

# FRAUD ON THE COURT AND ABUSIVE DISCOVERY

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*Unbeknownst to many, federal courts have the power under the Federal Rules of Civil Procedure to set aside judgments entered years earlier that were obtained by “fraud on the court.” Fraud on the court, however, can take many forms and courts and commentators agree that it is a nebulous concept. The power to set aside a judgment requires courts to strike a balance between the principles of justice and finality. A majority of courts require a showing, by clear and convincing evidence, of intentional fraudulent conduct specifically directed at the court itself. This standard is flawed. And courts that have adopted it are abdicating their solemn responsibility as the gatekeeper to justice because innocent victims seeking to set aside judgments obtained by abusive discovery find themselves as a square-peg trying to fit into a round hole. The remedial and equitable nature of the fraud-on-the-court doctrine and the great public policy that it embodies militates against making that burden an impossible hurdle for victims of abusive discovery.*

*This Article suggests that courts depart from the heightened standard used to set aside judgments, particularly judgments obtained by abusive discovery. Specifically, this Article advances a four-step process to resolve the ultimate inquiry: whether the abusive conduct caused the court not to perform in the usual manner its impartial task of adjudging cases. Under this standard, courts will more readily find that abusive discovery that undermines the integrity of the judicial process or influences the decision of the court constitutes a fraud on the court.*

## TABLE OF CONTENTS

INTRODUCTION .....	708
I. ABUSIVE DISCOVERY PRACTICE .....	711
A. <i>Common Discovery Abuse</i> .....	711
B. <i>The Vulnerable Victims</i> .....	717
1. <i>The Pro Se Litigant</i> .....	717
2. <i>The Attorney-Abandoned Litigant</i> .....	722
II. FRAUD ON THE COURT .....	725
III. ABUSIVE DISCOVERY AS FRAUD ON THE COURT AND REEVALUATING THE STANDARD .....	730
A. <i>The Offender and His Duty</i> .....	730

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B. Evaluation of the Conduct .....	732
C. Consideration of the Victim's Status (The Equitable Component) .....	735
D. Consideration of the Relief Being Sought .....	737
E. Illustration of the Four-Part Test .....	739
1. The Offending Party and His Duty .....	740
2. The Conduct .....	740
3. The Victim .....	741
4. The Relief .....	741
CONCLUSION .....	742

### INTRODUCTION

There is an old adage that nice guys finish last. It is well documented that in litigation, this maxim oftentimes rings true. General William Tecumseh Sherman stated, “War is Hell!”<sup>1</sup> Litigation, some think, is like war. Make your opponent’s life miserable, put them through hell, and you will eventually defeat your adversary. Why is hardball litigation so common? Is it because it works and frequently goes unpunished? As one scholar noted, “[t]hrough perceptions differ, there seems to be some consensus that adversary excess is frequent, often not by any standard justifiable as zealous representation, and that many lawyers will indeed cross ethical lines when they think they can get away with it, which, because of the weakness of monitoring agents, they usually do.”<sup>2</sup>

When this abusive practice—sometimes referred to by lawyers and judges as “Rambo-Lawyering”<sup>3</sup>—occurs during litigation, parties are equipped with several tools under the rules of civil procedure to thwart improper behavior and move the proceeding into civil territory. However, when attorney misconduct or abusive discovery tactics result in favorable judgments to the offending parties, the available remedies under the rules diminish substantially, and the party

<sup>1</sup> *William Tecumseh Sherman*, WIKIQUOTE, [http://en.wikiquote.org/wiki/William\\_Tecumseh\\_Sherman](http://en.wikiquote.org/wiki/William_Tecumseh_Sherman) (last visited Jan. 5, 2016).

<sup>2</sup> Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709, 736 (1998).

<sup>3</sup> The term “Rambo Lawyering” has been discussed in several legal articles. See, e.g., Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 *HOFSTRA L. REV.* 561 (1996); Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 *LOY. L.A. L. REV.* 81 (1991); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don’t Work*, *A.B.A. J.*, Mar. 1, 1988, at 79. Moreover, the District Court of Denver includes a “Rambo Lawyering” instruction to attorneys in case management orders. The instruction reads as follows

This is a *CIVIL* division. “Rambo Lawyering” will not be tolerated. Counsel will treat jurors, parties, witnesses, me, my staff and each other with professionalism, courtesy and respect at all times. This applies not only to the actual trial, but to all aspects of the case, including discovery and motions practice, and includes what is written as well as what is said.

*Rambo Lawyering*, WEINBERGER LAW OFFICES, [http://weinbergerlawoffice.com/article\\_rambolawyering.asp](http://weinbergerlawoffice.com/article_rambolawyering.asp) (last visited Jan. 5, 2016).

against whom the judgment was entered is now faced with a challenging legal hurdle. A rancher from Nevada knows this story all too well.

In 2007, Judith Adams sued Susan Fallini for the death of her son after he struck one of Ms. Fallini's cows that was on a well-known highway in Nevada.<sup>4</sup> That stretch of highway is designated as "open range."<sup>5</sup> Nevada law protects open-range ranchers from liability if vehicles strike their cattle.<sup>6</sup> Thus, Ms. Fallini should have prevailed in the lawsuit because of this statutory defense, but that did not happen.<sup>7</sup> Instead, Ms. Fallini's lawyer abandoned her during the case and, among other things, failed to respond to plaintiff's requests for admission, which asked Ms. Fallini to admit that the accident did not occur on open range, even though it did, and even though plaintiff and her attorney knew it did.<sup>8</sup> Because she failed to answer the request for admission, she was deemed to have admitted that the accident did not occur on open range, which obviated her complete defense under Nevada law.<sup>9</sup> Eventually, Ms. Fallini's "admission" led to a partial summary judgment in plaintiff's favor and an award of damages in excess of \$2.7 million.<sup>10</sup>

Was the type of conduct in the *Fallini* case just clever lawyering and proficient advocacy? Or did the attorney act uncivilly or unethically in obtaining the judgment and, consequently, violate rules of civil procedure and professional conduct? More importantly, if the attorney knew the accident occurred on open range and knew that the open-range defense provided a complete defense to Fallini as a matter of law, did that attorney perpetrate a "fraud on the court"<sup>11</sup> when he obtained summary judgment based on Fallini's deemed admission of a well-known false fact? The answer to this last question is puzzling.

While fraud on the court has been recognized for centuries as a basis for setting aside a final judgment, it has been used for several other purposes under the rules of civil procedure. Generally, fraud on the court is a fraud "directed to the judicial machinery itself and is *not* fraud between the parties or fraudulent documents . . . . It is thus fraud where . . . the impartial functions of the court have been directly corrupted."<sup>12</sup> Interestingly, the term "fraud on the court" is

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<sup>4</sup> Mike Blasky, *Conflicted Judge's Decision Looms in Rancher Lawsuit*, L.V. REV.-J., July 28, 2014, at B001; *see also* Complaint at 2–4, Estate of Adams v. Fallini, No. CV24539 (Nev. 5th Dist. Ct. Jan. 31, 2007).

<sup>5</sup> Blasky, *supra* note 4.

<sup>6</sup> *Id.*; *see also* NEV. REV. STAT. ANN. § 568.360(1) (West 2015) (providing that those who own domestic animals do not have a duty to keep those animals off highways located on "open range" and are not liable for any damage or injury resulting from a collision between a motor vehicle and an animal on open range highways).

<sup>7</sup> Blasky, *supra* note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> FED. R. CIV. P. 60(d)(3).

