

Addressing Egregious Misconduct

The Perjuring Plaintiff

by Jonathan M. Stern

Without looking at the rulebook, can you state which Rule or Rules in the Federal Rules of Civil Procedure prohibit litigants from committing perjury or fabricating evidence? If you cannot, no need to worry—the question is a trick. None of the Federal Rules prohibits such conduct, at least not directly. Surprisingly, the words “perjury,” “perjure,” and “perjured” cannot be found anywhere in the text of the Federal Rules of Civil Procedure. Likewise, “fabricate” appears nowhere in the Rules. The word “false” appears only once, in the heading (but not the text) of Rule 37(c).

Given the absence of these words from the Rules, it is no wonder that defense counsel often are unaware of a potent weapon in their arsenal to combat the plaintiff who commits or suborns perjury, fabricates evidence, or both. Defense counsel can, in appropriate cases, obtain dismissal and thereby avoid trial. They can do so despite their inability to satisfy the standards for summary judgment and despite the

absence of express prohibitions of the plaintiff’s misconduct in the rules.

This article addresses the role that the “unclean hands” and “fraud on the court” doctrines, supported by Rules 11, 16, 26, 37, and 41 of the Federal Rules of Civil Procedure (or their state counterparts) and the inherent powers of a trial court, may play in disposing of a perjuring plaintiff’s claims without trial.

“Unclean Hands”

The genesis of the case law that puts this arrow in the defense lawyer’s quiver is “unclean hands,” an equitable doctrine that courts apply for their own protection. It is “a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant.” *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814–15 (1945).

The following two equitable maxims underlie the doctrine: (1) he who seeks equity must do equity; and (2) he who comes into equity must come with clean hands. *See, e.g.*, 27A Am. Jur. 2d, Equity §§119, 126 (1996). If not already encompassed by the first maxim, the courts have added the requirement that

hands remain clean during the litigation. *E.g.*, *Mas v. Coca-Cola Co.*, 163 F.2d 505, 508 (4th Cir. 1947); *Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc.*, 792 F.Supp. 969, 972 (S.D.N.Y. 1992), *aff’d without opinion*, 983 F.2d 1048 (2d Cir. 1992). As one trial court explained: “It would be strange if a court of equity had power—because of public policy for its own protection—to throw out a case because it entered with unclean hands and yet would have no power to act if the unconscionable conduct occurred while the case was in court.” *American Ins. Co. v. Lucas*, 38 F.Supp. 896, 921 (W.D. Mo. 1940) (“It would be as fantastic as to think that a householder could eject one who entered his house to steal the family silverware but could not eject a guest who entered innocently but whom he caught later stealing the silverware.”), *aff’d sub nom.*, *American Ins. Co. v. Scheufler*, 129 F.2d 143 (8th Cir. 1942).

Unclean hands has been invoked to dismiss claims or defenses of litigants who have used underhanded means to advance their cause. So, for example, in *Mas v. Coca-Cola Co.*, a plaintiff used forged documents and perjured testimony in a failed attempt to establish priority of invention before the Patent Office. When subsequently he sued for a declaration of entitlement to a design patent on a beverage bottle, his case was dismissed for his coming into court with unclean hands. 163 F.2d at 507.

The unclean hands doctrine, flexible in application, permits a court to exercise broad discretion to deny relief to a litigant who has acted in an unconscionable way that “has immediate and necessary relation to the matter that he seeks in respect of the matter in litigation.” *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 (1933); *accord Precision Instrument*, 324 U.S. at 814–15. While the misconduct must be closely related to the subject of the claim, it need not rise to the level of fraud or illegal conduct. John Norton Pomeroy, *Equity Jurisprudence* 397, 404 (5th ed. 1941) (“It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience.”); *see also Mas*, 163 F.2d at 507–8. Moreover, the doctrine does not call for a balancing of the misconduct on both sides of the case. Rather, the conduct of the party seeking relief and its effect on the judicial process are the sole considerations. *E.g.*, *Alcatel*



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USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 794 n.92 (5th Cir. 1999); *Mas*, 163 F.2d at 510–11; *United Cities Gas Co. v. Brock Exploration Co.*, 995 F.Supp. 1284, 1296 n.11 (D. Kan. 1998).

Traditionally an equitable defense, the unclean hands doctrine has at times since the merger of law and equity been applied to cases at law. *E.g., Tempo Music, Inc. v. Myers*, 407 F.2d 503, 507 n.8 (4th Cir. 1969); *Buchanan Home & Auto Supply Co. v. Firestone Tire & Rubber Co.*, 544 F.Supp. 242, 245 (D.S.C. 1981); *Cummings v. Wayne County*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995). But see *Shirvanian v. Defrates*, No. 14-02-00447-CV, 2004 Tex. App. LEXIS 182 (Jan. 8, 2004) (rejecting application of unclean hands to action at law). As a practical matter, there may be little need to apply the doctrine in law cases because of the parallel development of the “fraud on the court” doctrine.

