

During a criminal investigation of possible securities fraud committed by the senior management of a public corporation, the prosecutor has called a witness to testify before a grand jury. The witness will testify that he was an accountant for the corporation, that he dealt with its senior management on a daily basis concerning the corporation's financial disclosures to the public, and that, in his opinion, all members of the senior management knew that the disclosures were fraudulent.

Can the witness's testimony be considered by the grand jury?

- A. No, because the witness has not been qualified as an expert regarding fraudulent financial disclosures.
- B. No, because the witness's opinion about senior management's knowledge is not rationally based on his perception and would not be helpful to the grand jury.
- C. Yes, because the rules of evidence do not apply to grand jury proceedings.
- D. Yes, because the witness's opinion is rationally based on his perception and would be helpful to the grand jury.

Incorrect

Correct answer C

Collecting Statistics

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## **Explanation:**

### **When Federal Rules of Evidence do NOT\* apply**

Preliminary-question determinations

Grand jury proceedings

Search / arrest warrant determinations

Preliminary examinations in criminal cases

Extradition or rendition proceedings

Bail & other release hearings

Sentencing hearings

Probation / parole revocation hearings

\*Note that evidentiary rules regarding privilege apply to *all* proceedings, including those listed above.

Under Federal Rule of Evidence (FRE) 701, lay opinion is ordinarily admissible if it is:

rationally based on the witness's perception

helpful to clearly understanding the witness's testimony or determining a fact in issue *and* not based on scientific, technical, or other specialized knowledge **(Choices B & D)**.

And under FRE 702, a party must qualify a witness as an **expert** in a subject that pertains to an issue in question before eliciting an expert opinion from the witness **(Choice A)**.

However, the **Federal Rules of Evidence**—except those relating to privilege—**do not apply to grand jury proceedings**. Therefore, the witness's testimony *can* be considered by the grand jury regardless of whether it satisfies the criteria for lay opinion admission or constitutes an expert opinion on fraudulent financial disclosures.

### **Educational objective:**

The Federal Rules of Evidence—except those relating to privilege—do not apply to grand jury proceedings.

### **References**

Fed. R. Evid. 701 (discussing the admissibility of opinion testimony by a lay witness).

Fed. R. Evid. 702 (providing the requirements for testimony by an expert witness).

Fed. R. Evid. 1101 (stating the applicability of the Federal Rules of Evidence).

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