

Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws

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ABSTRACT

Major League Baseball (“MLB”) revised its amateur draft rules in 2012, which had a significant effect on how much of a signing bonus MLB teams could offer their draftees. Accordingly, it is no surprise that signing bonuses for first round draftees decreased by almost \$12 million in 2012, as compared to 2011. The new rules, and their subsequent effect on MLB teams, demand that baseball student-athletes, now more than ever, not only be educated in all facets of the MLB Draft before deciding to turn pro or become/remain college student-athletes, but also retain a competent attorney or agent to represent them in the negotiation of a professional contract. The problem is that current National Collegiate Athletic Association (“NCAA”) rules make it virtually impossible for baseball student-athletes to receive the education they deserve to make a well-informed decision. Furthermore, NCAA rules completely prohibit

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student-athletes from hiring an attorney and/or agent for representation during negotiations.

MLB revised its rules to address changes in professional baseball; the NCAA must follow suit and amend its outdated bylaws to be in tune with the current state of amateur baseball. This article argues that the NCAA should 1.) Make a “High School Baseball Exception” to its no-agent rule, 2.) Reform its bylaw regarding Professional Sports Counseling Panels, 3.) Revise the no-agent rule as applied to college baseball student-athletes, and 4.) Create a National Professional Sports Counseling Panel.

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INTRODUCTION

Dear National Collegiate Athletic Association,¹

Major League Baseball revised its First-Year Player Draft rules, which had a significant effect on baseball student-athletes' signing bonus amounts and, thus, on their decision to turn pro or become/remain college student-athletes. Have you considered revising your rules so that student-athletes could be well informed before they make such a life-altering decision?

June 4, 2012, commenced the Major League Baseball ("MLB") First-Year Player Draft ("Draft"). This was a significant day for student-athletes, because it was the first day MLB teams could select and sign them to professional baseball contracts. MLB teams had until July 13, 2012 to sign their selected student-athletes to such contracts. Consequently, between June 4 and July 13, over 1,200 high school and college student-athletes learned the monetary value MLB teams placed on their skills as future professional baseball players.² In past Drafts, teams valued and signed players drafted in the first ten rounds for millions of dollars over their recommended signing bonus value (i.e. slot value).³ However, under the 2012-16 Basic Agreement between Major

¹ The NCAA is an association of 1,281 institutions, conferences, organizations and individuals that organizes the athletic programs of many colleges and universities in the United States and Canada. See Who We Are, NCAA

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Who+We+Are+landing+page> (last visited Oct. 18, 2013).

² At the conclusion of Round 40 of the 2012 MLB First Year Player Draft, 1,238 student-athletes were drafted. *2012 MLB Draft Tracker*, MLB, <http://mlb.mlb.com/mlb/events/draft/y2012/draftcaster.jsp#ft=round&fv=40> (last visited Aug. 3, 2012).

³ See, e.g., Jim Callis, *Highest Bonuses, Draft History*, BASEBALL AMERICA (Jul. 18, 2012, 8:08 AM), <http://www.baseballamerica.com/blog/draft/2012/07/highest-bonuses-draft-history-2/>.

League Baseball and the Major League Baseball Players Association (“Basic Agreement”),⁴ MLB places a limit on the total amount of money a team can sign all of its players drafted in the first ten rounds. As such, if a team exceeds this imposed limit, it will be taxed accordingly.⁵ Not surprisingly, teams thought twice about spending lavishly on their 2012 draftees under the new Basic Agreement.

The new Draft rules may in effect encourage MLB teams to select a lower-valued prospect in earlier rounds so they could sign him for under the recommended slot value, and thus save a significant amount of money. For a high school student-athlete, a team could use the money it saved to offer him an amount greater than his recommended slot value, whereby the student-athlete is more likely to be enticed away from enrolling in college.⁶ For a college student-athlete with at least a year of NCAA eligibility remaining, he may have to carefully consider his projected value and leverage in next year’s Draft versus the value of completing (or being closer to completing) his degree.

Regardless of whether the student-athlete is in high school or college, the new MLB Draft rules require that student-athletes not only be educated in all facets of the Draft in order to make a well-informed decision, but also retain a competent attorney or agent to represent him in the

⁴ The “Basic Agreement” is the Collective Bargaining Agreement (CBA) between MLB teams and the Major League Baseball Players Association (MLBPA). The MLBPA is the union for MLB players. *MLBPA Info*, MLB, <http://mlb.mlb.com/pa/info/cba.jsp>.

⁵ See *Summary of Major League Baseball Players Association – Major League Baseball Labor Agreement §III(e)(3)(B)*, at 4, available at http://mlb.mlb.com/mlb/downloads/2011_CBA.pdf [hereinafter *Summary of 2012-16 Basic Agreement*].

⁶ Jeff Passan, *Landmark CBA’s Draft Dollars Cause Consternation*, YAHOO! SPORTS (Nov. 23, 2011) http://sports.yahoo.com/mlb/news?slug=jp-passan_cba_hgh_testing_draft_rules_112211.

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negotiation of a professional contract.⁷ Herein lies the problem: In an effort to protect a student-athlete's amateur status, the NCAA prohibits the student-athlete from retaining anyone to represent him.⁸ The sole exception is that if the student-athlete is in college, the NCAA allows him to be represented by his school's Professional Sports Counseling Panel ("PSCP").⁹ However, this exception has problems of its own. First, the NCAA regulates who can be on the panel, which, as will be discussed in this article, prevents the student-athlete from obtaining a high level of expertise.¹⁰ Second, a majority of schools do not have PSCPs, thus limiting the student-athlete's ability to obtain such expertise in the first place.

Part I of this article discusses the MLB Draft rules under the former Basic Agreement, highlights changes to the rules under the new Basic Agreement, and illustrates the new Draft rules' potential impact on high school and college baseball student-athletes. In Part II, this article discusses the challenges current NCAA rules present to baseball student-athletes, and illustrates how such rules are also a problem for parents, NCAA member institutions and their coaches, agents and attorneys, MLB teams, and the NCAA itself. Part II concludes by highlighting the challenges the NCAA and its member institutions have faced trying to regulate this arena.

In Part III, this article contends that the effects of the Basic Agreement on baseball student-athletes confirm the

⁷ Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sports of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT.& TECH. L. 215, 222 (2005).

⁸ NCAA, 2012-2013 NCAA DIVISION I MANUAL §12.3.1, at 68 (2013), available at <http://www.ncaapublications.com/productdownloads/D113.pdf> [hereinafter NCAA D1 Manual].

⁹ *Id.* at §12.3.4.

¹⁰ *Id.* at §§12.3.4.1-12.3.4.2.

immediate need for revision of outdated NCAA rules. Part III concludes by proposing four recommendations for revision.

PART I: THE MLB DRAFT AND ITS EFFECT ON STUDENT-ATHLETES

A. *The MLB Draft and its rules prior to the 2012-2016 Basic Agreement*

The Draft takes place every year during the first full week of June.¹¹ In general, 30 MLB teams select amateur players, one at a time, in reverse order of their respective win-loss records at the close of the previous regular season.¹² The Major League Rules (“MLRs”) govern which players are eligible for selection in the Draft.¹³ To be eligible, a player must first be a resident of the United States or Canada.¹⁴ Second, the player must have never signed a MLB or Minor League Baseball contract prior to the Draft.¹⁵ Third, a player must fit within one of three basic categories: (1) graduating high school senior, (2) college player who has completed at least his junior year *or* who is at least 21 years old within 45 days of the Draft, or (3) junior college player.¹⁶ Thus, all Draft-eligible players include student-athletes. Once a

¹¹ Major League Rules Rule 4(b) (*available at* <http://bizofbaseball.com/docs/MajorLeagueRules-2008.pdf> [hereinafter MLR]).

¹² See First-Year Player Draft Official Rules, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 18, 2013).

¹³ *Id.*

¹⁴ MLR Rule 4(a). “For purposes of this Rule 4, the term “United States” shall mean the 50 states of the United States of America, the District of Columbia, Puerto Rico, and any other Commonwealth, Territory or Possession of the United States of America.” Under MLR 3(a)(1)(A), at 15, “a player shall be considered a “resident of the United States” if the player enrolls in a United States high school or college or establishes a legal residence in the United States on the date of the player’s contract or within one year prior to that date.”

¹⁵ *Id.*

¹⁶ MLR 3(a)(2)-(4) (emphasis added).

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student-athlete is selected, a MLB team retains an exclusive right to negotiate a contract with the student-athlete until he enters, or returns to, a four-year college.¹⁷ Under the 2007-2011 Basic Agreement, the deadline for signing a selected student-athlete was August 16th of each year.¹⁸

If a student-athlete decides to turn pro, he will sign a standard Minor League contract.¹⁹ Under a standard Minor League contract, salary rates for players are fixed by MLB.²⁰ However, in order to incentivize student-athletes to sign professional contracts, MLB allows its teams to offer them a signing bonus.²¹ The amount of the signing bonus is one of the few terms that are negotiable under the standard Minor League contract.²² Prior to the 2012-16 Basic Agreement, there were no restrictions on the signing bonus amount a MLB team could offer a student-athlete. In light of the absence of such restrictions, and in an effort to curb Draft spending by teams with deep pockets, MLB recommended a specific bonus amount (i.e. slot value) for each selection in the first five rounds of the Draft, and a \$150,000 maximum bonus for all players drafted after the 5th round.²³ For

¹⁷ MLR Rule 4(d)(3). The rules affect *junior college* student-athletes differently. Specifically, under MLR Rule 4(f), if a selected high school senior attends a junior college, or a selected junior college player returns to junior college, then the team that drafted him retains the exclusive right to negotiate with that player up until the seventh day prior to the next Draft.

¹⁸ *Id.*

¹⁹ MLR Rule 3(b)(2). A Minor League contract is a contract between a Minor League Baseball team and a player. Minor League Baseball is an organization that operates under the purview of MLB, and comprised of a tiered system of professional baseball leagues, namely AAA, AA, A-Advanced, A, A-Short Season, and Rookie League. Minor League Baseball serves as a system for developing future MLB players.

²⁰ MLR Rule 3(c)(2).

²¹ MLR Rule 3(c)(4).

²² *Id.*

²³ See Jim Callis, *Bonuses Vs. Slots, 2011*, BASEBALL AMERICA (Jul. 22, 2011, 2:52 PM),

example, in the 2010 Draft, the 28th overall selection (1st round) was assigned a slot value of \$1.2 million.²⁴ Thus, MLB recommended that the team who had the 28th overall selection, the Los Angeles Dodgers, sign its selection to a \$1.2 million signing bonus. However, with no penalties for signing its selection above \$1.2 million, the Dodgers signed Zach Lee for \$5.25 million – over \$4 million above MLB's slot value.²⁵

B. *Changes to the MLB Draft rules under the 2012-2016 Basic Agreement*

The new Basic Agreement brought sweeping changes to the Draft. First, the signing deadline was moved from mid-August to mid-July.²⁶ Second, and most significantly, MLB teams are now restricted in offering student-athletes signing bonuses.²⁷ Under the new Basic Agreement, each MLB team is assigned an aggregate “signing bonus pool” prior to each Draft.²⁸ Similar to the 2007-11 Basic Agreement, each selection in the first ten rounds of the Draft will be assigned a recommended slot value.²⁹ Each team's signing bonus pool equals the sum of the values of that team's selections in the first ten rounds of the Draft.³⁰ Student-athletes selected *after*

<http://www.baseballamerica.com/blog/draft/2011/07/bonuses-vs-slots-2011/>.

²⁴ Steve Henson, *Dodgers Will Make Strong Move To Sign Lee*, YAHOO! SPORTS (Aug. 13, 2010), <http://sports.yahoo.com/mlb/news?slug=sh-leedodgers081310>.

²⁵ Tony Jackson, *Dodgers Agree With Zach Lee*, ESPN (Aug. 17, 2010, 11:14 AM), <http://sports.espn.go.com/los-angeles/mlb/news/story?id=5469749>.

²⁶ Major League Baseball Players Ass'n, *supra* note 5, §III(e)(1). The signing deadline is now between July 12th and 18th, depending on the date of the MLB All-Star Game.

²⁷ *Id.* at §III(e)(3)(A).

²⁸ *Id.*

²⁹ *See, e.g., Slots You Can Believe In*, BASEBALL AMERICA (May 16, 2012), <http://www.baseballamerica.com/today/draft/news/2012/2613398.html>.

³⁰ Major League Baseball Players Ass'n, *supra* note 5, §III(e)(3)(A).

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the 10th round do not count against a team's signing bonus pool *if they receive bonuses up to \$100,000*.³¹ Any amounts paid in excess of \$100,000 will count against a team's signing bonus pool.³² To illustrate this new scheme as applied to the 2012 Draft, consider the Houston Astros' 2012 Draft signing bonus pool in the following chart.

Figure 1 - Houston Astros Signing Bonus Pool Under the 2012-16 Basic Agreement³³

<u>Round #</u>	<u>Selection #</u>	<u>Slot Value</u>
1	1	\$7,200,000
Comp. A	41	\$1,258,700
2	61	\$844,100
3	96	\$495,200
4	129	\$360,200
5	159	\$269,700
6	189	\$201,900
7	219	\$151,400
8	249	\$140,400
9	279	\$131,100
10	309	\$125,000
<i>Total Signing Bonus Pool:</i>		<i>\$11,177,700</i>

As the illustration above shows, under the new Basic Agreement, the Houston Astros' signing bonus pool is limited to \$11,177,700.

