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## **RESPONDING TO AN NCAA INVESTIGATION, OR, WHAT TO DO WHEN AN OFFICIAL INQUIRY COMES\***

**CHARLES ALAN WRIGHT\*\***

University presidents receive large batches of mail every day, most of it trivial, some of it gratifying, and some unwelcome. Surely, however, there is nothing that can do more to spoil the president's mood than to see in his mail a large manila envelope from the National Collegiate Athletic Association (NCAA) and, on opening it, to find that it is an official inquiry by the NCAA into allegations that the president's institution has violated the constitution and bylaws of the NCAA.

The president's first reaction will be one of shocked dismay. In most instances, the president will have received an earlier letter stating that the NCAA is conducting a preliminary inquiry. He may also have heard that NCAA investigators are on his campus. But hope dies hard; and to receive the actual official inquiry itself, accompanied by a covering letter with the ominous statement that "the allegations appear to be of sufficient substance and reliability to warrant an official inquiry," must be immensely disturbing. The university will expend much time and money to investigate the allegations, prepare its response to the official inquiry, and attend the hearing some months hence before the Committee on Infractions. Even worse, if this costly process results in a finding that the university has committed significant violations, it is likely to receive both a serious penalty and bad publicity. The president's shock and dismay is surely justified.

His second reaction is likely to be one of perplexity. How should he proceed? The hypothetical president in this paper is deeply committed to running an athletic program that will be strongly competitive but that will also live within the rules. He will want to defend only what is defensible, to admit the truth even when it hurts, and to get on with the task of rebuilding a credible and an honorable program. But even with these commendable

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\* This paper reflects the views of Charles Alan Wright, former Chairman of the NCAA Committee on Infractions, and is not intended to represent an official NCAA publication.

\*\*William B. Bates, Chair for the Administration of Justice, The University of Texas; Former Chairman of the NCAA Committee on Infractions.

goals, the president is naturally going to be perplexed about the mechanics of how to proceed and deal with this situation.<sup>1</sup> For almost every college president, this is a once-in-a-lifetime experience.

Official inquiries come in all sizes. Some may have only one or two allegations, while in others there may be as many as one hundred or more. Perhaps thirty to forty is the most common number. The inquiry falls into three distinct parts. The overture is four questions inquiring about how the athletic program is organized and administered at the university, and what procedures the university uses to inform its athletic staff and supporters about what can and cannot be done under NCAA, conference, or institutional rules and policies. These questions seem routine, but often universities find that they learn about policies and structures that simply have evolved over the years from having to put something on paper. At the hearing, the NCAA staff and Infractions Committee members may point out danger areas where the university's procedures create a risk that NCAA legislation might be violated.

The heart of the official inquiry is the second part, a series of highly specific allegations that cite the rules thought to have been violated and then give the names of those believed to have been

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1. This paper is an attempt to provide some guidance for those who find themselves in this unhappy situation. Although I have never been a university president or taken part in responding to an NCAA official inquiry from 1973-78 I sat as a member, and from 1978-83 as chairman, of the Committee on Infractions. In more than 100 cases, I read the responses of institutions and heard their presentations at the hearing. Inevitably, I came to have thoughts about what is effective and what is not.

To prepare this paper, I wrote to a dozen university presidents, chancellors, athletic directors, and lawyers for institutions that had appeared before us and that seemed to me to have done a good job in their investigation and response. Many of those to whom I wrote provided me with thoughtful and helpful descriptions of what they had done and what they would do differently if they could do it over again. I also showed drafts of the paper to my then-colleagues on the Committee on Infractions and to members of the NCAA enforcement staff and was greatly aided by their suggestions and their thoughts. Despite all of this help, the views stated here are mine. They are in no way an official position of the NCAA or the Committee on Infractions.

