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PROFESSIONAL CONDUCT

Play Ball! Resolving Potential Conflicts in *U.S. v. Clemens*

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Special to the Legal

The snow is melting, the seed catalogs are arriving, and all eyes are turning to Spring Training in Florida! Some baseball fans are also turning their attention to the U.S. District Court for the District of Columbia to follow the recent developments in *United States v. William R. Clemens, aka Roger Clemens*. The indictment, filed in August 2010, charges Clemens with six counts: three counts of making false statements to Congress, two counts of perjury, and one count of obstruction of Congress.

The charges arise out of testimony that Clemens gave before Congress on Feb. 8 and Feb. 13, 2008, concerning the use of performance enhancing drugs (PEDs) in Major League Baseball. Clemens flatly denied ever using PEDs. It appears that recently retired Yankees pitching ace Andy Pettitte, a former teammate of Clemens', remembers things differently. Prosecutors anticipate that Pettitte, a government witness, will testify that Clemens admitted using PEDs to him some years ago, according to court documents in *U.S. v. Clemens*. Pettitte's anticipated testimony was the catalyst for a recent motion by prosecutors requesting a hearing concerning defense counsel's potential conflict of interest.

The motion was based on the government's concern that Clemens' lawyer, well-known criminal defense attorney Rusty Hardin, should be precluded from cross-examining Pettitte, because he had previously represented Pettitte in a related matter. Prosecutors say in the motion that this representation occurred in early December 2007, when Hardin represented both Clemens and Pettitte in connection with an investigative report then scheduled to be released by former Sen. George Mitchell on Dec. 13, 2007. The report detailed Mitchell's investigation, at Congress' request, concerning the use of steroids and other PEDs by Major League Baseball players.

Prior to the release of the Mitchell Report, but in anticipation of it, attorney Hardin met with Clemens and Pettitte and engaged in confidential and privileged conversations with both of them, prosecutors say. Soon after that, Clemens and Hardin formalized their attorney-client relationship. Pettitte, however, retained separate counsel, according to the prosecutors' motion.

On Feb. 8, 2008, Pettitte provided an affidavit in the congressional investigation in which he recounted having a conversation with Clemens in 1999 or 2000 during which Clemens admitted using PEDs, the motion says. Pettitte is now expected to be a government witness in the prosecution against Clemens.

The Rule of Professional Conduct most directly implicated by the government's conflict of interest motion in the Clemens prosecution is Rule 1.9, Duties to Former Clients. The rule imposes continuing duties of confidentiality and loyalty following the conclusion/termination of our attorney-client relationships.

First, RPC 1.9(a) states that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent." Though "materially adverse" is nowhere defined in the rule or its explanatory comment, the term has been defined as directly adverse. In addition, the Comment to Rule 1.9 defines "substantially related" as either relating to "the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

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RPC 1.9(b) prohibits a lawyer from "knowingly represent(ing) a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent."

RPC 1.9 (c) is aimed more directly at the duty of confidentiality and prohibits a "lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter … (from) (1) using information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or (2) revealing information relating to the representation except as these rules would permit or require with respect to a client."

Thus, the rule could implicate Hardin's ability to cross-examine his former client (Pettitte) and potentially limits his ability to fully represent his current client (Clemens). The potential problem arises if Hardin learned something in his meeting(s) with Pettitte that he would like to use in his anticipated cross-examination of Pettitte. Could Hardin's potential inability to cross-examine with all guns blazing prejudice Clemens? Is Clemens willing to waive some cross-examination to keep a lawyer he believes in, trusts, and who has been thinking and strategizing about his case for years? Or is it a moot point, since no lawyer can use those statements for purposes of cross-examination? Could another lawyer perhaps develop the facts separately and cross-examine Pettitte concerning them without violating any confidentiality rules?

It appears to us that Hardin undertook prompt, sound measures to address the potential conflicts issue with his former client. Early on, Hardin hired co-counsel to handle Pettitte's cross-examination. The government signaled that the retention of unconflicted co-counsel for this purpose would be satisfactory to address its concerns so long as sufficient assurances could be provided to the court that proper screening measures were taken and that Clemens made a knowing and voluntary waiver of the potential conflict. To that end, prosecutors suggested that certain questions be asked of Hardin, co-counsel and Clemens. For example, in its motion the government suggested that Hardin answer questions concerning the nature and duration of the screening measures taken to prevent the exposure of co-counsel to prohibited information. For co-counsel, questions centered on when he was brought into the case and whether he received any privileged information either prior to or since undertaking the representation. Concerning Clemens, the focus was on his understanding of the potential conflict of interest and whether he understood all of its possible adverse consequences.

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Of course, it was also up to Clemens to agree that despite these consequences, he wished to go forward with his current representation. A hearing on the government's conflict of interest motion was held earlier this month, and the court has since approved the representation arrangements at issue.

Pettitte announced his retirement from baseball this month, asserting that his role in the *Clemens* case had nothing to do with his decision. Barry Bonds is scheduled to be tried on perjury charges this coming July. Earlier this week, MLB announced that Red Sox prospect William Abreu, a 19-year-old pitcher in rookie ball, has been suspended 50 games after allegedly testing positive for the anabolic steroid known as Deca-Durabolin. Whatever happens in the *Clemens* case, it certainly appears that the steroid-era chapter of baseball history will cast a shadow over the sport for many seasons to come. •