The 2010 Sports Law Criminal Cases

Two of the greatest baseball players of all time – Barry Bonds and Roger Clemens – faced criminal charges in 2010 related to their alleged use of performance-enhancing drugs. The public's attention was riveted to the BALCO scandal and Bonds, the game's greatest home run hitter, was tried on a series of charges stemming from his testimony before a federal grand jury. Clemens, a seven-time Cy Young Award winner, was charged with perjury based on his testimony before a Congressional committee. Although Bonds was ultimately convicted of one minor charge, Clemens was acquitted. Both, however, face diminished chances for enshrinement in baseball's Hall of Fame. These cases address some of the issues involved regarding the criminal cases against these two superb athletes.

U.S. v. Barry Lamar Bonds

608 F.3d 495 (9 Cir. 2010)

[In a perjury prosecution against Barry Bond, defendant moved in limine to exclude certain testimony, laboratory blood and urine test results, and laboratory log sheets of test results. The lower court granted defendant's motion in part, and the government filed an interlocutory appeal. In the absence of these documents, the government's case would likely fail.]

SCHROEDER, Circuit Judge:

In 2001, Barry Bonds hit 73 home runs for the San Francisco Giants. Also in 2001, as well as in prior and succeeding years, BALCO Laboratories, Inc. in San Francisco recorded, under the name "Barry Bonds," positive results of urine and blood tests for performance enhancing drugs. In 2003, Bonds swore under oath he had not taken performance enhancing drugs, so the government is now prosecuting him for perjury. But to succeed it must prove the tested samples BALCO recorded actually came from Barry Bonds. Hence, this appeal.

The government tried to prove the source of the samples with the indisputably admissible testimony of a trainer, Greg Anderson, that Barry Bonds identified the samples as his own before giving them to Anderson, who took them to BALCO for testing. Anderson refused to testify, however, and has been jailed for contempt of court.

The government then went to Plan B, which was to offer the testimony of the BALCO employee, James Valente, to whom Anderson gave the samples. Valente would testify Anderson brought the samples to the lab and said they came from Barry Bonds. But the district court ruled this was hearsay that could not be admitted to establish the truth of what James Valente was told Accordingly we have this interlocutory appeal by the United States seeking to establish that the Anderson statements fall within some exception to the hearsay rule.

The district court also ruled that because Anderson's statements were inadmissible, log sheets on which BALCO recorded the results of the testing under Bonds' name, were also inadmissible to prove the samples were Bonds'. The government challenges that ruling as well.

We have jurisdiction pursuant to 18 U.S.C. § 3731 which authorizes government interlocutory appeals of adverse evidentiary rulings. We review for abuse of discretion and affirm.

I. Background

BALCO Laboratories, Inc. was a California corporation that engaged in blood and urine analysis, and was located in San Francisco. In 2003, the IRS began to investigate BALCO, suspecting the company of first, distributing illegal performance enhancing drugs to athletes, and then, laundering the proceeds. In September 2003, the government raided BALCO and discovered evidence which it contends linked both trainer Greg Anderson ("Anderson") and BALCO to numerous professional athletes. One of these athletes was professional baseball player and Defendant Barry Bonds ("Bonds"). The government also found blood and urine test records which, it asserts, established that Bonds tested positive for steroids.

On multiple occasions Anderson took blood and urine samples to BALCO Director of Operations James Valente ("Valente") and identified them as having come from Bonds. According to Valente, when he received a urine sample from Bonds, he would assign the sample a code number in a log book, and then send the sample to Quest Diagnostics ("Quest") for analysis. Quest would send the result back to BALCO. BALCO would then record the result next to the code number in the log book. Also, according to Valente, BALCO would send Bonds' blood samples to LabOne & Specialty Lab ("LabOne") for analysis. The government seized the log sheets from BALCO, along with the lab test results.

Before the grand jury in the probe of BALCO, the questioning by the government focused extensively on the nature of Bonds' relationship with Anderson. Bonds testified that he had known Anderson since grade school, although the two had lost touch between high school and 1998. In 1998, Anderson started working out with Bonds and aiding him with his weight training. Anderson also provided Bonds with substances including "vitamins and protein shakes," "flax seed oil," and a "cream." According to the government, some or all of these items contained steroids. Anderson provided all of these items at no cost to Bonds. Bonds testified he took whatever supplements and creams Anderson gave him without question because he trusted Anderson as his friend. ("I would trust that he wouldn't do anything to hurt me."). Bonds stated that he did not believe anything Anderson provided him contained steroids. He specifically denied Anderson ever told him the cream was actually a steroid cream.

