CHAPTER ONE

# 1 Cutting Through the Maze

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> Half the work that is done in this world is to make things appear what they are not.
>
> —*E. R. Beadle*

## INTRODUCTION

'Cutting through the Maze.' This chapter attempts to codify and achieve a succinct *understanding* of fraud as a clear (but not over-simplified) explanation. Avoiding the incessant circular discussion around definitions saves time and gains more convictions. Moreover, a common output of this problem among others, being that professionals across investigations, risk and data analysis, audit, are often at odds with each other with the ever-present dilemma on agreeing what fraud actually is.

Risk management and prevention are alluded to but the main emphasis of this book is *investigation*, to introduce you to the issues and nuances of fraud awareness from a fresh perspective, with *practicalities* to combine with your skills, side-by-side.

The run of this first chapter commences with a fundamental engagement of fraud definitions, leading to more involved engagement with the theoretical perspectives and explanations, which are then closed in and combined with practical guidance to reassure you that the definitions are mostly in common with each other, to then lead to a

chapter summary of accepted definitions. Therefore, this chapter does not purport or claim to 'reconcile' definitions (which cannot be done) but forms the fundamentals to counter-fraud work and places them into a workable practical perspective.

**PLEASE NOTE**

When I refer to a fraud 'player' in all chapters, the word **'offender'** is used, as opposed to the word **'accused'.** In *Exposing Fraud*, together we will deal with a range of examples of how cases are both investigated and disposed of. An 'offender' is identified when a case of fraud is established in any context. The 'accused' is normally the reference to a (fraud) criminal who is legally charged (or sued) to appear before a court. Hence, non-police or enforcement Investigators whose cases are addressed by HR policy as opposed to a case for indictment to court, differ in terms of the scale of the standard of proof. Fraud Investigators (not necessarily 'dedicated' Investigators) need to be clear on how far they need to go in 'proving' a case with this describing of a person involved in fraud, and to remove existing confusion.

The above benchmark is to be borne in mind and used as a running element when reading and working through this book.

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## 1.1 WHAT IS FRAUD? THE MOST DEBATED QUESTION

This chapter hits upon one the most challenging aspects of fraud and its explanation: the differences and the argument about that amorphous area which is 'problematic' to some, being the difference between what is fraud and what is 'sharp practice.'

At this early stage in our working together, to help delve into this area, write down your first response to the scenario in the activity below.

**Activity:**

**Please state *your own* understanding of what the word 'fraud' means.**

This is not a trick question or a test. It is just to help discover your notions of fraud as an entity as well as a crime at this point.

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Broken down further, and in connection with another which was once at least a burning question, was looking at the 'mis-selling' of financial products by UK banks. Source evidence was gathered which included sales pitches such as, *'Your mortgage*

*application will be viewed "more favourably" if you take out the mortgage protection insurance'* – or, *'the credit card insurance is compulsory'.*

So are these two examples fraud? To me, the short answer is yes, as this is over and above and (dishonestly) extraneous to a bona fide business transaction because there is a blatant misrepresentation of fact, actual gain for the offender and actual loss to the parties. Banks in the UK were guilty of systemic and institutional fraud when the staff were given open licence to sell financial products that were needless to a customer by any means. Sales 'techniques' with 'patter' and half-truths were prima facie fraud (and hence why billions of pounds were set aside in compensation in the wake of it). But the practicalities of outcomes are different. Cases of fraud do not always get prosecuted, as we know. No one from the banks went to jail. So this early engagement with definitions and live practicalities is to set out our way forward.

Next, is a fraud case which is an extended example from the above, and we can make use of a case study involving United Airlines in February 2015.

## CASE **STUDY**

A currency exchange-rate error in third-party software supplied to United Airlines affected several thousand bookings on United's Denmark-facing website. The technical fault temporarily caused flights originating in the United Kingdom and denominated in Danish Kroners, to be presented at only a fraction of their intended prices.

Because tickets became available at unusually low prices they were instantly 'snapped up' because of the technical error.

Customers booking the flights (mostly in the US) identified 'Denmark' as their country, in, other words, where their billing statements are received when entering billing information at the completion of the purchase process, and were able, online, to complete their purchase at the mistaken fare levels.

News of these obviously wrong fares spread like wildfire online. 'Bloggers' boasted about buying multiple tickets, hoping that when the mistake was discovered, they would use the consumer authorities to bully United Airlines into honouring the cheaper fares.

Please state if you think this case contains 'fraud' and why. Or, if not, then why not?

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The above activity is not a 'test'. It is a platform to engage early and deal with the 'ethical versus fraud' dilemma. Please return to this page and case after the next section, so you can review your account above and re-appraise and sharpen up your approach to fraud as a crime.

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## Perceptions and representations of fraud

Many academic, legal and vocational disciplines lack definitions to work with, but a polite though honest point made in this chapter (and in furtherance of the good of countering fraud) is that in the world of counter-fraud work there are too many. Academic definitions vary widely and become more and more disparate the more authors become involved and colour the meaning of fraud with their own hypotheses.

As with most serious crimes, many notions of what fraud actually is miss the point of how fraud should be understood, and as such are often fragmented from each other. Moreover, problems persist and lie within inconsistent fraud definitions, political influences, corporate terminology and policy classifications of fraud and inconsistent legislation across jurisdictions.

Therefore, new meanings 'seep in' and germinate as definitions. This cluster of influences sidewind actual fraud definitions as a result of certain policies effectively watering down the law and other fraud investigations and even enforcement, in different ways.

Hence, with the growth of 'fraud awareness', ironically the complexity has increased in understanding what fraud actually is. It has, in some ways, grown out of proportion. The saying goes that 'a little knowledge can be dangerous' and whilst the intentions of the various contributors and injudicious investigators with their definitions are well-meant, they can be collectively and exclusively problematic.

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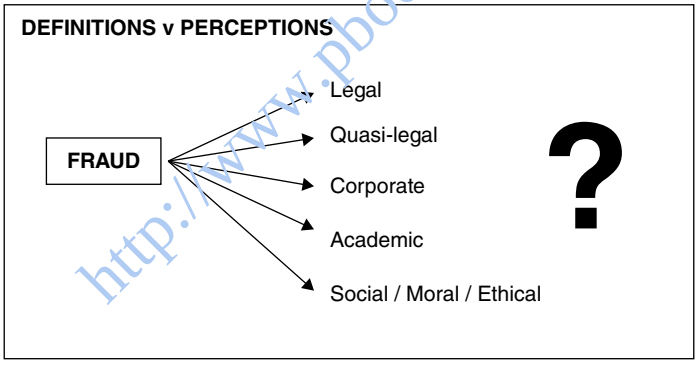


**Explanatory Notes**

**Legal:** The issue of definitive requirements in *law* to establish a fraud case MUST be your working 'anchor' (not to interfere with of course multi-jurisdictional fraud cases, which are the ones often left unchallenged) and also will raise the debate if fraud is actually present. For example in US law, a financial gain for the offender and loss for the victim must be present. However, in UK law this is not so because the offence of fraud is now 'offender' focused, and a 'risk' of loss to the victim will substantiate a case of fraud to answer – legally.

**Quasi Legal:** Not to be underestimated or viewed here as dumbing down the legal, but referring mainly to auditing standards and such mainstream organisations which operate them, such as the 'Big 4' who naturally herald the highest standards in the

countering fraud cause. But there is a practicality that appears in that, unlike corporate entities, the courts are not customer-led. Again, it is emphasised that an organisation dealing with auditing and/or investigation of fraud must, and does, work to the legal backdrop, but financial parameters creep in. If, for example, in the event of the discovery of internal fraud, would the audit mandate state the amount concerned should be over a certain value for it to be *fraud*? This is often the case. Hence, the legal and the corporate entities branch away from each other.

Added to the above exemplar is business-related operational services, such as due diligence. A more detailed comparison of the practicalities and overlaps with investigations is made in Chapter 4. If we take the standard definition of due diligence to mean an investigation of a business or person prior to signing a contract or other risk-based project, or an act with a certain standard of care, I trust this gives a brief summary of it. The word 'investigation' throws the understanding slightly, as it invites a myriad of corporate business formalities and practicalities.

**Corporate:** This refers to the huge inconsistency regarding definitions of fraud. Far too often a discussion of fraud is pulled into different directions in the boardroom. Equally, even in the IT industry, or in corporate settings, it is often the case that definitions are made up to suit, to give a formal analysis of notions of fraud but often in a singular context. For example, key words such as 'specification' and 'verification' of 'normative systems', 'detection and prevention' and 'trade procedures design'. These often represent a fraud possibility as opposed to a fraud definition.

**Academic:** Fraud definitions are revealed to have a long history (longer than one would expect) and developed since the 15th century. Arguably, not a great deal has changed, because even then, the term 'fraud' included behaviours such as a breach of position of trust.

Newburn (2007) made the most excellent argument that definitions of fraud have been caught up in modern trends and types, and as such the definitions have been narrowed by the contextual attachment of fraud to so-called 'white-collar' crime. But this to my mind creates yet another dimension: that of a vacuum of 'white-collar' crime whereby the meaning has become so frivolous in many quarters, that it now has little useful substance as a definition.

What has happened also is that the academic approach to defining fraud has realised a cross-over with 'categories' which include corruption, theft at work (which will of course align with the US fiduciary breach), 'employment offences' and consumer offences (one which attacks the moral wrongdoing against an innocent consumer at all levels of business to business or to a related business-to-consumer transaction).

**Social and Moral:** This refers to representations of fraud at street level or media-based terminology, including associated words such as 'scam', 'con', 'swindle', 'extortion', 'double-cross', 'hoax', 'cheat', 'ploy', 'ruse', 'hoodwink', and 'confidence trick'.

Equally, when a case arises which brings in emotional influences (such as a pensioner being conned out of his life savings, or theft from a children's charity) if the element of misrepresentation is present, then the presence of fraud is established with it.

But as in the case of the United Airlines ticket shambles we saw in the case study, the sheer welter of opinion of 'defining fraud' diversified to a massive extent. It even reached

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the point whereby many publicly blogged online, defying the airline and even trying to allegedly bully the airline by way of the United States Department of Transportation (DOT), a federal department of the US government governing transportation. The point being that the seemingly social acceptance of this was the airline's own fault, so 'tough luck' completely overrode the notion of any kind of wrongdoing at all, let alone fraud.

One commentator wrote a lengthy article denouncing the actions of the 'chancers' and exploiters who took advantage of a golden opportunity to them to secure the most ludicrously cheap transatlantic flight tickets. What was presented is indicative as being one of *the* most talked about points in the field and generated further debate between both active professional consumers of fraud issues and passive recipients alike. Words such as 'lack of character' seeped into the article. The content then transformed into cybercrime with the repeated use of the word 'hacking' (which it wasn't, in any form, because customers simply went onto a website which was promulgated by in-house IT efficiency lapses and paid the prices on display) but certainly the word 'misrepresentation' was rightly used, as customers lied about their localities.

Many responders kept saying over again 'it must be wrong' or 'it's unethical' but then many also concluded 'so therefore it "must" be fraud'. Of course it is 'wrong' to do what these passengers did and this is not so much to be scathing or unsupportive of United Airlines, but this reference is merely to point out the type of debate it presents. You, as a professional or student of the subject, need to be able to unravel the debate and apply a clear, reasoned answer to it (there are extended 'problem solving' scenarios and assessments for you in the investigations chapter).

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## Definitions, key distinctions and informing elements

The point must be stressed most clearly that this section is intended to establish a baseline standard of knowledge and understanding of what fraud is and what needs to be proved when both investigating and seeking to prevent fraud (including by way of governance and policy).

Therefore as opposed to jumping straight to definitions, I trust the preceding pages served as a platform and build-up to lead us where we are now: the definitions themselves. These now follow with their integral points.

### *The* mens rea *of fraud*

*Irrespective of your legal and geographical jurisdiction*, the following essential elements must be present before an actual finding of fraud will occur:

- **Misrepresentation** of a fact – a false representation. This gives a connotation of an 'active' false utterance or statement of fraud, such as lying or forging; however, a misrepresentation can also be withholding, concealment and/or non-disclosure.
- Thus the evidence of misrepresentation can be established (causing the victim to act or not act and suffer loss as a result) by standard items of percipient evidence to prove 'lie-based' conduct, such as forged documents, or documents which contain partially

falsified content (such as misrepresentation of the price of an order, or the quantity or quality of imports or exports). Items (forming exhibits) include fake websites, etc.

- A blatant verbal lie can constitute misrepresentation in fraud, but it must have a significant weight of percipient evidence to substantiate it as such.
- The offender *must know* that the statement is untrue. A statement of intended fact that is simply mistaken is not fraud. To be fraudulent, a false statement must be made with intent to deceive the victim. This is usually a straightforward element to prove, once falsity and materiality are established, as most material false statements are designed to mislead.
- The victim's reliance on the false statement must be reasonable. Reliance on an absurdly false statement will not generally give rise to fraud. However, people who are especially gullible or superstitious, for example, or who are illiterate may have a cause of action in fraud if the offender both knew of and took advantage of their condition.
- Finally, the false statement must cause the victim some injury that leaves the victim in a worse position than she or he was in before the fraud.

### *Misrepresentation. Practicalities*

Whether the fraud is committed by an *individual* or by a *corporate identity,* the same standards are applied. It is merely the practicalities that differ in investigations and legal outcomes.

