

# SPORTS & ENTERTAINMENT LAW JOURNAL

## ARIZONA STATE UNIVERSITY

VOLUME 5

FALL 2015

ISSUE 1

### ***McNair v. NCAA*: WHAT IT MEANS FOR THE NCAA ENFORCEMENT PROCESS AND HOW TO FIX THE PROBLEM IT CREATES**

John Carlson\*

#### **TABLE OF CONTENTS**

<b>INTRODUCTION .....</b>	<b>89</b>
<b>I. NCAA ENFORCEMENT PROCESS.....</b>	<b>90</b>
A. HISTORY OF NCAA ENFORCEMENT .....	90
B. CURRENT ENFORCEMENT AND INFRACTIONS PROCESS.....	94
<b>II. <i>McNair v. NCAA</i>.....</b>	<b>97</b>
A. SUMMARY .....	97
B. PROBLEMS STEMMING FROM THE <i>McNair v. NCAA</i> RULING ...	103
<b>III. SOLUTIONS CURRENTLY ADOPTED BY THE NCAA .....</b>	<b>104</b>
A. APPEAL.....	104
B. NCAA CONFIDENTIALITY BYLAWS AND BALANCING TEST ....	105
C. NFL CONFIDENTIALITY OF WITNESSES .....	108
<b>IV. PROPOSED SOLUTION TO THE <i>McNair</i> PROBLEM .....</b>	<b>108</b>
A. PROPOSED BYLAWS.....	109
B. ANALYSIS OF THE PROPOSED BYLAWS .....	110
1. <i>Confidential Documents</i> .....	110
2. <i>General Standard</i> .....	111
3. <i>Exceptions</i> .....	112
C. BENEFITS OF THE PROPOSED BYLAWS .....	113
D. DISADVANTAGES OF THE PROPOSED BYLAWS.....	115
E. IMPLEMENTATION .....	116
<b>CONCLUSION.....</b>	<b>117</b>

#### **INTRODUCTION**

To a casual observer, the *McNair v. National Collegiate Athletic Association* decision does not appear overtly controversial or troublesome. However, the *McNair* decision

---

\* John Carlson is a practicing attorney at Aspey, Watkins, & Diesel, PLLC, in Flagstaff, Arizona. Mr. Carlson is a 2015 graduate of the Sandra Day O'Connor College of Law at Arizona State University. The author would like to thank Professors Rodney K. Smith and Stephen Webb for their assistance in writing this article. Finally, the author would like to thank Skyla Savitch for her unwavering support.

created a significant barrier to the efficient and effective disposition of internal National Collegiate Athletic Association (“NCAA”) enforcement matters. In *McNair*, the California Court of Appeals refused the NCAA’s motion to seal certain confidential enforcement documents that it desired to use in its defense against Plaintiff Todd McNair’s claims.<sup>1</sup> The Court relied on “the public’s First Amendment right of access to documents used at trial or as a basis of adjudication.”<sup>2</sup> The NCAA unsuccessfully argued that “the interest in confidentiality of its enforcement proceedings [should] override [this] public right of access to documents used as a basis for adjudication.”<sup>3</sup>

If the *McNair* decision is not overturned, and if other courts throughout the United States subsequently adopt it, the NCAA will be required to conduct an evidentiary balancing act in every future case it defends in court. The NCAA will find it necessary to balance the interests of proving its case in court using confidential enforcement documents, against the interests in maintaining the confidentiality of those same documents. This overarching problem creates two major underlying problems related to confidentiality. First, the NCAA will have more difficulty convincing witnesses outside the purview of the NCAA bylaws to cooperate due to the diminished guarantee of confidentiality. Second, members of the NCAA enforcement staff, Committee on Infractions (“COI”), and the Infractions Appeals Committee (“IAC”) will be less likely to express their candid opinions in internal communications, memoranda, and other notes due to the fear of possible future disclosure in a court proceeding.

Part I of this article provides an overview of previous and current NCAA enforcement procedures; part II summarizes *McNair* and how the case creates a problem for the NCAA’s future enforcement process; part III examines the solutions currently adopted by the NCAA; and part IV offers the NCAA a new solution to the *McNair* problem.

## **I. NCAA ENFORCEMENT PROCESS**

### **A. HISTORY OF NCAA ENFORCEMENT**

Until the early 20<sup>th</sup> century, intercollegiate sports were

---

<sup>1</sup> *McNair v. NCAA*, 183 Cal. Rptr. 3d 490 (Ct. App. 2015).

<sup>2</sup> *Id.* at 492.

<sup>3</sup> *Id.* at 496.

largely unregulated.<sup>4</sup> The need to regulate and reform intercollegiate rules prompted the formation of the Intercollegiate Athletic Association in 1906.<sup>5</sup> In 1910, the Intercollegiate Athletic Association changed its name to the NCAA.<sup>6</sup> In its early years, the NCAA predominately focused on standardizing the rules of play and creating national championships for the various intercollegiate sports.<sup>7</sup> During this initial period, the NCAA was highly ineffectual in its enforcement and governance functions.<sup>8</sup>

The NCAA enacted the “Sanity Code” in 1948 to bolster its enforcement powers and to combat the illegal payment of players.<sup>9</sup> The Sanity Code stated that if an athlete met the ordinary admission requirements, he or she could only receive financial aid based on need.<sup>10</sup> To investigate institutions and enforce the Sanity Code, the NCAA created the Constitutional Compliance Commission.<sup>11</sup> The Sanity Code, however, was highly ineffectual because the only sanction for a violation was expulsion of the member institution.<sup>12</sup> In 1951, both the Sanity Code and the Constitutional Compliance Committee were replaced with the Committee on Infractions, “which was given broader sanctioning authority.”<sup>13</sup>

The enforcement powers were strengthened in the 1950s, primarily due to the efforts of Walter Byers,<sup>14</sup> the new NCAA

---

<sup>4</sup> Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10 (2000) [hereinafter Smith, *Brief History*].

<sup>5</sup> Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 155 (2000); Smith, *supra* note 4.

<sup>6</sup> Smith, *Brief History*, *supra* note 4, at 12.

<sup>7</sup> *Id.* at 12-13.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Id.* at 14.

<sup>10</sup> Hakim, *supra* note 5, at 157.