“Fraud on the Court”

The Supreme Court has described fraud on the court as “a wrong against the institutions set up to protect and safeguard the public.” *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). “Fraud on the court” is used as shorthand to describe a variety of improper acts that may lead to sanctions under the rules of civil procedure or pursuant to a court’s inherent powers in managing its docket. *E.g., Stanley Shenker & Assocs. v. World Wrestling Fed’n. Entm’t*, 48 Conn. Supp. 357 (Conn. Super. Ct. 2003). *Hazel* upheld the vacation by the Third Circuit of a judgment for patent infringement it had previously affirmed. After the judgment holder’s patent application faced “insurmountable Patent Office opposition,” its officials and attorneys prepared and arranged for publication of an article, purportedly written by a disinterested expert, that was then used to influence favorable treatment by the Patent Office and, subsequently, the Third Circuit in the infringement action. The Supreme Court explained: “[W]e find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme, and of its complete success up to date, is conclusive.” *Hazel*, 322 U.S. at 246 (citation omitted).

In *Rockdale Management Co. v. Shawmut Bank*, N.A., 638 N.E.2d 29 (Mass. 1994), the Supreme Judicial Court of Massachusetts held that the trial judge had not abused her discretion in dismissing the lawsuit because of plaintiff’s fraud. Rockdale Management Company had purchased real property at auction from

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Shawmut Bank. Rockdale subsequently sued the bank for fraud and negligence for its failure to disclose environmental contamination of the property. To bolster the damages case, Rockdale’s president created a letter that purported to be a third-party offer to lease the subject property for a specified monthly amount. The letter was referenced in an interrogatory response prepared by the plaintiffs, and the president testified in deposition to the letter’s authenticity. Only after the nominal author testified that the letter was a fake was the forgery admitted.

The conduct of the party seeking relief and its effect on the judicial process are the sole considerations.

In affirming the dismissal, the appellate court relied on a trial court’s inherent power to dismiss a case when a litigant commits a fraud on the court:

A “fraud on the court” occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.

The *Rockdale* court noted that determining whether a fraud on the court has been committed is fact-specific and must be done on a case-by-case basis. Courts will only find fraud on the court where there is clear and convincing evidence of the fraud. *E.g., Hull v. Municipality of San Juan*, 356 F.3d 98 (1st Cir. 2004); *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003); *Nichols v. Klein Tools, Inc.*, 949 F.2d 1047, 1048 (8th Cir. 1991). The “clear and convincing” evidence requirement was satisfied in *Rockdale*, if for no other reason, by the admission of the president that he had fabricated the letter, incorporated it into an interrogatory response, and falsely testified that the letter was authentic.

Examples of Conduct That Has Led To Dismissal

Reported cases provide a broad range of examples of how one should not behave as a litigant.

As the First Circuit stated in *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989): “Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms.” Some of the more creative or interesting examples of conduct that triggered the unclean hands and fraud on the court doctrines are the following:

Suborning perjury

Plaintiffs in a defamation case involving reports that they stole two dogs were found to have paid a witness to provide a false alibi for the day of the dognapping and to testify falsely that he heard a defendant making defamatory statements about one of the plaintiffs on the radio and, as a result, had a lower opinion of her. *Schultz v. Sykes*, 638 N.W.2d 604 (Wis. App. 2001).

Suppressing evidence

Plaintiff was found to have suppressed an important medical report in an Americans With Disabilities Act case. *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003).

Improperly accessing an opponent’s work product

A plaintiff in a slip-and-fall case who was an employee of the insurance company that administered claims against the supermarket in which the fall occurred accessed the insurer’s computerized file, which contained defense counsel’s work product. The court dismissed the complaint, finding that plaintiff’s conduct constituted an underhanded violation of the work product rule and, therefore, Rule 26 of the Massachusetts Rules of Civil Procedure. *Elliott v. Shaw’s Supermarkets, Inc.*, No. 93-304, 1995 Mass. Super. LEXIS 853 (Jan. 19, 1995). See also *Perna v. Elec. Data Sys. Corp.*, 916 F.Supp. 388 (D.N.J. 1995) (involving a litigant who photocopied the contents of opposing counsel’s briefcase when it was left in his office); *Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994) (involving a plaintiff who surreptitiously removed papers from opposing counsel’s table during a pretrial conference); *Fayemi v. Hambrecht & Quist, Inc.*, 174 F.R.D. 319, 324–26 (S.D.N.Y. 1997) (involving similar misconduct but a different outcome).