This paper was originally prepared in 1980 and duplicated by the NCAA for distribution to institutions about to appear before the Committee on Infractions (though with a firm disclaimer that it was my opinion, not that of the NCAA or the Committee). Looking over the paper four years later, I have found very little to change. The prehearing conference was still thought of as an experiment in 1980; it is now a regular part of NCAA procedure, and I have altered the text to show this. I have made other alterations as needed to reflect the constant change and, I would hope, improvement in the enforcement procedures, but these have indeed been small and incremental. Of the six members of the committee, only one was on it in 1980 when this paper was originally written and distributed. I have good hope that the new people on the committee will produce new ideas and find better ways of doing things than those that my colleagues and I in those earlier years were able to devise.

involved in the violation and say what these people are believed to have done and when. The following allegation is fictitious, but is typical of the kind of allegation that appears in many official inquiries.

It is alleged that in January 1984, through the arrangements of head football coach Neils Thompson, student-athlete Charles Wright received the benefit of one-way commercial airline transportation at no cost to him between Ardmore, Pennsylvania, and Austin, Texas, in order to travel to the university following a visit to his home.

Please indicate whether this information is substantially correct and submit evidence to support your response.

Also provide the following:

- a. The actual date of this transportation.
- b. The reasons Wright was provided commercial airline transportation at no personal expense to him on this occasion.
- c. A statement indicating the actual cost of this transportation and the source of funds utilized to pay the resultant cost.
- d. The identity of all athletic department staff members involved in or knowledgeable of these arrangements for Wright, and a description of such involvement or knowledge prior to, at the time of, and subsequent to this trip.<sup>2</sup>

In the typical case described, allegations of this type will go on for many pages. They are likely to name a number of student-athletes and potential recruits, as well as various coaches and boosters. The allegations commonly refer to incidents that occurred in several different years and may concern more than one sport. For some allegations there may be more subparts, calling for specific information and often for documentation, than the form in the example given.

If the president feels somewhat uneasy after reading the substantive part of the official inquiry, he will not be helped by the final series of questions and allegations, which provide a blazing coda to the document. These may include an allegation that named members of the athletic staff "acted contrary to the principles of ethical conduct." They will almost always include allegations in which the president himself is named. Since 1974, NCAA bylaws have required the chief executive officer of each member institution to certify that the institution is complying with NCAA rules insofar as he can determine. Since 1975, each athletic department

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2. This sample allegation is based upon the NCAA CONST. art. 3, §§1-(g)-(4), 1-(g)-(15), 4-(a) (1984-85).

staff member has been required to sign a statement that he has reported his knowledge of, and involvement in, any violations of NCAA legislation involving the institution. Why, the final allegations thunder, did the staff members who were breaking the rules fail to report to university officials; and why did the president, during these years, erroneously certify the university's compliance?

These final allegations sound worse than they really are. What, if anything, the committee will do about them turns almost entirely on what it finds on the substantive charges. These allegations assume that all of the substantive allegations will be proven, which is highly unlikely to happen. In the light of its substantive determinations, the committee decides what to do with these final matters. The Infractions Committee is reluctant to make a finding of unethical conduct except in the most flagrant cases. The allegations about the annual certificates are usually found to be questionable practices rather than violations. Except where the president has himself defied NCAA legislation, the language that refers to him is carefully drawn to make it clear that his certificate was based on the information given him by the athletic department staff and that he did not intend to make an erroneous certificate of compliance.

Now that the president has read through this rather frightening document, what should he do next? Some mechanism must be created to interview persons involved, assemble documentation, and put all of this together in a coherent form. There must also be a mechanism to determine what judgment to make on the information when it is compiled and to decide what corrective or disciplinary actions the institution itself wishes to take. Choosing the right mechanisms, and the people who will be part of them, are probably the most important decisions the president will have to make. These two functions ought not be combined. There should be separate mechanisms for each one. Investigating and decision-making are quite different tasks, best performed by different people. Those who will ultimately speak for the university ought to be kept informed of the progress of the investigation and exercise general supervision of it. It is a mistake, however, to have the same people do both tasks.

