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UNTANGLING A TANGLED WEB WITHOUT TRIAL: USING THE COURT'S INHERENT POWERS AND RULES TO DENY A PERJURING LITIGANT HIS DAY IN COURT

JONATHAN M. STERN*

"Oh what a tangled web we weave,
When first we practice to deceive!"
—Sir Walter Scott 1771-1832

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I. INTRODUCTION

PERJURY IS A serious crime, punishable by fine, incarceration, or both.¹ Yet, more than a few litigants in civil cases have chosen to lie under oath despite the fact that dollars, not personal liberty, were at issue. Cross-examination at trial, many would say, is the tool that we litigators have to expose the perjuring litigant and influence the trier of fact to come to a just conclusion. This is not, however, the only means we have to address such misconduct.

The common law, the Federal Rules of Civil Procedure, and the rules of civil procedure of many states also provide tools that, in the right set of circumstances, can be used to dispose of a suit (or a claim or defense within a suit) without a trial on the basis of perjury, fabrication of evidence, or other serious misconduct of a litigant. When a suit can be won without the inherent risks of trial, why not use the available tools to do so?

This article addresses the role that the inherent powers of a trial court and how Rules 11, 16, 26, 37, and 41 of the Federal Rules of Civil Procedure (or their state counterparts) may play (generally under the rubric of “fraud on the court” or the “clean hands” doctrine) in disposing of one or more claims or defenses in advance of trial. It does not deal with other sanctions that may be available.² The article also does not address the separate issue of relief from a judgment for fraud under Rule 60 of the Federal Rules of Civil Procedure, although several cases seeking post-trial relief are discussed.³ Several examples of factual sce-

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² See, e.g., Fed. R. Civ. P. 37(b) (2) (listing examples of sanctions); Owens-Corning Fiberglass Corp. v. Watson, 413 S.E.2d 630 (Va. 1992) (invalidating the attorney-client privilege as a sanction for providing false answer to interrogatory).
³ In general, it is more difficult to obtain relief from a judgment for fraud than it is to avoid a judgment in the first instance for fraud on the court. See, e.g., Davenport Recycling Assocs. v. Comm'r, 220 F.3d 1255, 1262 (11th Cir. 2000); Gleason v. Jandrucko, 860 F.2d 556 (2d Cir. 1988); Mothershed v. Gregg, No. 92-6035, 1993 U.S. App. LEXIS 11635 (10th Cir. May 11, 1993); Chang v. Geary, No. 88-4780, 1994 Mass. Super. LEXIS 109 (Nov. 22, 1994). Nonetheless, numerous courts, starting with the Supreme Court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), have found fraud on the court a sufficient basis on which to grant relief from a judgment. (“This case involves the power of a Circuit Court of Appeals, upon proof that fraud was perpetrated on it by a successful litigant, to vacate its own judgment entered at a prior term and direct vacation of a District Court's decree entered pursuant to the Circuit Court of Appeals' mandate.”). Id. at 239. (“We have . . . a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of
narios that have resulted in dismissal or default are described. The article then reviews the factors that courts will consider in selecting the appropriate sanction. Also analyzed is the effect that a finding of fraud on the court may have in related cases, including the impact on res judicata and collateral estoppel. Finally, the article addresses the standards by which appellate courts will review fraud on the court determinations.

II. FRAUD ON THE COURT

The Supreme Court of the United States has stated that "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a flagrant 'affront' to the truth-seeking function of adversary proceedings." The "fraud on the court" doctrine provides a means of response to such intolerable conduct.

Regardless of the specific tool utilized to deal with the perjuring litigant, the analysis usually comes down to whether there has been a "fraud upon the court." Moreover, "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.

For example, in an oft-cited Supreme Court patent infringement case, the Court mandated reversal of a judgment that had been entered in the patent-holder's favor. The evidence showed that, when the application for the patent faced "insurmountable Patent Office opposition," the applicant's 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, by the circuit court of appeals in the infringement case. This constituted fraud on the court and cost the patent holder the case, and perhaps the patent.

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4 ABF Freight Sys., Inc. v. NLRB, 510 U.S. 317, 323 (1994) (holding that NLRB had discretion to grant an employee reinstatement with backpay even though the employee gave false testimony under oath in an unfair labor practice proceeding).

5 Hazel-Atlas Glass, 322 U.S. at 238.

6 Id. at 240-41.

7 Id. at 251.
The Supreme Court has described fraud on the court as "a wrong against the institutions set up to protect and safeguard the public." While viewed as a wrong perpetrated on the system rather than an individual litigant, the judicial response to fraud on the court can be of great benefit to the wrongdoer's opponent. In numerous cases, a litigant's fabrication, destruction, or suppression of evidence and related perjury has led to dismissal of the perjuring plaintiff's claim or default judgment against the perjuring defendant. Indeed, the combination of fabrication of evidence and perjury has been described as a "classic" example of fraud on the court.

In Rockdale Management Co. v. Shawmut Bank, N.A., 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. In that case, Rockdale Management Company had purchased real property at auction from 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, Vincent Fernandes, created a letter that purported to be an offer by Sun Refining and Marketing Company to lease the subject property for a specified monthly amount. The letter was referenced in an interrogatory response prepared by the plain-

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8 Id. at 246.
10 Unlike the defense of spoliation of evidence, which has in some jurisdictions been recognized as an independent cause of action, fraud on the court is not recognized as an independent cause of action because it is a wrong against the judicial system. Nat'l Eng'g Serv. v. Galello, No. 92-05303, 1995 Mass. Super. LEXIS 779 (May 3, 1995); see also Liberty Leather Corp. v. Callum, 653 F.2d 694, 700 (1st Cir. 1981) (holding that there is no cause of action for failure to provide discovery); Marozsan v. United States, 849 F. Supp. 617, 645 (N.D. Ind. 1994) (same).
13 Aoude, 892 F.2d at 1118.
tiffs, and Fernandes testified in deposition that the letter was authentic. Only after the nominal author testified that the letter was a fake did Fernandes admit the forgery.\textsuperscript{15}

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. The court wrote:

A “fraud on the court” occurs where it can be demonstrated, clearly and convincingly, that a party has sentimentally 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.\textsuperscript{16}

The 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.\textsuperscript{17}

In addressing fraud on the court, some courts have resolved factual disputes by deciding issues of credibility.\textsuperscript{18} Others suggest a standard akin to summary judgment.\textsuperscript{19} The fact that appellate courts review sanction determinations for abuse of discretion and related factual findings for clear error strongly suggests that trial courts are not bound by Rule 56 strictures in

\textsuperscript{15} Id. at 31.

\textsuperscript{16} Id. (quoting Aoude, 892 F.2d at 1118).

\textsuperscript{17} Id. at 32.

\textsuperscript{18} E.g., Wyle v. R.J. Reynolds Indust. Inc., 709 F.2d 585, 589 n.2 (9th Cir. 1983) ("[W]hen a district court makes findings of facts in connection with a motion for sanctions, we review those findings under the clearly erroneous standard to determine whether they are supported by the record.") (citing Anderson v. Air West, Inc., 542 F.2d 1090, 1093 (9th Cir. 1976); Hindmon v. National-Ben Franklin Life Ins. Corp., 677 F.2d 617, 621 (7th Cir. 1982); Pope v. Fed. Express Corp., 138 F.R.D. 675, 681 (W.D. Mo. 1990) (resolving factual issues and making credibility determinations after evidentiary hearing), aff'd in part and vacated in part, remanded, 974 F.2d 982 (8th Cir. 1992) (upholding dismissal but remanding for further proceedings on issue of monetary sanctions).

