

Observations on the FCPA Gun Sting Trial

Last week I was in Washington DC and had the opportunity to visit the Federal District Courthouse, where the first of the Gun Sting defendants currently in trial. Chris Matthews is reporting daily for MainJustice and although I think Chris is a great reporter, unfortunately I do not have a subscription to MainJustice so I cannot read what he has been writing about this trial. So the following are my observations are from sitting in the trial for a short time.

I am not going to reveal the name of the defendant which they were discussing at the time I sat in court but one of the federal Prosecutor's was direct examining an FBI agent, who was an undercover operative in the sting operation, on some recorded conversation where he was present. The Prosecutor was proving up the transcripts of wiretaps and video recordings of the defendant in question. The direct examination was straight forward with the Prosecutor reading the transcript, then asking the FBI agent if he was present and if the FBI agent heard the defendant state the lines of transcript submitted and, if so, then requesting admission and publication to the jury. Riveting stuff or perhaps not.

My first observation is really that from my wife, who sat in with me. She is English and had never seen a US criminal trial live and in person. So her first reaction was something along the lines of "Is this it?" followed by "How does the jury stay awake?" It was immediately *before* lunch so that may have been one reason the jury was awake.

Needless to say I found it riveting. But I found it riveting for the same reason that my wife found it somewhat tedious. My explanation to her was that it was a slow, methodical presentation of the evidence. The Prosecution puts building block up after building block, in an inexorable march towards an impenetrable case based upon the admitted evidence. The simple act of reading line after line of conversations where the defendant either heard about requests to pay a bribe or actually agreed (or seemed to agree - not to supplant my opinion for the jury's role as the trier of fact) to pay monies for a bribe. This seemed to me to be one of the trial tactics of the Federal Prosecutors Galleon insider trading case; that is, to build such a powerful case based upon the defendant's own words, gesture or agreements that it simply cannot be explained away.

I understand that this was the prosecution's case and it was direct testimony. The defense counsel is already going after the undercover FBI agent on cross-examination this week. Additionally the defendant has raised the defense of entrapment and other substantive and jurisdictional defenses. But the slow plodding forward by the prosecution of the defendant's own words and actions may well have a powerful effect on the jury. My colleague Howard Sklar often says that if you have to raise jurisdictional defenses or claim that you were entrapped, you are already in a place you do not want to be in. He may well be right in this assertion.

Another strong impression that I had while watching this slow, steady march of evidence was how much of a game changer the Gun Sting case is for the Foreign Corrupt Practices Act (FCPA) world. Watching this direct examination was the direct result of using organized crime

fighting techniques in a very mundane white collar case. My civil side clients need to be very aware of what is happening around them, both from any solicitations for bribes by any customers and any comments by competitors regarding such actions. While in the past such comments may have been laughed off, any competitor which makes any such comments must be taken very seriously and immediately denied and refuted by your sales team. Your company can simply not afford, literally or figuratively, to be caught up in any similar circumstances.

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