

2005

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?

Richard T. Karcher

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Recommended Citation

Richard T. Karcher, *The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 *Vanderbilt Journal of Entertainment and Technology Law* 215 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol7/iss2/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Entertainment & Technology Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball:

Are the Rules Detrimental to the Best Interest of the Amateur Athlete?

By Richard T. Karcher*

When one considers what a sports agent does, he or she often recalls the movie *Jerry Maguire*, in which Tom Cruise hustles prospective clients and does whatever it takes to keep or acquire a client, even if it means stealing a client from a competitor. Of course, this reprehensible conduct only takes place among sports agents, not in other industries, right? Sports agents have gained the reputation of being corrupt and "unscrupulous" actors who

take advantage of amateur and professional athletes in favor of their own proprietary self-interest. Much of this negative sentiment stems from highly publicized cases involving sports agents engaged in illegal conduct.¹

The crimes committed by a few "bad apples" prompted the enactment of numerous, comprehensive state statutes and governing rules established by professional sports players unions and collegiate athletic governing bodies.² For example, the National Collegiate Athletic Association (NCAA) has enacted a strict set of bylaws regulating the use of agents by amateur athletes. Among these pro-

visions, an amateur athlete is prohibited from retaining anyone, including a *competent* lawyer or agent, to represent him or her in the negotiation of a professional sports contract. This is otherwise known as the "no agent rule." According to the NCAA, these regulations are necessary to promote and ensure

"Sports agents have gained the reputation of corrupt and "unscrupulous" actors who take advantage of amateur and professional athletes..."

amateurism in intercollegiate athletics.³

When looking at these regulations, the unavoidable question arises: who is the NCAA trying to protect? If the NCAA seeks to protect the amateur athlete, it would seemingly be in the athlete's best interest to have competent representation to deal with professional sports organizations and the complex business and legal issues that surround the world of professional sports. Protecting the athlete from corrupt, unscrupulous sports agents is an understandable and noble objective. But even if the NCAA regulations play a role in deterring corrupt and unscrupulous conduct

on the part of agents (a notion that is highly suspect), the rules are detrimental to the athlete if he is precluded from retaining a competent agent or lawyer to advocate on his behalf.⁴

First, this Article will discuss the NCAA regulations applicable to all sports regarding the use of agents by amateur athletes. Next, this Article will discuss (i) the mechanics of the annual Major League Baseball draft, (ii) the factors that contribute to the necessity and desire for amateur baseball players to retain a competent agent or lawyer before they have extinguished their NCAA eligibility, and (iii) how the NCAA regulations are detrimental to both drafted and draft-eligible amateur baseball players. Finally, this Article will discuss how the NCAA should revise its regulations to better serve the amateur athlete in the sport of baseball without destroying the distinction between amateur and professional sports.

I. The NCAA Regulations Regarding Use of Agents

Section 12.3 of Article 12 (Amateurism) of the NCAA Bylaws governs the use of agents. The guiding principle of Article 12 is that only amateur student-athletes are eligible for participation in intercollegiate athletics.⁵ According to the NCAA, "[m]ember institutions' athletics programs are designed to be an integral part of the educational program [and] [t]he student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between collegiate athletics and professional sports."⁶ The NCAA regulations also indicate that "an amateur student-athlete is one who engages in a particular sport for the educational, physical, mental and social benefits derived therefrom, and for whom participation in that sport is an avocation."⁷

A. Agreements with Agents

The NCAA regulations prohibit amateur athletes from agreeing to representation by an agent. Bylaw 12.3.1, often referred to as the "no agent rule," states that "[a]n individual shall be ineligible for participation in an intercollegiate sport if he or she has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport."⁸ Furthermore,

the agency agreement is applicable to all sports unless the contract specifically states that it only applies to a particular sport or sports.⁹ Thus, an athlete who agrees to representation by an agent is ineligible to participate in any sport at any NCAA institution.¹⁰ However, if the athlete and the agent limit their agreement to a particular sport or sports, then the athlete would be ineligible to participate only in such sport or sports.¹¹

The prohibition set forth in Bylaw 12.3.1 is not limited to agreements with respect to professional sports negotiations by an agent on behalf of an athlete that take place while the athlete is enrolled at the institution or has eligibility remaining in that sport. An athlete shall also be ineligible if he or she agrees that the agent will represent him or her in negotiations with professional sports teams that are to take place subsequent to the athlete's completion of eligibility in that sport.¹²

It is important to note that the NCAA regulations prohibiting amateur athletes from agreeing to representation by an agent apply not only to collegiate athletes already enrolled in NCAA institutions, but also to high school students or graduates prior to collegiate enrollment.¹³ Thus, even high school students may be declared ineligible to participate in collegiate sports by the NCAA before they even sign a scholarship or Letter of Intent to attend an NCAA institution.

B. Benefits from Prospective Agents

The NCAA has instituted strict regulations with respect to amateur athletes receiving any benefits, financial or otherwise, from agents. The regulations even prohibit the athlete's friends or relatives from accepting such benefits. NCAA Bylaw 12.3.1.2, also known as the "no benefits rule," provides as follows:

An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from:

- (a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on

athletics skill and is an extra benefit not available to the student body in general; or

(b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport.¹⁴

These regulations apply to the receipt of benefits by any "individual." They apply not only to collegiate athletes already enrolled in NCAA institutions, but they also apply to high school students or graduates prior to enrollment.¹⁵

For example, an amateur athlete's acceptance of automobile transportation from the athlete's campus to a prospective agent's office to discuss services the agent could provide to the athlete upon signing a professional contract is an improper.¹⁶ In addition, a football agent cannot provide transportation to a friend of a member of the local Division I college's baseball team.¹⁷ If an agent provides advice to an amateur athlete about a professional sports contract, with the understanding that the athlete would pay

the agent for such services after the athlete has been drafted, regardless of the fact that the agent has the same fee arrangement for all amateur-athlete clients, that too would be an improper benefit according to the NCAA.¹⁸