<sup>11</sup> *Id.*

<sup>12</sup> Smith, *Brief History*, *supra* note 4, at 15.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

Executive Director, who established the NCAA's enforcement division.<sup>15</sup> Byers formed the enforcement division to work with the Committee on Infractions in the enforcement process.<sup>16</sup> The NCAA's enforcement powers steadily increased until the early 1970s, when it was "criticized for alleged unfairness in the exercise of its enhanced enforcement authority."<sup>17</sup> Partially in response to these criticisms, the NCAA enforcement process was modified in 1973 by splitting the Committee on Infractions' prosecutorial and investigative roles.<sup>18</sup> However, the criticism remained, and it further increased in 1978 "when the NCAA was given additional authority to enforce the rules by penalizing schools directly, and, as a result, athletes, coaches, and administrators indirectly."<sup>19</sup> The United States House of Representatives Committee on Oversight and Investigation became involved in 1978, and "held hearings to investigate the alleged unfairness of the NCAA's enforcement processes."<sup>20</sup> Although the NCAA made changes in response to these investigations, the NCAA's enforcement processes would be subject to further criticism over the next two decades.<sup>21</sup>

Faced with the fact that college athletics were becoming a primary driver of students' higher education related decisions, many university presidents were determined to take on a larger role concerning NCAA governance.<sup>22</sup> In 1984, university presidents collaborated and formed the Presidents Commission,<sup>23</sup> which was initially formed to change a number of NCAA enforcement rules.<sup>24</sup> However, a decade after it formed, the Presidents Commission implemented an Executive Committee, and Board of Directors comprised predominately of university presidents,<sup>25</sup> and attempted to change the very governance

---

<sup>15</sup> Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 993 (1987) [hereinafter Smith, *Death Penalty*].

<sup>16</sup> *Id.*

<sup>17</sup> Smith, *Brief History*, *supra* note 4, at 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 16-17.

<sup>23</sup> *Id.* at 17.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

structure of the NCAA.<sup>26</sup>

In 1988, as a result of the Presidents Commission's attempt, the Supreme Court decided *NCAA v. Tarkanian* in a 5-4 decision.<sup>27</sup> The Court held that the NCAA was not a state actor; and therefore, the NCAA was protected from constitutional due process claims.<sup>28</sup> Despite *Tarkanian* protecting the NCAA's enforcement process, the presidents still believed the NCAA needed enforcement reform.<sup>29</sup> They subsequently formed a special committee to review the NCAA enforcement and infractions process, chaired by Brigham Young University President Rex E. Lee.<sup>30</sup> In 1991, the special committee released a report with several recommendations:

- (1) 'Enhance the adequacy of the initial notice of an impending investigation and assure a personal visit by the enforcement staff with the institution's chief executive officer;'
- (2) 'Establish a 'summary disposition' procedure for treating major violations at a reasonably early stage in the investigation;'
- (3) 'Liberalize the use of tape recordings and the availability of such recordings to involved parties;'
- (4) 'Use former judges or other eminent legal authorities as hearing officers in cases involving major violations and not resolved in the 'summary disposition' process;'
- (5) 'Hearings should be open to the greatest extent possible;'
- (6) 'Provide transcripts of all infractions hearings to appropriate involved parties;'
- (7) 'Refine and enhance the role of the Committee on Infractions and establish a limited appellate process beyond that committee;'
- (8) 'Adopt a formal conflict-of-interest policy;'
- (9) 'Expand the public reporting of infractions cases;'
- (10) 'Make available a

---

<sup>26</sup> *Id.*

<sup>27</sup> *See id.*

<sup>28</sup> Smith, *Brief History*, *supra* note 4, at 17.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 17-18.

compilation of previous committee decisions;’  
and (11) ‘Study the structure and procedures of  
the enforcement staff.’<sup>31</sup>

These recommendations influenced the current enforcement and infractions process.<sup>32</sup>

## B. CURRENT ENFORCEMENT AND INFRACTIONS PROCESS

The NCAA enforcement staff initially handles NCAA enforcement matters.<sup>33</sup> The enforcement staff consists of approximately 57 staff members who are responsible for enforcing 5,800 rules across 1,084 member colleges and universities.<sup>34</sup> They conduct an estimated 450 interviews each year, investigating potential rules violations.<sup>35</sup> The enforcement process begins when the NCAA enforcement staff receives information about a potential violation.<sup>36</sup> This initial information can come from various sources, including confidential or anonymous tips, or self-reports from a member or conference.<sup>37</sup> The enforcement staff then researches the claims to determine whether the information is credible and if a possible violation actually exists.<sup>38</sup> The type of research at this stage varies depending on the nature of the alleged violations.<sup>39</sup> If the enforcement staff determines that the facts warrant a full

---

<sup>31</sup> Smith, *Brief History*, *supra* note 4, at 18-19 (citing NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE TO REVIEW THE NCAA ENFORCEMENT AND INFRACTIONS PROCESS, Oct. 28, 1991, at 1).

<sup>32</sup> Smith, *Brief History*, *supra* note 4, at 19

<sup>33</sup> See *National Office Enforcement Staff*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015); *Enforcement by the Numbers*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

<sup>34</sup> *Enforcement by the Numbers*, *supra* note 35.

<sup>35</sup> *Id.*

<sup>36</sup> *Overview of a Division I Investigation*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

investigation, it will issue a Notice of Inquiry to the institution and begin the investigation.<sup>40</sup> During the investigation, the enforcement staff works closely with the involved individuals, including the institution's employees and student athletes.<sup>41</sup>

The majority of interviews take place during this portion of the enforcement process.<sup>42</sup> The institutions' current employees and student athletes are required, under the bylaws, to cooperate and provide information during this process.<sup>43</sup> However, individuals that do not fall into these categories are outside the sphere of NCAA control, and are not required to cooperate or provide any requested information to the enforcement staff.<sup>44</sup> Furthermore, the NCAA does not have subpoena power to obtain this information.<sup>45</sup> Thus, the enforcement staff members generally rely on the guarantee of confidentiality to convince outside individuals to provide information.<sup>46</sup> Without these guarantees of confidentiality, it can be difficult to persuade witnesses to cooperate.<sup>47</sup>

If the enforcement staff finds that sufficient information exists to conclude that a violation has occurred, they will issue a Notice of Allegations.<sup>48</sup> The staff then prepares a written report

---

<sup>40</sup> *Id.*

<sup>41</sup> *Infractions Phases and Parties*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

<sup>42</sup> *See Id.*

<sup>43</sup> *F.A.C.T. Investigations*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

<sup>44</sup> *See id.*; *see also* *McNair v. NCAA*, 183 Cal. Rptr. 3d 490, 493 (Ct. App. 2015).

<sup>45</sup> *McNair*, 183 Cal. Rptr. 3d at 493.

