WHITE COLLAR CRIME & INVESTIGATIONS

LAW UPDATE

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Ruskin Moscou Faltischek's White Collar Crime & Investigations Capabilities

- Mortgage fraud
- Bribery and political corruption allegations
- Internet/computer crimes
- Healthcare fraud
- Federal RICO violations
- Medicare and Medicaid fraud
- Mail and wire fraud
- Money laundering
- State Enterprise Corruption cases
- Pollution and other environmental crimes
- Anti-kickback allegations
- Financial institution, insurance fraud and embezzlement
- Securities and other financial frauds
- Insider trading
- U.S. Customs violations

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Planning For Summations

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How often do we attorneys – who spend our time trying to convince a jury to side with our client – actually get to give the closing argument that we have prepared before the case began? That's right, you need to prepare your summation before you even set foot in the courtroom. Given that trials are often unpredictable, the chances of actually delivering a summation are always an open question. However, presenting a summation does happen, but never by mistake and always as a result of hard work, planning and, if we are honest with ourselves, a little bit of luck. We are all familiar with the advice that a trial attorney should prepare his summation before the case begins and use it as a roadmap throughout the defense of a case so that one is able to give that very same summation at the end. To accomplish this not an easy task; one needs to keep the summation in mind every step of the way.

The effective use of jury selection should never be ignored when it comes to summation considerations. The ideas you want jurors to focus on and the themes that you want them to consider during the course of the trial should start during the voir dire process and then be brought home during the summation. During jury selection, as well as during opening arguments, defending attorneys must be very careful not to make guarantees or promises concerning the evidence and proof in a case. Remember, the burden is on the prosecution and from jury selection through closings, jurors should be reminded of that fact. While you may choose to disregard or ignore the unfulfilled promises that you mistakenly made at the beginning of a case, rest assured jurors will remember them in the end.

The opening statement – should defense counsel even opt to present one – must likewise be part of the process leading you to an effective and complete closing argument. Similar to jury selection, caution must be employed by criminal defense counsel during opening statements. Criminal trials are full of surprises, and promises or predictions by defense counsel are perilous. However, establishing the "theme" of your defense and focusing jurors' attention on issues such as burden of proof, credibility – and relevant issues like identification or witness motivation, which you will come back to in summation – is a must. Jurors are more perceptive than we sometimes think. It is better to suggest what the evidence will or has shown than to tell them what they must conclude.

During the course of testimony, it is very important to continue to consult your closing argument to determine if the points you intended to "hammer home" have in fact been raised and resolved the way you intended them to be. Waiting until the night before or the day of your summation to try to tie these issues together is always a mistake and is obviously too late to fix any detours or omissions which may exist in the record. In the worst case scenario, a trial attorney who does not pay attention to how accurately his summation reflects what has occurred during the course of the trial will lose credibility with the jury at the worst possible time – the last time they will hear from you.

Obviously, the type of summation that you will or should give in a particular case depends in large part on the unique facts and your specific defense to the allegations. In a criminal trial, the prosecution has a distinct advantage in that the jury gets to hear from them last, just before their deliberations. An effective way to address that seeming disadvantage is to anticipate what a prosecutor will say in his closing arguments and address it directly. One can ask jurors to ask themselves during a prosecutor's summation "what would defense counsel say to that," if given opportunity to answer the prosecutor's summation. This strategy not only has the advantage of mitigating the advantage of the prosecutor in speaking last, but when handled correctly, can actually derail an adversary and force them, on the fly, to modify their own closing remarks, thus tacitly suggesting that what you have said is worthy of response. Likewise, in a criminal trial, an effective tool in summation for defense counsel is to point out each and every instance of reasonable doubt which exists in the case, and in the end drive home the point that not only are the jurors free to identify their own reasonable doubts, but remind them that merely accepting one issue as reasonable doubt must prevent them from voting for a conviction. When the prosecutor, in reply, addresses each of these issues, they are again telling the jurors that what you have said in closing argument must be addressed.

Oftentimes, trial attorneys are either hesitant to make objections during their adversary's openings or closing arguments, and in some cases, are even warned against doing so by judges. Making a record of objectionable comments or actions by prosecutors during the course of their summations, however, is critical to a proper defense and must be done to preserve appeallable issues. More importantly, the case law is clear that counsel, especially prosecutors, are given a wide range of latitude in summing up the evidence in a case, and one or two objectionable comments or actions during a summation, no matter how egregious, may not result in a reversal of a conviction. Appeals courts have forgiven some fairly egregious comments because of the sanitizing effect of a curative instruction or two. The offending statements or conduct must be cumulative, objected to and identified in order to preserve a record and, when necessary, overturn a conviction. Therefore, counsel must pay attention to and develop a complete record of such offending conduct all the way up to and including during summation in the event of a conviction.

There are few better moments than when a trial attorney actually gets to give the exact closing argument he prepared before the trial began. The only way that this can occur, though, is through careful attention and planning. A wise mentor told me years ago that I should read, watch and study other attorneys summations, but in the end give your own, not someone else's, with the demeanor and tone that fits your personality. Jurors know when you are faking it. In the end, a jury must find you and the arguments you make credible, and be provided with a reason why they should rule in your client's favor. Plan in the beginning so they will do what you want in the end.

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