

OLIVER WITH A TWIST: THE NCAA’S
NO-AGENT RULES APPLIED TO NON-LAWYER
REPRESENTATIVES OF BASEBALL
STUDENT-ATHLETES

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I. INTRODUCTION

The NCAA’s prohibition against student-athletes retaining agents to represent them in negotiations for professional contracts (at least for those student-athletes seeking to retain their eligibility) has come under scrutiny for many years.¹ Problems are particularly acute in the sport of baseball—due to the timing of the annual First-Year Player Draft and Major League

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1. See, e.g., Jan Stiglitz, *NCAA-Based Agent Regulation: Who Are We Protecting?*, 67 N.D. L. REV. 215 (1991); Thomas R. Kobin, Comment, *The National Collegiate Athletic Association’s No Agent and No Draft Rules: The Realities of Collegiate Sports Are Forcing Change*, 4 SETON HALL J. SPORT L. 483 (1994).

Baseball (MLB) rules governing draft eligibility.² The draft is conducted in June each year, roughly at the end of baseball players' seasons.³ Prior to the draft, players are focused on the classroom and ballfield and typically do not have the time or the knowledge to prepare adequately for draft negotiations with MLB clubs.⁴

Draft eligibility also creates unique problems: essentially, baseball players are draft-eligible at the end of their senior year in high school and again at the end of their junior year in college.⁵ (College players completing their senior year also are draft-eligible, but because they will have exhausted their eligibility to compete at an NCAA institution, the retention of an agent after completing their final season causes no concerns from a rules-compliance perspective.) High school draft prospects may wish to play college ball, and college juniors may wish to return for their senior years to compete one last season with their college teammates. But if they seek advice regarding their options from agents or other representatives, they risk jeopardizing their college eligibility.

The fundamental concern is that young baseball players—even if they were not preoccupied with their other responsibilities in the classroom and on the ballfield—are seldom equipped to negotiate effectively with representatives of MLB clubs, who typically are experienced, sophisticated negotiators.⁶ To try to level the playing field, student-athletes almost uniformly retain agents or other advisors to assist them in the draft process.⁷ The NCAA's "no-agent rule"—hire an agent and lose eligibility to compete at an NCAA institution⁸—obviously creates a significant roadblock for players who wish to have assistance in draft negotiations, yet still retain the option to compete (or continue competing) in college baseball.

In 2009 a state court judge in Ohio recognized the clear disparity in bargaining power between MLB clubs and student-athletes.⁹ In a case involv-

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

3. *First-Year Player Draft—Official Rules*, MLB.COM, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Mar. 17, 2015) [hereinafter "Official Rules"].

4. Karcher, *supra* note 2, at 222.

5. See Official Rules, *supra* note 3. Draft-eligible players include high school graduates who have not attended college, junior college players, and four-year college players "who have either completed their junior or senior years or are at least 21 years old." *Id.*

6. See Karcher, *supra* note 2, at 224.

7. Katie Thomas, *Baseball Star Challenges N.C.A.A. Rule*, N.Y. TIMES, Oct. 4, 2008, at D1 ("Virtually every player has an agent – call them a lawyer, call them an advisor, there's no difference.") (quoting an MLB executive speaking on condition of anonymity).

8. See *infra* text accompanying notes 41–43.

9. The NCAA considers "student-athletes" to include only individuals currently

ing Andrew Oliver, a pitcher at Oklahoma State University, the court held that an NCAA rule prohibiting a student-athlete's attorney from being present during negotiations between the student-athlete and an MLB club was arbitrary and capricious, noting that the rule "stifles what attorneys are trained and retained to do."¹⁰ The *Oliver* court's injunction in favor of the student-athlete drew considerable attention because it represented a rare defeat for the NCAA¹¹ and threatened the NCAA's enforcement of the no-agent rule. After the decision, however, the parties settled the case for a reported \$750,000, with the stipulation that the court's injunction be vacated.¹²

So the *Oliver* issue remains on the table. The NCAA continues to enforce its rule against lawyers participating in negotiations between their clients and MLB representatives. The *Oliver* decision calls into question the legality and enforceability of that rule. But the *Oliver* decision, even if it had not been vacated, was narrow in scope and grounded explicitly in the attorney-client relationship and the role attorneys play in representing their clients.¹³ Even though one can argue, particularly after *Oliver*, that the NCAA's no-attorney restriction treads too heavily on the attorney-client relationship, at least the rule is clear: the student-athlete may not have a lawyer present during negotiations with an MLB club.

But what about non-lawyer representatives? The NCAA's broader no-agent rules also are clear (at least on their face), but not all student-athlete representatives are "agents." The NCAA does allow student-athletes to retain "advisors" to assist them in the MLB draft process.¹⁴ What if a student-athlete, seeking to preserve the option of competing in college, is careful *not* to hire an attorney to represent him, but instead retains a non-attorney "advisor"? In what activities can such advisors engage before they cross a line and become "agents"—thereby jeopardizing their clients' college eligibility?

The latter questions are the focus of this article. The article begins with

enrolled as students at an NCAA member institution. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2014–15 DIVISION I MANUAL, Bylaw 12.02.12. (The Manual is available online at www.ncaapublications.com. Hereinafter, Manual provisions will be cited simply to "NCAA Bylaws.") High school seniors would be considered "prospective student-athletes." See NCAA Bylaw 13.02.12. For simplicity of discussion, however, this article uses the term student-athlete to include both types of MLB draft prospects—high school seniors and college juniors.

10. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc. 2d 17, 32 (Com. Pl. 2009).

11. See T. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA's "Veil of Amateurism,"* 35 U. DAYTON L. REV. 175, 186–88 (noting courts' general deference to NCAA in past litigation).

12. *Id.* at 178.

13. See *Oliver*, 155 Ohio Misc. 2d at 31–33.

14. See *infra* text accompanying notes 53–54.

an overview of *Oliver* because the case does represent an extraordinary defeat for the NCAA and also serves as a good introduction to the NCAA's broader concerns about student-athletes' use of agents. The article next examines the relevant rule structure the NCAA has adopted to address concerns about amateurism. The article then shifts the focus to the specific problem of applying the no-agent rules to non-lawyer representatives of baseball student-athletes, using a recent case as an example. The article concludes with a few modest suggestions for the NCAA and its member institutions in their application of amateurism rules in this particular context.

II. THE *OLIVER* CASE

Andy Oliver's troubles with the NCAA began during his senior year of high school in Vermilion, Ohio.¹⁵ Anticipating that an MLB club might draft him in June 2006, shortly after his high school graduation, Oliver and his family retained the services of the Icon Sports Group—specifically attorneys Robert and Tim Baratta—in February 2006.¹⁶ Sure enough, the Minnesota Twins drafted Oliver in the 17th round during the First-Year Player Draft in June.¹⁷ During a meeting later that summer, representatives of the Twins met with Oliver and his father at their family home in Ohio, offering Oliver a \$390,000 signing bonus to join the Twins.¹⁸ On the advice of his father, Oliver turned down the offer and later enrolled at Oklahoma State University, where he pitched on scholarship for the Cowboys during his freshman and sophomore years.¹⁹

Unfortunately for Oliver, one of his attorneys, Tim Baratta, had attended the meeting between the Olivers and the Twins representatives in the summer of 2006.²⁰ This was in violation of NCAA Bylaw 12.3.2.1, which stated (and still states):

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.²¹

To be clear, the plain language of the bylaw made Baratta's presence during the meeting a violation. Baratta was a lawyer representing Oliver at the

15. *See Oliver*, 155 Ohio Misc. 2d at 22.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 22–23.

20. *Id.* at 22.

21. NCAA Bylaws, *supra* note 9, § 12.3.2.1.

time, so his “presence” during contract discussions in the Oliver home is “considered representation by an agent” by the NCAA, in violation of the broader no-agent rule.

Thus, after the violation was discovered, the only possible legal challenge Oliver had was to attack the rule itself, which he did. After Oklahoma State University suspended him in May 2008—not only for allowing Baratta to be present during the contract discussions, but also for allowing the Barattas “to contact the Minnesota Twins by telephone”²²—Oliver brought an action in the Ohio Court of Common Pleas.

The Ohio state court judge issued a temporary restraining order in Oliver’s favor in the summer of 2008.²³ The NCAA, however, still considered Oliver to be ineligible, so in October 2008 the university petitioned the NCAA for reinstatement of Oliver’s eligibility.²⁴ In December the NCAA suspended Oliver for one full season, but after an appeal reduced that suspension to seventy percent of the season.²⁵

Oliver continued to press his action in the Ohio court, seeking both declaratory and injunctive relief against enforcement of NCAA Bylaw 12.3.2.1.²⁶ The court recognized that the attorney’s presence clearly violated the rule, but the rule itself was subject to challenge: “Was Baratta’s presence in that room a clear indication that [Oliver] . . . was a professional? According to Bylaw 12.3.2.1, . . . he was. As such the following issues must be resolved: Is the . . . rule against the public policy of Ohio? Is it arbitrary? Is it capricious?”²⁷

The court answered the latter two questions in the affirmative, and at least implicitly determined the NCAA rule invalid as against public policy as well:

For a student-athlete to be permitted to have an attorney and then to tell that student-athlete that his attorney cannot be present during the discussion of an offer from a professional organization is akin to a patient hiring a doctor, but the doctor is told by the hospital board and the insurance company that he cannot be present when the patient meets with a surgeon because the conference may improve his patient’s decision-making power. Bylaw 12.3.2.1 is unreliable (capricious) and illogical (arbitrary) and indeed stifles what attorneys are trained and retained to do.

...

22. *Oliver*, 155 Ohio Misc. 2d at 23.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 24.

27. *Id.* at 32.

This court appreciates that a fundamental goal of the member institutions and the [NCAA] is to preserve the clear line of demarcation between amateurism and professionalism. However, to suggest that Bylaw 12.3.2.1 accomplishes that purpose by instructing a student-athlete that his attorney cannot do what he or she was hired to do is simply illogical. . . .

. . . [N]o entity, other than that one designated by the state, can dictate to an attorney where, what, how, or when he should represent his client. . . . If the [NCAA] intends to deal with this athlete or any athlete in good faith, the student-athlete should have the opportunity to have the tools present (in this case an attorney) that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.²⁸

The *Oliver* decision was a strong rebuke to the NCAA, which argued that as a voluntary association of member schools, its bylaws were presumptively valid and “rationally related to . . . preserving the amateur model of collegiate athletics.”²⁹ Those arguments certainly have carried the day in prior court challenges to NCAA enforcement of its bylaws.³⁰ But Judge Tone of the Ohio Court of Common Pleas was simply not prepared to grant that much deference to the Association: “Just because member institutions agree to a rule or bylaw does not mean that the bylaw is sacrosanct or that it is not arbitrary or capricious.”³¹

As noted previously, the court’s injunction against the enforcement of Bylaw 12.3.2.1 was vacated as part of a settlement that also included a reported \$750,000 payment by the NCAA to Oliver and his attorney.³² Since 2009, then, the NCAA has continued to enforce the rule, even though the *Oliver* decision calls into question the rule’s viability.

The *Oliver* decision focused specifically on Bylaw 12.3.2.1 and whether preventing an attorney’s participation in contract negotiations unduly interfered with the attorney-client relationship. By noting that “no entity, other than that one designated by the state,” can regulate attorney conduct,³³ the court also seemed to ground its decision in the well-recognized principle that regulation of attorney conduct is exclusively the province of *state* regu-

28. *Id.* at 32–33.

29. *Id.* at 25.

30. See Lockhart, *supra* note 11, at 186–88.

31. *Oliver*, 155 Ohio Misc. 2d at 33–34.

32. Pat Borzi, *Settlement Sheds Little Light on N.C.A.A. No-Agent Rule*, N.Y. TIMES (July 23, 2010), <http://www.nytimes.com/2010/07/24/sports/baseball/24advisers.html>.

