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## THE ATHLETIC DEPARTMENT COMPLIANCE JOB: DESCRIPTIVE AND PRESCRIPTIVE

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## THE ATHLETIC DEPARTMENT COMPLIANCE JOB: DESCRIPTIVE AND PRESCRIPTIVE

Josephine (Jo) R. Potuto\*

*Universities have an absolute obligation as NCAA members to maintain control of their athletic programs. These programs are highly visible, highly scrutinized, and highly criticized when something goes wrong. Institutional compliance directors investigate and report NCAA violations. They also oversee incidents involving student-athlete behavioral issues, and they are the athletic department liaisons to the greater campus. Scrutiny and criticism of athletic programs necessarily extends to scrutiny of their work.*

*This article describes the nuts and bolts of the institutional compliance job. It then focuses on a prime impediment to effective compliance risk management—the failure of those with information about violations to report that information to the compliance director. Finally, it offers guidance on how to increase the likelihood of reports being made. It also sets forth the minimal requisites of a violation investigation, and the prime elements of a compliance risk management plan.*

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## I. INTRODUCTION

The National Collegiate Athletics Association (NCAA) is a member-driven private association of four-year post-high-school educational institutions<sup>1</sup> that administers championships and regulates intercollegiate athletics competition.<sup>2</sup> Its bylaws cover rules of the game, team

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1. NAT'L COLLEGIATE ATHLETIC ASS'N, 2019-2020 DIVISION I MANUAL Art. 4, § 4.02.1 (2019) [hereinafter NCAA MANUAL].

2. NCAA MANUAL, *supra* note 1, § 1.2.

staffing limits, and coach and student-athlete department.<sup>3</sup> Because conduct by and concerning student-athletes off the field can impact competition on the field, NCAA bylaws also cover student-athlete academic performance and integrity and the off-field conduct of athletes, staff, and boosters.<sup>4</sup>

NCAA bylaws and policies operate directly only on NCAA member institutions.<sup>5</sup> An obvious requirement of membership is that member institutions must comply with the NCAA Constitution, bylaws, and policies.<sup>6</sup> Another requirement of NCAA membership is the cooperative principle. Pursuant to the cooperative principle, NCAA member institutions must cooperate in uncovering, investigating, and reporting violations.<sup>7</sup>

Universities act only through the people for whom they are responsible. That means universities meet their obligations of rules compliance and investigative cooperation by enforcing those obligations on their coaches, other staff members, and student-athletes.<sup>8</sup> Coaches, staff members, and student-athletes annually certify to their rules compliance and acknowledge their obligation to report violations.<sup>9</sup>

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3. *E.g.*, NCAA MANUAL, *supra* note 1, at Art. 17, Art. 18.

4. NCAA MANUAL, *supra* note 1, at Art. 16 (prohibiting payments and other benefits provided to student-athletes); NCAA MANUAL, *supra* note 1, at Art. 14 (governing academic eligibility to compete); NCAA MANUAL, *supra* note 1, at Art. 13 (governing conduct with recruits, including inducements); NCAA MANUAL, *supra* note 1, at Art. 15 (governing financial aid). Boosters include individuals who make donations to get season tickets, make financial contributions to athletic departments, or help to promote university athletics. *See* NCAA MANUAL, *supra* note 1, § 6.4.2 (Representatives of Athletics Interests). *Role of Boosters*, NCAA, <http://www.ncaa.org/enforcement/role-boosters> (last visited Aug. 17, 2020).

5. NCAA MANUAL, *supra* note 1, §§ 1.3.2, 2.1.2, 2.8

6. NCAA MANUAL, *supra* note 1, §§ 2.8, 19.2.1. *See also* NCAA MANUAL, *supra* note 1 (The Commitment to Institutional Control and Compliance).

7. NCAA MANUAL, *supra* note 1, §§ 19.2.3, 19.01.3.

8. The focus of this article is on how compliance directors achieve effective monitoring and processing of violations to assure a rules compliant institutional environment. Outside the scope of this article, because it is outside the job responsibility of compliance directors, is a critically important component to achieving rules compliance—the establishment by high-level university and athletic administrators of a positive environment for staff and student-athletes, one that reinforces and provides incentives for acting in ethical, rules-abiding ways. Also critically important, and outside the scope of this article is the hiring and student-athlete reinstatement process. The best assurance of rules compliance is a work force and student-athletes who embody ethical behavior.

9. Coaches and staff annually execute a Certification of Compliance by which they certify that they have no knowledge of any violations. NCAA MANUAL, *supra* note 1, §§ 3.2.4.16, 18.4.2.1.1. The obligation to be rules compliant also is included in coach contracts. Student-athletes annually execute a Student-Athlete Statement. *See infra* note 33. Staff members and student-athletes commit unethical conduct by refusing to “furnish information relevant to an investigation of a possible violation of an NCAA regulation when requested to do so” and by “[k]nowingly furnishing . . . false or misleading information concerning . . . involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation.” NCAA MANUAL, *supra* note 1, § 10.1(a), (c).

## II. THE INSTITUTIONAL COMPLIANCE JOB: IN GENERAL

Institutional compliance directors perform the central risk management prevention functions of rules education and monitoring bylaw compliance to prevent violations.<sup>10</sup> They handle rules interpretation<sup>11</sup> and the process of seeking waivers from the operation of bylaws.<sup>12</sup> They are the athletic department's point person for investigating potential bylaw violations and reporting to the NCAA enforcement staff when violations are committed.<sup>13</sup> To do all these jobs properly, institutional compliance directors must be knowledgeable about NCAA bylaws and policies, as well as bylaw interpretations and amplifying educational material that give scope and content to the black letter of a bylaw.

In most ways, the work of institutional compliance directors supports and facilitates the objectives of staff and student-athletes. Both rules education and rules interpretation assist coaches and staff to forestall the commission of violations. Waivers, when successful, permit student-athletes and staff to engage in conduct that otherwise would constitute a violation. Interpretative efforts also often result in finding a rules-compliant way for coaches and staff to achieve their objectives.<sup>14</sup>

Compliance directors necessarily are a Janus,<sup>15</sup> however, with the educational/interpretative face being friendly and supportive and the monitoring/investigative face being skeptical and potentially adversarial. To be successful in effective oversight, compliance directors must forge positive working relationships with coaches and other staff and establish and maintain informal channels of communication grounded in

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10. See ROBERT R. MOELLER, *COSO ENTERPRISE RISK MANAGEMENT* 58-60, 68-70, 210 (2d ed. 2011). It also is a byproduct of new laws; new technology; changes in the economy; and evolving social mores, interactions, and priorities. *Id.* at 67-68. Reputational risk is triggered by both external and internal events. *See id.* at 210.

11. For an overview of the NCAA interpretations process, see NCAA MANUAL, *supra* note 1, §§ 5.4.1, 5.4.1.2.

12. See NCAA MANUAL, *supra* note 1, § 14.02.16. When there is no committee with subject matter authority over a waiver, waivers are handled by the Committee for Legislative Relief. NCAA MANUAL, *supra* note 1, § 5.4.1.3.

13. The NCAA enforcement staff investigates bylaw violations and the COI adjudicates them. See NCAA MANUAL, *supra* note 1, at Art. 19. The compliance director also is the liaison between the university and the NCAA enforcement staff when a Level I or Level II violation is processed. See E-mail from Jamie Vaughn, Exec. Assoc. Athletic Dir. for Compliance, Univ. of Neb. Athletics, to Josephine R. Potuto, Professor of Law & Faculty Athletics Representative, Univ. of Neb. (Mar. 7, 2020, 1:12 PM) (on file with author). See *infra* note 20 for a discussion of the hierarchy of NCAA violations. The email from Vaughn also demonstrates that the FAR has oversight of this process. Email, Jamie Vaughn, *supra*.

14. For information on the NCAA process, see INTERPRETATION REQUEST FORM FOR NCAA DIVISION I INTERPRETATIONS COMMITTEE, <https://www.ncaa.org/sites/default/files/Interpretation%20Request%20Form%2042715.pdf> (last visited Sept. 30, 2020).

15. *Janus*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Janus-Roman-god> (last visited Aug. 14, 2020).

an atmosphere of trust. At the same time, monitoring involves double checking and verifying information; at least some staff perceive these monitoring efforts as compliance staff mistrust of them. The potential for conflict between compliance directors and those monitored, moreover, can become a real conflict even with requests for bylaw interpretations. On occasion, coaches or others attempt to pressure or wheedle compliance directors to provide a convenient interpretation or to resolve an inquiry more quickly and on less evidence than they think is warranted.<sup>16</sup>

A full-blown investigation of a coach or other staff member for complicity in the commission of serious NCAA violations, characterized as Level I or Level II, can be explicitly adversarial, even confrontational, as an investigation can end with negative job consequences for coaches and other athletic staff and NCAA penalties for them, student-athletes, particular athletic teams, and for the athletic department.<sup>17</sup>

Individuals who are penalized may be popular within the athletic department. Scholarship limits and other team penalties may lead to losing seasons. Athletic department staff, and those outside the athletics department, may blame a compliance director for producing these impacts.<sup>18</sup> They also may view the compliance director as disloyal to co-workers and unconcerned about the impacts that are caused.

The obvious relational impact will be between compliance staff and those investigated. But the post-investigative aftermath also may have a negative impact on the relationship between the compliance staff and

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16. See Jeff Eisenberg, *Toughest jobs in sports: NCAA enforcement staff member*, YAHOO! SPORTS (July 27, 2014, 9:38 AM), <https://sports.yahoo.com/blogs/ncaab-the-dagger/toughest-jobs-in-sports—ncaa-enforcement-staff-member-163826437.html>; see generally ENFORCEMENT SELF-STUDY: OPERATIONS AND COMPLIANCE, [https://www.ncaa.org/sites/default/files/EWG%20self-study\\_052616\(final\).pdf](https://www.ncaa.org/sites/default/files/EWG%20self-study_052616(final).pdf) (last visited Sept. 30, 2020).

17. There are four classifications of NCAA violations. Level I violations are the most serious. They provide or are intended to provide a substantial recruiting or competitive advantage or substantial impermissible benefits. NCAA MANUAL, *supra* note 1, § 19.1.1. Examples are academic fraud and cash payments to a recruit that result in the recruit's enrollment at an institution. Level II violations provide more than a minimal but less than a substantial recruiting or competitive advantage or impermissible benefit. NCAA MANUAL, *supra* note 1, § 19.1.2. Level IV violations are technical violations. An example is the failure to have all required documents (SAT score, high school transcript, etc.) filed before a prospect takes an official visit, when all the documents substantively are sufficient and ultimately were filed. See NCAA MANUAL, *supra* note 1, § 13.6.3. Level IV violations are handled by Conference offices. NCAA MANUAL, *supra* note 1, §§ 19.11.2, 19.12.2. For a description of Level III violations, see *infra* note 47.