<sup>46</sup> *Id.*

<sup>47</sup> *See id.*

<sup>48</sup> *Resolving Alleged Bylaw Violations*, NCAA DIV. I INFRACTIONS PROCESS, NCAA.ORG [http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

outlining their investigation's findings of fact.<sup>49</sup> At this point, the matter is turned over to the Committee on Infractions ("COI").<sup>50</sup> The COI is ultimately responsible for deciding whether violations occurred and, if so, which penalties are appropriate.<sup>51</sup> COI members are not NCAA staff members, but instead are individuals from member schools, conferences, and the public.<sup>52</sup> The COI reviews the evidence from the enforcement staff and any written submissions prepared by the institution or involved individuals.<sup>53</sup> If all the parties agree on the facts, then the COI may decide the case through summary disposition.<sup>54</sup> If there are factual disputes, the COI will hold a hearing where the parties will have the opportunity to present their respective cases, and the COI will have the opportunity to ask questions.<sup>55</sup> The COI will then deliberate privately until it reaches a decision.<sup>56</sup> It will release a written decision with its conclusion, stating whether violations occurred and, if so, which penalties shall be imposed.<sup>57</sup>

If either the institution or any involved individual disagrees with the COI's decision, they may appeal to the Infractions Appeals Committee ("IAC").<sup>58</sup> Like the COI, the IAC is made up of qualified individuals from the NCAA schools

---

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Committee on Infractions*, NCAA DIV. I INFRINGEMENTS PROCESS, NCAA.ORG

[http://www.ncaa.org/sites/default/files/Enforcement%20Handouts\\_Combined.pdf](http://www.ncaa.org/sites/default/files/Enforcement%20Handouts_Combined.pdf). (last visited Dec. 1, 2015).

<sup>52</sup> *Id.*; NCAA DIV. I MANUAL 2014-2015, art. 19.3 (2015), <http://www.ncaapublications.com/productdownloads/D115JAN.pdf> (last visited Dec. 1, 2015) [hereinafter 2015 NCAA MANUAL] The COI is made up of two university presidents, two conference commissioners, three senior athletic administrators, two university administrators, three professors and/or faculty athletic representatives, two former NCAA coaches, and four public individuals with formal legal training). See *Committee on Infractions*, NCAA.ORG, <http://www.ncaa.org/about/resources/media-center/news/committee-infractions> (last visited Dec. 1, 2015).

<sup>53</sup> 2015 NCAA DIV. I MANUAL, *supra* note 54, at Fig. 19.2; DIV. I ENFORCEMENT HANDOUTS, *supra* note 35.

<sup>54</sup> *Resolving Alleged Bylaw Violations*, *supra* note 50.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



and public.<sup>59</sup> The IAC hears arguments from the schools, involved individuals, and the COI, and then deliberates privately until it decides whether the COI decision should be affirmed or reversed.<sup>60</sup> Their decision is final, barring a lawsuit and judicial intervention.<sup>61</sup>

## II. MCNAIR V. NCAA

### A. SUMMARY

In 2010, the NCAA penalized former University of Southern California assistant football coach, Todd McNair, with a one-year show cause penalty as a result of the NCAA's investigation into former USC running back Reggie Bush.<sup>62</sup> The *McNair* case arose from a complaint filed by Todd McNair against the NCAA for damages due to breach of contract, defamation, and other torts stemming from the investigation and penalty.<sup>63</sup> The NCAA quickly filed a special motion to strike, in which it argued that the plaintiff's lawsuit was a "strategic lawsuit against public participation."<sup>64</sup> This special motion imposed an automatic stay on discovery.<sup>65</sup> McNair applied to lift this automatic stay of discovery so that he could take the depositions of the lead investigator, Committee on Infractions (COI) chairman, and COI director.<sup>66</sup> McNair also sought to obtain

transcripts from the COI and Appeals Committee hearings, the entire investigative file, and drafts of the COI Report, including all notes, and other writings discussing or referring to the drafts, and e-mails within the custody and

---

<sup>59</sup> *Infractions Phases and Parties*, *supra* note 43.

<sup>60</sup> *Resolving Alleged Bylaw Violations*, *supra* note 50.

<sup>61</sup> *Id.*

<sup>62</sup> *NCAA Delivers Postseason Football Ban*, ESPN.COM (June 11, 2010), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615>.

<sup>63</sup> *McNair v. NCAA*, 183 Cal. Rptr. 3d 490, 493 (Ct. App. 2015).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

control of the NCAA, by or to members of the COI or Appeals Committee staff that mentioned or related to plaintiff.<sup>67</sup>

The trial court determined that McNair had shown good cause and granted the motion, subject to a protective order and the court's supervision.<sup>68</sup> The parties signed a protective order and the NCAA produced the requested documents.<sup>69</sup> The NCAA then moved to seal certain portions of the record, including many of the exhibits that were disclosed as part of the court's order.<sup>70</sup> In its motion, "[t]he NCAA argued that its bylaws require it to keep its investigations strictly confidential."<sup>71</sup> The NCAA routinely promises confidentiality to witnesses to obtain much of its needed information.<sup>72</sup> The NCAA claimed that if the trial court were to deny its request to seal the documents, "its enforcement proceedings would be made public, thereby prejudicing its enforcement abilities and embarrassing witnesses who had relied on confidentiality."<sup>73</sup> The relevant documents were lodged conditionally under seal.<sup>74</sup>

The trial court denied the NCAA's motion to seal, stating that they "failed to make a sufficient factual showing to seal the documents."<sup>75</sup> However, the court stayed enforcement

---

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* The NCAA sought

"[t]o seal unredacted versions of plaintiff's opposition to the NCAA's special motion to strike, his memorandum of points and authorities in support thereof, the declarations of plaintiff and his counsel, and specified exhibits attached thereto, including (1) the COI Report, (2) the NCAA case summary provided to the COI, (3) memoranda drafted by members of the COI concerning the allegations, (4) excerpts of witness interviews, (5) telephone records, (6) the notice of allegations, (7) excerpts of the deposition testimony of NCAA officials describing the NCAA's investigative and adjudicative process, (8) e-mails between the COI members while adjudicating the allegations, (9) excerpts of the COI hearing transcripts, (10) plaintiff's response to the notice of allegations, and (11) his appeal to the NCAA's Appeals Committee."

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

and ordered the documents “to remain conditionally lodged under seal pending appellate review.”<sup>76</sup> The NCAA then filed a notice of appeal from the denial of the special motion to strike, and subsequently moved the appellate court to seal the “appellate record that had been conditionally sealed in the trial court.”<sup>77</sup> The documents in the record on appeal were conditionally sealed pending the resolution of the motion.<sup>78</sup>

The appellate court began its analysis by stating that the public has a general First Amendment right of access to civil litigation documents that are used at trial or are a basis for adjudication.<sup>79</sup> It maintained, “the public has an interest, in *all* civil cases, in observing and assessing the performance of its judicial system.”<sup>80</sup> Public court records help “expose corruption, incompetence, inefficiency, prejudice, and favoritism.”<sup>81</sup> However, the openness of court records is a presumption that is not absolute.<sup>82</sup> California courts follow a rule established in *NBC Subsidiary* to determine whether a presumption of openness has been overcome.<sup>83</sup> The trial court must find that

(1) there is an overriding interest supporting sealing of the records; (2) there is a substantial probability that the interest will be prejudiced absent sealing; (3) the sealing order is narrowly tailored to serve the overriding interest; and (4) there is no less restrictive means of meeting that interest.<sup>84</sup>

These requirements are explicitly embodied in the California

---

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 493-94.

