

APPEAL OF TODD MCNAIR

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INTRODUCTION

Overview

Former assistant USC football coach Todd McNair submits this Appeal to set aside Finding B-1-b and the associated penalties.

The finding is clearly contrary to the evidence because it is based on factually incorrect and false statements. Specifically, the COI changed and mischaracterized the testimony of Lloyd Lake, the sole source of the allegations against McNair, and then based its finding on the mischaracterized testimony.

Further, the COI's findings that McNair was not credible are internally inconsistent, contradictory and based on false statements and mischaracterizations. McNair understands that the COI has discretion to make credibility findings. He is not challenging that principle. However, the COI's credibility findings must be based on true and correct facts. The COI may not change testimony or make up facts to support credibility findings.

The COI also committed a procedural error by using an erroneously low standard in making credibility findings. Specifically, the COI found that McNair's recollection of certain events was less likely than other versions and then used that innocuous finding to cast grave doubt on McNair's credibility. If the COI is going to denounce an individual's credibility in a public infractions report, it must find that the individual made statements that are unbelievable, inconceivable, unimaginable or unthinkable, not merely unlikely. The collective errors and mistakes with the credibility findings are so egregious, that they are both clearly contrary to the evidence and based on procedural error.

Finally, McNair complains of pre-hearing and post-hearing misconduct. First, the enforcement staff violated McNair's right to fair process by unilaterally excluding USC from the interviews of Lake and his family. Thus, McNair was denied the opportunity to have his institution question Lake and test his credibility.

Second, the COI communicated *ex parte* with the enforcement staff concerning the draft infractions report. The purpose of the *ex parte* communications reportedly was to permit the enforcement staff to correct any "factual errors" in the report. McNair believes the *ex parte* communications were improper and unauthorized by NCAA bylaws. McNair also believes the improper communications created a rebuttable presumption of prejudice.

Third, McNair believes the NCAA has prejudged his appeal. Following the COI's release of the Infractions Report, the NCAA issued a public statement criticizing an article that raised questions about the COI's finding against McNair and voicing support for the COI. McNair believes the NCAA's statement is inappropriate and shows prejudgment.

Chronology of Relevant Events

While this case is not as factually complex as some, McNair understands that the IAC is new to the case and unfamiliar with the chronology and details of relevant events. The events below relate directly to the COI's finding against McNair.

- **Saturday, March 5, 2005 – Marshall Faulk's Birthday Party In San Diego**

Lloyd Lake alleged that he provided [REDACTED] with a hotel room for two nights so he could attend the Faulk party. Lake claimed to have met McNair both at the hotel room and at the party,

and he alleged that McNair knew he provided the hotel room to [REDACTED]. Lake was the sole source of the allegations.

The staff alleged that [REDACTED] received a benefit in violation of NCAA amateurism legislation, and it charged McNair with unethical conduct for allegedly knowing about the benefit but not reporting it and for allegedly having a conversation with Lake at the Faulk party. The COI did not find evidence sufficient to support any of the three allegations. Nonetheless, the Infractions Report said that McNair's successful defense to the allegations raised questions about his credibility. The Infractions Report did not question Lake's credibility even though the COI rejected his allegations. As set forth in more detail below, the COI's credibility analysis and determinations are procedurally improper and prejudicial.

- **Night of October 29, 2005 – [REDACTED] Hosted PSA [REDACTED] On An Official Visit/Todd McNair Appeared In A Photograph At A Nightclub With Lloyd Lake In The Background**

It is important to understand that no one has ever alleged that McNair committed any violations on October 29, 2005. The date is relevant only because the staff alleged that McNair had telephone and in-person contact with Lake that night. Thus, the staff argued that McNair knew Lake. However, the staff did not allege – nor is there any evidence – that McNair was told on October 29, 2005, that [REDACTED] had entered into an agency agreement with Lake and that Lake had provided [REDACTED] with impermissible benefits.

While the COI did not find any violation against McNair relating to October 29, 2005, it did question his credibility concerning what he reported occurred that night. Specifically, the COI said McNair was not credible in his recollection that he attempted to contact [REDACTED] to get him to retrieve then prospective student-athlete [REDACTED] from his hotel room and entertain him

during his official visit. The COI said Lake's version of the events was more credible than McNair's recollection.

However, in making its credibility findings, the COI misstated and mischaracterized the evidence. In fact, it based its findings on false statements. Moreover, the two credibility findings against McNair relating to October 29, 2005, are mutually inconsistent and contradictory. In other words, the COI found that two mutually exclusive events occurred and then used both events to denounce McNair's credibility.

The events of that night are discussed in detail below. For purposes of this overview, what is important is that McNair never denied that he may have been introduced to Lake; he simply said he did not recall ever being introduced to Lake. It is not a violation for McNair to be introduced to Lake nor is it unbelievable that McNair would not recall the introduction when he was interviewed almost a year after it occurred.

- **January 8, 2006, Call To McNair**

The COI found that Lake made a two and a half minute call to McNair on January 8, 2006, and attempted to get McNair to convince ██████ either to adhere to the agency agreement or reimburse Lake for the money provided to ██████ and his family. The COI found that McNair committed unethical conduct when he failed to report the call to USC and when he reported false and misleading information about the call to the enforcement staff. McNair has consistently and categorically denied the allegations.

The finding is clearly contrary to the evidence because it is based on mischaracterized evidence and false statements. The COI changed and mischaracterized Lake's testimony about the call. Lake's actual testimony does not support the finding.

Moreover, the COI materially mischaracterized Lake's girlfriend's testimony by stating that she "confirmed Lake's account of the call." However, the girlfriend was not present for the call, did not know what was said during the call and did not even know McNair. The evidence is far short of that necessary to support a finding of unethical conduct

I. STANDARD OF REVIEW

Bylaw 32.10.4.2 (Findings) states:

Findings of violations made by the Committee on Infractions shall not be set aside on appeal, except on a showing by the appealing party that:

(a) a finding is clearly contrary to the evidence presented to the Committee on Infractions;

(b) the facts found by the Committee on Infractions do not constitute a violation of the Association's rules; or

(c) there was a procedural error and but for the error, the Committee on Infractions would not have made the finding of violation.

II. ISSUES RAISED ON APPEAL

A. The COI Used False Statements To Support Its Unethical Conduct Finding Against McNair

The crux of the finding against McNair is the COI's conclusion that Lake called McNair at 1:34 a.m. on January 8, 2006, and asked McNair to convince ██████ "either to adhere to the agency agreement or reimburse Lake and Michael Michaels for money provided to ██████ and his family." Infractions Report, Finding B-1-b, p. 23. According to the COI, it was this two and a half minute phone call that put McNair on notice that ██████ had entered into an agency agreement with Lake and Michaels, and that ██████ had accepted money in violation of NCAA amateurism legislation.¹

¹ The findings states, "At least by January 8, 2006, [McNair] had knowledge that ██████ and [Lake and Michaels] likely were engaged in NCAA violations." Infractions Report at p. 23 (emphasis added). The COI did not identify a single piece of evidence indicating that McNair knew of the violations prior to January 8, 2006. Thus, the COI has no business using the phrase "[a]t least by January 8, 2006..." to suggest or imply that McNair knew of the

McNair has consistently and categorically denied the allegation. The COI said it relied on Lake's testimony to support its finding.

The Committee finds [Lake] credible in his report of the call. Lake said that he phoned [McNair] to ask him to intercede with ██████ and get him to adhere to the agency agreement that he made with [Lake and Michaels]. [Lake] said he also told [McNair] that he did not intend to lose the money he had given ██████ and his parents and preferred not to go public with the matter and implicate the institution.

Infractions Report at p. 26.

The COI materially mischaracterized and changed Lake's testimony. Lake never said, either in words or substance, what the COI claims he said. In fact, Lake's actual testimony does not comport with undisputed facts and, therefore, it is not credible or reliable. To fix that problem, the COI changed Lake's testimony to fit the finding.

Set forth below is three-part analysis showing what Lake actually said contrasted with what the COI claims he said. The complete excerpt from Lake's transcript was set forth at pp. 1-19 to 1-21 of McNair's Response to the Notice of Allegations, and it is attached to McNair's Appeal as Exhibit 1.

1. First Discrepancy – Lake Said McNair Called Him, But That Did Not Happen

As shown in Lake's testimony and explained in McNair's Response, the enforcement staff told Lake that McNair's phone records show that *McNair called Lake* at 1:34 a.m. on January 8, 2006, even though the records show it was *Lake who called McNair*. Lake agreed with the

violations before that date. After a four year investigation, a three day hearing and months of deliberation, the COI should be required to state its findings with specificity and precision. McNair cannot appeal a finding that he knew of a violation but failed to report it, unless he knows the specific date he is alleged to have had notice. Accordingly, for purposes of this Appeal, McNair requests the IAC to strike the phrase "At least by" and replace it with the word "On".

enforcement staff's mischaracterization of who placed the call and explained why McNair had called him. Lake said McNair called him to discuss the agency agreement, even though there is no record of a call from McNair to Lake on January 8, 2006, or at any other time around that date.

As described in more detail below, it is material who placed the call because there is no evidence to support Lake's claim that McNair would have called him to discuss the agency agreement. McNair did not even know there was an agency agreement. Thus, Lake reported something that did not happen, i.e., that McNair called Lake to discuss the agency agreement.

That should be a strike against Lake's credibility. Lake's failure to correct the investigator and say, "No, I called McNair," raises the question whether Lake was even the person who placed the call. At a minimum, it calls into question whether he remembered the call and testified from actual knowledge or made up his testimony. The COI had an easy fix for this problem. It ignored Lake's actual testimony and changed it to fit the facts.

The COI stated that it found Lake "credible in his report of the [January 8, 2006] call [Lake] said that he phoned [McNair]..." *Infractions Report* at p. 26 (emphasis added). The obvious purpose in changing Lake's testimony was to make it conform to the phone records and thus make it appear that Lake had an accurate recollection of the call and the conversation. However, Lake did not say that he called McNair in the early morning hours of January 8, 2006, and, therefore, the COI's finding is based on an erroneous statement.²

² Later in the interview, *after discussing the January 8, 2006 call*, the enforcement staff asked Lake, "Did you ever call McNair?" and Lake said, "Yeah, I called him a couple times . . . trying to get this resolved, just get my money back and make it right." See McNair Response at pp. 1-20 to 1-21. This proves that Lake claimed that McNair called him at 1:34 a.m. on January 8, 2006. Otherwise, after discussing the January 8, 2006, call, the NCAA investigator would not have asked Lake if he ever called McNair and Lake would not have given the answer that he

2. Second Discrepancy – Lake Said McNair Called Him To Try To Resolve The Dispute With ██████████ And Asked Him Not To Implement USC

The COI's mischaracterization does not end with Lake's mistake about who placed the call on January 8, 2006. The COI stated that Lake said that he asked McNair to intercede and get ██████████ to adhere to the agency agreement. However, Lake's description of the conversation – brief and vague as it is – makes clear that Lake claimed McNair initiated the call because he (McNair) wanted to intercede and mediate whatever dispute that supposedly existed between Lake and ██████████. That is the opposite of what the COI claimed Lake said. The verbatim excerpt from Lake's testimony describing the call on January 8, 2006, is set forth below.

Mr. Johanningmeier: --McNair makes a call to you at 2:32. I was asleep at the time--
(People laughing)

Mr. Lake: Yeah.

Mr. Johanningmeier: --personally, but, but in your case--

Mr. Lake: *I think that was like that was like him (McNair) trying to resolve it, you know, and like ██████████ wrong, he should make it right and basically don't implement the school.*

Mr. Johanningmeier: Because this, this is 2006 we are talking about.

Mr. Lake: Yeah, that's when I went to jail, that's when everything started falling apart, I mean, it fell apart.

Mr. Johanningmeier: What can you tell us that you specifically recall about that conversation with him?

Mr. Lake: Uh, just telling about ██████████ and all, he knew about the money he took, he knew that he had an agreement and--

Ms. Cretors: Todd McNair indicated to you in the telephone conversation that he was aware that ██████████ took money--

did. More importantly, it shows that Lake said he made two calls that never occurred. The records show only the call on January 8, 2006. Thus, Lake described calls that did not occur.

Mr. Lake: I mean, he knew--

Ms. Cretors: --from you?

Mr. Lake: --Yeah, bec, he knew ██████ took money from me. There's no doubt he knew about that.

Lake Transcript at p. 113 (emphasis added).

Thus, Lake said McNair interceded on his own initiative trying to resolve it, that McNair acknowledged that ██████ was wrong, and that McNair asked Lake not to implement [sic] USC. That is the reverse of what the COI claimed Lake said, i.e., that he asked McNair to intercede and get ██████ to adhere to the agency agreement. In other words, even though Lake said it was McNair who placed the call and initiated the discussion, the COI said in its Infractions Report that Lake said he called McNair and asked for McNair's assistance.

The reason the COI changed Lake's testimony is simple: Lake's story does not comport with the facts because there is no evidence that McNair even knew about the agency agreement, much less that ██████ was backing out of the agreement. There is no evidence – *even from Lake* – that anyone told McNair about the agency agreement before January 8, 2006. To avoid any possibility that the IAC misunderstands this point, McNair will state it again and emphatically: *there is not one shred of evidence that anyone, including Lake or ██████ told McNair about the agency agreement prior to the call at 1:34 a.m. on January 8, 2006.*³ Thus, McNair would not have called Lake to discuss something he was not aware of. But that is exactly what Lake claimed McNair did.

The COI resolved this material contradiction in Lake's testimony by changing Lake's description of the call to make it appear like Lake said he called McNair to ask him to intercede and get

³ To be clear, McNair disputes that Lake told him about the agency agreement during the call.

██████ to adhere to the agency agreement. That is not what Lake said and the COI has no authority to mold and shape a witness's testimony to make it appear more credible and reliable than it actually is. The COI should take a witness's testimony at face value, not change it to fix inconsistencies and contradictions.

Finally, the COI claimed Lake said he told McNair that he "preferred not to go public with the matter and implicate [USC]." Infractions Report at p. 26. Lake did not say that he told McNair that he preferred not to go public with the matter. Neither those words nor anything similar to those words appear anywhere in Lake's transcript. Yet the COI claimed Lake said those words in its Rationale supporting the unethical conduct finding against McNair.⁴

3. **Third Discrepancy – Lake Never Said That He Told McNair That He Did Not Intend To Lose the Money He Had Given ████████**

The COI claimed "[Lake] said he also told [McNair] that he did not intend to lose the money he had given ████████" Infractions Report at p. 26. Lake never told the enforcement staff that he said those words to McNair during the January 8, 2006 call. Indeed, Lake's brief and vague description of the call is only about what he claims *McNair said to him*. He did not describe any statements *he made to McNair*.

