APPEAL OF THE UNIVERSITY OF SOUTHERN CALIFORNIA

I. Introduction

The University of Southern California ("USC" or the "University") concedes and regrets that significant violations occurred in its athletics program, and accepts responsibility for the infractions that occurred. USC takes its compliance obligations very seriously, and is committed to doing its best to prevent future violations. To this end, the University has instituted significant changes in its administration and athletics program to ensure it has the best possible athletic department and athletic compliance offices and programs, commensurate with USC's commitment to teaching and research. July 20, 2010 Memo from President-Elect C. L. Max Nikias, Exhibit 1. USC self-imposed sanctions on the men's basketball program and women's tennis program, and the Committee on Infractions ("Committee") accepted these sanctions. Committee on Infractions Report No. 323, Exhibit 2, pp. 58-60. Accordingly, this appeal focuses predominantly on the football program.

USC disputes certain of the Committee's findings regarding football, as noted below. However, USC respectfully submits that, even if all of the Committee's findings are accepted as correct, the Committee abused its discretion in imposing penalties on the football program that are grossly excessive and patently inconsistent with applicable precedent. USC therefore seeks relief from two of the Committee's sanctions in football: (1) the post-season ban; and (2) the scholarship reductions limiting initial grants-in-aid to 15 and total grants to 75 during the 2011-12, 2012-13 and 2013-14 academic years. USC respectfully requests that the Infractions Appeals Committee ("IAC") vacate the second year of the post-season ban and decrease the scholarship reductions in half, limiting initial grants-in-aid to 20 and total grants to 80 for each of the three academic years. USC accepts all other penalties on its football program.

USC further submits that the Committee erred in basing certain findings upon insufficient evidence or facts that do not constitute a violation of NCAA legislation. USC specifically appeals: (1) the Committee's finding of unethical conduct against the former assistant football coach; (2) the Committee's finding that sports marketer A, sports marketer B and their company, became representatives of USC's athletics interests by hiring three USC football players for a summer internship; and (3) the Committee's finding of a lack of institutional control. A reversal of one or more of these findings further supports USC's request for a reduction in penalties.

A. Nature of the Violations

The Committee recognized the central focus of this case when it described it as one that strikes "at the heart of the NCAA's Principle of Amateurism." Exhibit 2, p. 1. The amateurism violations in this case centered on impermissible benefits that agents and sports marketers provided to two prominent student-athletes, student-athlete 1 and student-athlete 2. The agents and sports marketers, motivated by greed and profit in anticipation of a later payback when the young men became professional athletes, did not act to benefit USC, but out of their own self-interest. The student-athletes, in turn, disregarded the extensive rules education that USC provided about NCAA rules banning the receipt of benefits from agents. The Committee acknowledged that the agents and student-athletes conducted their illicit activities in a clandestine manner to avoid detection by the University. Exhibit 2, pp. 46-47.

To establish direct institutional knowledge and responsibility, the Committee found that the former assistant coach knew or should have known that student-athlete 1 received impermissible benefits from agency partner A, and that sports marketer A acted as a USC representative when he provided impermissible benefits to student-athlete 1 and his family. The

Committee based the former finding upon a single two-minute phone call from agency partner A to the assistant football coach, about which neither was accurately questioned, that occurred **after** student-athlete 1's career at USC had ended. The Committee also found that USC failed to monitor student-athlete 1's summer employment, his relationship with his employer, and his car ownership.

The remaining ties to the institution are either minor, or unrelated to football, and thus should not play a role in determining the penalties assessed against USC's football program. The Committee found USC guilty of a failure to monitor contact with a football booster that it described as "relatively innocuous," resulting in a secondary violation. Exhibit 2, p. 55. It also found USC guilty of a failure to monitor the use of a consultant during the 2008 football season. The consultant engaged in coaching activity, causing USC to exceed the limit on the number of coaches. Exhibit 2, p. 55. As the enforcement staff and director of enforcement for secondary violations noted during the hearing, the underlying violation could have been viewed as secondary, and neither felt the consultant violation to be a significant issue. Hearing Transcript, pp. 297-300. Finally, unrelated to football, the Committee found a lack of institutional control for the involvement of representative B in the recruitment of men's basketball player, student-athlete 2, and a failure to monitor the unauthorized phone calls of one women's tennis player to her home country.

B. <u>The Penalties are an Abuse of Discretion</u>

In all prior Committee decisions where post-season bans and significant scholarship reductions were imposed, a staff member or traditional booster was involved in the violations. Here, although no USC staff member or traditional booster was involved in the violations the

Committee cited as the basis for the penalties (Exhibit 2, p. 56), the Committee imposed the most draconian penalties on a Division I athletic program since the Southern Methodist University "death penalty" case in 1987. The penalties imposed on USC even exceed those imposed in 1995 on the University of Miami, which was found to have direct institutional culpability in providing more than $630,000 in impermissible benefits over a four-year period to more than 140 student-athletes in four sports. When the violations in this case are compared to the Miami case and other prior cases involving post-season bans and significant scholarship reductions, the Committee's abuse of discretion is clear.

A comparison of the lesser penalties imposed in prior cases involving similar violations with those imposed on USC underscores the fact that the Committee abused its discretion and treated USC much more harshly than it has other institutions. Further, in prior cases where the Committee did impose severe penalties, the penalties were directly attributable to knowing or intentional violations by institutional staff members or traditional boosters. Here, in sharp contrast, **not one USC staff member or traditional booster provided benefits to any USC student-athlete.** Never before has the Committee so significantly punished an institution for not being able to detect and curb the clandestine actions of agents and runners acting only to promote their own interests. USC therefore respectfully requests that the IAC reduce or set aside penalties C-4 and C-9.

C. Overview of Findings under Appeal

The Committee based its unethical conduct finding against the assistant football coach upon evidence that is neither persuasive nor reliable. The Committee's finding is premised upon words that agency partner A never said and testimony about two telephone calls that never took

place. Agency partner A's testimony has no evidentiary value because of the enforcement staff's serious errors during his interview. Because of these serious errors and ensuing failures of proof, the Committee's findings against the assistant football coach must be set aside.

The Committee's finding that sports marketer A, sports marketer B and their sports marketing agency became representatives of USC's athletics interests by hiring three USC student-athletes is similarly flawed. The finding is based upon USC student-athletes, including student-athlete 1, holding summer jobs that were found by the Committee and enforcement staff to be completely permissible under NCAA bylaws. The Committee's finding that the summer positions were created exclusively for USC student-athletes is factually incorrect, and an improper basis to support the Committee's conclusion.

The Committee also erred in finding a lack of institutional control, in part, based upon facts that do not constitute a violation of NCAA rules. Specifically, the Committee erred in finding a lack of institutional control when USC failed to monitor: (1) Student-athlete 1's summer employment at the sports marketing agency and (2) Sports marketer A 's role in arranging for student-athlete 1's disability insurance policy, even though neither the employment nor the policy was a violation. The Committee ignored the IAC's mandate that "there must be some nexus between a failure to monitor finding and an underlying violation." University of Oklahoma Infractions Appeals Committee Report (2008), Exhibit 3, p. 6. In making its finding, the Committee relied on a newly created "heightened duty" to monitor elite student-athletes, and then improperly retroactively applied this new compliance standard to USC. Finally, the Committee erred in finding that USC failed to monitor representative B's role in the recruitment of student-athlete 2 and lacked institutional control because it failed to recognize that

representative B became a representative of USC's athletic interests based upon his having provided a men's basketball student-athlete with impermissible benefits in 2001. The Committee neglected to consider key evidence relating to the NCAA's involvement in investigating student-athlete 2 before he enrolled at USC, and USC's extensive efforts to monitor student-athlete 2's recruitment. This exclusion resulted in a misleading picture of USC's efforts to exercise appropriate institutional control in its athletic programs, and contributed to the erroneous finding of lack of institutional control. Accordingly, USC respectfully requests that the IAC set aside Findings B-1-b, B-2, B-2-a and B-7.

II. The Penalties Should Be Reduced Because They Are Excessive, Not Based Upon A Correct Legal Standard And Not Supported By The Facts.

The IAC has authority to reduce or set aside penalties if "the penalty is so excessive such that it constitutes an abuse of discretion." Bylaw 32.10.4.1. A penalty is excessive if it: (1) was not based upon a correct legal standard or was based upon a misapprehension of the underlying legal principles; (2) was based upon a clearly erroneous factual finding; (3) failed to consider and weigh material factors; (4) was based upon a clear error of judgment, such that its imposition was arbitrary, capricious or irrational; or (5) was based in significant part on one or more irrelevant or improper factors. Alabama State University Infractions Appeals Committee Report (2009).

