

GOING PRO IN SPORTS: PROVIDING GUIDANCE TO STUDENT-ATHLETES IN A COMPLICATED LEGAL & REGULATORY ENVIRONMENT ♦

GLENN M. WONG *

WARREN ZOLA **

CHRIS DEUBERT ***

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* Professor, Department of Sport Management, Isenberg School of Management, University of Massachusetts, Amherst, MA; J.D., Boston College Law School; B.A. Brandeis University. Professor Wong is the author of *ESSENTIALS OF SPORTS LAW* (4th ed. 2010) and *THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS* (Jones & Bartlett Publishers, 2008).

** Assistant Dean, Graduate Programs, Carroll School of Management, Boston College, Chestnut Hill, MA; M.B.A., Boston College Carroll School of Management; J.D., Tulane University; B.A. Hobart & William Smith Colleges, Geneva, NY. Adjunct Professor and Chair of the Professional Sports Counseling Panel at Boston College.

*** Associate, Ginsberg & Burgos, PLLC, New York, NY; J.D./M.B.A., Fordham University School of Law and Graduate School of Business, New York, NY; B.S., Sport Management, University of Massachusetts, Amherst, MA.

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INTRODUCTION

In 2008 the National Collegiate Athletic Association (NCAA) launched a national advertising campaign entitled “*Going Pro in Something Other than Sports.*” As a major strategic and branding initiative by the NCAA that was years in development, this effort seeks to emphasize the academic rather than athletic abilities of collegiate student-athletes.¹ Humor captivates the audience, yet it is the campaign’s tagline that the NCAA has “more than 380,000 student-athletes and most of them will go pro in something other than sports” that resonates with the viewer.² This declaration is true, and the promotion’s purpose is clearly aimed at calling attention to the core purpose of the NCAA, which 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.”³

The reason that the NCAA feels compelled to run this campaign is to combat the high profile, occasionally controversial, and sometimes even illegal nature of the entry of many college student-athletes into professional sports. When one considers the

¹ Marta Lawrence, *Behind the Scenes*, NCAA CHAMPION, Spring 2008, at 56, available at www.ncaachampionmagazine.org (follow link at bottom of page for Spring 2008 issue).

² *Id.* NCAA Public Service Announcement developed by Young & Rubicam for the NCAA’s JoJo Rinebold, NCAA’s managing director of brand strategies and events.

³ NCAA.org, About the NCAA, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa> (last visited October 10, 2010).

complexities of this process, coupled with the fact that student-athletes and their families are woefully unsophisticated and unprepared to navigate the process, the lack of assistance provided by colleges and universities to their student-athletes who are preparing to join the professional ranks is shocking

This article will discuss the existing process for this transition, the problems therein, and the urgency with which these problems need to be addressed. We then explain why it is in the best interests of all parties concerned to improve the system and make recommendations for doing so.

I. NAVIGATING THE PROCESS 101

Despite the NCAA's campaign, the sheer volume of former college student-athletes playing professional athletics is still enormous. About two-thirds of the 2,050 individuals drafted by the four major domestic leagues in 2010 came directly from college.⁴ This does not include the 515 high school seniors drafted by Major League Baseball (MLB) and the National Hockey League (NHL) who may decide to delay their entry into these leagues by attending college.⁵ The number of high school students who are now faced with major decisions related to their potential entry into the professional ranks highlights the need for earlier engagement in providing counsel. Final career decisions are often made long before a student-athlete enrolls in college, demonstrating that the traditional model of working with seniors only after their eligibility has expired is dwindling. Receiving far less attention are the large number of former college student-athletes, in a multitude of sports, who progress towards less visible leagues and the individual opportunities in professional athletics around the globe.

Many of these student-athletes do not make optimal decisions about their future during this process for a variety of reasons, including poor and conflicting sources of information, the lure of professional money, and an inability to understand the many complex issues surrounding the amateur-to-professional transition. The results of these poor decisions can be dramatic

⁴ The four major domestic leagues being Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), and the National Hockey League (NHL). Based on the 2010 entry drafts of the four major sports leagues there were 2,050 individuals drafted and 1,355 of them were college athletes. See MLB.com, 2010 MLB First-Year Player Draft, <http://mlb.mlb.com/mlb/events/draft/y2010/> (last visited Oct. 8, 2010); NFL.com, 2010 NFL Draft, <http://www.nfl.com/draft/2010> (last visited Oct. 8, 2010); NBADraft.net, 2010 NBA Draft, http://www.nbadraft.net/nba_final_draft/2010 (last visited Oct. 8, 2010); NHL.com, 2010 NHL Entry Draft, <http://www.nhl.com/ice/eventhome.htm?location=/draft/2010> (last visited Oct.8, 2010).
⁵ 2010 MLB First-Year Player Draft, *supra* note 4; 2010 NHL Entry Draft, *supra* note 4.

and affect a long list of stakeholders. While this article will highlight the role many organizations and people play in this process, student-athletes are, and should still be, responsible for their actions.

Although fans are most familiar with the riches and fame of professional athletes, the reality is that achieving such a lofty status is the exception and not the rule. Far more student-athletes end up as hidden victims of this flawed transition process. The athlete may suffer permanent career and financial harm while his former school may incur penalties and suffer embarrassment for any misconduct that occurred while the athlete attended the school. Furthermore, the NCAA and/or the professional league with which the athlete is now involved may have to deal with a paying public critical of their operations and constituents.

The stakes involved in professional athletics are unmistakably high and most athletes will get limited chances to make good on that potential. A failure to properly capitalize on those opportunities works to the detriment of all interested parties. To properly understand the problem, it is important to understand the current process student-athletes go through to turn professional.

A. *The Current Process*

For most student-athletes the process by which they contemplated pursuing a professional career in sports began long before they actually could pursue such a career. Such aspirations most likely influenced the student-athlete's choice of which high school and college to attend, the student-athlete's leisure activities, and almost certainly the student-athlete's level of interest in academia. In Division I football, 59% of student-athletes reported that athletics were the primary reason for attending their college as opposed to 24% who said academics; in men's basketball and baseball the numbers rose to 68% and 79% respectively.⁶ Additionally, 72% of Division I male student-athletes not in football, baseball, or basketball, reported viewing themselves as more of an athlete than a student.⁷ Even 55% of Division III male student-athletes felt the same way, as did 64% of Division I female student-athletes.⁸ However, at some point whether or not the student-athlete has professional potential will no longer be

⁶ 2008 NCAA Convention, THE STUDENT-ATHLETE PERSPECTIVE OF THE COLLEGE EXPERIENCE: FINDINGS FROM THE NCAA GOALS AND SCORE STUDIES, 18 (2008), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Research/Student-Athlete+Experience+Research> (follow "The Student-Athlete Perspective of the College Experience: Findings from the NCAA GOALS and SCORE Studies" hyperlink).

⁷ *Id.* at 14.

⁸ *Id.*

evidenced by the decisions the student-athlete and his family make, but instead by the attention the student-athlete receives.

The process reaches a new level of intensity when agents, scouts, coaches or media members begin to inquire into the student-athlete's professional goals and plans. These questions are no longer presented to just young men and women but increasingly to teenagers and adolescents. It is common today for many elite student-athletes to have been followed, graded, and interviewed since they were adolescents.⁹ Amateur Athletic Union (AAU) basketball camps and teams have become particularly swarmed with coaches, recruiters, agents, and others looking for the next great college or professional star that can help their own careers.

As the process of transitioning from student-athlete to professional begins, the student-athlete may be flooded with wanted and unwanted suggestions and guidance. This transition process involves a number of important decisions, actions, and/or omissions in the latter stages of the student-athlete's college career. As will be discussed in greater detail, an athlete's agent or advisor can and should help with many of these decisions. However, the focus in this article is on the earlier decisions where a university or other entities may be positioned to provide guidance.

Other than a school's Professional Sports Counseling Panel (PSCP), which will be discussed in greater detail in Part II, a wide variety of people can and do provide a student-athlete with guidance and advice on the transition from an amateur to a professional athletic career. Certainly family members serve as an important component of a student-athlete's decision making process, yet some less actively involved relatives may see the student-athlete's budding professionalism as a cash grab opportunity for themselves. College coaches and athletic department officials can provide an important connection to the professional world; however, they too might have the school's interests ahead of those of the student-athlete.

The sources of information and influence are never ending. Ultimately, student-athletes with professional prospects must conduct themselves in an appropriate fashion and make informed and prudent decisions throughout the process. For the vast majority of student-athletes the transition process consists of properly maneuvering through NCAA legislation so as to retain eligibility, followed by choosing an agent. Unfortunately,

⁹ See Daniel Libit, *A Basketball Program Rises by Dipping Lower*, N.Y. TIMES, May 7, 2010, at B19; Anne Stein, *The Best 10-Year-Old Basketball Player in America*, CHI. TRIB., Mar. 31, 2010, at 1 (discussing the scouting and ranking of basketball players as early as the fifth grade).

understanding the professional landscape they are entering is often an afterthought to be hopefully handled by their agent.

1. Maneuvering through NCAA Legislation

In the summer of 2010, a bevy of potential scandals were uncovered that jeopardized the eligibility of college football players.¹⁰ Before a student-athlete can become a professional, he or she must properly follow NCAA rules concerning his or her amateurism.¹¹ Failure to do so can result in the loss of the student-athlete's ability to display his or her skills and ultimately the cessation of a career before it begins.¹² The NCAA has long been hailed as the protector of amateurism.¹³ Consequently, the NCAA Bylaws have very strict and specific rules to uphold that image. In

¹⁰ The NCAA instituted several investigations. First, they examined allegations that former University of Florida lineman Maurkice Pouncey received \$100,000 from an agent while still playing at Florida. The NCAA was concerned whether Maurkice's twin brother, Mike, still a lineman at Florida may have also received improper benefits. See ESPN.com, *Pouncey Denies Accepting Money*, July 22, 2010, <http://sports.espn.go.com/nfl/news/story?id=5398414>. Pouncey's agent is Joel Segal. See Pat Forde, *Source: NCAA Probe Allegation*, ESPN.COM, July 21, 2010, <http://sports.espn.go.com/nfl/news/story?id=5392159>. Second, the NCAA investigated whether several players from the Universities of North Carolina, South Carolina, and Alabama may have improperly attended a party hosted by a Miami agent. See Stewart Mandel, *NCAA Turning Up Heat On Agent-Player Relations with More Probes*, SPORTSILLUSTRATED.COM, July 19, 2010, http://sportsillustrated.cnn.com/2010/writers/stewart_mandel/07/19/ncaa.agents/index.html; Ivan Maisel & Mark Schlabach, *Dareus May Have Attended Agent's Party*, ESPN.COM, July 22, 2010, <http://sports.espn.go.com/nfl/news/story?id=5396236>.

¹¹ NCAA Bylaws have been challenged many times. See *Bloom v. NCAA*, 93 P.3d 621 (Colo. App. 2004). Bloom was a college football player at the University of Colorado and also an Olympic skier. *Id.* at 622. He was paid to participate in endorsements in connection with his professional skiing career and the NCAA subsequently held Bloom to be ineligible for the final two years of his college football career. *Id.* at 622. The courts upheld the determination, finding it impossible to determine which endorsement and media activities were, in fact, unrelated to his athletic ability or prestige as Bloom contended. *Id.* at 627. Bloom was eventually drafted in the 5th round of the 2006 NFL Draft but never actually played in an NFL game during his short career. For additional cases involving eligibility, see *Pryor v. NCAA*, 288 F.3d 548 (3d Cir. 2002); *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999); *Butts v. NCAA*, 751 F.2d 609 (3d Cir. 1984); *Spath v. NCAA*, 728 F.2d 25 (1st Cir. 1984); *Lasege v. NCAA*, 53 S.W.3d 77 (Ky. 2001). For cases challenging academic standards, see *Bowers v. NCAA*, 475 F.3d 524 (3d Cir. 2007); *Cole v. NCAA*, 120 F. Supp. 2d 1060 (N.D. Ga. 2000); *Tatum v. NCAA*, 992 F. Supp. 1114 (E.D. Mont. 1998); *Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997). For a case concerning transfers, see *NCAA v. Yeo*, 171 S.W.3d 863 (Tex. 2005). For cases concerning financial aid, see *Wiley v. NCAA*, 612 F.2d 473 (10th Cir. 1979); *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975). For cases concerning sanctions, see *Regents of Univ. of Minnesota v. NCAA*, 422 F. Supp. 1158 (D. Minn. 1976); *NCAA v. Gillard*, 352 So.2d 1072 (Miss. Sup. Ct. 1977).

¹² See the discussion on Maurice Claret *infra* Part II. See also cases cited *supra* note 11 (referring specifically to *Bowers*, *Bloom*, *Lasege*, *Hall*, *Wiley*, and *Hall*).

¹³ See Nat'l Collegiate Athletics Ass'n v. Bd. of Regents, 468 U.S. 85, 120 (1984). See also Marc Bianchi, *Guardian of Amateurism or Legal Defiant? The Dichotomous Nature of NCAA Men's Ice Hockey Regulation*, 20 SETON HALL J. SPORTS & ENT. L. 165 (2010); Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009); Daniel E. Lazaroff, *The NCAA In Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007); Christian McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495 (2008).

fact, Article 12 of the NCAA Division I Manual is entitled “Amateurism.”¹⁴

While the NCAA Bylaws do not define “amateur,” they state there must be a “clear line of demarcation between college athletics and professional sports.”¹⁵ “A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the [NCAA].”¹⁶ Even if a student-athlete was never paid for his or her athletic participation, they may still be penalized if they played on a “professional” team.¹⁷ The NCAA has a broad definition of a professional team,¹⁸ essentially including any situation where any other player on that team received money, food, housing, apparel, transportation or any other benefit for their athletic participation.¹⁹ This can often be an issue for foreign student-athletes.²⁰

Once a student-athlete’s amateurism is established, the more difficult part is retaining it. Aiding a player in this retention is among the chief duties of any athletic department’s compliance office. Compliance offices vary widely in size based on the size of the institution and also the school’s history of violations and current probation status. For example, Southern Eastern Conference (SEC) schools have an average of 5 employees in their compliance departments.²¹ In contrast, the Southern Conference

¹⁴ 2009-2010 NCAA DIVISION I MANUAL 61 (2010), available at <http://www.ncaapublications.com/productdownloads/D110.pdf> [hereinafter DI Manual].

¹⁵ *Id.* at § 12.01.2.

¹⁶ *Id.* at § 12.02.3.

¹⁷ The situation often occurs when European players come to play college basketball in the United States. See Bill Koch, *Hrycaniuk’s Come Long Way for UC*, CINCINNATI ENQUIRER, Jan. 11, 2008, at C1; Mark Lazerus, *Fumey Loses Redshirt, Year of Eligibility*, MERRILLVILLE POST-TRIBUNE, Nov. 7, 2008, at B3.

¹⁸ In hockey, Major Junior A Ice Hockey, a level of hockey played in both the United States and Canada, is considered professional, but athletes can petition for a restoration of eligibility provided they sit out at least one year of intercollegiate athletic competition. See DI MANUAL, *supra* note 14, § 12.2.3.2.4.

¹⁹ See DI MANUAL, *supra* note 14, § 12.1.2.

²⁰ Enes Kanter is a star basketball player from Turkey. Kanter played with a professional team in Turkey but claims he refused to accept compensation specifically so he could retain his NCAA eligibility. See Mike DeCourcy, *Enes Kanter a Revolutionary Case for Kentucky*, NCAA, SPORTING NEWS, Apr. 14, 2010, <http://www.sportingnews.com/ncaa-basketball/story/2010-04-14/enes-kanter-revolutionary-case-for-kentucky-ncaa>. However, NCAA Bylaw § 12.2.3.2 states that “[a]n individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team in that sport.” DI MANUAL, *supra* note 14, § 12.2.3.2. In September 2010, the General Manager of Kanter’s Turkish team alleged Kanter received over \$100,000 in salary and housing over a three-year period. See Chris Littman, *UK’s Kanter Paid More Than \$100K by Turkish Team*, SPORTING NEWS, Sept. 8, 2010, <http://www.sportingnews.com/ncaa-basketball/feed/2010-09/enes-kanter/story/report-uks-kanter-paid-more-than-100k-by-turkish-team#subnav>.

²¹ See Florida Athletics Department Directory, <http://www.gatorzone.com/directory/> (last visited Oct. 10, 2010) (Florida has 3 compliance employees); Georgia Bulldogs Compliance, <http://www.georgiadiogs.com/school-bio/compliance.html> (last visited Oct.

(SoCon) members who play both Division I football and basketball have an average of 1.4 employees.²² In addition, most of these compliance officers spend their time checking the eligibility of athletes and monitoring practice limits, rather than dealing with agents or educating student-athletes on the transition process. For perspective, Alabama's Athletic Department lists over 150

10, 2010) (2 compliance employees); Kentucky Athletic Department Staff Directory & Contact Information, <http://www.ukathletics.com/athletic-dept/directory.html> (last visited Oct. 10, 2010) (4 compliance employees); South Carolina Gamecocks Administrative Directory, <http://gamecocksonline.cstv.com/school-bio/scar-staff-directory.html> (last visited Oct. 10, 2010) (6 compliance employees); Tennessee Compliance, <http://www.utsports.com/compliance/> (last visited Oct. 10, 2010) (4 compliance employees); Vanderbilt Athletics Staff Directory, <http://vucommidores.cstv.com/school-bio/vand-staff-dir.html> (last visited Oct. 10, 2010) (4 compliance employees); Alabama Crimson Tide Compliance, <http://www.rolltide.com/sports/compliance/main.html> (last visited Oct. 10, 2010) (8 compliance employees); Arkansas Athletics – Dept. of Compliance, www.arkansasrazorbacks.com (follow “For Recruits” hyperlink; then follow “Compliance Office” hyperlink; then follow “Compliance Office Contact Information” hyperlink) (last visited Oct. 10, 2010) (5 compliance employees); Auburn Athletics Staff Directory – Compliance, <http://auburntigers.cstv.com/ot/staff-directory.html#comp> (last visited Oct. 10, 2010) (5 compliance employees); LSU Athletics Staff Directory, www.lsusports.net (follow “Departments” hyperlink; then follow “Compliance & Autographs” hyperlink; then follow “Staff” hyperlink) (last visited Oct. 10, 2010) (4 compliance employees); MSU Athletics Staff Directory, www.mstateathletics.com (follow “Athletics” hyperlink; then follow “Staff Directory” hyperlink; last visited Oct. 10, 2010) (4 compliance employees); Mississippi Athletics – Compliance, <http://www.olemisssports.com/compliance/ole-compliance-staff.html> (last visited Oct. 10, 2010) (5 compliance employees). Alabama has the largest compliance department, having been subjected to NCAA sanctions for major rules violations on several occasions: in 2009, the school was put on three years of probation and forced to vacate wins in which certain football student-athletes competed for receiving improper benefits; in 2002, the school was given five years probation, banned from the postseason for 2002 and 2003 and had scholarships reduced after football student-athletes received improper gifts from boosters and for recruiting violations; and in 1995, the football team lost scholarships and was forced to forfeit wins because football student-athletes received improper benefits. See NCAA's Legislative Services Database, <https://web1.ncaa.org/LSDBi/exec/homepage> (last visited Oct. 10, 2010) (provides information about major infractions by NCAA member institutions). For more information on the history of the NCAA's infractions process and an analysis of major recent cases, see Glenn M. Wong, Kyle Skillman & Chris Deubert, *The NCAA's Infractions Appeals Committee: Recent Case History, Analysis and the Beginning of a New Chapter*, 9 VA. SPORTS & ENT. L.J. 47 (2009).

