

PERJURY IN THE SECOND DEGREE
by Inconsistent Statements
(in written instruments)
Penal Law §§ 210.10/210.20
(Committed on or after Sept. 1, 1967)

The (*specify*) count is Perjury in the Second Degree.

Under our law, a person is guilty of Perjury in the Second Degree when he or she swears falsely and when his or her false statement is made in a subscribed written instrument for which an oath is required by law, and is made with intent to mislead a public servant in the performance of his or her official function, and is material to the action, proceeding or matter involved.

The following terms used in that definition have 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 under oath in a subscribed written instrument.¹

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. And a person makes a false statement with intent to mislead a public servant in the performance of his or her official function when that person's conscious objective or purpose is to do so.²

PUBLIC SERVANT means any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.³

1 See Penal Law § 210.00(5).

2 See Penal Law §15.05(1).

3 Penal Law §10.00(15)

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

[NOTE: Add If the term “oath required by law” is not in issue:

Under our law, (specify) is a written instrument for which an oath is required by law.]

[NOTE: Add If the term “oath required by law” is in issue:

A subscribed written instrument is one for which an OATH IS REQUIRED BY LAW when, absent an oath or swearing thereto, it does not or would not, according to statute or appropriate regulatory provisions, have legal efficacy in a court of law or before any public or governmental body, agency or public servant to whom it is or might be submitted.⁵]

Under our law, a false swearing in a subscribed written instrument is not deemed complete until the instrument is delivered by its subscriber, or by someone acting in his or her behalf, to another person with intent that it be uttered or published as true.⁶ A person delivers a subscribed written instrument to another with intent that it be uttered or published as true when his or her conscious objective or purpose is that the instrument be uttered or published as true.⁷

4 Penal Law § 210.00(1).

5 Penal Law § 210.00(4).

6 Penal Law § 210.00(5).

7 See Penal Law § 15.05(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.⁸⁸

[NOTE: Add where appropriate:

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.^{9]}

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.¹⁰

⁸ 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."

⁹ See *People v. Davis* at 171.

¹⁰ See Penal Law 210.30.

[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.^{11]}

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),¹² in the County of (County), the defendant, (defendant's name), made a statement under oath in a subscribed written instrument for which an oath was required by law;
2. That on or about (date),¹³ in the County of (County), the defendant, (defendant's name), made a second statement under oath in a subscribed written instrument for which an oath was required by law;

11 Penal Law 210.30.

12 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].”

13 See footnote 12.

3. That both statements were material to the action, proceeding or matter involved.
4. That the two statements are inconsistent to the degree that one of them is necessarily false; and
5. That the circumstances were such that the defendant must have intentionally made the false statement not believing it to be true and with intent to mislead a public servant in the performance of his or her official function.

[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 Second 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

proceeding and before it became manifest that its falsity was or would be exposed.¹⁴

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 Second 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.

¹⁴ Penal Law 210.25.