USC appeals only the second year of the post-season ban, for the 2011-12 season, and one-half of the scholarship reductions, so that USC would be limited to 20 initial awards and 80 total awards during the 2011-12, 2012-13 and 2013-14 academic years. This reduction is appropriate because (1) the penalties are excessive and unsupported by case precedent; (2) the

Committee applied the wrong legal standard in assessing the penalties; and (3) the penalties are based, in part, on findings that should be overturned.

A. The Committee's Imposition Of Excessive Penalties Against USC's Football Program Is An Abuse Of Discretion.

By any measure, the penalties imposed on USC are the most severe ever levied against an institution's football program since the so-called SMU "death penalty" case in 1987. Until the Committee's Report in this case, no institution, no matter how egregious its conduct, has **ever** suffered both a two-year post-season ban and a loss of 30 or more scholarships – even for systematic and intentional violations involving an institution's coaches or staff. Moreover, before this case, the Committee had **never** reduced the total number of scholarships to 75 for a single year, much less three years.

Even if none of the findings are overturned, a review of case precedent demonstrates that the penalties imposed are so excessive and unsupported by prior precedent as to constitute an abuse of discretion. Historically, the Committee has imposed severe sanctions only in cases involving **deliberate and intentional** violations by traditional boosters, coaches, or institutional staff members, where the violations took place over an extended period of time and were designed to – or did – give the institution a substantial recruiting or competitive advantage. This approach to sanctions for serious and deliberate wrongdoing is consistent with NCAA Constitution 2.1.2, which provides that the institution's responsibility "for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities **promoting the athletics interest of the institution**."

USC's case differs significantly in that there are **no allegations of deliberate or intentional violations by USC's staff members or representatives who were promoting USC's athletics interests.** The conduct underlying the violations found by the Committee all were undertaken to promote the violators' own careers and self-interests. Agency partner A, sports marketer A and their associates acted solely for their own personal profit, not to give a competitive advantage to USC. Because agent-related violations are not intended to, and do not, benefit the institution, such violations rarely form the basis for an NCAA major infractions case. Unless the institution was directly involved in the violations themselves, the NCAA typically treats the violations as secondary and processes them independently of the major infractions process.

USC recognizes that the Committee has the authority to impose penalties when a school fails to detect or prevent violations committed by agents. However, a review of case precedent, demonstrates that the penalties assessed against USC are so excessive as to constitute an abuse of discretion, especially when considering: (1) the lesser penalties imposed in cases involving similar violations, (2) the egregious nature of violations in cases involving severe sanctions, and (3) the unintended consequences of the scholarship reductions.

1. The Committee Has Imposed Significantly Lesser Sanctions in Major Infractions Cases Based On Similar Violations.

As demonstrated by the Florida State University (1996) and University of Oklahoma (2007) cases, typical sanctions for cases involving a failure to monitor include minimal scholarship reductions and probation, not significant scholarship reductions and postseason bans.

Florida State University (1996)

The 1996 Florida State case illustrates how the Committee historically has penalized universities for amateurism violations. Florida State University Public Infractions Report (1996), Exhibit 24. In that case, seven different sports agents provided approximately $8,000 in impermissible benefits to eleven football student-athletes.[1] One of the agents also arranged for a $29,000 loan for a student-athlete and a $23,000 loan for the student-athlete's mother. The enforcement staff classified the Florida State case as a secondary infractions matter, but the Committee disagreed and processed it as a major case.

In its decision, the Committee focused on **four** instances where athletics staff members received direct information regarding potential violations and failed to investigate or monitor:

- the institution did not thoroughly investigate the authenticity of a contract a football student-athlete signed to retain an agent and provide him with a $300 advance (the school accepted the agent's and student-athlete's denials at face value);
- the institution did not investigate a shopping spree involving football student-athletes and agents even though another agent told the institution about the spree;
- an assistant football coach failed to report or investigate a telephone call from an agent who identified other agents that had contacted football student-athletes and provided free merchandise to one student-athlete; and
- an assistant athletics director failed to notify the compliance office that agents had been seen in the football dormitory.

Despite failures to monitor arguably more serious than those found against USC, Florida State received only public reprimand and censure, mandatory recertification of current athletics policies and practices from the university's president to ensure that all policies and practices

[1] During the time the violations occurred, Florida State won the 1993 National Championship and one of its players received the Heisman Trophy.

conform to all requirements of NCAA regulations, one year of probation, and a requirement that it continue to develop a comprehensive athletics compliance education program, with reports to the committee during the period of probation. The Committee did **not** reduce scholarships or impose a post-season ban, correctly emphasizing that the underlying amateurism violations did not involve institutional knowledge or participation. The Florida State case establishes that amateurism violations, standing alone, do **not** trigger institutional responsibility, but rather may indicate a failure to monitor.

The differences between the sanctions imposed upon Florida State and the sanctions imposed upon USC are striking. In contrast to Florida State's penalties as noted above, the USC football program was penalized as follows: (1) public reprimand and censure; (2) four years of probation; (3) two-year ban on postseason competition, including no exception to the limit on football contests during the two-year ban; (4) vacate all wins from December 2004 through January 2006 and modify institution records regarding individual and team statistics to reflect the vacated wins; (5) limit of 15 initial scholarships and 75 total scholarships for three academic years; (6) fine of $5,000; (7) show cause order relating to disassociation of student-athlete 1; (8) prohibition of all non-institutional personnel from traveling with the team, attending practices and camps, and receiving sideline and locker room access; (9) report and publicize the sanctions by informing prospects and include the information annually in the media guide; (10) one-year show cause order on the assistant football coach relating to coaching and recruiting activities; (11) continue to develop and enhance the educational program; (12) file a preliminary report by July 31, 2010; and (13) file a report annually for the duration of probation.

Although Florida State was put on notice **four** times regarding potential violations, the Committee identified just **one** instance where USC (through the assistant football coach) knew or **might have known** of violations. The difference in the penalties imposed cannot be supported, and shows that the Committee abused its discretion in imposing excessive penalties against USC.

University of Oklahoma (2007)

In the University of Oklahoma case (2007), an automobile dealership employed 17 football student-athletes from 2002-2005, including 12 during the summer of 2005, and the Oklahoma football office referred several student-athletes to the dealership. Three of the 12 (including the starting quarterback and a starting offensive lineman) worked at the dealership during the academic year as well. These three were paid thousands of dollars for work not performed. The university failed to collect earnings information from the dealership for the student-athletes in accordance with its policy and took no affirmative steps to monitor their employment. The car dealership provided courtesy cars to the athletic department and thus, was a representative in the traditional sense before the employment at issue. The same was true of the dealership's manager, who was a football season ticket owner.

Based upon findings of failure to monitor and the provision of impermissible benefits, the Committee reduced the total scholarships by only two (a total 83) for two years, but did not reduce the initial scholarships or impose a post-season ban. The Committee did not impose a "heightened duty" on the university to monitor the employment of its star quarterback, instead stating "the Committee concedes that institutions cannot reasonably contact all potential employers of student-athletes to determine whether student-athletes are employed." University of Oklahoma Public Infractions Report (2007), Exhibit 4, p. 11. Notably, the IAC reversed the

Committee's vacation of wins in which the student-athletes competed while ineligible, concluding that the Committee's failure to monitor finding was partially incorrect. Exhibit 3.

When USC's case is compared to the Oklahoma case, which involved a high number of student-athletes, including one of the most high profile players on the team, engaging in admitted violations during summer employment with traditional boosters, it is clear that the Committee exceeded and abused its discretion by imposing such severe penalties on USC for failure to monitor, especially because no violations were found to have occurred during Student-athlete 1's summer employment.

2. The Committee Abused its Discretion in Imposing A Two-Year Post-Season Ban and Drastic Scholarship Reductions in Football For the Violations In This Case.

The Committee has never before imposed on a program a two-year post-season ban **and** at the same time taken away 30 or more scholarships. Additionally, the Committee has never before reduced the total number of scholarships to 75 for a single year, much less for **three** years as it did to USC. The Committee has imposed a two-year post-season ban only twice in the past 15 years – the University of Alabama (2002) and the University of Michigan (2003) – and the IAC set aside the second year in the Michigan case as excessive.

In comparing prior cases where the Committee imposed a post-season ban and significant scholarship reductions in football, USC's violations are much less serious and lacking in intent, particularly with regard to institutional culpability, yet USC's penalties are much more severe. Four cases stand out – the University of Miami (1995), Texas Tech University (1998), the

University of Alabama (2002), and the University of Kentucky (2002).[2] The decision in the University of Michigan (2003) basketball case is also instructive.

University of Miami (1995)

In the Miami case, the most prominent violations included the university providing more than $630,000 in impermissible aid to student-athletes (primarily football) over a five-year period (1989-94). University of Miami Public Infractions Report (1995), Exhibit 5. More than $220,000 of this amount resulted from fraudulent Pell Grant forms completed with the assistance of a Miami athletics staff member. The institution also provided an additional $412,000 in direct extra benefits to student-athletes – many of them football student-athletes. Fifty-five football student-athletes competed while ineligible due to these benefits. In addition, the head football coach and head of compliance failed to report their knowledge of a "pay for play" pool in which student-athletes were paid for big plays. The institution also failed to follow its student-athlete drug testing policy, allowing elite football student-athletes who tested positive for drugs to continue to compete, including in the 1994 Fiesta Bowl where the institution played for the national championship.

