Law

Law Related to Fraud
**Definition of Fraud**

- *Fraud* includes any *intentional* or deliberate act to deprive another of property or money by guile, deception, or other unfair means.
Principal Types of Fraud

- Fraudulent Misrepresentation of Material Facts
  - Deliberately making false statements to get a victim to part with money
    - Defendant made a false statement
    - False statement was material
    - Knowledge that the representation was false
    - Reliance on the misrepresentation
    - Damages resulting from the misrepresentation
Principal Types of Fraud

- **Bribery ("Official Bribery")**
  - Giving or receiving a thing of value
  - With corrupt intent
  - To a public official
  - To influence an official act

- **Illegal Gratuity**
  - A thing of value
  - Given, offered, or promised to
  - A public official
  - For or because of an official act
  - Difference: no need for proof that gratuity was given for purpose of influencing an official act
Principal Types of Fraud

- **Commercial Bribery**
  - Corruption of private individual to gain business advantage
    - Gave or received thing of value
    - Acted with corrupt intent
    - Scheme designed to influence recipient’s action in a business decision
    - Acted without victim’s knowledge or consent
Conflicts of Interest

- Employee or agent has undisclosed personal or economic interest in matter that could influence his professional role.
- Conflicts do not necessarily constitute legal violations if properly disclosed.
Embezzlement Versus Larceny

- **Embezzlement**
  - Fraudulent appropriation of money by person to whom it was lawfully entrusted
  - Without knowledge or consent
  - A breach of trust is necessary
    - But unnecessary to show fiduciary relationship

- **Larceny**
  - Unlawful taking of money with intent to deprive
  - Fraudster never has lawful possession, though may have custody
Breach of Fiduciary Duty

- **Duty of Loyalty**
  - Agent acts solely in best interest of principal
  - Free of any self-dealing or conflict of interest

- **Duty of Care**
  - Must conduct business affairs prudently
  - Fiduciaries who act carelessly or recklessly are responsible for any resulting loss to shareholders
    - Business Judgment Rule
  - Breach of Fiduciary Duty is a civil action
Conspiracy

- Agreement between two or more people to commit an illegal act
  - Agreement to defraud and willfully take part in conspiracy
  - Carried out at least one overt act furthering conspiracy
  - Overt act need not be criminal
  - Purpose need not be accomplished
Other Charges

- **Obstruction of Justice**
  - Engaging in act designed to impede or obstruct investigation or trial of other substantive offenses
  - Tampering with or threatening witnesses, jurors, court personnel
  - Includes destruction of evidence, obstructing government auditors

- **Perjury**
  - Intentional false statement given under oath (sworn) on a material point at issue
Federal Legislation Related to Fraud

- Prosecution under U.S. Code (by statute) requires federal jurisdictional basis
- Federal criminal and civil actions are tried at the district court level
Federal Legislation Related to Fraud

- Mail Fraud
  - **Involves use of mail to perpetrate scheme to defraud victim of money or property**
    - But the mailing does not need to contain the false representation
    - **Integral part**—generally helps advance the scheme
  - Not necessary for fraud scheme to succeed or victim to suffer a loss
  - Not necessary that mailing travel in interstate commerce
  - Involves postal “system,” not necessarily USPS
    - Includes private carriers (e.g., FedEx, UPS, DHL)
Federal Legislation Related to Fraud

- Wire Fraud
  - Scheme to defraud by means of wire or other electronic communications (e.g., radio or television) in foreign or interstate commerce
  - Does require interstate/foreign communication for violation
Federal Legislation Related to Fraud

- **False Claims and Statements**
  - Prohibits lying to or concealing information from various federal officials
  - Need material false statement with knowledge of falsity when made
  - Statement capable of influencing agency

- **Aiding and Abetting**
  - Induces another to commit an offense or aids in the commission of an offense
Foreign Corrupt Practices Act

- Prohibits making corrupt payments to foreign officials to obtain business
- DOJ oversight of criminal enforcement
- Requires company to keep accurate books and adopt internal controls to prevent corruption (SEC oversight)

Regulated Party
- Domestic concerns and their agents
- Issuers and their agents

Exception of Facilitation “Grease” Payment
UK Bribery Act

- Similar but broader application than FCPA
- Stricter compliance issues than for FCPA
- Covers bribery on a private level
  - Thus, commercial bribery component
- No facilitation payment exception
Qui Tam and Civil False Claims Act

- A private individual sues on behalf of the government to recover damages for criminal or fraudulent actions committed against the government.
Sample Prep Question

1. In order for the U.S. federal mail fraud statute to apply, it is necessary that:

   A. A loss be suffered
   B. The fraudulent scheme succeed
   C. The mailing contain a fraudulent representation
   D. None of the above
Correct Answer: D

- It is not necessary that the fraudulent scheme succeed or that the victim actually suffer a loss for the statute to apply. The gist of the offense is the use of the mail. Thus, where the mail is not used, no matter how large or serious the fraud, there is no federal jurisdiction under this statute. Yet, the mailing does not need to contain the false and fraudulent representations, as long as the mailing element is an integral part of the scheme.
Sample Prep Question

2. Which of the following is the primary legal distinction between larceny and embezzlement?

A. Whether the crime involved cash or property
B. Whether the property crossed state lines
C. Whether the thief had been legally entrusted with the items when they were taken
D. Whether the thief was an employee of the company
Correct Answer: C

