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How to Avoid Going to Jail under 18 U.S.C. Section 1001 for Lying to Government Agents

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What do Martha Stewart and enemy combatant Ali Saleh Kahlah Al-Marri have in common? They were both indicted, under Title 18, United States Code, Section 1001, for lying to federal government agents. Ms. Stewart now stands convicted of intentionally misleading SEC and FBI officials who questioned her about insider trading. Mr. Al-Marri was one of several hundred immigrants who voluntarily submitted to FBI interviews in the wake of the September 11, 2001 attacks. He was later charged with lying, during his interview, about the timing of a previous trip to the United States. Here are two criminal defendants from widely divergent backgrounds. Yet both were ensnared by Section 1001, a perennial favorite of federal prosecutors.

Did you know that it is a crime to tell a lie to the federal government? Even if your lie is oral and not under oath? Even if you have received no warnings of any kind? Even if you are not trying to cheat the government out of money? Even if the government is not actually misled by your falsehood? Well it is.

Title 18, United States Code, Section 1001 makes it a crime to: 1) knowingly and willfully; 2) make any materially false, fictitious or fraudulent statement or representation; 3) in any matter within the jurisdiction of the executive, legislative or judicial branch of the United States. Your lie does not even have to be made directly to an employee of the national government as long as it is "within the jurisdiction" of the ever expanding federal bureaucracy. Though the falsehood must be "material" this requirement is met if the statement has the "natural tendency to influence or [is] capable of influencing, the decision of the decisionmaking body to which it is addressed." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). (In other words, it is *not* necessary to show that your particular lie ever really influenced anyone.) Although you must know that your statement is false at the time you make it in order to be guilty of this crime, you do *not* have to know that lying to the government is a crime or even that the matter you are lying about is "within the jurisdiction" of a government agency. *United States v. Yermian*, 468 U.S. 63, 69 (1984). For example, if you lie to your employer on your time and attendance records and, unbeknownst to you, he submits your records, along with those of other employees, to the federal government pursuant to some regulatory duty, you could be criminally liable.

Even in our age of ever expanding federal power, the breadth of this statute (and the discretion it

lodges in prosecutors) is awesome. Congress has regulated so many areas of our lives and federalized so many functions that the reach of Section 1001 is virtually boundless. This is what caused many federal courts to create an "exculpatory no" doctrine, holding that falsely answering "no" to an inquiry from a federal agent was, standing alone, not a crime under Section 1001. In 1998, however, the United States Supreme Court rejected this doctrine (as being inconsistent with legislative intent) in *Brogan v. United States*, 522 U.S. 398, 805 (1998). Thus, the only avenue for reform with respect to Section 1001 is in Congress, where politicians seldom get brownie points for narrowing the reach of federal criminal statutes.

But why, you may ask, should law-abiding citizens be alarmed about this statute? Don't the feds only pick on big-league liars? Don't we trust the federal government and its law enforcement officers and assume that they are responsibly trying to ferret out crime? Besides, if we meet an FBI agent that we do not trust, can't we always decline to speak to him?

It may be true that most federal agents and prosecutors are decent people who would not intentionally abuse Section 1001. Moreover, it is very important from a law enforcement perspective for federal agents to be able to informally question witnesses during the initial stages of an investigation. And certainly citizens are under no obligation to speak to a law enforcement agent in the first place, although, as shown below, it is essential to learn *how* to decline to speak to government officers. But power corrupts, and the potential for abuse of this statute is great, especially during periods of public outcry over corporate and other white-collar crimes. When we reflect upon how many petty rules and regulations get broken and how many white lies are told during the course of an average American business day, it is apparent that Section 1001 can easily be applied and misapplied to normally upstanding folk.

Consider, for example, the following hypothetical. Assume you are the former employee of a corrupt home health care agency. You hated the place, left as soon as you could and did your best while there not to join in the fraud you saw being committed all around you. Nevertheless, you looked the other way and on occasion minimally aided the owner's criminal behavior. Maybe you transported false vouchers to the mailbox or handed miscoded bills to a visiting auditor. (It is very easy under federal criminal law to passively aid another in his or her crime and thereby subject yourself to criminal exposure. All you need is to know of another's crime and perform *any* act, even a minor act, that intentionally and knowingly facilitates the crime.) Assume further that you are a registered nurse and that your licensing state will revoke your license if they find that you were involved in fraud. One afternoon, two years after you quit, your neighborhood FBI agent comes calling. He needs damaging information about your former employer and you certainly know enough to help out. But revealing what you know could also expose you to revocation of your license. What do you do in that situation and what are the potential pitfalls?