- To inform the above, it must be established that the offender:
  - had *clear* knowledge of the falsity;
  - had *intent* to deceive, to induce the victim to act or give over something in a context that the victim would not have done if the true intention(s) of the offender were known;
  - sought actual reliance on the misrepresentation; and
  - intended to gain from that (mis)representation, or resulted in loss or risk of loss.
- For example, if you interview a 'suspected' fraudster do you think you ought to push the issue until you hear in your own estimation, a clear and total, and unequivocal account or utterance of 'knowledge' or confession of the falsity or practised deception?
- Or, in parallel, if appraising other evidence (documentation, data, footage, 'e-discovery' evidence) what level and kind of detail or perceived clarity do you work towards obtaining?
- Equally, and in the alternative to a direct misrepresentation, a breach of a fiduciary duty. This will be dealt with in this and later chapters as we thread together these issues and questions they raise.

### *Conveying the misrepresentation*

Another critical point to prove is that the misrepresentation of fact was conveyed directly from offender to victim. For example, employees of a company may sell products or offer

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a service but without *personal* knowledge of any kind of wrongdoing. A sales officer who sells a completely fraudulent insurance policy on behalf of a dishonest company would not have known the policy was bogus at the time of the sale. Hence, in order to prove fraud, the prosecution or investigating authority (if in-house) must not merely demonstrate, but present beyond doubt that the (employee) offender in this example had prior knowledge *and* willingly misrepresented *and* conveyed facts both legally-orientated and in effect, hijacking the entity of a binding contract.

**Summary: Misrepresentation**

**Lie** = achieving false insurance claim = but to prove fraud will need authenticity in writing from the insurer

**Lie** = offering fictitious investments = affirmation by the investigator that the scheme does not exist

**Lie** = so-called 'phishing' emails = percipient evidence of a scam per se, (production of the email)

**Lie** = falsifying invoices for personal gain = tracing through an audit trail and engage with auditors

**Lie** = creating fake website = hacking law firm database, stealing customer IDs = emailing for additional fees or 'disbursements' = asking client to pay via bank transfer or on line process on fake website which is identical to the law firm's = fake website then closed down so cannot be tracked.

**Lie** = forging references = equals lying = fabrication = fraud

**Lie** = using certain words = misleads – but not a fraud

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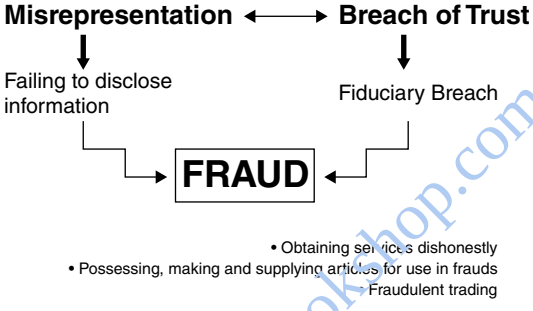
## Definition of fiduciary duty

**Definition of 'Fiduciary'** (as defined and confirmed by the cases of Svanoe v. Jurgens, 144 111.507, 33 N. E. 955; Stoll v. King, 8 How. Prac. (N. Y.) 299):

- A 'fiduciary duty' is a legal duty to act solely in another party's interests. Parties owing this duty are called *fiduciaries*. The individuals to whom they owe a duty are called principals. Fiduciaries may not profit from their relationship with their principals unless they have the principals' express informed consent. They also have a duty to avoid any conflicts of interest between themselves and their principals or between their principals and the fiduciaries' other clients.
- A fiduciary duty is the strictest duty of care recognised by the US legal system. Hence, albeit the fiduciary duty is governed by the law of the United States, it does cross practically with other jurisdictions. As does the term misrepresentation.
- Moreover, aside to a misrepresentation of fact, fraud is most likely to occur where one party exploits a position of trust and confidence, being a fiduciary relationship. Fiduciary relationships prominently include those between doctors and their

patients, lawyers and clients, financial advisors and clients, and the executives and partners of a corporation and their shareholders.

- Taking this into another practical aspect, an example of a breach of a fiduciary relationship could be where an employee steals items from the office whilst in a position of trust. (That trust could have been formalised by a contract of employment with HR policy about codes of conduct inbuilt into it.) If the employee conceals the items and removes them, there has been no misrepresentation, but there has been a clear breach of a fiduciary duty. The matter would not, therefore, be a theft but instead a (more serious) matter of fraud by way of the aggravating features of breaching this enhanced standard of trust.

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SUMMARY **POINT:**

Repeated is the point that to be a victim of fraud is to be made a fool of. So as harsh as this may seem, this is at the root of ALL fraud investigation cases that you clearly establish fraud in a case. Even if emotional dialogue raging about 'ethics' and right and wrong and insouciantly applied dishonesty is brought in by one of the parties to the case, if there is no misrepresentation of fact for gain or requisite breach of trust you will have a scenario of dishonesty in its basic sense, but you will not have fraud.

## 1.2 OTHER DISTINCTIONS

### Intent

This means intent to do the harm that was actually done, or recklessness as to whether harm would be done. For example, if A represents something to B and B relies on the representation and the undeniable result of that misrepresentation is loss to the victim (or mere risk of loss in some jurisdictions) and the victim would not have followed an action or paid something had [he] known the offender's true intentions, or the offender is reckless about the loss (such as the scale of amount of money lost), then this will constitute fraud.

### The difference between 'misrepresentation' and a hoax

A hoax is a separate action that involves deception but without the intention of gain or of causing loss to the victim. If, of course, the offender 'cons' or misrepresents to the victim as a means of 'poking fun' at the victim but the representation contains such substance of deceit as to cause loss to the victim (incidentally or as 'fall-out') then a *material fact* of fraud could be established. But the misrepresentation must go to a material fact and not merely result in an insignificant issue.

If a sales agent makes a representation to a customer which causes the customer no monetary or any other type of harm, the customer would have a very difficult task to show that this was 'material' and a *fraudulent* statement. An agent, for instance, could misrepresent something which would be of little significance, even though the representation was untrue.

## 1.3 LYING, FRAUD AND THE STATE OF THE MIND

> The trust of the innocent is the liar's most useful tool
>
> —*Stephen King*

In his book, *Born Liars,* Ian Leslie argues that far from being a 'bug' in the human software, lying is central to who we are; we cannot understand ourselves without first understanding the dynamics of deceit. Using a vivid, panoramic style, Leslie explored the role of deception and self-deception in our childhoods, our careers, and our health, and the part played by lies.

He describes so-called spin doctoring, which is a method, for example, of providing a favourable slant to an item of news, such as potentially unpopular policy, especially on behalf of a personality or party; in short … the politically acceptable method of lying. One sure example and comparison is when the 'consultation period' leading to the implementation of the UK Bribery Act (and afterward) saw very petulant responses from business leaders against (legally) being made to stop bribery in their own organisations. The dialogue ranged from complaining about costs, to a rather uneasy plateau with directors effectively arguing to be allowed to write their own rules and set up formal business arrangements to effectively allow themselves to act in a corrupt manner. To a point they got their way with help from political meddling and watering down of the Act. Nothing much changes. Setting up the lie to set up the fraud.

The UK Fraud Act of 2006 was enacted to modify the law to deal with fraud as an acquisitive crime (not just to be fooled, as was enshrined in the law before it) but certain lawyers argued that the Act criminalised lying for the sake of it. The four-part definition of fraud as an offence presented a transformation from what was a 'result' crime to a 'conduct' crime (see summary of statutes in this Chapter).

Equally the (legal) need to have a confirmed monetary loss was removed also, with risk of loss being sufficient to set out a case to answer in fraud. The 'catch-all' scheme of the law, the tightening up of the clarity, or better put, simplifying of the *mens rea* ('guilty mind') to be proved made an offence of fraud prima facie easier to prove than before. Easier that

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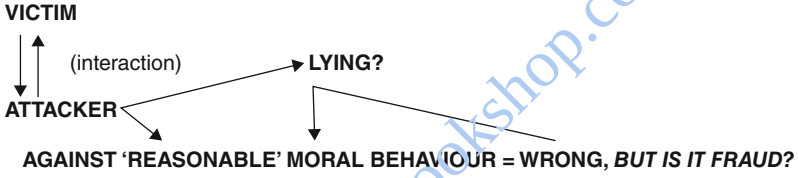
is, in terms of lowering the barrier of the standard and burden of proof that favoured the offender instead of the victim. It also showed a break away from the traditional neoconservative way of thinking and the very unhelpful precedent set by Lord Chief Justice Holt circa 1700, in his judgment speech: '*Shall we indict one man for making a fool of another?'*

Hence, one of the most justice-balanced, enforcement-friendly Acts (and ethically so) ever to come from parliament is not used to its full potential by any means. It bridges this gap from the dubious to the legally-proven dishonest.

Does the reliance on a statement or representation or act put someone at risk of loss? Is that utterance or representation firm enough to have no other meaning as to rely on its content, implication or form of 'guidance'? Fraud?

Definitional work in any vocationally-driven profession is crucial, and whilst Chapter 2 will increase the meanings and understanding of this point, it is important even at this stage that we partially expand the explanation of key points to prove, in order to go beyond the basic or literal or dictionary meaning of words like 'lies' and 'misrepresentation'.

*A critical pathway in seeing the 'right v wrong v fraud' debate in such a case.*

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## Lying and the problem with words

Fraud cases can involve complicated financial transactions conducted by (to reluctantly quote the vernacular) 'white collar criminals', and professionals with specialised knowledge, underpinned by criminal intent. An unscrupulous investment broker may present clients with an opportunity to purchase shares in precious metals, for example. Status as a professional investor gives credibility, which can lead to a justified belief among potential clients. Those who believe the opportunity to be legitimate contribute substantial amounts of cash and receive seemingly authentic bonds in return, which of course are totally fraudulent.

This example is used as it alludes to lies with a sphere of mostly 'business' dialogue, often thick with tactics. But pulling out the fraud indicators from the semantics can be done, with the right training and application (and 'knowing your business' in Chapter 2).

The Problem With Words

- **Deletion**
  *Language is selective to the experience*
- **Distortion**
  *We simplify what we say. But over-simplification inevitably leads to distortion*
- **Generalisation**
  *We generalise in order avoid spelling out every condition and exception.*

For example, the phrase 'mistakes were made' is a statement that is commonly used as a rhetorical expedient, whereby the speaker (really) acknowledges that a situation was badly managed or failed because of low-quality or inappropriate handling of a situation: the speaker seeks to evade any direct acceptance of responsibility by not naming the person who made the mistakes. The acknowledgement of a mistake is often framed in an intellectually uplifted sense. But a 'non-evasive evasive' response might be, 'yes I made the mistake' or 'the buck stops with me'. That speaker neither accepts personal responsibility nor accuses anyone else. The word 'mistakes' also holds an intention to dumb down an admission of liability – especially in fraud. UK politicians caught up in the so-called expenses scandal often used the words, 'errors' and 'omissions'. When we reach Chapter 4 (investigations) I will provide some insight on how to dismantle 'the rules are not clear' type rhetoric which has extended from politicians to corporate fraud offenders.

**Activity:**

What would you make of the following statement?

In the UK, large positive net errors and omissions likely represent unrecorded financial inflows. As well as cyclical, these inflows are linked to the UK's status as a refuge for international capital flight. For the first time we confirm through balance of payments data the popular belief that Russian money has flooded into the UK in recent years. Indeed, there is strong evidence that a good chunk of the UK's GBP 133bn of hidden capital inflows is related to Russia. Hidden inflows have been marginally supportive of GBP in recent years, and are another factor behind the UK's large current account deficit.

(*Source*: Dark matter: the hidden capital flows that drive G10 exchange rates. Deutsche Bank Market Research Report, 2015)

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You could relate such an article to a 'problem with words' as opposed to 'lies' as one cannot help but detect a political agenda by the authors in the above statement. It is not suggested that the writers of the statement are being dishonest. When you encounter a phrase such as *'a refuge for international capital flight'* you will learn, when we deal with 'knowing your business' in the next chapter, that terms such as 'capital flight' are used when money and assets are hastily moved out of a country for any manner of reasons, usually economic collapse. But capital flight often also goes hand in hand with international money laundering.

Therefore, a reasoned response or restatement of that extract could be:

> The UK is the money laundering capital of the world, with laughably weak money laundering controls, the ones responsible for controls and regulation being too ready to avert their eyes to billions in illicit revenues pouring into the country, so long as it pours into the country. Ably indulged by non-interested UK enforcement authorities, the point is suitably demonstrated by sporadic enforcement against money laundering that is too disconnected from the law itself.

> In fact, what I have done with the statement is a mere extraction of the indicative content and turning the wording and eccentric phraseology back on itself. If you see the issue as *both* an intellectual problem *and* an investigative one, you expose the raw material of the scenario, and you are left with a definite presence of illicit monetary practices and movement in one form or another. You then see which direction money flows come from, then you can work out why, and then move to your analytics and colleagues to trace finer and particular lines of monetary movement as necessary, expose identities and spot relationships and tack these in. The case is now created. Then you address jurisdictional protocols.

Ensure you deal with quality and credible resources if you are a professional who investigates cross-border money laundering and even asset tracing. Appraisal of these kinds of reports is something you really ought to include in your work. From an *investigation of fraud* perspective, seeing evidence of fraud is often only possible (really) when you make yourself clearly aware of what these kinds of terms are and what informs them. Think of known examples of this happening. For myself, take Argentina in early 2000, up to 2002 when the economy collapsed there also, and every bit as it did in Russia (but without the enlarged media and other publicity). I was working there at the time and one gentleman in banking made the point that the country had been 'looted'.