For the investigative function, a lawyer seems to be essential. Lawyers are experienced in this kind of work and are sensitive to the rights of the individuals with whom they will be dealing. Not every lawyer will fill the bill, however. In today's litigious world, every university probably has one or more lawyers in its full-time employ. In some instances that lawyer might be the perfect person

to head the investigation, but this is not usually the case. Most university lawyers are experts on such things as HEW regulations, student discipline, land conveyances, and contracts. What is needed here are the skills of the trial lawyer. There is almost never an occasion in an NCAA investigation or hearing for a devastating cross-examination, the Infractions Committee will not be impressed by an impassioned jury-type argument, and the university would be disserved by a lawyer whose goal is to exonerate the institution rather than determine the truth. Even so, a trial lawyer is best because of his experience in dealing with contested issues, in investigating or having others investigate at his behest what the evidence will show, and in making an orderly presentation.

State universities may be able to turn to the state's attorney general for help. Although there may be cases in which this would be the wisest course, I think this an unwise choice in most instances. The president must be sure that the lawyer who is investigating for him is acting in the interest of both the president and the university and shares their desire to find the truth, whether it helps or hurts. A lawyer from the attorney general's office may find himself serving two masters with conflicting goals. On all of these points, however, it is the ability, experience, and integrity of the particular individual that is more important than any generality.<sup>3</sup>

The second mechanism needed is one to appraise all of the evidence the investigator has gathered, to make judgments about what the evidence establishes, and to decide what should be done about it. Ultimately these decisions must be made by the president himself, but how actively he participates depends on the president's interests and on the demands on his time. If the president feels that he cannot do all of this personally, and prefers to review and act on the recommendations of others at the end of the process, it is important that the persons relied upon reflect the philosophy and commitment of the president, be of unquestioned integrity and judgment and, if at all possible, be reasonably familiar with the university's athletic program and the NCAA role in governing intercollegiate athletics. Some institutions have found that either someone in the university administration or the university's faculty representative meets these qualifications. Others have

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3. Normally, a law professor would not seem to be very well suited for this task, but the most impressive investigation and presentation I saw in my years on the committee was made by a professor at the institution's law school. The professor in question had useful experience in private practice, and teaches Criminal Procedure, Evidence and Practice Court. He did a superb job.

turned to a committee, either the regular Intercollegiate Athletics Committee or a special committee designated by the president for this purpose. Any one of these methods can work well if the right kind of people are brought into the process.

Once the president has decided on the mechanisms to be used and the people who will be part of them, there are two other things that I would do, if I were a university president, at the outset. First, I would make it clear to everyone within the university who has knowledge of the investigation that they should make every effort to keep this out of the press. It has been claimed that the NCAA imposes a "gag rule" on institutions charged with violations. That is not, and has never been, true (at least in the years I have been familiar with the process). The NCAA does impose a "gag rule" on itself. The Committee on Infractions and the Council are required to treat all cases before them as confidential, until the final decision has been announced in accordance with the prescribed procedures.<sup>4</sup> The staff is not even allowed to confirm or deny the existence of an infractions case until it has been completely resolved; although the executive director may confirm any information concerning the case which the institution involved has made public.<sup>5</sup>

Some institutions feel that they must announce the facts about an NCAA investigation, either because of local laws or to still rumors that are worse than the actual charges. This is a decision the institution is, and must continue to be, free to make for itself. In some instances, the university does its best to keep the matter out of the press, but too many people become aware of the investigation for one reason or another and eventually a diligent reporter learns of it. It is not impossible, however, to keep an NCAA investigation in confidence. One case that came before the committee involved a major athletic power, and one of the former athletes named in an allegation had become a household word. After the hearing, the committee concluded that there had been some minor violations but that none of the major charges, including the one involving the famous athlete, had been proven. The committee agreed that the university should be given a private reprimand. Not one word ever appeared in the press about the investigation, the hearing, or the penalty.