For teams that spend beyond their signing bonus pool, the new Basic Agreement subjects them to penalties, ranging

³¹ *Id* (emphasis added).

³² *Id.*

³³ *Draft 2012: What Your Team Has To Spend*, BASEBALL AMERICA (May 18, 2012), <http://www.baseballamerica.com/today/draft/draft-preview/2012/2613426.html>.

from a 75% tax on any overage, to a 100% tax on any overage and loss of future Draft selections.³⁴ Figure 2 below summarizes such penalties.

Figure 2 - Summary of Penalties for Signing Bonus Pool Overage³⁵

<u>% Above Pool</u>	<u>Penalty</u>
< 5%	75% tax on overage
5-10%	75% tax on overage and loss of 1st round pick in next year's Draft
10-15%	100% tax on overage and loss of 1st & 2nd round picks in next year's Draft
>15%	100% tax on overage and loss of 1st round picks in next two Drafts

Referring to Figures 1 and 2 above, if the Houston Astros were to spend a total of \$11,847,726 on its Draft selections (i.e. 6% above its signing bonus pool), it would have to pay a 75% tax on the \$670,626 overage.³⁶ This amounts to a \$502,970 penalty. In addition, the Astros would lose its 1st round selection in the 2013 Draft.³⁷

Although not a formal penalty, one other significant restriction is placed on MLB teams under the new Basic Agreement. If a MLB team selects a student-athlete in the Draft, but fails to sign him, the team is not allowed to apply the slot value that corresponded to the draftee to its other selections.³⁸ In other words, the MLB team loses the slot

³⁴ Major League Baseball Players Ass'n, *supra* note 5, at §III(e)(3)(B).

³⁵ *Id.*

³⁶ *Id.* This number represents the difference between what was spent (\$11,847,726) and the aggregate signing bonus pool (\$11,177,700).

³⁷ Major League Baseball Players Ass'n, *supra* note 5, at §III(e)(3)(B).

³⁸ See Kevin Thomas, *Dollars for Draftees: New Rules Limit What a Big-Money Team Can Spend*, PORTLAND PRESS HERALD, Jun. 3, 2012, available at http://www.pressherald.com/sports/dollars-for-draftees-new-rules-limit-what-a-big-money-team-can-spend_2012-06-03.html.

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value from its overall bonus pool.³⁹ To illustrate the significant impact this restriction could have on a MLB team, refer once again to the Houston Astros example in Figure 1, *supra*. If the Astros drafted, but failed to sign its 1st round selection, the team's signing bonus pool would decrease from \$11,177,700 to \$3,977,700.⁴⁰

In contrast to previous Drafts, MLB teams will be required to seriously consider spending lavishly on draftees under the new Basic Agreement. Although teams are allowed to spread their signing bonus pool money among their selections in the first ten rounds in whatever manner they deem necessary, they will have to diligently weigh the risks of offering early Draft selections any amount over their slot value.⁴¹ This may, in turn, lead teams to pass over superior athletes who demand higher bonus amounts.⁴² Instead, teams may find it more rational to select under-slot value players in earlier rounds, essentially getting a "bargain." Figure 3 immediately below shows that MLB teams are in fact executing such a strategy.

Figure 3 – Signing Bonus Departure from Slot Comparison (in dollars)⁴³

³⁹ *Id.*

⁴⁰ *Id.* The slot value associated with the Astros' 1st round pick was \$7,200,000. The difference between the Astros' initial signing bonus pool (\$11,177,700) and the slot value of the non-signed draftee (\$7,200,000) equals \$3,977,700.

⁴¹ See, e.g., Passan, *supra* note 6.

⁴² *Id.*

⁴³ See Jim Callis, *Bonuses Vs. Slots*, BASEBALL AMERICA DRAFT BLOG (Jul. 22, 2011, 2:52 PM),

[http://www.baseballamerica.com/blog/draft/2011/07/bonuses-vs-slots-](http://www.baseballamerica.com/blog/draft/2011/07/bonuses-vs-slots-2011/)

[2011/; 2011 MLB Draft Signings and Bonuses, MyMLBDraft.com,](http://www.mylbldraft.com/2011-mlb-draft-signings-and-bonuses/)

<http://www.mylbldraft.com/2011-mlb-draft-signings-and-bonuses/> (last visited on Oct. 10, 2012); Jim Callis, *Bonuses Vs. Pick Values*, BASEBALL AMERICA DRAFT BLOG (Jul. 18, 2012, 9:15 AM),

[http://www.baseballamerica.com/blog/draft/category/signings/; 2012 Draft LIVE! Draft Pick Database, PerfectGame.com,](http://www.baseballamerica.com/blog/draft/category/signings/)

Selection #	Slot Value	2011 Draft Actual Bonus (+/-) Slot	Year in School*
1	4,000,000	4,000,000	JR
2	3,250,000	5,250,000	JR
3	2,925,000	1,525,000	JR
4	2,700,000	3,550,000	HS
5	2,530,000	4,970,000	HS
6	2,340,000	4,860,000	JR
7	2,178,000	2,822,000	HS
8	2,043,000	857,000	HS
9	1,962,000	663,000	HS
10	1,863,000	0	JUCO
11	1,791,000	734,000	JR
12	1,719,000	806,000	JR
13	1,656,000	444,000	HS
14	1,602,000	398,000	HS
15	1,557,000	443,000	JR
16	1,512,000	77,000	JR
17	1,467,000	0	JR
18	1,422,000	118,000	JR
19	1,386,000	114,000	JR
20	1,359,000	41,000	JR
21	1,332,000	Did Not Sign	HS
22	1,287,000	13,000	JR
23	1,260,000	740,000	JR
24	1,242,000	358,000	HS
25	1,215,000	1,535,000	HS
26	1,197,000	1,303,000	HS
27	1,161,000	839,000	HS
28	1,134,000	0	JR
29	1,116,000	0	JR
30	1,089,000	86,000	JR
31	972,000	143,000	JR
32	954,000	9,000	HS
33	936,000	0	HS

***HS** = High school, **SO** = College Sophomore, **JR** = College Junior, **SR** = College Senior, **JUCO** = Junior College

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Selection #	2012 Draft		
	Slot Value	Actual Bonus (+/-) Slot	Year in School*
1	7,200,000	-2,400,000	HS
2	6,200,000	-200,000	HS
3	5,200,000	-1,200,000	JR
4	4,200,000	120,000	SO
5	3,500,000	-500,000	JR
6	3,250,000	650,000	HS
7	3,000,000	0	HS
8	2,900,000	Did Not Sign	JR
9	2,800,000	-200,000	JR
10	2,700,000	-100,000	HS
11	2,625,000	0	HS
12	2,550,000	-250,000	HS
13	2,475,000	0	HS
14	2,375,000	-375,000	HS
15	2,250,000	-500,000	JR
16	2,125,000	800,000	HS
17	2,000,000	-250,000	HS
18	1,950,000	400,000	HS
19	1,900,000	0	JR
20	1,850,000	0	JR
21	1,825,000	-200,000	HS
22	1,800,000	0	JR
23	1,775,000	-175,000	SR
24	1,750,000	300,000	JR
25	1,725,000	-12,500	JR
26	1,700,000	0	HS
27	1,675,000	0	HS
28	1,650,000	-125,000	JR
29	1,625,000	0	HS
30	1,600,000	-400,000	HS
31	1,575,000	0	JR
32			
33			

***HS** = High school, **SO** = College Sophomore, **JR** = College Junior, **SR** = College Senior, **JUCO** = Junior College

As Figure 3 illustrates, over 83% of 2012 draftees⁴⁴ signed either at or below their slot value, compared to just over 15% in 2011.⁴⁵ This statistic further proves that the new Draft rules prevent MLB teams from straying from recommended slot values, thus leaving less negotiating room for draftees. Mark Appel, Stanford University's ace pitcher, experienced this firsthand. As a junior in 2012, Appel was 10-2 with a 2.56 ERA, earned 130 strikeouts in 123 innings, and raised his overall college record to 18-10.⁴⁶ These 2012 statistics earned him National College Pitcher of the Year honors. Due to Appel's superior level of talent, he was considered by many to be a consensus number one overall Draft pick in the 2012 Draft. As exhibited by Figure 3 above, the 1st pick in the 2012 Draft came with a recommended slot value of \$7.2 million.

When the Commissioner of MLB, Bud Selig, rose to the podium to announce the first selection of the 2012 Draft, Mark Appel's name was not mentioned. In fact, Appel's name was not heard until the Pittsburgh Pirates selected him as the 8th pick.⁴⁷ Appel's drop from the 1st pick to the 8th corresponded with a \$4.3 million drop in recommended slot value.⁴⁸ The baseball community was left wondering why Appel dropped so far down in the Draft. One source says that Appel turned down a \$6 million offer from the Houston

⁴⁴ *Id.* In 2012, 25 out of the 30 draftees who signed professional contracts signed either at or below their slot value.

⁴⁵ *Id.* In 2011, five out of the 32 draftees who signed professional contracts signed either at or below their slot value.

⁴⁶ Associated Press, *Mark Appel Will Stay at Stanford*, ESPN (Jul. 14, 2012, 7:10 AM) http://espn.go.com/mlb/story/_/id/8164488/mark-appel-spurns-pittsburgh-pirates-stay-stanford.

⁴⁷ *2012 MLB Draft Tracker*, *supra* note 2.

⁴⁸ *Slots You Can Believe In*, *supra* note 29 (The 1st pick's recommended slot value is \$7.2 million, whereas the 8th pick's is \$2.9 million).

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Astros.⁴⁹ As a result, the Astros instead selected and offered a high school student-athlete \$4.8 million, essentially saving the team \$1.2 million.⁵⁰ What happened from that point on is speculation,⁵¹ but regardless of his drop to the 8th pick, Mark Appel still had a sizeable recommended slot value associated with his spot in the Draft: \$2.9 million.⁵² The Pirates offered him \$3.8 million, \$900,000 above the \$2.9 million recommended slot value, but, surprisingly, Appel turned it down. The result: the Pirates walked and Appel would return to Stanford for his senior college season. For the Pirates, the new Draft rules prohibited the team from allocating the offered \$3.8 million to other Draft selections. However, because the team didn't sign Appel, it will receive an extra first-round pick in next year's Draft (i.e. the 9th overall selection).⁵³

Mark Appel's example shows that the limits placed on MLB teams in the way of signing bonus pools, as well as the imposed penalties for exceeding the pool, affect a MLB team's Draft strategy. In regards to Appel's situation, one source said that the Pirates were prepared to go as much as five percent above its signing bonus pool.⁵⁴ At that level, the Pirates would incur a 75% tax on the overage, which would amount to around \$440,000. However, the Pirates did not want to exceed five percent because doing so would not only

⁴⁹ Matthew Pouliot, *Report: Mark Appel Turned Down \$6 Million From Astros*, NBCSPORTS (Jun. 5, 2012, 6:11 PM) <http://hardballtalk.nbcsports.com/2012/06/05/report-mark-appel-turned-down-6-million-from-astros/>.

⁵⁰ Callis, *supra* note 43; *See also*, *Draft 2012*, *supra* note 43.

⁵¹ Associated Press, *supra* note 46. One source said that MLB teams who had the 2nd through 7th picks in the Draft shied away from Appel because of the expected demands of his advisor, Scott Boras.

⁵² *Slots You Can Believe In*, *supra* note 29.

⁵³ Associated Press, *supra* note 46.

⁵⁴ *Id.*

result in a higher tax penalty, but also the loss of a 1st round Draft pick in 2013.⁵⁵

C. *Complexities surrounding a baseball student-athlete's decision to turn pro*

Every year, Draft-eligible student-athletes eagerly anticipate the Draft. With over 1,200 student-athletes selected in the Draft each year,⁵⁶ student-athletes across the United States and Canada remain hopeful they will be one of those selected. For many student-athletes, it is their dream to play professional baseball and a way to earn a living doing something they enjoy. For superior student-athletes with attractive MLB talent, the anticipation can be huge, and grows as the Draft gets closer. Much of the anticipation is the result of the attention a student-athlete receives by scouts representing MLB teams. As early as two years prior to the Draft, scouts from all 30 MLB teams evaluate student-athletes at their games and practices, at regional and national showcases, and at MLB-sponsored tryouts.⁵⁷ One commentator explains the important role scouts play: "As part of the evaluation process, scouts assess a student-athlete's skill, makeup, and character."⁵⁸ In many cases, scouts will begin to develop a personal relationship with student-athletes.⁵⁹ Moreover, scouts will request that a student-athlete complete questionnaires.⁶⁰ MLB teams approach the evaluation process with utmost diligence, because selecting and signing a student-athlete in the Draft is an investment, especially for those selections in the first ten rounds.⁶¹

⁵⁵ *Id.*

⁵⁶ 2012 *MLB Draft Tracker*, *supra* note 2.

⁵⁷ Karcher, *supra* note 7, at 220.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Slots You Can Believe In*, *supra* note 29. 2012 Draft slot values in the first ten rounds ranged from \$125,000 (last pick in the 10th round) to \$7.2 million (first pick in the 1st round).

