

**RESPONSE OF THE UNIVERSITY OF KANSAS
TO
DIVISION I COMMITTEE ON INFRACTIONS'
PETITION TO REFER CASE NO. 00874
TO THE INDEPENDENT ACCOUNTABILITY RESOLUTION STRUCTURE**

JUNE 8, 2020

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INTRODUCTION

The University of Kansas (KU or University) has reviewed the NCAA Division I Committee on Infractions (COI) Petition to Request Referral of the case to the Independent Accountability Resolution Process (Referral Petition) and agrees that referral to the Independent Accountability Resolution Process (IARP) is appropriate for the men's basketball portion of the Amended Notice of Allegations (ANOA), Allegations 1-5.¹ However, KU does not agree that all of the factors cited by the COI are applicable to this case, or the COI's characterization of those factors is accurate. Further, KU does not agree that the football portion of the ANOA, Allegations 6-8, meets the legislated requirements for referral to the IARP. Therefore, KU respectfully requests that the Infractions Referral Committee (IRC) bifurcate the football allegations and men's basketball allegations and remand the football portion of the case to the COI for immediate resolution.²

With respect to the men's basketball portion of the ANOA, the University believes that four factors support referral to the IARP: (1) major policy issues that may implicate NCAA core values and commitments to the collegiate model; (2) the scope and scale of the case and other factual complexities; (3) increased stakes; and (4) the COI's ruling on a material issue in a parallel infractions case and other procedural anomalies.

With respect to the football portion of the ANOA, Allegations 6-8 should be separated and resolved by the COI. Specifically, Allegations 6 and 7 are the result of self-reported Level II violations involving the former football staff, are not disputed by the University, were confirmed independently by the enforcement staff and do not form the basis for a failure to monitor or lack of institutional control allegation. Similarly, Allegation 8 is the result of a self-reported violation involving the current football staff and is an agreed upon Level III violation. Most importantly, these allegations do not involve any of the referral factors that are set forth in NCAA Bylaw 19.11.3.1.1. Finally, the type of violations that KU self-reported in football are regularly processed through the peer review model, and therefore, the COI is best positioned to resolve any remaining issues and to do so in a prompt manner.³

¹ Although KU believes it is more likely to receive a fair decision through the IARP, KU submits that the use of the IARP should not result in the inability to have the decision of the Independent Resolution Panel (IRP) reviewed by the federal courts, as the Rice Commission recommended. Accordingly, KU does not waive any right to seek a review and/or appeal in any forum should a procedural error occur or should the IRP render a decision or penalty that is not supported by the record in this case.

² The record in this case has already been bifurcated so that the involved individuals only have access to the portions of the record that pertain to their sport.

³ In the past five years, the COI has adjudicated 14 cases involving impermissible coaching activities. See Nebraska (2020), Siena (2020), TCU (2019), DePaul (2019), UCONN (2019), Pittsburgh (2020), Maryland (2019), Utah (2018), Oregon (2018), California State Sacramento (2018), Northern Colorado (2017), San Jose State (2016), Hawaii (2015), SE Louisiana (2015). Thus, the principles at issue in the football portion of the matter are well settled, and there is no reason to delay resolution of the football portion while the novel issues and potentially wide-ranging consequences of the basketball portion of the matter proceed through the IARP process, including the time it will necessarily take for new personnel to learn and understand a very substantial record followed potentially by additional investigation, reduced or revised charges, and additional written submissions prior to any hearing.