Nonetheless, the COI claimed Lake said he told McNair he did not intend to lose the money he had given ████████ and the COI then used it to support its finding that Lake called McNair and put him on notice that he had given money to ████████. But Lake did not say that. The only thing Lake ever said about whether McNair knew that ████████ had taken money is in this exchange:

⁴ Moreover, Lake did not use the word "implicate." Lake said it was McNair who interceded on his own initiative and asked him "basically don't implement [sic] the school." But as explained above, McNair would not have contacted Lake to ask him not to implicate USC because McNair did not know Lake had any reason to implicate USC. Thus, the COI not only changed Lake's testimony to fit its finding, it also corrected and dressed up his vocabulary.

Mr. Johanningmeier: What can you tell us that you specifically recall about that conversation with him?

Mr. Lake: Uh, just telling about [REDACTED] and all, he knew about the money he took, he knew that he had an agreement and--

Ms. Cretors: Todd McNair indicated to you in the telephone conversation that he was aware that [REDACTED] took money--

Mr. Lake: I mean, he knew--

Ms. Cretors: --from you?

Mr. Lake: --Yeah, bec, he knew [REDACTED] took money from me. There's no doubt he knew about that.

Lake Transcript at p. 113.

How did McNair know that [REDACTED] had taken money? Because according to Lake, "he knew ... [t]here's no doubt he knew about that." Thus, it is not because, as the COI claims, "[Lake] said he also told [McNair] that he did not intend to lose the money he had given [REDACTED] . . ." It is merely because Lake *said* McNair knew.

Lake's bare, unsupported conclusory statement was insufficient to establish that McNair knew that [REDACTED] had taken money. Without competent evidence that McNair knew that [REDACTED] had taken money, there is no unethical conduct finding. Thus, the COI embellished Lake's testimony to support its finding that Lake specifically told McNair that he had given money to [REDACTED] even though Lake never said that.

4. **Without Credible And Reliable Testimony From Lake, The COI's Finding Is Clearly Contrary To The Evidence**

McNair and Lake were the only people on the call.⁵ McNair has consistently and categorically denied the allegation that forms the basis for Finding B-1-b. The COI changed and mischaracterized Lake's testimony to support its finding. The COI's description of Lake's testimony is below. The factual assertions which are incorrect or mischaracterized are in red.

The committee nonetheless remains particularly troubled by the two minute and 32 second telephone call from [Lake] to [McNair] that took place at 1:34 a.m. on January 8, 2006. [McNair] claimed that he did not remember the phone call and denied [Lake's] description of what was said. The committee finds [Lake] credible in his report of the call. [Lake] said that he phoned [McNair] to ask him to intercede with ██████ and get him to adhere to the agency agreement that he made with [Lake and Michaels]. [Lake] said he also told [McNair] that he did not intend to lose the money he had given ██████ and his parents and preferred not to go public with the matter and implicate the institution.

Infraction Report at p. 26 (emphasis added).

Without the incorrect and mischaracterized statements, there is no meat on the bone. There is no competent factual evidence to support Finding B-1-b and, therefore, the IAC must vacate the finding because it is clearly contrary to the evidence. Mischaracterized and made up testimony does not meet the standard required in Bylaw 32.8.8.2.⁶

5. **The COI Also Mischaracterized Lake's Girlfriend's Testimony**

The COI also mischaracterized the secondary evidence it used to support the finding. Specifically, the COI said Lake's girlfriend "confirmed Lake's account of the call." Infractions

⁵ Assuming Lake was even on the call, which as explained above is questionable.

⁶ Bylaw 32.8.8.2 (Basis of Findings): The Committee on Infractions shall base its findings on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.

Report at p. 26. However, the girlfriend described a call Lake *said he was going to make to a person she did not even know*. Jones Transcript at pp. 56-58, included in Case Summary at pp. 1-169 to 1-171, attached hereto as Exhibit 2.

The girlfriend did not say anything about McNair calling Lake "trying to resolve it" and asking Lake "basically don't implement the school." That is the call that Lake reported. If the girlfriend had "confirmed Lake's account of the call," her description would be similar to Lake's. However, the girlfriend described a call that Lake claimed he was going to make, not a call that Lake had received. She does not know if Lake even made the call he claimed he was going to make. Jones Transcript at p. 58. Thus, the girlfriend did not "confirm Lake's account of the call."

Moreover, the girlfriend did not even know who McNair was until the NCAA investigator mentioned his name to her and told her that he was [REDACTED] position coach. Even after being led by the investigator, she still said, "I don't know for sure if it was that guy though." Jones Transcript at p. 58. Thus, the girlfriend could not confirm a call with McNair because she was not present for the call and did not even know who McNair was.

B. The COI's Adverse Credibility Determinations Against McNair Are Clearly Contrary To The Evidence

The IAC has made clear that the COI determines the credibility of the evidence. University of Mississippi Public Infractions Appeals Committee Report (May 1, 1995) at p. 8. However, if the COI's finding of violation is based on clearly erroneous credibility findings, then it is clearly contrary to the evidence and must be set aside. The COI does not have free reign to make internally inconsistent and contradictory credibility decisions. It also may not use false statements to support its credibility decisions.

In this case, the COI found McNair to be more credible than Lake with respect to the two allegations involving the Marshall Faulk birthday party (Allegations 1-b-1 and 1-b-2). We know the COI found McNair more credible than Lake because Lake was the sole source for those allegations and the COI did not find any violations related to those allegations. In other words, *the COI rejected Lake's allegations*. However, even though the COI found McNair more credible than Lake and declined to find the violations alleged in Allegations 1-b-1 and 1-b-2, the COI used those nonfindings to find that McNair was not credible without once questioning Lake's credibility. In other words, McNair successfully defended the allegations by showing that Lake was not credible, yet the COI questioned McNair's credibility.

The COI also flatly mischaracterized and changed testimony to support its findings that McNair was not credible. The COI made demonstrably false statements. Findings based on incorrect and false statements are erroneous and must be set aside as clearly contrary to the evidence.

Finally, the COI used an erroneously low standard in determining that McNair was not credible. Specifically, the COI found that McNair's recollection of certain events was less likely than other

versions. The COI then used that innocuous finding to support its particularly harsh conclusion that it has "grave doubt as to the credibility of [McNair]." Infractions Report at p. 26. As explained in detail below, a finding that one person's recollection of events is more likely than another's person's version does not justify "grave doubt" about the latter's credibility.

1. The COI Ruled In Favor Of McNair With Respect To The Faulk Birthday Party Allegations But Then Improperly Made An Adverse Credibility Determination Against Him

Allegations 1-b-1 and 1-b-2 involved the Marshall Faulk birthday party in San Diego in March 2005. See McNair Response at pp. 1-5 to 1-18. Lake claimed that he met McNair at the Hyatt Hotel that weekend and that McNair knew that Lake had provided [REDACTED] with a hotel room. Lake also claimed that he had a conversation with McNair at the party, during which he told McNair that he was starting a sports agency and asked for referrals.⁷ As explained in McNair's Response, Lake was the *only* source of these allegations. Not a single person corroborated Lake. Not even his girlfriend and sister.

Those alleged incidents formed the bases of two unethical conduct allegations against McNair, which the COI did not find.⁸ In other words, with regard to Lake's allegations involving the Faulk birthday party, the COI found McNair to be more credible than Lake.

Normally when the COI declines to find an allegation that has been brought by the enforcement staff, there is no discussion of the nonfinding in the infractions report.⁹ However, in this case,

⁷ Lake did not claim that he told McNair about the [REDACTED] agency agreement during this alleged conversation or even that he knew [REDACTED]

⁸ The COI also found that there was insufficient evidence to support Lake's allegation that [REDACTED] stayed in the Hyatt room for two nights at a cost of \$1,574. Thus, the COI rejected *in toto* Lake's allegations about the Faulk party weekend.

⁹ It is unusual for the COI to comment on nonfindings. In this case, the COI devoted over two full pages to a discussion about nonfindings that have little or nothing to do with the one finding the COI did make against McNair.

the COI included two paragraphs and a footnote in its report detailing what the COI said are reasons to question McNair's credibility concerning what occurred during the Faulk birthday party weekend. Throughout its analysis of the evidence, the COI *did not once* cite the problems with Lake's credibility, of which there were many. See McNair Response to Notice of Allegations at pp. 1-5 to 1-18.¹⁰ The COI's failure to discuss the problems with Lake's credibility is inexplicable and inexcusable. Lake was the sole source of the allegations and part of the COI's job was to determine whether Lake was credible in his allegations against McNair.¹¹

If the COI found that Lake's testimony about the Faulk party allegations was not credible – which it obviously did – then the COI should say so in its discussion of the nonfindings. However, in declining to make any findings against McNair involving the Faulk party, the COI said only that "the evidence contained unresolved discrepancies in what witnesses reported regarding the events and who was present during the March 2005 birthday party weekend." Infractions Report at p. 26. In other words, Lake was not credible. But the COI did not say that because that would undermine Lake's credibility with regard to the January 8 call.

To be clear, the nonfindings do not show that McNair was put on notice prior to January 8, 2006, that either ██████ had entered into an agency agreement with Lake or that Lake had provided benefits to ██████ in violation of NCAA amateurism rules. It is obvious that the COI departed from its normal procedure in order to try to establish that McNair was not credible in order to strengthen the only finding the COI did make. The COI's unorthodox approach illustrates the lengths it was willing to go to try to articulate a Rationale that would hold up on appeal.

¹⁰ For example: (1) McNair was in Los Angeles on the day Lake claimed to have met him at the San Diego Hyatt; (2) Lake's girlfriend said Lake did not meet McNair until October 29, 2005, almost eight months *after* the Faulk party; and (3) Lake claimed he gave McNair a New Era business card at the Faulk party, but New Era was not formed until November 2005, over eight months after the party.

¹¹ The COI did find that Lake was credible in the information he provided with regard to the efforts to establish the sports agency and the benefits he provided to ██████ and ██████ family. See Infractions Report at p. 7. However, credibility as to those issues does not automatically establish credibility with regard to Lake's allegations against McNair. As explained in McNair's and USC's Responses, Lake blamed McNair for not having signed ██████. See McNair Response at p. 1-4, USC Response at pp. 1-30 to 1-31. Specifically, Lake made the completely false and unsubstantiated allegation that McNair accepted \$50,000 from a different agent for delivering ██████ to the agent's firm. No one disputed that Lake had a motive to damage McNair. However, there is no evidence in the Infractions Report that the COI even considered Lake's motive in determining that Lake was credible in his report of the January 8, 2006, call.

However, instead of acknowledging that Lake was not credible or remaining silent on the nonfindings, as is customary, the COI actually attacked McNair's credibility with respect to the two unethical conduct allegations *that he successfully defended*. In other words, the enforcement staff failed to carry the burden of proof on Allegations 1-b-1 and 1-b-2 (Faulk party allegations), but rather than detailing the problems with Lake's credibility and the staff's case in explaining why it declined to make the findings, *the COI attacked McNair's defense*.

The COI's credibility analysis is upside down and internally inconsistent. The COI may not rule in favor of McNair on Allegations 1-b-1 and 1-b-2 – and in doing so, rule against Lake – but then turn around and use McNair's successful defense as a basis for its finding that Lake is more credible than McNair on Allegation 1-b-3 (January 8 call). To do so turns analytical reasoning on its head.

The obvious purpose of this exercise in sophistry was to create the illusion that Lake was credible and McNair was not, and thereby bolster the only finding the COI made against McNair, i.e., the January 8, 2006 call. However, Lake was not credible with regard to the Faulk party allegations. If he was, the COI would have made findings relating to those allegations. The COI's credibility determinations against McNair relating to those nonfindings are prejudicial, procedurally improper, intellectually dishonest and should be set aside.

2. **False Statement About [REDACTED] Assisting Todd McNair With His Record Label**

The COI went to great lengths to discount McNair's report that [REDACTED] a USC student, accompanied him to San Diego for the Marshall Faulk birthday party in March 2005. See

Infractions Report at pp. 24-25. However, in doing so the COI made a demonstrably false statement. Specifically, the COI said:

According to [McNair], [REDACTED] was a tutor in the athletics department and he contemplated hiring her to assist him in "starting an independent record label." [Note: *No such enterprise was ever started.*]¹²

Infractions Report at p. 24 (emphasis added).

The obvious implication of the COI's statement is that McNair made up the story that he met [REDACTED] at USC and invited her to accompany him to the Faulk party because he was thinking about hiring her to help with his record label. The COI made it appear that McNair was not credible because it said *no record label was ever started*. In other words, if McNair never started a record label, it is not credible that he invited [REDACTED] to the Faulk party to discuss her helping with the record label. As detailed below, there is substantial credible and undisputed evidence in the record that McNair did start a record label and that [REDACTED] did a significant amount of work for the label.

First, it was not just "according to McNair" that [REDACTED] was a tutor in the athletics department, it was an undisputed fact. [REDACTED] herself testified that she tutored USC student-athletes in the basement of Heritage Hall.¹³ See [REDACTED] Transcript at pp. 2-3, attached to the University's Response to the Notice of Allegations as Exhibit 22, attached hereto as Exhibit 3. There is absolutely no evidence to dispute that [REDACTED] was a tutor and it is misleading to suggestively frame the testimony as if McNair made it up.

¹² The COI did not cite one piece of evidence for its conclusion that McNair never started an independent record label.

¹³ [REDACTED] being a tutor was relevant because it explained how she and McNair met. They worked in the same building.

Second, the COI is incorrect when it says that no record label was ever started. The record is replete with evidence that McNair did start a record label and that ██████ assisted him.

Chairman Dee: What was the purpose of having ██████ go with you [to the Faulk party]?

Mr. McNair: Well, I had – at that time I had an idea on starting an independent record label, and at the time she was one of the people that I had an idea that I wanted to work for me.

Hearing Transcript at p. 515.

Later in the hearing, McNair described in detail the circumstances that led him to take ██████ to the Faulk party and her working with him.

- He met ██████ in the football offices in the fall of 2004 when she helped a USC football student–athlete and his father deliver a home cooked meal to the football coaches. Hearing Transcript at p. 540.
- He learned that she had done promotion and publicity work for an entertainment company in Los Angeles. Hearing Transcript at pp. 540-41.
- He occasionally saw ██████ in Heritage Hall during the winter of 2004-05 but he was not working on forming his record label at that time because he was busy preparing for the national championship game and then he was on the road recruiting. Hearing Transcript at p. 541.
- Going to the Faulk party was the first thing they did together. Hearing Transcript at p. 541.
- Following the Faulk party, McNair decided to hire ██████ and they started communicating much more frequently. Hearing Transcript at p. 542.