33. *Oliver*, 155 Ohio Misc. 2d at 33.

lators, particularly state supreme courts.³⁴ (Oliver had argued that the Barattas, as Ohio attorneys, were “subject to the exclusive regulation of the Ohio Supreme Court. Therefore, the [NCAA] has no authority to promulgate a rule that would prevent a lawyer from competently representing his client.”³⁵)

Despite its attorney-specific ruling, however, *Oliver* is also about the fundamental unfairness of requiring young student-athletes to negotiate with MLB clubs without help: “[T]he student-athlete should have the opportunity to have the tools present . . . that would allow him to make a wise decision . . . especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.”³⁶ The “tool” at issue in *Oliver* was an attorney, but the same rationale applies to non-attorney representatives who might assist the student-athlete in making a wise decision.

This article focuses not on the attorney-specific aspects of the *Oliver* case, but on broader *agent* issues—after all, NCAA Bylaw 12.3.2.1 is a subsection of NCAA Bylaw 12.3 of the NCAA rulebook, which is entitled “Use of Agents.”³⁷ While even the *presence* of an attorney during contract negotiations constitutes a violation, the application of the bylaws to non-attorney representatives of student-athletes is not so clear. For example, the *Oliver* court noted that the NCAA “permits student-athletes and their parents to negotiate contracts while in the presence of a sports representative,” but only if that representative is a non-attorney.³⁸ That may be a reasonable interpretation of the bylaws, but in reality, seldom will a student-athlete be in the clear with a non-attorney “sports representative” present for negotiations.

III. THE BYLAWS

The NCAA Division I Manual devotes an entire chapter, or “article,” to “Amateurism.” Article 12 begins with two ideals: (1) “Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”³⁹ (2) “Member institutions’ athletics programs are designed to be an integral part of the educational program[,]” so NCAA institutions must maintain “a clear line of demarcation between college athletics and

34. See, e.g., 7 C.J.S. *Attorney & Client* § 2 (2004) (“The practice of law is a privilege . . . bestowed upon certain persons . . . upon such terms and conditions as the state may fix.”).

35. *Oliver*, 155 Ohio Misc. 2d at 24.

36. *Id.* at 33.

37. NCAA Bylaws, *supra* note 9, § 12.3.

38. 155 Ohio Misc. 2d at 32.

39. NCAA Bylaws, *supra* note 9, § 12.01.1.

professional sports.⁴⁰ A multitude of rules (“bylaws”) put flesh on these two basic principles, but this article will focus on a handful of rules that apply directly to the use of representatives in negotiating MLB contracts.

The starting point is NCAA Bylaw 12.1.2, which states that “[a]n individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual . . . [e]nters into an agreement with an agent.”⁴¹ A subsequent bylaw related to negotiations surrounding a professional draft provides that a student-athlete, his parents or legal guardians, or an institution’s “professional sports counseling panel” may negotiate with a professional team without the student-athlete losing his amateur status.⁴² However, a student-athlete “who retains an agent shall lose amateur status.”⁴³

Thus, the NCAA legislation is clear that retention of an agent will render a student-athlete ineligible. But when is a representative an “agent”? In 2012 the NCAA approved an expanded definition of “agent.”⁴⁴ NCAA Bylaw 12.02.1 now states:

An agent is any individual who, directly or indirectly:

- a) Represents or attempts to represent an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or
- b) Seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete’s enrollment at an educational institution or from a student-athlete’s potential earnings as a professional athlete.

12.02.1.1 Application. An agent may include, but is not limited to, a certified contract advisor, financial advisor,

40. *Id.* § 12.01.2.

41. *Id.* § 12.1.2-(g). NCAA Bylaw 12.1.2 also addresses other ways in which a student-athlete can lose amateur status, including accepting pay to play, signing a professional contract, competing for a professional team, or entering a professional draft. Unlike in other sports, such as basketball and football, a baseball player need not “enter” the MLB draft by officially declaring for the draft; MLB clubs simply draft student-athletes who are eligible—i.e., high school seniors and college juniors. Official Rules, *supra* note 3; *see also* Borzi, *supra* note 32.

42. NCAA Bylaws, *supra* note 9, § 12.2.4.3. Another bylaw, 12.3.4, permits an NCAA member university to create a professional sports counseling panel to advise student-athletes regarding potential professional careers. The creation of such a panel, however, is strictly optional, and many universities do not have such a panel. For more information regarding the panels, see Karcher, *supra* note 2, at 218–19, 223–24. Karcher notes that even those universities that do provide such a service to their student-athletes may have an inherent conflict of interest in wanting their junior ballplayers to return to school rather than turn professional. *Id.* at 224. Moreover, the panels are unavailable to high school draft prospects. *Id.*

43. NCAA Bylaws, *supra* note 9, § 12.2.4.3.

44. *See id.* § 12.02.1 (noting adoption of agent definition on January 14, 2012).

marketing representative, brand manager or anyone who is employed or associated with such persons.⁴⁵

The definition tracks language that has been included for many years in NCAA Bylaw 12.3 on “Use of Agents.” That rule makes a student-athlete ineligible for intercollegiate competition if the student-athlete “ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in [a] sport.”⁴⁶ The bylaw also renders a student-athlete ineligible for accepting “transportation or other benefits” from (1) “[a]ny person who represents any individual in the marketing of his or her athletics ability” or (2) “[a]n agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete’s sport.”⁴⁷

Agents, then, are clearly off-limits to student-athletes who seek to compete (or to continue competing) at the intercollegiate level. Collectively, these bylaws can be considered a forceful NCAA “no-agent rule.” Yet the bylaws, including the bylaw defining an “agent,” still leave ambiguities in their application—at least in the sport of baseball, where the NCAA permits players to use an “advisor.”⁴⁸ What does seem clear, however, is the NCAA’s focus on two particular activities that will render an advisor an agent: (1) the *marketing* of a student-athlete’s athletics ability or reputation, and (2) the participation in *negotiations* with an MLB club.

Finally, NCAA Bylaw 12.3.2 addresses the conduct at the heart of the *Oliver* case—a student-athlete’s retention of a *lawyer* to secure advice about a professional contract. The bylaw begins with a seeming exception to the no-agent rule: “Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule”⁴⁹ But the rule immediately begins to chip away at what such an attorney can do: “unless the lawyer also represents the individual in *negotiations* for such a contract.”⁵⁰ And as we saw in *Oliver*, lawyers are also explicitly excluded from even being “*present* during discussions of a contract offer with a professional organization” and from “direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual.”⁵¹

NCAA Bylaw 12.3.2 severely restricts the use of a lawyer representative. The rule permits the lawyer to give advice to the student-athlete re-

45. *Id.* (date of adoption omitted).

46. *Id.* § 12.3.1 (noting adoption in 1997).

47. *Id.* § 12.3.1.2.

48. *See infra* text accompanying notes 53–54.

49. NCAA Bylaws, *supra* note 9, § 12.3.2.

50. *Id.* (emphasis added).

51. *Id.* § 12.3.2.1 (emphasis added).

garding the terms of a contract proffered by an MLB club, but it prevents the lawyer from engaging in negotiations with the club on behalf of the client. Indeed, any “direct contact” with an MLB club by a lawyer on behalf of a client is prohibited. (It bears repeating that these restrictions apply only to student-athlete clients that wish to preserve their option of future collegiate competition. Any MLB draftee is free to use an agent—attorney or otherwise—in negotiations as long as the draftee understands that he will no longer be eligible to compete at an NCAA institution.)

The *Oliver* court’s discomfort with NCAA Bylaw 12.3.2 is understandable. An attorney’s usefulness to a client is seriously impaired if the attorney is unable to represent that client *fully*, by engaging directly with the parties on the other side of the bargaining table. But again, the rules are clear, and if a student-athlete like Andy Oliver decides to engage an attorney to represent him directly with an MLB club, the student-athlete should be fully aware of the risks to his collegiate eligibility.

It is not surprising, in light of NCAA Bylaw 12.3.2, that some student-athletes who wish to preserve all of their options will avoid attorney representatives. If they seek help in the draft process, they steer instead toward non-attorney representatives. The perils that come with that choice are the focus of the remainder of this article.

IV. APPLICATION OF THE BYLAWS TO NON-LAWYER REPRESENTATIVES

A. The “Advisor” Trap

The NCAA bylaws and their interpretations create a trap for the unwary. As noted above, NCAA Bylaw 12.3.2 explicitly singles out lawyer representatives for special treatment, prohibiting their direct contact with MLB clubs and their presence at discussions with club representatives relating to contract offers.⁵² Naturally, one might presume that non-lawyers, by their absence from the bylaw, have more latitude—that is, they *can* contact MLB clubs directly and be present during contract negotiations, but *not* if they’re acting as “agents.” Agents are always off-limits due to the no-agent rules.

If that were not challenging enough, the NCAA has introduced a third category of representatives into the mix—“advisors.” Guidance available on the NCAA website poses a series of questions and answers geared toward college juniors who are becoming draft-eligible.⁵³ One of those questions asks, “Am I permitted to have an advisor during this [draft] process?”

52. NCAA Bylaws, *supra* note 9, § 12.3.2.

53. NCAA Memorandum from Mark Hicks, Managing Director of Enforcement, and Kris Richardson, Director of Academic and Membership Affairs, to Division I Baseball Student-Athletes with Remaining Eligibility (Mar. 6, 2014) (on file with author), available at <http://paperzz.com/doc/379817/memorandum-march-6-2014-to-division-i-baseball-ncaa> [hereinafter NCAA Informational Memo].

The answer is “YES!”—in bold letters and green ink (as opposed to red ink for the “NO!” answers).⁵⁴

The task for draft prospects (or draftees), then, becomes clear—how to navigate the waters between an “agent” and an “advisor.” Those waters become particularly treacherous when one realizes that the same individual can wear both hats. For example, a certified agent with the Major League Baseball Players Association can market and negotiate on behalf of one client, but still hold himself out as a mere “advisor” to assist another client who seeks to preserve his amateurism options.⁵⁵

Young student-athletes and their parents are susceptible to representations by agents that they can serve as “advisors” and not jeopardize the student-athletes’ collegiate eligibility. But as the NCAA has made clear in its guidance, the *label* one uses is not determinative; the *activities* in which the representative engages will determine whether one is an agent or merely an advisor.⁵⁶ Again, the focus seems to be on “marketing” a student-athlete’s athletics ability or reputation or actively engaging on the student-athlete’s behalf in negotiations for a professional contract.⁵⁷

The NCAA guidance, however, goes further. After informing student-athletes that “YES!” you can have an advisor, the memo states:

[T]his advisor may not serve as a link between you and the professional sports team. . . . If the advisor has direct contact with a professional team regarding you or your status, whether independently or per your request or direction, the advisor shall be considered an agent and you will have jeopardized your eligibility at an NCAA school. For example, an advisor may not be present during the discussions of a contract offer with a professional team or have any direct contact (including, but not limited to, in person, by telephone, text message, Facebook, MySpace, Twitter, email or mail) with the professional sports team on your behalf.⁵⁸

The effect of these statements, of course, is to close the gap between attor-

54. *Id.* at 3.

55. *See, e.g., infra* note 126.

56. NCAA Informational Memo, *supra* note 53, at 3.

57. The former is highlighted in the NCAA Bylaws, *supra* note 9, § 12.02.1, which focuses on representation of a student-athlete “for the purpose of marketing his or her athletics ability or reputation for financial gain.” Note as well that the new definition of “agent” in the NCAA Manual reaches even one who “indirectly . . . attempts” to market a student-athlete. *Id.* As for negotiations, the NCAA’s informational memo highlights the following statement: “Under NCAA regulations, you and your parents are permitted to receive advice from a lawyer or other individual concerning a proposed professional contract, provided the advisor does not represent you directly in negotiations for the contract.” NCAA Informational Memo, *supra* note 53, at 3 (underlined in original).

58. NCAA Informational Memo, *supra* note 53, at 3 (underlined in original).

ney representatives and non-attorney advisors. The actual legislation (NCAA Bylaw 12.3.2) prohibits only *lawyers* from having “direct contact” with a professional organization on a student-athlete’s behalf, being “present” during contract negotiations, or representing a student-athlete in “negotiations” for a contract. But with its non-legislated interpretation, the NCAA effectively imposes the same restrictions on non-lawyer representatives, who cannot be present during contract negotiations or have “any direct contact” with an MLB club on a student-athlete’s behalf.⁵⁹ Presumably the lack of direct contact also prohibits any contract “negotiations.”

