

The New NCAA Independent Accountability Resolution Process for Infractions Cases: An Overview

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Written for and first published by LawInSport

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September 27, 2017 was a pivotal date for college athletics. The FBI made several arrests - including of four Division I assistant basketball coaches -- as part of a federal corruption investigation that focused on coaches being bribed to steer NBA-bound college basketball players toward certain sports agents, financial advisers and apparel companies. That scandal caused the NCAA to appoint a commission, the Commission on College Basketball, chaired by former Secretary of State Condoleezza Rice, to review the situation and make recommendations that would lead to "decisive action."

[The Rice Commission](#), as it became known, issued its recommendations on April 25, 2018¹. One of the recommendations, the creation of an independent process to resolve NCAA infractions matters (also known as rules violations), is the focus of this article. The relevant recommendation taken from the section headings of the report:

"Section 2: Establish Professional Neutral Investigation and Adjudication of Serious Infractions and Hold Institutions and Individuals Accountable

- A. Implement independent investigation and adjudication of complex cases.*
- B. Enact and impose core punishments with significant deterrent effect."*

The NCAA moved quickly to implement the recommendations from the Commission.

There were working groups formed, comprised of individuals from the NCAA membership, that determined how to best implement the recommendations. The Enforcement Infractions Processes Working Group was comprised of conference commissioners, athletic directors, and others with deep knowledge related to the infractions process. It is that working group that put the contours around a new process for resolving infractions cases that has independent involvement and oversight.

The authors of this article are all involved in the new independent process – the Chair of the Infractions Referral Committee (who is also a member of the Independent Resolution Panel), the Administrative Officer for the Independent Resolution Panel and the NCAA Vice President of Hearing Operations, who provides strategic support and coordination for the Independent Accountability Resolution Process. The purpose of this article is to give a high level overview of this new process.

Overview of Process

In order to describe the new infractions process, it is important to first describe the peer-review infractions process which has been the sole way of resolving infractions prior to the creation of the new independent process. All infractions cases

¹ Commission on College Basketball, Report and Recommendations To Address the Issues Facing Collegiate Basketball, April 2018, accessed 24 February 2020, http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf

commence in the peer-review process whether or not a case ultimately is referred to the new independent process.

Any infractions case begins with a Notice of Inquiry sent to an institution from the NCAA enforcement staff. The notice of inquiry is the document that alerts an institution that there is an alleged failure to comply with the NCAA constitution and bylaws or to meet the conditions and obligations of membership. See NCAA Bylaws 19.5.1 & 19.5.3. If the enforcement staff “determines after an investigation that there is sufficient information to conclude that a hearing panel of the Committee on Infractions could conclude that a violation occurred, it shall issue a cover letter and notice of allegations to the chancellor or president of the institution involved . . .” NCAA Bylaw 19.7.1. Institutions and “Involved Individuals” have the opportunity to file a response (NCAA Bylaw 19.7.2). The enforcement staff then issues its reply to any responses to the Notice of Allegations.

The NCAA Committee on Infractions (“COI”) then assigns a hearing panel and conducts a hearing (see, e.g., NCAA Bylaws 19.7.4, 19.7.4, & 19.7.7). The COI hearing panel is then charged with rendering a final written infractions decision. NCAA Bylaw 19.8.1. A decision of the COI may be appealed by the institution or involved individuals to the infractions appeals committee (see e.g. NCAA Bylaws 19.10.1 & 19.10.2).

An important note here, the COI is [comprised](#) of primarily individuals from members schools and conferences. For the last two decades the COI has also incorporated the perspective of public members, who are individuals not connected to NCAA member schools. They are all volunteers committed to fairness and equity in college athletics.²

The Commission on College Basketball recommended the NCAA adopt a process where the investigators and adjudicators are independent of the NCAA and NCAA member schools and conferences.

The Independent Accountability Resolution Process (“IARP”) was thereby created to provide an alternate option, that may be taken by certain parties on a certain timeline, for the resolution of infractions cases determined to be complex and suitable for resolution under the new process.

The authorizing legislation for the IARP was [adopted](#) in August 2018 by the Division I³ Board of Directors. The legislation became effective on August 1, 2019. The IARP is only available in Division I. The four components of the IARP are the:

- Independent Accountability Oversight Committee;
- Infractions Referral Committee;
- Complex Case Unit; and
- Independent Resolution Panel.

² Division I Committee on Infractions, last accessed 9 July 2020, <http://www.ncaa.org/governance/committees/division-i-committee-infractions>

³ <http://www.ncaa.org/student-athletes/future>

The process can best be seen in overview from this [graphic](#)⁴:



INDEPENDENT ACCOUNTABILITY RESOLUTION CASE PATH



To understand the process fully, one must refer to the NCAA Bylaws and the specific entity procedures (all of which we reference below).

⁴ 'Inside the Division I Infractions Process', NCAA, last accessed 05 July 2020, https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/DIINF_InfractionsProcessIndependentAccountabilityResolutionFactSheet.pdf

The Independent Accountability Oversight Committee

The Independent Accountability Oversight Committee (“IAOC”) is charged with administering and overseeing the IARP. One of the recommendations from the Commission on College Basketball is relevant for discussing the IAOC: The recommendation for the inclusion of independent members on the NCAA Board of Governors, the highest committee in the NCAA formal governance structure, was also adopted by a vote of the entire NCAA membership during the 2019 NCAA Annual Convention.

The IAOC is comprised of three of the five independent members that were appointed to the NCAA Board of Governors and the Chair and Vice Chair of the NCAA Division I Board of Directors (NCAA Bylaws 19.11.2.1.1 & 19.11.2.1.2.). The IAOC appoints its own chair from among its members who are also independent members of the NCAA Board of Governors (NCAA Bylaw 19.11.2.1.4).

Specifically, the key duties of the IAOC are to:

- (a) *Oversee the Infractions Referral Committee, Independent Resolution Panel and Complex Case Unit;*
- (b) *Consult with the Board of Directors in revising operating procedures for the independent accountability structure;*
- (c) *Appoint the Independent Resolution Panel, Committee on Infractions and Infractions Appeals Committee members on the Infractions Referral Committee, and the independent external investigators and advocates on the Complex Case Unit;*
- (d) *Nominate individuals to serve on the Independent Resolution Panel, subject to appointment by the Board of Directors;*
- (e) *On request by the Independent Resolution Panel, appoint a member of the general public (with formal legal training who is not associated with a collegiate institution, conference, or professional or similar sports organization and who does not represent coaches or athletes in any capacity) knowledgeable in the infractions process and with the NCAA constitution and bylaws to confer with the panel during its review of a particular case;*
- (f) *Resolve operational matter related to the Infractions Referral Committee, Independent Resolution Panel and Complex Case Unit in accordance with applicable operating procedures; and*
- (g) *Carry out such other duties directly related to hearing an infractions case and as assigned by the Independent Accountability Oversight Committee.”*
(NCAA Bylaw 19.11.2.1.5)

It is important to note here that the IAOC does not have any substantive responsibilities related to any infractions case. Its role is that of providing oversight of the process.

The inaugural IAOC consists of, among others, a former White House Chief of Staff under President Obama, who serves as the chair, a former Surgeon General of the United States, two Presidents of NCAA Division I universities, and a Hall of Fame

former NBA and NCAA basketball player and current co-owner of a NBA franchise. The list of current IAOC members is [available here](#).⁵

The IAOC completed its work forming the various components of the independent structure and recruiting and having the Independent Resolution Panel approved by the NCAA Division I Board of Directors in the summer of 2019, in time for an August 1 [rollout](#).⁶ In addition, the IAOC adopted and the Division I Board of Directors approved the procedures that in addition to Article 19 govern the IARP.

The procedures we will discuss and the links to those procedures can be found here:

- [Independent Accountability Oversight Committee](#);
- [Infractions Referral Committee](#);
- [Complex Case Unit](#);
- [Independent Resolution Panel](#).

The Infractions Referral Committee

The Infractions Referral Committee (“IRC”) consists of five members:

- one from the Independent Resolution Panel (who serves as Chair of the IRC),
- one from the NCAA Division I Committee on Infractions, one from the NCAA Division I Infractions Appeals Committee, and,
- the NCAA Division I Council Chair and Vice (NCAA Bylaws 19.11.2.2.1). The IRC are appointed by the IAOC (NCAA Bylaws 19.11.2.1.5(c) & 19.11.2.2.2). The IRC also has a vice chair elected by the IRC to fulfill the duties of the chair if the chair is “unable to fulfill his or her duties.” (IRC Procedures 2-10).