[2] *See also* University of Mississippi (1994) (rogue boosters provided impermissible benefits and engaged in serious recruiting violations with knowledge of coaching staff; penalties included a television ban, two-year post-season ban, and reduction of 24 scholarships over two years); University of Washington (1994) (two-year post-season ban imposed for violations by six representatives for providing student-athletes excessive compensation over a nine-year period, including compensation for work not performed, and lack of institutional control regarding institution's failure to monitor this improper employment); and Auburn University (1993) (two-year post-season ban imposed for violations where boosters made cash payments to football student-athletes, including bonuses based on game performance, and assistant coach and athletics department assistant made cash payments to student-athlete; and lack of institutional control for failure to investigate potential violations even though one student-athlete reported receiving payments to university staff members).

In finding a lack of institutional control, the Committee focused on the clear causal connection between the underlying violations and the lapses in monitoring. The Committee described Miami's institutional shortcomings as "significant failures in oversight in a variety of areas within the institution's athletics department." Exhibit 5, p. 1. Thus, intentional wrongdoing by athletics department staff, coupled with failure or lack of monitoring systems to detect both intentional wrongdoing and other mistakes – matters completely within Miami's control – led directly to egregious violations.

Despite the fact that the violations in USC's case pale in comparison to those in the Miami case -- not only in financial terms and number of student-athletes, but importantly, with regard to institutional intent -- the Committee imposed much more severe penalties upon USC. Although Miami lost 31 initial scholarships over three years (one more than USC's 30), its total scholarships were only reduced to 80 (as opposed to USC's 75), and it received only a one-year post-season ban. The violations in Miami were very much within its control; no such claim can be asserted in USC's case, where the violations were committed in stealth by cunning outliers. While the Committee found that Miami's failures to monitor **"contributed to," "permitted," and "resulted in"** the underlying violations, the most that the Committee could say in this case was that USC **"might have"** found or detected some violations had it taken additional monitoring steps.[3] Exhibit 2, pp. 48-49. The "might have" standard is inadequate to justify the most devastating football penalties since SMU, penalties designed to debilitate the program for a

[3] The Miami case involved undisputed direct institutional culpability in providing over $600,000 in extra benefits and allowing elite athletes to compete in a championship contest in violation of the institution's drug testing policy. In contrast, the Committee found USC guilty of failing to adequately monitor student-athlete 1's purchase of a 10-year old car and his relationship with a sports marketer over a two-month period in late 2005, and the institution's use of an outside consultant during the 2008 season.

period of several years. The penalties imposed on USC are so incongruent with the decision in the Miami case that they constitute an abuse of discretion, and should be reduced.

Texas Tech University (1998)

This case involved 77 instances where a football student-athlete competed while ineligible during a seven-year period because the institution failed to apply satisfactory progress legislation correctly. Texas Tech University Public Infractions Report (1998), Exhibit 25. Members of the football coaching staff also provided tuition assistance and committed academic fraud by completing significant portions of student-athletes' course work. Finally, a booster provided free bail bonding and legal services to three football student-athletes.

The Committee found a total of 42 instances where a football student-athlete competed while ineligible during the university's four bowl appearances in this period, with some student-athletes doing so in more than one academic year. The Committee further found that the football staff provided money to a student-athlete before and after his enrollment and also found an assistant football coach guilty of unethical conduct. The Committee imposed a one-year bowl ban and reduced initial scholarships by eight, six and four (a total of 18) over three years with a total cap on scholarships of 80 for two years – a much lesser sanction than that imposed on USC.

University of Alabama (2002)

The Alabama case involved recruiting violations by three prominent "rogue boosters" that the Committee described as "some of the most serious in recent memory." University of Alabama Public Infractions Report (2002), Exhibit 6, p. 29. Student-athletes received benefits over a five-year period from boosters who had attained and enjoyed insider status to the university's football program. The most prominent booster paid $200,000 to a high school coach

in exchange for a prospect's commitment to attend the university. The boosters gave another prospect $20,000 in cash and other recruiting inducements. The boosters had close relationships and extensive contacts with the coaching staff during the violation period. A car dealer (also a booster) sold a student-athlete a used vehicle at no cost for an extended period. The boosters also had impermissible contacts with highly regarded prospects on campus. The institution admitted that excessive entertainment (strippers) was provided at parties that prospects attended while visiting campus. Finally, the institution was a two-time repeat violator, with major infractions cases in 1995 and 1999.

The violations in USC's case are nowhere near as egregious as those in the Alabama case. Yet, the Committee imposed the same two-year post-season ban and significantly greater scholarship restrictions here than in the Alabama case where Alabama lost 21 initial scholarships over three years, and total grants were reduced to 80. The Committee's decision to impose substantially more punitive measures against USC is a clear abuse of discretion.

University of Kentucky (2002)

This case primarily involved a recruiting coordinator who improperly paid for or provided free meals, lodging, and clothing to prospects, their families, and their high school coaches over a period of three years. The recruiting coordinator solicited and received funds from boosters for a recruiting slush fund, committed academic fraud and forged letters from school deans or professors to prospects to ensure the prospects that they would be admitted to their preferred course of study, and falsified recruiting records in the form of meal receipts so that the institution could pay for meals for people not entitled to receive them. In addition, a booster club improperly supplemented the salaries of football staff members.

The Committee made findings of failure to monitor and lack of institutional control, noting that the recruiting coordinator "was able to openly violate basic, fundamental recruiting legislation for an extended period of time (approximately two years) without detection." University of Kentucky Public Infractions Report (2002), Exhibit 7, p. 28. The Committee imposed a one-year post-season ban and accepted the institution's self-imposition of the reduction of 19 initial scholarships over three years. The Committee limited the total scholarships to 80 during this time.[4] The IAC upheld the penalties on appeal. Again, as with Miami, Texas Tech, and Alabama, Kentucky received lesser sanctions than USC for much more egregious conduct.[5]

University of Michigan (2003)

In the Michigan basketball case, a booster who had what the Committee described as "insider status" provided benefits to student-athletes. The booster gave over $600,000 in benefits to four men's basketball student-athletes who were among "the nation's most prominent basketball student-athletes on one of the country's most elite basketball teams." University of Michigan Public Infractions Report (2003), Exhibit 8, p. 11. The booster also provided

[4] The Committee imposed the post-season ban and reduced total scholarships to 80 "primarily because of the significant and protracted recruiting advantage . . . derived from the numerous and blatant violations of NCAA recruiting legislation." Exhibit 7, p. 36. This factor is not present in USC's case.

[5] Two additional cases with more serious violations, yet less severe sanctions, are: (1) Mississippi State (2004) (boosters, individually and in conjunction with assistant coaches, engaged in serious football recruiting violations, resulting in only a one-year post-season ban); and (2) Marshall University (2001) (university arranged employment of 21 non-qualifier football student-athletes over a three-year period with a local booster, where they were paid $25 an hour for jobs that normally paid $4.50 to $6.00 per hour, and volunteer coach committed academic fraud involving seven student-athletes, resulting in scholarship reduction of just five grants a year for a three-year period, as opposed to USC's ten).

recruiting inducements and was present during some home visits by the university's coaching staff to a prospect's house.

The Committee imposed a two-year post-season ban on Michigan, among other penalties. On appeal, the IAC determined that a one-year post-season ban satisfied the provisions of the presumptive penalty in Bylaw 19.5.2-(f). University of Michigan Infractions Appeals Committee Report (2003), Exhibit 9. The IAC found no causal connection between the benefits provided after the student-athletes had already enrolled and any competitive advantage, because the student-athletes would have attended Michigan even if the benefits had not been provided.

The IAC's rationale applies equally to USC and student-athlete 1, as student-athlete 1 was enrolled and competing at a high level well before he received any benefits from agents, and would have continued to compete for USC in the absence of any such benefits. As with Michigan, then, a reduction in penalties for USC is appropriate.

3. The Scholarship Reductions Are Excessive, Particularly When Considering Their Unintended Actual Impact.

The actual impact of the scholarship penalties is far worse than the imposed limit of 75 total grants per year. Since the sanctions were announced, four football student-athletes have transferred to other institutions, and two prospects who signed national letters of intent with USC in February 2010 requested and received unconditional releases from their letters and will attend other institutions. Assuming no further transfers, USC will enter the 2010-11 academic year with 72 total counters in football. Assuming normal attrition in addition to graduation, it is certainly possible that USC will be below 70 in 2011-12. The projected total number drops to the mid 60s in 2012-13, as there are 18 counters in USC's current junior class. The impact in 2013-14 is likely worse. These reduced numbers, coupled with the fact that many prospects may

not consider USC because of the sanctions, could damage the program well beyond the sanction period. The violations in this case do not justify this unintended and draconian punishment.