<sup>12</sup> *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995) (emphasis added) (citation omitted).

only mentioned in Rule 60(d)(3) of the Federal Rules of Civil Procedure, yet courts have also used this doctrine to order dismissal or default under other rules where a litigant has stooped to the level of fraud on the court.<sup>13</sup>

Generally, if a party wants to utilize the fraud-on-the-court doctrine as a remedy under the rules of civil procedure, it must prove, by clear and convincing evidence, intentional fraudulent conduct specifically directed at the court itself.<sup>14</sup> Recent case law incorrectly suggests that this high standard for proving fraud on the court—which several courts agree is reserved only for the most egregious misconduct, such as a bribery of a judge or jury members—lacks any flexibility or equitable components.<sup>15</sup> Indeed, this rigid approach seems to disregard entirely the victim's status. It also creates a nearly impossible hurdle for innocent victims seeking to set aside judgments obtained by attorney misconduct. This flawed approach—particularly as courts apply the fraud-on-the-court doctrine to abusive discovery practices resulting in favorable judgments to the offending party—is inconsistent with the purpose of Rule 60(d)(3).

This Article suggests that courts depart from the heightened standard used to set aside judgments secured by a fraud on the court. Specifically, this Article advances a four-step process and recommends courts focus on one specific question when evaluating whether conduct rises to the level of fraud on the court: whether the conduct complained of caused the court not to perform in the usual manner in its impartial task of adjudging cases.

Part I of this Article discusses the various forms of abusive discovery that may lead to improper judgments, as well as some of the relevant rules of professional conduct and civil procedure. Part I also discusses the classes of victims that are the most greatly impacted by abusive discovery. Part II introduces the concept of “fraud on the court” and discusses its meaning, history, and use in combating fraudulent litigation practice. Finally, Part III introduces the four-step process, which requires an examination of the following: (1) the offending party and his duties, (2) the conduct at issue and its effect on the judicial ma-

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<sup>13</sup> See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991) (relying on Rule 11 where counsel made thirty-six changes on a deposition errata sheet after the client advised that the transcript was accurate and the testimony was correct); *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985) (affirming district court's entry of default judgment under court's inherent powers in response to defendant's abusive litigation practices); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) (“[C]ourts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.”); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986) (finding that where fraud is committed upon the court, the court's power to dismiss is inherent “to protect the integrity of its proceedings”).

<sup>14</sup> *C.B.H. Resources, Inc. v. Mars Forging Co.*, 98 F.R.D. 564, 569 (W.D. Pa. 1983) (dismissing under Fed. R. Civ. P. 41(b) where party's fraudulent scheme, including use of a bogus subpoena, was “totally at odds with the . . . notions of fairness central to our system of litigation”).

<sup>14</sup> See, e.g., *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

<sup>15</sup> See, e.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

chinery, (3) the victim's status during the underlying litigation—i.e., whether the harmed party was in a position to recognize and combat the fraud at issue prejudgment—and (4) the relief sought. Part III also utilizes the four-step process to demonstrate that advancing falsehoods during the discovery process is a form of fraud on the court and that courts have equitable power to entertain a party's action that seeks to set aside a judgment based upon fraud during the discovery process.

## I. ABUSIVE DISCOVERY PRACTICE

### A. *Common Discovery Abuse*

In a 2008 survey conducted by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, 45 percent of those surveyed indicated they believed discovery is abused in “almost every case.”<sup>16</sup> And a recent law review article led with this statement: “[o]ur discovery system is broken.”<sup>17</sup> Unfortunately, while the system may be “broken” for some, it oftentimes works for others as it allows them to gain a tactical advantage over their opponents.

Abusive discovery includes, among other things, expensive and time-consuming “inundation . . . with tons of motions, interrogatories, document requests, deposition notices and other pre-trial disputes.”<sup>18</sup> For example, in *Adelman v. Brady*, the Pennsylvania district court held that an interrogatory request in a Title VII discrimination case was “extremely burdensome” where it required the IRS to examine personnel files for records of reprimand with no limitations, such as a date range or employed staff versus unemployed staff.<sup>19</sup> The court found that this would “require the IRS to review thousands of files.”<sup>20</sup> Accordingly, the request was determined to be unduly burdensome and an abuse of discovery procedures.<sup>21</sup>

Discovery abuse also includes trickery,<sup>22</sup> harassment,<sup>23</sup> threats,<sup>24</sup> and interference with depositions.<sup>25</sup> In *Prize Energy Resources, L.P. v. Cliff Hoskins*,

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<sup>16</sup> Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather than the Exception*, 87 DENV. U. L. REV. 513, 515 (2010) (quoting AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT & 2008 LITIGATION SURVEY OF THE FELLOWS OF THE AMERICAN COLLEGE OF TRIAL LAWYERS, B-1 to B-2 (2008)).

<sup>17</sup> Netzorg & Kern, *supra* note 16, at 513.

<sup>18</sup> Ronald L. Hicks, Jr., *Strategies and Tips for Dealing with Dirty Litigation Tactics by Opposing Counsel*, EMP. & LAB. L. 153, 159 (May 2013).

<sup>19</sup> *Adelman v. Brady*, No. 89-4714, 1990 WL 39147, at \*2 (E.D. Pa. Mar. 28, 1990).

<sup>20</sup> *Id.*

<sup>21</sup> *See id.*

<sup>22</sup> *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 573 (Tex. App. 2011).

<sup>23</sup> *Id.*; *Adelman*, 1990 WL 39147, at \*2.

<sup>24</sup> *Prize Energy Res.*, 345 S.W.3d at 573; *Florida Bar v. Ratiner*, 46 So.3d 35, 37 (Fla. 2010) (per curiam).

*Inc.*, an attorney engaged in trickery when he “secur[ed] documents under false pretenses” during discovery.<sup>26</sup> The attorney used a “false letterhead” to contact potential witnesses regarding a case and purported to be a “businessman” for an oil and gas company.<sup>27</sup>

In addition to his trickery, the same attorney also engaged in harassment to obtain discovery information.<sup>28</sup> For example, he contacted the opposing party and “continually badgered him to produce documents that had already been provided,” even after the party obtained counsel.<sup>29</sup> Additionally, he threatened the opposing party with “criminal penalties” if the party failed to comply.<sup>30</sup>

Attorneys frequently adopt similar behavior to interfere with depositions and thwart truth telling or disclosure of facts. *In re Fletcher* is illustrative.<sup>31</sup> In *Fletcher*, an attorney threatened a police-officer witness with civil liability during his deposition as a means of intimidation by telling the officer that he had been added to an amended complaint alleging a Bivens action against the officer.<sup>32</sup>

Aside from improper and unethical threats, other parties engage in Rambo-Litigation tactics to deter depositions.<sup>33</sup> In *Van Pilsum v. Iowa State University of Science and Technology*, the court found that an attorney’s conduct was sanctionable when he “monopolize[d] 20% of his client’s deposition.”<sup>34</sup> There, the attorney interrupted and objected to opposing counsel’s questioning so often that between the “167 page deposition . . . only four segments [exist] where five or more pages occur without an interruption.”<sup>35</sup> He also groundlessly attacked opposing counsel for his “ethics, litigation experience, and honesty.”<sup>36</sup> For this behavior, the attorney was sanctioned and a protective order was issued.<sup>37</sup>

While the above clearly demonstrates abusive discovery tactics and misconduct, the instances likely did not rise to fraud on the court. Throw in dishonest behavior by an officer of the court, however, and a strong argument begins to unfold that a fraud on the court may be in the works. Indeed, the most

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<sup>25</sup> *In re Fletcher*, 424 F.3d 783, 785 (8th Cir. 2005); *Van Pilsum v. Iowa State Univ. of Sci. and Tech.*, 152 F.R.D. 179, 180–81 (S.D. Iowa 1993) (order on motion to compel); *Hall v. Clifton Precision*, 150 F.R.D. 525, 526 (E.D. Pa. 1993).

