

STRATEGY – MAKING CRIME/FRAUD ALLEGATIONS

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OVERVIEW

“Sunlight is said to be the best of disinfectants.” L. Brandeis, Other People’s Money 72 (1933). In a civil case against a corporate defendant, that observation by Justice Brandeis 67 years ago is demonstrably, unequivocally true. The question that confronts every plaintiffs’ lawyer is this: what is the proper and best way to make sure that the corporate defendant doesn’t hide documents, plays by the rules, and tells the truth. The short answer is, of course, there’s no “way” to do that. The longer answer is that you need to hold the defendants to the law. That’s a task that requires the lawyer to do his or her job and that job takes time and persistence.

The battlefield in litigation against big companies is discovery. The site of the fiercest battle is the place in which privilege and work product issues are won and lost. Corporations abuse those discovery weapons, time and time again. Practice, patience, and countless battles have taught our firm at least three things about privilege claims: (1) you’ve got to question them all; (2) you’ve got to make sure the corporation supports every claim completely when it is required to do so; and (3) you need to look at what it is the defendant is claiming is “privileged” and go beyond the claim to try to figure out why the defendant doesn’t want you to have the document and how that document fits into representations the defendant has made in pleadings or in open court.

The purpose of this handout is to address the most serious abuse of privilege and work product claims: using the privilege or work product doctrine to perpetuate crimes and frauds. Defendants use privilege and work product claims to prevent plaintiffs from seeing the very documents that disprove the defendants' own representations. That's improper and the law doesn't allow it. The crime/fraud exception is a way to expose a defendant's misconduct and to get the documents produced. The first part of the handout gives an overview of what the crime/fraud exception is, how it applies in Georgia, and how it applies more broadly across the country. The second part of the handout sets out some common sense approaches to assessing whether or not the crime/fraud exception may apply and making allegations of crime/fraud in the right case. The final part of the handout sets out the common State and Federal statutes and ethical rules used to prove crime/fraud in the discovery context discussed here.

PART I: THE LAW – THE CRIME/FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE.

“It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy,’ between lawyer and client does not extend to communications ‘made for the purpose of getting legal advice for the commission of a fraud’ or crime.” United States v. Reeder, 170 F.3d 93, 106 (1st Cir. 1999) (citing United States v. Zolin, 491 U.S. 554 (1989)).

Virtually every State and every federal court recognize some form of the crime/fraud exception, although there are areas in which there are differences among the various jurisdictions in the application of the crime/fraud exception, such as the requisite burden of proof, the procedural hurdles the challenging party must overcome to trigger an *in camera* review of documents, or the way in which a particular jurisdiction articulates the nexus required between the communication at issue and the alleged crimes or frauds.

A challenge to privilege based upon the crime/fraud exception generally consists of two “phases.” First, the party must demonstrate to the court what is known as a *prima facie* case, which means that non-privileged evidence must be used to show that there is more than a mere speculation that a crime or fraud may have been committed at some point *after* the “advice” was given or the particular document created. In re Grand Jury Investigation, 974 F.2d 1068, 1072 (9th Cir. 1992). Once the court is satisfied that a *prima facie* case has been shown, then the court will review the specific documents *in camera* to determine -- on a document-by-document basis -- whether or not the document satisfies the requisite nexus to the crimes and frauds. If you allege crime/fraud, you ought to have strong proof to support the *prima facie* showing. It is the second part of the equation (showing that there is a sufficient nexus between the communication and the alleged crimes or frauds) that requires detailed thinking and an understanding of the broader picture.

It is essential in the crime/fraud context to insure that the nexus between the crime or fraud and the document in question is evaluated in light of all that is known to have transpired after the initial communication of “advice.” Corporations defending the crime/fraud allegation will insist upon a very narrow and specific nexus between the document itself and the alleged crime or fraud. Examples of crime/fraud challenges being denied based upon a failure to prove the required connection between the document and the criminal or fraudulent conduct are legion. The most practical (and workable) approach with respect to the “nexus” requirement can be seen in those cases that articulate that the crime/fraud exception applies to any document that reasonably “relates to” the criminal or fraudulent conduct. It would be an impossible burden – and one that would swallow the rule – to require that a document (on its face) is or shows a

communication used in furtherance of a crime or fraud.

