New York Law Journal
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JANUARY 12, 2015

Combating the Perjury Problem in Civil Litigation

By Harry H. Rimm and Clark A. Freeman

Every experienced litigator knows that perjury in civil cases is common and too often goes unpunished. Prof. Alan Dershowitz once testified before the House of Representatives Judiciary Committee that "no felony is committed more frequently in this country than the genre of perjury and false statements."[1] Unfortunately, he may be right. Our legal system depends on the veracity of sworn testimony.[2] Witnesses affirm or take an oath to tell the truth. If that oath or affirmation is to mean anything, there must be consequences for witnesses who violate it. When perjury goes unpunished, it undermines our legal system and public confidence in that system.

We acknowledge that our adversarial judicial system is designed to correct a certain amount of perjury. "[T]he function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses."[3] Nevertheless, judges should not rely solely on their ability to assess self-interested testimony, giving it only the weight that it deserves, or on a jury's ability to follow instructions regarding witness credibility.

Current methods for punishing dishonest witnesses—and deterring would-be perjurers—have proved inadequate. In this article, we cover the tools that courts have at their disposal to police witness perjury in deposition and in-court testimony and provide some suggestions on ways to do it better. We note that our focus is on cases of clear perjury. It sometimes can be difficult to determine whether a witness has committed perjury, as there are many shades of gray. We leave how to deal with mere suspicious testimony for another day.

Criminal Prosecution

Perjury is a serious crime with harsh penalties. Under federal law, whoever knowingly makes a false statement under oath "in any proceeding before or ancillary to any court or grand jury of the United States … shall be fined … or imprisoned not more than five years, or both."[4] Similarly, under New York law, giving false testimony under oath is punishable by up to seven years in prison.[5]

The threat of criminal prosecution should deter witnesses from lying under oath, but its deterrent effect is compromised by the infrequency of prosecutions. In the one-year period beginning Oct. 1, 2009 through Sept. 30, 2010, the latest available period in the Federal Justice Statistics Series, only .2 percent of the matters referred to U.S. attorneys were referred for "perjury, contempt, and intimidation" offenses, and the U.S. attorneys declined to prosecute 60.1 percent of the perjury, contempt and intimidation cases referred to them.[6] In the year 2012, the latest available year from the Federal Criminal Processing Statistics, only .36 percent of federal criminal cases filed involved perjury, contempt or intimidation offenses.[7] These statistics do not indicate how many of those prosecutions were for lying under oath in a civil proceeding.

This is not to say that witnesses are not prosecuted for lying under oath at depositions or in court. They are—both at the federal and state levels.[8] State court judges, as well as U.S. magistrate judges, district judges and circuit judges

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can and do refer matters to the U.S. attorneys for investigation and prosecution.[9]

Rules of Procedure

The Federal Rules of Civil Procedure provide for sanctions in a variety of situations. None of the Rules, however, is ideally suited for sanctioning perjury at depositions or in court.

Rule 37 of the Federal Rules is the most obvious choice. If a party fails to cooperate in discovery, the opposing party may seek a court order compelling the recalcitrant party's compliance. If the party fails to comply, then the aggrieved party may move for sanctions. Possible sanctions include an adverse inference, striking a pleading, claim or defense, staying the proceeding until compliance, dismissing the action in whole or in part, entering a default judgment and treating non-compliance as contempt of court.

Rule 37 falls short, however, as a tool for punishing perjury in certain important respects. By its terms, it deals only with discovery sanctions and seems inapplicable to misconduct at trial. In addition, it requires a party to defy a court order before the court can impose sanctions.[10] A party generally does not violate a specific court order when he or she lies under oath.

Rule 41 of the Federal Rules provides that if a party fails to comply with the Federal Rules or a court order, the opposing party "may move to dismiss the action or any claim against it." Such a dismissal "operates as an adjudication on the merits." Rule 41 would be a useful device for punishing perjury if the Federal Rules explicitly prohibited witnesses from lying in depositions or on the witness stand.

Rule 11 may not be very helpful either, as it deals primarily with attorney representations to the court, not perjury by witnesses. At least one court, however, has tried to force perjured testimony within the scope of Rule 11.[11]

New York's civil rules are better, but not perfect. Section 3126 of the CPLR provides: "If any party … refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just." It is broader than Rule 37 because it allows sanctions where a court finds that a party or witness ought to have disclosed information, not just where a party or witness violates a court order. Like its federal counterpart, though, it is not designed to deal specifically with perjury. Nevertheless, New York courts sometimes do use CPLR §3126 to sanction perjury.[12]

Harry H. Rimm and Clark A. Freeman of Sullivan & Worcester discuss tools that courts have at their disposal to police witness perjury in deposition and in-court testimony and provide some suggestions on ways to do it better.

