United States District Court found that the NCAA and its employees did not act under the color of state law,¹³¹ the Second Circuit of the United State Court of Appeals found that the NCAA and its employees were state actors.¹³² The Second Circuit distinguished Cohane's case. The court found that while in *Tarkanian* the "NCAA enjoyed no governmental powers to facilitate its investigation," including the power to subpoena witnesses,¹³³ in Cohane's case, SUNY Buffalo used its authority to compel witnesses to testify against him just as if they had been compelled by subpoena.¹³⁴

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Complaint at 6, Cohane v. Nat'l Collegiate Athletic Ass'n., WL 2373474 (W.D.N.Y. Sept. 27, 2005) (No. 04-CV-0181S).

¹³⁰ Cohane 2005 WL 2373474 at *8.

¹³¹ Cohane v. Nat'l Collegiate Athletic Ass'n ex rel. Brand, 215 F. App'x 13,14 (2d Cir. 2007).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

c. *Mississippi State University*

In 2002, the Enforcement Staff commenced an investigation involving Mississippi State University (“Mississippi State”) head football Jackie Sherrill and some of Sherrill’s assistant coaches.¹³⁵ The following year, Mississippi received a Notice of Allegations from the NCAA, which alleged that Mississippi committed a number of NCAA rule violations.¹³⁶ Sherrill was named in two of the allegations set forth by the NCAA.¹³⁷ One allegation asserted that Sherrill offered a car to recruit Joseph Scott.¹³⁸ The second allegation asserted that Sherrill made impermissible offers to recruit Chris Spencer.¹³⁹ More specifically, the NCAA alleged that Sherrill told Spencer’s father, Ben Wallace, that “he would make sure that Spencer and his family were taken care of, and that if Wallace was in need of employment or anything, to call Sherrill.”¹⁴⁰

In October 2004, the COI ruled that the Mississippi State football program committed several NCAA violations, including impermissible recruiting contact, inducements, and unethical conduct.¹⁴¹ While some of the football program’s assistants were found guilty, Sherrill was not.¹⁴²

Despite his exoneration, Sherrill filed a lawsuit against (i) the NCAA; (ii) Mark P. Jones, who was an NCAA Director during the Mississippi State investigation; (iii) Richard Johanningmeier, who was an NCAA investigator involved with the Mississippi State investigation, and (iv) Julie Gilbert, a booster for University of Mississippi (“Ole Miss”), one of Mississippi State’s rivals in college football.¹⁴³ The complaint, which has been amended twice since being filed in 2004, propounds eighteen counts of wrongdoing¹⁴⁴ and asserts that, in concert, the defendants:

¹³⁵ The NCAA first learned of possible violations and alerted Mississippi State of investigation. Wong, *IAC History*, *supra* note 14, at 122.

¹³⁶ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Jackie Sherrill Notice of Allegations*, 1 (_____) [hereinafter *Sherrill NOA*].

¹³⁷ *Id.* at 5.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.*

¹⁴⁰ Wong, *IAC History*, *supra* note 14 at 123.

Id. at 124.

¹⁴¹ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *Mississippi State University Committee on Infractions Reports*, 1 (TBD).

¹⁴² Former Mississippi State coach, who filed suit in 2004, says organization defamed him, *THE CLARION LEDGER*, (Apr. 11, 2009), <http://www.clarionledger.com/article/20090412/SPORTS030102/904120347/>.

¹⁴³ Complaint at 1, *Sherrill v. Nat’l Collegiate Athletic Ass’n.* (NO. 2007-0161-C).

¹⁴⁴ *Id.* at 34.

- (a) Contacted and hired private investigators to illegally, willfully, maliciously, and repeatedly follow, harass, and stalk Plaintiff; Plaintiff's players; Plaintiff's Staff and Coaches; Plaintiff's potential recruits; and Mississippi State Alumni and Boosters with the intent to interfere with Jackie W. Sherrill's right to earn a living, his contract of employment with Mississippi State University, his right to coach football, and his right to serve as an NCAA football coach.
- (b) Unreasonably and persistently hounded and unreasonably invaded the privacy of the Plaintiff.
- (c) Committed such malicious acts as soliciting information from unreliable sources; threatening and intimidating witnesses; falsely reporting information known by them to be false; twisting testimony of witnesses; destroying or causing the spoliation of documents, audio tapes and evidence and/or carelessly and recklessly failing to preserve evidence; and conveying false information to others about the Plaintiff's and Plaintiff's associates.
- (d) Willfully giving publicity to private facts and thereby invading the privacy of Plaintiff on the reasonable expectation that the information be kept confidential. Information has been made public and is highly offensive and objectionable to any reasonably person since the information made public pertaining to Jackie W. Sherill was false, inaccurate, and incomplete.
- (e) Intentionally gave publicity to private acts which invaded the Plaintiff's reasonable expectation of privacy and is contrary to applicable provisions of the NCAA Rules and Regulations and of State Law.¹⁴⁵

The case is currently pending in the Madison County Circuit Court in Mississippi. While the allegations in the complaint have not yet proven to be true in the court, they are very consistent with a pattern of behavior that NCAA Enforcement Staff members have demonstrated in prior investigations.

d. University of Southern California

In 2006, the Pacific 10 Conference ("Pac-10"), which is now the

¹⁴⁵ *Id.* at 27-28.