<sup>78</sup> *Id.* at 494.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* (citing *NBC Subsidiary, (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337 (1999) (emphasis in original)).

<sup>81</sup> *McNair*, 183 Cal. Rptr. 3d at 494.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see *NBC Subsidiary*, 980 P.2d at 337.

<sup>84</sup> *McNair*, 183 Cal. Rptr. 3d at 494 (citing *NBC Subsidiary*, 980 P.2d at 337).

Rules of Court, Rule 2.550.<sup>85</sup> Furthermore, an appellate court must order a record to be sealed if the record was not initially filed in the trial court; a seal is not permitted solely by stipulation of the parties.<sup>86</sup> Because this was not an appeal of the trial court's order denying the motion to seal, the appellate court must make its own findings in accordance with *NBC Subsidiary* and Rule 2.550 requirements.<sup>87</sup> Finally, "the NCAA has the burden to 'justify the sealing.'"<sup>88</sup>

The appellate court first addressed whether there was an overriding interest justifying a sealing order.<sup>89</sup> The NCAA argued that its interest in confidentiality, as outlined in its bylaws and contractual agreements, is an overriding interest.<sup>90</sup> It contended that enforcement is necessary to uphold the basic NCAA principle of amateurism and to protect student athletes from exploitation.<sup>91</sup> Confidentiality, in turn, is an essential enforcement tool because the NCAA lacks the power to subpoena.<sup>92</sup>

The court dismissed the NCAA's claim that its bylaws created an overriding interest, stating "the NCAA cannot make the showing of an overriding interest to justify sealing merely because its internal bylaws say so by designating certain

---

<sup>85</sup> *Id.*; Cal. Rules of Court, Rule 2.550.

<sup>86</sup> *McNair*, 183 Cal. Rptr. 3d at 495; Cal. Rules of Court, Rule 8.46(d)(1).

<sup>87</sup> *McNair*, 183 Cal. Rptr. 3d at 495;

<sup>88</sup> *Id.* (citing Cal. Rules of Court, Rule 8.46(d)(2)).

<sup>89</sup> *Id.* The court lists examples from *NBC Subsidiary* of an assortment of interests that potentially constitute an overriding interest to justify a sealing order. These include: "an accused's interest in a fair trial; a civil litigant's right to a fair trial; protection of minor victims of sex crimes from further trauma and embarrassment; privacy interests of a prospective juror during individual voir dire; protection of witnesses from embarrassment or intimidation so extreme that it would traumatize them or render them unable to testify; protection of trade secrets; protection of information within the attorney-client privilege; enforcement of binding contractual obligations not to disclose; safeguarding national security; ensuring the anonymity of juvenile offenders in juvenile court; ensuring the fair administration of justice; and preservation of confidential investigative information." *Id.*

<sup>90</sup> *Id.* at 496.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

documents as confidential.”<sup>93</sup> The court determined that the two NCAA bylaws, which stated that certain information and documents related to investigations are confidential, did not create an all-encompassing, overriding interest to justify the sealing of a public record.<sup>94</sup>

The court also dismissed the NCAA’s argument that the contractual confidentiality agreements signed by the parties should be considered an overriding interest.<sup>95</sup> The court stated that “[m]ore than a mere agreement of the parties to seal documents filed in a public courtroom’ is needed” to show an overriding interest to justify sealing;<sup>96</sup> “[t]here must be a specific showing of serious injury.”<sup>97</sup> Broad allegations of harm are not sufficient to meet this standard.<sup>98</sup> Further, California Rules of Court Rule 8.46(d)(1) confirms that a record will not be sealed solely by agreement of the parties.<sup>99</sup> The court concluded that the NCAA had not made a specific showing of serious injury, therefore the agreements themselves were not sufficient to constitute an overriding interest to justify sealing the documents.<sup>100</sup> Overall, the court concluded, “the bylaws and contractual agreement of confidentiality of a private, voluntary organization . . . do not overcome the presumption of, and the courts’ obligation to protect the constitutional interest in, the openness of court records in ordinary court proceedings.”<sup>101</sup>

The court next considered the second required finding of *NBC Subsidiary*, whether there exists a substantial probability of

---

<sup>93</sup> *Id.* at 497.

<sup>94</sup> *Id.* at 496-97. (The NCAA cites bylaw 32.1.1, which treats case information in a confidential manner until it has been announced, and bylaw 32.3.9, which designates the interview records of interviewees and their institutional representatives confidential). *Id.*

<sup>95</sup> *Id.* at 498.

<sup>96</sup> *Id.* at 497 (citing *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 2 Cal. Rptr. 3d 484 (2003)).

<sup>97</sup> *McNair*, 183 Cal. Rptr. 3d at 497.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 498.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

prejudice if the documents are not sealed.<sup>102</sup> The NCAA argued that its enforcement ability would be crippled if its records were not kept confidential.<sup>103</sup> The NCAA was afraid that “witnesses who might otherwise cooperate will be unwilling to talk or may temper their statements or candor for fear of repercussions.”<sup>104</sup> In addition, the NCAA asserted that volunteer investigators and committee members may now “forego detailed notes of their thoughts and impressions” due to “concern over disclosure of internal emails and communications.”<sup>105</sup>

The court was not convinced by the NCAA’s arguments.<sup>106</sup> The court noted that “member institutions, their employees, students, and alumni already agree to submit to NCAA enforcement” and thus are required to give testimony, whether it is confidential or not.<sup>107</sup> Additionally, the court believed that the risk of disclosure would likely force COI members and investigators to “ground their evaluations in specific examples and illustrations in order to deflect potential claims of bias or unfairness.”<sup>108</sup> The court further pointed out the fact that the NCAA’s investigative and adjudicative documents have been subject to public scrutiny in other courts throughout the United States, and that “[t]he NCAA has not demonstrated that such disclosure chilled future investigations.”<sup>109</sup>

The Court also reaffirmed the point that the NCAA is a private, voluntary organization that “is more akin to a private employer who investigates misconduct of its employees” than it is to judiciary and administrative agencies acting in an adjudicative capacity, both of which enjoy confidentiality of their deliberations under the law.<sup>110</sup> The court was also not persuaded by the NCAA’s complaint that if the records were not sealed, it must decide between two opposing evils.<sup>111</sup> Namely

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (The NCAA cites a fact that it took “months and months and months” to convince one non-party witness to cooperate). *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 499 (citing *Univ. of Penn. v. EEOC*, 493 U.S. 182, 200-201 (1990)).