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The MLRs expressly permit MLB team representatives to talk to any Draft-eligible student-athlete prior to the Draft.⁶² Therefore, once teams determine what student-athletes they are interested in potentially selecting in the Draft, teams will inquire about each student-athlete's willingness to sign a professional contract and thus forego any remaining college eligibility.⁶³ This inquiry includes determining the signing bonus amount for which a student-athlete will sign.⁶⁴ The obvious method MLB teams use to make this inquiry is through direct discussions with the student-athlete and/or those individuals acting on his behalf.⁶⁵ In some cases, MLB teams will negotiate a signing bonus with a baseball student-athlete and his representative prior to the Draft, and ask the student-athlete to verbally commit to the team prior to such team selecting him in the Draft.⁶⁶ Although this type of "pre-Draft dealing" is prohibited by the MLRs, MLB teams and student-athletes engage in it because "it brings certainty to both [parties]; thus, a contract can be completed shortly after the [D]raft without the need for prolonged negotiations [between Draft day and the signing deadline]."⁶⁷ Considering the decision to turn pro may be less attractive to a student-athlete under the new Draft rules (i.e. the likelihood of not signing for over the recommended slot value is greater), MLB teams are more likely to violate the MLRs and enter into pre-Draft agreements because of their need for some level of certainty in signing a highly valued prospect.

⁶² MLR 3(g)(1).

⁶³ NCAA DI Manual, *supra* note 8, §12.1.2(c). Once student-athletes sign a professional contract, their remaining eligibility will expire.

⁶⁴ Karcher, *supra* note 7, at 220. This is known as "signability" in the baseball industry.

⁶⁵ *Id.* at 221.

⁶⁶ *Id.*

⁶⁷ *Id.* at 56. Since pre-Draft deals are prohibited by the MLRs, verbal agreements between MLB teams and student-athletes are not binding.

Due to the nature of the Draft, signability plays more of a role with high school seniors and college juniors because it is this category of Draft-eligible student-athletes that have the bargaining leverage of entering/returning to college.⁶⁸ For the vast majority of student-athletes, this is most likely the first time they have been made the subject of discussions about 1.) signing a contract, and 2.) receiving compensation for upwards of seven figures. The reality is that 17 to 22 year-old student-athletes and their families are involved in sophisticated discussions regarding the Draft and the decision to turn pro – discussions with implications on student-athletes' professional baseball careers and financial futures. In most cases, student-athletes with little or no real-world experience are expected to bargain with MLB teams, MLB team representatives who have years of negotiating experience, and other MLB team staff members that seek to minimize the signing bonus of its draftees.⁶⁹ As discussed above, under the new Basic Agreement, MLB teams are limited in what they can offer student-athletes.⁷⁰ Thus, team representatives are forced to exercise a certain level of shrewdness during discussions about the Draft and potential signing bonuses. As can be expected, these discussions have an elevated level of intensity with top prospects. The pressure surrounding discussions can also reach high levels

⁶⁸ *Id.* at 220. College seniors have less bargaining leverage in a Draft because their college eligibility will have expired. College seniors have only two choices for professional baseball upon expiration of their college eligibility: 1.) Enter the Draft, or 2.) Compete in an international league or professional league not affiliated with MLB or Minor League Baseball (i.e. Independent League baseball organizations). Considering the latter choice neither pays lucrative signing bonuses, nor has the attraction MLB does, student-athletes prefer to enter the Draft. MLB teams realize this, which in turn leads to college seniors being offered signing bonuses significantly less than their recommended slot value.

⁶⁹ Virginia A. Fitt, Note, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L. J. 555, 571 (2009).

⁷⁰ Summary of 2012-16 Basic Agreement, *supra* note 5, §III(e)(3)(A).

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when agents, coaches, family, friends, and/or the media begin to inquire into the top prospects' particular goals and plans.⁷¹

Furthermore, a student-athlete's decision to turn pro involves a complicated set of MLB and NCAA rules and regulations.⁷² Therefore, student-athletes must fully understand the consequences surrounding their choice to turn pro and be aware of ways to reduce their personal risks during the decision-making process.⁷³ In order to do so, it is common practice for student-athletes and their families to lean on the expertise of agents to assist them during discussions.⁷⁴ Such assistance often results in the agent having contact with MLB teams that, unfortunately, is in violation of NCAA Bylaw 12.3: the "no-agent rule" (to be discussed *infra*).⁷⁵ Violations of NCAA rules can have severe consequences for student-athletes and, if college student-athletes, the NCAA member institution they attend.⁷⁶ Penalties could include forfeiture of student-athlete eligibility, as well as institutional fines, investigations, probations, or even athletic program termination.⁷⁷ Regardless of whether the baseball student-athlete is in high school or college, the regulations, technicalities, and legal jargon surrounding the Draft and NCAA eligibility warrant that student-athletes be educated and advised properly. In most cases, this requires the student-athlete to retain an attorney and/or agent. As such, this article will now discuss the importance of retaining

⁷¹ Glenn M. Wong, Warren Zola, & Chris Deubert, *Going Pro in Sports: Providing Guidance to Student-Athletes in a Complicated Legal & Regulatory Environment*, 28 CARDOZO ARTS & ENT. L. J. 553, 557 (2011).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Karcher, *supra* note 7, at 222.

⁷⁵ NCAA DI Manual, *supra* note 8, §12.3 (prohibiting a student-athlete from being represented by an agent for the purpose of marketing his or her athletics ability).

⁷⁶ Karcher, *supra* note 7, at 222.

⁷⁷ *Id.*

an attorney and/or agent and how the process is made complicated due to NCAA overreach and its principle of amateurism embodied in NCAA Bylaw 12.3.

PART II: THE NCAA'S ROLE IN A STUDENT-ATHLETE'S DECISION TO TURN PRO

A. *The NCAA's "amateurism principle"*

Before discussing the details of the no-agent rule and the challenges surrounding it, it is important to highlight the NCAA's claimed purpose behind all of its bylaws. The NCAA's core purpose is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education *so that the educational experience of the student-athlete is paramount.*"⁷⁸

One of the guiding principles of the NCAA bylaws governing the use of agents is that only *amateur* student-athletes are eligible for participation in intercollegiate athletics.⁷⁹ Thus, the NCAA purports that "[NCAA] member institutions' athletic programs are designed to be an integral part of the educational program [and] the student-athlete is considered an integral part of the student body, thus maintaining a *clear line of demarcation* between collegiate and professional sports."⁸⁰

The NCAA's purpose and its guiding principles behind amateurism have been under severe criticism lately, especially considering the \$60 billion industry that is college sports.⁸¹ Economic benefits from NCAA-sponsored events such as March Madness,⁸² bowl games, promotions, as well as from profits made by using student-athletes' image and

⁷⁸ Wong, *supra* note 71, at 554 (emphasis added).

⁷⁹ Karcher, *supra* note 7, at 216 (emphasis added).

⁸⁰ NCAA DI Manual, *supra* note 8, §12.1.2 (emphasis added).

⁸¹ Fitt, *supra* note 69, at 567.

⁸² Name designated to the men's NCAA Division I Basketball Championship held each spring. Christian Dennie, *Changing the Game: The Litigation That May Be the Catalyst for Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 18 (2012).

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likeness, all have played a role in the \$60 billion figure that has led many to argue the NCAA stands for anything but amateurism.⁸³ For example, the NCAA was paid \$711 million for television rights to the 2011 March Madness basketball tournament alone.⁸⁴ Student-athletes are not ignorant of such profits; indeed, most of them know that billions of dollars are floating around because of them.⁸⁵ Similarly, student-athletes are also aware of the multi-million dollar salaries of NCAA coaches.⁸⁶ In fact, part and parcel of living the life of a NCAA student-athlete includes dreaming about earning multi-million dollar salaries of their own, along with signing large bonuses and endorsement deals.⁸⁷ For the most talented and highly touted student-athletes, NCAA competitions are theoretically a student-athletes' ideal opportunity to showcase their market value to the world of professional sports – a world where they could earn the multi-million dollar salaries and bonuses similar to those of their current coaches.

B. *Agents, the agent industry, and the NCAA's no-agent rule*

Agents in the context of sports are similar to agents found in principal-agent relationships under agency law. The

⁸³ Fitt, *supra* note 69, at 567. See, e.g., Michael McCann, *Players 2, NCAA 0*, SPORTS ILLUSTRATED, Oct. 15, 2012, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1206132/index.htm> (Ed O'Bannon, former student-athlete at University of California-Los Angeles, challenging NCAA's licensing of names, images and likenesses of former Division I college athletes for commercial purposes without compensation or consent).or consent).

⁸⁴ Taylor Branch, *The Shame of College Sports*, THE ATLANTIC, Sept. 7, 2011, available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>.

⁸⁵ *Id.*

⁸⁶ Fitt, *supra* note 69, at 568.

⁸⁷ *Id.*

fundamental function of sports agents is to represent, counsel, advise, and assist an athlete in the negotiation, execution, and enforcement of their contract.⁸⁸ However, in contrast to the portrayal of agents in the movie *Jerry Maguire*, the most successful agents provide services that extend beyond “showing clients the money” attached to a long-term, multi-million dollar contract.⁸⁹ Specifically, such agents offer services such as education to student-athletes and their families regarding the Draft and their transition to the pros, endorsement and marketing advice, and post-athletic career planning.⁹⁰ There has also been a growing trend among sports agents to limit their representation activities to one sport, or athletes of a particular playing position. Therefore, many agents are able to provide expert advice to athletes on the rules, regulations, and complexities of a given sport.⁹¹

The nature of the agent industry can be summed up in one word: cutthroat. Thousands of individuals claim to be agents, however there are only 3,346 active athletes among the three major sports leagues, namely MLB, the National Football League (NFL), and the National Basketball Association (NBA).⁹² In MLB, the only way an agent can

⁸⁸ Robert P. Garbarino, *So You Want to be a Sports Lawyer, or is it a Player Agent, Player Representative, Sports Agent, Contract Advisor, Family Advisor or Contract Representative?*, 1 VILL. SPORTS & ENT. L. F. 11, 30 (1994).

⁸⁹ See Cameron Crowe, *Jerry Maguire* Movie Script (1996), available at <http://screenplay.com/downloads/scripts/Jerry%20Maguire.pdf> (last visited on Sep. 29, 2013).

⁹⁰ Garbarino, *supra* note 88, at 32. Within the context of baseball, and in consideration of the new Draft rules, agents should consider engaging in such differentiation because providing value by negotiating signing bonuses well above the recommended slot will be difficult to do under the new Draft rules. Refer to Figure 3, *supra*.

⁹¹ *Id.* at 22.

⁹² MLB is comprised of 30 teams, with 40 players per team, totaling 1,200 players. *Team-by-Team Information*, MLB.COM, <http://mlb.mlb.com/team>; *Player Search*, MLB.COM, <http://www.mlb.com/mlb/players> (last visited Sept. 29, 2013). The NFL is made up of 32 teams, with 53 active players (Footnote continued on page 81)

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become “certified” by the Major League Baseball Player’s Association (MLBPA)⁹³ is by representing a player on the “40-man roster.”⁹⁴ Therefore, as one can imagine, the competition among agents to acquire a client is fierce. Several agents have gone to great measures, such as wrongfully giving prospective clients cash and loans and buying them cars, alcohol, and equipment, as a means to recruit them while they are student-athletes.⁹⁵ Reggie Bush, former University of Southern California (USC) football standout, is a well-publicized example.⁹⁶ Bush and his family had received hundreds of thousands of dollars in cash and gifts from advisors who labeled themselves as “sports marketers.”⁹⁷ After a four-year investigation, the NCAA punished Bush for his receipt of extra benefits, and USC for its lack of institutional control.⁹⁸ Specifically, the NCAA

per team, totaling 1,696 players. *Teams*, NFL, <http://www.nfl.com/teams> (last visited Sept. 29, 2013). The NBA has 30 teams, with about 15 players per team, totaling about 450 players. *Team Index*, NBA.COM, <http://www.nba.com/teams> (last visited Sept. 29, 2013).

⁹³ The MLBPA is the union, and thus the exclusive bargaining representative for MLB players. However, per Article 4 of the Basic Agreement, a MLB player may designate an agent to negotiate a MLB contract on his behalf, provided that such agent is certified to MLB teams by the MLBPA. MLB teams are not allowed to negotiate with any agents except those that are certified by the MLBPA. *See* MLBPA Regulations Governing Player Agents, §1(B), *available at* <http://reg.mlbpagent.org/Documents/AgentForms/Agent%20Regulations.pdf>.

⁹⁴ The “40-man roster” is composed of all the players on a MLB team who are signed to a MLB contract.

⁹⁵ *See generally* United States v. Walters, 913 F.2d 388, 390 (7th Cir. 1990) (agents enticed talented college football players by providing signing bonuses in cash, no-interest loans, sports cars and other incentives).

⁹⁶ *Reggie Bush to forfeit Heisman*, ESPN, Sep. 15, 2010, <http://sports.espn.go.com/los-angeles/ncf/news/story?id=5572827>.

