

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

---

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 10-223 (RBW)
	)	
WILLIAM R. CLEMENS,	)	
	)	
Defendant	)	

---

**MEMORANDUM IN SUPPORT OF NON-PARTY  
DLA PIPER’S MOTION TO QUASH SUBPOENA**

In accordance with Rule 17(c)(2) of the Federal Rules of Criminal Procedure, non-party DLA Piper US LLP (“DLA Piper”) submits this memorandum in support of its motion to quash the subpoena *duces tecum* served on it by Defendant William R. Clemens on or about February 10, 2011.

**INTRODUCTION**

On March 30, 2006, the Commissioner of Baseball engaged Senator George Mitchell and his law firm, DLA Piper, to investigate allegations that a number of players in Major League Baseball had illegally used steroids and other performance enhancing substances. On December 13, 2007, following an extensive investigation that included numerous witness interviews, Senator Mitchell published his “Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball” (the “Mitchell Report”). Mr. Clemens has now issued a subpoena seeking to compel DLA Piper to produce the notes that DLA Piper attorneys took during the interviews of three fact witnesses (Jose Canseco, Brian McNamee, and Kirk Radomski), the memoranda that DLA Piper attorneys wrote to memorialize what they thought

was important in these interviews, and any other written communications related to those interviews.

As shown in greater detail below, there are twenty-five documents in DLA Piper's possession, custody, or control that are responsive to the subpoena. The vast bulk of these are either handwritten or typed notes taken during interviews or memoranda prepared after interviews summarizing the substance of the interviews. There is also one email prepared after an interview summarizing the substance of the interview and one form summarizing the substance of a telephone conversation with an attorney for one of the witnesses. Finally, there is a declaration executed by a DLA Piper attorney and four items of correspondence. DLA Piper has produced the declaration and the four items of correspondence. The other twenty documents, however, constitute classic attorney work product. As described in more detail in this memorandum, these documents were prepared in anticipation of litigation, they are "opinion" work product of the sort that is virtually immune from production, and, even if they were "ordinary" or "fact" work product, Mr. Clemens has not made, and cannot make, the showing required to compel their production. Accordingly, the subpoena should be quashed as to these twenty documents.

## **FACTUAL BACKGROUND**

### **(A)**

#### **The Office of the Commissioner of Baseball**

The Office of the Commissioner of Baseball (the "Commissioner") is an unincorporated association doing business as "Major League Baseball." *See* Exhibit 1 (Major League Constitution) at 1. It has as its members the thirty major league baseball clubs. *Id.* The functions and powers of the Commissioner are established by contract. The functions and powers of the Commissioner are enumerated in the Major League Constitution, which is the

governing agreement among the thirty major league clubs. *Id.* These functions and powers include “[t]o determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major League Clubs or individuals, as the case may be.” *Id.* They also include negotiating agreements with the Major League Baseball Players Association, such as the 2002 Basic Agreement discussed in the Mitchell Report, which set forth a system of mandatory drug testing for major league players.

**(B)**  
**Overview of the Mitchell Report**

The Mitchell Report (Exhibit 2) describes in detail the events that led up to and required Senator Mitchell’s investigation and the resulting report. Salient events in this history include the rise of the “Steroids Era” beginning in the late 1980s; numerous incidents involving players and steroids or drug paraphernalia in 2000 and 2001; the Commissioner’s negotiation with the Players Association of the 2002 Basic Agreement, which included both mandatory random drug testing and a formal procedure for reasonable cause testing; the drug scandal involving the Bay Area Laboratory Co-Operative (“BALCO”) that first came to public attention in 2003; the moratorium on drug testing agreed to by the Commissioner and the Players Association in 2004 and the subsequent resumption of drug testing; Congressional scrutiny of the use of steroids and other performance enhancing substances in Major League Baseball in the form of congressional hearings held in 1973, 2002, 2004, and 2005; and continuing disclosures of the use by players of illegal performance enhancing substances in 2004 through 2007.

**(C)**  
**The Clemens Subpoena**

The Clemens Subpoena (Exhibit 3) seeks the following documents:

- (1) For each individual listed below, all interview summaries, notes and memoranda related to the “Report to the Commissioner of Baseball of an

Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball.”