Altering evidence

Plaintiffs who claimed to have been injured when a cargo jet crashed in Ecuador submitted altered medical records. The dates had been

changed so that, rather than showing treatment *before the crash*, they reflected treatment at the time of the crash. Despite the absence of evidence of who altered the records, the court found that utilization of the altered records constituted fraud on the court and dismissed the case. *Joza v. Millon Air, Inc.*, No. 96-3165, *slip op.* (S.D. Fla. May 31, 2001), *rev'd in part sub nom., Schwartz v. Millon Air*, 341 F.3d 1220 (11th Cir. 2003) (reversing monetary sanctions that had been awarded against plaintiffs' U.S. counsel).

Perjuring

Plaintiff and her husband, previously employed as a maid and butler by a corporate defendant, brought sexual harassment, retaliatory discharge, and other claims. Plaintiff testified in a deposition that the individual defendant, in whose suite in the Waldorf-Astoria plaintiff had worked, had given her a pair of panties in *September of 1992*. The plaintiff produced the panties at her deposition. Through painstaking investigation, the defendants were able to show that the panties were first sold in *November of 1993*, that they were sold in the United States exclusively in Target stores, and that plaintiff had stolen several pairs of panties from a Target store near her residence shortly before her deposition. The court, relying on its inherent power, dismissed the complaint. *Vargas v. Peltz*, 901 F.Supp. 1572 (S.D. Fla. 1995). Dishonest interrogatory or deposition answers concerning prior or subsequent injuries in personal injury cases are frequently cited as grounds for fraud on the court dismissals. *E.g., Hull*, 356 F.3d 98; *Martin v. DaimlerChrysler Corp.*, 251 F.3d 691 (8th Cir. 2001); *Grant v. K Mart Corp.*, No. 2000-CA-01367-COA, 2001 Miss. App. LEXIS 547 (Dec. 18, 2001). *But see Ruiz v. City of Orlando*, 859 So.2d 574, 576 (Fla. App. 2003) ("Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions.").

Proceeding under a false name

In *Dotson v. Bravo*, 202 F.R.D. 559 (N.D. Ill. 2001), *aff'd*, 321 F.3d 663 (7th Cir. Ill. 2003), the plaintiff brought a section 1983 action under a false name to prevent the defense from learning of his criminal record. The court dismissed the complaint.

Fabricating evidence

In advancing an insurance coverage claim for the value of a thoroughbred racehorse, the insured created, or caused others to create, documents used to support the claimed valuation of the deceased horse. Some of these documents were letters offering to buy a share of the horse. The documents were dated before the death of the horse even though, it was later determined, they were prepared after the horse had died:

There is now no question but that all ten letters had been backdated to make it appear to the Court that these prominent and knowledgeable horsemen had expressed themselves before the horse died. True, they may have made oral offers before the horse died but it is now a fact that the opinions expressed in the letters came after [the horse] died. The credibility of these "offers" to buy a share for \$75,000, after the fact became highly questionable. Talk is cheap, they say.... We were all misled.

Eppes v. Snowden, 656 F.Supp. 1267, 1273 (E.D. Ky. 1986). *See also Gilmer v. Colorado Institute of Art*, No. 00-1192, 2001 U.S. App. LEXIS 13743 (10th Cir. June 19, 2001) (unpublished opinion affirming dismissal for fabrication of evidence); *McDowell v. Seaboard Farms of Athens, Inc.*, No. 95-609-CIV-ORL-19, 1996 U.S. Dist. LEXIS 19558, at 23-24 (M.D. Fla. Nov. 4, 1996) (dismissing plaintiff's discrimination claim where a diary claimed to have been contemporaneously maintained was shown not to align with the days of the week for the year in which the occurrences were alleged to have taken place); *Pope v. Fed. Express Corp.*, 138 F.R.D. 675 (W.D. Mo. 1990) (dismissing sexual harassment complaint where plaintiff fabricated a document to support claim), *aff'd in part, vacated in part on other grounds*, 974 F.2d 982 (8th Cir. 1992); *Munshani v. Signal Lake Venture Fund II, LP*, No. 02-P-1377, 2004 Mass. App. LEXIS 323 (Mass. App. Ct. Mar. 26, 2004) (e-mail created to overcome statute of frauds defense).

In *Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103 (D. Md. 1989), the pilot of a 1956 Cessna Model 182 airplane that crashed following loss of engine power sued the manufacturer of the airplane for an alleged fuel system defect. The pilot broke both his legs in the crash and sought damages for income lost from his contracting business, pain and suffering, other compensatory and punitive damages.