\textsuperscript{19} See, e.g., Meador v. New Times, Inc., No. 92-1357 PHX ROS (SLV) 1995 U.S. Dist. LEXIS 11201, at *29-30 (D. Ariz. Aug. 2, 1995) (citing United States v. Cravero, 530 F.2d 666, 670 (5th Cir. 1976), for proposition that "[o]ne of the oldest established rules of Anglo-American jurisprudence is that the jury is the arbiter of credibility of witnesses") ("In the absence of inconsistent representations to the Court or evidence which shows that there is no genuine issue of material fact, the truthfulness of statements is necessarily a question for the finder of fact, and not properly resolvable on a motion for summary judgment."); Bower v. Weisman, 674 F. Supp. 109, 111 (S.D.N.Y. 1987) ("With respect to the alleged forgery, the issue of who signed Weisman’s signature on the document and at whose direction is among ultimate issues in the trial, and will not now be resolved or otherwise used as a basis for a sanction.").
ruling on motions for sanctions.\textsuperscript{20} In any case, courts will only find that a fraud on the court has been committed where there is clear and convincing evidence.\textsuperscript{21} The "clear and convincing" evidence requirement was satisfied in \textit{Rockdale Management}, if for no other reason, by the admission of Fernandes that he had fabricated the letter, incorporated it into an interrogatory response, and testified—perjuringly—that the letter was authentic. The appellate court also found the selection of the ultimate sanction of dismissal within the trial court’s discretion because it was shown that Fernandes’s fraudulent conduct was “part of a pattern or scheme to defraud.”\textsuperscript{22}

While the evidence that will satisfy the "clear and convincing" standard must be assessed on a case-by-case basis, some broad generalizations can be made. Admission of the wrongdoing is a frequent feature of cases in which the ultimate sanctions of default or dismissal are selected or sustained.\textsuperscript{23} Where the contrary testimony of one witness is offered to show that the litigant has committed perjury, the conflicting testimony will normally be presented to the fact finder for resolution at trial.\textsuperscript{24} The same is true when the testimony or interrogatory response is ambiguous and subject to a construction that would not clearly be untruthful.\textsuperscript{25} On the other hand, where a litigant’s own testimony is irreconcilably inconsistent, the court may invoke the fraud on the court doctrine and deny that litigant a trial.\textsuperscript{26}

\textsuperscript{20} See infra Section VIII for a discussion of standards of review on appeal.
\textsuperscript{25} \textit{Wood v. Biloxi Pub. Sch. Dist.}, 757 So. 2d 190 (Miss. 2000).
So, for example, the Supreme Court of Mississippi reversed a dismissal sanction in *Wood v. Biloxi Public School District*, 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 “[o]ne 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.”

Finally, the courts usually will not dismiss or default a litigant if the misconduct is in an area that is either irrelevant or peripheral to the case. For example, a case in which it “might be relevant” whether plaintiff had sexual relations with men other than the individual defendant was not dismissed as a result of plaintiff’s lying in deposition about the number of other men with whom she had relations where she had testified that there were such relationships. Instead, the plaintiff was taxed with costs, fees, and expenses of additional depositions that were necessitated by the perjury.

Accordingly, in a recent case arising out of an airline accident, counsel made a tactical decision not to seek dismissal
where the plaintiff made misrepresentations about peripheral matters that were significant to his credibility but not directly relevant to his claim. The plaintiff, who claimed only four days of lost earnings, responded to an interrogatory about his work history by stating that he had left a job as a police officer "to pursue other opportunities and better pay." According to the police department’s records, however, the officer was terminated after he was charged with second-degree rape of a female police officer. Moreover, presumably after he provided the details to his counsel, a supplemental interrogatory response was served in which the answer was corrected to reflect that the police department had terminated him. With a significant sanction highly unlikely, counsel chose to save the information for cross-examination at trial.

III. CLEAN HANDS DOCTRINE

The “clean hands” doctrine is a longstanding equitable doctrine whose scope is broader than, but may encompass, fraud on the court. 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." The doctrine 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; the plaintiff suffered a dismissal for coming into court with unclean hands. The 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." Accordingly, the clean hands doctrine does not close the courthouse doors to a litigant simply because he is a bad person; rather, relief is denied where a "violation[ ] of conscience as in some measure affect[s] the equitable relations be-

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34 163 F.2d 505 (4th Cir. 1947).
35 Id. at 507.
tween the parties in respect of something brought before the court for adjudication.\textsuperscript{37}

The clean hands doctrine is one that the court applies, not for the protection of the parties, but for its own protection. Its basis was well stated by Professor Pomeroy as follows:

It assumes that the suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, and therefore refuses him all recognition and relief with reference to the subject-matter or transaction in question. It says that whenever a party, who, as actor seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.\textsuperscript{38}

Another passage by this authoritative writer on equity jurisprudence, thus states the rule: “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.”\textsuperscript{39}

An example of application of the clean hands doctrine is found in \textit{Smith v. Cessna Aircraft Co.}\textsuperscript{40} In \textit{Smith}, 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, and other compensatory, as well as 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.”\textsuperscript{41} Cessna also served a corresponding request for production of tax returns for the years about which income information was requested in the interrogatory.\textsuperscript{42} The pilot responded to the discovery by providing dollar amounts of income for each of the years requested, agreeing

\textsuperscript{37} \textit{Keystone Driller}, 290 U.S. at 245.

\textsuperscript{38} \textit{John Norton Pomeroy, Equity Jurisprudence} § 397 (5th ed. 1941).

\textsuperscript{39} \textit{Id.} at § 404; see also \textit{Mas}, 163 F.2d at 507-8.

\textsuperscript{40} 124 F.R.D. 103 (D. Md. 1989).

\textsuperscript{41} \textit{Id.} at 104.

\textsuperscript{42} \textit{Id.}
to produce the requested tax returns, and producing *portions* of tax returns for the years requested. After several requests by Cessna's counsel to the pilot's counsel for the missing portions of the tax returns, the pilot's attorney advised Cessna's counsel 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.

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* Id. at 105.
* Id.
* Id.
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.  

Armed with admissions by the plaintiff pilot that he had committed perjury in his first deposition and 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 Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss the pilot’s complaint.  

The clean hands doctrine in its traditional formulation applied against those parties asserting equitable claims or defenses where they arrived before the chancellor with unclean hands. In fact, the clean hands doctrine is unique among the tools for fighting fraud on the court in its applicability solely to misconduct of those (typically, but not always, plaintiffs) seeking the application of equity. When applied in this way, the doctrine does not call for a balancing of the misconduct on both sides of

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47 Id.
48 Id.
50 E.g., Aris-Isotoner Gloves, Inc. v. Berkshire Fashions, Inc., 792 F. Supp. 969 (S.D.N.Y. 1992) (applying clean hands doctrine to bar defendant’s equitable defense of laches). But see Pierce v. Heritage Props., 688 So. 2d 1385, 1391 (Miss. 1997) (implying that the clean hands doctrine could apply to the defendants had they been guilty of misconduct). This does not mean, however, that only plaintiffs or counterclaimants will be negatively impacted by the clean hands doctrine. Rather, the doctrine allows the court to deny equity to one who has not acted equitably in the matter and, therefore, can apply to a claimant bringing an equitable claim or a defendant asserting an equitable defense. See, e.g., Fayemi v. Hambrecht & Quist, Inc., 174 F.R.D. 319, 326 (S.D.N.Y. 1997) (“The final issue is whether the Court should withhold any sanction because of the defendants’ own misconduct. Because the relief sought by the defendant is equitable, the unclean hands doctrine applies.”); Aris-Isotoner, 792 F. Supp. at 972 n.7 (“We further disagree with Berkshire’s argument that the doctrine of unclean hands especially applies to plaintiffs, as opposed to defendants. The cases that Berkshire cites do not state that a distinction exists as to the application of the unclean hands doctrine to equitable causes of action on the one hand and to equitable defenses on the other, and such a distinction is needlessly artificial and unwarranted under these circumstances.”).
Rather, the conduct of the party seeking relief and its effect on the judicial process is the sole consideration.\textsuperscript{52} As suggested above, one requirement of the clean hands doctrine is that the misconduct bear a substantial relationship to the matter(s) in issue.\textsuperscript{53} For example, in \textit{Pierce v. Heritage},\textsuperscript{54} the Supreme Court of Mississippi explained:

Courts apply the maxim requiring "clean hands" only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to anything involved in the suit, but only for such violations of conscience as in some measure affect the equitable relations between the parties in respect of something brought before the court for adjudication.\textsuperscript{55}

Moreover, some courts have recognized that the misconduct may relate to only a portion of the case and that only those claims or defenses that are tainted need be dismissed.\textsuperscript{56} Thus, the federal judge in \textit{Smith v. Cessna Aircraft Co.}, after finding that the pilot's hands were unclean with respect to a matter at issue in the lawsuit,\textsuperscript{57} exercised his discretion and dismissed the claim for lost earnings but not the entire complaint of the plaintiff-pilot who lied about his past income and his failure to file tax


\textsuperscript{52} \textit{E.g.}, Mas v. Coca-Cola Co., 163 F.2d 505, 510-11 (4th Cir. 1947).


\textsuperscript{54} 688 So. 2d 1385, 1391 (Miss. 1997).

\textsuperscript{55} \textit{Id.} at 1391 (quoting \textit{Keystone Driller}, 290 U.S. at 245).

\textsuperscript{56} \textit{E.g.}, Belmont Labs. v. Heist, 151 A. 15, 19 (Pa. 1930); Comstock v. Thompson, 133 A. 638, 640 (Pa. 1926); Barnes v. Barnes, 118 N.E. 1004, 1005 (Ill. 1918); Munn & Co. v. Americana Co., 91 A. 87, 88 (N.J. 1914).

