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120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535

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ISSUES TO DEVELOP AT TRIAL

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This month's issue focuses on the use of PowerPoint presentations during summation — theirs and yours — and provides tips both for protecting your client from being prejudiced by the prosecution's use of a PowerPoint, and for taking advantage of this effective tool yourself.

In short, if it's okay to say it in summation, it's okay to put it on a PowerPoint slide. Superimposed commentary is okay only if it accurately reflects the trial evidence. Blatant emotional appeals, not good. This is what the Court of Appeals recently decided in *People v. Leonard Williams*, ___ N.Y.3d ___ (April 4, 2017), discussed in more detail below.

Background: In *Williams*, the prosecution introduced surveillance footage of the street outside the assault victim's apartment, as well as still photographs from that footage. Viewing the still photographs during his testimony, the victim's brother testified that the truck in the photo looked like the one he was driving that night while he spoke with the victim shortly after the attack, but since it was snowing heavily (and the photo reflected that), he couldn't be sure. He also could not be sure that one of the hooded men he saw on the street that night was the defendant, because he didn't see his face, but he "thought it was him."

In summation, the prosecutor displayed a PowerPoint presentation containing slides of images of the trial exhibits, some of which had been annotated through the PowerPoint program with text, circles or arrows. Slides depicting the still photographs that the prosecutor had showed the victim's brother had been annotated with captions such as "[the victim's brother 's t]ruck" and "[the victim's brother] sees Defendant," despite the witness's inability to make those definitive identifications. Defense counsel's objections were sustained, and the court told the jury to disregard the annotation and ultimately curtailed the PowerPoint presentation because of these annotations. However, the court denied defense counsel's mistrial motion.

The Court of Appeals affirmed. Reviewing the longstanding rules governing summation comments as stated in *People v. Ashwal*, 39 N.Y.2d 105 (1976), the Court first endorsed the use of a PowerPoint presentations as "an effective tool," but noted that "the long-standing rules governing the bounds of proper conduct in summation apply equally to a PowerPoint presentation." Thus, if it would be improper to make a particular statement, it would likewise be improper to display it. This means that annotations must accurately represent the trial evidence, and that blatant appeals to the jury's emotions or "egregious proclamation[s] of a defendant's guilt would plainly be unacceptable."

In *Williams*, to the extent the annotations may have misrepresented the evidence, the court stopped the slideshow and instructed the jury to disregard the slides. Defense counsel also

rejected the court's offer of any less drastic relief after the denial of the mistrial. Therefore, the defendant was not deprived of a fair trial.

Practice Tips: If the prosecutor indicates that he or she will be using a PowerPoint presentation during summation (or if you think that he or she might), take these steps to protect your client and to preserve and issues on appeal:

- have the PowerPoint marked as a court exhibit — this will ensure that it is easily available to the appellate lawyer in the event of a conviction;
- insist on seeing the presentation before the prosecutor displays it to the jury so that you can lodge any objections before the jury sees the objectionable material. Consider appropriate remedies — barring its use, redaction, judicial instruction, etc.;
- at a minimum, ask the court to review the presentation beforehand;
- if you're not able to take care of objections before it is displayed, then object during the presentation and make a record (if at sidebar, then **make sure the sidebar is recorded by the court reporter**). If your objection is sustained, ask for further remedies — for the presentation to be struck and disregarded, for a mistrial.

As the Court noted, PowerPoint presentation can be an effective tool — for you as well. If you are not familiar with this technology, and think your case would benefit from such a presentation,

- ask the court for funds to consult with an IT person;
- reach out to bar groups or defense resource centers for support and guidance;
- contact a local community college — a millennial might love the chance to work with a practitioner to come up with a great PowerPoint.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof**. A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.
- If you are litigating a 30.30 issue, state in your initial motion that you are entitled to a pre-trial hearing under People v. Allard and CPL § 210.45(5)(c). Do a reply even if you don't think the prosecution has rebutted your showing with conclusive proof.

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