B. The Committee Applied an Incorrect Standard In Imposing a Two-Year Post Season Ban, Thereby Abusing Its Discretion.

During the NCAA's June 10, 2010, press conference announcing the Committee's decision, and in response to a question from the media about how the Committee determined the length of USC's post-season ban, the Committee's Chairman stated, "Well, frankly…, it was the number of bowl games that the individual [i.e., student-athlete 1] participated in." Transcript of NCAA Press Conference, Exhibit 10, pp. 15-16. This reasoning does not reflect an established standard. See Bylaw 19.5.2.1 (f). It is arbitrary, capricious and irrational, and inconsistent with case precedent.

A literal interpretation of the Chairman's comments would mean that post-season bans may be imposed only if an ineligible student-athlete has competed in the post-season, which, of course, is not the case. The Committee has imposed post-season sanctions on institutions even when the involved institution did not compete in a post-season contest during the period when the violations occurred (*e.g.*, University of Memphis, 1989; St. Bonaventure University, 2004). Conversely, the Committee has chosen not to impose post-season bans in situations where student-athletes competed in bowl games while ineligible (*e.g.*, Georgia Institute of Technology, 2005 and University of Oklahoma, 2007). Several of the cases discussed above demonstrate that the Committee has never before applied the standard articulated by the Chairman in this case.[6]

[6] For example, using the standard as stated by the Chairman, Miami should have received at least a five-year post-season ban and possibly a nine-year ban if the violations dated back to 1986 (as Miami reported to the Committee following the hearing). Exhibit 5, p. 6. Similarly, under this flawed reasoning, Texas Tech should have received a four-year post-season ban.

The Chairman's comments demonstrate that the Committee's imposition of a two-year post-season ban, at a minimum, (1) was not based upon a correct legal standard or was based upon a misapprehension of the underlying legal principles and (2) was based upon a clear error of judgment, such that it was arbitrary, capricious and irrational.

C. The Penalties Are Based On Findings That Should Be Overturned.

A reduction in penalties is also warranted because the Committee erred in three of its findings. These errors are discussed in detail in section III below, but in sum, (1) the only direct institutional tie between USC and the benefits agency partner A provided is the Committee's findings against the assistant football coach, which are factually unsupported, contrary to the evidence and procedurally flawed;[7] (2) the Committee's finding that sports marketer A , sports marketer B and their sports marketing agency became representatives of USC's athletics interests by hiring USC student-athletes is flawed because it is clearly contrary to the evidence, not supported by competent evidence and the facts found by the Committee do not constitute a violation; and (3) the Committee's finding of a lack of institutional control regarding the internships and student-athlete 1's disability insurance policy is flawed because there is no underlying violation, and thus no nexus between the failure to monitor and an underlying violation. Because the Committee found two separate failures to monitor where there was no underlying violation, the Committee's decision is not based upon the correct standard and reflects a misapprehension of the underlying principles. Because of these erroneous findings, the football penalties should be reduced substantially.

[7] Even if the assistant football coach findings are upheld, he did not have contemporaneous knowledge of the violations, as the most the Committee could say was that he learned that agency partner A and student-athlete 1 had "likely" engaged in violations "[a]t least by January 8, 2006," after the violations had occurred and after student-athlete 1 last competed for USC. Finding B-1-b, Exhibit 2, p. 23.

III. The Committee's Findings Of Violations B-1-B, B-2, B-2-A, And B-7 Are Contrary To The Evidence, Based Upon Facts That Do Not Constitute A Violation And Compromised By Procedural Error.

The Committee's findings of violations must be set aside where: (1) a finding is clearly contrary to the evidence presented; (2) the facts found do not constitute a violation; or (3) there was a procedural error and but for the error, the Committee would not have made the finding of a violation. Bylaw 32.10.4.2. Further, findings of violations must be based only upon information that is "credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs." Bylaw 32.8.8.2.

The Committee's finding regarding the assistant football coach (section B-1-b) must be set aside because it is clearly contrary to the evidence, not supported by competent evidence and compromised by procedural error. The finding that the sports marketing agency, sports marketer A and sports marketer B became representatives of USC's athletics interests (sections B-2 and B-2-a) must be set aside because it is clearly contrary to the evidence, not supported by competent evidence and the facts found by the Committee do not constitute a violation. Finally, the finding of lack of institutional control (section B-7) must be set aside because the Committee erred in relying upon activities that did not constitute a violation of the NCAA's rules, and failed to consider a number of mitigating factors.

A. <u>The Finding of Unethical Conduct Against Assistant football coach is Contrary to the Evidence, Based on Incompetent Evidence and Compromised By Procedural Error.</u>

An allegation of unethical conduct for providing false and misleading information in violation of Bylaw 10.1(d) is the most serious violation an individual can face. Accordingly, the Committee usually finds unethical conduct only in cases where the actual facts supporting the

finding are clearly contrary to the information provided by the accused. *See, e.g.*, University of New Mexico (August 20, 2008) (coach accused of arranging unearned course credit for prospective student-athlete said he had not spoken to the course professor in the prior year and spoke to her only once every six months prior to that time; after phone records showed the coach called the professor 82 times from January 2004 to June 2006, including 19 times while the prospect was enrolled in the course, the coach was found guilty of unethical conduct). Indeed, in many cases, overwhelming evidence led the accused to later admit to lying. *See, e.g.*, University of Minnesota (October 24, 2000) (men's basketball head coach denied in NCAA interview paying $3,000 to a secretary to compensate her for impermissible "academic assistance" she provided to a student-athlete, but subsequently admitted he had paid the $3,000 after he was forced to provide personal financial records showing the payment); *See*, *e.g.,* Howard University (November 27, 2001) (assistant coach denied that the institution paid the travel expenses of a junior college coach who accompanied one of his players on his official visit, but later admitted he lied).

In contrast, the evidence in the record here does not support the Committee's finding. The Committee found that the assistant football coach lied when he (1) denied that he knew agency partner A,[8] and (2) denied having knowledge of any of the amateurism violations

[8] The assistant football coach did not deny having met agency partner A. The assistant football coach stated that he was "not sure" whether he had met agency partner A, he did not recall having met him and to the best of his knowledge, had not met him. Assistant football coach Interview, September 19, 2006, Exhibit 11, pp. 26-27. The Committee erred by equating "met" with "knew." The only evidence that the assistant football coach "knew" agency partner A is the January 8 call and a single photograph of assistant football coach and a friend in which agency partner A is standing in the background. The Committee found, correctly, that the January 8 call was the only communication between agency partner A and the assistant football coach. No substantive conversation was alleged or found to have occurred during the

involving agency partner A, student-athlete 1, or student-athlete 1's family.[9] The assistant football coach has maintained throughout that he had no knowledge of student-athlete 1's receipt of impermissible benefits. The Committee, however, **imputed** this knowledge to the assistant football coach based entirely upon a single, two-minute telephone call agency partner A made to the assistant football coach on January 8, 2006, after student-athlete 1 had played his last game at USC and announced his intention to leave USC for the NFL. The Committee concluded that the assistant football coach provided "false and misleading information regarding his knowledge of this telephone call and the NCAA violations associated with it." Exhibit 2, p. 23. With such a serious accusation against the assistant football coach, any finding must be supported by clear testimony and other evidence proving the assistant football coach lied. Unfortunately, however, the enforcement staff's crucial errors rendered meaningless all of the testimony regarding this phone call. The Committee erred by overlooking the impact of these errors. With regard to the phone call, the Committee stated that it:

> finds [agency partner A] credible in his report of the call. [agency partner A] said that he phoned [the assistant football coach] to ask him to intercede with [student-

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three one-minute or less phone calls placed on October 29, 2005. USC Notice of Allegations, Exhibit 12, p. 15; Exhibit 2, p. 25.

[9] While the Committee criticized assistant football coach's credibility, it ultimately accepted the assistant football coach's testimony and rejected agency partner A's statements in Allegations 1(b)(1) and 1(b)(2) regarding the March 2005 weekend in San Diego, as evidenced by it declining to make an unethical conduct finding against the assistant football coach in connection with that weekend. Nevertheless, the Committee omitted any discussion in the Report of important information demonstrating that agency partner A fabricated those allegations. The Committee also failed to give any weight to or even mention that agency partner A made similar allegations against the former head football coach that were found to be not credible. Agency partner A accused the former head football coach of having direct knowledge and involvement involving student-athlete 1's parents' housing. Hearing Tr., pp. 206-15. The enforcement staff investigated the allegation thoroughly and did not pursue it as a formal charge. The Committee discussed it during the hearing and accepted the former head football coach's denial. Understandably, the Committee rejected as false all of these allegations by agency partner A, but at other times, inexplicably chose to believe him.

