

**HIGH SCHOOL BASEBALL, THE NCAA,
AND MAJOR LEAGUE BASEBALL:
“A REALITY SHOW”**

*Martin L. Levy**

INTRODUCTION.....	333
I. THE RULES.....	333
II. THE REALITY SHOW.....	338
III. PLAYER ONE—MY CAKE AND EAT IT TOO.....	339
IV. AGENT—ADVISORS??.....	341
V. PLAYER TWO—A FIRST ROUNDER.....	343
VI. PLAYER THREE—A FIFTH YEAR OF COLLEGE, PLEASE.....	345
VII. PLAYER FOUR—BROKE HIS ARM BEFORE THE DRAFT.....	347
VIII. PLAYER FIVE—HE WAS TO BE A BARGAIN.....	348
IX. PLAYER SIX—AN UNDRAFTED FREE AGENT.....	349
CONCLUSION.....	351

* Professor of Law, Thurgood Marshall School of Law, Texas Southern University. I would like to thank my Research Assistant, Ms. Leila Clewis, for her invaluable assistance in preparation of this article, as well as Stephanie Sciandra of *Albany Government Law Review*.

INTRODUCTION

While the title of this piece fits well within the context of the *Albany Government Law Review* symposium, the addition of "A Reality Show" does not, and certainly begs some explanation. The facts are that "by day," I am a law professor specializing in constitutional law and federal courts. But for an extended period of time, "by night," so to speak, I assisted/represented a variety of amateur high school and college baseball players in regard to the potential, usually via the draft, of forsaking their amateur career to sign and play professional baseball with a Major League Baseball team.

So this is notice to the reader, though published in a scholarly journal, and given my occupation, having previously published scholarly pieces in such journals, this is not such a piece. Befitting (hopefully) the intent of the *Albany Government Law Review* symposium, this is an essay dedicated to the real world of amateurism and professional sport negotiations, which will provide insight into how it works, how it happens, and the impact of the National Collegiate Athletic Association (NCAA) rules in the real world. Thus, this essay is in the nomenclature of present day media, if you will, "A Reality Show!"

I. THE RULES

Both the NCAA,¹ as well as almost all state organizations that supervise their athletic programs, require their athletes maintain amateur status.² Given this review concerning such status and Major League Baseball (MLB), this essay by necessity is also affected by the process in which the professional teams retain and

¹ Technically speaking the NCAA is a private organization as the Supreme Court held in *NCAA v. Tarkanian*, 488 U.S. 179 (1988). Yet the Court also concluded in *Tarkanian* that, under appropriate circumstances, the NCAA could well be held a "state actor," thus mandating that the Fourteenth Amendment to the federal Constitution would then be applicable to them. *Id.* at 182, 193–94.

² NCAA ACADEMIC & MEMBERSHIP AFFAIRS STAFF, OPERATING BYLAW art. 12.01.1, reprinted in 2010–2011 NCAA DIVISION I MANUAL (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf> [hereinafter NCAA MANUAL]. Each individual state maintains an organization responsible for the state's amateur high school athletic program. Thus, Texas, as an example, accomplishes such supervision through what its legislature dubbed the University Interscholastic League (UIL). See, e.g., CONSTITUTION AND CONTEST RULES OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE 2011–12 § 441, available at <http://www.uiltexas.org/files/constitution/uil-ccr-subchapter-m.pdf>.

employ these amateur players. This is consummated by professional teams scouting these amateur players and selecting them via a “draft” organized by MLB,³ or those “undrafted” players signed by individual teams, who are also subject to MLB rules.

But given the purpose of this essay, and my involvement, the core issue created is how sports agents representing baseball players affect amateur status. As of recent, particularly in regard to college football, the involvement of agents has become quite

³ *First-Year Player Draft Rules*, MLB.COM, <http://www.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 10, 2011). These rules and process are detailed by the MLB:

The Major League Baseball First-Year Player Draft is held every year in June by conference call among the 30 Major League Clubs. The Clubs take turns selecting players in reverse order of their won-lost records at the close of the previous regular season. The order of selection is without regard to League.

The Major League Rules govern which players are eligible for selection in the Draft. These Rules are detailed, but the basic eligibility criteria can be described as follows: Generally, a player is eligible for selection if the player is a resident of the United States or Canada and the player has never before signed a Major League or Minor League contract. Residents of Puerto Rico and other territories of the United States are eligible for the Draft. Also considered residents are players who enroll in a high school or college in the United States, regardless of where they are from originally.