(2) All communications between each individual listed below or any person acting on behalf of an individual listed below, on the one hand, and DLA Piper US LLP, or any person acting on its behalf, on the other hand, relating to the “Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball.”

List of Individuals Covered by Subpoena

Jose Canseco  
Brian McNamee  
Kirk Radomski

The documents in DLA Piper’s possession, custody, or control that are responsive to the Clemens Subpoena are described below. Most of the individuals mentioned in the descriptions (Charles Scheeler, John Clarke, Brett Ingerman, Jeffrey Gordon, Ellen Ginsberg, and Robert Gaumont) are attorneys at DLA Piper who assisted Senator Mitchell in his investigation and in the preparation of the Mitchell Report. The internal documents that are described below have been kept confidential and have not been shown to any persons outside DLA Piper.

**Documents Relating to Jose Canseco**

1. A June 13, 2006 letter from Charles Scheeler to Mr. Canseco in which Mr. Scheeler introduces himself and requests Mr. Canseco’s cooperation. This document has been produced.
2. A June 15, 2006 email from Mr. Scheeler to Linda Caballero, a paralegal at DLA Piper, entitled “For the Canseco Witness Folder,” that summarizes Mr. Scheeler’s telephone conversation that day with Mr. Canseco. Attorney work product.
3. Mr. Scheeler’s handwritten notes of his June 15, 2006 telephone conversation with Mr. Canseco. Attorney work product.
4. A June 26, 2006 email exchange between Mr. Scheeler and Robert Saunooke, Mr. Canseco’s attorney, working out dates for Mr. Canseco’s interview. This document has been produced.

5. A September 5, 2006 memorandum to file by Jeffrey Gordon summarizing the July 11, 2006 interview of Mr. Canseco conducted by Mr. Scheeler. Mr. Gordon and Mr. Canseco's attorney, Mr. Saunooke, were also present during the interview. Attorney work product.
6. Jeffrey Gordon's handwritten interview notes of the July 11, 2006 interview of Mr. Canseco. Attorney work product.
7. A February 1, 2007 letter from Senator Mitchell to Mr. Saunooke requesting that Mr. Canseco sign an enclosed Waiver and Consent allowing access to Mr. Canseco's medical data. This document has been produced.
8. A document captioned "MLB Investigation Inquiry / Tip Intake Form" that summarizes a telephone conversation with Mr. Saunooke initiated by Jeffrey Gordon and Ellen Ginsberg on March 5, 2007 regarding Mr. Canseco's online drug purchases. Attorney work product.

#### **Documents Relating to Brian McNamee**

1. A July 13, 2007 memorandum to file by Brett Ingerman summarizing a July 9, 2007 interview of Mr. McNamee. Senator Mitchell, Mr. Scheeler, John Clarke, and Mr. Ingerman were present for the interview, as were two Assistant United States Attorneys (Matt Parrella and Jeff Nedrow), two IRS agents (Jeff Novitsky and Erwin Rogers), an FBI agent (Heather Young), and Mr. McNamee's attorney (Earl Ward). Attorney work product.
2. John Clarke's typed notes of the July 9, 2007 interview of Mr. McNamee. Attorney work product.
3. Mr. Scheeler's handwritten notes of the July 9, 2007 interview of Mr. McNamee. Attorney work product.
4. An October 4, 2007 memorandum to file by Ellen Ginsberg summarizing an October 3, 2007 interview of Mr. McNamee. Senator Mitchell, Mr. Scheeler, and Ms. Ginsberg were present for the interview, as were an AUSA (Mr. Parella), two IRS agents (Mr. Novitsky and Mr. Rogers), and an FBI agent (Ms. Young). Mr. McNamee and his attorney (Mr. Ward) participated via conference call. Attorney work product.
5. A December 3, 2007 memorandum to file by Ellen Ginsberg summarizing a December 3, 2007 interview of Mr. McNamee. The interview was conducted via a conference call. Participants in the conference call were Mr. McNamee, his attorney (Mr. Ward), Senator Mitchell, Mr. Scheeler, Ms. Ginsberg, an AUSA (Mr. Parella), an IRS agent (Mr. Novitzky), and an FBI agent (Ms. Young). Attorney work product.

6. A December 5, 2007 memorandum to file by Mr. Scheeler summarizing a telephone conversation he had that day with Mr. McNamee and his attorney (Mr. Ward). Attorney work product.
7. A December 1, 2008 Declaration by Mr. Scheeler regarding the interviews of Mr. McNamee. This document has been produced.