Pacific 12 conference, launched an investigation of the University of Southern California (“USC”) regarding improper benefits that were allegedly distributed to USC running back Reggie Bush, his mother, and his stepfather.¹⁴⁶ Soon thereafter, the NCAA Enforcement Staff, in conjunction with the Pac-10, investigated the allegations.¹⁴⁷ The investigation lasted almost four years before the COI conducted its hearing.¹⁴⁸ In 2010, the COI issued its report, which found that from October 2004 until November 2005, Bush and his family agreed to form a sports agency partnership with two individuals: Lloyd Lake, a convicted criminal, and Michael Michaels.¹⁴⁹ During this time period, Lake and Michaels purportedly gave Bush and his family impermissible benefits, including “several thousand dollars, an automobile, housing, a washer and dryer, air travel, hotel lodging, and transportation, among others.”¹⁵⁰ Because Bush allegedly received these benefits, the COI deemed that he was ineligible from October 2004 to November 2005 and imposed harsh sanctions on USC, including a two-year bowl ban and significant scholarship reductions.¹⁵¹

In the USC investigation report, the NCAA alleged that USC running backs coach Todd McNair was aware of and acquiesced to the improper benefits that were received by Reggie Bush.¹⁵² As a result, McNair lost his job.¹⁵³ In response, McNair filed a lawsuit in the Los Angeles Superior Court against the NCAA, claiming that the NCAA’s investigation was one-sided and that the NCAA’s ruling will negatively impact his future earnings.¹⁵⁴ The several causes of action enumerated in the complaint include but are not limited to, libel, slander, tortious interference with prospective economic advantage, tortious interference

¹⁴⁶ *Timeline of investigation at the University of Southern California*, USA TODAY (June 25, 10), http://usatoday30.usatoday.com/sports/college/2010-06-10-usc-timeline-bush-mayo-violations_N.htm.

¹⁴⁷ *Bowl ban among penalties for Southern California*, NCAA.COM, <http://www.ncaa.org/wps/wcm/myconnect/public/ncaa/resources/latest+news/2010+news+stories/june+news+stories/bowl+ban+among+penalties+for+southern+california>.

¹⁴⁸ See, NAT’L COLLEGIATE ATHLETIC ASS’N, *University of Southern California Infractions Report*, 1 (2012) [hereinafter *USC Report*].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *USC parts ways with running backs coach Todd McNair*, L.A. TIMES (July 1, 2010), <http://articles.latimes.com/2010/jul/01/sports/la-sp-0702-usc-todd-mcnair-20100702>.

¹⁵⁴ Rich Hammond, *Judge: NCAA ‘malicious’ in investigation of McNair*, THE OC REGISTER, <http://usc.ocregister.com/2012/11/21/judge-ncaa-malicious-in-investigation-of-mcnair/112730/#more-112730>.

with contractual relations, and negligence.¹⁵⁵

In his complaint, McNair asserted that the Enforcement Staff provided suggestive questions to witnesses, including Lloyd Lake, at interviews, which McNair was not present at, in order to wrongfully implicate McNair.¹⁵⁶ During these interviews, none of the witnesses, including Reggie Bush, ever indicated that McNair had knowledge of the benefits received by the Bush family.¹⁵⁷ However, in finding that McNair violated NCAA rules, the NCAA *solely* relied on Lloyd Lake's responses and mischaracterized these responses.¹⁵⁸ McNair was not permitted to be present during Lake's interrogation and he was not permitted question or cross-examine Lake.¹⁵⁹

In August of 2012, in a Los Angeles Superior Court opinion, the judge labeled the NCAA investigation as "malicious" and claimed that some of the NCAA's behavior illustrated "ill-will" or "hatred" towards McNair.¹⁶⁰ One Enforcement Staff members even labeled McNair as a "lying morally bankrupt criminal, in [his] view, and a hypocrite of the highest order."¹⁶¹ The judge noted that at least three people may have improperly contacted the NCAA infractions committee regarding McNair's complicity in the investigation.¹⁶² In addition, the NCAA showed "reckless disregard for the truth" and some of the witnesses secretly exchanged emails with the COI.¹⁶³ The opinion also states that a COI member admitted that an interview with McNair was "botched."¹⁶⁴

The NCAA filed a motion to seal the documents in McNair case and the court granted the motion;¹⁶⁵ however, non-parties have attempted to intervene and unseal the documents in order to expose the NCAA's

¹⁵⁵ Complaint at 1, *McNair v. National Collegiate Athletic Ass'n* (No. BC462891) [hereinafter *McNair Complaint*].

¹⁵⁶ *McNair Complaint* *supra* note ____ at 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Dennis Dodd, *Documents appear to show improper NCAA involvement in USC case*, CBSSPORTS.COM (November 27, 2012), <http://www.cbssports.com/collegefootball/blog/dennis-dodd/21162720/documents-appear-to-show-improper-ncaa-involvement-in-usc-case>.

¹⁶¹ *Id.*

¹⁶² Dennis Dodd, *NCAA pushing back on unsealing of documents in McNair/USC case*, CBSSPORTS.COM (Jun. 24, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/22514205/ncaa-pushing-back-on-unsealing-of-documents-in-mcnairusc-case>.

¹⁶³ The Sports Xchange, *Three violated NCAA ethics code in USC appeal*, YAHOO! SPORTS, November 28, 2012 <http://sports.yahoo.com/news/report-three-violated-ncaa-ethics-051013372—ncaaf.html>.

¹⁶⁴ Dodd, *supra* note ____.

