

The CFE's Role in Educating Judges on Fraud Cases

Courts are handling more fraud cases but might not be aware of their intricacies. CFEs on legal teams can respectfully help inform judges about pre-trial motions, internal controls, discovery, chain of custody, and other matters. The result is greater efficiency, clearer presentations, fairer trials, and less re-litigation. Here's how to do it.

By Frank S. Perri, J.D., CFE, CPA

The judge hadn't presided over many white-collar crime cases even though at one point in his career he was the elected prosecutor of the county in which I practiced. My job as appointed defense counsel was to not only tactfully educate him on the facts of the criminal case but on the finer points of fraud examinations and how they drastically differed from non-fraud investigations. The case involved homicide, bank fraud, cash larceny, and accounts receivable skimming. I'm a Certified Fraud Examiner, but I needed to hire a CFE to help oversee the many fraud aspects of the case.

By the end of the pre-trial stage, the judge had a working knowledge of what constitutes fraud, how fraud investigations differ from other types of criminal investigations, and how the law imposes certain legal requirements on the parties that would normally not exist in non-fraud cases. In the end, the up-front work at the pre-trial stage increased the efficiency and soundness of the court's legal rulings during the trial so that the court system was able to uphold the law and ensure that the defendant received a fair trial. If I didn't have the CFE's assistance in court, I couldn't have met those goals.

In fraud trials, we normally focus on the attorneys' understanding of the facts and their presentations. Yet we seldom pay attention to judges and their abilities to digest the progression and intricacies of white-collar crimes before and during a trial. Some judges might not have the experience or knowledge to understand the dynamics for a fraud case to be properly proven and to ensure that defendants receive fair trials. This is especially true at the state level as opposed to the federal level in which judges often oversee more white-collar crime cases such as bank fraud, mortgage fraud, and securities fraud.

Many fraud cases settle early so judges might accept settlements without knowing the details of the cases. They often don't learn how a true fraud case unfolds from an evidentiary perspective because the case doesn't go to trial. Also, post-Enron, prosecutors are taking more action against frauds both at the state and federal levels. Consequently, state judges especially have had to play catch-up on a classification that they might not have taken as seriously as other crimes. For example, non-white-collar crime cases rely heavily on physical evidence that's easier to legally and intuitively digest. Judges can see it, feel it, and smell it. But fraud cases often turn on evidence that the senses can't analyze. As a result, judges have to start thinking through the evidentiary aspect of fraud cases differ-

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ently, and this is going to require the assistance of a CFE.

I outline here some of the major issues I face when working with judges who might not yet be adept in understanding fraud. Judges must handle fraud cases properly so the court system isn't forced to revisit the ones that were overturned on appeal because of judicial errors. The issues here apply to both defense and prosecutorial counsel.

JUDICIAL CONCERNS

Because judges might not quite understand the accounting and fraud examination principles behind white-collar crime cases, they might erroneously disallow relevant and material evidence at a trial because they fear appellate reversal. To help prove or disprove cases, CFEs must work with attorneys to connect the evidentiary dots for judges because fraud cases often are entirely circumstantial, which means we must infer conclusions from the evidence. Sometimes, fraud cases are a combination of circumstantial and direct evidence but *rarely* direct evidence alone.

Through trial counsel, CFEs can educate judges on pre-trial motions, internal controls, discovery, and chain-of-custody issues. It has been my experience that CFEs bring credibility to the court because they aren't viewed as "hired guns" to testify about a given point simply because they were paid to testify by one side or the other. I often remind the court of the ethical obligation CFEs must uphold when they're retained to increase the credibility that they bring to court.

PRE-TRIAL MOTIONS

Criminal trials, like civil proceedings, often begin with pre-trial motions. For example, both civil and criminal defendants can make motions to have certain information disclosed to the parties such as financial records or motions *in limine* in which the parties attempt to exclude certain evidence from trial. The judge then determines if a party's request should be granted. Thus, just as the prosecution might attempt to prove that the defendant perpetrated the fraud though its pre-trial motion requesting incriminating evidence, the

defense could conceivably attempt to show that the defendant didn't commit fraud through its pre-trial motion requesting that certain information be disclosed by the prosecution.

This position is in line with the Axioms of Fraud Examination in the ACFE's "Fraud Examiners Manual," which states, "The examination of fraud matters is approached from two perspectives. To prove that a fraud has occurred, the proof must include attempts to prove that it has not occurred. The reverse is also true. In attempting to prove fraud has not occurred that proof must also attempt to prove that it has." For example, if the prosecution's pre-trial motion is requesting material relevant to the case, the CFE assisting the prosecution might have to testify to convince the judge

that the material is necessary.