#### **Documents Relating to Kirk Radomski**

1. A June 7, 2007 memorandum to file by Mr. Ingerman summarizing a June 7, 2007 interview of Mr. Radomski. Senator Mitchell, Mr. Scheeler, John Clarke, and Mr. Ingerman were present, along with an AUSA (Mr. Parella), two IRS agents (Mr. Novitzky and Mr. Rogers), and an FBI agent (Ms. Young). Attorney work product.
2. John Clarke's typed notes of the June 7, 2007 interview of Mr. Radomski. Attorney work product.
3. A "June 7, 2007 as revised on July 11, 2007" memorandum to file by Mr. Ingerman making minor changes to the June 7, 2007 memorandum to file described above. Attorney work product.
4. A July 11, 2007 memorandum to file by Mr. Ingerman summarizing a July 9, 2007 interview of Mr. Radomski. Senator Mitchell, Mr. Scheeler, John Clarke, and Mr. Ingerman were present, along with two AUSAs (Mr. Parella and Mr. Nedrow), two IRS agents (Mr. Novitsky and Mr. Rogers), an FBI agent (Ms. Young), and Mr. Radomski's attorney (John Reilly). Attorney work product.
5. Mr. Scheeler's handwritten notes of the July 9, 2007 interview of Mr. Radomski. Attorney work product.
6. Mr. Ingerman's handwritten notes of the July 9, 2007 interview of Mr. Radomski. Attorney work product.
7. John Clarke's typed notes of the July 9, 2007 interview of Mr. Radomski. Attorney work product.
8. An October 4, 2007 memorandum to file by Ms. Ginsberg summarizing an October 3, 2007 interview of Mr. Radomski. Senator Mitchell, Mr. Scheeler, and Ms. Ginsberg were present, along with an AUSA (Mr. Parella), two IRS agents (Mr. Novitsky and Mr. Rogers), an FBI agent (Ms. Young), and Mr. Radomski's attorney (Mr. Reilly). Attorney work product.
9. An October 5, 2007 letter from Mr. Scheeler to Mr. Radomski enclosing a \$36 check for parking reimbursement. This document has been produced.

10. A November 6, 2007 memorandum to file by Ms. Ginsberg summarizing a November 6, 2007 interview of Mr. Radomski. Senator Mitchell, Mr. Scheeler, Robert Gaumont, and Ms. Ginsberg were present, along with an AUSA (Mr. Parella), an IRS agent (Mr. Novitsky), and Mr. Radomski's attorney (Mr. Reilly). The interview took place via a conference call. Attorney work product.

### **GROUND FOR MOTION TO QUASH**

The party seeking access to materials under a Rule 17(c) subpoena bears the burden of showing that the subpoenaed documents: (1) are relevant; (2) are admissible; and (3) have been requested with adequate specificity. *United States v. Nixon*, 418 U.S. 683, 700 (1974). A Rule 17(c) subpoena may not be used for discovery purposes and is not intended to support a "fishing expedition." *Id.* Even upon a showing that the subpoena seeks relevant, admissible, and specific evidence, a court must consider whether the materials are "otherwise procurable reasonably in advance of trial by exercise of due diligence," whether the proponent can "properly prepare for trial without such production and inspection in advance of trial," and whether "the failure to obtain such inspection may tend unreasonably to delay the trial." *Id.* at 699. Under Rule 17(c)(2), "[a] court may quash a subpoena where compliance would be unreasonable or oppressive." *In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1461*, 706 F. Supp.2d 11, 14 (D.D.C. 2009). A Rule 17(c) subpoena should be quashed if it calls for privileged matter or matter protected by the attorney work product doctrine. 2 Charles Alan Wright & Peter Henning, *Federal Practice and Procedure – Federal Rules of Criminal Procedure* § 276 at 282-83 & n.16 (2009); *United States v. Jewell*, 2008 WL 3871736, at \*2 (E.D. Ark. Aug. 15, 2008); *United States v. Mettatal*, 1997 WL 599296, at \*1 (W.D. Va. Aug. 20, 1997); *see also In re Grand Jury Investigation of Possible Violations*, 706 F. Supp.2d at 21-23 (quashing Rule 17(c) subpoena where it was overbroad and infringed on legitimate First Amendment rights). Mr. Clemens has not shown how the interview materials he seeks by his

subpoena, which are hearsay, satisfy the admissibility requirement. Moreover, the documents constitute work product. Mr. Clemens' subpoena as to these documents, accordingly, must be quashed.