Certain groups of players are ineligible for selection, generally because they are still in school. The basic categories of players eligible to be drafted are:

- High school players, if they have graduated from high school and have not yet attended college or junior college;
- College players, from four-year colleges who have either completed their junior or senior years or are at least 21 years old; and
- Junior college players, regardless of how many years of school they have completed

A Club generally retains the rights to sign a selected player until 11:59 PM (EDT) August 15, or until the player enters, or returns to, a four-year college on a full-time basis. A player who is drafted and does not sign with the Club that selected him may be drafted again at a future year’s Draft, so long as the player is eligible for that year’s Draft. A Club may not select a player again in a subsequent year, unless the player has consented to the re-selection.

A player who is eligible to be selected and is passed over by every Club becomes a free agent and may sign with any Club until the player enters, or returns to, a four-year college full-time or enters, or returns to, a junior college. *Id.*

controversial.⁴ Given that agents represent professional athletes for income and employment purposes, the NCAA must define and enforce regulations in regard to how amateur status is affected. In baseball this is of particular significance because of the amateur draft, the significant "signing bonuses" offered to amateur players, as well as the potential for a professional employment contract. As such, the NCAA adopted strict prohibitions against certain types of agent/student-athlete contact:

12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she 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 that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

12.3.1.1 Representation for Future Negotiations. An individual shall be ineligible per Bylaw 12.3.1 if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.

12.3.1.2 Benefits from Prospective Agents. An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from: (*Revised: 1/14/97*)

(a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or

(b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport. (*Adopted: 1/14/97*)⁵

Note, of course, that violation of Rule 12.3.1 via agent representation costs the player his amateur status, and his ability to engage in the sport at any NCAA member university. This is, of course, a significant penalty, not only in its denial of participation, but also in the loss of any bargaining power the

⁴ See, e.g., Mike Garrett, Op-Ed., *How to Keep Agents off the Field*, N.Y. TIMES, Oct. 30, 2010, at A23 (describing the ongoing problem of agents' influence in college sports).

⁵ NCAA MANUAL, *supra* note 2, art. 12.3.1–12.3.1.2.

player might have with the professional team. Thus, a high school player who violates this as well as any other such rule, when offered a college scholarship to play baseball rather than “sign” with a professional team, loses the scholarship and no longer maintains use of the college option as a bargaining tool. Since, as noted above,⁶ college players who have completed their junior year or are twenty-one years old, may be drafted and/or signed by professional teams, there is a similar effect and loss of bargaining power. For example, if a junior is drafted and maintains amateur status, he could return for his senior year in college if not pleased with the offer received from a professional team. Retaining an agent, or any violation of Rule 12, would forsake this possibility, leaving the player no choice but to sign with the professional team if he wanted to play baseball.

Now, whether to sign with a team that drafted you, or play college baseball, is of course a significant choice for any young person. Most parents could not properly advise their child in regard to the team, the offer, and whether they should sign or return as an amateur to play college baseball. Recognizing this, the NCAA has provided two exceptions for such advice.

First, in Rule 12.3.2 the NCAA provides an exception for legal counsel. It states that “[s]ecuring advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the individual in negotiations for such a contract.”⁷ Yet, apparently concerned about distinguishing a “lawyer” from an “agent,” the NCAA also stipulates in 12.3.2.1 that “[a] lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual.”⁸ A lawyer’s presence during such discussions is considered representation by an agent.⁹ This limitation of the right to an attorney in itself, as we shall soon see, creates problems for a family trying to negotiate with sophisticated and experienced representatives of professional baseball teams.

The other exception, which, given its terminology, is often abused by agents themselves claiming to be advisors, allows for

⁶ *First-Year Player Draft Rules*, *supra* note 3.

⁷ NCAA MANUAL, *supra* note 2, art. 12.3.2.

⁸ *Id.* art. 12.3.2.1.

⁹ *Id.*

"advisors" to assist the player and family in contracts and negotiations.¹⁰ Yet, notably, the NCAA quite specifically limits who may serve this role to appointees of the university president and chancellor who are full-time employees of the school.¹¹ These requirements and their enforcement, for high school as well as college players, are of great significance in baseball because these programs serve as a talent pool for professional baseball. Let me now put them in the context, as asserted earlier, of the real world.

¹⁰ *Id.* art. 12.3.4. That section states:

It is permissible for an authorized institutional professional sports counseling panel to:

- (a) Advise a student-athlete about a future professional career;
- (b) Assist a student-athlete with arrangements for securing a loan for the purpose of purchasing insurance against a disabling injury or illness and with arrangements for purchasing such insurance; (*Adopted: 1/16/93, Revised: 1/16/10*)
- (c) Review a proposed professional sports contract;
- (d) Meet with the student-athlete and representatives of professional teams;
- (e) Communicate directly (e.g., in-person, by mail or telephone) with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete; (*Adopted: 1/11/94*)
- (f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete and by having direct communication with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players' association); and (*Adopted: 1/11/94*)
- (g) Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value (e.g., potential salary, draft status). (*Adopted: 1/11/94. Id.*)

¹¹ *Id.* art. 12.3.4.1–12.3.4.2.