Your first instinct may very well be to feign lack of knowledge concerning the details of the former employer's behavior, particularly if, as is often the case, the agent's visit is unexpected. People often panic in these encounters and blurt out falsehoods to cover up past misdeeds, even very small misdeeds. Once you make that fateful choice the FBI agent and the Assistant United States Attorney ("AUSA") who he works with may have you over a barrel. If they possess

enough evidence to prove that you are lying they can bring or threaten to bring charges against you under Section 1001. *In fact some AUSAs specifically send agents out to conduct interviews knowing that a witness will either tell the truth and help build a case against someone else or lie and subject himself to a Section 1001 charge* . In such situations, the federal agent is typically well-informed about the facts of the case, but plays dumb in order to instill a false sense of confidence in the interview subject. And, unlike you, the agent has had time to examine all relevant documents. (It also bears noting that the FBI will usually not tape record the interview and that the only official interview report will be an FBI 302, which is the agent's own dictated version of the conversation. Agents usually work in pairs as well, so in any later dispute over what was said in the interview, guess whose version is likely to prevail? Yours, or the two FBI agents who dictated the 302?) Even if the prosecutor does not really want to indict a little fish like you, by lying in the interview you may force him to do so. If he ultimately convinces you to tell the truth and indicts your former employer, he must still reveal your falsehood to the employer's attorney, under *Brady v. Maryland* , 373 U.S. 83 (1963) and *Giglio v. United States* , 405 U.S. 150 (1972). This information will be used by the attorney to publicly and vigorously cross-examine you at trial. Since you are now going to be a tainted witness, because of your original falsehood, the prosecutor may feel obliged to indict you in order to show a jury (or other potential witnesses) that you have paid a price for lying to the FBI.

Hence we see that even a decent person who tries to stay out of trouble can face criminal exposure under Section 1001 through a fleeting conversation with government agents. What else can be done (in our hypothetical interview) to avoid being placed in such a dilemma? Of course, you can simply tell the whole truth the first time, like your mommy taught you to do. Wouldn't that be the easy thing to do, even if your nursing license ends up being revoked? Perhaps. But by telling the truth, and avoiding prosecution under Section 1001, you expose yourself to a potential indictment for aiding and abetting your former employer's health care fraud. You don't think it could happen? Trust me. It happens all the time, almost every week, all across this country.

What if you are absolutely convinced that you didn't do anything to help your former employer and that you are entirely innocent of wrongdoing? Since you have nothing to hide, is it safe to talk? There can still be real danger in speaking to a government agent in these circumstances. *To begin with, you are not qualified to know whether you are innocent of wrongdoing under federal criminal law* . I have already noted the minimal nature of the act needed to connect you to another's crime if you have knowledge of that crime. But the danger goes beyond this. Not all federal crimes (particularly regulatory crimes) even require criminal intent. Moreover, you and your employer may have engaged in some widespread industry practice, acceptable at the time, which is now under stricter scrutiny. One offhand remark to the federal agent could turn into a damaging admission.

Even assuming your absolute innocence of the wrongdoing being investigated, however, the agent has had the luxury of minutely studying all of the relevant paperwork surrounding that investigation. You, on the other hand, may not have thought about the subject matter, much less the underlying details, of his inquiry for years. You will probably not be shown any of the

pertinent documents before the interview begins. *You could easily make factual mistakes during your interview* . What happens then? Maybe nothing, if you are dealing with an experienced agent who surmises that you are trying to tell the truth. But if the agent is inexperienced and unsure of your culpability or if you are not confirming his version of events, your mistakes can easily be interpreted as intentional falsehoods under Section 1001.