¹⁶⁵ *Id.*

investigation practices.¹⁶⁶ In June 2013, the New York Times and the Los Angeles Times filed an opposition to the NCAA's motion to seal the documents.¹⁶⁷ One of the arguments put forward by the non-parties is that the public has great interest in accessing court records that show that the NCAA published statements with both common law and constitutional malice.¹⁶⁸ The motion specifically notes that the public interest is magnified given the NCAA's "perceived excesses" in its USC investigation.¹⁶⁹

e. University of Miami

In 2005, Nevin Shapiro, a University of Miami booster, formed Capitol Investments USA, Inc. ("Capitol Investments"), a corporation that falsely portrayed itself as wholesale grocery distribution business.¹⁷⁰ From 2005 to 2009, Capitol Investments sold securities to investors, who were under the assumption that their investments funded a legitimate grocery business, and promised the investors returns between ten and twenty-six percent.¹⁷¹ In actuality, Capitol Investments was conducting ponzi scheme, which illegally funded the lavish lifestyle of Shapiro.¹⁷² The ponzi scheme caused over sixty investors to lose \$820,000,000 in investments.¹⁷³ In 2009, a group of Capitol's investors filed involuntary bankruptcy proceedings against Capitol Investments and Nevin Shapiro.¹⁷⁴ One year later, Shapiro was indicted on "two counts of money laundering, two counts of wire fraud, one count of securities fraud and one count of conspiracy to commit securities and wire fraud."¹⁷⁵ Ultimately, Shapiro pled guilty to two counts and was sentenced to twenty years in prison.¹⁷⁶

Shapiro's unscrupulous behavior during the past decade was not limited to the financial crimes that he committed. In August 2011, the

¹⁶⁶ Non-Party's Press Representatives Application to Intervene, *McNair v. National Collegiate Athletic Ass'n* (No. BC462891).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Securities Exch. Comm'n, *SEC Charges Prominent Miami Beach Businessman in \$900 Million Ponzi Scheme*, <http://www.sec.gov/news/press/2010/2010-63.htm>.

¹⁷¹ *Id.*

¹⁷² *United States v. Shapiro*, 505 F. App'x 131 (3d Cir. 2012)

¹⁷³ *Id.*

¹⁷⁴ *In re Capitol Investments, Inc.*, 473 B.R. 838, 840 (Bankr. S.D. Fla. 2012)

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

National Collegiate Athletic Association (“NCAA”) announced the investigation of Shapiro’s inappropriate interactions with the University of Miami (“UM”) football and basketball programs.¹⁷⁷ Reportedly, Shapiro distributed improper benefits to UM football and basketball players from 2002 to 2011, violating NCAA regulations.¹⁷⁸ Such benefits allegedly included money, cars, yacht trips, jewelry, and televisions.¹⁷⁹

Ironically, the NCAA exhibited unethical practices in carrying out the UM investigation, particularly in securing interviews with key witnesses. Under NCAA by-law 19.2.3, all representatives of member institutions “have an affirmative obligation to cooperate fully with and assist the NCAA enforcement staff, the Committee on Infractions and the Infractions Appeals Committee to further the objectives of the Association and its enforcement program.”¹⁸⁰ However, the NCAA is limited in conducting its investigation because it does not have subpoena power;¹⁸¹ therefore, it cannot require those outside of its jurisdiction, like parents of student-athletes or prospects or agents, to cooperate in its investigations.¹⁸² However, the NCAA found a way to circumvent this limitation in the UM investigation. In December of 2012, the NCAA announced that some of its staff members improperly obtained information about Nevin Shapiro and his involvement with the UM football program from Shapiro’s attorney, Maria Elena Perez, a University of Miami School of Law alumna.¹⁸³ Ameen Najjar, an NCAA Enforcement Staff member during the investigation, entered an agreement with Perez to elicit information utilizing Perez’s subpoena power during Shapiro’s bankruptcy proceedings.¹⁸⁴ More specifically, NCAA Perez agreed to Enforcement Staff members sat in on question

¹⁷⁷ Steve Gorten, *Miami issues statement about Nevin Shapiro*, SUN-SENTINEL (Aug. 16, 2011), http://articles.sun-sentinel.com/2011-08-16/sports/fl-ncaa-visit-miami-hurricanes-0815-20110814_1_coach-al-golden-ncaa-probe-ncaa-enforcement-officials.

¹⁷⁸ Charles Robinson, *Renegade Miami football booster spells out illicit benefits to players*, YAHOO! SPORTS, (Aug. 16, 2011), http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

¹⁷⁹ *Players got gifts from ex-Miami booster*, ESPN.COM, (Aug. 17, 2011), http://espn.go.com/college-football/story/_/id/6866006/ponzi-schemer-nevin-shapiro-says-provided-benefits-miami-athletes%27%20rel=%27nofollow.

¹⁸⁰ *NCAA Bylaws*, supra note ___, at 312.

¹⁸¹ Nat’l Collegiate Athletic Ass’n, Membership, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/process/investigations>.

¹⁸² *Id.*

¹⁸³ Tim Reynolds, *NCAA Announces Problems With Miami Investigation*, ASSOCIATED PRESS (Jan. 23, 2013), <http://bigstory.ap.org/article/ncaa-announces-problems-miami-investigation>.