12.3.4.1 Appointment by President or Chancellor. This panel shall consist of at least three persons appointed by the institution's president or chancellor (or his or her designated representative from outside the athletics department). (*Revised: 3/8/06*)

12.3.4.2 Composition. The majority of panel members shall be full-time employees outside of the institution's athletics department. No more than one panel member may be an athletics department staff member. No sports agent or any person employed by a sports agent or agency may be a member of the panel. All panel members shall be identified to the NCAA national office. (*Revised: 1/11/94, 1/10/05. Id.*)

II. THE REALITY SHOW

My involvement in this process extended from my working with one of the most successful high school baseball programs—a program that over the years has produced numerous “drafted” college and MLB baseball players. The head coach of the program, concerned that players with college scholarship offers maintain their amateur status if they decided not “to go pro,” asked that I assist the players and parents in dealing with the logistics of the process. Familiarizing myself with the process and the rules, I set out to so assist without any remuneration, only the desire to assist outstanding young athletes.

If I was to serve the purpose stipulated, the first thing I had to do was verify that my service as an attorney would not affect amateur status. This, of course, seemed verified by NCAA Rule 12.3.2, cited above, which details that a player may be represented by an attorney. Yet I still proceeded so as to not violate 12.3.2.1, which also specifies that such a counsel could not be present and participate at actual negotiations. I felt at that time that this rule was objectionable and unconscionable, as it interfered with one’s right to an attorney. I nonetheless complied with this rule since my purpose in representing the player was to maintain, not compromise, amateur status.

Interestingly enough, in 2009, an Ohio court reviewed just this issue in *Oliver v. NCAA*¹² and concluded that the NCAA’s bylaw prohibiting an attorney from representing a student athlete during contract negotiations violated both the contractual obligations of good faith and fair dealing, and the injunction the player (Oliver) sought was awarded as necessary to prevent irreparable harm.¹³ The court held that the bylaw was arbitrary and capricious, and violated public policy by preventing attorneys from doing what they are trained to do.¹⁴ The court held that no entity may dictate when an attorney may represent his client.¹⁵ The court found that the unintended consequence of the rule allowed for the “exploitation of . . . student-athlete[s] ‘by professional and commercial enterprises’ . . .”¹⁶ Though this was

¹² 155 Ohio Misc. 2d 17, 2009-Ohio-6587, 920 N.E.2d 203, *vacated pursuant to settlement*.

¹³ *Id.* ¶ ¶ 41–43.

¹⁴ *Id.* ¶ 46.

¹⁵ *See id.*

¹⁶ *Id.* ¶ 38.

technically limited in applicability to the state of Ohio, and the NCAA itself has not modified the rule, present arguments abound in regard to the illegality of 12.3.2.1 as per the Ohio court's decision.

For our purposes, and well before this decision, I dealt with the rule by preparing the parents and player to deal adequately with the MLB team representatives. Let me give you an example of such an approach in regard to a player, whose contract I might add, was lauded by one of baseball's foremost agents as one of the best ever negotiated.¹⁷

III. PLAYER ONE—MY CAKE AND EAT IT TOO

This player was a high draft choice of a professional team shortly after he graduated high school. His father was a brilliant professor who had graduated from a prestigious university, and his son, prior to the draft, had been accepted at a university of similar prestigious status. Although the school and its "conference" did not offer athletic scholarships, his admission may well have been dependent on his agreement to play baseball.¹⁸ While the parents understood that their son was an exceptional player and because of his high draft selection that he might well receive a sizable "signing" bonus, they did not want him to jeopardize his opportunity to attend a prestigious university, much as his dad did. I told them that I thought this would likely be impossible because a professional team, once invested in a player, was not likely, in fact to my knowledge, had never allowed a player to pursue a baseball career while at the

¹⁷ Please allow me to note at this point, that I will be citing to actual "real world" examples and encounters, that as Joe Friday once asserted in a famous television program, the "name[s] will be] changed to protect the innocent." *Biography for Sgt. Joe Friday*, IMDB.COM, <http://www.imdb.com/character/ch0028271/bio> (last visited Oct. 11, 2011). Thus, other than myself, these encounters and examples will protect the privacy of those involved by not divulging actual names that might jeopardize the same.