As the Supreme Court held in its seminal *Hickman v. Taylor*, 329 U.S. 495 (1947) decision, “[i]n performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This . . . [work product] is reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.” *Id.* at 510-11. This work product doctrine, as articulated in *Hickman*, applies in criminal cases as well as civil cases. *United States v. Nobles*, 422 U.S. 225, 239 & n.13 (1975); *In re Sealed Case*, 146 F.3d 881 (D.C. Cir. 1998) (applying *Hickman* work product doctrine to grand jury subpoena to attorney). The *Hickman* work product doctrine has been substantially incorporated into Rule 26(b)(3) of the Federal Rules of Civil Procedure. *Byers v. Burlison*, 100 F.R.D. 436, 439 n.4 (D.D.C. 1983). Accordingly, given that the *Hickman* work product doctrine applies in criminal cases and FRCP 26(b)(3) embodies the *Hickman* doctrine, courts in criminal cases often cite cases interpreting FRCP 26(b)(3). *See, e.g., United States v. Paxson*, 861 F.2d 730, 735-36 (D.C. Cir. 1988).

The internal documents summarizing interviews that are at issue here are classic attorney work product. The *Hickman* case itself involved such interview summaries, and Justice Jackson in his concurrence in that case eloquently described why such documents require extraordinary protection:

I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language permeated with his inferences. Every one who has tried it knows that it is almost impossible so fairly to record the expressions and emphasis of a witness that when he testifies in the environment of the court and under the influence of the leading question there will not be departures in some respects. Whenever the testimony of the witness would differ from the 'exact' statement the lawyer had delivered, the lawyer's statement would be whipped out to impeach the witness. . . . The lawyer who delivers such statements often would find himself branded a deceiver afraid to take the stand to support his own version of the witness's conversation with him, or else he will have to go on the stand to defend his own credibility—perhaps against that of his chief witness, or possibly even his client.

329 U.S. at 516-17; *see also Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981) (“Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.”).

For the reasons set forth below, the twenty internal documents summarizing interviews were prepared in anticipation of litigation, they are “opinion” work product of the sort that is virtually immune from production, and, even if they were “ordinary” or “fact” work product, Mr. Clemens has not made, and cannot make, the showing required for their production. Accordingly, the Clemens Subpoena should be quashed as to these documents.

(A)  
**The Interview Memoranda and Notes  
Were Prepared in Anticipation of Litigation**

The work product doctrine provides an attorney with a zone of privacy in which to think, plan, weigh facts and evidence, candidly evaluate a client’s case, and prepare legal theories. *Coastal States Gas v. Department of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980). It may be asserted by both lawyer and client. *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994). The standard for protection under the work product doctrine is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have

been prepared or obtained because of the prospect of litigation. *In re Sealed Case*, 146 F.3d at 884. To meet this standard, the lawyer must have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable. *Id.*

It is not necessary for work product protection that a specific claim have arisen at the time the lawyer prepared the documents. *Id.* at 885-87. It is enough that the documents were prepared in anticipation of foreseeable litigation. *Oceana v. Locke*, 262 F.R.D. 32, 41 (D.D.C. 2009), *set aside in part on other grounds*, 2010 WL 2363940 (D.D.C. May 18, 2010). In *Upjohn*, for example, the Supreme Court applied the work product protection even though no proceedings against the company were threatened when the documents were prepared. *See* 449 U.S. at 386-87 (involving documents created during internal investigation of “possibly illegal” payments to foreign government officials). The work product doctrine also applies regardless of whether the anticipated litigation ever actually occurs. *In re Sealed Case*, 146 F.3d at 888. Material generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status as attorney work product. *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010).

