

A man owned an investment portfolio that, for the past several years, had consistently outperformed the stock market average. When the overall stock market precipitously declined in a single day, the man immediately contacted his financial advisor to ask about the status of his investment portfolio. The advisor lied to the man and told him that due to the decline in the stock market, the value of his account was \$250,000, an amount significantly less than what the man had anticipated. However, the decreased value was not attributable to the decline in the stock market but rather the advisor's negligence in managing the portfolio. The man demanded that his account be closed and that the remaining balance in the account be transferred to him within the next two days. The advisor agreed and, accordingly, closed the man's account and transferred the remaining balance two days later. Unbeknownst to the man, there had been a temporary recovery in the investment portfolio that had resulted in a \$5,000 increase in the man's account balance the day before his account was closed. The advisor retained the \$5,000.

In a jurisdiction that follows the common law with regard to property crimes, which crime has the advisor committed?

- A. Embezzlement.
- B. False pretenses.
- C. Larceny by trick.
- D. Theft.

## Explanation:

### Comparison of property offenses

	Actus reus	Mens rea
<b>Embezzlement</b>	Conversion of <i>lawfully</i> possessed property that belongs to another	Specific intent to defraud/permanently deprive
<b>Larceny</b>	<i>Unlawful</i> taking & carrying away of another's property	
<b>Larceny by trick</b>	Knowingly misrepresenting a material fact to obtain <i>possession</i> of another's property	
<b>False pretenses</b>	Knowingly misrepresenting a material fact to obtain <i>title</i> to another's property	

Embezzlement is:

The **conversion** of lawfully possessed property that belongs to another with the specific intent to defraud the owner of that property.

Conversion occurs when the person holding the property **substantially interferes** with the owner's right to the property—eg, by selling, damaging, or unreasonably withholding possession of the property. As a result, a conversion can be established by showing that the **owner demanded the return** of the property and the **defendant failed to comply** with that demand.\*

Here, the financial advisor lawfully possessed the man's account. The man requested the return of the balance, but the advisor failed to fully comply with that request because she retained \$5,000. This substantially interfered with the man's right to those funds, and there is no indication that she intended to return them. Therefore, the advisor has committed embezzlement.

\*Although an owner can establish a conversion by showing that a demand was made but ignored by the defendant, an owner is generally not required to demand the return of the property for a defendant's acts to constitute conversion.

**(Choice B)** False pretenses is obtaining *legal title* to another's property by knowingly making a false representation of a past or present material fact with the specific intent to defraud. Here, while the advisor falsely represented that the decline in the stock market caused the decrease in the man's account, that representation was not made to obtain title to the \$5,000.

**(Choice C)** Larceny by trick is obtaining *possession* of another's property by knowingly misrepresenting a past or present material fact. But here, the misrepresentation was not made to obtain possession of the man's money.

**(Choice D)** Under the Model Penal Code and many state criminal codes, common-law property offenses such as larceny, embezzlement, and false pretenses are treated as a single statutory crime of **theft**. However, this is a common-law jurisdiction, so the offense of theft is inapplicable.

**Educational objective:**

Embezzlement is the conversion of lawfully possessed property that belongs to another with the specific intent to defraud the owner of that property. Conversion can be established by proving that the defendant failed to comply with the owner's demand for return of the property.