The inaugural IRC consists of, among others, a former Attorney General of the United States, an Ivy League University athletic director, a conference commissioner, a faculty representative from a major Division I university, and an Olympic movement former general counsel and current arbitrator/mediator, who serves as chair. The members of the inaugural IRC can be [found here](#).⁷

The function of the IRC is to serve as an administrative body charged with deciding whether to approve or reject requests for referral of an infractions case to the IARP. Specifically, the IRC “shall decide whether to refer cases to the Independent Accountability Resolution Process pursuant to the standard and process for referral” and shall:

⁵ ‘Independent Accountability Oversight Committee’, last accessed 5 July 2020, https://iarpc.s3.us-east-2.amazonaws.com/IA+Oversight+Roster_Final.pdf

⁶ ‘New independent infractions process launches’, NCAA, 1 August 2020, last accessed 5 July 2020, <http://www.ncaa.org/about/resources/media-center/news/new-independent-infractions-process-launches>

⁷ Members of the inaugural IRC, last accessed 5 July 2020, https://iarpc.s3.us-east-2.amazonaws.com/FINAL+Infractions+Referral+Committee+Roster+_Final.pdf

- (a) *Review and respond to requests by the involved institution, vice president of enforcement and Committee on Infractions chair for referral to the independent accountability resolution structure, and positions taken by parties and the Committee on Infractions chair in response to the requests;*
- (b) *Prepare and approve decisions on the requests;*
- (c) *Report to the Independent Accountability Oversight Committee; and*
- (d) *Carry out such other duties as assigned by the Independent Accountability Oversight Committee.” (NCAA Bylaws 19.11.2.2.5).*

IRC members are prohibited from participating in a decision “*if he or she is directly connected with an institution under investigation or if he or she has a personal, professional or institutional affiliation that may create the appearance of partiality.*” (NCAA Bylaws 19.11.2.2.6). Clear affiliations are easy to address (e.g., currently works at an institution, has a degree from an institution, has close relationships with an institution or individuals in leadership or athletics at an institution). IRC members can recuse themselves in the event there is any potential issue that might create a concern about their impartiality when viewed by participants in the process.

The IRC Procedures provide that a party may seek to disqualify an IRC member based on a conflict of interest by making such a challenge in writing to the IRC chair not later than fifteen days after notification of the submission of a referral request (IRC Procedures 2-7-4). The IAOC has the final authority to determine whether a conflict of interest exists. *Id.* If the IAOC determines that an IRC member has a conflict, the member will be recused and a substitute member may be appointed. *Id.* The substitute member shall be from the same body as the committee member unable to participate (IRC Procedures 2-8).

Sending a Case to the Infractions Referral Committee

After an institution receives a notice of inquiry from the enforcement staff, the institution and the NCAA Vice President of Enforcement can request the referral of a pending matter to the IRC (NCAA Bylaw 19.11.3.2). The request for referral must be in writing (NCAA Bylaw 19.11.3.2.1(c)).

The Chair of the COI may make a request for referral after the issuance of the Notice of Allegations.

Involved individuals may not submit a request for referral to the IRC. IRC Procedures 6-1.

Any request for referral must be made no later than fifteen calendar days after the enforcement staff’s reply to responses to a Notice of Allegations (NCAA Bylaw 19.11.3.2.1(b)).

All parties identified above as having authority to submit a request for referral of a case to the IRC must make the request for referral in writing to the IRC (NCAA Bylaw 19.11.3.2.2).

The referral request shall be limited to ten pages, and should:

“include an analysis of how the Association’s interests are best served by resolving the case under the independent accountability resolution structure. As part of this analysis, the referral request should identify the referral factors and the impact of the referral factors within the case. Also, the referral request should reference supporting documentation by attaching or hyperlinking relevant documents to the referral request.” (IRC Procedures 6-3-1 & 6-3-2)

After a referral request is made, a response to a referral request may be made by all parties to an infractions case, including involved individuals, and the NCAA Committee on Infractions chair. Although involved individuals may not make a request for referral, all parties known to a case at the time a referral request is made have the opportunity to respond (IRC Procedures 7-1). The response must be made within 20 calendar days of the confirmation of the submission of the referral request (IRC Procedures 7-2). The response must be written and is limited to ten pages (IRC Procedures 7-3-1). The response *“should include:*

- (1) a clear articulation of position on the referral request;*
- (2) a statement addressing the arguments and the analysis included in the referral request; and*
- (3) a reference to supporting documentation.”* (IRC Procedures 7-3-2)

Review by Infractions Referral Committee

If a request for review by the IRC is filed timely, then the IRC is tasked with reviewing two aspects.

The IRC must first determine if additional information is needed to act on the request (NCAA Bylaw 19.11.3.2.3). The IRC may request additional information from institutions, involved individuals, the NCAA vice president of enforcement and/or the NCAA Committee on Infractions Chair “to assist the committee in making its determination to grant or deny a referral request.” (IRC Procedures 8-1).

After it receives the requested additional information, or if the time passes for the IRC to receive such information, then the IRC will undertake to render a decision on the request based on its standard of review set forth below. (*Id.*)

If the IRC determines it does not require additional information to act on the request, then the IRC will undertake to render a decision on the request based on the standard of review set forth below. (*Id.*)

The IRC standard of review is as follows:

“Approve the referral request if the Association’s interests are best served by resolving the case under the independent accountability resolution structure, including when a case involves unique policy issues or factors that, when weighted in totality, could impede accurate and effective resolution of the case under the internal infractions structure.” (NCAA Bylaw 19.11.3.1)

The NCAA Bylaws provide non-exclusive and non-exhaustive examples of referral factors the IRC may consider:

- (a) Cases involving major policy issues that may implicate NCAA core values and commitments to the collegiate model;*
- (b) Stale or incomplete facts;*
- (c) Lack of acceptance of the core principles of self-governance, such as adversarial posturing or refusal to cooperate;*
- (d) Actual or perceived misconduct by the involved parties;*
- (e) The scope, scale and duration of the case, and other factual complications;*
- (f) Breaches of confidentiality; and*
- (g) Increased stakes.” (NCAA Bylaw 19.11.3.1.1)*

The IRC is required to consider the referral request, and any responses thereto, and any additional information sought and received, against the standard of review set forth above, when making its decision (NCAA Bylaw 19.11.3.2.3). The IRC will make a determination on the request for referral based upon the written submissions and there is no in person hearing before the IRC related to the request (IRC Procedures 9-1).

Even if all parties agree that a case should proceed to the independent process, the IRC must still review the matter with an eye toward whether it satisfies the standard of review set forth above.

While there are no prescribed time periods by which the IRC must render its decision, the IRC’s practice since inception has been to meet monthly at a minimum, but the committee has been conducting scheduled calls every two weeks, so that it can immediately consider referral requests in a timely, and efficient manner.

As of publication of this article, the IRC has referred three (3) cases into the Independent Accountability Resolution Process.

Decision of Infractions Referral Committee

The IRC decision must be by a majority of the IRC and written (NCAA Bylaw 19.11.3.2.4; IRC Procedures 9-1 & 9-2). The decision of the IRC is provided to the institution, the Committee on Infractions, the NCAA Vice President of Enforcement, and any involved individuals who have appeared in the case (NCAA Bylaw 19.11.3.2.4.1). In addition, copies of the referral decision will also be sent to the IAOC. IRC Procedures 9-4.

The proceedings of the IRC are confidential (IRC Procedures 3-1). However, limited disclosure may be made by the IRC when it refers a case into the Independent Accountability Resolution Process. The disclosure is limited to the fact that the case has been accepted into the independent process and notes that no additional information will be provided until the release of a decision by the IRP (IRC Procedures 3-1-2). In other words, the fact of the referral is communicated publicly but not the content.

The decision by the IRC to refer a matter is final, and the case cannot return to the Committee on Infractions (NCAA Bylaw 19.11.3.2.4.2). It is possible that in a case where a decision by the IRC to not refer a matter has been made may again come to the IRC where the case further develops in the peer-review process and the relevant deadlines have not yet lapsed (IRC Procedures 6-3-3). In making a subsequent request, the party making the request *“shall identify the new information and explain the distinction between the current referral request and any previously denied referral requests in the case.”* *Id.*

Complex Case Unit

Once a case is referred to the IARP, the IAOC appoints the five Independent Resolution Panel members who will hear the case, appoints a Chief Panel Member from one of those five, and the Independent Investigator and Advocate that will form the Complex Case Unit (“CCU”).

The CCU, by rule, is to consist of “one or more external investigators, one or more independent external advocates, and select enforcement staff members” (NCAA Bylaw 19.11.2.4.1).

The CCU, at this writing, consists of six entities; three entities that will serve as Independent External Investigators and three entities that will serve as Independent External Advocates. The list of the entities that comprise the CCU as of this writing can be [found here](#)⁸.