18. See, e.g., Sam Blum, *'They gotta point the finger at somebody': Ex-Stephen F. Austin compliance leader says he's not to blame for NCAA issues*, DALL. MORNING NEWS (May 20, 2020, 5:49 PM), <https://www.dallasnews.com/sports/college-sports/2020/05/20/they-gotta-point-the-finger-at-somebody-former-stephen-f-austin-compliance-leader-argues-hes-not-to-blame-for-ncaa-issues/>.

those not the target of an investigation.<sup>19</sup> Rebuilding the harmonious relationship needed for the compliance part of the compliance job may be difficult. Some relationships may be irrevocably broken.

Having a fully engaged individual outside athletics with oversight of compliance is an important way to ameliorate both the real time and downstream consequences that aspects of the compliance job, and particularly investigations, can have on the relationship between compliance staff and others in the athletic department. That person can take responsibility for unpopular investigative decisions. To be most helpful, that person needs to have a close understanding of NCAA bylaws and NCAA national office operations and also must know and be known by athletic department coaches and other staff. That person should have regular communication with the compliance staff and sufficient time to do oversight effectively. Engaging with athletics only when Level I or Level II violations are uncovered is problematic; effective oversight is not achieved post hoc.

At the University of Nebraska, the outside person is the faculty athletic representative (FAR),<sup>20</sup> a position required by the NCAA Constitution.<sup>21</sup> The compliance director promptly reports to the FAR all

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19. Their myriad roles can be stressful to manage, and, when in a monitoring or investigative mode, compliance staff can feel isolated. Architecture has an impact. Compliance staff should be located in the heart of athletics activities, ideally near the training table and academic support. In addition, academic staff, including tutors, should be housed together. They should not be housed with the athletic team with which they work. Loyalties may be misplaced. The opportunity for cross-pollination and support is reduced.

20. The Nebraska FAR description: The Nebraska FAR is charged by the chancellor to provide active and close oversight of athletics. She has dotted line oversight of compliance and solid line oversight of athletics academic services which, at Nebraska, includes academic standards and integrity, and admissions and eligibility matters. She is the liaison between the chancellor and the compliance and athletics academic services staffs. She signs off on, and on occasion writes, Nebraska self-reports of violations to the Conference and to the NCAA, requests for waivers of the application of a Conference rule or NCAA bylaw, and formal requests for bylaw interpretation. She is informed at a preliminary stage of all matters that might be a major violation, those that affect a high-profile sport or athlete, and others that are identified as raising sensitive issues. She participates in decisions as to the direction and scope of investigations and, at her discretion, decides the extent of her active involvement, including whether to participate in interviews. She is the point person on legislative proposals. She chairs the UNL Chancellor's Intercollegiate Athletics Review Committee (other members are the University General Counsel and the Vice Chancellor for Academic Affairs), which, if needed, would handle exclusively external (to athletics) the investigation and processing of an NCAA major infractions case or other major athletics issue. See Harvey Perlman, *Establishment of the Intercollegiate Athletics Review Comm.*, UNIV. NEBRASKA-LINCOLN (July 11, 2004), <https://www.unl.edu/chancellor/establishment-intercollegiate-athletics-review-committee> [hereinafter Memorandum from UNL Chancellor].

21. NCAA MANUAL, *supra* note 1, §§ 4.02, 6.1.3. There is good reason for a FAR to be the individual with outside oversight of athletics. The FAR typically is a tenured member of the faculty. Part of a faculty member's job is to test hypotheses and be skeptical. Faculty interact with students, understand how they operate and also have informal lines of

potential violations, student-athlete well-being and behavioral issues, and projected waiver requests.<sup>22</sup> The compliance director and the FAR consult regarding what action should be taken. When interviews of staff or student-athletes are warranted, the compliance director and FAR typically conduct them together.<sup>23</sup>

In sum, then, an effective compliance system requires not only an informed and experienced compliance director, but also engaged outside oversight. Effective oversight for an athletics department, moreover, cannot stop with oversight of potential NCAA violations. The outside person also must oversee, or at least be informed of, all matters that touch on student-athlete behavioral and wellbeing issues.

Issues involving student-athletes or coaches may overlap several substantive areas (NCAA violations, Title IX misconduct, criminal conduct, coach misbehavior, student-athlete well-being, campus discipline or risk assessment, etc.). A question regarding a coach's interactions with student-athletes on a team may implicate NCAA violations but also institutional human resources policies. Unless there is one central place, one responsible party in receipt of all information, no matter the subject area, a larger, perhaps more ominous, picture may be obscured. It is lethal for effective oversight if different people have parts of a story, but no one has the full story.

### III. THE INSTITUTIONAL COMPLIANCE JOB: COMPONENTS

The institutional compliance job has many components. Part III lists the major components of the job, and then describes the prime ways that compliance directors go about doing them.

#### *A. Compliance Forms*

Much of the day-to-day compliance function revolves around reviewing forms created to help monitor compliance with NCAA

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communication with them. Faculty are familiar with campus processes. Faculty are less troubled by hierarchical structures and more willing to challenge authority. Tenured faculty have job security. A FAR adds to that set of characteristics the fact that she is familiar with NCAA bylaws and processes, and knows people in the athletic department, the Conference Office, and the NCAA national office. She already is the eyes and ears of the campus president.

22. Memorandum from UNL Chancellor, *supra* note 20. The FAR also is informed of student-athlete Title IX and criminal conduct as well as HR issues involving coaches and other staff. *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, ROLES, RESPONSIBILITIES AND PERSPECTIVES OF NCAA FACULTY ATHLETICS REPRESENTATIVES 35 (2013), [https://www.ncaa.org/sites/default/files/FAR\\_STUDY\\_Report\\_final.pdf](https://www.ncaa.org/sites/default/files/FAR_STUDY_Report_final.pdf).

23. If the FAR believes that an investigation should be conducted outside athletics, the FAR can convene the Chancellor's Intercollegiate Athletics Review Committee. *See* Memorandum from UNL Chancellor, *supra* note 20.



bylaws.<sup>24</sup> Coaches must report compliance with play/practice limits.<sup>25</sup> Student-athletes must complete the student-athlete statement<sup>26</sup> and drug test permission forms.<sup>27</sup> There are squad lists and eligibility certification forms to be completed.<sup>28</sup> There is paperwork involving financial aid offers, awards, renewals, and terminations.<sup>29</sup> There are forms governing student-athlete outside competition,<sup>30</sup> forms filed prior to prospective student-athlete official visits and forms filed subsequent to those visits.<sup>31</sup> Compliance staff manage forms related to student-athlete use of the transfer portal.<sup>32</sup> They track complimentary football tickets<sup>33</sup> and student-athlete requests for, and payments from, the student-athlete assistance fund.<sup>34</sup>

Creating and reviewing forms is an important part of monitoring for rules compliance, but it is only part of that job. People can make mistakes or lie on a form just as they can in an interview.<sup>35</sup> Monitoring requires at least spot checking to assure the accuracy of information

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24. See, e.g., *2020-21 Division I Compliance Forms*, NCAA, <http://www.ncaa.org/2019-20-division-i-compliance-forms> (last visited Aug. 17, 2020). There also are forms generated by institutional policy that compliance directors monitor in conjunction with the FAR and the Director of Athletic Academic Services.

25. NCAA MANUAL, *supra* note 1, at Art. 17. Many athletic departments now use Teamworks or other software to monitor play/practice bylaw compliance and other student-athlete time demands. See E-mail from Jonathan Bateman, Assoc. Dir. of Compliance, Univ. of Neb. Athletics, to Josephine R. Potuto, Professor of Law & Faculty Athletics Representative, Univ. of Neb. (Mar. 20, 2020, 10:21 AM) (on file with author); Elite Compliance Webinar, Front Rush (training on practice logs, declaring play/practice season, etc.) (on file with author).

26. NCAA MANUAL, *supra* note 1, §§ 3.2.4.6, 3.2.4.7, 12.7.2; *NCAA Division I Student-Athlete Statement Form 19-1a*, NCAA, [https://ncaaorg.s3.amazonaws.com/compliance/d1/2019-20D1Comp\\_Form19-1a-StudentAthleteStatement.pdf](https://ncaaorg.s3.amazonaws.com/compliance/d1/2019-20D1Comp_Form19-1a-StudentAthleteStatement.pdf) (last visited Sept. 19, 2020). The student-athlete statement has six parts. Among other things, student-athletes attest that they have not violated NCAA rules, are eligible to compete, and are amateurs. *Id.*

27. NCAA MANUAL, *supra* note 1, § 15.5.11.3.

28. NCAA MANUAL, *supra* note 1, § 15.5.11. For a list of compliance forms required by the NCAA, see *2020-21 Division I Compliance Forms*, *supra* note 24.

29. NCAA MANUAL, *supra* note 1, §§ 15.3.4, 15.3.5, 15.3.7. For an example of a form notifying a student-athlete of a financial aid termination, see E-mail and attachment from Lisa Dority, Athletic Scholarship Coordinator, Univ. of Neb., to Darien Chase, Student Athlete, Univ. of Neb. (Feb. 28, 2020, 4:32 PM) (on file with author).

30. See *Outside Competition Form* (on file with author). Outside competition refers to competitions in which student-athletes compete as individuals and not as members of a university team. National and Olympic competition is outside competition.

31. The forms include an Official Visit Report (on file with author); Official Visit Guidelines (on file with author); Student Host Guidelines (on file with author); Official Visit Checklist (on file with author).

32. See *NCAA Overview of Four-Year College Transfer Data and NCAA Transfer Portal Data* (on file with author).

33. See *Student-Athlete Complimentary Admission Request Form* (on file with author).

34. See NCAA MANUAL, *supra* note 1, § 16.11.1.8; *2019-20 Student-Athlete Assistance Fund Policies and Procedures* (on file with author).

35. See, e.g., U. MICH., *INFRACTIONS REPORT NO. 333* at 6, (Nov. 4, 2010); U. IND., *BLOOMINGTON, INFRACTIONS REPORT NO. 287* at 3 (Nov. 25, 2008).

recorded on a form. Consider play/practice logs. Compliance directors use these to monitor team compliance with NCAA limits on daily and weekly required athletic participation. On occasion, and without prior notice, compliance staff should watch a practice or talk to student-athletes or facilities staff about the length of time a team practiced. These spot checks may surface violations not recorded on a form. A coach who knows that these spot checks will occur likely will be more observant of play/practice rules and also exercise more care in completing the forms.