The trap is set. Non-attorney representatives and their clients believe they have steered clear of problems with NCAA Bylaw 12.3.2 because no lawyer is involved. They know the representatives cannot engage in activities associated with agents—marketing a student-athlete and negotiating on his behalf—because those restrictions also are set forth in NCAA legislation. If they are not aware of the NCAA’s broader interpretation, however, they do *not* know the representatives are prohibited from having *any contact* with MLB clubs on behalf of a client, or being present during contract negotiations even if they do not actively engage in those negotiations. Yet as recent cases have shown,⁶⁰ even the slightest contact between an MLB club and an “advisor” has the potential for implicating the no-agent rule.

The trap is not set on purpose. I was involved for many years with infractions cases processed by individuals in the NCAA’s home office, particularly those individuals charged with enforcement of NCAA rules. I know them to be competent staff members whose actions, overwhelmingly, are taken in good faith, and I have the utmost respect for the difficult jobs they have. Yet it seems problematic to build no-agent cases on *interpreta-*

59. Indeed, prohibited contact by advisors is even broader than the prohibited contact for attorneys because the former includes contact by text message, Facebook, MySpace, Twitter, and email—all missing from NCAA Bylaw 12.3.2. Presumably the bylaw will soon catch up in terms of social media. In the meantime, it seems odd in this age that the NCAA would try to cover all social media bases with a list. Does that mean contact by Instagram, LinkedIn, Tumblr, or some other social media platform would be OK? Presumably restrictions on all social media contacts would be a better approach.

60. See, e.g., *infra* text accompanying notes 124–26. In addition to the Wetzler case discussed later in this article, the NCAA’s student-athlete reinstatement staff has decided other cases in recent years, and imposed withholding penalties, based on agent-advisor contact with MLB clubs. Unlike public infractions reports issued by the Committee on Infractions, however, student-athlete reinstatement case reports are not made publicly available. Thus, they are not accessible on the ncaa.org website except to designated employees at member institutions who possess a password. See Chris Low, *NCAA Exec: Athletes’ “Welfare” Is Priority*, ESPN (Dec. 6, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5892059> (interviewing former NCAA Vice President of Enforcement Julie Roe Lach, who explains that federal law on student privacy prevents public reports on student-athlete reinstatement). Student-athlete reinstatement reports are on file with the author.

tions of rules—interpretations that may be unknown to the student-athletes and advisors they affect.

The fact that these cases continue⁶¹ is an indication of one of two scenarios: either (1) agent-advisors (and perhaps their clients) are knowingly violating the rules, or (2) they are unwittingly tripped up by a misunderstanding of what is allowed and disallowed. I have no doubt that some advisors (and some clients) fall into the former category. Much of the NCAA's legislative focus in recent years has been on curtailing the activities of unscrupulous agents,⁶² and I well know from my infractions experience that inter-collegiate athletics participants often knowingly violate the rules as well. Nonetheless, the NCAA should take every step possible to ensure that those who try, in good faith, to stay on the right side of the rules know *all* of "the rules" under which they are expected to operate.

The NCAA, of course, has little direct control over the actions of agent-advisors who operate outside its member institutions. Whether those agent-advisors know the extent of the NCAA's rule interpretations is unknown.⁶³ But hopefully those individuals are paying attention when stories surface of student-athletes rendered ineligible because of their dealings with agents. Certainly it would seem to be in the best interests of the agent-advisors, at least in the long term, to comply with the NCAA's expectations; their business would not be sustainable if their clients regularly ran into difficulties with NCAA eligibility.

For several years, the NCAA has attempted to reach out to member institutions and draft-eligible student-athletes. Each spring, the NCAA sends a memorandum to college juniors with "Information Regarding the . . . Major League Baseball (MLB) First-Year Player Draft, Agents and Tryouts."⁶⁴ The timing of this memo, however, creates significant issues. The individuals the memo is intended to reach are deep in the middle of their playing seasons.⁶⁵ Whether the information even reaches those student-athletes is questionable, and of course it does not reach *high-school* draft prospects.

61. Alan Scher Zagier, *College Baseball Reconsiders Murky Rule on Agents*, USA TODAY (Apr. 6, 2011), http://usatoday30.usatoday.com/sports/college/baseball/2011-04-06-2240467668_x.htm.

62. See Karcher, *supra* note 2, at 215.

63. As noted previously, the NCAA's informational memo setting forth guidance on the MLB draft process and student-athletes' use of agent-advisors is available on the NCAA website, at least with a little hunting. Final decisions of the student-athlete reinstatement staff, on the other hand, are made available to employees of NCAA institutions with NCAA accounts and passwords, but they typically are not available directly on the NCAA website to other members of the public.

64. See NCAA Informational Memo, *supra* note 53 and accompanying text.

65. The 2014 memo was released in March, but in earlier years the memo had not been released until considerably later. The 2013 memo, for example, was dated June 11, after most student-athletes were already out of school for the summer. See *infra* notes 128–30 and accompanying text.

The information also is available on the NCAA website, but it is not particularly easy to locate, and it takes both knowledge of its existence and an affirmative, concerted effort for an interested individual to find the information. In contrast, the actual *rules* (the bylaws, which implicitly give greater leeway to non-lawyer advisors) are readily accessible and perhaps reasonably, but erroneously, considered to be comprehensive in their regulation of agents.

In summary, then, representatives of baseball student-athletes can be lawyers, “agents,” or “advisors”—and each individual can wear multiple hats. MLB draftees (or prospective draftees) can hire an agent to assist them in negotiations with MLB clubs, but as soon as they do, strict NCAA no-agent rules make such student-athletes ineligible for further intercollegiate competition. Student-athletes can hire an “advisor,” but under NCAA bylaws, that individual will be deemed an impermissible “agent” if the individual “markets” a student-athlete’s athletics ability or reputation to MLB clubs or engages on the student-athlete’s behalf in negotiations for a professional contract. Agents or advisors can be lawyers, but in addressing lawyers, NCAA legislation goes beyond marketing and negotiating: a *lawyer* representative of a student-athlete cannot be *present* during contract negotiations with an MLB club, nor can the lawyer have “any *direct contact*” with an MLB club on the student-athlete’s behalf.

This legislative scheme thus distinguishes between lawyer representatives and non-lawyer representatives. The latter seemingly have more latitude to engage with MLB clubs on a student-athlete’s behalf, provided they do not “market” their client or directly “negotiate” for their client. However, a non-legislated NCAA *interpretation* of the bylaws prohibits even non-lawyer advisors from having “direct contact” with an MLB club regarding their clients or being “present” during discussions of a contract offer. This interpretation effectively negates the legislative distinction between lawyer and non-lawyer representatives.

Non-agent advisors (whether attorneys or not) can still serve their clients, but must do so behind the scenes, with student-athletes relaying information from MLB clubs to their advisors and presumably implementing their advisors’ advice in their communications back to MLB clubs. If student-athletes seek to preserve intercollegiate eligibility, they cannot risk allowing any direct communication or contact between advisors and MLB clubs. Not only does this enforcement scheme hamper student-athletes’ negotiating abilities, but it also results in numerous practical problems, which are the focus of the next section of this article.

B. Practical Problems with Rules Enforcement

Practical problems with the enforcement of no-agent rules begin with the ubiquity of student-athlete use of advisors—the vast majority of draft prospects have one. MLB representatives have been candid about the extent to

which they deal with advisors. One former MLB executive told a *New York Times* reporter in 2010 that it was “standard practice” to discuss professional contracts with student-athletes’ advisors: “You’re not dealing with the kid.”⁶⁶ Because the use of advisors is so common, the NCAA opens itself up to charges of selective enforcement virtually anytime it pursues a no-agent case that happens to come to its attention.

Student-athlete use of advisors, of course, is understandable. Young ballplayers in the draft process are expected to make life-altering decisions, and they are naturally inclined to seek the aid of someone familiar with the world of big-business baseball.⁶⁷ The NCAA recognizes that need . . . to a point. In its guidance to draft prospects, the NCAA attempts to answer the question “*Do I need an advisor?*”⁶⁸ with the following:

The answer to this question is not an easy yes or no. You will likely receive many different opinions on this subject depending on who you ask. It is permissible for you to use an advisor to provide advice regarding the draft and/or a professional contract offer, as long as your advisor acts in accordance with the NCAA legislation summarized in this memorandum. . . . You do not need to have an advisor to be recognized or drafted by a MLB club. MLB and its clubs employ numerous scouts, and with 50 rounds of selections, their teams can discover the talents of potential draftees without the assistance of advisors.⁶⁹

This advice appears to reflect the NCAA’s grudging acceptance of reality: we know student-athletes will engage agents or advisors on the advice of others, but the risk of using one likely outweighs the potential benefit—particularly when the restrictions on advisors are severe:

You cannot allow an agent or advisor to have conversations with MLB clubs on your behalf. This means that an agent or advisor cannot discuss your draft status with any club. An agent or advisor cannot discuss your signability or contract status with any club. An agent or advisor cannot arrange tryouts for you with any club.⁷⁰

The NCAA notes that MLB contracts for first-year players “may include: (1) Signing bonus; (2) Scholarship money; (3) Incentive bonus plan;

66. Borzi, *supra* note 32; *see also* Thomas, *supra* note 7 (quoting another anonymous MLB executive as saying “[v]irtually every player has an agent”).

67. Karcher, *supra* note 2, at 221–22, 225 (describing the “big business” aspects of the MLB draft process). Karcher played professional baseball in the Atlanta Braves organization. *Id.* at 225.

68. NCAA Informational Memo, *supra* note 53, at 4 (italics in original).

69. *Id.*

70. *Id.*

(4) Invitations to MLB camps; and (5) MLB starting level.”⁷¹ Some of those terms, in the NCAA’s judgment, can be negotiated by student-athletes and their families without the help of an advisor: “Through your own research, you can learn about scholarship money and the bonus plan and you may also be able to locate past MLB Draft signing bonus numbers to make your own comparison of the offer you receive.”⁷²

With signing bonuses ranging up to the millions of dollars,⁷³ it seems naïve, or worse, for the NCAA to encourage student-athletes to negotiate the terrain of MLB contracts without the assistance of an advisor. In the face of regular criticism of its no-agent rules, the NCAA may be reconsidering its stance. In 2011, Dennis Poppe, at the time the NCAA’s managing director for baseball, suggested that new rules in tune with baseball’s “unique set of circumstances” might be in the works.⁷⁴ To date, though, such changes have not come to pass.

To be fair, the NCAA does permit the use of an advisor, “as long as [the] advisor acts in accordance with. . .NCAA legislation.”⁷⁵ That’s partly true; the NCAA *legislation* consists of the bylaws in the Division I Manual, but as noted above, the NCAA has added another layer of constraints in more informal *interpretations* of those bylaws.⁷⁶ So student-athletes and their advisors must be aware of both the NCAA bylaws and the NCAA’s interpretations of those bylaws in order to stay on the sunny side of the no-agent rules.

For example, it is critical that student-athletes, their families, and potential advisors have knowledge of the NCAA directive—from a bylaw *interpretation*—that an advisor, whether attorney or not, “may not be *present* during the discussions of a contract offer with a professional team.”⁷⁷ Knowledge of that one straightforward rule can help to avoid difficulties for student-athletes who, in reliance on a bylaw focusing solely on attorneys, may unwittingly seek to have non-attorney advisors accompany them to contract discussions with representatives of an MLB club.

71. *Id.*

72. *Id.*

73. See Karcher, *supra* note 2, at 220–21 (listing signing bonuses of top draftees from 1989–2004 and noting that even a third-rounder in the 2004 draft received a bonus of \$2.29 million).

74. Zagier, *supra* note 61 (quoting Poppe’s observation that “[i]f I had a kid who was left-handed and threw 95 (mph), I’d like to know what his value would be”). Poppe retired in January 2014; in June 2014, the “Dennis Poppe Plaza” outside TD America Park, home of the College World Series in Omaha, was named in his honor. Eric Olson, *CWS Stadium Plaza Named in Honor of Retired NCAA Official Dennis Poppe*, NCAA.COM (June 6, 2014), <http://www.ncaa.com/news/baseball/article/2014-06-06/cws-stadium-plaza-named-honor-retired-ncaa-official-dennis-poppe>.