¹⁸ Some NCAA programs do not offer athletic scholarships, and thus are not affected by the same. See, e.g., *Undergraduate Athletic Scholarships*, NCAA.ORG, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/Academics+and+Athletes/Scholarships+and+Internships/Undergraduate+Athletic+Scholarships (last visited Oct. 3, 2011) (discussing how Division III colleges do not award athletic scholarships); see also Katie Thomas, *The New Director of the Ivy League Seeks to Strike an Old Balance*, N.Y. TIMES, Aug. 1, 2009, at D6 (discussing how Ivy League colleges also do not award athletic scholarships). Participation in a sport may nonetheless affect admission to the institution.

same time attending school.

One afternoon I received a call from the dad, who stated, "Marty, you won't believe what I'm looking at." When I inquired what it could be, he responded, "I have an Excel spreadsheet where I have traced prospective income for a baseball career versus a career as a ' ' ¹⁹ lawyer, and guess who makes the most, the lawyer!" My immediate response was to tell him to hold on to that spreadsheet and use it in negotiations to accomplish what we thought would be impossible. To the dad I said, "When the general manager shows up for negotiations, I think if you hold the line, you will be most credible in your demand that you would like to sign, but want your child to go to the university as well because you yourself are an academic who attended a similar university." Consequently, I urged, "Your demand will be most credible, you are believable, and they won't believe that they have a parent who is arguing to them that going professional will cost their son money!" I still doubt any ballclub had ever had a parent so argue!

The father, who really deserves the credit because he was the one who, in fact, negotiated it, did exactly that. The team's representatives left the meeting fully convinced that this family would not allow this young man to miss the opportunity to attend this university to make "less" and play professional baseball. He proved credible. After a short period of time, the ball club responded with an offer well into six figures that would allow the young man to attend the university at the same time. Yes, he would matriculate to the school as a normal student, and when the spring semester was over (well after baseball had commenced its own spring training!), he would play ball in the summer. He became, in short, a normal college student whose summer job was being a professional ballplayer! This was the unusual fact that the agent I referred to above was referencing, and it happened within the confines of allowing a lawyer to assist in negotiations while the player maintained his amateur status, which was my very purpose. The player went on to have a great minor league career displaying much potential until an injury ended his career. As you might have guessed, he is today a successful attorney with a prestigious law firm, as the dad suggested!

¹⁹ Meaning a famous and renowned law school in America.

IV. AGENT—ADVISORS??

Particularly, given the income potential of amateur players selected in the early rounds of the MLB draft, the issue of agents, their effect on amateur status, set against their desire to sign athletes and earn a living, lurks around this entire process. As if these issues needed to be emphasized, just this past year has seen NCAA scrutiny of agent contact with college football players receive national attention and the NCAA apply enforcement penalties.²⁰

Baseball and its drafted players are not exceptions to these circumstances. Though it should be noted that, given the attention and money at stake in college football as opposed to college baseball, how the NCAA reacts does appear to be different. Over the years, and in regard to the players that I have assisted, I have dealt with several agents and firms interested in representing players. I have, in fact, as their attorney, continued to advise players on selection and use of agents, even after they have turned professional and retained such services.

In the early years of my work, though agents made themselves known to players, they seemed to understand the need, given the NCAA rules cited above,²¹ to stay away and not interfere so as to allow the players to maintain their amateur status. Nonetheless, on several occasions, I informed them that we demanded that they so act. In short, much revenue is at stake, and controversy seemed to be guaranteed. Though it is worth pointing out that, given my background, amateur players would still benefit from the knowledge and experience that professional agents had, as a predicate for negotiating with baseball clubs.

Here, it is also worth noting that agents are closely governed by rules established by the Major League Baseball Players Association (Union).²² Amateur athletes are of course not protected by such, as they are not members of the Union. First round draft choices receive much attention from potential agents, as they are prospectively the best future clients. I viewed my job as making sure these agents did not affect the amateur status

²⁰ Garrett, *supra* note 4. See also Joe Schad, *Financial Penalties for Players Possible*, ESPN.COM (Oct. 26, 2010, 6:22 PM), <http://sports.espn.go.com/nfl/news/story?id=5725836> (discussing NCAA consideration of further penalizing players for improper contact with agents).

²¹ NCAA MANUAL, *supra* note 2, art. 12.3.1–12.3.1.2.

²² 2007–11 Basic Agreement, art. IV, MLB.COM, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf.

and ability of the athletes to play college baseball. Often these agents would offer broad but helpful advice of prospective player value, information that as an attorney I myself would value. In this regard, these agents, even though they might sign such a player after he signed with a team and became a professional, would not receive any remuneration in regard to a signing bonus, which often reached into the millions of dollars.