State and federal courts have applied the “reasonable relationship” test in the crime/fraud setting. For example, Georgia recognizes the crime/fraud exception and requires a showing that the document at issues reasonably relates to the crime or fraud in question. Southern Guaranty Ins. Co. of Georgia v. Ash, 192 Ga. App. 24, 383 S.E.2d 579, 583 (1989); Marriott Corp. v. American Academy of Psychotherapists, 157 Ga. App. 497, 502, 277 S.E.2d 785, 790 (1981) (citing Atlanta Coca-Cola, etc. v. Goss, 50 Ga. App. 637, 639, 179 S.E. 420 (1935)); In re Grand Jury, 575 F. Supp. 777 (D.C. Ga. 1983); see also State ex rel. United States Fid. & Guar. Co. v. Montana Second Jud. Dist. Ct., 240 Mont. 5, 14, 783 P.2d 911, 916 (1989)(citing 2 J. Weinstein, Evidence § 503(d)(1)(01); Annot., 31 ALR 4th 458)); In re Grand Jury Investigation (Schroeder), 842 F.2d 1223 (11th Cir. 1987); In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985) (setting forth requirement that communication at issue have “some relationship” to the prima facie violation).

State courts often derive the nexus analysis from an established line of federal authority supporting the proposition that a communication reasonably relate to the alleged crimes or frauds. In re Grand Jury Proceedings, 87 F.3d 377 (9th Cir. 1996); U.S. v. Laurins, 857 F.2d 529, 540 (9th Cir. 1988) In re Grand Jury Investigation (Schroeder), 842 F.2d 1223 (11th Cir. 1987); In re Sealed Case, 754 F.2d 395 (D.C. Cir. 1985); Cunningham v. Connecticut Mutual Life Ins., 845 F. Supp. 1403, 1415 (S.D. Cal. 1994). These cases provide a good analysis of the crime/fraud exception and a realistic basis for its application.

PART II: COMMON SENSE APPROACHES TO ASSESSING WHETHER OR NOT TO ALLEGE CRIME/FRAUD IN A PARTICULAR CASE.

The outline below provides an analytical framework for an evaluation of whether or not the crime/fraud exception might apply to a particular set of documents or communications in a civil case:

STEP ONE

- Has the defendant responded to discovery by raising attorney-client privilege and work product objections?
- Are the privilege and work product objections documented on a detailed privilege log which sets forth the basic identifying information for each communication so that the Court and the opposing party may evaluate the claims of protection? Is the privilege log entirely consistent with privilege logs the company has filed in other cases on the same subject?
- Are there identifiable communications on the privilege log that suggest that there were communications about a critical factual issue in the case. For example, in the tobacco litigation, there certainly were communications about whether or not nicotine was addictive and whether the public should be told. In other product liability litigation, is there a discussion about the development of the product, the way in which the company conducts its business, or some other matter pertinent to the case? There ought to be because corporations act by and through their lawyers.
- Evaluate the timing of the communications in light of subsequent representations to courts, juries, or the public about the particular subject in question. For example, if there are communications thirty years ago between an engineer and lawyers relating to the engineer's work, look at what has transpired since that time. Has the engineer testified at all about his or her work? What has he said? This is the starting point for developing an understanding of how the corporation has handled a particular subject. If there is a crime or fraud afoot, the privilege logs may provide some insight.

STEP TWO

- Create a timeline of communications noted on the privilege log and compare the timeline to the representations the company has made publicly (either to courts, juries, the news, or elsewhere).
- Determine through investigation if there is any available contrary evidence which refutes

the representations of the company or otherwise suggests that it cannot be true or that something improper was done.

- Collect all the non-privileged evidence and see how it compares to what has transpired over time.

STEP THREE

- If there is evidence of some wrongdoing, what specifically is the wrongdoing? Did the company itself lie? Did it instruct its employee to lie? Did it make false representations to courts, juries, or the public? Did it hide contrary evidence? Did it perpetuate some crime or fraud?
- Determine whether you can sustain an allegation that specific crimes and frauds were likely committed after the initial communication and that a set of documents reasonably relate to the criminal or fraudulent conduct or scheme. That is a difficult assignment. It is hard to “read between the lines” of a privilege log. It is hard to assemble sufficient information to get a clear picture of what the history of a particular matter is. It is a process that may take *years* to develop to simply make the allegations in the first place, if the evidence is there.

