

THE NATIONAL LAW JOURNAL

DAILY UPDATES AT NLJ.COM

THE NEWSPAPER FOR THE LEGAL PROFESSION

Monday, March 24, 2008

ALM

IN FOCUS

WHITE-COLLAR CRIME

Learning from high-profile perjury cases

Defendants should know how to talk to investigators, grand juries.

By Lee G. Dunst
SPECIAL TO THE NATIONAL LAW JOURNAL

THE RECENT SPATE OF criminal perjury cases filed by federal prosecutors—which has ensnared a wide spectrum of defendants including, for example, current Major League Baseball home run leader Barry Bonds, former Olympic track star Marion Jones and former Washington political insider I. Lewis “Scooter” Libby Jr.—provides a very useful reminder for white-collar defense counsel and their clients about what to do (and not to do) when they sit down and start talking with government investigators.

Many of these recent cases filed by the U.S. Department of Justice involve exclusively perjury or obstruction of justice, in which no actual criminal charges were filed relating to the conduct underlying the government investigation. As the old saying goes, “the cover-up can be worse than the crime”—words that ring true when the average sentence for these so-called “administration of justice” crimes can be as much as one year in prison. See U.S. Sentencing Commission, 2006 Datafile, USSCFY06, Table 13; “Former Olympic Champion Marion Jones-Thompson Sentenced to 6 Months In Prison For Making False Statements In Two Federal Criminal Investigations,” Press release from the U.S. attorney for the Southern District of New York (Jan. 11, 2008).

Thus, while the alleged perjury of Bonds, for example, may not seem to have relevance to the white-collar world, there certainly are lessons that

can be drawn from his and other recent perjury cases to help corporate executives and others avoid becoming ensnared in a perjury case as a result of meeting with government agents or federal prosecutors or when testifying before a grand jury.

At the outset, it is important to keep in mind a number of important principles before bringing a white-collar client in to sit down and talk as part of a government investigation, in order to avoid a possible perjury charge down the road.

Federal prosecutors have numerous weapons in their arsenal to go after a witness who they believe may have made a false statement—either in a meeting with government agents or prosecutors or when testifying before the grand jury. The primary charging tools are the federal perjury statutes, the elements of which are that the defendant testified under oath or made an affirmation; that the testimony was false; that at the time of such testimony, the defendant knew the testimony was false; and that the false testimony was material. 18 U.S.C. 1621, 1623. Prosecutors can seek perjury charges against a witness who makes material false statements under oath in an official federal proceeding (under § 1621) or in a grand jury proceeding or in any proceeding relating to a federal court action (under § 1623).

Speaking to government agents

However, the existence of some kind of official proceeding or court action is not necessary for prosecutors to file criminal charges if a witness has made a false statement. For example, the federal false statement statute is closely akin to the perjury statutes and criminalizes false statements in any matter within the jurisdiction of a federal agency or department. 18 U.S.C. 1001. Under this statute, the false statement need not be under oath and must be directed to a government representative, such as, for example, an investigating agent, a federal prosecutor or an official of the U.S. Securities and Exchange Commission (SEC). See, e.g., *U.S. v. Jones*,

Information ¶¶ 6, 12, No. S6-05-CR-1067 (S.D.N.Y. Oct. 5, 2007) (charges that the defendant made false statements to various government officials, including an Internal Revenue Service agent and an Immigration and Customs Enforcement agent).

This is especially important for witnesses to understand if they choose to meet with federal prosecutors or agents pursuant to a proffer agreement (a so-called “Queen for a Day Agreement”), under which the witness’s statements cannot be used against him or her in any subsequent prosecution—with the important exception of a prosecution for perjury or false statements made in the meeting with government officials. In fact, prosecutors and SEC attorneys make this point clear to witnesses by advising them in the proffer agreement that statements made during the meeting can be used for purposes of a prosecution for making false statements. See, e.g., *U.S. v. Jones*, Information ¶ 6, No. S6-05-CR-1067 (S.D.N.Y. Oct. 5, 2007).

Similarly, witnesses testifying before a grand jury pursuant to an order of immunity are specifically advised that their testimony cannot be used against them in any criminal case “except for a prosecution for perjury.” See, e.g., *U.S. v. Bonds*, Indictment ¶ 8, No. 07-CR-0732 (N.D. Calif. Nov. 15, 2007).