### *B. Rules Education*

Compliance staff educate coaches, staff, student-athletes, and boosters on bylaws that affect them.<sup>36</sup> Student-athletes typically receive in-person rules training at the beginning of each academic year, head coaches receive rules training at monthly compliance meetings,<sup>37</sup> and other staff and boosters receive training as needed. Rules education also includes information on new bylaw interpretations and information bearing on bylaw scope and meaning that arises out of infractions or waiver cases. Compliance staff also are responsible for tracking proposed by-law additions and revisions and spearheading the institutional process for developing athletic department positions on them.

### *C. Rules Interpretation*

Language is not self-defining. Even bylaw language that seems clear in the black letter may be opaque as to its application to particular situations.<sup>38</sup> Contrary to most legal systems, where the body that adjudicates a violation of a rule also interprets the rule allegedly violated, the

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36. See E-mail from Jonathan Bateman, Assoc. Dir. of Compliance, Univ. of Neb., to Josephine R. Potuto, Professor of Law & Faculty Athletics Representative, Univ. of Neb. (Feb. 20, 2020, 11:19 AM) (on file with author). Rules education also is directed at those outside athletics with association with athletics. *Id.* These may include corporate sponsors, the university bookstore, and instructors with student-athletes in their classes. *Id.* Between June 2018 and December 2019, the rules education for student-athletes at the University of Nebraska entailed three in-person meetings, eight compliance subjects summarized on TV monitors in athletics, and ten emails on different compliance subjects. *Id.* Compliance information also is included in a student-athlete planner distributed to all student-athletes. *Id.*

37. See Agenda for Univ. of Neb. Head Coaches Meeting (Sept. 11, 2019, 12:00 PM) (on file with author). For an agenda of a monthly head coach meeting, see (602A) *NCAA and Conference Regulations Review*, KAN. ATHLETICS, <https://kuathletics.com/602a-ncaa-and-conference-regulations-review/> (last visited Aug. 16, 2020).

38. In consequence, all legal systems provide for controlling interpretations of existing language of a statute or rule when that language is challenged as insufficiently clear in application.

NCAA interpretations process operates separately from the adjudicative process.<sup>39</sup>

Interpretations begin on campus, with questions directed at compliance staff most often from coaches, but also from other staff, student-athletes, and occasionally a booster. They know what they want to do, but they may not know which facts will be critical to separating conduct that is rules-compliant from that which is rules-violative. Their descriptions of projected action may be imprecise or incomplete. On occasion, moreover, they may attempt to direct a specific response by very carefully crafting the question that they ask.

Compliance staff need to be sure that they have full information before answering a question. They should always ask if there is action contemplated beyond what has been described. They also must clearly state to the person who asked the question that their answer is specific to the facts provided and only to those facts. The person who asked the question must understand that any deviation from those described facts triggers another consultation with compliance staff.

Although each member of a compliance staff typically has clear subject areas of responsibility, the nature of compliance work means that these lines blur and also that, on occasion, another staff member must field a question because the compliance staff member with that specific responsibility is unavailable. In consequence, compliance protocols should assure that all staff are made aware of questions asked and information provided and that, before answering a question, a compliance staff member should ascertain whether another compliance member already answered it.

Sometimes a head coach asks a question in the hope that the bylaw language does not mean what it plainly says. At other times a head coach believes another university is interpreting the language differently, and this belief prompts an “interpretative” request.<sup>40</sup> This type of question takes little time to answer, often requiring nothing more than a straightforward recitation of bylaw language.

When bylaw language is unclear in its application to particular facts, compliance staff will confirm their reading of a bylaw’s scope and impact by checking NCAA interpretations posted on the NCAA

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39. In part, that is because the NCAA system has an enforcement adjudicatory arm—the Committee on Infractions—but no equivalent interpretative adjudicatory arm. For a complete description of the NCAA interpretations process, see NCAA MANUAL, *supra* note 1, § 5.4.1; NCAA MANUAL, *supra* note 1, at fig. 5-1 (NCAA Division I Legislative Process); NCAA MANUAL, *supra* note 1, at fig. 5-1 (Legislative Activity Calendar).

40. *Interpretation Request Form for NCAA Division I Interpretation Committee*, NCAA, <https://www.ncaa.org/sites/default/files/Interpretation%20Request%20Form%2042715.pdf> (last visited Aug. 19, 2020).

legislative services database (LSDBi).<sup>41</sup> On occasion, they consult with Conference or NCAA staff.<sup>42</sup> Most often, the process ends with an NCAA staff response.<sup>43</sup> In rare cases, compliance directors appeal a staff decision and seek a formal interpretative answer from the NCAA Interpretations Committee.<sup>44</sup>

#### D. Waivers

Institutional compliance staff seek waivers from the operation of a bylaw when they believe that conduct falls within the letter of a bylaw but not its intent.<sup>45</sup> Waivers often involve a student-athlete's eligibility to compete, where time is of the essence and coaches have high interest and want quick results.<sup>46</sup> In consequence, handling a waiver request can be stressful.

A compliance director's first move in a waiver request is to direct a question to NCAA staff assigned to, and following guidelines set by, the NCAA committee with jurisdiction over the bylaw for which the waiver is sought.<sup>47</sup> Should a waiver be denied, institutional compliance

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41. The LSDBi includes legislative proposals, infractions reports, interpretations, and waivers. See LSDBi Database, NCAA, <https://web3.ncaa.org/lstdbi/> (last visited Aug. 19, 2020). A copy of the information summary, and a sample interpretations page, are on file in the office of Josephine R. Potuto.

42. See E-mail from Jamie Vaughn, Exec. Assoc. Athletic Dir. for Compliance, Univ. of Neb. Athletics, to Athletics Head Coaches & Assistant Coaches, Univ. of Neb. Athletics (Oct. 14, 2019, 4:44 PM) (on file with author). A prime responsibility of the NCAA Membership Affairs staff is to interpret bylaws. NCAA MANUAL, *supra* note 1, § 5.4.1.2.1. For an illustration of the NCAA model of analysis, see generally NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 265 (2007) (West Virginia University); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 163 11-12 (1999) (University of Notre Dame). Compliance staff also may seek guidance from compliance administrators at the Conference Office.

43. These interpretations are not published, and may be relied on only by the institution involved. When an interpretative request has broader implications and potentially more far-reaching consequences, a decision is referred to the Interpretations Committee and ultimately published. All these decisions are reviewed by the Division I Legislation Committee. See NCAA DIV. I INTERPRETATIONS COMM., POLICIES AND PROCEDURES (2019).

44. These answers typically resolve the appeal. They are reviewed by the Division I legislative committee. If approved, they then are published on the NCAA website. See NCAA DIV. I INTERPRETATIONS COMM., POLICIES AND PROCEDURES (2019).

45. See *Waivers*, NCAA, <http://www.ncaa.org/content-categories/eligibility/waivers> (last visited Sept. 30, 2020).

46. See, e.g., *Remaining Eligible: Academic Waivers*, NCAA, <http://www.ncaa.org/remaining-eligible-academic-waivers> (last visited Sept. 30, 2020).

47. Committees with responsibility for particular bylaws consider waivers specific to the bylaws for which they have responsibility. Such bylaw responsibility includes waivers of team CAP rules, NCAA MANUAL, *supra* note 1, § 23.1, validation of academic records of prospective student-athletes, NCAA MANUAL, *supra* note 1, §§ 14.1.2.1, 14.1.2.2, and initial and continuing eligibility of individual student-athletes, NCAA MANUAL, *supra* note 1, §§ 14.3.1.5, 14.4.3.6. Although the NCAA provides no general set of policies and procedures governing all committees, each committee has published policies and procedures governing

staff may appeal the decision to the applicable committee.<sup>48</sup> The waiver and appeal process are handled online.<sup>49</sup>

### *E. NCAA Violations*

Institutional staff members, boosters, and student-athletes can commit NCAA violations.<sup>50</sup> Each of their violations also is an institutional violation.<sup>51</sup> If the Committee on Infractions (COI)<sup>52</sup> concludes that institutional monitoring and oversight were not reasonably calculated to prevent and uncover violations, then it will penalize the institution for a failure to monitor its athletic programs<sup>53</sup> or for a more general lack of institutional control.<sup>54</sup>

Institutional and staff culpability for violations is resolved through the infractions process; Level I and Level II violations typically result in in-person, adversarial hearings before the COI.<sup>55</sup> Institutional

its operations. *See, e.g., Student-Athlete Reinstatement*, NCAA, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement> (last visited Aug. 19, 2020).

48. *See, e.g., NCAA MANUAL, supra* note 1, § 12.8.4.1.1.

49. Example of Filed Waiver (on file with author).

50. NCAA MANUAL, *supra* note 1, § 2.8.1.

51. Institutional responsibility tracks the law of respondeat superior in which employers are liable for intentional torts of employees that arise out of the employment relationship when the employee acts, or intends to act, in furtherance of the employer's interests. CLARK BOARDMAN CALLAGHAN, 54 CAUSES OF ACTION 255 § 2 (2d ed. 2020). To some degree, institutional responsibility in NCAA processes also tracks agency principles that make it unfair for an enterprise to benefit from the work of its agents and yet not be responsible when they cause harm. *See* RESTATEMENT (SECOND) OF AGENCY § 8A cmt. a (AM. LAW INST. 1958). Under general agency law, principals are not responsible when their agents act solely in their own self-interest. *Id.* § 23. By virtue of the institutional control mandate, NCAA institutions are responsible for the conduct of staff and others beyond what agency principles dictate. At the same time, NCAA coach and staff misconduct is typically directed at team success. That success inures to the benefit of the athletic department even when it also injures the department because of violation of NCAA bylaws.

52. The COI adjudicates institutional and staff violations. *See infra* note 54 and accompanying text for the jurisdiction of the COI and how it works.

