

## Litigators of the Week: The Latham Duo Who Won an Acquittal for Former Perkins Coie Partner Michael Sussmann

By Ross Todd

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That's the trial record of Special Counsel John Durham's team.

That record comes courtesy of the work of **Sean Berkowitz**, **Michael Bosworth** and their team at **Latham & Watkins**, this week's Litigators of the Week. They led the defense team for former **Perkins Coie** partner **Michael Sussmann** whom Durham's office charged last year with lying to the FBI about who he was representing when he shared allegations of potential ties between the Trump Organization and a Russian bank in the run-up to the 2016 presidential election.

After deliberating just a few hours, a federal jury in Washington, D.C., found Sussmann not guilty on Tuesday.

**Lit Daily:** Who was your client and what was at stake?

**Michael Bosworth:** Our client was Michael Sussmann, a well-respected national security and cyber security lawyer who spent his entire professional career working for and with the federal government. For over 12 years, he worked for the U.S. Department of Justice, serving in both Democratic and Republican Administrations. Then, for over a decade, he worked as a partner at Perkins Coie LLP, where he regularly interacted with federal law enforcement and the intelligence community at the highest levels. Nevertheless, in the fall of 2021, Special Counsel John Durham charged Mr. Sussmann with making a false statement to the Federal Bureau of Investigation. Specifically, the special counsel alleged that in September 2016, when Mr. Sussmann met with the then-general counsel of the FBI, Mr. Sussmann falsely stated that he was not meeting with him on behalf of a client when,



Courtesy photos

**(L-R) Sean Berkowitz, Michael Bosworth, Natalie Hardwick Rao and Catherine Yao of Latham & Watkins.**

according to the special counsel, Mr. Sussmann was really meeting with the FBI on behalf of the Clinton Campaign and a tech executive. For Mr. Sussmann, nothing less than his liberty, his livelihood, and his reputation were at stake at trial. And a unanimous jury restored all three by returning a not guilty verdict after only a few hours of deliberation.

**Who all was on your team and how did you divide the work?**

**Sean Berkowitz:** We had an extraordinary team at trial. The two of us led the charge and we divvied things up pretty equally between us, with each taking a jury address and roughly half the arguments and witnesses at trial. We were assisted by an incredibly talented group of associates, two of whom—**Natalie Hardwick Rao** and **Catherine Yao**—examined witnesses in the defense case and did a terrific job helping to oversee all aspects of trial preparation. Rounding out our associate team were **Sarah Grimsdale**, **Alison Korman**, **Naomi Zuckerman**, and **Joseph Sitzmann** from our Washington, D.C. office; **Faust Petkovich**, **Layan Charara** and **Cameron Sinsheimer** in New York; and **Kirsten Lee** in Chicago. We also benefited from the assistance of star paralegals and support staff. This team was critical to our success. While Mr. Sussmann was charged with only one count of making a

false statement, it was far from a simple or small case. The special counsel produced over a half-million pages of discovery, significant portions of which were classified; the special counsel put dozens of witnesses on its initial list; and the special counsel wanted to make the case about much more than a simple false statement, alleging all sorts of other conduct that he did not actually charge. We were able to overcome these challenges and prevail at trial because of the intelligence, commitment, and work ethic of every member of the team.

**What were your trial themes and how did you drive them home with the jury?**

Bosworth: We wanted to keep the jury laser-focused on the actual elements that the special counsel had to prove beyond a reasonable doubt. From the opening through the summation, we made clear that the case turned on four key questions: 1) what did Mr. Sussmann actually say to the FBI; 2) was it false; 3) did he intend to say something false; and 4) did it matter? We asked the jury to evaluate all the evidence through the prism of these four questions and we did so for the simple but critical reason that we did not believe the special counsel could prove any of these elements beyond a reasonable doubt.

Berkowitz: We also thought it was helpful to keep the jury's focus on these elements—and the actual crime charged—because the special counsel desperately wanted to make this case about something bigger. He wanted to make this case about a giant conspiracy to influence the election. That's not what the case was about at all. And that's why, during summation, I put up one poster board focused on the September 19, 2016, meeting that Mr. Sussmann had with the FBI and another poster board that just said "giant political conspiracy theory."

**What did you set out to accomplish during the cross-examination of the government's star witness, former FBI general counsel James Baker? And how did you go about it?**

Berkowitz: We needed to undermine his credibility with the jury, and in turn damage the credibility of the government attorneys, who sponsored him. Mr. Baker was potentially a very damaging witness because he had an impressive background, he portrayed himself as a reluctant witness who was a friend of our client, and

he testified that he was "100% confident" our client had made a particular statement to him at the meeting that was at the center of the case. We started by showing that despite claiming to be our client's friend, he had met with the government 10 times and refused to meet with us before trial. We then pointed out that he had a motive to work with the government because he had been under criminal investigation by the same special counsel who was prosecuting our client. And we hit hard at his memory (who can be 100% confident of anything?), by taking him through many of his prior inconsistent statements over the years and his lack of memory about other details. (In closing we noted that he answered some version of "I don't remember" over 160 times in his testimony.) Finally, we were able to get some valuable concessions from him about certain helpful things our client said.