At some point, perhaps about midway through the twenty some years of my work, the role played by agents in this process changed. I am here to tell the story! Major agents and their firms first asserted to the high school and college players that it was in fact permissible for them to have an agent as an advisor, which the NCAA allowed as much. Agents making this assertion worked for some of the major firms in the nation, and they sought actual representation with the young players asserting that it was okay if they were called “advisor” as opposed to “agent.” I believe this practice is still taking place and, as if to underscore its absurdity, these advisors would become agents after the player signed with a professional team and then take three percent of their signing bonus as a fee for the representation.²³ Thus, by the time you could prove that they were in fact serving as agents by the aforesaid remuneration, it was too late, they had already become professionals!

The assertion by these agents, that they could serve as advisors within NCAA guidelines, caused me once again to research the NCAA rules thoroughly to see if they had in fact changed. Yet, as noted above, the present rules do not allow any such thing.²⁴ The most I have been able to see as a basis for such are the exceptions cited for lawyers. But the rules dictated that a “lawyer” under the guidelines could not be a professional agent as well, or an

²³ Rick Horrow, *Marketing and Representing the Professional Athlete*, PRO STAR SPORTS AGENCY, <http://www.prostaronline.com/articles/athletemarketing.pdf> (last visited Oct. 10, 2011). See *Frequently Asked Questions: Sports Agent Salaries*, SPORTS MGMT. WORLDWIDE, <http://www.sportsmanagementworldwide.com/courses/athlete-management-sports-agent/salaries> (last visited Oct. 10, 2011).

²⁴ NCAA MANUAL, *supra* note 2, art. 12.3.1.2.

An individual shall be ineligible . . . if he or she . . . accepts . . . benefits from: (*Revised: 1/14/97*)

. . . .

(b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete’s sport. (*Adopted: 1/14/97*). *Id.*

"advisor" allowed for university panels, of which they clearly would not qualify.²⁵ When I inquired of the agents themselves, informing them that their claim seemed to be bogus, they cited as authority that the Union had informed them that they could so act, yet this appears clearly to be in violation of the NCAA rules, and threatens a player's amateur status.²⁶ At present this is the opinion I give to prospective players when agents inform them that they can act as advisors, noting that the only manner in which this would appear to occur given the present NCAA rules is because the NCAA plays so little attention the enforcement of these rules in regard to college baseball. Thus, no one gets caught. This does not mean, however, that this is "allowed," and any player affected could be sanctioned. Query, would there then be a cause of action against the agent? Hope you're having fun, as I let the "cat out of the bag."

Having laid a predicate to incur the ire of my agent friends, it would now be befitting to talk about the only time where I did in fact involve agents in the negotiating process.

V. PLAYER TWO—A FIRST ROUNDER

This player had just finished his junior year playing college baseball, and was thus eligible for the major league draft prior to his senior year. Normally, in this circumstance, I would stay clear of agent involvement to maintain the possibility of his returning for a senior year in college as both a bargaining tactic as well as a reasonable choice for the athlete. This was, however, a premier player, often mentioned as a possible top pick of the first round of the draft. Because of the enormous monetary value here, this circumstance mandated much thought and attention.

A variety of agents and firms were recruiting the player and peddling their services, even asserting that the NCAA would allow them to act as "advisors." Rumors and baseball contacts indicated that as the draft approached the demand for the player's services were slipping, that he was falling out of a possible first round selection. What to do? Much was at stake at this point, particularly where he might fall to as these draft rumors circulated.

At this point I recommended to the player and his family that

²⁵ *Id.* arts. 6.1.4, 12.3.2 (committee referred to as "advisors" for university panels).

²⁶ *Id.* art. 12.3.2–12.3.2.1.

we involve a professional agent, even though his amateur status and the possibility of a return for his last year at college would be at stake. This was unfamiliar territory for me since I was usually involved to assure that amateur status was maintained. But as I explained to the family, their son, even if he fell out of the first round, would be drafted so high, and there was so much money at stake that the chances of not going professional were minimal. We needed help and information, thousands of dollars might be at stake if he fell out of the first round. So, much to the surprise of a firm, I set up a meeting to discuss the draft and the player with one of the more experienced agents working Major League Baseball.

Sitting in the living room of the player's home with the player, his parents, myself, and the agents, we commenced by engaging in small talk concerning the draft, which was to take place the next day. Here I surprised everyone, as I turned to the agent, and challenged him. "You are here because of your contacts with MLB team management, and your knowledge of this draft," I continued, "So, here's the deal, we sign with you tomorrow if our player is drafted in the first round, otherwise not!" He was shocked, as were all present. But I persisted, "We ask that this evening you use your contacts with the major league teams, and do all that you can to secure a deal with a team for a first round selection. If you agree to do such, go all out now, and he is drafted in the first round, we sign with you." A deal was struck, all was on the line.