CASE HISTORY AND BACKGROUND

The disputed men's basketball allegations in this case, Allegations 1-5, arose out of prosecutions in the Southern District of New York (SDNY) in which former adidas employees James Gatto and Merl Code were convicted of wire fraud and conspiracy to commit wire fraud (SDNY trial). A necessary element of the government's successful case was that KU was defrauded, a fact that the jury found was proven beyond a reasonable doubt. Thomas "TJ" Gassnola, a cooperating government witness, testified at trial that he provided cash to family members/guardians of prospective student-athletes who committed to several NCAA member institutions, including KU. Importantly, Gassnola also testified multiple times that no KU men's basketball coaches, nor anyone else at the University, had any knowledge that Gassnola provided or intended to provide benefits to family members/guardians of prospective student-athletes. In fact, Gassnola testified that he and Gatto actively hid his activities from KU and its men's basketball coaches, and the court found during sentencing that sophisticated means were used to conceal the conduct from KU. The court further found that the defendants were motivated by personal benefit and that they sought to influence the prospective student-athletes into signing endorsement contracts with adidas when they became professionals. The defendants and Gassnola were ordered to pay restitution to KU. This infractions case seeks to turn the criminal verdict on its head by asserting novel and factually unsupported theories as to why Gassnola and Gatto were representatives of the University's athletics interests at the time of their criminal actions, thereby holding the University responsible for the crimes committed against it. KU finds it troubling that the COI does not reference these key facts anywhere in its lengthy Referral Petition and instead repeatedly characterizes the conduct as an "illicit recruiting scheme." See Referral Petition, pp. 3, 4, 5 and 9.

Allegations 6 and 7 are the result of information that KU self-reported to the NCAA enforcement staff after a departing football staff member raised concerns about violations during an exit interview in November 2018. As set forth fully in the University's Response to the ANOA, the University and enforcement staff are in agreement with respect to these allegations. Finally, Allegation 8 is an agreed upon Level III violation that KU self-reported after the issuance of the Notice of Allegations (NOA) in October 2019 and involved a different football coaching staff than Allegations 6 and 7. The enforcement staff issued an ANOA that included the Level III violation because it involved the same sports program as Allegations 6 and 7. As noted in Footnote 3, Allegations 6-8 involve violations that are typically adjudicated by the COI.

Despite the fact that the federal criminal convictions in the SDNY case were premised on the lack of knowledge of the activities of Gassnola and Gatto by KU and its coaches, on August 22, 2018, the NCAA enforcement staff initiated an investigation. On September 19, 2019, the chair designee stayed all SDNY infractions cases for 60 days. See Exhibit 1. On September 23, 2019, the NCAA enforcement staff issued an NOA, which was subsequently amended on January 31, 2019.⁴ See Exhibit 2. On November 21, 2019, the chair designee lifted the stay. See Exhibit 3. On March 5, 2020, KU and all involved parties submitted their responses to the ANOA. See Exhibit 4. On May 4, 2020, the NCAA enforcement staff submitted its written reply as to KU and the involved parties. See Exhibit 5. On May 18, 2020, the COI submitted its referral petition.

⁴ The amendment to the Notice of Allegations added a self-reported Level III violation in the sport of football but did not change the allegations in men's basketball set forth in Allegations 1-5.

RESPONSE

REQUESTED BIFURCATION OF FOOTBALL ALLEGATIONS

(1) Referral factors identified by the COI are moot

The Referral Petition identifies four factors that the COI asserts are applicable to the Level II football portion of the case, Allegations 6 and 7: major policy issue; lack of acceptance of core principles of self-governance; scope, scale and factual complexities; and increased stakes. See Referral Petition, pp. 4, 5, 8 and 10. Each of the COI's assertions related to the football allegations are premised on what the COI characterizes as "parallel tracks" of the infractions case and a lawsuit brought by former head football coach David Beaty against the University regarding Beaty's contract. The University and Beaty have reached a settlement of the lawsuit, which now renders the assertions related to Beaty's lawsuit moot. Therefore, the University does not believe that any referral factors are applicable to the football portion of this case.