> athlete 1] and get him to adhere to the agency agreement that he made with [agency partner A and agency partner B]. [Agency partner A] said he also told [the assistant football coach] that he did not intend to lose the money he had given [student-athlete 1] and his parents and preferred not to go public with the matter and implicate the institution.

Exhibit 2, p. 26.

Agency partner A did not say this. These are the words of the enforcement staff. The Committee merely quoted, nearly verbatim, the enforcement staff's Allegation 1(b)(3) from the Notice of Allegations. Exhibit 12, pp. 3-4. The Committee's reliance on the enforcement staff's characterization of agency partner A's testimony, rather than on the testimony itself, constitutes serious procedural error that resulted in an erroneous finding.[10]

During the staff's interviews of the assistant football coach and agency partner A, the staff bungled what should have been easy and straightforward questions about the January 8, 2006, call. During the assistant football coach's interview, the enforcement staff questioned the assistant football coach about a telephone call on January 8, **2005**, instead of January 8, **2006**. Assistant football coach Interview, February 15, 2008, Exhibit 14, p. 29. The assistant football coach understandably did not recall a telephone call that never occurred (*i.e.*, on January 8, 2005); nevertheless, he was steadfast throughout that he had no knowledge of student-athlete 1 and his family receiving impermissible benefits. As a result, there is no testimony from the

[10] The Committee also ignored the very plausible explanation that agency partner A may have called the assistant football coach about the meeting that student-athlete 1, the assistant football coach and the former head football coach had scheduled with prospective agents for the very next day, January 9. *Los Angeles Times* Article, Exhibit 13 (submitted as Exhibit 11 to USC's Response to Notice of Allegations). The Committee dismissed this possibility out of hand, even though it is logical that agency partner A, hoping to become student-athlete 1's agent, would call the assistant football coach to lobby for an invitation to the meeting.

assistant football coach as to what was said on the January 8, 2006 call, because the enforcement staff made an error when questioning him about the call.

When the enforcement staff questioned agency partner A about the January 8, 2006 call, it told agency partner A that the **assistant football coach called him** on January 8, which is **indisputably wrong**. USC Response to Notice of Allegations, Exhibit 15, USC Response to Allegation 3, p. 3-9. The phone records establish that it was agency partner A who called the assistant football coach on January 8, 2006. Therefore, when assessing the Committee's finding and agency partner A's testimony, it is critically important to understand that agency partner A's testimony is irreparably tainted on this point because it is in response to an incorrect question that the enforcement staff presented to him as fact. In response, agency partner A failed to correct this mistake, falsely confirmed that assistant football coach called him and concocted an entire conversation that is plausible only if the assistant football coach had called agency partner A. Specifically, agency partner A claimed that the assistant football coach called him, "trying to resolve it, you know, and like student-athlete's wrong, he should make it right and basically don't implement [sic] the school." Agency partner A Interview, p. 113. Agency partner A went on to state that the assistant football coach volunteered that he (assistant football coach) knew about student-athlete 1's agreement with the sports agency and marketing company and about all of the benefits student-athlete 1 had received from agency partner A. Agency partner A Interview, p. 113. Thus, building upon the enforcement staff's error, agency partner A said the assistant football coach called him in an attempt to protect USC, which, without question, never happened.

The Committee committed clear error by basing its finding upon this tainted testimony. This defective testimony does not constitute credible, persuasive information that could be reasonably relied upon in the conduct of serious affairs, and therefore fails to meet the standard of proof set forth in Bylaw 32.8.8.2. USC argued this in both its written submission and at the hearing, yet the Committee did not even mention the enforcement staff's mistakes when making its finding of unethical conduct against the assistant football coach.

USC did not have an opportunity to correct the enforcement staff's fundamental errors in its questions to agency partner A or to ask any key follow-up questions. The enforcement staff unilaterally excluded USC from its interview with agency partner A,[11] asked agency partner A a series of misleading and inaccurate questions, and then mischaracterized agency partner A's responses regarding the assistant football coach to the Committee. Compounding these errors, the Committee accepted at face value **and quoted** the mischaracterized statements of agency partner A as the staff alleged, instead of looking to what agency partner A actually said. But for

[11] The enforcement staff unilaterally decided to exclude USC from participating in agency partner A's interview even though at that time, USC and the NCAA had been in a joint investigation for well over a year, with both parties attending interviews and sharing information. The enforcement staff's actions violated USC's common law right to fair process, which "includes the right to notice of the charges, to confront and cross-examine the accusers, and to examine and refute the evidence." *Cason v. Glass Bottle Blowers Ass'n of U.S. and Canada*, 37 Cal. 2d 134, 143-144 (1951). That right requires that the enforcement staff's and Committee's actions "be both substantively rational and procedurally fair." *Pinsker v. Pacific Coast Society of Orthodontists ("Pinsker II"),* 12 Cal. 3d 541, 550 (1974). USC was denied the opportunity to cross-examine agency partner A and test his credibility by, for example, observing and judging his body language and mannerisms, and probing his responses. USC timely raised this lack of fair process in its Response and at the hearing. Exhibit 15, Introduction, pp. 5-6; Hearing Tr., pp. 17-29. The enforcement staff responded at the hearing that it had no control over USC's exclusion and informed the Committee that agency partner A refused to allow USC to participate in the interview. The enforcement staff's statement, however, was false. Only after USC provided an e-mail from the enforcement staff proving this falsehood did the staff admit that it had, in fact, unilaterally excluded USC from agency partner A's interview. November 6, 2007 Email from Member of the Enforcement Staff, Exhibit 16; Hearing Tr., pp. 17-24.

these procedural errors, the Committee could not have found the assistant football coach guilty of unethical conduct, as there is no evidence to support this finding.

The only testimony about any call from agency partner A to the assistant football coach consists of one short sentence. In response to the enforcement staff's question about the content of any telephone calls he made to the assistant football coach, agency partner A's testimony, in its entirety, was that he called the assistant football coach **"trying to get this resolved, just get my money back and make it right."** Agency partner A Interview, p. 115. There is no date for this purported conversation or call, and no testimony as to what the assistant football coach might have said in response. Yet, this is the only evidence in the record from agency partner A to support the Committee's finding of unethical conduct against the assistant football coach. It is clearly insufficient to support the Committee's finding.

The Committee attempted to buttress its unethical conduct finding by asserting that agency partner A's girlfriend, "confirmed [Agency partner A's] account of the call." Exhibit 2, p. 26. It is clear from agency partner A's girlfriend's testimony, however, that not only did she lack personal knowledge of any call from agency partner A to the assistant football coach, she never even claimed that agency partner A told her anything about any conversation he had with the assistant football coach. The Committee ignored the following testimony establishing that agency partner A's girlfriend had zero knowledge – personal knowledge or hearsay – regarding the actual content of any call between agency partner A and the assistant football coach:

> I think him [agency partner A] and agency partner B made the call . . . . I remember him saying **he was gonna do it** and then I remember him going over to agency partner B's. I don't know for sure if agency partner B was around, but I know he was at agency partner B's when all this was going on and he had made the call. You know, he had said that **he was gonna call somebody** and start to make some moves.

Agency partner A's girlfriend Interview, March 31, 2008, Exhibit 17, p. 58.

Thus, agency partner A's girlfriend's testimony does not provide any kind of legitimate, independent corroboration of agency partner A's account or the Committee's findings against the assistant football coach. Her statement does not establish whether agency partner A actually spoke to the assistant football coach or what information was shared during the call. The Committee disregarded this testimony, even though USC and the assistant football coach pointed it out at the hearing. Hearing Tr., pp. 591-97. Instead, the Committee quoted excerpts from agency partner A's girlfriend's interview that give the misimpression that she either heard the actual call or that agency partner A told her about the call after it occurred. Exhibit 2, pp. 26-27. It is undisputed that neither happened.

In addition, the Committee found further support for its finding based upon the fact that the assistant football coach and student-athlete 1 had a 13-minute conversation later on January 8, 2006. Exhibit 2, p. 27. The impression in the Report is that the assistant football coach promptly called student-athlete 1 after the 1:34 a.m. call from agency partner A. This is misleading. The assistant football coach did not call student-athlete 1 until 2:50 p.m., more than 13 hours later. Assistant football coach Cell Phone Records for January 8, 2006, Exhibit 18 (submitted as Exhibit 13 to USC's Response to Notice of Allegations). The time lag between calls supports the conclusion that agency partner A did **not** tell the assistant football coach that he had given student-athlete 1 impermissible benefits and was now demanding repayment. If

agency partner A had made such a shocking revelation to the assistant football coach, the assistant football coach would not have waited more than half a day to call student-athlete 1.[12]

Finally, the Committee fails to address why it finds agency partner A's version of the January 8, 2006, phone call credible, but not agency partner A's claim that he met the assistant football coach with student-athlete 1 in San Diego in March 2005. Exhibit 2, p. 26. The Committee quietly rejected the following allegations that were based entirely on agency partner A's statements, with no discussion as to why his statement was not credible enough to support a finding:

- Agency partner A's claim that he and agency partner B paid for a hotel room for Student-athlete 1 during the March 2005 weekend.
- Agency partner A's claim that student-athlete 1 told the assistant football coach, in agency partner A's presence, that agency partner A paid for the hotel room.
- Agency partner A's claim that he discussed his sports agency with the assistant football coach the same night at a party.

