
ARBITRATION, MEDIATION, & THE NCAA INFRACTIONS PROCESS

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Recent events surrounding the oft-criticized NCAA infractions process through which it adjudicates violations of its legislation present a prime opportunity to evaluate the appropriateness of arbitrating or mediating NCAA infractions cases. While doing so, it is important to recognize that alternative dispute resolution (“ADR”) methods’ goals should include educating, deterring, and encouraging incident reporting, all of which are crucial to the infractions process’s effectiveness as currently structured.

This Article analyzes the propriety of arbitrating or mediating NCAA infractions cases. To do so, Part I explores the current infractions process. Part II examines aspects of the disputes for which arbitration and mediation are most appropriate and whether they are present in infractions cases. Part III suggests a means of effectively inserting arbitration into the infractions process. A brief conclusion follows.

I. INTRODUCTION

The National Collegiate Athletics Association (“NCAA”) infractions process—the mechanism through which the Association adjudicates violations of its myriad rules¹—has long been a target of criticism.² Individuals from prominent college athletics constituents, from Southeastern Conference Commissioner and

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1. See NCAA, *Division I Infractions Process*, NCAA, <http://ncaa.org/enforcement/division-i-infractions-process> (last visited June 19, 2023) [<https://perma.cc/D7CD-2BLC>] [hereinafter “*Division I Infractions Process*”].

2. See, e.g., Dan Wolken, *Analysis: NCAA Investigators Persevere Against Scrutiny*, USA TODAY (Mar. 14, 2013), <http://usatoday.com/story/sports/college/2013/03/14/ncaa-enforcement-investigators-headquarters/1988405/> [<https://perma.cc/4BNZ-FUKY>] (quoting former University of North Carolina football student-athlete Marcus Wilson, who worked for the NCAA Enforcement Staff, as stating that “the enforcement staff from the beginning of time has always been subjected to scrutiny”); see also Ross Dellenger, *Bipartisan Bill in Congress Seeks Overhaul of NCAA Infractions Process*, SPORTS ILLUSTRATED (Mar. 29, 2022), <http://si.com/college/2022/03/29/ncaa-infractions-cases-congress-bipartisan-bill> [<https://perma.cc/DP57-Q9BT>] (explaining “[f]or years now, college coaches, athletes and administrators have skewered the NCAA for an infractions process they say is unfair, dawdling and lacking transparency”).

former Committee on Infractions (“COI”) member Greg Sankey³ and University of Notre Dame President Rev. John I. Jenkins⁴ to sports law scholars,⁵ have complained about the process. Dismayed by the available options, the University of Kansas, which as of this writing has an infractions case pending, recently requested an alternate means of resolving its case.⁶ The general public has likewise lost faith in the infractions process due to its perceived lack of fundamental fairness.⁷

Recently, however, the NCAA adopted a revised constitution, marking the first time in a quarter century that it made significant changes to its charter document.⁸ As a result, each of the NCAA’s three divisions will adopt changes to support its own governance model.⁹ The Division I Transformation Committee was formed and charged with modernizing college athletics, and it identified the infractions process as an initial focus area.¹⁰ Infractions process critics may be heartened that recent changes to the governance structure included reforms to the infractions process. Among them was eliminating the clunky Independent Accountability Resolution Process (“IARP”),¹¹ which served as the only means by which an infractions case could resolve completely independently of the NCAA.¹² Simultaneous to these changes, prominent federal politicians

3. See, e.g., Nikki Chavanelle, *Greg Sankey Knocks NCAA on Infractions Process at SEC Media Day*, ON3 (July 18, 2022), <http://on3.com/news/greg-sankey-knocks-ncaa-on-infractions-process-at-sec-media-day-can-not-go-on-punishing-student-athletes/> [<https://perma.cc/XTA4-TNVG>] (quoting Sankey as lamenting “infractions issues where college athletes face uncertainty and penalties related to actions that may have taken place when they were in junior high or in elementary school”); see also Michael Wayne Bratton, *Greg Sankey Issues Statement Following NCAA’s Decision to Uphold Missouri’s Postseason Ban*, SATURDAY DOWN S. (2019), <http://saturdaydownsouth.com/mizzou-football/greg-sankey-missouri-postseason-ban-comment-statement-commissioner-2019/> [<https://perma.cc/3JL7-BB3F>] (quoting Sankey as describing the University of Missouri’s penalties resulting from an infractions case as “unusually severe”).

4. See Matt Freeman, *A Letter from the President on the NCAA Infractions Case*, IRISH SPORTS DAILY (Feb. 13, 2018), <http://irishsportsdaily.com/s/5520/a-letter-from-the-president-on-the-ncaa-infractions-case> [<https://cc.perma.cc/4B5J-M2WW>] (quoting Jenkins as contending that the NCAA “perverted” academic autonomy “by divorcing it from its logical and necessary connection to the underlying educational purpose” in an infractions case).

5. See, e.g., Greg Heller, *Preparing for the Storm: The Representation of a University Accused of Violating NCAA Regulations*, 7 MARQ. SPORTS L.J. 295, 308 (1996).

6. Kyle Boone, *Memphis Infractions Case Closed: Updates on Where Kansas, Louisville, LSU, Arizona Stand with IARP*, CBS SPORTS (Sept. 27, 2022), <http://cbssports.com/college-basketball/news/memphis-ncaa-infractions-case-closed-updates-on-where-kansas-louisville-lsu-arizona-stand-with-iarp> [<https://perma.cc/2ZWP-D8YN>].

7. Christian Dennie, *The Benefits of Arbitration: Arbitration in NCAA Student-Athlete Participation and Infractions Matters Provides for Fundamental Fairness*, 46 U. MEM. L. REV. 135, 173 (2015).

8. Corbin McGuire, *NCAA Members Approve New Constitution*, NCAA (Jan. 20, 2022, 6:12 PM), <http://ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx> [<https://perma.cc/2YMQ-842U>].

9. *Id.*

10. *Division I Transformation Committee*, NCAA, <http://ncaa.org/sports/2021/11/3/division-i-transformation-committee.aspx> (last visited June 19, 2023) [<https://perma.cc/VH35-LDBA>].

11. Megan Durham, *Division I Board of Directors Modernizes Infractions Process*, NCAA (Aug. 31, 2022, 4:38 PM), <http://ncaa.org/news/2022/8/31/media-center-division-i-board-of-directors-modernizes-infractions-process.aspx> [<https://perma.cc/LFF4-PMVV>].