The next day he was drafted in the first round! Was this due to the agent's contact and discussions with MLB general managers, as I requested? Well, even though conversations with the team that drafted him took place, we will never know! It may have had an affect, maybe not. All I cared about was the player being selected in the first round, whether the agent played a role when that occurred was no longer of much meaning. Represented by the agent, we signed and the player received a bonus, free of any fee paid to anyone—that would make anyone smile. Here, it is interesting to note, that when the team told us that they would not make an offer above "X" dollars, a deal was done when we agreed to sign for one cent less than that figure. Don't think, as many do, that baseball teams throw money around; like any other business, they are close with their dollars and try to save any money that they can.

Here, given the choices, things turned out very well, but keep

in mind that such occurred even though we were prepared to forgo a return for his last year of college as we "threw the dice." Each individual circumstance is different and should be treated as such. This player went on to have a brief but rewarding major league career, with some extra money in the bank.

VI. PLAYER THREE—A FIFTH YEAR OF COLLEGE, PLEASE

Well, having reviewed a couple of my more "glamorous" representations, how about taking a look at "another side of this life?" A player, whose father I admired, respected, and would have done anything for, had a son who was not only a "late round" draftee, but had used up all of his college eligibility—four years of NCAA baseball without graduating.

I am reviewing this circumstance because we have yet to discuss a most significant, yet peripheral issue, concerning these young men. What happens to the education of a high school player who decided to go "pro" and forsakes a college scholarship in the process, or a junior in college (or an athlete who turns twenty-one) who goes "pro" and forsakes not only the remaining year of his scholarship but graduation from college? Why is this so important? Anyone who follows baseball is aware that not only do very few players actually succeed and have professional career in the "majors," but in baseball, knowing who will succeed and who will not is assuredly the most difficult of all professional sports. Thus, having that college degree might in the end, for life purposes, be more important.

Here, ethical questions are raised and MLB has responded with its "scholarship" plan. The Professional Baseball Scholarship Plan is applicable for players who have:

Negotiated for participation in the Plan as part of their first professional Minor League Uniform Player Contracts. . . . [A] participant must be enrolled and attend classes at an accredited college/university or junior college in pursuit of an undergraduate degree. The maximum number of semesters allowed is eight; the maximum number of quarters/trimesters is twelve.

. . . .

The maximum reimbursable amount is determined by the amount specified in the participant's first Minor League Uniform Player Contract.²⁷

²⁷ *College Scholarship Program: A Guide for Players*, MLB.COM, http://mlb.mlb.com/mlb/official_info/scholarship.jsp?content=guide#1 (last visited Oct. 10, 2011).

The Tuition Allowance covers:

[T]he participant's cost of tuition, fees . . . and textbooks (not included are computers, calculators or materials other than textbooks) required for the course of study.

. . . .

Generally, the original Club that signed the player will be responsible for the payments under the Plan, even if the player plays for different organizations throughout his career.

. . . .

A participant's unconditional release, retirement or placement on the Military List shall not relieve the Club of its obligations to pay for the scholarship under the terms of the Plan.²⁸

Thus, every high school athlete offered a college scholarship, and every college baseball player on scholarship, is included. But note, only if such is "negotiated . . . as part of their first professional Minor League Uniform Player Contracts."²⁹ So this issue becomes a part of every negotiation with an MLB team. Further, and underscoring this as a full part of the negotiation process, "[t]he maximum reimbursable amount is determined by the amount specified in the participant's first Minor League Uniform Player Contract."³⁰ The best example of this, in my experience, was our "Player One"³¹ discussed earlier, who was allowed to attend a "prestigious" university by the MLB team that drafted and signed him at a school that was very, very expensive. For that player, we negotiated payment for a full eight semesters, but since his baseball career might intervene and postpone attendance, we stipulated an amount of scholarship funds so large that it covered tuition and expenses for a period of twenty years!

But how about our present player? For MLB teams, I must say, in only one instance did any of the clubs not fully cooperate with including college payment as a part of the contracts signed. As the clubs acknowledge, it is the right thing to do. But that said, this was not the case for Player Three. Why? Well, he had already completed four years of college, and had yet to graduate; in fact, he would need an extra year to complete his college degree. This was quite important to him and his family.

Yet, that MLB team had drafted him in the lowest of rounds. In fact, players drafted this low were almost never offered any

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See supra* Part III.

signing bonus, just, as the saying went, "a cup of coffee" for signing. Of even greater consequence, the club felt no obligation because his class had already graduated from college, and he had not made it. They argued this was his fault, and that they had no obligation on their part.