<sup>26</sup> *Prize Energy Res.*, 345 S.W.3d at 577.

<sup>27</sup> *Id.* at 573.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See generally* 424 F.3d 783 (8th Cir. 2005).

<sup>32</sup> *Id.* at 790.

<sup>33</sup> *See, e.g.*, *Van Pilsum v. Iowa State Univ. of Sci. and Tech.*, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (order on motion to compel).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 180.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 181.

harmful form of discovery abuse is likely in the form of attorney deceit. No one can dispute “the discovery system is designed to facilitate truth-finding.”<sup>38</sup> Yet, deception during discovery is all too common. As one scholar noted, “one reason for [attorney misconduct] is the tension inherent in the discovery process.”<sup>39</sup> Absent information protected by the attorney-client privilege or work-product doctrine, the rules of civil procedure require full disclosure during discovery; yet providing an opposing party with information that might harm the client’s case seems to conflict with zealous advocacy.<sup>40</sup> This quandary appears to be a true Catch-22 from which there is no escape. Thus, when these mutually conflicting situations arise, “the natural tendency for many lawyers is to resist the disclosure of client information”<sup>41</sup> or consciously deceive the opposing party in order to gain a tactical advantage.

In *In re Shannon*,<sup>42</sup> for example, a lawyer—the subject of the complaint filed by the State Bar of Arizona—materially altered some of his client’s handwritten answers to interrogatories without providing a copy of the altered interrogatories to his client.<sup>43</sup> After the client terminated the lawyer—but while the lawyer was still acting as the attorney of record—he submitted the altered interrogatories, along with the verification to the court for support of a motion for summary judgment.<sup>44</sup> Fortunately, the lawyer’s motion was denied,<sup>45</sup> and the court *did not* have to discuss whether the lawyer committed fraud upon the court. The opinion arose out of disciplinary proceedings, so the focus was whether the attorney violated certain rules of conduct and ethics, not whether a fraud on the court occurred. Further, despite the altered interrogatories submitted to the court, no judgment was ever obtained, and therefore, the parties were not seeking to set aside any judgment.<sup>46</sup> If, however, a judgment was obtained in favor of the lawyer’s client based on the doctored answers to the interrogatories, would this be sufficient to set aside the judgment for fraud on the court pursuant to Rule 60(d)(3)? The answer is unclear.

In another similar case, *In re Griffith*,<sup>47</sup> an attorney was disciplined for failing to make critical disclosures during discovery and trial concerning his client’s medical records and treatment.<sup>48</sup> In that case, the lawyer represented the estate of Morris Pina, Jr. in a lawsuit against the City of New Bedford for po-

<sup>38</sup> W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996).

<sup>39</sup> Alex B. Long, *Attorney Deceit Statutes: Promoting Professionalism Through Criminal Prosecutions and Treble Damages*, 44 U.C. DAVIS L. REV. 413, 423 (2010).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See generally 876 P.2d 548 (Ariz. 1994), *modified*, 890 P.2d 602 (Ariz. 1994).

<sup>43</sup> *Id.* at 552.

<sup>44</sup> *Id.* at 556.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 577.

<sup>47</sup> 800 N.E.2d 259 (Mass. 2003).

<sup>48</sup> *Id.* at 259.

lice misconduct.<sup>49</sup> New Bedford police officers arrested Pina and, while in custody, he died.<sup>50</sup> Before commencing the trial, however, the lawyer for the estate learned that Pina was being treated for medical problems and had tested positive for human immunodeficiency virus (HIV).<sup>51</sup> And when specifically asked through interrogatories whether Pina had ever been treated or admitted to a hospital prior to the alleged incident, the estate responded that it had no knowledge of any treatment or admissions.<sup>52</sup> These responses were false. The estate was also served with a request for documents, including a request to produce all medical records with any doctor or hospital rendering treatment on behalf of Pina for a period of five years prior to Pina's death.<sup>53</sup> The lawyer never produced the documents he had in his possession that would have been responsive to this request.<sup>54</sup> Furthermore, the attorney retained an expert economist to testify on damages arising from Pina's alleged wrongful death.<sup>55</sup> However, the lawyer never told the expert about the HIV.<sup>56</sup> Accordingly, the expert calculated the decedent's total loss of pleasure of life exceeded two million dollars.<sup>57</sup> At trial, the estate was awarded damages in the amount of \$435,000.<sup>58</sup>

But, during trial the defendant learned of the HIV and opposing counsel's calculated efforts to conceal this material information.<sup>59</sup> Following trial, the parties settled for \$555,000 and defense counsel sought sanctions against the lawyer, alleging that he had withheld this critical information during discovery and trial.<sup>60</sup> After a hearing, the judge entered an order in which he found that the lawyer had "engaged in a pattern of activity to hide [Pina's HIV status] from the defendants and initially . . . from the court, and had engaged in deliberate misconduct in connection with [plaintiff's] responses to the defendants' interrogatories."<sup>61</sup> Again, the court was not forced to analyze Rule 60(d)(3) because the attorneys uncovered the deceit before a judgment was rendered. However, had plaintiff prevailed at trial, would the defendant have a case to set aside the judgment for fraud upon the court? Did the plaintiff intentionally aim the false responses directly at the court? Could the failure disclose relevant information cause the court not to perform in the usual manner its impartial task of adjudging cases? Or was this just ordinary fraud between the parties?

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 260.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 261.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 260.

<sup>59</sup> *Id.* at 262.

<sup>60</sup> *Id.* at 260, 262.

<sup>61</sup> *Id.* at 262 (internal quotation marks omitted).

In another case, *In re Estrada*,<sup>62</sup> the lawyer—who was representing a pharmacy in a personal injury action resulting from a pharmacist accidentally filling a child’s prescription with methadone—misled the court by falsely denying the plaintiff’s request for admission of fact.<sup>63</sup> The lawyer’s indiscretion was not just a minor oversight, but rather a critical omission that could make or break the plaintiff’s case against the pharmacy.<sup>64</sup> Indeed, the case resulted in a mistrial after it became apparent that a prescription introduced into evidence, intended to prove that the pharmacy could account for all its dispensed methadone, was a forgery.<sup>65</sup> Fraud on the court?

Unfortunately, the foregoing represents just a small number of cases where deceit and fraud are present. One would hope that the majority of attorneys understand and acknowledge that zealous representation—even aggressive representation—can always be accomplished through playing by the rules. Indeed, despite the tension of litigation, lawyers are always responsible for maintaining the ethical standards of the profession. These standards and ethical obligations are governed by a combination of sources,<sup>66</sup> which include the Federal Rules of Civil Procedure, state rules, and laws governing attorney conduct.<sup>67</sup> Violating or otherwise ignoring these discovery-based rules have broad implications. As one court noted,

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is . . . hindering the adjudication process, and . . . violating his or her duty of loyalty to the “procedures and institutions” the adversary system is intended to serve.<sup>68</sup>

Notwithstanding the procedural and ethical components of these rules, there will always be lawyers and parties that simply disregard or sidestep the rules to gain an advantage. And it does not matter whether the rule falls within a “gray area” of law or is replete with obvious warnings and penalties designed to deter the offending party from abusive practice.

