

OUT of ORDER

Opinion • Commentary • Humor

A View From the Dugout at the Roger Clemens Trial

by ANDY DRUMHELLER, DEREK HOLLINGSWORTH
and JEREMY MONTHY

Every trial is important, and every client is important. Occasionally the rest of the world agrees and a spotlight hits your case.

That was the scenario we recently faced at Rusty Hardin & Associates during the firm's successful defense of former professional baseball star Roger Clemens against perjury charges.

LITIGATION

The nine-week jury trial in *United States v. William Roger Clemens* provided several valuable lessons for any trial lawyer handling a complex or high-profile case, including those listed below (one for each of Clemens' Cy Young awards):

1. *Even large, well-funded opponents can be defeated.* The considerable forces aligned against Clemens included four federal prosecutors at the counsel table, the accumulated work of more than 100 FBI agents, and an untold number of others from the U.S. Attorney's Office for the District of Columbia (the largest U.S. attorney's office in the nation) researching and briefing specific issues, not to mention staff and legal counsel in the U.S. Congress. The prosecution had significant legal and investigative firepower.

In the Clemens case, we decided to select jurors who had no baseball knowledge.

We matched our opponent — with far fewer people — by leveraging the investigative experience of our team members from the day we were hired through the last day of trial.

2. *A gag order is not a restraining order.* When appropriate, our firm tries to make sure press accounts include our client's legal position and view of key events. U.S. District Judge Reggie Walton issued a gag order, but some fundamental ground rules for interacting with the press still applied.

Be courteous. Even reporters who seem intent on discrediting you and your client have a job to do. Lawyers can answer questions about process and schedules without violating most gag orders.

Don't forget to smile. Photos of a stressed-out or fatigued legal team make a lousy statement.

Finally, don't spend too much time poring over the press clippings. Reporters often make unreliable shadow jurors. They may not be able to attend the entire trial, and they have to tell a story each day rather than assimilate evidence over time like a

juror. Dwelling on inaccuracies in the press is a distraction from what actually is happening in the courtroom.

3. *The courtroom is a great classroom.* Jurors often say they enjoy being educated on new subjects, whether it is employee incentive plans, the design of a high-tech device, personal-injury science or baseball. This is especially true when jury service lasts weeks or months.

In the Clemens case, we decided to select jurors who had no baseball knowledge. We then taught them the innocent reasons for Clemens' success by getting testimony from coaches at various stages of his career rather than relying on more-famous athletes who would vouch for him.

4. *Authentic testimony is rarely scripted.* We didn't coach our witnesses by rehearsing specific answers or subjecting them to intense mock examinations. Instead, we prepared them by making them comfortable about the process so they could convey their message to the jury in their own words and with their own personalities.

5. *Maintain perspective.* Rather than spending jurors' time attacking the government's evidence, we strove to minimize our objections even when some of the offered evidence was considered damaging. We embraced the story that was developing at trial because our own investigation and trial experience made us confident that our story would resonate with jurors and ultimately withstand attack.

Jurors told us afterward that they appreciated this open approach. Getting mired in battle tactics also can prevent lawyers from savoring the moment. Rather than pacing the halls during jury deliberations, we found a sunny garden to relax and take team photos.

6. *Consistent details persuade jurors.* One of the central issues in the public debate about Clemens was his success and longevity as a pitcher. Many believed him guilty of using performance-enhancing drugs because his accomplishments seemed otherwise unattainable.

But by focusing on specific, accurate details about Clemens' career, we showed the jury that the only thing unnatural about him was the continuity of his determination over 25 years. Witnesses testified that Clemens did not take shortcuts and that his mechanics, work ethic and integrity as a ballplayer were consistent from his days in high school until the end of his career. This approach allowed us to fully deconstruct the accusations and turn apparent weaknesses into strengths.

7. *A jury trial is not a risk; it's an opportunity.* Clemens and all of us on his legal team believed in his innocence, and he wanted his day in court. However, the court of public opinion all too rapidly



Roger Clemens

adjudicates a dispute. U.S. Supreme Court Justice Anthony Kennedy wrote for the high court in *Lafler v. Cooper* (2012) that "criminal justice today is for the most part a system of pleas, not a system of trials." Many now believe that jury trials are a mere formality when cases already have been the subject of intense public debate and scrutiny.

Nothing could be further from the truth. There are no rules of evidence in the court of public opinion. People can say anything in media reports and other politicized public forums leading up to a high-profile trial. But that's not true in a court of law.

Jury trials are the place where advocates for each side finally test scandalous allegations in front of impartial citizens. Without the crucible of cross-examination and the constitutional protections offered by a fair jury trial, there is little chance that anyone will examine public allegations in a manner that is fair to all sides. Lawyers often think about a jury trial as a risk, but in a high-profile case, a jury trial is how they can level the playing field. **▶▶▶**



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What Olympic Athletes Can Teach Lawyers

by MICHAEL P. MASLANKA

Did you watch the Olympics? I love the medal ceremony, but my focus is not on those athletes who win the gold. I watch the runners-up, those decked in silver and bronze.