Of all representations I have done in assisting amateur athletes over the years, from first round draft choices to college "all stars," the most difficult negotiation, believe it or not, the hardest I have ever worked or pressed, was getting a fifth year of college for this young man. Any illusions one may have about MLB clubs not being thrifty would be blown away by this. Only after much threatening, demeaning, and pressing for the right thing, and just before the deadline, did the ball club agree to provide his final year of college financing. Thus, this was perhaps my most sterling accomplishment!

VII. PLAYER FOUR—BROKE HIS ARM BEFORE THE DRAFT

Player Four was a talent on any standard, a great defensive outfielder with both speed and power! A five-tool player. This is not hypothetical, he has gone on to have an outstanding MLB professional career. But, in his last high school game he broke his arm, and instead of being a "high draft" choice, he fell to the middle rounds.

I knew this was going to be difficult from the start. The ball club seemed interested only in middle round money. The Player only had a choice of playing junior college baseball (no NCAA offers), thus not much bargaining power. When the family, at my urging, told the club that they would not sign unless he was compensated for his worth before the injury, the club closed all negotiations and was not happy. Assisting these families, by the way, did not make me very popular with the clubs.

Post-draft requirements of MLB and the Union require a signing by a certain date after the draft or the player becomes a free agent and is available for the next draft.³² So, despite the urging of the clubs—"Don't you want to play ball?," "We want players who want to play," "If you don't start playing now, you will fall behind everyone,"—a player will never know his ultimate

³² *First-Year Player Draft Rules*, *supra* note 3; accord Kevin T. Czerwinski, *Clock Ticks on Draft Signing Deadline*, MLB.COM (Aug. 15, 2008, 6:15 PM), http://mlb.mlb.com/news/article.jsp?ymd=20080813&content_id=3300931&vkey=draft2008&fext=.jsp.

value until they reach the signing period deadline! Clubs will do all they can to urge a player to rush and sign to save money. This was the most critical aspect of assisting this family. Since orthopedists indicated his arm would heal and return to normal, the family had to be willing to hold back, despite the ball club's urging, and force them to negotiate for the real value of the player.

With no offer within forty-eight hours of the deadline, we still asked for top-ten round money since that is where the player would have gone before the injury. This family stood their ground. I did only one thing, I left a message with the club's general manager to the effect that he needed to get with it or the player would not sign. Here, talent ruled, and at the last minute, a fair offer suddenly appeared, the player signed, and he still plays professional baseball today, now a wealthy young man.

VIII. PLAYER FIVE—HE WAS TO BE A BARGAIN

Player Five was a below average high school pitcher who played baseball at a somewhat obscure junior college. Guess what happened? He suddenly started to throw the ball over ninety-three miles an hour and a scout recorded such on his gun. The scout pulled the player aside, told him to keep quiet, but indicated his ball club would draft him if he kept his "mouth shut" and promised to sign!

But his dad and I had been good friends for years, and despite the seventeen-year-old player's promise that "I'll sign," when the ball club discovered that I would assist the family as their lawyer and that he might not sign, well, they freaked out. To them all this meant was "no undiscovered ninety-three miles per hour thrower" for a bargain. When they were informed that they would have to pay the "going rate" for a pitcher of this ability, the negotiations came to a stop.

What to do next was a problem. The player was finishing his second year in junior college, but did not have an offer from any four-year college. As discussed above, this is the major bargaining power retained by an amateur player. The ball club knew it was their piddling offer or nothing because he was a drafted player. So there we were, in the middle of summer and no alternative, until the dad told me a college coach had seen his son throw and invited him to call to see about a scholarship. The timing, well into July, appeared to be too late to get into a school and get a baseball scholarship. It turned out not to be, and let me

welcome you to the real world of college sports. Within a week, the college informed the player that if he took an "entry equivalence" exam successfully, he would be admitted and given a baseball scholarship! We did it, he took the exam, and "bingo," he received an offer.

As I suspected, the MLB team that drafted him, after discovering that they were about to lose him, made a most reasonable offer appropriate to his ability. I should add that the family had to hold out to the last signing day, something most amateur players have to do if they want to know what the maximum offer will be. Once again, MLB teams do what any business would do, save as much money as possible. But having been successful, here is where this story takes a most unusual turn.

Player Five told me, once I relayed this significant offer from the team, "I want to go to college!" As I said to his dad, if ever a young man should sign I think it is your son, but how can you tell a young man not to go to college if that is what he wants to do? Why did I think he should have signed? Well, you see, college baseball coaches, some more than others, are notorious for over pitching young pitchers, often causing future arm problems. Whereas the "pros," more concerned about the big club winning and using the minors for development, with money invested, are likely to take care of the pitcher, develop him, and not over-pitch him. This young pitcher, who just recently developed, I felt needed such tutelage to develop into a professional pitcher.