⁹⁷ *Id.*

⁹⁸ *Id.*

stripped Bush of the 2005 Heisman Trophy;⁹⁹ it barred USC from participating in bowl games for two years, took away football scholarships, and stripped the university of its 2004 National Championship.¹⁰⁰

Due to the nature of the agent industry and its possible negative impact on student-athletes, the NCAA instituted bylaws as a means to regulate the agent industry. The general rule, called the “no-agent rule,” is found under NCAA Bylaw 12.3.1. Under Bylaw 12.3.1, “an *individual* [who has ever] agreed (orally or in writing) to be represented by an agent for the purpose of marketing [the athlete’s] athletics ability or reputation...” will be ineligible for participation in an intercollegiate sport.¹⁰¹ The NCAA has defined “individual” as a “person prior to and subsequent to enrollment in a [NCAA] member institution.”¹⁰² Therefore, the NCAA has extended its reach beyond collegiate student-athletes; it also includes high school student-athletes or graduates prior to enrollment in a NCAA member institution. Thus, high school student-athletes could essentially be deemed ineligible by the NCAA to participate in collegiate sports before they step foot on a college campus.¹⁰³

Pursuant to Bylaw 12.3.1, the NCAA further restricts high school and collegiate student-athletes from entering into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the student-athlete has exhausted his eligibility.¹⁰⁴ The classic case includes an agent providing advice to a student-athlete about his or her transition to professional sports, and

⁹⁹ *Id.* Annual award given to the most outstanding player in college football.

¹⁰⁰ *Reggie Bush to forfeit Heisman*, *supra* note 96.

¹⁰¹ NCAA DI Manual, *supra* note 8, §12.3.1 (emphasis added).

¹⁰² NCAA DI Manual, *supra* note 8, §12.1.3.

¹⁰³ Karcher, *supra* note 7, at 216.

¹⁰⁴ NCAA DI Manual, *supra* note 8, §12.3.1.1. The NCAA also prohibits a student-athlete and his or her relatives and friends from accepting transportation or other benefits from agents under §12.3.1.2.

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the student-athlete verbally agreeing to pay the agent a fee for this advice, as well as retain him or her, after his NCAA eligibility expires. Regardless if the agent has the same fee arrangement for all student-athletes, the student-athlete will be in violation of both Bylaw 12.3.1.1, “Representation for Future Negotiations,” and Bylaw 12.3.1.2, “Benefits from Prospective Agents.”¹⁰⁵

The NCAA has carved out a limited exception to its general rule. Under Bylaw 12.3.2, the NCAA allows a student-athlete to secure advice “from a lawyer concerning a proposed professional sports contract.”¹⁰⁶ However, the lawyer, like an agent, may neither represent the student-athlete in negotiations for such a contract, nor be present during discussions of a contract offer between the student-athlete and a professional sports team.¹⁰⁷ Additionally, lawyers, like agents, may not have any direct contact (in person, by telephone, or by mail) with a professional sports team on behalf of the student-athlete.¹⁰⁸

C. *The NCAA’s exception to its no-agent rule: Professional Sports Counseling Panels*

As mentioned above, a student-athlete’s transition to professional sports can be complex, sparking a need for expert counsel in most situations.¹⁰⁹ Considering the NCAA’s mission to protect student-athletes from unethical agents attempting to provide such counsel, the NCAA created Bylaw 12.3.4.¹¹⁰ Bylaw 12.3.4 allows an NCAA member institution to create a PSCP and outlines seven different

¹⁰⁵ Karcher, *supra* note 7, at 217.

¹⁰⁶ NCAA DI Manual, *supra* note 8, §12.3.2.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* §12.3.2.1.

¹⁰⁹ Karcher, *supra* note 7, at 222.

¹¹⁰ NCAA DI Manual, *supra* note 8, §12.3.4.

functions it can serve.¹¹¹ These functions include: advising a student-athlete about a future professional career,¹¹² advising a student-athlete on agent selection,¹¹³ directly communicating and meeting with representatives of professional teams,¹¹⁴ and discussing a student-athlete's market value with the student-athlete, agents, and representatives of professional teams.¹¹⁵ The NCAA mandates that the PSCP consist of at least three persons appointed by the school's president, with not more than one panel member being an athletics department staff member.¹¹⁶ Sports agents, or any person employed by a sports agent or agency, are not allowed to sit on the PSCP.¹¹⁷

PSCPs can be an invaluable resource to student-athletes, especially considering that "many student-athletes are ill prepared for the transition to professional sports due to the lack of guidance, counsel, and expertise throughout it."¹¹⁸ Proponents of PSCPs argue that if NCAA member institutions prepared their student-athletes better, everyone involved in the professional sports transition process would win.¹¹⁹ Specifically, the student-athlete and his or her family would have a clearer understanding of the process. Moreover, professional teams and player's unions such as the MLBPA would appreciate a more mature and educated player entering the league, because it may result in a more positive image for the league and a better opportunity to market the player as a league representative.¹²⁰ Those representing the athletes win, too. Specifically, if student-athletes have a fundamental

¹¹¹ *Id.*

¹¹² *Id.* §12.3.4(a)

¹¹³ *Id.* §12.3.4(f)

¹¹⁴ *Id.* §12.3.4(d) and (e).

¹¹⁵ *Id.* §12.3.4(f).

¹¹⁶ *Id.* §12.3.4.1-12.3.4.2.

¹¹⁷ *Id.*

¹¹⁸ Wong, *supra* note 71, at 600.

¹¹⁹ *Id.* at 588.

¹²⁰ *Id.*

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knowledge of their career potential and financial outlook, it greatly reduces the “babysitting” agents and financial advisors have to do in servicing their clients.¹²¹ Additionally, student-athletes have a better chance to attract and retain the best agents and financial advisors. Such agents and financial advisors prefer smarter, more mature clients who understand the professional sports process.¹²² With a clear understanding of the process, student-athletes are more likely to have loyalty toward those representing them.¹²³

Despite the potential benefits of PSCPs and the option they provide in light of the NCAA’s strict rules regarding the use of agents, many NCAA member institutions have not instituted them. In fact, it is estimated that only 25% of schools have a PSCP.¹²⁴ For example, in the ACC,¹²⁵ a premier NCAA athletic conference that includes twelve schools, fewer than half have a PSCP.¹²⁶ Why is this? One argument is that since the NCAA mandates that the majority of PSCP panelists come from outside a university’s athletic department, there are limited, if any, sources of funding.¹²⁷ However, this argument is somewhat weakened considering that some schools have expended large sums of money to hire outside consultants to advise their student-athletes, rather than instituting their own PSCP.¹²⁸

¹²¹ *Id.* at 600.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Jimmy Golen, *At some schools, advisers help navigate going pro*, WASHINGTON TIMES, Oct. 14, 2011, available at <http://www.washingtontimes.com/news/2011/oct/14/at-some-schools-advisers-help-navigate-going-pro/?page=all>.

¹²⁵ Athletic Coast Conference, <http://www.theacc.com> (last visited Oct. 10, 2012).

¹²⁶ Golden, *supra* note 124.

¹²⁷ *Id.*

¹²⁸ See CORNERSTONE SPORTS CONSULTING, <http://cornerstonesports.com> (last visited Oct. 10, 2012). As of October 10, 2012, Cornerstone Sports Consulting has been retained by eight NCAA member institutions: LSU,

Scholars have argued that even if a NCAA member institution creates its own PSCP, NCAA restrictions prevent student-athletes from obtaining the level of expertise they deserve. First, because the NCAA limits the panel members to athletic department employees and faculty members, it is reasonable to conclude that most panel members are not well-versed in the rules and regulations of not only the NCAA, but also the numerous major sports leagues such as MLB, the NFL, NBA, and National Hockey League (NHL). Furthermore, many of these panel members most likely do not have relationships with scouts and team executives.¹²⁹ This presents a problem since these are the people who determine the market value of student-athletes and negotiate their signing bonuses. One of the main reasons a student-athlete hires an agent is because of the agent's relationships with scouts and team executives.

Second, the makeup of the PSCP may potentially create a conflict of interest among student-athletes and panel members. Since panel members are full-time employees and representatives of the university, they may be more inclined to sway an elite student-athlete to compete as a student-athlete for another year before turning pro.¹³⁰ One scholar explains: "As long as the institution has a vested, financial interest in encouraging the student [-athlete] to stay [in school], full-time employees of the institution may not be wholly neutral."¹³¹ Simply put, the longer an elite student-athlete competes at the school, the more likely such a student-athlete will help the school generate more wins and thus more revenue. If a PSCP member encourages a student-athlete to

Oklahoma, Kentucky, Washington, Georgia, Arkansas, Auburn, and Alabama. *Id.* Cornerstone Sports Consulting limits its practice to football student-athletes. CORNERSTONE SPORTS CONSULTING, <http://cornerstonesports.com/about-us> (last visited Oct. 10, 2012).

¹²⁹ Karcher, *supra* note 7, at 224.

¹³⁰ *Id.*

¹³¹ Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 364 (1997)

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sign a professional contract, the school may miss out on such benefits.

Third, PSCP members may not have the time necessary to devote to fulfilling his or her duties as a PSCP member. More likely than not, panel members selected to serve on a school's PSCP are individuals with major responsibilities at the university.¹³² Considering there is an extensive amount of time demanded in researching a student-athlete's market value, communicating with the student-athlete and his or her family, agents, scouts, and team executives, and becoming well versed in the NCAA bylaws and a particular sports league's rules and regulations, this also presents a problem for the student-athlete. Chances are that a student-athlete will not receive the necessary attention and counseling he deserves to make an informed decision about whether to turn pro or not.

Finally, it is important to note that since high school student-athletes are not yet student-athletes of a NCAA institution, they are not allowed access to PSCPs.¹³³ For baseball student-athletes, this is a problem because there are very few outlets, besides agents, to obtain the necessary information to make a well-informed decision about turning pro.¹³⁴

¹³² Karcher, *supra* note 7, at 224.

¹³³ *Id.*

¹³⁴ This situation is unique to high school baseball student-athletes compared, for example, to basketball and football student-athletes. Basketball student-athletes must be out of high school for at least one year before they are draft-eligible in the NBA. *Article X – Player Eligibility and NBA Draft*, 2005 COLLECTIVE BARGAINING AGREEMENT 225 (2005), available at <http://www.nbpa.org/sites/nbpa.org/files/ARTICLE%20X.pdf>. Football student-athletes must be out of high school for at least three years before they are draft-eligible in the NFL. *Article 6 College Draft*, COLLECTIVE BARGAINING AGREEMENT 17 available at http://images.nflplayers.com/mediaResources/files/PDFs/General/2011_Final_CBA.pdf.

D. *The NCAA's no-agent rule and the challenges surrounding baseball student-athletes*

With the MLB Draft taking place in the beginning of June, Draft-eligible student-athletes obligated to comply with NCAA rules face significant challenges. In the early weeks of June, there is no guarantee a high school or college baseball student-athlete will be finished with his season.¹³⁵ As a result, every year, hundreds of baseball student-athletes are forced to finish their season (or state or national championship run) with the distractions and pressures of the Draft looming over them. In addition, MLB teams and executives contact student-athletes during this time, in an effort to determine their signability and willingness to negotiate a signing bonus.¹³⁶ Accordingly, this is quite a daunting scenario for most 17 to 22-year olds, let alone student-athletes who are focused on competing for their school at a highly visible level. Because of this reality, it would be wise for most baseball student-athletes to hire an agent or attorney to advise them and speak with MLB teams.¹³⁷ As one scholar argues, "without an agent to communicate with a MLB team, the student-athlete is at a disadvantage in the Draft selection and negotiation process."¹³⁸ Furthermore, without an agent, a baseball student-athlete may make a career decision that could have a devastating effect on his future.¹³⁹ However, student-athletes face limited options regarding the use of agents because of NCAA restrictions. Student-athletes could either challenge NCAA rules in court, or completely disregard them and thus risk the loss of their NCAA eligibility.

¹³⁵ Karcher, *supra* note 7, at 222.

¹³⁶ *Id.* at 221.

¹³⁷ *Id.* at 224.

¹³⁸ Fitt, *supra* note 69, at 571.

¹³⁹ Todd Fisher, *Amateurism and Intercollegiate Athletics: The Double Standard of Section 12.2.4.2.1*, 3 SPORTS LAW. J. 1, 13 (1996).

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One would think student-athletes have a reasonable option of challenging the validity of NCAA rules in court. However, courts generally have been unfavorable to student-athletes on past challenges to NCAA rules. Courts have reasoned that since the NCAA is a private, voluntary association, it has the right to apply its rules and manage its own internal affairs without interference from the courts.¹⁴⁰ For example, in *Cole v. NCAA*, the court stated that the “NCAA’s rules and decisions regarding the concerns and challenges of student-athletes are entitled to considerable deference” and that it “is reluctant to replace the NCAA...as the decision-maker.”¹⁴¹ The student-athlete in *Cole* brought action in state court against the NCAA, seeking a declaration that the association’s participation policy violated the Americans with Disabilities Act (ADA) and seeking to enjoin the NCAA from discriminating against student-athletes.¹⁴²

Despite courts’ past unfavorable rulings for student-athletes, in 2009, Andy Oliver, then baseball student-athlete at Oklahoma State University, nonetheless decided to challenge the NCAA rules affecting him in Ohio state court.¹⁴³ In *Oliver v. NCAA*, one of the arguments presented by Oliver was that the no-agent rule was “arbitrary and capricious because it does not impact a player’s amateur status but instead limits the player’s ability to effectively negotiate a contract that the player or a player’s parent could negotiate.”¹⁴⁴ Surprisingly, the Court of Common Pleas of

¹⁴⁰ See *NCAA v. Tarkanian*, 488 U.S. 179, 202 (1988) (NCAA is not a “state actor” for purposes of the 14th Amendment); *Wiley v. NCAA*, 612 F.2d 473, 477 (10th Cir. 1976) (unless clearly defined constitutional principles are at issue, the suits of student-athletes displeased with NCAA rules do not present substantial federal questions).