Separate and apart from the mootness of the COI's positions, the University notes that Beaty's lawsuit and the infractions case were not on "parallel tracks." The lawsuit had its own timeline that was not driven by the NCAA infractions process. Indeed, in most instances, civil litigation cases will take significantly longer to resolve than cases in the NCAA infractions process. The IARP does not have any additional investigative or adjudicative tools to address the differing timeframes or the complexities due to the existence of civil litigation than does the COI.⁵

(2) Bifurcation of the football portion of the case will result in the most effective, fair and efficient resolution of the allegations

The ANOA includes two very different cases involving the University's men's basketball and football programs that are unnecessarily coupled together. There is no legislated requirement that disparate allegations must be processed in the same case for a member institution. In a similar situation, the COI has determined that it was appropriate to bifurcate allegations in a case.⁶ In addition, the enforcement staff can also independently utilize its discretion to process cases separately.⁷ Here, NCAA Bylaw 19.11.2.2.5 and IRC IOP 2-2, provides the IRC with the authority to decide whether to refer cases to the independent accountability structure. Inherent in the

⁵ Using the COI's logic, a former employee could hijack the NCAA infractions process by reinvestigating a case through civil discovery even when a member institution has self-reported violations and those violations had been vetted independently and alleged separately by the enforcement staff. Further, based on the COI's position on Bylaw 19.7.8.3.1, Importation of Facts, any discovery taken in a separate matter can then be automatically entered into the infractions record without objection or following NCAA infractions' process procedures. This surely cannot be what the membership intended with the adoption of the "importation of facts" bylaw. This is one of many likely unintended consequences of the adoption of the "importation of facts" bylaw and why careful analysis of that rule in pending cases is necessary in order to establish the appropriate parameters for that rule.

⁶ See University of Mississippi (2016), p. 4 [Chief hearing officer issued a decision to bifurcate all football allegations, instructed the enforcement staff to issue a revised NOA and removed the hearing panel's access to all football allegations].

⁷ See Southeast Missouri State University (2017), p. 2, Footnote 4 [Noting that to ensure a fair and timely resolution for the women's basketball program, the institution and enforcement staff determined that the case should be bifurcated from men's basketball violations that were discovered during the processing of the women's basketball case].

authority is the ability to refer a portion of a case and to bifurcate allegations when the IRC determines that some allegations made by the enforcement staff do not belong in the IARP, or when referral would unnecessarily delay resolution.

Here, it is clear that there is a significant difference between allegations involving men's basketball and those involving football. Specifically, the football allegations were self-reported, the institution and enforcement staff substantially agree on all aspects of the football allegations, the allegations involve only Level II and Level III violations, and the football allegations are not contemporaneous with the men's basketball allegations. In fact, the allegations are only included in the ANOA because the violations were reported during the same time period that KU was under investigation by the enforcement staff in men's basketball as a result of the SDNY case. The football allegations do not trigger any factors identified in Bylaw 19.11.3.1, that suggest referral of those allegations to the IARP is necessary or appropriate.

In short, there is no factual or logical nexus between the men's basketball portion of the case, Allegations 1-5, and the football portion of the case, Allegations 6-8. Therefore, KU respectfully requests that the IRC bifurcate Allegations 6-8 from Allegations 1-5, and that Allegations 6-8 be returned to the COI for final and expeditious resolution through the peer-review process.

APPLICATION OF REFERRAL FACTORS TO MEN'S BASKETBALL ALLEGATIONS

KU asserts that this case involves at least four referral factors that are pertinent to the IRC's review of whether referral is appropriate and in the best interests of the Association: (1) a major policy issue that implicates NCAA core values and commitment to the Collegiate Model; (2) significant scope, scale and factual complications; (3) increased stakes for the institution, including potential penalties; and (4) a COI ruling on a disputed issue in a parallel case and other procedural anomalies.

(1) Bylaw 19.11.3.1.1-(a): Major Policy Issue

The COI identifies several commitments to the Collegiate Model set forth in the NCAA Constitution and cites Bylaw 19.01.1 indicating that the mission of the infractions process is to uphold integrity and fair play by ensuring that institutions are not disadvantaged by their commitment to compliance. See Referral Petition, p. 4. The University notes that also embedded in the mission of the infractions program pursuant to Bylaw 19.01.1 is the importance that member institutions receive the benefits of a fair infractions process. As part of this commitment to fairness, the infractions process must ensure that legislation is applied and interpreted consistently, and in accord with the regular application of the rules to all member institutions and coaches.