\textsuperscript{57} "[The pilot] has filed suit, seeking damages resulting from the crash of his plane. As part of those damages, he seeks compensation for the income he lost while recuperating from his injuries. His tax returns are critical to allowing the defendants to assess accurately their potential liability for these damages. By providing the defendants with tax documents that were admittedly false, and by lying in his deposition and answers to interrogatories, [he] has abused the discovery system and has deprived the defendants of essential information." \textit{Smith v. Cessna Aircraft Co.}, 124 F.R.D. 103, 107 (D. Md. 1989).
returns with the Internal Revenue Service. Likewise, a relatively trivial misrepresentation (such as a lie about having completed college by a personal injury plaintiff whose lost earnings claim is predicated on the salary he was earning at the time of injury) will not usually lead to a successful invocation of the clean hands doctrine, although a plaintiff who falsely denied in deposition ever having been convicted of a crime found herself out of court.

Traditionally an equitable defense, the clean hands doctrine has been applied to cases at law since the merger of law and equity. As a practical matter, the fraud on the court doctrine is sufficiently developed and, in this context, sufficiently similar to the clean hands doctrine that the clean hands doctrine can be left to its traditional application to equity. Therefore, it may be sensible to rely on the clean hands doctrine only in situations of fraud on the court by litigants asserting equitable claims or defenses.

The standard exposition of the clean hands doctrine speaks of the requirement of coming into court with clean hands, but many courts also require that hands remain clean during the litigation. Thus, a plaintiff who arrives in court with clean hands may still find herself out of court if her hands become soiled during the litigation. 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

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58 Id. ("[T]he validity of the tax documents relates only to the issue of damages for lost income."). Judge Smalkin noted that the pilot's misconduct had begun years earlier when he failed to file income tax returns but that such failure did not relate directly to the lawsuit. Id. at 107 n.3. Other courts faced with similar misconduct have dismissed the entire case. See, e.g., Derzack v. Allegheny County, 173 F.R.D. 400 (W.D. Pa. 1996).

59 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").


61 E.g., Mas, 163 F.2d at 508.

entered with unclean hands and yet would have no power to act if the unconscionable conduct occurred while the case was in court.”

IV. EXAMPLES OF CONDUCT THAT HAS LED TO DISMISSAL OR DEFAULT

Reported cases provide a broad range of examples of how not to behave as a litigant. As the First Circuit stated in *Aoude v. Mobil Oil Corp.*: “Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms.” Some of the more creative or interesting forms are discussed in the examples below:

- A supermarket slip-and-fall plaintiff who was employed by the insurance company that administered her claim against the supermarket accessed the insurer’s computerized file, which contained defense counsel’s work product. The court dismissed plaintiff’s complaint, finding essentially that plaintiff’s conduct constituted an underhanded violation of the work product rule.

- A plaintiff 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 one year 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.

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63 *Lucas*, 38 F. Supp. at 921 (“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.”).

64 892 F.2d 1115, 1118 (1st Cir. 1989).


• A corporate defendant and counterclaimant that withheld relevant documents from production until three months before trial on a false claim that they had been destroyed in a fire suffered dismissal of its counterclaim.\textsuperscript{67}

• Plaintiff and her husband, previously employed as a maid and butler by a corporate defendant, brought sexual harassment, retaliatory discharge, and a variety of related state law claims. Plaintiff testified in 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 at her deposition produced the panties. 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.\textsuperscript{68}

• Plaintiff in a sexual harassment case testified that the original of a handwritten note that said, “Carol, you ‘feel’ good! Danny,” was left on her desk at work. After an evidentiary hearing that included expert testimony that the document was a “cut and paste” job and could never have existed as an “original,” the court dismissed the complaint with prejudice.\textsuperscript{69}

• In a racial discrimination case, plaintiff presented a diary in which he claimed he had contemporaneously recorded events that reflected discrimination in his workplace. The days of the week and the dates, however, frequently did not align given the year in which the events were alleged to have taken place. Concluding that plaintiff had fabricated evidence and committed perjury, the court dismissed the complaint.\textsuperscript{70}

• In advancing an insurance coverage claim for the value of a thoroughbred racehorse, the insured created, or caused


\textsuperscript{68} Vargas v. Peltz, 901 F. Supp. 1572 (S.D. Fla. 1995).


others to create, documents used to support the claimed valuation of the deceased horse. Some of these documents were letters of offer to buy a share of the horse. The documents were dated before the death of the horse even though 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.71

V. SOURCES OF AUTHORITY

Courts that have dismissed or defaulted litigants for fraud on the court or for unclean hands have found the necessary authority inherent, in the rules of civil procedure, or both. Rules among the Federal Rules of Civil Procedure that have been cited include Rules 11, 16, 26, 37, and 41.

A. INHERENT POWERS

Trial courts have inherent power to sanction parties who engage in bad faith conduct that abuses the judicial process.72 The First Circuit has said:

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 fundament of the judicial system.73

73 Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1119 (1st Cir. 1989) (citing Link, 370 U.S. at 630-31).
In *Link v. Wabash Railroad Co.*, the Supreme Court upheld the exercise of inherent power to dismiss a civil action for failure to prosecute. *Link* therefore shows that inherent powers are sufficiently potent to terminate litigation regardless of the merit of the substantive claims. It seems only logical that trial courts also have inherent power to dismiss for misconduct sufficiently egregious to constitute fraud on the court.

In *Chambers v. NASCO, Inc.*, the Supreme Court considered a trial court's imposition of attorneys' fees as a sanction for a broad range of bad faith conduct in litigation over a contract for the sale of a Louisiana television station. The issue in the Supreme Court was whether it was permissible for the trial court to rely on inherent powers when at least some of the conduct was sanctionable under various federal rules or 28 U.S.C. § 1927, which allows a court to require counsel who unreasonably multiply proceedings to bear the marginal costs. The Court began with an explanation of the basis for inherent powers:

It has long been understood that “certain implied powers must necessarily result to our Courts of justice from the nature of their institution,” powers “which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.” For this reason, “Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates.” These powers are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Prior cases have outlined the scope of the inherent power of the federal courts. For example, the Court has held that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. While this power “ought to be exercised with great caution,” it is nevertheless “incidental to all Courts.”

The Court, in a five-to-four decision, upheld the sanctions under inherent powers:

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74 *370 U.S. 626 (1962).*

75 *Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980).*

76 *501 U.S. 32 (1991).*

77 *Roadway Express* contains an interesting history of § 1927, which was originally enacted in 1813 and may have been prompted by the practices of United States Attorneys, some of who were paid on a piece-work basis. *Roadway Express,* 447 U.S. at 759.

78 *Chambers,* 501 U.S. at 43 (citations omitted).
We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. 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. 79

The majority recognized that Congress could limit the exercise of inherent powers but expressed the opinion that neither Rule 11 nor Rule 26 had such effect. 80 One area in which the dissenters and the majority disagreed was with respect to the ability of a court to rely on inherent powers where the conduct was sanctionable under a rule or statute. 81 Thus, even the dissenters agreed that a trial court's inherent powers could be relied upon to sanction bad-faith misconduct not governed by rules or statutes. 82 But the majority went one step further:

There is, therefore, nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct. This is plainly the case where the conduct at issue is not covered by one of the other sanctioning provisions. But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules. A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees. Furthermore, when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power. 83

Thus, despite what perhaps should be viewed as a preference to use applicable rules and statutes, under Chambers federal trial

79 Id. at 46.
80 Id. at 47-51.
81 Id. at 60.
82 Id. at 66.
83 Id. at 50 (citation omitted).
courts have discretion to invoke their inherent power to mete out sanctions in response to bad faith misconduct in matters pending before them.

Courts that dismiss or default for fraud practiced on the court often cite their inherent powers as a source of sanctioning authority.\(^8\) Perhaps this 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.\(^8\) "The federal case law is well established that dismissal is the appropriate sanction where a party manufactures evidence which purports to corroborate its substantive claims."\(^8\)

So, for example, the First Circuit in\textit{Aoude v. Mobil Oil Corp.} affirmed dismissal of two suits that Aoude had brought on the same cause of action, the first supported by fabricated evidence attached to his complaint.\(^8\) After a co-conspirator was deposed, "the truth began to emerge," and Aoude was confronted with the co-conspirator’s testimony.\(^8\) Only then did Aoude admit his fraudulent scheme, and it took him almost three months thereafter to bring a motion to amend his complaint to substitute an authentic document for the fabricated one originally attached.\(^8\) The First Circuit did not concern itself with the source of authority on which the trial court had dismissed Aoude’s lawsuits:

Exercising great circumspection, the court below suggested several sources from which it derived authority to enter the dismissal orders. We are not similarly inclined. It strikes us as elementary that a federal district court possesses the inherent


\(^8\) Vargas, 901 F. Supp. at 1581.

\(^8\) Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1116-1117, 1122 (1st Cir. 1989).