<sup>109</sup> *McNair*, 183 Cal. Rptr. 3d at 499-500.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

the decision to either “publicly reveal the contents of the conditionally lodged documents to pursue its appeal or . . . to have those records returned to it.”<sup>112</sup> The NCAA did not believe it could present a complete defense without using the documents.<sup>113</sup> The court held that this did not create substantial prejudice, as it is a decision that all litigants must face.<sup>114</sup>

The court did not address the final two requirements of *NBC Subsidiary* because the NCAA failed to make the necessary showing for the first two.<sup>115</sup> Thus, the court denied the motion to seal and directed the clerk to return the conditionally sealed documents to the NCAA so that it may determine which documents it wants to submit to the public record, and which documents it will withhold.<sup>116</sup>

#### B. PROBLEMS STEMMING FROM THE *McNAIR V. NCAA* RULING

In its argument to the California Appellate Court, the NCAA summarized the problem that the *McNair* decision creates. In any action against the NCAA in California, the NCAA will be required to balance two competing interests regarding the use of its evidence. The first interest is in presenting a full defense using any and all documents in its possession. The second interest is that of confidentiality in those documents that the NCAA wishes to use. If the court had granted the motion to seal, these interests would not conflict. Because the court made it clear that the NCAA will not be able to file these documents under seal unless it comes up with a persuasive argument, the NCAA must balance the competing interests.

As noted, this overarching problem creates two underlying problems for the NCAA. The NCAA routinely relies on confidentiality guarantees to obtain information from witnesses who are not subject to NCAA governance.<sup>117</sup> The

---

<sup>112</sup> *Id.* at 500.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 501.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 493.

*McNair* decision limits the extent of confidentiality that the NCAA can guarantee to these individuals. A second underlying problem concerns the communications between individuals involved in the enforcement and infractions process, including members of the enforcement staff, COI, and IAC. The NCAA argued that without a standard in place that allows the NCAA to file confidential enforcement documents under seal, the individuals involved in the enforcement process would be hesitant to fully disclose their impressions in internal communications and notes. It is possible that these individuals would be concerned that their impressions could someday be subject to public record as evidence in a potential NCAA lawsuit. This could disrupt the effectiveness and efficiency of the enforcement process.

### III. SOLUTIONS CURRENTLY ADOPTED BY THE NCAA

There have been no direct solutions to the *McNair* problem offered from any outside sources since the February 2015 decision.<sup>118</sup> However, there is at least one current strategy that the NCAA may employ to cope with the *McNair* problem. This section presents this strategy and addresses two other practices that the NCAA should not employ. The most direct solution to the *McNair* problem would have been to appeal to the California Supreme Court; however, this is no longer an option available to the NCAA. The NCAA has employed an initial, workable practice following *McNair*: the NCAA continues to rely on its current confidentiality standards and engages in the evidentiary balancing test. The final portion of this section examines the NFL's personal conduct policy, and addresses why the enforcement procedures of professional sports organizations present little assistance to the NCAA.

#### A. APPEAL

The NCAA's first and most straightforward solution was to appeal the decision to the California Supreme Court. The NCAA quickly sought a rehearing before California's 2<sup>nd</sup> Court of Appeals, but the court denied this request.<sup>119</sup> If the NCAA had appealed to the California Supreme Court, it could have

---

<sup>118</sup> As of March 25, 2015.

<sup>119</sup> Nathan Fenno, *Court Denies NCAA Request to Reconsider Todd McNair Ruling*, LA TIMES (Feb. 24, 2015), <http://www.latimes.com/sports/sportsnow/la-sp-sn-ncaa-todd-mcnair-lawsuit-documents-20150224-story.html>.



eliminated the *McNair* problem with a reversal. However, the California court docket indicates that the NCAA did not file a petition of review with the California Supreme Court within the deadline.<sup>120</sup> In fact, the NCAA filed many of the documents that were conditionally sealed into the public record.<sup>121</sup> Therefore, an appeal of the *McNair* decision is no longer a viable solution. One reason for its lack of appeal is perhaps that the NCAA believed it was beat on this issue, and did not want to expend resources on appeal.

#### B. NCAA CONFIDENTIALITY BYLAWS AND BALANCING TEST

It is unquestionable that NCAA employees, Board of Directors, or COI members have had internal conversations regarding how they should address *McNair*. However, the NCAA has not publicly indicated how, if at all, it will alter its enforcement practices. Therefore, the NCAA's current solution to the problem is to continue to rely on its established confidentiality bylaws, and then engage in the evidentiary balancing test of confidentiality in the face of a lawsuit.

As part of its recent enforcement modification process, the NCAA has removed and modified several of its relevant confidentiality bylaws. Bylaw 32.1.1, titled "Confidentiality," which was cited by the NCAA in *McNair*, has been retitled and moved to bylaw 19.01.3. It is now titled "Public Disclosure."<sup>122</sup> This bylaw previously stated that the members of the enforcement staff, COI, and IAC were to treat all cases as confidential until they had been announced.<sup>123</sup> The modified bylaw states that the enforcement staff, COI, and IAC "shall not make public disclosures about a pending case until the case has

---

<sup>120</sup> Cal. 2d Appellate District Docket for *McNair v. NCAA*, CAL. APP. CT. CASE INFO. (Dec. 1, 2015, 2:13 PM), [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc\\_id=2031960&div=3&doc\\_no=B245475](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2031960&div=3&doc_no=B245475) (last visited Dec. 1, 2015).

<sup>121</sup> *Id.*

<sup>122</sup> 2015 NCAA DIV. I MANUAL, *supra* note 54, at art. 19.01.3.

<sup>123</sup> 2011-2012 NCAA DIV. I MANUAL, ART. 32.1.1 (2011), <http://www.ncaapublications.com/productdownloads/D112.pdf> (last visited Dec. 1, 2015) [hereinafter 2011 NCAA MANUAL].

been announced.”<sup>124</sup> The new bylaw functions in the same manner as the old bylaw, but it uses different phrasing. Thus, this change would likely have little effect on changing the court’s mind in *McNair*. But this bylaw does have continued effect in ensuring that certain confidential documents will not be disclosed to the public, absent their use in court.

The second relevant bylaw cited in *McNair* was bylaw 32.3.9.1.4, titled “Statement of Confidentiality.”<sup>125</sup> This bylaw has since been relocated to bylaw 19.5.8.<sup>126</sup> This bylaw states that individuals and institutional representatives who are interviewed as part of the enforcement process must sign a confidentiality agreement that precludes them from releasing any recordings or interview transcripts to a third party.<sup>127</sup> The *McNair* decision noted that this provision does not cover many of the documents that the NCAA wished to seal, including communications between COI members and enforcement staff, memoranda drafted by the COI, and other investigative documents.<sup>128</sup> The court in *McNair* conceded that although this bylaw provides confidentiality protection to the NCAA and its interviewees, it indicated that these extrajudicial agreements do not bind the court.<sup>129</sup> Thus, this bylaw remains effective in guaranteeing confidentiality for certain documents, but only outside of a court proceeding.