C. Use of Lawyers and Other Advisors

The NCAA regulations permit an amateur athlete to retain a lawyer for consultation and advice concerning a proposed professional sports contract.¹⁹ However, the lawyer, like an agent, may not represent the athlete in negotiations for such a contract.²⁰ The regulations even prohibit a lawyer from being present dur-

ing discussions of a contract offer between an athlete and a professional sports organization or making any contact with a professional organization on behalf of the athlete.²¹ According to the NCAA, "[a] lawyer's presence during such discussions is considered representation by an agent."²² Similar to the regulations regarding entering agreements with agents and receiving benefits, these rules also apply to high school players prior to college enrollment.²³

In 1974, the members of the NCAA determined that student-athletes might need legal advice to assist them in evaluating and understanding a professional sports contract offered while they still had collegiate sports eligibility remaining.²⁴ The NCAA decided that, during consideration of such a proposal, a student-athlete "may seek the advice of a lawyer relative to future negotiations or discussion of the individual's professional aspirations, so long as the lawyer does not become actively involved in negotiations with the professional team or organization."²⁵ According to the NCAA, "once the student decides to have legal counsel con-

"The crimes committed by a few 'bad apples' have prompted the enactment of numerous and comprehensive state statutes and governing rules established by professional sports players unions and collegiate athletic governing bodies."

tact the professional club concerning the contract offer, the individual has agreed to be represented by an agent in the marketing of his or her athletics talent, and no longer is eligible per 12.3.2."²⁶

Interestingly, the NCAA makes no distinction between lawyers and non-lawyers in terms of giving consultation and advice to the athlete. According to the NCAA, Bylaw 12.3.2 "was not intended to restrict individuals other than lawyers (e.g., financial consultants, family friends) from giving advice regarding professional contracts."²⁷ Thus, any third party is permitted to advise the athlete provided that the "advisor" does not represent the athlete in negotiations for such a contract.²⁸

D. Professional Sports Counseling Panel and Head Coach Exception

Section 12.3.4 of the NCAA Bylaws permits an authorized institutional professional sports counseling panel, implemented by the member institution, to essentially engage in activities that an experienced agent would otherwise do, including the following:

- (a) Advise a student-athlete about a future professional career;
- (b) Provide direction on securing a loan for the purpose of purchasing insurance against a disabling injury;
- (c) Review a proposed professional sports contract;
- (d) Meet with the student-athlete and representatives of professional teams;
- (e) Communicate directly (e.g., in-person, by mail or telephone) with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete;
- (f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete, and by having direct communication with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players' association); and
Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value (e.g., potential salary, draft status).²⁹

Although it is not expressly stated, the NCAA also permits the panel to negotiate a contract

with a professional sports organization on behalf of the student-athlete.³⁰

The panel consists of at least three persons appointed by the institution's chief executive officer.³¹ Not more than one person on the panel may be a member of the athletic depart-

“...high school students may be declared ineligible to participate in collegiate sports by the NCAA before they have even signed a scholarship or Letter of Intent to attend an NCAA institution.”

ment staff; all others on the panel must be members of the institution's full-time staff.³² Finally, no institutional staff member who is also an agent may participate as a member on the panel.³³

The legislative intent behind Bylaw 12.3.4, adopted in 1984, is worth noting:

This legislation was intended to encourage member institutions to provide guidance to their student-athletes regarding future athletic professional careers. While legislation previously was adopted to permit institutions to offer career counseling in all areas, in 1984 the membership believed that student-athletes' involvement with professional athletics warranted special attention. While this focus on professional athletics is essential, it should not detract from an institution's role in providing guidance to student-athletes in career counseling generally.

Further, this legislation was intended to assist student-athletes in making a decision regarding whether to remain in school or turn professional and providing guidance to student-athletes regarding contracts and agree-

ments with player agents. Additionally, a panel should provide to the student-athlete a realistic appraisal of his or her potential for becoming a successful professional athlete. It is important that the student-athlete receive objective advice from individuals at institutions who have no vested interest in the student-athlete's career. Essentially, a panel should attempt to provide information to the student-athlete regarding professional athletics that he or she may not be able to obtain or understand sufficiently himself or herself.³⁴

Unlike the regulations previously discussed in this Article pertaining to (i) agreements with agents, (ii) the use of lawyers and other advisors, and (iii) the receipt of benefits, the bylaw provisions regarding sports counseling panels only apply to collegiate athletes enrolled in NCAA member institutions.³⁵ Therefore, high school players who have been drafted, or anticipate being drafted, are prohibited under the NCAA Bylaws from receiving *any* assistance in contacting professional teams to secure a tryout, determining their market value, or negotiating a contract with a professional sports organization.