¹⁴¹ *Cole v. NCAA*, 120 F.Supp.2d 1060, 1071-72 (N.D. Ga. 2000).

¹⁴² *Id.* at 1062.

¹⁴³ *Oliver v. NCAA*, 2009-Ohio-6587, 920 N.E.2d 203, 207 (Com. Pl. 2009).

¹⁴⁴ *Id.* at 208.

Ohio agreed with Oliver's argument and also added that the NCAA's no-agent rule was against public policy.¹⁴⁵ The NCAA appealed this decision, but the case was settled out of court with the NCAA paying Oliver \$750,000.¹⁴⁶

Judge Tone's decision in *Oliver* seemed to be a major victory for baseball student-athletes. However, because the case was settled out of court before any higher courts could rule on appeal, the *Oliver* decision did not set a precedent. The NCAA did nothing to change its rule, but instead added an additional level of enforcement on baseball student-athletes.¹⁴⁷ Specifically, the NCAA mandates that universities administer a survey for drafted undergraduate baseball student-athletes that asks if they 1.) retained an agent prior to enrollment, and 2.) if they retained an agent, did the agent speak to a professional organization on their behalf? This places baseball student-athletes in a no-win situation. If a baseball student-athlete answers the questions in the affirmative, he will be deemed ineligible. If he answers in the negative, but in fact did hire an agent and such agent spoke to MLB teams on his behalf, he has more than likely committed an ethical violation at his university and may face suspension or expulsion if the university is made aware of such a violation.

The other option student-athletes have concerning the NCAA's rules restricting the use of agents is to completely disregard them. For the high school baseball student-athlete, the NCAA unquestionably wants him or his family to strictly adhere to the no-agent rule. This means talking to or negotiating with a MLB team without an agent present, thus facing the consequences of unequal bargaining power. For the college baseball student-athlete, the NCAA wants him to

¹⁴⁵ *Id.* at 215.

¹⁴⁶ Parties' Settlement Agreement at 1 *Oliver v. NCAA*, 2009-Ohio-6587, 920 N.E.2d 203 (Com. Pl. 2009) (No. 2008-CV-0762), *available at* <http://www.docstoc.com/docs/12908872/Andy-Oliver-Settlement-Terms>.

¹⁴⁷ Branch, *supra* note 84.

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either strictly adhere to the no-agent rule, or, if his university has a PSCP, use its services. Unfortunately, if a student-athlete or his family is not comfortable in talking to or negotiating with a MLB team, or if a PSCP is not available, or, if a PSCP is available but lacks the expertise the student-athlete demands, his only option is to disregard the no-agent rule and allow his agent to talk to and negotiate with a MLB team on his behalf. In many cases, this is what student-athletes do.

MLB scouting directors, agents, and coaches have publicly stated that nearly every Draft prospect violates the no-agent rule.¹⁴⁸ A well-publicized example took place during the 2001 Draft. Before the signing deadline of the 2001 Draft, high school student-athlete and 20th round pick Jeremy Sowers and his family hired an agent to advise them.¹⁴⁹ Sowers' agent had contact with the Cincinnati Reds – the MLB team that drafted him.¹⁵⁰ When the NCAA caught wind of this while Sowers was enrolled at Vanderbilt University, it suspended Sowers for six games for violating the no-agent rule.¹⁵¹ A more recent example took place in 2006 when Andy Oliver, then a high school student-athlete at Vermillion High School (Ohio), hired an agent before the 2006 MLB Draft.¹⁵² Oliver was drafted in the 17th round by the Minnesota Twins and, before the signing deadline, met with representatives of the Twins at his home.¹⁵³ Oliver's agent, Tim Baratta, was present at the meeting, along with Oliver's father. Because his agent was present, Oliver clearly

¹⁴⁸ Aaron Fitt, *Headed To Trial: Oliver case may have lasting ramifications*, BASEBALL AMERICA Dec. 22, 2008, available at www.baseballamerica.com/today/college/on-campus/2009/267366.html.

¹⁴⁹ Karcher, *supra* note 7, at 222.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Oliver*, 920 N.E.2d at 206.

¹⁵³ *Id.*

violated the no-agent rule.¹⁵⁴ After heeding the advice of his father, Oliver rejected a \$390,000 offer from the Twins and instead chose to attend Oklahoma State University as a student-athlete.¹⁵⁵ The NCAA learned of Oliver's violation of the no-agent rule in 2008, after Oliver fired Baratta.¹⁵⁶ In retaliation for both being fired and not collecting fees for the "legal services" he provided Oliver, Baratta sent correspondence to the NCAA, making it aware of Oliver's violation of the no-agent rule.¹⁵⁷ Unlike Jeremy Sowers' case, the NCAA was harsh – it suspended Oliver for his junior season, as well as limited his eligibility to three years as opposed to four.¹⁵⁸

Baseball student-athletes are not the only ones adversely affected by the NCAA rules regarding the use of agents. Parents, universities and their coaches, agents and attorneys, MLB teams, and the NCAA itself are affected as well. Most parents are not sophisticated when it comes to the rules and regulations of the Draft and NCAA and do not have negotiating experience. Thus, if they are forced to negotiate on their son's behalf, they will most likely not be able to place their son in the best bargaining position.

The no-agent rule also presents universities and their coaches with challenges. Regardless of actual knowledge, universities face possible sanctions when student-athletes violate NCAA rules.¹⁵⁹ In addition, universities may lose out on revenue and wins when their student-athletes are deemed ineligible due to rules violations. This is exactly what happened to USC as a result of Reggie Bush's decision to accept cash payments from "sports marketers" acting as

¹⁵⁴ *Id.* at 207.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Karcher, *supra* note 7, at 222.

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agents.¹⁶⁰ University coaches are hurt because they may have distracted athletes leading up to and during the Draft. The more time, focus, and energy student-athletes have to devote to talking and bargaining with MLB team representatives, the less the student-athletes have towards helping their team win baseball games.

The no-agent rule complicates matters for agents, attorneys, and MLB teams as well. In order to help their clients during negotiations with MLB teams (while ensuring their clients are abiding by NCAA rules), agents are forced to be a “ghost negotiator.” In other words, the agent has to communicate directly to the student-athlete and/or his family and tell him what to say and how to negotiate with a MLB team representative. This presents several problems. The agent’s message to the MLB team may be lost in the translation from student-athlete to MLB team representative; the student-athlete may “buckle under the pressure” of negotiation, and agree to an offer against the agent’s strategy; the potential for delays in the process become more of a reality because at least three people (i.e. student-athlete, agent, MLB team representative) need to be available when discussions are to commence. This makes for a complex scheduling challenge, especially for MLB team representatives who are balancing the time demands that come with drafting 40 or more student-athletes. As for attorneys who are retained by student-athletes, some argue that letting a 17-22 year old student-athlete negotiate a potential million-dollar contract by himself would be setting the attorney up for a malpractice suit.¹⁶¹

¹⁶⁰ *Reggie Bush to forfeit Heisman*, *supra* note 96. It is estimated that USC lost millions of dollars in revenue as a result of the university being barred from participating in two years worth of bowl games.

¹⁶¹ Fitt, *supra* note 69, at 571.

Finally, the NCAA's no-agent rule presents challenges to its own administration's ability to enforce the rule. Currently, the NCAA has 57 full-time employees that are responsible for investigating and enforcing its bylaws.¹⁶² With over 1,200 baseball student-athletes drafted each year, along with thousands of student-athletes in other sports considering the option to turn pro, the NCAA's ability to comprehensively investigate potential violations is questionable at best considering its small enforcement staff.¹⁶³

E. *Regulation and enforcement issues surrounding the athlete-agent relationship*

Continuing efforts have been made by the NCAA and its member institutions to regulate the athlete-agent relationship. However, such efforts have been "largely ineffectual."¹⁶⁴ In regards to the NCAA, the first problem is that its reach of enforcement only extends to student-athletes,

¹⁶² Employment number is based on the author's email correspondence with Emily Potter, the NCAA's Associate Director of Public and Media Relations, on Feb. 11, 2013.

¹⁶³ Prior to 2011, the NCAA's Agents, Gambling, and Amateurism Department was responsible for bylaw investigation and enforcement and included only four employees. In 2011, the NCAA restructured its enforcement staff and streamlined more full-time employees to address potential violations. Although the NCAA's current staff of 57 employees is much bigger than in previous years, it is still rather small compared to the over 450,000 student-athletes participating in the NCAA. See Symposium, *Ethics and Sports: Agent Regulation*, FORDHAM INTELL. PROP. MEDIA * ENT. L.J. 747, 756 (2004); NCAA, *NCAA enforcement restructures for greater flexibility*, Jun. 30, 2011, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/June/NCAA+enforcement+restructures+for+greater+flexibility>; NCAA, *NCAA student-athlete participation hits 450,000*, Sep. 19, 2012, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/September/NCAA+student-athlete+participation+hits+450000>.

¹⁶⁴ R. Alexander Payne, Note, *Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game*, 13 VAND. J. ENT. & TECH. L. 657, 659 (2011).

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NCAA member institutions, and coaches.¹⁶⁵ Ethical agents are more likely to follow NCAA rules for fear of placing their clients and the general student-athlete body at risk of ineligibility. However, unethical agents are not deterred by NCAA rules because the NCAA has no jurisdiction over them.

The second problem is that the NCAA does not have enough staff to investigate no-agent rule violations. With limited staff to investigate, the NCAA cannot proactively work to uncover such violations. Thus, in most cases, the NCAA will not become aware of a violation unless a party involved in the violation brings it to the NCAA's attention.¹⁶⁶ If a student-athlete makes a promise to an agent to hire him or her upon turning pro, the student-athlete will not report such an agreement because he or she will lose NCAA eligibility. The agent won't report the violation because, if his or her client is deemed ineligible, he or she may hurt the market value of such client. Additionally, by reporting a violation, the agent may put a state on notice that he or she has violated a state's anti-agent laws.¹⁶⁷

The third problem is that the scope of the NCAA's regulation of the athlete-agent relationship is inconsistent with state and federal laws. As mentioned above, NCAA Bylaw 12.3.1 prohibits a student-athlete from agreeing to be represented by an agent. Although state and federal legislators have gotten involved in regulating the athlete-agent relationship, they have not prohibited a contractual relationship between such parties. The primary issues state

¹⁶⁵ Timothy G. Nelson, Comment, *Flag on the Play: The Ineffectiveness of Athlete-Agent Laws and Regulations* – Timothy G. Nelson, Comment, *Flag on the Play: The Ineffectiveness of Athlete-Agent Laws and Regulations – and How North Carolina Can Take Advantage of a Scandal to be a Model for Reform*, 90 N.C. L. REV. 800, 819 (2012).

¹⁶⁶ See Oliver, *supra* note 143.

¹⁶⁷ See discussion of state and federal agent laws *infra*.

and federal legislators deem worthy of regulation are the registration of agents¹⁶⁸ and the criminal activities committed

by agents¹⁶⁹ in the context of the athlete-agent relationship. Since state and federal legislatures are not interfering with the contractual relationship between student-athletes and agents, neither should the NCAA.

NCAA member institutions face similar challenges in regards to enforcing the no-agent rule. Many universities have taken the NCAA's no-agent rule one step further and enacted rules that determine when and under what circumstances their student-athletes can meet with agents. For example, The University of North Carolina recently enacted a rule that limits a student-athlete/agent meeting to one hour and only allows the meeting to take place during a certain time of the semester.¹⁷⁰ At the University of Miami,

¹⁶⁸See NCAA, *Uniform Athlete Agents Act*, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Uniform+Athlete+Agents+Act+Homepage> (last visited Oct 10, 2012). The Uniform Athlete Agents Act (UAAA), enacted in 2000 by the National Conference of Commissioners, is a model state law passed in 40 states that provides a means of regulating the conduct of athlete agents. The UAAA requires an agent to register with a state authority, typically the Secretary of State, in order to act as an agent in that state.

¹⁶⁹See Sports Agent Responsibility and Trust Act, Pub. L. No. 108-304, 118 Stat. 1125 (2004)(codified at 15 U.S.C. §§ 7801-7807 (2006)). In 2004, the federal government passed the Sports Agent Responsibility and Trust Act (SPARTA). SPARTA makes it illegal for an agent to provide anything of value (e.g. providing a loan, co-signing a loan, etc.) to a student-athlete (or anyone associated with the student-athlete) before the student-athlete enters into an agency contract. Agent violations of SPARTA are considered unfair and/or deceptive trade practices regulated by the Federal Trade Commission (FTC).