¹⁸⁴ *Id.*

individuals regarding the UM investigation under the guise of “Rule 2004” examinations, which are bankruptcy depositions to obtain information.¹⁸⁵ During these depositions, the staff members provided Perez with questions to ask witnesses while they were under oath.¹⁸⁶

Sean Allen, a former UM football equipment manager and former associate of Nevin Shapiro, was victimized by the NCAA’s arrangement with Perez. In August 2011, the NCAA conducted an interrogation of Allen, which was independent of Shapiro’s bankruptcy proceedings.¹⁸⁷ The NCAA felt that Allen was not being forthcoming and truthful during the interview; they were correct.¹⁸⁸ In fact, in an interview with CBS Sports, Allen admitted “‘I denied. I denied. I denied. I lied about EVERY-THING.’”¹⁸⁹

In December 2011, Allen was deposed subpoenaed in connection with Shapiro’s bankruptcy proceedings.¹⁹⁰ Prior to his “Rule 2004” examination, Perez assured Allen’s counsel, Devang Desai, that Allen’s deposition would focus on his employment with Capitol Investments.¹⁹¹ When Allen arrived at the deposition, he was surprised to see Najjaran NCAA investigator and During his deposition, DesaiAllen asked the NCAA investigator to leave.¹⁹² While Najjar was not present during the deposition, his presence was felt. ; however, despite these wishes, the investigator stayed. Shapiro’s attorneyPerez asked thirty-four questions provided by the NCAA investigator Najjar that were about the UM scandal and unrelated to the bankruptcy proceedings.¹⁹³ In fact, some of the questions had been drafted by Nevin Shapiro while he was in

¹⁸⁵ Complaint at 6, Rob Dauster, *Investigator questions Mark Emmert, NCAA’s look into enforcement*, NBC SPORTS COLLEGE BASKETBALL TALK (Jan. 1, 2013), <http://collegebasketballtalk.nbcsports.com/2013/01/31/investigator-questions-mark-emmert-ncaas-look-into-enforcement/>. Florida Bar v. Perez, No. SC14-733 (Fla. filed Apr. 14, 2014)[hereinafter *Perez Complaint*]. Rule 2004 examination is a deposition which may only relate to “the acts, conduct, or property or to the liabilities and financial condition of the debtor or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge.” Fed. R. Bankr. P. 2004.

¹⁸⁶ *Id.*

¹⁸⁷ Bruce Feldman, *Exclusive: Ex-employee details how Hurricanes program unraveled in scandal*, CBSSPORTS.COM, (Sep. 21 2012), <http://www.cbssports.com/collegefootball/story/20301408/exclusive-exemployee-details-how-hurricanes-program-unraveled-in-scandal>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Perez Complaint *supra* note ____ at 12.

¹⁹¹ *Id.* Reynolds, *supra* note ____.

¹⁹² Feldman, *supra* note ____; see also

¹⁹³ *Id.*; see also Perez Complaint *supra* note ____ at 14.

prison.¹⁹⁴ Because he was under oath, Allen had no choice but to tell the truth and expose the lies that he conveyed during his NCAA interview.

Sean Allen was not the only person deceived by these purported “Rule 2004” examinations. Perez also deposed Michael Huyghue, a former business associate of Shapiro’s, in Orlando, Florida.¹⁹⁵ According to Huyghue’s attorney, the deposition did not relate to bankruptcy and Perez primarily asked Huyghue to identify photographs of UM athletes with Shapiro.¹⁹⁶

In response to reports that surfaced regarding the Enforcement Staff’s mismanagement of the UM investigation, the NCAA engaged law firm Cadwalader, Wickersham & Taft LLP (“Cadwalader”), a national law firm, to launch an independent external investigation of the Enforcement Staff’s procedures and conduct.¹⁹⁷ The report was issued in February of 2013 and found that the NCAA committed several acts of misconduct.¹⁹⁸ Cadawalader found that the NCAA violated its own internal practice when the Enforcement Staff, rather than the NCAA’s in-house counsel, engaged Ms. Perez.¹⁹⁹ It also revealed that the NCAA’s legal department advised Najjar not to execute the arrangement with Perez because the legal department believed that the arrangement with Perez was “an effort to circumvent the limits on the NCAA’s authority to compel cooperation from third parties.”²⁰⁰ Najjar disregarded this advice.²⁰¹ In addition, the report noted that the Vice President of Enforcement Julie Roe Lach and Managing Director of Enforcement Tom Hosty, who was also a named defendant in *Cohane*, exercised insufficient oversight of Najjar and “failed to detect and rectify the problems with the Perez proposal for almost a full year.”²⁰² Moreover, it found that:

Mr. Najjar adopted and Ms. Lach and Mr. Hosty went along with the Perez proposal without sufficiently considering whether it was

¹⁹⁴ See, CADWALADER, WICKERSHAM & TAFT LLP, *Report on the NCAA’s Engagement of a Source’s Counsel and Use of the Bankruptcy Process in its University of Miami Investigation* (2012) [hereinafter *NCAA External Report*].

¹⁹⁵ Perez Complaint *supra* note ____ at 15.

¹⁹⁶ *Id.*

¹⁹⁷ NCAA launches external review of enforcement program, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/NCAA+launches+external+review+of+enforcement+program>.

¹⁹⁸ *NCAA External Report supra* note ____ at ii.

¹⁹⁹ *Id.* at 31.

²⁰⁰ *Id.* at 30.