The student-athlete's head coach at the NCAA member institution may contact agents to assist the athlete in selecting an agent and determining his or her market value.³⁶ The coach may also contact professional sports organizations on behalf of the athlete to secure tryouts and to assist the student-athlete in determining his or her market value.³⁷ The coach is not permitted, however, to receive compensation for such services.³⁸ If the head coach partakes in these activities, he or she is then required to consult with and report his or her activities to the institution's professional sports counseling panel; if the institution does not have such a panel, then the coach is to report to the institution's chief executive officer.³⁹

E. Draft Inquiry and Negotiations Without An Agent

The NCAA Bylaws permit amateur ath-

letes to interact with professional sports teams on their own without the use of an agent. For example, an amateur athlete is permitted, both before and after college enrollment, to ask a professional sports organization for information concerning his or her eligibility for the draft or individual market value.⁴⁰ The athlete and his legal guardians are also permitted to negotiate a contract with a professional sports organization.⁴¹

However, an amateur athlete loses eligibility if he or she asks, subsequent to initial full-time collegiate enrollment, to be placed on the draft list or supplemental draft list of a professional sports league even if (i) the athlete asks to have his or her name be withdrawn from the draft list prior to the actual draft, (ii) the athlete's name remains on the draft list but he or she is not drafted, or (iii) the athlete is drafted but does not sign an agreement with any professional sports team.⁴² This NCAA regulation is often referred to as the "no draft rule." The only exception to the rule is for an enrolled student-athlete who plays basketball; he or she may enter his or her name on the draft list one time without jeopardizing his eligibility, provided that the student-athlete is not drafted by any team and that he or she subsequently declares an intention in writing to resume intercollegiate participation within 30 days after the draft.⁴³

III. Application of the NCAA Regulations in Baseball

A. The Major League Baseball Amateur Draft

In June of each year, Major League Baseball conducts its amateur draft, known as the First-Year Player Draft.⁴⁴ In general, players who are eligible to be drafted and sign a professional contract are (i) graduating high school seniors, (ii) college players who have completed their junior year or who are at least 21 years old within forty-five days of the draft, and (iii) junior college players.⁴⁵ The team that drafts a player has the exclusive right to negotiate a professional contract with that player until the player becomes a college player by entering or returning to college.⁴⁶ If a player instead chooses to become a professional athlete, the

player signs a standard minor league player contract.⁴⁷

The only terms and conditions in the standard player contract that are negotiable are (i) the player's signing bonus, which must be

stated in a fixed dollar amount and paid to the player before the end of the calendar year following the date of the contract, (ii) a provision in which the player receives a payment of \$2,500 contingent upon the player being retained by the signing major or minor league club for a period that may not exceed 90 days of the club's playing season, (iii) a provision in which the player receives standard "incentive bonus payments" contingent upon the player being on the roster in a certain classification for 90 days in any one season (\$1,000 for the AA classification, \$1,500 for the AAA classification, and \$5,000 for the major league level), and (iv) the amount to be paid to the player by the club for attendance at a college of the player's choice for tuition, room, board, books and fees pursuant to the college scholarship plan.⁴⁸

B. The "Signability" Factor

In the days, weeks, and months leading up to the draft each year, scouts from all thirty clubs and the Major League Scouting Bureau evaluate all of the draft-eligible amateur players throughout the United States, Canada, and Puerto Rico. As part of the evaluation process, scouts assess a player's skill, makeup, and character. In evaluating character attributes, scouts begin to develop a personal relationship with select players. Scouts even ask players to take psychological exams and to answer a variety of questions in order to assess character and personality traits.

Another important component to a scout's evaluation is the player's "signability." This term, widely used among scouts, players, and agents, refers to the amount of money it will cost a team to sign a particular player to a professional contract if that player is drafted.

"The NCAA has instituted strict regulations with respect to amateur athletes receiving any benefits, financial or otherwise, from agents."

As one might expect, signability becomes more of a factor with respect to high school seniors and college juniors than with college seniors. This is because younger players have the bargaining leverage of returning to school in the fall following the June draft instead of signing a professional contract.

Due to the steady increase in signing bonuses of drafted players over the past ten to fifteen years, signability has become more and more important to the clubs. The signing bonuses of the players picked first in the baseball draft for the last fifteen years are as follows:

1989: Ben McDonald - \$350,000
 1990: Chipper Jones - \$275,000
 1991: Brien Taylor - \$1,550,000
 1992: Phil Nevin - \$700,000
 1993: Alex Rodriguez - \$1,000,000
 1994: Paul Wilson - \$1,550,000
 1995: Darin Erstad - \$1,600,000
 1996: Kris Benson - \$2,000,000
 1997: Matt Anderson - \$2,500,000
 1998: Pat Burrell - \$3,150,000
 1999: Josh Hamilton - \$3,960,000
 2000: Adrian Gonzalez - \$3,000,000
 2001: Joe Mauer - \$5,150,000
 2002: Bryan Bullington - \$4,000,000
 2003: Delmon Young - \$5,800,000 guaranteed salary hat includes a \$3,700,000 signing bonus⁴⁹
 2004: Matt Bush - \$3,150,000⁵⁰

It is important to note that a player's draft slot is not necessarily indicative of the amount of a signing bonus. For example, in the 2000 draft, the twelfth pick in the draft received a signing bonus in the amount of \$5,300,000, which is \$2,300,000 more than the first pick that year.⁵¹ In the 2002 draft, the second overall pick re-

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball

ceived \$600,000 more than the first pick.⁵² In the 2004 draft, third round draft pick Matt Tuiasosopo, a high school player from Woodinville, Washington, signed for \$2,290,000, the equivalent to the bonus that players in the top half of the first round received.⁵³ Thus, it is easy to see how important a player's signability is to the clubs at draft time.