12. See *Independent Accountability Resolution Process*, IARP, <http://iarpc.org> [<https://perma.cc/CF2B-QCHR>] (describing the IARP’s intended purpose).

introduced a bill seeking to regulate the infractions process.¹³ Notably, at a time when political parties often fail to find common ground, the bill is bipartisan as its main supporters “found common ground on a subject: their disdain for the NCAA.”¹⁴ The bill’s proposals included introducing arbitrators into the process in a very limited role.¹⁵

The confluence of these events surrounding the infractions process presents a prime opportunity to examine the potential use and benefits of significantly featuring two prominent means of alternative dispute resolution (“ADR”)—arbitration and mediation—as a means of resolving infractions cases. Part I of this Article thus explores the current NCAA Division I infractions process. Part II details the advantages of arbitration and mediation and examines their potential fit as a means to resolve infractions cases. Part III suggests a means of effectively incorporating arbitration in the infractions process as a way to resolve a certain type of infractions case. A brief conclusion follows.

II. THE CURRENT NCAA DIVISION I¹⁶ INFRACTIONS PROCESS

The NCAA is “big, national, the focus of media and public attention, and scrutinized by legislators.”¹⁷ A private association,¹⁸ the NCAA self-describes as “a member-led organization” that consists of over 1,000 colleges and universities.¹⁹

A ground-up association,²⁰ the NCAA derives its authority from its member universities.²¹ Through the NCAA’s legislative process, its member

13. Dellenger, *supra* note 2. Among other things, the bill seeks to streamline the infractions process, limiting investigations to eight months and reducing the statute of limitations in half to two years. Dennis Dodd, *With NCAA Enforcement on its Last Legs, Congress Seeks to Place Limits on Investigations*, CBS SPORTS (Mar. 29, 2022), <http://cbssports.com/college-basketball/news/with-ncaa-enforcement-on-its-last-legs-congress-seeks-to-place-limits-on-investigations/> [https://perma.cc/4HM3-2KX9].

14. *Id.* (noting that the “bill has two outspoken and high profile U.S. senators, one a Black Democrat man from the Northeast and the other a white Republican woman from the Deep South, whose political views normally differ greatly.”).

15. *Id.* (explaining that the bill would permit a university to appeal sanctions to a three-person arbitration panel).

16. Division I is the highest division in the NCAA’s three-division structure. Glenn M. Wong, Christopher R. Deubert & Justin Hayek, *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 5 (2015). It includes “the largest and best-funded research universities.” Josephine (Jo) R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 259 (2010). This Article focuses on potentially incorporating arbitration and/or mediation in the infractions process in Division I only.

17. Potuto, *supra* note 16, at 266. It may surprise that state legislatures and even United States Congress-people have shown interest in the NCAA’s regulation of college athletics. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 506–07 (1995).

18. Potuto, *supra* note 16, at 266 (citing *NCAA v. Tarkanian*, 488 U.S. 179 (1988)).

19. *What Is the NCAA?*, NCAA, <http://ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited June 19, 2023) [https://perma.cc/Q62A-WXDN] (providing basic information regarding the NCAA).

20. Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 223 (2012).

21. Potuto, *supra* note 16, at 259 (describing the NCAA as both “one of the most talked about and widely known private associations” yet “also the least understood”).

universities propose and adopt rules regarding college athletics and implement them on campus.²² NCAA legislation, while often complex,²³ attempts to level the playing field for universities competing against each other.²⁴ NCAA member universities and their staff and student-athletes agree to abide by the rules in exchange for the opportunity to compete in NCAA-sponsored competitions.²⁵

The NCAA notoriously does not lack rules.²⁶ For example, one NCAA Division I bylaw defines the term “business day” while others regulate when and how often coaches may call or write prospective student-athletes, or even answer incoming calls from them.²⁷

The NCAA investigative and penal process through which member universities and their staff members are penalized for NCAA rules violations is unique,²⁸ and, like the NCAA itself, the public holds many misperceptions about it.²⁹ To appreciate the potential effects of incorporating arbitration and/or mediation into the infractions process, it is necessary to understand the current process through which the NCAA enforces its myriad rules. Thus, this Part describes the infractions process.

A. *The NCAA Enforcement Staff and its Role in the Infractions Process*

Universities and their staff members that abide by NCAA legislation should not be disadvantaged by their compliance.³⁰ Thus, NCAA member universities created an infractions process to help ensure fair play and integrity among members.³¹ One group of NCAA employees in particular bears this responsibility: the

22. See *What is the NCAA?*, *supra* note 19.

23. Megan Fuller, *Where’s the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y.L. SCH. L. REV. 495, 507 (2010) (noting that “experienced coaches and sports law scholars have lamented the difficulty of understanding these rules and called for reforms to the rules”).

24. Potuto, *supra* note 16, at 262. For example, were there no rules regulating the amount of time coaches can require student-athletes to practice, some coaches would “require student-athletes to spend all waking hours in athletics-related activities” to gain a competitive advantage. *Id.* at 262.

25. See Brandon Leibsohn, *Road to Recovery: The NCAA’s New Enforcement Process Creates More Legal Headaches*, 21 SPORTS L. J. 123, 126 (2014).

26. NCAA bylaws and policies cover myriad substantive areas, competition rules, and scheduling. See Potuto, *supra* note 16, at 262.

27. NCAA, *2022-23 Division I Manual* § 13.02.1, 13.1.3, 13.4.1 (2022), <http://web3.ncaa.org/lstdbi/reports/getReport/90008> [<https://perma.cc/5XSZ-JHZB>] (hereinafter “2022-23 Manual”).

28. Broyles, *supra* note 17, at 487 (explaining that aspects of the infractions process would be unconstitutional in the United States court system yet “this is the way the game is played” in college athletics).

29. Parkinson, *supra* note 20, at 219.

30. See Elizabeth Lombard, Note, *Changes Are Not Enough: Problems Persist with NCAA’s Adjudicative Policy*, 95 NOTRE DAME L. REV. 925, 928 (2019). Conversely, without rules, enforcement, and an infractions system to find and punish rules violators, unscrupulous coaches and staff members would have a field day. See Potuto, *supra* note 16, at 262.

31. *Division I Infractions Process*, *supra* note 1. An offshoot of private associations’ authority to adopt the rules governing them is their right to control their rules’ enforcement and interpretation. Potuto, *supra* note 16, at 272.