Court's Inherent Authority

Separate and apart from procedural rules, courts are vested with inherent authority to punish misconduct by parties and witnesses.[13] This inherent authority is the best tool that a court has to punish and deter perjury. It is a broad power that allows a court to impose a variety of sanctions, including dismissal of an action, in situations not covered by any rule. While isolated instances of perjury may not warrant dismissal, "when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process, it can fairly be said that he has forfeited his right to have his claim decided on the merits."[14]

That a court's inherent authority is broad and ill-defined is both a strength and a weakness. "Because the[] [inherent] powers spring from the very function of the court, they 'are shielded from direct democratic controls, [and] must be exercised with restraint and discretion.'"[15]

Perjury in Criminal Proceedings

Interestingly, there are more mechanisms for policing perjury in the criminal context. For example, "Sentencing Guideline 3C1.1 provides for a two-level increase in the offense level if a defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice. An example of obstructive conduct is committing, suborning, or attempting to suborn perjury."[16]

Agreements between the government and a defendant or a witness contain provisions subjecting the latter to penalties for perjury. Plea agreements typically allow the government to

seek an enhancement for a defendant's obstruction of justice in accordance with U.S.S.G. §3C1.1. Proffer agreements provide protection to a defendant or witness for statements made, except in connection with a prosecution for perjury. A Financial Affidavit for appointed counsel in federal court must be signed under penalty of perjury. Finally, the first question asked by the court at a guilty plea—following a defendant being sworn in—is whether the defendant understands that he is now under oath and that any false statements given might result in a prosecution for perjury.

Possible Improvements

The lack of more measures in the civil litigation context is surprising given the importance of oral testimony in our legal system. It is time to consider new ways to reduce the incidence of perjury. To accomplish that goal, every player in the system—judges, prosecutors, counsel and the parties themselves—must be vigilant and take increased care to prevent and correct perjury whenever possible. In addition, new procedural rules are needed.

Judges at all levels of the federal and state judiciaries should refer more cases to increase the deterrent effect inherent in prosecutions. Prosecutors must continue to investigate these referrals and pursue more prosecutions. To increase resources available for such prosecutions, U.S. attorneys, the state attorney general and district attorneys might consider, for example, allowing their colleagues from within their offices' civil divisions to assist, at the very least, with perjury investigations, if not the prosecutions themselves.

Another option is to create a panel to investigate and report on cases of suspected perjury in order to assist courts in determining whether to impose sanctions or to assist prosecutors in deciding whether to prosecute. Lawyer disciplinary committees provide one example of how such a committee could be structured.

Each of the Second Circuit, the U.S. District Court for the Southern District of New York and the Departments of the New York Supreme Court, Appellate Division, has a lawyer disciplinary committee. In the First Department, the committee is comprised of lawyers and non-lawyers, all of whom are appointed by the First Department. The committee receives complaints and investigates them in multiple phases, occasionally with formal hearings. If the committee determines that sanctions are warranted, it drafts a report and recommendation and refers the matter to the First Department for consideration.

A committee for investigating perjury could operate in similar fashion. It could investigate and report on cases upon referral from a court. Committee members could be appointed by the courts and/or by one or more bar associations. There is some precedent for such a committee; the New York City Bar Association and the Federal Bar Council collaborated some years ago to work on a Joint Committee on Judicial Conduct that received and investigated complaints about alleged improper conduct of federal judges. While an investigative committee admittedly could create problems of its own, the potential obstacles are not insurmountable.

Another option is to form something akin to the Criminal Justice Act Panel—a panel of attorneys who could be called upon to assist with perjury investigations and/or prosecutions. Appointing these attorneys would allow prosecutors to pursue more perjury cases than they can with their current resources. While there might be a problem with this idea at the federal level due to Department of Justice regulations, there would be fewer impediments at the state level. In fact, the New York County District Attorney's Office currently has a program through which practicing attorneys are deputized as special assistant district attorneys to prosecute criminal appeals on a pro bono basis.

