

## The Clemens Defamation Lawsuit: Litigation Marches On

Written by Patrick K. Thornton  
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*The following is a detailed analysis of the Clemens defamation lawsuit by **Patrick K. Thornton**. Thornton is a regular contributor to the Business of Sports Network. --*  
**Maury Brown, Founder and President, Business of Sports Network**

Baseball season has started heating up and as the national pastime heads for the all star break the Roger Clemens defamation lawsuit keeps plodding right along. Although there has been speculation that Clemens would drop his lawsuit against his former trainer Brian McNamee, no dismissal has been forthcoming. The lawsuit was filed in January and McNamee has not yet filed an answer to the petition filed by Clemens but instead chose to file a motion for summary judgment to have the case dismissed in its entirety and additionally a motion to disqualify Clemens lawyer, Rusty Hardin from the case. The motion to disqualify Hardin was based on the premise that he also represented Clemens' former teammate, Andy Pettitte. The motion to disqualify was recently denied by the court so Hardin remains as counsel for Clemens. The motion for summary judgment is still pending. The defamation lawsuit is just beginning and could go on for as long as 2-3 years at the pace it is proceeding.

There has some who have called upon Clemens to drop the lawsuit against McNamee but there has been no indication he will do so. Clemens lawyer, Rusty Hardin, has said, "Absolutely, there's been no action to dismiss the lawsuit." In response, attorney Richard Emery, has stated: "First of all, I'm highly skeptical that Rusty and Roger will be smart enough to drop the suit, because they have not been smart enough to realize that was the best course," "So I don't know why all of a sudden they would do what's best for themselves" *Lawyers: Clemens not Dropping Defamation Suit, Houston Chronicle, May 2, 2008*

. Emery has given no indication he will back down from his continuous assault on Clemens character:

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“We're preparing for a trial,&quot;... &quot;We will follow every lead concerning Roger's rather questionable reputation, including deposing all the women who claimed they have slept with him and members of his family and his wife as to their knowledge of his use of steroids...

&quot;There have been a number of reports that Debbie knew about Roger's dalliances. And we certainly have to inquire whether that was the case.” *id.*

Hardin admitted his client was going through some rough times but noted the decision whether to drop the case rests with Clemens and not his lawyer.

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### Defendant McNamee's Motion for Summary Judgment

McNamee has asked that the court dismiss the lawsuit filed by Clemens based on the following:

1. The court lacks personal jurisdiction over the defendant, (McNamee);
2. The present court is not the proper venue for Mr. Clemens' lawsuit; and
3. The complaint fails to state a claim for defamation under the law.

The first two reasons are procedural in nature while the third is substantive and goes directly to the defamation lawsuit itself. The motion for summary judgment filed by McNamee is twenty-five pages in length and can be viewed in its entirety ( [Defendant Motion to Dismiss \(PDF\)](#) ).

McNamee first asserts the U.S. District Court for the Southern District of Texas has no

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jurisdiction over him personally because he is from the State of New York and does not have “sufficient contacts” with the State of Texas to allow the court to exercise personal jurisdiction over him. If the court did grant McNamee’s motion to dismiss for lack of personal jurisdiction, Clemens would then be forced to re-file the action in a New York Court if he wanted to continue the lawsuit.

Secondly, McNamee argued that even if the court does not dismiss the action for lack of jurisdiction, the U.S. District Court for the Southern District of Texas is the wrong venue for the lawsuit. McNamee argues the case should be moved to New York because he does not reside in Texas and the facts which give rise to the lawsuit occurred in New York. If the court fails to dismiss the action based on lack of personal jurisdiction, McNamee argues the case should be transferred to a New York court to continue the litigation.

Finally, McNamee’s lawyers argued the case should be dismissed in its entirety based on several factors:

1. The complaint fails to state a claim because the allegedly defamatory statements are absolutely privileged;
2. The complaint fails to state a claim because it does not provide Defendant (McNamee) with sufficient notice of the allegedly defamatory statements, nor does it allege special damages; and
3. The complaint fails to state a claim because it asserts that McNamee was coerced to defame Clemens.