¹⁷⁰Darren Heitner, *New University of North Carolina Agent Policy is Extremely Limiting*, SPORTS AGENT BLOG, (Jul. 3, 2012), <http://www.sportsagentblog.com/2012/07/03/new-university-of-north-carolina-agent-policy-is-extremely-limiting/>. The University of North Carolina enacted its rule in response to NCAA allegations that seven university football student-athletes received more than \$27,000 in improper benefits in 2009 and 2010, as well as trips paid for by an agent.

student-athletes are prohibited from having any communication with an agent.¹⁷¹ Despite universities enacting their own rules to protect themselves and their student-athletes, most university Compliance Departments lack the staff and resources to monitor athlete-agent relationships.¹⁷² University Compliance Departments responsible for enforcing both NCAA and their own rules spend most of their time checking eligibility and practice limit issues, as opposed to investigating agents and educating student-athletes on the process of transitioning to the pros.¹⁷³

Aside from the enforcement challenges individual NCAA member institutions face when they enact their own rules restricting the athlete-agent relationship, there is an underlying concern that such rules are enacted to the detriment of the student-athlete. By imposing restrictions such as limiting the athlete/agent meeting to one hour, or prohibiting all contact between a student-athlete and agent, universities are thereby preventing student-athletes from conducting due diligence on agents. By obstructing such due diligence, universities are making it more likely for student-athletes who follow the rules to select an agent that may not be the best fit for the student-athlete. Additionally, such restrictions are in fact encouraging student-athletes to violate the rules to acquire the information they need to make an informed decision.

In high school and college baseball, it is no secret that there is an overwhelming lack of enforcement and compliance with NCAA rules regarding the athlete-agent relationship. Agents are prevalent in amateur baseball, and they, along with the student-athletes they represent, are willing to bend or break rules and laws to effectively address their respective

¹⁷¹ *Id.*

¹⁷² Wong, *supra* note 71, at 561.

¹⁷³ *Id.* at 560.

interests and needs. As one MLB scouting director said, "...we're playing a charade here if we think these [student-athletes] are representing themselves."¹⁷⁴ With such little enforcement, it is not surprising that both baseball agents and student-athletes are willing to risk being investigated and sanctioned. Considering this culture of non-compliance, it is necessary for the NCAA to revise its rules in order to more effectively monitor and regulate the athlete-agent relationship, especially within the context of baseball.

PART III: THE NEED FOR NCAA BYLAW 12.3 REVISION

As Taylor Branch reminds us, the NCAA has created an implicit presumption that preserving amateurism is necessary for the well-being of student-athletes.¹⁷⁵ However, as Branch argues, "...while amateurism – and the free labor it provides – may be necessary to the preservation of the NCAA, and, perhaps, to the profit margins of various interested corporations and educational institutions, *what if it doesn't benefit the [student-] athletes? What if it hurts them?*"¹⁷⁶

There is a lot on the line for elite baseball student-athletes, such as their education, college baseball career, professional baseball career, and financial well-being. As such, many such student-athletes work around the seldom enforced no-agent rule because it seems to be the only way to get the advice and information needed to make a well-informed decision. Plus, what student-athlete would feel comfortable negotiating with an experienced MLB executive with all that is on the line? Even if a PSCP at a university is established, PSCPs are off limits for high school baseball student-athletes, and, for college baseball student-athletes, it

¹⁷⁴ James Halt, *Andy Oliver Strikes Out the NCAA's "No-Agent" Rule for College Baseball*, 19 J. LEGAL ASPECTS OF SPORT 185, 197 (2009).

¹⁷⁵ Branch, *supra* note 84.

¹⁷⁶ *Id.* (emphasis added).

does not have the credibility to provide student-athletes the expert, unbiased advice they deserve. To a large extent, the NCAA bylaws, particularly the bylaws addressing the use of agents and PSCPs, are not aligned with modern amateurism. Additionally, they are especially detrimental to baseball student-athletes in light of the new Draft rules governing the signing bonuses student-athletes will be offered from MLB teams. Considering such changes to the Draft under the new Basic Agreement, there is no better time than now for the NCAA to revisit its bylaws as they pertain to baseball student-athletes.

A. *Recommendations*

1. *Make a “High School Baseball Exception” to the no-agent rule*

The NCAA should carve out a “High School Baseball Exception” (hereinafter Exception) to Bylaw 12.3. This Exception has three parts: 1.) Allow a high school baseball student-athlete to enter into a representation contract with an agent, 2.) Allow an agent or attorney to represent the student-athlete in discussions with MLB teams and be present at negotiations for a professional contract, and 3.) If the student-athlete does not sign a professional contract and enrolls as a student-athlete in a NCAA member institution, the athlete-agent contract would terminate at the time of enrollment.

a. *Exception, Part 1: Allow a high school baseball student-athlete to enter into a representation contract with an agent*

From the NCAA’s perspective, it is acceptable for a high school baseball student-athlete to obtain advice from his agent before, during, and after the MLB Draft. However, it is not acceptable for such a student-athlete to contract with his agent for the purpose of advocating his market value to MLB teams.¹⁷⁷ As mentioned in Part II, the pre-Draft advice an

¹⁷⁷ NCAA DI Manual, *supra* note 8, §12.3.1.

agent provides a student-athlete is invaluable. Most agents are devoting significant resources (i.e. time, employees, travel costs, etc.) in delivering such advice. Like any professional providing value-added services, an agent prefers something in return for the value he or she provides. Thus, it is reasonable to assume that a contractual relationship would encourage agents to demand up-front payment from their clients. However, the vast majority of student-athletes and their families cannot afford the pecuniary value of an agent's services before the Draft. The best agents are aware of this reality, and are willing to defer their fees until their client is able to pay (which is typically when the client receives a signing bonus subsequent to the Draft). These agents are taking a risk because there is no guarantee a client will be drafted and subsequently sign for a significant amount of money. Therefore, having some guarantee that the student-athlete will not "shop around" other agents for advice, but instead be committed to the agent, is all the agent can ask from his amateur client. A contractual relationship can address this. Although a contract between the agent and athlete may not guarantee the student-athlete's long-term commitment to the agent, it may initially encourage client loyalty, provide an extra layer of accountability between the parties, and/or allow for remedies for breach of contract.

In addition to safeguarding agents, a contractual athlete-agent relationship also safeguards high school student-athletes. First, a contract would clearly establish and define the athlete-agent relationship, and thus allow the student-athlete and his family to set expectations as to the services the agent will provide. Second, a contract would provide the student-athlete assurance that the agent will remain loyal to him in the moments leading up to the Draft, especially if the student-athlete becomes a less-desirable Draft prospect. Third, if an agent does not execute on what was contracted, veers outside the scope of the relationship defined in the contract, and/or demands a different fee, the contract may

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provide a way to terminate the relationship and/or provide remedies for breach of contract.

b. *Exception, Part 2: Allow an agent or attorney to represent the high school baseball student-athlete in discussions with MLB teams and be present at negotiations for a professional contract*

Recall the NCAA's purpose behind disallowing an agent or attorney to represent the student-athlete in discussions with professional teams and/or be present at negotiations: to maintain "a clear demarcation between collegiate athletics and professional sports." Viewed in the context of the MLB Draft, to maintain such a "clear demarcation," the NCAA believes that a high school baseball student-athlete and his family are the only people that should communicate, negotiate, and be physically present at discussions with MLB teams. This view is flawed for two principal reasons.

First, as highlighted earlier in this article, student-athletes and their parents lack the level of sophistication needed to negotiate with MLB teams. On the other hand, agents are in the best bargaining position to negotiate a student-athlete's signing bonus, therefore the NCAA should not get in the way of the agent or attorney's duty to represent their clients competently. By allowing an agent or attorney to handle the discussions and negotiations, a high school student-athlete can focus on the responsibilities and commitments he has as a student and athlete. Moreover, parents can direct their efforts in supporting their son during his life-altering decision.

The NCAA may be concerned that by allowing an agent or attorney to have this level of involvement, more high school student-athletes may be convinced to turn pro. The quicker the agent's client is paid, the sooner the agent will be compensated for his or her services. However, the *best* agents

are more concerned with a student-athletes' long-term success, and thus take a comprehensive approach to providing them advice. Specifically, the *most reputable* agents will evaluate the student-athlete's complete picture (e.g. financial need, projected market value, probability of academic success in college, etc.) before providing advice regarding whether to turn pro or enroll in college. In addition, there are benefits for agents to encourage a student-athlete to enroll in college which include: further building (thus solidifying) his or her relationship with the student-athlete and his family while he's in college; establishing a relationship and rapport with the student-athlete's college coaches; gaining a more mature and educated client in anticipation of the student-athlete's next Draft-eligible year, thus garnering a more marketable client.

Second, the NCAA's view is flawed because a student-athlete is not a professional-in-fact simply because he hires an agent or attorney to help him make a career decision. As was the case in *Oliver*, when a high school baseball student-athlete retains competent counsel to represent him in contract discussions, he does nothing more than to retain an expert to advocate on his behalf and help him make a decision to turn pro or go to college.¹ Furthermore, in the context of MLB, a student-athlete does not agree to become a *professional* baseball player until he signs a professional contract with a MLB team. Until that point, he is still considered an amateur baseball player. So why does the NCAA deem a student-athlete to have crossed from amateur to professional before he even agrees to become a professional? In brief, because the NCAA says so.

The NCAA's stance that hiring an agent or attorney to discuss, negotiate, and/or be present at negotiations is a student-athlete's declaration that he or she has turned professional is at odds with its own Bylaw 12.3.4,

¹ Brandon D. Morgan, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, but Remains Safe*, 17 SPORTS LAW. J. 303, 314 (2010).

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“Professional Sports Counseling Panel.” There is no fundamental difference between an agent or attorney discussing, negotiating, or being present at negotiations than it is for a PSCP member to do so. However, the NCAA says college student-athletes remain amateurs if a PSCP member negotiates on their behalf. What if such a PSCP member is an attorney? Again, there is no fundamental difference between a PSCP attorney and non-PSCP attorney negotiating with a MLB team. Thus, a baseball student-athlete should retain his amateur status regardless if a PSCP or non-PSCP member is representing him, especially a high school baseball student-athlete who has no access to a PSCP in the first place.

c. *Exception, Part 3: If the high school baseball student-athlete does not sign a professional contract and enrolls as a student-athlete in a NCAA member institution, Bylaw 12.3.1.1 would take affect*

If a high school baseball student-athlete does not sign a professional contract after his senior high school season, but instead enrolls as a student-athlete in a four-year NCAA member institution, he will not be eligible for another Draft until his junior year or after he turns 21.² Therefore, such a student-athlete will not need to discuss his market value or negotiate a potential professional contract with a MLB team until that time. Consequently, outside of continuing to build a personal relationship with his agent, the majority of unsigned student-athletes will not need pre-Draft services for at least two years.³ Accordingly, under this article’s proposed Exception, once the student-athlete enrolls in college, the

² MLR 3(a)(2)-(4).

³ Two years from the conclusion of his senior high school season would be the conclusion of his sophomore college season – exactly one year before most college student-athletes become Draft-eligible again.

contractual agreement between the student-athlete and agent would terminate and Bylaw 12.3.1.1 would take effect.

In order for this proposed Exception to be effective, the NCAA should revise Bylaw 12.3.1.1 to require that all baseball athlete-agent contracts contain an expiration clause which causes the athlete-agent contractual relationship to terminate prior to the student-athlete's enrollment in a NCAA member institution. Additionally, the NCAA should command that a copy of such contract be held with the member institution's Athletics Compliance Department. If the student-athlete's athlete-agent contract does not expire upon enrollment and/or the student-athlete failed to submit a copy of the contract to his university's Athletics Compliance Department, the NCAA would deem the student-athlete ineligible by way of Bylaw 12.3.1.1.

Requiring contract termination to preserve NCAA eligibility may seem inequitable at first blush; however, it is beneficial for both the student-athlete and the agent. The best agents are not only involved with student-athletes' athletic careers, but also their finances, health, and families. As student-athletes mature through the college years, their perspectives and needs change accordingly. As such, an agent that met all of a student-athlete's needs after high school may not be able to meet them at a later time. Therefore, it is crucial to give a student-athlete time to further build trust in his relationship with his agent before he enters into another contractual agreement with him or her. This was acutely illustrated in *Oliver*.⁴ In *Oliver*, Andy Oliver fired the advisor who represented him while he was in high school and retained Scott Boras before he became Draft-eligible again as a college junior.⁵ Undoubtedly, Oliver's needs changed between his senior year in high school and his junior year in

⁴ *Oliver*, 920 N.E.2d at 207.

⁵ *Id.*

college, and thus Oliver viewed Scott Boras as the person better able to meet his needs at that particular time.

The agent benefits from contract termination as well. The student-athlete may not be an ideal client by the time his next Draft-eligible year arrives for several reasons. Specifically, the student-athlete may have a change in personality or values that clash with the agent, may lose the interest of MLB teams due to a decline in performance or to injury, or simply may not value the agent's services anymore. Therefore, by the student-athlete abiding by NCAA Bylaw 12.3.1.1, the agent does not have to be concerned about fulfilling contractual obligations to a client he or she would not otherwise want to represent.