The reason I think the president ordinarily should try to keep

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4. *Official Procedure Governing the NCAA Enforcement Program* §11, NCAA MANUAL, (1984-85), (hereinafter *Enforcement Procedure*).

5. *Enforcement Procedure* §12(a)(15).

the matter confidential is not for the benefit of the NCAA but for the benefit of the institution and the individuals involved. More than once, institutions appearing before the committee have produced newspaper clippings showing that for an extended period of time the NCAA investigation of their school has been headline news in their state. This, they say, has had a devastating effect on their recruiting during that time and has amounted to a *de facto* probation and punishment, which should be taken into account in assessing a possible penalty. There is no doubt that this kind of publicity can hurt recruiting. Some committee members cannot avoid giving some weight to this factor when thinking about a penalty. It is far better, however, to avoid the publicity altogether rather than rely on it as a mitigating factor going to penalty. Another reason for avoiding publicity is to protect the individuals involved. More often than not, some persons named in an official inquiry will be found by the committee not to have been party to any violation. These persons ought not have the charges against them trumpeted in the newspapers.

The other thing I would urge the president to do is speak with the NCAA staff as soon as practicable. Several presidents, or their representatives, have gone to Shawnee Mission to speak with the staff and have favorably commented on the cooperation they received.<sup>6</sup> The staff can help the institution understand the mechanics of the presentation to be made to the committee, give information on where to find former student-athletes named in the allegations, and offer suggestions about how the university should proceed in its fact-finding. A trip to Shawnee Mission is not essential, however. The NCAA procedures provide that the primary investigator will be available to meet with the institution to discuss the development of its response and to assist in locating principals in the case.<sup>7</sup> An institution should take advantage of this assistance and ask the primary investigator to meet with those at the university who will be involved in preparing its response.

The person who is investigating for the university must then arrange to speak with all of the persons named in the allegations. The cover letter accompanying the official inquiry will have notified the institution that it is requested to read to the individual each allegation involving a present or former institutional staff member, or a prospective, present, or former student-athlete whose eligibility could be affected. The institution must give that person

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6. Shawnee Mission, Kansas is the location of the NCAA headquarters.

7. *Enforcement Procedure*, §12(a)(14).

an opportunity to submit any information he desires and advise him of his rights under NCAA procedures.<sup>8</sup>

Many of the people named in the inquiry will be on the campus or in the community and thus will be readily available. Others may be far away and difficult to track down. In some instances a telephone interview will suffice, although this is not desirable with the central figures. Some of the persons named may refuse to talk to the representatives of the institution, while others may be impossible to locate. All that the university can be expected to do is make its best effort to talk to everyone named. If, at the hearing, the staff reports on an interview it had with an individual who the university has been unable to talk with, the committee will have to take this factor into account in considering how much weight to give the statement made to the staff.

Coaches may be helpful to the university's investigator in locating former athletes. It is not desirable, however, to have coaches who are themselves named in the allegation talk to the former athlete or be present when he is interviewed by the investigator. In most instances in which this has happened, I am sure the discussion between the named coach and athlete has been entirely innocent, and the coach has said nothing more to the athlete than to urge him to talk to the investigator and to tell the truth. Even so, because coaches are figures of authority to most young men and the coach's job and reputation are at stake, conversations between the coach and the athlete or the presence of the coach at the interview may subtly influence the young man, causing him to be less than candid.

A common allegation is that the institution acted improperly in its attempt to recruit an athlete who is now competing for another school. The cooperation of the institution the athlete is now attending will be essential in arranging to interview him. The interview is usually arranged through the athletic director at that institution. If the second institution is reluctant to have its athlete interviewed, or wishes to impose unacceptable conditions on the interview, the assistant executive director for enforcement of the NCAA can be helpful in securing the necessary cooperation.