In this case, the scope of institutional culpability for the actions of "third parties," here adidas as KU's apparel sponsor, and its employees or contractors, is a major policy issue that implicates NCAA core values and fairness. Specifically, whether by entering into an arm's length corporate sponsorship agreement a member institution is automatically responsible pursuant to NCAA rules

for the actions of its corporate sponsor and the sponsor's employees and contractors is a major policy issue that will affect virtually all NCAA Division I member institutions.⁸

Allegations 1 through 5 include the alleged involvement of Gassnola, Gatto, Code and Cutler in the recruitment of prospective student-athletes, some of whom attended KU and some who attended other NCAA member institutions. Gassnola, Gatto, Code and Cutler were all employees or contractors of adidas. These individuals can accurately be identified as a “third-parties,” individuals with no affiliation to a specific school but involved in youth basketball on behalf of their own interests and/or those of their employer. The NCAA enforcement staff has asserted that by virtue of adidas serving as a corporate sponsor of the institution, adidas is a representative of the University's athletics interests and the University is responsible for the acts of all adidas employees or contractors regardless of the University's lack of knowledge or approval of their conduct. In this regard, the enforcement staff has asserted that funds paid pursuant to a negotiated sponsorship contract constitutes providing a “financial contribution” to the athletics department for purposes of NCAA Constitution 6.4.2-(b) and that sponsorship agreements necessarily result in promotion of the institution's athletics interests for purposes of NCAA Constitution 6.4.1, 6.4.1-(a), and 6.4.2-(e). Adoption of either of these proposed interpretations of NCAA rules would have wide-ranging consequences for the Association and all NCAA member institutions who have corporate sponsorship agreements of any kind. In this regard, for decades prospective basketball student-athletes throughout the country have participated on teams and in leagues, tournaments, and events that have been certified by the NCAA enforcement staff pursuant to NCAA Bylaw 13.18 even though the teams and games have been sponsored by adidas, Nike or Under Armour. If the NCAA enforcement staff's theory that apparel companies that sponsor institutions are boosters is adopted, all prospective student-athletes who received expenses for their participation in these NCAA-certified events would have received prohibited pay and would have lost their amateur status.⁹ In addition, if the apparel companies are boosters because of their sponsorship agreements, their innumerable contacts and telephone calls with and evaluations of prospective student-athletes during grassroots youth basketball over the past decades would have violated NCAA legislation.¹⁰

⁸ See **Exhibit 6**, quoting University of Notre Dame head men's basketball coach and recent past president of the National Association of Basketball Coaches, “Every one of us works the shoe company angle to help us get players, I speak to those guys as much as I would speak to parents. No question if there was an Under Armour event somewhere, I'd get a call from someone at Under Armour saying, 'Hey Mike, did you see this 15 year-old kid in Dallas? He's in our program, you gotta get on him.' I'm not saying they'd cheat to get him, but damn right they're helping, absolutely.”

⁹ See Bylaws 12.1.2, 12.1.2.1, 12.1.2.1.4.3. In its reply, the enforcement staff relies on a 2012 interpretation in response to this observation. As evidence of the weakness of its position, the enforcement staff resorts to misstating the actual holding in the 2012 interpretation (it does **not** state that “it is permissible for a booster to provide pre-enrollment expenses to a sports club” under any circumstances), and the 2012 interpretation did not cite to or purport to address any legislation in Bylaw 12.

The NCAA enforcement staff's theory also would call into question the apparel companies' payments of expenses to the families of the prospective student-athletes and the apparel companies' provision of unlimited personal use apparel and equipment to prospective student-athletes pursuant to NCAA Bylaws 12.1.2.1.4.4, and 12.1.2.4.12.

¹⁰ For example, Gassnola and Code helped run grassroots teams that participated in NCAA-certified events for many years, and Cutler worked at the NCAA-certified events. As a result, they would have had ongoing communications with prospective student-athletes. The same would be true for innumerable employees and contractors of all of the apparel companies. Among the many provisions that this contact would violate under the enforcement staff's theories are Bylaws 13.01.2, 13.02.4, 13.02.7, 13.02.17, 13.02.19, 13.1.1.1.2, 13.1.2.1, 13.1.2.4, 13.1.3.5.1, 13.1.6.2.2 and 13.1.6.2.2.1.

