

# Pittsburgh Baseball Drug Trials

## An Ethical Note on the Event

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Our seminar on the Pittsburgh Baseball Drug Trials of the mid-Eighties will discuss much of what is in the public record. Information that becomes public is no longer protected by the attorney-client privilege. For roughly fifty plus years, including the time of our trial and now, information freed of the privilege is still subject to the ethical rules on confidentiality. That is, just because information is in the public domain, a lawyer, who learned that information during the representation, from whatever source, still may not talk about it.

Prior to the mid-Sixties and the first substantial reformation of the rules of professional conduct, lawyers ethical duty of confidentiality was co-extensive with the attorney client privilege. The ABA in creating the modern rule noted that clients were easily confused as to what information was actually covered by the privilege (as are lawyers still). By way of example, a lawyer representing a client in a slip and fall might be told by the client that a date for a deposition is inconvenient because he had planned a little get-away with a woman who is not his wife. This information is not protected by the privilege; that is, not conveyed by the client to obtain legal advice. Yet, this tidbit is exactly the sort of information learned during the course of the representation the client would expect to be held in confidence. Consequently, R.P.C. (Rules

of Professional Conduct) 1.6 prohibits lawyer discussion of any information learned during the course of the representation.

The rule has exceptions but none but one applies for this sort of post-trial retrospective: client consent. There has been recognition that for educational purposes, lawyers might tell “war stories.” This common law idea (or occasionally set in a comment to the rule) still requires in telling a “war story” that the auditor must not be able to tell who the client really is. Obviously, this modest exception does not help in a discussion of a specific case. The only way is through a client’s informed consent.

In this regard, informed consent by the client can be tricky. Understand that the ethical obligation of confidentiality is eternal, surviving the death of both lawyer and client. Again, this obligation is not changed even if the rest of the world knows what you are about to say; the lawyer must not speak. A good number of cases exist, mulling over how to obtain consents for decedents or incompetents; the prevailing view is that personal representatives or guardians might waive the rule. But, sometimes, there is no one to waive and that means eternal silence.

The timing of this consent is also constrained but that constraint comes from other rules. Let me note that I have disliked the consequences of the rules as certainly much value can come from these historical discussions. For example, I would like to permit an advance waiver in initial fee agreements that allowed unfettered lawyer speech, say, twenty-five years after the representation. (Obviously, the client could say no, for timeless confidentiality.) But advance consents are not permitted in this area, because such an agreement with the lawyer is an impermissible and unconsentable conflict of interest.

The seminar problem is the same as the book problem or any publication, by speech or writing, which reveals information learned during the course of the representation. (Again, even if the client themselves write a tell all, you can tell nothing.) Obviously, this type of stuff has been everywhere but R.P.C. 1.8 (d) prohibits an agreement or, even negotiation over the ability to use the story by the lawyer until after the representation is over. A number of opinions have come out over the years, triggered sometimes by Son of Sam laws. Those laws, in varying form, preclude criminals of a sort from profiting by their crime. (As an old bankruptcy lawyer, I believe that these laws are slightly wrong headed. Victims should have judgments for their loss and a lien on any proceeds.)

Some lawyers tried to get around R.P.C. 1.8's limitation by getting (prior to the conclusion of the representation) a blanket consent under R.P.C. 1.6. All who have considered the matter have concluded that, in effect, R.P.C. 1.8 trumps R.P.C. 1.6. Consequently, my idea of habitual historical use waivers by clients must come only when the representation is over.

When I have told lawyers this analysis, usually the older lawyer is frequently skeptical, if not downright hostile. Sometimes, to my chagrin, they begin to read the rules, lacking faith in my now thirty years in the ethics racket, reading as W.C. Fields read the Bible, looking for loopholes. The only other rule that seems to be germane and, to the uneducated, offer an out is RPC. 1.9 (c) on "use" of information learned during the representation of a former client. Noting the other exceptions to confidentiality (here client consent), the rule prohibits the use of information to the former client's disadvantage unless "the information has become generally known."

The problem is not apparent to the occasional visitor to the rules. Simply, “use” is not speak. When you learn stuff during a representation, the stuff remains in your head. “Use” here means thinking, not speaking. You represent a client that is planning to build a shopping center. The planning continues after your part of the representation is over. This rule prevents you from, say, buying property where the center is planned to be – until the world knows the center is coming. It does not give a lawyer any license at all, ever, to speak about the course of the prior representation.

