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# Ninth Circuit Strikes out on Hearsay

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### **Ninth Circuit Strikes out on Hearsay**

Peter Keane

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The recent Ninth Circuit U.S. Court of Appeals opinion, [United States v. Barry Bonds](#), is a murky distortion of an important Federal Rule of Evidence. Quite apart from any celebrity status about a decision regarding the upcoming perjury trial of the former Giants' slugger, the ruling significantly affects the admissibility of evidence in the federal courts in an unfortunate and erroneous way.

#### **FACTUAL HISTORY**

Greg Anderson was Barry Bonds' weight trainer during the period Bonds is alleged to have used steroids. Bonds is charged with perjury for denying such use in testimony before a federal grand jury. So a critical element in the government's case is proving that Bonds used these substances.

At issue are blood and urine samples Anderson obtained from Bonds on several occasions and delivered to a laboratory for testing. Anderson identified the samples to lab personnel as being from Bonds. The samples tested positive for steroids and human growth hormones.

To get the test results into evidence, the government must show the samples got to the lab from Bonds via Anderson. The natural path, of course, is Anderson as a government witness. But Anderson is loyal to Bonds. He refused to testify before the grand jury and spent a lengthy period in jail. He says he will never testify and that he is willing to be jailed again when he refuses to do so in the trial.

The government wants to get around this by having the lab employee to whom Anderson gave the samples testify that Anderson said they were from Bonds. Prosecutors countered the defense's hearsay objection by citing Federal Rules of Evidence 801(d)(2)(C)-(D), which are the modern, broadly liberalized embodiments of the old common law exception to the hearsay rule for authorized admissions.

Common law had a very narrow interpretation of the exception for authorized admissions which often frustrated attempts to admit critical probative evidence in a trial. Take, for example, where a truck driver working for a trucking company drove through a red light and injured a plaintiff. A witness to the accident heard the driver say, shortly after climbing out of his cab, "The brakes didn't work." Under common law, the driver's statement could of course be used against him in a later suit for damages, but the statement would not be admissible in a suit against the trucking company for failing to maintain its trucks. The simplistic common law reasoning was: The driver was authorized to drive the truck, not to make

statements on his employer's behalf.

The drafters of the Federal Rules of Evidence in the 1970s aimed to eliminate these and other archaic common law barriers to the admission of relevant, probative evidence. They agreed with the substantial body of judicial and scholarly criticism of these evidentiary roadblocks that they were unnecessary, costly hurdles that frustrated the search for truth in a trial.

Their solution was Federal Rule 801(d)(2)(D), which governs when employee statements are admissible against employers as authorized admissions. The rule states that such a statement is an authorized admission if it 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."

The meaning is clear: If you employ someone to do a task and your employee makes statements about that task while doing it, then those statements are admissible against you as authorized admissions.

Under the modern Federal Rules of Evidence, our truck driver's statement about the brakes is now admissible in a negligence suit against the trucking company. The truck driver's statement was one "concerning a matter within the scope of employment" — the driving of the truck — and the statement was made "during the existence of the relationship" (while the company employed the driver).

Bonds' situation is a parallel one. Bonds employed Anderson and entrusted him to take blood and urine samples to the lab, where Anderson told the lab technicians that the samples were from Bonds. So Anderson's statement is admissible as an authorized admission against Bonds.

Not so, according to the trial judge and to two judges of the Ninth Circuit panel. Instead, their rulings go to great lengths to do everything except simply apply the straightforward language of the rule. They struggled mightily, and unnecessarily, over the true meaning of an "agent" and "employee." Out of all this superfluous straining emerged a totally flawed analysis and conclusion.

Here it is: (1) Anderson was Bonds "weight trainer," (2) the job of weight training did not include taking samples to a lab, therefore, (3) Anderson was not Bonds' employee for the purpose of the rule.

Dissenting Judge Carlos Bea got it right. He argued, with understandable frustration and dismay, that the specific job description of a weight trainer is irrelevant — a "red herring." The essential fact remains that Bonds directed Anderson, his employee, to take the samples to the lab for analysis. Thus by any measure of language, Bonds "employed" Anderson to do the task.

Both the trial court's and the appellate majority's opinions are awash with errors of law and logic that do not inspire confidence in their analysis. In one particularly egregious example, the trial court judge relied heavily on Anderson's status as an "independent contractor." The judge wrote that the authorized admission rule did not apply to independent contractors, even though prevailing law says it does apply. The appellate majority had to admit that the trial court was wrong — yet the panel simply brushed off this major gaffe, arguing that it really didn't matter that the trial judge based her ruling on an incorrect understanding of the law.

Both courts also made a big deal over how Bonds characterized his and Anderson's relationship as one between "friends." The judges found that this "friendship" negated the employer-employee relationship when Anderson took the samples to the lab. Only Bea pointed out the interesting detail that this so-called "friendship" also involved Bonds paying Anderson more than \$110,000 during the period he was his trainer.

And it goes on: Both courts saw enormous significance in Bonds' statement to the grand jury that the original idea for testing the samples was Anderson's. That's another red herring that has nothing to do with the question of whether Bonds employed Anderson to take the samples to the lab for testing.

Bonds has admitted that on several occasions he summoned his own personal doctor to come to his home, draw the samples and give them to Anderson so that Anderson could get them to the lab within a 20-minute period to assure accurate testing. So out of Bonds's own mouth it is conclusively established that he employed Anderson as his agent to do this task and he facilitated Anderson's doing it.

Again, what matters is the rule's plain wording: If you employ someone to do something for you, any statements that person makes about the task while doing it are admissible against you as authorized admissions. That is the case here. All these other distractions — whether the two were friends, what a weight trainer's job description includes, and whose idea this testing was to begin with — make absolutely no difference.

But the most disturbing aspect of all of this, even if we put aside the incoherent analysis on which these judicial opinions are based, is that *United States v. Bonds* will likely have unfortunate consequences, at least in the courts of the Ninth Circuit. The intent of the Federal Rules of Evidence was to reform modern litigation, to clear away those unnecessary hurdles of common law that prevented a fair search for truth in a trial. This decision lurches back to that era. It stands as a triumph of rigid sophistry over practical clarity. Hopefully, the Ninth Circuit will revisit this topic soon and set the matter straight.

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