The final bylaw relevant to the confidentiality of enforcement proceedings is bylaw 19.7.7.3.1, titled “Information from Confidential Sources.”<sup>130</sup> The bylaw states:

At a hearing, the parties, including the enforcement staff, shall present only information that can be attributed to individuals who are willing to be identified. Information obtained from individuals not wishing to be identified shall not be relied on by the hearing panel in concluding whether a violation occurred. Such confidential sources shall not be identified to the hearing panel, the institution or an involved

---

<sup>124</sup> 2015 NCAA MANUAL, *supra* note 54, at art 19.01.3.

<sup>125</sup> 2011 NCAA MANUAL, *supra* note 125, at art. 32.3.9.1.4.

<sup>126</sup> 2015 NCAA MANUAL, *supra* note 54, at art. 19.5.8.

<sup>127</sup> *Id.*

<sup>128</sup> *McNair v. NCAA*, 183 Cal. Rptr. 3d 490, 497 (Ct. App. 2015).

<sup>129</sup> *Id.*

<sup>130</sup> 2015 NCAA MANUAL, *supra* note 54, at art. 19.7.7.3.1.

individual.<sup>131</sup>

Curiously, the NCAA in *McNair* did not cite this bylaw, even though it tends to strengthen the argument that the NCAA values the confidentiality of its sources. However, citing this provision would likely not have affected the *McNair* decision. The court would likely critique it in the same manner as bylaw 19.5.8, by stating that it only applies to the identity of the confidential witness and the information obtained from that witness. It does not cover the remaining documents the NCAA sought to seal. In addition, the court is not obligated to cooperate with a NCAA confidentiality requirement. In sum, this bylaw still operates functionally the same way post-*McNair*, but again, there is little protection of confidentiality afforded to individuals in court proceedings.

The NCAA may determine that it will continue to conduct all of its enforcement proceedings and investigations in the same manner as before *McNair*, without any alterations to its procedures. However, the primary fallout from *McNair* concerns how individuals within the NCAA, and any potential witnesses outside the NCAA, will behave in the future, which in turn could harm the overall NCAA enforcement process. In other words, even if the NCAA as an organization states that it will not modify its procedures in the wake of *McNair*, it is likely that the individuals affected the most by *McNair* (the enforcement staff, COI and IAC members, and witnesses outside the scope of the NCAA's bylaws) will independently alter their behavior. This behavior modification will likely come in two forms, as outlined above: (1) refusing to cooperate in an investigation because confidentiality is no longer actually guaranteed if the case goes to court; and (2) a decrease in the candidness of internal enforcement communications. In post-*McNair* cases, the NCAA will be forced to decide between keeping the information confidential, or disclosing it in its defense. The threat of disclosing confidential documents could scare away potential witnesses, which would harm the overall NCAA enforcement process. Thus, the NCAA's decision to maintain its current

---

<sup>131</sup> 2015 NCAA MANUAL, *supra* note 54, at art. 19.7.7.3.1.

confidentiality bylaws, with no formal change, will not lead to optimal outcomes.

#### C. NFL CONFIDENTIALITY OF WITNESSES

The NCAA is a highly specific organization. The size of the membership, its public nature, and the types of violations it investigates differ greatly from most other organizations. For this reason, it is difficult to compare its enforcement process with any other private organizations. The only other organizations that are comparable in size and purpose are American professional sports leagues. These leagues differ in several key areas, but are similar enough to warrant examining how their policies might deal with *McNair*.

In December 2014, the NFL revised its personal conduct policy.<sup>132</sup> The new policy states that promises of confidentiality will be given to witnesses if reasonable: “In conducting investigations, the league office will make reasonable efforts to safeguard requests for confidentiality from witnesses and others with information.”<sup>133</sup> The NFL’s “reasonable efforts” to keep confidentiality are not at the same level as the NCAA’s commitment to confidentiality, which *requires* confidentiality in several situations. Furthermore, the NFL does not indicate in any supporting documents that confidentiality is a key concern in its overall investigatory process. More importantly, the NFL and other professional sports leagues would be subject to the same standard outlined in *McNair* if they ever sought to seal enforcement and investigatory documents. Having less interest in confidentiality than the NCAA, it is highly unlikely that the NFL would be able to overcome the burden of openness of court records in order to seal its records. Because of this, the policies and procedures of the professional sports leagues provide little assistance in examining the best practices currently available to the NCAA.

#### IV. PROPOSED SOLUTION TO THE *MCNAIR* PROBLEM

This section presents a new, unique solution to the *McNair* problem, and involves the implementation of several new NCAA bylaws. The proposed bylaws intend to ensure confidentiality to the greatest extent possible for potential

---

<sup>132</sup> *Personal Conduct Policy*, NFL.COM (Dec. 2014), <http://static.nfl.com/static/content/public/photo/2014/12/10/0ap3000000441637.pdf> (last visited Dec. 1, 2015).

<sup>133</sup> *Id.*

confidential witnesses and members of the NCAA enforcement staff, COI, and IAC.

A. PROPOSED BYLAWS

**19.14 CONFIDENTIALITY OF NON-DISCLOSED ENFORCEMENT DOCUMENTS.**

**19.14.1 GENERAL STANDARD OF CONFIDENTIALITY.**

All Confidential Documents (as defined in 19.14.2) shall remain confidential, subject to the exceptions contained in bylaw 19.14.3.

**19.14.2 CONFIDENTIAL DOCUMENTS DEFINED.**

Under this bylaw, Confidential Documents shall include all internal communications (including emails), memoranda, reports, interview transcripts and recordings, hearing transcripts and recordings, notices, personal notes and other documents prepared by or for any member of the NCAA enforcement staff, Committee on Infractions, or Infractions Appeals Committee in connection with any NCAA enforcement proceedings, which have not been previously disclosed in a 19.8.1 Infractions Decision or a 19.10.6 Decision of the Infractions Appeals Committee.

**19.14.3 EXCEPTIONS TO THE GENERAL STANDARD OF CONFIDENTIALITY**

**19.14.3.1 CONFIDENTIAL DOCUMENTS NEEDED BY NCAA IN CONNECTION WITH COURT PROCEEDINGS.**

The NCAA reserves the right to use any Confidential Documents in a court proceeding connected to the enforcement proceeding in which the Confidential Documents were used, but only if the relevant court grants an order sealing the Confidential Documents. If the court does not grant the sealing of the confidential documents, the NCAA may use the Confidential Documents in the court proceeding only after obtaining the express written consent of those individuals who created, drafted, or were

transcribed within, each particular Confidential Document that the NCAA desires to use.

#### **19.14.3.2 WHEN DISCLOSURE ORDERED BY THE COURT.**

If a party in a court proceeding seeks to compel disclosure of Confidential Documents or the court has ordered the disclosure of Confidential Documents, the NCAA will take all reasonable efforts to ensure any requested Confidential Documents remain confidential, while still complying with any court orders. This includes, but is not limited to, objecting to the relevance of requested documents, objecting to overbroad requests, seeking an in-camera review of the requested documents, and/or redacting sensitive and/or confidential information from the requested documents when appropriate.