Enforcement Staff.³² The Enforcement Staff is akin to the NCAA's prosecutor,³³ as its responsibilities include reviewing information about potential violations.³⁴

If the Enforcement Staff believes information may substantiate violations, it alleges potential Level I or Level II violations, with the former being the more significant of the two.³⁵ The Enforcement Staff bears the burden of proving these violations.³⁶

B. Resolution of NCAA Infractions Cases

Following the pause on referrals to the IARP, there are currently three means by which an infractions case involving a Division I member university resolves, and all conclude with a COI decision.³⁷ Founded in 1954,³⁸ the COI is an independent administrative body that includes volunteers from NCAA member universities, athletics conferences, former coaches, and individuals from the general public who possess legal training.³⁹ More specifically, COI panelists' professional profiles include current and former university presidents, chancellors, and athletics directors, conference commissioners, former coaches, attorneys, and professors.⁴⁰ The COI thus touts the infractions process as "peer-

32. See NCAA, DIVISION I INFRACTIONS: 2019-20 ANNUAL REPORT 9 (2020), https://ncaaorg.s3.amazonaws.com/infractions/d1/2019D1Inf_AnnualReport.pdf [<https://perma.cc/7DHW-BPLL>] [hereinafter "2019-20 Annual Report"]. "[E]nforcement staff members ... are paid employees of the NCAA." Parkinson, *supra* note 20, at 224.

33. See Timothy Davis & Christopher T. Hairston, *Majoring in Infractions: The Evolution of the National Collegiate Athletic Association's Enforcement Structure*, 92 OR. L. REV. 979, 988 (2014); see also Mike Rogers & Rory Ryan, *Navigating the Bylaw Maze in NCAA Major Infractions Cases*, 37 SETON HALL L. REV. 749, 753-54 (2007).

34. *Division I Infractions Process*, *supra* note 1.

35. See 2019-20 Annual Report, *supra* note 32, at 7. There are three violation levels. See *id.* at 9. The COI adjudicates cases involving alleged levels I and II violations, whereas, for the most part, the Enforcement Staff and universities handle Level III violations. See *id.*

36. See Parkinson, *supra* note 20, at 224.

37. See *Division I Infractions Process*, *supra* note 1. Note that a fourth means through which an infractions case could resolve was through the Independent Accountability Resolution Process, although as of this writing referrals to it were paused due to its backload of cases. See Michelle Brutlag Hosick, *DI Board of Directors Pauses Referrals to Independent Infractions Process*, NCAA (Jan. 20, 2022), <http://ncaa.org/news/2022/1/20/media-center-di-board-of-directors-pauses-referrals-to-independent-infractions-process.aspx> [<https://perma.cc/84GV-T89L>].

38. See Heller, *supra* note 5, at 298.

39. *Division I Committee on Infractions*, NCAA, <http://ncaa.org/governance/committees/division-i-committee-infractions> (last visited June 19, 2023) [<https://perma.cc/99SU-ZJ56>]. Some question the COI's neutrality and describe the COI as an arm of the Enforcement Staff that will not deviate from the Enforcement Staff's recommendations. For example, see Davis & Hairston, *supra* note 33, at 993. Others question the propriety of having COI panelists from campuses adjudicate matters involving other campuses. See, e.g., Katharine Ross, *The Potential Role of ADR in NCAA Academic Fraud Cases*, 2020 J. DISP. RESOL. 487, 488 (2020).

40. See NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: DIVISION I COMMITTEE ON INFRACTIONS COMPOSITION, (Jan. 2019), https://ncaaorg.s3.amazonaws.com/infractions/d1/glnc_grphcs/D1INF_COI_Composition-FactSheet.pdf [<https://perma.cc/LD6L-SK7P>] [hereinafter "Inside the Division I Infractions Process: Composition"].

review[ed].”⁴¹ There are up to twenty-four COI members at any given time, a smaller panel of which considers each case on the COI’s behalf.⁴²

One way an infractions case can resolve is via “negotiated resolution.” If the university and any other parties (e.g., coaches) agree with the Enforcement Staff on the facts, violations, level(s) of violations, and penalties, the Enforcement Staff and parties may pursue a negotiated resolution to resolve the matter.⁴³ Procedurally, the Enforcement Staff and parties draft a report and submit it to the COI for review.⁴⁴ The COI’s involvement is limited to reviewing the appropriateness of the parties’ agreed-upon penalties.⁴⁵

The second means by which an infractions case can resolve is through the “summary disposition track.” When the parties agree to the facts and violation level but disagree on penalties, they may elect to forgo participating in a COI hearing and attempt to resolve their case via summary disposition track.⁴⁶ When doing so, the Enforcement Staff, the university, and any individual subject to a violation charge submit a report to the COI.⁴⁷ If the COI accepts the report, it determines and issues penalties based on NCAA penalty guidelines without holding a hearing.⁴⁸ The COI may, however, reject the report and order a full contested hearing if it feels the Enforcement Staff failed to allege a pertinent violation.⁴⁹

In cases involving disputed allegations, a panel of COI members conducts a hearing and determines whether the Enforcement Staff’s allegations are accurate and, if so, imposes penalties on the involved university and any staff member(s) accordingly.⁵⁰ A COI hearing combines elements of a legal trial, an

41. See Division I Infractions 2019-20 Annual Report, *supra* note 32, at 5. For analysis regarding whether the process is actually peer reviewed for coaches who face allegations that they violated NCAA rules, see Josh Lens, *The NCAA Infractions Process and Peer Review*, 83 OHIO STATE L.J. ONLINE 80 (2022).

42. See Inside the Division I Infractions Process: Composition, *supra* note 40 (explaining that a panel’s size for each individual case is between three and seven COI members).

43. *Division I Infractions Process*, *supra* note 31.

44. *Id.*

45. NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: NEGOTIATED RESOLUTION (2019), https://ncaaorg.s3.amazonaws.com/infrations/d1/glnc_grphes/D1INF_InfractionsProcessNegotiatedResolution-FactSheet.pdf [<https://perma.cc/YBM2-NALH>].

46. *Division I Infractions Process*, *supra* note 1.

47. *See id.*

48. *See id.*

49. See NCAA, DIVISION I COMMITTEE ON INFRACTIONS: INTERNAL OPERATING PROCEDURES, §§ 4-10-2-3, 4-10-3 (July 20, 2021), https://ncaaorg.s3.amazonaws.com/committees/d1/infracton/D1COI_IOPs.pdf [<https://perma.cc/9RQT-B6WH>] [hereinafter “INTERNAL OPERATING PROCEDURES”]. See, e.g., COMM. ON INFRACTIONS, NCAA, THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS DECISION 4 (2022), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102968> [<https://perma.cc/6JZF-B66A>].

50. *Division I Infractions Process*, *supra* note 1.

administrative agency hearing, and an academic misconduct hearing on a university campus.⁵¹ Contested COI hearings are not open to the public.⁵²

Following a hearing, the COI confers privately,⁵³ ultimately producing a written decision detailing the facts, violations, penalties,⁵⁴ and reasoning for its findings and penalties.⁵⁵ This written report is publicly available⁵⁶ and is comparable to a court opinion.⁵⁷ In summary disposition or contested cases, the COI follows NCAA member-legislated guidelines when issuing penalties.⁵⁸ “The penalties range from financial penalties and vacation of records to [athletics] scholarship reductions and postseason bans.”⁵⁹ A law review article co-authored by former COI Vice Chair Gene Marsh describes the COI as “the thousand pound gorilla, with the final word in the case.”⁶⁰ Some consider the COI to be the most powerful committee in college athletics.⁶¹

III. WHETHER ARBITRATION AND/OR MEDIATION WOULD APPROPRIATELY RESOLVE INFRACTIONS CASES

To understand whether and how arbitration and/or mediation may be effective in the infractions process, it is important to understand the basics of these ADR methods and how the sports industry has incorporated them. This Part examines ADR methods, their implementation in the sports industry, and their propriety for the infractions process.