**1. The Commissioner and DLA Piper Anticipated Litigation In Connection with the Mitchell Investigation and Report**

Charles P. Scheeler was designated by Senator Mitchell to lead the investigation on a day to day basis under Senator Mitchell’s direction and supervision. Scheeler Declaration at ¶5 (attached as Exhibit 4). As Mr. Scheeler avers in his attached declaration, from the moment the Commissioner engaged DLA Piper, both the Commissioner and DLA Piper were aware of anticipated litigation against either or both of them. *Id.* at ¶¶ 7-8. This was manifested, among other ways, by the inclusion in their Memorandum of Understanding of indemnity provisions protecting DLA Piper in the event it became embroiled in litigation. *Id.* at ¶ 8.

**2. The Commissioner's and DLA Piper's Anticipation of Litigation as a Result of the Mitchell Investigation and Report Was Objectively Reasonable**

As the Mitchell Report itself makes clear, under the exigent circumstances confronting the Commissioner in 2006, the Mitchell investigation and report, to be effective, needed to be impartial, wide-ranging, thorough, and publically disseminated. Given this reality, properly conducting the investigation and preparing the report placed the Commissioner and his counsel in potential conflict with an array of persons and entities who might be harmed or aggrieved, or feel themselves harmed or aggrieved, by the disclosures in the report. More specifically, it was readily foreseeable that disclosure of a player's alleged use of steroids or performance enhancing drugs might trigger defamation, injurious falsehood, or similar claims; that the Commissioner, exercising his authority and responsibility under the Major League Constitution to take punitive actions as a result of the Mitchell investigation, might be sued by those against whom he took such actions; that the Players Association, zealous to protect the players, might assert that the Commissioner and his counsel by the disclosures in the Mitchell Report breached the 2002 Basic Agreement or related agreements; and that Congress might convene yet another hearing into drug use in baseball and take an adversarial stance against the Commissioner. As discussed below, all these potential claims were objectively reasonable possibilities.

Defamation and Similar Claims. To state the obvious, publicly asserting that a professional athlete has illegally used steroids or performance enhancing substances creates a scenario in which defamation and similar claims are not merely possible but likely.<sup>1</sup> As to the Mitchell Report, the likelihood of such claims was enhanced by the facts, among others, that the Mitchell Report would receive wide publicity; that the report would disclose evidence of drug

---

<sup>1</sup> News reports, for example, indicate that Lance Armstrong has repeatedly responded to doping allegations with defamation suits. See Exhibit 5. Marion Jones, the Olympic sprinter accused of doping, also threatened a defamation action. See Exhibit 6.

use by many prominent players, including many potential Hall of Fame players; and that the disclosures could potentially harm or even end many players' lucrative careers.

To illustrate the likelihood of such suits, one need look no further than the actions of Mr. Clemens himself. On January 6, 2008 – less than a month after the Mitchell Report was published – Mr. Clemens sued Brian McNamee in Texas state court. *See* Exhibit 7. In this complaint, Mr. Clemens asserted a claim against Mr. McNamee for defamation, alleging Mr. McNamee had falsely stated to Senator Mitchell that Mr. Clemens has used steroids and human growth hormones. *Id.* at ¶¶ 7-8. Mr. Clemens alleged that the Mitchell Report republished Mr. McNamee's allegedly false and defamatory statements, *id.* at ¶ 35, thus asserting that the Mitchell Report itself was defamatory. Although Mr. Clemens elected not to sue the Commissioner or Senator Mitchell as well as Mr. McNamee, the rapidity with which Mr. Clemens sued Mr. McNamee after the publication of the Mitchell Report, the linking of Mr. McNamee's alleged defamation to the Mitchell Report, and the seriousness of the claim – Mr. Clemens alleged in his complaint that Mr. McNamee's statements in the Mitchell Report “captured the attention of the nation, fueled rampant speculation, and irreparably tainted the reputation of one of baseball's hardest working and most talented pitchers,” *id.* at ¶ 7, – bear witness that the Commissioner and his counsel acted reasonably in foreseeing the possibility of defamation claims arising from the Mitchell Report. Indeed, it would have been grossly imprudent for them to have ignored this risk.

Litigation Relating to the Commissioner's Power to Take Punitive Actions. Under the Major League Constitution, after the Commissioner has conducted an investigation, such as the investigation conducted for him by Senator Mitchell, the Commissioner is authorized to take appropriate “preventive, remedial or punitive action.” Following the Mitchell Report, as

numerous news articles noted, the Commissioner seriously considered punitive actions against both players and team management. *See* Exhibit 8. Although no punitive actions in fact resulted, it was reasonable for the Commissioner and his counsel, in preparing the report, to have anticipated that punitive actions might be taken and that the players or teams punished might take adverse responsive actions, including litigation. Actions of this type are not unprecedented. *See, e.g., Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989) (Pete Rose brought suit in state court to prevent the Commissioner from conducting disciplinary proceedings against him).