²⁰¹ *Id.*

²⁰² *Id.* at 51.

consistent with the NCAA's membership's understanding about the limits of the Enforcement Staff's investigative powers. There are a number of techniques that, though impermissible in the law enforcement context, were considered over the line for NCAA investigations. Mr. Najjar and his supervisors never considered whether the Perez proposal fell within that category.²⁰³

The report also mentions that Richard Johanningmeier, who initially oversaw the UM investigation and is named a defendant in Jackie Sherrill's pending case in Mississippi, was aware of the arrangement with Perez and "seemed to believe that the proposal entailed nothing more than paying for the transcripts produced in the deposition, which he did not see as a departure from past practice."²⁰⁴

Abusing an attorney's subpoena power was just one type of tactic that the NCAA has used in in the Miami investigation; coercion was another. Former UM football player Dyron Dye was also interviewed twice by the NCAA in 2011.²⁰⁵ During his second interview, Dyron Dye made statements that implicated UM. In 2013, Dye filed an affidavit on behalf of former UM coach Aubrey Hill, which contained information that conflicted with statements provided by Dye in his second NCAA interview.²⁰⁶ In the affidavit, Dye stated that, during his second interview, Johanningmeier:

continually threatened me if I did [not] comply with him. I felt intimidated by Mr. Johanningmeier and I was also concerned regarding the possibility of losing my scholarship and athletic eligibility. . . . I felt compelled to testify in a manner that would be consistent with the manner in which Mr. Johanningmeier was directing me in order to keep my eligibility. . . . I feel it is unfair the NCAA has twisted my testimony to use it negatively against coach Hill.²⁰⁷

Dye also filed a police report, asserting that former NCAA investigator Richard Johanningmeier coerced him into providing answers that would

²⁰³ *Id.* at 5.

²⁰⁴ *Id.* at 45.

²⁰⁵ Zac Ellis, *Report: Miami player says NCAA tried to coerce him into implicating school*, SPORTS ILLUSTRATED, (Jun. 3, 2013) <http://college-football.si.com/2013/06/03/report-miami-player-says-ncaa-tried-to-coerce-him-into-implicating-school/>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

incriminate the UM football team.²⁰⁸ In August 2013, despite the fact that the NCAA had not issued its findings, UM released Dye from the football team because his involvement in the NCAA's investigation was a "distraction."²⁰⁹

On October 23, 2013, almost two and a half years after the commencement of the investigation, the COI released the UM infractions report.²¹⁰ The sanctions imposed upon UM include, but are not limited to, the loss of nine football scholarships and the loss of three basketball scholarships.²¹¹ Show-cause penalties were also issued against two football assistant coaches and one assistant basketball coach.²¹²

Former UM basketball coach Frank Haith, who is currently the head coach at the University of Missouri, was also found guilty and suspended for five games during the 2013-2014 college basketball season.²¹³ According to the report, Shapiro entertained the UM basketball coaches at a strip club and gave the basketball coaches ten thousand dollars to secure a commitment from a high school prospect.²¹⁴ While incarcerated, Shapiro threatened to tell the NCAA about the strip club outing and the issuance of ten thousand dollars if Haith and his staff did not return the money.²¹⁵ In response, Haith, according to the report, advanced multiple payments to his assistant coaches so that they could repay Shapiro.²¹⁶

None of the three sanctioned coaches have filed a law suit against the NCAA; however, it would not be surprising if some of these coaches followed the footsteps of Jerry Tarkanian, Tom Cohane, Jackie Sherrill, and Todd McNair. Of the four sanctioned coaches, Haith may have the most intriguing case against the NCAA. On May 6, 2013, Haith filed a petition to perpetuate testimony of Bank of America employees in the United States District Court Southern District of Florida under Federal

²⁰⁸ *Id.*

²⁰⁹ Michael Casagrande, Dyron Dye booted from Miami football team, *SUN SENTINEL*, (Aug. 19, 2013), <http://www.sun-sentinel.com/sports/um-hurricanes/sfl-dyron-dye-booted-from-miami-football-team-20130819,0,2016040.story>.

²¹⁰ See, NAT'L COLLEGIATE ATHLETIC ASS'N, *University of Miami Infractions Report*, 1 (Oct. 22, 2013) [hereinafter *Miami Report Report*].

²¹¹ *Id.* at 63, 67.

²¹² *Id.* at 65-66, 68.

²¹³ *Id.* at 67.

²¹⁴ *Id.* at 20-21.

²¹⁵ *Id.* at 21.

²¹⁶ *Id.*

Rule of Civil Procedure 27.²¹⁷ In anticipation of litigation, Haith filed this petition to determine whether Bank of America allowed an unknown person to access private microfiche copies of three checks that were requested by the NCAA during the UM investigation.²¹⁸

According to an affidavit of Pamela Haith, she and Frank became “suspicious of the information that the enforcement staff possessed concerning three checks (Checks Nos. 2092, 2095, and 2096)” after Frank’s second interview with the NCAA.²¹⁹ She further asserted that the she and Frank could not locate this information that the NCAA had from the bank statements and check images.²²⁰ On October 22, 2012, the NCAA Enforcement Staff told the Haiths that a “‘source’ informed the staff that a microfiche copy of the checks was available.”²²¹ With this information, Ms. Haith contacted Bank of America on that same day to inquire, for the first time, about the three checks that were requested by the NCAA.²²² A customer service representative informed Ms. Haith that those copies had been “previously viewed or ordered.”²²³ Ms. Haith then informed Bank of America’s fraud department that an unauthorized individual may have gained access to the three checks.²²⁴ Bank of America agreed to investigate the matter.²²⁵ Ms. Haith communicated with Bank of America on multiple occasions after her initial phone call to determine the status of Bank of America’s investigation.²²⁶ In November of 2012, Bank of America informed Ms. Haith that the case was closed without any explanation.²²⁷

The petition asserts that Bank of America’s unwillingness to share information is an “attempt to conceal an illicit act.”²²⁸ If the petition is granted, Haith’s counsel will subpoena Bank of America employees²²⁹ and

²¹⁷ Verified Petition to Perpetuate Testimony and Incorporated Memorandum of Law at 1, Haith v. Bank of America, (S.D. Fla. 2013) (No. 1:13-mc-21611).