²² See Appalachian State Athletics Staff Directory, http://www.goasu.com/ViewArticle.dbml?DB_OEM_ID=21500&ATCLID=1546163 (last visited Oct. 10, 2010) (1 compliance employee); Chattanooga Athletics Staff Directory, http://www.gomocs.com/StaffDirectory.dbml?DB_OEM_ID=17700 (last visited Oct. 10, 2010) (2 compliance employees); Citadel Athletics Staff Directory, http://www.citadelsports.com/ViewArticle.dbml?DB_OEM_ID=9700&ATCLID=204836980 (last visited Oct. 10, 2010) (2 compliance employees); Elon Athletics Staff Directory, <http://www.elonphoenix.com/staff.aspx?staff&> (last visited Oct. 10, 2010) (2 compliance employees); Furman Athletics Staff Directory, <http://www.furmanpaladins.com/information/directory/index> (last visited Oct. 10, 2010) (1 compliance employee); Georgia Southern Athletics Staff Directory, http://www.georgiasoutherneagles.com/SportSelect.dbml?DB_OEM_ID=18700&KEY=&SPID=10884&SPSID=95346 (last visited Oct. 10, 2010) (2 compliance employees); Samford Athletics Staff Directory, <http://samfordsports.cstv.com/athletic-dept/samf-athletic-dept.html> (last visited Oct. 10, 2010) (1 compliance employee); Western Carolina Athletics Staff Directory, <http://www.catamountsports.com/athletic-dept/wcar-directory.html> (last visited Oct. 10, 2010) (1 compliance employee); Wofford Athletics Staff Directory, <http://athletics.wofford.edu/staff.aspx?tab=staffdirectory> (last visited Oct. 10, 2010) (1 compliance employee).

employees, including nine in the Business Office, ten in Media Relations, fourteen in the Marketing department, and nine more in something called “TIDE PRIDE.”²³ While schools might avoid providing relatively substantial funding for compliance departments because they are not revenue producers, a school’s failure to properly do so can easily become a massive expense.

Clearly, compliance offices almost always lack the staff, resources, and preparedness to deal with those determined to bend the rules. As a result, more and more schools are turning to outside professionals to help with the process.²⁴ In general, compliance offices are not staffed by attorneys, but by young professionals interested in working in college athletics.²⁵

NCAA Bylaws list several activities that would cause the loss of a student-athlete’s amateurism, including using his or her skills for pay, accepting a promise of pay to be received after completion of intercollegiate athletics, signing a contract to play professional athletics, receiving any kind of financial assistance from a professional sports organization without NCAA permission, competing on any professional athletics team; entering into a professional draft, and entering into an agreement with an agent.²⁶ The definition of “pay” per NCAA Bylaws is also quite broad, encompassing all the extraneous benefits one might foresee a student-athlete receiving because of his or her athletic skill.²⁷

These Bylaws may seem plain enough, but every year hundreds and possibly thousands of student-athletes violate them, with the vast majority going undetected. In the sports most likely to attract professional attention (football, basketball, and, to a lesser extent, hockey and baseball), many talented student-athletes are not in financially stable situations.²⁸ Despite the scholarships and other benefits offered by the member institution,²⁹ student-athletes in these sports regularly accept cash, gifts, and other

²³ Alabama Athletics Staff Directory, <http://www.rolltide.com/staffdir/alab-staffdir.html> (last visited Oct. 10, 2010).

²⁴ Cornerstone Sports Consulting is run by Joe Mendes, a former NFL team and league executive and talent evaluator. Among the schools that Cornerstone is providing amateur-to-professional transition guidance are the Universities of Alabama, Southern California and Georgia. See Cornerstone Sports Consulting, <http://www.cornerstonesports.com/team.html> (last visited June 15, 2010); Liz Mullen, *Some Agents Question Former NFL Exec’s Role with Schools*, SPORTS BUSINESS JOURNAL, Aug. 24, 2009, www.sportsbusinessjournal.com/article/63356.

²⁵ For more on issues related to this, see Megan Fuller, *Where’s the Penalty Flag? The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 N.Y.L. SCH. L. REV. 495 (2009/2010).

²⁶ See DI Manual, *supra* note 14, § 12.1.2.

²⁷ *Id.* § 12.1.2.1.

²⁸ See Phillip C. Blackman, *NCAA’s Academic Performance Program: Academic Reform or A Academic Racism?*, 15 UCLA ENT. L. REV. 225, 242-43 (2008).

²⁹ Throughout this article when we refer to NCAA member institutions or universities, we also mean their athletic departments and compliance staffs.

benefits from supporters of the school's team ("boosters"), agents, financial advisors, marketing representatives, or other people trying to win their favor.

Most student-athletes dream of being drafted into the professional ranks. Each of the major American professional team sports leagues, (National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL)), collectively known as the 'Big Four' have drafts through which student-athletes enter the professional ranks. As a result of legal challenges and collective bargaining agreements, the rules of each draft have evolved over time and vary considerably in the number of players drafted, age restrictions, number of times a player can be drafted, and other issues.³⁰ Consequently, the NCAA Bylaws attempt to accommodate these different structures. Many of these rules have caused problems for athletes, universities and the leagues, as will be discussed in greater detail in Part III - Problems with the Current Process. Exhibit 1 summarizes these different rules and the interplay of the NCAA Bylaws.

³⁰ The drafts' rules have evolved as the result of many legal challenges over the years. For cases in the NFL, see *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev'd*, 369 F.3d 124 (2d Cir. 2004) (discussed in greater detail in Part II); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978); *Zimmerman v. Nat'l Football League*, 632 F. Supp. 398 (D.D.C. 1986); *Kapp v. Nat'l Football League*, 390 F. Supp. 73 (N.D. Cal. 1974). For cases in the NBA, see *Bridgeman v. Nat'l Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987); *Denver Rockets v. All-Pro Mgmt.*, 325 F. Supp. 1049 (C.D. Cal. 1971). For a case in the NHL, see *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 325 F.3d 712 (6th Cir. 2003).

Exhibit 1. Professional Drafts and Applicable NCAA Rules

	NFL	MLB	NBA	NHL
Date	April	June	June	June
Length	7 Rounds ³¹	50 Rounds ³²	2 Rounds ³³	7 Rounds ³⁴
Number of Players³⁵	255	1,520	60	210
Minimum Age	3 years since High School ³⁶	17 years old ³⁷	19 years old ³⁸	18 years old ³⁹
Pre-Draft Workouts⁴⁰	Permissible	Permissible	Permissible	Permissible
Status if Undrafted⁴¹	Can Return ⁴²	Can Return	Can Return ⁴³	Can Return

³¹ NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT Art. XVI, §2(a) (2006), *available at* <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> [hereinafter NFL CBA].

³² MAJOR LEAGUE BASEBALL RULES MLR 4(b) (2008), *available at* <http://www.bizofbaseball.com/docs/MajorLeagueRules-2008.pdf> [hereinafter MLB Rules].

³³ NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT Art. X, § 3 (2005), *available at* <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> [hereinafter NBA CBA].

³⁴ NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT Art. 8, § 8.2 (2005), *available at* <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA].

³⁵ All numbers are approximate as the NFL, MLB and NHL drafts have systems to allow for compensatory selections on the loss of free agents and occasionally teams lose draft picks for violating league rules.

³⁶ The NFL requires that at least “three regular seasons have begun and ended following either his graduation from high school or graduation of the class with which he entered high school, whichever is earlier.” NFL CBA, *supra* note 31, Art. XVI, § 2(b). Prior to the 2006 extension of the CBA, this rule was not specifically in the CBA but instead only in the NFL Bylaws and Constitution. After the Maurice Claret lawsuit, *Claret v. Nat’l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004), *rev’d*, 369 F.3d 124 (2d Cir. 2004), the NFL and NFLPA (National Football League Players Association) negotiated the inclusion of the rule into the CBA.

³⁷ MLB does not have a specific age but instead requires that a player’s high school eligibility be expired before he can sign a contract with a major or minor league club. MLB Rules, *supra* note 32, MLR 3(a)(2). However, it is important to note that players from outside of North America are not subject to the draft and are able to sign free agent contracts when they are sixteen, so long as they turn 17 prior to the end of that season or September 1, whichever is later. MLB Rules, *supra* note 32, MLR 3(a)(1)(B).

³⁸ The NBA requires all players to be at least 19 years old; if American, at least one NBA season must have elapsed since he graduated (or should have graduated) high school. NBA CBA, *supra* note 33, Art. X, § 1(b).

³⁹ The NHL requires all players to be at least 18 years old. NHL CBA, *supra* note 34, § 8.4.

⁴⁰ An enrolled student-athlete may participate in a pre-draft workout or combine at any time, provided the individual does not miss class. The student-athlete may receive actual and necessary expenses in conjunction with one 48-hour tryout per professional team or combine. A tryout may extend beyond 48 hours if the individual self-finances additional expenses, including return transportation. A self-financed tryout may be for any length of time, provided the individual does not miss class. DI MANUAL, *supra* note 14, § 12.2.1.3. Different rules apply prior to a student-athlete enrolling. *Id.* § 12.2.1.1.

⁴¹ In any college sport other than basketball or football, a student-athlete can enter a professional league’s draft once without signing with an agent and then return to college if they go undrafted and announce their intention to return within 72 hours. DI MANUAL,

Number of Times a Player Can be Drafted	Twice ⁴⁴	Four ⁴⁵	Twice ⁴⁶	Twice ⁴⁷
Team Retention Rights if Player Returns to College	One year after the date of the draft in which a player would have been in the last season of eligibility ⁴⁸	August 16 of the year of the draft ⁴⁹	One year after the date of the draft in which a player absent his becoming an Early Entry Player, first would have been eligible to be selected ⁵⁰	Expire on August 15 following the athlete's college graduation ⁵¹

supra note 14, § 12.2.4.2.4.

⁴² A football student-athlete can return if he goes undrafted provided that he has not signed with an agent and declares his intention to return to intercollegiate athletics in writing within 72 hours of the draft. DI MANUAL, *supra* note 14, § 12.2.4.2.3.

⁴³ A basketball student-athlete can enter the NBA Draft once during their career, without signing with an agent and can return to intercollegiate athletics only if they request that their name be removed from the draft list by May 8 of the year before the draft and they ultimately go undrafted. DI MANUAL, *supra* note 14, § 12.2.4.2.1.1.

⁴⁴ If a player is drafted in an initial draft and does not sign with the drafting team prior to the subsequent draft, the player is eligible to be drafted by any team except the team that drafted him in the initial draft. NFL CBA, *supra* note 31, Art. XVI, §4(b)(ii).

⁴⁵ A player can be drafted after high school and choose not to sign. MLB RULES, *supra* note 32, MLR 3(a)(2). If the player enters a four-year college, he cannot be drafted again until he is 21 or after his junior year. *Id.* MLR 3(a)(3)(E). Therefore, a player could be drafted after high school, his junior year of college, and then his senior year of college. In addition, some players go from high school to junior college, where you can be drafted after your second year. *Id.* MLR 3(a)(4). Hypothetically, a player could be drafted after high school, enter a junior college and be drafted after junior college, then enroll in a four-year college, be drafted after his junior year, and be drafted a fourth time after graduating from, or completing his eligibility at, the four-year college. A player does not need to enter his name into the draft, consequently avoiding some possible issues with the NCAA. A recent example of a player being drafted several times is Cincinnati Reds pitcher Micah Owings. Owings was drafted in the second round by the Colorado Rockies out of high school in 2002 but did not sign. *See* Baseball-Reference.com, Micah Owings, <http://www.baseball-reference.com/players/o/owingmi01.shtml> (last visited May 30, 2010). Then, he was drafted in the nineteenth round by the Chicago Cubs in 2003 after his freshman year at Georgia Tech because he was 21, but again he did not sign. *Id.* Finally, Owings was drafted the third time in 2005 after his junior year, this time at Tulane, in the third round by the Arizona Diamondbacks with whom he did sign. *Id.*

⁴⁶ If a player does not sign with the team that drafts him originally, he may be drafted again in the subsequent draft. If he does not sign with the team that drafts him in the subsequent draft, he will become a free agent after the next (third) draft. NBA CBA, *supra* note 33, Art. X, § 4(b).

⁴⁷ NHL CBA, *supra* note 34, Art. 8, § 8.4(ii).

⁴⁸ NFL CBA, *supra* note 31, Art. XVI, § 6.

⁴⁹ MLB RULES, *supra* note 32, MLR 4(d)(3). This rule only applies in cases where the drafted player has college eligibility left. As compared to the NHL, baseball players have a level of leverage unavailable to their hockey counterparts—the ability to tell a team to meet their demands or risk losing their rights. Accordingly, although not entirely the reason, there are huge differences in signing bonuses between MLB and the NHL.

⁵⁰ NBA CBA, *supra* note 33, Art. X, § 6(b). If the player does not return to college, the original drafting team holds the players rights until the next draft. *Id.*, Art. X, § 4(a).

⁵¹ NHL CBA, *supra* note 34, Art. 8, § 8.6(c). If the player does not stay in college, the

2. Choosing the Right Time to Turn Professional

For the best student-athletes, one of the most important decisions will be whether or not to leave school early and begin their professional career. For the lower-tier student-athletes, an important decision is often whether or not the athlete is willing to try to continue his or her career overseas. As we will discuss more in Part III, the answer to that question is more frequently “Yes.”

Clearly the decision to leave school early for the professional ranks can be a risky one. Leaving college early certainly can be a wise choice, and on occasion, staying in school can be a mistake from the perspective of a professional sports career. For example, wide receiver Larry Fitzgerald left the University of Pittsburgh after his sophomore year,⁵² was chosen as the third overall pick in the 2004 NFL Draft and has gone on to a sensational career. On the other hand, University of Southern California quarterback Matt Leinart chose to stay for his senior year after winning the 2004 Heisman Trophy as a junior despite being the consensus #1 overall pick in the 2005 NFL Draft. After his senior season, Leinart was selected as the tenth overall pick in the 2006 NFL Draft, a decision that arguably cost Leinart \$10 million or more.⁵³ Yet, there are often situations where players enter the draft early only to fall into the later rounds, whereas if they had remained in school, their draft stock may have substantially improved the following year.⁵⁴ Either way, student-athletes must carefully understand this choice, its ramifications, and ways to reduce their personal risks moving forward.

As part of the decision-making process student-athletes must seek out information on their professional prospects. In recent years, approximately fifty student-athletes per year have left school and declared for the NFL draft before the expiration of their

NHL team holds his rights until the fourth June 1 following his initial selection in the draft.

⁵² Fitzgerald was able to leave after just two years of college because he completed a year at a preparatory academy prior to entering University of Pittsburgh. See Paul Zeise, *Fitzgerald, Green Join Forces Again, Pitt's Star Receiver Third Pick of Draft*, PITT. POST-GAZETTE, Apr. 25, 2004, at D1.

⁵³ Alex Smith, the #1 overall pick in the 2005 NFL Draft received \$24 million guaranteed in his rookie contract. See Dennis Georgatos, *Smith Living a Dream, Rookie QB Eager to Prove He's Worth Investment*, SAN JOSE MERCURY NEWS, July 27, 2005, at 3. In contrast, Leinart received \$14 million guaranteed. See *Better Late... Rookie QB Matt Leinart is Finally in Camp, and He's Raring To Go*, ARIZ. REPUBLIC, Aug. 16, 2006, at C1.

⁵⁴ A notable recent example is former Ole Miss quarterback Jevan Snead. See Andrea Adelson, *Yo, Jevan, What Were You Thinking?*, ORLANDO SENTINEL, May 3, 2010, at C1. Snead entered the 2009 season as a junior and one of the top-rated quarterbacks in the country. However, Snead struggled through a difficult season and the consensus was that he needed to return to college to reestablish his status. Even after being given a fifth round projection, Snead chose to enter the NFL Draft. When he was not drafted, Snead signed as a free agent with the Tampa Bay Buccaneers, was released during training camp and faces an uphill career challenge. *Id.*

college football eligibility.⁵⁵ However, NFL players who graduate from college have, on average, longer careers than those who chose to leave early.⁵⁶ Nevertheless, it is important to point out that many of the student-athletes who leave school early do not necessarily do so because they think they are ready for the NFL, but instead are forced to leave for academic reasons.⁵⁷

Each professional league has unique features that they have developed to assist student-athletes in making the transition from college. However, the ability to navigate through the variances can be confusing, and a college or university needs someone well versed in the nuanced differences for each sport. Football student-athletes who will be eligible for the NFL Draft following the season have the advantage of the NFL Advisory Committee, created in 1994, to assist student-athletes evaluate their potential in an upcoming NFL Draft.⁵⁸

The student-athlete or his athletic department on his behalf may request a formal evaluation from the NFL about his potential draft prospects without jeopardizing his eligibility.⁵⁹ The Committee is comprised of general managers, personnel directors and scouts of NFL clubs.⁶⁰ The Committee provides

⁵⁵ Fifty-three underclassmen declared for the 2010 NFL Draft. See Rick Gosselin, *Sizing Up the Cornerbacks for the NFL Draft*, DALLAS MORNING NEWS ONLINE, Apr. 14, 2010. Forty-six underclassmen declared for the 2009 NFL Draft. See *NFL Draft*, CHI. TRIB., Jan. 21, 2009, at 87. Fifty-three underclassmen declared for the 2008 NFL Draft. See Sammy Batten, *Bowl Game Could Be Last Game for Nicks as a Tar Heel*, FAYETTEVILLE OBSERVER (N.C.) ONLINE, Dec. 27, 2008.

⁵⁶ See Brian Jaramillo, *Testing the Waters, Ways Are Sought To Give Undergraduates a Chance To Determine Their Value As Professionals Before They Give Up Their College Eligibility*, L.A. TIMES, July 25, 1993, at 3 (where NFLPA Executive Director Eugene Upshaw stated college athletes who graduated have longer professional careers); see also Roger Mills, *Brooks Not Super, But He is a Starr*, ST. PETERSBURG TIMES (FL), Feb. 1, 2004, at 13C (where NFLPA General Counsel Richard Berthelsen stated graduating college athletes have longer professional careers).

⁵⁷ See *Indiana Opts for DiNardo as Coach*, ST. PETERSBURG TIMES (FL), Jan. 9, 2002, at 5C (mentioning ineligibility of former Georgia Tech running back Joe Burns); Matt Winklejohn, *The Draft ESPN Won't Show*, ATLANTA J. - CONST., July 12, 2007, at D2 (mentioning the ineligibility of former Georgia cornerback Paul Oliver); Evan Woodberry, *AU's McClover to Enter Draft*, MOBILE REG. (AL), Jan. 6, 2006, at C3. (discussing ineligibility of former Auburn defensive end Stanley McClover).