Claims By the Players Association. As the Mitchell Report explains, the Players Association and the Commissioner negotiated the terms of a joint drug program, which included drug testing and confidentiality provisions, as part of the 2002 Basic Agreement, and subsequently negotiated modifications to that program. *See* Mitchell Report at pages SR-12, SR-13, SR-23. After federal agents searched two private firms involved in the drug testing and seized data they believed could identify players who had tested positive during the drug testing, the Commissioner and the Players Association negotiated a moratorium on 2004 drug testing. *Id.* at SR-25. The Mitchell Report discussed this moratorium and several issues that arose between the Commissioner and the Players Association with regard to it. *Id.* at SR-25 to SR-28. The Players Association objected to Senator Mitchell making any reference to these matters in his report and explicitly warned that doing so, in their view, constituted a breach of promise:

Because of certain actions by the Government in 2004 (which led to litigation, much of which has been under seal), the parties were forced to confront a serious threat to the confidentiality and integrity of our program. To combat that threat, and indeed to save the credibility of our program, the parties undertook certain measures in that year only. These were not unilateral actions undertaken by the MLBPA, but actions discussed and agreed upon between the MLBPA and the Commissioner's Office. Each party was fully aware and in agreement with the steps the other was taking.

The MLBPA believes that, by publishing in this Report anything related to these subjects, Senator Mitchell and the Commissioner's Office are breaching promises of confidentiality made to the MLBPA and to its members.

SR-28. In the face of such an explicit warning, the Commissioner and DLA Piper were fully warranted in anticipating possible litigation.

Additional Congressional Hearings on Drug Use in Baseball. Representative Henry Waxman, Chairman of the House Committee on Oversight and Government Reform, stated the following in the House Hearings on the Mitchell Report on January 15, 2008:

When our committee held its first hearing 3 years ago on Major League Baseball's steroid scandal, I talked about how the culture of Major League clubhouses trickled down to become the culture of the high school gym.

Later that same day, Dan Hooten and Denise and Raymond Garibaldi proved that connection with their powerful testimony about the deadly impact that steroids had on their sons.

The Hooten and Garibaldi families were frustrated that baseball wasn't doing more to confront its role in a growing epidemic. For our part, this committee made it clear to the players and owners that they needed to take steps, and major ones, to deal with this problem. The first was to dramatically strengthen the league's testing program for performance-enhancing drugs. The second was to investigate the extent of steroid use.

*See Exhibit 9.* As Congressman Waxman's statement made clear, Congress, which had convened several prior hearings on drug use in baseball, was keenly interested in the issue and expected the Commissioner to take decisive action. The Mitchell Report was thus written in the context of a well-founded expectation that the Commissioner would be called before Congress to explain and justify the actions he was taking (or not taking) to address the steroid scandal.

Under the law of the District of Columbia Circuit and other circuits, the "litigation" in the "anticipation of litigation" requirement also encompasses proceedings that are not, strictly speaking, litigation. *See In re Rail Freight Fresh Fuel Surcharge Antitrust Litig.*, 268 F.R.D.

114, 117 (D.D.C. 2010) (discussing cases and holding that documents prepared in anticipation of a hearing before Surface Transportation Board were entitled to work product protection). The touchstone is whether the anticipated proceedings are adversarial in nature. *Id.* The Restatement of the Law Governing Lawyers § 87 comment h (1998) states that “litigation” in this context “includes a proceeding such as a grand jury or a coroner’s inquiry or an investigative legislative hearing.” The Congressional Hearings on steroid use in baseball were certainly adversarial in the sense that the Commissioner was vigorously interrogated under oath and held accountable for his responses. Under these circumstances, the Commissioner’s anticipation of additional congressional hearings in connection with the Mitchell Report provides an additional reason why Senator Mitchell’s work product should be protected.

