

PROFILE IN PERSUASION

Unless he pitches for another major league baseball team this year, but now 50 years old, Roger Clemens is eligible for the Hall of Fame next year, 2013. Despite serious allegations made against him by his former trainer, Roger Clemens has not been convicted of any offence nor proven to have taken performance enhancing drugs. After a mistrial in the first proceeding, he was acquitted of six counts of lying to Congress in the retrial (although why Congress was bothering with baseball in the first place is another matter). Who was the lawyer who steered Clemens through these treacherous shoals successfully? Rusty Hardin, of course. >>

Over a wide-ranging interview, I learned a few things about Rusty Hardin not the least of which was his advice to his client, Clemens. Vilified by other lawyers, as he put it, for letting Clemens testify before Congress, Clemens (and his counsel's advice) was ultimately vindicated by a jury. A number of jurors expressed the view that the prosecution's case was overreaching and an abuse of government authority. What is a person supposed to do, Hardin asked rhetorically, "if you are a public person, with a public reputation, whether you're a ballplayer or a politician or actor or actress, who is accused of something that is totally contrary to the way you led your professional life and you did not do it?" Clearly, according to Hardin, if you did not do it, you deny it; if you did it (as did Andy Petite), you admit it, apologize and move on. He told Clemens, having already been named in the Mitchell Report, that if he did deny the allegations, having waived his right to take the Fifth Amendment, he would be pilloried in the press and prosecuted by Congressional referral to the Justice Department and that's what happened. After a first mistrial, Clemens was ultimately acquitted and his Hall of Fame eligibility unfettered although one wonders whether baseball's voters, its jurors so to speak, will allow Clemens on the first ballot.



Hardin attributes much of his jury success with being able to relate to jurors, being able to hear and see things the way that average people hear and see them, a quality Rusty attributes to growing up middle-class in a small town in North Carolina. He says this is the best training of all for trial lawyers, that of being an average citizen, an attribute that Hardin not only still values but also actively pursues, even now. Before entering private practice in 1991, Rusty Hardin established an enviable reputation as an assistant district attorney in Houston where he became known for his cross-examination skills and, in 1989, was named Prosecutor of the Year.

In 1994, he was chief trial counsel in the Whitewater Independent Counsel's Office, serving under both Robert Fiske and Kenneth Starr. His high profile clients have included Arthur Andersen (in the Enron Scandal), Rudy Tomjanovich and, most recently, Adrian Peterson of the Minnesota Vikings. He has squared off against Anna Nicole Smith, among others. Rusty is a lawyer you want on your side.

Money doesn't motivate him, he says. Rather, fear of failing his client, a quality you certainly cherish in a lawyer. Contrary to popular tenets of advocacy, Rusty breaks any number of rules. He told me that trial

counsel must ask the difficult question, the one jurors want to know, and take calculated risks at trial including asking open-ended questions, then follow the flow before you get to the leading, narrow ques-

Rusty Hardin will be speaking at the May 2013 Region 15 (Upstate New York-Ontario-Québec) Meeting in Cooperstown, New York.

tions at the end of your cross-examination. Maximize surprise at trial, limit discovery, is another Hardin maxim. And finally, train yourself to listen, all the better to intuit the sense of a courtroom and gauge judge and jurors' reactions.

The best advice he can give, especially to younger lawyers, is to enjoy what you do because none of it is worth doing if you aren't having fun.

A persuasive advocate is Rusty Hardin. ■

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