A. Arbitration and Mediation Basics

ADR can provide a more satisfying means of settling disputes than other drawn-out, contentious alternatives.⁶² The mediation process allows disputants to attempt to negotiate a voluntary settlement of their differences with a neutral third party’s assistance.⁶³ Mediation thus provides a forum for parties to reach a resolution by guiding them through information exchange, facilitating common

51. Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 678 (2003). COI hearing procedures have been criticized for lacking due process safeguards. Heller, *supra* note 5, at 308. For example, evidence rules are inapplicable at infractions hearings; therefore, reliance on hearsay is commonplace. Potuto, *supra* note 16, at 297. For further comparison of NCAA infractions proceedings and legal proceedings, see Rogers & Ryan, *supra* note 33, at 754–61.

52. Broyles, *supra* note 17, at 507.

53. *Id.* at 496.

54. See 2019-20 Annual Report, *supra* note 32, at 22.

55. Potuto, *supra* note 16, at 295.

56. Parkinson, *supra* note 20, at 218.

57. Broyles, *supra* note 17, at 497.

58. See 2019-20 Annual Report, *supra* note 32, at 15.

59. Nathaniel Richards, *The Judge, Jury, and Executioner: A Comparative Analysis of the NCAA Committee on Infractions Decisions*, 70 ALA. L. REV. 1115, 1116 (2019).

60. See Marsh & Robbins, *supra* note 51, at 677.

61. See, e.g., Broyles, *supra* note 17, at 493.

62. Ross, *supra* note 39, at 499.

63. Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOTIATION L. REV. 265, 269 (2001) (quoting Brown University’s Ad Hoc Committee on Sexual Misconduct’s definition).

interests, and focusing on underlying issues in a confidential setting.⁶⁴ Mediation is particularly beneficial in areas where reducing strife is vital to maintaining community.⁶⁵ In this way, mediations are forward-looking⁶⁶ and preferable if the parties have an existing relationship that they seek to preserve and if there is a reasonable chance they could achieve a settlement.⁶⁷ A disadvantage is that, unlike arbitration, it is not binding.⁶⁸ In other words, a mediator does not possess the power to impose a binding resolution on the parties.⁶⁹ Thus, if parties attempt to mediate, but one or more of them are dissatisfied, they must still resort to another means of resolving the dispute to dispose of it.⁷⁰ Another disadvantage of mediation is that it does not establish precedent for future cases.⁷¹

Arbitration has likewise become a common means to resolve disputes.⁷² This ADR method is a consensual, binding, and neutral process through which a third party resolves a dispute.⁷³ Procedurally, disputants generally present evidence and argument over their respective positions to the neutral third party⁷⁴ in adversarial fashion.⁷⁵ Arbitration tends to be more structured than mediation, typically resembling an adjudicatory trial.⁷⁶ The neutral third party generally possesses authority to issue a binding decision⁷⁷ on the dispute.⁷⁸ Arbitration's benefits include its efficiency, confidentiality, the fact that it can include neutral arbitrators specialized in the relevant legal area,⁷⁹ and finality of the decision.⁸⁰

64. Ross, *supra* note 39, at 499.

65. Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. DISP. RESOL. 27, 30 (2002) (citing areas such as the workplace, neighborhood, and family relations as examples).

66. Chanda, *supra* note 63, at 279.

67. Eric Ordway, *International Arbitration: The Benefits and Drawbacks*, 2007 WL 6082200 at *4 (2007).

68. *Id.*

69. Niall Mackay Roberts, *Definitional Avoidance: Arbitration's Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1562 (2016).

70. Ordway, *supra* note 67, at *4.

71. Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 14 (2006).

72. Leslie Solondz, *A Reasonable Alternative: Reaping the Benefits of Arbitration*, 47 FOR DEF. 1 (2005) (identifying litigation costs, backlogged court systems, and uncertainties involved with jury trials as some of the reasons parties consider arbitration an attractive alternative to litigation).

73. Roberts, *supra* note 69, at 1550.

74. Jonathan S. Rosenthal, *Defining & Understanding ADR Terms*, 38 MD. BAR J. 18 (2005) (citing Maryland Rule 17-102(b)).

75. Jeffrey M. Schalley, *Eliminate Violence From Sports Through Arbitration, Not the Civil Courts*, 8 SPORTS LAW J. 181, 196 (2001).

76. Brent C. Moberg, *Dispute Resolution in Intercollegiate Athletics*, 4 TEX. REV. ENT. & SPORTS L. 181, 186 (2003).

77. Schalley, *supra* note 75, 196.

78. AMERICAN ARBITRATION ASSOCIATION, *Using ADR to Resolve Collegiate, Professional, and Sports-Business Disputes*, http://adr.org/sites/default/files/document_repository/Using%20ADR%20to%20Resolve%20Collegiate%20Professional%20and%20Sport%20Business%20Disputes.pdf [https://perma.cc/G4GR-4EML] [hereinafter "Using ADR"].

79. Ross, *supra* note 39, at 487.

80. Schalley, *supra* note 75, at 196.

B. Use of Arbitration and Mediation in Sports

Mediation is not common in the sports setting.⁸¹ Arbitration's use in sports disputes is quickly growing,⁸² however, to the point where it has become the preferred tribunal for adjudicating disputes in the industry.⁸³ United States professional sports take full advantage of arbitration, with collective bargaining agreements in Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League, as well as the PGA Tour player handbook and anti-doping policy and the United States Olympic Committee's constitution and bylaws subjecting matters to arbitration.⁸⁴ While arbitration rules and procedures can vary by sport, the status of the league or involved athletes as professional or amateur, and the issue involved,⁸⁵ such widespread use of a self-contained means to resolve disputes is rare in other industries.⁸⁶

When considering the benefits of arbitration, however, its effectiveness in sports-related disputes is unsurprising. Its advantages in sports disputes, relative to litigating them, are "generally accepted" and include timely hearings, lower overall costs, a process generally more sensitive to sport needs, and inclusion of a decision maker with familiarity with sports issues.⁸⁷ Importantly, if selected strategically, arbitrators can possess knowledge of, and experience with, both the industry and arbitration process.⁸⁸ The American Arbitration Association, for example, selects and maintains a panel of sports arbitrators based on their expertise in sports or because they were elite athletes.⁸⁹ Likewise, the North American Court of Arbitration for Sport panel requires its arbitrators to possess legal training, recognized competence with sports law and/or international arbitration, and quality knowledge of sports generally.⁹⁰

C. Propriety of Inserting Arbitration and/or Mediation in the Infractions Process

Given arbitration's widespread use in the sports industry, it is worth considering whether it and/or mediation should be part of the NCAA infractions

81. See Harry N. Mazadoorian, *The Role of ADR in Sports*, DISP. RESOL. MAG. (Spring 2007) (querying whether mediation in sports has "untapped potential").