²¹⁸ *Id.* at 3.

²¹⁹ Affidavit of Pamela R. Haith at 2, Haith v. Bank of America (S.D. Fla. 2013) (No. 1:13-mc-21611).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 2-3.

²²⁴ *Id.* at 3-4.

²²⁵ *Id.* at 4.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See, *id.*; see also, Dennis Dodd, *Haith petition looking at how bank records were obtained*, CBSSports.com (May 6, 2013), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/22206546/haith-petition-looking-at-how-bank-records-were-obtained>.

may ultimately file a civil action against Bank of America under the Gramm-Leach-Bliley Act, which requires financial institutions to protect information that they collect from consumers.²³⁰ If Haith's counsel is able to determine that the "unknown person" is an NCAA employee or agent, Haith may have grounds to file a lawsuit against the NCAA.

IV. FALLING SHORT OF THE GOAL LINE: GOVERNMENT INTERVENTION

a. State Government

After *Tarkanian*, the Florida, Illinois, Nebraska, and Nevada state governments passed statutes that required the NCAA to incorporate due process into their enforcement procedures.²³¹ Some of these statutes specifically address investigation deficiencies, particular those found in the interrogation process.²³² For example, the Nevada statute mandated that oral statements be transcribed at the request of any party.²³³ In addition, the statutes addressed the lack of rules governing the use of evidence. The Illinois statute even mandated that Illinois rules of evidence apply at enforcement hearings.²³⁴ The Nevada statute required that "all written statements introduced as evidence at a proceeding must be notarized and signed under oath by the person making the statement."²³⁵ Further, the statute gave accused individuals the right to "confront and respond to all witnesses and evidence related to the allegations against the party and may call witnesses on his or her own behalf."²³⁶

In response, the NCAA challenged the constitutionality of these laws in federal court. In 1992, the NCAA filed a suit against the State of Nevada, the first state that passed this type of law, asserting that the due process laws violated both the Commerce Clause and the Contract Clause.²³⁷ The NCAA sought to enjoin application of the Nevada

²³⁰ *Id.*; see also, Bureau of Consumer Prot. Bus. Ctr., *Gramm-Leach Bliley Act*, <http://www.business.ftc.gov/privacy-and-security/gramm-leach-bliley-act>.

²³¹ Robin J. Green, *Does the NCAA Play Fair? A Due Process Analysis of NCAA Enforcement Regulations*, 42 DUKE L.J. 99, 144 (1992).

²³² *Id.*

²³³ Nev. Rev. Stat. Ann. § 398.175.

²³⁴ 110 ILCS 25/4

²³⁵ Nev. Rev. Stat. Ann. § 398.155(4).

²³⁶ Nev. Rev. Stat. Ann. § 398.155(2).

²³⁷ *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 635 (9th Cir. 1993). The Commerce Clause of the United States Constitution gives Congress the power to "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Contract Clause of the

statutes and a declaration that statutes were void.²³⁸ The United States Court of Appeals of the Ninth Circuit found that the NCAA engages in interstate commerce and held that the statute violated the Commerce Clause of the United States Constitution because the practical effect of the regulation would “control conduct beyond the boundaries of the State.”²³⁹ In other words, if the NCAA wanted to enforce uniform procedures, it would have to apply the Nevada statute in every state.²⁴⁰ The court also struck down the Nevada statute because it would conflict with the other due process statutes passed by other states.²⁴¹ While the *Miller* decision only applies to the Nevada statute, the reasoning enumerated in the opinion casted “serious doubt on the ability of the states to force the NCAA to adhere to more rigorous due process principles.”²⁴²

b. Federal Government

The United States House of Representatives has also attempted to intervene in both professional and collegiate athletics on numerous occasions in the past and has failed on each of those occasions. In 2000, Congress attempted to address the incorporation of due process into NCAA procedures.²⁴³ Representative Meeks of New York introduced a bill which would have required NCAA member institutions to retain legal counsel for any of their student athletes that were accused of violating the NCAA rules and to provide “notice and opportunity to be heard before an arbitrator, neutral party, or tribunal not associated with the National Collegiate Athletic Association or a member institution shall be afforded before any enforcement actions are administered by the institution.”²⁴⁴ Under the bill, accused students shall have “the opportunity to be heard by testimony or otherwise” and the right to controvert “every material

United States Constitution holds that “No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” U.S. Const. art. I, § 10, cl. 1.

²³⁸ *Nat’l Collegiate Athletic Ass’n v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992) *aff’d*, 10 F.3d 633 (9th Cir. 1993).

²³⁹ *Miller* at 639.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² CRS Report for Congress, *The NCAA and Due Process: Legal Issues*, <http://congressionalresearch.com/RL32529/document.php?study=The+NCAA+and+Due+Process+Legal+Issues>.