McNair's testimony about starting a record label even provoked a lively and lengthy discussion between the COI and USC about whether USC had a policy prohibiting moonlighting and whether California law allows an employer to prohibit moonlighting. See Hearing Transcript at pp. 547-553. Some of the questions indicated the COI was somewhat incredulous that USC did not have a policy. It is curious the COI would debate California's moonlighting law with USC but then find that McNair was not moonlighting.

Testimony was even entered into the record that former head coach Pete Carroll knew about McNair's record label.

Mr. Tompsett: Chairman Dee, I just wanted to add it is my understanding that Coach Carroll was fully aware of Todd's record label and that he was working on that.

Chairman Dee: Were you, Mr. Garrett? Did you know about this record label and production company?

Mr. Garrett: No, I did not know about it. I understand that Pete Carroll did. I think Pete's idea is as long as he is performing his job adequately, then it was fine with him.¹⁴

Hearing Transcript at p. 553.

Finally, [REDACTED] reported detailed information during her interview about the record label and how long she worked with McNair. She said the name of the label was Blakout Records and that she worked for the label for about three and a half years. See [REDACTED] Transcript at pp. 10-11, attached to the University's Response to the Notice of Allegations as Exhibit 22, attached hereto as Exhibit 4.

¹⁴ Coach Carroll had been excused from the hearing prior to this issue being discussed and, therefore, was not present to answer the question himself.

Thus, there was overwhelming competent evidence that McNair did start a record label and that he hired ██████ to assist him. This information was relevant to McNair's credibility because it explained why ██████ accompanied him to the Faulk party. Even though there was no evidence refuting that McNair started a record label and that ██████ helped him, the COI ruled that "no such enterprise was ever started" and used that finding to impeach McNair's credibility. The COI's finding is clearly contrary to the evidence.

3. **The COI Used A Straw Man Argument To Question McNair's Credibility On Whether He Ever Was Introduced To Lake And It Also Applied The Wrong Standard In Finding That McNair Was Not Credible**

The COI also questioned McNair's credibility because it believed McNair's actor friend, Faison Love, likely introduced McNair to Lake at the club where the photograph was taken. Infractions Report at p. 25. The COI said that given the fact that Love and Lake knew each other, "the Committee finds it *unlikely* that [McNair] would have posed in a photograph, which included [Lake] and [Love] and not, at a minimum, have been introduced to [Lake] by [Love]." Infractions Report at p. 25 (emphasis added).

The implication is that McNair categorically denied ever being introduced to Lake despite the fact that there is a photograph of them in a nightclub. However, McNair never denied that he may have been introduced to Lake; he said he had not met Lake to the best of his knowledge. Thus, the issue is not whether it is unlikely that McNair posed in a photograph that included Lake but was not introduced to Lake. The issue is whether McNair may have been introduced to Lake but did not recall the introduction nearly a year later when he was first interviewed by the enforcement staff. Set forth below is the relevant testimony.

McNair was asked at his first interview if he had ever met Lake.

Ms. Cretors: Can you tell me if you ever met Michael Michaels?

Mr. McNair: Yeah.

Ms. Cretors: Have you ever spoken with Michael Michaels?

Mr. McNair: Not to my knowledge.

Ms. Cretors: Have you ever met Lloyd Lake?

Mr. McNair: *Not to my knowledge.*

Ms. Cretors: So you might have but you're not sure and you might not have. Is that to your knowledge, you never have met them, you don't know them or you're not sure whether you have?

Mr. McNair: *Not to my knowledge.* I'll come in here with my nephew and some of his old friends and I introduce you to them. As my nephew Marcus would say, "Hey Marcus, that's Pete." What's your name again?

Ms. Cretors: Angie.

Mr. McNair: "That's Pete. That's Angie. Bobby, that's Angie and Steve. That's Andrew, so hey, hey, hey." All of 'em then they'll go about their way, so not to my knowledge. If I asked you a month later, have you met Pete or Bobby or, your, I don't know. I mean really, I don't, I don't think I have, *so not to my knowledge.*

Ms. Cretors: Has [REDACTED] ever . . .

Ms. Ragsdale: And certainly it sounds like you certainly don't recall meeting them.

Mr. McNair: *Don't recall ever meeting them.*

Ms. Ragsdale: Okay. What about speaking with him?

Mr. McNair: No.

Ms. Cretors: With either Lake or Michaels?

Mr. McNair: No.

McNair Transcript, Sept. 19, 2006, at pp. 26-27 (emphasis added).

At his second interview, which was conducted a year and a half later, the staff asked McNair again about Lake and then showed him the photograph.

Mr. Johanningmeier: When you were asked, when you were asked during the interview back when we met.

Mr. McNair: Uh huh.

Mr. Johanningmeier: *You denied that you ever knew or met Lloyd Lake. Is that correct?*

Mr. McNair: *You asked me did I meet him and I think I told you not to my knowledge.*

Mr. Johanningmeier: That's correct. We're gonna go through this.

Mr. Jones: That's what he said though.

Mr. McNair Uh huh.

McNair Transcript, Feb. 15, 2008, at p. 31 (emphasis added).

This is what McNair said about the photograph.

Mr. Johanningmeier: Would you look at this photograph right here.

Mr. Jones: Thought we were done.

Mr. Johanningmeier: Do you know who these individuals are?

Mr. McNair: That's Faison. I don't know who they are. That's (inaudible), I guess.

Mr. Johanningmeier: So you don't know the other two individuals?

Mr. McNair: Naw, is it supposed to be Lake? Is one of them supposed to be Lake?

Mr. Johanningmeier: That's what we're asking you.

Mr. McNair: I don't know.

McNair Transcript, Feb. 15, 2008, at pp. 36-37.

* * *

Ms. Myers: And you don't recall – what do you recall about this photograph?

Mr. McNair: I don't recall anything about the photograph. I take a ton of photographs, especially when I am with Faison, and especially in a club, we can't get 20

feet without people kind of mobbing him and Big Worming and all that stuff.¹⁵

If we walked in this room from the door to where you are sitting, we would be stopped fifteen times. We have taken so many pictures, especially with him, you know. I just couldn't remember that.

Ms. Myers: When did you first see this picture?

Mr. McNair: I believe my second interview. I believe my second interview with the enforcement staff.

Ms. Myers: Did you recognize – other than Mr. Love, did you recognize who was in the picture?

Mr. McNair: No, I didn't recognize them, but I could tell by the way they were leading the questions and the way they presented it was probably, you know, the two individuals in question.

Ms. Myers: So, Mr. Lake didn't look familiar to you when you saw the picture?

Mr. McNair: No, not at all.

Hearing Transcript at pp. 623-24.

Thus, McNair consistently stated that he had not met Lake *to the best of his knowledge*. In other words, he never denied being introduced to Lake; he simply said he did not recall meeting him. Nonetheless, the COI set up a classic straw man argument as a basis to question McNair's credibility. The COI misrepresented McNair's testimony to make it sound like McNair categorically denied ever being introduced to Lake. Then the COI questioned the credibility of that position without ever refuting McNair's actual position, i.e., that he may have been introduced to Lake but did not recall.

If the COI is going to question McNair's credibility, it should at least get the facts straight and frame the issue accurately according to the testimony. In other words, state whether it is credible

¹⁵ Big Worm is the name of a character Love played in a movie.

that McNair met a friend of a friend after midnight at a club and did not recall the incident a year later.¹⁶ That is the issue. Not whether it is unlikely that McNair and Lake were in a photograph but were not introduced.

The COI also failed to explain in its credibility finding that Lake never described actually being introduced to McNair on the night the photograph was taken.¹⁷ In fact, the staff never asked Lake to describe what interaction, *if any*, that he had with McNair the night the photograph was taken. Lake never said what happened between him and McNair at the club where the photograph was taken. He never said whether he and McNair talked to each other, what they talked about or how long he was around McNair that night. For all the COI knows, Lake and McNair were introduced briefly immediately before the photograph was taken and they went separate ways immediately after it was taken. There is no evidence in the record to conclude that did not happen.

In fact, Lake had difficulty recalling McNair's name in his interview with the enforcement staff.

Mr. Johanningmeier: Did, did you socialize at all with [REDACTED]?

Mr. Lake: Yeah, you mean as far as a club, go out and hang out?

Mr. Johanningmeier: Yeah.

Mr. Lake: Yeah.

¹⁶ It is perfectly understandable that McNair may have met Lake and not recalled it almost a year later when he was interviewed. First, it was after midnight and it had been a long day for McNair. He had been up since early that morning and had helped coach USC in a conference game against Washington State earlier that day. He also had enjoyed a few drinks while club hopping with his friend. Second, McNair, a nine year veteran of the NFL and an assistant coach with one of the most successful college football programs in the country, had nothing in common with Lake, an unemployed felon recently released from prison. It is hard to imagine what they would have talked about. The one thing we know that they did not talk about is Lake's agency agreement with [REDACTED] and his provision of money to [REDACTED]. Lake himself said that was done so secretly that it reminded him of a drug deal. See McNair Response at p. 1-11.

¹⁷ Lake claimed he first met McNair in March 2005 during the Faulk party weekend. The Committee did not make any finding supporting this claim. That should be another strike against Lake's credibility.

Mr. Johanningmeier: Tell us about that. This is when he's at USC now?

* * *

Mr. Lake: . . . what, you know, we went out to a couple of clubs. We went to Faison Love, T-Mac, his running back coach, uh, *I don't even know the name of the dude.*

Mr. Johanningmeier: [REDACTED] running back coach?

Mr. Lake: Yeah.

Mr. Johanningmeier: [REDACTED]?

Ms. Cretors: T-Mac?

Mr. Lake: Yeah.

Ms. Cretors: Do you know his full name?

Mr. Lake: Uh, McNair, I think.

Mr. Johanningmeier: But did he call him T-Mac?

Mr. Lake: Yeah.

Mr. Johanningmeier: And would Todd McNair make –

Mr. Lake: Yeah, that's it. McNair. Yeah.

Mr. Johanningmeier: Okay. Okay. So, so he was with you when you socialized?

Mr. Lake: One time we went to the club. I got a picture.

Lake Transcript at pp. 15-16 (emphasis added).

Finally, the COI used an erroneously low standard in determining that McNair was not credible with regard to whether he was introduced to Lake. The COI did not find that McNair met Lake under circumstances that would have caused McNair never to forget Lake's face and name. The COI did not find that the introduction, assuming it occurred, would have been so memorable that McNair could not have forgotten it. Instead, the COI found that it is "unlikely" that McNair

would have posed for a photograph and not have been introduced to Lake.¹⁸ Infractions Report at p. 25.

A finding that an event is merely "unlikely" is insufficient to support a finding that there are grave doubts concerning an individual's credibility. Merriam-Webster's Online Dictionary defines unlikely as not likely. Something may be not likely but still take place nonetheless. But when describing something as not credible, we say it is unbelievable, inconceivable, unimaginable or unthinkable. We do not say something is not credible merely because it is not likely.

But that is exactly the misguided approach the COI has taken in finding that McNair is not credible because "the Committee finds it unlikely" that he posed for a photograph in which Lake appears but was not introduced to Lake. Thus, in addition to misframing the issue and using a straw man argument to support its adverse credibility finding, the COI also used the wrong standard. If it had framed the issue correctly and applied the correct standard, the COI would have been required to find that McNair's lack of recall of meeting Lake is unbelievable, inconceivable, unimaginable or unthinkable – not merely unlikely - before it destroyed his character and reputation in a public infractions report.

4. The COI Mischaracterized And Misstated The Evidence Concerning The Events On October 29, 2005 And It Also Applied The Wrong Standard In Finding That McNair Was Not Credible

The COI again took aim at McNair's credibility when it said it believed Lake's explanation that McNair knew Lake was with [REDACTED] on the night of October 29, 2005, that McNair phoned Lake

¹⁸ As explained above, the issue is not whether McNair and Lake were introduced, the issue is whether it is credible that McNair did not recall the introduction.

to locate ██████ and that McNair eventually met Lake, ██████ and then prospective student-athlete ██████ at the club. Infractions Report at p. 25. The COI said that version of events was more credible than McNair's explanation that he called Lake's phone because ██████ had given him that number to call and he was trying to contact ██████ to get him to retrieve ██████ from his hotel room, and that he went to a club looking for ██████ and ██████ but did not see them, even though McNair stopped calling ██████ at that point. *Id.* As explained below, the COI's finding contains half truths and false statements.

First, the COI's statement that "[McNair] said that he went to a club looking for ██████ and ██████" is not correct. McNair did not say that. This is what he said.

Mr. McNair: . . . Now, ██████ was the most important recruit in the country by far.

I remember that night it was hard for me to get ahold of ██████ and, you know, to really coordinate what he was going to do with ██████. Somewhere along the night I found out, it was getting later in the evening, and I found out that ██████ had not picked ██████ up yet.

So, I am now frantically calling ██████ to have him go pick up ██████ and I really can't get ██████. I talked to him at some point in time during the night, and he is having trouble with his phone. His phone is dying or something.

He gave me another number to call him. You know, he said if you can't reach me on this number, call me on this number. He gave me another number for me to call him on. That is not uncommon.

Like with these kids, they live on their phone. If your phone is dying, you know, "My phone is about to die, call me on this number or call me on this phone." So, now I am under the realization I have the number one recruit in the country who is sitting in the hotel and he is not being entertained.

So, I am calling ██████ and he is not responding to me. I can't get him. I get him on the phone. I might have reached him somewhere in there, and he says he is going to go get him.

Well, later, you have got to get down there and pick him up. Now, it is later in the evening, 11:00 or 11:30, or so, I guess, and it is really him, you know, I am trying to call him.

"You have to come pick this kid up or go pick this kid up." You know, after he picked him up, I am sure I called him again to make sure that, "Do you have him, did you pick him up?" As I told you, when you have a host, what are your plans? You ask your host what are your plans for the evening?

Well, it is a basketball party at UCLA, and we might go to this spot or that spot. So, I get some kind of idea where you are at. If anything happens, I will know at least where you said, you know, a good chance where you would be.

So, my recollection of the evening was I had the best player in the country here at USC. He is being neglected by his host, and I am trying to call his host and he is not responding to me.

I have got two numbers and I am calling the phone for him to go pick him up. *I believe once he picked him up and I was sure that he had him, and they were on their way out or whatever, I don't think I called after that.*

* * *

Ms. Myers: Mr. McNair, were you at the club with [REDACTED] later in the evening?