But, as eluded, we turned down the offer; the player matriculated to college and pitched there. The ending is not nice, he severely injured his rotator cuff in school, and despite extensive surgery, his career came to an end. Hey, all was not lost, ninety-three mile-an-hour pitching ability and a pro offer got him a college scholarship!

IX. PLAYER SIX—AN UNDRAFTED FREE AGENT

Do undrafted free agents ever sign with clubs and make it to the big leagues? This one did. He never pitched in high school, but became a pitcher in junior college and had a fairly successful pitching career at a small NCAA college. His family was truly a baseball family and they wanted him to have a chance to pitch professionally, as well as pick up funds to finish his last year in college.

In life and in baseball, sometimes who you know helps. One of my friends and client has had a successful career as a talent evaluator for MLB clubs. He knew the family and young athlete himself, and I needed help, so he agreed to assist. This assistance took place by having big league scouts watch this young man pitch in game situations. This we needed, as he played in a summer league that allowed for such observations.

Now here is something that, although quite logical, most fans do not think about. Since, by far and away, most minor league players will never make it to the big leagues,³³ in order to allow those that have the best chance to play and learn baseball, you have to fill out rosters for all positions and substitutes for every minor league team with those that do not have much of a chance. Thus, there is opportunity and need for such an unrecognized player. Though this young man lacked the velocity that, almost by necessity, must be present to project future success for a right-handed pitcher, his control, savvy, and baseball background, intangibles if you will, were evident as was his success on the field. Unnoticed by those looking for evident and abundant talent, he caught the eye of a scout we had observe him, who also knew of his family's profound baseball background.

We signed him with this ball club as an undrafted free agent. Though, given his circumstance, we were plenty happy with receiving a "cup of coffee" for signing, he also got his fourth year in college from the club per the scholarship program. But this story does not end here; he made it to the big leagues!

You see, many times the great baseball scouting geniuses scout the obvious. Yet, and as Yogi Berra once put it, "90 percent of this game is half mental."³⁴ Thus, unlike other sports, players who "make it" must have great athletic ability and be easy to scout, but they must also be able to deal with failure and the "mental side" of baseball. This aspect is "not so easy to scout." As such, it is very difficult to project major league players. Player

³³ *Major League Baseball Antitrust Reform: Hearing on S. 53 Before the S. Comm. on the Judiciary*, 105th Cong. 14 (1997) (statement of Dan Peltier, former Minor and Major League Baseball player), available at <http://www.diamondfans.com/minors-peltier.html> (estimating that ten percent of all drafted players play in the major leagues).

³⁴ Pablo S. Torre, *A Light in the Darkness: Led by Players Such as Ian Snell, Baseball is Taking the Lead in Pro Sports in Addressing Depression, Anxiety, and Other Mental Health Problems*, SI VAULT (June 21, 2010), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1170866/2/index.htm>.

Six excelled in the intangible areas so hard to scout and project, and his mental fortitude, accompanied with great control, allowed him to go all the way to the big leagues.

I recall after he signed and was playing for an "A"-level minor league team that, despite great success, he was sent down a level (Low A!) by the parent club. This was very depressing, but at this level a part of "baseball politics." You see, just plain common sense tells you if you sign a player as a high draft choice and spend some money on him, those who invest also succeed if he succeeds. So, in the minor league clubhouses the feeling is that you will never make it if you are an undrafted free agent because the club wants those they are invested in to succeed. Nobody, if you will, is in your corner. Unfortunately, to feel such is ultimately a predetermined excuse for failure! Can anyone make it if they think they will never be given a chance?

You want to know why Player Six made it against all odds? He could "deal with all this mentally." Remember, "90 percent of this game is half mental."³⁵ When he was sent down, rather than cave in to the politics, he proceeded to perform even better and was promoted to AA. I remember telling him as we talked on his cell phone, while he was in transit to the new team, that he had shown me he could handle the mental side of baseball, a necessity to play, and that I would now predict that he would "make it." You see, in the end, baseball is a game played on the field, in front of the "whole world." I was right, he did it, and it is a story worth telling!

CONCLUSION

So, there it is. As stated at the outset, a real world view of the real world process of amateur baseball players, the NCAA, and MLB. A "Con. Law" professor's foray into the world of baseball. I hope this "reality show" has been an insightful addition to the Baseball Symposium so skillfully put together by the *Albany Government Law Review*—thanks for "listening."

³⁵ *Id.*