Consider, for example, Rule 26(g) of the Federal Rules of Civil Procedure. This rule—“[o]ne of the most important, but apparently least understood or fol-

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<sup>62</sup> 143 P.3d 731 (N.M. 2006).

<sup>63</sup> *Id.* at 735.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449, 450 (2009).

<sup>67</sup> *Id.*

<sup>68</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 362 (D. Md. 2008) (citation omitted).

lowed, of the discovery rules<sup>69</sup>—clearly and expressly requires that “every discovery request, response, or objection be signed by at least one attorney of record, . . . or by the [client], if unrepresented.”<sup>70</sup> The signature “certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry,” the discovery is complete and correct, and that the discovery request, response, or objection is

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.<sup>71</sup>

If a lawyer or party makes the certification required by Rule 26(g) that violates the rule, the court “must” impose an appropriate sanction, which may include an order to pay reasonable expenses and attorney’s fees caused by the violation.<sup>72</sup> But do fraudulent responses to written discovery, for example, expose a party to default or dismissal for committing fraud on the court?

Rule 26 is clear on its face and in its purpose: deter abusive discovery and sanction offending parties for misconduct in discovery. One would think that the transparencies of the rule and the obvious consequences for compliance would have a strong deterrent effect, yet that is not always the case. In addition to Rule 26, other remedies exist to prevent abusive discovery, including sanc-

<sup>69</sup> *Id.* at 357.

<sup>70</sup> FED. R. CIV. P. 26(g).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* The Advisory Committee’s Notes to Rule 26(g) provide further guidance:

Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. The subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. . . .

If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection. . . .

Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection.

The duty to make a “reasonable inquiry” is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by Rule 11.

FED. R. CIV. P. 26(g) advisory committee’s notes to the 1983 amendments (emphasis added) (citations omitted).

tions,<sup>73</sup> discovery statutes,<sup>74</sup> and misconduct-reporting boards.<sup>75</sup> These rules and remedies share a few common shortfalls. First, they are written and used to deter abusive conduct *during* the litigation. However, these rules have little utility post-judgment (i.e., if abusive discovery leads to an improper judgment, these rules have minimal value or impact). Second, while these rules may combat abuse that otherwise might lead to improper judgments, the rules are plainly more effective in the hands of competent attorneys who understand how they operate and how they can potentially deter attorney misconduct. Yet, when victims of abusive discovery are representing themselves pro se, or have been abandoned by counsel, the rules serve a very limited function, if any, in these victims' hands.

### B. *The Vulnerable Victims*

Abusive discovery practice comes in all shapes and sizes. From the multi-billion-dollar case with hundreds of defendants to the ten-thousand dollar breach of contract case, one is likely to find attorneys engaging in unsound litigation tactics. Any party on the receiving end of this abuse is a victim and has standing to seek redress from the court. However, abusive discovery's impact seems to be far greater for two classes of victims: the pro se litigant and the attorney-abandoned litigant. Should these victims receive special treatment when faced with judgments obtained by fraud? Is their status relevant to the court's analysis under Rule 60(d)(3)—i.e., should the courts be more flexible and willing to set aside judgments in cases where the victim was not adequately represented by counsel when the fraud occurred?

#### 1. *The Pro Se Litigant*

The saying goes, "one who is his own lawyer has a fool for a client."<sup>76</sup> In *Powell v. Alabama*,<sup>77</sup> the Supreme Court wrote,

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding

<sup>73</sup> See, e.g., *In re Lucas*, 789 N.W.2d 73, 78 (N.D. 2010) (suspending an attorney for misconduct). Sanctions can also include paying opposing party's attorney's fees.

<sup>74</sup> See, e.g., FED. R. CIV. P. 26(b)(2)(C) (providing that a court "must limit the frequency or extent of discovery"); FED. R. CIV. P. 33(a)(1) (providing that "[u]nless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories"); FED. R. CIV. P. 37(a)(1) (allowing a party to compel discovery); FED. R. CIV. P. 45(d)(3)(A) (authorizing a district court to quash a subpoena if it subjects a person, including a non-party, to an undue burden, fails to allow for a reasonable time for compliance, or requires disclosure of confidential information).

<sup>75</sup> *Outback Steakhouse of Florida, Inc. v. Markley*, 856 N.E.2d 65, 85 (Ind. 2006) (disciplining by ethics committee for false statements); *People v. Scruggs*, 52 P.3d 237, 241 (Colo. 2002) (holding that disbarment was an appropriate remedy for abuse).

<sup>76</sup> *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting).

<sup>77</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.<sup>78</sup>

So why would anyone choose to appear pro se? The likely response is that they have no choice. They are victims of a legal market failure. On the demand side, most Americans struggle to find a lawyer to provide them with legal advice. On the supply side, law school graduates and other lawyers are either unemployed or underemployed.<sup>79</sup> Chief Justice Warren Burger predicted thirty-five years ago that America was turning into “a society overrun by hordes of lawyers, hungry as locusts.”<sup>80</sup> But what are these lawyers craving? Pro bono work? Serving the underprivileged? Not likely. Lawyers, generally, provide for the legal needs of those individuals and businesses that can deliver a secure retainer and pay a considerable amount of money. However, there are only so many low-risk, high-paying clients around. As a result, scores of the American population are forced to represent themselves because lawyers are either not willing to take on the risk of not being paid or not willing to devote a significant amount of time to serving the underprivileged.

This “pro se” problem was recently highlighted in states where foreclosures require a judge’s approval. “[H]omeowners in default have traditionally surrendered their homes without ever coming to court to defend themselves.”<sup>81</sup> That inaction, however, has begun to recede.<sup>82</sup> Indeed, “[w]hile many foreclosures are still unopposed, courts are seeing a sharp rise in cases where defendants show up representing themselves.”<sup>83</sup> Some courts “welcome[] the influx of parties defending themselves.”<sup>84</sup> Louis McDonald, the chief judge for New Mexico’s Thirteenth Judicial District, acknowledged that “[s]ome of [the pro se defendants] have fairly legitimate defenses.”<sup>85</sup> But the law grows more complex as cases progress through litigation, and several of the pro se defendants are in over their heads and unable to combat abusive practice.<sup>86</sup> These parties are susceptible to the problems highlighted above. “Admit you signed the loan documents.” “Admit you are in default.” “Admit we hold the deed of trust against your home and we are the entitled beneficiaries.” If true, these requests to admit, alone, could establish a lender’s prima facie foreclosure case. But what if the plaintiff submitting these requests was not the beneficiary? What if they were not in possession of the promissory note and the deed of trust? That

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<sup>78</sup> *Id.* at 69.

<sup>79</sup> Michael S. Hooker & Guy P. McConnell, *Too Many Lawyers—Is It Really a Problem?*, *FED. LAW.*, Sept. 2014, at 62, 63–64.

<sup>80</sup> Warren E. Burger, *Our Vicious Legal Spiral*, 16 *JUDGES’ J.* 22, 49 (1977).

<sup>81</sup> David Streitfeld, *For the Foreclosed, Themselves*, *N.Y. TIMES*, Feb. 3, 2011, at B1.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

alone would be sufficient to prevent the lender from foreclosing. If the requests went unanswered, they would be deemed admitted.<sup>87</sup> By asking the homeowners to admit known falsehoods and then injecting those falsehoods into the court system to support a motion for summary judgment, would the plaintiff seeking to foreclose be committing fraud on the court?