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## Ethnicity misunderstood: the chasm between belief and actual criminal deception

In the field of investigative psychology, a study took place about word usage differences between truths and lies. Most of the existing research involves an examination of truths and lies in 'low stakes' situations, written statements or interviews (not both) and native speakers of a single language. In handling definitions of fraud, the defining of lying is very open.

Matsumoto and Wang (2014) examined differences in word usage between truth tellers and liars in a moderately high stakes, real-life scenario (mock crime) involving participants from four cultural, ethnic groups: European-Americans, Chinese, Hispanic and from the Middle East. Each participant produced a written statement and participated in an investigative interview; word usage in both was analysed. Word usage differentiated truths from lies in both the written statement and the interview, and the effect sizes associated with these findings were substantial. For the written statement, word usage predicted truths from lies at 68.90% classification accuracy; for the investigative interview, word usage predicted truths from lies at 71.10% accuracy. Ethnicity did not moderate these effects. These findings are discussed in terms of their implications to cross-cultural applicability of the psychological demands placed on liars and in terms of their practical field utility. (Published by Wiley, 2014.)

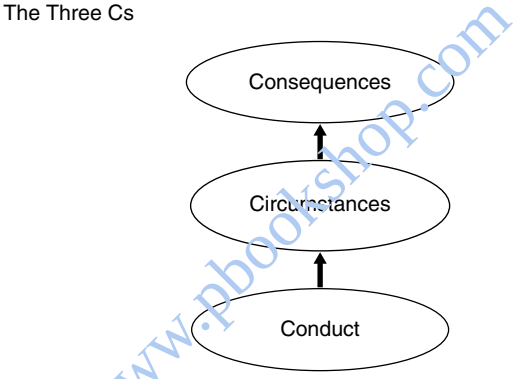
Following on from the above, compulsive liars are easily spoken about and conjured into conversation, but are not so prevalent in reality in line with lies turning into

provable fraud. Lies often go hand in hand with rhetoric. It matters not just to show a lie or lies were told in a fraud case, but that the lie misrepresented a fact sufficiently to the legal standard to make it a criminalised lie, breaking away from the sticking point of the lie being an immoral or unethical one.

## 1.4 CUTTING THROUGH THE MAZE

At this point, this model may be useful to proceed with as a workable tool, both to take away the worry of being hung-up on definitions, and to handle a new case (but not to oversimplify it).

### 'The Three Cs'

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**Conduct**: Look at the overall conduct, and how the 'players' appear and act in it. Avoid 'relevance filtering' in your reading of the facts. Evidence of fraud will sometimes leap out immediately, but this is not about 'gathering evidence' at this point. It is a brisk and effective appraisal of the case that arrives with you.

**Circumstances**: The circumstances in which the conduct took place. It may be that this part will lead you to investigate underlying causes and effects of a fraud offender, and related items of evidence to look for in such circumstances of a fraud, such as a corporate fraud, and evidence will (but not exhaustively) include:

- Manipulated contracts.
- Fraudulent/forged financial statements.
- Fraudulent conveyancing.
- Conflicts of interest.

**Consequences** The consequences of the conduct in those circumstances. Monetary loss to the victim? Risk? Deferment of debt, to delay, to eventual full evasion by fraud?

Remember also that the **Three Cs** application is a first-point screening process. Your findings from this will then inform a full investigation and how you will prioritise and resource it.

## CASE **STUDY**

***Using the Three Cs model, review the following case study.***

T is the managing director of a security company. He secures government funding by application and subsequent contract for training of his staff (over 2,000 personnel). But T, instead of using the funding for training, uses the money for 'other purposes' in the business (to cover other debts). The company accounts show the funding recorded as 'liquid assets' (assets which can be easily converted to cash).

**The following is to be extracted from the scenario:**

**Conduct:** Notes, 'accountancy lies' – fiduciary breach? – accepted government monies specifically released for training and compliance purposes for 'other purposes'?

**Circumstances:** Notes, unethical practices, informing evidence of fraud appearing in the misrepresentation of how the monies are accounted for in formal company records, recorded as liquid assets is 'red flag' of preparedness for fraud. But is this fraud, because the funding is actually accounted for?

**Consequences:** Notes, T secured money he would not otherwise have had, which is an 'end-result' gain by continuing to accept the funding and misusing, misreporting and misrepresenting it. Misrepresentation of the application that the undertaking would be that the funding would be used for training.

**Result:** One count of fraud against the government agency by misrepresentation (will take investigation to establish intent at the point of application); alternatively, a clear fiduciary breach of trust directly amounting to fraud. Abuse of position of trust. Fraudulent conveyance if the accounts were presented in that state to pass an audit.

Fraud victim is government (and also an offence of money laundering in disguising assets from (his own) crime).

**Even at this stage, it is important you realise that by applying a model such as this, you can quickly appraise all the information, apply the tests of fraud, and be assured that fraud is not complicated or 'complex'. It would just remain for you to decide which element of the fraud behaviour would prioritise your case (see Chapter 4) and what evidence from this point you will secure and how (statements, contract, funding application form and follow on accounting statements to compare and thus to offset and expose fraud).**

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**Activity (1)**

***Using the Three C's model, review the following case study.***

This time apply your own reasoning of the case. Don't look at the suggested response overleaf until you have appraised this case on your own.

L is a Company Director with the responsibility of running an extended cleaning contract at strategic level. Staff from her company clean a large number of offices in London, and

*(Continued)*

because of the scale of the operations and service delivery there are 200 staff engaged, many part-time, working various shifts. L has also appointed a number of managers and supervisors that report to her, to run the service for corporate clients.

The staff are made up of wide range of nationalities, for whom English is their second language. L is running over budget each month, and the CEO has put L on notice that the matter must be turned around. In response L understates the working hours of the cleaning staff by 10% from approximately half of the staff, and enters the falsified figures on the spreadsheet to the Head Office finance office. This she does over the next 3 months. Consequently those staff are underpaid each of those months by at least 10% in line with the stated hours.

L made no personal gain. She saw this as a 'cost cutting exercise.'

**Conduct:** Notes .....

**Circumstances:** Notes .....

**Consequences:** Notes .....

**Result:**

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**Activity (2)**

***How does your response compare?***

**Conduct:** Notes, definite 'misrep' – by falsifying workers' hours – material fact, loss to victims, but gain? Who has gained? Fiduciary breach?

**Circumstances:** Notes, senior level position of trust, client management, contract financials, budget holder, taking advantage of workers, many of whom cannot speak English very well, won't question the discrepancies on their timesheets, not all will keep a record themselves, clear reporting lines, no allocation of staff pay returns to Head Office.

**Consequences:** Notes, probably not a fiduciary breach, but definitely a continuing misrep, by misrepresenting the pay returns, which clearly results in the staff each having incurred a loss, and by volume across all workers. The quantum will be substantial (need to confirm amount).

A slightly unusual twist is the losses to fraud of the staff victims, having been deprived by fraud of monies owed to them. A type of evasion of payment by fraud, a kind of rough parallel with tax fraud, but against her own staff. Company not liable criminally (L is personally) but company could be sued if civil recovery was the option pursued.

**Result:** Fraud clearly established. Confirmed financial injury/loss, notwithstanding L did not take the money for herself (this being a UK case – if in another country then proof of loss would be necessary).

Question the facts against fraud definition points as per the above cases. Do not just follow an ongoing theme to guilt; you will notice in the case studies above that effective use of the Three Cs will entail asking yourself short questions of what you find. This helps settle your appraisal of the scenario, ready for the investigation plan.

Never skip the 'circumstances' stage.

The Three Cs is a good way to place the whole scenario in context and then, clinically, the facts. It may be that evidence indicated then has to be gathered, but the above is a good starting point.

If you cannot identify and pull out evidence (not necessarily 'conclusive' at first sight) in a case such as this then the case will *not* be fraud. The worst unethical or even dishonest behaviour will not always equate to the fraud standards required to prove or substantiate a case. A step down to the HR disciplinary process could be the best option for this type of disreputable behaviour.

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## 1.5 DISTINGUISHING AND OVERLAPPING: FRAUD AND MONEY LAUNDERING

Many books have been written about money laundering, but here we tactically narrow the scope and essentially refer to the inevitability in economic acquisitive crime of there being overlaps between fraud, corruption and money laundering (along with

what are called 'second tier' offences such as 'false accounting' and forgery or a related 'predicate' offences, meaning the application of one offence to support another). It is now often the case that these offences form part of the prosecution evidence to inform the fraud, such as a fake contract or invoice. This section will therefore address money laundering succinctly and make connections with fraud (as the underpinning crime).

For example, an ex-MEP for a British political party was jailed for two years for expenses fraud. The prosecution had sought to charge him not only with false accounting but also with 'using criminal property'. His lawyers argued for dismissal of this second charge on the grounds that it would merely complicate the case for the jury, which required the prosecution to prove the offence of false accounting anyway.

The predicate offence was a matter of factual evidence, which it would be necessary to prove in order to show use of criminal property, that is, money laundering. If the prosecution was unable to prove the predicate, there could be no criminal property, so rendering the second count pointless. The judge agreed with this reasoning; the money laundering charge would only 'obscure the Crown's pure case' against the defendant, which was one of 'unvarnished dishonesty'.

Interestingly, the money laundering offence was punishable by a maximum of 14 years' imprisonment, whereas the maximum term for false accounting is seven years. Although the money laundering legislation is drafted sufficiently widely to embrace the activities of the predicate criminal holding the proceeds of his crime, the defendant in this case was doing no more than 'enjoying the fruits' of his crime.

What is interesting in this case example is the interplay between fraud and money laundering (aside from the unfortunate misapplication of the law by the prosecution, who seemingly wanted to charge the defendant with money laundering to aggravate the case before the court, but oddly without the evidence for it).

If we return to our case study, the key difference is that the offender in that case actually disguised criminal proceeds to make them appear legitimate. The stolen money came from an outside source and was concealed as something else after it was misappropriated (the lynchpin point to make it 'criminal proceeds') and that is money laundering in itself. So based on that distinction, the British politician-turned-fraudster (among many others) 'cooked the books' and committed fraud purely for greed and self-gain with no discernible attempt to commit money laundering, whilst our other case with the crooked company director demonstrated a pattern of one financial crime being complemented with another: that being fraud working alongside money laundering.

Offences including tax evasion and terms such as 'embezzlement' remain in some jurisdictions, but have largely been swallowed up by modern fraud definitions. This also demonstrates a change in the way of legal thinking by aligning traditional crimes with relatively modern money laundering activities. However, money laundering is defined in such a sporadic way regionally, and many jurisdictions have a focal point of terrorism implicit in their definition of money laundering.

**Money Laundering is therefore essentially best explained as an example:**

- **Whereby the criminal disguises the existence, nature, source, ownership, location and disposition of property derived from criminal activity.**

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With specific reference to money laundering affecting financial institutions and financial movements and management generally, the basic money laundering process has three steps:

- Placement.
- Layering.
- Integration.

**NOTE:** Whilst competent, the 3-point definition of money laundering falls short of connecting with more intricate or elaborate money laundering operations. This is a common criticism, and notwithstanding that the banks for example will be targeted and in line with their banking procedures, the discussion of money laundering mostly is over-simplified and lacks scope and detail for more sophisticated or involved money laundering schemes. Not all laundered money goes into the financial systems.

Training in this area is unfortunately also akin to assembling a piece of flat-pack furniture. (One highly possible reason why so much money laundering goes undetected.)

Please note:

- Money need *not* actually 'move' to be laundered (but moving the money can be if movement or transfer of it is established as an attempt to disguise it).
- The disguising of the criminal proceeds by any means is sufficient.
- The above (3) stages of money laundering need not occur in that order, and not all of these stages actually need to happen.

Also note, that the 'proceeds' of crime to entail money laundering ('dirty money') can be from any crime. Likewise, it is important to note that the investigator and prosecutor need not actually prove or, better put, precisely identify the originating crime and *those* offenders. It has to be established reasonably and on balance that the criminal proceeds are from crime of some kind. But we will confine this reference point to the proceeds of fraud. We will also look at how fraud acts as a perverse funding mechanism for money laundering and vice-versa.

**'Money'** in money laundering can include other tradable commodities. For example, a United Nations team was able to expose that gold mined in north-eastern Congo was shipped to Uganda and then Switzerland to be processed into ingots so its origins would be concealed.

## Money laundering: the *mens rea*

Money laundering as a criminal offence traditionally had a 'dark twin', a predicate offence which generates the funds to be laundered. Cases decided on the law require proof that such criminal conduct has in fact generated the money being laundered.

There are two ways to confirm the 'property' is criminal property:

(a) By showing that it derives from conduct of a particular kind or kinds and that conduct of that kind or those kinds is unlawful; or

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(b) By evidence of the circumstances in which the property is handled, which is such as to give rise to no other inference that it can only be derived from crime.
(c) Money laundering is an offence in its own right. It criminalises an arrangement which facilitates the 'acquisition' of criminal property. (Note, it facilitates *acquisition* of criminal property, not the creation of it; however, in the majority of acquisitive economic criminal cases (especially fraud), in practice 'criminal property' only becomes such at the moment it is 'acquired'.)

In other cases criminal property is created before it is acquired by the criminal, such as when a transfer goes awry or is stopped by the bank or by agency intervention. Nonetheless, the degree of overlap between the predicate offence (fraud, conspiracy to defraud) and the 'laundering' offence (an arrangement which 'facilitates ... acquisitions ... of criminal property') is all but complete.