With respect to blood sample testing, Bonds testified before the grand jury that Anderson asked Bonds to provide blood samples on five or six occasions, telling Bonds he would take the blood to BALCO to determine any nutritional deficiencies in his body. Bonds said that he would only allow his own "personal doctor" to take the blood for the samples.

Bonds also testified he provided around four urine samples to Anderson and he believed the urine samples were also going to be used to analyze his nutrition. Anderson also delivered these samples to Valente at BALCO for analysis. ("Greg went [to BALCO] and dealt with it."). Bonds did not question Anderson about this process because they "were friends."

The government showed Bonds numerous results of blood and urine tests but Bonds denied ever having seen them before. Rather Bonds contended that Anderson verbally and informally relayed the results of any tests to him. Bonds stated that Anderson told him that he tested negative for steroids. ("Greg just said: "You're—you're negative."). Bonds trusted what Anderson told him. ("He told me everything's okay. I didn't think anything about it.").

With respect to the relationship between Bonds and Anderson, Bonds admitted to paying Anderson $15,000 a year for training. Bonds stated that this payment was not formally agreed to. Rather, Bonds contended that he "felt guilty" and "at least [wanted to give Anderson] something." ("Greg has never asked me for a penny."). Bonds had several trainers and considered some of the trainers employees, but considered Anderson a friend whom he paid for his help. ("Greg is my friend.... Friend, but I'm paying you."). Bonds made his payments to Anderson in lump sums. In 2001, the year he set the Major League Baseball single season home run record, Bonds also provided Anderson, along with other friends and associates, a "gift" of $20,000. Bonds spent considerable time with Anderson in San Francisco but Bonds noted that Anderson only visited during weekends during spring training.

On February 12, 2004, a grand jury indicted Anderson and other BALCO figures for their illegal steroid distribution. Anderson pled guilty to these charges and admitted to distributing performance enhancing drugs to professional athletes. The government also commenced an investigation into whether Bonds committed perjury by denying steroid use during his grand jury testimony. Anderson, since that time, has continuously refused to testify against Bonds or in any way aid the government in this investigation and has spent time imprisoned for contempt.

II. Procedural History of this Appeal

On December 4, 2008, the government indicted Bonds on ten counts of making false statements during his grand jury testimony and one count of obstruction of justice. They included charges that Bonds lied when he 1) denied taking steroids and other performance enhancing drugs, 2) denied receiving steroids from Anderson, 3) misstated the time frame of when he received supplements from Anderson.

The next month, in January 2009, Bonds filed a motion in limine to exclude numerous pieces of evidence the government contends link Bonds to steroids. As relevant to this appeal Bonds moved to exclude two principal categories of evidence: the laboratory blood and urine test results, and the BALCO log sheets of test results.

When the government sought to introduce as business records the lab test results from Quest (urine) and LabOne (blood) seized from BALCO, Anderson's refusal to testify created an obstacle. The essence of the government's identification proof was Anderson's identification of the samples to Valente as Bonds'. The government wanted to introduce Valente's testimony that Anderson told him for each sample that "This blood/urine comes from Barry Bonds," in order to provide the link to Bonds. Because the government was attempting to use Anderson's out of court statements to prove the truth of what they contained, Bonds argued that Anderson's

statements were inadmissible hearsay and that the lab results could not be authenticated as Bonds' in that manner. *See* Fed.R.Evid. ("FRE") 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

The government sought to fit the statements within a hearsay exception. In its response to the defense motion in limine the government countered that Anderson's statements were admissible as statements against Anderson's penal interest (FRE 804(b)(3)), as statements of a co-conspirator (FRE 801(d)(2)(E)), and, alternatively, as admissible under the residual exception (FRE 807). At oral argument and in supplemental briefing before the district court, the government advanced two additional rationales as to how the court could admit the blood and urine samples: as statements authorized by a party (Anderson's statements authorized by Bonds) under FRE 801(d)(2)(C), or as statements of an agent (Anderson as Bonds' agent) under FRE 801(d)(2)(D). The court held that the government, as the proponent of hearsay, had failed to prove by a preponderance of the evidence that any of the exceptions or exemptions applied. . .

The government also sought to introduce the log sheets from BALCO containing the Quest lab test results showing Bonds' urine testing positive for steroids, arguing that the log sheets were admissible as non-hearsay business records, or as statements of a conspirator, as statements against penal interest, or admissible under the residual exception to hearsay. The district court ruled the log sheets were also inadmissible to establish the samples tested were Bonds'. This appeal followed. On appeal, the government argues only that FRE 807, the residual exception, or FRE 801's exceptions for authorized statements (d)(2)(C) or for statements by an agent (d)(2)(D) apply.

