

**PERJURY IN THE FIRST DEGREE**  
**by Inconsistent Statements**  
**Penal Law §§ 210.15/210.20**  
**(Committed on or after Sept. 1, 1967)**

The (specify) count is Perjury in the First Degree.

Under our law, a person is guilty of Perjury in the First Degree when he or she swears falsely and when his or her false statement consists of testimony, and is material to the action, proceeding or matter in which it is made.

The following terms used in that definition has a special meaning:

A person SWEARS FALSELY when that person intentionally makes a false statement which he or she does not believe to be true while giving testimony.<sup>1</sup>

INTENT means conscious objective or purpose. Thus, a person intentionally makes a false statement which he or she does not believe to be true when that person's conscious objective or purpose is to do so.<sup>2</sup>

TESTIMONY means an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered.<sup>3</sup> Under our law, (specify) is authorized by law to conduct a proceeding and to administer the oath or cause it to be administered.]

The term OATH includes an affirmation and every other mode authorized by law of attesting to the truth of that which is stated.<sup>4</sup> Under our law, (specify mode) is an authorized mode of attesting to the truth of that which is stated.

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<sup>1</sup> See Penal Law § 210.00(5).

<sup>2</sup> See Penal Law § 15.05(1).

<sup>3</sup> Penal Law § 210.00(3).

<sup>4</sup> See Penal Law § 210.00(1).

A false statement is MATERIAL to an action, proceeding or matter when it reflects on the matter under consideration during the action or proceeding in which it is made, or tends to support and give credit to the witness in respect to a main fact in issue.<sup>5</sup>

[NOTE: Where the alleged false statement constitutes testimony before a grand jury, add:

A false statement in a proceeding before a grand jury is also material when that false statement has the natural effect or tendency to impede, influence or dissuade the grand jury from pursuing its investigation.<sup>6</sup>]

The falsity of a single sworn statement must be proven by evidence establishing that it is false. In this case, however, the People have presented two sworn statements which they contend are inconsistent to the degree that one of them is necessarily false.

Under our law, where a person has made two statements under oath which are inconsistent to the degree that one of them is necessarily false, and where the circumstances are such that each statement, if false, is perjurally so, the People need not establish specifically which of the two statements is the false one. Instead, the falsity of one or the other of the two statements may be established by proof or a showing of their irreconcilable inconsistency.<sup>7</sup>

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<sup>5</sup> See *People v. Stanard*, 42 N.Y.2d 74, 80 (1977); *People v. Davis*, 53 N.Y.2d 164, 171 (1981); *People v Perino*, 19 NY3d 85, 89 (2012), quoting *Davis* at 170-171: "To be material, the statement need not prove directly the fact in issue; it is sufficient if it is [circumstantially material or tends to support and give credit to the witness in respect to the main fact .... Thus a statement that 'reflect[s] on the matter under consideration' ... even if only as to the witness' credibility ... is material for purposes of supporting a perjury charge."

<sup>6</sup> See *Davis* at 171.

<sup>7</sup> See Penal Law 210.20.

[NOTE: *Add where appropriate:*

Under our law, it is no defense to a prosecution for perjury that:

the defendant was not competent to make the false statement alleged;

*or*

The defendant mistakenly believed the false statement to be immaterial,

*or*

the oath was administered or taken in an irregular manner or that the authority or jurisdiction of the attesting officer who administered the oath was defective, if such defect was excusable under any statute or rule of law.<sup>8</sup>

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, the following elements:

1. That on or about (date),<sup>9</sup> in the County of (County), the defendant, (defendant's name), made a statement that consisted of testimony;

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<sup>8</sup> See Penal Law §210.30.

<sup>9</sup> Penal Law § 210.20 requires that “each statement was made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged.” The requirement that each statement was made within New York is satisfied by proving that the statement was made in a particular county of the state. If, in a highly unusual case, a factual issue arises as to whether a particular statement was made within the statute of limitations, the date on which the statement was made should be alleged as “on or about but before [the date the statute of limitations expired].”

2. That on or about (date),<sup>10</sup> in the County of (County), the defendant, (defendant's name), made a second statement that consisted of testimony;
3. That both statements were material to the action, proceeding or matter in which they were made;
4. That the two statements are inconsistent to the degree that one of them is necessarily false; and
5. That the circumstances are such that the defendant made the false statement intentionally and not believing it to be true.

*[NOTE: If the affirmative defense below does not apply, conclude as follows:*

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty.

If you find the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty.

*[NOTE: If the affirmative defense below applies, continue as follows:*

If you find that the People have proven beyond a reasonable doubt each one of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Perjury in the First Degree, you will not consider the affirmative defense.

Under our law, in any prosecution for perjury, it is an affirmative defense that the defendant retracted his or her false statement in the course of the proceeding in which it was made before such false statement substantially affected the

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<sup>10</sup> See footnote 9.

proceeding and before it became manifest that its falsity was or would be exposed.<sup>11</sup>

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People have proven beyond a reasonable doubt each of the elements of Perjury in the First Degree, you must find the defendant guilty.

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty.

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<sup>11</sup> Penal Law 210.25.