One of the key elements of a federal perjury charge is materiality—to wit, the false statement must pose the potential to interfere with the investigative proceeding. See, e.g., *U.S. v. Waldemer*, 50 F.3d 1379, 1382 (7th Cir. 1995). Needless to say, this is not a very difficult standard for prosecutors to satisfy and, as a result, a witness easily could run afoul of the materiality threshold with even the most innocuous false statement. See, e.g., *U.S. v. Richardson*, 596 F.2d 157, 165 (6th Cir. 1979) (testimony is material if a truthful statement might have assisted or influenced the grand jury in its investigation). However, there is no requirement that the false statement at issues should actually have interfered with or even influenced the proceeding.

Statements that are not under oath can still be actionable.

Lee G. Dunst is a partner in the New York office of Los Angeles-based Gibson, Dunn & Crutcher, and he concentrates in civil, regulatory and white-collar criminal matters. He previously served as an assistant U.S. attorney for the Eastern District of New York, and can be reached at ldunst@gibsondunn.com.

The standard for scienter

One of the central questions in many of these cases is whether the witness knew his or her statement was false so as to trigger the filing of a perjury charge. This is hotly contested in many cases, but the legal standard favors the government. The federal perjury statutes require that the defendant acted willfully (§ 1621) or with knowledge that the testimony was false (§ 1623). For all intents and purposes, the standard is the same under these two perjury statutes, as well as the false statement statute. Thus, perjury cannot be the result of confusion, mistake or faulty memory by the witness. See, e.g., *U.S. v. Fawley*, 137 F.3d 458, 466 (7th Cir. 1998). However, if a defendant is deliberately ignorant or willfully blind to the fact that his or her statement is false, then he or she cannot claim lack of sufficient intent to be found guilty of perjury. See, e.g., *id.* at 466-67.

In fact, the Department of Justice has advised that a witness claiming not to remember still may be prosecuted for perjury under certain circumstances. See U.S. Attorney's Manual, Title 9, Criminal Resource Manual 1753. This actually appears to be the basis for one of the perjury charges in the Bonds case. The prosecutor asked Bonds in the grand jury, "you weren't getting this flax seed oil stuff during that period of time [January 2002]" and Bonds testified, "[n]ot that I can recall. Like I say, I could be wrong. But I'm—I'm—going from my recollection it was, like in the 2002 time and 2003 season." *U.S. v. Bonds*, Indictment ¶ 17, No. 07-CR-0732 (N.D. Calif. Nov. 15, 2007).

However, when proceeding under this theory, the prosecutor carries the burden of demonstrating that the witness once knew the fact at issue and that he or she must have remembered it at the time of the witness's subsequent testimony. See *U.S. v. Chen*, 933 F.2d 793, 795 (9th Cir. 1991). However, the government may rely on circumstantial evidence to meet its burden here, as well as (if appropriate) to point to the closeness in time between the event at issue and the testimony to imply that the witness must have remembered at the time of his or her testimony. See, e.g., *U.S. v. Libby*, Indictment, No. 05-CR-394, at 18-19 (D. D.C. Oct. 28, 2005) (perjury charges relating to Libby's testimony concerning his claimed lack of knowledge that Joseph Wilson's wife Valerie Plame worked for the CIA as expressed during a conversation with Tim Russert of NBC News because "[a]t the time of the conversation [with Russert], Libby was well aware that Wilson's wife worked at the CIA").

Corroborating evidence

If the feds decide to file perjury charges, then they must demonstrate that the statement at issue is actually false. In § 1621 cases, this is referred to as the "two-witness rule," suggesting that the government must have two witnesses to corroborate the falsehood of the statement at issue. See, e.g., *Hammer v. U.S.*, 271 U.S. 620, 626 (1926). However, the title of the rule is a misnomer, as the courts really view this as a

corroborating evidence rule—that is, if the government is relying upon oral testimony to demonstrate the falsehood of the defendant's statement, then the government must offer some additional corroboration of this testimony. See, e.g., *U.S. v. Stewart*, 433 F.3d 273, 315-16 (2d Cir. 2006).