**PART III: PERTINENT CRIMINAL STATUTES AND ETHICAL RULES
CRIMINAL STATUTES AND ELEMENTS OF CRIMES.**

I. PERJURY

A. Perjury Under Federal Law

The federal perjury statute is found at 18 U.S.C. § 1621. It provides as follows:

Whoever --

- (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes to any material matter which he does not believe to be true; or
- (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement is made within or without the United States.

“A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory.” United States v. Dunnigan, 507 U.S. 87, 94 (S. Ct. 1993). The requirement of materiality is a matter of law for the district court to determine. Masinia v. United States, 296 F.2d 871, 874 (8th Cir. 1961). “This federal definition of perjury has remained unchanged in its material respects for over a century.” Dunnigan, 507 U.S. at 94 (S. Ct. 1993). In order to sustain a conviction for perjury, it is generally held that the prosecution must prove two essential elements: (1) that the statements made by the defendant are false; and, (2) that the defendant did not believe the statements to be true. See, e.g., United States v. Nicoletti, 310 F.2d 359, 362 (7th Cir.) (citing cases), cert. denied, Nicoletti v. United States, 372 U.S. 942 (1963).

It is perjurious for a witness to testify falsely that he “does not recall” with respect to a material issue. Id.; United States v. Barnhart, 889 F.2d 1374, 1379 (5th Cir. 1989), cert. denied, Barnhart v. United States, 494 U.S. 1008 (1990). Circumstantial proof is sufficient to show that defendant in fact recalled or knew

about a material matter that he testified he “did not recall.” Nicoletti, 310 F.2d at 362-63 (citing numerous cases). The Fourth Circuit reasoned in United States v. Beach,

‘Obviously where the perjury related to the accused’s state of mind, such as what he knew or saw or heard, proof can only be made by proof of facts from which the jury will infer that the accused must have known or seen or heard what he denied knowing or seeing or hearing.’

296 F.2d 153, 155 (4th Cir.).

Statements made by a witness in a civil proceeding -- such as those made in an affidavit or in a deposition -- are admissible in a subsequent prosecution for perjury under the statute. See Hale v. United States, 406 F.2d 476, 478-79 (10th Cir.), cert. denied, 395 U.S. 977 (1969); United States v. Manfredi, 789 F. Supp. 961, 962 (N.D. Ind. 1992).

B. Perjury Under Georgia Law

Georgia’s perjury statute is O.C.G.A. § 16-10-70. It provides as follows:

- (a) A person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement material to the issue or point in question.
- (b) A person convicted of the offense of perjury shall be punished by a fine of not more than \$1,000.00 or by imprisonment for not less than one nor more than ten years, or both. A person convicted of the offense of perjury that was the cause of another’s being imprisoned shall be sentenced to a term not to exceed the sentence provided for the crime for which the other person was convicted. A person convicted of the offense of perjury that was a cause of another’s being punished by death shall be punished by life imprisonment.

Under Georgia law, courts have defined perjury as the willful assertion of a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding. Hicks v. State, 21 S.E.2d 119 (Ga. App. 1942). The statement may be made in open court, by affidavit, or through some other testimonial convention. Id. If the witness knows that the statement is false at the time he gives it, then he is guilty of perjury. Stokes v. State, 2 S.E.2d 674 (Ga. App. 1939). It is also perjury under Georgia law for an affiant to swear to something

that the affiant in fact does not have any knowledge of. Hicks, 21 S.E.2d at 122.

The requirement of materiality may be shown under Georgia law by citing to the record of proceedings in which testimony was given, or by reference to pleadings and other facts that tend to prove that the testimony was material. Clackum v. State, 189 S.E. 397, 402 (1936). Materiality is defined as “whether the alleged false statement could have influenced the decision as to the question at issue in the judicial proceeding in which the perjury is alleged to have been committed.” Devine v. State, 494 S.E.2d 87, 91 (Ga. App. 1997) (citing Hardison v. State, 71 S.E.2d 525 (Ga. App. 1952), cert. denied (Feb. 20, 1998)).