Mr. McNair: I did not see [REDACTED] at the club that I went to.

Ms. Myers: You were at a club later that evening, though?

Mr. McNair: *I was at several clubs that evening.*

Ms. Myers: Can you tell us which ones?

Mr. McNair: I really don't recall. I remember being at Pearl. I think Pearl was the name of one of them, but I really don't recall.

* * *

Ms. Potuto: . . . I just have a couple of other questions. That is, you are really concerned that [REDACTED] is messing up and he is not doing what he is supposed to do with [REDACTED]. You called him a couple of times, and I believe you said it was 10:00 and 10:30.

[REDACTED] didn't actually pick him up until actually midnight. So, how do you know that [REDACTED] ever picked him up since the last call I think is 10:30, 10:37 or 10:57, maybe?

Mr. McNair: I made a number of calls. I believe I made a call at 11:00. My lawyer is looking for the record now. I made a number of calls right just before midnight, at like 11:55, two calls at 11:56, and I think it was four calls total.

Ms. Potuto: [REDACTED] who has not been doing much hosting and has messed up earlier in the evening, finally picks up the prospect.

Do you call after that to be sure that he is now doing what he is supposed to be doing, or do you assume once he gets him that everything is copacetic?

Mr. McNair: I believe that night he gave me the idea, like I said before, a couple of options where they might go. *I might have stopped by, you know, might have tried to drop in to make sure where they were, or something, in the Hollywood aspect of it. I wouldn't go down to campus and go –*

Ms. Potuto: To the club where they were at?

Mr. McNair: He gave me a couple of options where they might be. *I believe I could have stopped by to check on them, but I didn't call them after that. I knew that he had him and they are on their own then.*

Ms. Potuto: *You think you may have stopped calling, and then went to an in-person check, or attempted an in-person check?*

Mr. McNair: *I could have. You know, I am speculating there.*

* * *

Ms. Myers: Coach McNair, correct me if I'm wrong. I think I heard two different things today. One was that you did not see [REDACTED] and [REDACTED] at the club, and then at another point you said you might have stopped by just to make sure that they were there.

If you have no memory, I could understand that. But I think the record has two different things at this moment.

Mr. McNair: *No, I said I could very well have stopped by to see if they were there, but I didn't see them.*

Ms. Myers: You could have stopped by but you didn't see them?

Chairman Dee: He went to the club.

Mr. McNair: Yes, ma'am. I had some idea where they might be. As the staff said earlier, they think that they went out, came back and went out again, and

you know if they had given me any idea where they might be, *I could very well have stopped by there and then I would be there.*

But this is, you know, a very long time ago and night life, and I can't really recall with any accuracy.

* * *

Ms. Conboy: I might have missed it, but what club did [REDACTED] take [REDACTED] to that evening?

Mr. McNair: Ma'am, I don't recall that.

Ms. Conboy: Do you recall what club you stopped by to check to see if they were there, because you had an idea of where they might be going?

Mr. McNair: I don't recall that either. I recall vaguely that we were at Pearl, but I can't recall that.

Ms. Conboy: Coach, is it common for members of the athletic staff and coaches to socialize at the same clubs that student-athletes go to in Los Angeles?

Mr. McNair: No, it is not common, and I didn't say I was socializing with them.

Ms. Conboy: No, but you said you had been to several clubs that evening. I am just wondering if there is any kind of a policy that you know of that would prohibit coaches and student-athletes and students in general from being at the same types of establishments.

Mr. McNair: I don't know if there is any policy, because some of our student-athletes are over the age of 21. Like I said, I don't make it a habit of socializing with student-athletes.

Hearing Transcript at pp. 409-11, 430, 436-38, 451-52 and 453-54 (emphasis added).

Thus, McNair never said that he went to a club looking for [REDACTED] and [REDACTED]. He said that he stopped calling [REDACTED] when he learned that [REDACTED] had picked up [REDACTED] from the hotel and that he *could have* stopped at a club to check in on them but he *does not recall*. That is what McNair said and it is materially different from the COI's false statement that McNair said he "went . . . looking for [REDACTED] and [REDACTED] [but] [h]e claimed he did not see them in the club, even though

the phone calls stopped at that point," which the COI said was "[y]et another example of [McNair's] lack of credibility." Infractions Report at p. 25. The phone calls stopped because McNair knew that [REDACTED] had picked up [REDACTED], not because he went looking for them and found them. Thus, the COI based its adverse credibility finding on a false and incorrect recitation of McNair's testimony.

Moreover, the COI also mischaracterized Lake's testimony. The COI said it believed Lake's statement that McNair called him to locate [REDACTED] and then eventually met him, [REDACTED] and [REDACTED] at the club. Infractions Report at p.25. However, that is a very misleading characterization of Lake's testimony. Lake was all over the map regarding the calls to his phone on the night of October 29, 2005. In fact, Lake had no independent recollection of the calls until the NCAA investigators told him about them and even then he seemed surprised. The relevant testimony is below.

Mr. Johanningmeier: What club did you go to?

Mr. Lake: I don't know the name of it.

Mr. Johanningmeier: Where was it located?

Mr. Lake: I wanna say Hollywood but I'm not sure.

Mr. Johanningmeier: And, and this is the time you said McNair –

Mr. Lake: Yeah.

Mr. Johanningmeier: How does he show up or how does, does he go with you? Just help us understand how this comes about?

Mr. Lake: *I guess he called [REDACTED] and [REDACTED] told him where we were going. He came there. He just met us down there. He didn't ride with us.*

* * *

Mr. Johanningmeier: Let me go through this thing 'cause this might be in the same area. All right, I wanna, I, I wanna ask you, uh, on record, if in, uh, October 2005 was 619/726-9713 your telephone number?

Mr. Lake: Yes.

Mr. Johanningmeier: Okay. And the reason I ask you this is that in checking, uh, telephone records at USC, there shows a call on October 29th at 11:39 p.m. –

Mr. Lake: Uh-huh.

Mr. Johanningmeier: -- to Todd McNair for a minute, another call at 11:52 p.m. for a minute, and another one on the same October 29th at 11:56 for one minute.

Mr. Lake: *They called me?*

Mr. Johanningmeier: There was calls, uh, that call was made to your telephone number, correct.

Mr. Lake: Yes.

Mr. Johanningmeier: From Todd McNair.

Mr. Lake: Yes.

Mr. Johanningmeier: Can you tell us what those calls were about?

Mr. Lake: *Shh, I don't even recall.* Uh, let me see. What was the dates on it?

Mr. Johanningmeier: October 29th.

Mr. Wong: Is that the night of, of, uh –

Mr. Lake: That's the night of that party I think.

Mr. Wong: Yeah, of, uh, Marshall Faulk's party. Was it the 29th?

Mr. Johanningmeier: That would've been March.

Ms. Cretors: That would've been March.

Mr. Wong: Oh, okay.

Mr. Lake: No, no I think that was the night, this is the night we were out.

Mr. Johanningmeier: The, is this the night you're talking about –

Mr. Lake: The club.

Mr. Johanningmeier: Right.

Mr. Lake: Yeah. That's, that's that night. That's what it's gotta be 'cause we was trying to figure out where we were.

Mr. Johanningmeier: Somebody's got a computer we can figure out real quick –

Ms. Cretors: I'm trying to see if I can –

Mr. Johanningmeier: -- if that's a Saturday.

Ms. Cretors: -- find that.

Mr. Johanningmeier: I think it might be a Saturday.

Mr. Lake: Oh.

Mr. Johanningmeier: October 29th on, uh, 2005. Do you, first of all, do you remember McNair making a call to you?

Mr. Lake: Yeah, that's why I said that's what's it gotta be. Yeah, Saturday.

Ms. Cretors: Saturday.

Mr. Lake: That was the night we went to the club I'm telling you guys about.

Mr. Johanningmeier: Okay.

Mr. Lake: Hello? (apparently answering phone) Oh, shit. Why don't, why, I'm looking for an important call for a reason.

Mr. Johanningmeier: Okay. So, so that Oct, so that October 29th, you remember the calls from McNair?

Mr. Lake: Yes.

Mr. Johanningmeier: And what would he be calling you about?

Mr. Lake: He was calling seeing what club we were at, where we were going.

Lake Transcript at pp. 26-27.

Thus, Lake's story evolved from *guessing* that McNair called ██████ to being surprised that the phone records show that McNair called his phone, to finally saying "that's what it's gotta be," i.e., McNair called him to find out what club they were going to. It is fundamentally unfair and misleading for the COI to arbitrarily choose the last version of Lake's three stories to discredit

McNair's recollection that he called Lake's phone because [REDACTED] gave him that number that to call. The record shows Lake guessed and speculated and was not sure what happened. The COI cannot rely on such equivocal and unreliable testimony to cast "grave doubt" on the credibility of McNair.

[REDACTED] also contradicts Lake's claim and the COI's conclusion that McNair joined Lake, [REDACTED] and [REDACTED] at the club. [REDACTED] said he was with [REDACTED] the entire time from when [REDACTED] picked him up at the hotel until [REDACTED] brought him back to the hotel around 2 or 3 a.m. and he did not recall seeing McNair that night. McNair Response at p. 3-7. Below are the relevant excerpts from [REDACTED] transcript.

Mr. Johanningmeier: ... and, uh, when you were in that [club], were you with [REDACTED] every minute or was he somewhere where you didn't see him?

[REDACTED] I mean for the most part, like every now and then he'll go, like, walk off and like go talk to a girl or, or something like that. But it was never like a long period of time that he, he wasn't there.

Mr. Johanningmeier: Was, was he always in your sight?

[REDACTED] Yeah, like, uh.

* * *

Mr. Johanningmeier: Was, was, was McNair at the party?

[REDACTED] Uh, I'm not, I'm not sure. Not, *not that I can recall*.

Mr. Johanningmeier: Okay. You don't recall that?

[REDACTED] Yeah.

Mr. Johanningmeier: Do you recall if any of those individuals, was Faison Love at the party?

[REDACTED] Uh, I don't, I'm not, I don't think so.

* * *

Mr. Johanningmeier: Okay. But you don't ever rem, uh, seeing any, seeing McNair that evening?

[REDACTED] I'm, I'm not recalling, I, I, like I say, I can't give you a definite answer but I, not that I, uh, I don't, *I don't think so.*

* * *

Mr. Johanningmeier: Okay. But you still, uh, from the recollection of this photograph, you don't recall any time seeing McNair and Faison Love in that club with, with those other guys (Lake and Michaels)?

[REDACTED] Hmm, I couldn't even, this, that might be the, the club picture. I don't, it's a chance.

* * *

Mr. Johanningmeier: Okay. Uh, uh, uh, would it have been possible for McNair to be in that club and you be in the club and not see each other?

[REDACTED] And not see each other? Uh, nah, pretty much it was just one big dance floor. And, now let's see, if he stood by the bar, but it was a little walkway to where the bar was at and pretty much all that was the club. I wouldn't, I'm not sure who, I remember like somebody, like, coming up to me and shaking my hand but I, I'm, I can't connect it to if it was him or not. Like I said, it could, it, it could be a possibility.

Mr. Johanningmeier: Okay.

[REDACTED] But I don't want to give you my word on it or anything.

* * *

Mr. Johanningmeier: What time did you leave from the party?

[REDACTED] I wanna say around 2, 3, 2.

Mr. Johanningmeier: In the morning?

[REDACTED] Yeah.

[REDACTED] Transcript at pp. 26, 27, 30, 47, 49 and 17-18 (emphasis added).

Thus, the NCAA investigators asked ██████ repeatedly if he saw McNair while he was with ██████ at the club and ██████ said he did not recall seeing McNair. The COI conveniently ignored ██████ testimony in choosing to believe Lake's story that McNair met him, ██████ and ██████ at the club.

Finally, even the enforcement staff acknowledged that there is no clear evidence whether ██████ and ██████ were in the same club as McNair, Love, Lake and Michaels on the night of October 29, 2005.

Ms. Myers: Am I correct that there is something in ██████ statement that he remembers the medallion that Mr. Michaels was wearing?

Mr. Johanningmeier: That is correct. Initially, ██████ could not recall Lake or Michaels, and then as he looked at the photograph, and particularly he probably remembered Michaels more than Lake because of the way he dressed.

He had a presence about him. There was a certain type of, I guess, medallion or necklace that kind of caught his eye. He remembered seeing it. He also remembered seeing Faison Love earlier in the day at a Chicken and Waffles, and had some comments made to him about attending USC. So, he recalled that.

Ms. Myers: Does that suggest that he and ██████ were at the same club with Mr. Michaels, Mr. Lake and Mr. McNair that night, and Mr. Love?

Mr. Johanningmeier: It is the best of the suggestions. *We are at the point where I am not sure anyone at this stage, with all the stories, could sort this thing out completely as to who was where at what time.*

Again, I think the best recollection might be the one that ██████ gave, because ██████ backs that up. ██████ says that he was at the club, at the first club, with ██████ He was tired.

He said ██████ basically ignored him, didn't talk to him very much. He stood in the corner by himself most of that evening. They decided there was a gathering out in the parking lot. He was like, "Hey, I want to go home."

He said he knew ██████ had "family or friends," he wanted to go do some things with, and he asked to be taken home. ██████, his friend told him apparently, because ██████ said he remembers absolutely nothing

about [REDACTED] or that night. But according to [REDACTED] friend, they went to two clubs that night, and probably makes the most sense that that is the one where Lake, Michaels, McNair, Faison, Love, [REDACTED], etc., were at. *That is the best we can do from the speculation standpoint.*

Ms. Myers: Mr. McNair, is it your testimony that you were not at any – you did not see [REDACTED] or [REDACTED] at any clubs that night on October 29th, right? I guess this would have been October 30th, right, because it is past midnight?

Chairman Dee: It was Halloween.

Mr. McNair: Yes, I don't remember seeing [REDACTED] or [REDACTED]

* * *

Mr. King: I wanted to follow-up on Mr. Johannigmeier's description of [REDACTED] testimony. I don't have the page cites and I will try to get them. But as I recall, [REDACTED] said that he and [REDACTED] went to this club and not that [REDACTED] blew him off and he was in a club, that they kind of stayed together at the club, and he was very tired and he said, "[REDACTED], take me on home."

I think he said he got back to the hotel, I don't know, it was late, 2:30 or 3:00, something like that. My understanding is that they were together at the club based on his testimony.

Mr. Johannigmeier said, and maybe I am forgetting a witness, was that [REDACTED] friend said they went to a second club. If I can ask the question of them through you, may I ask who that is in reference to?