For example, where a credit card fraudster makes a payment using stolen credit card details, he is both committing an offence of fraud and, arguably, laundering his criminal property by transferring it. A fraud offender who alters the payee and amount details on a cheque in order to divert funds fraudulently to him is both committing an offence of fraud and simultaneously laundering the proceeds of that fraud.

The following examples incorporate both fraud and money laundering.

**Example 1**

- A commits fraud. Buys a car with the proceeds. Then A sells the car to B.
- A deposits the money into a savings account.
- B uses the car as a taxi for a year and makes a good turnover in the business. He had a 'good idea' where the money came from and its source.

**Example 2**

- A steals mobile phones and laptops from the office and sells them to a local shopkeeper B.
- B sells the items to C and D. B promises A a 'bonus' if she brings more items to sell.
- C and D do not know A but know B sells stolen gear as a matter of habit.
- B deposits the cash and then transfers it via a cash transfer service to a relative's account.

Reference to other crimes which inform money laundering cases (such as drugs trafficking) are for direct comparative purposes and not subject of further exploration in this book.

To further this, the next illustration, a case example, shows how fraud layers up more funding for money laundering, as an evolving criminal funding in process. The example used is a case of car smuggling.

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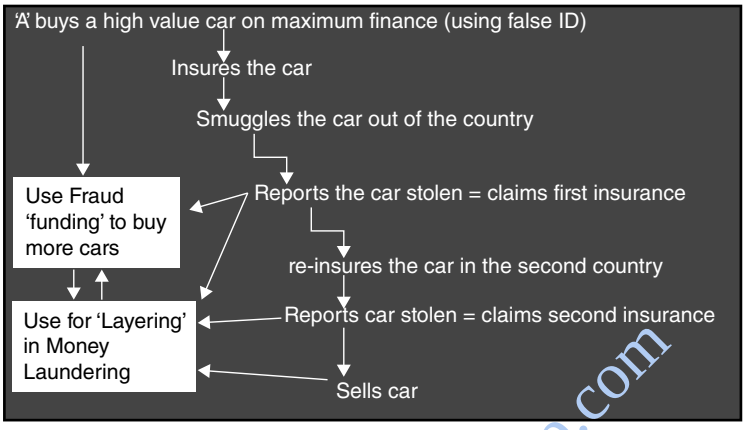
## CASE **STUDY**

***Car Smuggling***




- Try to pinpoint the elements where fraud takes place and how.

What we have in effect is a 'continuing' offence of fraud. At each element of contact between the parties there is a misrepresentation. Avoid thinking of fraud in separate elements and types in a prolonged financial crime scenario like this. Think through the scenario.

- I investigated a case similar to this. So here is my quick assessment of the case:

**Offender** buys car on finance obtained by fraud (misrepresentation of facts of loan, what it will be for, possibly crime, or the adulteration of an application, informed by fake references).

**Offender** smuggles car out of the country (money laundering – by both disguising and movement the proceeds of the loan obtained by fraud).

**Offender** reports car stolen. Claims insurance (straightforward insurance fraud).

**Offender** reinsures car (again money laundering – by disguising the proceeds of the fraud in the preceding act in the chain. *And* fraud again, by misrepresentation to obtain insurance – the car is not his to insure).

**Offender** reports car stolen (2). Claims insurance (straightforward insurance fraud, and another wave of money laundering).

**Offender** sells car? (Fraud, the new owner will be lied to, to the extent of being led to believe the car is owned by the offender).

**Offender** uses proceeds for 'layering' back into money laundering.

**Additional Issues:** If you scan back over the scenario, what should leap out at you is the high likelihood of more than one offender being involved. Staging points, physical movement of the stolen items, and the accompanying money transfers that combine with it.

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- If you train yourself in problem-solving activity like this, some excellent productive thought processes will come to you instinctively and instantly. You will have implanted the definitions into your subconscious 'vault' and thereafter, your investigation plan will hook in information such as co-accomplices. It will also hint your thinking towards protocols and evidence-gathering formalities (such as the bureaucracies of getting statements from insurance companies, and cross-border protocols and data sharing).
- **Please note also:** Evidence of dishonesty in one claim does not necessarily constitute evidence of dishonesty in another. It may be intelligence but not evidence. Of course insurance companies reserve the right not to pay or pay out on a claim on an informed business decision, but when it comes to investigating fraud this is an important point.

**Now:**

- How would you prioritise the evidence?
- What offence would you cite and lead your case with?

These will be your next steps once you are in a position to present your case (after you have secured the physical and other evidence on each of these points to justify the naming of the offender/s). We will deal with these ensuing *skills, process* and *practicalities* in Chapter 4.

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## 'Politically Exposed Persons' – a reference

Politically Exposed Persons, known as PEPs, is a term used as a benchmark of those professionals (mostly) who are often main targets to assist money launderers. For example, lawyers, agents and investment managers: those who handle clients' money professionally. Of course, some in those professions have been convicted of laundering the money of criminal clients (such as Umberto J. Aguilar, who features in Chapter 2).

But the term, 'politically exposed person' has its critics, who say the term is a textbook cliché that has found its way into law. Moreover, the term merely restricts the understanding and awareness of certain money launderers – namely PEPs themselves – and I agree.

*Practicality:* The long and laborious arrival of the 4th EU Directive extended the definition of PEPs and thus directly represents an over-simplified 'strategic' approach to countering money laundering. It does this by inventing terms and constructs that are neatly theoretical and operationally convenient. The problem is, however, that the investigative eye goes off the ball. Enforcement authorities, fixated with modelling money laundering cases around text book terminology, miss massive amounts of money laundering going on all around. They are too busy, or too programmed to terms like 'placement' and 'layering' and 'PEPs' of course – and if it doesn't fit into those tick boxes then there is no money laundering. A lack of sophistication leads to avoidance of more sophisticated money laundering schemes. Equally, enforcement policy blindly follows.

One could wager also that many lawyers for example do not like being labeled up-front as at least 'potential' money launderers ('so look out for them') by what has become a convention of enforcement bias, just to suit the accolades of those who sit behind desks and come up with clichéd models that cover only a smear of the global money laundering problem.

This is on a par with the incessant impersonating of who actually constitutes who and what in 'organised crime' – i.e., ones of a certain category. It goes circular. It takes little more creativity or operational know-how to know what a money launderer is, or who is money laundering in a given case.

## Trade-based money laundering

Methods of money laundering continue to evolve. When authorities constrain certain types of money laundering, perpetrators migrate to other methods and law enforcement has focused its efforts on two methods:

1. The movement of value through the financial system using cheques and wire transfers; and
2. The physical movement of banknotes via cash couriers and bulk cash smuggling.

Now a third method called 'trade-based' money laundering is growing in popularity.

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### CASE **STUDY**

***'iTunes' being used for money laundering.***

Five men in the UK were jailed after using stolen credit card numbers. They bought £750,000 in vouchers, then sold them at cheaper prices over eBay (the originating crime being fraud committed with the stolen card numbers).

Therefore, on a par with our examples in procurement fraud, so-called trade-based money laundering presents the same business modelling and schema, but this time extracting the points of the money laundering implicit within a scenario.

Trade-based money laundering is defined by the Financial Action Task Force (FATF) as 'the process of disguising the proceeds of crime and moving value through the use of trade transactions in an attempt to legitimise their illicit origins' (which as you may notice created yet another definition).

Disguising funds as goods is now the way a significant portion of laundered money is moved illicitly. If Y can move $100 million from New York to Columbia via Venezuela, Y is not going to smuggle cash there when Y can move it through trade-based money laundering.

The newly revised Bank Secrecy Act (see law chapter) contains an expanded section on trade-based money laundering. These operations are necessary to aid the detecting of complex relationships between trading operations, operators, and money movements.

But two key barriers are present and in the way of detecting trade-based money laundering:

1. The high volume of trade makes it easy to hide individual transactions.
2. The complexity that is often involved in multiple foreign exchange transactions.

Arguably, the volume of trade means that highly scalable *automated* methods are needed, as the complexity of sifting through multiple transactions and finding hidden connections is beyond the capabilities of normal methods. But fixation on this can lead to problems.

Indeed, as trade between the Middle East and the rest of the world continues to grow, trade-based money laundering increases with it. Many countries in the Middle East depend on trade to grow their economies. This growth is highly dependent on a transparent and predictable process that importers and exporters can rely on. According to the World Bank, the United Arab Emirates' percentage of merchandise trade as a share of GDP rose from 136% in 2010 to 157% in 2014. Dubai in particular has seen the growth of its gold trade from $6 billion in 2003 to $75 billion in 2014, accounting for 40% of global trade; a sure indicator of the increasing reliance on trade as an engine of growth. Money laundering can and does disrupt this growth.

When moving illicit money, offenders see trade as an opportunity. The main method by which criminals launder money is through value transfer of goods traded. For example, if drug traffickers in Mexico want to launder money, they would consider entering a trade transaction by raising a letter of credit. They could set up a fictitious import company in the United States or other jurisdiction that would 'buy' goods from an exporter in Mexico and pay higher than normal prices. The trade documents would reflect the value of the goods being shipped. The importer would pay for the inflated goods through a bank to the seller in Mexico. This seller could also be a 'front' company based in Mexico. The seller in Mexico would then receive the funds through a local bank. From the bank's perspective, the transaction would be proper, since relevant documents were used. However the value of the goods was misrepresented, resulting in transfer of money through the trade. In this example, the buyer in the United States would pay $100 per unit for a pen typically valued at $1. The seller in Mexico would mark up the invoice to $100 per pen and ship the goods. Once the seller receives payment from the buyer for $100 per pen, $99 has been transferred from the United States to Mexico due to overvaluation of the goods. There are occurrences of these trades happening globally.

This is an area of economic crime not to be underestimated, and its connections with fraud cannot allow this area to be separated from the discourse. Mis-invoicing goods distorts the true value of goods in an economy, causing unpredictable patterns of trade. So-called dirty money can be directed to consumption or investment activities that benefit the money launderers, potentially at the expense of the region's economic development.

In terms of fraud and security, we get back to the same problem: poor due diligence checking and standards. Banks have a role to play in minimising the impact of trade-based money laundering but fall very short of determining the legitimacy of trades. Regulators should be more focused on ensuring that banks actually identify where the

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goods are being shipped to, and even what transportation is used; and whether the goods are potentially used for dual use purposes.

## 1.6 NOW ADDING CORRUPTION … LINKING TO FRAUD

### Key distinctions (between fraud and corruption)

**Corruption** is mostly a crime of influencing as opposed to misrepresenting. Therefore there are distinctions from fraud, but equally there are overlaps or facilitating episodes of both offences within a financial crime scenario.

The main distinctions from fraud are the giving, offering, or receiving of bribes and exploiting conflicts of interests.

Bribery is also the inappropriate offering or use of favours in exchange for gain of some kind. No-one has been deceived, just tempted. There are also kickbacks. This is the most common form of corruption (as we will see in the Sainsbury's case later) but on a grand scale it is in parallel with fraud and money laundering.

Types of favours are diverse and are not just money. They can include gifts, sexual favours, company shares, lavish entertainment, employment and political benefits. We have shown examples which connect with these.

Equally, corrupt behaviour involves behaviour such as nepotism, favouritism, and covering up. Internal politics also have an influence in regard to allowing it to go on unchallenged (and hence the UK saw fit to place reporting measures into the law, albeit it took the UK nearly 100 years to do so).

It also demonstrates for pure learning purposes in this chapter concerning handling definitions and perceptions of fraud and corruption etc., that to some people in business, perceptions and explanations of financial crime are appeased with the application of corporate spin. A bribe is suddenly a 'preferred supplier payment' but to the more discerning is a direct and in-house systemic practice of receiving bribes.

Another phrase for this kind of scenario is 'reciprocity' or as is often the case as I have worked in the Middle East, in Arabic, where 'bakshish' really means: 'redistribution of wealth' (not another form of corruption as it is so often and mistakenly referred to).

Each and every time I run a training course on fraud corruption, the subject of whistleblowing combined with fraud and corrupt practices comes up – every time, without exception. I infer from experience now that these so-called 'cultural' or nationalistic

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differences in this particular context are mythical really. Of course some things work differently in different places, but those who choose to put spin on the word BRIBE such as 'customer support' or 'part of our continuing customer relations' or 'recognition' or – the best one I heard – 'our gift as part of a platinum introductory package for special customers'.

This topic, however, demonstrates clearly the gulf in terms of attitudes and assertions in how to win business. It is not a complicated subject really, but many choose to make it so, and even amongst fraud and corruption professionals this point of discussion brings in many different perceptions and opinions of what is 'OK' in business in terms of both offering or accepting gifts, incentives, or 'guarantees' (yes, that is another interesting one).

**Key Distinction:**

**Fraud has a central legal element of dishonesty, whilst corruption is a deliberate act of inducement to gain favours or financial advantage or commercial favour.**

As asserted by Duperouzel:

A discussion about corruption must start with some theory about fraud, as the phenomena are interlinked. However, they are not the same; rather they are like two circles that overlap in some areas but are separate in others. *Fraud can occur, but without corruption; corruption can occur without fraud.* Yet where fraud is, corruption often is too.