New York has experienced similar issues. Before 2008, “about 90 percent of foreclosure defendants never appeared before a judge.”<sup>88</sup> However, with new mandatory settlement laws in place, “more than three-quarters of defendants now show up to court, about 32,000 in the first [ten months of 2010].”<sup>89</sup> However, only about 12,000 had a lawyer.<sup>90</sup> The other 20,000 were in charge of their own fate. “We’re getting the people in here, getting them to the table with the bank, but I don’t know what happens to these cases long term,” said Paul Lewis, chief of staff to New York’s chief administrative judge.<sup>91</sup> “Many of the homeowners would do much better with an attorney.”<sup>92</sup>

Unlike criminal proceedings, the right to counsel is not absolute in civil cases.<sup>93</sup> This further strengthens the argument that most pro se appearances by civil litigants are not voluntary, but instead result because they simply cannot afford attorneys to represent them. This is especially true when one considers the potential costs involved with discovery alone. Indeed, “[p]erhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs.”<sup>94</sup> Unfortunately, “in far too many cases, economics—and not the merits—govern discovery decisions.”<sup>95</sup> The result is that “[l]itigants of moderate means are often deterred through discovery from vindicating claims or defenses, and the litigation process all too often becomes a war of attrition for all parties.”<sup>96</sup>

If the right to counsel were absolute in civil cases, pro se appearances would decrease significantly, if not entirely. For several justifiable reasons, however, this is not how the American legal system functions. Because of this, some courts accord pro se litigants a certain degree of leniency, particularly

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<sup>87</sup> See, e.g., FED. R. CIV. P. 36(a)(3) (stating that “[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney”).

<sup>88</sup> Streitfeld, *supra* note 83.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Lassiter v. Dep’t. of Soc. Servs.*, 452 U.S. 18, 26–27 (1981).

<sup>94</sup> S. REP. NO. 101-650, at 20 (1990), as reprinted in 1990 U.S.C.C.A.N. 5763, 6823.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

with respect to procedural rules.<sup>97</sup> Notwithstanding, extending too much leniency undermines the system. As one court recently explained,

[T]he Court may not be co-opted by a pro se litigant to perform tasks normally carried out by hired counsel. Providing assistance or extending too much procedural leniency to a pro se litigant risks undermining the impartial role of the judge in the adversary system. Moreover, it has never been suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel. Pro se litigants must adhere to procedural rules as would parties assisted by counsel. This includes procedural requirements regarding the provision of adequate factual averments to sustain legal claims.<sup>98</sup>

In other words, claims of discovery abuse may be null, even if there is some trickery or omission from the opposing counsel because procedural rules tend to apply uniformly to pro se and represented parties, regardless of the unequal knowledge of the law.<sup>99</sup> For example, in *Tall v. Alaska Airlines*, a Kentucky court of appeals held that a pro se defendant's belief that he had entered a settlement agreement with the plaintiff's counsel during discovery did not provide a remedy when he failed to submit a denial in a request for admissions.<sup>100</sup> The defendant defaulted on a credit agreement and responded to a complaint filed by the bank by "denying that he owed any debt."<sup>101</sup> He stated that he discussed a settlement amount with the bank's attorney that would allow him to bring his account current; this conversation allegedly occurred prior to suit.<sup>102</sup> A review of the case indicates there was a misunderstanding as to the agreement, and instead of a monthly payment, the defendant rendered the total "principal amount," minus "interest owed, costs, or fees."<sup>103</sup>

During discovery, the opposing counsel requested admissions and the defendant failed to answer, resulting in his admission that he still owed the debt.<sup>104</sup> The defendant argued that counsel had "tak[en] advantage of [his] ignorance of the law" in violation of a state statute that required parties to make a "good faith effort" to resolve discovery disputes.<sup>105</sup> Yet, the court held that because the "unanswered admission requests are deemed admitted . . . there is no

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<sup>97</sup> See, e.g., *GJR Invs., Inc. v. Cty. of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998) (stating that "[c]ourts do and should show a leniency to pro se litigants not enjoyed by those with the benefit of a legal education").

<sup>98</sup> *United States v. Gregg*, No. 12-322, 2013 WL 6498249, at \*4 (W.D. Pa. Dec. 11, 2013) (internal quotations and citations omitted).

<sup>99</sup> *Paselk v. Rabun*, 293 S.W.3d 600, 611 (Tex. Ct. App. 2009) (petition denied).

<sup>100</sup> *Tall v. Alaska Airlines*, No. 2009-CA-002256-MR, 2011 WL 831918, at \*1-\*2 (Ky. Ct. App. Mar. 11, 2011) (alleging Credit Union took advantage of Tall's pro se representation during discovery, in violation of Jefferson County Local Rule 4).

<sup>101</sup> *Id.* at \*1.

<sup>102</sup> *Id.* at \*3.

<sup>103</sup> *Id.* at \*4.

<sup>104</sup> *Id.* at \*3.

<sup>105</sup> *Id.* at \*4 (citing Local Rule 402).

foreseeable reason for a party to seek to compel such admissions.”<sup>106</sup> Therefore, an opposing attorney does not have a duty to warn another party, even pro se, to follow discovery procedures.<sup>107</sup>

This Article does not necessarily advocate for extra-judicial assistance to pro se litigants.<sup>108</sup> Instead, it highlights a growing problem: pro se litigants are becoming more plentiful and they lack legal skill and knowledge to oppose aggressive counsel. As one scholar noted,

Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact-finder and the choreography of the trial. But few litigants or courts can afford it.<sup>109</sup>

When a party opponent senses this weakness, it will seize its prey. In one article discussing foreclosures and pro se parties, it was noted that lawyers “pretty much bank on people not showing up, or not having an attorney to represent them.”<sup>110</sup> Consequently, in addition to facing the aggressive lawyer, the misguided and naïve litigant is likely to encounter an opposing party who refuses to play by the rules because it knows (1) the chances of being caught, sanctioned, or challenged are relatively small and (2) the probability of prevailing in the lawsuit is significantly greater if the rules are not observed. The skilled lawyer, knowing that his opponent is not qualified, is thus encouraged to engage in improper or unsound litigation tactics.<sup>111</sup> During the pending litigation, there are several remedies available to thwart abusive litigation practice. Yet, when abusive practice actually leads to a judgment in favor of the perpe-

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Some courts actually do accord “special attention” to pro se litigants faced with procedural complexities, such as summary judgment motions. *Ham v. Smith*, 653 F.2d 628, 629–30 (D.C. Cir. 1981). Indeed, some courts agree that a litigant is entitled to be warned that when she is confronted by a summary judgment motion, she must obtain evidentiary material to avoid the entry of judgment against her. *See, e.g., Timms v. Frank*, 953 F.2d 281, 285 (7th Cir. 1992); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam); *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968) (per curiam).

<sup>109</sup> Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 *UCLA L. REV.* 1935, 1942 (1997).

<sup>110</sup> Kat Aaron, *Foreclosure Crisis + Legal Aid Cuts = @#\$\$!*, *MOTHER JONES* (Feb. 14, 2011, 7:00 AM), <http://www.motherjones.com/politics/2011/02/legal-services-corporation-recession>.