#### **B. ANALYSIS OF THE PROPOSED BYLAWS**

The proposed bylaws do not completely eliminate the *McNair* problems, but they do alleviate many of the pressure points. The post-*McNair* world does not guarantee complete confidentiality to any witnesses or members of the COI, IAC, or enforcement staff, and there is little the NCAA can do to escape this reality. However, the proposed bylaws help adapt the NCAA's enforcement confidentiality provisions to the post-*McNair* world, to ensure the greatest degree of confidentiality possible.

##### *1. Confidential Documents*

It is important that any adopted bylaws clearly outline which documents are covered. Proposed bylaw 19.14.2 broadly defines what is included in the definition of Confidential Documents. Confidential Documents do not include any documents that have been disclosed as part of a final written decision publicly disclosed by either the COI or IAC. As drafted, the bylaw covers all documents that the NCAA was seeking to have filed under seal in *McNair*. It includes documents and recordings related to any interviews conducted, and internal communications and notes of the members of the COI, IAC, and enforcement staff, which were created in connection with an NCAA enforcement proceeding. These two areas of confidentiality were the NCAA's primary concerns when arguing for the sealing of documents in *McNair*. Additionally, the definition is modifiable, so if after review of

the bylaw, and before adoption, the NCAA deems that one or more of the categories may be routinely important in future court proceedings, the NCAA can simply remove the bylaw from the list.

## 2. *General Standard*

The general standard of the proposed bylaws is stated in bylaw 19.14.1. The function of this bylaw is straightforward: all Confidential Documents shall remain confidential, unless there is an applicable exception. Neither the NCAA nor the individuals who have access to the Confidential Documents may publicly disclose any Confidential Documents. It is important that the restriction extends to both the NCAA and the individuals. Any individual who is under the purview of the NCAA will be obligated to comply with this confidentiality requirement. And any individuals outside the NCAA's power will sign confidentiality agreements according to bylaw 19.5.8.

Together, proposed bylaws 19.14.1 and 19.14.2 provide a basic groundwork for maintaining confidentiality in NCAA enforcement proceedings. The *McNair* court rejected the NCAA's argument that the bylaws were not "[a] one-size-fits-all cloak of confidentiality."<sup>134</sup> The proposed bylaws address this aspect of the NCAA's argument. The proposed bylaws are much more akin to the so-called "one-size-fits-all cloak of confidentiality."<sup>135</sup> The proposed bylaws provide more broad and explicit protection to involved parties, which were absent from the original NCAA bylaws in *McNair*. If the proposed bylaws are adopted, a court ruling on a motion to seal could issue a different conclusion than the conclusion reached in *McNair*. However, the *McNair* court implied that even if a "one-size-fits-all cloak of confidentiality" provision had been present, the court would still not be obligated to honor the confidentiality agreements and rules of a private organization.<sup>136</sup> Therefore, a reversal based on the proposed bylaws, although not impossible, is unlikely.

---

<sup>134</sup> *McNair*, 183 Cal. Rptr. 3d at 497.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

### 3. *Exceptions*

Because the court is not likely to honor the general standard of the proposed bylaws, and because the NCAA may be required to disclose confidential documents in the future, exceptions to the general rule are necessary. Proposed bylaw 19.14.3 outlines the exceptions. Both 19.14.3.1 and 19.14.3.2 exceptions relate to the use of confidential documents in court proceedings. Bylaw 19.14.3.1 covers situations in which the NCAA desires to use confidential documents in a court proceeding, but has not been ordered to disclose the documents by the court. The first sentence of the bylaw allows the NCAA to use any confidential documents in a court proceeding if it obtains a sealing order. This provision is consistent with the general standard of confidentiality, and functions as a clarifying statement. Granted, even without this language, the NCAA would still be able to use the sealed, confidential documents in a court proceeding. However, the sentence is necessary because it explicitly permits this behavior and it frames the remainder of the exception.

The second provision of bylaw 19.14.3.1 outlines how the NCAA may use confidential documents if the court declines to seal the documents. The NCAA must obtain written consent from the individuals who were involved in the creation of the confidential documents. This provision serves several purposes. First, it provides the NCAA the ability, although limited, to use confidential documents in a court proceeding if the NCAA deems them to be relevant or useful. The permission requirement may preclude the NCAA from using certain documents, but in most situations, the NCAA should not have much difficulty obtaining this permission. Enforcement staff, COI, and IAC members are all directly involved with the NCAA in some way; thus, they presumably have the NCAA's best interests in mind. Therefore, it should not be too difficult to obtain permission to use certain confidential documents drafted by these individuals, if necessary.

Bylaw 19.14.3.1 creates a greater guarantee of confidentiality for confidential witnesses. The NCAA would likely have difficulty obtaining permission from these individuals. This reality provides greater confidentiality protection to witnesses because witnesses are permanently guaranteed to remain confidential unless the witness consents to disclosure (or the court orders the disclosure, which is addressed below). This partially alleviates the *McNair* problem of



potentially discouraging confidential witnesses to come forward with information.

Finally, proposed bylaw 19.14.3.2 addresses court ordered disclosure of confidential documents. The courts may overcome any confidential bylaw guarantees and may order the NCAA to produce certain confidential documents if an opposing party has moved to compel document disclosure. In these situations, the NCAA will use all reasonable efforts to oppose the motion. However, if the motion is granted and the court orders the disclosure, the NCAA must take further reasonable steps to ensure the confidential documents remain as confidential as possible. This may include seeking an in-camera review to ensure the parties and judge may locate the relevant documents, thereby reducing the total number of confidential documents disclosed to the public record. It may also include redacting any non-relevant confidential information contained in a confidential document.

#### C. BENEFITS OF THE PROPOSED BYLAWS

There are several benefits to the proposed bylaws, some of which have been briefly mentioned in the preceding sections. The benefits are framed with respect to the problems that the proposed bylaws were designed to address. One of the problems created by *McNair* was the possible issue that individuals, who are not required to participate in NCAA investigations, may be reluctant to cooperate if they are not guaranteed confidentiality. The proposed bylaws do not eliminate this risk completely, but they do greatly reduce it. The proposed bylaws create an additional layer of protection for individuals who wish to share information with the NCAA. These individuals, under proposed bylaw 19.14.3.1, have the final say whether the NCAA may use their interview documents in the NCAA's defense. This provision grants individuals greater authority over the future use of confidential documents.

Additionally, proposed bylaw 19.14.3.2 requires the NCAA to take all reasonable steps to protect the confidential information in the event the court orders the disclosure of confidential documents. This provision creates an added layer of protection for outside individuals. Overall, the proposed bylaws

increase the level of confidentiality afforded to individuals outside the governance of the NCAA, which should alleviate some of the *McNair* confidentiality problems.