82. *Id.*

83. Dennie, *supra* note 7, at 147.

84. *Id.* at 148.

85. Maidie E. Oliveau, *Navigating the Labyrinth of 'Amateur' Sports ADR Procedures*, DISP. RESOL. MAG. (Spring 2007).

86. Mazadoorian, *supra* note 81. "Such universal acceptance of ADR is a testament to its effectiveness within the context of sport." Oliveau, *supra* note 85.

87. Hilary A. Findlay, *Rules of a Sport-Specific Arbitration Process as an Instrument of Policy Making*, 16 MARQ. SPORTS L. REV. 73, 74 (2005); see also Dennie, *supra* note 7, at 147, 163. For example, the Amateur Sports Act of 1978 mandates that United States Olympic Committee procedures, in relevant part, timely resolve conflicts and disputes involving amateur athletes. *Id.* at 159-60.

88. *Id.* at 147; see also Findlay, *supra* note 87, at 75.

89. Oliveau, *supra* note 85.

90. *Id.*

process.⁹¹ After all, ADR can be an appropriate means of determining issues involving discipline and sanctions,⁹² as ADR requires disputants to come face-to-face with the realities of the sanctioning process⁹³ and “reality test” their positions’ perceived strengths and weaknesses.⁹⁴ Depending on how the parties structure it, ADR can empower them to help determine final punishments.⁹⁵ For a university facing potential penalties through the infractions process, ADR would provide an opportunity for school administrators, coaches, and other constituents to recognize and accept responsibility for their actions.⁹⁶ The following parts explore the potential benefits and drawbacks of arbitrating and/or mediating infractions cases.

1. *Potential Benefits of Inserting Arbitration and/or Mediation Into the Infractions Process*⁹⁷

On the surface, there appear to be many potential benefits to inserting arbitration and/or mediation into the infractions process.⁹⁸ For one, including arbitration and/or mediation in the process could help mitigate any objections regarding a lack of due process and fair decision-making,⁹⁹ as these two ADR methods provide participating parties the satisfaction of feeling as though they had a “voice” in the process.¹⁰⁰ This would go a long way to restoring faith in it.¹⁰¹

Arbitration could also expedite the infractions process, long bemoaned as slow.¹⁰² A primary goal of arbitration is to advance matters quicker, and¹⁰³ its

91. Scholars have previously described arbitration as a potentially great fit in college athletics. *See, e.g.*, Ross, *supra* note 39, at 499 (“Given the widespread acceptance of this method of dispute resolution in the sports industry, it is a wonder that arbitration has not been employed in intercollegiate athletics.”).

92. Mazadoorian, *supra* note 81; *see also* Alexander Wynn, *Red Card Racism: Using the Court of Arbitration for Sport (CAS) to Prevent and Punish Racist Conduct Perpetrated by Fans Attending European Soccer Games*, 13 CARDOZO J. CONFLICT RESOL. 313, 317 (2011); *see also* Moberg, *supra* note 76, at 187–88 (describing effectiveness of grievance arbitration in Major League Baseball).

93. Ross, *supra* note 39, at 498.

94. Valerie Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 OHIO ST. J. DISP. RESOL. 669, 769 (2003).

95. Ross, *supra* note 39, at 498; *see also* Dennie, *supra* note 7 (describing benefits of ADR in infractions case appeals to include less procedural restrictions when it comes to determining alternative punishment forms).

96. Ross, *supra* note 39, at 498.

97. Inserting arbitration and/or mediation in the infractions process would not be difficult. The NCAA’s constitution and rules operate as a contract with its member universities, with coaches and student-athletes as third-party beneficiaries. Dennie, *supra* note 7, at 168; *see also* Ross, *supra* note 39, at 501. Thus, the NCAA may simply adopt either or both ADR methods into its infractions process through its legislative process. Dennie, *supra* note 7, at 168 (proposing arbitration as the means to resolve NCAA infractions investigations); *see also* Moberg, *supra* note 76, at 189. Further, the recent elimination of the IARP provides an opportune time to give universities and the Enforcement Staff alternate means of resolving infractions cases.

98. Ross, *supra* note 39, at 498.

99. *Id.* at 498–99, 504; *see also* Heller, *supra* note 5, at 308.

100. Ackerman, *supra* note 65, at 37.

101. *See* Dennie, *supra* note 7, at 168; *see also* Ross, *supra* note 39, at 498. “Established neutral parties will restore fundamental fairness and create a more positive public perception of NCAA enforcement.” Dennie, *supra* note 7, at 170.

102. *Id.* at 168.

103. *Id.* at 169.

flexibility and speed could help alleviate concerns about the infractions process's lack of efficiency.¹⁰⁴ In fact, matters handled through arbitration in the sport setting have generally resolved more quickly than COI proceedings.¹⁰⁵ It is not unreasonable to assume that arbitrators are likely more readily available and have more schedule flexibility than athletics administrators and individuals from other professions who currently comprise the COI.¹⁰⁶

It stands to reason that mediation, though not as common in the sports setting,¹⁰⁷ may be particularly appropriate in the infractions process because the enforcement process strives to be collaborative.¹⁰⁸ Further, the Enforcement Staff and other involved parties (e.g., universities, coaches) will likely have an ongoing relationship with each other that mediation would be less likely to damage than a more contentious contested infractions hearing.

2. *Potential Downsides of Inserting Arbitration and/or Mediation into the Infractions Process*

While there are potential benefits of inserting arbitration and/or mediation into the infractions process, there would also be drawbacks. Most notably, the goals of an effective dispute resolution process can and should include deterrence (both specific and general), education, and encouragement of reporting incidents.¹⁰⁹ These goals are particularly appropriate for the infractions process. But as explained in more detail below, if inserted into the infractions process, the typical confidentiality of arbitration and mediation processes and outcomes, though beneficial in other areas of the law,¹¹⁰ would diminish the infractions process's deterrent effect, mitigate its effectiveness as a source of education, and could reduce the likelihood that individuals would report other individuals and universities for violating NCAA rules. As the following paragraphs show, the

104. *Id.* at 168.