II. SUBORNATION OF PERJURY

A. Subornation Of Perjury Under Federal Law

The federal subornation of perjury statute provides as follows:

Whoever procures another to commit any perjury is guilty of subornation of perjury and shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1622.

To prove that a defendant suborned perjury, the prosecution must show (1) procurement of another; (2) to commit any perjury. United States v. Dell, 736 F. Supp. 186, 190 (N.D. Ill. 1990). Stated another way: “It is essential to subornation of perjury that the suborner should have known or believed or have had good reason to believe that the testimony given would be false; that he should have known or believed that the witness would testify willfully and corruptly, and with knowledge of the falsity; and that he should have knowingly and willfully induced or procured the witness to give such false testimony.” 70 C.J.S. § 54 (Perjury) (1951); United States v. Magana, 118 F.3d 1173, 1195 (7th Cir. 1997). To support a conviction for subornation of perjury, the underlying perjury itself must be proven. Doan v. United States, 202 F.2d 674, 678 (9th Cir. 1953). And, although the underlying perjury must be supported by two witness or by one witness and corroborating circumstances, there is no such requirement for the “procurement” or “inducement” element of the subornation offense. Id.

B. Subornation Of Perjury Under Georgia Law

Georgia’s subornation of perjury statutes provides as follows:

A person commits the offense of subornation of perjury or false swearing when he procures or induces another to commit the offense of perjury or

the offense of false swearing and, upon conviction thereof, shall be punished by a fine of not more than \$1,000.00 or by imprisonment for not less than one year nor more than ten years, or both.

O.C.G.A. § 16-10-72.

As with its federal counterpart, to support a conviction for subornation of perjury under Georgia law, the underlying perjury itself must be proven. West v. State, 136 Ga. App. 249, 220 S.E.2d 767 (1975). An “attempt” to induce another to commit perjury is not sufficient under the Code; rather, the person induced must testify falsely. See Nicholson v. State, 97 Ga. 672, 25 S.E. 360 (1896).

III. PARTICIPATION IN A CONSPIRACY TO COMMIT PERJURY OR TO SUBORN PERJURY

A. Conspiracy To Commit Or To Suborn Perjury Under Federal Law

Conspiracy to commit or to “produce” perjury are indictable offenses under federal law. Both acts are chargeable under 18 U.S.C. § 371, the conspiracy statute. That statute provides, in pertinent part:

If two or more person conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. Courts have held that both perjury and subornation of perjury are offenses against the United States that fall within the ambit of the conspiracy statute. See United States v. Ashley, 905 F. Supp. 1146, 1160-62 (E.D.N.Y. 1995). The federal perjury and subornation of perjury statutes are quoted above.

To show a conspiracy to commit perjury or to suborn perjury, it is not necessary to prove the underlying offenses. Hall v. United States, 78 F.2d 168, 169 (10th Cir. 1935) (“To establish the conspiracy, it was not necessary to prove that the substantive offenses had been committed”).

To establish the existence of a conspiracy, the prosecution must prove an agreement between two or more persons to act together in committing an offense and an overt act in furtherance of the conspiracy. United States v. Chorman, 910 F.2d 102, 109 (4th Cir. 1990). Under the above requirements, it is necessary to show only that the defendant knew of the purpose of the conspiracy and that he took some action indicating his participation. United States v. Laughman, 618 F.2d 1067, 1075 (4th Cir.), cert. denied, Laughman v. United States, 447 U.S. 925

(1980). “A tacit or mutual understanding between or among conspirators is sufficient to show a conspiratorial agreement.” United States v. Reifsteck, 841 F.2d 701, 704 (6th Cir. 1988).