75. See *supra* text accompanying note 69.

76. See *supra* text accompanying notes 58–59.

77. NCAA Informational Memo, *supra* note 53, at 3 (emphasis added).

Even if student-athletes are aware of all relevant NCAA rules, enforcement of those rules remains difficult because of the inherent ambiguity of relevant terms. For example, the same interpretation quoted above forbids advisors from having “*any direct contact . . . with the professional sports team on [the student-athlete’s] behalf.*”⁷⁸ But what kind of contact is “on the behalf” of a student-athlete? Does a simple voice or text message between an advisor and an MLB representative—“Hi, this is Joe Smith. Just wanted to introduce myself. I understand you’ve been scouting John Johnson, and thought I’d let you know I’m his advisor.”—constitute a violation? Does contact “on behalf of” a student-athlete imply some type of “marketing” of a student-athlete’s athletics ability or reputation, and does an introductory contact such as the one above constitute “marketing”?

What constitutes “indirect” contact? And does it matter who *initiates* the contact? The rules appear to forbid any direct contact between advisor and MLB club representative, but as a practical matter, that could give significant leverage to an MLB club seeking to manipulate the rules to its advantage. For example, what would stop an MLB club from initiating direct contact with the advisor of one of its draftees, thus rendering the draftee ineligible to compete at the intercollegiate level, and then using that presumed ineligibility as an inducement for the student-athlete to sign a professional contract, perhaps with terms favorable to the club?

One can see that the bylaws and their interpretations give the NCAA’s rules-enforcement staff immense latitude in deciding whether to pursue alleged no-agent violations. That latitude is enhanced by the expanded definition of “agent” that the NCAA adopted in 2012, which includes “any individual who, directly or indirectly . . . [s]eeks to obtain any type of financial gain or benefit . . . from a student-athlete’s potential earnings as a professional athlete.”⁷⁹ That definition, again depending on how NCAA representatives interpret it, seemingly could embrace virtually every advisor. What advisor is *not* in the business of seeking, at least indirectly, some financial benefit from the client’s potential professional career?

The process by which no-agent violations are determined also insulates NCAA decisions from meaningful review, which may encourage NCAA staffers to interpret the rules broadly. In a standard infractions case, the NCAA enforcement staff investigates an alleged rules violation, determines whether it is likely that a violation occurred, and then presents its case before the Committee on Infractions.⁸⁰ The Committee ultimately determines whether the evidence supports a finding of a violation.⁸¹ No-agent cases,

78. *Id.* (emphasis added).

79. NCAA Bylaws, *supra* note 9, § 12.02.1-(b).

80. See Jerry R. Parkinson, *Scoundrels: An Inside Look at the NCAA Infractions and Enforcement Processes*, 12 WYO. L. REV. 215, 225–27 (2012).

81. *Id.* at 227.

however, rarely go through that process because student-athlete eligibility is the central issue, and eligibility matters are resolved by a separate student-athlete reinstatement staff.⁸²

In a no-agent case, the NCAA enforcement staff, after investigating and determining that a violation likely occurred, presents its evidence to the institution for which the student-athlete competes. The institution then is expected to declare the student-athlete ineligible and seek *reinstatement* through a student-athlete reinstatement process.⁸³ Typically a reinstatement—granted by NCAA staff without a formal finding of a violation by the infractions committee—carries with it a withholding of the student-athlete from competition, sometimes permanently, but more typically for part or all of a season.

Schools seldom contest the enforcement staff's determination that a violation occurred because challenging that determination—and allowing the student-athlete to continue competing—exposes the institution to further sanctions if the challenge is unsuccessful.⁸⁴ Moreover, challenges take time, and, if the case is being processed either shortly before or during the playing season, the interests of both the institution and the student-athlete may be best served by getting the student-athlete back on the field as soon as possible. In that scenario, institutions often will be inclined to bite the bullet, declare the student-athlete ineligible (even if there is doubt about a violation), and seek reinstatement as soon as possible. It serves little purpose, for example, to spend even a couple of weeks at the beginning of a season challenging a no-agent violation if the likely result of the reinstatement process is a modest withholding of the student-athlete from competition.

The institutional incentive to declare a student-athlete ineligible and seek reinstatement highlights an inherent conflict-of-interest problem: the student-athlete's interests may differ from the interests of the other participants in the process—the student-athlete's institution, MLB clubs, and even the student-athlete's own advisor. In their enforcement of no-agent rules, NCAA staffers must consider that these other participants may manipulate the process to the detriment of the student-athlete.

A student-athlete, for example, may believe that he has committed no violation, but rather than challenge the NCAA's case against him, he may

82. *Behind the Blue Disk, Student-Athlete Reinstatement: How It Works*, NCAA (Oct. 21, 2009), available at [http://www.ncaa.org/sites/default/files/SAR%2BBlue%2BDisk%2B\(web%2Bone\).pdf](http://www.ncaa.org/sites/default/files/SAR%2BBlue%2BDisk%2B(web%2Bone).pdf) [hereinafter NCAA Student-Athlete Reinstatement Summary].

83. *Id.*

84. If the school allows a student-athlete to compete, but after the challenge, the student-athlete ultimately is determined to have committed a no-agent violation, the school effectively has allowed competition by an ineligible student-athlete and is subject at least to a vacation of contests in which the student-athlete competed.

defer to his institution's decision to withhold him from competition—a decision heavily influenced by the threat of sanctions, should the program compete with an ineligible player. Another example arises from a provision in the NCAA bylaws that allows an institution to create a “professional sports counseling panel” to assist its student-athletes in negotiating with MLB clubs.⁸⁵ The bylaws specifically allow such a panel to “enter into negotiations with a professional sports organization” on behalf of a student-athlete without jeopardizing the student-athlete's eligibility.⁸⁶ But as one commentator (and former major leaguer) has noted, that arrangement creates “an inherent conflict of interest . . .—the school may have an interest in having its players play for the school another year instead of becoming a professional.”⁸⁷

Potential conflicts of interest between the student-athlete and MLB clubs are readily apparent. Not only does each party in contract negotiations seek to secure terms favorable to its position, but MLB clubs' interest even in signing their draftees could run counter to a student-athlete's interest in competing (or continuing to compete) in college. In one recent example, an MLB club was alleged to have retaliated against draftees who decided to return to their institutions to compete in their senior year. The retaliation allegedly took the form of “turning in” the student-athletes to the NCAA for violations of the no-agent rules, despite the club's willingness to engage with (that is, to have “direct contact” with) the student-athletes' advisors during the draft process.⁸⁸

Similar scenarios can arise in the relationship between student-athletes and their advisors. Because most of those advisors presumably are interested in a longer-term relationship with their clients that will continue to compensate them as the clients become professionals, they may have interests that differ from the interests of their clients. An advisor, for example, may wish to strike while the iron is hot and encourage a student-athlete client to sign a professional contract rather than to enter (or return to) college. Similarly, they may be inclined to reach out to MLB representatives, in violation of NCAA no-contact rules, unbeknownst to their clients.⁸⁹

85. NCAA Bylaws, *supra* note 9, § 12.3.4.

86. *Id.* § 12.2.4.3. The bylaw specifically provides that the panel may engage in negotiations “without the loss of the [student-athlete's] amateur status.” *Id.*

87. Karcher, *supra* note 2, at 224. Karcher played three seasons as a first baseman for the Atlanta Braves. *Id.* at 225.

88. *See infra* text accompanying notes 106–109.

89. The NCAA's 2014 informational memo states that agent-advisor contact with an MLB club is a violation regardless of whether the contact was made “independently or per [the student-athlete's] request or direction.” NCAA Informational Memo, *supra* note 53, at 3. That is new language in the memo; the 2013 memo did not include such language. Memorandum from Rachel Newman Baker, Managing Director of Enforcement, and Kris Richardson, Director of Academic and Membership Affairs, to Division I Baseball Student-Athletes with Remaining Eligibility (June 11, 2013) (on file with author) [hereinafter NCAA 2013 Informational Memo]. The message to student-

The *Oliver* case illustrates what can happen if the advisor-client relationship turns sour. Recall that Oliver, according to the NCAA, violated the no-agent rule when one of his attorney-advisors was present during a meeting with the Minnesota Twins to discuss a contract offer.⁹⁰ The case opinion reports that the attorney attended the meeting, held in the Oliver home, at the attorney's "own request"⁹¹—despite the fact that NCAA Bylaw 12.3.2.1 specifically prohibited lawyers from being present during discussions of a contract offer.⁹² Even at this stage, the attorney may have been acting in his own interests rather than in the interests of his client, who may not have wanted the attorney present.⁹³

What happened subsequent to the meeting is even more troubling. Over a year and a half later, in March 2008, Oliver decided to terminate his relationship with his attorney-advisors and retain the Boras Corporation instead.⁹⁴ Two months later, presumably miffed at this turn of events, Oliver's former attorneys notified the NCAA (by regular mail, fax, and email) of the NCAA violation that they had caused in 2006.⁹⁵ That same month, Oliver's school, Oklahoma State University, suspended him indefinitely from the baseball team.⁹⁶

Oliver's case is a cautionary tale for student-athletes considering the retention of an advisor to represent them in their dealings with MLB clubs. But at least the violation in the *Oliver* case easily could have been avoided—the no-attorney-presence bylaw was (and remains) clear. More problematic are situations in which student-athletes attempt in good faith to comply with the rules, but get tripped up because they are not aware of NCAA interpretations of rules, or because of the inherent ambiguity of the rules related to non-attorney advisors. The next section provides an illus-

athletes, then, is clear: it really does not matter to the NCAA whether one's agent-advisor has contact with an MLB club without the student-athlete's knowledge; it is still a violation.

90. *Oliver v. Nat'l Collegiate Athletic Ass'n*, 155 Ohio Misc. 2d 17, 22–23 (Com. Pl. 2009).

91. *Id.*

92. *Id.* at 30.

93. The opinion does not indicate whether either Oliver or the attorney was aware of the NCAA prohibition.

94. *Oliver*, 155 Ohio Misc. 2d at 23. The Boras Corporation is owned by Scott Boras, a "super-agent" who has represented many of the top MLB players. The 10-year, \$252 million contract he negotiated for Alex Rodriguez with the Texas Rangers in December 2000 was by far the richest in professional sports history. Henry Schulman & John Shea, *\$252 MILLION MAN / Rodriguez Signs with Rangers; Contract Doubles Previous Richest*, S.F. CHRON. (Dec. 12, 2000), <http://www.sfgate.com/sports/article/252-MILLION-MAN-Rodriguez-signs-with-Rangers-3238243.php>.

95. *Oliver*, 155 Ohio Misc. 2d at 23.

96. *Id.*

tration of such a case.

C. The Wetzler Case: Anatomy of a No-Agent Violation

One commentator has called the Wetzler case “[t]he first major application of the No-Agent Rule by the NCAA since Andy Oliver.”⁹⁷ While the NCAA has enforced its no-agent rules in numerous other cases since *Oliver*, the Wetzler case probably generated more heat and attention because of the role played by another participant in the MLB draft process. Recall that in *Oliver*, a disgruntled agent-advisor reported a violation to the NCAA. The Wetzler case was facilitated, if not initiated, by a spurned MLB club.⁹⁸

Ben Wetzler was a promising pitcher coming out of high school in 2010 in Clackamas, Oregon.⁹⁹ A left-hander, he drew enough attention to be drafted in the 15th round of the 2010 MLB First-Year Player Draft by the Cleveland Indians.¹⁰⁰ Wetzler had his heart set, however, on pitching for Oregon State University, which had won back-to-back national championships in 2006-07.¹⁰¹ He had considerable success in college, garnering first-team all-PAC-12 honors and helping his team earn a bid to the College World Series in his junior year.¹⁰²

As a result, in June 2013, at the end of Wetzler’s junior year, he was drafted in the fifth round of the First-Year Player Draft by the Philadelphia Phillies and offered “a signing bonus in the neighborhood of \$350,000.”¹⁰³

97. Darren Heitner, *Why the Philadelphia Phillies and NCAA Deserve Your Scorn*, FORBES (Feb. 23, 2014), <http://www.forbes.com/sites/darrenheitner/2014/02/23/why-the-philadelphia-phillies-and-ncaa-deserve-your-scorn>.