Some of the persons named in the allegations probably should be spoken with twice by the investigator. It is common, and clearly desirable, to approach first members of the current coaching staff who are named in allegations. These people should be given copies

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8. *Id.* §12(b)(3).

of the allegations in which they are named, advised of their rights, and asked to prepare a written statement responding to each of the charges against them. At a later date, the investigator may wish to go back to these people and ask them any further questions that were suggested by their statements or by information the investigator has obtained from others named in the allegation. Although one hopes that the current staff will be candid and truthful in their statements to the investigator for their institution, it is a serious mistake to assume that this is the case and to ignore all conflicting information that may come to the investigator.

The statements of the persons interviewed on behalf of the institution will be presented as part of the institutional response to the official inquiry. These statements come to the Infractions Committee in many different forms. The most impressive and most helpful form of statement is a verbatim transcript of the interview, either taken by a court reporter or prepared from a tape recording. The committee can then hear what the person said in his own words and can also hear what questions were and were not asked. Unfortunately, this is also the most expensive method of obtaining a statement, and the presence of a court reporter or even a tape recorder can have an inhibiting effect on those being interviewed. A written statement actually prepared by the person in question is almost as good, and the committee is often given statements of this kind from current coaches and from boosters named in allegations.

The most common practice, however, is for the investigator to interview the person, make notes as the conversation takes place, and subsequently prepare a statement for the individual to sign. This is not only the way statements are obtained by universities; it is also the way in which the NCAA staff prepares its information. The interviewer should take great care to try to capture the actual words used by the person he interviewed and avoid putting into the subject's mouth the kind of legal jargon beloved by lawyers but never spoken by real people in real life. Occasionally, the university's investigator, like the NCAA staff, will find that a statement has been prepared faithfully reporting what the individual said, but the individual refuses to sign it. The statement is still useful evidence and should be submitted by the institution. The fact that it is not signed is a matter the committee will have to consider in deciding the weight to be given to the statement. It is also possible that the investigator may call someone to arrange an appointment for an interview and that person will comment on the case but refuse to meet with the investigator. When this occurs, the investigator should immediately dictate his recollection of the conversation

and submit that as part of the response. Even that form of evidence is better than none.

Many universities waste a lot of effort having statements notarized. When these institutions appear before the committee, they make a great point that their evidence was given under oath while the statements obtained by the NCAA staff were not. This argument falls on deaf ears and the committee gives absolutely no weight to a notarial seal on a statement. In the modern world very few people expect divine retribution for a false statement under oath, and the possibility of a perjury prosecution for a false affidavit in an NCAA investigation is nonexistent. A false statement to the Internal Revenue Service or other government agency is more likely to bring prosecution, but even so Congress wisely adopted a statute in 1976 that did away with all requirements of an oath and provided that an unsworn signed statement shall have the same effect as if it were under oath.<sup>9</sup>

In most cases, the NCAA's allegation is based on information given the staff by a person named in the allegation. If the person named denies, when he is interviewed by the university, that the violation described in the allegation actually occurred, the investigator should be alert to the possibility that the person has given different information to the staff. It would then be useful to ask if he spoke with the NCAA, if he told the NCAA the same thing he is telling the investigator, and if he admits a change, why he is saying different things.

Eventually, the investigation will be complete. The investigator will have interviewed, to the extent possible, every person named in the allegations and probably a number of others not named who may have been able to provide relevant information. Statements, in whatever form, will have been obtained, and there probably will be a mass of other documentation: airline tickets; telephone bills; university vouchers; and many similar items.

At this point, the first task is to decide what conclusions, if any, the university can draw from its information. Each allegation closes with "[p]lease indicate whether this information is substantially correct and submit evidence to support your response." The university president, or his delegate, or the committee he has named, must decide whether the allegation is substantially correct. The first sentence of the response to each allegation should state the university's position in this regard. In some instances, the uni-

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9. 28 U.S.C. §1746 (1976).

versity's investigation will have confirmed that the allegation is correct, either wholly or in substance. If this is the case, the university should say so. If there are mitigating circumstances (e.g., if the coach says, "Yes, I gave the young man \$50 to get home, but it was because his mother had died and it was on a weekend when the financial aid office was closed"), the university should say that the allegation is correct but then explain why the seemingly questionable conduct occurred.