It is well-settled that a corporation may be found guilty of a conspiracy under § 371. See, e.g., United States v. Wise, 370 U.S. 405 (S. Ct. 1962) (“ . . . the fiction of the corporate entity, operative to protect officers from contract liability, has never been applied as a shield against criminal prosecutions . . . ”); United States v. Hughes Aircraft Co., Inc., 20 F.3d 974, 978 (9th Cir.), Hughes Aircraft Co. Inc. v. United States, 513 U.S. 987 (1994); United States v. Mahar, 801 F.2d 1477 (6th Cir. 1986); United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984); United States v. Hartley, 678 F.2d 961, 971 (11th Cir.), reh’g denied, 688 F.2d 852 (1982), cert. denied, Hartley v. United States, 459 U.S. 1170 (1983); United States v. American Grain & Related Indus., 763 F.2d 312, 320 (8th Cir. 1985); Minisohn v. United States, 101 F.2d 477 (3d Cir. 1939). For a corporation to be guilty of a criminal conspiracy under the statute, two or more high ranking or authoritative agents must be shown to have engaged in a criminal conspiracy on behalf of the corporation. United States v. Hugh Chalmers Chevrolet-Toyota, Inc., 800 F.2d 737, 738 (8th Cir. 1986).

A corporation may be convicted under § 371 based solely on a conspiracy with its own employees, agents, or officers. United States v. Hartley, 678 F.2d 961, 971 (11th Cir.), reh’g denied, 688 F.2d 852 (1982), cert. denied, Hartley v. United States, 459 U.S. 1170 (1983). Corporate agents may be convicted of conspiracy under similar circumstances. “The actions of two or more agents of a corporation, conspiring together on behalf of a corporation, may lead to conspiracy convictions of the agents (because the corporate veil does not shield them from criminal liability) and of the corporation (because its agents conspired on its behalf).” United States v. Peters, 732 F.2d 1004, 1007 (1st Cir. 1984).

B. Conspiracy To Commit Perjury Or To Suborn Perjury Under Georgia Law

Conspiracy under Georgia law is defined under O.C.G.A. § 16-4-8:

A person commits the offense of conspiracy to commit a crime when he together with one or more persons conspires to commit any crime and any one or more of such persons does any overt act to effect the object of the conspiracy.

* * *

The Georgia Code also defines the criminal responsibility of corporations. O.C.G.A. § 16-2-22 provides:

- (a) A corporation may be prosecuted for the act or omission constituting a crime only if:
 - (1) The crime is defined by a statute which clearly indicates a legislative purpose to impose liability on a corporation, and an agent of the corporation performs the conduct which is an element of the crime while acting within the scope of his office or employment and in behalf of the corporation; or
 - (2) The commission of the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation.
- (b) For purposes of this Code section, the term:
 - (1) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.
 - (2) "Managerial official" means an officer of the corporation or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees.

See also State v. Military Circle Pet Ctr. No. 94, Inc., 360 S.E.2d 248, 248-49 (Ga.) (noting that State need not allege the provisions of O.C.G.A. § 16-2-22 in order to charge corporation with crime), on remand to Military Circle Pet Ctr. No. 94 v. State, 363 S.E.2d 360 (Ga. App. 1987). Under Georgia law, the State may prove the existence of a conspiracy by showing the existence of a common plan or purpose between two or more persons to commit an unlawful act. McWilliams v. State, 339 S.E.2d 721, 725 (Ga. App. 1985). The conspiracy may be proven by direct or circumstantial evidence, including 'by inference, as a deduction from acts and conduct.' Id. And, the "agreement," for purposes of proving the conspiracy, may be simply a 'tacit understanding.' Drane v. State, 455 S.E.2d 27 (Ga. App. 1995).

As with the federal conspiracy statute, a 'person' commits the crime of conspiracy in Georgia when two elements are present: (1) an agreement; and, (2) an act in furtherance of it. McCright v. State, 336 S.E.2d 361 (Ga. App. 1985). Co-conspirators may be found guilty under the conspiracy statute when one conspirator acts in furtherance of the conspiratorial objective. "The law in Georgia governing the liability of conspirators for the acts of co-conspirators is well-settled. 'The elements of proof that one is a party to a crime . . . [require] proof of a common criminal intent. . . . When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one is in legal contemplation the act of all, subject to the qualification that each is responsible for the acts of the others only so far as such acts are naturally or necessarily done pursuant to or in furtherance of the conspiracy.'" Leigh v. State, 478 S.E.2d 905 (Ga. App. 1996) (quoting Crawford v. State, 435 S.E.2d 64 (Ga.

App. 1993)).