In fact, a player's signability often determines whether a particular club will even consider drafting that player. Prior to the draft, scouts attempt to determine as precisely as possible a player's signability through discussions with the player and/or his representative.⁵⁴ Indeed, the Major League Rules expressly permit club personnel to talk to any player, prior to the draft, "at any time concerning a career in professional baseball and discussing the merits of the player's contracting, when eligible, with any particular [c]lub."⁵⁵

Thus, many clubs engage in "pre-draft dealing" with certain players. In other words, a scout or other front-office personnel engages in negotiations with a player and/or his representative prior to the draft. Essentially, the player makes a commitment to the club that he will sign for a certain amount of money if that club drafts him.⁵⁶ This arrangement can be beneficial to the club and the player because it brings certainty to both sides; thus, a contract can be completed shortly after the draft without the need for prolonged negotiations throughout the summer.⁵⁷

The signing of Matt Bush, the number one draft pick by the San Diego Padres out of a local San Diego high school in 2004, involved a pre-draft deal. Jim Callis from Baseball America discussed the negotiations that took place between Padres general manager, Kevin Towers, and the representatives of Matt Bush just days

before the draft:

The deal took four more phone calls, all the Sunday morning before the draft among Towers and Bush's advisors, Greg Genske and Kenny Felder, both associates of longtime agent Jeff Moorad. They went like this:

Call No. 1: Towers indicates a willingness to spend between \$2.5 million and \$3 million. Knowing Bush isn't the true No. 1 talent, Genske wants the \$3.35 million No. 3 pick Kyle Sleeth received last year. "I'm not sure we can go much lower," Genske says.

Call No. 2: An hour later, Towers calls back and says he probably can't go over 3. Although no Padres deal would slide Bush to at best the Devil Rays at No. 4 or, more likely, the Nos. 7-12 range (meaning just a \$2 million bonus and no hometown team), Genske still comes down to only \$3.25 million. Towers says, "He's from San Diego. You want to go to Tampa Bay? Or later? We're very prepared to roll the dice and take [Stephen] Drew."

Call No. 3: Towers informs Genske, "3.1 is our final offer, or we're walking." Genske counters with 3.15. Towers tells [scouting director, Bill] Gayton, "We could stay at 3, and the kid will call back and take the 3."

Call No. 4: Towers tells Genske, "We have a deal at 3.15."⁵⁸

As a result of the signability factor, increased signing bonuses, and pre-draft dealing, the draft

“the NCAA makes no distinction between lawyers and non-lawyers in terms of giving consultation and advice to the athlete.”

process has become “big business.” In addition to employing a staff of full- and part-time scouts, clubs hire statisticians to analyze player performance and lawyers to monitor compliance with the Major League Rules and negotiate player contracts. To level the playing field, it is common practice for amateur baseball players to retain agents to assist them with the business aspects of the draft process, which often results in the representative having contact with professional clubs in violation of the NCAA regulations.⁵⁹

C. The Regulations’ Effect on Players

Violations of the NCAA Bylaws by amateur athletes can have severe consequences for the athlete and his institution. When the athlete becomes ineligible for competition due to a violation, the member institution can be forced to retroactively forfeit games.⁶⁰ Also, ineligibility can lead to further NCAA investigations, self-imposed probations, NCAA-imposed suspensions, or even program termination.⁶¹ In essence, the NCAA has discretion to impose any sanctions it deems appropriate.

In the summer of 2001, the NCAA ex-

ers retained a competent agent to represent him and advocate on his behalf in his best interest. Sowers did not receive any improper benefits from the agent, nor did the agent engage in any corrupt or unlawful behavior.⁶⁴

Sowers, like any draft-eligible baseball player, is susceptible to violating NCAA rules due to the timing of the draft and the Major League Baseball draft-eligibility rules. The draft takes place at the end, or shortly after the end, of the high school and collegiate baseball regular seasons. Thus, draft-eligible baseball players do not have time to interview prospective agents, to make an informed decision as to who they want to represent them, and to have their representative contact professional clubs on their behalf to assess market value and determine which clubs are most interested. It is, therefore, in the best interest of an amateur baseball player to retain an agent before the season starts.⁶⁵

Baseball is significantly different from other draft sports, such as football. 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, they do not face the difficult decision of whether to sign

“The NCAA Bylaws permit amateur athletes to interact with professional sports teams on their own without the use of an agent.”

exercised that discretion. Before his freshman year at Vanderbilt, Jeremy Sowers and his family retained an advisor regarding a proposed contract after he was drafted in the first round (20th pick) by the Cincinnati Reds. The advisor had contact with one or more representatives of the Reds organization.⁶² Sowers could not reach an agreement with the Reds; he enrolled at Vanderbilt in the fall of 2001. The NCAA reprimanded Sowers with a six-game suspension for violating the no agent rule.⁶³ This result is disturbing in light of the fact that Sowers

retained a competent agent to represent him and advocate on his behalf in his best interest. 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 an agent and have their representative contact professional clubs on their behalf in preparation

“...an amateur athlete loses eligibility if he or she asks, subsequent to initial full-time collegiate enrollment, to be placed on the draft list or supplemental draft list of a professional sports league...”

visor who has direct contact, by way of negotiations or otherwise, with the club (which is impermissible). In essence, the regulations prohibit the student-athlete from retaining a competent law-

for the draft.⁶⁶

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.⁶⁷ 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.⁶⁸

IV. Revisiting the Regulations: Two Recommendations

A. Permit Players to Retain Agents under the Supervision of the Member Institution

As succinctly stated by one commentator: “The NCAA's general rule on student-athlete contact with a sports agent is clear: A student-athlete risks losing his or her intercollegiate athletics eligibility by doing anything more than talking with an agent.”⁶⁹ The current NCAA regulations make no distinction between permissible and impermissible conduct on the part of agents. This is because the NCAA has no standing to discipline the agents since agents are not members of the NCAA.⁷⁰ Instead, the NCAA makes the pertinent distinction between an advisor who deals one-on-one with the student-athlete (which is permissible) and an ad-

viser or agent to negotiate a contract to the maximum benefit of the student-athlete; however, they permit an amateur athlete to seek advice from a lawyer about a standard player contract and to negotiate a professional contract with the aid of a member institution's professional sports counseling panel.

