

## Jury Instructions: Key Topics in Federal White Collar Cases

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The right jury charge can make the difference between conviction and acquittal. Take, as a basic example, a criminal securities fraud case in which the government has alleged that a defendant employed in a large organization made misleading statements about the company's performance in financial statements. The defendant contends that although he participated in drafting the documents, he did not have final control over the statements. Under the Supreme Court's recent decision in *Janus Capital Group Inc. v. First Derivative Traders*, only "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it" is the maker of a statement for purposes of primary liability under the securities laws.<sup>1</sup> Most model or pattern securities fraud instructions do not account for or address the *Janus* ruling. Proposing and advocating for an instruction that incorporates *Janus* could provide the jury with a reason to acquit.

This article discusses six key issues where the court's instructions to the jury can truly affect the outcome of the case and where there is much room for advocacy. The first three — reasonable doubt, willful blindness, and venue — are common to white collar cases and to criminal cases in general. As a result, courts often propose to give their standard instructions. But there is a strong basis to propose instructions that may be more advantageous to the defense and can help make the difference between conviction and acquittal. The last three concern instructions in substantive areas of white collar law— securities fraud, tax evasion, and antitrust. These areas highlight that where the law is still developing, model or pattern jury instructions may not reflect the latest precedent, and often there are significant open issues that can, in appropriate cases, be pursued to the defense's advantage.

Jury instructions are an extremely effective way for defense counsel to present their theory of the case and law. The right charge can focus the jury and require it to confront directly whether the government has met its burden of proof on key defense issues. Proposing and advocating for clear and fair instructions in the trial court is thus critical, particularly in areas such as those discussed below, where courts are reluctant to reverse convictions on the basis of erroneous instructions.