

To Tell the Truth: A Qui Tam Action for Perjury is Necessary to Protect the Integrity of the Civil Judicial System

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INTRODUCTION

Trials have often been described as a "search for the truth." Many of the judicial system's procedural and substantive rules seek to serve that end. The requirements of the Federal Rules of Civil Procedure and the Federal Rules of Evidence, as well as those inherent in oath-taking and cross-examination, all aim to ensure that the search for the truth will proceed efficiently and effectively. Despite the procedural and substantive tools intended to prevent and expose perjury, many commentators believe that perjury has become increasingly common and tolerated in modern civil litigation. The reasons for the increased incidence of perjury are certainly multifaceted, but include both society-wide changes and specific changes to the civil litigation system. Social changes in the perception of truthfulness have coincided with important changes in the civil litigation system. We have become an extraordinarily litigious society and jury verdicts dwarf those of past generations. The financial incentives to lie during modern high stakes civil litigation has never been greater for the parties, their paid expert witnesses and the attorneys. Professional experts, seeking repeat business in future cases from the parties and attorneys they assist, know they are valued more for their ability to be "effective" than for the reliability of the data and methodology supporting their opinions or diagnoses. Attorneys retained on a contingency fee basis or financially wedded to a few repeat corporate clients also have a greater incentive to avoid "knowing" when clients and witnesses commit perjury, and to ignore the perjury if they become aware of it.

The solution proposed by this article is a civil cause of action that will employ private attorneys to serve as defenders of the sanctity of the judicial system, rather than a civil cause of action that seeks to recover damages suffered by a party to the prior litigation. The proposed Model Civil Perjury Act (hereinafter "the MCPA") features a *qui tam* provision that would allow anyone with knowledge of perjury in a civil case to bring a civil cause of action on behalf of the jurisdiction where the perjury occurred and to recover a civil penalty for each instance of perjury proven by clear and convincing evidence. This private attorney general action is modeled after the Federal False Claims Act, which empowers private persons with knowledge of those defrauding the government to bring a civil suit on behalf of the United States government to recover a civil penalty and triple actual damages.

Truth is the Currency of the Courts.

- The judiciary has neither the force of the executive branch nor the purse of the legislature, "but merely judgment, and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Alexander Hamilton*
- Perjury undermines the fundamental truth-seeking process of the courts and the integrity and legitimacy of the judicial process.
- The MCPA protects the integrity and honor of the legal system by making only the most modest of demands upon witnesses: to tell the truth.

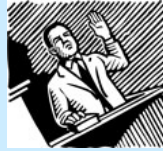
IS PERJURY IN CIVIL LITIGATION A PROBLEM?

As one prosecutor put it, "If perjury were water, the people in civil court would be drowning."

"Scarcely a trial occurs in which some witness does not lie." Alan M. Dershowitz (quoting an anonymous Judge)

"The problem is so pervasive that it has gotten dangerous. I would be hard-pressed to tell you about a case in the past five years in which I believed that every witness and every lawyer told me the complete truth." Marvin H. Shoob, a U.S. District Court Judge in Atlanta.

TOOLS TO PREVENT PERJURY



1. The Oath

•Under the common law atheists and others "insensible to the obligation of an oath from defect of religious sentiment and belief were incompetent to testify as witnesses." *State v. Elliot*, 45 Iowa 486, 489 (Iowa 1877)

FED R. EVID 603

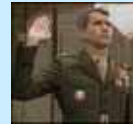
The rule seeks to preserve the integrity of the judicial process in two ways:

1. an appeal to the witness's conscience
2. witness's apprehension of criminal punishment for perjury



"Even the most dastardly scoundrels, cheats and liars are generally competent to testify." *United States v. Zizzo*, 120 F.3d 1338, 1347 (7th Cir 1997)

Can the legal system depend on an appeal to conscience in the "Post-Truth Era"?



2. Criminal Punishment.

The Risk of Criminal Punishment for Perjury in a Civil Case is Too Remote to be Effective.

Increasing the risk of punishment has a greater deterrent effect than does increasing the severity of the punishment

83,530 criminal defendants in U.S. District Courts only 88 were charged with perjury.

"Prosecutors say they have so many drug cases, so many white-collar criminal cases, so many bank robberies, that perjury falls to the bottom of the priority list," U.S. District Court Judge Zita L. Weinshienk

3. CROSS EXAMINATION - Is cross examination effective with expert witnesses?

- Opinions as to the ultimate issue. Fed. R. Evid. 704.
- Opinions may be based upon facts and data not admissible in evidence. Fed. R. Evid. 703.
- Market creates incentives for exaggeration, misrepresentation and fraud.
- In order to be **repeat players** experts must be "effective."
- Accuracy, integrity, and reliable methodology that lead to useful theories in the real world are secondary to credentials, appearance and advocacy
- More "litigation experience" than the attorney cross-examining them and greater knowledge

THE MODEL CIVIL PERJURY ACT'S QUI TAM PROVISION ALLOWS PRIVATE PERSONS WITH KNOWLEDGE OF PERJURY TO BRING SUIT ON BEHALF OF THE JURISDICTION

PROPOSED MODEL CIVIL PERJURY ACT

• Any person who in any civil proceeding before or ancillary to any court of the United States makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true is liable to the United States Government for perjury and subject to a civil penalty of not less than \$5,000 and not more than \$50,000, plus reasonable attorney fees and costs

THE QUI TAM PROVISION

Qui tam is an abbreviation of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own.

THE FALSE CLAIMS ACT AS TEMPLATE FOR THE MODEL CIVIL PERJURY ACT QUI TAM PROVISION

• In 1863 Congress passed the False Claims Act and its *qui tam* provision, empowering private citizens and their lawyers to prosecute civil lawsuits on behalf of the government and earn a percentage of any recovery as a reward.



Unmistakable similarity between the federal government preoccupied by prosecuting a civil war and the judicial system preoccupied by prosecuting a war on drugs and violent crime.

In both instances, a viable solution is to enlist the aid of private persons with knowledge of the wrongdoing to prosecute the wrong in exchange for a bounty.

EVIDENTIARY USE OF JUDGMENT

• A judgment imposing liability against any person under this act shall be admissible evidence to impeach a witness to the same extent as a conviction of a crime involving dishonesty or false statement under Rule 609(a)(2) of the Federal Rules of Evidence.

• Identify dishonest expert witnesses and other repeat offenders.

RECOMMENDATIONS

The CDC's proposed quarantine regulations afford little protection for individuals' due process rights and have the potential to be abused. The CDC should revise its proposal and model its regulations in accordance with the WHO's International Health Regulations (IHR), which take a disease-specific approach to containing outbreaks of disease. The IHR on Avian Flu will take effect in June 2006. Therefore, the CDC may choose to rely on the IHR, rather than promulgating new, ineffective, and unconstitutional regulations.

Due to the geography of the virus and the incidence of human cases in Asian countries, and the history of how Asians have been treated in public health emergencies in the past, there is great potential for discrimination against Asians and Asian-Americans in the case of a human Avian Flu outbreak if the CDC regulations are adopted as proposed. Carefully drafted regulations, providing for current standards of due process, can help avoid the abuses of public health authority that have occurred in prior epidemics.