According to the NCAA, these rules are necessary to maintain “a clear line of demarcation between collegiate athletics and professional sports.” The NCAA's objective, however, is accomplished with the regulation that an amateur athlete is ineligible to compete in a collegiate sport once he or she signs a professional contract in that sport. Simply permitting a student-athlete to retain competent representation to contact professional clubs and to advocate on his behalf to obtain a result that is in his own best interests, financially and otherwise, would not destroy the line of demarcation any more than allowing the student-athlete or the professional sports counseling panel to engage in the same conduct.

Prior to the annual baseball amateur draft, it is clearly in the player's best interest, due in large part to the signability issue and pre-draft dealing, for him to (i) accurately assess his market value, (ii) evaluate the pros and cons to signing a professional contract after his senior year in high school or junior year in college (as the case may be), (iii) determine for how much he is willing to sign a professional contract and properly convey this information to the clubs, and (iv) learn about the Major League Baseball rules and regulations. Further, once the player is drafted, there is no compelling reason to deny a player the opportunity to obtain maximum value for his services, even if that requires retaining an experienced agent to ne-

gotiate with the club. In the NCAA's view, the student-athlete or the institution's professional sports counseling panel is best qualified to handle all of these pre- and post-draft responsibilities.⁷¹ This perspective is flawed in numerous respects.

First, the player is clearly not the appropriate person to be handling these responsibilities. The amateur athlete is not experienced in the business aspects of major league baseball to adequately assess his market value or to effectively negotiate a professional contract. He should not be given these responsibilities to maintain in addition to his responsibilities in the classroom and on the field. Second, players graduating from high school are not going to have access to professional sports counseling panels at NCAA member institutions. In effect, the panels are only available to draft-eligible college players. Since it is not mandatory that NCAA member institutions establish a professional sports counseling panel, many colleges and universities do not even offer such a service to their student-athletes. With respect to institutions that do have a panel for the benefit of its student-athletes, it is questionable as to whether the members of that panel are qualified to adequately serve the best interests of the athlete.

Using Villanova University's panel as an example, the Associate Dean of Administration, the Associate Athletic Director, the university's General Counsel, and the chairperson of the Department of Education and Human Services are probably not experienced in baseball talent evaluation or knowledgeable enough about the Major League Baseball rules and regulations. Furthermore, they probably do not have relationships with scouts and front-office personnel. Indeed, these individuals have full-time jobs with major responsibilities at the university and likely cannot devote the necessary time and effort to such details on behalf of the player. In addition, there is an inherent conflict of interest when representatives of the university advise its players whether to sign a professional contract—the school may have an interest in having its players play for the school another year instead of becoming a professional.⁷²

Student-athletes in every major collegiate sport who are professional prospects are going to retain a representative experienced and

knowledgeable in their particular sport to assist them in obtaining maximum draft status, and rightfully so. However, with respect to baseball players, the NCAA regulations create an incentive for a player to engage in the agent selection process in isolation, apart from the assistance of the member institution and coaching staff, for fear that the player might lose eligibility or that he or the member institution might be reprimanded. "Unscrupulous" agents thrive in this type of environment.

The NCAA needs to recognize the problems caused by the timing of the baseball draft and the Major League Baseball rules pertaining to draft-eligibility, and make an exception for student-athletes in the sport of baseball to retain agents. If such an exception is made and the fear of NCAA reprimand is removed, more college coaches and member institutions would be inclined to provide assistance to student-athletes in the selection of an agent.⁷³ The role of the professional sports counseling panel would then be limited to the evaluating potential agents who are interested in representing the player and assisting the player in the selection of a competent representative. Keeping the "no benefits" rule intact would help maintain the integrity of the agent selection process and ensure that players are not subject to undue influence.

B. Standard Athlete-Agent Representation Agreements

The NCAA should also require the student-athlete to execute a standard representation agreement with his agent, similar to the NFL Players Association standard agreement between draft-eligible football players and their agents. In addition to helping to maintain the integrity of the agent selection process, this would enable the NCAA to establish certain terms and conditions governing the relationship between the student-athlete and agent, including the duties, responsibilities, and fees of the agent. Such written agreements would be beneficial to both the athlete and the agent because it would replace the "loose" understandings that often result in disputes between the parties with certainty. The student-athlete would then be required to send a copy of the executed representation agreement to the member institution, where it would be kept on file

for a certain period of time for future reference.

V. Conclusion

The NCAA regulations regarding use of agents are not practical for the amateur baseball player. More specifically, the regulations fail to consider the timing of the baseball draft and the Major League Baseball rules regarding draft eligibility. As a result of the huge increases in signing bonuses over the last fifteen years, a player's signability has become a significant factor in the draft process and pre-draft dealing has become commonplace in the industry—all of which amounts to "big business." There is no compelling reason to prohibit a player from retaining a competent agent to deal directly with the clubs, both pre- and post-draft, to maximize the player's draft potential and obtain maximum value for his services. With the assistance of the member institution and its coaching staff in the agent selection process, as well as standardizing player-agent representation agreements, the player is less likely to get involved with an "unscrupulous" agent and the line of demarcation between collegiate athletics and professional sports would remain undisturbed.

ENDNOTES

* Assistant Professor of Law, Florida Coastal School of Law. Prior to becoming a full-time law professor, Professor Karcher was a partner at Honigman Miller Schwartz and Cohn LLP. Before earning his bachelor's degree, Professor Karcher played three seasons as a first baseman for the Atlanta Braves.

¹ One of the most notable cases involved sports agents Norby Walters and Lloyd Bloom, both of whom were charged with, and convicted by a jury for, multiple crimes, including mail fraud, conspiracy, and racketeering for offering student-athletes money, cars, trips, and other gifts in exchange for the player's agreeing to sign post-dated representation agreements. Rob Remis, *Analysis of Civil and Criminal Penalties in Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability upon*

Athletes, 8 SETON HALL J. SPORT L. 1, 26–27 (1998); see also MEL LEVINE, *LIFE IN THE TRASH LANE: CASH, CARS & CORRUPTION, A SPORTS AGENT'S TRUE STORY* (1993). Sports agent Mel Levine was sentenced to 30 months in federal prison for tax and financial fraud in his dealings with professional athletes. *Id.* at 131.