The procedures define the role of the enforcement staff with the CCU. The enforcement staff participation is limited to one member of the CCU and that person’s role:

“will be limited to serving as a resource to the independent external investigator and independent external advocate by providing process support and information related to previous investigative efforts connected to the case.”
(CCU Procedures 1-2)

⁸ List of the entities that comprise the Complex Case Unit, last accessed 9 July 2020, <https://iarpc.org/complex-case-unit/>

Once a case has been referred to the IRP *“the vice president of enforcement, in conjunction with the managing director of enforcement, will assign a member of the enforcement staff to the matter.”* (CCU Procedures 1-2-1-1). But the external advocate and external investigator shall first be nominated by the enforcement representatives on the CCU based on the needs associated with the referred case, including but not limited to *“[s]ubject matter expertise”, “[f]actors pertinent to the [IRC’s] decision to refer a case to the IRP”, and “[p]osture and timing of case [sic].”* (CCU Procedures 1-2-2-1 & 1-2-3-1).

Once the enforcement identifies one or more external advocates and investigators, *“they shall forward the entities’ name to the [IAOC] for approval and appointment”* but if *“the enforcement staff and [IAOC] cannot agree on the appropriate [external investigator or external advocate], the [IAOC] may appoint one or more independently”* (CCU Procedures 1-2-3; IAOC Procedures 3-2-2).

The responsibilities of the CCU include the following:

- (a) Determine whether supplemental investigation of potential violations of the NCAA constitution and bylaws is warranted;*
- (b) If supplemental investigation is warranted, develop, to the extent reasonably possible, all relevant information about potential violations;*
- (c) Process violations it believes to be substantiated through final resolution by the [IRP];*
- (d) Report to the [IAOC]; and*
- (e) Carry out such other duties as assigned by the [IAOC].* (NCAA Bylaw 19.11.2.4.3)

A CCU member is not permitted to *“participate in a case if he or she is directly connected with an institution under investigation or if he or she has a personal, professional or institutional affiliation that may create the appearance of partiality.”* (NCAA Bylaw 19.11.2.4.4)

Within the CCU process, the assigned investigator will work to understand complex case issues, parties, records, data and information, develop and execute investigative case strategies, provide expertise in identifying and locating individuals, secure cooperation and make requests for production of documents and records, and transition information and investigative findings to the independent external advocate.

The independent advocate will work to assess, organize and analyze factual information, evaluate and articulate the credibility of competing information, arguments and positions, exercise appropriate discretion in leveling allegations of violations, draft written case documents, and present relevant information necessary for hearing panels to reach an informed decision.

The CCU is charged with determining whether supplemental investigation of potential violations of the NCAA Constitutions and Bylaws is warranted (supplemental to the enforcement staff investigation already conducted). NCAA Bylaw 19.11.4.1. If

supplemental investigation is warranted, the CCU is to develop, to the extent reasonably possible, all relevant information about potential violations. *Id.*

If an investigation is to be conducted by the CCU, then the CCU may use any of the following investigative tools to gather information:

- a. *Letter of inquiry.*
- b. *Interviews with individuals who may have relevant knowledge.*
- c. *Document and record requests.*
- d. *Review of publicly available information.*
- e. *Observation of public places (on or off campus).*
- f. *Research.*
- g. *Communications between departments of the NCAA national office.*
- h. *Communications with sources. (CCU Procedures 3-1)*

If the CCU intends to use any other investigative tool, it should first obtain written approval from the [IAOC]. (Id.)

These are the same tools that are available to the enforcement staff in the peer-review process before the Committee on Infractions.

CCU members are not to misrepresent their identity or title to an individual who may provide information relevant to an investigation (CCU Procedures 3-2).

The CCU Procedures go on to identify the specifics of how interviews are to be conducted and how document and record requests are to be made (CCU Procedures 3-3 & 3-4).

The CCU is to process violations it believes to be substantiated through final resolution by the Independent Resolution Panel (See CCU Procedures 1-1). What this means can be found in the NCAA Bylaws:

“If the [IRC] refers a case to the independent accountability resolution structure before the enforcement staff issues a notice of allegations, and the [CCU] determines that there is sufficient information for a hearing panel to conclude that a violation occurred, the [CCU] shall issue a cover letter and notice of allegations to the chancellor or president of the institution. The institutions and/or involved individuals, if applicable, shall be given notice of the alleged violation(s), the details of the alleged violation(s), the possible level of each alleged violation, the processing level of the case, the available hearing procedures and the opportunity to answer the allegations. The notice of allegations shall also identify the factual information and aggravating and/or mitigating factors on the which the [CCU] may rely in presenting the case.”
(NCAA Bylaws 19.11.5.1)

In short, the CCU may file a notice of allegations.

If the CCU intends to issue, supplement or amend allegations, the CCU may submit the draft or amended notice of allegations to the academic and membership affairs (“AMA”) staff of the NCAA for an audit of the bylaws that have been cited.

“One or more of the AMA CCU liaisons, in consultation with the appropriate bylaw team(s), will review the draft or amended NOA to determine whether (1) the allegations, as drafted, support that a violation occurred; (2) the cited bylaws are appropriate; (3) the appropriate versions of the bylaws are cited; and (4) additional bylaws should be cited.” (CCU Procedures 4-1)

In addition, the CCU and the institution involved may agree to submit an agreed statement of facts to the AMA staff for a formal interpretation and if the institution disagrees with the interpretation provided the institution may appeal to a committee of representatives from member institutions under existing NCAA legislation and AMA procedures (CCU Procedures 4-2).

The CCU is required to follow the enforcement staff’s internal operating procedure for charging guidelines when making its charge(s) in its notice of allegations (CCU Procedures 4-3).

The CCU operates within the parameters of Article 19 and the procedures that govern the IARP. In essence, the CCU operates in a similar fashion to how the enforcement staff would operate in the peer-review process. There is a slight difference in the approach in that the enforcement staff serves as the investigators and presenters in the peer-review process and that role is separated in the independent structure. While the independent investigators and independent advocates work in tandem they each are tasked with specific roles within the process.

Independent Resolution Panel

The true heart of the new independent structure is the Independent Resolution Panel (“IRP”). The Commission on College Basketball recommendation was that those outside of the NCAA membership make decisions related to conduct of member schools that do not comport with the collegiate model. The IRP consists of fifteen members nominated by the IAOC and approved by the NCAA Board of Directors, based on their expertise or background in legal, higher education and/or sports (including with experiences as judge, litigator, arbitrator/mediator, and athletics administration,) (NCAA Bylaws 19.11.2.3.1 & 19.11.2.3.2). IRP members are not permitted to be employees of NCAA member institutions or conferences (NCAA Bylaw 19.11.2.3.1). IRP members serve for staggered terms (IRP Procedures 1-6).

Current members of the IRP include former state court trial judges, a former Canadian trial court judge, a full-time law professor, several experienced commercial and/or sports arbitrators (with experience with the two leading US arbitration providers of JAMS and the AAA and some with the Court of Arbitration for Sport), sports lawyers,

a former NCAA Division I athletic director, and a former NCAA athlete. The current list of IRC members can be [found here](#).⁹

The role of the IRP is analogous to that of the Committee on Infractions. Acting through its appointed hearing panels of five, the IRP is tasked with performing all duties related to hearing an infractions case referred to the panel, including resolving pre-hearing matters, conducting a hearing and preparing and issuing a decision. Specifically, its broad remit is legislatively defined as follows:

The [IRP] hears and decides cases through hearing panels. Disciplinary or corrective actions other than suspension or termination of membership may be prescribed by panel members present and voting at any duly called hearing thereof, provide the call of such a hearing shall have contained notice of the situation presenting the disciplinary problem. The penalties prescribed by a panel are separate and apart from any penalties prescribed as part of the Academic Performance Program by the Committee on Academics. The [IRP] shall:

- (a) Find facts related to alleged NCAA constitution and bylaw violations;*
- (b) Conclude whether the facts constitute one or more violations of the NCAA constitution and bylaws;*
- (c) Upon concluding that one or more violations occurred, prescribe an appropriate penalty consistent with the provisions of this article;*
- (d) As approved by the [IAOC] at the request of the panel, confer with a member of the general public (with formal legal training who is not associated with a collegiate institution, conference, or professional or similar sports organization and who does not represent coaches or athletes in any capacity) knowledgeable in the infractions process and with the NCAA constitution and bylaws during the panel's review of a particular case;*
- (e) Coordinate with the office of the Committee on Infractions as necessary for logistic, administrative or other support related to implementation of the [IRP's] decision;*
- (f) Coordinate with the Committee on Infractions, which will monitor compliance with prescribed penalties. In the event that an institution fails or refuses to implement prescribed penalties, the [IRP] may prescribe additional penalties, provided the institution is given the opportunity to appear before the panel;*
- (g) Prescribe penalties during the investigation if an institution or individuals fails to satisfy the responsibility to cooperate;*
- (h) Sanction parties and/or their representative(s) for behaviors that inhibit the panel's ability to effectively manage the docket, ensure a professional and civil decorum in all proceedings or otherwise efficiently resolve infractions cases;*
- (i) Report to the [IAOC]; and*
- (j) Carry out such other duties as assigned by the [IAOC]. (NCAA Bylaw 19.11.2.3.5)*

⁹ Current list of IRC members, last accessed 9 July 2020, http://iarpcc.org/wp-content/uploads/2019/08/IRP_roster_20190812.pdf.

