

4.13 Intent to Defraud

An intent to defraud is an intent to deceive [or] [and] cheat.

Comment

While *United States v. Shipsey*, 363 F.3d 962 (9th Cir. 2004) explicitly approved the language of this instruction, *United States v. Miller*, 953 F.3d 1095, 1101 (9th Cir. 2020) expressly overruled *Shipsey*, holding that intent to defraud for purposes of wire fraud (18 U.S.C. § 1343) and mail fraud (18 U.S.C. § 1341) requires intent “to deceive *and* cheat[.]” (emphasis in original); *see also United States v. Saini*, 23 F.4th 1155, 1163 (9th Cir. 2022) (holding that “ordinary meaning of ‘intent to defraud’ under § 1029(a)(3) and (4) requires an intent to deceive *and* cheat” (emphasis added)). However, for purposes of other statutes, the [or] [and] formulation may be permissible for this instruction. *See United States v. Dearing*, 504 F.3d 897 (9th Cir. 2007).

Miller did not disturb *Shipsey*’s ruling that because the trial court gave this instruction, “no good faith instruction was necessary at all.” *Shipsey*, 363 F.3d at 967-68; *see also United States v. Crandall*, 525 F.3d 907, 911-12 (9th Cir. 2008) (in which the Ninth Circuit rejected a contention based on *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704-06 (2005), an obstruction of justice case, that intent to deceive requires proof of “consciousness of wrongdoing” in a prosecution for mail or wire fraud and said that the Ninth Circuit model instruction that was given “adequately covered the defense theory of lack of intent.”).

As to whether the defendant acted in good faith, and therefore did not act with an intent to defraud, *see United States v. Molinaro*, 11 F.3d 853, 863 (9th Cir. 1993), in which the Ninth Circuit approved the following instruction in a case involving the crime of bank fraud:

You may determine whether a defendant had an honest, good faith belief in the truth of the specific misrepresentations alleged in the indictment in determining whether or not the defendant acted with intent to defraud. However, a defendant’s belief that the victims of the fraud will be paid in the future or will sustain no economic loss is no defense to the crime.

Revised Sept. 2020