\(^8\) Id. at 1117.

\(^8\) Id.
power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court. 90

In its sole reference to the Federal Rules of Civil Procedure, the court said: “The Civil Rules neither completely describe nor purport to delimit, the district court's powers.” 91 Yet, other authorities continue to suggest that the courts' inherent powers may only be utilized to respond to misconduct not addressed by statutory enactments or rules of court. For example, Professor Moore writes, “When an appropriate sanction for a specific abuse exists under the Rules . . . , a court may not resort to its inherent sanctioning power but must use the sanctions available under the Rules.” 92 Nonetheless, it is beyond question that many fraud on the court scenarios are not governed by the rules.

For example, “wrongful destruction of documents or other physical evidence prior to the commencement of an action is generally outside the scope of the sanctions available under specific Rules.” 93 Further, “the fabrication of evidence or testimony is subject to the court's inherent sanctioning power and dismissal is a potential sanction.” 94 In these situations, federal trial courts clearly are authorized to invoke their inherent power to sanction recalcitrant litigants.

90 Id. at 1118. Aoude was decided before the Supreme Court decided Chambers.

91 Id. at 1119 (citing HMG Prop. Invs., Inc. v. Parque Indust. Rio Canas, Inc., 847 F.2d 908, 915 (1st Cir. 1988); Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985)).

92 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.06[1] (Matthew Bender 3d ed. 2000) (citing Societe Int'l Pour Participations Indus. et Comm'l, S.A. v. Rogers, 357 U.S. 197, 207 (1958); Black Panther Party v. Smith, 661 F.2d 1243, 1259 n.103 (D.C. Cir. 1981), vacated on other grounds, 458 U.S. 1118 (1982)). In Societe Internationale, the Supreme Court held that the trial court erred by resorting to inherent powers and Rule 41(b), instead of Rule 37(b) (2) (iii), for authority to dismiss a case because of plaintiff's noncompliance with a discovery order. 357 U.S. at 207. The Chambers majority opinion distinguished Societe Internationale on the basis that there was “no need” in Societe Internationale to invoke inherent powers or Rule 41(b) and that where “individual rules address specific problems . . . it might be improper to invoke one when another directly applies.” Chambers, 501 U.S. at 49 n.14.

93 MOORE, supra note 92, at ¶ 26.06[1]. Accord 8A CHARLES ALAN WRIGHT ET AL., WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE: Civil § 2282 (2d ed. 1994) (“[T]hough the Supreme Court said that Rule 37 is the sole source of sanctions for the discovery violations described in that rule, there are some violations of the discovery rules not within the compass of Rule 37, and it should be held that the court has inherent power to deal with these violations.”).

94 Id. (citing Pope, 974 F.2d at 984; Vargas, 901 F. Supp. at 1579).
The advisory committee's notes to the 1993 amendments to Rule 11 set forth the position that appears to have been taken by the Supreme Court in *Chambers*:

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. § 1927. See [Chambers]. *Chambers* cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers.\(^95\)

The question, then, in deciding whether inherent powers properly *should* be invoked is whether the specific set of facts constituting fraud on the court is adequately addressed by a rule of civil procedure.\(^96\) It is unclear how tight the fit of the facts to the rule must be before inherent powers should not be relied upon.\(^97\) Accordingly, counsel defending a party charged with

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\(^{95}\) Advisory committee's notes to 1993 amendment of Rule 11.

\(^{96}\) In *Derzack v. County of Allegheny*, the court relied on inherent powers to dismiss for misconduct that included fabrication of evidence.

>[B]ecause 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.


\(^{97}\) Compare *Societe Internationale*, 357 U.S. at 207

>(([W]hether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37, which addresses itself with particularity to the consequences of a failure to make discovery by listing a variety of remedies which a court may employ as well as by authorizing any order which is 'just.' There is no need to resort to Rule 41(b), which appears in the part of the Rules concerned with trials and which lacks such specific references to discovery.))

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 congressional intent to the contrary) but that the proper exercise of discretion will usually lead to reliance on a directly applicable rule or statute.
fraud on the court may want to argue that a rule that appears to fit the misconduct applies if it authorizes a maximum sanction short of default or dismissal.

Because inherent powers can be so potent, the Supreme Court has required that they be exercised with restraint and discretion.  

B. Rule 11

In certain instances, Rule 11 may apply to fraud on the court. While some courts have relied on their inherent powers to dismiss or default a litigant for committing fraud on the court and have imposed monetary sanctions under the authority of Rule 11 as well, other courts have premised dismissal or default directly on Rule 11. This latter use of Rule 11 appears justified by the text of the Rule in those situations where pleadings, motions, or other papers filed with the court contain false statements that are intended to mislead the court.

98 Chambers, 501 U.S. at 44; Roadway Express, 447 U.S. at 764.


100 E.g., Eppes v. Snowden, 656 F. Supp. 1267, 1281-82 (E.D. Ky. 1986) (“The remedy must be sufficient to serve universal notice that this conduct will not be tolerated. The remedy therefore must go further than a dismissal of the counterclaim. . . . What sanctions then, could be imposed that would impress a gentleman who would pay $2,000,000.00 for a horse. . . . His net worth is into seven figures. A penalty of $194,131.52, when compared to his net worth, would amount to something just under a 'tithe.'”).

101 E.g., Combs v. Rockwell Int'l Corp., 927 F.2d 486 (9th Cir. 1991) (relying on Rule 11 where counsel made 36 changes on deposition errata sheet after client advised that transcript was accurate and testimony correct); Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384, 389-90 (E.D. Cal. 1992).

102 Fed. R. Civ. P. 11 provides:

Rule 11. Signature of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information,
THE PERJURING LITIGANT

and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing pay-
tain—or incorporate—fraudulent materials or information. For example, where a litigant attaches fabricated evidence to a complaint or answer, it would appear an appropriate use of Rule 11 to strike the offensive pleading (which could have the effect of putting the misbehaving litigant out of court). Some authorities, however, believe that dismissal is not a sanction available under Rule 11.

In Sun World, Inc. v. Lizarazu Olivirria, the defendant attached to a brief opposing a motion an altered contract (entitled Notice of Termination), which—if authentic—would have allowed the defendant to avoid liability. He also swore to the authenticity of the Notice of Termination in two affidavits filed with the court. The court did not hesitate to apply Rule 11 to the situation:

ment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

103 FED. R. CIV. P. 11(a) (1997) (“Every pleading, written motion, and other paper . . .”); Id. 11(c)(2) (“[T]he sanction may consist of, or include, directives of a nonmonetary nature . . .”); advisory committee’s notes to 1993 amendments (“The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper . . . .”). Numerous courts, however, appear to stretch Rule 11 to address circumstances not clearly encompassed by the text of the rule. For example, in Bower v. Weisman, 674 F. Supp. 109, 112 (S.D.N.Y. 1987), Judge Sweet held that a witness’ review of and signature on a deposition transcript brought perjury during the deposition within the scope of Rule 11.

104 This was the scenario in the first suit filed against Mobil Oil Corporation in Aoude. The First Circuit, however, relied on the trial court’s inherent powers in affirming dismissal of the complaint. Aoude v. Mobil Oil Corp., 892 F.2d 1115 (1st Cir. 1989).

105 E.g., Hutchinson v. Hensley Flying Serv., No. 98-35361, 2000 U.S. App. LEXIS 402, at *6-13 (9th Cir. Jan. 6, 2000) (dissenting opinion); Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 593 (9th Cir. 1983) (implying that striking of pleading, but not dismissal, is authorized under Rule 11).

Application of Rule 11 to these facts is exceedingly simple. Lizarazu admittedly and intentionally defrauded the court by filing the Notice of Termination. He also committed perjury in at least two instances in furtherance of that fraud. Consequently, to say that the Notice of Termination and the two perjured documents were not well grounded in fact is a gross understatement.