In addition, the NCAA enforcement staff has asserted for the first time that routine and mundane conversations between an institution's coaches and individuals about prospective student-athletes constitute requests for assistance in recruitment of prospective student-athletes for purposes of NCAA Constitution 6.4.2-(c) and makes the other party a representative of the institution's athletics interests. Examples of the types of daily conversations that occur between institutions' coaches and various individuals include asking what the other party to the conversation thinks about a prospect's abilities or which schools he or she is favoring, who is helping the prospect make a decision or which institutions are showing the most interest in a prospect. The extension of "booster" legislation to people who coaches talk with about prospects on these types of topics would have far-reaching impacts on the membership.¹¹

Further, the NCAA enforcement staff has contended for the first time that adidas and its employees and contractors are agents because adidas has signed former student-athletes to sponsorship agreements upon their becoming professional athletes. This novel argument would apply to any of the numerous entities that sign professional athletes to sponsorship agreements and would greatly expand the historical application of the agent legislation. Moreover, it would impact the application of numerous bylaws that restrict the conduct of agents and student-athletes' interactions with agents.¹²

The NCAA enforcement staff has not limited its reliance on novel theories with wide-ranging consequences to the issues involving adidas and its employees and contractors. The enforcement staff has taken the unprecedented position that a coach for an institution is the institution's booster for life because coaches both recruit student-athletes and promote the athletics program during their tenure as coaches. Given the mobility of coaches, the enforcement staff's interpretation, if accepted, would impact all institutions and impose new responsibilities.

Finally, this case presents important policy issues as to the scope of the NCAA enforcement staff's obligations to provide institutions, involved individuals, and the COI or IRP with all relevant factual information that is material to the case and the consequences of the staff's failure to do so. KU and Coaches Self and Townsend have made multiple requests to obtain information that is pertinent to the issues in this case. The staff has repeatedly refused those requests for information, which raises questions under Bylaws 19.5.1, 19.5.9, 19.7.7.3, 19.7.8.3.2, 19.11.5.7.1, and 19.11.5.8.3.2.

¹¹ For example, under either of the NCAA enforcement staff's theories that adidas and its employees and contractors are "boosters" if they ever talk to any college coach about a prospect, adidas and its employees and contractors may not have contact or telephone calls with prospective student-athletes under Bylaws 13.1.2.1, 13.1.2.4, 13.1.3.5.1. Given that adidas and the other shoe companies talk on a daily basis to innumerable college coaches about prospects and they essentially run grassroots basketball and interact extensively with prospective men's basketball student-athletes as part of that process, the consequences of the NCAA enforcement staff's interpretation would result in innumerable recruiting violations having occurred throughout the membership for decades. See also Footnote 8 supra.

¹² As one example, Bylaw 12.1.2.1.4.3 prevents prospective student-athletes from receiving actual and necessary expenses for competing on a team that is sponsored by an agent. The NCAA enforcement staff's contention would mean that all of the prospective student-athletes who participated on a nonscholastic team that was sponsored by adidas, Nike, Under Armour or any other entity that signs athletes to sponsorship agreements received prohibited pay and lost their amateur status.

(2) Bylaw 19.11.3.1.1-(e): Scope, Scale and Factual Complexity

Another significant factor supporting referral is the scope, scale and factual complexity of this case. The ANOA alleges five Level I allegations against the University, including impermissible inducements from an alleged representative of the institution’s athletics interests; head coach responsibility and lack of institutional control. These allegations are based primarily on the enforcement staff’s interpretation of evidence and statements made by counsel during the SDNY trial, with all inferences made in the light least favorable to the University and the head coach. The record in this case includes thousands of pages of testimony and other material. Indeed, there is a significant amount of exculpatory evidence and statements from the head coach, his assistant coaches and other key witnesses that have been discounted, ignored or mischaracterized by the enforcement staff without an unbiased review. See Exhibit 4, pp. 84-91. In addition to the amount of information, the application of the facts to certain NCAA bylaws, some of which are new [e.g., Bylaw 19.7.8.3 (Importation of Facts)], raises factual complications that could impact the resolution of this case.¹³ It appears to some extent the COI has independently determined how Bylaw 19.7.8.3 should be applied in this case. See Referral Petition, pp. 5-6.¹⁴