During discovery, Cessna propounded an interrogatory that asked the pilot to state his

income in various years "as reflected by your federal income tax returns." Cessna also served a corresponding request for production of tax returns for the years about which income information was requested in the interrogatory. The pilot responded to the discovery by providing dollar amounts of income for each of the years requested, agreeing to produce the requested tax returns, and producing portions of tax returns for the years requested. After the pilot's counsel received several follow-up requests for the missing portions of the tax returns, he advised that an authorization would be provided so that Cessna could obtain the missing documents directly from the Internal Revenue Service. "When [the pilot's] attorney asked his client to execute the authorization, however, he learned for the first time that his client had in fact failed to file any tax returns for the years 1983 through 1987."

Shortly thereafter, the pilot filed a supplemental interrogatory response with wording over which his lawyer undoubtedly agonized. It read:

The amounts stated with respect to the years 1983 through 1986 in the [pilot's] original answers to this interrogatory are probably in error. The purported portions of income tax returns furnished by the plaintiff to the defendants through counsel, as being portions of plaintiff's income tax returns are, in fact, not portions of any income tax returns filed by the plaintiff with the Internal Revenue Service. Income tax returns for the plaintiff for the years 1983 through 1987 are being prepared with the assistance [of a certified public accountant] identified below, and copies hereof will be furnished to the defendants as soon as the same can be completed.

The pilot had been asked about his income at his deposition. A follow-up deposition was agreed upon in light of the supplemental interrogatory responses. At the second deposition, the pilot admitted that he had "hedged" an answer about filing his tax returns, implying that he had filed returns. Asked whether he wanted the lawyers to think that his answer to the income interrogatory had come from federal tax returns, the pilot responded: "I assumed that that is what you would think, yes." The following questions and answers led to an admission of perjury:

Q. So your affirmation at the end that this is true under penalty of perjury, that is not accurate, is it?

- A. The answers to the interrogatories in that instance is [sic] not correct.
- Q. So your statement you declare under penalty of perjury that the foregoing answers and responses are true and correct, that certification signed by you was not accurate, was it?
- A. In this case, that is correct.
- Q. So you committed perjury in that case, didn't you?
- A. I would believe you would call it that, yes.
- Q. What would you call it? You would call it perjury, too?
- A. Yes.

124 F.R.D. at 105. Armed with admissions by the plaintiff pilot that he had committed perjury in his first deposition and in his interrogatory responses and that he had “committed fraud by submitting false tax returns in response to Cessna’s request for production of documents,” Cessna moved, pursuant to the clean hands doctrine and Fed. R. Civ. P. 41(b), to dismiss the pilot’s complaint.

Some courts have recognized that misconduct in discovery may relate only to a portion of a case and that only tainted claims need be dismissed. *E.g., Belmont Labs. v. Heist*, 151 A. 15, 19 (Pa. 1930). Thus, the federal judge in *Smith*, after finding that the pilot’s hands were unclean with respect to evidence of his earning history, exercised his discretion and dismissed only the claim for lost earnings. 124 F.R.D. at 107. Likewise, a relatively trivial misrepresentation (such as a personal injury plaintiff whose lost earnings claim is predicated solely on the salary he was earning at the time of injury lying about having completed college) will usually not lead to a successful invocation of the clean hands or fraud on the court doctrines. *But see Rodriguez v. M & M/Mars*, No. 96 C 1231, 1997 U.S. Dist. LEXIS 9036 (N.D. Ill. June 18, 1997) (relying on inherent powers to dismiss sexual harassment case for plaintiff’s attempt to “conceal relevant information bearing directly upon her credibility,” by falsely denying in deposition ever having been convicted of a crime).

Sources of Authority

The sources of authority for these doctrines are a trial court’s inherent powers, its procedural rules, or a combination of the two. Courts that dismiss cases because of fraud practiced on them often cite their inherent powers as a source of sanctioning authority. *E.g., Brady v. United*