* * * *

[T]he court finds that the only appropriate sanction is the striking of Lizarazu's answer, the dismissal of his counterclaim and the entry of default judgment against him on Sun World's complaint. Lizarazu's egregious conduct, his lack of repentance and his obvious disregard for this court's authority force the conclusion that no other sanction would be efficacious. Accordingly, pursuant to Rule 11, the court hereby strikes Lizarazu's answer, dismisses his counterclaim, orders the entry of default judgment for Sun World, and orders Lizarazu to pay all costs and attorney's fees incurred by Sun World resulting from and relating to the fraudulent document.107

While some might argue that the Rule 11 violation stems from the signing of the pleading, motion, or other paper and that, therefore, only the attorney is subject to sanction,108 the Rule provides for sanctions against the person "responsible for the violation."109

C. RULE 16

Rule 16 deals with pretrial conferences and scheduling management.110 As such, it is not likely to be, and generally has not been, a source of authority for responding to fraud on the court. Nonetheless, because it contains a sanctions subdivi-
which provides for sanctions for failure to obey a scheduling or pretrial order, it can respond to some situations involving fraud on the court. In one such case, plaintiff failed to obey a pair of pretrial orders calling for the plaintiff to account for the pre-trial destruction of relevant documents. Although the court, in dismissing, relied on its inherent powers, it noted that dismissal would also be justified under Rule 16(f).\textsuperscript{112}

D. \textbf{Rule 26}

Rule 26 of the Federal Rules of Civil Procedure is the general provision addressing discovery, including such things as the scope of discovery, supplementation obligations, and the work product rule.\textsuperscript{113} Since 1983, the Rule has contained a Rule 11 equivalent applicable to discovery papers.\textsuperscript{114} Rule 26(g) provides in part as follows:

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request,
response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.\textsuperscript{115}

Accordingly, fraudulent responses to written discovery may violate Rule 26(g)(2)(B) and expose a party to default or dismissal much like fraudulent pleadings might do so under Rule 11.\textsuperscript{116} More often, however, Rule 26(g) is used to mete out monetary sanctions to combat discovery abuses of a more traditional variety.\textsuperscript{117}

One court that used Rule 26 to support dismissal grounded the sanction on a violation of Massachusetts's Rule 26(b)(3), the work product rule. In \textit{Elliott v. Shaw's Supermarkets, Inc.},\textsuperscript{118} the court apparently relied on its inherent power for the dismissal sanction. The plaintiff was employed by an insurer hired to investigate, evaluate, and attempt to settle her claim. She took advantage of her access to the employer's computer system and reviewed defense counsel's impressions of the case, trial plans, evaluations of the evidence, settlement recommendations, and other work product. Against plaintiff's argument that she had neither submitted falsified evidence nor offered false testimony, the court found the conduct a violation of the work product rule and that putting the plaintiff out of court could only right the process.\textsuperscript{119}

\begin{center}
E. Rule 37
\end{center}

Rule 37 of the Federal Rules of Civil Procedure is a common source of sanctions for discovery abuse.\textsuperscript{120} In the right set of

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\textsuperscript{115} \textit{Fed. R. Civ. P.} 26(g).
\textsuperscript{116} \textit{See supra} note 103.
\textsuperscript{117} \textit{E.g., Malauatea v. Suzuki Motor Co.}, 987 F.2d 1536, 1545 (11th Cir. 1993).
\textsuperscript{119} \textit{Id.} at *6-9.
\textsuperscript{120} \textit{Fed. R. Civ. P.} 37 provides:
\begin{center}
\textbf{Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions}
\end{center}

\textbf{(a) Motion For Order Compelling Disclosure or Discovery.} A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

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\textbf{(1) Appropriate Court.} An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.
\end{flushleft}
(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. 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.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and
may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure To Comply With Order.

(1) Sanctions by Court in District Where Deposition Is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a
circumstances, Rule 37 is sufficiently potent to support dismissal

hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]
of a claim or action or rendition of a judgment by default.\textsuperscript{121} As presently constituted, however, it does not provide a good fit for addressing fraud on the court. With the exception of failure to make mandatory disclosures required by Rule 26(a), to attend a deposition, to serve answers to interrogatories, or to serve a written response to a request for inspection, sanctions provided for by the Rule for conduct \textit{prior to entry of a court order on the subject} are limited to the reasonable expenses, including attorney's fees, of bringing a motion to compel.\textsuperscript{122} Accordingly, counsel representing a litigant charged with committing fraud on the court in the context of discovery may argue that the misconduct is nothing more than "an evasive or incomplete disclosure, answer, or response" and, therefore, subject to Rule 37(a).\textsuperscript{123} Such an approach, if successful, could limit the sanction to the expenses of bringing a motion to compel.\textsuperscript{124}

Some courts, however, have applied Rule 37(b) sanctions to fraud on the court by employing the fiction that there was a standing order against perjury, subornation of perjury, and the like. For example, in \textit{Quela v. Payco-General American Credits, Inc.}, the trial judge wrote:

\begin{itemize}
  \item (f) [Repealed. Pub. L. 96-481, Title II, § 205(a), Oct. 21, 1980, 94 Stat. 2330]
  \item (g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.
\end{itemize}

\textsuperscript{121} E.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 763-64 (1980) ("[Rule 37(b)] permits the trial court to strike claims from the pleadings, and even to 'dismiss the action . . . or render a judgment by default against the disobedient party. . . .' Th[e] failure [to answer interrogatories after being ordered to do so] was the immediate ground for dismissing the case. . . ."); Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1542 (11th Cir. 1993) (affirming the striking of defendants' answers and entry of default judgment pursuant to Rule 37(b)(2)(C) for defendants' failure to comply with court's orders to produce documents to plaintiff); 8A WRIGHT, supra note 93, at § 2281.

\textsuperscript{122} FED. R. CIV. P. 37(c) (mandatory disclosures and supplementation thereof); FED. R. CIV. P. 37(d) (failure to attend or respond). See also Shepherd v. Am. Broad. Cos., 62 F.3d 1469 (D.C. Cir. 1995) (holding that sanction may not be based on Rule 37(b) in absence of violation of court order, but ultimate sanction may be based on inherent powers under certain circumstances); 8A WRIGHT, supra note 93, at § 2282 ("The general scheme of the rule is that ordinarily sanctions can be applied only for failure to comply with an order of the court.").

\textsuperscript{123} FED. R. CIV. P. 37(a).

\textsuperscript{124} FED. R. CIV. P. 37(a)(4)(A).
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 37.125

"The imposition of penalties under [Rule] 37(d) . . . is limited to an absolute failure to respond."126 Nonetheless, some courts that have sanctioned litigants for perjury and fabrication of evidence have looked to Rule 37(d) as a source of sanctioning authority.127 For example, the trial court in Pierce v. Heritage Properties relied on Rule 37 and its inherent power in dismissing the complaint of a woman allegedly injured when a ceiling fan fell on her leg.128 Plaintiff was not alone at the time of her injury, but she testified that she had been (and answered an interrogatory about eyewitnesses in a similarly untruthful manner), because she did not want her parents to know that she had a male guest in her apartment at night. After an anonymous caller advised defense counsel of the eyewitness and plaintiff became aware that defense counsel knew of the eyewitness, she admitted that she had given false testimony.129

By treating false responses to discovery as no response, as the Pierce court suggested could be done,130 some courts that have relied on Rule 37 for sanctioning authority have tightened the fit that Rule 37 bears to fraud on the court.131 Nonetheless, it is

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127 E.g., Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 592 (9th Cir. 1983).
129 Id. at 1388.
130 The trial court in Pierce relied on Rule 37(b)(2), Rule 37(e), and inherent powers. Id. The Supreme Court of Mississippi affirmed the trial court's dismissal without stating whether the specific rules relied on by the trial court were appropriate. Id. at 1392. In discussing the issues, however, the supreme court approvingly noted that some federal courts had treated a false response as a failure to respond under Rule 37(d). Id. at 1389.
unclear whether Rule 37(d) is appropriately used to respond to false deposition testimony, untrue interrogatory responses, or fabricated evidence produced for inspection, because (1) the Rule expressly applies to complete failures to respond, and (2) unlike Rule 37(a), which expressly provides that an evasive answer should be treated as a failure to respond, it does not contain a provision broadening its applicability beyond complete failures to respond.132

Because the Federal Rules of Civil Procedure do not expressly prohibit perjury, subornation of perjury, destruction of evidence, or fabrication of evidence, Rule 37—which is directed at violations of discovery rules—often does not provide a good fit for addressing fraud on the court. Courts that have thoughtfully applied Rule 37 to fraud on the court have often utilized fictions to make the rule fit the situation. Given the Supreme Court’s holding in Chambers v. NASCO, Inc.,133 however, it seems that such fictions are unnecessary and that reliance on inherent powers is more appropriate in many fraud on the court scenarios. As discussed below, Rule 41, for this reason, may also constitute more appropriate authority for dismissing a plaintiff (but not sanctioning a defendant) who commits fraud on the court.

F. Rule 41

Rule 41(b) of the Federal Rules of Civil Procedure provides in part: “For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.” 134 Thus, Rule 41(b) provides a basis for dismissal of a plaintiff’s claim, not default of a defendant, for non-compliance with the rules of civil procedure or a court order. A number of courts have relied on Rule 41(b), in addition to inherent powers, for unwarranted assertion of Fifth Amendment rights at a deposition as a refusal to respond to discovery under Rule 37(d) and dismissing where plaintiff previously had committed perjury at trial that ended in mistrial).