The court has several options when contemplating the motions. It could dismiss the case on the basis of lack of personal jurisdiction. This would again force Clemens to have to re-file the case. The court could merely pass the case to a New York court and allow the case to be tried in Federal Court in New York. Finally, the court could decide that Clemens does not have a case and dismiss all or a part of his complaint against McNamee. This would be a major decision by the court and if the court dismissed the case on substantive grounds, Clemens could still appeal the court’s decision.

### The Admissibility of the Clemens Alleged Extramarital Affairs

Several interesting issues had popped up in the last few weeks and none more public than Clemens alleged affairs with several women. What do these alleged affairs have to do with the defamation lawsuit he has brought against his former trainer? Plenty, asserts Richard Emery, McNamee's lawyer. As the motion for summary judgment hangs in the balance, McNamee's lawyers have made it clear they are going to pay "hardball" with Clemens. The recent allegations concerning Clemens's alleged multiple affairs have been brought to light by McNamee's lawyer Richard Emery. ( [See Emery's biography](#) ). Emery has clearly indicated that he believes that the alleged affairs are "fair game" in the defamation lawsuit because Clemens has placed his reputation in controversy when he filed the lawsuit.

In a civil lawsuit, unlike a criminal case, an individual cannot assert their constitutionally protected Fifth Amendment privilege against self-incrimination. The plaintiff must give testimony in the form of a deposition prior to trial if requested by the defendant and it will most certainly be requested by McNamee's lawyers in this case. Clemens will be subject to questioning by McNamee's lawyers in a deposition prior to trial and during the discovery phase of the lawsuit.

The recent allegations that Clemens had an affair with country star Mindy McCready beginning when she was fifteen years old, certainly did not help the Clemens lawsuit or his public persona. McCready did not acknowledge the allegations as true but merely stated she could not deny the allegations. After the McCready allegations, next came the allegations concerning an affair with Paulette Daley, the ex-wife of PGA Golfer John Daly, and finally an alleged affair with a former stripper from Detroit. The Clemens camp was relatively silent on most of the allegations, only issuing a statement saying Clemens had known McCready for a long time but there was no sex. Clemens lawyer, Rusty Hardin has stated:

"At no time did Roger engage in any kind of inappropriate or improper relationship with her. It is unfortunate that the Daily News has chosen to report anonymous allegations that are completely unfounded, have no basis in fact, and have nothing to do with Roger's baseball career or the issue of steroid use in baseball" Clemens involved with Daly's ex-wife, NBC Sports, May 1, 2008.

Paulette Daley has stated: "I know Roger, I consider him a good friend. That's all I'm comfortable saying" *id.*

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Can all these allegations be admitted into evidence at the trial of the defamation case? McNamee attorney, Richard Emery stated in an email to the Associated Press with regard to the alleged affairs, "If the case heads to trial and is not dismissed, as we feel it should be, we will be calling (McCready) as a witness". id. Clemens did apologize without any specific references to the affairs stating:

"I believe my personal life has nothing to do with the accusations of steroid and HIGH use,...I have already made clear that I did not use them. Now, I have been accused of having an improper relationship with a 15-year old girl. Nothing could be further from the truth. This relationship has been twisted and distorted far beyond reality. It is just one of many, many accusations that are utterly false.

"I realize that many people want me to simply confess and apologize for the conduct that I have been accused of, but I cannot confess to, nor apologize for, things I did not do. I have apologized to my family for my mistakes, and having offered this apology to the public, I would ask that you let me and my family deal with these matters in private". *Clemens 'Sorry' For Mistakes In Personal Life, 13 WJZ-TV Baltimore, May 5, 2008.*

Even if proven to be true, does cheating on your wife translate to a person lying about whether they took performance enhancing drugs? If the case resulted in a trial would evidence of Clemens alleged multiple affairs be admitted into evidence at a trial? Not necessarily, but McNamee's lawyers has show every intention of connecting the two in the court of public opinion and in the courtroom as well.