⁵⁸ See Mike Chappell, *Chancy Proposition: Underclassmen who Enter Draft Weigh the Risks; Colts' Bashir Doesn't Regret Leaving School*, INDIANAPOLIS STAR, Apr. 14, 2002, at C1; John McClain, *'Bama's Palmer to Enter Draft Now/All-America Receiver Alters Decision*, HOUS. CHRON., Jan. 11, 1994, at 3.

⁵⁹ See Brent Schrottenboer, *Dad: Brown Will Be Back in Scarlet and Black in 2010*, SAN DIEGO UNION-TRIB., Jan. 16, 2010, at D3 (discussing decision of San Diego State wide receiver Vincent Brown to return for his senior season after receiving a projection that he would not be taken in the first three rounds); see also Wes Rucker, *Foster Back to Make Mark at University of Tennessee*, CHATTANOOGA TIMES (TN) ONLINE, July 19, 2008, <http://timesfreepress.com/news/2008/jul/19/foster-back-make-mark-university-tennessee/?print> (discussing decision of Tennessee running back Arian Foster's decision to return for his senior season despite having received a second round projection from the NFL Draft Advisory Committee).

⁶⁰ See Randy Peterson, *Submitting Draft Paperwork Not 'Too Big a Deal' For Greene*, DES MOINES REG., Dec. 27, 2008, at C2; Nathan Warters, *Tech's Flowers, Harris Exploring NFL Draft Possibilities*, THE NEWS & ADVANCE ONLINE (LYNCHBURG, VA), Dec. 12, 2007,

underclassmen who request it, a draft round range in which the player could be expected to be selected. The Committee's evaluation is non-binding and certainly cannot guarantee a specific round,⁶¹ but it can provide underclassmen with a valuable estimate of where they stand in the draft. Although the NFL and the player are to keep the evaluation confidential, a player's projection from the Committee is often revealed by the media.⁶²

Obviously, the Committee does not provide a projected draft status to seniors with expiring eligibility because they have no decision to make. In reality, a student-athlete receives his professional prospect status from a variety of sources: his own coaches who may know NFL personnel, NFL scouts that are contacting the player as part of their scouting evaluations, agents who are gathering that information from friendly NFL personnel, and media who may be relying on their own projections or information they have received from NFL personnel.⁶³ Ultimately, each source may have its own agenda, which may strain existing relationships such as those between a student-athlete and his college or coach. Although difficult to find, it is imperative that a student-athlete and his family obtain the maximum impartial guidance available.

The deadline for early entrants to declare for the NFL draft is January 15.⁶⁴ However, within seventy-two hours of this date, student-athletes may formally remove themselves from the draft and declare their intention to resume their college career, so long as they have broken no other regulations relative to retaining their

http://www2.newsadvance.com/sports/2007/dec/12/techs_flowers_harris_exploring_nfl_draft_possibili-ar-228571/.

⁶¹ There have been numerous incidents in which a player entered the NFL Draft based on the opinions of the Advisory Committee only to go undrafted. See Scott Hotard, *LSU's Black a Forgotten Man by NFL*, BATON ROUGE ADVOC., May 3, 2010, at C1; Manish Mehta, *Warren Steps Up for Jets*, STAR-LEDGER (NEWARK, N.J.), May 1, 2010, at 35.

⁶² See Bob LeGere, *Injury Slowed Wootton, But NFL Will Come Calling NFL Draft Top 10 D-linemen*, CHI. DAILY HERALD, Apr. 17, 2010, at 6 (discussing projection of Northwestern defensive end Corey Wootton as a late first or early second round pick); Susan Miller Degan, *UM: Miami Hurricanes' Allen Bailey Back, Ready to Attack, Hurricanes Defensive Lineman Allen Bailey Passed Up the NFL Draft To Help His Teammates Improve on Last Season*, MIAMI HERALD ONLINE, July 26, 2010 (discussing projection of Miami defensive end Allen Bailey as a late first or early second round pick).

⁶³ The best known draft projectors perhaps are ESPN's Mel Kiper and Todd McShay. However, their projections are prone to error as much as anyone else's. Famously, during the 2007 college football season McShay touted Kentucky quarterback, junior Andre Woodson, as one of the top players in the draft. It is believed that Woodson in part relied on McShay's projection in deciding to leave college early, only to be drafted in the sixth round and never to make an official NFL roster. See Mike Florio, *Locker Didn't Get a First-Round Grade From Advisory Committee*, NBC SPORTS PRO FOOTBALL TALK, Dec. 18, 2009, <http://profootballtalk.nbcsports.com/2009/12/18/locker-didnt-get-a-first-round-grade-from-advisory-committee/>.

⁶⁴ See Chuck McGill, *Herd's Smith Wants To Play Holliday's Way*, CHARLESTON GAZETTE & DAILY MAIL (WV), Jan. 22, 2010, at 5B; Blair Kerkhoff, *OU's Peterson Dashes To NFL, Junior Forgoes Final Year After Rushing for Third-Most Yards in Sooners History*, KANSAS CITY STAR (MO), Jan. 16, 2007, at C1.

amateur status.⁶⁵ Like the NFL, the NBA has an Undergraduate Advisory Committee of general managers, player personnel directors, and scouts who will provide a confidential projection of a potential draftee's projected draft position.⁶⁶

Again, should a player choose not to enter the draft, in order to retain the right to restore their amateur status, the student-athlete must not have signed with an agent.⁶⁷ Signing with an agent, in any sport, is a binding step, permanently shifting an individual from amateur status into the ranks of professional sports. Nevertheless, as will be discussed, agents can provide very valuable services to an athlete during his draft preparations.

A successful entrance into and through a professional sport's leagues draft is a complicated set of regulations from the league and the NCAA. It is here, at the nexus of the two regulatory organizations, that an institution should provide a level of expertise and guidance to help navigate through the confusion.

a. The NCAA Exceptional Student-Athlete Disability Insurance (ESDI) Program

To ease the concerns that student-athletes might have in returning to college when the professional ranks become available to them, the NCAA created the Exceptional Student-Athlete Disability Insurance (ESDI) program.⁶⁸ This program was created by the NCAA to allow student-athletes with a future in professional athletics to insure against debilitating injury during their college careers.⁶⁹ The program, offered for the first time by the NCAA in 1990 for football and men's basketball, has subsequently been expanded to include men's ice hockey, baseball, and women's basketball.⁷⁰

Student-athletes who have demonstrated that they have the potential to be selected in the first three rounds of the NFL or

⁶⁵ DI MANUAL, *supra* note 14, § 12.2.4.2.3.

⁶⁶ See Eric Bailey, *Jordan's TU Future Remains Unclear*, TULSA WORLD, Apr. 10, 2009, at B1; Mike Griffith, *Hopson Makes It Clear: I'm Coming Back To Tennessee*, KNOXVILLE NEWS-SENTINEL, Apr. 16, 2010, at 503; Parrish Alford, *Ole Miss' White Will Test NBA Waters*, NORTHEAST MISSISSIPPI DAILY J. ONLINE, Apr. 10, 2010, http://www.nems360.com/printer_friendly/7025796; Jerry Tipton, *Patterson Staying Put*, LEXINGTON HERALD-LEADER ONLINE (KY), May 9, 2009.

⁶⁷ DI MANUAL, *supra* note 14, § 12.1.2.

⁶⁸ For more information on the ESDI program, see NCAA.org, NCAA Exceptional Student-Athlete Disability Insurance Program, <http://www.ncaa.org/wps/wcm/connect/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/Insurance/exceptional.html?pageDesign=Printer+Friendly+General+Content+L+ayout> (last visited May 5, 2010) [hereinafter NCAA ESDI Program]. See also DI MANUAL, *supra* note 14, § 16.11.1.4; Glenn M. Wong & Chris Deubert, *The Legal and Business Aspects of Disability Insurance Policies in Professional and College Sports*, 17 VILL. SPORTS & ENT. L.J. 473 (2010).

⁶⁹ See generally Wong & Deubert, *supra* note 68.

⁷⁰ See *id.*

NHL draft, or the first round of the NBA, MLB, or Women's National Basketball Association (WNBA) draft are eligible for the program.⁷¹ The policy provides the student-athlete with a lump sum payment twelve months after it has been determined that he or she has suffered permanent total disability.⁷² Student-athletes are eligible for loans to pay the premiums without jeopardizing their amateur status.⁷³

The NCAA's ESDI program, administered through HCC Specialty Underwriters Company, caps coverage at \$5 million for projected first-round NFL draft picks and men's basketball student-athletes.⁷⁴ Coverage for baseball, men's ice hockey and women's basketball is capped at \$1.5 million, \$1.2 million, and \$250,000, respectively.⁷⁵ The premiums cost between \$10,000 and \$12,000 for each \$1 million of coverage, which is a few thousand dollars cheaper than a private policy.⁷⁶ It is reported that some 80 to 100 athletes participate in the ESDI program each year, and that approximately 75% to 80% of those athletes are college football players.⁷⁷

In addition to the ESDI program, other creative options exist through private insurers, such as "Loss of Draft Position" policies.⁷⁸ These policies provide coverage to professional prospects that are not drafted as highly as expected, making up the loss of income associated with the drop in draft status.⁷⁹ The drop in status must be associated with a serious injury causing substantial and material deterioration in his or her ability to perform.⁸⁰

3. Choosing Competent Representation

To many people, inside and outside the world of sports, agents are a leading cause of problems relating to the transition for student-athletes into professional athletes.⁸¹ While the misconduct of agents, and/or their "runners"⁸² is far-reaching,

⁷¹ *Id.*

⁷² *Id.* at 488. Permanent total disability typically requires that the athlete be completely unable to perform their profession or sport for an entire twelve-month period after the initial injury.

⁷³ *Id.* (citing NCAA ESDI Program).

⁷⁴ *Id.* at 507.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See id.* at 496-97.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ As a demonstration of the ongoing problem in this area, noted sports attorney Bob Ruxin detailed many of the same concerns nearly thirty years ago. *See* Robert Ruxin, *Unsportsmanlike Conduct: The Student-Athlete, the NCAA, and Agents*, 8 J.C. & U.L. 347 (1982).

⁸² Runners can be defined as someone employed by an agent, typically a young person, whose job it is to become friendly with the student-athlete, potentially provide the student-athlete with cash, meals, clothes or other gifts and ultimately steer the student-athlete towards the employing agent. *See* Chris Deubert, *What's a "Clean" Agent to Do? The Case for*

frequent, well documented, and often litigated,⁸³ agents are still a necessary component of this process and attempts to minimize their involvement or ignore their existence only exacerbates the issues. Furthermore, the vast majority of agents do follow the rules and do have the best interests of their clients at heart. Rules and processes should be tailored to reward law-abiders and enforced effectively to deter law-breakers.

It should be noted from the outset that the NCAA and member institutions have no direct regulatory power over agents. Instead agents are regulated by the players association of the particular sport in which they represent athletes.⁸⁴ In addition, there are both state and federal laws that regulate the conduct of agents,⁸⁵ though the laws are rarely enforced.⁸⁶ Furthermore, it is no longer just traditional agents that are actively recruiting players – financial advisors and marketing representatives also swarm

a Cause of Action Against a Players Association, VILL. SPORTS & ENT. L.J. (forthcoming).

⁸³ For breaches of fiduciary duties, see, e.g., *Jones v. Childers*, 18 F.3d 1899 (11th Cir. 1994); *Lankford v. Irby*, No. 04-2636, 2006 WL 2828548 (D.N.J. Sept. 29, 2006); *Hillard v. Black*, 125 F. Supp. 2d 1071 (N.D. Fla. 2000); *Brown v. Woolf*, 554 F. Supp. 1206 (S.D. Ind. 1983); *In re Ekuban*, No. 03-35869SAF-7, 2004 WL 1088340 (Bankr. N.D. Tex., Apr. 16, 2004). For fraud, see, e.g., *Cuyahoga County Bar Ass'n v. Glenn*, 649 N.E. 2d 1213 (Ohio 1995). For conflicts of interest, see, e.g., *Detroit Lions, Inc. v. Argovitz*, 580 F. Supp. 542 (E.D. Mich. 1984); see also Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be The "Exclusive" Representatives of the Players*, 42 WILLAMETTE L. REV. 737 (2006); Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA ENT. L. REV. 193 (2004). For unethical behavior, see *Poston v. NFLPA*, No. 02CV871, 2002 WL 31190142 (E.D. Va. Aug. 26, 2002); see also David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31 (2003); Stacey B. Evans, *Sports Agents: Ethical Representatives or Overly Aggressive Adversaries?*, 17 VILL. SPORTS & ENT. L.J. 91 (2010); Melissa Neiman, *Fair Game: Ethical Considerations in Negotiations by Sports Agents*, 9 TEX. REV. ENT. & SPORTS L. 123 (2007). For tortious interference with contractual relations, see *Steinberg, Moorad & Dunn, Inc. v. Dunn*, 136 Fed. Appx. 6 (9th Cir. 2005); *Smith v. IMG Worldwide, Inc.* 360 F. Supp. 2d 681 (E.D. Pa. 2005); *Walters v. Fullwood*, 675 F. Supp. 155 (S.D.N.Y. 1987); see also Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781 (2006).

⁸⁴ Only the NFLPA makes their Agent Regulations publicly available on their website. See NFL Players' Association Regulations Governing Contract Advisors, http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf [hereinafter NFLPA Agent Regulations]. Other regulations can be viewed as a member of the Sports Lawyers Association at www.sportslaw.org, by contacting the respective players association or contacting the authors of this article.

⁸⁵ For federal law, see Sports Agent Responsibility and Trust Act (SPARTA), 15 U.S.C.A. §§ 7801-7807 (2004). Some states have their own legislation, while 39 states have passed some form of the Uniform Athlete Agents Act. See NCAA.org, .FAQ on Uniform Athlete Agents Act, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+new+stories/july+latest+news/faq+on+uniform+athlete+agents+act> (last visited Oct. 30, 2010).

⁸⁶ See Deubert, *supra* note 82; see also Associated Press, *Report: State Agent Laws Unenforced*, ESPN.com, Aug. 17, 2010, <http://sports.espn.go.com/ncaa/news/story?id=5470067> (stating that more than half of the 42 states with sports agent laws have never revoked or suspended a single license, or invoked a penalty of any sort. "Likewise for the Federal Trade Commission, which in 2004 was given oversight authority by Congress.").

student-athletes in hopes of providing them their services.⁸⁷

While some may argue that there is no need for an agent until after an athlete has been drafted and negotiations with a particular team begin,⁸⁸ this position is uncommon and erroneous. Having an advisor experienced in easing the transition from the final college game to the first professional game is vital to the long-term success of any would-be professional athlete. Once a relationship is formed, a quality agent can provide valuable advice, guidance, and oversight to a professional athlete, significantly enhancing the athlete's chances of finding success in his or her career, finances, health, family, and education.

It is routine for players preparing for the NFL Draft to refer to the NFL's annual scouting combine process as "the biggest job interview of their lives."⁸⁹ In preparation for the combine and the subsequent workouts, industry competition has dictated agents must pay \$10,000 - \$20,000 in training expenses for each player, including many who go undrafted.⁹⁰ In addition, agents are able to provide valuable information to players on what NFL teams are looking for and how the player needs to improve through their own league contacts.

When a student-athlete has eligibility remaining and is considering turning professional, they need to be exceptionally careful about their involvement with an agent.⁹¹ As explained earlier, the NCAA has strict rules concerning the use of agents. The situation is particularly complicated in baseball and hockey, where players are often drafted out of high school but choose to attend college instead.⁹² Some of these issues are discussed in

⁸⁷ See Mike Florio, *Marketing Reps Mix It Up in Indy*, NBC SPORTS PRO FOOTBALL TALK, Feb. 27, 2010, <http://profootballtalk.nbcsports.com/2010/02/27/marketing-reps-mix-it-up-in-indy/>; Scott Wolf, *Settlement in Bush's Civil Lawsuit Reached*, DAILY NEWS (Los Angeles), Apr. 22, 2010, at C7.

⁸⁸ See generally Karcher, *supra* note 83.

⁸⁹ See Rick Alonzo, *Decker Playing Catch-Up: Ex-Gopher Hopes Foot Injury Won't Hurt Draft Stock*, ST. PAUL PIONEER PRESS (Minn.), Feb. 28, 2010, at C3; Tom Kowalski, *Breaking Through Michigan Players Put Talent on Display*, GRAND RAPIDS PRESS, Feb. 28, 2010, at C6; Ian R. Rapoport, *Combine Notebook: McKenzie, Murphy Talk Things Over*, BOSTON HERALD, Mar. 1, 2010, at 66; John Vellante, *Woburn's McLaughlin Gathers Postseason Honors*, BOSTON GLOBE, Jan. 21, 2010, at 5.

⁹⁰ See Albert Breer, *Michael Johnson's Complex Gets Into NFL Draft Game*, DALLAS MORNING NEWS ONLINE, Feb. 28, 2008, http://www.dallasnews.com/sharedcontent/dws/spt/football/nfl/stories/022808dnspec_ombine.3391566.html; Dale Robertson, *Sports Training is His Business, Danny Arnold's Performance Programs Have a Reputation For Preparing NFL Hopefuls for the Combine, But He'll Work With Anyone Who is Dedicated*, HOUS. CHRON., Feb. 20, 2008, at 1; John Booth, *Training Day NFL Draft Prospects Flock to Duo's Euclid Complex to Prep for the League Combine*, CRAIN'S CLEV. BUS. NEWS, Feb. 20, 2006, at 1; Carter Strickland, *Former Sooners Prepping for Combine, Daily Drills Can Help for Players as They Ready for Draft*, DAILY OKLAHOMAN, Feb. 24, 2005, at 3C.

⁹¹ DI MANUAL, *supra* note 14, § 12.1.2.

⁹² These high school student-athletes need guidance during their discussions with the professional team that has drafted them to properly determine whether or not they want to turn professional or instead enroll in college. However, the use of an agent can

greater detail in Part II.

There is both an art and a science in selecting an appropriate agent, and this is undoubtedly an area in which a modicum of education and understanding can greatly aid an individual in making a sound decision. An advisor's role is to provide guidance and resources so that student-athletes and their families interested in becoming educated about agents may do so.

There are all types of agents and it can often be a daunting task for a student-athlete and their family to sort through the pile of individuals seeking to serve as their official representative. Typically, the first step in the decision process is to understand the services that agents provide and how they are compensated.⁹³ Each student-athlete has unique and specific needs as they enter the professional ranks and it is important to understand how an agent's particular attributes or skills can aid those specific needs.

Beyond the compensation and negotiation of an employment contract, many agents also offer services in a spectrum of areas: marketing and endorsement deals, financial planning, community service or charitable endeavors, tax advice, media relations, legal matters, and estate planning. Finding the right level of service and support is an important determining factor in selecting the appropriate agent for an individual. Ultimately, most of the agents a student will consider are competent and trustworthy. What the student-athlete's decision most often comes down to is personality and comfort with the agent.

The rise in both salaries⁹⁴ and the visibility of professional athletes⁹⁵ has created an environment in which sound counsel is necessary to navigate a player through the opportunities available. Given the fact that a player's agent typically receives a percentage of their client's compensation,⁹⁶ competition is fierce among

jeopardize the eligibility they are considering retaining.