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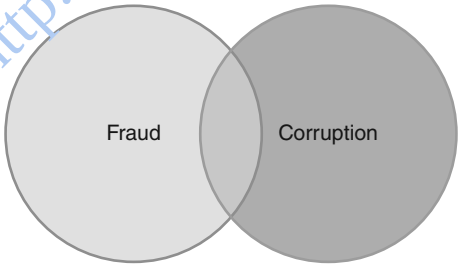


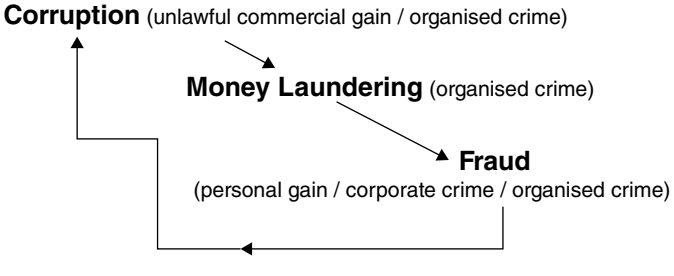

**Threads running through fraud to money laundering are:**

### *Coercive practices*

'Coercive practice' is impairing or harming, or threatening to impair or harm directly or indirectly, any party or the property of the party, to influence improperly the actions of a party:

- A kind of 'aggravated' bribery likened to blackmail. This distinction is in the definition, as there is no demand 'with menaces'.
- Coercive practices are actions undertaken for the purpose of bid rigging or in connection with public procurement or government contracting or in furtherance of a corrupt practice or a fraudulent practice.
- Coercive practices are not intended to cover 'hard bargaining', the exercise of legal or contractual remedies or litigation.

### *Collusive practices*

'Collusive practice' means an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party.

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## 1.7 LEGISLATION SUMMARY

A comparative study of the laws alone is a demanding and particular task in its own right. This is directly due to a lack of direct or precise legislation, which has been a problem in combating fraud, corruption and money laundering.

Therefore, reconciliation of these globally is impossible, but if the core elements of misrepresentation and breaches of (enhanced) trust are followed, you need not be unduly worried about achieving this. What is important is that you have a clear grasp of the law you are likely to be working with, as well as an ability to state its purpose and constituents simply and without hesitation. You then apply more overreaching legislation with international jurisdiction (when appropriate and necessary).

Of course, there are differences in law across jurisdictions, but keeping in step with the modernisation of global laws and the evolving new definitions they bring, this book takes the standpoint that misrepresentation has now overtaken the term 'deception'. The focus on the act of fraud should be, and very wisely is, about the behaviour and intentions of the offender, as opposed to the historical view of the victim having to be fooled and having to have incurred loss before anything is either done, or even formally considered to be actual fraud.

Indeed, in relation to international perspectives, across international jurisdictions, fraud (and money laundering) definitions are often addressed by category.

The necessity, however, for actual monetary (or other) loss to have occurred is a requirement still present in some jurisdictions. In US law, there is a legal requirement for the accuser or prosecution to establish there was 'injury' to the alleged victim as a result.

This is in complete contrast with the UK Fraud Act, for example, which is a broad-ranging Act to capture offending activity by fraud. (See below.)


What is important is to distinguish the substantive law from the procedural law. Likewise, the purpose and 'scheme of the law'. Criminal Law is designed to prohibit something, compel you to do something, or both. Incorporating the above points, this is broadly divided into four main areas:

## Definitions: comparatives

### *Africa – Middle East – Malaysia – South Africa*

There follows a summary of legal definitions of fraud and procedural statutes across strategic jurisdictions. These are not exhaustive and many jurisdictions will apply these.

For practical purposes, I have condensed this section into a workable and enabling element so as to track to your indigenous legal jurisdiction. But again, the point is emphasised that whilst 'the laws are different' across countries and regions, these are effectively labelling and terminology differences (such as 'embezzlement', which is still used in certain places) and the purpose of addressing misrepresentation and loss (and risk) is mostly consistent.

As a means of added support, we make the point that in many jurisdictions the law is structured to address individual or silos of fraud activity by 'type'.

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***Africa*** **Example**: the Penal Code of Kenya creates the substantive law to combat fraud and corruption.

Individual laws therefore tend to go with individual offences and specific fraud contexts.

For example:

- Bank fraud.
- Credit fraud.
- Insurance fraud.
- Marriage fraud.
- Investment fraud.

***Middle East*** **Equally, for example in the United Arab Emirates, where the UAE Government passed Law No. 24/2006.**

An example is the regime in the United Arab Emirates against damages posed by defective industrial products, unfair business practices and misleading advertising, unfair and deceptive practices such as the selling of defective or substandard goods, the charging of ridiculous prices, misrepresentation of the efficacy or usefulness of goods, and negligence as to safety standards. This is not to be confused with the principles of Sharia law (see below) and that of the coverall legislation of the UK.

The sheer volumes of these issues go to an 'extreme' level, which informed the new legislation in the UAE. Two examples are:

- A Ministry of Health report on energy drinks and a fraudulent and illegal service charge levied by some restaurants in the UAE to cash in on the craze of this. Fines were imposed on offenders and as a result 95 to 98% of restaurants and cafes in the UAE implemented the removal of this charge.
- The UAE Government also presented a report concerning car dealers and the widespread problem of manufacturing defects in cars, which were withheld from consumers.

***South Africa*** The wording is subtle, but the structure and definitional reach is similar to the UK Fraud Act. According to C.R. Snyman 2002 (520) 'Fraud consists of the unlawful intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'

***Malaysia*** Financial fraud is the focal area. Fraud can be broadly defined as an intentional act of deception involving financial transactions for purpose of personal gain. Fraud is a crime, and is also a civil law violation. Many fraud cases involve complicated financial transactions.

An unscrupulous investment broker may present clients with an opportunity to purchase shares in precious metal repositories, for example. His status as a professional investor gives him credibility, which can lead to justified credibility among potential clients. Those who believe the opportunity to be legitimate contribute substantial amounts of cash and receive authentic-looking bond documentation in return. If the investment broker is fully aware that no such repositories exist and still receives payments for worthless bonds, then victims may sue him for fraud.

Hence, we identify another aspect in relation to the enactment of new law to address a worrying trend or increase in certain fraud contexts (and unfortunately also how slow some governments are to react and how fraud is still marginalised in the way of thinking for officialdom).

## Sharia law

In recent years, the Islamic financial market has become increasingly global. Financial contributors from many jurisdictions are taking the opportunity to pool their resources and form alliances to jointly participate in the global business. Therefore, and given that the cornerstone of Islamic finance transactions is the application of Sharia principles,

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such principles are being adapted into the wider non-Islamic legal environment. Attempts are made to implement Islamic finance transactions in jurisdictions which are not bound to give effect to Islamic principles.

Sharia law is divided into two main sections. The part which is relevant to our work is applicable to, amongst other issues, human interaction, or al-mu'amalat, which includes financial transactions, and judicial matters (and forms of evidence).

Islamic financial transactions pose a challenge to the choice of law and the parties will mostly want to opt for Islamic law as the governing law of the finance documents. Sharia is not a national system of law and there is not a standard codified Islamic law to be used as guidance and reference to deal with fraud. Parties cannot merely adopt Islamic law as the governing law without reference to the law of a particular jurisdiction.

In contrast to other countries who have adopted either their common laws, or civil law system, there is a lack of a comprehensive legal system to support the application of Islamic principles in specific Islamic finance transaction documents, and hence against fraud. Even if market participants agree to use contracts based on Sharia principles, most Islamic laws and their courts lack the sufficient specific legal backdrop, infrastructure, and resources to interpret and enforce the transaction documents. Criminal cases of fraud, especially at less serious monetary levels or 'day-to-day' scenarios, are mostly disposed of by an alternative means (such as deportation, if the offender is a foreigner, or the suspension of work permits, or some other kind of sanction which is more of a convenience in punitive terms as opposed to proportionate sentences to fraud activity).

Sharia law does not contain a definition of fraud; however, this is not to be misunderstood that economic crime is not heeded. The 'corruption trials' in the Sultanate of Oman in 2013 and 2014 saw the handing down of hefty sentences.

A main issue that arises as a result of the increasing participation of financial institutions and other market players from multiple jurisdictions is about the choice of governing law which will govern the Islamic finance transaction documents and the extent to which Islamic law principles are applied within the chosen governing law framework.

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### *The role of Sharia principles regarding the choice of governing law*

The choice of governing law can be a point of confusion, especially for cross-border finance transactions involving parties from multiple jurisdictions. For a conventional cross-border financial arrangement, there is less complication as there is no requirement to consider the application of Islamic principles. Instead, the issues revolve around the applicability of the choice of law in the jurisdiction itself where a fraud case, for example, envisages a legal action in another jurisdiction, and the enforcement of a (foreign) judgment in the jurisdiction where the obligor resides and/or where the assets of the obligor are located.

A scenario of that nature gives rise to the question as to the extent of applicability of Sharia principles in the law of a selected jurisdiction. In practice for example, English law is mainly chosen as the governing law of Islamic cross-border finance transactions, which may give rise to financial fraud within them or arising from them.

This overcomes another practicality in that judicial system. Parties who follow the Sharia principles as the law of a specific domestic jurisdiction, often discover in litigation that the courts lack the expertise or resources to implement the Sharia rules. There have been a large number of cases litigated in the English courts in civil cases involving Islamic finance agreements, where the courts examined the issue of the governing law in such agreements.

One case, *Shamil Bank of Bahrain* v. *Beximco Pharmaceuticals*, presents this point very well. This set a noticeable judicial precedent because for the first time, questions of the validity, interpretation and scope of the English law against Islamic principles were measured by a secular court.

The judge in the first instance held that English law was the governing law and there was no scope for the Sharia law to apply as there could not be two separate law systems governing a transaction. Further, it would be highly impossible that an English secular court would apply religious principles in making the determination of a dispute. The appeal by Beximco against the decision of the first instance judge was dismissed along the same arguments. The judge in the English Court of Appeal case further argued that the general reference of the Sharia law in the agreement did not identify any specific Sharia principles to be applied and further ruled that the reference to Sharia law is repugnant to English law.

This above case illustrates two challenges:

1. The reluctance of a secular court to admit the application of Sharia principles; and
2. The clear scope for potential abuse by fraud and by defaulting parties using debt as cover for earlier fraud intentions to use Sharia invalidity arguments to avoid making payments under the Islamic documents.

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## Insurance and the law: a special mention

This section is not so much about investigating fraud but in keeping with this chapter, makes reference to the unique legal derivatives from an insurance fraud case up in the theatre of the law. In insurance cases the courts have a large element of their work assigned to post-conviction settlements and hence there are hearings within hearings. Recoveries and claims hearings represent a point in the proceedings which have left the investigation part of the case well behind. Moreover, disposal of criminal cases in insurance fraud often presents a different type of closure to other crimes. If an offender steals, or commits an assault for example, the conclusions and case disposal are straightforward. But in insurance cases, much emphasis is put on recovery and the legal arguments arising therefrom.

Civil cases brought after alleged breaches of contract often form the main body of cases, certainly at corporate levels, whereby highly financial penalties and contracts are at stake. One main point on this is that the higher courts face uncertainty on the position in a case where fraud is not alleged in the original proceedings. Equally, it is not possible to rescind settlement agreements fraud where that very fraud is alleged in the original proceedings.

Practically, for the investigator of insurance fraud it means thinking a little differently. It is crucial that the exposer of fraud in insurance cases stays outside of the rights and wrongs of what should happen to an offender. Very often insurance companies are obliged to pay out in cases where fraud is suspected. The traditional term 'beyond reasonable doubt' in criminal law across the world is propagated more so in insurance cases than in any other area of fraud investigation work.

In an English Court of Appeal case, *Hayward v. Zurich [2015]*, it was held that a person can only be said to have relied on a false statement for the purposes of the law of deceit and fraudulent misrepresentation insofar as that person believed that the statement was true.

The point here is that in insurance cases a person who has settled previous litigation may seek to use the doctrine of fraudulent misrepresentation to rescind a settlement agreement and obtain repayment of money paid under it.

In this case, an insurance claimant brought a claim against his employer for a back injury sustained at work. It was exposed by investigation that at first instance he had fraudulently and hugely exaggerated the nature and extent of his injuries. He claimed over £420,000 in damages; but if the claimant had told the truth, he would have recovered just £14,000.

Video surveillance footage was produced as evidence of the fraud, which undermined his credibility, in that he had recovered not long after the accident.

On the basis of this new information, the insurance company brought a claim of deceit against the claimant for rescission of the original settlement agreement, and a repayment of the difference between what it paid under the settlement and what the claimant (fraudster) would have been entitled to be paid on the basis of his injuries as they really were.

The claimant appealed to the Appeal Court on the basis that the judge had used the wrong test for determining whether there had been reliance by the insurance company. Lawyers argued that the judge was wrong to treat the authorities referring to a person being 'influenced' by a misrepresentation as 'including anything other than being influenced by believing that it was true'.

It was decided that a person entering a compromise agreement in an insurance claim where fraud is alleged should not be able to escape from that agreement later (which, by necessary implication, compromised the allegation of fraud) on the basis of the very fraud that was compromised.

The leading judgement in this case was as follows:

> In my opinion the true principle is that the equitable remedy of rescission answers the affront to conscience occasioned by holding to a contract a party who has been influenced into making it by being misled or, worse still, defrauded by his counterparty. Thus, once he discovers the truth, he must elect whether to rescind or to proceed with the contract. It must follow that, if he already knows or perceives the truth by the time of the contract, he elects to proceed by entering into it, and cannot later seek rescission merely because he later obtains better evidence of that which he already believed, still less if

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he merely repents of it. This seems to me to be *a fortiori* the case where, as here, the misrepresentation consists of a disputed claim in litigation, and the contract settles that claim.

This is about the misrepresentation in documents and statements.