This article suggests one exception to Bylaw 12.3.1.1 taking affect during a college baseball student-athlete's career. This exception will be discussed under Recommendation Three, *infra*.

2. Reform Bylaw 12.3.4 addressing PSCPs

PSCPs should be fixtures at NCAA member institutions. If "[NCAA] member institutions' athletic programs are designed to be an integral part of the educational program [and] the student-athlete is considered an integral part of the student body,"⁶ it is a university's duty to provide necessary life skills for its student-athletes.⁷ This includes providing education to student-athletes regarding their transition to the pros – an area in which there is an "overall lack of guidance, counsel, and expertise."⁸ Many student-athletes are unaware of their needs and thus do not know what resources for which to search throughout their transition to the pros. Unfortunately, "if the transition process is deficient and it has a negative effect on the athlete's career,

⁶ NCAA DI Manual, *supra* note 8, §12.1.2.

⁷ Wong, *supra* note 71, at 596.

⁸ *Id.* at 574.

it will impact the rest of [the student-athlete's] life.”⁹ In fact, there have been many examples of athletes making poor financial and personal decisions shortly after their time as a college student-athlete. One such example is JaMarcus Russell, former Louisiana State University (LSU) standout and 1st pick of the 2007 NFL Draft. In 2007, Russell signed a contract worth \$61 million, \$32 million of which was guaranteed.¹⁰ Sources have reported that Russell almost lost his \$2.4 million mansion to foreclosure, and, as of 2011, owed nearly \$200,000 in back taxes.¹¹

NCAA member institutions across the country are in a great position to make a positive impact on their student-athletes' lives through PSCPs, especially considering that the college years are among the most developmental years of an individual's life. Likewise, in consideration of baseball student-athletes who will be affected by MLB's new Draft rules, student-athletes may decide not to use agents, and thus will more likely look to resources such as their university's PSCP for education and advice.¹² Despite the opportunity to

⁹ *Id.* at 580.

¹⁰ Nancy Gay, *Raiders, Russell agree to contract - \$32 million guaranteed*, S. F. CHRON., Sept. 11, 2007, available at <http://www.sfgate.com/sports/article/Raiders-Russell-agree-to-contract-32-million-2522930.php>.

¹¹ Chris Chase, *JaMarcus Russell is on the verge of losing his mansion*, YAHOO! SPORTS (Mar. 3, 2011, 7:08 PM), http://sports.yahoo.com/nfl/blog/shutdown_corner/post/JaMarcus-Russell-is-on-the-verge-of-losing-his-m?urn=nfl-329411.

¹² As mentioned previously, the new Draft rules have essentially diminished a MLB team's willingness to offer signing bonuses above the recommended slot value. *Supra* note 5. Thus, there is arguably a lesser need for agents because they will not be able to provide the same value by negotiating a higher signing bonus (as agents were able to do in previous Drafts). If agents are not providing value-added services beyond negotiating a signing bonus (e.g. education on the transition process to the pros) student-athletes are better off seeking advice elsewhere for two primary reasons. First, student-athletes can save upwards of six figures in agent commission fees. Darren Heitner, *No More Commissions*, SPORTS AGENT BLOG (Dec. 29, 2006),

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impact and help student-athletes, and the plethora of stories detailing former student-athletes' failures as professional athletes, it is estimated that only around 100 universities have a PSCP.¹³ NCAA President, Mark Emmert, said that "little has been done in regards to the pro sports transition" and that the "NCAA needs to have a sharper focus on educating student-athletes through athletics."¹⁴

One reason for the shortage of PSCPs may be because NCAA member institutions wrongly assume that it is solely the agent's job to help student-athletes transition to the pros. However, another key reason for the shortage is because of the limits the NCAA places on the composition of PSCPs. This article suggests the NCAA revise Bylaws 12.3.4.1 and 12.3.4.2, which limit a school's PSCP to one full-time Athletic Department employee and two full-time faculty members.¹⁵ Specifically, this article suggests a three-part revision that involves: 1.) Allow attorneys, agents, and financial advisors to *advise* a PSCP, 2.) Allow non-agent professionals, former professional athletes, and distinguished alumni to *sit* on a PSCP, and 3.) Expand the PSCP to include three, full-time Athletic Department employees.

a. Part 1: Allow attorneys, agents, and financial advisors to advise a PSCP

Some of the key topics that are involved in a student-athlete's potential transition to the pros include, but are not

<http://www.sportsagentblog.com/2006/12/29/no-more-commissions/> (noting that Ray Allen saved \$2.8 million agent commission by paying an attorney hourly fees instead). Second, the student-athlete more likely will not place his NCAA eligibility at risk by entering into an athlete-agent relationship that may lead to improprieties. NCAA DI Manual, *supra* note 8, §10.4.

¹³ Wong, *supra* note 71, at 581.

¹⁴ Elisia J.P. Gatemen, *Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes*, 10 SEATTLE J. FOR SOC. JUST. 509, 559-60 (2011).

¹⁵ NCAA DI Manual, *supra* note 8, §12.3.4.

limited to, the following: the decision to remain in school or not, agent selection, weighing insurance options, financial education, responsibilities and pressures as a professional athlete, and market/talent valuation. Considering the vast differences in the rules and regulations between different professional sports leagues, it is virtually impossible for three full-time employees at a school to understand them all. One college baseball coach admits, “administrators don’t understand this part of college baseball.”¹⁶ Without a clear understanding, PSCP members will not be able to provide their student-athletes with the expertise they need and deserve.

There are two key benefits associated with allowing student-athlete advisors such as attorneys, agents, and financial advisors to advise PSCPs. First, the NCAA creates a win-win for PSCP members and the advisors that are counseling student-athletes. PSCP members win because such advisors could provide much needed help understanding a particular professional league’s rules and regulations, as well as the current market for student-athletes in a respective professional sports league. Student-athlete advisors, on the other hand, win because PSCP members could help them better identify their client’s needs since such members are more likely to interact with the student-athlete on a more frequent basis. “Most [student-athlete advisors] would welcome the presence of an experienced, independent advisor [who is a PSCP member]...because it’s more likely to be a discussion about the things that are meaningful [to the student-athlete’s future career as a professional athlete].”¹⁷ Additionally, student-athlete advisors realize that if “student-athletes had better guidance, it is more likely they would be able to...form healthy [professional] relationships.”¹⁸

¹⁶ Halt, *supra* note 174, at 197.

¹⁷ Golen, *supra* note 124.

¹⁸ Wong, *supra* note 71, at 589.

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Second, allowing agents, attorneys, and financial advisors to advise PSCPs provides the NCAA and its member institutions with a diplomatic way to monitor the relationships student-athletes have with them – something they have not been able to do successfully. The NCAA has admitted that addressing the problems that surround student-athletes' relationships with such professionals cannot be handled by a single organization.¹⁹ By partnering with the professionals who are experts in sports, student-athletes would be allowed to build legitimate relationships with such professionals – all while creating an environment for regular oversight by the school. With effective oversight, NCAA member institutions will be able to identify and blacklist unethical and incompetent agents, while rewarding ethical and proficient ones with continued relationships with university administrators and student-athletes. As one scholar writes, “if the [transition] process were better handled, less desirable agents would be obtaining fewer clients, resulting in less regulation violations and disputes.”²⁰

b. Part 2: Allow non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP

As mentioned above, there are several questions surrounding the level of expertise and objectivity that university athletic department employees and faculty members can provide various student-athletes in regards to their transition to the pros. Thus, many student-athletes, especially those who have the potential to sign million-dollar signing bonuses, will not view such employees and faculty members as credible. Without credibility, the PSCP more likely will not be consulted, thus preventing their

¹⁹ Associated Press, *Report: State agent laws unenforced*, ESPN (Aug. 17, 2010, 4:20 PM), <http://sports.espn.go.com/ncaa/news/story?id=5470067>.

²⁰ Wong, *supra* note 71, at 589.

effectiveness from the outset. The NCAA should address this by allowing non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP. The collaboration of such individuals with PSCP members could provide several benefits.

First, expanding the panel to include non-agent professionals such as attorneys, accountants, and business consultants can offer PSCP members and student-athletes with additional insights and broader perspectives into the business and legal landscape of sports.

Second, former professional athletes can provide PSCP members and student-athletes with a more realistic view of the pressures, complexities, and responsibilities that come with being a professional athlete – a viewpoint that most athletic department employees or faculty members are unable to offer. Moreover, former professional athletes can provide insight into the typical career duration and potential future earnings of professional athletes. This insight is crucial because, as one scholar admits, “[many] of the problem[s] associated with the inability of players to make... informed decision[s] lies in the makeup of pro athletes. While there are exceptions, most players are relatively young, unsophisticated in making business decisions, and have egos.”²¹ This “makeup” is not limited to pro athletes; it is the makeup of thousands of student-athletes across the country. In addition, “many [student-] athletes have an inflated sense of their future pro prospects.”²² In the context of baseball, considering the “average MLB career...for a position player that makes it to the Big Leagues is 5.6 years,” this inflated sense of reality can set an athlete up for failure, especially in

²¹ Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the “Exclusive” Representatives of the Players*, 42 WILLAMETTE L. REV. 737, 752 (2006).

²² Wong, *supra* note 71, at 591

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the realm of financial management.²³ Therefore, former professional athletes become an invaluable asset to a student-athlete because of their ability to speak, from firsthand experience, to the realities of professional sports. As a result, the PSCP becomes more credible to student-athletes because it can be the conduit to obtaining such an asset.

Third, non-agent professionals, former professional athletes, and distinguished alumni collectively could provide student-athletes with a strong foundation of lifelong relationships and mentorships. Student-athletes need various role models and guidance not only in the context of their transition to professional sports, but also in life. In addition, providing student-athletes with the opportunity to build relationships with successful professionals well before their athletic careers end will provide them with a network of people that can help them transition from their playing careers to their next career. It is well documented that there is a dark side to retirement from professional sports, which can include depression, addiction, and even suicide.²⁴ Many agents position themselves as an athlete's "go-to" during the athlete's athletic career. However, just as many agents are not around when their clients' athletic careers end.²⁵ Furthermore, professional sports leagues such as MLB, the NFL and NBA do not provide many resources to athletes transitioning out of professional sports. PSCP members can fill that void, especially if strong relationships were formed during the athlete's college years. Although PSCP members

²³ Sam Roberts, *Just How Long Does The Average Baseball Career Last?*, NEW YORK TIMES, Jul. 15, 2007, available at http://www.nytimes.com/2007/07/15/sports/baseball/15careers.html?_r=0.

²⁴ Robert Laura, *How Star Athletes Deal With Retirement*, FORBES, May 5, 2012, available at <http://www.forbes.com/sites/robertlaura/2012/05/22/how-star-athletes-deal-with-retirement/>.

²⁵ Karcher, *supra* note 21, at 768.

may not be able to address all of an athlete's issues and needs, just being there for support is much better than the athlete's alternative: no support whatsoever.

Fourth, there is an indirect benefit to the NCAA and NCAA member institutions by allowing non-agent professionals, former professional athletes, and distinguished alumni to sit on a PSCP: deterrence of bad agents. The NCAA has made it clear that it desires to prevent unscrupulous agents from negatively impacting student-athletes.²⁶ If athletes have the opportunity to be educated and advised by qualified professionals, former professional athletes, and distinguished alumni, student-athletes will more likely select an ethical agent who can provide expertise and best fit the student-athlete's needs. With a team of professionals helping the student-athlete in this area, those agents who have earned the reputation of being knowledgeable, ethical, and professional will more likely overshadow the unethical ones.

c. Part 3: Expand the PSCP to include upwards of three, full-time Athletic Department employees

Chances are, the lone athletic department employee designated to sit on a PSCP under current NCAA rules will be a full-time employee with significant responsibilities. As stated earlier, there is an extensive amount of time demanded in researching a student-athlete's market value, communicating with the student-athlete and his or her family, agents, scouts, and team executives, and in becoming well versed in a particular sports league's rules and regulations. With Compliance Department employees already overworked by having to ensure that hundreds of its university's student-athletes are complying with NCAA rules, student-athletes considering the transition to the pros will not receive the necessary attention and counseling they deserve to make an

²⁶ Karcher, *supra* note 7, at 224.

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informed decision. Thus, student-athletes are more likely to search outside their university for answers, or simply may depend on their family, friends, and agents to make the decision for them. This could make for a messy situation, especially if those who the student-athlete relies upon do not have his or her best interests in mind. As one scholar argues, “a sloppy pro transition process only blurs the clear line of demarcation and makes the NCAA’s and colleges’ job that much difficult.”²⁷

As argued earlier, it is the duty of university athletic departments across the country to educate its student-athletes on the transition process to the pros. If such athletic departments are to be an “integral part of the educational program” for student-athletes, then more of their full-time employees need to be involved in the student-athlete’s transition process to the pros. Thus, the NCAA should allow upwards of three, full-time Athletic Department employees to sit on PSCPs. More Athletic Department employees will not only allow them to “spread the workload” among each other, but will also give them the opportunity to select the best suited employee to serve on the PSCP for a particular student-athlete.

3. Revise the no-agent rule as applied to college baseball student-athletes

Aaron Fitt, Baseball America’s national writer for college baseball, mentioned, “if the NCAA is going to get serious about [no-agent rule] enforcement, it needs to start by coming to grips with the simple reality that agents are omnipresent in college baseball in the 21st century.”²⁸ Due to the timing of the Draft, the industry norm in college baseball

²⁷ Wong, *supra* note 71, at 587.