States, 877 F.Supp. 444 (C.D. Ill. 1994); *Sun World, Inc. v. Lizarazu Olivarria*, 144 F.R.D. 384, 390 (E.D. Cal. 1992); *Eppes*, 656 F.Supp. at 1279. This likely is because there is not a tight fit between the rules of civil procedure and situations in which litigants repeatedly lie under oath, fabricate evidence to support their claims, or destroy evidence. *E.g., TeleVideo Sys. Inc. v. Heidenthal*, 826 F.2d 915 (9th Cir. 1987); *McDowell*, 1996 U.S. Dist. LEXIS 19558 (fabrication of evidence); *Vargas*, 901 F.Supp. at 1581 (fabrication of evidence); *ABC Home Health Serv. Inc. v. Int’l Bus. Mach. Corp.*, 158 F.R.D. 180 (S.D. Ga. 1994) (evidence destroyed prior to initiation of lawsuit); *O’Vahey v. Miller*, 644 So.2d 550 (Fla. Dist. Ct. App. 1994) (personal injury plaintiff repeatedly lied under oath about education and background); *Vaughn v. Tex. Employment Comm’n*, 792 S.W.2d 139 (Tex. App.–Houston [1st Dist.] 1990, no writ) (wrongful discharge when plaintiff lied under oath). Nonetheless, the cases set forth examples in which Rules 11, 16, 26, 37, and 41 of the Federal Rules of Civil Procedure or their state counterparts have been cited as support for dismissal for fraud on the court. *See Jonathan M. Stern, Untangling A Tangled Web Without Trial*, 66 J. Air L. & Com. 1251, 1272–1285 (Summer 2001) (collecting cases).

Perhaps the most likely candidate for a rule to combat fraud on the court is Rule 37 of the Federal Rules of Civil Procedure. Rule 37, after all, contains the Rules’ sole use of the word “false,” addresses “failure to make disclosure or cooperate in discovery,” and provides—pursuant to subsection (b)(2)(C)—a sanction of “dismissing the action or proceeding or any part thereof.” In the right set of circumstances, Rule 37 is sufficiently potent to support dismissal of a claim or action. *E.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763–64 (1980). As presently constituted, however, it does not provide a complete fit for addressing fraud on the court.

Despite the appearance, beginning in 1993, of the word “false” in the heading of Rule 37(c), “false” is not used in the express terms of the Rule or explained by any of the advisory committee notes. Moreover, Rule 37(b) applies only to “failure[s] to comply with [an] Order,” and fraud on the court usually bears no relation to an existing order. A Rule 37(b)(2)(C) sanction nonetheless is available for violations of Rule 37(c)(1) or 37(d). These subsections respond to failures to: (1) make Rule 26(a) disclosures, (2) supplement those dis-
clo-

sures or previous responses to interrogatories, requests for production, or requests for admission (as required by Rule 26(e)), (3) attend a deposition, serve answers or objections to interrogatories, or serve a written response to a request for inspection. Again, these violations often are not directly implicated by fraud on the court.

Cases decided prior to the 2000 amendments held that Rule 37(b) sanctions were available only for violation of a court order or a complete failure to respond. *See, e.g., Keefer v. Provident Life and Accident Ins. Co.*, 238 F.3d 937 (8th Cir. 2000); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469 (D.C. Cir. 1995); 8A Charles Alan Wright *et al.*, *Wright, Miller & Marcus, Federal Practice and Procedure: Civil* §2282 (2d ed. 1994) (“The general scheme of the rule is that ordinarily sanctions can be applied only for failure to comply with an order of the court.”); *Orkin Exterminating Co. v. McIntosh*, 452 S.E.2d 159, 162 (Ga. Ct. App. 1994) (applying the Georgia Rules of Civil Procedure) (“The imposition of penalties under [Rule] 37(d)… is limited to an absolute failure to respond.”). Cases in which the fraud occurs in response to an order compelling discovery are relatively rare. *But see Grant*, 2001 Miss. App. LEXIS 547.

Rule 37(a)(3) provides, “For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.” Accordingly, counsel representing a plaintiff charged with committing fraud on the court in the context of discovery could argue that the misconduct was nothing more than “an evasive or incomplete disclosure, answer, or response” and, therefore, subject only to Rule 37(a) and its limited set of sanctions. Such an approach, if successful, could limit the sanction to the expenses of bringing a motion to compel.

Some courts, however, have applied fictions to improve the fit between Rule 37(b) and fraud on the court. These fictions include treating any rule that requires an oath as also requiring truthful testimony, treating a perjured response as no response, or proceeding as though there is a standing court order against perjury, subornation of perjury, or the like. *E.g., Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145, 155 (7th Cir. 1976)); *Quela v. Payco-General American Credits, Inc.*, No. 99 C 104, 2000 U.S. Dist. LEXIS 6932 (N.D. Ill. May 17, 2000); *Smith*, 124 F.R.D. at 108–109; *Bell v. Auto. Club of Mich.*, 80 F.R.D. 228 (E.D. Mich.

1978); *Pierce v. Heritage Properties*, 688 So.2d 1385 (Miss. 1997); *see also Black Horse Lane Assoc. v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000) (treating failure to prepare Rule 30(b)(6) deposition witness as failure to appear for deposition). For example, in *Quela* the trial judge wrote:

Although there has been no specific court order, we believe such an order is not required to provide notice that parties must not engage in such abusive litigation practices as coercing witness testimony, lying to the court, and tampering with the integrity of the judicial system. Because all litigants are presumed to know that contumacious conduct of this sort is absolutely unacceptable, we can properly consider the sanctions available under Rule 37.