98. In the spirit of full disclosure, I represented Mr. Wetzler in reinstatement proceedings before the NCAA. I do not represent him, and have not represented him, in dealings with any MLB organization. This account is based solely on published newspaper reports and does not disclose any communications between Mr. Wetzler and myself, or any confidential information revealed in the NCAA investigation or reinstatement proceedings.

99. 2014 OREGON STATE BASEBALL MEDIA GUIDE, OR. ST. U., at 46 (Jan. 26, 2014), available at http://www.osubeavers.com/pdf9/2619546.pdf?SPSID=750183&SPID=127157&DB_OEM_ID=30800.

100. *Id.* at 45. Wetzler was named the top high school player in Oregon by *Baseball Northwest* and garnered both Gatorade and Louisville Slugger Player of the Year honors. His high school win-loss record was 28-3. *Id.* at 46.

101. *Id.* at 45.

102. *Id.*

103. Kerry Eggers, *Phillies, NCAA Are the Bad Guys – Not Ben Wetzler*, PORTLAND TRIB. (Feb. 21, 2014), <http://portlandtribune.com/pt/12-sports/211798-69615-eggers-phillies-ncaa-are-the-bad-guys-not-ben-wetzler>; Connor Letourneau, *Oregon State Baseball: NCAA Ruling on Ben Wetzler Feeds National Debate on “No Agent” Rule*, OREGONIAN (Feb. 21, 2014), http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_wetzler.html (Phillies’ offer “reportedly included a signing bonus of about \$350,000”).

Intent on helping his OSU teammates return to Omaha (home of the College World Series), Wetzler turned down the Phillies' offer and returned to Oregon State to complete his college degree and compete for the Beavers in his senior year.

Wetzler's plan began to unravel in November 2013, when he and Oregon State officials learned that the NCAA was investigating Wetzler for an alleged violation of the no-agent rules during the draft process earlier that year.¹⁰⁴ Ultimately, on February 21, 2014, the NCAA issued a public statement announcing that Wetzler was suspended for 11 games (20% of the season) "due to his involvement with an agent during the 2013 Major League Baseball draft."¹⁰⁵

By the time of the NCAA announcement, the case already had generated some notoriety. The investigation had become public when Wetzler did not compete for his team at the beginning of the season¹⁰⁶; soon after, it was reported that representatives of the Philadelphia Phillies had told the NCAA enforcement staff that Wetzler had used an agent during the contract negotiation process that accompanied the 2013 draft. Aaron Fitt, a writer for *Baseball America*, first disclosed on February 20, 2014 that "[s]everal sources have confirmed . . . that the Phillies . . . told the NCAA in November that Wetzler violated the NCAA's 'no-agent' rule."¹⁰⁷ The Phillies initially had no comment, but after the NCAA reported Wetzler's suspension, the Phillies organization issued the following statement: "The Phillies did participate in the NCAA investigation and a ruling has been issued. We believe it is inappropriate to comment further on either the negotiation with the player or the action taken by the NCAA."¹⁰⁸

The reaction to the Phillies' involvement, from commentators around the country, was immediate and harsh, particularly after it was reported that the

104. Seth Prince, *NCAA Rules Ben Wetzler Will Miss 20 Percent of Season; Oregon State Calls Penalty "Too Harsh,"* OREGONIAN (Feb. 21, 2014), http://www.oregonlive.com/beavers/index.ssf/2014/02/ncaa_rules_ben_wetzler_will_20.html (quoting press release from Oregon State University noting that "[t]he NCAA notified OSU in late November 2013 of its intent to conduct an investigation involving Wetzler").

105. NCAA Press Release, *Oregon State's Ben Wetzler Eligible to Play on March 2* (Feb. 21, 2014), <http://www.ncaa.org/about/resources/media-center/press-releases/oregon-states-ben-wetzler-eligible-play-march-2>.

106. See Letourneau, *supra* note 103 (noting that Wetzler did not travel with the team on its season-opening road trips and was likely to miss his third start before becoming eligible on March 2).

107. Aaron Fitt, *Phillies Accused Ben Wetzler of NCAA Rules Violations*, BASEBALL AMERICA (Feb. 20, 2014), <http://www.baseballamerica.com/college/phillies-accused-ben-wetzler-of-ncaa-rules-violations/>.

108. Aaron Fitt, *Oregon State's Ben Wetzler Suspended 11 Games by NCAA*, BASEBALL AMERICA (Feb. 22, 2014), <http://www.baseballamerica.com/college/oregon-states-ben-wetzler-suspended-11-games-by-NCAA/>.

Phillies also had reported a similar violation by their sixth-round draft pick, Jason Monda of Washington State University, whom the Phillies also were unsuccessful in signing to a professional contract.¹⁰⁹ A *Forbes* writer called the Phillies' actions "downright deplorable . . . and preposterous."¹¹⁰ A baseball writer from *CBS Sports* suggested that the Phillies' actions would come back to haunt them:

[N]ow that word has gotten out that the Phillies turned in Wetzler, they potentially have a very serious problem themselves. . . . [I]t's hard to imagine being a highly-touted collegiate junior and seeing upside in being drafted by the Phillies as opposed to 29 other teams who haven't turned in a kid and cost him 20 percent of his senior year.¹¹¹

Fitt, of *Baseball America*, even suggested that the Phillies would be shut out of future negotiations involving some agents' clients. He quoted an unnamed agent "who advises numerous high-profile prospects" as saying, in response to the Phillies' actions,

As of today, the Phillies are out. If the Phillies call for an in-home visit, the Phillies are not getting into any more of our households. We're going to shut down all communication with the Phillies—no questionnaires returned, no communications with the Phillies' scouts about when players are going to pitch and no communication about signability information. You can't have this adversarial relationship between teams and players, and then have them be able to hold that over the players: "You'd better take this deal or I'm going to turn you in."¹¹²

The reason for all the criticism, of course, is that virtually all MLB draftees use agent-advisors, and MLB clubs willingly work with those advisors during the draft process. To quote Fitt again, "Major league scouting directors have often told [*Baseball America*] that they prefer dealing directly with agents, who know the ins and outs of the draft process. That is the industry norm for baseball"¹¹³ Therefore, for an MLB club to report a student-

109. *Id.* See also Mark Townsend, *NCAA Suspends Oregon State Pitcher Ben Wetzler for 20 Percent of the Season, Phillies Issue Statement*, YAHOO SPORTS (Feb. 22, 2014), <http://sports.yahoo.com/blogs/big-league-stew/ncaa-suspends-oregon-state-pitcher-ben-wetzler-20-171448138-mlb.html>; Matt Gelb, *Ben Wetzler Suspended 11 Games; Oregon State "Disappointed" in Phillies*, PHIL. INQUIRER (Feb. 22, 2014), <http://www.philly.com/philly/blogs/sports/phillies/Ben-Wetzler-suspended-11-games-Oregon-State-disappointed-in-Phillies.html>; Heitner, *supra* note 97.

110. Heitner, *supra* note 97.

111. Matt Snyder, *Ben Wetzler Suspended for 20 Percent of Oregon State's Season*, CBS SPORTS (Feb. 21, 2014), <http://www.cbssports.com/mlb/eye-on-baseball/24451662/ben-wetzler-suspended-for-20-percent-of-oregon-states-season>.

112. Fitt, *supra* note 108.

113. *Id.* See also Townsend, *supra* note 109 ("[I]t's understood around the league

athlete to the NCAA for violating the no-agent rules—after the student-athlete decides not to sign a contract with the club—seems either vindictive or retaliatory, or both. And it rarely occurs: *Baseball America* reported that before the Wetzler case, “the last known case of a big league team directly reporting a violation to the NCAA was in 1992, when the White Sox turned in A.J. Hinch.”¹¹⁴

To be fair, the Phillies may not have sought out the NCAA to turn in Wetzler. While its statements on the matter are cryptic,¹¹⁵ the Phillies may have simply responded truthfully to inquiries by the NCAA. A very small number of top-ten-round draftees each year fail to sign a professional contract and return to school.¹¹⁶ Thus, it would not require much effort on the part of the NCAA enforcement staff to seek out information related to each of those players, including whether any given player had been represented by an advisor and what the nature of the advisor’s involvement in contract negotiations had been.¹¹⁷

Regardless of who initiated the discussions between the Phillies and the NCAA, the Wetzler case highlights a significant problem in the development of a no-agent infractions case. As *Baseball America*’s Fitt puts it, “the only players who get punished for violating the ‘no agent’ rule are those who are turned in by a scorned former agent, or a major league team that failed to sign its draftee.”¹¹⁸ And MLB clubs are under considerable pressure to sign draftees because of a collectively bargained “slotting system that predetermines the assigned value to particular draft pick numbers When a team does not sign a player selected, the team . . . forfeits the value assigned to that particular slot.”¹¹⁹ In other words, the club loses

that involving an agent/advisor is a necessary and now standard procedure, regardless of the NCAA rule. MLB teams simply don’t squeal”).

114. Fitt, *supra* note 108.

115. See *supra* text accompanying note 108 (“The Phillies did participate in the NCAA investigation”); Heitner, *supra* note 97 (stating that Phillies general manager Ruben Amaro Jr. “admitted that he was aware when his club decided to report Wetzler to the NCAA”).

116. Fitt, *supra* note 108; Heitner, *supra* note 97.

117. The Phillies’ scouting director, in an interview with Philadelphia’s Daily News in May 2014, stated that the Phillies simply responded to requests for information from the NCAA: “We gave them the information they asked for and let them do their job.” David Murphy, *Phillies Scouting Director Marti Wolever Discusses NCAA, Ben Wetzler Suspension*, (PHIL.) DAILY NEWS (May 29, 2014), <http://www.philly.com/philly/blogs/phillies/Phillies-scouting-director-Marti-Wolever-discusses-NCAA-Ben-Wetzler-suspension.html>.

118. Fitt, *supra* note 108.

119. Heitner, *supra* note 97. Heitner quotes Rick Johnson, the attorney who represented Andy Oliver in his case against the NCAA: “No teams can afford not to have players signed under [the] new hard slotting draft system. On a macroeconomic scale, all MLB teams are probably secretly saying this [the Phillies turning in Wetzler] is great, because in future drafts, players are worried that teams will tattle on them. This is the first time that I’m aware of that a team has done this, but keep in mind that this is

money that it could have used to help sign other draftees.

The pressures on MLB clubs—and the hard feelings that can accompany the failure to sign a draftee—are apparent from the comments of the Phillies’ scouting director. In discussing the club’s failure to sign both Wetzler and Monda, and the Phillies’ cooperation in the NCAA’s subsequent cases against both student-athletes, scouting director Marti Wolever said the following:

The NCAA did the investigation, not the Philadelphia Phillies. That’s one. Two, as I said before, the only regret I have is taking players who wouldn’t sign and had no intentions of signing. We were led to believe, prior to the draft, that both of these gentlemen, according to their agents, would sign. Subsequently, that’s why we took them. We offered what we offered and both accepted and then decided against it after that. Again, my only regret is we could have taken other players who would be in this organization. There’s no compensation and with the new rules the way they are, guess what guys? You can’t use that money. I can’t use it in the back half to sign Jarred Cosart or Jonathan Singleton or any of those kids. I can’t use that money. So all I ask for is for people to be honest and upfront. It’s very plain and simple. If you don’t want to sign, tell us. If you do, let’s try to reach an agreement and let’s move forward. Plain and simple.¹²⁰

“Plain and simple,” perhaps, for MLB clubs, but clearly not so plain and simple for student-athletes like Ben Wetzler, who are dealing with scouts, advisors, and the MLB draft process at the same time they are trying to concentrate on their academics and playing seasons. A host of reasons could influence—and alter—a young ballplayer’s initial inclination to go pro. In Wetzler’s case, he made it clear that the experience of playing in the College World Series with his Oregon State teammates at the end of his junior year led to his desire to return to school. He wanted to be “on the bottom of that dog pile” when his team won the national championship his senior year.¹²¹ In many respects, that is the type of student-athlete the NCAA should applaud, particularly if he is also motivated by the desire to

based on the first year of hard-slotting. So you’ve got a whole different dynamic that’s going on in baseball. If a kid doesn’t sign it costs them money. So they’re going to make someone pay for that. What happens to the signing scout when he doesn’t bring home the bacon?”