53. *See, e.g., NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 262, 15-18 (2006) (University of Kansas); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 191, 12-13 (2001) (Marshall University); NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 287 (2016) (University of Notre Dame).*

54. NCAA MANUAL, *supra* note 1, § 2.8.1. *See, e.g., NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 192, 20-24 (2002) (University of Kentucky).*

55. NCAA MANUAL, *supra* note 1, § 19.7.7. The COI makes factual findings and writes full infractions reports explaining the reasons for its findings and penalties. NCAA MANUAL, *supra* note 1, § 19.8.1. Ancillary to its responsibility to resolve cases, the COI oversees scheduling of cases before it and resolves procedural issues, including those directed at the conduct of enforcement staff. Procedural matters must be raised prior to or during an infractions hearing or else they are waived. They are resolved at the hearing, *see, e.g., INFRACTIONS REPORT NO. 265, supra* note 42, at 37-43, or in a separate hearing preceding the hearing on the merits, *see, e.g., NCAA DI COMM. ON INFRACTIONS, INFRACTIONS REPORT NO. 256 (March 10, 2006) (Ohio State University)*. Two other COI responsibilities are to determine whether cases offered for processing through summary disposition may be so resolved or require a full

culpability for less serious violations, characterized as Level III,<sup>56</sup> is handled by the NCAA enforcement staff based on the investigation and self-report of institutional compliance staff; the enforcement staff conduct no independent investigation.<sup>57</sup> Student-athlete culpability for all violations is resolved through the student-athlete reinstatement process, which mirrors the process for handling institutional culpability for Level III violations.<sup>58</sup> The responsibility of the Reinstatement Committee and staff is limited to assessing a student-athlete's responsibility based on information that the institutional compliance director provides and then deciding the conditions to be imposed before a student-athlete will be reinstated to competition eligibility.<sup>59</sup>

#### *F. The Compliance Job Beyond NCAA Bylaws*

Compliance staff monitor institutional athletic policies<sup>60</sup> as well as those of the athletic conference to which a member institution belongs. When student-athletes or athletic staff are the focus, the head compliance director also may have monitoring responsibility even though the policies enforced are not those of the NCAA, conference, or institutional athletic department. Some aspects of student-athlete well-being are covered by NCAA bylaws,<sup>61</sup> but many others are not. On occasion, and particularly when the issue is coach treatment of student-athletes, there may be an overlap with institutional human resources policies. Institutional compliance staff sometimes also participate in these inquiries.

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hearing, NCAA MANUAL, *supra* note 1, § 32.7, and to appear before the IAC to respond to appeals. This latter function is handled by the two COI coordinators of appeals. NCAA MANUAL, *supra* note 1, § 19.1.1.4.

56. Level III violations are isolated and inadvertent and produce only limited competitive advantage. For these, no independent NCAA investigation takes place. Instead, NCAA staff rely on the investigation and fact findings of institutional compliance staff. NCAA MANUAL, *supra* note 1, § 19.1.4.

57. For a general description of handling Level III violations, see NCAA MANUAL, *supra* note 1, § 19.12.

58. For a full discussion of the NCAA reinstatement process, see Josephine R. Potuto, *The NCAA Student-Athlete Reinstatement Process: Say What?*, 63 BUFF. L. REV. 297 (2015). Student-athlete violations render a student-athlete ineligible until reinstated through the NCAA student-athlete reinstatement process. NCAA MANUAL, *supra* note 1, §§ 14.11.1, 14.11.2, 14.12.

59. For reinstatement purposes, consequences to student-athletes are not called "penalties." Instead, they are called "reinstatement conditions." See *supra* note 56 and accompanying text.

60. At Nebraska, for example, the athletic academic services staff, compliance staff, and the FAR track instructors with a relationship with athletics who have student-athletes in their classes. See E-mail from Leah Huber, Administrative Assistant to Athletic Dir., Univ. of Neb. Athletics, to Josephine R. Potuto, Professor of Law & Faculty Athletics Representative, Univ. of Neb. (Mar. 3, 2020) (on file with author).

61. Bylaws that limit the hours a student-athlete may play or practice are an example. See NCAA MANUAL, *supra* note 1, at Art. 17.

The head compliance director also may be the staff member in the athletic department who interacts with the campus Title IX administrator, campus threat assessment team, campus police, campus student discipline and academic misconduct offices, and city police. In these cases, the compliance director does not investigate but acts as liaison, facilitates information acquisition and scheduling, and also evaluates whether the conduct may violate NCAA bylaws and, therefore, ultimately require a compliance investigation.<sup>62</sup> The laws and policies that may apply to student-athlete conduct or that of athletic department staff include not only Title IX,<sup>63</sup> but also the Clery Act,<sup>64</sup> federal criminal statutes, state criminal statutes, county and city ordinances, and university/regents/trustees policies.

#### *G. Compliance Directors as Athletic Department Senior Staff*

Compliance directors are part of the athletic department's senior executive staff. Senior executive staff members typically are assigned athletic teams to supervise. Sports supervisors oversee head coaches and also manage team budget requests, team travel, and day-to-day team organizational and operational matters that may arise. Sports supervision adds time demands to an already time-intensive compliance job, and it further complicates the conflict between a compliance director's cooperative and investigative roles.<sup>65</sup> This conflict is particularly acute when a compliance director, acting as sports supervisor, has factual information regarding an investigation or was part of a decision-making process relevant to an investigation.

In a world focused only on compliance and investigative imperatives, compliance directors would not supervise sports. Sports supervision, however, fully integrates a compliance director into an athletic director's management team, an important goal for an athletic director. In addition, sports supervision is an important box to check for a compliance director who seeks to move from compliance to general athletic administration.

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62. See Jake New, *The 'Black Hole' of College Sports*, INSIDE HIGHER ED (Feb. 9, 2017), <https://www.insidehighered.com/news/2017/02/09/baylor-not-alone-shielding-athletes-accused-misconduct-punishment>.

63. Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1972).

64. The Clery Act requires universities to maintain crime statistics and report them to students and staff. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f).

65. For an example of how the pressure of the two roles may affect the compliance responsibility, see INFRACTIONS REPORT NO. 287 at 3-4 (2008) (Indiana University, Bloomington).

If a compliance director supervises sports, there needs to be a written policy on file that describes the protocols that apply to minimize conflicts and the process to be employed when a conflict arises.<sup>66</sup> Among other things, the policy should specify that compliance directors will not supervise large squad teams or high profile sports. Large squads entail time and work that compliance directors can ill afford to devote. High profile sports are likely to trigger more instances in which investigations may be needed and also enhanced public scrutiny of those investigations.<sup>67</sup> In consequence, the responsibility for these investigations must be in the hands of the compliance director.

#### IV. IMPEDIMENTS TO RISK MANAGEMENT

No system can avoid all risk because that requires both perfect knowledge and perfect execution, each unattainable by fallible human beings over the long haul. Even if perfection were attainable, it comes at too great a cost. Avoiding major NCAA violations is a substantial interest of a university and its athletics department, but it is not the only one. The cost of a full-bore monitoring system will be expensive; the tradeoff may be cessation of, or limits on, athletic programs or staffing. A full-bore monitoring system also will be overblown compared to the type and incidence of most violations that will be committed.<sup>68</sup> Costs aside, no one wants to live or work in a police state, with a compliance officer watching every move. “Big brother is watching you”<sup>69</sup> does not portend a positive work environment. The NCAA requisites of institutional control mean that a university has systems in place reasonably calculated to detect and report violations, not a system that is calculated to

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66. The protocols should specify, for example, that someone in the compliance department other than the compliance director will manage compliance issues for a team the compliance director supervises. The protocols should specify, as another example, that someone in the compliance department other than the compliance director will be involved if there is an investigation of team members or staff.

67. See, e.g., Dan Kane, *NCAA faces criticism for UNC decision*, NEWS&OBSERVER (Oct. 14, 2017, 9:11 PM), <https://www.newsobserver.com/sports/college/acc/unc/article178784981.html>.

68. There are several systems used to evaluate the type, potential, and likelihood that violations and misconduct might occur, as well as the potential harm to individuals and the enterprise. MOELLER, *supra* note 10, at 43-49. These include brainstorming, use of a group of experts to ponder potential risks identified to them (called the “oracle” method), a variation of the oracle method (called the “Delphi” method) in which there is a loop interaction between the oracles, use of computer models and simulations (called the “Monte Carlo” method), and finally assessment of risk as interrelated probabilities with the occurrence of one risk making more likely (or more serious) the occurrence of other risk (called the “decision tree” method). *Id.* at 45-49.

69. GEORGE ORWELL, 1984, 3 (1983).



cover every contingency that might happen, no matter the cost to other important and worthwhile institutional goals and interests.<sup>70</sup>

#### *A. Failure to Report Suspected Misconduct*

A prime component in a system reasonably calculated to detect violations is that individuals with information about violations report what they know. Yet time and again, individuals fail to report misconduct.

From childhood, people are told not to tattle tale. Athletic staff fear career impact when what they report implicates a valued employee such as the head coach of the football team or when it may cause trouble to an athletic team or program.<sup>71</sup> They worry that they will not be believed,<sup>72</sup> and they worry about job consequences.<sup>73</sup> They likely second-guess themselves.<sup>74</sup> They also may think, wrongly, that they have no responsibility to report because a supervisor also heard the information or because the information came from someone in another athletic unit. Their reluctance to report may be amplified by a concern that their report may cause unwarranted damage to reputation or job prospects because decision-makers will overreact rather than provide a measured response to available information.<sup>75</sup>

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70. See *Principles of Institutional Control as Prepared by the NCAA Committee on In-fraction* (on file with author); see also Draft of Standards for Effective Compliance and Risk Management Programs Maintaining Institutional Control, D-IA Athletics Directors Association Compliance and Enforcement Task Force (June 5, 2013) (on file with author).

71. It is a prime reason that graduate students and untenured faculty members remain silent about abuse perpetrated by faculty. Kate Clancy, *From the Field: Hazed Tells Her Story of Harassment*, SCI. AM. (Jan. 30, 2012), <https://blogs.scientificamerican.com/context-and-variation/from-the-field-hazed-tells-her-story-of-harassment/>; Tom Bartlett & Nell Gluckman, *More Women Come Forward to Report Sexual Harassment by Harvard Professor*, CHRON. OF HIGHER EDUC. (Mar. 4, 2018), <https://www.chronicle.com/article/More-Women-Come-Forward-to/242737>. Concern over career consequences also deterred most of Harvey Weinstein's accusers from reporting his misconduct when it occurred. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

72. See Kantor & Twohey, *supra* note 71.

73. The fear that there will be job consequences is not unfounded. See, e.g., Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 977 (2008); Detlev Nitsch et al., *Why Code of Conduct Violations Go Unreported: A Conceptual Framework to Guide Intervention and Future Research*, 57 J. BUS. ETHICS 327, 335 (2005).