Is there an intelligent alternative to lying or telling the truth that we have not yet examined? Yes. In our hypothetical interview, you can politely *decline* to be interviewed by the FBI agent. Tell the agent that you have an attorney and that "my attorney will be in contact with you." If the agent persists, say that you will not discuss anything without first consulting counsel. Ask for the agent's card, to give to your attorney. If you have not yet hired a lawyer, tell the agent that "I want to consult a lawyer first" or that "an attorney will be in touch with you." The absolutely essential thing to keep in mind is to say *nothing* of substance about the matter under investigation. It is preferable to do this by politely declining to be interviewed in the absence of counsel. If the agent asks "why do you need an attorney?" or "what do you have to hide?" do *not* take his bait and directly respond to such questions. (Do not even say that you have nothing to hide.) Simply state that you will not discuss the matter *at all* without first consulting counsel and that counsel will be in touch with him. If the agent asks for a commitment from you to speak with him after you have consulted or retained counsel, do not oblige him. Just respond that you will consult with your attorney (or "an" attorney) and that the attorney will be in touch. And by all means do not get bullied or panicked into making up a phony reason for refusing to talk. You are not obliged to explain your decision to anyone.

What if the FBI agent threatens to have you subpoenaed to the grand jury if you don't talk? Simply repeat your mantra that you will not discuss the matter with him in the absence of counsel. (If you are already represented tell the agent that you authorize your attorney to accept service of the subpoena. That way you will not have to be embarrassed at work by the FBI's service of a grand jury subpoena in broad daylight.) What if the agent already has a subpoena and serves you with it? Thank him and tell him that your attorney will be in touch.

It is crucial to note that affirmatively declining to discuss the investigation in the absence of counsel is not the same thing as remaining completely silent . If you are not in custody, your total silence, especially in the face of an accusation, *can* very possibly be used against you as an adoptive admission under the Federal Rules of Evidence.

Your invocation of counsel, however, cannot be used against you at trial. *United States v. McDonald* , 620 F.2d 559, 561-64 (5th Cir. 1980). Your refusal to talk substance in the absence of counsel will force the prosecutor to decide whether your information is important enough to justify a grand jury subpoena for your testimony.

If the prosecutor responds to your declination by serving you with a grand jury subpoena, this will present you with an interesting range of options such as: 1) testifying; 2) refusing to testify, by invoking the Fifth Amendment privilege against self-incrimination, which broadly applies to *anyone* , innocent or guilty, facing criminal exposure; 3) testifying (or talking to the government) *only* after receiving a grant of immunity; or 4) proffering to the government—that is, giving them a

sneak preview of what you will tell them if they agree to grant you immunity. *The important thing to remember is that declining to speak to the agent in the first place buys you time in which to weigh these alternative strategies with your white-collar criminal defense attorney .*

I am not suggesting that you should obstruct the FBI or invariably decline to answer an agent's questions. If you are certain that you have committed no crime, *and* if the agent promises you that nothing will happen to you if you tell the truth, *and* if it is crystal clear that you are nothing but a peripheral witness, it *may* be appropriate to voluntarily interview with federal law enforcement officials. But don't speak to them unless: you have discussed the matter thoroughly with your attorney; your attorney has called the prosecutor to determine your status as a witness, subject or target; and, your attorney is present during the interview.

Neither am I suggesting that it is generally acceptable to be interviewed by federal agents as long as your attorney is present . In fact, it is usually unacceptable and is often quite risky. (Just ask Martha Stewart, who had counsel by her side when interviewed by the FBI and SEC.) *Indeed, barring special circumstances, I never let a client with the slightest degree of criminal exposure submit to an interview by government agents .*

There are some instances in which you may effectively be forced to interview with law enforcement agents. If you are an employee of the government and you are assured that an inquiry is administrative only and that your interview will not result in any criminal action against you, you will usually be *required* , in order to keep your job, to submit to the interview. Furthermore, a private employer can require you to cooperate with a law enforcement or regulatory investigation as a condition of continued employment. If you are an officer or director of a company that operates in a regulated industry or does business with the federal government, your failure to submit to questioning by regulatory officials may result in significant economic sanctions against you or your company by the United States. But even in the above situations, you should avoid substantive conversations when law enforcement agents make surprise visits. If you have to submit to an interview, it is far better to do so after careful consultation with your attorney.

If all of this sounds complicated, it is. *Whether you speak, what you say and how and when you say it can have a profound effect on your future when you find yourself involved in a white-collar criminal investigation .* The time to realize this, hire an experienced white-collar criminal defense attorney and develop a strategic plan is before the feds come knocking at your door.

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