Before the case proceeds to trial Clemens' lawyers would most likely file motions in limine to attempt to have the evidence excluded and deemed not relevant to the defamation claim brought by Clemens against McNamee. The judge would be guided by the Federal Rules of Evidence which define relevant evidence as follows:

### **Rule 401. Definition of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of

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any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” .

If the danger of unfair prejudice from the affairs would outweigh the probative value in examining Clemens defamation claims against McNamee then the evidence would most likely be deemed inadmissible.

It would be within the discretion of the trial judge whether to allow the admission of such evidence into the trial.

According to most public opinions polls, the reputation of Clemens has been tarnished. It was recently reported that Clemens was not welcome on the U.S. Olympic team for the 2008 Olympics in Beijing. U.S. general manager, Bob Watson has stated: “From my viewpoint, we didn’t need that type of distraction” *Clemens Not Welcome on US Olympic team, NBC Sports, May 7, 2008.*

This lawsuit is barely underway. If Clemens continues to move forward there will be numerous depositions taken of individuals involved in the lawsuit including, Roger Clemens, Debbie Clemens, Mindy McCready, Paulette Daly, Brian McNamee, Jose Conesco, Andy Pettite, and most likely many more high profile individuals. The lawsuit could take 2-3 years to resolve. The overwhelming majority of lawsuits settle, so what are the prospects for some type of settlement of this lawsuit? If the judge dismisses the lawsuit Clemens would then have to appeal the court’s decision. Whether he would do so or not is still a mystery. The pre-trial discovery phase of the litigation could take 1-2 years to complete. Of course, settlement discussions can occur at any time and federal courts are known to coerce parties to the settlement table. The question now is, what does Clemens have to gain by pursuing the case further? His prospects for winning seem rather dim considering the “public figure” requirement under defamation law which he would have to overcome. See *New York Times v. Sullivan, 376 U.S. 254 (1964)*. If a plaintiff in a defamation case is considered a “public figure” as defined by the law then the plaintiff would have to meet a higher burden of proof, that of “actual malice” to prevail in a civil lawsuit. It is a virtual certainty that Clemens would meet the test for public figure status under defamation law.

McNamee does seem to be collectable for any damages Clemens might be awarded and Clemens is certainly in need of money. With his reputation tarnished and a long tough road ahead for the civil lawsuit it seems unlikely Clemens would continue the case against McNamee

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for an extended period of time. However, if Clemens never took performance enhancing drugs as he asserts, then just maybe, he wants to prove that in a court of law.

Clemens approached his baseball career with an aggressive style and was known to throw a “brush back” pitch or two, just ask Mike Piazza. Maybe he has a piece of evidence that would show his innocence and he is just waiting to deliver the “smoking gun” at the right time. However, considering the beating he has taken in the press he most likely would have come forward with that evidence by now.

It is rudimentary to state that the reputation of Roger Clemens is hanging in the balance and his reputation has always been something he has treasured and monitored. If he voluntarily dismisses the case then he will certainly look “guilty” and giving up is something Roger Clemens has never been very good at. Pressure is something he is always thrived upon. Never before has he been in a pressure cooker such as this one. One of his closest friends swearing under oath that Clemens discussed performing evidence drugs with him, a pending federal investigation into whether Clemens lied to Congress, allegations of marital infidelity and a very public lawsuit which has been the main focus of the media in the last few months. All those factors together are troubling for Clemens.

Clemens has never wilted under pressure on the diamond but he has never faced such long odds either. It is difficult to believe he will sit idly by and do nothing. That seems against his very nature. McNamee’s attorney seems bent on embarrassing Clemens into dropping the lawsuit. McNamee has not filed a counter-claim against Clemens for defamation but there are court deadlines that parties must follow and a counter-claim by McNamee could raise the level of the intensity of litigation by the parties. Maybe Clemens is hoping fans have had enough and will shift their focus to the Boys of Summer and as the season goes on, forget all about the Mitchell Report, Roger Clemens and the cast of characters which have been on display for the last few months. In the meantime, the litigants weigh their next move.

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