<sup>111</sup> *See* Scott L. Garland, *Avoiding Goliath's Fate: Defeating a Pro Se Litigant*, 24 *LITIG.* 45, 46 (1998) (commenting that in his experience as a clerk at a federal district court, “[m]any lawyers seem to think that litigating against a pro se party gives the lawyer license to litigate like a pro se party, by omitting legal citations, making conclusory statements, forgoing affidavits and evidence in favor of *ipse dixit*, and failing to evaluate the opponent’s arguments.”); *see also* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 *BROOK. L. REV.* 519, 520 (1996) (concluding that state attorney generals’ experience with frivolous pro se prisoner litigation has led them to exaggerate or misstate the merit of certain pro se allegations).

trator, the pro se litigant is left with very few procedural arrows in his quiver to combat the wrongdoing.

## 2. *The Attorney-Abandoned Litigant*

Pro se litigants are not the only victims abused by improper gamesmanship. The *Fallini* case introduced in the Introduction represents the classic example of attorney abandonment.

When Fallini was sued, she retained an attorney to represent and defend her.<sup>112</sup> He filed an answer on Fallini's behalf. At the time of the lawsuit, Fallini was over sixty years of age and had no legal skills or knowledge of the procedures involved in a lawsuit.<sup>113</sup> She relied on and trusted her attorney to resolve the legal dispute quickly, efficiently and competently. In June 2007, shortly after her attorney filed Fallini's answer, he represented to her that the case was over and that she had prevailed because of her statutory open-range defense.<sup>114</sup> Unbeknownst to Fallini, however, the case was not over. In fact, litigation continued by way of discovery requests and motion practice by counsel for the plaintiff, but Fallini's attorney failed to answer various requests for admission, oppose a motion for summary judgment based on those unanswered requests for admissions, appear for a hearing on the motion for summary judgment, or respond to other discovery requests.<sup>115</sup>

Fallini "did not receive direct notice of the foregoing neglect of her attorney."<sup>116</sup> Nonetheless, the court entered partial summary judgment in which it imposed liability on Fallini for the accident.<sup>117</sup> In particular, Fallini was *deemed* to have admitted that the accident did *not* occur on open range—which obviated her *complete defense* to the action pursuant to NRS § 568.360(1)—even though she had already asserted that defense in her answer.<sup>118</sup>

The court later held her attorney in contempt of court and repeatedly imposed significant sanctions for his failure to appear and comply with its orders in the case.<sup>119</sup> "But despite these court-imposed sanctions, Fallini was still not informed of the status of her case, nor was she informed that her attorney was being sanctioned for his deliberate failure to represent her."<sup>120</sup> It was not until June 2010—three years after Fallini's attorney told her that the case was over

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<sup>112</sup> Estate of Adams v. Fallini, No. CV 24539 (Nev. 5th Dist. Ct. Aug. 6, 2014), at 2 (court order).

<sup>113</sup> Motion for Relief from Judgment Pursuant to NRCP 60(b) at 5, *Estate of Adams*, No. CV 24539.

<sup>114</sup> *Id.* at 21.

<sup>115</sup> *Id.* at 20–21.

<sup>116</sup> *Id.* at 6.

<sup>117</sup> *Estate of Adams*, No. CV 24539, at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 3–4.

<sup>120</sup> Motion for Relief From Judgment Pursuant to NRCP 60(b) at 6, *Estate of Adams*, No. CV 24539.

and that she had prevailed—that Fallini learned the true status of her case—that a judgment exceeding \$2.7 million had been entered against her despite her ironclad statutory defense.<sup>121</sup>

In situations where attorney misconduct like that discussed above leads to a favorable judgment, Rule 60(d)(3) should serve as a wide-open door that victims can enter unhindered. One of the major problems associated with attorney abandonment is the difficulty in reversing the wrongdoing, especially if the party is faced with an adverse judgment. Abandonment has been defined in very strict terms and requires a high bar before a party may gain relief from judgment due to its own counsel's inadequacy.<sup>122</sup> Though not a discovery-abuse case, in *Maples v. Thomas*,<sup>123</sup> the United States Supreme Court recently held that a “habeas prisoner’s default” would be excused when the filing deadline was missed due to his attorneys’ abandonment because “a client cannot be charged with the acts or omissions of an attorney who has abandoned him.”<sup>124</sup> However, this is a high bar, requiring “extraordinary circumstances beyond . . . [a party’s] control,” such as “evidence [of] counsel’s near-total failure to communicate with, [or respond to], petitioner.”<sup>125</sup> A procedural error, such as missing a filing deadline, does not fit the mold.<sup>126</sup> Abandonment requires something more akin to the injured party in *Maple* where the attorneys not only failed to file the petition, but also, among other things, (1) took on new employment, (2) failed to notify their client, (3) failed to withdraw, (4) allowed ineffective counsel to take over, and (5) permitted clerical issues to occur at their firm that deprived the client of important communications.<sup>127</sup> Furthermore, the “attorney abandonment” addressed by the Supreme Court occurred in a criminal procedure context, not in a civil suit.<sup>128</sup>

Accordingly, without facts similar to this extreme example of abandonment in a *criminal* case, courts are left to their discretion to render judgment against a party due to his own attorney’s misconduct during discovery. Though failing to communicate with a client<sup>129</sup> and failing to file orders or respond to re-

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<sup>121</sup> *Id.* at 6–7.

<sup>122</sup> This is a narrow exception from the normal discretion courts have to impose sanctions for discovery violations.

<sup>123</sup> 132 S. Ct. 912 (2012).

<sup>124</sup> *Id.* at 924.

<sup>125</sup> *Id.* at 923–24.

<sup>126</sup> *Id.* at 921. Yet, it should be noted that courts still have the discretion to sanction for a procedural error.

<sup>127</sup> *Id.* at 928 (Alito, J., concurring).

<sup>128</sup> See generally *id.*

<sup>129</sup> See, e.g., *Comerica Bank v. Esposito*, 215 Fed. App’x 506, 508 (7th Cir. 2007) (stating that failure to communicate with a client is not generally enough for “postjudgment relief”); *Cohen v. Brandywine Raceway Ass’n*, 238 A.2d 320, 325 (Del. Super. Ct. 1968) (stating that even if the attorney failed to follow up after delivering the interrogatories, it was not “excusable neglect” when answers were not filed on time).

quests<sup>130</sup> are common, these actions generally do not afford relief, even when it is the fault of the represented party's counsel.

For example, in *Platinum Rehab, Ltd. v. Platinum Home Health Care Services*, an Ohio district court found that abandonment arising to “extraordinary circumstances” did not exist when the represented party could not show she was free from fault after her attorney failed to meet several deadlines, resulting in judgment against her.<sup>131</sup> The defendant alleged that her attorney was “grossly negligent” and “abandoned representation” when he failed to answer a complaint, respond to discovery requests, and failed to appear at a hearing.<sup>132</sup> Yet, the court found that she was not abandoned for three reasons.<sup>133</sup> First, she was present and aware of the filing dates for the answer and discovery requests.<sup>134</sup> Second, there was no evidence except her own statement that she provided the necessary information for the discovery requests.<sup>135</sup> Third, there was no evidence that she made an effort “to ensure” her attorney complied with the deadlines.<sup>136</sup> For these reasons, the court upheld the judgment against the defendant, even though her own counsel was negligent.<sup>137</sup> But what if the complaint or discovery requests that went unanswered were peppered with inaccurate, misleading, or fraudulent statements that allowed the plaintiff to obtain a judgment against the attorney-abandoned defendant? What would be the defendant's remedy? How could that judgment be set aside? Even if she was not free from fault because she was aware of the filing dates, would that somehow offset any fraud that occurred during discovery or mitigate the harm?