In the case I mentioned at the beginning of the article, the judge didn't understand why bank statements were important in addressing issues of criminal motive and intent until the CFE outlined how motive or lack of motive could be shown through cash inflows and outflows from a given account that was in question. Without that CFE, whom the court considered an expert, my pre-trial motion to receive certain documents would've been denied. If the court had not ruled in my favor, this could have easily resulted in a reversal by the appellate courts because courts allow both defense counsel and prosecutors considerable latitude in proving or disproving motive in a given case. The CFE's assistance in this point is an excellent illustration of how the court was able to effectively resolve a pre-trial issue properly, decreasing the probability of appellate reversal and guaranteeing that the defendant received a fair trial.

In essence, the CFE attempts to make financial crime evidence, which initially appears intangible, more tangible to the judge. A judge might not be aware that it isn't necessarily the fraud itself that's hard to understand but the methods the fraudsters used to conceal the crime. Explaining those methods might require additional pieces of evidence, such as bank statements, to show how the fraud was perpetrated and hidden. The CFE should emphasize to the court that fraud examinations can be more complex than street-level crime investigations in terms of time commitment and analysis.

INTERNAL CONTROLS

The prosecution, with help from the CFE, might need to present testimony on how fraud symptoms arose from an organization's bypassing of internal controls. It's important to define internal controls and their relevance because fraud cases so often are based on circumstantial evidence of guilt. Violation of internal controls policies is devastating proof of culpability; without introduction of this evidence in a trial, the judge and jury might not be able to understand how the fraud was committed.

The CFE can also explain to the court *how* the bypassing of normal internal controls narrowed the field of potential suspects, which ultimately led investigators to the defendant. I have used the analogy that obtaining an organization's internal controls for the benefit of the court is like using DNA testing procedures to evaluate the reliability of physical evidence in possibly assessing guilt or innocence.

As previously stated, defense counsel might file pre-trial motions, such as motions *in limine* to keep out evidence of an organization's internal controls violations because they know that if the jury hears this, the probability will increase that their client will be found guilty. The prosecution must know that if internal controls are weak or if they were over-ridden, the defense might also be prepared to ask for an organization's written internal controls procedures to cast doubt on the defendant's culpability. CFEs need to explain to judges the importance of considering internal controls from an accounting perspective.

DISCOVERY

Judges need to know that fraud cases normally generate much more discovery than other criminal cases. Discovery is the process by which attorneys learn about the other side's evidence that points to guilt or innocence. Discovery can include paper documents such as police reports, financial documents, photographs, and physical evidence. Attorneys might not have the time to truly digest fraud facts because of the volume of work involved.

Before a trial, I will have the CFE I've retained draft a letter to the judge explaining the great amount of time we need to analyze the discovery and effectively convey it to the court. Educating the court on discovery issues that are unique to white-collar crimes is important because the traditional rules of discovery and notions of due process fairness might not take into account the inherent qualitative and quantitative differences in these cases. Judges appreciate the warning and will be less inclined to rush the case through the system, which decreases the probability of judicial error and attorney ineffectiveness – both reasons for appellate reversal.

In the fraud-related homicide case with which I was involved, the judge was pressuring the parties to go to trial within a few months from the time I had received the case even though I had indicated to the court that I couldn't possibly review more than 6,000 pages of financial documents referencing the fraud plus understand the actual homicide case. At this point, once the judge put such a short time frame on the case, it was the retained CFE who was able to convince the judge that more time was needed to do a thorough job analyzing data, interviewing witnesses, and educating the attorneys on the case.

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PRE-TRIAL PREPARATION IMPORTANT FOR SUCCESSFUL EXPERT WITNESS

The discovery process in a civil case usually begins with each side giving the other a set of written questions, called interrogatories, so that each party can learn the relevant facts of the other party's case. (However, in a criminal case the defendant under the U.S. Constitution can't be forced to make incriminating statements during the discovery process that can be used against him.) Your assistance as a CFE might begin by helping the attorney compose the interrogatories or by providing the replies, depending on your side of engagement.

Both sides in a criminal or civil fraud case submit requests to the other for production of records pertinent to the case. A financial expert is often expected to educate a lawyer on the types of documents typically available through normal discovery and what might have to be specially requested such as an internal control manual if it should exist. Most everything – from a single deposit slip to continuous ATM videotapes to voluminous accounting ledgers – is subject to discovery.

Financial crime experts on the prosecutor's side often must scale a mountain of documents or scroll through a heap of computer files to find the core facts that show criminal intent or behavior. Remember, however, the courts have stated that the prosecution can't "document dump" evidence on the defense. Conversely, the defense might attempt to bury the other side in paper to hide or trivialize vital documentation, but the legal burdens of document specification also apply to the defense. Because an efficient search saves time and money, successful experts develop an early strategy and tick off a detailed checklist to achieve their goals within a specific time frame to avoid problems.

Early in the process, review a list of all witnesses to be called so you'll have time to evaluate and comment on expert witnesses' reports.