105. Ross, *supra* note 39, at 500 (comparing arbitration timelines in the PGA Tour Handbook to the timeframe in which a recent infractions case involving the University of Missouri resolved).

106. Dennie, *supra* note 7, at 169; *see also* Findlay, *supra* note 87, at 74 (“A pool of adjudicators is typically available.”). Like COI panelists, the college coaches and athletics administrators who must participate in infractions hearings have busy schedules and lives that can complicate scheduling hearings (or arbitrations). Ultimately, however, NCAA rules require coaches and administrators to attend and participate in COI hearings, even if they were not directly involved in a violation but currently coach the involved sport program in some instances. *See, e.g.,* Jim Lohmar, *Ole Miss Head Coach Matt Luke Will Reportedly Appear Before NCAA Committee on Infractions*, SB NATION (Sept. 5, 2017), <http://redcuprebellion.com/2017/9/5/16257818/ole-miss-football-ncaa-investigation-committee-infractions-matt-luke-meeting-why> [<https://perma.cc/6H73-MEDG>] (providing examples of then-University of Mississippi head football coach Matt Luke and then-University of North Carolina, Chapel Hill head men's basketball coach Roy Williams having to participate in COI hearings despite not facing allegations of NCAA rules violations).

107. Mazadoorian, *supra* note 81.

108. NCAA, *Division I Enforcement*, <http://ncaa.org/sports/2021/5/11/division-i-enforcement.aspx> (last visited June 19, 2023) [<https://perma.cc/X4HW-WDSD>].

109. *See* Chanda, *supra* note 63, at 270 (explaining the propriety of goals of a dispute resolution process for sexual assault victims).

110. *See, e.g., id.* at 313–14. While parties to a dispute may prefer it, a private and confidential outcome through a dispute resolved via ADR may not be in society's best interests. Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 OHIO ST. J. DISP. RESOL. 539, 559 (2012).

current process and its resulting COI written decision better meet the goals of deterrence, education, and encouraging incident reporting in *most* types of infractions cases.

To start, consider the importance of deterrence in the infractions process. The COI publishes and makes publicly available its written decisions.¹¹¹ Thus, NCAA sanctions stemming from infractions cases act as a deterrent for others who may be tempted to commit rules infractions.¹¹² Arbitration proceedings, however, are private and only a select few types of arbitration produce written decisions.¹¹³ Because most arbitration decisions and opinions rarely publish, an offender's reputational costs are mitigated, as are any sanctions' deterrent effect.¹¹⁴ Likewise, most mediations are completely confidential, meaning that parties not privy to the dispute are unlikely to learn from others' behavior.¹¹⁵ Instead, mediation provides its greatest deterrent effect at the individual, as opposed to the general, level.¹¹⁶ While it is beneficial to reduce the likelihood that a coach engages in future actions that violate NCAA recruiting rules, for example, mediating such an infractions case would mitigate the likelihood that it would deter others from engaging in similar behavior.

Further, because it involves actual, instead of hypothetical, parties, a dispute presents a unique learning opportunity.¹¹⁷ Thus, dispute resolution attempts can provide opportunities to educate an offender¹¹⁸ and others. And to the extent an offender is a recidivist, any failure to educate in the dispute resolution process fails to further the deterrence goal.¹¹⁹ In reality, however, arbitration is unlikely to educate much due mainly to both its structure and adversarial nature.¹²⁰ And while mediation can effectively educate an offending party, it does little to educate others.¹²¹ Further, arbitration and mediation's confidential nature means that

111. Parkinson, *supra* note 20, at 218.

112. See Trent Wood, *NCAA Sanctions May Change Dramatically in the Future. Here's How*, DESERET NEWS (May 25, 2022, 5:30 PM), <http://deseret.com/2022/5/25/23141762/ncaa-sanctions-may-change-dramatically-in-the-future-heres-how> [<https://perma.cc/US5H-CMRG>] (quoting academic Maureen Weston's description of sanctions like postseason bans serving as a deterrent for universities); see also Tim Sullivan, *Sullivan: NCAA's New Softer Side Makes Worst-Case Less Worrisome for Louisville*, COURIER J. (Dec. 21, 2021, 4:08 PM), <http://courier-journal.com/story/sports/college/louisville/2021/12/21/sullivan-ncaas-new-disciplinary-discretion-bodes-well-louisville/8981881002/> [<https://perma.cc/73CW-AGQ3>] (explaining that the severity of penalties should be sufficient enough to act as a deterrent).

113. Moberg, *supra* note 76, at 187–88 (describing an arbitration award as “cryptic” and not disclosed publicly).

114. See Chanda, *supra* note 63, at 276 (evaluating arbitration's fit as a means of resolving sexual harassment claims). While the NCAA could require arbitration decisions to publish if inserted in the infractions process, Part III explains the benefits of introducing arbitration in negotiated resolution cases only, which would further the goals of ADR and the infractions process while keeping in line with the general practice of not publishing arbitration rulings.

115. *Id.* at 280.

116. *Id.* at 301–03.

117. See *id.* at 274.

118. See *id.* at 273–74 (describing mediation of sexual harassment incidents as an opportunity to educate the offender).

119. *Id.* at 274.

120. *Id.* at 277–78.

121. *Id.* at 304.

others would not have the opportunity to learn from them.¹²² Conversely, college athletics constituents can learn valuable information from COI written decisions. Though written with hindsight's benefit, these publicly available written decisions provide valuable insight into the COI's application of NCAA legislation and expectations and enable others to learn from colleagues' mistakes as a means to improve compliance strategies.¹²³ Further, COI decisions in contested cases are instructive for future cases.¹²⁴

Finally, a goal of a dispute resolution system can be to encourage incident reporting.¹²⁵ This is especially true of the infractions process, which relies on universities and individuals self-policing and self-regulating.¹²⁶ If infractions cases resolved via arbitration or mediation, however, the analysis and penalties in infractions cases would be confidential, thus reducing individuals' incentive to report perceived transgressions at other universities because they would never learn of, and obtain satisfaction from, the case's resolution and penalization of the offenders.

IV. ARBITRATING NEGOTIATED RESOLUTION CASES

While arbitration and mediation have many benefits, this Part suggests that one of their main benefits in most disputes—confidentiality—actually renders them ineffective in all but one of the three means of resolving infractions cases.¹²⁷ Thus, this Part proposes using arbitration to resolve only those infractions cases that the Enforcement Staff and involved parties seek to resolve through negotiated resolution. The other two currently available means of resolving cases—summary disposition and contested cases—should continue to resolve through the current process under which the COI publishes its written decision.