² Many state legislatures have enacted burdensome laws that require all sports agents to register with the state by paying registration fees and posting a bond, both of which can be quite costly, to cover any loss due to the agent's potentially illegal future conduct. Law of Prof'l & Amateur Sports, (West Group) Vol. 1, at 1-12 and 1-13 (Gary A. Uberstine ed., 2002). State regulation of sports agents is beyond the scope of this article. For a discussion on the state regulation of sports agents, see Jan Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N.D. L. REV. 215 (1991); Jan Stiglitz, *A Modest Proposal: Agent Deregulation*, 7 MARQ. SPORTS L.J. 361 (Spring 1997).

³ NCAA Bylaws §§ 12.01.1–12.01.2, available at http://www.ncaa.org/library/membership/division_i_manual/2004-05/2004-05_d1_manual.pdf (Aug. 1, 2004); see also *Summary of NCAA Regulations Related to Agents and Other Amateurism Provisions*, National Collegiate Athletic Association, available at http://www.ncaa.org/agents/ncaa_summary.html (last visited Jan. 28, 2005) [hereinafter *NCAA Amateurism Regulations Summary*].

⁴ As one commentator noted: "Without the help of a reputable agent, student-athletes are left on their own to accurately determine their value to a professional league. Ostensibly, the purpose of the no agent rule is to prevent student-athletes from being able to market their talent as a professional. Unfortunately, the rule actually increases the likelihood that student-athletes will make uninformed and incorrect decisions by impairing their ability to obtain accurate information concerning their potential as professionals." Todd Fisher, *Amateurism and Intercollegiate Athletics: The Double Standard of Section 12.2.4.2.1*, 3 SPORTS LAW J. 1, 5 (1996). Another author stated: "These amateurism and educational/student welfare protection arguments backing the no agent rule

and no draft rules are tenuous at best. Barring an athlete's ability to compete on the collegiate level simply because he wished to explore his worth in his chosen job market does not preserve amateurism. The no agent and no draft rules do little to promote amateurism or protect educational values, but rather primarily protect the NCAA's economic interests." Thomas R. Kobin, *The National Collegiate Athletic Association's No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483, 515 (1994).

⁵ NCAA Bylaws, *supra* note 3, § 12.01.1.

⁶ NCAA Bylaws, *supra* note 3, § 12.01.2.

⁷ NCAA Amateurism Regulations Summary, *supra* note 3.

⁸ See also NCAA Bylaws, *supra* note 3, § 12.1.1(g).

⁹ NCAA Bylaws, *supra* note 3, § 12.3.1.

¹⁰ *Id.*

¹¹ *Id.*

¹² NCAA Bylaws, *supra* note 3, § 12.3.1.1.

¹³ NCAA Bylaws, *supra* note 3, § 12.01.3. As used in the NCAA Bylaws, the term "individual" refers to "a person prior to and subsequent to enrollment in a member institution," and if the NCAA regulations refer to the term "student-athlete," the legislation "applies only to that person's activities subsequent to enrollment." *Id.* NCAA Bylaw 12.02.5 further defines a student-athlete as "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program [and] [a]ny other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.4." *Id.* § 12.02.5.

¹⁴ NCAA Bylaws, *supra* note 3, § 12.3.1.2.

¹⁵ See *supra* note 13.

¹⁶ NCAA Amateurism Regulations Summary, *supra* note 3, § II.D.1.

¹⁷ Law of Prof'l & Amateur Sports, *supra* note 2, at 1-9.

¹⁸ NCAA Amateurism Regulations Summary, *supra* note 3, § II.D.3.

¹⁹ NCAA Bylaws, *supra* note 3, § 12.3.2.

²⁰ *Id.*

²¹ *Id.* § 12.3.2.1.

²² *Id.*

²³ See *supra* note 13.

²⁴ NCAA Amateurism Regulations Summary, *supra* note 3, § II.E.2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § II.E.1.

²⁸ *Id.*

²⁹ NCAA Bylaws, *supra* note 3, § 12.3.4. It is questionable as to how and why the panel would assist the student-athlete in the selection of an agent pursuant to Bylaw 12.3.4(f) when retaining an agent is clearly prohibited. *Id.* § 12.3.4(f).

³⁰ NCAA Amateurism Regulations Summary, *supra* note 3, § II.G.2.b.

³¹ NCAA Bylaws, *supra* note 3, § 12.3.4.1. For example, Villanova University's panel consists of the law school's Assoc. Dean for Administration, the university's General Counsel, the Assoc. Athletic Director and the chairperson of the Dept. of Education and Human Services. Law of Prof'l & Amateur Sports, *supra* note 2, at 1-10 (citing Robert Garbarino, *So You Want To Be a Sports Lawyer, Or Is It a Player Agent, Player Representative, Sports Agent, Contract Advisor,*

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball

Family Advisor, or Contract Representative?, 1 VILL. SPORTS & ENT. L.J. 25 (1994).

³² NCAA Bylaws, *supra* note 3, § 12.3.4.2.

³³ *Id.*

³⁴ NCAA Amateurism Regulations Summary, *supra* note 3, § II.G.1.

³⁵ NCAA Bylaw 12.3.4 uses the term “student-athlete” as opposed to “individual”. NCAA Bylaws, *supra* note 3, § 12.3.4; *see supra* note 13.

³⁶ NCAA Bylaws, *supra* note 3, § 11.1.4.1.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* § 12.2.4.1.