The second fundamental problem created by *McNair* includes the possibility that members of the NCAA enforcement staff, COI, and IAC might be less candid or forthright in their internal communications, and that these individuals “may forego detailed notes of their thoughts and impressions” due to fear of disclosure.<sup>137</sup> Confidential deliberation processes prevent influence from outside forces. Therefore, for the enforcement process to function effectively and efficiently, the individuals in these groups must be able to communicate and take notes with minimal fear of future disclosure. A confidential deliberation process allows individuals to focus on the issues and allegations at hand, instead of how internal communications may be perceived by the public.

The proposed bylaws ensure deliberations remain confidential to the greatest extent possible. The proposed bylaws also provide final authority over the use of confidential documents to the involved individuals. Therefore, if a member of the enforcement process does not authorize disclosure of a confidential document that she worked on, it will not be disclosed absent a court order. Granted, it is possible the NCAA could exercise influence over enforcement staff members, who are NCAA employees, to gain their permission to use their confidential documents. On the other hand, members of the COI and IAC are volunteers and are not employees of the NCAA, and therefore the NCAA may have a more difficult time forcing permission from these individuals. As noted above, the proposed bylaws do not completely shield confidential documents from disclosure, but an ultimate veto over the use of confidential documents should alleviate further *McNair* confidentiality fears.

Finally, the proposed solution would benefit the NCAA because implementation would be relatively inexpensive. The proposed solution could be implemented in the normal course of business and therefore costs would be negligible. Granted, extra costs could possibly arise once a lawsuit is brought against the NCAA, or when the NCAA desires or is required to use confidential documents. However, as *McNair* demonstrated, the NCAA is already prepared to pay legal fees associated with a

---

<sup>137</sup> *Id.* at 498-99.

motion to seal, thus litigation costs should not be considered an additional cost. On the other hand, document review costs would likely increase as the NCAA carefully determines which confidential documents are necessary, and in addition, costs may also be required to obtain permission from required parties. Nevertheless, these costs should not pose a substantial burden on the NCAA.

Overall, the benefits of the proposed bylaws alleviate the regulatory enforcement concerns that arose from *McNair*. Increasing confidentiality protections to various individuals under the proposed bylaws will lead to more effective and efficient enforcement proceedings. The NCAA enforcement staff will more easily be able to obtain the cooperation of witnesses who wish to remain confidential. Further, members of the COI and IAC will be able to express their full opinions and impressions nearly completely free from the fear of disclosure.

#### D. DISADVANTAGES OF THE PROPOSED BYLAWS

The proposed bylaws present several distinct disadvantages. First, the proposed bylaws limit the NCAA's ability to effectively defend itself in court. The proposed bylaws give more power over confidentiality to the individuals who create the confidential documents, and essentially grant these individuals the ability to veto the NCAA's use of the documents in a court case that gave rise to the production of the same documents. The NCAA's lack of ultimate authority over the documents restricts the NCAA's ability to unilaterally decide which documents are important enough to be disclosed despite their confidential nature.

Second, the proposed bylaws could potentially damage the NCAA's reputation. The proposed bylaws decrease the possibility that certain enforcement documents will be disclosed to the public. The general public will not likely react warmly to the NCAA's perceived unwillingness to disclose certain information. The proposed bylaws may be perceived as an attempt by the NCAA to hide incriminating documents. Granted, this would not be a fair reading of the bylaws. If implemented, the NCAA must frame the adoption of the proposed bylaws in a manner that avoids these reputational

setbacks. As it relates to confidential witnesses, the NCAA must make it clear that the COI and IAC members do not rely on the information obtained from these witnesses in making their final decisions. These witnesses are used for other purposes.

Finally, the NCAA should analogize the confidential documents created by the COI and IAC, to the internal notes kept by judges and other administrative bodies. Judges' notes and memoranda are not disclosed publicly, only their final decision is released. This structure should also apply to private organizations such as the NCAA, because it promotes freer discussion among the members of the respective committees.

#### E. IMPLEMENTATION

The logistics of implementing the proposed bylaws do not present significant hurdles. The proposed bylaws should be implemented into the NCAA Division I bylaws, in Article 19, which covers the infractions process. The NCAA Division I Board of Directors overhauled the enforcement process in 2012 and could again vote to add the proposed bylaws with relative ease.<sup>138</sup> The primary barrier to successful implementation would be garnering a majority of votes in favor of the proposed bylaws. The voting directors must weigh the advantages and disadvantages to decide whether to ultimately implement the proposed bylaws.

Any difficulty in implementation will arise during the initial rollout of the new bylaws. As previously noted, the general public may view the new bylaws as a method to hide potentially incriminating documents. This was apparent after the release of the disputed documents in *McNair*; however, it was also apparent that some individuals involved in *McNair* were biased against McNair, USC, or both.<sup>139</sup> The NCAA should distance itself from individuals who portrayed such bias, or indicate that it has already distanced itself from these

---

<sup>138</sup> Casey C. Kannenberg, *The New NCAA Enforcement Model*, AMERICANBAR.ORG, [www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/the\\_new\\_ncaa\\_enforcement\\_model.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/the_new_ncaa_enforcement_model.html) (last visited Dec. 1, 2015).

<sup>139</sup> Dennis Dodd, *NCAA Overstepped in USC Case, Unsealed Documents Seem to Show*, CBS SPORTS (Mar. 24, 2015), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/25121727/ncaa-overstepped-in-usc-case-unsealed-documents-seem-to-show>.

individuals. Next, the NCAA should communicate that it is committed to conducting fair investigations and reviews. It is important the NCAA emphasizes that its commitment to confidentiality does not hamper the integrity of the enforcement process. One possible way to accomplish this task would be to introduce a bylaw that makes all enforcement communications reviewable by internal NCAA staff. This would help ensure the integrity of the process, while also maintaining overall confidentiality.

Finally, the NCAA must also effectively demonstrate why there is a need for confidentiality. The general public most likely does not understand the importance of confidentiality. A carefully worded statement regarding why confidentiality is important should accompany the press release that announces the proposed bylaws. There should also be an area on the NCAA website dedicated to the explanation of confidentiality in the enforcement process. These clarifying statements may not alter everyone's perception, but they will help clarify the NCAA's position on confidentiality in the enforcement process.

#### CONCLUSION

The NCAA needs an effective and complete enforcement structure. The *McNair* decision negatively impacted the current enforcement structure by eliminating the confidentiality of certain NCAA enforcement documents. The NCAA must alter its enforcement structure in response to *McNair* if the NCAA wishes to continue to conduct effective enforcement and infractions cases. The proposed bylaws provide a framework that the NCAA should implement to achieve continued confidentiality.