In another case, a Michigan court of appeals held that “effective abandonment” was not a legal term and denied reversing judgment against the plaintiff that resulted from the plaintiff's attorney's failure to comply with discovery.<sup>138</sup>

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<sup>130</sup> See, e.g., *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002) (refusing to overturn dismissal for attorney's failure to follow court orders and procedures); *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986) (finding that relief for judgment was not warranted for attorney's failure to comply with discovery requests); *Corchado v. Puerto Rico Marine Mgmt., Inc.*, 665 F.2d 410, 413 (1st Cir. 1981) (holding that dismissal was appropriate where counsel repeatedly failed to respond to discovery requests); *Weinreb v. TR Developers, LLC*, 943 N.E.2d 856, 858 (Ind. Ct. App. 2011) (holding that relief from summary judgment would not be granted where the defendant's attorney failed to argue a defense that was “known or knowable” at the time judgment was granted); *Moore v. Taylor Sales, Inc.*, 953 S.W.2d 889, 894 (Ark. Ct. App. 1997) (holding that default judgment would not be set aside where the attorney failed to file “timely answers” even though his client delivered the attorney the answers and the attorney assured the client he would file a response).

<sup>131</sup> *Platinum Rehab., Ltd. v. Platinum Home Health Care Servs., LLC*, No. 1:11CV1021, 2012 WL 4461502, at \*4 (N.D. Ohio Sept. 25, 2012).

<sup>132</sup> *Id.* at \*1.

<sup>133</sup> *Id.* at \*1, \*4.

<sup>134</sup> *Id.* at \*4.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at \*5.

<sup>138</sup> *Beck v. Cass Cty. Rd. Comm'n*, No. 305246, 2012 WL 4465166, at \*2 (Mich. Ct. App. Sept. 27, 2012).

In *Beck v. Cass County Road Commission*, the trial court dismissed the plaintiff's complaint as a "sanction for the willful failure to comply with an order to compel discovery."<sup>139</sup> In denying the plaintiff's motion for relief from judgment, the court determined that relief was unwarranted because an attorney's professional negligence is attributable to the client and does not ordinarily constitute grounds for setting aside judgments.<sup>140</sup> Even though the plaintiffs claimed that they were effectively abandoned by this non-assistance, the court found that there was no legal basis for this claim.<sup>141</sup> Thus, the attorney's lack of vigor and lack of compliance was insufficient to allow relief from judgment.<sup>142</sup>

As illustrated in the *Fallini* case, a false admission, which stems from an attorney failing to respond adequately to a request for admission, may lead to a dangerous result: an improper judgment unsupported by any law.<sup>143</sup> While a court may have no problem withdrawing a false admission in a discovery document while discovery is *ongoing*,<sup>144</sup> there is little guidance to show how a court would consider a false admission after judgment has been entered.<sup>145</sup> A party who is represented and is subjected to judgment due to his own party's misconduct has very limited remedies. For states that impute liability, Federal Rules of Civil Procedure Rule 60<sup>146</sup>—or state-law equivalents—appear to be the only source of relief.<sup>147</sup>

## II. FRAUD ON THE COURT

Rule 60(d) of the Federal Rules of Civil Procedure, which provides the grounds for relief from a final judgment, order, or proceeding, states that the rule "does not limit a court's power to . . . set aside a judgment for fraud on the court."<sup>148</sup>

What is "fraud on the court" within the meaning of Rule 60? Are there certain time limitations associated with this rule for parties seeking grounds for

<sup>139</sup> *Id.* at \*1.

<sup>140</sup> *Id.* at \*2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at \*3.

<sup>143</sup> Blasky, *supra* note 4.

<sup>144</sup> See *Brankovic v. Snyder*, 578 S.E.2d 203, 207 (Ga. App. 2003) (stating that "[a] party has no right to a judgment based on *false* 'admissions'" due to a late response).

<sup>145</sup> *Turner v. Alta Mira Vill. Homeowners Ass'n, Inc.*, No. 2 CA-CV 2013-0151, 2014 WL 7344049, at \*4 (Ariz. Ct. App. Dec. 24, 2014) (refusing to award sanctions where false admission resulted from "erroneously admit[ing] the truth."). Compare this to the somewhat analogous treatment for the failure to assert an affirmative defense (both require an affirmative statement). See, e.g., *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 665–66 (9th Cir. 1997) (holding that failure to plead an affirmative defense does not afford relief from judgment due to an attorney's "'ignorance nor carelessness'") (quoting *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir. 1992)).

<sup>146</sup> See FED. R. CIV. P. 60.

<sup>147</sup> *Las Vegas Land & Dev. Co., LLC v. Wilkie Way, LLC*, 219 Cal. Rptr. 3d 391, 392 (Ct. App. 2013); *Beck*, 2012 WL 4465166, at \*2.

<sup>148</sup> FED. R. CIV. P. 60(d)(3).

relief from a final judgment? Does “fraud on the court” require the same standard of proof for common law fraud? Was that intent of the rule’s framers?

Rule 60(d)(3) was added in 1948.<sup>149</sup> The framers’ intention may best be indicated in the Advisory’s Committee’s discussion of the rule:

The amendment . . . mak[es] fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a ground for relief by independent action insofar as established doctrine permits. And the rule expressly does not limit the power of the court . . . to give relief under the savings clause. As an illustration of the situation, see *Hazel-Atlas Glass Co. v. Hartford Empire Co.* [322 U.S. 238 (1944)].<sup>150</sup>

Because of the express reference to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,<sup>151</sup> an examination of this case is important for a full understanding of the meaning of the phrase. Hartford, in support of an application for a patent, submitted to the Patent Office an article—drafted by an attorney of Hartford—referring to the contested process as a “revolutionary device.” The company had arranged to have the article printed in a trade journal under the name of an ostensibly disinterested person.<sup>152</sup> The Patent Office relied heavily on this article in granting the patent application.<sup>153</sup> Hartford then sued Hazel, charging infringement of the patent. The Third Circuit, in upholding the validity of the patent, also relied on the article.<sup>154</sup> Eventually, Hazel yielded and paid Hartford \$1,000,000 and entered into a licensing agreement.<sup>155</sup> Approximately ten years later, the information about the fraud surrounding the agreement was brought to light.<sup>156</sup> Hazel then filed an action with the court to have the judgment against it set aside and the judgment of the district court reinstated.<sup>157</sup> The Supreme Court, in an opinion authored by Justice Black, held that the judgment must be vacated:<sup>158</sup>

[T]he general rule [is] that [federal courts will] not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. . . . [but]

. . . .

[e]very element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.

<sup>149</sup> 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE CIVIL § 2870 (3d ed. 2015).

<sup>150</sup> FED. R. CIV. P. 60 advisory committee’s note to 1946 amendment (citations omitted).

<sup>151</sup> 322 U.S. 238 (1944).

<sup>152</sup> *Id.* at 240.

<sup>153</sup> *Id.* at 241.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 243.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 251.

