

FORENSIC AUDIT AS APPLIES TO ELECTIONS DEFINED

INTRODUCTION

There exists no legal definition of the term “forensic audit” and in this post 2020 election period of time the term “forensic audit” is bandied about without any real consensus as to what is actually being referred to by people. To one person it means investigating the smallest details, to another it means nothing. But based on the definition given to the word forensic, and phrases of forensic evidence, forensic engineering, forensic medicine, etc., we can come to a reasonable derived definition of forensic audit such that we can accurately use and apply the term with a definition of what it is and means in terms of forensic auditing of an election.

FORENSIC

Forensic, adjective. 1: belonging to, used in, or suitable to courts of judicature or to public discussion and debate. 2: ARGUMENTATIVE, RHETORICAL. 3: relating to or dealing with the application of scientific knowledge to legal problems. [<https://www.merriam-webster.com/dictionary/forensic>]

Forensic, adjective. 1. Used in or suitable to courts of law or public debate <forensic psychiatry>. 2. Rhetorical, argumentative <Spence’s considerable forensic skills>. 3. *Hist.* Exterior; foreign. [Black’s Law Dictionary, 8th edition, page 676]

Forensic. “The adjective forensic describes scientific methods used to investigate...” “When you describe something as forensic you usually mean that it has to do with finding evidence to solve a crime. It could also mean that it has to do with the courts or legal system. You could have a forensic advantage

— meaning an advantage in court — if the forensic team — meaning the investigators — found no forensic evidence of you being involved.” [<https://www.vocabulary.com/dictionary/forensic>]

Forensic engineering. The use of engineering principles or analysis in a lawsuit, usu. through an expert witness’s testimony. [Black’s Law Dictionary, 8th edition, page 676]

Forensic Evidence. Evidence used in court; esp., evidence arrived at by scientific or technical means, such as ballistic or medical evidence. [Black’s Law Dictionary, 8th edition, page 597]

AUDIT

Audit, noun. 1: a; a formal examination of an organization's or individual's accounts or financial situation <The audit showed that the company had misled investors.>; b; the final report of an audit. 2: a methodical examination and review <an energy audit of the house>. [<https://www.merriam-webster.com/dictionary/audit>]

Audit. “An audit is a thorough counting, review, or assessment of a situation or collection of things.” “a methodical examination or review of a condition or situation.” [<https://www.vocabulary.com/dictionary/audit>]

Audit, n. A formal examination of an individual’s or organization’s accounting records, financial situation, or compliance with some other set of standards. [Black’s Law Dictionary, 8th edition, page 140]

FRAUD

Fraud, noun.1: a; DECEIT, TRICKERY specifically : intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right <was accused of credit card fraud>; b; an act of deceiving or misrepresenting : TRICK <automobile insurance frauds>. 2: a; a person

who is not what he or she pretends to be : IMPOSTOR <He claimed to be a licensed psychologist, but he turned out to be a fraud.> <also : one who defrauds : CHEAT>; b; one that is not what it seems or is represented to be <The UFO picture was proved to be a fraud.> [<https://www.merriam-webster.com/dictionary/fraud>]

Fraud, noun. "A fraud is a something that deceives or tricks another person..." "intentional deception resulting in injury to another person" "something intended to deceive; deliberate trickery intended to gain an advantage" [<https://www.vocabulary.com/dictionary/fraud>]

Fraud, n. 1. A knowing misrepresentation of the truth or concealment of material fact to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime. Also termed "intentional fraud". 2. A misrepresentation made recklessly without belief in its truth to induce another person to act. 3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another person to act to his or her detriment. 4. Unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.

[Black's Law Dictionary, 8th edition, page 685]

ELECTION FRAUD

Election Fraud seems unthinkable, and to most of us, the thought of it is something that happens in distant third world countries and the event of election fraud is something that would never happen in the United States of America. The reality is that today there is just as much if not more for the United States of America's citizens to lose as the people in any other country. The what and the why of this point is the liberty and freedoms afforded its citizens by its constitution. If this point is in question, one needs not look further than to the battle over the second amendment of the constitution and the

verbiage “shall not be infringed”. There is much to be won or lost by election fraud against the people of the United States of America as those liberties and freedoms are guarded by those sworn to defend and protect the constitution and elections determine those men and women who ultimately do or do not defend and protect the constitution.

The nature of election fraud will depend on how elections are accomplished and governed, who is responsible for that governance, the biases and prejudices of those charged with conducting the operation of the election, as well as the kind of opportunities that are available to those who operate and govern the election to exploit the procedures, rules, and laws governing those elections.

Fraud is possible in a variety of ways; however, there are a few common areas of fraud germane to elections.

- Election officials and workers abusing their positions.
 - Hiding or changing information, ballots, and vote tallies in order to benefit a specific political party.
 - Excluding the lawful ballots favoring certain candidates or political parties.
 - Intentional violations of election laws.
- Third-party suppliers of ballots and voting machines or other election resource vendors taking advantage of their position to pervert the election via technologies employed in their products supplied.
- Manipulation of data, information, and votes that occurs either internally by election officials or workers, or externally by an outside actor through systems hacking. Sensitive information can be stolen by an election official, worker, or an outsider and then used to damage the election.