IV. OBSTRUCTION OF JUSTICE

A. Obstruction Of Justice Under Federal Law

The federal obstruction of justice statute is found at 18 U.S.C. § 1503, with the following omnibus catch-all provision:

Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justices, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

The concealment of documents in a judicial proceeding is considered a “corrupt means of influencing, obstructing, or impeding the due administration of justice.” United States v. Rasheed, 663 F.2d 843, 862 (9th Cir. 1981), cert. denied sub nom., Phillips v. United States, 454 U.S. 1157 (1982). To prove that a defendant has obstructed justice under the catch-all provisions of the obstruction statute, the government must show that a “person” (1) corruptly or by threats; (2) endeavored; (3) to influence, obstruct, or impeded the due administration of justice. 18 U.S.C. § 1503; United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990).

To show that a defendant acted “corruptly,” the prosecution must demonstrate that the act was knowingly and intentionally performed and that “obstruction” was a reasonably foreseeable consequence of the act. United States v. Thomas, 916 F.2d at 651. The defendant need not have a specific intent to obstruct justice; rather, he must have a corrupt motive for the action he undertakes. Id.

The element of “endeavoring” means any attempt to obstruct. Id. (citing Osborn v. United States, 385 U.S. 323, 333 (S. Ct. 1966)). It does not require that the defendant was successful in obstructing justice. Id.; United States v. Collins, 875 F. Supp. 398, 400 (E. D. Mich. 1995). The requirement that the defendant “endeavor” dovetails into the final element of the offense; that is, that the defendant did so in order to influence, obstruct, or impeded the due administration of justice. The prosecutor may prove this final element by demonstrating a nexus between the false statements and the obstruction of justice. In re Michael, 326 U.S. 224, 227-28 (S. Ct. 1945); Thomas, 916 F.2d at 651.

Attorneys with knowledge that their representations or submissions to a government agency are materially false may be found guilty of obstruction under 18 U.S.C. § 1503. See United States v. Sprecher, 783 F. Supp. 133, 164 (S.D.N.Y. 1992) (interpreting similar provisions under 18 U.S.C. § 1505); United

States v. Cintolo, 818 F.2d 980 (1st Cir.), cert. denied, Cintolo v. United States, 484 U.S. 913 (1987).

B. Obstruction Of Justice Under Georgia Law

Georgia does not have a specific “obstruction of justice” statute which parallels the language of the federal provisions cited above. Instead, Georgia has a broad false statements statute. That statute is set out in O.C.G.A. § 16-10-20 and reads as follows:

A person who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes a false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city, or other political subdivision of this state shall, upon conviction thereof, be punished by a fine of not more than \$1,000 or by imprisonment for not less than one year nor more than five years, or both.

O.C.G.A. § 16-10-20. Georgia’s appellate courts have interpreted the Georgia False Statements statute to apply to the judicial branch. Grant v. State, 488 S.E.2d 79 (Ga. App. 1997); see also United States v. Oaker, 111 F.3d 146 (D.C. Cir. 1997) (discussing amended language of 18 U.S.C. § 1001 and applying it in legislative context).

APPLICABLE ETHICS RULES

I. Model Rules of Professional Conduct

- **Rule 3.3: Candor Toward The Tribunal**

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of fact or law to a tribunal;
 - (2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take the following remedial measures:
 - (A) when a client has offered false evidence, the lawyer shall promptly call upon the client to rectify the same; if the client refuses or is unable to do so, the lawyer shall promptly reveal its false character to the tribunal;
 - (B) when a person other than a client has offered false evidence, the lawyer shall promptly reveal its false character to the tribunal.
- (b) The duties stated in paragraph (a) are continuing and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 (confidentiality).

* * *

- **Rule 3.4: Fairness to Opposing Party and Counsel**

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

* * *

- **Rule 4.1: Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

- **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;

II. Georgia Ethics Rules and Standards:

- **DR 1-102. Misconduct.**

(A) A lawyer shall not:

- (1) violate a Disciplinary Rule;
- (2) circumvent a Disciplinary Rule through actions of another;
- (3) engage in illegal professional conduct involving moral turpitude;
- (4) engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation;
- (5) engage in professional conduct that is prejudicial to the administration of justice;
- (6) engage in any other professional conduct that adversely reflects on his fitness to practice law.

- **Standard 3:** A lawyer shall not engage in illegal professional conduct involving moral turpitude. A violation of this standard may be punished by disbarment.