Chairman Dee: Was there a statement made by the staff that they went to a second club that night and with whom?

Mr. Johannigmeier: We believe it is in [REDACTED] interview with the staff. Again, for the committee, [REDACTED] refused to allow us to record that conversation, so we are going to have to probably – we have the University's version and our version.

We sent our version to ask [REDACTED] like we did Mr. Fritz, to review it and make any changes, acknowledge it, and we are still waiting to get it back.

Chairman Dee: But your notes in that said they went to a second facility? You are going to read that to us? You are correct, that is what they said, but were your notes different than that?

Mr. King: I don't remember from the interview summary. When he said his friend reported it, I just wondered, I didn't recall a friend being interviewed or saying that. I am on page 18 of the [REDACTED] interview. He said he and [REDACTED] were together the entire time of the party.

Mr. Tompsett: If I may add, my recollection is that [REDACTED] said he was taken back to the hotel, I am sure Rich will correct me if I misstate this, somewhere around 3:00 am, and the closing time for bars in L.A. is 2:00.

So, if [REDACTED] took [REDACTED] back after 2:00, they more than likely were not back out to another club.

* * *

Chairman Dee: Some of the statements that have been made here today present something that is sort of unrealistic. That is, any group of people that are fettered together for the entire night.

Mr. King: Exactly.

Chairman Dee: Well, we don't remember. Somebody could have gone to the restroom. Somebody would have seen another friend. They could have gone off to another corner.

So, the mere fact that something wasn't seen at a particular point in time doesn't mean that it didn't happen. It just means that person didn't observe it. So, we have to take that for what it is worth.

Infractions Report at pp. 622-23, 624-25 and 628-29.

The COI may choose to believe one version over another. However, McNair's recollection that he was trying to contact [REDACTED] to retrieve [REDACTED] that [REDACTED] gave him an alternative number to call because [REDACTED] phone was dying,¹⁹ that he eventually contacted [REDACTED] but stopped calling him around midnight when he confirmed [REDACTED] had picked [REDACTED] up, and did not see [REDACTED] and [REDACTED] later at the club is hardly evidence that McNair was untruthful, and it is not so contrary to the rest of the evidence that the COI may single out McNair and say he lacks credibility. The

¹⁹ Who among us has never been asked to call a friend on an alternative number?

COI has to conclude more than that McNair's version is merely less likely than Lake's version before it publicly denounces McNair as not credible. It has to find that McNair made statements that are unbelievable, inconceivable, unimaginable or unthinkable. The COI also has an obligation to accurately recite all of the relevant evidence and not base its findings on half truths and false statements.

However, in the end it really does not matter whether they were all in the same club at the same time because no one – including Lake – has ever suggested or alleged that McNair was put on notice that night that Lake and ██████ were involved in an impermissible arrangement. There is absolutely no evidence that McNair was involved in or learned of any NCAA violations on the night the photograph was taken. Thus, the COI's analysis of the events of October 29, 2005, is not only fraught with half truths and false statements, it is a red herring.

5. The COI's Credibility Findings Involving The Events Of October 29, 2005, Are Contradictory And Internally Inconsistent

The COI's findings concerning what occurred between McNair and Lake on October 29, 2005, are also contradictory and internally inconsistent. Specifically, the COI said it believed Lake's explanation that McNair called him because McNair knew he was with ██████, McNair wanted to locate ██████ and that McNair later joined him, ██████ and ██████ at the club. Infractions Report at p. 25. The COI's finding presupposes that McNair knew Lake, otherwise he would not have called Lake to locate ██████²⁰ However, the COI also found it likely that McNair's friend, Faison Love, *introduced* Lake to McNair at the club *later that night*. *Id.*

²⁰ The COI never explained when and where McNair met Lake prior to calling him on October 29, 2005, to locate ██████. As explained above in Section II.B.I at p. 16, the COI did not find evidence sufficient to support Lake's claim that he met McNair in San Diego during the Faulk birthday party weekend. Thus, there is no finding to provide a

The COI's contradictory findings beg the question: If McNair was not introduced to Lake until he got to the club, how did McNair know to call Lake earlier in the evening to locate [REDACTED]? Certainly McNair did not call someone that he had not yet met in order to find his star player. That makes no sense. But that is exactly what the COI concluded in order to find that McNair lacked credibility. McNair's explanation that [REDACTED] gave him Lake's number because [REDACTED] phone was dying makes more sense than the COI's conclusion that McNair called Lake to find [REDACTED]

The point is that the COI cannot have it both ways. If McNair knew Lake and called him to locate [REDACTED] then there would be no need for Love to introduce Lake to McNair at the club. Love would not introduce two people who already know each other. On the other hand, if Love introduced Lake to McNair at the club, then McNair certainly did not call Lake earlier that evening to locate [REDACTED]. The COI said both of these events occurred and used them to publicly destroy McNair's credibility. The COI may not base its findings on mutually inconsistent and contradictory events.

foundation for the COI's conclusion that McNair knew Lake and, therefore, would have called him to locate [REDACTED] on October 29, 2005.

C. The COI Improperly Relied On Lloyd Lake's Surreptitious Audio Tapes To Conclude That Lake Was Credible

In concluding that Lake was credible, the COI relied on surreptitious audio tapes that Lake made.

[Lake] went to extraordinary lengths to document his version of the events. In an interview with the enforcement staff, a portion of which was provided to the Committee in the Case Summary, he reported that he taped telephone conversations, which he said would corroborate his account of what transpired in the attempted founding of the agency and the associated provision of benefits to ██████ and his family²¹. On the advice of NCAA counsel, the enforcement staff did not present the tapes to the Committee.

Infractions Report at p. 7, f.n.1.

It is obvious the tapes influenced the COI's decision to conclude Lake is credible even though the COI never even listened to the tapes. That is clear error.

NCAA Bylaw 32.8.8.2 (Basis of Findings) states:

The Committee on Infractions shall base its findings on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.

Because the tapes were never presented to the COI, the COI is precluded from basing any of its findings on the tapes. Thus, the COI erroneously relied on the tapes to conclude that Lake was credible.

Moreover, the COI's reference to "taped telephone conversations, which [Lake] said would corroborate his account of what transpired . . . ," wrongfully suggests that there is a tape supporting the COI's finding that Lake called McNair on January 8, 2006 and asked McNair to

²¹ The COI is referring to an alleged conversation between ██████ and agent David Caravantes, that Lake claimed he recorded. See Case Summary at pp. 1-7 to 1-8, attached as Exhibit 5. Not only did the COI not listen to the alleged tape, but the enforcement staff never made the tape available to USC and McNair so they could listen to it and confirm whether Lake's description was credible.

convince ██████ to adhere to the agency agreement or reimburse Lake and Michaels for money provided to ██████ and ██████ family. There is no such tape and McNair's attorney specifically told the COI that during the hearing.

Mr. Tompsett: Yes, I would like to respond to that question on behalf of my client. I firmly believe that we have included and discussed in our response, and that the record before you, before the Committee, contains all relevant and probative inculpatory and exculpatory evidence concerning the allegations directed at my client.

I will take that a step further, if I may.

Ms. Potuto: Sure.

Mr. Tompsett: Because this is something that occurred to me last night. I don't believe that I am violating California law in what I am about to say.²² The staff, as I understand it, they said that Lake made his surreptitious recordings.

Let me back up to be clear. What I have been given access to, what we have been given access to. We have been given access to the two surreptitious recordings that Lloyd Lake made in which he had discussions with Lamar Griffin. I think that is it. I am speaking as to those only.

The staff said that Lake made his recordings because he knew his credibility was going to be questioned. And concerning the allegations directed at my client, that's right, we are questioning his credibility.

The point I want to make is this: I am not aware of any surreptitious recording that implicates Todd McNair in any of the allegations directed at him. I would suggest to you that if Todd knew about the impermissible benefits that Lake was giving ██████ like Lake claims, there would be a recording.

But there isn't any recording implicating Todd. Certainly nothing that I have been made aware of. I have listened to the two that we have been given access to, and my analysis of those recordings is they are not particularly relevant to these allegations and they don't implicate Todd.

Ms. Potuto: Are they just relevant to the allegations in which Coach McNair is implicated or relevant to the allegations in total that relate to football?

²² The COI and USC had discussed whether California law prohibited the COI from using Lake's surreptitious recordings to adjudicate the allegations. See Hearing Transcript at p. 156 et seq.

Mr. Tompsett: I have not been retained to address any allegations other than the allegations in 1-b and 3. I have not analyzed the evidence concerning allegations other than those, and, therefore, I have no position.

It would be improper for me to take a position concerning the relevance of those tapes to allegations that are not directed at my client.

Infractions Report at pp. 535-37 (emphasis added).

Thus, the COI knew that the tapes did not implicate McNair in any form or fashion. The COI should have made that clear in the Infractions Report rather than suggesting that the tapes may corroborate Lake's story about the two and half minute phone call on January 8, 2006. Finally, that Lake recorded conversations—none of which involved or even referenced McNair—has nothing to do with McNair's credibility, nor does it make Lake's allegations against McNair credible.

D. McNair Was Denied Fair Process Because The Enforcement Staff Excluded USC From Participating In The Interviews Of Lake And His Family.

As explained in USC's appeal of Finding B-1-b, the enforcement staff unilaterally excluded USC from the interviews of Lake and his family. USC was McNair's employer at the time and as such, was McNair's only representative for cross-examining witnesses prior to the issuance of the Notice of Allegation.²³ By excluding USC from Lake's interview, the staff denied McNair the opportunity to have his institution question Lake and test his credibility when it would be most effective, i.e., contemporaneous with the first time that Lake was questioned about the matters that ultimately became the basis of the allegations against McNair.

²³ NCAA enforcement procedures generally do not permit an individual staff member or his counsel to participate in or conduct interviews of other witnesses until after an NOA is issued. However, institutional representatives and legal counsel often are permitted to participate in interviews conducted by the staff.

E. The COI Had Impermissible *Ex Parte* Communications With The Enforcement Staff About The Infractions Report

On June 4, 2010, almost a week before the Infractions Report was released, McNair's attorney, Scott Tompsett, contacted NCAA director of enforcement Ameen Najjar about the status of the report. Najjar informed Tompsett that he did not know when the report would be released but he said the COI had shared its draft report with the enforcement staff so the staff could inform the COI of any "factual errors" in the report. Najjar did not discuss what, if any, feedback the staff provided to the COI concerning the draft report.

McNair was not involved with the *ex parte* communications between the COI and the staff nor was he ever informed that the COI would share its draft report with the staff so the staff could correct "factual errors."²⁴ As explained below, McNair believes any *ex parte* communications the COI had with the staff are improper and create a rebuttable presumption of prejudice.

NCAA enforcement procedures do not authorize the COI to communicate *ex parte* with the staff about its decision. In fact, the enforcement procedures expressly state that the COI shall make its determinations of fact and violation in private and that if the COI requests new information from any party, all parties shall be afforded an opportunity to respond.

Bylaw 32.8.8 (Posthearing Committee Deliberations) states:

After all presentations have been made and the hearing has been concluded, the Committee on Infractions shall excuse all others from the hearing, and the Committee on Infractions shall make its determinations of fact and violation in private.

²⁴ The staff's explanation does not justify or excuse the conduct. First, if that was the COI's intent, it should have done as many courts do with a tentative decision; share it with *all* parties and request comments. Second, the COI did not accomplish its goal because, as explained above, the findings against McNair contain factual errors and mischaracterizations.

Bylaw 32.8.8.1 (Requests for New Information) states:

In arriving at its determinations, the Committee on Infractions may request additional information from any source, including institution, the enforcement staff or an involved individual. In the event that new information is requested from the institution, the enforcement staff or an involved individual to assist the Committee on Infractions, all parties will be afforded an opportunity to respond at the time such information is provided to the Committee on Infractions.

Indeed, statements made by the COI at the end of the discussion of McNair's allegations led McNair to believe that the COI would give him an opportunity to participate in any additional discussion that the COI might have with either the staff or USC about the allegations directed at him.

Chairman Dee: I'm going to read some of the closing instructions. It will be repeated at the end of the entire hearing, but these are for the benefit of Coach McNair and Mr. Tompsett.

Coach McNair, I want to advise you that after leaving the hearing today, that it is the Committee's expectation that nothing that is said will involve allegations concerning you. All allegations will have been discussed that do concern you.

Should the Committee believe that information being presented may affect you, the Committee will cease the discussion of that allegation until you are given the opportunity to participate.

Hearing Transcript at pp. 647-48.

The law also generally prohibits *ex parte* communications between a decision maker and one party in an adversarial proceeding. See Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Appeals Bd., 145 P.3d 462 (Cal. 2006) (holding that California law prohibits *ex parte* communications between an agency's prosecutor and the agency's decision maker).

One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision

maker's advisors in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals. California's Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), as overhauled in 1995, adopts these precepts by regulating and strictly limiting contacts between an agency's prosecutor and the officers the agency selects to preside over hearings and ultimately decide adjudicative matters. We conclude that the Department's procedure violates the APA's bar against *ex parte* communications.

* * *

Article 7, modeled on provisions of the federal Administrative Procedure Act and the 1981 Model State Administrative Procedure Act (see *California's New APA, supra*, 32 *Tulsa L.J.* at p. 315), broadly prohibits *ex parte* contacts between parties, including agency parties, and decision makers during administrative adjudicative proceedings. "While the proceeding is pending there shall be *no communication, direct or indirect, regarding any issue in the proceeding*, to the presiding officer from an employee or representative of an agency that is a party ... without notice and opportunity for all parties to participate in the communication." (§ 11430.10, subd. (a), italics added.)

Dep't of Alcoholic Beverage Control, at 463, 466.

Codes of Judicial Conduct and Rules of Professional Conduct also generally prohibit *ex parte* communications. See, e.g., Indiana Code of Judicial Conduct, Rule 2.9; Indiana Rules of Professional Conduct, Rule 3.5, attached as Exhibit 6.

Once an *ex parte* communication has been established, most courts hold that a rebuttable presumption of prejudice arises, and the burden of showing that the prohibited *ex parte* communication has not resulted in prejudice shifts to the agency. See, e.g., Blaker v. Planning & Zoning Commission, 562 A.2d 1093 (Conn. 1989); Jennings v. Dade County, 589 So.2d 1337 (Fla. Dist. Ct. App. 1991).

Indeed, McNair has good reason to be concerned that he has been prejudiced by the COI sharing its draft decision with the enforcement staff to correct "factual errors." In addition to *ex parte*

communications being impermissible and, at a minimum, creating the appearance of impropriety, based on what occurred at the hearing, McNair believes there is a strong likelihood that the staff mischaracterized or misstated facts to the COI during the *ex parte* communications. At the hearing, USC's counsel and McNair's counsel had to correct incorrect factual representations that the staff made to the COI. Three examples are set forth below.