Many are unsettled by this judgment. The reasoning to a degree is understood, as it is about a settlement that was agreed, based on dishonesty – a direct lie to the court in the first place. The fact that it was not sworn testimony but submitted as part of the legal process, does not make it any less of a false representation (in my view). When evidence is later discovered that proves the falsehood, one cannot see how the court can reasonably find in favour of the dishonest party. It sets a peculiar legal precedent which is clearly unhelpful to those engaged in combating fraud. Certainly from an *investigative* viewpoint.

One senior London lawyer even went so far to say, that '… no cases in which fraud was alleged could ever realistically be settled, which would be the result if a settlement agreement could be rescinded for the very fraud that it was purporting to compromise.'

In surface court cases, the problem goes circular, because most insurance companies rightly do not pursue cases in the criminal courts because the criminal courts do not consider compensation to the value of the settlement in such a case. Yet enforcement against fraud does not occur because the only real possibility of criminal liability is by a long and winding road of using the civil courts to have people committed for contempt of court instead of fraud.

Hence the belief that criminal courts should be used more in cases like this is a very valid one, but unfortunately the police do not often specialise in fraud prosecutions (other than 'low hanging fruit' cases, which invariably involves a police-corporate partnership) and neither do many prosecution authorities.

One final ingredient for the mix is that recovery of funds is distinct from compensation. The criminal courts can make compensation orders or confiscation orders upon conviction, but there is no separate concept of 'recovery of funds' (and this is totally different to asset tracing in money laundering cases).

In all, the proceeds of an insurance fraud are quantified on how they are informed in the courts and are thus viewed differently in that regard to other fraud cases in other scenarios.

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**Concluding note:**

- Insurance fraud investigation has a high standard of proof.
- Insurance fraud cases can invite different influences (and frustrations).
- Court cases regarding insurance fraud can continue beyond the limitations of other crimes.

## The United Kingdom Fraud Act 2006

Structured in a four-part definition:

**Fraud by false representation, to make a gain for self – contrary to section 2.**

**Fraud by false representation –**

(1) A person is in breach of this section if he—
  (a) dishonestly makes a false representation, and (b) intends, by making the representation—
    (i) to make a gain for himself or another, or
    (ii) to cause loss to another or to expose another to a risk of loss.

(2) A representation is false if—
  (a) it is untrue or misleading, and
  (b) the person making it knows that it is, or might be, untrue or misleading.

(3) 'Representation' means any representation as to fact or law, including a representation as to the state of mind of—
  (a) the person making the representation, or
  (b) any other person.

**A person is in breach of this section if he—**

(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
(b) intends, by failing to disclose the information—
  (i) to make a gain for himself or another, or
  (ii) to cause loss to another or to expose another to a risk of loss.

**Fraud by failing to disclose information, contrary to section 3**
**Fraud by abuse of position, contrary to section 4.**

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- In addition, the UK Fraud Act addresses categories concerning the fraudulent behaviour of companies, covered by section 10 – and a new offence of participating in fraudulent business carried on by a sole trader was established by section 9.
- Section 12 of the Act provides that where an offence against the Act was committed by a body corporate, but was carried out with the 'consent or connivance' of any director, manager, secretary or officer of the body -– or any person purporting to be such – then that person, as well as the body itself, is liable.
- The key difference between the Fraud Act and the Theft Act is that Fraud Act offences do not require there to have been a victim as was the case with the Theft Act.

## Bribery Act 2010 (UK)

It took the UK almost 100 years to pass a new (and much needed) law to deal with bribery and corruption. It is referenced here to conclude with our comparing and identifying where fraud and corruption cases connect. The dominant legislation will apply in such a case.

The Act has a near-universal jurisdiction, allowing for the prosecution of an individual or company with links to the United Kingdom, regardless of where the crime occurred. As the title of the Act indicates, it is to address and criminalise the giving and taking of bribes, but also adds a punitive element of placing a legal obligation on

organisations and businesses to ensure both adequate corruption (bribery) controls and reporting procedures.

## United States – definition of fraud

A false representation of a matter of fact – whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed – that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.

Fraud must be proved by showing that the defendant's actions involved five separate elements:

1. A false statement of a material fact;
2. Knowledge on the part of the defendant that the statement is untrue;
3. Intent on the part of the offender to deceive the alleged victim;
4. Justifiable reliance by the alleged victim on the statement; and
5. Injury to the alleged victim as a result.

The (18) U.S. Code Chapter 47 – FRAUD AND FALSE STATEMENTS sets out a lengthy schedule of definitions and contexts:

- 1001. Statements or entries generally.
- 1002. Possession of false papers to defraud United States.
- 1003. Demands against the United States.
- 1004. Certification of checks/cheques.
- 1005. Bank entries, reports and transactions.
- 1006. Federal credit institution entries, reports and transactions.
- 1007. Federal Deposit Insurance Corporation transactions.
- 1008, 1009. [Repealed.]
- 1010. Department of Housing and Urban Development and Federal Housing Administration transactions.
- 1011. Federal land bank mortgage transactions.
- 1012. Department of Housing and Urban Development transactions.
- 1013. Farm loan bonds and credit bank debentures.
- 1014. Loan and credit applications generally; renewals and discounts; crop insurance.
- 1015. Naturalization, citizenship or alien registry.
- 1016. Acknowledgment of appearance or oath.
- 1017. Government seals wrongfully used and instruments wrongfully sealed.
- 1018. Official certificates or writings.
- 1019. Certificates by consular officers.
- 1020. Highway projects.
- 1021. Title records.
- 1022. Delivery of certificate, voucher, receipt for military or naval property.

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- 1023. Insufficient delivery of money or property for military or naval service.
- 1024. Purchase or receipt of military, naval, or veteran's facilities property.
- 1025. False pretences on high seas and other waters.
- 1026. Compromise, adjustment, or cancellation of farm indebtedness.
- 1027. False statements and concealment of facts in relation to documents required by the Employee Retirement Income Security Act of 1974.
- 1028. Fraud and related activity in connection with identification documents, authentication features, and information.
- 1028 A. Aggravated identity theft.
- 1029. Fraud and related activity in connection with access devices.
- 1030. Fraud and related activity in connection with computers.
- 1031. Major fraud against the United States.
- 1032. Concealment of assets from conservator, receiver, or liquidating agent.
- 1033. Crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce.
- 1034. Civil penalties and injunctions for violations of section 1033.
- 1035. False statements relating to health care matters.
- 1036. Entry by false pretences to any real property, vessel, or aircraft of the United States or secure area of any airport or seaport.
- 1037. Fraud and related activity in connection with electronic mail.
- 1038. False information and hoaxes.
- 1039. Fraud and related activity in connection with obtaining confidential phone records information of a covered entity
- 1040. Fraud in connection with major disaster or emergency benefits.

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## Foreign Corrupt Practices Act 1977 (FCPA)

A United States federal law with two main provisions:

1. Addressing accounting transparency requirements re: the Securities Exchange Act 1934.
2. Concerning the bribery of foreign officials.

## Sarbanes–Oxley Act (USA)

Enacted July 2002, also known as the 'Public Company Accounting Reform and Investor Protection Act' (in the Senate) and the 'Corporate and Auditing Accountability and Responsibility Act' – a federal law which set new or enhanced standards for all US public company boards, management and public accounting firms.

The Act was a reaction to a number of major corporate and accounting scandals including those affecting Enron, Adelphia, Peregrine Systems and WorldCom.

## Dodd–Frank (USA)

The *Dodd–Frank Wall Street Reform and Consumer Protection Act* (referred to as 'Dodd–Frank') was signed into federal law by President Barack Obama on July 21, 2010.

Dodd–Frank brought the most significant changes to financial regulation in the United States since the regulatory reform that followed the Great Depression in the 1930s. Being regulatory-dominant, it made changes in the American financial regulatory environment that affect all federal financial regulatory agencies and almost every part of the nation's financial services industry.

But controversially also, in 2010 the Dodd–Frank Act enabled the SEC whistle-blower reward program. Both US citizens and foreign nationals may file whistle-blower claims and receive rewards.

### Other fraud related legislation

1. The Financial Action Task Force (FATF) initiatives (explained further in later chapters).
2. BASEL customer due diligence and Know Your Customer (KYC) principles. Essentially to support the banking industry, but is a good guidance tool in procurement fraud prevention.
3. Wolfsberg anti-money laundering (AML) Principles for private and correspondent banking. Enacted concerning the financing of terrorism, and monitoring and screening for suspicious financial activity.
4. EU Directives on Money Laundering (the 4th Directive being continually updated and added to, the latest released addendum in relation to online gambling was released in January 2015).

## 1.8 EVIDENCE

> Armageddon wipes out the good as well as the evil…
>
> —*Anon*

### Evidence – law in itself. Not a 'free for all' game to ensure prosecution

In Chapter 4, we will have a *practical* handling of evidence in fraud cases: extracting evidence from information, weighing, prioritising and presenting.

At this point, however, it is important to stress that evidence and its issues can form a huge pit behind you, ready to fall into if you either fabricate evidence or try to circumvent the rules of evidence. The 'Armageddon Effect' certainly appears at such instances that form it. Far too many cases have been lost simply because of an ego-centric approach to 'rubbing it in' on an offender or defendant by grafting layers of superficial legality onto the case evidence. That is with either macho rule-bending or management investigations gamesmanship. Worse yet, is the full-on malpractice some of which is relevantly chronicled in this book. Training also has some involvement in this whereby many average trainers unflinchingly follow an aims and objectives format, and directly encourage investigators to embellish what they can do, and fail to point out pitfalls and poor practices in handling evidence, and exercising powers generally.

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The Regulation of Investigatory Powers Act 2000 (RIPA), an Act of the Parliament of the United Kingdom is supposed to regulate the powers of public bodies to carry out surveillance and investigation, and covering the interception of communications. However, this is open to abuse, for example by local authorities, who use the powers to enforce minor by-laws and thus impose fines at random to instigate and gather revenues on the shakiest legal grounds. Also used to hound whistle-blowers in the UK (HMRC and the NHS).

All of the above inform crucial points of evidence and attitudes to the issue.

## Basic principles of evidence for fraud investigators

### *Format*

This section will begin with an outline of:

- Evidential sources, classification and practicalities.
- Perceiving 'naturally occurring' evidence.
- 'Beyond Red Flags' – specific evidence of fraud.

It will then summarise evidence by category and the rules of admissibility. This will lead into the next section about expert witnesses.

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## Evidential sources, classification and practicalities

### *Evidence (definition)*

Evidence is information given to a court or other authority to help them decide if a crime has been committed or not, and tends to prove the truth or probability of truth about a fact or facts put before it. Evidence is based on *facts* upon which a case is eventually decided.

The two main distinctions in law (in any jurisdiction) are: **Civil and Criminal**.

Fraud investigations can and do involve either or both of these.

> 'Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "Of course it is possible but not in the least probable", the case is proved beyond reasonable doubt; nothing short will suffice.'
>
> Denning J. ***Miller*** v ***Minister of Pensions*** [1947] 2 All ER 372

The above judgement by Lord Denning in the *Miller Pensions* case has been overreached by later precedents such as the jury 'being sure'(?) but for me and many others, this still forms the best standard of proving a (fraud) case that there is. The judgment set a standard and the clearest of legal principles and is deemed to be the best possible guide for every case, even though the case may not end up in a court.

The statement bridges the civil and criminal areas of evidence at this point.

Civil cases (being a lesser standard of proof) are to be addressed with equal importance and verve as criminal but it is not normally for you as an investigator to decide or overly concern yourself with the 'civil or criminal' question. Although your experience and role will obviously contain this awareness for you. The key point is that you *effectively investigate*, and do not work to an injudicious legal agenda. Furthermore, some investigators have made the mistake of taking their foot off the pedal when quoting 'it's only a civil case' and the like. The civil standard of proof needs as much expertise and acumen as the criminal, and our lawyers are highly competent to engage with and apply these matters in cases they either defend or prosecute, or mediate outside of the courts.

- What matters is what can be admitted.
- If an element of evidence or testimony cannot be tested then it is not admissible.
- Evidence will not be admissible if its prejudicial effect outweighs its probative value.
- **Hence, each time you go into ANY fraud case, think of yourself as being in court.**

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### *Burden of proof: criminal*

'He who accuses must prove'

In criminal procedure, the burden of proof (in all jurisdictions globally) is on the prosecution.

Albeit the following legal term is enshrined in English law, and taking into account that some prosecution jurisdictions are *adversarial* as opposed to *inquisitive*, it also holds good in all legal provinces in all places about being innocent until proven guilty:

Ei incumbit probatio qui dicit, non qui negat – *'The presumption of innocence'*.

**You will always be obliged by law to co-operate with those you accuse, in respect of their right to probe the veracity of the allegations that they face as a serious predicament.**

**The main classifications of Criminal evidence are:**

- Direct.
- Primary and secondary.
- Circumstantial.
- Hearsay.
- Forensic.
- (Expert).

  *(The above quoted in brackets applies in civil cases also.)*

Other cross-jurisdictional applicable terms are *prima facie* (at first sight) and 'probable cause'.

### *Burden of proof: civil*

The unheeding burden of proof is on the party asserting a claim, since the default position is generally one of neutrality or unbelief. Each party in a case will carry the burden of proof for any assertion they make in accusation, although some assertions may be accepted by the other party without further evidence. If the case is set up as a mediation or resolution the burden of proof is on the side supporting the resolution.

In practical terms, the US system of *clear and convincing proof* means that the evidence presented during trial must be *highly and substantially more probable to be true than not*. In this standard, a higher degree of believability must be met than the 'on balance' standard of proof in civil actions, which only requires the facts as a reference point to be 'more likely than not' to prove the issue for which they are asserted.