⁹³ The standard practice is for agents to be paid based on a percentage of the contract they negotiated for the player. All union regulations dictate that the agent is to be paid only when the player is paid. It is also important to point out that there can be significant sums of money earned by players pursuant to the collective bargaining agreement, such as performance bonuses and playoff game compensation.

⁹⁴ From 1990 to 2010, average salaries have risen: 447% in MLB to an average of \$3.27 million; 414% in the NFL to an average of \$1.8 million; 609% in the NBA to an average of \$5.85 million; and 638% in the NHL to an average of \$2 million. See GLENN M. WONG, *ESSENTIALS OF SPORTS LAW*, Ex. 1.2 (4th ed. 2010).

⁹⁵ See Associated Press, *Super Bowl XLIV Mashes M-A-S-H: Saints Victory Over Colts Most-Watched Program in TV History*, CHARLESTON GAZETTE & DAILY MAIL (WV), Feb. 9, 2010, at 4B (describing how the 2010 Super Bowl was the most watched program in U.S. television history).

⁹⁶ The NFLPA limits an agent's compensation to three percent of the player's contract. See NFLPA Agent Regulations, *supra* note 84, § 4(B). The NBA Players' Association limits an agent's compensation to four percent. Neither the MLBPA or NHLPA limits an agent's compensation, instead, honoring the free market system, they work to obtain on behalf of their constituents. See MLB.com, *Major League Baseball Players Association: Frequently Asked Questions*, <http://mlbplayers.mlb.com/pa/info/faq.jsp#negotiating> (last

agents for player representation.⁹⁷ What results is an environment of competition by agents for uneducated (for these purposes) and typically naïve consumers. Ultimately, as a result of this mayhem, schools are often left with NCAA violations as a result of improprieties while student-athletes, or their representatives, often find themselves making poor decisions in difficult situations.

An individual's perceived value in the upcoming draft obviously dictates the sheer volume of interest they will receive from agents. A potential first round pick may have several dozen agents and/or firms trying to get an interview. Individuals who will potentially be drafted in the middle rounds of the NFL draft will also receive dozens of inquiries. Someone who may be on the bubble of being drafted or who falls under the "priority free agent" category may have only a few people contacting them. Finally, some student-athletes may actually need to convince an agent to represent them.

The actual process of whittling down a few agents to interview can be a daunting task but one that is necessary. When faced with dozens of agent requests and brochures that have been sent to a family or a student-athlete, typically a family will ultimately choose a few finalists (half a dozen or so) and then, when the time is right, conduct formal interviews so that the student-athlete is able to find an agent or firm to his liking. Student-athletes have the ability to, and should, negotiate with agents about their services and costs.⁹⁸

The timing of this formal process is unique to each institution. Typically each college football program will determine a period, before, during or after the season, in which it allows its student-athletes the ability to conduct interviews. Some schools will formally host "agent days" while others see no merit in this initiative. In addition, there is an increasing trend of schools hiring outside consultants to help them and their student-athletes with the process.⁹⁹ Nevertheless, it is not uncommon for student-

visited July 26, 2010). To view a Standard Representation Agreement between an NFLPA Certified Contract Advisor and player, see NFLPA Agent Regulations, *supra* note 84, D-1. Other standard agent-player agreements can be viewed as a member of the Sports Lawyers Association at <http://www.sportslaw.org>, by contacting the respective players association, or contacting the authors of this article.

⁹⁷ In the NFL, the agent competition is arguably at its fiercest. As of the start of the 2010 NFL season, 773 agents were certified by the NFLPA, but only 338 (43.7%) of them had clients. E-mail from Caitlin Reddinger, Administrative Assistant, Salary Cap & Agent Administration, NFL Players' Association, to Glenn M. Wong, Professor, University of Massachusetts Department of Sport Management (Mar. 23, 2010, 13:57:00 EDT) (on file with author); *see also* NFLPA Player-Agent Report (on file with NFLPA).

⁹⁸ The NFLPA Standard Representation Agreement provides a section requiring the agreed upon commission percentage to be checked off, ranging from one percent to three percent in half-percent increments with an "other" option as well. *See* NFLPA Agent Regulations, *supra* note 84, D-2.

⁹⁹ *See* Mullen, *supra* note 24.

athletes to ignore the rules of their school¹⁰⁰ and talk and meet with agents throughout the season as permitted by NCAA Bylaws.

The NCAA may be (or should be) a good resource in dealing with this selection process. In addition to NCAA rules and regulations, again primarily on the topic of eligibility, there are several helpful documents that the NCAA has developed.¹⁰¹ The NCAA allows for contact between student-athletes and agents at all times,¹⁰² and there is nothing in the rules that prohibit direct discussions at any point during a student-athlete's career. However, there is one strong restriction: no agreement, or even a promise to agree in the future, may be reached with an agent while a student-athlete is still in college.¹⁰³

Ultimately, as Bob Ruxin correctly points out at the end of his book, *An Athlete's Guide to Agents*,¹⁰⁴ the onus falls upon the client for selecting the appropriate representation. This decision, while difficult and filled with potential pitfalls, is the responsibility of the student-athlete. It is their duty to use the resources available to them in order to determine their unique needs and which potential agent is the best match for them.

II. PROBLEMS WITH THE CURRENT PROCESS

There is an overall lack of guidance, counsel, and expertise in the transition process. With few people willing to help in the absence of a personal agenda, each year, the process victimizes

¹⁰⁰ Three days prior to the 2009 Sugar Bowl, featuring sixth-ranked University of Utah versus fourth-ranked University of Alabama, Alabama announced that star left tackle Andre Smith was suspended for the game due to contact with agent Alvin Keels in violation of team rules. See *Mr. College Football with Tony Barnhart, Smith's Suspension Will Be Good for Alabama*, <http://blogs.ajc.com/barnhart-college-football/> (December 30, 2008, 7:05:00 EDT).

¹⁰¹ See, e.g., NCAA, YOUR PATH TO THE STUDENT-ATHLETE EXPERIENCE (2010), available at <http://www.ncaapublications.com/p-4193-2010-11-your-path-to-the-student-athlete-experience-pack-of-100-due-late-summerearly-fall-2010.aspx>; NCAA, GUIDE TO THE COLLEGE-BOUND STUDENT-ATHLETE, (2007-2008), available at http://www.willamette.edu/athletics/prospective_students/2007-08_cbsa.pdf; NCAA, A CAREER IN PROFESSIONAL ATHLETICS: A GUIDE FOR MAKING THE TRANSITION, (2004), available at <http://www.ncaapublications.com/p-3957-a-career-in-professional-athletics-a-guide-for-making-the-transition.aspx>.

¹⁰² However, NFLPA Regulations do not permit agents to talk to student-athletes until after a prospective player's last regular season college or conference championship game (excluding any post-season bowl game) or December 1, whichever is later, of the college football season immediately prior to the year in which such prospective player would be eligible to apply for the NFL Draft. See NFLPA Agent Regulations, *supra* note 84, § 3B(30)(a); Mike Florio, *NFLPA Tweaks Junior Rule, But Doesn't Go Far Enough*, NBC SPORTS, Mar. 18, 2009, <http://profootballtalk.nbcsports.com/2009/03/18/nflpa-tweaks-junior-rule-but-doesnt-go-far-enough/>; Mike Florio, *Agents Learn of Revision to "Junior Rule,"* NBC SPORTS, Mar. 27, 2009, <http://profootballtalk.nbcsports.com/2009/03/27/agents-learn-of-revision-to-junior-rule/>. None of the other agent regulations have a rule as to when agents can contact student-athletes.

¹⁰³ DI MANUAL, *supra* note 14, § 12.3.

¹⁰⁴ ROBERT RUXIN, AN ATHLETE'S GUIDE TO AGENTS 160 (4th ed., Jones & Bartlett Publ. 2003).

new crops of potential professional athletes. Over the years the amateur-to-professional transition process has only become more complex as the financial stakes have risen. To combat this problem, in 1984 the NCAA adopted legislation permitting member institutions to establish Professional Sports Counseling Panels (PSCPs).¹⁰⁵ This legislation “was intended to encourage member institutions to provide guidance to their student-athletes regarding future professional athletics careers.”¹⁰⁶

In sum, a PSCP consists of at least three panel members, the majority of which are full-time employees outside of the institution’s athletic department.¹⁰⁷ No more than one panel member may be an athletics department staff member and no sports agent or person employed by a sports agent or agency may be a member of the panel.¹⁰⁸ The PSCP is permitted to:

Advise a student-athlete about a future professional career;

Provide direction on securing a loan for the purpose of purchasing insurance against a disabling injury;

Review a professional sports contract;

Meet with the student-athlete and representatives of professional teams;

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;

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).¹⁰⁹

However, many universities fail to use or properly use PSCPs, thus, failing to provide the appropriate level of support in this venue.¹¹⁰ As a result, student-athletes often make unwise decisions

¹⁰⁵ See NCAA DI MANUAL § 12.3.4 (1998-99) (citing the section titled “Professional Sports Counseling Panels”); see also HOWARD L. GANZ & JEFFREY L. KESSLER, UNDERSTANDING BUSINESS & LEGAL ASPECTS OF THE SPORTS INDUSTRY 161 (Practicing Law Institute 2001).

¹⁰⁶ See GANZ & KESSLER, *supra* note 105, at 161.

¹⁰⁷ See DI MANUAL, *supra* note 14, §§ 12.3.4.1, 12.3.4.2.

¹⁰⁸ *Id.* § 12.3.4.2.

¹⁰⁹ *Id.* § 12.3.4.

¹¹⁰ See Albert R. Breer, *Taunton Native Happy to Stay on His Raven Perch*, BOSTON GLOBE, May 23, 2010, http://www.boston.com/sports/football/articles/2010/05/23/taunton_native_happy_to_stay_on_his_raven_perch/?page=4 (noting that Boston College is the only school of its

at very important junctures in their lives that can have lasting and irreversible impacts, ranging from pecuniary harm to losing their professional athletic dreams altogether. The major professional sports leagues invest a significant amount of time, money and effort into its new players.¹¹¹ However, these leagues may find their investments to be significantly frustrated by the multitude of issues confronting athletes before they even have the chance to become professional. Finally, NCAA member-institutions can suffer the 'black eye' of bad publicity or the NCAA's enforcement procedures and sanctions for its or a student-athlete's faults during this transitional process.¹¹²

In recent years there have been several high profile cases that highlight the problems in the transition process. Maurice Clarett, the star freshman running back on the 2002 Ohio State University National Championship football team, violated NCAA rules, was suspended for a year as a result, and decided to challenge the NFL's draft eligibility rules in court as a violation of antitrust laws. Clarett eventually lost his case, his football career, and his freedom.¹¹³ Mike Williams, a standout sophomore receiver at University of Southern California decided to follow Clarett's lead after Clarett was initially granted eligibility, only to see that decision reversed, forcing Williams (who had signed with an agent) to sit out a year before beginning a disappointing NFL career.¹¹⁴ Similarly, Randolph Morris, a promising basketball

kind offering guidance outside the offices of the individual athletic teams).

¹¹¹ In 2009, NFL rookies signed contracts with a total value of \$1.2 billion, with \$600 million in total guaranteed. See Liz Mullen & Brandon McClung, *NFL, Union Differ on Rookie Wage Scale*, SPORTS BUS. J., Apr. 26, 2010, www.sportsbusinessjournal.com/article/65536.

¹¹² See NCAA's Legislative Services Database, *supra* note 21.

¹¹³ See *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004). Clarett argued that the NFL's draft eligibility rule unreasonably restrained trade in violation of Section 1 of the Sherman Act. The district court agreed, finding that because the eligibility rule was in the NFL Bylaws and not the CBA, it was not protected by the non-statutory labor exemption. *Id.* The Court of Appeals for the Second Circuit granted the NFL's motion to stay the district court's decision (which temporarily granted Clarett eligibility) just days before the 2004 draft and eventually reversed the district court, upholding the league's eligibility rules. See *Clarett v. Nat'l Football League*, 369 F.3d 124 (2d Cir. 2004). The Second Circuit Court found that the NFL's eligibility rule fell within the scope of the nonstatutory exemption and the fact that the NFL and the players' union did not bargain over the rule did not exclude it from the scope of the nonstatutory exemption. *Id.* In the 2006 extension of the NFL CBA, the NFL and NFLPA explicitly negotiated the eligibility clause into the CBA to help prevent any further legal challenges. Clarett was suspended for the 2003 season for receiving improper benefits and then lying about it to NCAA investigators. See *OSU Will Wait Until Spring to Seek Clarett Return*, CINCINNATI POST, Sept. 29, 2003, at C6. In the 2005 NFL Draft, he was chosen as the last pick of the third round by the Denver Broncos. Clarett was cut by the Broncos in training camp, failed to sign elsewhere, and has since encountered extensive legal trouble resulting in lengthy periods of incarceration. See Associated Press, *Clarett Agrees to Plea Deal, Will Serve 3½ Years*, Sept. 20, 2006, <http://sports.espn.go.com/nfl/news/story?id=2593068>.

¹¹⁴ See Jill Painter, *NCAA Turns Away USC's Williams; Top Receiver's Bid to Regain Eligibility Denied; Career Over*, DAILY NEWS (L.A.), Aug. 27, 2004, at S1. In the 2005 NFL Draft,

talent at University of Kentucky, chose to leave school after his freshman year and enter the NBA draft only to go undrafted. Unfortunately, Morris had signed with an agent and only after the NCAA found that Morris had a “clear intent to retain his college eligibility while declaring for the NBA draft,” did a full-season suspension get reduced to the first fourteen games of the 2005-06 basketball season.¹¹⁵ Lastly, in one recent case that has drawn a lot of attention, Andrew Oliver, a promising baseball student-athlete at Oklahoma State University had his eligibility suspended in May 2008, only to have it eventually restored by court order.¹¹⁶ Oliver was suspended after it was revealed he had agents talk with the Minnesota Twins when he was drafted out of high school in 2006.¹¹⁷ This case will be discussed in more detail later in the article.

The Morris situation highlights some of the difficulties in the professional basketball transition process. Beginning with the 2006 NBA draft, to be eligible, a player must be at least nineteen years old.¹¹⁸ As a result, many high school players who would have gone straight to the NBA (as thirty-five did between 1995 and 2005)¹¹⁹ now must attend at least one year of college or otherwise attempt to avoid the rule.¹²⁰ In reality, basketball student-athletes

Williams was chosen as the 10th overall pick by the Detroit Lions. Williams played three years in the league with three different teams, catching a total of forty-four balls. Former USC head coach and current Seattle Seahawks coach Pete Carroll gave Williams a comeback attempt prior to the 2010 season and Williams successfully made the team. See Arash Markazi, *The Comeback of Mike Williams*, Oct. 23, 2010, <http://sports.espn.go.com/los-angeles/nfl/news/story?id=5696566>.

¹¹⁵ See John Clay, *Getting Legal Help Not a Good Thing for UK, Morris Case Dragging Out*, LEXINGTON HERALD LEADER, Nov. 16, 2005, at C1; The Beat, *Wildcats' Morris Has Penalty Reduced*, ORLANDO SENTINEL, Dec. 16, 2005, at D5. Publicly Morris stated “in exploring my NBA options I made poor choices. Those choices included accepting bad advice while putting distance between me and my coaches and teammates.” Jerry Tipton, *Morris Will Be Back on Jan. 10, Confidential Evidence and Fax Change Season*, LEXINGTON HERALD-LEADER, Dec. 16, 2005, at A1. Morris was deemed to be a free agent by the NBA. Morris eventually returned to Kentucky for his junior year, but in March 2007, five days after his team had lost in the NCAA Men's Basketball Tournament, Morris left school and signed a two-year, \$1.6 million dollar contract with the New York Knicks. See *Knicks Sign Kentucky Center Morris to 2-year Deal*, Mar. 24, 2007, <http://sports.espn.go.com/nba/news/story?id=2809958>.

¹¹⁶ *Oliver v. Natl. Collegiate Athletic Assn.*, 920 N.E.2d 203 (Ohio Com.Pl. 2009).

¹¹⁷ *Id.* at 207.

¹¹⁸ NBA CBA, *supra* note 33, Art. X.

¹¹⁹ See NBA Draft History, www.nbadraft.net/nba_draft_history/index.html (last visited May 4, 2010).

¹²⁰ There have been some highly publicized attempts to circumvent the rule. First, Brandon Jennings, a California teenager who failed to score sufficiently on his SAT to attend the University of Arizona, played one season of professional basketball in Italy before being drafted 10th overall in the 2010 NBA Draft by the Milwaukee Bucks. See Gary D'Amato, *Bucks' Diminutive Point Guard Brandon Jennings Has Overcome Big Obstacles to Reach the NBA*, MILWAUKEE J. & SENTINEL ONLINE, Nov. 18, 2009, <http://www.jsonline.com/sports/bucks/67381447.html>. While Jennings had a fantastic rookie season with the Bucks, averaging 20.8 points per game, the story of Jeremy Tyler serves as a cautionary tale. Tyler, also from California, chose to skip his senior year of high school to play at the professional level in Israel. After a lackluster performance,

who know they are going to leave after just one season of college basketball (“one-and-done”), can take the minimum number of classes in their first semester, barely go to class as the college basketball season winds down in their second semester, declare for the draft, and drop out of school having completed only four or five general education classes. In the five years since the implementation of the minimum age rule, there have been thirty-six “one-and-done” players, including three #1 overall picks.¹²¹

For the purposes of this article, at issue are not the legal ramifications, or even who is at fault in these cases, but rather an example of the level of support many student-athletes require, even before they may reach campus, in navigating their way from amateur to professional athletics. Much has been written regarding the distinction between an advisor and an agent—the former permissible, and the latter not, under the NCAA’s rules.¹²² As is its prerogative as a private and voluntary sports association,¹²³ the NCAA has defined the parameters of what it means to be an amateur in intercollegiate athletics, even though many regard the distinctions within those parameters to be farcical.¹²⁴ The challenge, as born out for Oliver and countless others on an annual basis, is that often they and/or their families are unprepared for making a seamless transition from amateur to professional. Regardless of the outcome of this particular situation, a high school senior who should be concentrating on getting ready for their prom is all too often engaged in decisions that could be made far easier with proper guidance and support.

averaging just 2.1 points per game and displaying a disappointing work ethic, Tyler left his team mid-season and returned home to San Diego. Whether he ever plays in the NBA remains to be seen. See Howard Schneider, *In Israel, Jeremy Tyler's NBA Dreams Come Back Down to Earth*, WASH. POST, Feb. 19, 2010, at D4.

¹²¹ See NBA Draft History, *supra* note 119. The three #1 overall picks were Greg Oden to the Portland Trailblazers in 2007, Derrick Rose to the Chicago Bulls in 2008, and John Wall to the Washington Wizards in 2010. Thirty-one of the thirty-six players were first round picks and sixteen of them were Top Ten selections.

¹²² See Rick 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 VAND. J. ENT. L. & PRAC. 215 (2005); Brandon D. Morgan, *Oliver v. NCAA: NCAA's No Agent Rule Called Out, But Remains Safe*, 17 SPORTS L.J. 303 (2010).