- First Incorrect Representation – Staff Falsely Stated That It Did Not Exclude USC From The Lake Interview And That USC Never Attempted To Interview Lake

Mr. Najjar: If I could briefly respond. I don't disagree that the institution and the Pac-10 were excluded [from the Lake interview], *but I want to make it clear that it was not the enforcement staff that excluded them.* It took us months and months and months of wrangling to get Lloyd Lake's interview in the first place.

As you know, he is certainly not under the jurisdiction of the NCAA. He did not have to interview with us at all, and *he and his legal counsel excluded the University and the Pac-10.* So, *I want to make that clear. Again it was not the enforcement staff.*

Every interview we attempted or conducted, we always requested that the University of Southern California and the Pac-10 be allowed to participate, and in many of those instances were successful.

The other thing I would like to point out is after we were able to secure Lloyd Lake's interview, and up to this moment the institution never came to us, *nor as far as we know did they ever approach Lloyd Lake or his legal counsel to secure their own interview.*

Ms. Mauch Amir: May I respond to that, Mr. Chairman?

Chairman Dee: Are you finished, Mr. Najjar?

Mr. Najjar: Yes.

Chairman Dee: Okay. Please.

Ms. Mauch Amir: I would like to clarify a few of those points. In fact, I have an e-mail here dated November 6, 2007, which is the date of the Lake interview. We were informed the morning of the Lake interview that the interview was to move forward.

We had been trying to involve ourselves in this interview for six weeks before the day of the interview after hearing from press reports that the interview was being discussed between the NCAA and Lloyd Lake's attorney.

When we finally found out from Mr. Najjar, our outside counsel, Mark Jones, had an e-mail exchange with him asking why we were banned and what had happened? Ameen's e-mail back to Mark says, "Let me clarify one thing. *It is not my understanding that Lake banned USC from today's possible interview.* When the enforcement staff raised the possibility of USC's participation early on, it created a number of complications, coupled with the highly tenuous nature of the possible interview and the number of previously cancelled interviews, we thought it prudent at this time to simple attempt to get the interview."

So, it is clear that Lake did not say that he would not give the interview without USC present. It was the NCAA's staff's conclusion and decision to move forward without us. Also, with regard to the issue that Mr. Najjar raised with regard to whether USC tried to get an interview, we were not allowed to read the testimony of Lloyd Lake for more than three months after the interview was held.

During that three-month period, we finally were able to review it in the NCAA offices. We were not given a copy. It was after three months. During that three-month period, the staff had moved forward to interview the family members without USC present.

At the time that we did finally read the testimony, we then moved forward; *we tried to get an interview with Lloyd Lake.* We, in fact, sent a letter.

An attorney in my office, Kelly Bendell, who had been working on the investigation cooperatively with the NCAA, sent a letter to Lake and his attorney requesting an interview with Lake and his family members.

The NCAA was given a copy of that letter. They knew full well that we were trying to get the interview. Lake's attorneys, instead of responding to us, went directly to the press, talked about the fact that we were trying to get an interview with them, and eventually said we are considering our options. But they didn't come back to us.

Ultimately, we followed up with phone calls. We were never able to connect with Lake's attorney. They were never willing to sit down and interview with us. So, I think it was very clear from the beginning that avenue was not going to proceed.

Hearing Transcript at p. 19-21 (emphasis added).

- Second Incorrect Representation – Staff Falsely Stated That McNair's Explanation That He Called Lake's Number On October 29, 2005, To Reach ██████ Was "Completely New Information"

Mr. Najjar: Can we clarify something?

Chairman Dee: Go right ahead.

Mr. Najjar: Earlier in Coach McNair's statement today, apparently five years after the fact he has had a memory recall *which is new information*, and that concerns his statement that ██████ was having phone issues where the phone was dying, or something [on the night of October 29, 2005].

That is not contained and there is no reference to that in his February 15, 2008, interview. In fact, when he is questioned about the calls to ██████ ██████ that evening, he even says he is speculating that it could be about hosting a recruit.

Mr. McNair also just brought up in relation to that, that he was given another number to call. *Again, this is completely new information.* But we believe we know where he is going with this.

When he was questioned specifically about calling the 619 area code number during his February interview, he said he had no idea what that number was, and he was questioned about that a couple of times, and each time he said, "I have no idea."

So, we just wanted to point that out.

Mr. Tompsett: Mr. Dee, may I respond?

Chairman Dee: Yes, Mr. Tompsett.

Mr. Tompsett: First, let me point out that in the January or February 2008 interview that Mr. Najjar is referencing, Mr. McNair had no prior knowledge of what he was going to be questioned about in that interview. He had no notice of the issue. He came in totally unprepared, not knowing that he was going to be asked about these phone calls.

I submit to you that it is perfectly normal and to be expected that under those circumstances he would not recall specifically what happened three years prior to the fact. I want to respond to Mr. Najjar's comment that this is, I think he said, "totally new information," that Todd said he was trying to reach ██████ perhaps on a different phone because ██████ cell phone was low on batteries or dead.

That is totally not new information. This was included in McNair's Response at page 3-8, and in the first sentence of the first full paragraph. The staff has had that Response for several weeks, and this is not totally new information.

Mr. King: Chairman Dee, I would also like to refer the Committee to pages 42 and 43 of Exhibit 3 of our Response. This is a quote from Mr. McNair's February 2008 interview.

"I was trying to get hold of [REDACTED]. Obviously if [REDACTED] gave them that number to call him on, somebody gave me that number, I don't know." So, he raised the possibility totally cold.

He had no idea what the interview was going to be about before we walked in. The interview was approximately a week or ten days after USC had been given access to the Lake Transcript and instructed not to discuss it with anyone.

Coach McNair had not reviewed any of his records, he speculated that maybe [REDACTED] was hosting a recruit, which proved to be correct, and that maybe he was trying to get in touch with [REDACTED] about a recruit, which proved to be correct and, in fact, it was the number one recruit for [REDACTED] position that year.

So, for them to say that this is a change in his story or he has come up with something new is really not fair.

Mr. Tompsett: I would also add that when Todd suggested in response to the staff's question that he speculated he was trying to get hold of a recruit, the staff totally discounted that answer and said that they were pretty certain that [REDACTED] was not hosting a recruit that night. They were wrong, and Todd was right.

Hearing Transcript at p. 421-24 (emphasis added).

* * *

- Third Incorrect Representation – Staff Falsely Stated That Lake's Girlfriend Was Present For The January 8, 2006, Call

Mr. King: ...The staff relies on Miesha Jones. If you will look at page 1-174 of the Case Summary it says, "*Jones recalled that during a telephone conversation, Lake told a university coach that someone better talk with*

██████████ or the issue was going public because Lake was not going to lose money."

Now, when I read that, to me that clearly suggests that Jones was present and heard. She recalled a conversation in which he said that. Let's look at what she actually said. This is on page 1-171 of the Response.

Her actual testimony was that Lloyd Lake said he was going to call someone at USC, and she couldn't say if it was Todd McNair or not, that he left and went to somewhere else, she believes Michael Michaels' home. And she thinks that's where the call was made.

Ms. Jones did not say that Lloyd Lake came back to her at any time and reported, "I made the call." If you look at her testimony, and you have it all, it is at the very end, and I will refer you to the language, is that she has no personal knowledge.

The only knowledge that she claims to have is that he told her he was going to do this. Of course, we know that Lake told Ms. Jones he was going to make this call to someone at USC.

So, I didn't want you to read the Case Summary and believe, "Well, there is a second witness who says she heard the content of the conversation." That is not the case at all. She has no personal knowledge about any conversation or even that one was made.

Hearing Transcript at pp. 591-92.

The staff made materially incorrect statements to the COI at the hearing and but for USC's and McNair's counsel, the statements would not have been corrected. There is no reason to believe that conduct did not continue when the COI shared the draft report with the staff to correct "factual errors." Thus, McNair has good reason to be concerned that the staff made factually inaccurate and prejudicial statements to the COI during the *ex parte* communications.

Based on all of the authority above, McNair believes that there is a rebuttable presumption that he has been prejudiced by the impermissible *ex parte* communication between the COI and the

enforcement staff. If the COI is unable to overcome the presumption with credible and persuasive evidence, the IAC should set aside McNair's finding and penalties.

F. The NCAA Has Prejudged McNair's Appeal

On June 24, 2010, two weeks after the Infractions Report was released, the website USCFootball.com published an article titled "NCAA Missteps on McNair." See Exhibit 7. The article referenced the Case Summary and USC's Response, and detailed "a number of mistakes and factual errors in the evidence presented against [McNair]." Id. The points made in the article are some of the same arguments that McNair has made in his appeal.

The following day, the NCAA responded to the article by sending an email from NCAA associate director for public and media relations Stacey Osburn to ESPN, which was published in ESPN's Pac-10 Blog. See Exhibit 8. According to the ESPN article,²⁵ the email stated:

The NCAA will not comment on the content of confidential documents. However, it is important to note that the recent story from fan site USCFootball.com takes select pieces of information from comprehensive documents out of context, weaving them into an inaccurate depiction. When reaching a decision, the Committee on Infractions carefully considers the hearing discussions and reviews all documents from all parties in their entirety, not just excerpts taken out of their original context.

Thus, the NCAA criticized an article that suggested the COI made mistakes in adjudicating the allegations directed at McNair. The NCAA also expressly endorsed the COI's methodology and processes, stating that the COI had carefully considered all of the relevant evidence. Simply put, the NCAA came out in support of the COI and against McNair. Accordingly, McNair believes the NCAA has prejudged his appeal.

²⁵ McNair's attorney, Scott Tompsett, asked Osburn to provide a copy of the email so that he could include it with McNair's Appeal. See Exhibit 9. Osburn declined stating that Tompsett's representation of McNair "does not entitle you to the email correspondence of NCAA staff." See Exhibit 9. McNair finds it curious that the NCAA would send an email to a national news outlet concerning the COI's adjudication of his case, but not provide a copy of the email to his attorney.

NCAA enforcement procedures provide an involved individual, which McNair is, the right to appeal findings and penalties. See Bylaw 32.10.1.2. Because the NCAA has prejudged McNair's appeal, he has no meaningful option to appeal his finding and penalties. It is a foregone conclusion. The NCAA has nullified his right to appeal. The NCAA should vacate McNair's finding and penalties because in speaking out in support of the COI's decision, it has demonstrated bias and tainted the process.

CONCLUSION

The sole finding against McNair is based on false statements and mischaracterized testimony. The COI changed and mischaracterized Lake's testimony to make it appear credible. Lake's actual testimony is not credible and does not support the COI's finding.

The COI's credibility findings are filled with reversible error. They are based on incorrect statements and mischaracterized testimony. They also are internally inconsistent and contradictory. The COI also used an erroneously low standard to find that McNair was not credible.

Finally, there was misconduct by the enforcement staff, the COI and the NCAA. The staff wrongfully excluded USC from the interviews of Lake and his family. The COI engaged in impermissible *ex parte* communications with the staff about the draft Infractions Report. The NCAA publicly endorsed the COI's finding against McNair before he had even filed his notice of appeal.

For all of these reasons, McNair asks the IAC to set aside Finding B-1-b and the associated penalties.

Johanningmeier: Well let me ask you this one, too, Lloyd, on, uh, January 8, 2006, at 1:34 in the morning, there's a call, *McNair call to you* for two minutes and 32 seconds.¹

Lake: What time was that?

Johanningmeier: This is January 8, 2006, it's at 1:34 in the morning, and it's a call, uh, McNair--

Cretors: Coach doesn't understand why people are calling at 1:34.

Johanningmeier: --*McNair makes a call to you at 2:32.*² I was asleep at that time--

(Many people laughing)

Lake: Yeah.

Johanningmeier: --personally, but, but in your case--

Lake: I think that was like, *that was like him trying to resolve it, you know, and like ██████████ wrong, he should make it right and basically don't implement the school.*³

Johanningmeier: Because this, this is 2006 we are talking about.

Lake: Yeah, that's when I went to jail, that's when everything started falling apart, I mean, it fell apart.

Johanningmeier: What can you tell us that you specifically recall about that conversation with him?

Lake: Uh, just telling about ██████████ and all, he knew about the money he took, he knew that he had an agreement and--

Cretors: Todd McNair indicated to you in the telephone conversation that he was aware that ██████████ took money--

Lake: I mean, he knew--

Cretors: --from you?

Lake: --Yeah bec, he knew ██████████ took money from me. There's no doubt he knew about that.

¹ The staff incorrectly stated that McNair called Lake.

² Here the staff again misstated who made the call and also the time of the call.

³ Here Lake is saying that McNair called him to try to resolve the dispute and ask Lake not to implement (sic) USC.



Cretors: Did you ever call McNair?

Lake: Yeah, I called him a couple times.

Cretors: Do you know when or what the--

Lake: Around this time.

Cretors: --those conversations--

Lake: Yeah, trying to get this resolved, just get my money back and make it right.

Cretors: So you called McNair in early July and vocalized to him that you wanted your money back?

Lake: January.

Cretors: January of '06?

Lake: Yeah.

Cretors: Okay. And when did you say you went back to jail?

Lake: January 18.

Cretors: January 18. So before, prior to that--

Lake: Yeah.

Cretors: --you were making calls?

Lake: Yes.

Cretors: Okay.

Lake: I got calls with [REDACTED]

Lake Transcript at 112-113 and 115 (emphasis added).

- Jones was interviewed by the enforcement staff March 31, 2008.

Angie Cretors (AC)
Rich Johanningmeier (RJ)
Maiesha Jones (MJ)

[Excerpt from Page Nos. 56 through 58]

RJ: Do you have any knowledge --

MJ: His, oh --

RJ: -- of, uh, in, uh, of Lloyd making contact with anyone, uh, at USC about his concerns of, uh, about the deal falling apart and maybe calling to get their assistance? Do you have any knowledge of any contacts --

MJ: Uh.



RJ: -- he might've made?

MJ: I, if I'm not mistaken it might've been that guy. I don't, who is that guy? What, did he --

RJ: Todd McNair.

MJ: What is he?

RJ: He's an assistant football coach. He was the backfield coach for [REDACTED]

MJ: For, yeah, I think it may've been him. Like, look, tell him, you know, he needs to, I know for sure it was somebody at USC.

RJ: Well, well, what --

MJ: I know it wasn't Pete Carroll.

RJ: Okay.

MJ: You know.