²⁴³ H.R. 4117, 106th Cong. § 2 (2000).

²⁴⁴ *Id.*

fact which bears on the question of the [accused student] or private rights involved" at all hearings.²⁴⁵ The bill, unfortunately, was not enacted.²⁴⁶

In August 2013, two members of Congress attempted to intervene in the enforcement procedures again through the proposal of the National Collegiate Athletics Accountability Act ("NCAA Act").²⁴⁷ The purpose of the bill is twofold: to improve health and education of student-athletes and to require more transparency from the NCAA.²⁴⁸ The NCAA Act requires that the NCAA provide institutions and student athletes with due process procedures such as "the opportunity for a formal administrative hearing," "not less than one appeal," and "any other due process procedure that Secretary determines by regulation to be necessary."²⁴⁹ In addition, the NCAA must "hold in abeyance any such remedy until all appeals have been exhausted or until the deadline to appeals has been passed."²⁵⁰

While the purpose of the NCAA Act is admirable, it inadequately addresses the NCAA's lack of transparency. The bill only addresses the hearing and appeals components of an NCAA investigation process and does not address the investigation practices. Even if the proponents of the bill were to amend the bill to address the investigative procedures of the NCAA, history is a strong indication that the bill would likely not pass because Congress has exhibited a reluctance to intervene in college athletics. However, at minimum, the NCAA act may exert additional pressure on the NCAA to make drastic changes to its enforcement procedures.

c. Subpoena Power

Among others, Urban Meyer, the head football coach at the Ohio State University, believes that a grant of subpoena power will help resolve issues that plague NCAA investigation process.²⁵¹ Because of its lack of

²⁴⁵ *Id.*

²⁴⁶ GovTrack, *H.R. 4117 (106th): Collegiate Athletics Due Process Act of 2000*, <https://www.govtrack.us/congress/bills/106/hr4117>.

²⁴⁷ *House bill would reform NCAA*, ESPN.COM (Aug. 1, 2013), http://espn.go.com/college-sports/story/_/id/9530187/legislation-introduced-house-reform-ncaa.

²⁴⁸ *Id.*

²⁴⁹ The NCAA Accountability Act, H.R. 2903, 113th Cong. § 2 (2013).

²⁵⁰ *Id.*

²⁵¹ See, Graham Watson, Urban Meyer thinks the NCAA should have subpoena power. Can that really work? ,CBSSPORTS.COM, http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Urban-Meyer-thinks-the-NCAA-should-have-subpoena?urn=ncaaf-wp3915.

subpoena power, the NCAA Enforcement Staff has resorted to indecorous tactics, such as using an attorney's subpoena power, to gain truthful testimony from the individuals that it interviews. The NCAA's interview of Sean Allen in the UM case is a prime illustration of the sincerity concerns that surround NCAA interviews. During Allen's interview with the NCAA, he lied. During his deposition, he was truthful and provided a testimony that contradicted his interview with the NCAA.

While this solution would minimize unethical Enforcement Staff practices, it is unrealistic. First, because the NCAA is a private association, it is unlikely that Congress will grant it subpoena power. Congress has never granted subpoena power to a governing body in professional or amateur athletics and, as discussed in Section IV, has demonstrated a reluctance to intervene with NCAA enforcement procedures. The NCAA could also ask state legislatures for subpoena power; however, that process would be time consuming and, to be effective, would require all fifty states to pass legislation that would grant the NCAA this power. Second, if the NCAA was granted subpoena power, it would likely be limited. Josephine R. Potuto, a Professor at the University of Nebraska School of Law who served three terms as the COI chair, has noted that if NCAA subpoena power legislation is passed, it "will require that issuance of a subpoena be based on a quantum of credible information that the individual has relevant information."²⁵² The problem with this credible information requirement is that the NCAA sometimes has a need "to obtain information where the requisite factual basis underlying the suspicion cannot be shown."²⁵³ Therefore, it is unlikely that a grant of subpoena power would truly enhance the NCAA's investigative practices. Finally, it is improbable that the member institutions, which vote on all NCAA rules and regulations, would approve of a congressional grant that would increase the NCAA's enforcement staff's powers and lead to a more strict enforcement model.

V. A NEW GAMEPLAN: INTERNAL SOLUTIONS TO NCAA INVESTIGATION DEFICIENCIES

In September 2013, NCAA President Mark Emmert admitted that "the only thing everybody agrees on with Division I governance is that it

²⁵² Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 294 (2010).

²⁵³ *Id.*

doesn't work."²⁵⁴ He expressed that he "expects a lot of change" to the Division I governance and that the NCAA Board of Directors will convene over the next six to eight months to discuss changes.²⁵⁵ The five investigations described in Section III of this note illustrate aspects of the enforcement investigations that the Board of Directors (the "Board") must address. The Board can do so through the implementation of ethical standards, investigation regulations, and independent committee that oversees the Enforcement Staff.

A. Independent Oversight of the Enforcement Staff

Coaches oversee players. Athletic directors oversee coaches. University presidents oversee athletic directors. The NCAA oversees its member institutions; however, there is no oversight of the NCAA. NCAA investigator Rich Johanningmeier was named in three of the investigation cases discussed in the Section III: Mississippi State, University of Southern California, and the University of Miami. His continued unethical investigation practices demonstrate that the NCAA's leadership does very little to restrain or control its Enforcement Staff members. This type of perpetual behavior calls for independent oversight of the Enforcement Staff. If the NCAA seeks to maintain its integrity as a governing body, it is necessary to appoint independent, disinterested officers, who are not employed by the NCAA, that specifically monitor Enforcement Staff investigations. The employment of oversight officers is crucial to hold Enforcement Staff members accountable for their actions. Such officers could be administrators or faculty of member institutions and would be independent of the COI.