Counsel, while being mindful of Rule 3.4 of the New York Rules of Professional Conduct (prohibiting threats of criminal prosecution solely in order to obtain an advantage in a civil matter) and 28 U.S.C. §1927 (prohibiting vexatious multiplication of proceedings), could use existing procedural rules more effectively by bringing clear perjury from deposition testimony to a court's attention. Counsel also must carefully prepare parties and witnesses so that they are more likely not to give false testimony.

New procedural rules also are needed. The Federal Rules of Civil Procedure could contain a rule that specifically addresses

perjury during discovery and in court. Such a rule would codify, but not replace, the court's inherent authority. It would define more clearly the authority of the court and impose a measure of control that would free the court from some of the restraint it necessarily must exercise in acting under its inherent power.

To that end, the rule could lay out the procedures and burden of proof to find perjury, as well as the available sanctions. The procedural protections would vary with the severity of the sanctions, and the severity of the sanctions would vary with the materiality of the false statements and the extent of the witness's wrongdoing. The rule also could provide for a formal fee shifting mechanism, whereby a losing party that has committed perjury may be required to pay some or all of the opposing party's costs and attorney fees.

Conclusion

Maintaining the effectiveness of and the citizenry's confidence in our system of justice is critical. To that end, the Second Circuit recently announced a program of public engagement and civic education designed to bring its constituencies into the Circuit's courthouses to educate them about the justice system, to share ideas for improving the administration of justice in the federal courts and to empower them as citizens to support the federal judiciary. Reducing perjury and punishing those who opt to do it is an important part of securing public support and engagement.

Endnotes:

1. Testimony of Alan M. Dershowitz, House of Representatives Judiciary Committee, Dec. 1, 1998.

2. *McMunn v. Mem'l Sloan-Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002).

3. *In re Michael*, 326 U.S. 224, 227-28 (1945).

4. 18 U.S.C. §1623; see also 18 U.S.C. §§1621-22.

5. NY Penal Law §§70.00, 210.15.

6. Mark Motivans, U.S. Department of Justice, Bureau of Justice Statistics, Federal Justice Statistics, 2010—Statistical Tables 9, 11 (2013), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4861.

7. Bureau of Justice Statistics, Federal Justice Statistics Program, http://www.bjs.gov/fjsrc/ (search run Dec. 15, 2014).

8. See, e.g., *United States v. Kross*, 14 F.3d 751, 752 (2d Cir. 1994); *People v. Weiss*, 99 A.D.3d 1035, 1037-40 (3d Dep't 2012).

9. State: see, e.g., *Carroll v. Gammerman*, 193 A.D.2d 202, 206 (1st Dep't 1993); *Riverbay v. Houston*, L&T 8785/08, 2009 WL 921355, at *5 (N.Y. Civ. Ct. April 2, 2009); see also *Argent Mortg. v. Mentesana*, No. 25828/2004, 2009 WL 1110635, at *4 (N.Y. Sup. April 17, 2009). Federal: see, e.g., *Negrete v. Nat'l R.R. Passenger*, 547 F.3d 721, 722 (7th Cir. 2008) (circuit panel); *United States v. Cornielle*, 171 F.3d 748, 750 (2d Cir. 1999) (district judge); *Ades v. 57th St. Laser Cosmetica*, No. 11 CIV. 8800 (KNF), 2013 WL 2449185, at *13 (S.D.N.Y. June 6, 2013) (magistrate judge).

10. See, e.g., *McMunn*, 191 F. Supp. 2d at 442.

11. See, e.g., *Bower v. Weisman*, 674 F. Supp. 109, 112 (S.D.N.Y. 1987).

12. See, e.g., *317 W. 87 Assocs. v. Dannenberg*, 159 A.D.2d 245, 245-46 (1st Dep't 1990).

13. *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 318 (2014) (citing *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)).

14. *McMunn*, 191 F. Supp. 2d at 445.

15. *Bower*, 674 F. Supp. at 112 (quoting *Roadway Exp. v Piper*, 447 U.S. 752, 764 (1980)); *Chambers v. NASCO*, 501 U.S. 32, 44-45 (1991).

16. *United States v. Armstrong*, 620 F.3d 1172, 1176 (9th Cir. 2010) (quoting U.S.S.G. § 3C1.1 cmt. n.4(b)) (internal citation and quotation marks omitted); *United States v. Salim*, 549 F.3d 67, 73-75 (2d Cir. 2008).