Athletes lose; so do lawyers. How should we handle losing? What does it teach us? I have tried a lot of cases, and I have lost some. Here is what I learned.

Lesson No. 1: "All experiences are good ones as long as you draw the right lessons from them. Otherwise, they are just something that happened to you." My mother taught me this. Self-examination is painful but necessary for growth.

LITIGATION

After every case, win or lose, I do a personal after-action report (a term borrowed from the military). What did I do right? What could I have done differently? It's important to be honest. Sometimes, the truth is that, even if I had done things differently, the result would have been the same.

Clients also like such after-action reports in terms of improving their organizations — not to cast blame but to figure out what they did right and how to do more of it, and what did not go so well and how to avoid it in the future. The Japanese word *kaizen* roughly translates as "incremental improvement." Lawyers should apply it to their practices.

Lesson No. 2: Acknowledge the role of chance and circumstance. There are times that, even if lawyers had acted differently, they still would have lost. That's because a lot of what happens is out of their control.

After engaging in the sometimes painful exercise of doing an after-action report, lawyers should give themselves a break and embrace the reality that, despite their best efforts, they are at the mercy of events.

Doctors learn through trial and error, sometimes with unfortunate consequences. The same is true of the legal profession.

I was defending a suit in which the plaintiff was claiming negligent misrepresentation in hiring. In closing arguments, the lawyer for the plaintiff rustled his papers. I kept speaking; he kept rustling. A woman on the jury gave him a severe look, not once but several times — a really severe look. I know he was not doing it on purpose. It was, I believe, a nervous habit.

But the displeased juror ended up as the forewoman and apparently did not see the rustling the same way: As the jury returned with its verdict, I glanced at her, and she slyly nodded her head toward me, like a first-base coach signaling a steal. Did the rustling matter? Perhaps it did.

Lesson No. 3: Accept the hard truth about losing. Atul Gawande is a famous surgeon. In "The Malpractice Mess," a November 2005 article in *The New Yorker*, he lays bare a painful truth: Doctors learn through trial and error, sometimes with unfortunate consequences. The same is true of the legal profession. It's not that MDs or JDs are committing malpractice. Rather, surgeons or lawyers with 30 years of hard-earned experience know more than those with 10 years of experience. And how do they gain that experience?

Gawande, like me, is a longtime baseball fan, and he analogizes the doctor's dilemma to that of a third baseman: Those at third base, over a season, have as many chances to throw a base runner out as surgeons do to operate. But everyone playing a full season will make stupid mistakes — Gawande estimates it's about 2 percent of the time. Those mistakes mean a lead-off runner on first base or a patient in the morgue. Bottom line: Professionals should take every opportunity to learn, value every defeat and get better.

Lesson No. 4: Be gracious. Today's enemy is tomorrow's friend.



Lawyers and athletes who do not understand this universal principle are asking for trouble.

Approach vanquished foes by being gracious. Understand their pain. Here is Emily Dickinson: "Success is counted sweetest/By those who ne'er succeed."

Lawyers, unlike some athletes, do not need to hug the opponent. Personally, I like the hockey players who, after they beat the living daylights out of one another, shake hands in a line at the end of the game. When I lost a case in El Paso, I still recall the plaintiff's lawyer taking a minute to say, "Mike, the court of appeals still has a say. Good work." Being gracious costs nothing. Not being gracious costs a lot.

Lesson No. 5: Learn the art of reframing. Yes, a loss is a loss. It is toted up forever in the competitor's loss column. There is no getting around that. But, people are 100 percent in control of how they react to a defeat. Losing can become a habit, but only if we let it.

People fail to change a losing trajectory because of the tendency to frame issues in terms of a false dichotomy. Mary C. Gentile writes about this in "Giving Voice to Values: How to Speak Your Mind When You Know What's Right." She references organizational scholar Chris Argyris' theory of a defensive reasoning, writing that people see things in terms of win/lose and controlling/being controlled, and that makes them blind to new information and others' way of seeing situations.

Gentile proposes that it's better to help others view the previous decision as paying dividends, even if those gains don't take the anticipated form. Reframe from the win/lose point of view — "We did not get what we wanted" — to a more productive perspective — "What did we learn?"

Finally, here's a thought from Jim Murphy, who trains collegiate, professional and Olympic athletes in multiple sports. His book, "Inner Excellence: Achieve Extraordinary Business Success Through Mental Toughness," is a must read. On his blog for July 12, 2010, he wrote that he hated to fail, had given his entire life to the pursuit of being a great baseball player and didn't make it.

What life lesson did he learn? "We fail because we obsess about the future and cannot be present in the moment. In our relentless pursuit we focus so much on achievement that we miss lessons along the way. We're busy, but we are not growing; accumulating knowledge, but not wisdom. . . . We fail because we fail to learn."

While gold is a beautiful color, silver and bronze are as well. ■■■



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