74. One of Larry Nassar's victims said, "I'd make excuses" in an attempt to reconcile conduct she knew was wrong. Dan Barry, Serge F. Kovaleski, & Juliet Macur, *As F.B.I. Took a Year to Pursue the Nassar Case, Dozens Say They Were Molested*, N.Y. TIMES (Feb. 3, 2018), <https://www.nytimes.com/2018/02/03/sports/nassar-fbi.html>. For a discussion of Larry Nassar and the sex abuse scandal at Michigan State University, see *infra* note 90 and accompanying text.

75. Many believe that this describes the treatment of its men's lacrosse team and student-athletes by the Duke athletic and campus administration. See, e.g., DON YAEGER & MIKE

Other impediments to reporting are that those with information believe that there is little likelihood that the violations will recur, that the violations are only Level III and do not warrant the inconvenience of reporting, or that no report is needed because the violation has been remedied as, for example, by a coach directing a student-athlete to return money given to the student-athlete by a booster.

All these reasons combine to produce perhaps the biggest, and most intractable, impediment to reporting—an individual's belief that a report should be made only when an individual is certain, or nearly so, that a violation has occurred. This conflates the initial stage of an investigation with a post-investigation finding of culpability, a fundamental misunderstanding of what reporting signifies.

Individuals who seek certainty before reporting ignore the possibility that others also may have information relevant to a misconduct calculus. When each holder of a single piece of information fails to report, then there is real risk that major violations will go undetected. A university is the sum total of students and staff, and it is held to know the information of each, both individually and collectively. It gets no hall pass from a finding of failure of institutional control, and associated penalties,<sup>76</sup> because information was dispersed across staff members and students rather than centralized in the hands of one person.

When a suspected violation goes unreported, the fact that someone earlier knew something likely will sit in memory, or in a text or email, ready later to be uncovered. A subsequent investigation, when it finally comes, not only will amp up findings and penalties for information not earlier shared, but the failure to report also removes a salient opportunity for an institution to evaluate, and reform, institutional compliance and oversight systems.<sup>77</sup> These lost opportunities can have a cascading

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PRESSLER, IT'S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED (2007).

76. NCAA MANUAL, *supra* note 1, § 19.9.3.

77. The need for effective board oversight was highlighted at least by the time of the financial crises in the mid-2000's. *E.g.*, Jim DeLoach, *10 Principles for Effective Board Risk Oversight*, CORP. COMPLIANCE INSIGHTS (June 5, 2017), <http://www.corporatecomplianceinsights.com/10-principles-for-effective-board-risk-oversight/>. The issue of board oversight also is a focus area for university administrations. The Association of Governing Boards of Universities and Colleges (AGB), for example, has a wealth of publications and reports related to Board accountability and risk management. A list may be found on its web page. AGB, <https://www.agb.org/> (last visited Aug. 21, 2020). It advocates ERM (effective risk management). Among its recommendations: Make risk management a priority, discuss potential risks frequently, and assure that information is shared, especially "cross-functional" information; ASS'N of Governing Boards of U. and Colleges, *A Wake-up Call: Enterprise Risk Management at Colleges and Universities Today*, AGB (2014), <https://www.agb.org/sites/default/files/legacy/RiskSurvey2014.pdf>.

effect, with each of them amplifying and magnifying the overall consequences when the violations finally surface.

*B. Coach Involvement in Investigations*

Problems can occur even when someone reports a suspicion that violations were committed. Perhaps the most prevalent problem is that reports are made to someone in the athletic department other than the compliance director. When a potential violation involves a student-athlete, or the information relates to a particular team, then the invariable reaction is to report the matter to the head coach.<sup>78</sup> Even if the head coach takes no action and immediately reports the information to the compliance director, the coach still has information about a potential violation. If an investigation concludes with no findings against the head coach and no penalties imposed on the team, there may be questions about the sufficiency and objectivity of that investigation and suspicions that the head coach doctored records or coached witnesses as to what to say. If, on the other hand, the coach conducts an inquiry, however limited, more substantial problems arise.

Coaches are problem-solvers; they care about their programs, worry about competition consequences, and seek to protect their student-athletes. They are not trained investigators. Nonetheless, coaches who ask questions have involved themselves in an investigation. Even a few questions may alert others or permit them time to consider what and how to answer when the compliance director comes to call. In consequence, then, even a few questions may both corrupt an investigation and trigger questions about a coach's motives. A final problem with alerting the head coach is that the coach may be complicit in the violations or will actively engage in efforts to subvert an investigation.<sup>79</sup> As a result, persons who alert a coach have put a bullseye on their foreheads. They risk being fired, and also may be the subject of COI findings and penalties.

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78. Reporting to a sports supervisor rather than the compliance director raises some of the same issues discussed in text about head coaches. The focus is on head coaches because they are the most likely staff members to whom reports of suspected violations will be made. They also are the ones most likely to have their motives questioned and to have the most invested in subverting an investigation to protect their programs. As one example, consider Penn State. The assistant coach who witnessed Sandusky's sexual behavior with a juvenile reported to Head Coach Joe Paterno, and not to the compliance director or the police. See Sara Ganim, *Mike McQueary told Joe Paterno he saw something 'extremely sexual' between Jerry Sandusky, young boy*, PATRIOT NEWS (Dec. 16, 2011), [https://www.pennlive.com/mid-state/2011/12/mcqueary\\_says\\_he\\_sat\\_at\\_paterno.html](https://www.pennlive.com/mid-state/2011/12/mcqueary_says_he_sat_at_paterno.html).

79. See New, *supra* note 62.

### *C. Failure to Maintain Confidentiality in Investigations*

Keeping an investigation confidential and limiting those in the know is the best way to assure the integrity of an investigation and to insulate later findings from skepticism and criticism. In any organization, and certainly an athletics department, keeping an investigation fully confidential is difficult to achieve.

One reason is that people talk, no matter the admonition to keep information confidential. Another reason is that there are people who in the normal course of things need to know. If there are issues related to student-athlete well-being, then the team physician or trainers may need to be informed. An athletic director is the chief executive officer of the athletic department and needs to know matters of significance that go on in the department. With such knowledge, the athletic director may make different decisions regarding job assignments that may arise. The knowledge also may give the athletic director helpful context for understanding staff interactions. The athletic director typically is the compliance director's reporting line, and the compliance director would find it difficult to withhold information from the athletic director. In turn, an athletic director will want to alert the head coach whose program is implicated.

There are very good reasons why the athletic director wants to inform the head coach. First, this is simply good management. An athletic director needs a good working relationship with senior staff members. Second, a head coach needs to have sufficient information to run the team. For example, if a student-athlete's eligibility is at risk, the head coach may need to prepare other student-athletes to play or may need a new recruiting strategy. Third, head coaches, particularly those with winning records on popular teams, can generate fan and media support and also may have connections to powerful donors and perhaps even university trustees.<sup>80</sup> An athletic director can ill afford to have these others believe the coach has been mistreated. Finally, the head coach may learn through other channels about an investigation and believe the failure to inform betrays an affirmative mistrust of him rather than investigative prudence. This portends ill for the relationship between athletic director and head coach post investigation.

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80. In 2011, the Ohio State football team was investigated for NCAA violations. Gordon Gee, the Ohio State president at the time, was asked if he was considering firing the then head coach, Jim Tressel. Tressel's Ohio State teams won multiple Big Ten Conference championships and a national championship. In response to the question, Gee joked, "No, are you kidding? Let me just be very clear: I'm just hopeful the coach doesn't dismiss me." *Jim Tressel tenders resignation*, ESPN (May 30, 2011), <https://www.espn.com/college-football/news/story?id=6606999>. The joke had more than a gem of truth to it.

In most cases, the risk in alerting a head coach may be offset by the reasons for alerting the coach. When, however, there is reason to believe that a head coach is complicit in the commission of violations, or there is reason to believe a head coach will attempt to subvert an investigation, the calculus changes. In that situation, the compliance director must advise the athletic director of the inadvisability of alerting the coach. A reporting line outside athletics can assist the compliance director.<sup>81</sup> An outside person can reinforce the need to segregate information from a head coach and also will have authority, or access to authority, to require that an athletic director refrain from giving the head coach a heads up.<sup>82</sup>

#### *D. Michigan State as Object Lesson*

An object lesson of the consequences of failing to report is the sex abuse of student-athletes at Michigan State University. Larry Nassar was a physician on the staff of the Michigan State University College of Medical Osteopathy and the trainer for the Michigan State women's gymnastics team.<sup>83</sup> In February 2018, he was sentenced to forty to 175 years in prison for sexual assaults and misconduct perpetrated on more than 330 victims under the guise of medical treatment.<sup>84</sup>

Beginning in 1997 with the first report, and continuing until 2016, when Nassar's conduct became public, at least eight student-athletes shared concerns about Nassar to staff members at Michigan State.<sup>85</sup> Not one of the student-athletes shared their concerns with the compliance

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81. See *What is the NCAA's phone number?*, NCAA, <http://www.ncaa.org/about/what-naas-phone-number> (last visited Aug. 21, 2020).

82. See *supra* notes 20-23 and accompanying text.

83. Jen Kirby, *The sex abuse scandal surrounding USA Gymnastics team doctor Larry Nassar, explained*, VOX (May 16, 2018, 4:45 PM), <https://www.vox.com/identities/2018/1/19/16897722/sexual-abuse-usa-gymnastics-larry-nassar-explained>. Nassar also had been a former trainer for USA Gymnastics, the governing body for Olympics Gymnastics Competition; and a six-time winner of the Elite Gymnastic Coaches "National Contributor of the Year" award. Tim Evans et al., *How Larry Nassar abused hundreds of gymnasts and eluded justice for decades*, USA TODAY NETWORK (Apr. 4, 2018, 4:59 PM), <https://www.usa-breakingnews.net/2018/01/how-larry-nassar-abused-hundreds-of-gymnasts-and-eluded-justice-for-decades/>.

84. Meghan Keneally, *MSU agrees to pay gymnastics doctor Larry Nassar's accusers \$500 million in settlement*, ABC NEWS (May 16, 2018, 9:58 AM), <https://abcnews.go.com/US/msu-agrees-pay-gymnastics-doctor-larry-nassars-accusers/story?id=55208344>.