There are other allegations that the university will reasonably conclude are not correct and that the violation charged did not occur. When this is the university's position it should say so. The university may be wrong. It may be that every principal in the allegation has denied that an event occurred but that the NCAA staff has objective evidence that demonstrates conclusively that these people are not telling the truth. Even so, the university must form its conclusion on the evidence it has and cannot be faulted for failing to take into account evidence of which it could not reasonably be aware. As discussed later in this paper, procedures have been developed in recent years by the committee and staff to protect universities from unpleasant surprises of this kind.<sup>10</sup>

Finally, there are likely to be many allegations to which the only fair response is that the evidence is conflicting and the university does not know whether the allegation is correct or not. For example, the athlete tells the university, as he has told the staff, that the coach arranged for his airline ticket. The coach flatly denies this and records of the airline or the travel agency or the university fail to show which person is telling the truth. Even though there may be other circumstances that suggest to the university where the truth lies, it is generally wiser for the university not to be too judgmental in a case of genuinely conflicting evidence. It is the function of the Committee on Infractions to resolve conflicts where it can or to conclude that the burden of proof regarding a violation has not been satisfied if the conflict is irresolvable.

The committee's experience does not always lead it in the direction of finding a violation on conflicting evidence. The committee has learned that some high school athletes seek to boost their standing with their contemporaries by inventing fabulous offers that were never made and that having told a tale to their teammates they feel stuck with it when the NCAA investigator comes around. The committee becomes skeptical when it hears that a

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10. See *infra* p. 31.

coach purportedly offered \$10,000 to a blue chip quarterback and \$30,000 to a journeyman offensive guard. When a young man says that "the coach told me he would give me \$10,000 on the spot if I would agree to go to his school and another \$10,000 when I signed the letter of intent," the committee's skepticism becomes strong indeed. In the committee's experience, even those who are prepared to buy an athlete do not make a large down payment before anything is in writing.

There is probably nothing which causes as much tension between the NCAA and universities that have been through an investigation as instances in which the university has concluded that there was no violation and the committee finds that a violation has occurred. University presidents and faculty committee members who have been persuaded to one conclusion are very unhappy when the conclusions they have drawn are said to be wrong. The Committee on Infractions is better equipped to make these judgments on whether a violation has occurred than are other academics, no matter how distinguished in their fields, who have never before had to sit in judgment on matters of this kind. The number of possible violations of NCAA legislation is finite, and over the years the committee has dealt with all of them many times. The committee has been exposed repeatedly to the code words by which persons try to break the rules without seeming to do so. They are familiar, for example, with the recruit who hints that he would like to be given a car and the coach who responds, "Transportation will be no problem." Then the coach, in response to committee questions, states that he was thinking of the good bus service in the community. Another example is the recruiter who has promised the potential athlete that "if you come to our school your mother and father will be able to watch many of your games," and later tells the committee that he meant only that he hoped that a number of the school's games would be on television.

The committee's experience with polygraph examinations has not been good. The most definitive study of the polygraph was made by a committee of the House of Representatives of which Congressman John Moss was chairman. It showed that the notion that the polygraph is a "lie detector" is a myth. The NCAA Committee on Infractions heard three cases, while I was a member, in which polygraph evidence was presented to support the view that no violation had occurred and in each instance a violation was found. In one of those instances, the coach in question was confronted with objective evidence between the time of his polygraph examination and his appearance before the committee and admit-

ted to his university and to the committee that he had been lying. In another case, there was objective evidence, of unquestioned authenticity, that showed that the coach had done the things he had denied. In the third instance, the individual involved continues to assert his innocence; it is impossible in that case to determine whether the committee or the polygraph examiner was right.