“Independence” from the participants in the process is an essential characteristic of the IRP. Other elements of the independent process have appropriate connections to the NCAA – for example, the composition of the IAOC and IRC include representatives from the Board of Governors and the Division I governance structure. In addition, the staff that provides the strategic coordination and support for the IARP include the Vice President of Hearing Operations, and members of the hearing operations staff. But the IRP itself is independent.

In addition, the IRP and the independent process as a whole is supported by a communications firm, also independent from the NCAA. The communications firm will work with the Chief Panel Member on the release of a decision made by the IRP and field any media inquiries during the pendency of a case.

Independence can also mean an unfamiliarity with the NCAA structure and regulations. The former judges and arbitrators in the IRP are used to knowing very little about the law specific to a particular case and learning it as necessary when a case arises. But to ensure that all IRP members have a foundational understanding of NCAA legislation and to stay current, the IRP has had an in-person orientation session in Washington DC upon its inception and undertakes regular monthly recorded webinars that provide high-level overviews of NCAA legislation and structure with required pre-reading. The IRP will meet, at least, annually to continue to ensure common knowledge about administrative and procedural matters that will impact the work of the IRP as a whole and the work of hearing panels.

The IRP has also recently elected an administrative officer for itself who is responsible for liaising with the staff that supports the IRP, the IAOC, relevant governance bodies within the NCAA structure when requested, and provides a voice for the collective IRP outside of case specific matters.

Procedure Before the Independent Resolution Panel

Appointment of the Hearing Panel

When a case is referred to the IRP, a five-member hearing panel, plus one alternate, for that case will be appointed from among the fifteen IRP members by the IAOC. A computer program will generate the five hearing panel members and the alternate (NCAA Bylaw 19.11.2.3.4; IRP Procedures 2-1 & 2-3; IAOC Procedures 3-3-1. NCAA Bylaw 19.11.2.3.7; IRP Procedures 2-1; IAOC Procedures 3-3-1).

The computer program will generate the panel members based on a variety of factors including lack of a conflict of interest, assignment to other panels, training sessions attended and calendar availability. The IAOC may modify the panel “due to availability and subsequently disclosed conflicts of interest, generate the same panel for more than one case, and/or reassign a case to a different panel.” (NCAA Bylaw 19.11.2.3.7; IRP Procedures 2-1; IAOC Procedures 3-3-1). The IAOC will also appoint

one from the group of five to serve as chief panel member to preside over the hearing of an infractions case that has been referred.

Strict conflict of interest rules apply:

“No hearing panel member shall participate in a case if he or she is directly connected with an institution under investigation or if he or she has a personal, professional or institutional affiliation that may create the appearance of partiality. It is the responsibility of the panel member to remove himself or herself if a conflict exists. Objections to the participation of a panel member shall be addressed pursuant to applicable operation procedures.” (NCAA Bylaw 19.11.2.3.6)

A party may seek to disqualify a panel member based on conflict of interest by making such a challenge in writing, stating the basis for the disqualification request, to the chief panel member no later than fifteen days after receiving notice of the assignment of the panel member unless otherwise specified by the chief panel member. IRP Procedures 2-5-2. *“The IAOC has the final authority to determine whether a conflict of interest exists.”* (IRP Procedures 2-5-2; IAOC Procedures 3-3-3).

If a panel member is unable to participate in a case prior to the hearing the alternate panel member appointed by the IAOC will replace that panel member (IRP Procedure 2-5-2; IAOC Procedures 3-3-4).

The Chief Panel Member

The chief panel member has quite a bit of responsibility related to conducting the hearing of a referred case. The duties of the chief panel member are to, specifically:

- (a) *Preside over cases assigned to his or her hearing panel;*
- (b) *Resolve procedural and other matters that arise prior to the hearing as authorized in Bylaw 19.11.5.6.1;*
- (c) *Schedule deadlines for matters related to the case as authorized in Bylaw 19.11.5.6.2;*
- (d) *Conduct a hearing status conference with the parties and decide matters addressed in the conference as authorized in Bylaw 19.11.5.6.3;*
- (e) *At the request of the [CCU], determine whether to grant limited immunity to a current or former institution employee with responsibility related to athletics based on information that the employee reports in situations in which he or she would otherwise be subject to disciplinary action as described in Bylaws 19.9.56.4 and 19.9.8-(i). Such immunity shall not apply to the employee’s involvement in violations of NCAA legislation not reported, to future involvement in violations of NCAA legislation by the employee or to any action taken by an institution;*
- (f) *At the request of the [CCU], determine whether to grant limited immunity to a student-athlete or prospective student-athlete in situations in which he or she might otherwise be declared ineligible for intercollegiate competition based on information reported to the enforcement staff by the individual or a third party*

associated with the individual. Such immunity shall not apply to the individual's involvement in violations of NCAA legislation not reported, to future involvement in violations of NCAA legislation by the individual or to any action taken by an institution;

(g) Oversee hearing administration and logistics; and

(h) Carry out other duties related to the processing of an infractions case. (NCAA Bylaw 19.11.2.3.7).

In addition, the chief panel member is responsible to

- *“[R]esolve procedural and other matters that arise prior to the hearing.” (NCAA Bylaw 19.11.5.6.1; IRP Procedures 4-1).*
- Determine specific individuals who may or must attend the hearing or are to be excluded from the hearing for some or all of it. (NCAA Bylaws 19.11.5.7.3., 19.11.5.7.3.1 & 19.11.5.7.3.2).
- Determine immediate penalties during investigation for failure to cooperate if requested by the CCU or determine the hearing panel shall hear such a request. (See IRP Procedures 4-10 and detailed discussion below).
- Determine whether an Independent Resource is needed for the case. If yes, the Chief Panel Member would request the IAOC to *“appoint a member of the general public with formal legal training knowledgeable in the infractions process and with the NCAA Constitution and bylaws, nominated by the chief panel member, to confer with the hearing panel during the review of the case.”* (IRP Procedures 5-1).
- Determine if a conference member must attend the hearing. (IRP Procedures 5-4-2).
- Enforce proper decorum for the hearing. (IRP Procedures 5-15).
- Determine the logistics of drafting the final decision. (IRP Procedures 6-1-3).

The Chief Panel Member establishes the case management plan for a case. The case management plan may address:

- a. *Scheduling of any supplemental investigation by the CCU, including but not limited to deadlines for document and record production and interviews.*
- b. *Case processing deadlines, including but not limited to deadlines for the:*
 1. *CCU to issue the notice of allegations (if not issued by the enforcement staff before referral) or adopt, withdraw, supplement or amend the notice of allegations (if issued by the enforcement staff before referral).*
 2. *Responses to the notice of allegations (if not submitted before referral) or to any amended notice of allegations issued by the CCU after additional assessment or investigation.*
 3. *CCU's reply to the responses to the notice of allegations.*

- c. *Deadline for submission of information to be considered by the hearing panel.*
- d. *Deadline for submission of any prehearing motions.”* (IRP Procedures 4-2-2).

There are a large number of rules regarding the content and filing of the notice of allegations, the response to the notice of allegations, and any reply before the hearing panel, deadlines for doing so, the format and page limits, and related matters (see, e.g., IRP Procedures 4-3, 4-4, 4-5, 4-6, 4-7). It would be prudent for practitioners appearing before the IRP to familiarize themselves with these requirements. Failure to adhere to these specific requirements may result in the hearing panel taking adverse action toward the non-adhering party, including excluding such noncomplying submissions or information of that party (IRP Procedures 8-2).

After the CCU submits its reply, the chief panel member is required to conduct a hearing status conference with the parties by telephone or video. IRP Procedures 4-8-1. The hearing status conference may cover, at the chief panel member's discretion, the following:

- a. *Procedural matters to be resolved before the hearing, including the deadline for the submission of additional information, any allegations that the CCU intends to amend or withdraw, or the need for additional investigation.*
- b. *Disputes between the parties, including regarding the submission of additional information and identification of individuals with information germane to the case.*
- c. *Scheduling and logistics of the hearing, including the location, date, time, mode and estimated length.*
- d. *Hearing attendees, including individuals with information germane to the hearing.*
- e. *Order and manner of presentation of information at the hearing.*
- f. *Issues to be discussed during the hearing.* (IRP Procedures 4-8-1; IRP Procedures 5-6).