85. James Dator, *A comprehensive timeline of the Larry Nassar case*, SBNATION (July 31, 2019, 1:24 PM), <https://www.sbnation.com/2018/1/19/16900674/larry-nassar-abuse-timeline-usa-gymnastics-michigan-state>; Kim Kozlowski, *What MSU knew: 14 were warned of Nassar abuse*, DETROIT NEWS (Jan. 18, 2018, 12:00 AM), <https://www.detroit-news.com/story/tech/2018/01/18/msu-president-told-nassar-complaint-2014/1042071001/>; Sarah Brown, *How a Transformational President Set Michigan State on a Course to Disaster*, CHRON. OF HIGHER EDUC. (May 8, 2018), <https://www.chronicle.com/article/How-a-Transformational/243369>.

director; not one of the staff members to whom they reported took their concerns to the compliance director (or any other athletic department or campus senior administrator).<sup>86</sup>

In 2014, a student-athlete brought a formal Title IX complaint against Nassar.<sup>87</sup> The Title IX investigator confined her investigation to the four squares of the complaint.<sup>88</sup> Had she known about the earlier information, she might have expanded the scope of her inquiry to include interviews with the other student-athletes and the staff members to whom they shared concerns. Later, when the full scope of Nassar's conduct became public, the university found no shelter in the fact that none of the earlier student-athlete concerns had been reported to the compliance director in real time.<sup>89</sup>

The consequences to Michigan State include \$500 million paid in settlements to resolve civil litigation complaints filed by Nassar's victims,<sup>90</sup> a Title IX investigation into systemic failures in Michigan's State's handling of Nassar information,<sup>91</sup> a Clery Act investigation<sup>92</sup> that resulted in \$4.5 million in fines,<sup>93</sup> a two-year attorney general

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86. Kozlowski, *supra* note 85.

87. Caroline Kitchener, *The Nassar Investigation That Never Made Headlines*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/education/archive/2018/01/the-nassar-investigation-that-never-made-headlines/551717/>.

88. *See id.*

89. Jeremy Bauer-Wolf, *A Record Fine for Underreporting Sex Crimes*, INSIDE HIGHER ED (Sept. 6, 2019), <https://www.insidehighered.com/news/2019/09/06/education-department-fines-michigan-state-45-million-not-reporting-nassar-crimes>.

90. Mitch Smith & Anemona Hartocollis, *Michigan State's \$500 Million for Nassar Victims Dwarfs Other Settlements*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html>; Will Hobson & Cindy Boren, *Michigan State settles with Larry Nassar victims for \$500 million*, WASH. POST (May 16, 2018, 10:48 AM), [https://www.washingtonpost.com/news/early-lead/wp/2018/05/16/michigan-state-settles-larry-nassar-lawsuits-for-500-million/?noredirect=on&utm\\_term=.961774416a48&wpisrc=al\\_news\\_\\_alert-sports—alert-national&wpmk=1](https://www.washingtonpost.com/news/early-lead/wp/2018/05/16/michigan-state-settles-larry-nassar-lawsuits-for-500-million/?noredirect=on&utm_term=.961774416a48&wpisrc=al_news__alert-sports—alert-national&wpmk=1) (reporting that award provides \$425 million to 332 Nassar victims, an average of \$1.28 million per victim and \$75 million in a trust to cover other victims who may come forward, less lawyer fees of one-third); A.J. Perez, *How much money will Larry Nassar survivors get? Grim process will determine settlements*, USA TODAY (May 16, 2018, 5:59 PM), <https://www.usatoday.com/story/sports/2018/05/16/larry-nassar-survivors-sexual-abuse-settlements-money/617333002/>.

91. Eric Kelderman, *After the Nassar Conviction, Michigan State Goes on Trial*, CHRON. OF HIGHER EDUC. (Feb. 1, 2018), <https://www.chronicle.com/article/after-nassar-conviction-michigan-state-goes-on-trial/>; David Jesse, *Feds sending more investigators to MSU's campus*, DETROIT FREE PRESS (Feb. 26, 2018, 4:12 PM), <https://www.freep.com/story/news/local/michigan/2018/02/26/feds-sending-more-investigators-msu-campus/373884002/>.

92. Kelderman, *supra* note 91; Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2020).

93. Tawnell D. Hobbs, Melissa Korn & Louise Radnofsky, *Michigan State University Fined \$4.5 Million for Sex-Crime Reporting Failures*, WALL STREET J. (Sept. 5, 2019, 1:35 PM), <https://www.wsj.com/articles/michigan-state-university-fined-4-5-million-for-sex-crime-reporting-failures-11567698999>.

investigation, and several other investigations.<sup>94</sup> There also has been untold damage to Michigan State's reputation, and likely no good way to assess the magnitude of that damage.

The case also has had substantial impact on individuals. The Michigan State athletic director resigned.<sup>95</sup> The Michigan State president resigned and is being prosecuted.<sup>96</sup> The dean of the Michigan State College of Osteopathic Medicine retired,<sup>97</sup> foregoing emeritus status and benefits paid to retired senior administrators.<sup>98</sup> He since has been convicted of two misdemeanors and sentenced to one year in jail.<sup>99</sup> The University General Counsel, who handled an internal investigation, resigned.<sup>100</sup> The head Women's Gymnastics Coach resigned and since has been convicted of lying to the police about what gymnasts told her about Nassar.<sup>101</sup> A doctor who consulted in the Title IX investigation resigned in advance of being fired.<sup>102</sup>

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94. David Eggert, *AG suspends investigation of Michigan State over Nassar*, ASSOCIATED PRESS (Dec. 24, 2019), <https://ap-news.com/bb09d1bae41c718ba2b9621c6bb6dea5>.

95. Dan Murphy, *Michigan State AD Mark Hollis resigns*, ESPN (Jan. 26, 2018), [https://www.espn.com/college-sports/story/\\_/id/22223678/michigan-state-athletic-director-mark-hollis-resigns](https://www.espn.com/college-sports/story/_/id/22223678/michigan-state-athletic-director-mark-hollis-resigns).

96. Tracy Connor, *Michigan State president Lou Anna Simon resigns over Nassar scandal*, NBC NEWS (Jan. 25, 2018, 3:58 AM), <https://www.nbcnews.com/news/us-news/michigan-state-president-lou-anna-simon-resigns-over-nassar-scandal-n840866>. Simon is one of fewer than twelve Michigan State faculty to hold a Hannah Professorship, expected to be awarded only to star scholars; Sarah Brown, *Michigan State's Ex-President Now Holds a Prestigious Professorship. Some of Her Colleagues Aren't Happy About It*, CHRON. OF HIGHER EDUC. (Feb. 26, 2018), <https://www.chronicle.com/article/Michigan-State-s/242644>.

97. Sarah Brown, *Here's a List of Who Has Left Michigan State Since the Nassar Scandal Erupted*, CHRON. OF HIGHER EDUC. (Apr. 17, 2018), <https://www.chronicle.com/article/Here-s-a-List-of-Who-Has/243145>.

98. Kim Kozlowski, *Strampel retires ahead of possible firing by MSU*, DETROIT NEWS (July 6, 2018, 11:24 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/07/06/strampel-retires-ahead-possible-firing-msu/762808002/>.

99. Megan Banta, *Former MSU dean William Strampel sentenced to one year in jail*, LANSING ST. J. (Aug. 7, 2019, 2:20 PM), <https://www.lansingstatejournal.com/story/news/local/2019/08/07/former-msu-dean-william-strampel-sentenced-larry-nassar-michigan-state/1933906001/>.

100. Matt Harmon, *VP of Legal Affairs at MSU resigns in the wake of more Nassar-related lawsuits*, MICH. DAILY (Feb. 20, 2018, 6:04 PM), <https://www.michigandaily.com/section/administration/msu-vp-legal-affairs-retires-after-new-lawsuits-filed-against-university>.

101. Megan Banta, *Former Michigan State University gymnastics coach Kathie Klages convicted of lying to police*, LANSING ST. J. (Feb. 14, 2020, 7:00 PM), <https://www.lansingstatejournal.com/story/news/local/2020/02/14/former-msu-gymnastics-coach-kathie-klages-convicted-lying-police/4761128002/>.

102. Mat Mencarini, *MSU doctor resigned after removing Nassar patient files*, DETROIT FREE PRESS (Mar. 18, 2017, 10:01 AM), <https://www.freep.com/story/news/local/michigan/2017/03/17/larry-nassar-brooke-lemmen-gymnastics/99338982/>.

## V. ELEMENTS OF AN INVESTIGATION

Investigations begin when the compliance director learns of potential violations. Should the compliance director decide the violations, if proved, are Level I or Level II, the compliance director should inform the NCAA enforcement staff. That shows an intent to cooperate. In addition, in these days of social media and a twenty-four/seven news cycle, the enforcement staff may hear something from another source. It always is better for institutional compliance staff to get there first.

*A. External or Internal?*

Once a compliance director decides that Level I or II violations may have been committed, university senior administrators have a choice to make: hire external investigators to lead the investigation<sup>103</sup> or proceed with athletics compliance staff.<sup>104</sup> Although there are benefits and drawbacks to either choice, common to both is that investigators must know the elements of NCAA violations sufficiently well so that they may detect additional areas of potential violations; they must be skeptical about information provided; they must resist accepting explanations at face value; and they must be intrepid in pursuing uncomfortable areas of inquiry or challenging popular and forceful coaches.

Good investigations require time, diligence, testing and confirming information, and proceeding in ways designed to be impervious to tampering.<sup>105</sup> External investigators investigate for a living, are more experienced, and likely are better skilled in interviewing techniques. They also will not be hampered by prior relationships with investigation targets and other witnesses and will not worry whether their skepticism and probing will produce hurt feelings in co-workers or affect work relationships once an investigation ends. Outside investigators also are more likely to hear corroborative tangential information that a staff member would not want a co-worker to know. Consider a staff member having an extramarital affair who was at a hotel when he saw a booster pay a student-athlete. Why he was at the hotel may be information he is more inclined to share with a stranger.

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103. An investigation may be external to the athletic department, but internal to the university. At Nebraska, the FAR has the authority to remove an investigation outside the athletic department when the FAR believes an external review is needed. *See* Memorandum from UNL Chancellor, *supra* note 20. The FAR chairs are the review committee.

104. *See id.*

105. NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REP. NO. 176 (2000) (University of Minnesota). The University learned of a possible major infraction perpetrated by the Head Basketball Coach. It alerted the head coach that team members would be interviewed. Before interviews could be conducted, the head coach met with the team and coached them to lie. *Id.*



External investigators are more likely to satisfy outside observers that an investigation was complete and impartial. They also may make it easier for university and athletic administrators internally to implement recommended prophylactic measures. Finally, outside investigators will free compliance staff to continue to do all the other jobs that need to be done.