In teaching this array of rule interaction, I ask my students (who must be schooled in sin) about the literary miracle after the O.J. acquittal. It seemed that within minutes after the verdict, the public was treated to tomes by the whole “Dream Team” of the defense (I called them the “Nightmare Team.”) How were these books produced so fast, if the negotiation for story rights could not occur until the representation concluded? The Dream Team was expensive. There is an odor here that a fee was concealed, paid for by story rights. You may be able, ethically, to agree, after the representation, to trade a dollar obligation for story rights but you cannot include story rights initially as your form of payment.

Now, all of this conduct is definitely a secret sin. Absent client complaint or lawyer confession, we never know if there was proper consent. If you asked a lawyer whether the proper consents were obtained to speak, the lawyer should not tell you. After all that information is confidential, too. I know of no sanctions in this particular areas in terms of discipline. Violation of the rule does not set up a cause of action (ever). Lawyers could commit a tort, but the privacy torts require damage. Damage or harmful speech is not an element for proof of an ethical violation. In fact, it is well settled that there is no “public policy” exception

to the rules of confidentiality. For example, a lawyer learned a judge was corrupt during the representation of a client but the client did not consent to the lawyer calling a cop on the judge. The lawyer spoke anyway, the bad judge was caught and, in reward, the lawyer was suspended for a year. Largely, unconsented post representation speech is not caught. Purveyors of seminars, even if lawyers themselves, have no responsibility to check consents and no ability to check. Even if the sin becomes known by another lawyer, I would opine that knowledge does not trigger an obligation under the “squeal” rule. The speaking is a violation for sure but absent more egregious facts, the violation is not a material breach that goes to a lawyers substantial honesty and fitness required for the practice of law.

Prosecutor post-trial speech is perhaps worthy of an extended discussion, beyond the scope of this brief. First, the prosecution may be bound by internal regulations rather than just ethics regulations that may forbid or license the post-trial comments. Otherwise, the same rules apply as for the defense, the requirement of client consent. The problem for prosecutors (both state and federal) is who is the client and how do they consent. Take our Quaker State, the elected district attorneys in our counties enforce primarily state criminal law. Under our system, the county prosecutors and the Commonwealth’s Attorney General are treated (as far as non-ethics state law goes) as separate “firms.” For the D.A.’s, is the county the client? The state? Is it the governor? The county executive? The D.A’s themselves? In the ethics department, we do not care that perhaps consent is unattainable. After all the default provision is secrecy.

On this topic there is no clear answer. A while back, Professor (now President of Duquesne University of the Holy Spirit) Gormley caused Ken Starr, special prosecutor of the

Clintons, to speak on his work (while on-going) at a public seminar on our campus. Teasing Prof. Gormley, I asked who the hell gave him, Starr, permission to speak. Gormley looked at me, certain, I think, that I was nuts. Who is his client, I asked. The inadequate response, for me, was that he was the client and gave himself permission. I tell this tale simply to illustrate the breadth of the matter and maybe to illustrate I am not nuts. Prosecutors do talk.

Judicial ethics in this regard has a completely different foundation, not arising out of a client-attorney relationship. As with prosecutors, niceties exist because of formal regulation but both the lifetime appointed and the duly elected judges and those in between follow the ABA Model Rules of Judicial Conduct. Classic rules of all sorts inhibit prejudgment public rhetoric. Post-trial limitations in judicial ethics are more modest, as virtually all the judge knows in trial the public sees. The curtain to backstage is easily parted. No ethical rule prohibits a judge from talking about conferences or motions or what goes on in the private space of courts. No ethical rule prohibits disclosure of the sanctorum sanctum of judicial communications and deliberation. While rules of court may regulate this behavior, it is rather etiquette that restricts the judges to effect free communication and trust.

Judges have additional non-ethical restrictions for matters under seal, a body of law itself, covering juvenile records, actions with minors, the too lascivious, the trade secret, and matters of national security. But even seals need not be eternal. Time here may render the secret not secret or the lurid, tame.

All judicial speech must be effected with a consideration that such speech might be from a ground for later recusal. Under the newish rules occasioned by Republican Party v. White, judges may now comment on issues that may come before them, subject to the caution

that such comment might form the basis for a recusal motion. Loose though licit talk that leads to frequent recusal is an ethical violation as a judge's primary ethic is to hear and decide cases, which, if you are disqualified, you cannot do.

The most direct limitation on post-trial speech for judges is on comments to jurors. The amusing M.R.J.C. 2.8 (c) on decorum, demeanor and communication with jurors requires "[A] judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding. "The joke, unintended, is that a judge may write in an eternally preserved opinion how stupid the jury was but cannot evanescently tell them to their face. Time here must make a difference, although there are no cases. Simply, the tenor of the rule and its comments is that the immediate post-trial comment is what can evilly resonate. Still, the general caution is wise.