In negotiated resolution cases, the Enforcement Staff and parties agree on the violations and penalties and draft a report that they submit to the COI for review.¹²⁸ The COI's role is limited to reviewing the appropriateness of the parties' agreed-upon penalties.¹²⁹ Because the COI only reviews penalties'

122. See *id.* at 304 (explaining how mediation's confidentiality provides little education relative to trials and other disciplinary hearings, which are public affairs and thus more likely to inform the general public).

123. Martin J. Greenberg & Alexander W. Evrard, *Athletics Directors*, 26 MARQ. SPORTS L. REV. 735, 823–24 (2016).

124. INTERNAL OPERATING PROCEDURES, *supra* note 49.

125. See Chanda, *supra* note 63, at 277–78 (explaining how a goal of a sexual harassment dispute resolution system should be to encourage victims to report incidents).

126. See, e.g., Associated Press, *NCAA Calls for Schools to Help Investigate NIL Violations*, SPORTS ILLUSTRATED (Aug. 19, 2022), <http://si.com/college/2022/08/19/ncaa-nil-investigations-calls-for-help-member-schools-impermissible-benefits> [<https://perma.cc/BCR7-7MXM>] (describing Enforcement Staff correspondence regarding imperativeness of self-regulating).

127. Chanda, *supra* note 63, at 277, 280.

128. *Division I Infractions Process*, *supra* note 1 (noting there is no opportunity to appeal a negotiated resolution).

129. NCAA, INSIDE THE DIVISION I INFRACTIONS PROCESS: NEGOTIATED RESOLUTION (2019), https://ncaaorg.s3.amazonaws.com/infrations/d1/glnc_grphcs/D1INF_InfractionsProcessNegotiatedResolution-FactSheet.pdf [<https://perma.cc/YBM2-NALH>].

appropriateness and does not provide analysis in its written decisions in negotiated resolution cases, this Article suggests that they would be appropriately resolved via arbitration.¹³⁰

For example, consider a 2022 case involving the University of Nebraska, Lincoln (“Nebraska”) and its football program that resolved via negotiated resolution. The COI’s written decision is a mere eight pages (compared to LSU’s 30-page case decision and Arizona’s 19-page decision) and, following a “synopsis” of the case, describes the parties’ agreed-upon facts, violations, violation levels, and penalties.¹³¹ The final page of the written decision includes a couple of paragraphs limited to describing a three-person COI panel’s approval of the negotiated resolution agreement.¹³² The written decision is void of any analysis or application of legislation (which is appropriate for cases resolved through negotiated resolution since the parties already agree to the facts, violations, and penalties and the COI only reviews the matter to determine if the agreed-upon penalties are “manifestly unreasonable”).¹³³ Because of the lack of analysis or application of legislation, the Nebraska case is lacking from an educational standpoint. Further, while the COI’s written decision has some value as a deterrent, it lacks, for example, the warning and reminding language from the LSU and Arizona cases outlined below that provide additional deterrence.

This Article suggests that arbitrators could, using the NCAA’s penalty guidelines,¹³⁴ effectively determine whether the parties’ agreed-upon penalties are “manifestly unreasonable” in negotiated resolution cases. While the COI could refer all negotiated resolution cases to exterior arbitrators,¹³⁵ this Article instead suggests that COI panelist recruitment efforts intentionally include efforts to increase the number of panelists with experience and expertise in arbitration such that these additional COI panelists/arbitrators would only handle negotiated resolution cases. The Infractions Process Committee is already considering adjusting the size and composition of the COI.¹³⁶ Further, it would not be abnormal for the COI to include an individual with experience and expertise in arbitration. Current COI member William Bock, III, for example, possesses a “(s)trong background” in arbitration and serves as an arbitrator for the

130. Arbitration would be preferable to mediation in negotiated resolution cases because the former results in a final decision. Further, recall that scholars have expressed concern regarding a lack of due process in the infractions process. Scholars have likewise raised concerns regarding the lack of due process safeguards in mediation. Oberman, *supra* note 110, at 570. Thus, critics who contend that the infractions process lacks due process and fairness would likely feel the same if the infractions process included mediation.

131. NCAA, COMM. ON INFRACTIONS, UNIVERSITY OF NEBRASKA, LINCOLN NEGOTIATED RESOLUTION 2–7 (2022), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102970> [<https://perma.cc/RS6W-X2H5>] [hereinafter “Nebraska Case”].

132. *Id.* at 8.

133. *Id.*

134. The NCAA manual sets forth potential penalty options that can vary based on aggravating and mitigating factors. See 2022-23 Manual, *supra* note 27.

135. Others have proposed eliminating the COI and replacing it with arbitrators to adjudicate potential NCAA violations. See, e.g., Dennie, *supra* note 7, at 168; see also Ross, *supra* note 39, at 500.

136. Megan Durham, *Division I Board of Directors Modernizes Infractions Process*, NCAA (Aug. 31, 2022), <http://ncaa.org/news/2022/8/31/media-center-division-i-board-of-directors-modernizes-infractions-process.aspx> [<https://perma.cc/LFF4-PMVV>].

International Swimming Federation.¹³⁷ Additionally, it would likely not be difficult to find individuals with legal expertise and experience to serve as infractions process arbitrators.¹³⁸ By having a subset of COI panelists exclusively arbitrate the penalties' appropriateness in negotiated resolution cases, the COI could continue to author and publish written decisions in such cases that describe the facts and violations, ensuring that the deterrent effect remains. Thus, negotiated resolution written decisions would not look much different than they do currently, as they would still contain a statement that the COI arbitration panelist(s) approved the parties' proposed penalties. This would preserve the educational and deterrent effects of negotiated resolution cases while improving efficiency. And parties would benefit by having their penalties and case decided by a subset of COI panelists/arbitrators who only handle negotiated resolutions and thus have expertise and specialization in the NCAA penalty guidelines and intimate familiarity with past negotiated resolution cases.

Negotiated resolution has become the most common means of resolving an infractions case. Over the three-year period of 2018-19 through 2020-21, 29 cases resolved via negotiated resolution, compared to fourteen contested cases and 17 summary disposition matters.¹³⁹ In fact, in the 2020-21 academic year, nearly 60 percent of cases that reached the COI resolved via negotiated resolution.¹⁴⁰ Arbitrating negotiated resolution cases would free up the likes of Kenda Greene, a COI panelist in Nebraska's negotiated resolution case,¹⁴¹ who serves North Carolina Central University in a variety of roles,¹⁴² to focus her COI-related efforts on contested and summary disposition cases, both of which require application of NCAA legislation and analysis.¹⁴³

Unlike negotiated resolution cases, contested and summary disposition written case decisions include COI analysis and set forth its expectations. Because these insights educate college athletics constituents regarding colleagues' mistakes, help improve compliance strategies,¹⁴⁴ serve as a deterrent, and incentivize incident reporting, this Article suggests that neither arbitration nor mediation would be preferable to the way contested and summary disposition cases currently resolve. Consider, for example, a recent case involving recruiting

137. NCAA, *NCAA Division I Committee on Infractions Roster*, <http://ncaa.org/sports/2018/3/20/ncaa-division-i-committee-on-infractions-roster.aspx> (last visited June 19, 2023) [<https://perma.cc/EW7D-SR8S>].