Fraud can happen in any election and before we describe an action as election fraud we must know what the definition of fraud actually is. Merriam-Webster defines fraud as: “intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right” or “an act of deceiving or misrepresenting”. From these two statements we conclude the act must be conscious and intentional and that it must provide a benefit or gain of advantage to the actor(s) involved.

FORENSIC AUDIT

Let’s break down the term forensic auditing first.

According to Merriam-Webster, ‘forensic’ means, “relating to or dealing with the application of scientific knowledge to legal problems”.

Therefore, when we combine it with the word ‘audit’, defined as an examination or assessment, we have a scientific examination and/or assessment of the subject of the audit with any possible legal breaches of the subject of the audit identified. Essentially, the objective of forensic auditing as applies to an election is to analyze the election procedures, findings, and results and to examine whether they are valid in the eyes of the law.

Forensic auditing of an election is focused towards the resolution of disputes and to find the answers if the procedures, findings, and results do not meet the legal requirements established for the election.

It is used, therefore, to investigate and analyze the procedures, findings, and results of an election and determine if there has been errors in the election or not; and if there are errors, are they due to fraud or honest mistake; if fraud whether it rises to intentional criminal conduct or not.

Forensic auditing of an election answers the questions of:

- “HOW” a divergence from the procedures, rules, laws governing an election took place.
- “WHERE” in the procedural events including the rules and laws governing the election the divergence took place.
- “WHAT” was the divergence that took place and whether it was an intentional divergence or not.
- “WHY” the divergence took place and the motives behind the divergence showing the intention(s) of the actors involved in the divergence.
- “WHO” caused the divergence, a single person, a group, or organizational entity.
- “WHEN” the divergence from the procedures, rules, laws governing an election took place.

Forensic auditing of an election is useful for finding out whether fraud has taken place in an election. However, forensic auditing doesn't just deal with fraud, but it can also be used in other non-fraud situations to determine the full picture of the issues impacting an election.

Whether forensic auditing of an election finds fraud or is even supposed to look into possible fraud, the absolute objective is to find and present evidence that can stand before the law. The process is aimed at finding evidence that can be presented in court to prove the findings of the audit and convict a person, group, or organizational entity of the fraud or other legal charges brought as a product of the findings of the audit.

As to the issues of election fraud:

- The relevant election laws will determine whether the act constitutes as fraud. This is determined on a case-by-case basis and the available definitions by applicable existing

case law. Forensic election auditing would always use legal definition(s) of fraud as the basis for determining whether there has been fraud or not in the election.

- The auditor cannot determine what constitutes as fraud. The forensic election auditing team should not to make judgments or determine if election fraud has taken place. The forensic election auditor's role is only to investigate and present the evidence of its findings to the court of law, which makes the ultimate decision.
- Fraud requires intentional action. Fraud cannot take place without intention and part of the forensic election auditing team's job is to determine if enough evidence to show an intentional effort to manipulate or mishandle the vote has occurred.

Forensic election auditing should be used in situations where there is a possibility of unlawful or fraudulent election procedures, rules, or actions by election officials, workers, political parties, and third party election vendors. This would occur if electors, based on information and belief that election officials, workers, political parties, and third party election vendors have engaged in illegal election activities.

METHODOLOGY OF AN FORENSIC ELECTION AUDIT

"I keep six honest serving men, They taught me all I knew, Their names are What and Why and When, And How and Where and Who" Rudyard Kipling (1902)

Planning is first and the devil is in the details. The above quote by Rudyard Kipling by no means is a mistake as it already defined the answers that a forensic election audit must provide if it is to be truly of value and of effective use. The answers to the above questions are the six honest serving men that define the necessary objective(s) of any forensic audit and especially one that deals with elections.

Before the effort can begin in earnest the investigative team must be assembled and the team must have specific qualifications in order to produce an investigation or audit that is credible and able to stand. John 8:32 “And ye shall know the truth, and the truth shall *make* you free.” The end result to be obtained is truth and it is truth that will make all parties free as any bad actors, if discovered, will be held to account.

The team must have a leader and since the product of the audit is a report and evidence that can be put forward in a court of law the correct choice for the leader of the team is an attorney. The attorney chosen should have substantial credentials that are distinguished and will command the respect of any law enforcement agency the team may interact with. A member of the judiciary would be a strong credential choice for the team leader.

The subordinate auditors and investigators should then be selected based on specific investigative qualifications and skill sets. They should be selected based on the criteria determined by the team leader. Criteria of agencies such as the BATF for forensic auditors include requirements such as being either a Certified Public Accountant (CPA) and/or Certified Fraud Examiner (CFE) [<https://www.atf.gov/careers/forensic-auditors>]. Critical skill sets for auditors and investigators are data mining with computers, review of other documents using various methods and conducting interviews of subjects of interest.

Once the team is established an operational schedule can be determined based on the needs of the audit relative to the areas of examination to be conducted in the pursuit of answers to the objective questions of who, what, why, where, when and how. A critical piece to make a part of the audit plan will be a “Basis of Estimate” (BOE) that will identify any execution risks of the audit plan and provide for alternative solution sets should potential execution risks actually manifest.

