

Watch What You Write, Watch What You Say

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While market manipulation cases typically involve circumstantial evidence, prosecutors are finding more sophisticated ways to get defendants' direct statements into evidence. In market fraud cases, government prosecutors are required to prove a defendant's state of mind (the criminal intent component of a case). Historically, they have done so based on what the defendant did under specific circumstances—something referred to as “circumstantial evidence.” For example, an insider trading case may turn on the circumstance that a corporate insider had earnings information on the date she sold large quantities of corporate stock. Or, a market manipulation case may turn on the trades a defendant entered into after receiving a specific phone call. Another significant component of such cases is the defendant's own notes and comments. In recent insider trading convictions, juries have been captivated by defendants' own statements captured through government wiretaps. [In the 2015 Rajaratnam insider trading trial](#), the prosecution introduced 2,400 taped calls into evidence—many of which included Raj stating he had insider information on which he intended to trade. The risk that such statements will be used against defendants is much higher today than ever before because of the government's increased use of wiretaps to record defendants. Indeed, as Preet Bharara, the U.S. Attorney for the Southern District of New York, has said, the [“aggressive use of wiretaps is important. It shows that we are targeting white-collar insider trading rings with the same powerful investigative tools that have worked so successfully against the mob and drug cartels.”](#) Such wiretaps allow prosecutors to prove intent in market manipulation or trading cases with direct evidence rather than the type of circumstantial evidence previously the hallmark of such cases. Even in the age of technology, handwritten notes will continue to feature prominently in such cases, particularly when those notes reflect a defendant's intent. [In addition, expect wiretaps in all sorts of white collar cases going forward.](#) Finally, [don't expect to be able to hide by using technology](#)—the FBI has made it clear that it has figured out how to track conspirators attempting to hide their communications by chatting over headphones while playing video games together. In short, watch what you write and watch what you say.

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