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

Rules of Procedure

The Federal Rules of Civil Pro-
cedure provide for sanctions in a
variety of situations. None of the
Rules, however, is ideally suited
for sanctioning perjury at deposi-
tions or in court.

Rule 37 of the Federal Rules
is the most obvious choice. If a
party fails to cooperate in dis-
covery, 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 sanc-
tions include an adverse infer-
ence, striking a pleading, claim or
defense, staying the proceeding
until compliance, dismissing the
action in whole or in part, enter-
ing a default judgment and treat-
ing 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 dis-
covery sanctions and seems inap-
plicable 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 pro-
vides 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 deposi-
tions 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 bet-
ter, 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 vio-
lates a court order. Like its fed-
eral counterpart, though, it is not
designed to deal specifically with
perjury. Nevertheless, New York
courts sometimes do use CPLR
§3126 to sanction perjury.12

Court’s Inherent Authority

Separate and apart from pro-
cedural rules, courts are vested
with inherent authority to punish
misconduct by parties and wit-
tesses.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 author-
ity 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 exam-
ple, “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 jus-
tice. An example of obstructive
conduct is committing, suborn-
ing, or attempting to suborn per-
jury.”16

Agreements between the gov-
ernment and a defendant or a
witness contain provisions sub-
jecting the latter to penalties for
perjury. Plea agreements typi-
cally 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:**


5. NY Penal Law §§70.00, 210.15.


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


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).