- The issue of embezzlement has nothing to do with whether the crime involved cash or property; some wrongfully assume that larceny involves property and embezzlement involves money. The difference is that embezzlement is distinguished by legal possession of the property. Embezzlement is the wrongful appropriation of money or property by a person to whom it has been lawfully entrusted. Embezzlement implicitly involves a breach of trust.
Sample Prep Question

3. XYZ, Inc. (a U.S. company) paid a Japanese public official to win a lucrative contract. XYZ could be prosecuted under U.S. law for violation of the:

A. Foreign Corrupt Practices Act
B. Off-Shore Transfer and Bribery Act
C. International Corruption and Bribery Act
D. None of the above
Correct Answer: A

- The Foreign Corrupt Practices Act of 1977 prohibits certain publicly held companies from making corrupt payments to foreign officials or political organizations. Other amendments to the Act make it illegal for any U.S. citizen to make such payments. The statute was the result of disclosures from the Watergate investigations of corporate grease payments to foreigners to obtain business overseas.
Law

Testifying
Types of Testimony

- **Lay (Factual) Testimony**
  - Lay witnesses testify about what they have experienced firsthand and their factual observations.

- **Expert Testimony**
  - Expert witnesses are those who, by reason of education, training, skill, or experience, are qualified to render an expert opinion regarding certain issues at hand.
Testifying as an Expert

- **Testifying expert** witnesses give opinion testimony when specialized knowledge is needed to help the fact finder understand evidence or determine a fact in issue.
  - Consulting experts do not testify, but assist and support the case.

- Testifying experts may testify either for the prosecution or the defense.
  - May testify about another expert opinion
Testifying as an Expert

- Must quickly determine if any conflicts of interest exist—or even appear to exist
- Delegating tasks to subordinates
  - Important to review documentation to avoid hearsay issues
Expert Witness Report

- Federal Rule of Civil Procedure (FRCP) Rule 26
  - Complete statement of opinion, with basis for opinions expressed
  - Facts and data considered along with exhibits
  - Qualifications
  - List of publications authored in preceding ten years
  - List of cases testified as an expert over last four years
  - Compensation
- Some expert/attorney communications protected
  - Testifying expert witnesses have no privilege, however
Qualifying to Testify as an Expert Witness

- Expert Witness Testimony (FRE 702)
  - Must have “knowledge, skill, experience, training, or education” and may testify and form opinion on “scientific, technical, or other specialized knowledge” to help understand/determine a “fact in issue.”
  - No particular education requirement

- Determination left to judge – “gatekeeper”

- Three determinations:
  - Is the person qualified as an expert witness?
  - Will it assist the jury (i.e., relevant)?
  - Is the testimony reliable?
FRE 703 Basis of Expert Testimony

- Expert may base opinion on:
  - Firsthand observations
  - Facts, data, or opinions presented at trial
  - Facts, data, or opinions conveyed outside of court

- Experts can rely on inadmissible hearsay if reasonably relied upon
Direct Examination

- Presenting Expert Testimony
  - Narrative questions—open-ended
  - Specialized materials (e.g., professional publications) may be produced as part of trial
  - Use of special exhibits
    - Charts, diagrams, documents, photos
Cross-Examination

- Goals of Cross-Examination:
  - Diminish importance or attack report/opinion
- Avoid getting trapped
  - What-if scenarios
  - Complex, confusing questions
  - Ask for rephrasing of question if necessary
- Opposing counsel will cross-examine only when it will benefit the case
- Attempts at psychological control
Strategies to Discredit Witnesses

- **Myopic vision**
  - Great amount of time spent in one area

- **Bias**

- **Sounding Board**
  - Uses witness to reacquaint jury with favorable, opposing aspects of case
  - “Wouldn’t you agree?” or “Isn’t it true?”

- Willing to Say Anything for a Price
1. According to Rule 702 of the U.S. Federal Rules of Evidence, expert testimony is intended to “assist the trier of fact to understand the evidence or to determine the _______ in issue.”

A. Opinion  
B. Fact  
C. Guilt  
D. None of the above
Correct Answer: B

- Under Rule 702 of the Federal Rules of Evidence, a witness qualified as an expert by "knowledge, skill, experience, training or education" may testify in the form of an opinion or otherwise to "scientific, technical or other specialized knowledge" if such testimony will "assist the trier of fact to understand the evidence or to determine the fact in issue." The determination of whether a witness is qualified as an expert or whether expert testimony is needed is left to the discretion of the trial judge. There is no particular educational requirement for expert testimony; a witness with no formal education may be qualified based on training or experience.
Sample Prep Question

2. A lay witness (or fact witness) is anyone who provides nonexpert testimony in a legal proceeding.

A. True
B. False
There are two basic kinds of testimony. The first is lay testimony (sometimes called factual testimony), where witnesses testify about what they have experienced firsthand and their factual observations. The second kind is expert testimony, where a person who, by reason of education, training, skill, or experience, is qualified to render an expert opinion concerning certain issues at hand. A lay witness (or fact witness) is anyone who provides nonexpert testimony.
Sample Prep Question

3. _______________ is the cross-examination technique that entails getting the expert to admit a great amount of time being spent on a specific matter, and then selecting an area to highlight in which the expert has not done much work.

A. Sidelining
B. Myopic vision
C. Sounding board
D. None of the above
Correct Answer: B

- Myopic vision, a tactic primarily used against expert witnesses, entails getting the expert witness to admit to excessive time spent on a specific matter, and then selecting an area to highlight in which the expert is unsure or has not done much work. This area may not be central to the issues in the case or to the conclusions reached. Then, the questioning party will make a large issue of it and prove that the expert’s vision is myopic in that the work was limited in extent or scope and, as such, is substandard.