In addition, the chief panel member has authority to decide on all matters arising at the hearing status conference and may instruct the parties to brief issues not resolved at the conference. (*Id.*) As a result of the conference, the chief panel member “*shall issue a hearing status report memorializing decisions made by the chief panel member and agreements reached as a result of the hearing status conference*” which shall be confidential (IRP Procedures 4-8-2). The chief panel member may also conduct additional hearing status conferences at the chief panel member's discretion. *Id.*

The chief panel member has a great deal of granted authority for running the process leading up to the hearing and the hearing itself, nothing prevents the chief panel member, where possible and practical, from engaging the rest of the hearing panel to participate in the process of making the decisions for which the chief panel member is ultimately responsible.

Conferring with an Independent Resource During Case Review

The chief panel member for a particular case may determine that additional resources or expertise are needed for handling a particular case in the form of “*a member of the general public with formal legal training knowledgeable in the infractions process and with the NCAA Constitution and bylaws*” and the chief panel member may request the IAOC to appoint such person, nominated by the chief panel member for the IAOC’s approval and appointment, “*to confer with the hearing panel during the review of a case.*” (IRP Procedures 5-1; IAOC Procedures 3-4-1 & 3-4-2). This individual “*must not be associated with a collegiate institution, conference, or professional or similar sports organization, and not presently represent coaches or athletes in any capacity or have a conflict of interest*”. (*Id.*) The hearing panel “*may confer with this individual through its review of a case.*” (*Id.*)

The independent resource is to “*support the hearing panel in the review of the case by providing background information related to the NCAA Constitution and bylaws, infractions process and prior infractions cases*” but “*the independent resource shall not provide the panel with interpretations of the NCAA legislation.*” (IRP Procedures 5-1-1).

The independent resource will only be informed of the names of the parties but will not have access to any other case information and may not attend or participate in a case management conference, hearing status conference or hearing, or participate as a voting member during deliberations of the hearing panel (IRP Procedures 5-1-2).

There is transparency related to the use of an independent resource by a panel. The parties and their conference(s) shall be informed of the identity of the independent resource and shall be informed of the general nature of the questions asked by the panel and the responses of the independent resource to the same (IRP Procedures 5-1-3 & 5-1-4; IAOC Procedures 3-4-3).

The independent resource is to identify and disclose conflicts of interest the independent resource may have concerning a particular case and if that creates a disabling conflict in the view of the IAOC then the chief panel member may request the IAOC to appoint another person to serve as the independent resource to the hearing panel (IRP Procedures 5-1-5 & 5-1-6; IAOC Procedures 3-4-4 & 3-4-5).

The Hearing/Attendees

The hearing is to be “*held when practicable after the hearing status conference*” and “*in person or by videoconference, except as authorized by the chief panel member in unique circumstances.*” (IRP Procedures 5-2). The chief panel member must determine “*the location, date, time, mode and estimated length of the hearing*” and “*may change the location, date, time, mode and estimated length as necessary.*” *Id.* The location, date, time, mode and estimated hearing length shall be notified in the written report of the hearing status conference. IRP Procedures 5-2-1. A hearing may be continued by the chief panel member “*upon agreement of the parties, a request of a party or at the chief panel member’s discretion*” and continuances are “*discouraged and only granted in unique circumstances.*” (IRP Procedures 5-2-2).

Hearing logistics shall be overseen by the chief panel member and coordinated by the staff that supports the IRP at the chief panel member's direction (IRP Procedures 5-14).

The quorum for the hearing panel to conduct a hearing and deliberate is four panel members (IRP Procedures 5-5).

Attendees at the hearing are limited, as these are not public proceedings. The parties may have legal counsel in attendance (IRP Procedures 5-4-1). A conference representative may attend a hearing involving a conference member, and the conference member is expected to attend if the chief panel member specifically requests his or her attendance (IRP Procedures 5-4-2). A representative "from a member institution that is not the institution involved in the case but employs an involved individual at the time of the hearing" is strongly encouraged to attend since the hearing panel may "prescribe a show-cause order related to the involved individual." (IRP Procedures 5-4-3). The show cause could have an impact on the employing institution.

Presentation of Statements and Evidence

The hearings shall be conducted "*in a fair and efficient manner.*" IRP Procedures 5-6-1. Each party is entitled to present an opening statement prior to the presentation of information, with the institution presenting its opening statement first, followed by any involved individuals, and then the CCU. (IRP Procedures 5-6-2). The chief panel member may also permit the institution's conference to present an opening statement, though this is not mandatory. (*Id.*)

The parties shall be permitted to present information in support of or in opposition to the allegations, as determined by the chief panel member. IRP Procedures 5-6-3. The IRP prefers the parties to present information through their party representatives "*and the factual information in the record.*" (*Id.*) The chief panel member shall track the time used by any party and enforce any time limits that have been set. (*Id.*)

The parties may be permitted to present documentary information and information through in-person statements of individuals with information relevant to the case. (*Id.*) The CCU is entitled to present its information first, followed by the other parties, and the CCU may present rebuttal information. (*Id.*)

Only the hearing panel may question the parties "*(i.e., CCU representatives, institutional representatives and any involved individuals)*", and the parties and their representatives may not do so (IRP Procedures 5-6-4-1). The hearing panel "*may question any individuals with information germane to the case permitted to attend the hearing.*" (IRP Procedures 5-6-4-2). The parties "*may also question individuals with information related to the case directly, provided that the chief panel member shall have the authority to limit questioning or lines of inquiry based on, without limitation, relevance, that the questioning is cumulative, or that the questioning has become harassing or abusive.*" (*Id.*)

Exclusion of Evidence at the Hearing

The parties are to present “*material, relevant information necessary for the hearing panel to reach an informed decision, including information that corroborates or refutes an allegation.*” (IRP Procedures 5-7). The hearing panel may determine the relevance and materiality of the information offered and may exclude information it deems to be cumulative, irrelevant, or unreliable. (*Id.*)

The hearing panel is permitted to consider hearsay evidence, as well as documentary evidence which the hearing panel may give such weight as the hearing panel deems appropriate after considering any objection made to its admission (IRP Procedures 5-7-1 & 5-7-2).

Interpretations of NCAA Legislation

The hearing panel may request to consult with a representative from the NCAA Academic and Membership Affairs staff (“AMA”) (IRP Procedures 5-9). The hearing panel may also refer a question to AMA during deliberations. *Id.* If the panel initiates a consultation, AMA shall issue an interpretation in writing and it shall be added to the record. (*Id.*) “If any party intends to refer to an AMA interpretation, whether formal or informal, the request to AMA and AMA’s interpretation must be in writing and made part of the record.” (*Id.*)

Closing Arguments/Closing the Hearing/Post-Hearing Submissions

Each party may also present a closing statement “after the presentations on the allegations.” (IRP Procedures 5-6-5). The CCU presents its closing statement first, followed by the other parties. (*Id.*) The chief panel member will permit the CCU time for a reply. (*Id.*)

The chief panel member will declare the hearing closed at the conclusion of the hearing (IRP Procedures 5-6-6). The effect of this is to close the presentation of in-person information, but the chief panel member may establish deadlines for the submission of additional information and/or briefing by the parties after the hearing is closed (IRP Procedures 5-6-6-1). In certain unique circumstances, the chief panel member may accept additional information not requested by the panel after the hearing but submitted by a party into the record but the party wishing to submit such information must provide the information to all other parties before submitting to the panel and the other parties should be given an opportunity to “indicate their positions on whether the submission should be accepted into the record.” (*Id.*)

Amendment of Proposed or Self-Imposed Penalties

If an institution seeks to amend the penalties it proposed or self-imposed in its response to the notice of allegations, it may do so only if it seeks the permission of the chief panel member to do so in writing (a verbal statement at the hearing shall not

constitute sufficient notice of its intention to amend its proposed or self-imposed penalties) (IRP Procedures 5-6-6-2).

Transcription/Recording of Hearings/Confidentiality

Generally, the hearings will be transcribed by a court reporter and recorded (NCAA Bylaw 19.11.5.7.4; IRP Procedures 5-14-5). The transcript of the proceedings will not be provided to the parties (IRP Procedures 5-14-5).

All aspects of the proceedings before the IRP are confidential and are expected to be treated as such by the parties (IRP Procedures 3-2).

Decision of the Hearing Panel

The decision of the IRP will be written and will provide reasons (specifically, findings of fact, conclusions of violations, penalties, corrective actions, and, for institutions, requirements and any other conditions and obligations of membership). NCAA Bylaw 19.11.6.1. The hearing panel is required to deliberate after presentations by the parties and the deliberations shall be private and confidential (NCAA Bylaw 19.11.5.8; IRP Procedures 5-8). The deliberations may occur in person or through teleconference or videoconference and will “*remain open until the release of the infractions decision.*” (IRP Procedures 5-8).