¹²³ See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988). *But see* Cohane v. Nat'l Collegiate Athletic Ass'n, 215 Fed. Appx. 13 (2d Cir. 2007). In *Cohane*, the Court of Appeals for the Second Circuit held that the NCAA was a state actor when it conducted an investigation of a state school (the University of Buffalo). The Court differentiated the case from the Supreme Court's 1988 decision in *Tarkanian* in that UNLV had disputed all of the NCAA's charges against Tarkanian such that the NCAA could not have been participating in joint activity with the state. In *Cohane's* case, Buffalo accepted the NCAA's allegations and immediately forced Cohane's resignation. The Supreme Court of the United States denied the NCAA's petition for review.

¹²⁴ See Bianchi, *supra* note 13; Fitt, *supra* note 13; McCormick, *supra* note 13; Lazaroff, *supra* note 13.

A. *Hidden Victims*

When one asks “why have these problems persisted?” the answer becomes clear: there is no advocacy group for reform. The student-athletes and professional athletes are the ones that ultimately suffer the most personal and permanent harm, yet they are the least educated about the process and are in a poor position to understand the need for change when it matters most. To some extent, there is a sense that there is no true need for better guidance such as PSCPs. Either someone is talented enough to “make it” or they are not. If they are good enough, then his or her representative can help them transition to the professional league; if they do not have the talent, there is no need.

In addition, many colleges and universities stay willfully ignorant of the problems. Among the NCAA violations possible in these situations are a failure to monitor and a lack of institutional control. By not confronting and seeking out these problems, a member institution can attempt to avoid sanctions that might come had its personnel had actual knowledge and were complicit in the violations.

Often alumni who have been fortunate enough to succeed in professional athletics for a significant amount of time state how poorly they feel they were prepared for, or understood the complexities of, the business aspect of the professional sports industry. While no one could be expected to fully understand the business of the league in which they are entering, higher education, sports leagues, and unions have an obligation to provide more education and resources than they presently do.

If a school does have a PSCP, some may question the school’s incentive in helping the player, having already received the bulk of their benefit from the relationship. There is also the perception that perhaps some student athletes, if encouraged, may leave school earlier than they would otherwise, thus losing years of eligibility at their institution. As a result, coaches and athletic administrators often view PSCPs as a threat rather than an opportunity to provide the student-athlete with valuable information and guidance. Why give access to their student-athletes to individuals who may help them decide to leave college early? There must be a balanced approach that recognizes in fact sometimes it *is* in the student-athlete’s interests to leave school early.

The group who might benefit the most from PSCPs, student-athletes and their families, are by and large naïve about this allowance by the NCAA. Certainly they have neither the ability nor the leverage to generate any pressure for a school to develop a PSCP. High school players would certainly benefit from advice (as

will be shown in the *Oliver* case), but have no voice in this process. Athletic departments and coaching staffs often do not worry about a student-athlete's future in professional sports other than making the individual more proficient at their sport while in college.¹²⁵ Schools certainly are pleased when their student-athletes succeed in professional athletics yet they do very little to educate them about either entering the industry or understanding its business operations.

College student-athletes have the potential benefit of coaches, a PSCP, athletic administrative staff, and others. High school student-athletes are also an important and substantial population of potential professional athletes. Yet, colleges, professional leagues, and others do nearly nothing to provide them with the advice they need, and in fact, at times, work against allowing the student-athlete the assistance he or she may need, as is evidenced in the *Oliver* case.

B. Results of the Problems

Thus far this article has alluded to many of the problems resulting from a poor amateur-to-professional transition process. However, to properly understand the scope of the problem it is important to examine the negative effects on the diverse group of stakeholders in the situation, including the student-athlete and his or her family, the colleges and universities, the NCAA, the professional leagues and players associations, and even agents and financial advisors.

1. Student-Athletes and their Families

As previously highlighted throughout the article, student-athletes and their families are often the interested parties that are the least sophisticated and the least understanding of the process and its potential ramifications. Yet the results of a failing transition process most directly, harshly, and permanently affects them. Ultimately if the transition process is deficient and it has a negative effect on the athlete's career it will impact the rest of his

¹²⁵ A notable example of this problem is legendary Florida quarterback Tim Tebow. See Mike Florio, *Urban Feels the Heat On His Failure to Develop Tebow*, NBC SPORTS PRO FOOTBALL TALK, Mar. 27, 2010, <http://profootballtalk.nbcsports.com/2010/03/27/urban-feels-the-heat-on-his-failure-to-develop-tebow/>. During Tim Tebow's first three years, Florida won the BCS National Championship twice (2007 and 2009). Nevertheless, it was a hotly debated topic over whether Tebow possessed the skills to succeed in the NFL. Many felt that Florida coach Urban Meyer, who signed a six-year \$24 million contract extension in 2009 despite having four years left on his existing deal, owed it to Tebow to augment his spread offense, which was poorly suited to allow Tebow a chance to improve his professional skill set. This never happened and even though Tebow was ultimately a first round pick in the 2010 NFL Draft, his professional prospects are highly debatable.

or her life.

Apart from the potential fame, glory and, hopefully, fun associated with being a professional athlete, there are obvious real world financial implications. There are dramatic salary ranges in professional sports and even though most are guaranteed at least a six-figure salary by playing professionally in America, that salary might last but a few years.¹²⁶ Studies have shown that between 60% to 78% NBA and NFL players are in severe financial distress when surveyed within two to five years of retirement.¹²⁷ Proper handling of that income could help sustain the player and his family for the rest of their lives, but that is not often the case.

Failure to take the process seriously has resulted in many athletes being taken advantage of by unscrupulous agents and/or financial advisors.¹²⁸ Countless athletes have managed to burn through millions of dollars in poor investments, entourages, gambling, and other unnecessary expenditures.¹²⁹

Financial mismanagement is compounded dramatically when the athlete has failed to earn his or her college degree. The National Football League Players Association (NFLPA) has repeatedly reported that players who have college degrees often

¹²⁶ See Dustin Dow, *Much Pain, No Gain?*, CINCINNATI ENQUIRER, July 1, 2007, at C1 (providing that average NFL career is about 3.5 years); see also Rob Hiaasen, *Getting All the Breaks; As Head Trainer, Bill Tesserdorf Works to Get Sidelined Ravens Back in the Game*, BALTIMORE SUN, Dec. 28, 2002, at D1 (emphasizing difficulty in keeping some players on field); Mark Montieth, *NBA Draft – High Hopes*, INDIANAPOLIS STAR, June 25, 2006, at 1C (explaining that the average NBA career is about four years); David Parkinson, *When the Lights Go Out*, GLOBE AND MAIL (CANADA), Sept. 18, 2008, at 17 (discussing NHL players' difficulty in finances); *Salary Inflation Caused NHL Troubles*, BUFFALO NEWS, Nov. 21, 2004, at C4 (explaining that the average NHL career is about five years); Sam Roberts, *Just How Long Does the Average Career Last?*, N.Y. TIMES, July 15, 2007, at SP6 (concluding that the average MLB career is about 5.6 years); Desmond Ryan, *Basketball Dreamers Come Up Against Reality*, PHILADELPHIA INQUIRER, Dec. 31, 2005, at C1 (discussing reality that NBA careers are often short).

¹²⁷ See Ray Hagar, *Wealth Management Firm Counsels Bighorns Athletes on Fiscal Planning*, RENO-GAZETTE-J. ONLINE, Dec. 30, 2009, <http://www.rgj.com/>; see also Pablo S. Torre, *How (and Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Mar. 23, 2009, <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1153364/index.htm>.

¹²⁸ See *Atwater v. Nat'l Football League Players Ass'n*, No. 1:06-CV-1510-JEC, 2009 WL 3254925 (N.D. Ga., Mar. 27, 2009) (providing that six former NFL players unsuccessfully claimed that the NFLPA breached its duty to them by negligently performing background checks on certain financial advisors who participated in the NFLPA's Financial Advisors Program); Timothy Davis, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 42 WILLAMETTE L. REV. 781, 783 (2006) (discussing several players defrauded by financial advisors, including Scottie Pippen); see also Tom Reed, *Jackets Try To Avoid Financial Slipups That Often Beset Athletes*, COLUMBUS DISPATCH (OHIO), Nov. 11, 2009, at 01A (listing players defrauded by financial advisors, including NHL players Sergei Federov and Michael Peca).

¹²⁹ See Reed, *supra* note 128; Hagar, *supra* note 127. The two articles discuss the financial failures of former professional athletes. First, former Boston Celtics player Antoine Walker has been forced to file for bankruptcy as a result of gambling debts despite having earned more than \$110 million in a twelve-year career. Additionally, former Knicks and Warriors' star Latrell Sprewell, who made an estimated \$50 million to \$90 million in a thirteen-year career, lost a \$5.4 million mansion and \$1.5 million yacht to foreclosure. Lastly, former Celtics star Vin Baker, who made \$90 million dollars in a fourteen-year NBA career, saw his home and business go under because foreclosures.

have longer and hence more financially productive careers.¹³⁰ However, only about half of NFL players have their degree.¹³¹ To encourage college programs to take their student-athletes' educations more seriously, beginning in 2005 the NCAA began tracking the academic progress and graduation success of student-athletes at member institutions.¹³² Schools that fail to make sufficient progress are subject to sanctions ranging from a public warning for the first year of poor performance to restricted membership status for four consecutive years of poor performance.¹³³

According to the NCAA's 2010 Report, of all student-athletes that entered college as freshmen in 2002, 79% earned a four-year degree.¹³⁴ While this number is higher than the 64% of the general student body that earns their degree in the same amount of time,¹³⁵ many people continue to point out that the graduation rates of Division I football (55%) and men's basketball (48%) student-athletes are much lower.¹³⁶

Not surprisingly, lower rates of graduation combined with the possible lifestyle of the rich and famous has led to increased crime rates among professional athletes.¹³⁷ All of this data indicates the importance of taking the transition process seriously and understanding how the decisions therein can have a significant

¹³⁰ See Jaramillo, *supra* note 56; Mills, *supra* note 56.

¹³¹ See Mills, *supra* note 56. Even if a football student-athlete is taking the required number of classes each semester to graduate on time (which is rare), he will rarely attend class during the spring semester of his senior year as he prepares for the NFL Combine. It is then up to the athlete to complete his coursework in the summer or online.

¹³² For more information on the NCAA's Academic Progress Reports (APR) and Graduation Success Rates (GSR), see NCAA.org, NCAA's Academic Progress Reports (APR) and Graduation Success Rates (GSR), www.ncaa.org (follow "Academics" hyperlink; then follow "How Academic Reform Is Measured" hyperlink) (last visited Oct. 10, 2010).

¹³³ See NCAA.org, NCAA Academic Reform, www.ncaa.org/wps/portal (search "Academic Reform"; then follow "NCAA Academic Reform – NCAA.org" hyperlink) (last visited Oct. 10, 2010).

¹³⁴ See NCAA.org, 2009 Graduation Success Rate Report, www.ncaa.org/ (follow "Resources" hyperlink; then follow "Research" hyperlink; then follow "Graduation Rates" hyperlink; then follow "2009 NCAA Division I GSR School Data" hyperlink; then follow "All Division I") (last visited Oct 10, 2010).

¹³⁵ Letter from Rep. Bill Thomas, Chairman, House Comm. on Ways and Means, to Myles Brand, President, NCAA (Oct. 2, 2006), available at www.usatoday.com/sports/college/2006-10-05-congress-ncaa-tax-letter_x.htm.

¹³⁶ See NCAA.org, 2009 Graduation Success Rate Report, www.ncaa.org (follow "Resources" hyperlink; then follow "Research" hyperlink; then follow "Graduation Rates" hyperlink; then follow "Overview of Division I Graduation Success Rate / Division II Academic Success Rate" hyperlink) (last visited Oct 10, 2010). It is also important to note that the NCAA includes students who transfer from one school and finish at another while the Department of Education does not. See Gabriel A. Morgan, *No More Playing Favorites: Reconsidering the Conclusive Congressional Presumption that Intercollegiate Athletics are Substantially Related to Educational Purposes*, 81 S. CAL. L. REV. 149, 175 n. 184 (2007).

¹³⁷ See Jeffrey Isaac, *Professional Athletes and Violent Crime*, THE DAILY TRANSCRIPT (San Diego), Aug. 1, 2006, www.sddt.com/Law/lawyerinbluejeans.cfm?PublicationDate=2006-08-01.

effect on an athlete's life.

a. *Oliver v. NCAA*¹³⁸

In June 2006 Andrew Oliver, a high school pitcher, was drafted by the Minnesota Twins in the seventeenth round of the MLB draft. The summer following his senior year of high school, Oliver had to decide whether to enroll at Oklahoma State University (OSU) or turn professional and sign with the Twins. In compliance with NCAA Bylaw 12.3.2,¹³⁹ Oliver's family hired Robert and Tim Baratta, Major League Baseball Players Association (MLBPA) certified player agents and attorneys, as his advisors and legal counsel in February 2006.¹⁴⁰ Such a hiring is an extremely common practice for elite high school baseball players.

Oliver ultimately chose OSU over the Twins and after two outstanding years at OSU, Oliver notified the Baratta brothers of his intention to part ways with them and instead retained Scott Boras as his advisor.¹⁴¹ The Barattas then sent Oliver a non-itemized bill for \$113,750 for their services and reported possible NCAA violations to the NCAA.¹⁴² After an investigation, the NCAA determined that the Barattas were actively involved in negotiations with the Twins on Oliver's behalf, in violation of NCAA Bylaw 12.3.2.1.¹⁴³ In fact, the Barattas talked on the phone with the Twins and were present in the Oliver home when a representative from the Minnesota Twins tendered an offer to Oliver.¹⁴⁴

In May 2008 the NCAA indefinitely suspended Oliver.¹⁴⁵ Oliver and his family filed suit against both the Barattas and the NCAA, seeking an injunction against his suspension and permanent loss of eligibility.¹⁴⁶ The suit was filed in Ohio state court, where Oliver attended high school and the alleged wrongdoing by Oliver and the agents occurred. Oliver made two main claims in his lawsuit: (1) that the NCAA has no authority to

¹³⁸ 920 N.E. 2d 203 (Ohio Com. Pl. 2009).

¹³⁹ See DI MANUAL, *supra* note 14, § 12.3.2 (permitting student-athletes to secure "advice from a lawyer concerning a proposed professional sports contract").

¹⁴⁰ *Oliver*, 920 N.E. 2d 203.

¹⁴¹ Scott Boras is one of the most successful sports agents ever: his clients have included Greg Maddux, Kevin Brown, Alex Rodriguez, Mark Teixeira, Stephen Strasburg, Bernie Williams, Carlos Beltran, Johnny Damon, Daisuke Matsuzaka, Barry Zito and many more. He has negotiated approximately \$4 billion in guaranteed compensation for his clients. See Steve Serby, *Serby's Sunday Q & A With... Scott Boras*, N.Y. POST, Dec. 6, 2009, at 82.

¹⁴² *Oliver*, 920 N.E. 2d at 207.

¹⁴³ See DI MANUAL, *supra* note 14, § 12.3.2 (permitting student-athletes to "[secure] advice from a lawyer concerning a proposed professional sports contract"). But see DI MANUAL, *supra* note 14, § 12.3.2.1 (stating that "[a] lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.").

¹⁴⁴ *Oliver*, 920 N.E. 2d at 207.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

promulgate a rule that would prevent a lawyer from competently representing his client and therefore violate Ohio public policy and;¹⁴⁷ (2) that NCAA Bylaw 12.3.2.1 is arbitrary and capricious because it does not impact a player's amateur status, rather, it limits the player's ability to effectively negotiate a contract that the player or a player's parent could negotiate.¹⁴⁸

The NCAA countered: (1) that it has the right to manage its affairs and apply its bylaws, within legal limits, without interference from the judiciary, and since Oliver failed to prove that its bylaws are illegal, arbitrary, or fraudulent, the NCAA's internal affairs are presumptively correct;¹⁴⁹ (2) that Oliver failed to prove by clear and convincing evidence that the made by the NCAA Bylaw 12.3.2.1 was arbitrary or capricious and; (3) there was no contractual relationship between it and Oliver upon which declaratory relief could be granted.¹⁵⁰

The Ohio state court granted Oliver a temporary restraining order in August 2008.¹⁵¹ Unfortunately, Oliver was forced to miss OSU's chance at a Big XII Championship and participation in the NCAA College World Series.¹⁵² In February 2009, the court granted Oliver a permanent injunction.¹⁵³ In finding that the NCAA Bylaws violated the NCAA's contractual obligation of good faith, the court emphasized that Bylaw 12.3.2.1 restricted an attorney's ability to represent a client—an action beyond the scope of NCAA power.¹⁵⁴ Additionally, the court found that NCAA Bylaw 19.7 “fosters a direct attack on the constitutional right of access to courts” and was consequently arbitrary and capricious.¹⁵⁵ This rule permits the NCAA to take punitive actions against a member institution and/or student-athlete where a student-athlete participates in an intercollegiate competition by court order and against NCAA legislation or decision.¹⁵⁶

The NCAA appealed the decision and in October 2009 the parties settled, with Oliver receiving \$750,000 and retaining his eligibility, while the court decision was vacated, leaving the NCAA Bylaw in question in effect.¹⁵⁷ The injunction permitted Oliver to play the 2009 season, which though not outstanding (5-6 record

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 208.

¹⁴⁹ *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E. 2d 203, 208 (Ohio Com. Pl. 2009).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 207.

¹⁵² See Liz Mullen, *OSU P Andy Oliver Files Suit Against NCAA, Former Advisor*, SPORTS BUS. J., July 2, 2008, www.sportsbusinessdaily.com/article/122046.

¹⁵³ *Oliver*, 920 N.E. 2d at 215-216.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See DI MANUAL, *supra* note 14, § 19.7.

¹⁵⁷ See John Seewer, *NCAA, Oliver Settle Out of Court*, DAILY OKLAHOMAN, Oct. 9, 2009, at 3C.

with a 5.30 ERA) helped him be drafted in the second round of the 2009 MLB Draft by the Detroit Tigers. Perhaps for obvious reasons, this time Oliver chose to sign.¹⁵⁸

2. Colleges and Universities

As mentioned above, schools that do not properly advise student-athletes on the importance of an education are at risk of NCAA penalties.¹⁵⁹ Schools that allow or fail to prevent their athletes from dabbling impermissibly in the professional process face NCAA sanctions, ranging from the loss of a few scholarships to postseason bans, or even the dreaded “death penalty,” which prohibits a team from playing at all for a year or more.¹⁶⁰ It is also important to point out that Conferences are an equally involved bridge between schools and the NCAA. This article discusses the problems at the institutional and NCAA level and suggests better practices – Conferences are likewise prominent in these discussions.

One of the more recent scandals involved former USC running back Reggie Bush. While at USC, “Bush, his mother and his stepfather agreed to form a sports agency with two additional partners. After the agency was formed, Bush and members of his family asked for financial and other assistance from the partners, including living rent-free in a San Diego home.”¹⁶¹ As a result of the violations, the USC football team was forced to vacate all wins from December 2004 through December 2005 (including the 2005 BCS National Championship), lose thirty scholarships over three years and are banned from postseason competition for two years.¹⁶² It is debatable whether these sanctions have served as a sufficient deterrent since the number of institutions facing

¹⁵⁸ Oliver received a \$1.495 million signing bonus and a minor league contract. See Steve Kornacki, *Tiger Notebook*, SAGINAW NEWS (Mich.), Aug. 20, 2009, at B3.

