

## IS IT IN THE UNIVERSITY'S BEST INTEREST TO DETERMINE THAT A NCAA VIOLATION OCCURRED?

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A member institution confronted with a possible violation of NCAA legislation is required to conduct a thorough investigation and, based upon its results, make a good faith determination of whether a violation has occurred. NCAA Bylaw 32.7.6.2 sets the general standard for making this determination: a violation must be established by evidence that is “credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.” How should the institution interpret this standard?

Inevitably, there will be pressures on university representatives to adopt a defensive posture toward the allegation and to set a very high standard of proof for determining that a violation has occurred. This approach can be risky. If the NCAA Committee on Infractions disagrees with the university's conclusion, a valuable opportunity may have been lost to mitigate the penalty for the violation. The Committee will examine the thoroughness of the university's investigation and the reasonableness of its conclusions. As indicated in the accompanying article by David Swank, who formerly chaired the Committee on Infractions, the Committee looks favorably on institutions which candidly acknowledge violations and submit plans to correct them. Conversely, a university's denial of a violation, based on too high a standard of proof, could be viewed as an unreasonable failure to take responsibility for the violation, warranting an enhanced penalty. Thus, it will often be in the university's best interest to acknowledge a violation if its own investigation discloses evidence which the NCAA Enforcement Staff and the Committee on Infractions are likely to view as satisfying the standards of proof mandated by Bylaw 32.7.6.2.

The accompanying articles by Swank and former Director of Enforcement Chuck Smrt provide insight on how the NCAA Enforcement Staff and the Committee have historically interpreted and applied the Bylaws. As summarized by Swank, the standard of proof is somewhat higher than the “preponderance of evidence” generally used in civil proceedings, but lower than the “beyond a reasonable doubt” standard for criminal cases. There is, of course, room for good faith disagreement about whether such a standard has been met in an individual case. Moreover, even if the evidence appears to satisfy the NCAA standard – as least as it is likely to be interpreted by the NCAA – the university may have genuine doubts about whether a violation has actually occurred. Other legitimate considerations may be present; legal counsel may be concerned about setting a standard of proof for NCAA violations that is different from that used by the university in other areas, such as sexual harassment or research misconduct.

In most cases, a thorough investigation followed by a reasonable, good faith attempt to apply the NCAA standard of proof will lead both the university and the NCAA to the same conclusion about whether a violation has occurred. When there is a genuine disagreement, the university should not hesitate to make its case to the NCAA. Provided its investigation has been thorough and well documented, its application of Bylaw 32.7.6.2 defensible, and its analysis of the evidence reasonable and clearly set forth, the institution should suffer no additional penalties from having argued that no violation occurred, even if the NCAA ultimately disagrees with that position. In such cases, the source of the disagreement must be identified and analyzed, for example – why the university believes it was not reasonable to rely upon the testimony of a key witness.

It is important for the university to maintain its credibility and reputation for integrity with the public and the NCAA. Whether the university determines that a NCAA violation has or has not occurred, the process used to make that determination not only will affect its long-term credibility with the NCAA and the public, but will help it deal with similar problems in the future.

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