(3) Bylaw 19.11.3.1.1-(g): Increased Stakes

The increased stakes for the institution – including the potential for significant penalties if violations are found as alleged – is another factor that balances in favor of referral. This case is alleged as a Level I – aggravated case for the University, which is the most severe that the enforcement staff could allege.¹⁵ Additionally, the enforcement staff has identified nine aggravating factors and one mitigating factor for the committee’s consideration. Should the violations be found as alleged the penalties will have a significant financial and reputational impact on the University and involved parties.

(4) COI ruling on a disputed issue and other procedural anomalies

On April 8, 2020, several media outlets reported on NC State’s response to the COI request to refer NC State’s infractions case to the IARP.¹⁶ The reports included a link to the COI Referral Petition in the NC State case (NC State Referral Petition) that was filed by the COI on February 14, 2020. See Exhibit 8. In the NC State Referral Petition, the COI took a position on a material issue that is also applicable to KU’s infractions case. Specifically, the COI stated as follows: “NC State also challenges the enforcement staff’s classification of Adidas (sic) and

¹³ For example, the NCAA enforcement staff is relying on sidebar conversations about items that were determined inadmissible and citing as “evidence” and “sworn statements” unsuccessful arguments that were asserted in opening and closing statements and sentence memoranda by counsel. Certainly, the membership did not intend to allow the use of unsuccessful, self-interested arguments made in an unrelated legal action by attorneys for individuals who are not parties to an infractions proceeding.

¹⁴ The COI asserts that Gassnola’s plea agreement is “central to this case,” the plea is a final judgment and the facts upon which the plea is “based may be imported and treated as conclusive.” See Referral Petition, p. 2, Footnote 4 and p. 5. In addition to prejudging an issue in dispute before the parties have an opportunity to be heard, the COI overlooks that Gassnola’s plea does not state any facts concerning KU. See Exhibit 7.

¹⁵ See Exhibit 2, pp. 13-14.

¹⁶ <https://www.wralsportsfan.com/nc-state-accepts-ncaa-s-referral-to-independent-investigative-process/19047614/>

Gassnola as boosters, which is based on longstanding interpretive guidance relied upon by the NCAA membership.” See Exhibit 8, page 8, Footnote 6. Although the COI did not identify the “longstanding interpretive guidance,” it is clear that the COI agreed with the enforcement staff’s position – that adidas and all of its employees and contractors were boosters of NC State simply by virtue of adidas being NC State’s corporate sponsor – effectively ruling on this material issue. The enforcement staff takes the identical position in KU’s infractions case – that adidas and all of its employees and contractors are boosters of KU because adidas is a corporate sponsor of KU. KU disputed that adidas was a booster in its Response to the ANOA. The enforcement staff’s allegations involving men’s basketball are contingent on Gassnola, Gatto, Code, Cutler and adidas being deemed boosters of the University. KU has asserted in its Response that in these circumstances, liability for the actions of a corporate sponsor, the sponsor’s employees or contractors, as boosters is not the correct application of NCAA rules. However, based on the NC State Referral Petition, and prior to hearing from the parties or even requesting further briefing on the issue from KU, the COI has opined that a corporate sponsor and its employees or contractors are automatically boosters of a member institution based on unidentified “longstanding interpretive guidance.” The COI’s premature ruling in the NC State case materially affects KU’s case. Based on the prejudgment of this legitimate substantive issue, KU does not believe it can receive a fair hearing on the merits before the COI.