¹⁵⁹ See Wong, Skillman & Deubert, *supra* note 21; NCAA’s Academic Progress Reports (APR) and Graduation Success Rates (GSR), *supra* note 132.

¹⁶⁰ The “death penalty” “is applicable to an institution, if within a five-year period, the following conditions exist: (a) following the announcement of the major case, a major violation occurs, and (b) the second violation occurred within five years of the starting date of the penalty assessed in the first case. The second major case does not have to be in the same sport as the previous case to affect the second sport.” See NCAA.org, Frequently Asked Questions about the NCAA Enforcement Process, http://www.ncaa.org/wps/portal!/ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gjX29XJydDRwP_YHcDA08Df89AZwNHQwMLQ_2CbEdFANWftoY!/ (last visited Oct. 10, 2010). The “death penalty” has only been used once, on the Southern Methodist University football program in 1987, though the team didn’t actually play again until 1989. See Nakia Hogan, *SMU Can’t Escape Death Penalty; Twenty Years Later, It Still Has Overwhelming Effect on Program*, TIMES-PICAYUNE (New Orleans), Oct. 19, 2007, at S1.

¹⁶¹ See Nakia Hogan, *Bush Probe Results in Big Sanctions for USC, Saints RB Alleged To Have Received Money During College Career*, TIMES-PICAYUNE (New Orleans), June 11, 2010, at D1.

¹⁶² See NCAA.org, University of Southern California Public Infractions Report, <https://web1.ncaa.org/LSDBi/exec/homepage> (last visited Oct. 10, 2010); see also Brent Schrottenboer, *USC Appeals Penalties It Says Are ‘Too Severe’*, SAN DIEGO UNION-TRIB., June 26, 2010, at D5.

discipline has not changed substantially over time.¹⁶³

In addition to providing for recovery from unscrupulous agents, thirty-four states have laws that provide a cause of action for schools against the student-athlete involved.¹⁶⁴ However, schools are unlikely to take advantage of this statutory option due to the fear that it would significantly hamper recruiting efforts (no student-athlete wants to go to a school that might end up suing him or her), and it could bring to light the school's own failures and improprieties.¹⁶⁵

Colleges and universities undoubtedly experience surges in goodwill, applications, and donations when their athletic teams are achieving success. Yet all of those tangible and intangible assets can quickly be diminished by scandals involving the school's student-athletes. The incentives for a school to actively aide its student-athletes through the amateur-to-professional transition will be discussed in more detail in Part V.

3. The NCAA

As a result of the repeated scandals involving NCAA student-athletes, the NCAA is consistently bombarded with criticism over

¹⁶³ Between 1980 and 2000, the percentage of Division I institutions that were censured, sanctioned, or put on probation for major violations of the NCAA rules decreased only from 54% to 52%. See Morgan, *supra* note 136, at 178 (citing KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 8-9 (2001), available at www.knightcommission.org).

¹⁶⁴ Thirty-four states and the District of Columbia provide for a cause of action by the institution against a former student-athlete, in addition to the agent. See ALA. CODE § 8-26A-16 (2010); ARIZ. REV. STAT. ANN. § 15-1775 (2010); ARK. CODE ANN. § 17-16-116 (2010); COLO. REV. STAT. § 23-16-215 (2010); CONN. GEN. STAT. § 20-559o (2010); DEL. CODE ANN. tit. 24 § 5416 (2010); D.C. CODE ANN. § 47-2887.15 (2010); GA. CODE ANN. § 43-4A-18 (2010); HAW. REV. STAT. ANN. § 481E-15 (2008); IDAHO CODE ANN. § 54-4816 (2010); 225 ILL. COMP. STAT. ANN. 401/185 (2010); IND. CODE ANN. § 25-5.2-2-13 (2010); IOWA CODE § 9A.116 (2010); KAN. STAT. ANN. § 44-1530 (2010); KY. REV. STAT. ANN. § 164.6929 (2010); MD. CODE ANN., BUS. REG. § 4-415 (2010); MINN. STAT. § 81A.16 (2010); MISS. CODE ANN. § 73-42-31 (2010); MO. REV. STAT. § 436.260 (2010); NEV. REV. STAT. ANN. § 398.490 (2010); N.H. REV. STAT. ANN. § 332-J:14 (2010); N.C. GEN. STAT. § 78C-100 (2010); N.D. CENT. CODE § 9-15.1-15 (2010); OKLA. STAT. ANN. tit. 70 § 821.96 (2010); OR. REV. STAT. § 702.057 (2010); 5 PA. CONS. STAT. § 3314 (2010); R.I. GEN. LAWS § 5-74.1-16 (2010); S.C. CODE ANN. § 59-102-160 (2009); S.D. CODIFIED LAWS § 59-10-16 (2010); TENN. CODE ANN. § 49-7-2137 (2010); TEX. OCC. CODE ANN. § 2051.551 (2010); UTAH CODE ANN. § 15-9-116 (2010); WASH. REV. CODE § 19.225.120 (2010); W. VA. CODE § 30-39-16 (2010); WYO. STAT. ANN. § 33-44-113 (2010). Of the thirty-nine states that have adopted the UAAA, only five do not provide for a cause of action against the student-athlete. See FLA. STAT. § 468.4562 (2010); LA. REV. STAT. ANN. § 4:426 (2010); N.Y. GEN. BUS. LAW § 899 (2010); OHIO REV. CODE ANN. § 4771.01 (2010); WIS. STAT. § 440.99 (2010). Agent legislation in California and Michigan does not provide for a cause of action against the student-athlete. The remaining states have no legislation concerning athlete-agents. See, e.g., CAL. BUS. & PROF. CODE § 18895 (2010); MICH. COMP. LAWS § 750.411e (2010).

¹⁶⁵ For more on the availability of this option, see Tim Epstein, *Show Me the Sanctions!: More Scandals, the Uniform Athlete Agent Act, and an Institution's Cause of Action Against Agents and Former Players*, SPORTS LAW BLOG, <http://sports-law.blogspot.com/2010/07/show-me-sanctions-more-scandals-uniform.html> (July 20, 2010, 16:00:00 EST).

its established role as the guardian of amateurism.¹⁶⁶ NCAA revenues continue to increase, reaching \$710 million in the 2009-2010 academic year, with 90% of that revenue derived from television rights fees.¹⁶⁷ College athletics is undeniably big business, leaving many to speculate over whether the NCAA continues to deserve its tax-exempt status,¹⁶⁸ whether its actions constitute violations of antitrust law,¹⁶⁹ and whether it treats student-athletes fairly in light of the revenues being brought in.¹⁷⁰

To combat these allegations the NCAA has implemented the academic reform studies discussed earlier, and is attempting to be very transparent in explaining how NCAA revenues are being spent on educational endeavors.¹⁷¹ The NCAA emphasizes a “clear line of demarcation”¹⁷² between amateur athletics and professional sports, however, a sloppy transition process only blurs the demarcation and makes the NCAA’s job that much more difficult.

4. Professional Sports Leagues and Players’ Associations

As a result of the poor transition process, many young athletes enter professional leagues improperly prepared for their new career. The jobs of many team, league, and union employees

¹⁶⁶ See Nat’l Collegiate Athletics Ass’n v. Bd. of Regents, 468 U.S. 85, 85 (1984); see also Bianchi, *supra* note 13; Fitt, *supra* note 13; Lazaroff, *supra* note 13; McCormick, *supra* note 13.

¹⁶⁷ See NCAA.org, 2009-2010 NCAA Budgeted Revenues, http://www.ncaa.org/wps/wcm/connect/public/ncaa/answers/nine+points+to+consider_one (follow the “Graphic” hyperlink) (last visited Oct. 10, 2010). Approximately 90% of that total was derived from the CBS contract for the men’s basketball tournament. In April of 2010, CBS and the NCAA reached a new fourteen-year, \$10.8 billion deal. See John Ourand & Michael Smith, *NCAA’s Money-Making Matchup, How CBS, Turner Made the Numbers Work in \$10.8 Billion Deal*, SPORTS BUS. J., Apr. 26, 2010, www.sportsbusinessjournal.com/article/65533.

¹⁶⁸ See Letter from Rep. Bill Thomas, *supra* note 135; Morgan, *supra* note 136. See also John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 2010 U. ILL. L. REV. 109 (2010); Brett T. Smith, *The Tax-Exempt Status of the NCAA: Has the IRS Fumbled the Ball?*, 17 SPORTS L. J. 117 (2010).

¹⁶⁹ See Christian Dennie, *White Out Full Grant-In-Aid: An Antitrust Action the NCAA Cannot Afford to Lose*, 7 VA. SPORTS & ENT. L.J. 97 (2007); Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329 (2007); C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 MARQ. SPORTS L. REV. 285 (2008).

¹⁷⁰ See Aaron Brooks, *Exploring Student-Athlete Compensation: Why the NCAA Cannot Afford to Leave Athletes Uncompensated*, 34 J.C. & U.L. 747 (2008); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); Brian C. Root, *How the Promises of Riches in Collegiate Athletics Lead to Compromised Long-Term Health of Student-Athletes: Why and How the NCAA Should Protect Its Student Athletes’ Health*, 19 HEALTH MATRIX 279 (2009).

¹⁷¹ See generally NCAA.org, NCAA Budgets and Finances, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About+The+NCAA/Budget+and+Finances/ (last visited Oct. 10, 2010). From this page, you can view the NCAA’s budget, revenues, expenses, and revenue distribution amounts. The NCAA gives approximately \$103 million in scholarships, \$49 million annually in student assistance and \$20 million in academic enhancement. Approximately \$154 million is distributed to the conferences via the basketball fund. *Id.* (follow the “Current Revenue Distribution Plan” hyperlink).

¹⁷² See DI MANUAL, *supra* note 14, § 12.01.2.

would be made far easier if the players entering the league were more mature, informed, and prepared for their new career. Team personnel are routinely hired and fired based on their ability to determine an athlete's potential and an increasingly important part of that evaluation is the athlete's character, mental makeup and ability to handle the stress of professional athletics.¹⁷³

Just as the images of the NCAA and member institutions can be tarnished by scandal, so too can those of the professional leagues and unions. Ultimately, a negative image of a league and its players leads to a less marketable product and less revenue. As a result of player conduct problems in recent years, the 'Big Four' leagues have increased penalties and oversight of player conduct, most notably the NFL.¹⁷⁴

Pursuant to federal labor law, these types of discipline policies must be collectively bargained with the unions.¹⁷⁵ Since unions have had to fight with leagues over player conduct policies, the unions have effectively wasted one of the bullets they could have used on another issue during the collective bargaining negotiations. Furthermore, in times of labor strife, there is an important public perception battle between a league and its union.¹⁷⁶ The more unsavory the union's members appear or have acted, the more difficult it has been to gain public support for their side.

¹⁷³ Prior to the NFL Draft, players must take a Wonderlic general intelligence exam and also are interviewed by interesting teams. It has become common practice in the NFL for teams to ask off-beat or even inappropriate questions to test the player's ability to handle adversity. Prior to the 2010 NFL Draft, Miami Dolphins General Manager Jeff Ireland asked Oklahoma State wide receiver Dez Bryant if his mother was a prostitute – for which he later apologized. See Gregg Rosenthal, *Jeff Ireland Apologizes To Dez Bryant*, NBC SPORTS PRO FOOTBALL TALK, Apr. 27, 2010, <http://profootballtalk.nbcsports.com/2010/04/27/jeff-ireland-apologizes-to-dez-bryant/>. Skepticism is raised as to why these type of pre-employment questions are acceptable in the NFL but not in the general workforce. See Mike Florio, *Ken Herock Says No Question Is Off Limits During Pre-Draft Interviews*, NBC SPORTS PRO FOOTBALL TALK, Apr. 29, 2010, <http://profootballtalk.nbcsports.com/2010/04/29/ken-herock-says-no-question-is-off-limits-during-pre-draft-interviews/>.

¹⁷⁴ The following players have all been given suspensions ranging from six games to a full season or more for various types of illegal and inappropriate conduct: "Michael Vick, Adam 'Pacman' Jones, Tank Johnson, Chris Henry, Donte Stallworth, Ricky Manning, Joey Porter[,] Plaxico Burress" and Ben Roethlisberger. See D. Orlando Ledbetter, *QB Penalty 'Unprecedented'*, ATLANTA J.-CONST., Apr. 22, 2010, at C1.

¹⁷⁵ Under the National Labor Relations Act, certain topics are mandatory subjects of negotiation between employers and employees, including "wages, hours, and other terms and conditions of employment." 29 U.S.C.A. § 158(d) (West 2010). Courts have generally held that disciplinary rules are mandatory subjects of bargaining. See *Electri-Flex Co. v. NLRB*, 570 F. 2d 1327 (7th Cir. 1978); *Int'l Bd. of Teamsters, Local No. 320 v. City of Minneapolis*, 225 N.W. 2d 254 (Minn. 1975); see also Matthew J. Parlow, *Professional Sports League Commissioners' Authority and Collective Bargaining*, 11 TEX. REV. ENT. & SPORTS L. 179, 197-98 (2010).

¹⁷⁶ In January 2010, in preparation for negotiations for the CBA set to expire in March 2011, the NFL launched nfllabor.com to disseminate its views on the ongoing labor situation. See generally NFLLabor.com, *How We Arrived at This Point in NFL Labor*, <http://nfllabor.com/2010/01/24/81/> (last visited Oct. 10, 2010).

Although these personal conduct policies typically only concern conduct that occurs after a player has entered the league, many professional stars have scandalous stories break from their college days long after they have left campus, such as New Orleans Saints running back Reggie Bush¹⁷⁷ and Chicago Bulls guard Derrick Rose.¹⁷⁸ If a league grows sufficiently tired of its potential players entering their league in an improper and scandalous fashion, it could collectively bargain for the right to punish those players as well. Courts have held that a union can agree to provisions that affect persons who are not yet members of the union.¹⁷⁹

The unions expend tremendous resources regulating the conduct of agents, including arbitrating any disputes among agents, as well as between agents and players.¹⁸⁰ If athletes had better guidance, it is more likely they would be able to find and form healthy agent relationships. Also, if the process were better handled, less desirable agents would be obtaining fewer clients, resulting in less regulation violations and disputes.

Ultimately, the policies and actions of the players unions are dictated by the union members—namely, the athletes. Unfortunately, many professional athletes do not care about strictly enforcing agent misconduct or helping prevent NCAA violations. For starters, many of the players themselves might have taken cash or other benefits from agents or boosters at one time or another during their career, and they might not want to expose activities that could implicate themselves. Secondly, many professional 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. Consequently, convincing unions to be proactive in helping to solve these issues is very important.

5. Professional Advisors

Agents, financial advisors, marketing and insurance representatives and other advisors who earn a living off of professional athletes are the easiest targets for those who

¹⁷⁷ See Hogan, *supra* note 161.

¹⁷⁸ Rose, who led the Memphis Tigers to the NCAA Championship game in 2007-08 (his only season in college), had his SAT score invalidated by the Educational Testing Service. For this and other violations Memphis was forced to vacate its record season and forfeit \$615,000 in NCAA Tournament revenue. See Dan Wolken, *University of Memphis: NCAA Rules Violation Decision / Not A Banner Day – NCAA Denies Tigers' Appeal as Case Involving Rose Comes to Close*, COMM. APPEAL (Memphis), Mar. 23, 2010, at A1.

¹⁷⁹ See Wood v. Nat'l Basketball Ass'n, 809 F. 2d 954, 960 (2d Cir. 1987) (citing 29 U.S.C. § 152(3)); see also Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 210-15 (1964); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959); John Hancock Mut. Life Ins. Co. v. NLRB, 191 F.2d 483, 485 (D.C. Cir. 1951).

¹⁸⁰ For more information on issues related to this process, see Rick Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355 (2007).

recognize a problem with the amateur-to-professional transition. We emphasize that this category is no longer limited to the traditional definition of an agent, but instead student-athletes and athletes receive advice, guidance and support from professionals in a wide range of industries. As a result of this proliferation, forty states have passed a form of the Uniform Athlete Agent Act (UAAA),¹⁸¹ and the federal government passed the Sports Agent Responsibility and Trust Act (SPARTA) in 2004.¹⁸² Both laws are meant to regulate the conduct of agents by broadly defining “agent,”¹⁸³ listing prohibited conduct¹⁸⁴ and providing for civil remedies and penalties.¹⁸⁵

¹⁸¹ See NCAA.org, AQ on Uniform Athlete Agents Act, <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2010+news+stories/july+latest+news/faq+on+uniform+athlete+agents+act> (last visited Oct. 30, 2010); see also GLENN M. WONG, ESSENTIALS OF SPORTS LAW § 12.7 (4th ed. 2010).

¹⁸² Sports Agent Responsibility and Trust Act, 15 U.S.C.A. §§ 7801-7807 (West 2004); see also *Sports Agent Responsibility and Trust Act: Hearing on H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. 4 (2003); John A. Gray, *Sports Agent's Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141 (2006).

¹⁸³ The UAAA defines an “athlete agent” as:

an individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract. The term includes an individual who represents to the public that the individual is an athlete agent. The term does not include a spouse, parent, sibling, [or] grandparent[, or guardian] of the student-athlete or an individual acting solely on behalf of a professional sports team or professional sports organization.

UAAA, *supra* note 181, § 2(2). SPARTA uses a substantially similar definition. See 15 U.S.C.A. § 7801(2).

¹⁸⁴ The UAAA states that:

(a) An athlete agent, with the intent to induce a student-athlete to enter into an agency contract, may not: (1) give any materially false or misleading information or make a materially false promise or representation; (2) furnish anything of value to a student-athlete before the student-athlete enters into the agency contract; or (3) furnish anything of value to any individual other than the student-athlete or another registered athlete agent. (b) An athlete agent may not intentionally: (1) initiate contact with a student-athlete unless registered under this [Act]; (2) refuse or fail to retain or permit inspection of the records required to be retained by Section 13; (3) fail to register when required by Section 4; (4) provide materially false or misleading information in an application for registration or renewal of registration; (5) predate or postdate an agency contract; or (6) fail to notify a student-athlete before the student-athlete signs or otherwise authenticates an agency contract for a particular sport that the signing or authentication may make the student-athlete ineligible to participate as a student-athlete in that sport.

UAAA, *supra* note 181, § 14. SPARTA states that:

It is unlawful for an athlete agent to— (1) directly or indirectly recruit or solicit a student athlete to enter into an agency contract, by— (A) giving any false or misleading information or making a false promise or representation; or (B) providing anything of value to a student athlete or anyone associated with the student athlete before the student athlete enters into an agency contract, including any consideration in the form of a loan, or acting in the capacity of a guarantor or co-guarantor for any debt; (2) enter into an agency contract with a student athlete without providing the student athlete with the disclosure document described in subsection (b) of this section; or (3) predate or postdate an agency contract.

15 U.S.C.A. § 7802.

¹⁸⁵ See generally UAAA, *supra* note 181, §§ 15-16. For SPARTA, see 15 U.S.C.A. §§ 7803-05.