**Sean, you called the government's case "misdirection" in closings and analogized it to David Copperfield's famous illusion of making the Statue of Liberty seem to disappear. Can you briefly explain that metaphor and how you landed on using it?**

Berkowitz: The metaphor described a famous magic trick performed by David Copperfield, where he appeared to make the Statue of Liberty disappear by using misdirection. Copperfield had an audience on a platform in New York Harbor facing the Statue of Liberty, and he used misdirection (lights, noise, giant curtains and a speech) to distract the audience while the platform they were on slowly turned 180 degrees away from the Statue of Liberty. When Copperfield dropped the curtains, the audience was looking at New Jersey and it appeared the Statue of Liberty had disappeared. I had heard this metaphor used by another lawyer (**Michael Schachter**) in a closing argument and it really resonated with me. In this case, because the special counsel's evidence about the actual alleged crime (lying to the FBI at a single meeting with no recording or notes) was so weak, they tried to focus the jury's attention on a much larger political conspiracy theory. So, we used the metaphor to point out that the special counsel had used misdirection to turn the jury around and focus them on the "giant political conspiracy theory" rather than on the one short meeting the case was actually about.

**The conventional wisdom says that lawyer-defendants have a hard time getting sympathy from jurors. Were there specific concerns on that front, especially given the swirl of Mr. Sussmann’s billing records the government put into evidence?**

Bosworth: The special counsel certainly tried to make Mr. Sussmann unsympathetic. Both in the opening and the main summation, the special counsel tried to portray Mr. Sussmann as someone who abused his privilege—his relationships, his access, his prominence—in order to commit a crime. But this effort fell flat. For one thing, every witness at trial who actually knew Mr. Sussmann—including the special counsel’s own witnesses—testified that Mr. Sussmann is a serious lawyer who has a reputation for honesty and integrity. The uniformly positive things that people said about Mr. Sussmann as a lawyer and as a person undermined the effort to portray him as calculating or callous. And we also put on two character witnesses who helped show the jury what a truly good person Mr. Sussmann is. For example, one of the character witnesses was Mr. Sussmann’s legal assistant at DOJ, and she testified about the ways that Mr. Sussmann mentored her and encouraged her as she put herself through law school and became a prominent lawyer herself. She also testified about the ways in which Mr. Sussmann became a mentor to her son, who she raised as a single mother when she worked for Mr. Sussmann at DOJ. The character witnesses did more than humanize Mr. Sussmann; they showed the jury that he is a good and generous person, not the caricature that the special counsel tried but failed to draw of him.

**You put out a statement post-trial saying that this was a case that “should never have been charged in the first place.” What do you hope prosecutors take away from this case?**

Bosworth: This was a case of extraordinary prosecutorial overreach. We are not aware of a single prior case in which the government charged a tipster with making a false statement for something other than a false tip itself. We also are not aware of a single case in which the government charged a false statement based on an unrecorded oral statement allegedly made six years ago to a single witness. This is a case the

Department of Justice would never ordinarily bring. And the lesson we hope prosecutors learn from this case is this: politics is no substitute for evidence, and politics has no place in any system of justice.

**What comes next for your client?**

Berkowitz: Prior to being charged, our client, Michael Sussmann, had a thriving privacy and cybersecurity practice. We fully expect that Mr. Sussmann will get back to the active practice of law. He loves what he does, and he has always remained focused on returning to the law.

**What will you remember most about this matter?**

Berkowitz: Two things. First, the team. My most vivid memory is of the all-nighter we pulled before the closing argument, with every member of the team working together to finalize the closing argument slides. Each member of the team had worked on particular witnesses and factual portions of the case, and we came together like a symphony orchestra the final night organizing all the testimony and evidence into a clear closing argument that echoed our trial themes.

Second, our client and his family. Michael’s wife, his mother, his sister and his three children were present, in some combination, every day of trial. I was struck by how close the family remained and how resolute they were that we would achieve a favorable outcome. The night of the verdict we had a small celebration dinner and the look of happiness and relief on the family’s faces will be etched in my memory forever.

Bosworth: What I will remember most about this matter isn’t our team, which was incredible; nor the work we put into the case, which was all-consuming; nor even our client, who is as good as this case was bad. What I will remember most is that the jury system proved itself, yet again, to be one of the great foundations of justice in our democracy. Juries don’t always get it right; but they usually get it right, particularly in the federal system. Here, 12 people from all different walks of life came together; put their own lives and families on hold; listened carefully to the evidence; and determined the truth. At the very beginning of the case, we asked the jury to do justice and to prevent injustice. And that’s exactly what they did.