

Practice Insight: A Big Little Thing at the End of a White-Collar Criminal Trial



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The criminal trial of former President Trump in New York state court reminds experienced practitioners of some of the big issues that white-collar defense attorneys wrestle with as a trial comes to an end. The jury and the general public will focus on witness highlights, the attorneys' summations, and sound bites from commentators. Skilled practitioners in a white-collar case will have been thinking about the jury instructions well before they entered court to select the jury. The reason for the anticipation of jury instructions is that the strengths and weaknesses of the trial evidence coupled with the jury instructions can have a decisive impact on the jury verdict.

As the trial winds down, the prosecution and defense attorneys have likely been burning the midnight oil and refining arguments concerning jury instructions. Some jury instructions are standard and have stood the test of time. These are found in the Criminal Jury Instructions (CJI) crafted by the state court system. Additional specialized or unique instructions may be drafted by the attorneys and submitted to the trial judge for consideration. Behind the scenes and before the summations by the attorneys, the attorneys will meet with the judge in chambers to discuss what topics the judge should instruct the jury. The judge typically tells the attorneys what standard instructions he or

she intends to read to the jury. The judge will listen to arguments from the attorneys on whether certain instructions are applicable given the facts and issues in the case. The judge will accept or reject arguments, including accepting or rejecting any of the specific requests from the prosecution and defense attorneys. These instructions are critical as the jury will be highly influenced by the direction given to them by the judge. With the charge conference held prior to the attorneys' summations, skilled attorneys will incorporate what the known jury charges are into their summation points, e.g., "The judge will instruct you that ..."

In a New York state white-collar case criminal case, there are many instructions. A few of the key instructions surround the element of intent, reasonable doubt, and witness credibility. The instruction surrounding the credibility of witnesses looms large in cases, particularly where government cooperators or witnesses with bias are involved. The jurors will be instructed that they may consider a witness's past criminal record, motive, prior inconsistent statements, personal benefits, interest in the outcome of the case, and other similar issues in determining the truthfulness of the witnesses.

One of the most impactful jury instructions concerning the evaluation of truthfulness, or lack thereof, of a witness is the *Falsus in Uno* charge (translation: "false in one thing, false in everything"). In this jury charge, the court will instruct the jury that if they find that the witnesses testified falsely at any material fact, the jury may disregard that witness's entire testimony or as much as they found to be untruthful. If the jury applies this instruction and eliminates a witness's entire testimony, it can have a decisive impact on the outcome of the trial.

Absent a confession or a defendant taking the stand in his own defense, the element of intent is most often proven by circumstantial evidence because the surrounding circumstances serve as the window into the defendant's mind and, thus, his or her intent at the time of the alleged crime. The intent is defined as a defendant's "conscious objective or purpose." The trial judge will instruct the jury that they must find beyond a reasonable doubt that the defendant's intent or purpose was to commit the crime alleged.

Speaking of "reasonable doubt," what does that really mean? It is the prosecution's burden at trial to prove each and every element to this standard. A shortcoming on any element of the crime charge should result in an acquittal. The judge will instruct the jury that they are not required to find that the crime was committed beyond all doubt, but if there is an "honest doubt" of the defendant's guilt based upon the "nature and quality of the evidence," the jury must acquit the defendant. The defendant is entitled to a "presumption of innocence". This principle is one of the most misunderstood in criminal law. The presumption does not appear in the New York or U.S. Constitution. It is an evidentiary rule that applies at a criminal trial. The judge will instruct the jury that "the defendant is presumed innocent and that if the prosecution does not meet its burden of proving the case beyond a reasonable doubt, the jury must acquit the defendant." The judge will also tell the jury that the defendant "is not required to prove that he/she is not guilty". Notably, the instructions concerning burden use the phrase "not guilty" and not the word "innocent." The practical challenge for criminal defense counsel and the defendant is to deal with the natural human instinct of "where there's smoke, there's fire". The translation to a criminal case is the belief that the defendant would not have been charged unless they did something wrong. Giving the jury reason, other than the defendant's guilt, to explain why the case got to the point of a trial is part of the experienced defense counsel's role.

Errors by the trial court in providing proper legal instructions to the jury are often a topic for appeal if a defendant is convicted, particularly in a white-collar case.

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