The response to an official inquiry is likely to be hundreds of pages long, when the reports of interviews and other supporting material are added to the statement of the university's position on each allegation. There are no rules whatsoever on the form in which the response should be put together, and the committee members carefully read the response prior to the hearing, regardless of how it is compiled. When a lawyer prepares a brief to submit to a court, he tries to put it in the form that will be easiest for the judges to use; institutions should endeavor to assist the committee in the same way.

The response is then sent to the NCAA and to the members of the Committee on Infractions. At Shawnee Mission, it will be scrutinized with great care by the staff members responsible for the case. These staff members may do further investigating where the information submitted by the institution conflicts with what the staff has previously obtained.

At this point in the proceedings the university probably will be invited to participate in a procedure that has been used increasingly since 1979. This is a prehearing conference, in which the principal investigator and others from the NCAA meet with the representatives of the institution to go over the response, allegation by allegation. In some instances, the response will have satisfied the staff that no violation has occurred and the staff will "wash" the allegation (a slang term by which it is meant that the allegation is being withdrawn). There may be other allegations that the institution has admitted are correct, and these will be noted. On those allegations where there is dispute about the facts, the staff member may be able to suggest to the university additional persons it should contact or additional documents it should hunt for in an effort to establish the facts. This prehearing procedure was originally devised to save time at the hearing by identifying allegations that are not in dispute and by reducing the possibility of surprise, but often it also leads the university to important new evidence that otherwise would not have been heard. The prehearing conference was begun in 1979 as an experiment, but the results were so good that it has now become a regular part of the procedure, used in all except the narrowest cases.

Finally, when the day set for the hearing comes, a delegation from the university arrives at the hotel in which the committee is meeting. At the appointed hour, a staff member will invite the representatives of the university to come into the meeting room. At the end of the room the members of the committee will be sitting at a table. The members of the staff are at a table at the right, and at the left is another table for those who have come for, and with, the university. Immediately in front of the door is a smaller table at which a staff member operates and monitors the tape system by which the hearing is recorded.

After the persons from the university have taken their seats and put their papers in order, the hearing is formally opened by the chairman and the committee members are introduced. The institution's president is then called upon to introduce himself and those who are with him. The president does not always come with the university's delegation, and there is no requirement that he do so unless the committee has specifically requested that he be present. In any case of significance, however, it is desirable that the president appear. It is likely to be a useful education for him about any problems that may exist in his athletic programs, and his presence and statements are often persuasive evidence that the university is seriously committed to operating within the rules. After those from the university have been introduced, the assistant executive director for enforcement introduces himself and the other members of the staff who are present. The size of the group at the staff table is likely to be misleading. All staff members who are in the city are expected to sit through the hearing, even though they have never worked on that case, because it is thought that what they hear may be useful to them in investigating and presenting other cases.

First, the spokesman for the university and then the spokesman for the staff is called upon by the chairman to make a brief opening statement. The opening statements should express the overall position of the university and of the staff and should not get into details of particular allegations. Those details are dealt with after the opening statements are completed. The allegations are covered individually, with the committee noting those that are undisputed and discussing those that are in dispute. A staff member presents whatever evidence the staff has, whether it tends to support the allegation or to refute it. The spokesman for the university then says whatever he wishes to say about the allegations. It is not necessary for him to repeat what the university has set forth in its written response. He may wish, however, to emphasize

particular portions of the response, to add additional information that the university has learned since the response was submitted or to argue why the version of the facts submitted by the university should be accepted rather than the version presented by the staff.