Sources: 2008 Fraud Examiners Manual, © Association of Certified Fraud Examiners, and Frank S. Perri, J.D., CFE, CFA

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In this case, the CFE spent more than 100 hours interviewing witnesses, reviewing discovery, preparing flow charts explaining the financial data, and educating the legal team. The team frequently reported to the court about its progress in preparing for trial with the CFE's assistance. The CFE was willing to testify in court on our progress if the court were to have doubts.

CHAIN OF CUSTODY

From the time evidence is received, the legal team, including the CFE, must establish and maintain the chain of custody of evidence so the court will accept it. The chain of custody is the document or paper trail showing the seizure, custody, control, transfer, analysis, and disposition of physical and electronic evidence. Because evidence can be used in court to convict a person, it must be handled carefully to avoid later allegations of tampering or misconduct, which can compromise the prosecution's integrity or overturn a guilty verdict on appeal. Judges will want to expedite the case, but CFEs should disclose to the court that it will take time to review the material and map out the documents' chain of custody. If you don't deliberately establish a detailed chain of custody, you'll find it's virtually impossible for your team to prove or disprove a legal point.

It's not difficult to do this in most criminal cases. For example, in a narcotics case the reporting officer collects and tags the evidence, the evidence technician preserves and transports the drugs to a lab, and a lab technician analyzes the substance to determine if it's a controlled substance. It's easy to trace the persons in this simple chain of custody. However, in a complicated fraud case, the list of people who need to testify can be long, and the thousands of documents, most of them probably in electronic form, often don't immediately reveal the relevancy of the contents or its authors. The CFE must explain to the attorneys (and ultimately to the court) that if a chain of custody isn't established, the CFE won't be able to testify with certainty because he or she would be required to speculate if the evidence truly reveals culpability. If that's the case, the court wouldn't even allow the CFE to testify as an expert because speculation is not allowed in assessing guilt or innocence.

The CFEs, through the attorneys, should remind the court that it's necessary to have both the prosecution and defense identify the documents that they'll use at trial and the witnesses who'll be testifying about those documents.

LEGAL REQUIREMENTS

Many courts, faced with voluminous discovery in white-collar crime cases, have required the prosecution to designate well in advance of trial those documents it intends to use. For example, in *United States v. Turkish*, 458 F.Supp. 874 (S.D.N.Y., 1978), the court ordered the prosecution to identify to the defendant which of the almost 25,000 pages of documents it intended to use or refer to in connection with the testimony of any witness.

In *Turkish*, the prosecution disclosed the paper documents that would be used in trial. Conversely, just as the prosecution

must identify those documents it intends to use, the court in *U.S. v. Anderson*, 416 F.Supp.2d 110 (D.D.C. 2006) stated that the defense must disclose those documents to the prosecution that it intends to use at trial. Furthermore, because the prosecution is legally obligated under *Brady v. Maryland*, 373 U.S. 83 (1963) to disclose information that's exculpatory (material that reduces the "blameworthiness" of the defendant), CFEs will probably be required to explain to the judge which information is beneficial to the defendant through the attorney.

It's crucial for the CFE to reduce his or her opinions about *Brady* material to writing so that the CFE isn't perceived as withholding *Brady* material if the prosecution doesn't disclose it to the defense. Although rare, there are times when there's prosecutorial misconduct in the discovery process, and a CFE must be prepared to defend his or her professional reputation by memorializing findings in writing when disclosing them to the prosecution. (Also, memorializing their positions upholds the Axioms of Fraud Examination.) Conversely, if a CFE is retained by the defense, the CFE must protect his or her professional reputation by memorializing their findings in writing to avoid the appearance of impropriety in the event defense counsel attempts to manipulate the CFE's findings.

Cases have been overturned when the prosecution hadn't disclosed information because they were unaware that it was exculpatory; prosecutorial misconduct wasn't even an issue. In the case that I was involved in, the CFE actually was able to educate the prosecution in understanding the discovery aspect of the case so that when I did make requests for certain documents, the prosecution didn't resist because the CFE had helped them see how the request actually upheld the requirements of *Brady*.

CFEs can assist courts to understand that information that must be disclosed will increase the probability that defendants will receive fair trials and ultimately improve the soundness of the process. If the court is perceived as not being fair to the defense, cases can be overturned and sent back to be retried again because evidentiary protocol wasn't correctly followed. CFEs can help ensure that due process unfolds properly and that the integrity of the system is upheld.

CONTINUING JUDICIAL EDUCATION

In fraud cases, it might be imperative to utilize the services of CFEs to inform judges about issues unique to white-collar crimes. The CFE will anticipate unfamiliar areas of evidence and clarify the relevance of admitting or, if necessary, excluding certain evidence. The result? Increased efficiency of the legal proceedings and a decrease in re-litigation of fraud cases. 🔍

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