⁴¹ *Id.* § 12.2.4.3.

⁴² *Id.* § 12.2.4.2. Section 12.2.4.2 is not applicable to baseball players because, under the Major League Rules, a player does not become draft-eligible by making a declaration. Baseball players are automatically draft-eligible if they meet certain requirements. *See infra* Part III.A. For a discussion of the applicability of the NCAA no draft rule in football, *see* Kobin, *supra* note 4.

⁴³ NCAA Bylaws, *supra* note 3, § 12.2.4.2.1.

⁴⁴ Major League Rule 4(b) [hereinafter MLR].

⁴⁵ MLR 3(a)(2)–(4).

⁴⁶ MLR 4(d)(3). However, if a drafted high school senior attends a junior college, or a drafted junior college player returns to junior college, then the club that drafted the player retains the exclusive right to negotiate with that player up until the seventh day prior to the next

player draft. MLR 4(f). This is known as a “draft and follow” player.

⁴⁷ MLR 3(b)(2).

⁴⁸ MLR 3(c)(4). In certain rare circumstances, a very talented drafted player might be able to negotiate and sign a major league contract, which essentially allows the player and the team to negotiate a salary structure in which the player is paid over a term of years.

⁴⁹ *No. 1 Draft Picks, 1965-2002*, Baseball America, at <http://www.baseballamerica.com/online/draft/toppicks03.html> (2003); *see also* Marc Topkin, *Devil Rays Sign No. 1 Overall Pick Young*, at <http://www.baseballamerica.com/today/draft/030909dyoungsigns2.html> (Sept. 9, 2003).

⁵⁰ *2004 Draft: Round 1*, Baseball America, at <http://www.baseballamerica.com/draftdb/rnd.php?rnd=1> (last visited Jan. 28, 2005).

⁵¹ *2000 Draft Signing Bonuses*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus2000.html> (2002).

⁵² *2002 Signing Bonuses Top 10 Rounds*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus02.html> (2004).

⁵³ *2004 Draft: Round 3*, Baseball America, at <http://www.baseballamerica.com/draftdb/rnd.php?rnd=3> (2004).

⁵⁴ *See, e.g.* Jim Callis, *Drew's draft-day drop spurs volatile first round*, BASEBALL AM., July 5-18, 2004, at 10. Regarding Matt Bush, the first pick in the first round of the 2004 draft who signed for the lowest amount for a number one overall pick since the 2000 draft, Callis noted: The Padres insist that it's a misperception that their choice was based primarily on finances. They don't deny that money always enters into decisions at the top of the draft, but they viewed Bush as the best high school prospect in the draft. The bottom line was that they thought he was a better value at \$3.15 million than any of their other targets would be wherever their final price tags ended up. [Jered] Weaver, who like [Stephen] Drew is advised by Scott Boras, reportedly wants an eight-figure deal similar to

what Mark Prior got from the Cubs as the No. 2 choice in 2001. [Jeff] Niemann is expected to command a bonus in the \$3 million-\$4 million range. "From the information that we had gathered, from their advisers, at least what their expectations were, we didn't see the value in there," [general manager Kevin] Towers said. *Id.*

⁵⁵ MLR 3(g)(1).

⁵⁶ It is important to note that pre-draft dealing, while commonplace in the industry, is not permitted under Major League Baseball Rules. Therefore, pre-draft discussions and verbal agreements are non-binding to the club and the player. See Tom Haudricourt, *Brewers' Draft Plans Hinge On Other Teams'*, MILWAUKEE J. SENTINEL, June 2, 1997, at Sports p.3. For example, when the General Manager of the Milwaukee Brewers, Sal Bando, was asked whether the Brewers violated major league and NCAA rules by striking a pre-draft deal with 1996 first round pick Chad Green, Bando said, "You can't actually sign it, but you can talk to his representative and agree in principle on something and complete it after the draft.... You can't have a written contract, but you can talk money with his representative.... Everybody does it." *Id.*

⁵⁷ See, e.g., Michael Belmont, *2003 Draft Review*, BravesBeat.com, at http://www.bravesbeat.com/article_622.shtml (June 3, 2003) (Regarding 2003 supplemental first round draft pick, Luis Atilano, "Since there appears to be a pre-draft deal, you can expect him in Orlando this season.... Shortly after the pick was made, the folks at Baseball America announced that [Jarrod] Saltalamacchia followed Atilano by signing a pre-draft deal. You can also expect him to go to Orlando.").

⁵⁸ Callis, *supra* note 54, at 11.

⁵⁹ As one author correctly surmised: "One can only conclude that there is not necessarily anything 'per se unethical' in contacting an athlete and asking to represent the athlete in negotiations with professional sports teams. In fact, not only is such conduct not necessarily unethical, it may be entirely ethical and extremely

beneficial to the athlete for numerous reasons. First, the agent might be a highly qualified, experienced agent, capable of securing a multi-million dollar deal for the athlete. Second, even if the agent is not as experienced and well-known as other agents, it is becoming widely recognized that having an agent is usually better than no agent at all since a competent agent may have more knowledge of contract and labor laws, and better negotiation skills, than many athletes. The agent may level the playing field between the professional team and athlete and have access to more information than the average athlete will have in his or her possession." Remis, *supra* note 1, at 29-30.

⁶⁰ Law of Prof'l & Amateur Sports, *supra* note 2, at 1-10.

⁶¹ *Id.* NCAA Bylaw 14.11.1 states: "If a student-athlete is ineligible under the provisions of the constitution, bylaws or other regulations of the Association, the institution shall be obligated to apply immediately the applicable rule and to withhold the student-athlete from all intercollegiate competition." NCAA Bylaws, *supra* note 3, § 14.11.1.