Conflicts about the facts may come about through honest differences in recollection or in perception. They may also be the product of deliberate untruth, and in those instances the credibility of the witnesses becomes a legitimate issue. One method of attacking credibility is by showing the bad character of the witness. This attack should be limited to the person's character for truthfulness or untruthfulness, but rigid rules of evidence are not enforced at NCAA hearings. Some universities have sought to impeach athletes who have provided evidence damaging to the university by showing that the young men are given to violence, have had extramarital sexual experiences, do not pay their bills on time, and other matters of this kind. Each member of the committee must decide what weight, if any, to give to this kind of information. Evidence that a person interviewed has lied on other occasions or that he has a motive to injure the university or a particular coach is more clearly relevant. I always found, however, that the best way to resolve conflicting statements was by looking for objective evidence that confirmed one version rather than the other. If there were conflicts that could not be resolved in one way or another, I could not vote for a finding of violation.

As the committee makes its way through the allegations, the university is likely to be surprised by the informality of the procedure. After the spokesmen for the staff and the university have said what they have to say on a particular allegation, questions and comments often go back and forth between the staff and the university; the members of the committee are not reticent about participating in the colloquy themselves. The committee asks questions, frequently quite pointed, of both sides in an effort to settle uncertainties and to determine what really happened. The committee has always sought to conduct its business with dignity but without stuffiness.

The chairman attempts to keep everyone informed of the anticipated schedule for the hearing and to adapt the schedule to accommodate the travel plans of the representatives of the university. More than once, a hearing has begun early in the morning, recessed for lunch, and then continued without further breaks of more than five minutes until 11:00 at night. The committee finds these marathon sessions as unpleasant as does everyone else and it has come to doubt its ability to think clearly and to concentrate

effectively if it has been in session too long. Thus the committee tries to avoid remaining in session well into the evening, although the members still find that they are having meals on what most people would think an erratic schedule.

It is difficult to predict how much time a hearing will require. Experience has demonstrated that the proceedings move more rapidly on the latter allegations than on those at the beginning, when people are unsure about what is expected of them and what they can expect from others. Also, the final series of allegations, dealing with unethical conduct and erroneous certifications, require little discussion.

Finally the last allegation will have been heard. The spokesmen for the university and for the staff make closing statements. The chairman then advises the university of what will happen in the case after the hearing and of the university's opportunity to appeal to the Council if it is dissatisfied with the committee's findings, its penalty, or both. The hearing is then declared adjourned, and, with very few exceptions, genuinely friendly and respectful farewells are exchanged among the participants.

At that point there is nothing the institution can do but wait. The members of the committee go off alone to deliberate over the case. The committee members again go individually through the allegations and discuss the evidence heard until a consensus develops or a motion is made and carried on the finding, if any, that should be made on an allegation. In the deliberations, the committee members are mindful that the NCAA has required them to base their findings on information they determine to be "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs."<sup>11</sup> On a very few occasions, the committee has thought that additional information was needed, either from the institution or the staff, before it could resolve a particular allegation. When this is the case, both the institution and the staff are so advised and have an opportunity to be represented at the time the new information is heard.<sup>12</sup> In a simple case, the penalty is agreed upon as soon as findings on violations have been made. Even in more complicated cases, the committee relies on its own memory of what it has done in earlier cases and consults the file of press releases in earlier cases to refresh its recollection of their details. Under no circumstances does the staff suggest a penalty.

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11. *Enforcement Procedure* §4(b)(2).

12. *Id.* §12(c)(13).

The committee then dictates to the staff its findings and the penalty to be imposed. After the meeting has ended, the staff returns to Shawnee Mission and puts the findings and penalty in the form of a confidential report. The chairman, or the whole committee if necessary, checks this to be sure it accurately reflects what the committee has decided and it is sent out with a covering letter from the chairman.

This lengthy process began when the president received a large envelope from the NCAA with the official inquiry. It ends, unless an appeal is taken, when the president receives another large envelope from the NCAA, this time by certified mail, containing the confidential report. This, too, is not likely to be pleasant reading for the president. In a large case it is unlikely that the president and his colleagues will agree with every finding the committee has made, and they often think the penalty is too great. But at least the uncertainty is over and the insitution can look to the future and to avoiding whatever shortcomings have brought it into conflict with NCAA legislation.