**(B)**  
**The Interview Memoranda and Notes Are Opinion Work  
Product Entitled to Virtually Complete Immunity from Production**

The Supreme Court in *Hickman* strongly suggested that, by their very nature, attorney interview summaries, memoranda and notes enjoy virtually absolute protection from discovery. *See* 329 U.S. at 512 (“But as to oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production.”). Subsequent cases, however, distinguished between “opinion” work product, which is “virtually undiscoverable,” *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997), and “ordinary” or “fact” work product, which can be discovered on a showing of substantial need and undue hardship, *id.* In *In re Sealed Case*, 124 F.3d 230, 236-37 (D.C. Cir. 1997), *rev’d on other grounds, Swidler & Berlin v. United States*, 524 U.S. 399 (1988), the District of Columbia Circuit observed that under certain circumstances

factual material embedded in attorney notes may not deserve the heightened protection accorded to opinion work product but rather would be subject to the substantial-need-and-undue-hardship standard applicable to ordinary work product. A few subsequent District of Columbia district court cases, citing *In re Sealed Case*, have held, under the circumstances of those cases, that the attorney interview summaries, memoranda and notes there at issue potentially contained factual material discoverable under the standard for ordinary or fact work product. *See, e.g., In re HealthSouth Corp. Sec. Litig.*, 250 F.R.D. 8, 11-13 (D.D.C. 2008); *In re Vitamin Antitrust Litig.*, 211 F.R.D. 1, 4-5 (D.D.C. 2002). These cases notwithstanding, the DLA Piper attorney interview summaries, memoranda and notes previously identified are entirely opinion work product and are not subject to the ordinary work product standard. This is so for the following reasons.

First, the *In re Sealed Case* should be read together with *Mervin v. Federal Trade Commission*, 591 F.2d 821 (D.C. Cir. 1978), in which the District of Columbia Circuit, in the context of a FOIA case, emphasized that “even the factual material segregated from attorney work-product is likely to reveal some of the attorney’s tactical and strategic thoughts,” *id.* at 826, and “an attorney’s written product in preparing for litigation, even if factually oriented, seldom can be separated from his tactical and strategic thinking,” *id.* at 827; *see also In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (discussing special considerations that weigh against compelling disclosure of attorney memoranda summarizing oral interviews); *SEC v. Jasper*, 2010 WL 375137 (N.D. Cal. Jan. 25, 2010) (rejecting request to compel a redacted version of attorney interview notes and noting that revelation of all the purely factual assertions elicited from an interviewee may reveal the questions asked and therefore the attorney’s mental

impressions and conclusions). Accordingly, only in the rare case should disclosure of embedded factual material in attorney interview memoranda be required.

Second, although some post-*In re Sealed Case* district court decisions have approved the segregation of factual from opinion work product within attorney interview summaries, memoranda and notes, there are also post-*In re Sealed Case* decisions that have held such documents are opinion work product and have not required segregation of fact and opinion work product. See *United States v. M & T Mortg. Corp.*, 242 F.R.D. 16, 18-19 (D.D.C. 2007) (“[T]he attorney interview notes are classic opinion work product . . . [that] reveal counsel’s mental impressions and litigation strategy because they reveal . . . what questions counsel thought important to ask, and what information counsel thought important to memorialize.”); *NLRB v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 310 (D.D.C. 2009) (“[N]otes of an attorney memorializing his or her conversation with a witness are that attorney’s work product.”).

Third, cases such as *In re HealthSouth Corp.*, which have approved segregation of fact and opinion work product, are distinguishable from the present case. In *In re HealthSouth Corp.*, for example, the agenda of the interviews was set by the FBI; the attorneys who were invoking the work product doctrine “were merely observers of the interviews,” and “these memoranda are nearly verbatim transcripts of the FBI’s questions.” 250 F.R.D. at 12-13. In this case, the DLA Piper attorneys shaped the topics and conducted the interviews in question and the interview summaries, memoranda and notes cannot accurately be described as “nearly verbatim transcripts” of the questions and answers. To the contrary, the documents contain the attorneys’ paraphrases and reflect the topics they deemed important to memorialize. For these reasons, the interview memoranda and notes are properly regarded as opinion work product in their entirety.