120. Murphy, *supra* note 117.

121. Connor Letourneau, *Oregon State Baseball: Ben Wetzler Enters Senior Season Eager to Join the Dog Pile*, OREGONIAN (Feb. 14, 2014), http://www.oregonlive.com/beavers/index.ssf/2014/02/oregon_state_baseball_ben_wetzler.html (quoting Wetzler).

complete his college education.¹²²

Wolever's contempt for young ballplayers who "break their promises"¹²³ is evident in the remarks quoted above. That kind of contempt and anger over the failure to sign a draftee could lead an MLB club not only to turn in a student-athlete to the NCAA, but also to overplay the extent to which the student-athlete's advisor participated in the negotiation process. After all, student-athletes are permitted to have advisors, and the only way the student-athletes can be "punished" for their failure to sign is if those advisors cross the bounds of permissible conduct. I do not contend that the Philadelphia Phillies embellished the facts in the Wetzler case; I simply caution that in similar cases, the NCAA enforcement staff must be wary of building infractions cases on the testimony of individuals who may have ulterior motives.

Another significant problem highlighted by the Wetzler case is the ambiguity of the no-agent rules. Consider the NCAA's public announcement of the sanction against Wetzler:

Oregon State University baseball student-athlete Ben Wetzler must miss 11 games (20 percent of the season) due to his involvement with an agent during the 2013 Major League Baseball draft. According to the facts of the case, which were agreed upon by the school and the NCAA, Wetzler sought help from an agent who attended meetings where Wetzler negotiated contract terms with the team.

NCAA rules allow a baseball student-athlete to receive advice from a lawyer or agent regarding a proposed professional sports contract. However, if the student-athlete is considering returning to an NCAA school, that advisor may not negotiate on behalf of a student-athlete or be present during discussions of a contract offer, including phone calls, email or in-person conversations. Along with the school, a student-athlete is responsible for maintaining his eligibility.

When an NCAA member school discovers a rules violation has occurred involving a student-athlete, it must declare the student-athlete ineligible and may ask the NCAA to restore eligibility. Oregon State submitted its reinstatement request Feb. 18. The

122. Monda decided to go to medical school and forgo any opportunity to play major league baseball. Murphy, *supra* note 117.

123. Note that any such promises to sign are strictly verbal, often relayed through a third party (agent-advisor), and typically made during the intensity of a playing season, when ballplayers seldom have time to reflect seriously on their futures. Should it surprise a sophisticated ball club like the Phillies that young men may change their minds upon true reflection? As Wolever recognizes in his remarks, there is no "agreement" until after a written offer is put on the table and signed.

NCAA then worked with the school to finalize the facts of the case. The NCAA provided the school and student-athlete with a decision today, Feb. 21.¹²⁴

The heart of the violation is found in two sentences: (1) Wetzler's advisor "*attended meetings where Wetzler negotiated contract terms*" with the Phillies; and (2) an advisor may not "*be present during discussions of a contract offer.*" The statement indicates that it is permissible for student-athletes to have an advisor, and it certainly suggests that *Wetzler*, not the advisor, was the person directly negotiating contract terms with the Phillies. But the advisor was present. As noted previously, the NCAA prohibition on advisor presence does *not* come from the NCAA bylaws, which restrict only *attorney* advisors from being present during contract negotiations.¹²⁵ Wetzler's advisor was not an attorney, and perhaps that was intentional on Wetzler's part: the harsher restrictions on attorney advisors are apparent from a look at the NCAA rulebook.¹²⁶

One certainly could read the bylaws as allowing non-attorney advisors to be present during contract negotiations, as long as the advisor does not actively participate in the negotiations. However, as noted previously, the NCAA has purported to *interpret* the bylaws to prohibit the presence of non-attorney advisors as well.¹²⁷ That interpretation is included in an NCAA informational memorandum that is sent to student-athletes near the end of their junior year, presumably to guide them through the MLB draft process.¹²⁸ In Wetzler's case, however, the memo to "Division I Baseball Student-Athletes with Remaining Eligibility" was dated June 11, 2013, and

124. NCAA Press Release, *supra* note 105.

125. *See supra* text accompanying notes 58–59.

126. As the case became public, a reporter identified Wetzler's advisor as Nik Lubisich of Portland, OR. Kerry Eggers, *OSU's Ben Wetzler Still Has One Pitch to Make*, PORTLAND TRIB. (Mar. 2, 2014), <http://portlandtribune.com/pt/12-sports/212650-70420-eggers-osus-ben-wetzler-still-has-one-pitch-to-make>. Lubisich is President and CEO of the Northwest Sports Management Group and according to the organization's website, Lubisich, a former MLB pitcher, is a certified agent with the Major League Baseball Players Association. *Nik Lubisich*, NORTHWEST SPORTS MANAGEMENT GROUP, <http://www.nwsportsmanagementgroup.com/#!nik-lubisich/cw5m> (last visited Mar. 17, 2015). The website also includes a section on "Amateur Athlete Advising," which indicates that while the NCAA prohibits student-athletes from hiring an "agent," it "does allow athletes and their families to utilize an 'advisor' to help facilitate them through the important events leading up to the MLB Draft or in selecting a college." *Services*, NORTHWEST SPORTS MANAGEMENT GROUP, <http://nwsportsmanagementgroup.com/services> (last visited Mar. 17, 2015). In September 2014, Lubisich stated publicly that he had served as Wetzler's advisor during Wetzler's negotiations with the Phillies in 2013. Connor Letourneau, *Ben Wetzler Responds to Firing of Philadelphia Phillies Assistant GM Marti Wolever*, OREGONIAN (Sept. 27, 2014), http://www.oregonlive.com/beavers/index.ssf/2014/09/ben_wetzler_responds_to_firing.html.

127. *See supra* text accompanying notes 58–59.

128. *See supra* text accompanying note 64.

in the first paragraph refers to “the upcoming 2013 Major League Baseball (MLB) first-year player draft scheduled for June 4-6.”¹²⁹

Clearly, it is problematic to “inform” student-athletes of the rules after the fact. Moreover, at the time the memo presumably was sent, Wetzler was headed to Omaha to play in the College World Series with his teammates.¹³⁰ Thus, it seems highly likely that Wetzler would not have known about the NCAA’s non-attorney advisor-presence rule at the time he entered into contract negotiations with the Phillies. Perhaps the advisor should have known, and stayed away from any meetings during which such negotiations were conducted. But the informational memo expanding the presence rule beyond attorneys is not sent to agent-advisors, and it is certainly plausible that an advisor, particularly a relatively inexperienced one, likewise would be ignorant of the interpretation.

The NCAA bylaws also prohibit advisors from “marketing” a student-athlete’s athletics ability or reputation to professional organizations, or directly negotiating on behalf of a student-athlete.¹³¹ But no evidence was cited in the Wetzler case to suggest either of those prohibited actions by Wetzler’s advisor. Indeed, in its final student-athlete reinstatement report, the NCAA staff cited as a mitigating factor in its penalty the fact that Wetzler’s advisor “did not engage directly in negotiations with MLB representatives.”¹³²

Ultimately, then, the NCAA case against Ben Wetzler rested upon an interpretation that (1) is not in the NCAA bylaws, and (2) easily could have been unknown to both Wetzler and his advisor. And to top off the case, the student-athlete reinstatement committee’s final report cites Bylaw 12.3.2 as the governing legislation in the case.¹³³ That simply cannot be the basis of an ineligibility decision, however. Bylaw 12.3.2 addresses only *lawyer* presence at contract negotiations. Wetzler’s advisor was not a lawyer, and he cannot be converted into a lawyer through interpretations of the NCAA legislation. The only possible grounding for a competition-withholding penalty is a straightforward violation of the legislation prohibiting the re-

129. NCAA 2013 Informational Memo, *supra* note 89, at 1.

130. The 2013 College World Series began on June 15, with the championship series scheduled for June 24–26. Benjamin Klein, *College World Series 2013: Early Predictions and Preview*, BLEACHER REPORT (June 12, 2013), <http://bleacherreport.com/articles/1670446-college-world-series-2013-early-predictions-and-preview>.

131. *See supra* text accompanying notes 41–49.

132. NAT’L COLLEGIATE ATHLETIC ASS’N, Student-Athlete Reinstatement and Secondary Infraction Case Report, Feb. 25, 2014 (on file with author). Student-athlete reinstatement reports are not publicly available due to student privacy concerns. *See supra* note 60.

133. NAT’L COLLEGIATE ATHLETIC ASS’N, Student-Athlete Reinstatement and Secondary Infraction Case Report, Feb. 25, 2014 (on file with author).

tention of an *agent*. Yet that also is problematic in light of the agent by-laws' focus on "marketing" and "negotiation."

Note in the NCAA's public statement of Wetzler's sanction the references to the word "agent": "Wetzler must miss 11 games . . . due to his involvement with an *agent* According to the facts of the case, . . . Wetzler sought help from an *agent* who attended meetings" ¹³⁴ Admittedly, Wetzler's advisor was a certified MLBPA agent, ¹³⁵ but the NCAA presented no specific rationale to explain why he could not serve as a non-agent "advisor" to this particular student-athlete—other than to say that if an advisor steps over the line set out in bylaw interpretations, he has become an agent.

The remaining difficulties with the Wetzler case relate to process. Note again the language of the NCAA's public statement: "According to the facts of the case, which were agreed upon by the school and the NCAA," ¹³⁶ No mention is made of the student-athlete's position. It did not matter whether Wetzler concurred in the agreed-upon fact description because a student-athlete reinstatement process essentially adjudicates a dispute involving only the institution and the NCAA. ¹³⁷ Wetzler, for example, presumably would not have agreed that he retained an "agent" rather than an advisor.

In its concluding paragraph, the NCAA statement says, "When an NCAA member school discovers a rule violation, it must declare the student-athlete ineligible and may ask the NCAA to restore eligibility." ¹³⁸ A member school typically "discovers a rule violation" when the NCAA enforcement staff comes knocking with an allegation that a violation has occurred. The institution can contest the allegation, but if it allows the student-athlete in question to compete while the matter is being resolved, the school risks harsher sanctions for competing with an ineligible student-athlete. Thus, the school typically accedes to the command that it "must declare the student-athlete ineligible" and seek reinstatement.

The student-athlete is permitted to submit a personal statement, in which he could protest the finding of a violation, but he ultimately is at the mercy of his institution. And timing can be critical. In Wetzler's case, the "findings of fact" were being formulated as the baseball season was starting. ¹³⁹ If either the university or the student-athlete decide to mount a challenge to

134. See *supra* text accompanying note 124.

135. See *supra* note 126.

136. See *supra* text accompanying note 124.

137. See NCAA Student-Athlete Reinstatement Summary, *supra* note 82.

138. See *supra* text accompanying note 124.

139. See Letourneau, *supra* note 103 (Oregon State hired an attorney in December 2013 and discussed the matter with NCAA officials until February 18, 2014, when the institution proposed a 10% withholding penalty, which was rejected by the NCAA; season-opening game in Tempe, AZ was on Friday, February 14).

the “finding” that a violation occurred, the challenge would prolong the issuance of a sanction, thus jeopardizing even more of the student-athlete’s playing season. As a result, it is sometimes in the student-athlete’s best interest simply to accept a violation, even if it is questionable, and proceed to a resolution of the case as quickly as possible.

The effect of the process is to place enormous power in the NCAA enforcement staff to find a violation, without the usual oversight by the Committee on Infractions. In a typical infractions case, the committee makes findings of violations after hearing evidence from all affected parties and ensuring that the enforcement staff has “made its case.”¹⁴⁰ Because student-athlete *reinstatement* is at the heart of a no-agent violation, that typical process is bypassed in favor of resolution by NCAA staff members—first the enforcement staff and then the student-athlete reinstatement staff.