Diligent enforcement of these laws could potentially alleviate many of the concerns addressed in this article. However, the general perception is that there has been little to no enforcement of the state laws, and the Federal Trade Commission (FTC), the governing body in charge of enforcing SPARTA, has never brought an action based on the law.¹⁸⁶

As a result, the athlete representation industry has more undesirable members than it should. In turn, the industry is more competitive and the cycle repeats. Consequently, agent frustration, litigation, and insurance premiums are all higher than necessary.

III. THE URGENCY OF THE PROBLEM

With 119 teams competing in the Football Bowl Subdivision and each allowed to offer 85 scholarships, each year there are as many as 10,115 student-athletes hoping to earn a living playing professional football. While the percentages are remarkably low, when you speak to a room full of freshmen on any Bowl Championship Series (BCS) conference football team,¹⁸⁷ and ask how many of them have aspirations of playing in the NFL, it is apparent that most believe they have a realistic chance to play on Sundays. In fact, studies have determined that 44% of African-American college student-athletes expect to play professionally, yet only 2% actually do.¹⁸⁸

Not surprisingly, many student-athletes have an inflated sense of their own abilities and often fail to grasp just how difficult it is to make a living as a professional athlete.¹⁸⁹ Each year the 'Big Four' leagues turn over only a small percentage of their rosters to rookies. Additionally, making the roster once is far from the establishment of a career, which in the 'Big Four' leagues only runs an average of 3.3 to 5.6 years.¹⁹⁰ Nevertheless, outside of the

¹⁸⁶ See Deubert, *supra* note 82.

¹⁸⁷ The BCS is a selection and ranking system designed to create five bowl matchups involving ten of the top ranked teams in the NCAA Division I Football Bowl Subdivision. Six Conferences (Big East, Big Ten, ACC, SEC, Big 12 and Pac-10) are guaranteed to have their regular season champion in a BCS Bowl game. The BCS has no affiliation with the NCAA. For more information, see BCSfootball.org, BCS Selection Procedures, <http://www.bcsfootball.org/news/story?id=4819597> (Apr. 26, 2010 13:24:00 EST).

¹⁸⁸ See Richard Salgado, *A Fiduciary Duty To Teach Those Who Don't Want To Learn: The Potentially Dangerous Oxymoron of "College Sports,"* 17 SETON HALL J. SPORTS & ENT. L. 135, 145 n. 54 (2007) (citing R. Sellers, et. al., *Life Experiences of African-American Student-Athletes in Revenue Producing Sports: A Descriptive Empirical Analysis*, ACAD. ATHLETIC J. 21 (Fall 1991)); see also Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS AND ENT. L.J. 226, 227-28 (2004).

¹⁸⁹ See NCAA, *A CAREER IN PROFESSIONAL ATHLETICS: A GUIDE FOR MAKING THE TRANSITION*, app. C at 38 (2004), available at <http://www.ncaapublications.com/productdownloads/CPAONLINE.pdf> (discussed in greater detail later in the article).

¹⁹⁰ See sources cited *supra* note 126.

'Big Four,' professional opportunities continue to grow and as a result more and more student-athletes are becoming professional athletes.

The financial mismanagement by young professional athletes is well documented.¹⁹¹ While this issue is generally left to the responsibility of the athlete's agent and financial advisor, colleges have the opportunity to provide student-athletes with a more realistic sense of their future earnings. Although dozens of student-athletes might be drafted high enough each year such that their first contract is able to provide them with a lifetime of income, the majority will not be.

Many professional athletes toil through the minor leagues, practice squads or developmental leagues making \$10,000 to \$85,000 a year.¹⁹² Even the average rookie with an average career would be lucky to clear a few hundred thousand dollars after taxes and expenses throughout his career. This is certainly not a sum enabling the athlete never to have to work again – all the more reason why the student-athlete should take his education seriously.

While many student-athletes were sought-after recruits with the ability to go to the school of their choice, they will have very little control over the location of their professional team. Furthermore, student-athletes need to be cognizant of the very real possibility of having to leave the country if they wish to make a living playing sports.

Not surprisingly, increased exposure and revenue has generated a global market for professional sports. It is becoming more common for American athletes to head overseas to compete in professional leagues, many of whom are able to offer competitive salaries compared to American leagues, particularly in hockey and basketball.¹⁹³ Just in the major four sports, new leagues are sprouting up virtually every year. At last count there are about thirteen different countries offering professional opportunities in

¹⁹¹ See Hagar, *supra* note 127; Reed, *supra* note 128.

¹⁹² Minor league baseball players make a maximum of \$1,100 a month in their first season. See Minor League Baseball Frequently Asked Questions, http://web.minorleaguebaseball.com/milb/info/faq.jsp?mc=milb_info (last visited Oct. 10, 2010). Players in the National Basketball Developmental League (NBDL) earn between \$12,000 and \$24,000 for a season. See NBA Development League, <http://www.insidehoops.com/nbdl.shtml> (last visited Oct. 10, 2010). Players on an NFL practice squad can earn \$5,200 per week. See NFL CBA, *supra* note 31, Art. XXXIV, § 3.

¹⁹³ Most notably, Josh Childress, a four-year NBA veteran, who averaged 11.8 points per game last season, turned down a five-year \$33 million offer from the Atlanta Hawks in 2008 to play in Greece for three years and \$32.5 million. See Sekou Smith, *Migratory Hawk: Josh Childress Leaves NBA for Greece*, ATLANTA J. – CONST., July 24, 2008, at C1, available at 2008 WLNR 13774417. In addition, several NHL players have returned to their home countries to finish their careers, including Jaromir Jagr, Petr Forsberg and Dominik Hasek. See, e.g., *Czech Goalie Hasek Joins Spartak Moscow*, TIMES OF OMAN, June 9, 2010, available at 2010 WLNR 11702788; Jeff Z. Klein, *The Stars of Hockey Play Here, and There*, N.Y. TIMES, Feb. 20, 2010, at D4.

baseball,¹⁹⁴ over thirty countries with professional basketball leagues,¹⁹⁵ and at least sixteen countries with professional ice hockey.¹⁹⁶ With the folding of NFL Europe in 2007, an American football player's only viable international option is the Canadian Football League (CFL).

For players who aspire to play in the NBA, they often have to choose between making between \$12,000 and \$24,000 per year in the NBA Developmental League (NBDL)¹⁹⁷ or \$500,000 per year playing in Europe.¹⁹⁸ In addition, the Russian Continental Hockey League (KHL) has successfully persuaded several former NHL players, including Jaromir Jagr, to join their league.¹⁹⁹

In basketball, if one is unable to secure a spot in the NBA, dozens of leagues around the globe exist offering professional opportunities. While the student-athletes' pursuit of international opportunities in men's basketball often occur outside of the public eye, it should be noted that the volume of this transition dwarfs the number of former college players heading to the NBA. Amazingly, in the past five years, it is reported that 6,717 U.S. college alumni have played in professional men's basketball overseas.²⁰⁰ As an example of this international growth, since 2000 former University of Massachusetts men's basketball team members have elected to play professionally in twenty-three different countries—a fact offered less for the prestige of this particular program, but more so to illustrate the broad spectrum of opportunities.²⁰¹

Former college student-athletes are finding professional employment in athletics in a myriad of sports beyond baseball, men's basketball, football, and ice hockey. Around the globe there are professional athletes competing in just about every sport imaginable, including men's and women's soccer, track and field, women's basketball, field hockey, volleyball, softball, and lacrosse. And, as a statement of the times, no longer does the United States offer the highest level of competition or compensation in a variety

¹⁹⁴ List of Professional Sports Leagues, http://en.wikipedia.org/wiki/List_of_professional_sports_leagues (listing professional leagues in all major sports) (Oct. 12, 2010, 10:37:07 PM EDT).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Andrea Cohen, *Young Pros Now Have More Choices After Leaving: Playing Overseas College*, DAILY OKLAHOMAN, July 10, 2008, at 6C.

¹⁹⁸ Chris McCosky, *NBA Not Sweating the Euro Lure*, DETROIT NEWS, Oct. 22, 2008, at 2D.

¹⁹⁹ Denis Poissant, *Hockey Night in Russia; The NHL Is Still Superior, but It Has Not Faced Competition This Serious Since the Threat from the World Hockey Association*, TORONTO SUN, Jan. 27, 2009, at S10.

²⁰⁰ USBasket.com, Ex-College Basketball Tracker, <http://www.usbasket.com/ex-college-basketball-tracker.asp> (last visited Oct. 10, 2010).

²⁰¹ For a list of former University of Massachusetts men's basketball players playing professionally, see *supra* note 200.

of sports, including hockey, men's and women's soccer, track and field, and men's and women's basketball.

Perhaps the fastest growing class of professional athletes is women. As more and more countries outside of the United States embrace equality and female participation in athletics, so too do they embrace women's professional sports. Although women's sports leagues in the United States have had mixed success,²⁰² there are likely to be continued opportunities for women to play professionally here and abroad. In recent years, some of the biggest stars of the WNBA, including Diana Taurasi, Sue Bird, and Lauren Jackson, have spent their offseasons playing professionally in Russia, where they earn as much as \$500,000, almost ten times their WNBA salaries.²⁰³

As part of its "stay in school" campaign, the NCAA has attempted to quantify the long odds against college student-athletes making it to the professional level in the sports of men's and women's basketball, football, baseball, men's ice hockey, and men's soccer.²⁰⁴ The results clearly bolster the argument that the chances of success are small. According to the NCAA, in men's and women's basketball, football, and men's soccer, 2% or less of all college student-athletes will move on to play professionally.²⁰⁵ The odds increase slightly for men's ice hockey to 4.1% but this is due, in part, to the fact that there are less than 4,000 student-athletes competing in this sport.²⁰⁶ Finally, while the odds of college baseball players signing a professional contract appear quite high at 10.5%, the percentage of those individuals that advance all the way through the minor leagues to the major leagues is again small.²⁰⁷ It is important to point out that these NCAA estimates are grossly underestimated and probably only reflect the number of student-athletes playing professionally in the

²⁰² Following the US Women's dramatic victory in the World Cup Championship in 1999, the Women's United Soccer Association launched in 2000 only to fold three seasons later. In its place, Women's Professional Soccer (WPS) launched in 2009. National Pro Fastpitch (NPF), formerly the Women's Pro Softball League (WPSL), is currently the only professional women's softball league in the United States. The WPSL was founded in 1997 and folded in 2001 but revived in 2004 and currently features six teams. Perhaps the most successful women's league has been the WNBA, which outlasted the three year effort of the American Basketball League (1996–1998). For more on opportunities for women in sports, see Women's Sports Foundation, <http://www.womenssportsfoundation.org> (last visited Oct. 10, 2010).

²⁰³ See Alexander Wolff, *To Russia With Love*, SPORTS ILLUSTRATED, Dec. 15, 2008, available at <http://vault.sportsillustrated.cnn.com/vault/article/magazine/MAG1149632/index.htm>.

²⁰⁴ See NCAA, A CAREER IN PROFESSIONAL ATHLETICS: A GUIDE FOR MAKING THE TRANSITION 38 (2005), <http://www.ncaapublications.com/productdownloads/D108.pdf> [hereinafter NCAA, CAREER GUIDE].

²⁰⁵ See *id.*

²⁰⁶ See *id.*

²⁰⁷ See *id.*

United States.²⁰⁸

However, as educators and realists we must not ignore the significant number of college student-athletes who chase their dreams of making the transition from college to the professional ranks of athletics. And, while the percentage of the participants succeeding may be low, the bottom line is that thousands of college student-athletes transition to professional sports annually.²⁰⁹ In noting this fact, we must ask ourselves whether colleges and universities are preparing these student-athletes for this transition in an appropriate manner. It is our contention that colleges, universities, and the NCAA can and should do a better job of preparing student-athletes for this transition.

IV. REASONS FOR CHANGE

As we have detailed, there are many problems with the current process of transitioning from amateur athletics to professional sports. Perhaps more than ever before these problems are known to the public, and it has become clear that these scandals are not an occasional blip in the process, but are instead part of a systemic failure to provide meaningful guidance and support to student-athletes interested in turning professional. Furthermore, the problems persist because student-athletes are the group of people most affected by these problems, as well as the group most unaware of them and with the least amount of say in changing the process. Although solving the problem involves multiple steps and parties, there are reasons for each of the important parties involved to want to change the system.

A. *Student-Athletes and their Families*

The benefits to the student-athletes and their families are the most obvious; an improved process should increase a student-athlete's chances of having a successful professional career. Many areas of information could be made more easily available and more readily explained to student-athletes and their families,

²⁰⁸ In the six sports considered in the NCAA Career Guide, based on their projections about 1,334 student-athletes turn professional each year in just these sports – the NCAA gives the estimated number of student-athletes per sport per freshmen class year and also the probability of making it professional in that sport: men's basketball (4,500 and 1.3%); women's basketball (4,100 and 1%); football (16,200 and 2%); baseball (7,300 and 10.5%); men's ice hockey (1,100 and 4.1%); and men's soccer (5,200 and 1.9%). *Id.* By multiplying these numbers together, we arrived at the 1,334 figure. However, these calculations would estimate that only 59 men's and 41 women's basketball student-athletes are turning professional ever year – hundreds of athletes short of reality due to international leagues. These estimates also do not include about two dozen other NCAA sports in which athletes may turn professional, such as golf, swimming, tennis, and track & field.

²⁰⁹ *Id.*

including whether to remain in school, leave school, agent selection, insurance options, financial education, or dealing with the professional leagues.

B. *Colleges and Universities*

Among any university's basic tenets is to provide life skills for its students. Just as career services provide guidance to undergraduate students, so too should universities provide guidance to a small but incredibly visible group of students. Without a PSCP there is a void at the institutional level of an unbiased sounding board to serve as a resource for student-athletes in this process. Whether or not there is a PSCP, student-athletes will seek advice from a variety of different sources including their coaches, other athletic department staff, or personal contacts, as they ponder the decision to turn professional. While many coaches or staff administrators may be able to stay impartial while advising a student-athlete about returning to school to compete for another season, others undoubtedly suggest what is best for themselves or the institution rather than the student-athlete.

The NCAA has made it quite clear that it is "the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the [NCAA]."²¹⁰ Does it make sense to allow individuals who at least *may* have conflicting goals with that of the student-athlete to serve as the institution's advisor on this decision? Again, the goal of a PSCP is not to preserve eligibility and keep student-athletes in school to earn their degree—although that is often the default position—but rather to provide unbiased feedback from experts with whom they have consulted to arm a student-athlete with objective advice.

From an institutional perspective, another reason to create and use a PSCP is that alumni who succeed in professional athletics are virtually always major assets to the school's community. The earning potential and visibility of a professional athlete is enormous. From the vantage point of both advancement and public relations, schools can benefit significantly when one of their former student-athletes gains success as a professional athlete. One of the best ways in which a university may provide value to a future professional athlete is helping them enter their profession at the appropriate time to maximize their potential, both on and off the field.

Alumni relations are the lifeblood of colleges and universities

²¹⁰ DI MANUAL, *supra* note 14, § 2.1.1.

across the country. When one considers the investment each institution makes into alumni and advancement efforts, it appears foolhardy to neglect such a visible and important constituency—potential professional athletes—at so many schools. Certainly, professional athletes are often listed among a college’s most prominent and successful alumni. What other cohort can so easily be identified with one’s alma mater and provide a tremendous benefit at such a low cost? Also, if a professional athlete does not have fond memories of his university and how it may or may not have helped him or her turn professional, that athlete is certainly less likely to recommend the school to a high school star amidst the increasingly competitive recruiting process.

A final area in which PSCPs can help a university may be crude, but remains a fact nonetheless; there is no doubt an argument could be made to create a PSCP merely because of the good will it creates for future advancement and fund-raising efforts. Again, what constituency leaving any university has greater potential for earning large income over time? As such, the potential beneficial impact that these individuals as alumni can have on an institution cannot go unnoticed. With minimal effort there is the opportunity to enhance the chances that these individuals feel that their alma mater served their interests well during their tenure in general, and in the most confusing of times in particular.

Deciding whether or not to leave school early is an incredibly important decision for a student-athlete. One of the critical services that a PSCP can provide is to gather the relevant data and resources so that student-athletes and their families can make educated decisions — decisions that are right for their unique situation and not necessarily for the university for which they compete. As important as knowing the appropriate information to consider is recognizing what information to ignore. The first question to ask when assessing the value of an opinion is whether the person offering advice has a vested interest in the decision.

Anyone working for an athletic department, such as staff and coaches, may very well be offering their honest evaluation, but they also have something to gain if an individual returns to compete for their school. At the same time, agents may try to unscrupulously convince student-athletes that “now” is the right time to turn professional.

Herein lies one of the most difficult, yet helpful, areas in which a PSCP can assist a student-athlete and their family—a realistic talent evaluation. Each professional league has different ways in which they support this decision and knowing when and how to engage the experts is quite important.

C. *The NCAA*

Each year the NCAA faces costly and potentially embarrassing lawsuits over an athlete's eligibility or compliance with NCAA Bylaws. Furthermore, it must invest considerable funds into compliance, investigative and enforcement staff, in an attempt to discover violations, prosecute them, and defend them on appeal.²¹¹ Add in the headaches resulting from annual scandals and criticism lobbed from media and other commentators, and it becomes clear that the NCAA carries a heavy burden as the guardian of amateurism. A more coherent and informed transition process could help alleviate many of these problems while also providing clarity to the "line of demarcation between college athletics and professional sports"²¹² that the NCAA has stated is so important.

D. *Professional Sports Leagues and Players Associations*

As discussed earlier, the professional leagues and unions have also had to waste a lot of time and money on dealing with young men and women not properly prepared for the professional environment. Some of the leagues have attempted to alleviate these issues by establishing draft advisory committees and holding mandatory rookie orientations.²¹³ When that fails, leagues have resorted to harsh punishments as a deterrent to illegal and embarrassing behavior.²¹⁴ These professional leagues essentially treat college athletics as a form of minor leagues, from which they cultivate a product that produces nearly \$20 billion annually.²¹⁵

²¹¹ The NCAA's Budget for the 2009-2010 Academic Year included over \$672 million in expenses. However, how much it spends on compliance is not an available figure and not one to which the NCAA would like to admit. See NCAA.org, 2009-2010 NCAA Budget Breakdown,

http://www.ncaa.org/wps/wcm/connect/6d3874004e51aad96e0d622cf56f2f3/2009-10+Budget+Breakdown_ALL.pdf?MOD=AJPERES&CACHEID=6d3874004e51aad96e0d622cf56f2f3 (last visited Oct. 10, 2010).

²¹² See DI MANUAL, *supra* note 14, § 12.01.2.

²¹³ See Len Pasquarelli, *Game of Life Important to NFL, Rookie Symposium Furthering League's On-Going Initiative To Enhance Players' Life Skills*, ESPN.com, June 29, 2010, http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=5338948.

(discussing the merits and goals of the NFL Rookie Symposium); see also *Former KU Players Embarrass NBA, But There's Still Time For Them To Redeem Themselves*, KAN. CITY STAR, Sept. 4, 2008, at A1 (discussing how former Kansas players Darrell Arthur and Mario Chalmers were fined \$20,000 each for smoking marijuana in their hotel rooms at the NBA Rookie Symposium in 2008. Both were ordered to attend the Symposium the following year as well.).

²¹⁴ See Ledbetter, *supra* note 174.