III. Discussion

A. Admissibility of Anderson's Statements Under the Residual Exception to the Hearsay Rule

The district court held that FRE 807, the residual exception, did not apply. The court observed that it was designed for "exceptional circumstances." FRE 807, previously FRE 803(24), provides:

> A statement specifically not covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be served admission of the statement into evidence.

The court did not find Anderson's refusal to testify an exceptional circumstance because the effect was to make him an unavailable declarant, and FRE 804 already defines an "unavailable"

declarant and lists exceptions to inadmissibility that the government does not contend are applicable in this case.

FRE 807 involves discretion. It exists to provide judges a "fair degree of latitude" and "flexibility" to admit statements that would otherwise be hearsay. . .

Our sister circuits have also given district courts wide discretion in the application of FRE 807, whether it be to admit or exclude evidence. . . Therefore, the government is asking this Court to take an unprecedented step in using 807 to admit the statements of a declarant who has chosen not to testify and whose statements lack significant indicators of trustworthiness.

The government argues that the district court adopted an improperly narrow view of FRE 807 by not taking into account that Anderson's statements "almost" fell within several other hearsay exceptions. It also asserts the court did not give enough weight to Anderson's unavailability.

The government contends that Anderson's statements "almost" met several other hearsay exceptions, and for that reason the district court erred in not admitting them under FRE 807. Specifically the government points out that Anderson's statements came close to qualifying as statements against his penal interest and statements of a coconspirator. . . In this case, even though this was a "near miss" it was nevertheless a "miss" that may have permitted, but did not alone compel the trial court to admit Anderson's statements under FRE 807.

The government next suggests that Anderson's unavailability is "exactly the type of scenario" FRE 807 was intended to remedy, but cites no authority supporting the proposition. It argues the district court misunderstood the rule and applied it too narrowly. The district court, however, correctly noted that courts use FRE 807 only in exceptional circumstances and found this situation unexceptional because it involves statements of an unavailable witness like those FRE 804 excludes, with limited exceptions here not applicable.

In addition, FRE 807 requires that the admissible statements have trustworthiness. The district court concluded Anderson's statements were untrustworthy, in major part because Valente admitted that he once mislabeled a sample when Anderson asked him to do so. To the extent the government contends that the district court improperly focused on Valente's trustworthiness instead of on the trustworthiness of Anderson's statements, the government misinterprets the district court's opinion. The district court finding properly focused on the record of untrustworthiness of the out of court declarant, Anderson, as required under the rule. There was support for its conclusion that Anderson's statements about the source of samples were not trustworthy.

B. Admissibility of Anderson's Statements Under 801(d)(2)(C) and (D).

FRE 801(d)(2)(C) provides that a statement is a non-hearsay party admission if it "is offered against a party and is ... a statement by a person authorized by the[defendant] to make a statement concerning the subject." FRE 801(d)(2)(D) provides that a statement is not hearsay if it

"is offered against a party and is ... a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Subsection (C) thus requires the declarant to have specific authority from a party to make a statement concerning a particular subject. Subsection (D) authorizes admission of any statement against a party, but only provided it is made within the scope of an employment or agency relationship. . .

We turn first to the government's challenge to the district court ruling that the statements should not be admitted under Subsection (C) because Bonds did not specifically authorize Anderson to make the statements. Both parties agree that if the samples were Bonds', he *could* have authorized Anderson to make the statements. The question is whether the district court was within its discretion in ruling the record failed to establish sufficiently that he did.

The government acknowledges it cannot establish that Bonds explicitly authorized Anderson to identify the samples as his. Bonds was never asked the question during his grand jury testimony and Anderson, of course, is unavailable. The government's position is, in essence, that by authorizing Anderson to act as one of his trainers, Bonds implicitly authorized Anderson to speak to the lab on his behalf. The conclusion does not follow from the premise.

. . . There is no evidence of discussions about how Anderson was to deal with the samples. The district court could have quite reasonably concluded that Bonds was accommodating the wishes of a friend rather than providing Anderson with "the authority to speak" on his behalf. . .

To determine whether Anderson's statements are admissible under Rule 801(d)(2)(D), we must "undertake a fact-based inquiry applying common law principles of agency." For Anderson's statements to fall under this exception, he would have to have been Bonds' employee or agent. . .

The record supports the district court's conclusion that Anderson was an independent contractor, rather than an employee. . .