"[N]o rule specifically prohibits fraud and perjury in discovery."\footnote{Id.} Nonetheless, a number of courts have concluded that a prohibition against fraud and perjury is implicit in each rule that requires the giving of information under oath.\footnote{Id. at 108-09 (citing Evanson v. Union Oil Co., 85 F.R.D. 274, 277 (D. Minn. 1979); Hunter v. Int'l Sys. & Controls Corp., 56 F.R.D. 617, 631 (W.D. Mo. 1972)).} As Judge Smalkin explained in \textit{Smith v. Cessna Aircraft Co.},

It is true that neither Rule 30 nor Rule 33 specifically demands that answers in depositions and interrogatories be truthful. Nevertheless, each Rule's requirement that the party give answers under oath would be thwarted if giving false answers constituted compliance with the Rule. Thus, one court has noted: "An implicit condition in any order to answer an interrogatory is that the answer be true, responsive and complete. A false answer is in some ways worse than no answer; it misleads and confuses the party." The need for truthful answers certainly applies to depositions as well.\footnote{E.g., Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384, 389-90 (E.D. Cal. 1992).}

Another court, reaching the same conclusion pursuant to Rule 11, noted that the obligation to be truthful exists in all lawsuits: "[T]he court . . . need not order [a litigant] to refrain from submitting false documents or perjuring himself in order for those acts to be punishable by dismissal and the entry of default judgment. The legal obligation to refrain from committing such acts is imposed upon every party to a lawsuit."\footnote{357 U.S. 197 (1958).}

The argument against application of Rule 41(b) to fraud on the court in the discovery context is supported by the Supreme Court's 1958 decision in \textit{Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers},\footnote{Chambers v. NASCO, Inc., 501 U.S. 32, 49 n.14 (1991).} a case that was not overruled by \textit{Chambers}.\footnote{357 U.S. 197 (1958).} In \textit{Societe Internationale}, the Supreme
Court rejected reliance on Rule 41(b) to respond to noncompliance with an order to produce documents. The Court pointed out that Rule 41 appears in a part of the Rules that deals not with discovery but with trials. As with Rule 37, application of Rule 41(b) to fraud on the court may require use of a fiction to make the rule fit the situation. Given the Supreme Court's decision in Chambers, this seems unnecessary.

VI. SANCTION SELECTION

The trial court has broad discretion in selecting an appropriate sanction. Nonetheless, because dismissal or default "sounds 'the death knell of the lawsuit,'" these remedies should not lightly be invoked. Indeed, there are due process limitations on the imposition of sanctions. "In calibrating the scales, the judge should carefully balance the policy favoring adjudication on the merits with competing policies such as the need to maintain institutional integrity and the desirability of deterring future misconduct." The sanction may, however, penalize the recalcitrant litigant as well as act as a deterrent "to those who might be tempted to such conduct in the absence of such a deterrent."

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 default or dismissal.

142 Societe Internationale, 357 U.S. at 207.
143 Id.
144 See, e.g., Cessna Aircraft, 124 F.R.D. at 109.
145 Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (citations omitted); Bower v. Weisman, 674 F. Supp. 109, 112 (S.D.N.Y. 1987) (holding that court's inherent powers "must be exercised with restraint and discretion") (quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).
146 E.g., Bower, 674 F. Supp. at 112 (citing Roadway Express 447 U.S. at 767 n.14 (1980)); 8A Wright, supra note 93, at § 2283.
148 National Hockey League, 427 U.S. at 643. As revised in 1993, however, Rule 11 sanctions are to be used solely for deterrence. Fed. R. Civ. P. 11(c)(2); advisory committee's notes to 1993 amendment to Rule 11.
149 Counsel, whether urging—or defending against—sanctions, should research the applicable law to determine which factors the court will likely consider with
Factors that the courts consider in exercising their discretion include the following:\(^{150}\)

*The egregiousness of the misconduct.*\(^{151}\) Dismissal and default are "extreme remed[ies]" and "such strong medicine" should be reserved "for instances where the defaulting party’s misconduct is correspondingly egregious."\(^{152}\) The degree of willfulness, bad faith, or fault reflected by the misconduct,\(^{153}\) or, as stated by

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\(^{150}\) The advisory committee’s notes offer potential considerations for sanctions selected under Rule 11. They suggest the following considerations:

The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.


\(^{152}\) West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (citing Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962); D.P. Apparel Corp. v. Roadway Express, Inc., 736 F.2d 1, 3 (1st Cir. 1984); Corchado v. P.R. Marine Mgmt., Inc., 665 F.2d 410, 413 (1st Cir. 1982)).

some courts, the intentional nature of any misconduct, is a consideration in selection of an appropriate sanction.\textsuperscript{154}

The extent to which there has been a pattern of misconduct.\textsuperscript{155} Indeed, some courts have held that many individual acts of misconduct would not rise to the level of fraud on the court, but that the pattern they evidenced was sufficient to warrant an ultimate sanction.\textsuperscript{156}

Whether a litigant who has “come clean” has done so only after he or she has been “found out.”\textsuperscript{157}

For example, the Ninth Circuit in \textit{TeleVideo Systems, Inc. v. Heidenthal},\textsuperscript{158} wrote:

Appellant argues that a default judgment of this magnitude [over $11 Million] was far too severe a penalty. He argues that he mitigated the harm by admitting before trial commenced that he had perjured himself; he urges that his confession warrants some favorable consideration and argues that this court should be lenient towards him in order not to deter future perjurers from making such admissions. In other words, appellant believes that his belated candor should be rewarded. In some circumstances we

\textsuperscript{154} \textit{E.g., Cessna Aircraft}, 124 F.R.D. at 110. \textit{Accord Batson}, 765 F.2d at 514 (construing Rule 37(b)(2)(C), which applies to non-compliance with court order); \textit{Medina v. Found. Reserve Ins. Co.}, 870 P.2d 125, 126 (N.M. 1994) (same). Nonetheless, ultimate sanctions (i.e., default or dismissal) may be appropriate even if the misconduct is not intentional. \textit{E.g.}, \textit{Marrocco v. Gen. Motors Corp.}, 966 F.2d 220 (7th Cir. 1992) (affirming directed verdict for plaintiff as sanction for grossly negligent noncompliance with court order) (citing \textit{National Hockey League}, 427 U.S. at 640; \textit{Societe Int’l Pour Participations Indus. et Commerciales}, S.A. v. Rogers, 357 U.S. 197, 212 (1956)). In the context of fabricated evidence, courts are generally not receptive to the argument that the fabricated evidence contains truthful information. For example, the Supreme Court responded to this argument by pointing out that “Truth needs no disguise. The article, even if true, should have stood or fallen under the only title it could honestly have been given – that of a brief in behalf of Hartford, prepared by Hartford’s agents, attorneys, and collaborators.” \textit{Hazel-Atlas Glass Co. v. Hartford-Empire Co.}, 322 U.S. 258, 247 (1944).

\textsuperscript{155} \textit{E.g., Cessna Aircraft}, 124 F.R.D. at 110; \textit{Wood v. Biloxi Pub. Sch. Dist.}, 757 So. 2d 190 (Miss. 2000) (reversing dismissal where there was not pattern of misconduct).


\textsuperscript{157} \textit{E.g., Cessna Aircraft}, 124 F.R.D. at 109 ("Mr. Garner did not suddenly develop a case of cold feet; rather, he only admitted misconduct when it became apparent to him that the IRS was about to be asked to search for nonexistent forms."); \textit{Nakahara v. NS 1991 Am. Trust}, 718 A.2d 518, 525 (Del. Ch. 1998) (holding that post judgment contrition comes too late to merit leniency); \textit{Pierce v. Heritage Props.}, 688 So. 2d 1385, 1390 (Miss. 1997).

\textsuperscript{158} 826 F.2d 915 (9th Cir. 1987).
might agree that lesser sanctions would be appropriate where a defendant has admitted his falsehoods and they have not tainted the entire pretrial process. This is not such a case.

Appellant's recantation was not motivated by a desire to repent and set the record straight. Under questioning by the district judge, appellant revealed that even his admission was part of his elaborate scheme to prevail at trial. In answer to the district judge's question as to why he testified falsely in the depositions, appellant responded: "because I was making sure that I would have him and Phil [Hwang] to the point where they thought they had me by the short ones, and they would get me in here and then, when I get in here, I am going straight and tell the truth on everything, and his case is going to crumble apart."

Heidenthal's statement, perhaps the only candid one he makes, reveals that his perjury and the recanting were both orchestrated to reap a tactical advantage. To permit Heidenthal to proceed to trial would have played into Heidenthal's hands and greatly disadvantaged the plaintiffs who had planned their strategy and developed their case to respond to Heidenthal's false evidence.\textsuperscript{159}

The materiality of the misconduct.\textsuperscript{160} Most courts will find the misconduct material if it had the capacity to influence the litigation.\textsuperscript{161} Actual influence is usually unnecessary because "[t]he failure of a party's corrupt plan does not immunize the defrauder from the consequences of his misconduct."\textsuperscript{162} Where the deception is wholly unrelated to the merits of the action, an ultimate sanction may constitute a due process violation.\textsuperscript{163}

The efficacy of lesser sanctions.\textsuperscript{164} The trial court should consider whether lesser sanctions would achieve the purposes of the

\textsuperscript{159} Id. at 917.