Even prior to the issue identified above, there were several procedural anomalies in this case. On May 22, 2019, well before the enforcement staff’s investigation had been completed, the NCAA vice president of governance informed an ESPN reporter following a meeting of the Knight Commission on Intercollegiate Athletics (Knight Commission) that notices of allegations “will be coming.”¹⁷ This is especially disconcerting, not just because the Knight Commission was taking statements from NCAA executives on their actions related to open SDNY infractions cases; but, most significantly, because the current COI chair designee who oversees the KU case is a sitting member of the Knight Commission and co-chaired the meeting.¹⁸ Moreover, this statement was not the only public statement from NCAA executives. On June 12, 2019, again well before the KU investigation had been completed, the NCAA vice president for regulatory affairs informed CBS Sports that two-high profile programs would receive notices of allegations in early July and was quoted as stating, “The main thing is that we’re up and ready. We’re moving forward and you’ll see consequences.”¹⁹ These statements by high ranking NCAA officers prejudging the case are particularly troublesome since the investigation was ongoing and more than a dozen interviews still had to be conducted. Finally, the COI chair designee issued several directives related to all SDNY infractions cases that called into question the COI’s objectivity.²⁰

¹⁷ See Exhibit 9.

¹⁸ See Exhibit 10.

¹⁹ See Exhibit 11.

²⁰ The COI appears to have acted outside of its legislated authority in several instances in this case. The COI is authorized by the NCAA membership to perform two primary functions – find facts and conclude whether those facts constitute one or more violations of NCAA bylaws. See Bylaw 19.3.6-(a) and 19.3.6-(b). The COI is not empowered by the NCAA membership to direct the NCAA enforcement staff’s investigation, mandate how and when a Notice of Allegations (NOA) should be issued or suggest what should or should not be included in any potential NOA. See Bylaw 19.3.6. The chair designee’s letter that stayed this case informed the enforcement staff how it should present evidence in “SDNY cases” so the COI could “best position” those cases for resolution and ostensibly directed parties to stipulate to certain facts. See Exhibit 1. This directive from the COI was inappropriate and outside of the scope of the COI’s legislated authority. See Bylaw 19.3.6. Further, it is unclear what exactly the “stay” accomplished other than to unnecessarily delay the processing of this case.

These actions taken together raise serious concerns that the COI can fairly adjudicate the men's basketball portion of this case, or that member institutions can trust in the fairness of the infractions process under these circumstances.

REBUTTAL OF COI REFERRAL FACTORS

The Referral Petition identifies two referral factors which the University asserts are not applicable in this case and inappropriately characterize legitimate issues raised by the University and other involved parties as "adversarial posturing": (1) lack of acceptance of core principles of self-governance; and (2) breaches of confidentiality.

(1) KU accepts core principles of self-governance

KU fully accepts its responsibility to operate its athletics programs in accord with NCAA and Big 12 rules and has cooperated in the infractions process. For example, the University: (1) self-reported violations in the sport of football when discovered; (2) has been credited by the enforcement staff for having an established history of self-reporting Level III violations; (3) produced thousands of pages of material in response to enforcement staff requests for information; (4) produced coaches and staff members for interviews with the enforcement staff, including multiple interviews of key coaches and athletics staff, and actively participated in the interviews; and (5) responded to allegations made by the NCAA enforcement staff as contemplated by the infractions process.

Now, it appears that because the University does not wholly agree with the enforcement staff's allegations and its novel theories with far-reaching consequences, or the application, in at least one instance, of the importation of facts bylaw, the COI has alleged that the University was engaged in "adversarial posturing." This characterization by the COI is disappointing. Here, the COI has taken legitimate factual, interpretative and procedural disputes as an "attack on the peer-review process." The COI's position seems to be that anything short of full agreement with the enforcement staff's allegations is "adversarial." This simply cannot be the standard by which member institutions are held in the infractions process. If there were full agreement on ALL allegations, there would be no need for a COI. The COI's primary legislative function is to find facts related to the alleged bylaw violations and conclude whether the facts constitute one or more violations of the NCAA bylaws. Accordingly, the COI should refrain from any judgement on the application of NCAA rules until having heard from the involved member institution and all parties at a hearing. However, at least in this case, the COI has become an advocate for the NCAA enforcement staff's positions, defender of NCAA executives' conduct and interpreter of new NCAA rules without having complete information. In doing so, the COI has wholly abdicated its responsibility to member institutions to serve as a neutral adjudicator. KU notes that the enforcement staff's reply contains numerous misstatements and mischaracterizations of the evidence in the record and ignores or barely mentions important facts (e.g., the entire basis of the federal criminal case was that the payments were concealed from KU and its men's basketball coaches). Yet, the COI says not a word about the staff's conduct and expresses no concern about the staff's "adversarial posturing." At the appropriate time, KU will detail all of the misleading statements in the enforcement staff's reply.