138. Mazadoorian, *supra* note 81 (explaining that legal practitioners long to become involved with ADR in sports).

139. NCAA, *DIVISION I INFRACTIONS 2020-21 ANNUAL REPORT 26* (2021), https://ncaaorg.s3.amazonaws.com/infractions/d1/2021D1Inf_AnnualReport.pdf [<https://perma.cc/2PFB-SF5H>].

140. *Id.* at 6.

141. Nebraska Case, *supra* note 131, at 8.

142. NCAA, *NCAA Division I Committee on Infractions Roster*, <http://ncaa.org/sports/2018/3/20/ncaa-division-i-committee-on-infractions-roster.aspx> (last visited June 19, 2023) [<https://perma.cc/EW7D-SR8S>].

143. This model would further the notion that COI resources and hearings are best reserved for only the most serious cases. See Megan Durham, *Division I Board of Directors Modernizes Infractions Process*, NCAA (Aug. 31, 2022), <http://ncaa.org/news/2022/8/31/media-center-division-i-board-of-directors-modernizes-infractions-process.aspx> [<https://perma.cc/LFF4-PMVV>] (noting that member universities should pursue more timely and cooperative means of resolving cases such that COI hearings are left "for the most serious cases.").

144. Greenberg & Evrard, *supra* note 123, at 823-24.

violations at Louisiana State University (“LSU”). Because the involved assistant coach and Enforcement Staff “had factual disagreements,” this was a contested case that the COI heard in July 2022.¹⁴⁵ Among the violations that the Enforcement Staff alleged was that the now-former head football coach engaged in impermissible, off-campus recruiting contact with two prospective student-athletes at their high school prior to the permissible time period for doing so.¹⁴⁶ The COI’s September 2022 written decision devotes multiple pages to describing the facts in detail and applying legislation relevant to them, ultimately concluding that the head coach’s actions did not violate NCAA legislation.¹⁴⁷ In reaching its conclusion, the COI acknowledged that it had considered similar cases previously and warned “coaches about the risks associated with having any contact with prospects when it is not permissible ... it continues to be the responsibility of coaches to set expectations and boundaries and to immediately disengage if any contact occurs.”¹⁴⁸

This information and analysis is extremely valuable to college athletics administrators and coaches who desire to comply with NCAA rules. Administrators can use the facts and analysis from the LSU case to educate coaches on acceptable practices, and coaches likewise can use this information to shape their actions. Had this case not proceeded to a contested COI hearing with a written decision and instead been resolved more confidentially via arbitration or mediation, administrators and coaches would have missed out on the COI’s application of recruiting legislation and its resulting expectations for coaches in similar situations. Further, knowing that LSU received penalties for other recruiting violations, such as impermissibly providing athletics gear to prospective student-athletes,¹⁴⁹ should deter others from committing similar violations. Thus, the LSU case serves as an example of why neither arbitration nor mediation would be a more effective means of resolving contested infractions cases.

Similarly, this Article suggests that arbitration and mediation would not more effectively resolve infractions cases in the summary disposition track. Recall that when the parties agree to the facts and violation level but disagree on penalties, they may elect to forgo participating in a COI hearing and attempt to resolve their case via the “summary disposition” track.¹⁵⁰ When doing so, the Enforcement Staff, university, and any individual subject to a violation allegation submit a report to the COI.¹⁵¹ If the COI accepts the report, it issues penalties.¹⁵² Like in contested cases, the reports that the COI authors in summary disposition cases contain valuable analysis that can deter, educate, and encourage incident reporting.

145. NCAA, COMM. ON INFRACTIONS, LOUISIANA STATE UNIVERSITY PUBLIC INFRACTIONS DECISION 3 (2022), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102984> [<https://perma.cc/2TX4-K2ZL>].

146. *Id.* at 2.

147. *Id.* at 16.

148. *Id.*

149. *Id.* at 1.

150. *Division I Infractions Process*, *supra* note 1.

151. *See id.*

152. *See id.*

Consider, for example, a 2019 infractions case involving the University of Arizona (“Arizona”) and its swimming and diving program that resolved via summary disposition.¹⁵³ The parties agreed to the facts and violations and submitted a summary disposition report to that effect.¹⁵⁴ Arizona self-imposed corrective actions and penalties and the COI proposed additional penalties to Arizona and the involved coach.¹⁵⁵ Though the parties agreed to the facts and that violations occurred, the COI’s written decision includes five pages of extremely valuable analysis in its “Review of Case” section.¹⁵⁶ For example, the COI emphasized that the violations “arose from a scenario the COI has repeatedly warned can lead to violations: a prospect’s presence in the vicinity of campus prior to enrollment.”¹⁵⁷ The written decision then describes “(a)nother series of recruiting violations” involving impermissible recruiting inducements and tryout activities.¹⁵⁸ When analyzing the facts, the COI examined prior cases involving other universities and similar facts, reminding that “(n)otably, as in this case, each of these cases involved international prospects living in the institution’s locale prior to enrollment.”¹⁵⁹ This analysis can prove extremely helpful as an educational tool regarding COI expectations and serve as a deterrent to athletics administrators and coaches who may face a situation where a prospective student-athlete resides in their university’s locale. Had the Arizona case resolved through a more confidential arbitration or mediation, others would not be privy to this analysis. Thus, the Arizona case exemplifies why summary disposition cases would not more effectively resolve via arbitration or mediation.

V. CONCLUSION

The infractions process provides a source of education and deterrence for college athletics constituents and encourages incident reporting. Arbitrating or mediating contested or summary disposition infractions cases would mitigate these benefits. Arbitrating negotiated resolution cases, however, would provide many benefits, including expediting them and allowing other COI panelists to focus energy and resources on contested and summary disposition cases. Further, arbitrating negotiated resolution cases would not diminish the educational, deterrence, and incident reporting effects of the current negotiated resolution process. Thus, college athletics constituents should consider implementing arbitration into the infractions process for negotiated resolution cases as it considers alterations to it.

153. NCAA, COMM. INFRACTIONS, UNIVERSITY OF ARIZONA PUBLIC INFRACTIONS DECISION 1 (2019), <http://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102743> [https://perma.cc/N5UM-PVVE].

154. *Id.*

155. *Id.*

156. *See id.* at 6–10.

157. *Id.* at 6.

158. *Id.* at 8.

159. *Id.*