The elastic nature of this corroboration rule played out in the recent perjury case against Peter Bacanovic, Martha Stewart's former stockbroker. In upholding his perjury conviction, the 2d U.S. Circuit Court of Appeals concluded that the "two-witness rule" was satisfied on the basis of the trial testimony of Stewart's secretary as corroborated not by a second witness, but merely by a business record (specifically, a telephone message entry previously made by the same testifying secretary). *Id.* at 315 ("The rule is satisfied by the direct testimony of a second witness or by other evidence of independent probative value, circumstantial or direct, which is of a quality to assure that a guilty verdict is solidly founded").

It is important to note that this corroboration rule has been removed from § 1623 perjury cases involving false testimony in court or grand jury proceedings, as the statute specifically provides that "[i]t shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence." 18 U.S.C. 1623(e). Thus, the government bears a much lighter burden here and needs only the barest amount of evidence to demonstrate the falsity of the witness's statement.

If, as it turns out, one has made a false statement in a proceeding relating to a court case or grand jury proceeding, there is still a way for the witness to avoid federal perjury charges under § 1623—but he or she is going to have to act fast. The federal perjury statute provides a "safe harbor" for witnesses who recant their prior false testimony and admit that the prior statement was false, but they must do so during the same continuous proceeding, such as testimony during the same trial or before the same grand jury. See 18 U.S.C. 1623(d). Thus, if the witness waits until after the close of testimony at a trial or after the end of a grand jury proceeding, the witness will lose this opportunity to prevent the filing of a perjury charges.

Therefore, it is imperative for counsel to conduct a thorough debriefing of his or her client immediately after such testimony to ensure that no false statements were made, so as to correct them as soon as possible. Moreover, a witness seeking to recant in later testimony simply is not permitted to play any games with his or her words. The admission of the prior falsity must be clear and unambiguous and, if not, it fails as a defense to a perjury charge under § 1623. Also, it should be recognized that there is no safe harbor for recanting false statements when faced with a § 1621 or § 1001 charge.

Other potential defenses

In addition to recantation, there are other

possible ways for a witness to avoid a perjury conviction, but these defenses are an uphill climb in most cases.

On its face, one potential defense is the requirement that the allegedly false statement be clear and unambiguous. See *U.S. v. DeZam*, 157 F.3d 1042, 1049 (2d Cir. 1998). However, a smart prosecutor can snatch this defense away from a witness by posing clear questions and then repeating them again and again to lock the witness into that statement so as to undercut any subsequent claim of ambiguity. See, e.g., *U.S. v. Bonds*, Indictment ¶ 11, No. 07-CR-0732 (N.D. Calif. Nov. 15, 2007) (under repeated questioning, Barry Bonds testified at least five times that he denied taking steroids). Thus, ambiguity will not save a defendant if he or she understands the questions and answers them falsely. See, e.g., *U.S. v. McKenna*, 327 F.3d 830, 841 (9th Cir. 2003).

One last word should be made about one of the more popular defense claims—the existence of a so-called "perjury trap." The theory here is that it is improper for the government to question a witness before the grand jury for the sole purpose of eliciting false testimony under oath. See, e.g., *Brown v. U.S.*, 245 F.3d 830, 837 (9th Cir. 2003). However, the government's burden to defeat this claim is de minimis, as "the existence of a legitimate basis for an investigation and for particular questions answered falsely precludes any application of the perjury trap doctrine." *U.S. v. Regan*, 103 F.3d 1073, 1079 (2d Cir. 1997). Thus, the perjury trap defense poses no real problem in most prosecutions, as the government can easily identify some valid reason for the grand jury's inquiry. In fact, the Department of Justice has recognized that "[t]he [perjury trap] defense is rarely proven, even though the claim is relatively common when grand jury testimony gives rise to perjury charges." U.S. Attorney's Manual, Title 9, Criminal Resource Manual 1756.

So how can counsel try to prevent his or her client from getting into a perjury problem in the first place? At the outset of the representation, it is imperative to discuss all these issues with the client to ensure that he or she understands the rules of the road and the risks of doing anything other than telling the truth when making statements during the course of a government investigation. The recent high-profile perjury prosecutions are useful examples to point out to white-collar clients in demonstrating that prosecutors may find it easier to bring these cases than to file charges involving the underlying conduct that was the subject of the federal investigation in the first place. **NJ**

Reprinted with permission from the March 24, 2008 edition of The National Law Journal © 2008 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or visit www.almreprints.com. # 005-03-08-0015

'Safe harbor' for recanting testimony requires acting fast.

Attorneys should discuss every issue with their clients.