⁶² Press Release, Vanderbilt University, Baseball's Jeremy Sowers to Miss Two Starts (Feb. 1, 2002), available at <http://www.vanderbilt.edu/commodores/baseball/pressbox/Releases/020201.htm>.

⁶³ *Id.* In June of 2004, after his junior year at Vanderbilt, Sowers was again drafted in the first round, this time by the Cleveland Indians with the sixth pick overall. *2001 Draft Signing Bonuses*, Baseball America, at <http://www.baseballamerica.com/online/draft/bonus2001.html> (2001).

⁶⁴ According to Vanderbilt, which appealed the NCAA's decision to no avail, "Sowers did nothing wrong, received no material benefit and had been saying all along he planned to play collegiately." Press Release, *supra* note 62. Vanderbilt Head Coach Roy Mewbourne stated: "We were very disappointed with the NCAA's position....The Sowers family took great pains to handle everything properly so any penalty seems extremely harsh to us. We've

The NCAA's Regulations Related to the Use of Agents in the Sport of Baseball

known about this for some time so it does not upset our season's plans as much as we think it's unfair to an honest student-athlete." *Id.*

⁶⁵ When an amateur baseball player "retains" an agent, the player and the agent do not sign a representation agreement because the NCAA rules prohibit such agreements. Therefore, the player and the agent have a very "loose" understanding that the agent will represent the player in the draft process. This often creates disputes down the road between the parties as to the terms of the representation, including the agreed upon duties and responsibilities of the agent before and after the draft and the agreed upon fee to be paid to the agent.

⁶⁶ See, e.g., Joe Kay, *No Picnic for Top Picks; Preparing for draft day is a full-time job for stars such as Roethlisberger*, FLA. TIMES-UNION, Feb. 29, 2004, at C-16. Ben Roethlisberger was a highly-touted quarterback and pro prospect who left Miami University of Ohio after his junior year to enter the 2004 NFL draft. After the completion of the collegiate football season, Ben moved to California and hired an agent (Leigh Steinberg) who began preparing Ben for the draft and contacting NFL clubs on Ben's behalf. In the article, Kay expounded on Ben's daily routine, and in particular Steinberg's efforts to elevate Ben's draft position, during the months leading up to the 2004 draft:

Roethlisberger spent the last two months getting ready to make a good impression on teams looking for a franchise player. Roethlisberger, who was one of Ohio's top prep passers at Findlay High School, moved to Newport Beach, Calif., so he could work out every day in warmer weather. His daily routine includes an hour of weight training, an hour or more working out with a quarterback coach, then a session at Steinberg's office getting mail and doing interviews. There's another hour-long workout to improve his speed before the day is done.... There's also some travel. Steinberg took him to the Senior Bowl to meet NFL scouts, coaches and general managers. He also brought Roethlisberger to Super Bowl week in Houston, helping him get another foot in the door while getting a look at the mass media. "I was kind of star-struck to see people like Ronnie Lott, Joe Montana, Howie Long, Cris Carter,

Warren Moon," Roethlisberger said. "I had posters of these guys." *Id.*

⁶⁷ This standard agreement specifically states the obligations of the agent and the player, and a fee to be paid to the agent in the amount of 3% of the compensation received by the player.

⁶⁸ For a discussion about the detrimental effects of the NCAA rules on amateur football players, see Kobin, *supra* note 4. The author argues that, since the no draft rule does not apply to baseball players, football players are actually worse off than baseball players because the baseball player drafted after his junior season, unlike the football player, can return to school for his senior year if he cannot come to terms with the club that selects him in the draft. *Id.* at 516-19. He argues that football players who have completed their junior season are further harmed by the no agent rule because they need competent representation in order to make an informed decision about whether to declare draft-eligibility after their junior season. *Id.*

However, a college football player who completes his junior season and is considering whether to declare draft eligibility is permitted to retain an experienced and competent advisor to help him make the decision. If, after consulting with his advisor, he determines that it is in his best interest to declare himself eligible, then the advisor can immediately begin contacting clubs on his behalf. Furthermore, signability is not a significant factor to the clubs in football as it is in baseball because the draft compensation system in football is much more structured and predictable with the salary cap. Thus, pre-draft dealing is not as common a practice in football as it is in baseball. *Id.*

⁶⁹ Law of Prof'l & Amateur Sports, *supra* note 2, at 1-8.

⁷⁰ *Id.* at 1-11. "[A]thlete agents having no affiliation with a university are beyond the reaches of the NCAA's enforcement jurisdiction, as the NCAA is merely a private organization comprised of its voluntary institutional membership. The athlete, although not a member of the NCAA, can be disciplined indirectly since the NCAA can force the member institution to

which the student athlete is enrolled to declare the athlete ineligible for further intercollegiate competition." Remis, *supra* note 1, at 9.

⁷¹ According to the NCAA, "a panel should provide the student-athlete a realistic appraisal of his or her potential for becoming a successful professional athlete. It is important that the student-athlete receive objective advice from individuals at institutions who have no vested interest in the student-athlete's career." *NCAA Amateurism Regulations Summary*, *supra* note 3, § II.G.1.

⁷² See Stiglitz, *A Modest Proposal: Agent Deregulation*, *supra* note 2, at 364 ("As long as the institution has a vested, financial interest in encouraging the student to stay, full time employees of the institution may not be wholly neutral.").

⁷³ The University of Miami, for example, requires every agent to register with the university's NCAA compliance office prior to speaking with any student-athlete. The University ensures that the agent has been certified by the State of Florida (which is a state law requirement, *see* FLA. STAT. ANN. § 468.453 (West 2001)), and also requires the agent to complete a questionnaire in order to obtain references and certain information about the agent and his company.