On the flip side, compliance staff will be more familiar with athletic department, university, and Conference policies and may well be more familiar with the ins and outs of NCAA bylaws. They not only more quickly can locate documents, but they are better positioned to know what documents might exist and which staff members and boosters might have relevant information. They also know the proclivities, quirks, and behaviors of coaches and staff. Institutional compliance directors may cause fewer disruptions to work and student-athlete schedules as, by contrast to outside investigators, they need not fit all activity within a tightened time frame but, instead, can schedule interviews around work and student-athlete schedules. And, finally, institutional compliance staff will be much less expensive than an outside investigator.<sup>106</sup>

### *B. Interviewing Fundamentals*

No matter whether conducted by external or internal investigators, or by both working in tandem, some components of conducting an investigation are common to all investigations. First, it is critically important to act promptly to assure that relevant documents are not lost, removed, or destroyed.<sup>107</sup> Second, interviews should be kept confidential;<sup>108</sup> one of the best ways to corrupt an investigation is for information to become known to investigation targets. Third, there always should be two people conducting interviews. Fourth, interviews should be recorded.<sup>109</sup>

An investigator needs to decide who should be interviewed, the order in which interviews are conducted, the questions to be asked of

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106. Anne Ryman, *University of Arizona spends \$1.4M on legal bills related to FBI basketball investigation*, AZCENTRAL (Nov. 29, 2018, 6:00 AM), <https://www.azcentral.com/story/news/local/arizona-investigations/2018/11/29/arizona-wildcats-legal-bills-ncaa-basketball-investigation/2120399002/>.

107. See NCAA MANUAL, *supra* note 1, § 19.5.9 (Access to Information); for guidance on document preservation, see *infra* note 131 and accompanying text.

108. See NCAA MANUAL, *supra* note 1 § 19.5.8.

109. There are myriad police manuals and books on the subject. See generally, e.g., JOHN HESS, INTERVIEWING AND INTERROGATION FOR LAW ENFORCEMENT (2d ed. 2015); JOHN R. SCHAFER & JOE NAVARRO, ADVANCED INTERVIEWING TECHNIQUES (3d ed. 2016); DARREN DRAKE, THE INFORMATION YOU WANT (2016); see also DAVID E. ZULAWSKI ET AL., PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 420 (2d ed. 2001).

witnesses, and the order of questions. Typically, interviewers first talk to witnesses predicted to have the most critical information because what is learned may frame later interviews. An important early decision is when to interview the investigation target. Although witnesses will be told to keep the interview confidential, they nonetheless may fail to follow that admonition. Where to slot the target depends on what interviewers think is the greater risk to the integrity of the investigation.

The goal in an interview is to acquire all relevant information, of course. To achieve that goal, interviewing is an interactive process between asking the right, and right type of, questions and being an active listener. An active listener hears and pursues inconsistencies and identifies relevant documents and corroborating (or refuting) information not before identified. An active listener also pays attention to what is NOT said.

Specific questions produce specific answers that can be matched against other information and, therefore, identify witnesses who dissemble, but they also may alert targets as to where the pitfalls are in their answers and, in consequence, alert targets how to tailor a response. In focusing their attention in a particular direction, specific questions may lead even a fully cooperative witness to fail to provide other relevant information.<sup>110</sup>

Open-ended questions, with uninterrupted time for witnesses to answer, avoid the pitfalls of specific questions. They also minimize later claims that the witness's information was tainted by what the interviewer shared.<sup>111</sup> A negative is that open-ended questions extend the time that interviews take. Their major downside is that they risk even active listeners missing important new information or being distracted by answers into the pathways the answers provide, thereby failing to go back over the interview and follow up to acquire additional specific information.

The uncertainty that impedes people from making reports also leads them to equivocate or understate when they come forward. An investigator must avoid concluding that a tepid or equivocal answer means there is little or nothing to follow up.

A particularly bad mistake is for an investigator to decide that there can be no case proved in a swearing contest. The scenario: one person reports that something happened; the other denies it. That should begin

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110. *See, e.g.*, NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REP. NO. 193 at 26 (2002) (getting specific too early may permit a subject to answer a particular question honestly but avoid answering the sense and true intent of the question).

111. *See, e.g.*, BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18-19 (2011) (discussing criminal law literature regarding contaminations of confessions by providing information to a suspect).

an investigation, not end it. Investigators should seek corroborating evidence for each version and evaluate the comparative internal consistencies of the two versions and the surrounding contextual information. Not all situations generate equally plausible sets of inferences about what occurred. In addition, people and information are not equally credible.<sup>112</sup>

At the end of the day, even if there are just the two versions and not much more, an investigative conclusion can be made. Consider the municipal judge who affirms a traffic ticket when the entire basis of the evidence is the report of the police officer, contradicted by the driver.

### C. *The Backend Forward Approach*

Every investigation worth the name must be conducted independently, fully, and fairly.<sup>113</sup> Every investigation also must generate confidence in others that it was conducted independently, fully, and fairly. While these two goals appear consonant one to the other, they may point to different conduct during an investigation.<sup>114</sup> The point here is a simple one: the scope and direction of an investigation at the front end should be guided by how one would like to handle questions and criticism at the back end of an investigation—at a COI hearing or from the media, an academic senate, the state legislature, or various interest groups.

Suppose it is alleged that Head Coach Touchdown paid two recruits to attend State University, and that the university lacked institutional control because it had no effective system in place to police against the possibility of such conduct taking place. Coach Touchdown is a highly successful football coach. His teams have won Conference championships and one national title. The recruits were both five-star players out of high school, and they were integral to the 2019 national championship State University won. If the violations are proved, Head Coach Touchdown no doubt will lose his job, the two student-athletes will be

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112. Among other things, an investigator can assess the credibility of each individual with respect to past history and reputation for truthfulness; assess the credibility in terms of the common sense of what is being reported; assess the credibility in terms of other information in the record; and assess the credibility in terms of reason, if any, for dissembling.

113. See Elizabeth C. Tippet, *Why companies like Wells Fargo ignore their whistleblowers – at their peril*, CONVERSATION (Oct. 24, 2016, 12:09 AM), [http://Theconversation.Com/Why-Companies-Like-Wells-Fargo-Ignore-Their-Whistleblowers -At-Their-Peril-67501](http://Theconversation.Com/Why-Companies-Like-Wells-Fargo-Ignore-Their-Whistleblowers-At-Their-Peril-67501). Surprisingly, perhaps, that is not always what occurs.

114. See, e.g., Geri Ann S. Baptista, *Managing reputational risk: Why lawyers and PR professionals should be friends*, THOMSON REUTERS (Aug./Sept. 2012), <https://store.legal.thomsonreuters.com/law-products/news-views/corporate-counsel/managing-reputational-risk-why-lawyer-and-pr-professionals-should-be-friends>.

ineligible to compete, the national championship will be vacated, and there will be team scholarship limits going forward.<sup>115</sup>

An institutional investigation ensues. One conclusion of the investigators is that Head Coach Touchdown made the payments. A second conclusion is that the university both adequately monitored the football program and exercised institutional control. To reach the second conclusion, the investigators decided that Touchdown acted without the knowledge or connivance of any other person in the athletic department and that he cleverly circumvented athletic department policies reasonably calculated to detect violations. It is predictable that Touchdown will publicly criticize these conclusions and claim that the university abandoned his interests to protect its own. Fans, donors, and media representatives also may challenge the merits and motives of the university's position.

The university at the backend will want to demonstrate that it provided procedural fairness to Coach Touchdown during the investigation. One thing investigators should attempt to do at the front end is to accede to all Coach Touchdown's requests for documents and for witnesses that the university should interview, even if the requests are time consuming and even if the investigators believe the requests are designed to delay the conclusion of the investigation. The investigators also should document all coach requests and their responses to them. If the investigators refuse a request, for fear it will jeopardize the investigation, or because they believe the coach has been deliberately and repetitively attempting to thwart or stall the investigation, then the investigators should create a full record demonstrating why the request was denied.

#### *D. Follow-up, Especially When Investigation Ends with No Finding of Culpability*

It falls to compliance staff to assure that there is adequate follow-up post investigation even, and perhaps especially, if there are no findings of violations. Return to Michigan State and the 2014 Title IX complaint filed against Larry Nassar. After a four-month investigation, Kristine Moore, the Michigan State Assistant Director for Institutional Equity, found insufficient evidence that Title IX was violated.<sup>116</sup> At the same time, she accepted as true much of what the student-athlete said about how Nassar performed the procedure, and she recommended

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115. NCAA MANUAL, *supra* note 1, § 19.9.5 (discussing core penalties for Level I and Level II violations).

116. Jean Casarez et al., *She filed a complaint against Larry Nassar in 2014. Nothing happened*, CNN (Feb. 1, 2018, 5:53 PM), <https://www.cnn.com/2018/02/01/us/msu-amanda-thomashow-complaint-larry-nassar/index.html>.

prophylactic measures to cabin potential liability arising out of the procedure and to make the procedure more patient-sensitive.<sup>117</sup> Her recommendations were not implemented.<sup>118</sup>

William Strampel, the dean of the College of Medical Osteopathy who was Nassar's supervisor outside athletics, also made post-Report recommendations.<sup>119</sup> He did not take steps to assure Nassar complied.<sup>120</sup>

The failure to follow up post-investigation when there is no finding of culpability at best confounds a finding of failure of proof with a finding that the violations did not occur. Such a failure of follow-up would be a significant element, perhaps even determinative, in a showing of lack of institutional control should a later infractions case develop.

#### VI. WHAT TO INCLUDE IN A COMPLIANCE RISK MANAGEMENT PLAN<sup>121</sup>

Effective risk management requires advance planning. This section describes some of the most critical elements in a plan.

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117. Moore advised that Nassar's treatment should be carefully explained, that there be explicit patient consent, that a third person be present during the treatments, and that Nassar offer patients a choice between skin-on-skin and over the clothes manipulation of breast or pelvic floor area, unless skin on skin was medically necessary. She also recommended that Michigan State consider providing an information sheet to a patient in advance of treatment and include a disclaimer. Matt Mencarini, *MSU hid full conclusions of 2014 Nassar report from victim*, LANSING ST. J. (Jan. 26, 2018, 4:23 PM), <https://www.lansingstatejournal.com/story/news/local/2018/01/26/michigan-state-larry-nassar-title-ix/1069493001>.