Wetzler’s case is unusual only because of the Phillies’ active involvement in the development of the NCAA case against him and because of the resultant publicity generated by the Phillies’ actions. The NCAA has processed numerous other cases involving the no-agent rules, and it seems clear from that body of precedent that the enforcement and student-athlete reinstatement staffs have wide latitude to find a violation whenever a student-athlete’s advisor has *any* contact with a professional organization. Indeed, that is the position the NCAA has taken in its informational memorandum to baseball student-athletes: “an advisor may not . . . have any direct contact . . . with the professional sports team on your behalf.”¹⁴¹

The NCAA membership certainly has every reason to try to rein in unscrupulous agents and preserve its amateurism model. But not all agents are unscrupulous, and in baseball particularly, many are simply doing their jobs as advisors of student-athletes trying to navigate the MLB draft process at a busy time in their playing seasons. Representatives of MLB clubs clearly recognize the value of these agents, and often indicate that they “prefer dealing directly with agents, who know the ins and outs of the draft process.”¹⁴² It seems past time for the NCAA to conduct a thoughtful reassessment of the substance and enforcement of its no-agent rules. The following section provides some modest recommendations to consider.

V. RECOMMENDATIONS

The first recommendation is for the NCAA to reconsider the no-agent rules themselves, at least in baseball. After the *Oliver* decision in 2009,

140. See Parkinson, *supra* note 80, at 225–27.

141. See *supra* text accompanying note 58.

142. Fitt, *supra* note 108.

many commentators urged the NCAA, in its zeal to enforce no-agent rules, to consider the unique features of the MLB draft.¹⁴³ Those features include the fact that, unlike college football and basketball players, who “declare” for the draft with a full understanding that they will forfeit their college eligibility by doing so, college and high school baseball players are drafted by MLB clubs without any formal declaration by the student-athletes that they seek to go pro.

Although most top draftees do indeed end up signing professional contracts (at least those drafted as college juniors rather than as high school seniors), some sincerely wish to explore their options, including the option of playing, or continuing to play, in college. To expect those young student-athletes to negotiate with MLB clubs on their own, particularly during busy spring baseball seasons (and, lest we forget, busy academic terms), seems unrealistic and may jeopardize student-athletes’ abilities to maximize their potential. To quote again from the court in *Oliver*, “the student-athlete should have the opportunity to have the tools present . . . that would allow him to make a wise decision without automatically being deemed a professional, especially when such contractual negotiations can be overwhelming even to those who are skilled in their implementation.”¹⁴⁴ In *Oliver* the “tool” was an attorney, but surely the same rationale applies to non-attorney advisors who can assist the student-athlete in making a “wise decision.”

NCAA leaders occasionally have expressed a willingness to reconsider the no-agent rules as they apply to baseball. As noted earlier in this article, the NCAA’s then-managing director for baseball suggested in 2011 the possibility of new rules in tune with baseball’s “unique set of circumstances.”¹⁴⁵ Yet more than three years later—and more than five years after the *Oliver* decision—the no-agent rules remain fully in force and enforced with as much rigor as ever. Indeed, the only meaningful change in the no-agent rules came in 2012, with a seeming *expansion* of the bylaw defining “agents,” so that even more advisor activities may be violations.¹⁴⁶

The Wetzler case may provide a new impetus for the NCAA to reexamine its no-agent bylaws as applied to baseball. Not only did the case generate significant negative publicity for both the Philadelphia Phillies

143. See, e.g., Borzi, *supra* note 32 (quoting critics of no-agent rules). See also Aaron Fitt, *Oliver Settlement Restores “No Agent” Rule*, BASEBALL AMERICA (Oct. 8, 2009), <http://www.baseballamerica.com/college/oliver-settlement-reinstates-no-agent-rule/>.

144. *Oliver v. Nat’l Collegiate Athletic Ass’n*, 155 Ohio Misc. 2d 17, 33 (Com. Pl. 2009).

145. See Zagier, *supra* note 74 and accompanying text.

146. See NCAA Bylaws, *supra* note 9, § 12.02.1. See *supra* text accompanying notes 44–45.

and the NCAA,¹⁴⁷ it also involved a student-athlete at Oregon State University. Oregon State is led by President Edward Ray, who served recently as chair of the NCAA's Executive Committee and who stood by NCAA President Mark Emmert in their joint public announcement of the censure of Penn State after its child sexual abuse scandal.¹⁴⁸ In other words, Ray may carry significant clout within the NCAA leadership, and his implicit approval of his institution's harsh words for the application of no-agent rules in the Wetzler case may be telling. In pointed public remarks after the NCAA announced its withholding penalty against Wetzler, the university's spokesperson, while announcing Oregon State's appeal of the sanction,¹⁴⁹ said the following:

What's clear to us is that individuals within the NCAA and member institutions have discussed this matter for some time, saying that this rule needs to be fixed. We think this is a very unfortunate circumstance. It really points out what's wrong when a student-athlete decides to evaluate a matter and return to school, and now he is punished.

Our point is that it's time to stand up for our student-athlete and the choice he made to return to college, but also to address that this matter needs to be changed. It doesn't make sense.¹⁵⁰

Even if the NCAA provides no sort of "baseball exemption" from the no-agent bylaws, it at least must make those bylaws clear to those affected by them. Perhaps most troubling in media accounts of the Wetzler case was the presumption that Wetzler violated the rules because he engaged an "agent," and implicitly that he *knew* he violated the rules. It is entirely plausible, however, that Wetzler was caught completely off guard in November 2013 when he learned of the NCAA investigation; why would he

147. See, e.g., Heitner, *supra* note 97.

148. Jenna Johnson, *NCAA Sanctions on Penn State "Unanimously" Backed by Boards of College Presidents*, WASH. POST (July 23, 2012), http://www.washingtonpost.com/blogs/campus-overload/post/ncaa-sanctions-on-penn-state-unanimously-backed-by-boards-of-college-presidents/2012/07/23/gJQA0OsY4W_blog.html.

149. The university appealed the 20% withholding penalty imposed on Wetzler to a student-athlete reinstatement appeals committee, which affirmed the judgment of the student-athlete reinstatement staff and upheld the penalty. A university's president ultimately is responsible for the conduct of intercollegiate athletics. NCAA Bylaws, *supra* note 9, § 2.1.1 ("The institution's president or chancellor is responsible for the administration of all aspects of the athletics program . . ."). Thus, one can presume that President Ray approved both the appeal and the university's public statements regarding the case.

150. Gelb, *supra* note 109 (quoting Steve Clark, Oregon State University Vice President for University Relations and Marketing, and characterizing the Oregon State public statement as "a caustic, 821-word release late Friday night that questioned the intentions of the NCAA and its 'no-agent' bylaw").

assume he committed any violation when he retained a non-attorney advisor who did not “market” him to MLB clubs or “negotiate” with clubs on his behalf?¹⁵¹

As the investigation unfolded, it became clear that NCAA officials also considered other conduct by an advisor—conduct that is *not* proscribed by NCAA legislation/bylaws—to be violations as well. In particular, a staff *interpretation* of the bylaws—embodied in both an informational memorandum and an “educational column”¹⁵²—considered both (1) *presence* of an advisor during contract negotiations, and (2) any *direct contact* between advisor and MLB club to be violations.¹⁵³ While both the memorandum and the educational column have been posted on the NCAA website, it is again entirely plausible that student-athletes, or even their advisors, would be unaware of them.

NCAA staff members clearly have an interest in ensuring that all relevant individuals are aware of the rules the staff will enforce. While it seems fair to hold those individuals to knowledge of the NCAA bylaws themselves, it also seems problematic to build an infractions case on interpretations that are not nearly as transparent. One obvious solution, of course, would be to incorporate the staff interpretations into the bylaws. Such a remedy also would ensure that the NCAA *membership* approves of the bylaws’ reach, rather than simply relying on the assumption that the NCAA staff speaks for the membership.¹⁵⁴ In the Wetzler case, for exam-

151. The author of a recent article on the firing of Phillies scouting director Marti Wolever spoke with Wetzler, who apparently reported that he “hadn’t been briefed on the NCAA’s no-agent rule” in 2013, when the Phillies drafted him. Letourneau, *supra* note 126.

152. From time to time the NCAA will post “Educational Columns” on its website. According to the NCAA, these columns “are intended to assist the membership with the correct application of legislation and/or interpretations by providing clarifications, reminders and examples. They are based on legislation and official and staff interpretations applicable at the time of publication.” Moreover, the NCAA purports to make these educational columns “binding to the extent that the legislation and interpretations on which they are based remain applicable.” On July 5, 2012, the NCAA posted an educational column with questions and answers related to “NCAA Bylaw 12.02.1 – Definition of an Agent.” In answer to the question “May an advisor be present during negotiations between an individual and a professional team?”, the column states, “[a]n advisor may not be present during discussions of a contract offer with a professional team or have any direct contact (e.g., in person, by telephone or mail) with a professional sports team on the individual’s behalf without such action resulting in the advisor being considered an agent.” This column, of course, is consistent with the NCAA staff interpretation discussed previously in this article. The column may be currently on the ncaa.org website, but the author could not find it after an extensive search. A copy of the column is on file with the author.

153. NCAA Informational Memo, *supra* note 53. See also notes 58–59 and accompanying text.

154. New or amended bylaws take effect upon approval of the NCAA Board of Directors, which represents the membership. In Division I, proposals for new legisla-

ple, it seems clear that at least one prominent leader—Edward Ray, who served as chair of the NCAA’s Executive Committee—takes serious issue with the current application of the no-agent rules, at least to certain baseball student-athletes.

Moreover, even if all of the rules were embodied in NCAA legislation, the NCAA staff must recognize inherent ambiguities in the bylaw language and do whatever it can to clarify how that language will be interpreted and enforced. Certainly not every contingency can be anticipated; some cases involve novel fact scenarios, and those cases simply have to be resolved on an ad hoc basis. On the other hand, the legislation and interpretations include fundamental principles that are not always clearly understood: What does it mean to “market” a student-athlete’s athletics ability or reputation? Are all contacts between an agent and a professional organization “on behalf of” the student-athlete? Does it matter if the professional club initiates the contact? What constitutes “negotiation”? Under the new definition of an “agent,” is there any room left for non-agent advisors? Under what circumstances, for example, will an advisor *not* “seek[] to obtain any type of financial gain or benefit . . . from a student-athlete’s potential earnings as a professional athlete”?¹⁵⁵ All of these questions can arise in a no-agent case, so it is important that the NCAA staff is consistent and clear in its application of the rules.

NCAA member schools also need to step up and take responsibility in this area. Even the most prominent programs (like Oregon State in the Wetzler case¹⁵⁶) have a very limited number of student-athletes who are legitimate draft prospects in any given year. Their compliance staffs should be responsible for (1) knowing *all* of the rules that the NCAA applies under no-agent legislation, including staff interpretations that easily can escape the attention of student-athletes and advisors; and (2) engaging in effective rules education for all student-athletes who may confront the MLB draft process. For example, if university personnel know that the NCAA enforcement staff considers the mere presence of an advisor (even a non-attorney advisor) during contract negotiations to be a violation and clearly

tion (bylaws) are presented to a 31-member Legislative Council, with final review by an 18-member Board of Directors comprised of presidents and chancellors of member institutions. Provisions also exist for the membership to “override” legislation adopted by the Legislative Council or Board of Directors. NAT’L COLLEGIATE ATHLETIC ASS’N, *Division I Committees*, <http://www.ncaa.org/governance/committees?division=d1>.