This aspect is also termed as the 'clear, convincing, and satisfactory evidence'; 'clear, cognisant, and convincing evidence'; and 'clear, unequivocal, satisfactory, and convincing evidence', and is applied in cases or situations involving an equitable remedy or where a presumptive civil liberty interest exists.

## Criminal evidence

### *Direct*

Direct evidence is evidence that is known personally to the witness because this is based on what they

- Saw.
- Heard.
- Touched.

Direct evidence (mostly) demonstrates proof beyond reasonable doubt that an individual or co-offenders committed fraud.

If the direct evidence that is submitted at trial is true, the charge against the accused is substantiated and established. A claim that the accused committed the crime charged with can be proved by direct evidence alone.

Interestingly, in the United States, the law shows no distinction between circumstantial and direct evidence in terms of which has more weight or importance. Both types of evidence may be enough to establish the defendant's guilt, depending on how the jury finds the facts of the case. (This effectively affirms the point that circumstantial evidence is capable of being very 'good' evidence.)

- Direct evidence can have varying degrees of weight depending on the witnesses who deliver the testimony. The testimony of an upstanding and trustworthy source will have a stronger influence on the jury than the testimony from a shady and unreliable witness.
- Direct evidence is obviously helpful (to make it easier) for a court or other authority, because it lessens the degree to which they infer that the fraud was committed.
- Direct evidence is totally based on fact, and not coincidences.

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### *Primary and secondary*

*Primary* evidence is:

- An original document; or
- A statement about its contents.
  *(Primary evidence is usually required to prove the contents of a document.)*

*Secondary* evidence is:

- A copy of a document; or
- Verbal evidence (testimony) about its contents.

### *Circumstantial*

*Circumstantial* evidence is based on supporting facts in a case. It *implies* truth to an allegation. Circumstantial (and direct evidence) exists in many forms including: testimony, documentary, physical, digital, exculpatory, scientific, and genetic.

- Please be aware that circumstantial evidence can be very good evidence. If there is sufficient volume or capacity of it in a case, it is the closure on the detail in the circumstances that eliminates doubt.

The reliance on circumstantial evidence itself can be sufficient in the civil standard of proof. In criminal cases, circumstantial evidence mostly needs supporting with other evidence but not always. Each element of evidence, although it will belong in a classification, needs to be appraised within the case itself, and not horizontally regarded as always being the same in all cases.

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- A confession (much) later after a (fraud) crime which is made under controlled legal conditions (such as being under oath or caution) is an exception to the hearsay rule.

Circumstantial evidence allows a conclusion to be drawn from a set of circumstances or information. For example:

- The offender is accused of fraud by forging an invoice to make it appear it had arrived from an external source and have it paid to one of his own bank accounts, and a witness in the office saw the offender writing on an invoice form which had the same false letterhead as the item concerned.

What the witness saw is direct evidence. The conclusion that the defendant committed the fraud based on what the witness saw is circumstantial evidence.

Hence, circumstantial evidence is not necessarily weaker than direct evidence if there are number of circumstances that together can lead the court or a jury to a guilty verdict. One English legal maxim that:

> One strand of a cord might be insufficient to sustain the weight, but three stranded together may be quite sufficient of strength. Thus, it may be circumstantial evidence – there may be a combination of circumstances no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilty, that is, with as much certainty as human affairs can require or admit of.

This means that, even though you may only have circumstantial evidence, if there is enough of it, then altogether, it may be enough to prove guilt.

### *Hearsay*

*Hearsay* is 'a statement not made in oral proceedings'. This means a statement that has not been given in court, hence, it is effectively second-hand evidence, for example something:

- You have overheard;
- Someone has told you; or
- Someone has written.

In hearsay you are asking the court to believe:

- You are telling the truth; and
- The person who told you or whom you overheard was also telling the truth.
- It is the second assumption which mostly means that hearsay evidence is generally not admissible in court.

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### *Forensic*

In some fraud cases you may need to request forensic tests to be done on pieces of evidence, for example:

- Data analysis.
- Facial mapping (if the case demands it to prove a situational point in the case of locations).
- Handwriting.

Or procedures, such as forensic audit.

Forensic audit:

- Is carried out by forensic experts.
- The expert can give the results as evidence in a court.
- This evidence is subject to the same standards of admissibility as for any other class of evidence.

**Digital forensics and evidence**

Digital forensics (sometimes known as digital forensic science) is a branch of forensic science encompassing the recovery and investigation of material found in digital devices, often in relation to computer crime.

Digital forensics investigations have a variety of applications. The most common is to support or refute a hypothesis before criminal or civil (as part of the electronic discovery process) courts. Forensics may also feature in the private sector, such as during internal corporate investigations or intrusion investigation (a specialist probe into the nature and extent of an unauthorised network intrusion).

The technical aspect of an investigation is divided into several sub-branches, relating to the type of digital devices involved: computer forensics, network forensics, forensic data analysis and mobile device forensics. The typical forensic process encompasses the seizure, forensic imaging (acquisition) and analysis of digital media and the production of a report into collected evidence.

As well as identifying direct evidence of a crime, digital forensics can be used to attribute evidence to specific suspects, identify sources (for example, in copyright cases), or authenticate documents.

Investigations are much broader in scope than other areas of forensic analysis (where the usual aim is to provide answers to a series of simpler questions) often involving complex timelines or hypotheses.

- emails,
- digital photographs
- ATM transaction logs
- word processing documents
- instant message histories
- accounting programmes
- spreadsheets
- internet browser
- histories, databases
- contents of computer memory,
- computer backups,
- computer printouts,
- Global Positioning System tracks, logs from a hotel's electronic door locks,
- digital video or audio files

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| |
|---|
| *Never* write on *original* items of evidence. |

**Perceiving 'naturally occurring' evidence**

**'Naturally occurring' evidential phenomena in ANY criminal offence are:**

| KNOWLEDGE DETAIL | EVENT DETAIL | EPISODES AND CONTINUOUS STATES |
|---|---|---|
| – Identities | – Actions | – Simple everyday episodes |
| – Locations | – Interactions | |
| – Objects | – Reactions or Responses | |
| – Relationships | – Utterances | |
| – Routines | – Verbal Exchanges | |
| – Rituals | | |
| – Plans & Intentions | | |

**Then, 'Beyond Red Flags' – specific evidence and evidential phenomena of fraud**

| STATIC ACTIONS | UTTERANCES | 'MOVING' |
|---|---|---|
| – 'Bid rigging'<br>– Manipulated Contracts<br>– Documentation<br>– Overstating Revenue<br>– Forgery<br>– Misrepresentation | – Supporting a formality, such as a signed declaration | – Multiple frauds<br>– Money movement<br>– Email harvesting<br>– Mass credit card cloning<br>– Systemic normal activity to cover a 'single-hit' fraud |

**The above are addressed in Chapter 4 (investigations) with a practical approach with actual scenarios and content in regard to prioritising and handling evidence.**

Most criminal cases, including frauds usually get decided on a small number of key facts. Evidence to support those facts is provided as a consequence of human activity.

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## Other fraud-relevant incidental evidence

### *Electronic (digital) evidence*

(1)'Information stored or transmitted in (2) binary form that (3) may be relied on in court.'

Those three steps are especially complicated today. With all the different 'smart' devices, evidence is everywhere, and capturing evidence from a smartphone, for instance, requires a different process than harvesting data from a computer or even a smart refrigerator.

### *'Volatile' data*

One area of special focus is 'volatile' data.

It is worrying when those in authority in an organisation or company, whereby upon learning there is something seriously wrong (after an audit for example) order 'suspect devices' to be shut down to prevent any further damage.

Although it is accepted that management could stop criminal activity, it is also, however, problematic in that they could be destroying crucial data evidence and thereby directly hindering an investigation of the problems for the company. This will at least inhibit possible 'E-Discovery' or data recovery.

### *Witness testimony*

**Witness:** *a person who sees an event, or otherwise can provide information in relation to an event.*

- Witness testimony can form part of other evidence.

**Examples of this are as follows:**

- When a witness produces a report derived from large amounts of data for data analysis in order to support a particular evidential purpose in a case. This will be direct evidence; namely, what a person did. (The witness providing this evidence may also in some instances be an 'expert witness'– depending on the context.)
- When a witness is party to an event, a conversation and discusses it later. This will be hearsay. If a recording is made of a conversation (such as a police interview), the tape will be primary evidence, and the production of it will be direct. If a copy is passed to a colleague it will be direct. Copies of the tape and any written summary of it will be secondary.
- An important note also is about **Independent Witnesses**. Most expert witnesses are independent, but non-expert independent witnesses are not and, moreover, often fall in with some formal policy matters. For example, (and outside the box for a moment) some enforcement authorities will not accept evidence or an account from a witness who is not independent. If the allegation of crime is between family members for example an 'independent' witness such as a neighbour will be sought.
- The above account tends to go with eye-witness accounts to incidents such as assaults, to ensure as much objectivity as possible and to remove the emotive substance from it.
- In fraud cases, documents and documentary items forming primary or secondary evidence need to be authenticated legally and independently in some instances. In other instances the mere production of an item or document is acceptable. It depends on the purpose of its submission.

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**Eyewitness testimony** is a precise context of what evidence a witness will give.

- Even in the modern era of fraud investigations with all the technical advancement and focus, we must anchor ourselves to the point that fraud is a human crime. Witness testimony is, and always will be, the introducer of most evidence in most cases.

Massive amounts of research in cognitive psychology and human memory are done to analyse the effectiveness of eyewitness testimony, because juries especially tend to pay close attention to eyewitness testimony and generally find it a reliable source of information.

However, research into this area has found that eyewitness testimony can be affected by many psychological factors: stress, anxiety, bias, duress (has a witness been led or coerced?).

Naturally also, there is the distinct possibility that the witness is lying. If we refer back to the 'problem with words' and lies and liars, this issue appears prominently in the area of witness testimony.

A link here with our previous reference to memory, is *Reconstructive Memory*.

Bartlett's theory of reconstructive memory is crucial to an understanding of the reliability of eyewitness testimony as he suggested that recall is subject to personal interpretation dependent on our learnt or cultural norms and values, and the way we make sense of our world. With fraud cases this can be key, given certain social and religious concerns about fraud (and corruption).

Likewise, it is a feature of human memory that we do not store information exactly as it is presented to us. Rather, people extract from information the gist, or underlying meaning. In other words, people store information in the way that makes the most sense to them. We make sense of information by trying to fit it into 'schemas' which are a way of organising information.

Schemas are mental 'units' of knowledge that correspond to frequently encountered people, objects or situations. They allow us to make sense of what we encounter in order that we can predict what is going to happen and what we should do in any given situation. These schemas may, in part, be determined by social values and therefore prejudice.

Schemas are therefore capable of distorting unfamiliar or unconsciously 'unacceptable' information in order to 'fit in' with our existing knowledge or schemas. This can, therefore, result in unreliable eyewitness testimony.

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**SAMPLE WITNESS STATEMENT FROM FRAUD VICTIM**

NAME OF INVESTIGATOR

**Address:**

**Phone:**

Date of fraud incident or first date if several dates involved:

Amount lost: $10,000.

**Offender: XXX**

**Address:**

**Occupation:**

**1.** My wife, J and I live on a fixed income of $_____ from investments and pension funds. We are both retired.

**2.** On **Monday, September 30th**, we attended a dinner sponsored by our charity club. Drinks were served at 7 pm. J and I arrived around 7.30 pm, had one cocktail and chatted with our friends.

**3.** At 8 pm, a friend of ours from church, introduced me to his friend XXX. Our friend told me that XXX is an investment advisor, and that he had made good profits by investing with him. We shook hands and XXX gave me his business card. (Exhibit 1) I am always interested in making more money to boost our retirement fund.

**4.** XXX told me about his investment portfolio. He told me he runs an exclusive investment club, and that by using a secret system known only to a very select group, his club has been able to realise profits of up to 300% per year. He said that our friend is a trusted member, and that he, XXX, would trust anyone our friend recommended. XXX began to elaborate a bit about currency exchanges and bank guarantees when the dinner bell rang. We agreed to meet for lunch on **October 2nd**.

**5.** The following morning, **Tuesday, October 1st**, I received a call from XXX. This must have been at 10 am because I was just getting ready to take the dog for a walk, which I do at the same time every day. XXX was very polite, and apologised for calling at an inconvenient time, and said he wanted to confirm the luncheon meeting scheduled for the following day. He asked me if a certain restaurant would be okay, and asked if I would be his guest.

**6.** I met XXX at the restaurant at 11.15 am. We had cocktails and were joined by his friend. XXX introduced his friend as the pastor of a church in the neighbouring town. XXX stated that members of his congregation had already invested in the opportunity.

**7.** Foolishly in hindsight, I wired XXX $10,000 to an account XXX provided. He disappeared. I could not contact him by phone or mail.

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***Practical Exercise: extracting witness knowledge from information*** As an example of how crucial it is to handle eye witness testimony as any other element. From this case I dealt with, please read the following account. Read it with a purpose.

- First, separate the eye-witness account data from other information.
- Identify the key points which can *lead to* being direct evidence.
- Which other points are useful but need to be verified and why?

**Witness Statement**

My name is Miss D. I am the new CFO at XYZ Loans Company.