\textsuperscript{160} Sun World v. Lizarazu Olivarria, 144 F.R.D. 384, 390-91 (E.D. Cal. 1992) ("The court is hard put to think of any document which could be more firmly connected to the merits of this case than this one; if accepted as genuine it would have disposed of Sun World's case in one fell swoop."); Pope v. Fed. Express Corp., 138 F.R.D. 675, 683 (W.D. Mo. 1990) ("The manufactured document would have been the linchpin of plaintiff's case.").

\textsuperscript{161} E.g., Aoude, 892 F.2d at 1120 (1st Cir. 1989); Eppes v. Snowden, 656 F. Supp. 1267, 1278-79 (E.D. Ky. 1986).

\textsuperscript{162} Aoude, 892 F.2d at 1120.

\textsuperscript{163} E.g., Phoceene Sous-Marine S.A. v. U.S. Phosmarine, Inc. 682 F.2d 802 (9th Cir. 1982) (cited in Eppes, 656 F. Supp. at 1278-79). See also 8A Wright, supra note 93, at § 2283.

\textsuperscript{164} E.g., United States v. Shaffer Equip. Co., 11 F.3d 450 (4th Cir. 1993); Batson v. Neal Speelce Assocs., Inc., 765 F.2d 511, 514, 516 (9th Cir. 1985); Anheuser-Busch, Inc. v. Natural Beverage Distrib., 151 F.R.D. 346, 347 (N.D. Cal. 1993) (citing Henry v. Gill Indus., Inc., 983 F.2d 943, 946, 948 (9th Cir. 1993)). In a multi-party case, it may—from a tactical perspective—be wise for all parties on the
sanction.\textsuperscript{165} The deference that appellate courts will give to trial courts appears, however, to vary widely.\textsuperscript{166} Some courts have interpreted the absence of remorse or repentance as an indication that anything short of an ultimate sanction will not be effective.\textsuperscript{167}

The role that the client (as opposed to counsel) played in the misconduct.\textsuperscript{168} The courts are less willing to punish with default or dismissal when the lawyers, not the client, are responsible for the misconduct.

The prejudice suffered by the victim of the misconduct.\textsuperscript{169} Where there is significant prejudice, any sanction short of default or dismissal may be insufficient.\textsuperscript{170}

\textsuperscript{165} E.g., West, 167 F.3d at 779-80 (vacating and remanding for consideration of an effective lesser sanction, such as the use of presumptions favoring the defendants and preclusion of plaintiff's evidence, where trial court had dismissed plaintiff for spoliation of evidence in product liability action); \textit{Pope}, 138 F.R.D. at 683 ("Permitting this lawsuit to proceed would be an open invitation to abuse the judicial process. Litigants would infer they have everything to gain, and nothing to lose, if manufactured evidence merely is excluded while their lawsuit continues. Litigants must know that the courts are not open to persons who would seek justice by fraudulent means.").

\textsuperscript{166} Compare, e.g.,\textit{Malautea v. Suzuki Motor Co.}, 987 F.2d 1536, 1544 (11th Cir. 1993), (deferring to trial judge's conclusion that a sanction less harsh than default would not have changed the defendants' behavior), with West, 167 F.3d at 779-80 (reversing for consideration of lesser sanctions). See also Oliver v. Gramley, 200 F.3d 465 (7th Cir. 1999) (holding that trial court's failure to consider lesser sanctions was harmless error given egregiousness of misconduct).

\textsuperscript{167} E.g., \textit{Lee}, 93 F. Supp. 2d at 1331; \textit{Sun World}, 144 F.R.D. at 390 ("Lizarazu's egregious conduct, his lack of repentance and his obvious disregard for this court's authority force the conclusion that no other sanction would be efficacious.").

\textsuperscript{168} E.g., \textit{Shaffer Equip. Co.}, 11 F.3d at 450; \textit{Aoude}, 892 F.2d at 1121; \textit{Batson}, 765 F.2d at 514; \textit{Pierce}, 688 So. 2d at 1391.

\textsuperscript{169} E.g., \textit{Shaffer Equip. Co.}, 11 F.3d at 450; \textit{Batson}, 765 F.2d at 514; \textit{Anheuser-Busch}, 151 F.R.D. at 347 (citing \textit{Gill Indus.}, 983 F.2d at 946, 948; \textit{Sun World}, 144 F.R.D. at 390). But see \textit{Miller v. Time-Warner Communications, Inc.}, No. 97 Civ. 7286 (JSM), 1999 U.S. Dist. LEXIS 14512 (S.D.N.Y. Sep. 22, 1999) (dismissing case of plaintiff who intentionally erased handwritten notes to prevent the defendants from discovering them and who lied about the erasures despite the fact that defendants were not prejudiced because erasures remained sufficiently legible).

\textsuperscript{170} E.g., \textit{Elliott v. Shaw's Supermarkets, Inc.}, No. 93-304, 1995 Mass. Super. LEXIS 853, at *6-9 (Jan. 19, 1995) (holding that the only way to remedy the
The government or public interests at stake.\(^{171}\) This factor calls for a balancing of the preference for decisions on the merits with the desire to maintain the integrity of the court and provide for the orderly administration of justice.\(^{172}\)

Litigants who suffer severe sanctions may be able to argue that they should have been provided the safeguards of a criminal trial. This argument stems from the fact that, with respect to sanctions, “the trial court may act as accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed.”\(^{173}\) Indeed, imposition of a dismissal or default sanction may violate due process if the wrongdoing does not relate to the matter in controversy (i.e., the misconduct must be material to the lawsuit).\(^{174}\) Nonetheless, the misconduct need not bear on the entire case; it is sufficient if the misconduct could reduce the damages that would be awarded.\(^{175}\) Moreover, adequate notice and an opportunity to be heard have generally been found to satisfy any due process requirements where the misconduct is related to the merits.\(^{176}\)

\(^{171}\) E.g., Shaffer Equip. Co., 11 F.3d at 450; Sun World, 144 F.R.D. at 390.

\(^{172}\) E.g., Shaffer Equip., 11 F.3d at 463.


\(^{174}\) E.g., Wyle, 709 F.2d at 589, 591 (citing Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); Hammond Packing Co. v. Arkansas, 212 U.S. 322, 349-54 (1909); Phoceene Sous-Marine, S.A. v. U.S. Phosphine, Inc., 682 F.2d 802, 806 (9th Cir. 1982); Raiford v. Pounds, 640 F.2d 944, 945 (9th Cir. 1981); G-K Props. v. Redevelopment Agency of San Jose, 577 F.2d 645, 648 (9th Cir. 1978)). See 8A WRIGHT, supra note 93, at § 2283. In Hovey v. Elliott, 167 U.S. 409 (1897), the Supreme Court held that a trial court may not strike an answer and enter a default merely to punish a contempt that is unrelated to the merits of the case. Likewise, the Ninth Circuit in Phoceene Sous-Marine, S.A., held that a litigant’s false statement that he was too sick to attend trial, while meriting a severe sanction, was unrelated to the merits and therefore, an improper basis on which to enter a default judgment. 682 F.2d at 805-6.

\(^{175}\) Wyle, 709 F.2d at 589, 591 (citing First Beverages, Inc. v. Royal Crown Cola Co., 612 F.2d 1164, 1174-75 (9th Cir.1980)).

\(^{176}\) Malautea, 987 F.2d at 1543 (finding due process requirements satisfied where court warned that continued conduct would result in striking of answers and entry of default judgment and an evidentiary hearing was held before meting of sanctions).
VII. EFFECT ON OTHER CASES – *RES JUDICATA*
AND THE LIKE

Several cases have addressed the situation where the party who has acted fraudulently has become involved in related litigation. The issue then is the effect that the misconduct in or prior to one case has on the related litigation. Two approaches to this scenario are found in the cases.