The hearing panel decision shall be unanimous and dissenting opinions are not permitted (IRP Procedures 6-1). The hearing panel may consider prior cases as “instructive” but they are not binding. (*Id.*) “*Unless otherwise determined by the chief panel member, the chief panel member will assign a panel member or members the initial draft of the opinion based upon the decisions made during deliberations*” and, “*The initial draft will be reviewed and edited by panel members and approved by the panel.*” (IRP Procedures 6-1-3). There is no deadline by which the hearing panel must draft its decision, only “*when practicable . . . after the hearing.*” (IRP Procedures 6-1-2).

The hearing panel may request additional information from the parties, though all parties are to be afforded an opportunity to respond to any such information so provided (NCAA Bylaw 19.11.5.8.1; IRP Procedures 5-8-1).

In reaching its decision, the:

“hearing panel may request that the NCAA academic and membership affairs staff provide an interpretation of applicable legislation based on facts submitted by the hearing panel. If an interpretation is requested, the institution, involved individuals and the [CCU] will be notified in writing of the interpretation request and the response. The institution may appeal the interpretation in accordance with Constitution 5.4.1.2.” (NCAA Bylaw 19.11.5.8.2).

The hearing panel is required to base its decision:

“on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs. The information upon which the panel bases its decision may be information that directly or circumstantially supports the alleged violation.” (NCAA Bylaw 19.11.5.8.3)

In addition, the hearing panel is required to consider a number of other principles in reaching its decision:

“Facts established by a decision or judgment of a court, agency, accrediting body, or other administrative tribunal of competent jurisdiction, which is not under appeal, or by a commission, or similar review of comparable independence, authorized by a member institution or the institution’s university system’s board of trustees and regardless of whether the facts are accepted by the institution or the institution’s university system’s board of trustees, may be accepted as true in the infractions process in concluding whether an institution of individual participating in the previous matter violated NCAA legislation. Evidence submitted and positions taken in such a matter may be considered in the infractions process.” (NCAA Bylaw 19.11.5.8.3.1).

Also, the hearing panel *“may infer that materials requested during an investigation by the [CCU] and/or enforcement staff but not produced by an institution or individual would support an alleged violation for which the party may be subject to a penalty pursuant to Bylaw 19.9.”*¹⁰ (NCAA Bylaw 19.11.5.8.3.2).

In addition, the hearing panel *“may view the failure or refusal to participate in an interview requested by the [CCU] and/or enforcement staff as an admission that an alleged violation, for which the individual may be subject to a penalty pursuant to Bylaw 19.9, occurred.”* (NCAA Bylaw 19.11.5.8.3.3).

And finally, the hearing panel *“may view the failure by an institution or individual to submit a timely response to a notice of allegations as an admission that an alleged violation, for which the party may be subject to penalty pursuant to Bylaw 19.9, occurred.”* (NCAA Bylaws 19.11.5.8.3.4).

Of note is the fact that these rules are permissive and not mandatory; the hearing panel may choose to adopt such views and inferences, or not, in its sole discretion.

Perhaps more notable to the parties is that the hearing panel:

¹⁰ NCAA Bylaw 19.9 is lengthy and comprehensive, setting forth the various violations for which member institutions can be found responsible. See <https://web3.ncaa.org/lstdbi/search/bylawView?id=32096>.

“may make specific factual findings and conclude whether violations occurred based on information presented by the parties or at a hearing even if different from the notice of allegations. Additional factual findings and conclusions of whether violations occurred is most appropriate in circumstances where new findings or conclusions directly relate to the subject matter contained in the record or in situations where the panel has placed the parties on reasonable notice prior to the hearing. If, however, the panel believes additional allegations unrelated to the subject matter in the record are warranted based on information developed at the hearing, then it may issue notice of the additional allegations to all parties. If the panel issues a subsequent notice, the panel shall afford and schedule an opportunity for all parties to respond to additional allegations. Following review of any responses, the panel shall determine whether a hearing is necessary to address the additional allegations. The decision of whether a subsequent hearing is necessary rests with the panel. The parties will be notified of the location, date, time, mode and estimated length of any subsequent hearing.” (IRP Procedures 5-11; see also NCAA Bylaws 19.11.5.7.2).

Where the hearing panel determines that a violation occurred, the hearing panel:

“shall prescribe an appropriate penalty pursuant to Bylaw 19.9 or recommend to the Board of Directors suspension or termination of membership in an appropriate case. Failure to fully implement the prescribed penalty may be considered a violation and/or may subject the institution, and/or an institution employing an involved individual under a show-cause order, to further disciplinary action by the [IRP].” (NCAA Bylaw 19.11.5.8.4)

While penalties prescribed in the peer-review process and the independent process are outlined in Bylaw Article 19, Figure 19-1, Bylaw 19.11.5.8.4.1 provides clearly that, *“Penalties prescribed by the Committee on Infractions and [IRP] in prior infractions cases shall have no precedential value.”* (See also IRP Procedures 6-1).

After the decision of the hearing panel is provided to the parties, the hearing panel is required to release a public infractions decision (NCAA Bylaw 19.11.6.1.2). Specifically:

“The public infractions decision will not include names of individuals, but the panel may, at its discretion, identify the chancellor or president of the institution (in cases involving lack of institutional control); the director of athletics and/or any individual with direct responsibility and oversight of the athletics department (in cases involving lack of control or failure to monitor); the head coach(es) of the sport(s) involved; and, if appropriate, the chair or other members of the institution’s governing body.” (NCAA Bylaw 19.11.6.1.2; see IRP Procedures 6-1).

The decision released to the parties, the confidential decision, contains the names of “involved individuals.” (IRP Procedures 6-1). The chief panel member will be responsible for announcing the decision at a media briefing held for that purpose.

The decision of the IRP is “*final, binding and conclusive, and shall not be subject to further review by any governance body*”; if you end up before the IRP, there is no opportunity to appeal a hearing panel decision (NCAA Bylaw 19.11.6.2). The Commission recommended that cases resulting from the independent process should be final and not subject to further review. No appeal opportunity was adopted in legislation by the Division I membership.

If there is a clerical, typographical or computational error in the decision, then:

“Within seven days after receipt of the infractions decision, a party may request the hearing panel to correct any [such] errors in the decision. The other parties shall be given five days to respond to the request. If the panel corrects the errors in the decision, the panel will identify the corrections at the top of the first page of the decision.” (IRP Procedures 6-4)

An important note here is that a decision from the IRP will govern the conduct of the NCAA membership going forward. The decisions will be viewed in the same manner as decisions issued by the COI.

Immediate Penalties During Investigation for Failure to Cooperate

The IRP may prescribe “*immediate penalties during the investigation for failure to cooperate*” with the “*enforcement staff.*” (IRP Procedures 4-10-1).

The CCU may make this request in writing by “*asserting that an institution and/or individual failed to satisfy the responsibility to cooperate pursuant to [NCAA] Bylaw 19.2.3 and requesting immediate penalties*”, including “*all necessary information to review the petition appropriately, including sufficient detail regarding the circumstances related to the asserted failure to cooperate and any materials on which the enforcement staff may rely.*” (IRP Procedures 4-10-2-1). The institution or individual is given an opportunity to respond in writing and the CCU may reply thereto, on deadlines to be set by the chief panel member. (IRP Procedures 4-10-2-2 & 4-10-2-3). The formatting and page length requirements for this petition process are set forth in IRP Procedures 4-10-2-4.

