

# **The Conflict of Interest Issue with NCAA Student-Athletes and Professional Sports Counseling Panels**

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Under NCAA Bylaw 12.3, any student-athlete currently participating or who may be eligible to participate in intercollegiate sports may not agree to be represented by an athlete agent.<sup>2</sup> As was highlighted in *Call to the Bullpen*, this Bylaw greatly disadvantages student-athletes when facing a life-changing contract decision for what is most likely the first time.<sup>3</sup> One of the NCAA's "solutions" to the no-agent rule is to allow NCAA institutions to create Professional Sports Counseling Panels (hereinafter "PSCP").<sup>4</sup> The duties of a PSCP include advising student-athletes about their professional careers, meeting with representatives of professional sports teams, reviewing contracts, and discussing the athlete's market value with both the student and professional sports teams.<sup>5</sup> Although a PSCP could be instrumental in helping student-athletes make the best career choices possible, the PSCP system has many weaknesses that

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<sup>2</sup> *Overview of NCAA bylaws governing athlete agents*, NCAA.ORG, (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/Overview+of+NCAA+bylaws+governing+athlete+agents>.

<sup>3</sup> Jim Reid, *Call to the Bullpen: How the 2012 MLB Draft Shows Why the NCAA Must Make a Change to its Bylaws*, ARIZ. ST. SPORTS & ENT. L.J. (Nov. 2013).

<sup>4</sup> *Id.*

<sup>5</sup> 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, 575 (2011).

cannot be ignored.<sup>1</sup> For example, most NCAA institutions do not implement a PSCP, resulting in unequal access to information for student-athletes across the country. Also, many panel members are not well qualified to perform the duties of an agent. Further, a great potential for conflicts of interest exists between the institution's PSCP and the athletes it is supposed to represent.<sup>2</sup>

The members of a PSCP essentially play the role of an agent for the student-athlete. Thus, as an agent, a PSCP should have the best interests of the student-athlete in mind. Unfortunately, since a PSCP is comprised of mostly employees and representatives of the university, its interests often diverge from those of the student-athlete.<sup>3</sup> For example, universities invest a lot of time and scholarship money into securing the top recruits out of high school. Once a student-athlete agrees to play for a university, that university has an interest in keeping a high-profile athlete enrolled for as long as possible.<sup>4</sup> Not only do such athletes help to earn more wins for the school, but they also bring national attention to the university's athletic program and create revenue.<sup>5</sup> For these reasons, full-time university employees whose interests align with those of the school are unable to act in the neutral and unbiased way required by the principal-agent relationship. In fact, the panel members may be more likely to encourage a student-athlete to stay at the university until their eligibility expires, regardless of whether this is in the student's best interest.<sup>6</sup>

One potential solution to the conflict of interest problem inherent in the relationship between student-athletes

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<sup>1</sup> Reid, *supra* note 2.

<sup>2</sup> *Id.*

<sup>3</sup> *E.g.*, Wong, *supra* note 4, at 575.

<sup>4</sup> Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361, 364 (1997).

<sup>5</sup> *Id.*

<sup>6</sup> Reid, *supra* note 2.

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and PSCPs is to allow student-athletes to independently hire an agent.<sup>7</sup> Arguably, an agent hired by the student-athlete is better situated than university employees to give unbiased advice. Ideally, the student-athlete's interest and the agent's interest are one and the same.<sup>8</sup> For example, a high-profile collegiate athlete is typically interested in going pro as soon as he is most prepared, maximizing his chances of success as a professional athlete. Further, a student-athlete will be focused on signing a big contract.<sup>9</sup> Because agent salaries are based upon the income of the athletes they represent, agents will be looking for exactly what their client wants – a big pay day.<sup>10</sup> Also, an agent will do his best to meet all the client's requests aside from money, making the athlete more likely to retain the agent throughout his (ideally) successful career.<sup>11</sup>

However, there are reasons why the student-athlete market has not been opened to independently hired agents.<sup>12</sup> It is well known that the agent industry is extremely competitive and that agents are looking out for their own best interests whether or not they align with those of a potential client.<sup>13</sup> Although NCAA rules explicitly prohibit student-athletes from retaining agents, the number of student-athletes who hire agents has continually increased. This is largely attributable to accessibility through social networking and athletes who are earning higher salaries than ever before.<sup>14</sup> With the increasing number of student-athletes who retain agents, a greater amount of shady dealing occurs. Agents have been known to buy student-athletes pre-paid credit

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<sup>7</sup> Libby Sander, *Angst Over Agents*, CHRONICLE.COM (Sep. 26, 2010, 10:37 PM), <http://chronicle.com/blogs/players/angst-over-agents/27203>.

<sup>8</sup> Stiglitz, *supra* note 8, at 364.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Sander, *supra* note 11.

<sup>13</sup> Reid, *supra* note 2.