²¹⁵ See Chris Isidore, *Baseball Close To Catching NFL As Top \$ Sport*, CNN.com, Oct. 25, 2007, <http://money.cnn.com/2007/10/25/commentary/sportsbiz/index.htm> (noting how MLB generates over \$6 billion annually); see also John Lombardo, *NBA Increases Shared Revenue by 63 Percent*, SPORTS BUS. J., Apr. 28, 2008, <http://www.sportsbusinessjournal.com/art./58828> (discussing annual revenue of NBA as \$3.5 billion); Tripp Mickle, *Escrow Cash Will Boost NHL*, SPORTS BUS. J., Mar. 2, 2009, <http://www.sportsbusinessjournal.com/art./61684> (establishing that NHL generates approximately \$2.64 billion annually).

Consequently, it only makes sense that they would invest in the simplification and legitimization of that process.

Certainly any talent evaluator in a professional sport wishes they could simply watch game-tapes to determine an athlete's potential. With an improved transition process that better educates the student-athletes on what they are facing, team personnel could potentially have to spend less time digging into a player's personal life and family history. The bottom line is that leagues invest a tremendous amount of time and money into new players. They could assure themselves a much better return on their investment if they helped facilitate a process whereby the student-athletes understood their professional prospects, opportunities, and prerequisites. In the same vein, the time and money of the unions could be better spent if their members were more self-sufficient and responsible.

Presently, none of the union's agent regulations necessarily prohibit conduct by agents that results in a student-athlete losing eligibility or being otherwise punished by the NCAA. Certainly many activities by agents that would jeopardize a player's eligibility, such as providing cash or gifts, are prohibited by the agent regulations. However, some agents will continue to talk to players in spite of school rules prohibiting such contact, which can result in the player's suspension.²¹⁶ Although the value of the relevant NCAA Bylaw's is highly questionable, the Baratta brothers did not violate MLBPA agent regulations when they helped Andrew Oliver negotiate a potential contract with the Minnesota Twins, yet their actions ultimately resulted in Oliver temporarily losing his eligibility.²¹⁷ Direct reference to NCAA Bylaws in a union's agent regulations could make the basis for an antitrust claim by any agent punishable thereunder.²¹⁸

E. *Professional Advisors*

Again, agents and advisors might not be the most popular group in addressing this issue but they are an essential part of it and any attempt to minimize their existence and role will only make them less likely to cooperate in the process. One might speculate that agents enjoy the fact that the transition process is a

²¹⁶ See Barnhart, *supra* note 100 (discussing the suspension of former Alabama offensive lineman Andre Smith).

²¹⁷ See *supra* Part II.B.1.a (discussing *Oliver v. NCAA*).

²¹⁸ See *Collins v. Nat'l Basketball Players Ass'n*, 976 F.2d 740 (10th Cir. 1992) (citing *United States v. Hutcheson*, 312 U.S. 219 (1941)) (The Court upheld the power of a union to enact regulations governing agents). Generally, parallel conduct, absent evidence of agreement, is insufficient to sustain an antitrust action. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Even if an agent could prove that the union and NCAA agreed on certain portions of agent regulations, those agreements would not necessarily unreasonably restrain trade in violation of Section 1 of the Sherman Act.

mess because it gives them the opportunity to prey on uneducated student-athletes. This is certainly not the approach of the leading agents in the business nor any agent who wishes to make athlete representation a long-term career.

The truth is that the best agents prefer smarter, more mature clients who understand the process. It is easier to provide services to a client who understands the process and how to conduct himself accordingly. Also, a client that takes the agent selection process seriously the first time is much less likely to fire that agent – preventing agents from expending large amounts of time and money on players from whom they may never reap any benefit, let alone have to pursue in a grievance.²¹⁹

Whether most people believe it, most agents and financial advisors fully recognize the fiduciary relationship and responsibilities of their professions and work very hard to ensure their clients' well-being. Nevertheless, many athletes do not want to heed advice that interrupts their lavish plans and will often fire advisors until they can find one who will let them do what they want. If an athlete has some legitimate cognizance of his career and financial prospects it greatly reduces the baby-sitting an agent or financial advisor has to do.

V. RECOMMENDATIONS

What this article has tried to illustrate is that there are numerous and complicated decisions which begin, for many, even before the athletes are in college. The issues for each student-athlete are different, and are far more varied than some of the cases described herein. In proposing solutions we do not suggest that one or more of them is the absolute answer – but instead we seek to start a conversation and creative thinking to solve a large-scale and multi-faceted problem in need of desperate attention.

Each sport has its own unique way of operating and the problems that come with that operation. Consequently, the recommendations we have made are meant to apply across a broad spectrum of sports and issues. As a result, we cannot expect to solve the problems of every sport. Furthermore, there might exist a variety of real world obstacles to many of our suggestions,

²¹⁹ NFLPA Agent Regulations require agents to submit any grievance with a player to arbitration. See NFLPA Agent Regulations, *supra* note 84, § 5. Agents may pursue a player in a grievance for commission due on salary paid to the player from a contract negotiated by that agent. In addition, a common grievance occurs when a player fires his agent after the NFL Combine or NFL Draft but before he has signed his rookie contract. As a result, the agent will have already expended \$20-\$30,000 or more in training and other costs without recouping the benefit. Most agents have players sign an agreement to reimburse the agent for the training expenses should the agent be fired before the rookie contract is negotiated and signed.

most notably funding. Nevertheless, this is an issue that must become more of a priority for many of the organizations mentioned throughout this article.

It is our belief that there is a clear need for more education and knowledge for these student-athletes, as well as real and tangible benefits for colleges and universities. Better educated student-athletes are more likely (although not always) to make better decisions on when to go pro, how to make legal and business decisions, and how to avoid breaking rules (NCAA and state agent legislation). If colleges and universities fail to provide proper guidance, it is likely we will see the emergence of a cottage industry of private firms offering this advice to colleges and student-athletes.²²⁰ Seeing as how we have detailed the relatively powerless role of the student-athlete, and his or her family, in this process, the bulk of the improvements in the process must come from the other major stakeholders: colleges and universities, the NCAA, professional leagues and unions, and the agents and financial advisors.

A. *Colleges and Universities*

First, while a system of PSCPs is in place, not enough college and universities have PSCPs and those that do vary in terms of their use. NCAA institutions need to strongly consider using a PSCP and sufficiently funding it.

Second, colleges must increase funding for their compliance departments. A school's compliance department is its first line of defense to prevent and discover improprieties while aiding student-athletes through the complicated process. Compliance departments should be larger and universities should seriously consider hiring more attorneys to work in compliance departments as opposed to poorly paid and inexperienced graduate assistants.

Third, colleges and universities must aid in the enforcement of the Uniform Athlete Agents Act. As detailed earlier, most states have a form of the UAAA,²²¹ in which certain sections require that any contract between an agent and an athlete contain a warning that the player may lose his eligibility,²²² and that the agent give the school notice of the existence of a contract where the student-athlete might have eligibility remaining.²²³ It is extremely unlikely that agents are complying with either of these requirements.

It is not difficult to find out which agent is representing a

²²⁰ See Cornerstone Sports Consulting, *supra* note 24.

²²¹ See UAAA, *supra* note 181.

²²² *Id.* § 10.

²²³ *Id.* § 11.

former student-athlete from a college or university. As soon as the agency contract is formed, that college should immediately cross-check the agent's conduct against all applicable state laws, in particular whether that agent is registered in the state, as required by the UAAA.²²⁴ Schools must work closely with the applicable state body to ensure consistent and diligent enforcement of state laws.

Fourth, schools should reward agents who act in an ethical manner. In addition to the UAAA, many schools ask that agents register with them as well—if an agent fails to comply with the school's demands and rules, such as when to hold a meeting and when to contact the student-athletes, schools should not help that agent in any way during the recruiting process. On the other hand, an agent who is open with the compliance department and follows the school's rules should be given access to the student-athletes when appropriate to do so and possibly even a recommendation from the athletic department.

Fifth, smaller schools without the means to improve this process must then consider doing it on a Conference level. Most NCAA member institutions only send a student-athlete into the professional ranks every few years. Consequently, they do not have the experience or incentive to properly educate themselves and their student-athletes on this process. However, these smaller schools can pool their resources and provide these services within their Conference.

B. *The NCAA*

Just as funding for PSCPs needs to be increased for member institutions, the NCAA also needs increased funding to combat these problems. A clear source of funding is the television deals the NCAA and the Conferences have negotiated.²²⁵ The funding at the NCAA level could be used in a variety of ways.

First, the NCAA could create a guide of information and recommended solutions. This was done in the 1990s with a three-ring binder and can be done today with a website.

Second, the NCAA could run seminars, conferences, and webcasts to educate PSCP employees.

Third, the NCAA could hold seminars, conferences, and

²²⁴ *Id.* § 4.

²²⁵ In April of 2010, CBS and the NCAA reached a new 14-year, \$10.8 billion deal. See Ourand & Smith, *supra* note 167. In July 2010, ESPN and the Atlantic Coast Conference (ACC) reached a 12-year, \$1.86 billion deal. Just two years earlier, CBS and ESPN agreed to television deals with the SEC for a total of 15-years and \$3.075 billion. See Zach Berman, *12-Year Deal With ESPN Means Big Bucks for ACC*, WASH. POST. ONLINE, July 9, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/08/AR2010070803383.html>.

webcasts for the student-athletes who have a potential professional career. These could also be run on a regional and/or conference level.

Fourth, the NCAA could establish a formal grant program for institutions to establish and run PSCPs. Some of the money could go towards travel to attend a newly created PSCP conference and/or to be used in place of other university responsibilities for the chair of the PSCP.

Fifth, a course taken for college credit could be offered through the NCAA and/or member institutions that would educate student-athletes on some of the important issues involved in a professional sports career. Given the use of technology, this course could be delivered in a variety of ways, including video, delayed video, or online. Case studies using current and recent student athletes would be developed. The course could cover a variety of important issues discussed in this article and relevant to a student-athlete's professional ambitions, including: (1) NCAA rules and regulations; (2) agents; (3) contracts; (4) player unions; (5) collective bargaining agreements; (6) drafts; (7) drug testing; (8) intellectual property rights; (9) financial management; (10) the media and; (11) insurance. While there is a risk that the class could become an easy grade for student-athletes, if taken and administrated properly, it has the potential to provide a tremendous amount of important information to student-athletes in an environment where they would have to pay, at least, some attention.

Sixth, the NCAA should scrutinize and consider amending some of its Bylaws as they relate to this topic, most notably Bylaw 12.3.2, which was discussed at length in the *Oliver* case. The way in which this Bylaw relates to the use of an attorney-advisor, but not an agent, is unfair and confusing. A student-athlete needs the full scope of advice and services when considering whether to turn professional. Fortunately, it has been reported that the NCAA is considering ways in which student-athletes can utilize the services of advisors.²²⁶

Seventh, the NCAA needs to seriously consider the equity and long-term viability of a system where administrators, coaches, schools and others become very wealthy in exchange for the student-athlete's complimentary education. While a discussion of the proper pay or benefits received by student-athletes is beyond

²²⁶ See Dana O'Neil, *Will Agents Get An Invite To The Table?*, ESPN.com, July 20, 2010, http://sports.espn.go.com/ncb/columns/story?columnist=oneil_dana&id=5421033 (referring to "initial discussions [by the NCAA cabinet] regarding current agent and advisor legislations" and "how advisors might assist in providing information to student-athletes who are weighing their options.").

the scope of this article,²²⁷ the NCAA is currently facing serious litigation in which former student-athletes are contending that the NCAA and its member institutions have unjustly and illegally enriched themselves by misappropriating the student-athletes' rights of publicity.²²⁸ At stake are hundreds of millions of dollars in revenue for the NCAA and its member institutions, as well as the entire business model for the NCAA and athletic departments.

If the courts determine that student-athletes are entitled to some compensation for the use of their images or likenesses in licensing arrangements, the NCAA must be ready to propose some creative options if it wishes to maintain the "clear line of demarcation between college athletics and professional sports."²²⁹ One possibility is to use some of the money to purchase a bond, whereby if the student-athlete's wrongdoing causes the member institution or any other party any loss, the damaged party could collect on the bond.

Eighth, the NCAA must consider expanding their insurance options for student-athletes. Currently the NCAA does have a Catastrophic Injury insurance program that provides coverage to student-athletes and others injured during a covered sporting event.²³⁰ The NCAA should consider covering student-athletes with professional potential as well. With help from the professional leagues, the NCAA could determine a certain number of athletes to cover and could even base the coverage on a graduated scale based on their potential. The premiums for the coverage could be considered loans to be forgiven if the student-athlete is not involved in any NCAA violations during his or her career. Additionally, the NCAA should consider allowing Loss of Value insurance policies for student-athletes.

Ninth, the NCAA should consider providing loans to student-athletes. To prevent student-athletes from seeking and accepting inappropriate sources of cash above and beyond their scholarship, the NCAA could provide loans to student-athletes, possibly

²²⁷ For more on this viewpoint, see Root, *supra* note 170; see also McCormick & McCormick, *supra* note 13; Brooks, *supra* note 170.

²²⁸ See *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case No. C 09-01967 CW (N.D. Cal. 2010). In April 2009, former Nebraska quarterback Sam Keller filed a class-action lawsuit against the NCAA and EA Sports for the use of football student-athlete's likenesses in video games. Three months later former UCLA basketball player Ed O'Bannon filed suit alleging that in general the NCAA illegally benefitted from the use of student-athlete images and likenesses without permission. In February 2010, a federal district court denied the NCAA's motion to dismiss. In March 2010, the lawsuits were consolidated as a class action lawsuit. See Marlen Garcia, *NCAA Sued Over Player Likenesses*, USA TODAY, July 22, 2009, at 1C; Katie Thomas, *Ex-Players Join Suit vs. NCAA*, N.Y. TIMES, Mar. 11, 2010, at B15.

²²⁹ DI MANUAL, *supra* note 14, § 12.01.2.

²³⁰ See Wong & Deubert, *supra* note 68, at 508. The policy allows for maximum benefits of \$20 million with a deductible of \$75,000. The NCAA contributes approximately \$10 million in annual premiums to the insurance company as part of the program.

increasing in amount as the student-athlete approaches graduation or the professional level. The loans could then be forgiven if the student-athlete is not involved in any NCAA violation during his career.

Tenth, the NCAA could consider changing the requisite burden of proof to punish a member institution for lack of institutional control. Presently, to find a school lacked institutional control, the NCAA Committee on Infractions asks whether the school “knew, or should have known” about the violations.²³¹ The NCAA could apply a stricter liability standard, whereby schools are punished at the same level of harshness for violations occurring under their purview, regardless of their knowledge. Ideally, this would provide an additional incentive for schools to seek out and resolve issues in this process.

Eleventh, the NCAA should consider revising some of its Bylaws and practices as they relate to recruiting at amateur competitions. In basketball in particular, assistant coaches and recruiting coordinators must regularly attend summer AAU games and camps to recruit the best players. Placing further restrictions on when or where recruiting contact may take place would help remove some of the ‘professional feel’ that these amateur camps have taken on.

Twelfth, the NCAA should work more closely with the national federations, where they exist, such as USA Basketball and USA Hockey. These organizations are also non-profit entities that seek to develop the country’s best athletes in an ethical manner. The national federations and the NCAA have many of the same goals and principles and their collaboration would be mutually beneficial.

C. Professional Sports Leagues and Players Associations

First, professional leagues and unions must be more proactive in their approach to helping their athletes. As mentioned earlier, both the NFL and NBA host rookie symposia meant to enlighten their new players on the realities of the professional sports industry. However, as discussed throughout this article there are a multitude of problems that occur well before the player even reaches the professional level. Leagues and unions should be more involved in educating prospects in high school and college, prior to any issues arising that may derail their professional

²³¹ For the University of Southern California Public Infractions Report (June 10, 2010), Middle Tennessee State University Public Infractions Report (May 22, 2008), Purdue University Public Infractions Report (Aug. 22, 2007), Auburn University Public Infractions Report (Apr. 27, 2004), University of Kentucky Public Infractions Report (Jan. 31, 2002), and others, see NCAA’s Legislative Services Database, *supra* note 21.

dreams. “iHoops,” a joint venture between the NCAA and the NBA, may serve as a valuable start or model.²³²

Additionally, each league and union must be cognizant of where their athletes come from. For instance, both the NHL and MLB need to do more to educate high school students on the amateur-to-professional transition process. Considering the proliferation of elite leagues, tournaments, and events for high school players, it is not overly difficult to track down and begin educating these prospective student-athletes.

Second, the leagues and unions should consider collective bargaining punishment for players involved in behavior that was either illegal or against NCAA rules during their transition to the professional league. In recent years, the leagues have strengthened their enforcement and discipline of their personal conduct policies as they apply to current players. However, unethical principles can imbue in athletes far before they reach the professional ranks, drawing unwanted attention to their professional leagues when they finally do arrive. Consequently, the leagues should expand the use of their disciplinary process as a deterrent to the greatest extent possible.

D. *Professional Advisors*

First, agents and advisors must police themselves. No one is more aware of the new ways in which rules are being bent and broken than other agents, and, arguably no one is more hurt by it than the ethical agents unable to obtain clients as a result of rule bending. Although they often lack any real proof and it might sound like sour grapes, agents should report any possible violation of law or regulation of reasonable veracity to the state, NCAA, and players’ union.

Second, agents should be more forceful in defending their own rights and livelihoods through lobbying or litigation when necessary. In a highly questionable decision, the venerable Judge Posner determined that, in general, there is “nothing wrong with one sports agent trying to take a client from another.”²³³ Judge Posner’s analysis reflects a poor understanding of the realities of the agent industry. Agents must be more vocal in explaining

²³² iHoops was created in 2008 to “establish a structure and develop programs to improve the quality of youth basketball in America in order to enhance the athletic, educational, and social experience of the participants.” See iHoops.com, About iHoops, <http://www.ihoops.com/about/> (last visited Oct. 10, 2010). Both the NBA and the NCAA committed to spend up to \$15 million on the venture, with another \$20 million in shared marketing. The venture is based in Indianapolis and has a 12-member staff. In 2010 it hired highly regarded sports attorney, commentator and former NBA player Len Elmore as its CEO. See John Lombardo, *Elmore Scores iHoops Post*, SPORTS BUS. J., May 3, 2010, www.sportsbusinessjournal.com/article/65603.

²³³ *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 864 (7th Cir. 1999).

themselves, strive to operate in an ethical manner, and actively make suggestions to improve the current system.

CONCLUSION

There are a large number of student-athletes who would benefit from being educated about potential professional sports careers. While there are far more who “dream” about a professional career than actually realize one, there is still an important population of student-athletes who will pursue professional careers, and to whom colleges, universities, and the NCAA can provide valuable lessons and resources.

Student-athletes remain ultimately responsible for the decisions they make. Yet, the problems in the amateur-to-professional transition process are complex and cannot be solved by one person, one action, or one organization. While we proposed solutions relevant to each of the individual stakeholders, there must be a concerted and coordinated effort on the part of many parties to provide funding, education, enforcement, and intervention. All stakeholders should be interested in forming a Blue Panel Commission of sorts to study these issues – each stakeholder must take accountability for his or her role in this problem and be active in its solution.