The chief panel member may hear this proceeding alone or may request that the entire hearing panel consider the request (IRP Procedures 4-10-2-5). The chief panel member may request additional information or clarification and shall decide whether to resolve the matter on the written submissions or by using “*teleconference, videconference or other mode.*” (*Id.*)

The decision on the petition will be communicated in writing and will identify conclusions and any prescribed penalties (IRP Procedures 4-10-2-6). The resolution of this petition is final and not subject to appeal, like the rest of the activities of the IRP. (*Id.*)

The Hearing Panel's Job May Not Be Finished After Issuing a Decision

The IRP is required to “coordinate with the Committee on Infractions., which will monitor compliance with prescribed penalties” (IRP Procedures 7-2-1; see NCAA Bylaws 19.11.2.3.5(f)). If the NCAA Committee on Infractions “leadership team” determines that an institution is failing or refusing to implement penalties set by a hearing panel of the IRP, then the “hearing panel may prescribe additional penalties.” IRP Procedures 7-2-1. Institutions that have been the subject of IRP hearing panel action are required to file various compliance reports with the NCAA Committee on Infractions, which will then review such reports for compliance issues (IRP Procedures 7-2-2, 7-2-3, 7-2-4, & 7-2-5). If the NCAA Committee on Infractions determines a lack of compliance, “the [IAOC] will appoint the same hearing panel that adjudicated the case, if feasible, to consider the Committee on Infractions determination” (IRP Procedures 7-2-7). The hearing panel may propose further action, including “modifying existing penalties, proposing additional penalties, modifying the terms of probation or referring the matter to the CCU for investigation and processing” (IRP Procedures 7-2-8). If the institution does not, after receiving written notice of the hearing panel’s decision, accept a proposal to modify a penalty or terms of probation or add a penalty, then the institution may request a hearing. (*Id.*) That hearing will be before the same hearing panel. (*Id.*)

If a hearing panel determines that an institution has not taken appropriate disciplinary or corrective action regarding an individual who has violated the NCAA Constitution and Bylaws, the hearing panel may “issue an order that the institution take additional disciplinary or corrective action unless the institution appears before the panel to show cause why the additional penalties should not be applied.” IRP Procedures 7-3. If an institution then requests to show cause “why additional penalties should not be applied, the IAOC will appoint the same hearing panel that adjudicated the case, if feasible, to consider the institution’s position on additional penalties.” *Id.*; see also IAOC Procedures 3-3-6 (setting forth the IAOC’s obligation, after a hearing panel decision has been released, to assign a hearing panel to review compliance).

In cases involving post-season ban penalties, the panel assigned to a particular case may consider recommending or the NCAA Division I Committee for Legislative Relief may

“ask a hearing panel whether it recommends that the Committee for Legislative Relief waive the one-year residence requirement for student-athletes who transfer because the panel placed the student-athlete’s original institution on probation with sanctions that would preclude the institution’s team in that sport from participating in postseason competition during all remaining seasons of the student-athlete’s eligibility. If asked by the Committee for Legislative Relief for a recommendation regarding a waiver, the [IAOC] will appoint the same hearing panel that adjudicated the case, if feasible, to consider the request.”

(IRP Procedures 7-4; see also IAOC Procedures 3-3-6, authorizing the IAOC to appoint hearing panels in these cases).

A Few Words on Immunity

The NCAA enforcement staff and the CCU may use limited immunity as an investigative tool to obtain complete and truthful information from individuals about their knowledge of or involvement in NCAA violations. Hearing panels will, for purposes of proceedings before them, be able to grant limited immunity to current or former institution staff, student-athletes, or prospective student-athletes related to potential NCAA violations. See *generally* IRP Procedures 4-9; CCU Procedures 3-5. This form of limited immunity is “specific to the identified individual in the request” made for such immunity and “is in exchange for that individual providing complete and truthful information regarding identified potential violations and fully cooperating with the CCU and/or enforcement staff.” (*Id.*) There is no provision in the relevant procedures for immunity beyond limited immunity being granted.

Generally, limited immunity applies until revoked by the hearing panel (IRP Procedures 4-9-2). It does not apply:

- a. *When the grant of immunity has been to an individual’s involvement in other past violations not reported to the CCU or enforcement staff.*
- b. *When the individual fails to report violations.*
- c. *To any future violations committed by the individual.*
- d. *To any action taken by the institution or any other entity. (Id.)*

The effect of a grant of limited immunity is as you might expect. Institution employees in athletics will not be subject to disciplinary action for their involvement “related to disclosed conduct predating the grant of immunity.” IRP Procedures 4-9-3(a). Student-athletes or prospective student-athletes will not lose NCAA eligibility for the future because of the involvement in violations related to disclosed conduct predating the grant of immunity” provided the student-athlete or prospective student-athlete otherwise meets the other initial and continuing NCAA academic eligibility and certification criteria (IRP Procedures 4-9-3(b)). With respect to student-athletes, limited immunity does not cure ineligible competition by that individual predating the grant of limited immunity. (*Id.*)

In the new independent process, the CCU may request that an individual be granted limited immunity. The request goes to the hearing panel (IRP Procedures 4-9-4). The CCU may make this request at any time during the pendency of an investigation or the pendency of a case (CCU Procedures 3-5-1). The request shall be in writing. (CCU Procedures 3-5-4; IRP Procedures 4-9-4). The CCU request “*shall detail the general circumstances surrounding the request*”, “*shall contain a summary of the relevant facts that support a grant of limited immunity*”, and it shall “*also identify the involved parties and state whether the involved parties are represented by legal counsel or other advisor.*” (IRP Procedures 4-9-4; CCU Procedures 3-5-4).

Recipients of or candidates for limited immunity may be represented by legal counsel or another advisor throughout the process (CCU Procedures 3-5-2).

The CCU may consider the following factors when determining whether to seek limited immunity for an individual:

- a. *Whether the individual is a prospective student-athlete, current or former student-athlete, or a current or former staff member.*
- b. *Whether the individual received limited immunity in the past, and if so, the value of the information reported to the CCU.*
- c. *Whether the individual has information that will assist the investigation or otherwise support or refute allegations.*
- d. *The likelihood of obtaining relevant information with or without the grant of limited immunity.*
- e. *The nature of the potential allegations involved in the case.*
- f. *The position of the individual's institution on the request for limited immunity.*
- g. *The impact on the timeliness of an investigation.*
- h. *Any other circumstances supporting or refuting a grant of limited immunity.* (CCU Procedures 3-5-3).

The chief panel member, or if unavailable a designee panel member, reviews and either grants or denies the request in writing. *Id.* “*If the chief panel member grants the request, the chief panel member will provide the CCU a memorandum, which constitutes the sole and complete expression of the grant of limited immunity and its terms and conditions.*” (*Id.*) Where possible, the parties should present a pre-agreed grant of limited immunity memo to the chief panel member to consider and sign. In any event, the CCU is required to “*prepare an appropriate document outlining the IRP's terms and conditions of the limited immunity agreement*” which “*shall be signed by all parties subject to the limited immunity agreement, with a copy of the acknowledgement being provided to all signatories.*” (CCU Procedures 3-5-5).

If limited immunity has been granted before the case is referred to the IRP, then the limited immunity shall continue unless otherwise revoked in accordance with the IRP procedures (IRP Procedures 4-9-5).

Limited immunity may be revoked upon request by the CCU if it “*has a reasonable belief that an individual granted limited immunity has not provided complete and truthful information during the investigation or at the hearing, or otherwise has violated the terms of his or her limited immunity agreement*” (IRP Procedures 4-9-6). Such a request shall be made in writing filed with the chief panel member stating the basis for the revocation request and shall be provided to all parties. (*Id.*) The chief panel member is also empowered to act on his or her own after issuance of limited immunity after the notice of allegations issues “*if it appears on the record that the individual has not complied with the terms or conditions of the limited immunity*” (*Id.*; see also IRP Procedures 4-9-7 (setting for the process for the chief panel member to consider revoking limited immunity)).

Using Technology to Aid Efficient Confidential Case Management

The work of the IRC and the IRP, and those who appear before these groups, is conducted electronically through a secure website and email system maintained by the NCAA (See IAOC Procedures 3-1; IRP Procedures 3-4). The system uses strict security protocols and email policies that are enforced for all participants. All filings are made using a secure filing and case management system that provides the appropriate level of access to information to the participants as is required for their role in a particular matter. All notices are issued through that system, and, aside from at a hearing, all interaction with the committee members, chief panel member, or hearing panel members, as appropriate to any particular circumstance, occurs through that system. The parties are given notice of the filing of submissions by each other and of correspondence and decisions of the IRC and IRP, as appropriate, through the system.

To further expedite the use of information technology-based efficiencies in case management, the parties are expected to use hyperlinks to authorities wherever possible, including through uploading authorities and then hyperlinking to those uploads in their submissions. Overall, this is a relatively sophisticated case management system that should assist in expediting matters and minimizing burden on those interacting with the new independent process.

Conclusion

There is a new avenue for resolving cases outside of what had been the traditional peer-review process. The peer-review process remains well positioned to handle the overwhelming majority of infractions cases. But for those handful of cases each year that do not neatly fit in a process that is predicated on a self-regulating and collaborative model, the IARP is now available.

The key component of the IARP is that individuals who have no direct connection to NCAA member schools will be sitting in judgment of NCAA member schools who have been alleged to engage in conduct contrary to the collegiate model. There are many similarities between the peer-review process and the independent structure, including the rules that are being evaluated in each and the tools that are available to conduct that evaluation. What is distinctly different is the process by which a case will be adjudicated if you are in one system or the other. Both processes are designed and intended to uphold the mission and values of college athletics and the ethical compliance with the member adopted rules.

This new NCAA dispute resolution model is unlike any other in sport anywhere in the world. It is a hybrid process with similarities to both administrative law and arbitration. Not many successful sporting endeavors are willing to open themselves up to a such a high level of potential public scrutiny from within.