Id. at *18 (citations omitted).

Courts and commentators prior to the 2000 amendments to Rule 37 recognized that Rule 37 did not address many types of fraud on the court. *E.g., Aoude*, 892 F.2d at 1118; 6 James Wm. Moore *et al.*, *Moore's Federal Practice* ¶ 26.06[1] (Matthew Bender 3d ed. 2000); *accord* 8A Wright *et al.*, *supra*, §2282.

The fit of Rule 37 to fraud on the court marginally improved with the 2000 amendments to the Rule. In 1993, when subdivision (c)(1) was added to Rule 37, violation of “the duty to supplement discovery responses pursuant to Rule 26(e)(2) was omitted.” Fed. R. Civ. P. 37 advisory committee notes to 2000 amendment. This was corrected in 2000. As a result, Rule 37(c) now provides authority for a court to enter a dismissal, under appropriate circumstances, when a litigant fails, “without substantial justification,” to comply with Rule 26(e)(2). Rule 26(e)(2) requires reasonable amendment of a prior response to interrogatories, requests for production, or requests for admission “if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(2). A fabricated document produced in response to a Rule 34 request or a perjured response to a Rule 33 interrogatory or Rule 34 request for admission arguably would trigger a duty to supplement under Rule 26(e)(2). Thus, a Rule 37 dismissal sanction should be available to respond to fraud on the court if the fabrication is in an interrogatory, document produced, or Rule 36 admission. Under this

approach, it would be the failure to supplement, not the initial fraud, that would trigger a Rule 37(c) sanction.

Nonetheless, absent the fiction that a perjured response is no response, a dismissal pursuant to Rule 37 for perjured deposition testimony clearly is unavailable. Moreover, because Rule 37(c) does not contain a provision similar to Rule 37(a)(3), arguably it is inappropriate for a court to deem false testimony or provision of fabricated evidence as no response at all. Given the Supreme Court’s holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32

The court found that utilization of the altered records constituted fraud on the court and dismissed the case.

(1991) (upholding imposition of attorneys’ fees as a sanction for a broad range of bad faith conduct in litigation on the basis of inherent powers where at least some of the conduct was sanctionable under specific federal rules or 28 U.S.C. §1927, which allows a court to require counsel who unreasonably multiply proceedings to bear the marginal costs), it seems that such fictions are unnecessary and that reliance on inherent powers is more appropriate in many fraud on the court scenarios. *See, e.g., Moore, supra*, at ¶ 26.06[1] (citing *Pope*, 974 F.2d at 984; *Vargas*, 901 F.Supp. at 1579); *In re AMTRAK “Sunset Ltd.” Train Crash*, 136 F.Supp. 2d 1251 (S.D. Ala. 2001).

The First Circuit in *Aoude* explained the trial court’s inherent authority:

It is apodictic that federal courts possess plenary authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”... Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundamental of the judicial system.

892 F.2d at 1119 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–631 (1962)); *see also Derzack v. County of Allegheny*, 173 F.R.D. 400, 412 (W.D. Pa. 1996) (footnote and citations omitted) (“Because it occurred throughout several aspects of this litigation which are not squarely covered by any one rule, the Court holds, as have most federal courts faced with similar abuse, that plaintiffs’ misconduct most

directly implicates the inherent power of the court to curb such excesses and, just as clearly, warrants invocation of that power to sanction the responsible parties.”).

In *Chambers*, the Supreme Court explained that the inherent powers of a trial court, at a minimum, are available to fill any void in the rules and statutes:

These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices. 501 U.S. at 46.

General Rules for Using the Doctrines

Fraud on the court and unclean hands cases are assessed on a case-by-case basis and, because trial courts possess broad discretion in such assessments, the fact patterns and results can be “all over the map.” Nonetheless, some broad generalizations can be made.