I am concerned about the behaviour of one manager. I don't know his name, but I know him from a previous company. I have now received what I think is a fake invoice. It has come from his office. I know this because I went to his office and found the invoice pad there. He always had a reputation for being a little 'suspect' with his expenses. He was always joking about it. It was always when he was with his friends. I have been informed that Mr. X found some auditing irregularities last week. The invoice pad has turned up in this manager's office. The fake invoice is from it.

I was stopped in the corridor by someone who wouldn't give his name but stated that this manager is regularly overcharging clients for admin fees for loans and pocketing the difference.

Rorton International Pty Limited
Level 39, 2 Park Street, Sydney NSW 2000
Telephone : 0475 91293

Invoice No.
0004

ABN 92 7864 5432

INVOICE

Customer

Name / Address: Mr H. Snytherin, Purchasing Director
Megaton Corporation Pty Ltd
198 Castlereagh Street
Sydney, NSW 2000

Date: 24-Oct-09

| Description | TOTAL |
|---|---|
| Marketing consultancy fee as agreed | $ 10,000.00 |

Please pay immediately
H Snytherin 25/10/09

SubTotal $ 10,000.00

Please pay to :
Beneficiary Bank: Maybank International (L) Ltd, Labuan
Swift Code: MBBEMYKA
Account No: 361663920
Beneficiary Name: Rorton International
Beneficiary Account No: 102010028993

TOTAL $ 10,000.00

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***Investigator Response***

**Witness Statement**

My name is Miss D. I am the new CFO at XYZ Loans Company.

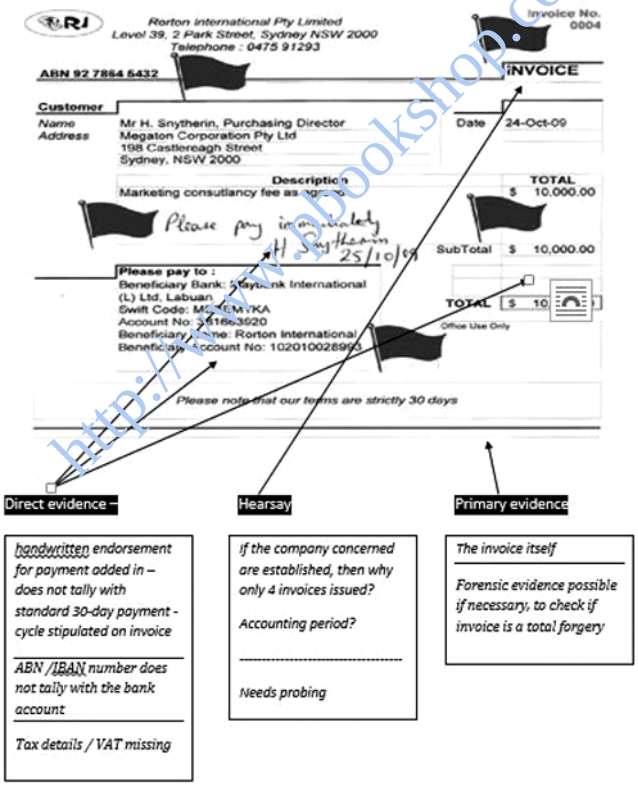
I am concerned about the behaviour of one manager. I don't know his name, but I know him from a previous company. I have now received what I think is a fake invoice. It has come from his office. I know this because I went to his office and found *the* (?) invoice pad there. He always had a reputation for being a little 'suspect' with his expenses. He was always joking about it. It was always when he was with his friends. I have been informed that Mr. X found some auditing irregularities last week. The invoice pad has turned up in this manager's office. The fake invoice is from it.

I was stopped in the corridor by someone who wouldn't give his name but stated that this manager is regularly overcharging clients for admin fees for loans and pocketing the difference.

- Knowledge: I think it reasonable to suggest that Miss D knows her own name.
  - Miss D, in her position as CFO, with her qualifications, competence and experience is likely to know a fake invoice when she sees one. Direct and opinion evidence (but subject to cross examination).
  - The first point of the misrepresentation is when the invoice is submitted to the company. It needs to be established who has first received it and then reported it, how it came to be forwarded to Miss D (crucial to the chain of custody).

- Knowledge: yes, but more opinion than anything else. It needs to be verified.
  - When you see comments like 'I know' or 'I know for a fact' it usually means they don't.
  - Likewise when a witness says 'I am sure'. Sure means you are not.
  - The invoice itself may or may not be from the invoice pad found. However a simple check of the process will establish if it was submitted through the normal accounting system. If not, the invoice is a complete forgery. If it has then the invoice is still fraud. It is a key point to establish the misrepresentation to nullify any reliance on a mistake.

- ***Information as Knowledge***: We must locate those with knowledge of the crime and manage the transfer of the information. Using the skill set we demonstrate an ability to receive knowledge – and then classify it.
- ***Information as Evidence***: the extraction of evidence from that information.




A slick and efficient handling and appraising of information will also help in terms of the evidence falling into place. You need not concern yourself with looking for types of evidence yourself at first instance. But if you reason out where in the information evidence of fraud exists, you will establish fraud immediately and plan an investigation effectively.

## Whistle-blowing – witnesses nonetheless

Personally speaking, the term 'whistle-blower' is one of the most pointless and most dangerous pieces of jargon ever. It demeans people. Another cliché, like 'mugging' and others, has found its way into a myriad of settings. But the growth of the meaning of this label has become so warped and out of control that many have simply lost sight of what the concept and ideal of someone exposing serious criminal wrongdoing (such as fraud and corruption) actually is.

In the UK, if you are being approached by a whistle-blower, then consideration has to be given to the Public Information Disclosure Act (PIDA) or is the person happy to disclose the information openly? Has the informant brought any information to reinforce their allegation? This is a basic safeguard to investigation in any case.

Other points are that, in the corporate world, whistle-blowers are regarded as 'snitches' and informants, just like in the criminal underworld. But this could attract the wrong kind of volunteer. This presents fraud risk itself. It also presents a problem about the authenticity of witness testimony in some cases (they could be in it for the money, human nature being what it is).

### *Whistle-blower retaliation and criminal charges*

Sometimes a company uses criminal charges as a form of retaliation. If successful, the company gets rid of the whistle-blower and discredits them, thereby minimising the possibility that they will file some kind of claim. If that isn't enough of an incentive, the tactic has a ripple effect throughout the entire company. Employees soon learn that if you make waves, the company can make your life miserable.

Thankfully, tactics like this rarely work. Smart, ethical businesses know that nothing encourages whistle-blowing more than retaliating against concerned employees who first try to bring concerns to the attention of management. While setting up an employee for failure and prosecution might scare some people away, companies that choose this extreme tactic run the real risk that the whistle-blower will have nothing to lose. Then the risks for the company are much higher, as many falsely accused employees will take their concerns to the media or the government.

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## Expert witnesses. Who are they?

Expert Witnesses carry out a major role in the judicial system of your country, by providing *opinion* evidence to assist courts in reaching decisions.

Such witnesses are commonly thought of as doctors or forensic scientists, criminal profilers, psychiatrists, and handwriting experts, but the remit of the expert witness can be an HR Director, or an IT expert with specialist knowledge of a given system or, as one witness in a case I encountered, an expert and CEO of a company in Kenya making industrial pesticides. Inside fraud was taking place whereby some employees were stealing some chemicals and adding other substitute chemicals and then selling these in the name of the company and keeping the money themselves.

Expert Witnesses may be asked to write a report or statement and be called to give evidence in a range of legal forums including civil and criminal, but also in tribunals, arbitration cases, and inquiries and professional conduct hearings, such as in health care.

International standards vary, and some countries have Associations and hold databases of experts who can attend court and give expert testimony. Qualifications are often set as a requirement, and a number of years professional, industrial or vocational experience. Equally, a requirement may be to have up-to-date training and accreditation (as pilots, or safety engineers).

But the 'E' word is one which has become so easily (ab)used in so many vocational contexts that it has become mundane and the true expert status cheapened across a range of professional benchmarks. In our area alone we have 'experts' in fraud who have never been anywhere near a fraud investigation.

Technical advancement creates experts but who are aligned to something else, and not necessarily with what the 'material cause' is (my polite way of saying that some 'experts' slide in from other vocations and pronounce themselves as 'experts' in fraud).

Another favourite word bandied around with equal effrontery is the word 'forensic'. (True) experts are often little-known 'doers' who create standards – not the opportunists who pretend to be.

Another twist to the tale is the warning to lawyers not to 'doctor' the reports of expert witnesses, as reforms are argued to be causing conflict between expert witness services and instructing lawyers.

Deadlines have affected turnaround and referred work. Expert witnesses are increasingly pressurised by deadlines to produce documents and reports.

One issue is the removal of dates for expert reports. Our way of practice is to put into an appendix the reports we've relied on with their dates. But we are asked to remove the date of the report.

Lawyers are found to have taken the dates out before serving the reports, without asking the expert witness who provided it, which is not particularly good practice.

'Subconscious analysis' is another aspect of controversy in this context.

Experts are often asked to remove a report from our list relied on for a case. The assumption is that if you have read something, then consciously or subconsciously, it's in your mind and may well affect your analysis. This a questionable assertion. The expert knows best.

What is clear, in any case, is that the expert's report must be authored by the expert. Whilst it is acceptable for a lawyer to make *suggestions* to the expert about changes to the report, it is unacceptable for a lawyer to 'doctor' an expert's report.

### *Accreditation and representation*

Forensic expert witnesses should be accredited. The ones who matter say this, namely judges.

A former South African police officer in one case I was involved with was torn to pieces in court by a judge who pronounced that the individual was not a forensic expert of any kind. The one concerned had agreed to appear as a defence witness claiming to have carried out a forensic audit on the records and client files of a business acquaintance. He

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had no qualifications or even professional external auditing experience. He sounded, and was made to look, ridiculous.

In one famous UK case, a criminal profiler was described by one outraged judge as a 'puppet master', who had led the police along entirely the wrong path from beginning to end in a very lengthy (and costly) investigation. The police had failed to carry out any kind of due diligence on the profiler and alignment with that type of case. The whole reinvestigation was based on misconception and the police blindly followed it.

- **The above two examples are factual cases, one of which I observed first-hand, so please do not shoot the messenger. My aim is to support you.**

The dangers of this credibility void are obvious; theoretically, anyone with any sort of background and sufficient personal confidence, perhaps less politely described as having the nerve, or who was sufficiently misguided, could set themselves up as a forensic science expert and produce evidence that, at best, is unhelpful and, at worst, positively misleading; nobody would necessarily be any the wiser.

A Council for the Registration of Forensic Practitioners (CRFP) was established with UK Home Office support in 1997 as an independent regulatory body to promote public confidence in forensic practice, but it later ceased to operate due to lack of government funding. CRFP accreditation was based on peer review only of forensic practitioners. Therefore, experts (rightly) had to obtain separate accreditation for each field of expertise in which they wished to give evidence, and had to specify precisely what they were accredited in.

Ironically the demise of the CFRP is a step backwards, as this is precisely the sort of regulation and accreditation which is now lacking.

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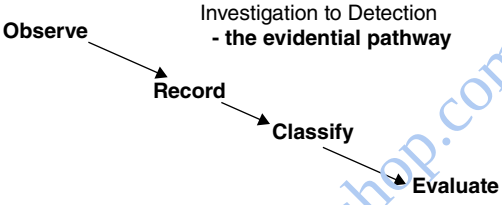
## SUMMARY **POINTS:**

- A common criticism is that some expert witnesses step outside the bounds of their expertise. In fairness of course, some lawyers insist on asking the wrong questions of witnesses in this context and actually invite an opinion that they ought not to be asking for at all. For example, a criminal profiler who is assessing a fraud offender pre-sentence can give opinion evidence of personality traits but cannot *diagnose* an offender's personality and propensity to commit fraud in the future.
- People find it tempting and as easy to exaggerate their professional status as a witness as they do with their CVs and resumes.
- As for all witnesses, the witness box can be a very lonely place if you are in any way trying to bluff your status. It is therefore inevitable that your evidence will be flawed as well.
- Politely put, if you want to be regarded and classified as an expert or 'forensic' witness, then please ensure you are accredited to be one. Judges have more than picked up on this and do not hold back when it comes to stating problems of this misrepresentation of professional status. In fact judges have been at their most outraged and outspoken in tearing into expert witnesses publicly, more so than the defendant on trial. Beware.

## CHAPTER SUMMARY

- Fraud is not the same as money laundering, but fraud can be the originating crime (or will form the 'criminal proceeds') for money laundering.
- Money laundering usually includes a fraud somewhere along the way.
- Fraud is not the same as corruption. No one has to be actually deceived in a corruption case (down to 'wheeling and dealing') but for fraud the misrepresentation and/or breach of fiduciary trust must be present.
- Lies do not necessarily equate to 'fraud'.

These first references already point to the fact that the level of guilty knowledge the offender must have to have a case to answer in fraud is a matter of subjective assessment.




Remember also that you are working towards *exposing* fraud to a tangible level of establishing the presence of fraud in a scenario to a legal standard *per se* (and ideally to incorporate accepting of guilt by the offender) and the case being capable of being understood and legally acted upon by an objective third party to whom you present the case. This can be a court or tribunal or HR department or senior decision maker.

But do not make the mistake of assuming that if the case is not being heard by a court and is 'in-house,' that the quality of the investigation and the evidence acquisition and handling of it can become casual or reduced to a lesser professional standard. The best rule of thumb is to assume that your case will end up in court one way or another – which includes the prospect of the offender suing you later for investigative malpractice, or there has been an abuse of process.

Casual thinking leads to adverse professional outcomes.

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