- **Standard 4:** A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. A violation of this standard may be punished by disbarment.

- **DR 7-102. Representing A Client Within The Bounds of The Law.**

- (A) In his representation of a client, a lawyer shall not:
 - (1) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;
 - (2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;
 - (3) conceal or knowingly fail to disclose that which he is required by law to reveal;
 - (4) knowingly use perjured testimony or false evidence;
 - (5) knowingly make a false statement of law or fact;
 - (6) participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false;
 - (7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent;
 - (8) knowingly engage in other illegal conduct or conduct contrary to a Directory Rule;
 - (9) institute or cause to be instituted or settle, a legal proceeding or claim without obtaining proper authorization from his client.
- (B) A lawyer who receives information clearly establishing that:
 - (1) his client has, in the course of the representation, perpetuated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal;
 - (2) a person other than his client has perpetuated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

- **Standard 45:** In his representation of a client, a lawyer shall not:
 - (a) knowingly use perjured testimony or false evidence;
 - (b) knowingly make a false statement of law or fact;
 - (c) participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false;
 - (d) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent;
 - (e) knowingly engage in other illegal conduct contrary to a disciplinary rule;
 - (f) institute, cause to be instituted or settle a legal proceeding or claim without obtaining proper authorization from his client.

A violation of this standard may be punished by disbarment.

- **Standard 46:** In his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. A violation of this standard may be punished by public reprimand.
- **Standard 56:** A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce. A violation of this standard may be punished by disbarment.

III. Courts Interpreting Violations of the Above-Noted Ethics Rules Have Imposed Severe Sanctions

Virtually every State has adopted ethics rules which have identical or parallel language to the rules cited above in this section. Violations of these ethics rules are punished severely. See, e.g., In re Barratt, 663 N.E.2d 536, 540 (Ind. 1996) (suspending lawyer for a period of one year for violations of ethics rules dealing with dishonesty and for engaging in an “elaborate plan for deceit”); Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1981) (suspending lawyer for a period of one year for urging witness to testify under oath to matter which witness did not believe or knew to be untrue); In re Murray, 362 N.E.2d 128, 132-37 (Ind. 1977) (disbarring lawyer for various disciplinary violations -- involving perpetuation of false testimony and failing to reveal testimony known to be false -- and explaining that “[w]hile an attorney must always be zealous in his representation of individuals, there are limits and the provisions of the Code of Professional Responsibility have been drafted to set forth these limits.”).

In situations where attorneys obstruct or impede the administration of justice by presenting false or misleading evidence, courts have punished such conduct severely. See In re Neitlich, 597 N.E.2d 425, 428-29 (Mass. 1992) (suspending attorney from practice of law for one year because attorney deliberately concealed and actively misrepresented facts from court). As the Supreme Judicial Court of Massachusetts explained, “[a]s an officer of the court, an attorney is a ‘key component of a system of justice,’ and is bound to uphold the integrity of that system by being truthful to the court and opposing counsel.” Id. at 428. “Where this duty is in seeming conflict with the client’s interest in zealous representation, the latter’s interest must yield.” Id. at 428-29. “Were we to condone any action to the contrary, the integrity of the judicial process would be vitiated.” Id. at 429. The court concluded its analysis by noting:

[T]he courts have emphasized an attorney’s duty of candor, stemming from his role as an officer of the court . . . The more persuasive judicial decisions require an attorney to bring material

facts to the attention of the court when ignorance of the court is likely to produce an erroneous decision and not just when his opponent is and will remain ignorant.

Id. (citing Mass. Att'y Discipline Rep. 189, 193-95 (1979)).

Courts also have punished severely conduct in which an attorney fails to reveal the existence of known facts. See Florida Bar v. Rood, 569 So.2d 750, 752-53 (Fla. 1990) (suspending attorney from practice of law for a period of one year because attorney failed to disclose the existence of an expert memorandum which contradicted his client's position). In punishing the attorney for one year, the Florida Supreme Court explained:

The misconduct is serious and reprehensible, but it does not warrant the extreme sanction of disbarment. In large part this is due to the isolated nature of this transaction, especially Rood's lack of disciplinary problems in the lengthy period since the incident came to light.

Id. at 753.