Admission of wrongdoing is a frequent feature of cases in which dismissal is granted or sustained. *Hazel*, 322 U.S. at 246 (citation omitted) (“Here, even if we consider nothing but Hartford’s sworn admissions, we find a deliberately planned and carefully executed scheme to defraud”); *Smith*, 124 F.R.D. at 105; *Rockdale Mgmt.*, 638 N.E.2d at 31. Likewise, where a litigant’s testimony is irreconcilably inconsistent, the court may choose to deny that litigant a trial even in the absence of an admission. *E.g., Aris*, 792 F.Supp. 969. Where, however, the contrary testimony of one witness is offered to show that the litigant has committed perjury, the conflicting testimony normally will be presented to the fact finder at trial. *E.g., Chang v. Geary*, No. 88-4780, 1994 Mass. Super. LEXIS 109 (Nov. 22, 1994). *But see Anheuser-Busch, Inc. v. Natural Beverage Distrib.*, 151 F.R.D. 346 (N.D. Cal. 1993), *aff’d*, 69 F.3d 337 (9th Cir. 1998) (resolving conflicting stories by holding evidentiary hearing and then dismissing for fraud on the court). The same is true when the testimony or interrogatory response is ambiguous and subject to at least one construction that would not clearly be untruthful. *Wood v. Biloxi Pub. Sch. Dist.*, 757 So.2d 190 (Miss. 2000).

The Supreme Court of Mississippi in *Wood* reversed a dismissal sanction, where the plaintiff was shown in surveillance videotape “walking normally, squatting, twisting, bending, and generally performing normal daily functions without any indication of impairment or pain” after answering an interrogatory about the extent of his injuries by stating: “These injuries affected my attitude, my concentration, my school work, and my ability to do manual labor. I no longer am able to enjoy tinkering with automobiles as the stooping, bending, and squatting are painful.” The court held that “one reasonable interpretation” of the interrogatory response was not “that he was incapable of bending, lifting, or performing manual labor, but rather that he was unable to enjoy performing these tasks.” 757 So.2d at 194.

Defense counsel, in preparing for a fraud on the court motion, should strive to obtain an unambiguous record of plaintiff’s deception. The same ambiguity that could derail otherwise effective cross-examination at trial is much more likely to derail a fraud on the court motion, where plaintiff’s counsel—not plaintiff herself—will dissect the record used in support of the motion. Indeed, where a potential “out” like that used in *Pierce* is anticipated, defense counsel may choose not to bring a fraud on the court motion and preserve the surprise for trial.

On the other hand, the pendency of a motion to dismiss for fraud on the court can be a compelling incentive for a plaintiff to settle a case on terms acceptable to the defendant. Not surprisingly, courts do not like to be defrauded. *See, e.g., Storm v. Allied Universal Corp.*, 842 So.2d 245 (Fla. App. 2003) (reversing in part a trial court’s decision not to dismiss a case as a sanction for fraud on the court where the trial judge instead granted a new trial and stated he would “give the plaintiff the break of his life”). The fraud on the court motion can deprive the plaintiff of a trial by jury with the trial court’s findings subject only to review for clear error or abuse of discretion. *E.g., Nat’l Hockey League v. Metro Hockey Club*, 427 U.S. 639, 642 (1976); *Keystone Driller Co.*, 290 U.S. at 245; *Hull*, 356 F.3d 98; *Gilmer*, 2001 U.S. App. LEXIS 13743; *Rockdale Mgmt.*, 638 N.E.2d 29; *Pierce*, 688 So.2d at 1388; *Schultz*, 638 N.W.2d 604 (“Because ensuring the truthful disclosure of facts is so central to both the court’s dignity and the purpose of its existence, circuit courts must have the power to sanction parties if they attempt to suborn perjury from witnesses. Further, this power is not extin-

guished any time there is a disputed issue of fact; otherwise courts would become powerless to stop abuses of the judicial process whenever a party guilty of misconduct denied his or her wrongdoing.”). Particularly in a case of an otherwise sympathetic plaintiff, this can provide powerful incentive to settle.

The courts usually will not dismiss a case if the misconduct is in an area that is either irrelevant (aside from its evidentiary relevance to witness credibility) or peripheral to the case. *E.g., Aoude*, 892 F.2d at 1120 n.3. For example, a case in which it “might be relevant” whether

A relatively trivial misrepresentation will usually not lead to a successful invocation of the clean hands or fraud on the court doctrines

plaintiff had sexual relations with men other than the individual defendant was not dismissed as a result of plaintiff lying in deposition about the *number* of other men with whom she had relations where she had admitted that there were *such* relationships. *Bower v. Weisman*, 674 F.Supp. 109, 112 (S.D.N.Y. 1987). Instead, the plaintiff was taxed with costs, fees, and expenses of additional depositions that were necessitated by the perjury. *Id.* at 112–113. Defense counsel should advance their very best arguments for tying the misconduct to the heart of the plaintiff’s case.

Similarly, the courts normally will not punish one plaintiff for the sins of another. Thus, in *Hull v. Municipality of San Juan*, 356 F.3d 98 (1st Cir. 2004), the First Circuit sustained the fraud on the court dismissal of a male personal injury plaintiff but remanded the case with respect to the consortium claim of his wife. While the husband had testified falsely with respect to prior injuries, there was no record with respect to the wife’s role in the deception. A different conclusion was reached in *Lett v. The Providence Journal Co.*, 798 A.2d 355 (R.I. 2002), where the trial justice’s conclusion that there was joint misconduct was not an abuse of discretion.