The Committee spent a considerable amount of time criticizing the assistant football coach regarding the March 2005 weekend,[13] yet provided no explanation why it rejected agency

[12] The context of this assistant football coach-student-athlete 1 call is not discussed in the Report. The Committee's conclusion that the assistant football coach called student-athlete 1 to discuss agency partner A's January 8 call is based entirely upon speculation, not actual evidence. A much more likely explanation is that the assistant football coach and student-athlete 1 were talking about the meeting student-athlete 1 was to have the next day, January 9, 2006, with assistant football coach, the former head football coach and three prospective agents. Exhibit 13. The assistant football coach and the former head football coach helped student-athlete 1 with the agent selection process after student-athlete 1 decided to enter the NFL draft. The assistant football coach and student-athlete 1 talked often by phone, and it is not surprising that the assistant football coach would have called student-athlete 1 to discuss the upcoming meeting where he would select an agent.

[13] The Committee questioned the assistant football coach's credibility with regard to whether he had a female associate with him during the March 2005 weekend. The assistant football coach initially stated he was alone, but later stated he was accompanied by the female associate. Exhibit 2, p. 24. The assistant football coach should have been forthcoming about this personal matter in his first interview, but this

partner A's allegations other than a vague reference to "unresolved discrepancies" in what witnesses reported regarding the events and who was present during the March 2005 weekend. Exhibit 2, p. 26. These "unresolved discrepancies" actually included strong evidence that agency partner A lied about the events of the March 2005 weekend in San Diego in an effort to directly implicate USC and the assistant football coach. Exhibit 15, USC Response to Allegation 1(b), pp. 1-28 to 1-36. In addition, the Committee ignored the fact that agency partner A falsely accused the assistant football coach of taking $50,000 from another sports agent, Agency partner A Interview, pp. 111-112, and also fabricated allegations against the former head football coach. Hearing Tr., pp. 206-215. In building its case against the assistant football coach, the Committee acted as if this compelling evidence of agency partner A's fabrications did not exist. When a finding of unethical conduct for lying is made, the accuser's credibility must be beyond question, or substantially corroborated by independent sources. The Committee's report implicitly acknowledges serious problems with agency partner A's credibility, but there is no independent, corroborating evidence to rectify this deficiency.

In the end, there is **zero** evidence in the record about the single conversation upon which the Committee based its finding that the assistant football coach knowingly hid student-athlete 1's amateurism infractions from the NCAA. The Committee engaged in unfounded and implausible inferences and suppositions about the content of that call in the face of obvious, innocent, alternative explanations. Due to this lack of competent evidence and the procedural

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omission does not concern the assistant football coach's knowledge of any NCAA violations student-athlete 1 and agency partner A committed. The Committee rightly rejected agency partner A's account of the March 2005 weekend.

errors identified above, the IAC should vacate the Committee's finding of unethical conduct against Assistant football coach. Finding B-1-b must be reversed.

B. The Committee Erred in Concluding that Sports marketer A , Sports Marketer B and Their Sports Agency Were Representatives of USC's Athletics Interests

The Committee determined that sports marketer A , sports marketer B and their business became representatives of USC's athletics interests when student-athlete 1 and two other USC student-athletes were hired as interns for the sports marketing agency in the summer of 2005. Although these summer jobs were completely permissible employment opportunities under NCAA Bylaw 12.4.1 and there were no NCAA violations related to the jobs themselves, the Committee nevertheless concluded that a booster relationship was created because (1) the "employment opportunities were created only for the institution's student-athletes," and (2) those opportunities were created "with the knowledge and assistance of the institution's athletics department staff members." Exhibit 2, p. 30. This conclusion is not supported by the NCAA bylaws or the evidence in the record.

1. An Employer Does Not Become a Representative of an Institution's Athletics Interests By Hiring as Interns Only Student-Athletes from the Institution.

Nowhere in the NCAA bylaws does it state that any person or entity that hires student-athletes from one institution automatically becomes a representative of that institution's athletics interests. The bylaws require only that student-athletes be paid only for work actually performed and at a rate commensurate with the going rate in the area for similar services. Bylaw 12.4.1 (a) and (b). Yet, the Committee found that an employer forever becomes a representative of an institution's athletics interests any time it employs even one student-athlete from that institution

without making the position available to the general public. Such an interpretation is unprecedented and imposes a new rule that is not supported by the bylaws or sound policy. It is clear the enforcement staff alleged this only as a means to an end – to make USC directly responsible for sports marketer A 's provision of benefits, sports marketer A must be classified as a representative. The Committee's failure to require USC to disassociate sports marketer A , however, appears to be tacit recognition by the Committee that sports marketer A was neither promoting USC's athletics interests nor operating on USC's behalf. The Committee erred when it accepted the enforcement staff's novel but flawed theory.

Moreover, the Committee's finding that the sports marketing agency internships were "created" solely for USC's student-athletes is factually incorrect.[14] There is no evidence that the internship program was limited only to USC student-athletes.[15] The sports marketing agency

[14] In support of its conclusion that the internships were "created" for USC student-athletes, the Committee noted that an individual , who had previously been in partnership with sports marketer A and sports marketer B in a different sports agency stated that that agency never had any "interns." The individual, however, in fact testified that the sports agency did employ a "college student" – *i.e.*, an intern by another name. Individual's Interview, September 21, 2006, Exhibit 19, p. 15.

[15] Despite undisputed evidence that the sports marketing agency offered internships to students from other schools, the Committee asserted that the internships were **only** for USC student-athletes, relying on the testimony of a witness who was not in charge of employment and who, when asked "Was it offered after student-athlete 1's summer? Was it a continuing program? I mean can USC student athletes go into it today?," answered "I have no idea. Probably, probably, they probably cut that off now. I'm, I'm guessing. I don't know because of the affiliation with sports marketer A. I have no idea." Former Compliance Director Interview, Sept. 6, 2007, Exhibit 20, p. 28. This is hardly persuasive information that can be reasonably relied upon. The former compliance director's further statement that "the talk was there was going to be a continuing thing. Continue to offer the opportunity to USC student athletes" does not connote that the internship was limited to USC student-athletes **exclusively**. Instead, it reveals simply that the internship was not designed to be a one-off. The Report also cites the second-hand statement by sports agent B that sports marketer A told him that the former head football coach asked sports marketer A to hire student-athletes in the summer. The former head football coach testified in person at the hearing, however, that he had not done so. Exhibit 2, p. 30 and Hearing Tr., p. 250. The Committee did not make a finding on this evidence. In short, no witness stated that the internships were created solely for USC student-athletes.

was formed in 2005. During its first summer, the sports marketing employed three interns, all USC student-athletes, which made sense as a matter of convenience and economics for a new Los Angeles-based business. The Committee ignored completely the undisputed fact that, in subsequent years, the sports marketing agency hired summer interns (student-athletes and non-athletes) from other schools across the country, including Purdue University, Harvard University, the University of Arizona and Loyola Marymount University. Exhibit 15, USC Response to Allegation 2, p. 2-8. Therefore, the internship did not constitute a "benefit" sufficient to confer representative status on sports marketer A , sports marketer B and their sports marketing agency, and the facts found do not constitute a violation of NCAA bylaws.

2. An Employer Does Not Become a Representative of an Institution's Athletics Interests Merely Because the Institution Recommends a Student-Athlete for Employment.

The Committee also cited the fact that members of USC's athletics department knew of the sports marketing agency internship opportunities and "assisted" in their creation to support its finding that sports marketer A , sports marketer B and their sports marketing agency became USC's representatives. While members of the athletics department knew of the openings, there is no evidence in the record that they "assisted" in their creation.

The sports marketing agency's interest in obtaining interns preceded its approaching anyone at USC. After sports marketer B asked a USC athletics department staff member whether any USC students might be interested in a summer job with the sports marketing agency, the staff member checked with the compliance office to make sure NCAA rules allow a student-athlete to work for a sports marketing firm. Associate Director of Athletics' Interview,

February 14, 2008, Exhibit 21, p. 9. USC compliance provided an official NCAA interpretation authorizing such employment provided certain conditions were met. Exhibit 20, p. 39, and NCAA interpretation, Exhibit 22. There is no question the sports marketing agency satisfied these conditions during the summer of 2005. The athletics department staff member then referred **one** student-athlete – **not** student-athlete 1 – to the sports marketing agency. Exhibit 21, p.9. The other two student-athletes who also worked there – including student-athlete 1 – found out about the employment opportunity through word of mouth. Exhibit 21, pp. 8-9. These actions do not constitute "assistance" in the creation of the internship opportunities. Rather, they demonstrate USC's diligence in ensuring compliance.