RJ: Okay. Help me, help me set the whole scene.

MJ: Uh-huh.

RJ: What you remember

MJ: Uh, I just remember Ta-Ta making the calls. And then, uh, he was, like, you know, I hate to do this but I'm gonna have to 'cause I'm not about to get screwed. So he called, I just remember the word co, I just remember coach. So I'm just assuming it's him, but I'm not sure.

RJ: And what was the call about?

MJ: Just basically, like, somebody better talk to [REDACTED] or this is gonna go public, you know, 'cause I'm not gonna lose my money.

RJ: And, and about what period of time would that call or calls --

MJ: This was at the, this was right when everything was getting dirty. When he was, uh, recording everything. So this was, he went to prison, I think, right after his

birthday so it must've been, like, the beginning of February then when he went to prison or late January of '06. So, I mean, within a four-month frame before that.

RJ: There's a call on the record --

MJ: Uh-huh.

RJ: -- that shows a call around January 8th.

MJ: Okay.

RJ: What that've been in the same time frame?

MJ: That's four month, yeah, that would've been in the same time.

RJ: And why do you --

MJ: I don't know for sure if it was that guy though.

RJ: Okay.

MJ: But I'm just assuming because I remember him saying, you know, oh, something, somehow, some way he made me believe that it was the person that [REDACTED] introduced him to. You know, he was, like, basically gonna tell on him. Like, this guy, at least if I call this guy he can talk to [REDACTED] and say, look, idiot. You know what I mean? Like, pay the money. You have, you know, you're gonna get yourself in deeper. So that's how Ta-Ta did it. You know, he was going above his head. He was trying to get him to, you know, and then also get somebody scared inside USC to say, look, you know what I mean, this is gonna be a bigger issue. And he really didn't wanna ruin [REDACTED] you know.

RJ: How did that conversation come up or how did you learn that from Lloyd?

MJ: Uh, I think him and Michael Michaels made the call. I just remember him saying it. You know, I remember him saying that he was gonna do it and then I remember him going over to Michael Michaels. I don't know for sure if Michael Michaels was around, but I know he was, like, at Michael Michaels when all this was going on and, uh, he had made the call. You know, he had said that he was gonna call somebody and start to make some moves.

[REDACTED]

And my cell phone is 612-669-8987.

TOMPSETT:

And you're currently a second year medical student at Michigan?

[REDACTED]

Yes, sir.

TOMPSETT:

Okay. Um. We want to talk about, um, some of the events that occurred in, uh, early 2005.

[REDACTED]

Uh-huh.

TOMPSETT:

Tell us what, where you were living in early 2005 and what you were doing.

[REDACTED]

So early 2005 I was living in an apartment on Menlow Blue. I was, mmm, spring of 2005, I was a Junior, I guess, at USC. I graduated in the spring of '06. Um. Pre-med and studying my butt off and, uh, I was, you know, working, trying to be a college student.

TOMPSETT:

Okay. And, uh, so you were a Junior at USC in ...

[REDACTED]

Yes.

TOMPSETT:

... early 2005, in the spring semester.

[REDACTED]

Uh-huh.

TOMPSETT:

And did you know Todd McNair?

[REDACTED]

I did. Um. I met Todd for the first time, um, late fall semester, right before Christmas, um, I had a lot of friends on the football team, one of my best friends is John Walker, um, he also lived in the Monroe Apartments, uh, and his dad is a big cook; loves to cook for everybody, how he showed love, um, and he made a big meal for the coaching staff and had asked me to help serve or whatever. Turns out I didn't really do much but, um, I ended up in the coaches office, upstairs and I met Todd, um, and then, uh, after Christmas, early in the spring semester, um, we started talking about, uh, working together on some music industry stuff that he was trying to put together.

TOMPSETT:

Okay. And I wanna talk about that a little bit.

[REDACTED]

Sure.

TOMPSETT:

If you can explain what that was, but, uhm, did you have any other, uh, connection with the football program, other than having a friend on the football team?



[REDACTED]

I mean, I was a student so I knew most of the boys. I also, at the time, was tutoring.

TOMPSETT:

Uh-huh.

[REDACTED]

Um, athletes downstairs in SAAS. I don't think, um, during that semester, I was tutoring any football players specifically but, you know, the athletes float in and out and, you know, the circle's kinda small. So, I mean, I knew a lot of them.

TOMPSETT:

And in what building were you doing the tutoring at?

[REDACTED]

So, SAAS is in the basement of Heritage Hall.

TOMPSETT:

Uh-huh.

[REDACTED]

Student Athlete Academic Services, so, yeah.

TOMPSETT:

Okay. Um. So tell us, you were explaining about, um, possibly working with Todd or doing some work in the music industry?

[REDACTED]

Yes.

TOMPSETT:

Talk about that a little bit for me.

[REDACTED]

So, he was doing a bit of independent, um, music stuff. He was thinking about, um, starting an independent record label. At the time, I had been doing fashion shows, um, kind of in the hip-hop circle in Los Angeles. Um. I had done a couple of, uh, print photo shoots with some hip-hop clothing lines, um, and I was also, um doing some celebrity party planning with a company called IMP, uh, Entertainment, uh, it's run by a guy named Remmy, with a very long last name that starts with D that I can't pronounce, um, uh, we were doing a lot of parties for some pretty big music artists at the time, um, we were doing Missy Elliott, Jermaine Dupri, um, I think Tiara Marie was pretty big at that time, we did one of her parties, um, so I was, you know, kind of foot-in-the-door, with that, um, scene already, um, so Todd and I got to talking and, you know, thought it might be interesting to sort of have a bigger role, I guess, in something, so ...

TOMPSETT:

Did you know [REDACTED] at that time?

[REDACTED]

I did, yes. I, um, I was a year ahead of [REDACTED] in school, um, I actually met [REDACTED] when he was a freshman so we've known each other, I guess, for, I don't know, what was he in '05. I suppose a year and a half, right, um, but yeah, I knew [REDACTED]

[REDACTED]

It was a long time ago.

NAJJAR:

And not to get too personal, how old were you in spring of '05?

[REDACTED]

Well, I'm 26 now, so, you're putting me on the spot with math, uh, 21, I guess.

NAJJAR:

Okay. And, uh, before the, uh, Marshall Faulk party ...

[REDACTED]

Uh-huh.

NAJJAR:

... had you socialized with Todd McNair previous to that?

[REDACTED]

Right. So, um, you know, we had met each other out at different, um, Hollywood parties, um, never gone anywhere specifically together, um, but, you know, I'm going here, okay, I'll, you know, meet you there type, um, you know, scenarios, but we'd never gone anywhere together.

NAJJAR:

And can you tell me a little more about this music industry idea or plan you guys had?

[REDACTED]

So his plan? Okay, so, um, he was working on an independent label, excuse me, he called it Blakout Records. B-l-a-k-o-u-t. Um. And originally, he brought me on to work on promotions, um, because that's what I had been doing, uh, eventually, you know, he sort of, through knowing me for a while, um, gave me a little bit more responsibility. I started doing all of the graphic designs that he needed done so they would do photo shoots, uh, with artists and then they would bring all the photos to me and there would be a great picture with some guy standing in, you know, behind a French door that you could see in, you know, it was my job to take that guy out from behind windows and, um, I did their web site, um, I, you know, basically took on a pretty big role in the label after a while, um, unfortunately, it ended up kind of being a, a record label on the back of two people cause, you know, the rest of the people we had brought in weren't really carrying weight, so, sort of fell apart after a while.

NAJJAR:

Did he pay you for your work?

[REDACTED]

Um, not really. Um, here and there, yes. Um, especially when I was, you know, doing the small stuff at the beginning, um, but after a while, it sort of became Well, you know, we're both basically putting in all this time and if it pays off, you know, it's kinda, almost like a partnershipee investment type, um, arrangement.

NAJJAR:

A venture type ...



[REDACTED]

Yeah, exactly.

NAJJAR:

Okay. When did it kind of dissolve or end?

[REDACTED]

I would say it floated off into the distance after I graduated, maybe a year after I graduated. I just, I remember working on stuff still when I was living at, um, you know, the different spots that I was, you know, living in, um, I would say probably a year and a half after I graduated.

NAJJAR:

Okay. And when did you graduate?

[REDACTED]

I graduated spring of '06.

NAJJAR:

And you went to USC, you went to USC all four years?

[REDACTED]

Yes.

JONES:

So how long were you working probably for Blakout?

[REDACTED]

So, let's see, if we start, um, early '05 and I would say three years, three and a half.

JONES:

Okay. Thank you.

[REDACTED]

Uh-huh.

NAJJAR:

What was your understanding of Todd McNair's marital status?

[REDACTED]

Hmm, uh, I mean, we never really got personal with his, uh, relationship. Todd's pretty tight-lipped about, you know, his marriage. I think it's pretty respectful, I guess, I don't know. I really don't have any idea. I know he was living at home.

NAJJAR:

Did you ever meet a wife or ...?

[REDACTED]

Um, I've met her at a, one of the spring ball scrimmages, at the very beginning of, um, you know, my, I guess, I don't know, working relationship, I guess with Todd, um, her and the kids were there, uh, I recognized the kids because they had been to the pool before. I worked also at the Lyon Center Swimming Pool here, that's kind of getting the whole vibe of me having a million jobs at once, uh, I was a life guard at the pool, so I saw the kids and, yeah, met his wife.

NAJJAR:

So you say that was early on. Would that have been spring of '05?

[REDACTED]

Yes.

NAJJAR:

Okay.

Lake was interviewed by the enforcement staff November 6, 2007.

Angie Cretors (AC), associate director of agent, gambling and amateurism activities
Rich Johanningmeier (RJ), associate director of enforcement
Lloyd Lake (LL)
Brian Watkins (BW), Lake's attorney
Paul Wong (PW), Lake's attorney

[Excerpt from Page Nos. 142 and 143]

AC: Did Cervantes ever have any conversations with Lamar, Denise or [REDACTED]?

LL: Yeah.

AC: With who?

LL: [REDACTED]

AC: Cervantes had conversations with [REDACTED]

LL: Yeah.

AC: How do you know that?

LL: Uh, it's on, it's on tape.

AC: There's a taped conversation between [REDACTED] and Cervantes?



LL: Yup.

AC: And did you tape that conversation?

LL: Yeah, but Dave Cervantes knew it was being taped.

AC: And --

RJ: What was the nature of that conversation?

LL: That was still about money, just to get the proof that it happened, you know, and still trying to recruit him at the time but just had proof that --

AC: So this was the December timeframe?

LL: Yeah, this is December.

RJ: So you're talking to him --

LL: This is like when the articles --

AC: Uh-huh.

LL: -- when it's really out, you know, well I've gotta get --

AC: Uh-huh.

LL: -- some proof because right now if I didn't have those tapes where would I say, it was just on ESPN saying I never gave him any money.

AC: Uh-huh.

LL: If I didn't have those tapes I wouldn't have any proof.

RULE 2.9: *Ex Parte Communications*

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Comment



[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

[8] A judge is permitted by Rule 2.9(A)(3) to consult about legal and procedural issues with the Indiana Judicial Center or Indiana Supreme Court Division of State Court Administration.

Rule 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;

 - (2) the juror has made known to the lawyer a desire not to communicate; or

 - (3) the communication involves misrepresentation, coercion, duress or harassment.

- (d) engage in conduct intended to disrupt a tribunal.

Amended Sep. 30, 2004, effective Jan. 1, 2005.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

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June 24, 2010

NCAA Missteps on McNair

Dan Weber and Bryan Fischer
USCFootball.com Staff

In its December Response to the charges from the NCAA Committee on Infractions, USC noted a number of mistakes and factual errors in the evidence presented against assistant coach Todd McNair.

Talk about it in The Peristyle



Gerard Martinez
After six years as USC's running backs coach, Todd McNair's contract ends this summer

Those errors were also detailed at the Committee's Feb. 18-20 hearing in Tempe, Ariz., according to a source familiar with the case but not authorized to speak publicly about it.

USCFootball.com reviewed a copy of the Case Summary detailing evidence in the NCAA Committee on Infractions Case No. M295 against McNair supports the USC claim of factual errors, misleading questions and uncorroborated evidence used by the organization's enforcement staff.

The testimony in question involves would-be sports marketer Lloyd Lake and whether McNair knew or should have known of a scheme to provide impermissible benefits to former USC running back [redacted] and his family.

The Case Summary is "what the institution believes, what the individuals in the case believe and what the enforcement staff believes," NCAA associate director of public and media relations Stacey Osburn said in commenting about infractions cases in general. No NCAA staffer may talk about a specific case, Osburn said, after the press conference conducted by the Committee chair on the report's release.

The Case Summary documented the allegations against McNair. Each

had factual problems.

- In questioning Lake, the enforcement staff misstated who made a 2-minute, 32-second phone call that the Committee said it relied on as proof McNair was told of the scheme. In questioning McNair, the staff incorrectly stated the year the phone call was made as happening in 2005. In all five mentions of the year in the questioning session, the phone call is said to have happened in January of 2005, not 2006, when it actually occurred.

"If this (mistake) did occur, then I couldn't imagine they would not be jumping out of their seats about it," said Tom Yeager, former Committee Chairman and Commissioner of the Colonial Athletic Association. "If it's as clear as they're trying to say, then there isn't even a finding to be made against the client."

"The committee would have turned to the enforcement staff for an explanation. If they're making a finding on a call that didn't even occur, that's strange credibility. I can't see all eight of those guys missing that."

Michael Buckner, whose Florida law firm represented Alabama State in the only appeals case that has reduced an NCAA penalty under the new, much stricter standard adopted in January, 2008, was not surprised by discrepancies in the allegations.

"That's not unusual," Buckner said. "They do make mistakes."

- The enforcement staff alleged that McNair had knowledge of impermissible activities when told of them by [redacted] and Lake at a San Diego hotel, March 4, 2005, a day when McNair was not in San Diego. Lake claims to have met McNair that "weekend" at a Marshall Faulk birthday party for 2,000 people. McNair didn't arrive in San Diego until Saturday, March 5, as phone records and two witnesses indicated. No witnesses corroborated Lake's account.

The inconsistencies in this allegation led to this statement in the NCAA June, 10 Infractions Report.

"The committee concludes that the evidence presented contained unresolved discrepancies in what witnesses reported regarding the events and who was present during the March 2005 birthday party weekend."

- In three one-minute phone calls to a 619 (San Diego) area code number, the enforcement staff claimed McNair called Lake on the night of Oct. 29, 2005. A photo was provided by Lake showing Lake and partner Michael Michaels standing behind McNair and an actor-friend at a club that night.