C. The Log Sheets

The district court excluded BALCO log sheets purportedly showing Bonds testing positive for steroids "because even if [the log sheets] qualify as business records, they are not relevant because the government cannot link the samples to [Bonds] without Anderson's testimony." The parties spar about whether this statement by the district court meant relevance in the literal sense that they did not on their face pertain to Bonds, or whether the district court meant they could not in fact relate to Bonds unless the data was authenticated as relating to Bonds. The district court meant the latter.

The log sheets were business records reflecting that BALCO recorded test results in the name of Barry Bonds. The records themselves, however, go no further toward showing the actual samples came from Barry Bonds than Valente's testimony about what Anderson told him. If

anything the logs, when offered for the truth of the identification of the sample donor, created an additional level of hearsay rather than removing one. The district court did not abuse its discretion in refusing to admit the log sheets as evidence that the samples listed were Bonds'.

U. S. v. William R. CLEMENS

793 F.Supp.2d 236 (D.DC 2011)

REGGIE B. WALTON, District Judge.

[The success of Roger Clemens' defense to the perjury charge depended on his counsel's ability to review the statements made by his chief accusers -- Brian McNamee, and Kirk Radomski -- to lawyers at George Mitchell's law firm, DLA Piper. In this opinion the addresses whether those statements were protected "opinion" work product or discoverable "fact" work product.]

William R. Clemens, the defendant in this criminal case, has been indicted on various criminal charges related to testimony that he provided to the House Committee on Oversight and Government Reform in February of 2008. On or about February10, 2011, the defendant served DLA Piper U.S. LLP ("DLA Piper") with a subpoena *duces tecum* pursuant to Federal Rule of Criminal Procedure 17(c), seeking, *inter alia*, "all interview summaries, notes, and memoranda" pertaining to Jose Canseco, Brian McNamee, and Kirk Radomski that are "related to the 'Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball." DLA Piper then moved to quash the subpoena, arguing that "the handwritten or typed notes taken during interviews" conducted by DLA Piper of these three individuals, as well as the "memoranda prepared after [the] interviews summarizing the substance of the[se] interviews .... constitute classic attorney work product." After careful consideration of DLA Piper's motion to quash, the defendant's memorandum in opposition to DLA Piper's motion, DLA Piper's brief in reply to the defendant's opposition memorandum, DLA Piper's work product, the defendant's *ex parte* submission regarding the DLA Piper documents, and the representations made to the Court during the *ex parte* hearing with the DLA Piper attorneys who participated in the interviews, the Court concludes for the following reasons that the motion to quash must be granted in part and denied in part, based on the finding that the defendant is entitled to excerpts from DLA Piper's interview notes and memoranda.

I. Background

The defendant is a former Major League Baseball ("MLB") player who played for four different teams over a span of twenty-four years. "In or about March 2005," the United States House of Representatives—specifically, the House Committee on Oversight and Government Reform (the "Committee")—conducted an investigation into "the use of [performance-enhancing drugs] in professional baseball." "[T]he Commissioner of MLB, partially in response to concerns raised by the Committee during its 2005 [investigation], engaged former ... United States Senator

... George J. Mitchell ... to conduct a comprehensive investigation of [performance-enhancing drug] use in MLB. Senator Mitchell, who at the time of the engagement was a partner at DLA Piper, retained his law firm to represent him during the investigation. ("[T]he way the contracts were set up is that baseball retained him to do an investigation, [and] he then retained [DLA Piper] to act as his legal counsel...."). "On or about December 13, 2007, Senator Mitchell issued a 409–page report," commonly referred to as the "Mitchell Report," which "contained multiple allegations of [performance-enhancing] drug use in MLB over the years preceding its release." Among the allegations contained in the Mitchell Report were claims that the defendant "used anabolic steroids on multiple occasions in 1998, 2000, and 2001," as well as human-growth hormone ("HGH") "on multiple occasions in 2000." In response to the allegations made in the Mitchell Report, the defendant appeared before the Committee for a deposition "on or about February 5, 2008," and a hearing "on or about February 13, 2008," during which he denied using performance-enhancing drugs. According to the government, the defendant made statements before the Committee that he "knew to be false and misleading," and it is these statements that are the subject of the criminal charges currently pending against him.

As noted above, the defendant served DLA Piper with a subpoena *duces tecum*, in which it demanded production of, *inter alia*, various interview notes and memoranda pertaining to Jose Canseco, Kirk Radomski, and Brian McNamee. DLA Piper moved to quash the subpoena on March 18, 2011.