(C)  
**Even Assuming *Arguendo* that Some Portions of the  
Interview Memoranda and Notes Were Ordinary or Fact Work Product,  
Mr. Clemens Has Not Made and Cannot Make the Showing Required to Compel  
Production**

Even assuming for sake of argument that some portions of the interview memoranda and notes could properly be separated out as ordinary work product, Mr. Clemens must still satisfy his burden to justify production of these portions. *Director, Office of Thrift Supervision*, 124 F.3d at 1307-08; *see also Oceana*, 262 F.R.D. at 41 (once work product doctrine shown to apply, burden shifts to moving party to justify production). Although Mr. Clemens has not yet stated any basis for justifying production, one can surmise that he wants the interview memoranda and notes in the hope of finding inconsistencies between those documents and the witnesses' statements as set forth in the Mitchell Report and elsewhere, *i.e.*, for the purpose of impeachment. But under precedents in this circuit as elsewhere, this purpose is not sufficient to warrant intrusion into an attorney's interview memoranda, even assuming they contain ordinary work product.

First, Rule 17(c) does not allow for pre-trial production of impeachment material. *Nixon*, 418 U.S. at 701 ("Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial."); *United States v. Fields*, 663 F.2d 880, 881 ("The only evidentiary use that defendants have been able to advance is that the statements and transcribed interviews of witnesses could be used for impeachment purposes. This use is generally insufficient to justify the pre-trial production of documents.").

Second, even under the FRCP 26(b)(3) standard, this theory for compelling production does not satisfy the substantial need requirement. As Magistrate Judge Facciola stated in *McPeck v. Ashcroft*, 202 F.R.D. 332, 339 (D.D.C. 2001):

[I]f the desire to impeach a witness with prior inconsistent statements is a sufficient showing of substantial need, the work product privilege would cease to exist; there is not a lawyer born who would not like to see opposing counsel's files in order to search for inconsistencies in opposing witnesses' potential testimony.

*See also United States v. MWI Corp.*, 232 F.R.D. 14, 18 (D.D.C. 2005) ("Defendants offer no authority for the proposition that a party's understandable interest in obtaining impeachment material satisfies the requirement of Rule 26(b)(3) . . . ."); *In re Grand Jury Investigation*, 599 F.2d at 1233 ("We do not believe . . . that the desire to impeach or corroborate a witness's testimony, by itself, would ever overcome the protection afforded the interview memoranda."); *Spruill v. Winner Ford of Dover, Ltd.*, 175 F.R.D. 194, 202 (D. Del. 1997) ("[T]he possibility of impeachment does not satisfy the showing required by Rule 26."); *SEC v. Stanard*, 2007 WL 1834709 (S.D.N.Y. June 26, 2007) (rejecting argument that party had substantial need for attorney interview notes because of risk that witnesses would tailor their testimony in response to government's power to threaten prosecution; this argument "would allow the work-product privilege to be overridden in any case in which there is reason to suspect a witness of changing stories, that is to say, in almost every case").

Third, even assuming, contrary to fact, that the desire to obtain impeachment material constituted "substantial need" sufficient to compel the production of internal attorney interview documents, in this case it is likely that Messrs. McNamee, Canseco, and Radomski testified before the grand jury and that transcripts of their testimony have been turned over to Mr. Clemens' counsel. Accordingly, even if Mr. Clemens could show a substantial need his theory would not satisfy the requirement that he show he could not obtain the material elsewhere without undue hardship. *See Jinks-Umstead v. England*, 232 F.R.D. 142, 147 (D.D.C. 2005) ("[E]ven if plaintiff could have demonstrated a substantial need, she has not shown that she

would be unable to obtain the substantial equivalent without undue hardship. To the contrary, the information sought was available to plaintiff through other discovery methods . . .”).

Respectfully submitted,

/s/ David Clarke

David Clarke, Jr., D.C. Bar No. 396002  
DLA Piper LLP (US)  
500 8th Street, N.W.  
Washington, D.C. 20004  
Tel.: (202) 799-4000  
Fax: (202) 799-5000  
david.clarke@dlapiper.com

and

Glen Allen (*of counsel*)  
Jennifer K. Squillario (*of counsel*)  
DLA Piper LLP (US)  
6225 Smith Avenue  
Baltimore, MD 21209  
Tel.: (410) 580-3000  
Fax: (410) 580-3001  
glen.allen@dlapiper.com  
jennifer.squillario@dlapiper.com

Attorneys for DLA Piper US LLP

Dated: March 18, 2011