Planning is complete and it is now time for the execution of the plan. The audit will now be focused on the gathering of the evidence of how the election was conducted and what, if any, breaches of procedures, rules, and laws were made by specific actors responsible for the election process. The audit will unearth the truth of what was done during the election process and the intentions of all the actions taken by the election officials, workers, organizational entities, and third party vendors of and to the election.

Data mining is about looking for anomalies, trends and patterns in the data relating to the election. These could include the digital files available or files and datasets relating to products, suppliers and so on. As the world is increasingly moving from traditional paper based data to digital data, data mining is an important tool for forensic auditors. Data mining is often done with automated software that has been designed to notice anomalies or patterns. Occasionally, a person reviews the data and the forensic auditing team studies noticeable differences further.

A significant area of data mining revolves around the concept of Metadata. This is the information related to the election's computer programs and the specific files used. Metadata is used to identify things such as:

- The date when a file was created and whether it had been modified.
- The location of the file and whether it has changed.
- The identity of the person who has modified and changed the data or the location.

Finding and understanding the trail of the digital data files is important because it can reveal fraud. As an example, if the vote count figures are wrong, data mining can identify whether they have been wrong since the start (i.e. possibly as a result of a typing mistake) or if they have been tampered with later (i.e. changed to create stronger vote totals, pointing to a fraudulent and intentional action). Aside from the metadata, forensic auditing also uses data mining to review the data in the file and the

patterns revealed by the data. Forensic auditors can spot election fraud by data mining with actions such as:

- Evaluating the frequency of ballot tabulations and consistency of vote counts.
- Finding gaps in election ledgers or missing data files or information.
- Examining the vendor and supplier information of voting machines, including IP addresses and DNS servers.

Data mining also utilizes different mathematical formulas such as Benford's Law for spotting fraud.

Data mining should be performed on any computer or another device that is used by the election and which could include information that might help the forensic auditing team. This includes, but is not limited to devices such as personal computers, network servers, answering machines, digital cameras, fax machines, printers, and GPS systems.

Of course, information isn't always in digital format and forensic auditing must also use document reviewing strategies to spot fraud. Reviewing physical documents can be difficult for the forensic team because they need to ensure they follow the right legal procedures in accessing, storing and managing these files. For example, the audit team cannot illegally obtain documents and then use them to accuse the election officials, workers, and third party entities of fraud, everything must follow the correct and legal route.

Generally, when the forensic team receives an invitation to perform the investigation, a legal contract is formed that issues the forensic auditing team with the rights and responsibilities regarding the documents. In certain instances, the contract also has to deal with the proceedings for digital

documents and any documents that might be accessed regarding an election official, worker, or third party entity and their premises.

A large part of the document review is identifying the carbon copy of documents. This means checking whether the documents have been modified after the date they were formed or simply added in later. The review of documents uses similar techniques to data mining in finding trends and patterns. Reviewing will be more laborious if it has to be done manually but forensic auditing teams often scan and create digital data files of the documents to allow data mining.

Forensic auditing does not only rely on data. Talking to election officials, workers, and third party personnel is a crucial technique to help identify data. By interviewing the people involved in the election, different stories of the procedure followed may come up and point to the election system being fraudulent. Sometimes the fear of the investigation can cause people to talk and admit fraud, helping the forensic team to find the answers to the questions they might have.

It is crucial to ensure the interviews are conducted professionally and within the legal boundaries. The process must be coordinated with the legal teams and there must be a record of the interview (this can be used in the court as evidence, rather than have a situation of 'he said, she said'). The purpose of the interview is to identify the following things, which could point out a possibility of fraud:

- Knowledge of the information being examined.
- Opportunities to change, swap or manipulate data.
- Understanding of the procedures being used in the election.

The forensic auditing team must be good at communicating with people and use a logical approach to getting to the material facts that are the objective of the audit.

Once the forensic election auditing team has been able to gather all the evidence, it will need to report the findings. The report is often used for determining whether legal action shall be brought forward or if there is no evidence to suggest fraud has taken place. The main function of the report is to summarize the evidence and to provide a conclusion whether any irregularities were due to fraud or not. If fraud is determined or indicated, it should provide the answers to the core questions of:

- How the fraud took place?
- When it is suspected to have happened?
- Why the fraud was perpetrated?
- What the specific mechanism of fraud was?
- Who was the perpetrator of the fraud?
- Where the fraud was perpetrated?

The report should also provide the basis of recommendations for strengthening the security in the election process to prevent future election frauds.

Lastly, in the event that fraud is uncovered in the search for the truth of the election, the team must be prepared to present the evidence or truth uncovered to the trier of truth, the court system. It must as well be ready to present the finding to legislative branches of government and to the departments of justice who will be charged with prosecuting any wrong doing on the part of bad actors if the evidence so establishes.

This document sources heavily from the work of Anastasia Belyh and her October 13th, 2020 article entitled "How to Spot Fraud Using Forensic Accounting".