

**18 U.S.C. § § 1341 & 1343**  
**(Mail / Wire / Carrier Fraud--Elements)**

To sustain the charge of [mail] [wire][carrier] fraud, the government must prove the following propositions:

First, that the defendant knowingly [devised] [or] [participated in] the scheme [to defraud] [or] [to obtain money or property by means of false pretenses, representations or promises], as described in Count[s] \_\_\_\_ of the indictment;

Second, that the defendant did so knowingly and with the intent to defraud; and

Third, that for the purpose of carrying out the scheme or attempting to do so, the defendant [used [or caused the use of]] [the United States Mails] [a private or commercial interstate carrier]] [caused interstate wire communications to take place] in the manner charged in the particular count.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Committee Comment

This instruction combines the mail and wire fraud instructions, which were previously offered separately. The substantive change involves the addition of private carrier language in § 1341 (effective September 13, 1994).

**18 U.S.C. §§ 1341 & 1343**  
**(Definition of Scheme to Defraud)**

A scheme is a plan or course of action formed with the intent to accomplish some purpose.

In considering whether the government has proven a scheme to [defraud] [obtain money or property by means of false pretenses, representations or promises,] it is essential that one or more of the [false pretenses, representations, promises and] acts charged in the portion of the indictment describing the scheme be proved establishing the existence of the scheme beyond a reasonable doubt. However, the government is not required prove all of them.

[A scheme to defraud is a scheme that is intended to deceive or cheat another and [to obtain money or property or cause the [potential] loss of money or property to another] [or] [to deprive another of [description of honest services, including source text of rule or statute]].

**Committee Comment**

The case law says that, although “scheme to defraud” and “intent to defraud” substantially overlap, they are not the same; in fact, one case specifically rejects the previous “scheme to defraud” instruction because it treats the two as the same. *United States v. Doherty*, 969 F.2d 425, 429 (7th Cir. 1992). The scheme to defraud definition set forth here, and included in part in the following instruction on intent, is from *United States v. Moede*, 48 F.3d 238, 241 and n. 4 (7th Cir. 1995).

Unanimity as to facts should be explicitly required in cases where there is a danger that jurors may disagree on the facts of the case, e.g. where the facts are particularly complex, where multiple schemes are charged, where there is a variance between charge and proof.

**18 U.S.C. §§ 1341 & 1343**  
**(Definition of Intent to Defraud)**

The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive or cheat the victim in order to cause [[a gain of money or property to the defendant] [or] [the [potential] loss of money or property to another] [or] [to deprive another of [description of honest services, including (insert definition taken from rule or statute)]].

Committee Comment

This instruction includes the concept of deprivation of honest services as expressed in 18 U.S.C. § 1346. Courts are urged to draft specific instructions tailored to particular statutes or rules defining the honest services duty at issue.

**18 U.S.C. § § 1341 & 1343  
(Loss)**

The [mail] [interstate carrier] [wire] fraud statute can be violated whether or not there is any [loss or damage to the victim of the crime] [or] [gain to the defendant].

**18 U.S.C. §§ 1341 and 1343**  
**(Use of Mails / Interstate Carrier / Interstate Communication Facility)**

The government must prove that [the United States mails] [[a] private or commercial interstate carrier[s]] [interstate communication facilities] [was] [were] used to carry out the scheme, or [was] [were] incidental to an essential part of the scheme.

In order to [use [or cause the use of]] [the United States mails] [a private or commercial interstate carrier]] [cause interstate wire communications to take place], the [a] defendant need not actually intend that use to take place. You must find that the defendant knew this use would actually occur, or that the defendant knew that it would occur in the ordinary course of business, or that the defendant knew facts from which that use could reasonably have been foreseen. [However, the government does not have to prove that [the/a] defendant knew that [the wire communication was of an interstate nature][the carrier was an interstate carrier].]

[The defendant need not actually or personally use [the mail] [an interstate carrier] [interstate communication facilities].]

[Although an item [mailed] [sent by interstate carrier] [communicated interstate] need not itself contain a fraudulent representation or promise or a request for money, it must further or attempt to further the scheme.]

[Each separate use of [the mail] [an interstate carrier] [interstate communication facilities] in furtherance of the scheme to defraud constitutes a separate offense.]

Committee Comment

A defendant does not actually have to use the mail or wire or a carrier to violate § 1341; he only needs to cause mailing to be done as a part of the scheme. The two essential elements are a scheme to defraud and that mailing or wiring or use of a carrier occurred as a part of that scheme. *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). The use of mail need not be intended but must be reasonably foreseeable and follow in the course of business of furthering the scheme. *United States v. Ashman*, 979 F.2d 469, 481-84 (7th Cir. 1992); *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir.1986) *United States v. Briscoe*, 65 F.3d 576,583 (7th Cir. 1995) *United States v. Hickok*, 77 F.3d 992, 1004 (7th Cir.), cert. denied, 116 S.Ct. 1071 (1996). See also *United States v. Kenofsky*, 243 U.S. 440 (1917); *United States v. Calvert*, 523 F.2d 895 (8th Cir.1975), cert. denied, 424 U.S. 911 (1976); and *Hart v. United States*, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

In *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) it was held that wire fraud parallels mail fraud. Consequently, the government is not required to prove the scheme was successful, but only that use of a wire communication was reasonably foreseeable, and actual wiring occurred in furtherance of the scheme. See also *United States v. Kenofsky*, 243 U.S. 440 (1917); *United States v. Clavert*, 523 F.2d 895 (8th Cir.1975), cert. denied, 424 U.S. 911 (1976); and *Hart v. United States*, 112 F.2d 128 (5th Cir.), *cert. denied*, 311 U.S. 684 (1940).

The Committee has combined separate mail and wire instructions, and has added interstate carrier language. It has also added the "incidental to" line in response to *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989). The Committee has also amended the knowledge requirement to conform with *Pereira v. United States*, 347 U.S. 1 (1954) and, in the case of interstate wire / interstate carrier communications, with *United States v. Lindemann*, 85 F.3d 1232 (7th Cir. 1996).

Finally, it has merged the last line, in brackets, for use in multiple count cases.