118. *See id.*

119. Megan Banta, *William Strampel first Michigan State official tied to Larry Nassar to be convicted*, USA TODAY (June 12, 2019, 2:31 PM), <https://www.usatoday.com/story/news/education/2019/06/12/william-strampel-michigan-state-university-msu-sexual-assault-jury/1433882001/> (stating that Strampel told Nassar to wear gloves and have someone else present); Julie Mack, *MSU colleagues initially defended Nassar, according to police investigation*, MICH. LIVE (Jan. 30, 2019), [https://www.mlive.com/news/2018/04/msu\\_colleagues\\_initially\\_defen.html](https://www.mlive.com/news/2018/04/msu_colleagues_initially_defen.html).

120. The Associated Press, *Michigan State dean charged, accused of harassing students*, OBSERVER-DISPATCH (Mar. 27, 2018, 12:30 PM), <https://www.uti-caod.com/news/20180327/michigan-state-dean-charged-accused-of-harassing-students>.

121. Several years ago, the athletic directors in the NCAA Division I FBS (formerly called D-IA) worked on a plan for athletic department compliance. The plan was never adopted. Its components cover the subjects discussed in this article. *See* D-IA Athletics Directors Ass'n Compliance and Enforcement Task Force, *Standards for Effective Compliance and Risk Management Programs Maintaining Institutional Control*, (June 5, 2013) (on file with author). A complete risk management plan also will include protocols for how to handle media and other external constituencies during the period of an investigation and post-investigation. This component will be the responsibility of university and athletic department high administrators and involves interaction with legal counsel and media relations experts. It therefore is outside the scope of this article.

### *A. The Staff Reporting Obligation*

Because the prime impediment to prompt discovery and handling of violations is that individuals with information about violations do not report, a prime focus in a risk management plan is to enhance the likelihood that coaches and staff will report. Protocols should include:

1. Periodic education of all staff so that they understand their behavioral and reporting responsibilities regarding operative legal, campus, NCAA, Conference, and Athletic Department rules and policies. These education sessions should include:
  - a. Regular compliance unit meetings with compliance staff and academic eligibility certifying staff members within the athletic department and on the greater campus.
  - b. Specific education for coaches and staff on NCAA, Conference, and Athletic Department rules and policies as they directly affect them.
  - c. A clear statement that the first priority of staff is to the university and athletic department, not particular coaches, staff, or student-athletes.
2. Regular training and written directives in the athletic department compliance manual that cover the obligation to report suspected violations, including:
  - a. A clear statement that suspected NCAA violations need to be reported to the compliance director, and only the compliance director.
  - b. A clear statement that a report to anyone other than the compliance director, including the head coach of a sport, does not satisfy a reporting obligation.
  - c. A clear statement that a failure to report triggers employment consequences that may include termination.
  - d. A clear statement that a staff member or coach who suspects a violation was committed should not investigate before reporting, even to ask a few questions.
  - e. A clear statement that a report must be made even if the violation was thwarted before its completion or action was taken to remedy the violation.
  - f. A clear statement that a report must be made even if the conduct does not relate to the staff member's athletic unit.
  - g. A clear statement that a report must be made when a staff member has a reasonable suspicion that a violation was committed. When in doubt, ask. When in doubt, report.

*B. Compliance Staff Treatment of Reports*

Compliance staff must make judgments regarding the extent to which follow up is required based on information reported or otherwise acquired. Some grounds rules include:

1. Compliance staff must regularly check traditional, non-traditional, and social media for information about student-athletes and coaches. NCAA enforcement staff do so, and compliance staff should be fore-armed.<sup>122</sup>
2. Compliance staff should not discount information because of its source, or because the individual reporting seems to be uncertain, or to equivocate.
3. All reports of potential violations are not equal. The obligation to conduct a full investigation increases when:
  - a. The person reporting is someone the compliance staff perceives to be trustworthy. This does not mean that information from a less reliable source should be ignored. It simply reflects a commonplace that the more reliable the source is perceived to be, the more seriously the compliance staff should treat the information.
  - b. The suspected violation concerns a high-profile program (or coach or student-athlete), or the matter potentially will have an impact on student-athlete eligibility. The likelihood of media and other public scrutiny increases in these cases and, therefore, so too, the need for a full investigation.
  - c. The suspected violation is Level I or Level II. The need for a full investigation is increased even when the information reported is relatively unspecific.
  - d. The information provided is detailed.
  - e. The person who reports has first-hand knowledge of the suspected violation (as compared to reporting hearsay).
  - f. The person who reports describes more than one instance of suspected violations.
  - g. More than one person reports the same potential violation.
  - h. More than one person reports different potential violations committed by the same coach or in the same sport.

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122. See, e.g., Andy Staples, *Cheating for Dummies: Your guide to smarter NCAA rule-breaking*, SPORTS ILLUSTRATED (July 5, 2011), [http://sportsillustrated.cnn.com/2011/writers/andy\\_staples/07/05/cheating-for-dummies/index.html](http://sportsillustrated.cnn.com/2011/writers/andy_staples/07/05/cheating-for-dummies/index.html).

### C. Minimal Requisites for Conducting an Investigation

Investigations require thought and planning in advance. Protocols setting minimum standards assure that certain requisites always will be followed and that there will be consistency across investigations.

1. Get to the documents as soon as possible.
2. Speak to IT regarding retrieval of deleted work computer files and the extent to which there is evidence of phone and text messages and whether they may be retrieved. If a staff member or coach is an investigative target, then consider seizing the computer.
3. Seize phone records and emails on university accounts.
4. Request all phone numbers and emails. Dates and times and recipients of phone and email and text messages, as well as exchanges between recipients and others, can tell a tale independent of the content of the messages.<sup>123</sup>
5. Ask about personal phone records—other cell phones owned by staff, cell phones of family members. Search for other social media information.
6. Plan the sequence of interviews and questions before beginning interviews. Cast a wide net to see who might have information. Often there are pockets of information in various hands. Do not forget secretaries, equipment managers, trainers, custodians, and other non-administrative staff members. They often are best positioned to hear information.
7. Have two people at every interview that may be significant; if possible, have two people at every interview. Ideally, the second person should be someone outside athletics.
8. Tape record interviews. Remember that the interview is being recorded and later may be heard by others, including NCAA enforcement staff. Do not turn the tape on and off. It raises questions as to what might have been said when the tape was off. If the interviewee refuses to be taped, tape the refusal. But now it is imperative to have an outside person be one of the two people who conduct the interview.
9. Interview witnesses separately. Group sessions corrupt the information that any one individual may provide.<sup>124</sup> They also may lead

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123. See, e.g., INFRACTIONS REP. NO. 193, *supra* note 110; see also NCAA DIV. I COMM. ON INFRACTIONS, INFRACTIONS REP. NO. 323 at 11-13, 23-27 (2010) (University of Southern California).

124. There is considerable research on eyewitness identification, and how one witness can influence another. See generally, e.g., Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL., PUB. POL'Y, & L. 765 (1995); Howard Eisenberg & Bruce Feustal, *Criminal Law: Pretrial Identification: An Attempt to Articulate Constitutional Criteria*, 58 MARQ. L. REV. 659, 673 (1975).



- more reticent individuals, and those with embarrassing information, to remain silent.
10. Be skeptical. People lie. People have faulty memories.
  11. Do not assume that records and forms always tell an accurate tale. People sometimes keep bad records. People sometimes lie in records.
  12. Create a record as the investigation proceeds that summarizes what is occurring, including memos to the file explaining investigative decisions made, why, and who was consulted.
  13. Be prepared to conduct second and even third interviews as new matters are uncovered.

## VII. CONCLUSION

Dean Smith,<sup>125</sup> the longtime head coach of the North Carolina University men's basketball team, said of intercollegiate athletics that, "[a]thletics is to the university like the front porch is to a home. It is the most visible part, yet certainly not the most important."<sup>126</sup>

No doubt high-profile teams and head coaches sit on the front porch and affect a university's reputation. No doubt losses by a football team, particularly in a major football program, can rock the porch, dominate public and media discussion, affect donor contributions, and even involve public officials in a discussion about what to do. Equally no doubt, NCAA violations and student-athlete behavioral issues can rock the front porch and cause long-term injury to the academic reputation and status of a university.

Universities have an absolute obligation as NCAA members to maintain control of their athletic programs. Institutional compliance directors are the athletic administrators with first-line responsibility to see that this happens. They are responsible for NCAA rules education, compliance form creation and management, rules interpretation, waivers, investigations, and reporting potential NCAA violations.<sup>127</sup> They also act as liaisons to campus processes that include Title IX investigations and student discipline, and they are the point persons for student wellbeing and behavioral issues.<sup>128</sup> Many of these "hot button" matters bring public scrutiny and criticism. No doubt, then, institutional compliance directors also sit on the front porch.

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125. Michael Levy, *Dean Smith*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Dean-Smith> (last visited Feb. 24, 2020).

126. *Maximize Marketing in College Athletics*, FRONT PORCH ATHLETICS, <https://www.frontporchathletics.com/> (last visited Dec. 26, 2020)..

127. *See supra* Part II.

128. *See supra* Part II.

This article described the nuts and bolts of the institutional compliance job. It then focused on a prime factor for problems on the institutional control part of the front porch—the failure of those with information about violations to report that information to the compliance director—and explained why individuals fail to report. Finally, it offered guidance on how to keep the front porch sturdy. In other words, it offered guidance on how to increase the likelihood of reports being made, as well as guidance on the minimal requisites of a violation investigation, and the prime elements of a compliance risk management plan.

The front porch is visible, yes. With visibility comes scrutiny and the potential for considerable, and protracted, second-guessing and criticism for how universities oversee their front porch.<sup>129</sup> Universities have every incentive to avoid being overwhelmed by the front porch. What compliance directors do, and how they do it, can either enhance the chances for a well-built and sturdy front porch. Or not.

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129. See, e.g., Ted Mitchell, *Higher education must clean out its 'front porch'*, WASH. POST (Apr. 25, 2018, 1:35 PM), <https://www.washingtonpost.com/news/grade-point/wp/2018/04/25/higher-education-must-clean-out-its-front-porch/>; see generally, e.g., Frank G. Splitt, *Time for accountability in sports*, THE NAT'L CATHOLIC REP., Nov. 14, 2008; JOHN S. & JAMES L. KNIGHT FOUNDATION, COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (2001); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS HAS CRIPPLED UNDERGRADUATE EDUCATION (2001); RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT (1996); COALITION ON INTERCOLLEGIATE ATHLETICS, A FRAMEWORK FOR COMPREHENSIVE ATHLETICS REFORM (2003); WILLIAM G. BOWEN ET AL., RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES (2003); JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE (2000); JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2002); JOHN R. THELIN, GAMES COLLEGES PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS (1994).