155. NCAA Bylaws, *supra* note 9, § 12.02.1(b).

156. Oregon State advanced to the College World Series in 2013. 2014 OREGON STATE BASEBALL MEDIA GUIDE, *supra* note 99, at 56. In 2014 it was the number one overall seed entering postseason competition. *Oregon State No. 1 Seed for NCAA Baseball Tournament*, USA TODAY (May 26, 2014), <http://www.usatoday.com/story/sports/college/baseball/2014/05/26/ncaa-baseball-tournament-pairings-oregon-state-no-1/9598059/>.

communicate that “rule” to their student-athletes, it seems likely that the number of cases like Wetzler’s would be reduced.¹⁵⁷

The NCAA no-agent legislation does permit member schools to constitute a “professional sports counseling panel” to advise the schools’ student-athletes who are interested in pursuing professional careers.¹⁵⁸ Such panels even are permitted to “enter into negotiations with a professional sports organization” on behalf of a student-athlete.¹⁵⁹ Because such panels are not mandatory, however, many schools do not have them.¹⁶⁰ Schools should consider whether such panels could provide valuable assistance to their student-athletes.

On the other hand, one commentator cautions that such institutional counseling panels may present additional problems. First, there is no guarantee that panels consisting of university staff and faculty will have the necessary expertise to provide sound advice to their student-athletes.¹⁶¹ Second, such panels may have “an inherent conflict of interest” in advising student-athletes because university representatives may wish to have the student-athletes return to the institution to compete for another year rather than to have the student-athletes sign professional contracts and leave.¹⁶² For these reasons, it may be wiser to put the principal burden on compliance staffs to educate their student-athletes regarding NCAA rules, and leave the “professional sports counseling” business to the professionals—agent-advisors who truly know the business.¹⁶³

Finally, the NCAA should reassess its enforcement process in no-agent baseball cases. As long as the rules remain as ambiguous as they are, the NCAA enforcement staff has virtually unfettered discretion to determine that a no-agent violation has occurred—for example, to find that a student-athlete’s advisor has “marketed” the student-athlete’s athletics ability or reputation, that an advisor has contacted a professional organization on the student-athlete’s “behalf,” or that the advisor seeks to obtain a “financial benefit” from the student-athlete’s potential earnings as a professional athlete. And once the enforcement staff informs the institution that it believes

157. Of course, student-athletes who are firmly committed to signing a professional contract may choose to have an advisor present, but at least they would be accepting the risks knowingly, should they change their minds and decide to return to school.

158. NCAA Bylaws, *supra* note 9, § 12.2.4.3.

159. *Id.*

160. Karcher, *supra* note 2, at 224.

161. *See id.* (questioning the qualifications of such panels).

162. *Id.*

163. On the other hand, agent-advisors may have their own conflicts of interest that are just as problematic as those of the institutions. Karcher advocates for allowing student-athletes to engage agents, with institutions providing guidance to student-athletes in the *selection* of agents—to help ensure that the student-athletes are not taken in by incompetent or unscrupulous agents. *Id.*

a violation occurred, the university typically feels compelled to accept that “finding” and begin the reinstatement process. Otherwise, if it resists the finding of a violation and allows the student-athlete to continue competing, the institution risks sanctions for competing with an ineligible student-athlete. Thus, even questionable cases proceed to the student-athlete reinstatement staff for a determination of a withholding penalty.

With today’s “hard slotting” system in the MLB draft, in which MLB clubs lose money “slotted” for draft picks who do not sign, MLB clubs have even more incentive to “turn in” student-athletes they fail to sign—particularly if the Philadelphia Phillies suffer no repercussions from their involvement in the NCAA’s case against Ben Wetzler.¹⁶⁴ Student-athletes who seek to preserve the option to compete at the collegiate level already are at a significant disadvantage vis-à-vis MLB clubs because NCAA no-agent rules leave them to their own devices, without the active assistance of an advisor during contract negotiations. That disadvantage is compounded when a student-athlete’s college eligibility is jeopardized if his advisor has even the slightest contact with an MLB club and the student-athlete believes the club may report that contact to the NCAA if he does not sign.

Surely the NCAA enforcement staff understands the pressures the hard-slotting system places upon scouts to sign their club’s draftees. Those pressures easily could motivate scouts to embellish the contacts they have had with draftees’ advisors, or even to initiate and solidify contacts with those advisors so that the draftees’ collegiate eligibility already is in jeopardy by the time of contract negotiations. For the enforcement staff, the lesson is simply to understand and account for potential ulterior motives by MLB club representatives when building a no-agent case against a student-athlete.¹⁶⁵ The same ulterior motives, of course, may exist when the principal witness is a scorned agent (as in *Oliver*) rather than the representative of a scorned MLB club.

In light of these factors, the NCAA leadership should consider whether another layer of oversight is advisable. An independent appeals committee is available to review withholding penalties imposed by the student-athlete

164. Marti Wolever, the Phillies’ scouting director, stated in May 2014 that the Wetzler case “has not hurt us a lick. . . . [T]o this point, we really have not had any problems with agents or players, families.” Murphy, *supra* note 117. Indeed, according to Wolever, “you wouldn’t believe the number of people in professional baseball who have come up to me and our group over the course of the year and say, thank you for what you did. You guys aren’t the bad guys in this situation.” *Id.* Interestingly, Wolever was fired by the Phillies in September 2014, and some wonder if the Wetzler case played a role in that decision. See Letourneau, *supra* note 126.

165. That understanding is particularly important if enforcement staff members automatically approach all agent-advisor involvement with a skeptical eye. After all, in many no-agent cases, fact-findings will boil down to an assessment of the relative credibility of agent-advisors vis-à-vis MLB club representatives. The student-athletes themselves may have no knowledge of the extent of the advisor-club contacts.

reinstatement staff,¹⁶⁶ but by that time, it is too late to address the merits of a no-agent case—the staff and the involved institution already have agreed on a set of facts, and the appeals committee’s role is to determine whether the penalty is appropriate. In other infractions cases, fact-findings are made by the Committee on Infractions, based on a review of evidence presented by all interested parties. While I hesitate to recommend additional “process” to an already complicated procedural scheme, I do believe there is value in at least abbreviated oversight by the infractions committee of no-agent findings by the NCAA staff. The fact that the Division I infractions committee recently has been expanded from ten members to over twenty members may make such oversight feasible.¹⁶⁷

All of these recommendations are based on the welfare of the student-athlete, a guiding principle for all NCAA legislation.¹⁶⁸ The MLB draft process is daunting enough for student-athletes in the midst of their academic studies and playing seasons. Their vulnerability is enhanced by a prohibition against advisor participation in contract negotiations with professional clubs. If the NCAA leadership truly expects student-athletes to navigate the draft terrain without the meaningful involvement of competent advisors, at the very least it should ensure that all of its rules are clear, widely disseminated, and consistently applied. Finally, the process by which the NCAA staff resolves no-agent cases should take into account student-athlete vulnerabilities and inspire confidence, not doubt, that student-athlete welfare is paramount.

VI. CONCLUSION

Two types of student-athletes become involved in the Major League Baseball draft process—(1) those who are sure they want to begin professional careers as soon as possible, and (2) those who are not so sure and thus want to preserve their options, including competing in college. The

166. “A school may appeal decisions made by the reinstatement staff to the Committee on Student-Athlete Reinstatement.” NCAA Student-Athlete Reinstatement Summary, *supra* note 82.

167. The expansion of the Committee on Infractions was part of a series of “reforms” initiated by NCAA President Mark Emmert. An “Enforcement Working Group” recommended the change, which was adopted in October 2012 and became effective August 1, 2013. NAT’L COLLEGIATE ATHLETIC ASS’N, *New Reform Efforts Take Hold August 1*, <http://www.ncaa.org/about/resources/media-center/news/new-reform-efforts-take-hold-august-1>.

168. NCAA Bylaws, *supra* note 9, § 2.2 (“Intercollegiate athletics programs shall be conducted in a manner designed to protect and enhance the physical and educational well-being of student-athletes.”); *see also* John Curley Center for Sports Journalism at Penn State, SPORTS, MEDIA & SOCIETY (Nov. 19, 2010), <http://sportsmediasociety.blogspot.com/2010/11/emmert-on-student-athletes-and.html> (a month into new role as NCAA President, Mark Emmert asserting focus on student-athlete welfare as a top priority of NCAA).

former can hire an agent and actively use that agent's knowledge and expertise in negotiations with MLB clubs, in order to ensure as bright a professional career as possible. Under NCAA rules, the latter cannot; instead, they face an unsavory choice: they can negotiate with seasoned MLB club representatives on their own, with an obvious downside to their bargaining position, or they can engage an advisor to assist them and run the risk that they will lose their eligibility to compete in college if that advisor's activities go the slightest bit too far.¹⁶⁹

Despite substantial criticism of the NCAA's no-agent rules as they are applied to the sport of baseball, the NCAA staff seems to have redoubled its enforcement efforts, perhaps as part of an overall initiative to crack down on the pernicious influence of agents on the NCAA's broader amateurism model.¹⁷⁰ Not only does the NCAA staff continue to enforce the no-agent rules vigorously, it also appears to have toughened its stance in three respects. First, it has extended the no-agent proscriptions beyond the language of NCAA legislation by rendering "interpretations" prohibiting virtually any contact between advisors and MLB clubs. Second, a revised NCAA informational memo in 2014 adds language to make clear student-athletes will be found ineligible even if their advisors' contact with MLB clubs is "independent"—that is, without the student-athlete's direction or even knowledge.¹⁷¹ Finally, if the Wetzler case is any indication, the NCAA staff is working hand-in-hand with professional clubs to scrutinize the conduct of student-athletes who were drafted but chose to forgo their professional option and compete (or return to competition) in college.

This enforcement focus seems perverse in some respects because it targets student-athletes that seemingly deserve the NCAA's commendation—*student*-athletes who have resisted the lure of professional competition and committed (or recommitted, in the case of college juniors) to furthering their education and competing at the intercollegiate level. Should those student-athletes be put at a disadvantage in negotiating a favorable professional contract simply because they retain an interest in competing in college if the professional option turns out to be ill-advised?

The *Oliver* court recognized in 2009 the bargaining disparity between student-athletes and professional sports organizations, and struck down as

169. Another option exists, of course: hire an agent-advisor, allow that agent to engage fully with MLB clubs, and hope the NCAA does not find out if one chooses ultimately to reject a professional offer and compete in college. If professional scouts are to be believed, that choice is widespread.

170. See, e.g., NAT'L COLLEGIATE ATHLETIC ASS'N, *Amateurism Cabinet Seeks Expanded Definition of Agents*, <http://www.ncaa.org/about/resources/media-center/news/amateurism-cabinet-seeks-expanded-definition-agents> (noting President Mark Emmert making "the agent issue" a top priority in his first State of the Association address at the 2011 NCAA Convention).

171. See NCAA 2013 Informational Memo, *supra* note 89.

arbitrary and capricious an NCAA rule prohibiting student-athletes' attorneys from being present during contract negotiations with MLB clubs. The court later vacated its decision when the NCAA reached a settlement with the plaintiff, thus leaving the rule intact. However, one of the court's fundamental concerns—whether the NCAA, by prohibiting student-athletes from being actively represented during the negotiation process, leaves them vulnerable to overreaching by MLB clubs—remains intact as well.

The *Oliver* decision raised important questions about the fairness of the no-agent rules, and those questions deserve further examination. One aspect of *Oliver*, however, sets it apart from more recent cases like that involving Ben Wetzler. At least the legislation was clear in *Oliver*: no lawyer representatives of student-athletes may be present during contract negotiations with MLB clubs. Oliver and his attorney presumably chose to ignore the applicable bylaw because they felt it unjust.

In the Wetzler case, like many others involving non-attorney advisors, the rules were not clear, unless one accepts as binding staff interpretations that have never been given the imprimatur of the NCAA membership. If the Oregon State University President's reaction to the Wetzler case is any indication, it is questionable whether the membership would agree that *any* "direct contact" between an advisor and a professional team, or the presence and silent observation of an advisor during contract negotiations, should be a violation.

Even if the staff interpretations do carry the authority of bylaws (at least until they are rejected by the membership), the NCAA staff must ensure that all individuals subject to the interpretations are fully aware of them. It has been problematic after *Oliver* to deny student-athletes the advice of competent counsel; it is doubly problematic to build an infractions case on interpretations that could escape the knowledge of even a diligent student-athlete or advisor.

Ultimately, the NCAA's focus on student-athlete welfare should guide deliberations in the no-agent arena. If those governing principles suggest the value of legislative change, the NCAA leadership should act accordingly. Student-athletes' careers—both in college and professionally—depend upon it.