<sup>14</sup> Sander, *supra* note 11.

cards, cars, alcohol, and equipment – going to any means necessary to obtain a star athlete's business.<sup>15</sup>

Knowing an agent is willing to break the rules to secure a high-profile client can lead to the conclusion that the agent is looking out for his own interests at the expense of the collegiate athlete. Agents are not disciplined by the NCAA Bylaws and risk virtually nothing other than being seen as unethical when they violate the rules governing players. Although forty states have enacted laws regulating the interactions of agents and student-athletes, which can result in felony charges for misbehaving agents, the laws are notoriously unenforced and ineffective.<sup>16</sup> A student-athlete, on the other hand, faces the very real risks of forfeiture of eligibility, imposition of fines, and probation for or even termination of the athletic department at his university.<sup>17</sup> Thus, when an agent employs under-the-table bargaining tactics, he demonstrates his willingness to allow a student-athlete to take huge risks for a shot at retaining the student-athlete's business in the future.

A strong argument can also be made that agents are interested in taking advantage of a student-athlete's inexperience in order to unfairly capitalize on the athlete's success.<sup>18</sup> As previously stated, most student-athletes are not well versed in contract law and may not understand their best career options. Although an agent will ideally be there to assist a student-athlete, some agents have their own ulterior motives in mind. As ProFiles Sports, Inc.'s President Pat Dye Jr. has put it, "for every good agent, there are countless more who cut corners and mislead athletes."<sup>19</sup>

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<sup>15</sup> Reid, *supra* note 2; Brad Wolverton, *On Bat Phones, Backstabbing, and Other Grievances*, CHRONICLE.COM (July 23, 2010), <http://chronicle.com/blogs/players/on-bat-phones-backstabbingother-grievances/25743>.

<sup>16</sup> Sander, *supra* note 11.

<sup>17</sup> Reid, *supra* note 2.

<sup>18</sup> See Sander, *supra* note 11; Reid *supra* note 2.

<sup>19</sup> Sander, *supra* note 11.

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In sum, a PSCP is most likely unqualified to represent the student-athlete in a decision as big as going pro and will often have interests adverse to the athlete's. However, independently hired agents also pose a significant conflict of interest risk. Therefore, a solution apart from these options may be best for the student-athlete.

As Mike Rogers, a law professor and faculty athletics representative at Baylor University, has said, "We all agree that we need to provide better information to our prospects and student-athletes. The debate is how to best go about that."<sup>20</sup> One option is to create a National Professional Sports Counseling Panel, an idea that has been considered by the Division I Amateurism Cabinet in the past.<sup>21</sup> The idea behind a national panel is similar to that of a PSCP. However, instead of staffing the panel with university employees who "lack the sport-specific expertise needed to be truly helpful to athletes," a national panel would focus on providing athletes with expert advice.<sup>22</sup> Further, a national panel could be staffed with agents, whereas university panels are prohibited from doing so. Having professional agents give advice to student-athletes could eliminate the conflict of interest problem that current university PSCPs face, as long as the agents sitting on the panel do not personally represent any of the athletes seeking its advice.<sup>23</sup> This obviously presents a problem of its own, since many agents will not be willing to sit on a panel requiring them to forfeit independent representation of high-profile athletes. However, if the job paid well and ensured a

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<sup>20</sup> Libby Sander, *NCAA Considers a National Pro-Sports Counseling Panel*, CHRONICLE.COM (Oct. 19, 2010), <http://chronicle.com/blogs/players/ncaa-mulls-idea-of-a-national-pro-sports-counseling-panel/27598>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

certain level of job security without the cutthroat atmosphere, it would be an appealing position for an agent.

Student-athletes have shown support for a national panel, stating that, “the panel can’t just be a bunch of people in the NCAA office. It has to be professionals, someone who has the experience of being both the college and professional athlete.”<sup>24</sup> This idea supports placing not only expert agents on the panel, but also former and current professional athletes who have been through the system before.<sup>25</sup> As one student-athlete has said, “[student-athletes] need to know what life is like as a professional compared to what they can get out of extra time in college.”<sup>26</sup> Having both agents and professional athletes on the national panel would further mitigate conflict of interest issues by providing student-athletes with views from each side of a contract deal.

Clearly, NCAA student-athletes are in need of more information when making life-changing decisions about when and if to leave university athletics and go professional. A university staffed PSCP not only lacks the sport-specific knowledge required, but also creates conflicts of interest when advising student-athletes. However, opening the market of student-athletes up to the cutthroat world of sports agents is not the best solution and is a great source of conflicts of interest, as well. Therefore, implementing a new process to advise student-athletes is the best option. A National Professional Sports Counseling Panel would provide student-athletes across the country with equal access to advice coming not only from agents and legal experts, but also

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<sup>24</sup> Michelle Brutlag Hosick, *Cabinet discusses agents, pro sports counseling panel*, NCAA.ORG (Oct. 11, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/October/Cabinet+discusses+agents,+pro+sports+counseling+panel>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

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professional athletes, thus eliminating most of the conflict of interest problems of a PSCP and independently hired agents.