First, some courts take the view that fraud "infects" the cause of action, and, therefore, a subsequent attempt on the same cause of action will fare no better than the original suit on the same cause. Thus, in *Aoude v. Mobil Oil Corp.*, the First Circuit affirmed the trial court's dismissal of two related lawsuits.\(^ {177} \) In the first, Aoude had attached to his complaint a fabricated document. In the second lawsuit, Aoude—having been found out—attached a genuine document as an exhibit.\(^ {178} \) The court of appeals dealt swiftly with Aoude's argument that the second suit, which was not predicated on fabricated evidence, should not have been dismissed:

Appellant remonstrates that whatever disposition may be made of his original suit, his second suit was filed without any reference to the bogus agreement and should not have been dismissed. The assertion will not wash. A malefactor, caught red-handed, cannot simply walk away from a case, pay a new docket fee, and begin afresh. History is not so glibly to be erased. Once a litigant chooses to practice fraud, that misconduct infects his cause of action, in whatever guises it may subsequently appear. Thus, to the extent that the two complaints paralleled each other, the second suit was, for the reasons already stated, appropriately jettisoned.\(^ {179} \)

The second approach to the related case is to apply *res judicata* principles. The clearest situation is, of course, where one suit is dismissed with prejudice because of the plaintiff's fraud on the court. In such a situation, a subsequent suit on the same cause against the same party or parties will be barred by *res judicata* or claim preclusion.\(^ {180} \) More likely, however, the fraud-committing litigant will be involved in subsequent litigation with a different party or parties and the opponent will seek to use the earlier

\(^{177}\) 892 F.2d 1115, 1121-22 (1st Cir. 1989).

\(^{178}\) Aoude argued that an additional cause of action was included in his second suit, but the court held that the additional cause of action was dependent upon a favorable determination on the original cause of action. *Id.*

\(^{179}\) *Id.* at 1121.

\(^{180}\) E.g., *Massie v. Paul*, 92 S.W.2d 11 (Ky. 1936).
court's finding of fraud against the litigant. In this situation, principles of collateral estoppel, or issue preclusion, may control the outcome.

For example, in Synanon Church v. United States, the church brought an action for declaratory judgment against the United States Government to establish its tax-exempt status. An earlier case in the Superior Court of the District of Columbia involved the issue of whether the church was a non-profit corporation under District of Columbia zoning laws. The earlier case had been dismissed after the judge "found by clear and convincing evidence that Synanon engaged in a 'willful, deliberate and purposeful scheme to . . . destroy extensive amounts of evidence and discoverable materials which probably would have had a dispositive bearing upon Synanon's . . . non-profit status.'" After deciding that the issues in the case against the United States were "substantially identical," and concluding that Synanon had a "full and fair opportunity to litigate" the issue in the Superior Court, the district court held that the church was collaterally estopped from seeking a different conclusion. The court noted that "[t]he purposes of the collateral estoppel doctrine — conserving judicial resources, protecting adversaries from vexatious litigation, and fostering reliance on prior judicial action by minimizing the possibility of inconsistent decisions — are served by its application here as in other contexts."

VIII. STANDARD OF REVIEW ON APPEAL

Appellate courts will review entry of default or dismissal for perjury or other misconduct for abuse of discretion. Factual

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183 Id. at 972-73.
184 Id. at 972 (citing a transcript of an October 12, 1983, hearing in Synanon Found., Inc. v. Bernstein, No. 7189-78 (D.C. Super.)).
185 Id. at 973 (citing Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 333 (1971); Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 851 (D.C. Cir. 1981); Carr v. District of Columbia, 646 F.2d 599, 608 n. 47 (D.C. Cir. 1980)).
186 Id. at 974 (citing Montana v. United States, 440 U.S. 147, 153-54 (1979)).
187 E.g., Nat'l Hockey League, 427 U.S. at 642; Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933) (holding that a court applying the unclean hands doctrine is “not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion”); Rockdale Mgmt. Co. v. Shawmut Bank, N.A., 638 N.E.2d 29 (1994) (fraud on the court); Pierce, 688 So. 2d at 1388.
determinations made in support of sanctions will only be reversed if they are clearly erroneous.\textsuperscript{188} The trial court's determination is only disturbed if a review of the record leads to "a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'"\textsuperscript{189} As the First Circuit has said: "the district courts must be accorded considerable latitude in dealing with serious abuses of the judicial process and the trier's determination to dismiss a case for such a reason should be reviewed only for abuse of discretion."\textsuperscript{190} Trial courts will generally be within their discretion when the evidence is sufficiently clear and a pattern of misconduct is shown.\textsuperscript{191} The trial court's discretion is not, however, without limits.

The judge must consider the proper mix of factors and juxta-
pose them reasonably. "Abuse occurs when a material factor de-
serving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them."\textsuperscript{192}

Given this deferential standard of review, it should come as no surprise that defaults and dismissals in fraud on the court and unclean hands situations are frequently sustained on appeal. Cases in which the trial judge is reversed typically involve a combination of misconduct that could be described as borderline and failure on the part of the trial judge to adequately explain her consideration, and rejection, of lesser sanctions.

For example, in \textit{West v. Goodyear Tire & Rubber Co.},\textsuperscript{193} the alleged misconduct was spoliation of evidence. West was injured when a tire made by Goodyear exploded while she was attempting to mount it on an oversized rim made by another defendant.\textsuperscript{194} West had already successfully mounted a similar tire on

\textsuperscript{188} E.g., \textit{Malautea}, 987 F.2d at 1543.
\textsuperscript{189} \textit{Wyle}, 709 F.2d at 589 (citing \textit{Anderson v. Air West, Inc.}, 542 F.2d 522, 524 (9th Cir. 1976); \textit{In re Josephson}, 218 F.2d 174 (1st Cir. 1954)).
\textsuperscript{190} \textit{Aoude}, 892 F.2d at 1117 (citing \textit{Link v. Wabash R.R. Co.}, 370 U.S. 626, 633 (1962); \textit{HMG Prop. Invs., Inc. v. Parque Indust. Rio Canas, Inc.}, 847 F.2d 908, 915, 916-917 (1st Cir. 1988)).
\textsuperscript{191} E.g., \textit{Rockdale}, 638 N.E.2d at 32.
\textsuperscript{192} \textit{Aoude}, 892 F.2d at 1117-8 (citing \textit{Indep. Oil & Chem. Workers of Quincy, Inc. v. Proctor & Gamble Mfg. Co.}, 864 F.2d 927, 929 (1st Cir. 1988); \textit{Anderson v. Cryovac, Inc.}, 862 F.2d 910, 923 (1st Cir. 1988)).
\textsuperscript{193} 167 F.3d 776, 779 (2d Cir. 1999).
\textsuperscript{194} \textit{Id.} at 777-78.
The spoliation claim was based on the fact that West's counsel had deflated the successfully mounted tire-rim combination prior to filing suit but after examining and photographing it and that West had sold his tire changing machine and air compressor while the litigation was pending. While the trial judge purported to consider and reject as inadequate lesser sanctions, the Second Circuit concluded that dismissal was unnecessary to achieve the aims of sanctions:

We disagree with Judge Owen's conclusion that dismissal constituted the only adequate sanction. It was not necessary to dismiss the complaint in order to vindicate the trifold aims of: (1) deterring future spoliation of evidence; (2) protecting the defendants' interests; and (3) remedying the prejudice defendants suffered as a result of West's actions. Judge Owen could have combined alternative sanctions in a way that would fully protect Goodyear and Budd from prejudice. For example, the trial judge could: (1) instruct the jury to presume that the exemplar tire was over-inflated; (2) instruct the jury to presume that the tire mounting machine and air compressor malfunctioned; and (3) preclude Mrs. West from offering evidence on these issues.

Not surprisingly, the more egregious the misconduct, the more the appellate courts defer to the trial judge's selection of the sanction. In Malautea v. Suzuki Motor Co., there was a long and well-documented history of noncompliance by the defendants with court orders. The Eleventh Circuit, noting that "the defendants richly deserved the sanction of a default judgment," essentially deferred to the trial judge's conclusion that "sanctions less harsh than a default judgment would not have changed the defendants' behavior." Likewise, in Oliver v. Gramley the Seventh Circuit ruled, in essence, that the trial court's failure to expressly consider lesser sanctions was, in light of the egregiousness of the misconduct, harmless error.

IX. CONCLUSION

Courts are empowered to deal harshly with litigants who act in underhanded ways to improperly influence the judicial system.

195 Id. at 778.
196 Id.
197 Id. at 780.
198 987 F.2d 1536, 1542-3 (11th Cir. 1993).
199 Id. at 1544.
200 200 F.3d 465 (7th Cir. 1999).
201 Id. at 466.
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 fit is not good, however, the courts are inherently empowered to respond.

In the right case, one where there is clear and convincing evidence of egregious misconduct by a litigant, counsel must decide whether to proceed to trial and show the malefactor for what he is through traditional evidentiary presentation or move to dismiss or default 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. If the misconduct took place in another case, counsel should consider whether the cause of action was “infected” or whether res judicata and collateral estoppel might apply to the subsequent case. Finally, because the standard of review of fraud on the court and unclean hands determinations is very deferential, counsel on the losing side in the trial court will face an uphill battle on appeal.
Comments