(2) There were no breaches of confidentiality

The COI attempts to characterize the University's release of information pursuant to the Kansas Open Records Act (KORA) as an impermissible disclosure pursuant to Bylaw 19.01.3. See Referral Petition, pp. 8-9. NCAA Bylaw 19.01.3 states:

Except as provided in this article, the Committee on Infractions, Infractions Appeals Committee, Independent Resolution Panel, enforcement staff and Complex Case Unit shall not make public disclosures about a pending case until the case has been announced in accordance with prescribed procedures. An institution and any individual subject to NCAA constitution and bylaws involved in a case, including any representative or counsel, shall not make public disclosures about the case until a final decision has been announced in accordance with prescribed procedures.

Despite making the assertion that KU's public release may have violated Bylaw 19.01.3, the COI acknowledges KU's requirement to follow state law. See Referral Petition, p. 8. In releasing the information required by KORA, as is customary, the University included an accompanying press release. The press release did not include any confidential information, nor express a position that was not in the University's 120-page Response. Further, the brief summary of information released by the University in this case was consistent with statements made by other member institutions in past infractions cases upon receipt of allegations or other material that it was required to make public based on a state's open records law.²¹ Finally, the University notes that the COI is much more forgiving of NCAA executives who are under no legal obligation to release information related to ongoing infractions cases. The COI states in relevant part "some review, comment and education about the process falls within the purview of NCAA executive staff in the proper settings." See Referral Petition, p. 7. The University did not violate NCAA confidentiality provisions when it released information pursuant to its requirements under state law.

CONCLUSION

For the foregoing reasons, KU agrees to resolution of the men's basketball portion of the ANOA, Allegations 1-5, through the IARP. With respect to the football portion of the ANOA, Allegations 6-8, KU requests that the IRC bifurcate those allegations and schedule them for immediate resolution by the COI.

²¹ See e.g., [University of Mississippi website](#) devoted to information related to its 2017 infractions case. No member institution has been charged with a violation of Bylaw 19.01.3 for releasing information consistent with its requirements pursuant to state law, including a press release or summary.

EXHIBITS LIST

- Exhibit 1: Committee on Infractions Stay of All SDNY Cases – 9/19/19
- Exhibit 2: Notice of Allegations and Amended Notice of Allegations
- Exhibit 3: Committee on Infraction Lift of Stay – 11/21/19
- Exhibit 4: KU Response to Amended Notice of Allegations
- Exhibit 5: Enforcement Written Reply
- Exhibit 6: The Athletic, Seth Davis, May 7, 2020 – What happens if the NCAA succeeds in labeling sneaker companies as boosters?
- Exhibit 7: Gassnola Plea Agreement – 3/30/18
- Exhibit 8: Committee on Infractions Referral Petition NC State – 2/14/20
- Exhibit 9: ESPN, Heather Dinich, May 22, 2019 – Notices of allegations coming after hoops scandal
- Exhibit 10: Knight Commission on Intercollegiate Athletics, May 22, 2019 Meeting to Address Major Changes and Challenges in College Basketball, Knight Commission members Bios, Co-Chair Dr. Carol Cartwright
- Exhibit 11: CBS Sports, Dennis Dodd, June 12, 2019 – At least six college basketball programs will be notified of major NCAA violations by this summer