

White Collar Defense Advisory: Avoiding Charges of Perjury and False Statements

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The recent federal indictment of baseball's falling star Roger Clemens for lying under oath to Congress when he denied using performance-enhancing drugs should be a reminder to high-profile athletes and white collar executives alike that the cover-up can be far worse than the underlying conduct. Government prosecutors can—and do—bring perjury and false statement charges without ever charging the individual with the underlying conduct that was the focus of their investigation. Clemens has never been charged with using illegal, performance-enhancing drugs, and may never have faced prosecution had he not voluntarily testified before Congress. He now faces a maximum 30-year prison term and a \$1.5 million fine.

Other high-profile individuals have suffered similar fates in recent years, including Lewis "Scooter" Libby, who was found guilty in 2007 of lying about his role in leaking an undercover CIA officer's identity. Libby was convicted of perjury, obstructing a government investigation, and making false statements to the FBI. Libby was sentenced to 30 months in prison, two years of probation, and a \$250,000 fine, even though he was never charged with leaking the information. In Massachusetts, Thomas Finneran, former Speaker of the Massachusetts House of Representatives, was indicted on three counts of perjury and one count of obstruction of justice, accused of giving false testimony under oath in a civil suit brought by voting rights groups seeking to overturn a controversial redistricting plan. Finneran agreed to plead guilty to obstruction of justice in exchange for the government's dropping the perjury charges. Along with a \$25,000 fine, he later lost his \$500,000-a-year job, had his state pension suspended, and was stripped of his license to practice law.

Perjury charges are not reserved for the famous and powerful; the government also makes examples of ordinary citizens who give statements or testify during investigations. In 2009, federal prosecutors indicted Erica Boylan—a 31-year-old Boston Fire Department human resources clerk responsible for processing disability pension applications—for lying to a federal grand jury when she denied under oath that firefighters asked her to help them collect more pay by stalling the processing of their pension applications. Boylan plead guilty to both perjury and obstruction of justice, and was sentenced to two years of probation and 200 hours of community service.

Government Tools to Prosecute False Statements

Federal prosecutors have a number of powerful weapons to use against individuals they believe made a false statement, whether a statement was made while under oath in an official proceeding, or during interviews with government agents or prosecutors.

Statements made while under oath during an official proceeding, such as in court, before a grand jury, before a Congressional committee or at a deposition, are prosecuted under the federal perjury statutes. *Each* perjury count carries a maximum five-year prison term and/or a fine up to \$250,000.

The federal false statement statute allows prosecutors to file criminal charges for false statements made *outside* of such official proceedings, where the defendant was *not* under oath, so long as the statement concerns a matter within the jurisdiction of a government agency or department and is made to a government representative, such as an FBI agent, a federal prosecutor, or an IRS official. Each false statement count also carries a maximum five-year prison term and a \$250,000 fine.

Minimizing Risk of Prosecution

Although perjury and false statement cases are not always easy for the government to prove, that does not stop prosecutors from trying. Anyone called to testify under oath or give a statement to a government investigator should keep the following rules in mind to minimize the risk that something they say can later be used to prosecute them for either perjury or false statements:

- **Tell the truth.** Obvious, but worthy of repeating. Don't tell the questioner what they want to hear, just tell the truth.
- **Answer only the question asked, with as few words as possible.** Don't expound upon your answers with long descriptions. Restrict your answers to brief, but responsive, statements—a simple yes or no, if appropriate. The more detail you provide, the more likely you will say something that could come back to haunt you.
- **Don't overstate.** Avoid, where possible, use of absolute terms, such as “always” or “never,” which may unnecessarily put you into a corner. Resist the questioner's attempts to force you to accept such absolute characterizations of your testimony or statement.
- **Ask for clarification.** If you are asked a question that you are not sure you understand, ask for further clarification. You don't have to answer what you don't understand; doing so increases the risk that you say something misleading.
- **Know what you are talking about.** Make sure that you know what you are talking about before you give an answer from your own experience or observations. Don't speculate or exaggerate, even if it is a topic you believe you should know more about.
- **Answer “I don't recall” if you truly don't recall.** A federal perjury charge requires that the defendant know the testimony was false when given, thus, perjury cannot result if the defendant has no memory of an event about which he or she is being questioned. However, an untruthful answer as to recollection can still form the basis for a perjury charge.
- **Remember the limitations of immunity.** Immunity from prosecution—often granted in return for your truthful statements to government agents or testimony under oath—does not shield you against prosecution for lying. Such grants of immunity always include an exception for perjury or false statements.
- **Move fast if you want to take it back.** The federal perjury statute provides a “safe harbor” for witnesses to recant a prior false statement and admit it was false, but it must

be done before the close of the particular proceeding, such as the grand jury or trial testimony in which the false statement was made.

- **Get a lawyer.** You have a constitutional right to speak to an attorney before talking to the government. No adverse inference can or will be drawn from invoking this right. Retain competent counsel to prepare you for and, if appropriate, represent you at interviews and during testimony.

Although high-profile perjury prosecutions of famous athletes and high-level government insiders might seem far removed from everyday business, in this age of increased government oversight, corporate executives and others who testify under oath or respond to questions from government investigators should tread cautiously to avoid later accusations of perjury or false statements. The government can, and will, bring such charges and seek strict penalties, including imprisonment, even where no underlying crime was committed.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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