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Fortenberry Conviction Reversal Affects Calculus for Witnesses

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A Ninth Circuit decision in former Nebraska lawmaker Jeff Fortenberry's criminal case signals new complexities to cooperating with investigators that witnesses should carefully consider.

In a blow to broad venue for charges brought under 18 U.S.C. § 1001, the US Court of Appeals for the Ninth Circuit reversed Fortenberry's conviction on charges stemming from his alleged impediment of an investigation, rejecting the government's "effects-based" venue test in false statement cases. The decision equips witnesses in the Ninth Circuit with a potential procedural defense and expands a growing circuit divide.

With government agencies aggressively cracking down on campaign finance violations, those in the political arena can't afford to be lame ducks when cooperating with government investigators. Potential witnesses and their counsel should take a cautious and long-term view of the case at the outset, mindful that witnesses are one materially false statement from becoming defendants.

The Investigation

In *United States v. Fortenberry*, the government alleged Fortenberry made materially false statements to federal agents in connection with improper foreign campaign donations. In late 2015, the FBI launched an investigation into a foreign national suspected of illegally funding

Authors

Michael E. Toner
Partner
202.719.7545
mtoner@wiley.law

Brandon J. Moss
Partner
202.719.7554
bmoss@wiley.law

Isaac J. Wyant
Associate
202.719.4705
iwyant@wiley.law

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political campaigns in the US. As the investigation unfolded, investigators came to believe that the foreign national had made conduit contributions—earmarked campaign contributions made through intermediaries—at a fundraiser for Fortenberry's campaign.

In 2018, a cooperating witness placed a call to Fortenberry and told him that the foreign national was the likely source of a $30,000 donation received at the fundraiser. Unbeknownst to Fortenberry, the FBI was listening.

Federal agents based out of Los Angeles later met with Fortenberry at his home in Nebraska for a voluntary interview and, without an attorney present, Fortenberry denied all awareness of the foreign contribution. Fortenberry denied knowledge again in an interview with counsel present in Washington, D.C.

In 2021, Fortenberry was indicted on one count of scheming to falsify and conceal material facts in violation of 18 U.S.C. §1001(a)(1), and two counts of making false statements in violation of 18 U.S.C. § 1001(a)(2).

Despite Fortenberry making the alleged false statements at both his home in Nebraska and his office in Washington, D.C., the government proceeded to charge Fortenberry in the US District Court for the Central District of California, on the theory that his statements had the effect of impeding the ongoing investigation there. The case was tried before a jury and Fortenberry was convicted on all counts.

Ninth Circuit Weighs In

Reversing the lower court, the Ninth Circuit panel unanimously rejected the government's expansive view of venue under 18 USC § 1001. The court began by observing that Congress didn't expressly prescribe a venue provision for a Section 1001 offense. In such circumstances, the court explained, the analysis must center on the "essential conduct elements of the offense." And while the court recognized that materiality was a statutory element necessary to prove a Section 1001 offense, it held that it wasn't a conduct element, since materiality "does not require anything to actually happen."

Materiality turns not on the actual effect of the statement, but on the propensity to affect an official matter, the court said. Since propensity is discernable when and where the false statement is made, there is no need to catalogue every location where the statement had an actual "effect." In other words, subsequent events or circumstances flowing from the false statements are irrelevant in determining where the case may be brought.

In addition to narrowing venue under the statute, the decision expands an existing circuit split. The Ninth Circuit joins the Tenth and Eleventh Circuits in holding that "the location of the crime must be understood to be the place where the defendant makes the statement."

The court distinguished as questionable the reasoning in conflicting cases out of the Second and Fourth Circuits. Those cases, the court said, either drew unpersuasive parallels to other statutes or otherwise left unexplained why the actual effects of an alleged false statement should be given any consideration at all.

"Fortenberry's trial took place in a state where no charged crime was committed, and before a jury drawn from the vicinage of the federal agencies that investigated the defendant," the court stated, concluding, "The Constitution does not permit this. Fortenberry's convictions are reversed so that he may be retried, if at all, in a proper venue."

Considerations for Witnesses

Where this decision leaves the state of play remains to be seen. For witnesses contemplating a meeting with government investigators, yet anxious over the looming threat of Section 1001, geographic distance may be the first defense.

Accepting a prosecutor's offer to sit for an interview in a neighboring jurisdiction will certainly signal the witness's willingness to cooperate—but it could also inadvertently subject the witness to an undesirable venue. Counsel should be mindful of where the relevant investigation is headquartered and weigh the benefits of cooperation (or the appearance thereof) against the risks of prematurely waiving home field advantage.

For their part, government attorneys will almost certainly give more robust consideration to resource allocation in investigations and venue selection. The *Fortenberry* decision creates procedural hurdles for prosecutors seeking to strategically transfer false statement cases from smaller, under-staffed, or geographically remote offices to offices principally responsible for the core investigations.

Further, with the conflicting case law in the Second and Fourth Circuits, tactical considerations become largely geographically dependent. For example, if Section 1001 is the sole basis for liability, it's unlikely DOJ attorneys practicing in the Ninth Circuit will be readily permitted to pluck a defendant from his home in North Dakota or Wyoming to face trial in California. The same can't be said for the Second and Fourth Circuits, where federal prosecutors are likely to face less pushback on this issue.

Supreme Court Guidance Needed

While an important development, it may take years—and potentially a trip to the Supreme Court—for the practical ramifications and implications to fully emerge. For example, post-Covid-19 practices inject further wrinkles into the analysis. Since the pandemic, it has become increasingly common for government attorneys to request remote interviews of witnesses.

If the effect of the false statements on investigators in another state can't serve as a basis for venue, does it matter if investigators are physically present in the desired venue when the witness isn't? Given the split of authority, any definitive answer would need to come from One First Street.

The case is *US v. Fortenberry*, 9th Cir., No. 22-50144, 12/26/23.