In choosing the basis for a motion, counsel should assess whether the specific set of facts constituting fraud on the court is adequately addressed by a rule of civil procedure. Where it is, the rule (and any of its procedures) nor-

mally will control and should be relied upon.

Counsel may assert inherent powers *and* any potentially applicable rule. It is unclear how tight the fit of the facts to the rule must be before inherent powers will become unavailable. *Compare Societe Int’l Pour Participations Indus. et Comm’l, S.A. v. Rogers*, 357 U.S. 197, 207 (1958), with *Chambers*, 501 U.S. at 50. A fair synthesis of these two cases, and one supported by the advisory committee’s notes to the 1993 amendment of Rule 11, is that federal trial courts have the judicial power to invoke inherent powers even when a rule or statute covers the misconduct at issue (absent a clear expression of contrary congressional intent) but that the proper exercise of discretion will usually lead to reliance on any directly applicable rule or statute.

Courts start from a general inclination to have cases decided on their merits and to avoid dismissals on technical grounds. As a result, they will often choose the least harsh sanction that will accomplish its purpose, or at least one where “the punishment fits the crime.” Factors that are considered in selecting an appropriate sanction for fraud on the court will vary depending upon the authority on which the court relies and, in some cases, the federal circuit or state in which the case is decided. Accordingly, the range of considerations associated with each rule will differ and may influence counsel’s selection of authority to urge upon the court for dismissal. Counsel should research the applicable law to determine which factors the court will likely consider with each source of sanctioning authority and how, in the particular jurisdiction, those factors are likely to be weighed and balanced. Some of the factors that courts have historically considered in deciding fraud on the court motions include: the egregiousness of the misconduct, the extent to which there has been a pattern of misconduct, whether a litigant who has “come clean” has done so only after the fraud has been discovered, the materiality of the misconduct, the efficacy of lesser sanctions, the role that the client (rather than his attorney) played in the misconduct, the prejudice suffered by the victim of the misconduct, and any government or public interests at stake.

Defense counsel should also proceed in a manner that is reasonably designed not only to achieve a desired sanction but to make it sustainable on appeal. In this respect, it is important that due process be provided to plaintiff before a dismissal is granted. *E.g., Schultz*, 638 N.W.2d 604. Plaintiffs usually will be en-

titled to notice, an opportunity to respond, and specific findings by the court. *See, e.g.*, Fed. R. Civ. P. 11(d) 1993 advisory committee notes. Rule 37(c) appears to require a motion to instigate, and an opportunity to be heard before assessing, any sanction for violation of Rule 37(c)(1) other than exclusion of the undisclosed evidence. The failure to provide due process is likely to lead to reversal on appeal. *E.g.*, *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983); 8A Wright *et al.*, *supra*, §2283. If it appears a trial judge intends not to engage in such a process, counsel may wish to encourage a different course of action.

Finally, a word of caution. The unclean hands and fraud on the court doctrines can apply against defendants. Fraud on the court can be applied against a defendant by entry of a default judgment or, in appropriate cases, lesser sanctions. The unclean hands doctrine, in its traditional equity formulation, can apply against

any party seeking equity. This can be equitable relief sought by a plaintiff, but it can also be the assertion of an equitable defense. Certainly, the equity maxims underlying the unclean hands doctrine stand as good advice to defendants and their counsel:

- If you seek equity, do equity
- Come into court with clean hands
- Keep your hands clean during litigation

Conclusion

Courts are empowered to deal harshly with plaintiffs who act in underhanded ways to improperly influence the judicial system. Sufficient flexibility exists to respond to whatever scheme a misbehaving litigant might concoct, whether it involves perjury, fabrication of evidence, destruction of evidence, suppression of evidence, witness tampering, or a combination of these.

The Federal Rules of Civil Procedure and

their state counterparts provide some of the tools to address fraud on the court. These rules, however, do not provide a good fit for most fraud on the court and unclean hands scenarios. This is, in part, a result of the fact that the rules do not expressly proscribe perjury, fabrication of evidence, destruction of evidence, and the like. Where the Rules do not sufficiently address the problem, however, the courts have the inherent power to deal with the situation.

In the right case, one where there is clear and convincing evidence of egregious misconduct, counsel must decide whether to proceed to trial and use traditional methods to reveal the fraud or move to dismiss for unclean hands or fraud on the court. The decision should be informed by an analysis of the likelihood that an ultimate sanction would be imposed and the ability, otherwise, to adequately develop the wrongdoing at trial. 