The Committee's strained interpretation and application of the bylaws is without precedent and inconsistent with existing legislation concerning the employment of student-athletes.[16] Further, the Committee's finding that the internships were created solely for USC student-athletes with the assistance of USC is not supported by the evidence in the record. For these reasons, the finding that sports marketer A, sports marketer B and their sports marketing agency became representatives of USC's athletics interests by providing summer employment to three student-athletes should be vacated.

C. The Committee's Finding of Lack of Institutional Control Should Be Set Aside Because Some of the Facts Found By the Committee Did Not Constitute A Violation of NCAA Rules, and the Committee Failed To Consider A Number of Mitigating Factors.

[16] This interpretation is a necessary predicate to finding that the benefits provided in Findings B-2-(b)(1) – (6) constituted violations of Bylaws 16.02.3 and 16.11.2.1. Thus, these findings should be amended to cite only Bylaw 12.3.1.2 (Benefits from Prospective Agents).

The Committee's finding of lack of institutional control is grounded on six particular allegations: (1) monitoring of [student-athlete 1]'s automobile registration; (2) monitoring of [student-athlete 1]'s internship at the office of a sports marketing agent [sports marketer A and the sports marketing agency]; (3) involvement of boosters and agents in the [men's basketball] recruiting process; (4) monitoring the number of countable coaches in the football program; (5) booster contact in the [football] recruiting process; and (6) monitoring long distance telephone calls made by a women's tennis student-athlete from the department of athletics. Exhibit 2, pp. 46, 55. With regard to student-athlete 1's internship, the Committee also found a lack of institutional control related to USC's failure to monitor sports marketer A 's apparent involvement with procuring student-athlete 1's disability policy. Exhibit 2, p. 51.

Thus, with regard to the sport of football, the Committee found a lack of institutional control related to monitoring student-athlete 1's automobile registration and summer employment with the sports marketing agency , sports marketer A 's involvement in student-athlete 1's procurement of disability insurance coverage during the fall of 2005, a failure to investigate adequately the relationship between student-athlete 1 and sports marketer A following the publication of a November 14, 2005, article by Liz Mullin in Street & Smith's *Sports Business Journal*, "relatively innocuous" booster contact in the recruiting process, and monitoring the number of countable coaches. Exhibit 2, pp. 48-51, 55.

The Committee was very critical of USC's monitoring of student-athlete 1's summer employment and disability insurance, yet the enforcement staff did not allege, and the Committee did not find, a single violation regarding either one. The Committee thus based its finding of a lack of institutional control, in part, upon facts and issues that involved **no** violations

of NCAA legislation. This constitutes the application of an improper legal standard. The IAC has made clear in its prior decisions that a lack of institutional control finding based upon a failure to monitor requires an underlying violation to precede it. Exhibit 3, p. 6. Once the summer employment and disability insurance monitoring findings are eliminated, only four issues remain to be attributed to football – the automobile registration, a secondary violation involving "relatively innocuous" booster contact, the number of countable football coaches[17] and a failure to investigate adequately the relationship between student-athlete 1 and sports marketer A after publication of the November 14, 2005, article. These issues alone are insufficient to support a finding of lack of institutional control.[18]

Furthermore, the Committee based its lack of institutional control finding on a newly created and articulated "heightened duty" to monitor elite student-athletes. The Committee erred when it created this new duty, and then *ex post facto* applied it to USC.

Finally, regarding the involvement of boosters and agents in the men's basketball recruiting process, even if one accepts the Committee's findings, the Committee failed to consider and weigh a number of mitigating factors, and thus did not assess fairly all of the relevant information. The exclusion of these mitigating factors from the Committee's Report painted a seriously misleading picture of USC's efforts to exercise appropriate institutional

[17] *See* Section I.A., above, regarding the consultant matter being considered "secondary."
[18] In finding a lack of institutional control regarding student-athlete 1's automobile, the Committee held USC to a standard more demanding than normal compliance practices among NCAA institutions. The Committee criticized USC's automobile monitoring practices, stating "[a]dequate processes" require student-athletes to update automobile information when any change occurs and to provide automobile registration records and purchase and financing documentation. Exhibit 2, p. 47. USC's practices in 2005 – collecting automobile information at the beginning of each academic year and conducting additional investigation where warranted – were generally consistent with the standard among other institutions.

control in its athletic programs, and contributed to the incorrect finding of lack of institutional control.

1. **The Committee Based Its Lack Of Institutional Control Finding On Two Instances Of Conduct That Did Not Constitute Violations Of Any NCAA Bylaw.**

a) Monitoring of Student-Athlete 1's Summer Employment at the Sports Marketing Agency

The Committee cited deficiencies in monitoring student-athlete 1's summer employment with the sports marketing agency as one of the "particular instances of lack of institutional control." Exhibit 2, p. 46. The enforcement staff, however, expressly stated that student-athlete 1's internship was **permissible**. Notice of Allegations, p. 10.[19] Thus, the Committee clearly erred in two ways: (1) the underlying facts do not constitute a violation; and (2) the Committee failed to apply the correct legal standard. The IAC has made clear that "there must be some nexus between a failure to monitor finding and an underlying violation." Exhibit 3, p. 6. In that case, the IAC reversed, in part, because the failure to monitor did not constitute a separate violation of the NCAA rules. The Committee's finding that USC failed to monitor student-athlete 1's internship at the sports marketing agency is similarly untenable. Significantly, the Committee found sports marketer A , sports marketer B and their sports marketing agency committed no violations during the summer internship; instead, it found they gave impermissible gifts to student-athlete 1 and his family months **after** the internship ended. Exhibit 2, pp. 31–36. None of those infractions could have been discovered or prevented if USC had required the

[19] There is no allegation, much less evidence, that any of the student-athletes were paid for work not performed, were paid at a rate in excess of the going rate for such work, or were paid because of their athletic reputation or fame. In addition, the benefits sports marketer A allegedly provided to student-athlete 1's family and friends were all allegedly provided several months after the employment ended – not during the employment. Exhibit 2, pp. 31-37.

sports marketing agency to provide a "written description of the duties" student-athlete 1 was assigned during the summer or if someone "from the institution conduct[ed] 'spot checks' to ensure that [student-athlete 1] was showing up at work and performing appropriate duties." Exhibit 2, p. 49.

Because the employment did not result in a violation of NCAA legislation, and because the impermissible benefits were provided after the employment ended, there is no nexus between any failure to monitor student-athlete 1's employment with the sports marketing agency and any subsequent violation of NCAA legislation. Therefore, the employment cannot form the basis of a finding of lack of institutional control.

b) Transmission of Disability Insurance Forms

The Committee also cited a failure to monitor adequately the extent of the sports marketing agency's involvement with student-athlete 1's disability insurance policy as a basis for its lack of institutional control finding. Exhibit 2, pp. 50-51. The Committee found a lack of control on USC's part for failing to monitor this "illicit activity." Exhibit 2, p. 51. This finding reflects a failure to apply the correct legal standard, as there is no underlying violation related to student-athlete 1's disability policy. USC and the NCAA conducted a thorough investigation of this policy, which included interviews with the insurance broker and a representative of the policy underwriter, and review of all relevant policy documents. Exhibit 15, Allegation Ten, pp. 10-16 to 10-17; Hearing Tr., pp. 1048-1052. No NCAA violations were alleged or found relating to the disability insurance policy. Because there is no underlying violation of NCAA bylaws as it relates to the insurance policy, there is no nexus with a failure to monitor, and thus it cannot be the basis for a finding of a lack of institutional control.

2. The Committee Erred By Faulting USC for Not Adhering to a Newly Created "Heightened Duty" to Monitor Elite Student-Athletes

The Committee based its lack of institutional control finding upon a "heightened duty" to monitor elite student-athletes. NCAA bylaws do not set forth any "heightened duty" standard, nor do they differentiate between "elite" athletes and other student-athletes. In fact, the only time "elite athletes" are mentioned in the bylaws is in reference to the USOC Elite Athlete Health Insurance Program. See Bylaws 12.1.4.5 and 16.10.1.1. The term "heightened" is entirely absent from NCAA legislation and from interpretations of NCAA legislation. No prior Committee decision mentions a "heightened duty" of supervision or monitoring for "elite" athletes, whatever that may mean. In short, the Committee's Report marks the **first** time this new "heightened duty" standard has been articulated. The Committee should not be permitted to articulate a new duty, apply it retroactively to a university, and then penalize the university for failing to meet this new standard. Because the Committee improperly applied the new "heightened duty" standard to USC's conduct *ex post facto*, the lack of institutional control finding should be reversed.