²⁸ *The NCAA’s “no agent” Rule Discriminates Against Baseball Players*, SPORTS LAW BLOG, Aug. 27, 2008, <http://sports-law.blogspot.com/2008/08/ncaas-no-agent-rule-discriminates.html>.

is for student-athletes to ignore the NCAA's no-agent rule and allow their agents to speak with MLB teams to assess their market value and determine which teams are most interested in them. Thus, the NCAA must also revise its no-agent rule as it relates to college baseball student-athletes.²⁹

The obvious argument is that if the NCAA makes such a revision, it must do the same for other sports, especially sports with major amateur drafts. However, it is important to recognize that the no-agent rule affects baseball student-athletes much differently than, for example, football student-athletes. These differences are due mostly to the timing and eligibility rules surrounding the Draft, which differ from the NFL draft. Professor Karcher summarizes the difference below:

Under the National Football League (NFL) rules, amateur football players are not draft-eligible until the completion of their senior year in college unless, upon completion of their junior football season, they ask to be placed on the NFL draft list. Thus, high school senior football players are not eligible for the NFL draft. As a result, [unlike baseball players], they do not face the difficult decision of whether to sign a professional contract or to enroll in college after being drafted. As for college football players, their season ends in the end of November or early December unless their team attends a bowl game, in which case the season would end in the first week of January at the latest. Therefore, college seniors, as well as college juniors who have declared draft eligibility, have three to four months between the end of the season and the NFL draft in April in which to select

²⁹ *Id.*

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an agent and have their representative contact professional clubs on their behalf in preparation for the draft.

After the completion of the season, draft-eligible football players choose an agent and execute a standard representation agreement with the agent issued by the NFL Players Association. Once the player either completes his senior football season or declares himself draft-eligible after his junior season, he has exhausted his remaining NCAA eligibility in that sport. At that point, the player is not concerned about violating the NCAA's prohibition against entering agreements with agents. In contrast, draft-eligible baseball players are obviously concerned about NCAA compliance because they have remaining NCAA eligibility both before and after the draft.”³⁰

The differences outlined above by Professor Karcher warrant an exception for baseball student-athletes. Therefore, the NCAA should apply the following revision: if a school has a PSCP in place, it should follow this article's recommendation under Recommendation Two, Part 1, *supra*, and allow a student-athlete's agent to advise the PSCP on issues pertaining to his or her client and be involved contemporaneously with discussions between the PSCP and MLB teams. The benefits of this are numerous, and are highlighted under Recommendation Two, Part 1, *supra*. However, if a school does *not* have a PSCP in place, then the same Exception this article suggests be given to high school baseball student-athletes should apply to college baseball student-athletes. Specifically, Parts 1 and 2 of the “High

³⁰ Karcher, *supra* note 7, at 222-23.

School Baseball Exception,” *supra*, should apply no earlier than one year before the student-athlete at a non-PSCP school becomes Draft-eligible. This “one year” bar is significant because most material discussions between MLB teams and college baseball student-athletes do not commence until one year before the student-athlete becomes Draft-eligible.

By allowing the High School Baseball Exception to apply to college student-athletes that are enrolled in a school that does not have a PSCP, the NCAA would encourage schools to institute and maintain a PSCP. As mentioned above, it is in a school’s best interest to form a PSCP, especially in regards to providing its student-athletes with a meaningful education about the professional sports transition process and proactively preventing them from violating NCAA rules. Consequently, the NCAA itself will more likely encourage and support its member institutions in creating a PSCP under such an Exception, since it too has a desire to monitor the athlete-agent relationship and prevent any blurring of the demarcation between amateur and professional sports. However, simply having a way to monitor the athlete-agent relationship is just one of many benefits that creating a PSCP could provide to a NCAA member institution.

Creating a PSCP could serve as a recruiting, retention, and fundraising tool for a NCAA member institution. When a prospective student-athlete at the top of a school’s recruiting list is aware that such a school is devoted to playing an active role in helping the student-athlete transition to a professional career in sports, such a student-athlete will more likely be persuaded to choose that school for undergraduate studies. Likewise, the student-athlete’s parents are more likely to gravitate towards a school with a PSCP, because it will not only serve as a resource to them, but also bring added comfort knowing the school is providing their son or daughter with invaluable resources and meaningful relationships.

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Additionally, by providing student-athletes with such resources and relationships, PSCPs will enhance their college experience and thus be more likely to retain them. “Many pro athletes are disgruntled about the lack of guidance they received during their college career and/or the way they may have been treated by the NCAA, especially while the school and NCAA make millions of dollars.”³¹ PSCPs can address this negative sentiment, and thus build much needed trust between student-athletes and athletic department administrators. A potential by-product of both enhancing the student-athletes’ college experience and building trust with them is fundraising dollars. If student-athletes go on to have successful professional careers, they more likely will be willing (and possibly eager) to give back to the school that prepared them for such success.

Although schools may be concerned about the costs associated with creating a PSCP, the potential costs that accompany NCAA violations far outweigh creating and maintaining a PSCP. A university could lose millions in the way of “bowl appearance fees, sagging attendance, attorney’s fees, direct restitution penalties, and a slew of other ancillary costs” if a student-athlete violates a NCAA rule surrounding the professional sports transition process.³² Once again, the incident surrounding USC’s Reggie Bush is a perfect example. Bush cost the school tens of millions of dollars in lost bowl game revenues from his violation alone.³³ If USC had a credible PSCP in place during Bush’s enrollment, the

³¹ Wong, *supra* note 71, at 589.

³² Warren Zola, *Supporting Student-Athletes in Their Transition to the Pros: A Financial Argument*, HUFFINGTON POST, Sep. 26, 2011, http://www.huffingtonpost.com/warren-k-zola/college-sports-scandals_b_980935.html.

³³ Gary Klein, *At USC, assessing the financial damage from Reggie Bush and O.J. Mayo scandals is the multimillion-dollar question*, L. A. TIMES, Jun. 21, 2011, available at <http://articles.latimes.com/2011/jun/21/sports/la-sp-0622-reggie-bush-usc-20110622>.

school more likely would have had a better opportunity to educate Bush, as well as monitor and be involved in Bush's relationship with his advisors. This, in turn, would have helped Bush better understand the implications of receiving improper benefits from agents and perhaps prevented the incident altogether.

4. Create a National Professional Sports Counseling Panel

One scholar explains, "Even though the NCAA generates and distributes a tremendous amount of money to [its] member institutions, only a small group of schools manage to generate a surplus from athletics."³⁴ With the majority of NCAA member institutions not generating profits, it makes sense that one possible pushback by schools in creating and maintaining PSCPs is that there is a lack of funding and resources. Therefore, the NCAA should create a National Professional Sports Counseling Panel ("NPSCP"). By creating a NPSCP, the NCAA would not only serve as support to schools that do not have adequate funding and resources to maintain a credible PSCP, but would also create a platform for the entire student-athlete community (i.e. high school and college) to receive education and information. Although the NCAA Division I Amateurism Cabinet initially considered creating a NPSCP in 2010 and admitted that it "need[ed] to provide better information to [its] prospects and student-athletes," nothing has been done since.³⁵ The following discussion provides suggestions as to the scope of the NPSCP.

³⁴ J. Winston Busby, Comment, *Playing for Love: Why the NCAA Rules Must Require A Knowledge-Intent Element to Affect the Eligibility of Student-Athletes*, 42 CUMB. L. REV. 135, 142 (2011-12).

³⁵ Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, CHRON. OF HIGHER EDUCATION (Oct. 19, 2010, 3:03 PM), <http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598>.

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First, similar to the suggestions for and reasons behind the composition of local PSCPs discussed in Recommendation Two, *supra*, the NPSCP should consist of full-time Athletic Department employees from NCAA member institutions, non-agent professionals, former professional athletes, and successful businessmen and women. Furthermore, the NPSCP should certify agents, attorney-agents, and financial advisors to serve as *advisors* to the NPSCP, especially if a particular student-athlete advisee is the agent, attorney-agent, or financial advisor's client. The benefits of having agents, attorney-agents, and financial advisors as advisors are discussed in Recommendation Two, *supra*.

Second, the NPSCP can provide various mediums for education surrounding the pro transition process. Besides serving the traditional functions of a local PSCP,³⁶ the NPSCP could hold workshops, seminars, and conferences to educate local PSCP members. As one scholar suggests, the NCAA could "create a guide of information on its website" and potentially "[create] a course" via the NPSCP.³⁷ Furthermore, the NPSCP could host retreats and summits for college student-athletes, not only to provide education about the professional sports transition process, but also about topics such as professionalism, ethics, and personal branding.

Third, since the NPSCP should aim to serve the overall student-athlete community, the NCAA should open the NPSCP to Draft-eligible high school student-athletes. This would allow such high school athletes access to resources and relationships regarding the pro transition process – something that a local PSCP cannot provide due to current NCAA rules. Unquestionably, high school student-athletes need education and support surrounding the pro

³⁶ See NCAA D1 Manual, *supra* note 8, §12.3.4(a)-(g).

³⁷ Wong, *supra* note 71, at 602-03.

transition process well before they set foot on a college campus.

Fourth, the NPSCP should create strategic alliances within the student-athlete community. Specifically, in the context of baseball, this would include partnering with institutions including, but not limited to, MLB, the MLBPA, USA Baseball, various collegiate summer baseball leagues, and high school baseball showcases. Partnering with such entities has several benefits to the NCAA and student-athletes, some of which include: the NCAA acquiring more pertinent information, resources, and relationships that will aid in supporting local PSCPs and in helping advise student-athletes; student-athletes and their families gaining more access to information surrounding the professional sports transition process; and providing student-athletes with a larger network of professionals that may help them market their abilities and human qualities for careers after their athletic career ends. Additionally, with a large network of strategic alliances, the NCAA has more avenues for possible funding of both the NPSCP and local PSCPs. In fact, the NCAA is already experiencing this possibility considering recent discussions with MLB regarding its involvement in funding scholarships for college baseball.³⁸

It would behoove the NCAA to implement a NPSCP that would create a support system and education platform for the student-athlete community. The timing of such discussions and implementation would be ripe, especially since the NCAA has been under fire lately for being more concerned about generating revenue, as opposed to supporting and protecting its member institutions and their student-

³⁸Jon Solomon, *Tie-In could increase scholarships: MLB, college may form unique partnership*, THE BIRMINGHAM NEWS, May 26, 2012, available at http://www.al.com/sports/index.ssf/2012/05/ncaa_and_major_league_baseball.html.

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athletes.³⁹ Additionally, with the NCAA losing increasingly more revenue as member institutions strike television deals outside the purview of the NCAA, the NCAA will need to get as many players in the student-athlete community on its side.⁴⁰ Giving support to the community by way of a creating a NPSCP would be a great start.

CONCLUSION

The effects of the changes to the 2012 Draft rules serve as a reminder that current NCAA bylaws as applied to baseball student-athletes must be changed. Under the new Basic Agreement, MLB teams face limitations regarding the signing bonuses they can offer Draft-eligible student-athletes. As such, now more than ever, high school and college baseball student-athletes must undertake extensive due diligence and acquire expert advice regarding their market value and decision to sign a professional contract. Without such an undertaking, student-athletes place their future financial independence and personal goals at risk. Unfortunately, current NCAA bylaws regarding the use of agents and the composition of PSCPs present a hindrance to student-athletes seeking to maximize their market value, obtain the information necessary to make a well-informed decision, and protect their NCAA eligibility. Specifically, student-athletes are forced to either enter into an unfair bargaining environment by conducting discussions on their

³⁹ Michael McCann, *O'Bannon expands NCAA lawsuit*, SPORTS ILLUSTRATED, Sep. 1, 2012, available at http://sportsillustrated.cnn.com/2012/writers/michael_mccann/09/01/obannon-ncaa-lawsuit/index.html (class action lawsuit against NCAA for NCAA's policy of licensing the names, images and likenesses of former Division I football and men's basketball players in various commercial ventures without the players' permission and without providing them compensation).

⁴⁰ Branch, *supra* note 84.

own, or disregard NCAA rules and place their NCAA eligibility at risk.

The NCAA can address the issues on baseball student-athletes by changing its no-agent rule as applied to them, as well as relaxing the limits placed on PSCPs. Specifically, the NCAA should carve out an exception for baseball student-athletes, which would allow an agent to represent them in discussions with MLB teams in certain circumstances. Such an exception is especially needed for high school baseball student athletes since they do not have adequate access to information regarding the transition to professional baseball, and do not have the level of sophistication to negotiate with MLB teams. The NCAA must also revise its bylaws regarding PSCPs so that college student-athletes can obtain the expertise they deserve, as well as build important relationships and mentorships. Finally, the NCAA should create a NPSCP, not only to support those member institutions who lack the funding and resources to create their own PSCP, but also to create a platform of education and advice that will benefit the student-athlete community as a whole. These changes will positively impact the decision-making process of baseball student-athletes, while concurrently protecting student-athletes' amateur status and providing a diplomatic way for the NCAA and its member institutions to monitor and regulate the athlete-agent relationship.