The NCAA, as a member-driven institution, is taking the lead insofar as its member organizations are agreeing to subject themselves to outside scrutiny from

independent adjudicators in appropriate cases. This bodes well for instilling greater public confidence in the NCAA and its member institutions in their efforts to run college athletics. The Independent Accountability Resolution Process provides the opportunity to achieve a result in any particular case that is free of the perception of internal or institutional influence.

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Written by:



Naima Stevenson Starks, Esq.

Naima Stevenson Starks is vice president of hearing operations, a position she assumed in June 2019 after a 13-year career in the national office, most recently as deputy general counsel and managing director of academic and membership affairs.

In her latest role, Stevenson Starks serves as direct liaison to the NCAA's Committees on Infractions and Infractions Appeals Committees in all three divisions and oversees the staffs that support these committees. These committees decide on penalties for member schools and involved individuals for violating NCAA rules.

She also provides strategic coordination for the NCAA's new Independent Accountability Resolution Process, which stems directly from the Commission on College Basketball's recommendation to bring more outside voices and expertise into the NCAA's infractions process.

Prior to her appointment as vice president, Stevenson Starks managed litigation activities and provided legal and regulatory counsel to various areas of the national office and NCAA governance committees. Before joining the NCAA, Stevenson Starks was a corporate and securities associate with the law firm of Arnold & Porter in Washington, D.C. While at Arnold & Porter, she advised a variety of corporations on the ever-changing landscape in securities regulations, assisted clients with raising equity in private equity transactions, and advised clients in merger and acquisition transactions.

An experienced speaker and panelist, Stevenson Starks has served as a panelist for the Sports Lawyers Association, the National Association of College and University Attorneys, the Indiana Bar Association, and many colleges and universities.

Originally from Brooklyn, New York, she is a graduate of the University of Maryland, College Park and received her law degree from Harvard Law School.



Jeffrey G. Benz, Esq.

Jeff is an accomplished arbitrator, mediator and certified electronic discovery specialist with JAMS in Los Angeles and London and is a Door Tenant at 4 New Square Chambers, London.

Jeff started his law practice in San Francisco, first with a small maritime and admiralty firm and then with a major international law firm (Coudert Brothers) as an antitrust, commercial and IP litigator. As a former General Counsel of the United States Olympic Committee (where he was responsible for all of the legal work (commercial, regulatory, governance, and otherwise) of the world's largest and most successful National Olympic Committee), and other leading sports entities (including a stint as a California licensed professional boxing promoter, and separately as professional beach volleyball executive), and as a former athlete, Jeff's sports credentials are without compare, though sports disputes form only a part of Jeff's overall dispute resolution experience and practice.

A Court of Arbitration for Sport arbitrator and mediator for over 20 years (many of his cases would be characterized as leading or high profile cases, particularly in doping-related matters), Jeff has acted as arbitrator or mediator or counsel in a wide variety of sports, including, among others, archery, athletics/track and field, badminton, basketball, biathlon, bobsleigh, boxing, canoe and kayak, cycling, equestrian, figure skating, football/soccer, golf, gymnastics, ice hockey, rowing, rugby, sailing, shooting, skateboarding, skeleton, speedskating, surfing, swimming, table tennis, taekwondo, team handball, tennis, triathlon, volleyball and beach volleyball, water polo, and wrestling, and in cases involving complex disputes and transactions involving sponsorships, film financings and production, technology, licensing, and live events in the sports and entertainment industries. Jeff's wide and varied subject matter expertise in sports includes disputes involving commercial/licensing, governance, discipline, doping, matchfixing, selections, transfers, employment, rulemaking/regulatory, safeguarding, and technology issues.

In 1998-99, Jeff was one of five members of the independent Mitchell Special Bid Oversight Commission, headed by former US Senate Majority Leader George Mitchell, which was charged by the USOC with investigating allegations of vote buying, influence, and bribery in the bid for the 2002 Olympic Winter Games in Salt Lake City. The recommendations made by the Commission were adopted in whole by the USOC, and the International Olympic Committee adopted many of them when it reformed its Olympic Games bid process.

Jeff is Chair of the National Collegiate Athletic Association's Infractions Referral Committee and is a member of its Independent Resolution Panel. He is a member of the World Athletics Disciplinary Tribunal and is a Sport Resolutions arbitrator and mediator. He is also a member of the doping panels for the PGA Tour and Ladies Professional Golf Association.

He is a long-time member of the Sports Lawyers Association Board of Directors and former chair of its International Committee, and he is a member of the National Sports Law Institute, both of which are based in the US.

Jeff is a CEDR accredited mediator, an IMI certified mediator, a Fellow of the Chartered Institute of Arbitrators, and a Fellow of the College of Commercial Arbitrators.

He has extensive practical experience (as both counsel and neutral) in commercial arbitration, mediation, early neutral evaluation, and other forms of non-court dispute resolution. He is an active, appointed, member of several panels of arbitrators and mediators including the American Arbitration Association, JAMS, Hong Kong International Arbitration Commission, Beijing Arbitration Commission, China International Economic and Trade Arbitration Commission (CIETAC), Shenzhen Court of International Arbitration, London Court of International Arbitration, International Chamber of Commerce, Court of Arbitration for Sport (CAS), and formerly the Rugby Football Union (RFU).

Jeff has taught dispute resolution, arbitration, mediation, and sports dispute resolution as an adjunct professor at the law school at Los Angeles-based Pepperdine University, and he contributes regularly to the literature and international speaking on dispute resolution and sports law.

Since 2013, Jeff has been named annually as one of a handful of worldwide professionals in the Who's Who of Entertainment and Sports Law, where he is one of the few neutrals so recognized in the field. In 2016, the BBC noted he is "widely regarded as amongst the most experienced judges" in world sport. According to Who's Who Legal UK Bar, where he has been listed since 2016, he is "widely recognised for his first-rate arbitration practice" and clients note he is 'in a class of his own' when it comes to complex sports disciplinary disputes."

He is qualified as a US lawyer as a member of the bar of the states of California, Colorado, Hawaii, and New York, and a number of United States federal district and appellate courts, and he is qualified as a barrister in England and Wales. Jeff has AB and MBA degrees from the University of Michigan and a JD degree from the University of Texas School of Law. Jeff also attended a semester of law school at Queen Mary University of London and the Institute of Advanced Legal Studies, and started his professional career as an intern in Lloyd's Claims Office, in London. Having lived in Pittsburgh, Detroit, Austin, San Francisco, Denver, and Los Angeles, Jeff now lives in London, splitting time in the US.

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Hon. Hugh Fraser (Ret.)

Hugh is an international arbitrator and mediator with JAMS in Toronto and New York City. He is a retired Judge, having spent over 25 years as a Justice of the Ontario Court of Justice in Ottawa and Toronto, Canada.

Prior to this appointment to the bench, Hugh worked as a barrister in private practice, as counsel to the Canadian Department of Justice, and as corporate counsel for a multinational technology firm. He also served on the Canadian Human Rights Tribunal.

Hugh is an Olympian and is recognized as an international expert in sports law. He has been an arbitrator with the Court of Arbitration for Sport for 25 years and served on the the first ad hoc Court at the Olympic Games in Atlanta, in 1996. He has been a member of several other ADR panels in North America and Europe including, the PGA/LPGA Anti-Doping Panel, the World Athletics Disciplinary Tribunal, the Sport Dispute Resolution Centre of Canada (SDRCC), the Swiss Arbitration Association, and the International Centre for Dispute Resolution. Hugh has resolved sports disputes throughout the U.S. and Canada as well as in Australia, Brazil, Grenada, Malaysia and Switzerland.

Hugh is currently a member of the National Collegiate Athletic Association (NCAA) Complex Case Independent Resolution Panel and serves as the Panel's Administrative Officer.

Hugh has held several administrative positions in sport including President of the Sports Federation of Canada; President, Commonwealth Games Foundation of Canada; VicePresident, Commonwealth Games Association of Canada; and Chef de Mission for the Canadian team at the World Championships in Athletics in Helsinki, Finland. From 1988-1990 Hugh was a member of the Dubin Commission of Inquiry into the use of anabolic

steroids and other banned substances in sport. The recommendations from that Commission provided the impetus for a new drug testing regime for sport in Canada.

Hugh has taught and lectured in Sports Law and dispute resolution at Carleton University and Concordia University and speaks often on these topics at various seminars held by universities and dispute resolution providers.

Hugh is a Fellow of the Chartered Institute of Arbitrators and a Fellow of the College of Commercial Arbitrators. In 2020, he was named a co-recipient of the Canadian Bar Association's President's Award, given for significant contribution to the legal profession in Canada.

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