3. The Committee's Failure To Consider Mitigating Factors Regarding the Involvement of Representative B in the Recruitment Of Student-Athlete 2 Contributed to the Erroneous Finding of Lack of Institutional Control.

The Committee's decision cites as further bases for its lack of institutional control finding (1) a failure to monitor representative B's role in the recruitment of student-athlete 2 and (2) USC's failure to recognize that representative B became a representative of USC's athletic interests when representative B provided a USC men's basketball student-athlete with impermissible benefits in 2001. Exhibit 2, pp. 51-52. The Committee's failure to mention, much

less consider, key evidence related to the NCAA's involvement in investigating student-athlete 2 before he enrolled at USC, however, created an incomplete and inaccurate view of USC's compliance efforts. The Committee's decision to omit this information from its analysis creates the misperception that USC lacked adequate controls in its athletics program, thus contributing to the erroneous finding of lack of institutional control.

a) USC's Monitoring of Student-Athlete 2's Recruitment and Representative B's Role

The Committee's Report summarily asserts that for a one-year period, November 2005 through November 2006, the University "failed to monitor the recruitment of [student-athlete 2], an extremely talented and high-profile prospective student-athlete..." Exhibit 2, p. 51. There is substantial evidence in the record, however, to establish that USC **did** closely monitor student-athlete 2's recruitment. Most importantly, the Committee arbitrarily set an ending date of November 2006 so as to omit any reference to a five-month joint investigation of student-athlete 2's amateurism status by USC and the NCAA's major enforcement staff; agents gambling and amateurism staff; and amateurism certification staff. In 2006, student-athlete 2 was identified as one of the first elite prospects to go through the NCAA's new amateurism certification review process. USC, therefore, knew by the fall of 2006 that the NCAA staff would closely scrutinize student-athlete 2 before clearing him for competition. The joint investigation, which started while student-athlete 2 was still in high school and ended after he enrolled at USC, focused on student-athlete 2's amateurism status and relationship with representative B. At the end of the investigation, in August 2007, the NCAA cleared student-athlete 2 as eligible for competition, without conditions.

Despite their best efforts, the NCAA and USC discovered none of the violations at issue in this case prior to student-athlete 2's enrollment. This is a testament to the clandestine nature of student-athlete 2's and representative B's actions, not a lack of institutional control. The Committee erred by failing to give any weight to the NCAA's and USC's extensive pre-enrollment investigation of student-athlete 2.

(b) Recognizing Representative B as a Representative of USC's Athletic Interests.

The Committee found a lack of institutional control based upon USC's failure to recognize that representative B became a representative of its athletics interests when he provided impermissible benefits to a student-athlete in 2001. As with the pre-enrollment joint investigation of student-athlete 2, the Committee erred when it failed to mention or give any weight to the undisputed fact that the NCAA staff made exactly the same mistake.[20] Hearing Tr., pp. 793-819; 1058-68.

The NCAA and USC knew about representative B's involvement in the 2001 violation at the time of the student-athlete 2 inquiry in 2007. Hearing Tr., pp. 795, 797, 815-18, and 1058-68. Yet, the NCAA never indicated to USC at any time prior to September 2009 that representative B had become a representative of USC's athletics interests based upon the 2001 violation. The reason for this omission is plain – at no time between January 2001 and the days

[20] At page 54, the Committee stated "[b]ut even without making the booster connection, both [the FAR and director of athletics] were aware of [representative B]'s provision of impermissible benefits to the former men's basketball student-athlete in 2001. This fact alone should have resulted in a higher level of scrutiny of representative B, but **no further investigation was done**." (emphasis added). The Committee's statement is incorrect and wholly ignores the five-month joint investigation prior to student-athlete 2 competing for USC that was, in fact, done.

before the Notice of Allegations was issued in September 2009 did the enforcement staff hold any belief that representative B was USC's representative based upon the 2001 violation. The enforcement and AGA staffs admitted at the hearing that they never considered representative B a representative based upon the 2001 violation until three weeks before the Notice of Allegations was issued, and only then because a member of Academic and Membership Affairs alerted them of his opinion that representative B became a representative in 2001. The enforcement staff director described the NCAA's stunned reaction: "We freely will admit we were aware of the situation [i.e., 2001 violation], but it didn't click and register . . . our jaws dropped. It dawned on us, the light bulb went off, whatever you want to call it." Hearing Tr., pp. 818-19.

Likewise, USC's jaw dropped when it discovered the Committee completely ignored this fact in finding USC guilty of a lack of institutional control for exactly the same oversight. Equally astonishing was the fact the Committee ignored USC's and the NCAA's five-month joint investigation of student-athlete 2 and representative B, after which the NCAA declared student-athlete 2 eligible without conditions. It is impossible to present fairly the entire story of USC's efforts to monitor student-athlete 2 without including this information. The Committee's finding that USC lacked institutional control regarding student-athlete 2 and representative B is clearly contrary to the evidence when USC, literally, reached exactly the same conclusions (and committed the same oversight) as the NCAA's most experienced and knowledgeable staff members following an extensive joint investigation.

Because the Committee found a lack of institutional control, in part, based on: (1) a failure to monitor student-athlete 1's permissible summer employment and disability policy, neither of which constituted a violation, (2) a newly articulated "heightened duty" to monitor

elite student athletes, which was improperly applied retroactively to USC, and (3) a misleading, incomplete summary of USC's extensive efforts to monitor student-athlete 2's recruitment and the NCAA's role therein, the lack of institutional control finding must be reversed.

IV. Conclusion

USC concedes three of its student-athletes received impermissible benefits that rendered them ineligible. The Committee accepted the university's self-imposed sanctions on the men's basketball program and the women's tennis program. USC has similarly accepted portions of the Committee's penalties on the football program based upon the impermissible benefits student-athlete 1 received. However, prior case precedent does not support the excessive penalties assessed against the football program. Moreover, certain of the Committee's findings are erroneous, and must be reversed.

The reason the penalties must be reduced is clear – they are an abuse of discretion and not supported by evidence or case precedent. First, even if the IAC were to accept all of the Committee's findings of violations, USC's violations pale in comparison to those in previous cases involving severe penalties. The excessive and onerous nature of the penalties here is obvious. A fair review of case precedent leads to no other conclusion. Chart of Case Precedent Violations and Penalties, Exhibit 23.

Second, several of the findings that the Committee relied upon in determining penalties must be vacated. The unethical conduct finding against the assistant football coach is not supported by information that is credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs, but instead upon tainted testimony and the enforcement staff's interpretations. A finding of this nature must be based upon sound, clear and

powerful evidence that leads to no other reasonable conclusion. Similarly, the finding that sports marketer A, sports marketer B and their sports marketing agency became USC representatives is based upon a novel, unsupported and unprecedented theory and warrants vacation. Finally, the Committee erred when it based significant portions of its lack of institutional control finding upon facts that, without dispute, do not constitute a violation of NCAA legislation. Contrary to the IAC's mandate that "there must be some nexus between a failure to monitor finding and an underlying violation," (Exhibit 3, p. 6), the Committee found a lack of institutional control for USC's failure to monitor student-athlete 1's summer employment and disability policy, despite the absence of an underlying violation. That error, coupled with the Committee's misapplication of a newly created "heightened duty" to monitor elite student-athletes and failure to consider a number of mitigating factors in student-athlete 2's recruitment, led to the erroneous finding of lack of institutional control.

The Committee's findings simply do not justify the imposition of the most severe penalties in the sport of football in 23 years. The combination of a two-year ban on post-season play, and drastic scholarship reductions over three academic years, is a devastating blow to the football program. Penalties of this nature are reserved for cases where the institution's staff members or its traditional boosters participate directly and actively in the violations, and the violations themselves are particularly egregious. This is not the case here.

USC has already accepted penalties that likely would rank among the worst ever imposed in the sport of intercollegiate football. The underlying violations do not, however, warrant the imposition of the second most severe football penalties in the history of the NCAA. The penalties, clearly intended to cripple the football program for the foreseeable future, are

disproportionate to the violations found, even if the IAC accepts the Committee's every finding. If the IAC agrees that some of the Committee's findings were flawed, the unwarranted harshness of the combined penalties becomes even more pronounced. The excessive penalties meted out simply are not justifiable when the violations involved amateurism and, at best, a questionable link to any institutional knowledge.

USC respectfully requests the IAC to reduce the two-year post-season ban on the football program to one year, and reduce the loss of 10 initial football scholarships per academic year to a loss of 5 initial scholarships per year over the next three academic years (2011-12, 2012-13 and 2013-14). USC also asks the IAC to increase the total scholarships from 75 to 80 during this time. Such a reduction would make the penalties more commensurate with the findings and case precedent.