B. Code of Conduct

Lawyers are governed by model rules of professional conduct that have been adopted by forty-nine states.²⁵⁶ Violations of such conduct result in license suspension, disbarment, or judicial sanctions. As of the date of this note, a code of conduct does not exist for Enforcement Staff members. In order to establish an effective oversight system of the enforcement staff, it will be imperative to establish standards that the Enforcement Staff must abide by and be held accountable to.

²⁵⁴ *Id.*

²⁵⁵ *NCAA President says change coming*, ESPN.COM (Sept. 23, 2013), http://espn.go.com/college-sports/story/_/id/9713684/ncaa-president-mark-emmert-says-lot-change-coming-ncaa.

²⁵⁶ *See*, National (ABA) Standards of Conduct, <http://libguides.law.ucla.edu/nationalethics>.

An effective code of conduct should include rules that deter the questionable practices that the NCAA has exhibited in past investigations. For example, the Enforcement Staff pressured interviewees to provide incriminating responses during the Buffalo State and UM investigations. Therefore, this code should forbid the Enforcement Staff from coercing witnesses during their interviews. In the UNLV case, the Enforcement Staff member David Berst lied about the responses that Rodney Parker provided during Parker's interview. Thus, a code of conduct should also disallow the falsification of evidence. This code should also prohibit the Enforcement Staff from bringing meritless allegations before the COI; bar the Enforcement Staff from obstructing an accused's access to material with evidentiary value; and require the Enforcement Staff to disclose all information to the accused individuals, accused institutions, and COI that may negate or mitigate purported offenses.

This list of rules is far from exhaustive; however, it provides a basic framework that the NCAA can expand on. To ensure that the Enforcement Staff adheres to a code of conduct, the NCAA should enumerate consequences for violating the code, such as loss of employment or suspension.

C. Procedural Regulations

While the some Enforcement Staff members have displayed unethical behavior, these members have not violated any rules or procedures. Therefore, it is equally important that the NCAA establishes investigations regulations for Enforcement Staff to follow in addition to a code of conduct. Currently, the only rules in place that that govern investigative procedures are the NCAA bylaws, which set wide parameters for the NCAA staff to operate under. These rules should aim to ensure that enforcement procedures are conducted fairly and with the sole purpose of revealing the truth.²⁵⁷

In the Buffalo State case, NCAA investigators elected not to interview individuals that would have helped supported Tom Cohane's defense. To ensure that accused individuals and institutions receive fair hearings, a rule should be implemented that requires the NCAA to interview all individuals that have knowledge that may mitigate the allegations brought against the accused.

The NCAA could also implement rules that resemble the NCAA due process laws that were passed by Florida, Illinois, Nebraska, and Nevada.

²⁵⁷

Fed. R. Evid. 102.

In the USC case, Todd McNair was not allowed to confront Lloyd Lake. To avoid this unfairness, the NCAA should allow all accused individuals and institutions to confront all witnesses that testified against them. Moreover, to ensure that testimonies are not mischaracterized and are reported accurately, the NCAA should install a rule that *requires* all interviews to be transcribed by a court reporter to ensure and a rule which requires that all written statements by witnesses to be notarized.

In addition, the NCAA could also model some of its investigation regulations after the Federal Rules of Evidence. A common practice that was illustrated in the UM and USC investigations was the use of leading questions, which are questions that suggests the answer to the person being interrogated.²⁵⁸ To prevent suggestive questions during interviews, the NCAA should consider implementing a rule modeled after Federal Rule of Evidence 611(c), which states "leading questions should not be used on direct examination except as necessary to develop the witness's testimony."²⁵⁹ The NCAA could develop a tailored definition of "hearsay"²⁶⁰ and forbid any statements that constitute its definition of "hearsay" from being used at COI hearings.

VI. CONCLUSION

The Enforcement Staff's corrupt practices have far reaching, trickling effects. To date, former USC coach Todd McNair has been unable to secure employment at an NCAA member institution. Tim Cohane, who is currently an associate head coach at a Division III school, never returned to the Division I ranks.²⁶¹ The accused individuals are not the only ones who suffer from improper behavior, but it is also the students who suffer from resulting sanctions and penalties imposed on their respective institutions. Because Government intervention and oversight is not a viable option, internal reform is imperative. The member institutions must ratify rules that inject boundaries and structure into

²⁵⁸ LEADING QUESTION, Black's Law Dictionary (9th ed. 2009), leading question.

²⁵⁹ Fed. R. Evid. 611 .

²⁶⁰ The Federal Rules of Evidence as defines hearsay a "statement that he declarant does not make while testifying at the current trial or hearing" and "a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 803(a).

²⁶¹ Timothy Cohane is also an adjunct faculty member at the Roger Williams University School of Law. According to his university biography, he enrolled in law school to o be able to represent student-athletes and coaches against the National Collegiate Athletic Association. Roger Williams University School of Law, *Tim Cohane*, <http://law.rwu.edu/tim-cohane>.

NCAA investigations; this is the only way that the Enforcement Staff will be stopped from breaking bad.