Testimony and records indicated that McNair was attempting to reach [redacted] that evening because [redacted] was hosting a high-profile recruit. Lake's number was provided to McNair by [redacted] who was out with his family and Lake and Michaels. Lake doesn't recall the phone calls. The photo, taken by Michaels' phone, was described by McNair as something the USC coach and former NFL player often did when out in public.

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The photo was also called into question by an expert in the USC Response to the NCAA because it was altered from its original format. Neither USC nor the Committee was able to examine the original photo.

Sources close to the case tell *USCFootball.com*, that USC and McNair detailed the inconsistencies and errors by the enforcement staff at the Committee's Feb. 18-20 hearing and they will be an element in USC's appeal and McNair's appeal.

"If there are apparent errors, the Committee requires that the errors be brought up at the hearing," Buckner said. The new appeals process does not allow new evidence to be presented in the appeal.

McNair had been pursued by NCAA investigators for the almost four years before being found guilty of unethical conduct and given a one-year show-cause penalty by the NCAA. The penalty prevents him from any recruiting activities in that time.

The Committee found that the USC assistant "knowingly provided false and misleading information . . ." when questioned about his knowledge of Lloyd Lake.

The longest, most-high-profile infractions case in modern NCAA history found USC culpable on many fronts, including multiple violations of amateurism rules. However, the strongest link connecting USC to knowledge of impermissible benefits to ██████ lay with McNair.

According to published reports, McNair was questioned for nearly eight hours over two days at the Committee's Tempe hearing. That's longer than many entire NCAA infractions hearings.

In the Case Summary, McNair's credibility was continually questioned by the enforcement staff. USC, in its Response to the allegations, stated that the enforcement staff "accepted at face value the allegations of the primary accusers and summarily dismissed the explanations of the accused . . . charges corroborated by little or no testimony or documentation."

USC also noted in its Response Lake's convictions of drug trafficking, theft, illegal possession of firearms, violence and domestic abuse. An FBI investigation also described Lake's involvement in a San Diego-based gang.

The NCAA countered by saying that, in addition to circumstantial evidence presented, Lake had tape recordings that supported his testimony. On the advice of legal counsel, however, the NCAA Infractions Report said that "the enforcement staff did not present those tapes to the Committee."

According to a source close to the case, and a review of the Case Summary, no tapes were ever cited to corroborate any allegations against McNair.

The NCAA's Osburn cautioned about relying too much on a Case Summary that "does not have all the documentation involved in the case . . . The Committee makes the decision."

But the enforcement staff, USC explained in its Response, needed McNair to make its case:


"USC believes the Staff has pursued these weak institutional allegations in football because it recognizes that without a direct institutional link, the allegations surrounding student-athlete 1 (██████████) involve amateurism issues with no institutional violation. After 3 1/2 years of intensive public and media scrutiny, including repeated public questions as to why USC football has not been 'brought to justice' by the NCAA, the pressure to accuse USC of having had actual knowledge of and direct connection to the alleged impermissible benefits is very real. The truth is that USC and the assistant football coach had no knowledge of the alleged impermissible benefits to student-athlete 1 and his family."

1 2 3

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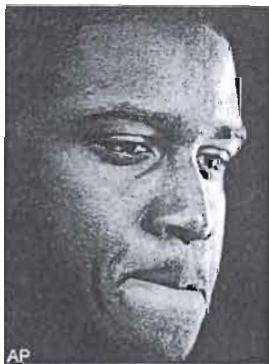
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While allegations against McNair about the March 2005 birthday party were dismissed by the Committee due to discrepancies, Oct. 29, 2005 and Jan. 8, 2006 remained key dates in the NCAA Infractions Report.

██████ was to host a recruit after the Oct. 29, 2005 USC-Washington State game considered the nation's the top high school prospect.



Associated Press
McNair made repeated attempts to contact ████████ in regards to the top recruit's official visit

But ████████, on a post-game outing with family and friends, including Lake and Michaels, left the recruit waiting in his hotel room while they ate dinner. The recruit would later verify that timeline.

Among the numerous calls McNair placed to ████████ and the recruit that night, three were to a 619 area code that was not ████████ number. That number, cited from McNair's USC phone records, belonged to Lake.

The NCAA assistant director of enforcement, Richard Johannngmeier immediately questioned McNair's credibility when he denied knowing Lake or having any recollection of whose phone number he'd called that night.

"So as you can see from our standpoint, we're having a lot of problems with your credibility and I have to tell you that there's a good possibility that, uh, the NCAA could allege a, uh, ethical conduct charge of providing us false, misleading information in the fact that you denied that you know him, we have the telephone calls and we have a photograph with you with people that you say that you don't know."

The phone calls and photo were cited as proof despite McNair's explanation that the three one-minute calls were to a number ████████ had given him earlier where ████████ cellphone wasn't working. Lake, in his interview, didn't recall the phone calls.

The photo, which USC was never allowed to see in its original format, had been altered, according to an expert in the university's response to the NCAA's allegations. McNair and his easily recognized actor-friend had posed for photos frequently according to his testimony.

Despite pages of documentation covering the Oct. 29 calls, the photo and statements of McNair's "lack of credibility" the June 10 Infractions Report did not cite this as evidence that the assistant football coach must have had knowledge of the illegal benefits.

That left the Jan. 8, 2006 phone call.

The Committee said the call from Lake's phone to McNair's at 1:34 a.m., Jan. 8, 2006, and lasting two minutes and thirty two seconds, was "particularly troubling". Based on that call, it said the USC coach misled the enforcement staff and failed to inform USC compliance that he'd been told of the intent to funnel illegal benefits to ████████

It was the same information about ████████ the staff had originally concluded that McNair learned in San Diego 10 months earlier. But the Case Summary shows several inconsistencies in the evidence cited.

The NCAA enforcement staff questioned Lake about the early Sunday morning call, which was the day before ████████ was to sit down with USC head coach Pete Carroll, McNair and others to qualify a list of agents seeking to represent ████████ Johannngmeier mistakenly stated twice to Lake that the call in question came from McNair.

Just 10 days from returning to prison at the time of the Jan. 8 call, Lake did not admit that the call had been made from his phone, as telephone records showed. He answered the question as if it accurately reflected the situation, recounting why McNair had called him even though that was clearly not true.

The Case Summary does not show that NCAA investigators asked Lake to explain this discrepancy or his detailed answer about a phone call that the assistant coach did not make.

But the NCAA enforcement staff said it did have a corroborating witness, Lake's girlfriend, Maiesha Jones, who was asked this question by Johannngmeier:

"Do you have any knowledge . . . of uh, in, uh, of Lloyd making contact with anyone, uh, at USC about his

I just remember 'coach' . . . So I'm just assuming it's him, but I'm not sure.

- Maiesha Jones tells investigators in the Case Summary

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concerns of, uh, about the deal falling apart and maybe calling to make their assistance? Do you have any knowledge of any contacts?"

Jones answered that she remembered such a call, "in like the beginning of February then, when he went to prison, or late January of '06, so I mean within a four-month period before that."

Lake's girlfriend thought maybe the call went to a USC coach, but wasn't sure it was McNair.

"I think it may have been him," Jones answered. "I know it wasn't Pete Carroll . . . I don't know for sure if it was that guy though . . . it might have been that guy . . . I just remember 'coach' . . . So I'm just assuming it's him, but I'm not sure."

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Another enforcement agent asked about what she described as "the July call." Elsewhere, the transcript shows the call was described as happening at 2:32 a.m. and lasting 1:34, reversing the numbers.

The questioning errors didn't end there.

Johanningmeier, who had misstated the nature of the call to Lake, would have similar factual inconsistencies in his questioning of McNair; asking the USC coach about a call that he said was made "Jan. 8, 2005," -- getting the year wrong.

There would be four more "2005" references in this session with no one catching the wrong year.

Given the 2005 date, McNair recounted what he was doing the week after USC's BCS championship game against Oklahoma, not after the 2006 Texas game, when [redacted] was a junior headed off early to the NFL.

At that time in 2005, McNair was on the road recruiting Kyle Moore in Georgia and Brian Cushing in New Jersey. Both signed letters of intent with USC in February of 2005.

As a result of the enforcement staff's mistakes, McNair appears to have never had the chance to respond about the call that the Committee used to convict him. The NCAA admitted that its staff had considered questioning McNair again, but declined since McNair "was on the record and adamant that he had never spoken to Lake."

The Committee agreed with the enforcement staff's finding that Lake, despite having given a detailed answer to a key question with a false premise, was more credible.

The Committee also agreed with its staff's recommendation, finding that McNair had received the incriminating knowledge of the [redacted] Lake and Michaels violations as a result of a phone call lasting two minutes and 32 seconds. A call in which, investigators said, Lake was threatening "to go public," and "attempted to get [McNair] to convince [redacted] to either adhere to the agency agreement or reimburse [redacted] and Michaels."

The Jan. 8, 2006 call that the enforcement staff had mischaracterized as to who made it and when it was made, seems to have provided the NCAA its proverbial smoking gun on McNair.

In a call that took "less time than it would take to order a pizza", as McNair's attorney described in his Response according to the Infractions Report, the Committee determined that the assistant coach learned about the scheme and then failed to report it to USC's compliance office. McNair is then accused of falsely signing a document saying he had no knowledge of any violations in order to avoid being implicated.

USC, in its Response to the Committee, objected to what it described as a flawed process when the NCAA denied USC any opportunity to take part in the questioning of Lake.

USC stated in the Response that Lake had a motive to go after McNair.

"He blamed the assistant football coach for student-athlete 1's decision to go elsewhere and even made the completely unsubstantiated and false allegation that the assistant football coach was paid \$50,000 by Sports marketer A (Michael Ornstein) for delivering student-athlete 1 to his sports marketing firm."

McNair, who had no comment for this report, is being represented by independent legal counsel, Scott

CASE SUMMARY - ALLEGATION NO. 3

An important exchange between Enforcement Agent Richard Johanningmeier and Todd McNair places the assistant coach in Jan. 2005 rather than Jan. 2006.

• RJ: Okay. This is January 2005. According to your telephone records, on Saturday, January 8th, 2005, you had a two minute and 32, uh, second telephone conversation with that same San Diego number, that 619. And for the record, let me read that into the record. The number was 619/**/****. Tell us about that?

• TM: I have no idea. I don't recognize that number.

• RJ: Okay. And then subsequently on January 8th, the same day, at 2:50 p.m., you placed a one minute call to [redacted] and at 3:26 p.m. [redacted] called you and that call lasted for 13 minutes and 23 seconds. Help us with that sequence? So again, I wanna set the record here, there's the call to the San Diego number comes to you, there's a one minute and 34 second conversation.

• TM: Right.

• RJ: You place a call to [redacted] for one minute, [redacted] then returns that call and there's a 13 minute, almost a 13 and a half minute conversation that occurs.

• TM: And this is when?

• RJ: This is on January 8th, 2005.

• TM: January 8th, I mean, I, I have no idea. January 8th.

• RJ: Okay. You still don't know --

• TM: Uh, that's two --

• RJ: -- recognize this?

• TM: -- that's 2005. That's the, uh, that's 2005, that's after the Orange Bowl, that's a week after the Orange Bowl. Uh, I could've, I don't know, I could, I don't know. I mean, I could be on the, on the road, I could be on the road recruiting 'cause the Orange Bowl was probably, that's the championship game, it's probably a week after the first, seventh, I'm probably on the road. I don't, I don't know.

• RJ: Okay. So --

• TM: I'm probably on the road recruiting. I don't know.

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Tompsett.

"You have to overwhelm the Committee with evidence," Buckner said, "you have to blow them out of the water if you challenge what the staff believes. If you don't, they're going to believe the staff."

Stay tuned to *USCfootball.com* for more on this developing story as we document further findings from the investigation as they become available.


Gerard Martinez contributed to this story.

Bryan Fischer and Dan Weber cover the Trojans program for USCFootball.com. You can reach them at bryan@uscfootball.com and weber@uscfootball.com.

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Friday, June 25, 2010

NCAA responds to USC charges of 'factual errors'

By Ted Miller
ESPN.com

We should have known that the USC-NCAA case wasn't going to just go away quietly. Not after four tumultuous years.

Yesterday [it was this](#): USC-centric website [USCfootball.com](#) charging in a story that the NCAA's investigation into the Trojans football program contained many "mistakes and factual errors."

Today, the NCAA responded in an email. This from spokesperson Stacey Osburn:

The NCAA will not comment on the content of confidential documents. However, it is important to note that the recent story from fan site USCFootball.com takes select pieces of information from comprehensive documents out of context, weaving them into an inaccurate depiction. When reaching a decision, the Committee on Infractions carefully considers the hearing discussions and reviews all documents from all parties in their entirety, not just excerpts taken out of their original context.*

So now both parties are accusing the other of taking pieces of information and "weaving them into an inaccurate depiction."

This is revealing, however, and USC should take note as it prepares its appeal. The NCAA's position is that only the totality of the case matters and that incidents of investigatory sloppiness don't (out of context or not, it's clear that NCAA investigators often got things wrong -- both dates and events).

The USC appeal needs to show clearly how the NCAA's mistakes tainted the totality of the case and led to an unfair conclusion.

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Tompsett, Scott

From: Osburn, Stacey [sosburn@ncaa.org]
Sent: Wednesday, July 21, 2010 3:05 PM
To: Tompsett, Scott
Subject: RE: Request for Email to Ted Miller

Scott,

I received both of your emails and am aware that you are representing Mr. McNair. However, this representation does not entitle you to the email correspondence of NCAA staff.

Thank you.

Stacey Osburn
Associate Director for Public and Media Relations
National Collegiate Athletic Association
(317) 917-6129

 Please consider the environment before printing this email.

From: Tompsett, Scott [mailto:STompsett@stinson.com]
Sent: Tuesday, July 20, 2010 7:53 PM
To: Osburn, Stacey
Subject: RE: Request for Email to Ted Miller

Stacey,

I would appreciate a response to my request below.

Thanks,
Scott

Scott W. Tompsett | Partner | Stinson Morrison Hecker LLP
1201 Walnut Street, Suite 2900 | Kansas City, MO 64106-2150
T: 816.691.3318 | F: 816.412.9340 | M: 816.674.4141
STompsett@stinson.com | www.stinson.com

From: Tompsett, Scott
Sent: Thursday, July 15, 2010 3:15 PM
To: 'Osburn, Stacey'
Subject: Request for Email to Ted Miller

Stacey,

As I think you know, I represent Todd McNair. Please send me a copy of the email you sent to Ted Miller last month concerning Dan Weber's article.

Thanks,
Scott



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