II. Legal Standard

The work[-]product doctrine reflects the strong public policy against invading the privacy of an attorney's course of preparation." . .. The attorney work-product doctrine also can bar a party from obtaining protected materials from a third party . . . Although the attorney work-product doctrine can protect an attorney's materials in a number of different circumstances, not "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases." Rather, attorney work-product is discoverable "if the party seeking discovery can make a sufficient showing of necessity." However, the showing of need required to discover another party's work product depends on whether the materials at issue constitute "fact" work product or "opinion" work product. *See* *In re Sealed Case*, 676 F.2d 793, 811 (D.C.Cir.1982) (noting that there is "qualified protection for 'fact' work product and more absolute protection for 'opinion' work product"). . . On the other hand, with regard to "opinion" work product—e.g., written materials prepared by counsel that reflect the attorney's " 'mental impressions, conclusions, opinions, or legal theories,' " such materials are "virtually undiscoverable."

The challenge for the Court here is determining what constitutes "fact" versus "opinion" work product. . . To be clear, however, simply because the record reflects a collection of facts that "necessarily reflect[ ] a focus chosen by the lawyer," does not mean that those facts are forever entitled to protection as "opinion" work product. . .

III. Legal Analysis

Applying the principles stated above to the facts of this case, the Court concludes that, for the most part, DLA Piper's notes from its initial interviews of Mr. Radomski and Mr. McNamee, as well as all of its interview memoranda, constitute "fact" work product and are, therefore, entitled to a lower standard of protection. . . The Court reaches its conclusion for three reasons: (1) with regard to the initial interviews of both Mr. Radomski and Mr. McNamee, these interviews were of a general nature and not "sharply focused or weeded" by DLA Piper; (2) government officials actively participated in all of these interviews; and, most importantly, (3) DLA Piper made substantial efforts to confirm the accuracy of the various statements contained in the memoranda with the two interviewees. Taken together, these factors persuade the Court that the recorded remarks of Mr. Radomski and Mr. McNamee contained in these notes and memoranda do not reflect the mental impressions, thought processes, legal strategy, or personal assessments of DLA Piper; in fact, they accurately depict the witnesses' own words. . .

DLA Piper must therefore produce portions of the interview memoranda and the initial interview notes to the defendant, provided that he has demonstrated a substantial need for the materials, and that it would be an undue burden to require that he attempt to obtain the materials from another source. And, based on defense counsel's representations, the Court concluded at the April 21, 2011 hearing and in its April 27, 2011 Order that the defendant established a substantial need for "(1) ... statements [that] are inconsistent with the statements made by [Mr. Radomski or Mr. McNamee] in interviews conducted by the government prior to their interviews with DLA Piper," or (2) any statements by Mr. McNamee that "are consistent with the defendant's theory that Mr. McNamee has progressively embellished the facts that form the basis of the offenses charged in the Indictment." Moreover, the defendant could not possibly learn what was actually discussed during DLA Piper's interviews of Mr. Radomski and Mr. McNamee without obtaining the law firm's notes and interview memoranda; thus, the defendant satisfied the "undue burden" prong as well. As a result, the defendant has made a sufficient showing to pierce the cloak of protection that otherwise might be accorded to DLA Piper's "fact" work product.

At the same time, the Court is hesitant to give the defendant the entirety of DLA Piper's "fact" work product because much of the interview memoranda and initial interview notes, at least at this stage in the litigation, do not seemingly have any relevance to the matters that will be at issue in the upcoming trial. By allowing the defendant complete access to irrelevant materials, the Court would be giving short shrift to the protections otherwise accorded to DLA Piper's "fact" work product. Accordingly, after further consideration of the record and governing case law, the Court finds that the more sensible approach is to provide the defendant with every statement provided by Mr. Radomski or Mr. McNamee in DLA Piper's work product that directly pertains to the defendant, and to redact all other information contained in these materials. The Court concludes that this is the more prudent approach because, at this point in the litigation, the only information contained in the work product that the Court can be certain will be at issue at trial are those statements regarding the defendant that were provided by Mr. Radomski or Mr. McNamee. . . In any event, if necessary based on what occurs during the trial, the Court will revisit whether other portions of DLA Piper's work product must be produced to the defendant. Accordingly, at this time, the Court will require that DLA Piper produce only those portions of its interview memoranda and initial interview notes that directly pertain to the defendant. The

Court believes that this approach properly balances the interests of DLA Piper in protecting its work product to the fullest extent possible, while also allowing the defendant access to the information that he needs to present his defense.