Here, even if we consider nothing but Hartford's sworn admissions, we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals.<sup>159</sup>

Additionally, although Hazel may not have exercised proper diligence in uncovering the fraud, the Court thought it immaterial.<sup>160</sup> Indeed, it noted the case did not concern just the private parties, but rather the public at large because there are "issues of great moment to the public in a patent suit."<sup>161</sup> It then stated,

Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.<sup>162</sup>

Interestingly, the Court held that it need not decide to what extent the published article by Hartford had influenced the judges who voted to uphold the patent or whether the article was the primary basis of that ruling because "Hartford's officials and lawyers thought the article material" and they were in "no position now to dispute its effectiveness."<sup>163</sup> And since the fraud had been directed to the Third Circuit, that court was the appropriate court to remedy the fraud.<sup>164</sup> Thus, the Supreme Court directed the Third Circuit to vacate its 1932 judgment and to direct the district court to deny all relief to Hartford.<sup>165</sup>

Nearly all of the principles that govern a claim of fraud on the court come from the *Hazel-Atlas* case.<sup>166</sup> First, the power to set aside a judgment exists in every court.<sup>167</sup> Second, in whichever court the fraud was committed, that court should consider the matter.<sup>168</sup> Third, while parties have the right to file a motion requesting the court to set aside a judgment procured by fraud, the court may also proceed on its own motion.<sup>169</sup> Indeed, one court stated that the facts that had come to its attention "not only justify the inquiry *but impose* upon us the duty to make it, even if no party to the original cause should be willing to cooperate, to the end that the records of the court might be purged of fraud, if

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<sup>159</sup> *Id.* at 244–45.

<sup>160</sup> *Id.* at 246.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 246–47.

<sup>164</sup> *Id.* at 248–50.

<sup>165</sup> *Id.* at 251.

<sup>166</sup> WRIGHT ET AL., *supra* note 151.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* (citing *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575 (1946) (other citations omitted)).

<sup>169</sup> *Id.*

any should be found to exist.”<sup>170</sup> Fourth, unlike just about every other remedy or claim existing under the rules of civil procedure or common law, there is no time limit on setting aside a judgment obtained by fraud, nor can laches bar consideration of the matter.<sup>171</sup> The logic is clear: “[T]he law favors discovery and correction of corruption of the judicial process even more than it requires an end to lawsuits.”<sup>172</sup>

The United States Supreme Court—in a case a few years after the *Hazel-Atlas* case—discussed some of the appropriate procedures used in adjudicating fraud on the court claims.

The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation. But if the rights of parties are to be adjudicated in such an investigation, the usual safeguards of adversary proceedings must be observed.<sup>173</sup>

Since *Hazel-Atlas*, a considerable number of courts have had the opportunity to dissect the meaning of “fraud on the court” and several definitions have been attempted. A number of courts have held that a “fraud on the court” occurs “where it can be demonstrated, *clearly and convincingly*, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”<sup>174</sup>

Fraud on the court is a very high bar. The Tenth Circuit has held that it is fraud “directed to the judicial machinery itself and is *not* fraud between the parties or fraudulent documents . . . . It is thus fraud where . . . the impartial functions of the court have been directly corrupted.”<sup>175</sup> And “only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court.”<sup>176</sup>

Some courts require the moving party to meet certain elements in order to set aside a judgment for fraud on the court. For example, in the Third Circuit,

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<sup>170</sup> *Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 521–23 (3d Cir. 1948) (emphasis added).

<sup>171</sup> See *WRIGHT ET AL.*, *supra* note 151.

<sup>172</sup> *Lockwood v. Bowles*, 46 F.R.D. 625, 634 (D.D.C. 1969).

<sup>173</sup> *Universal Oil*, 328 U.S. at 580.

<sup>174</sup> *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added) (citing *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989)); *Pfizer Inc. v. Int’l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976); *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960); *United Bus. Commc’ns, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1186–87 (D. Kan. 1984); *United States v. ITT Corp.*, 349 F. Supp. 22, 29 (D. Conn. 1972), *aff’d mem.*, 410 U.S. 919 (1973).

<sup>175</sup> *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995) (emphasis added).

<sup>176</sup> *Roziar v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978).

fraud on the court applies to only “the most egregious misconduct directed to the court itself”<sup>177</sup> and requires the following elements: “(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court.”<sup>178</sup>

Furthermore, fraud on the court under Rule 60(d)(3) does not encompass “ordinary fraud,” and must also be distinguished from “fraud” under Rule 60(b)(3)—i.e., those frauds which are not directed to the judicial machinery itself.<sup>179</sup> Rule 60(b)(3) provides relief from judgment where there is “fraud . . . misrepresentation, or misconduct by an opposing party.”<sup>180</sup> “Fraud upon the court as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication.”<sup>181</sup> Accordingly, the standard for establishing fraud on the court under Rule 60(d)(3) “is higher and distinct from the more general standard for fraud under Rule 60(b)(3).”<sup>182</sup> Furthermore, while Rule 60(c)(1) limits to one year the time within which a motion under Rule 60(b)(3) must be made, a claim based upon fraud on the court under Rule 60(d)(3) is intended “to protect the integrity of the judicial process” and, therefore, *is not time barred*.<sup>183</sup>

Despite the definitions and standards developed by the courts, the distinction between “fraud” and “fraud on the court” is unclear and much confusion still exists about what type of conduct falls into this category. As one court queried,

What is meant by “defile the court itself”? What is meant by “fraud perpetrated by officers of the court”? Does this include attorneys? Does it include the case in which an attorney is deceived by his client, and is thus led to deceive the court? The most that we can get . . . is that the phrase “fraud on the court” should be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest. We agree, but do not find this of much help to us in deciding the question before us.<sup>184</sup>

As one commentator noted, “[p]erhaps the principal contribution of all of these attempts to define ‘fraud upon the court’ and to distinguish it from mere ‘fraud’ is [] a reminder that there is a distinction.”<sup>185</sup> If any fraud connected with the presentation of a case to a court is fraud on the court, then Rule 60(b)(3) and the time restraints imposed on that rule lose meaning. Nonetheless, because of its opaque meaning and application, several arguments can be made that abusive discovery between the parties, which ultimately results in a

<sup>177</sup> *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

<sup>178</sup> *Id.* at 386.

<sup>179</sup> *See United States v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002).

<sup>180</sup> FED. R. CIV. P. 60(b)(3).

<sup>181</sup> *King v. First Am. Investigations, Inc.* 287 F.3d 91, 95 (2d Cir. 2002) (internal quotations omitted).

<sup>182</sup> *In re Old Carco LLC*, 423 B.R. 40, 52 (Bankr. S.D.N.Y. 2010).

<sup>183</sup> *Bowie v. Maddox*, 677 F. Supp. 2d 276, 278 (D.D.C. 2010).

<sup>184</sup> *Toscano v. Comm’r of Internal Revenue*, 441 F.2d 930, 933–34 (9th Cir. 1971).

<sup>185</sup> WRIGHT ET AL., *supra* note 151.

favorable judgment to the offender, should be included in the species of fraud on the court under Rule 60(d)(3).

### III. ABUSIVE DISCOVERY AS FRAUD ON THE COURT AND REEVALUATING THE STANDARD

When, if ever, will abusive discovery practices rise to the level of fraud on the court within the meaning of Rule 60(d)(3)? Do the current standards adopted by the courts preclude utilizing Rule 60(d)(3) to set aside judgments procured by deceptive or misleading discovery? Is it proper to modify the heightened standard under Rule 60(d)(3) based on the victim, the offender, and the relief sought?

Unfortunately, courts tend to focus on antiquated standards when analyzing whether a party has committed fraud on the court, but fail to recognize the flexibility and equitable nature of the fraud-on-the-court rule. Indeed, nearly all courts that undertake the fraud-on-the-court analysis begin their opinions with the *Hazel-Atlas* case, then discuss the standards and definitions adopted by other courts, and finally decide whether the facts fit within that definition and standard.<sup>186</sup> The problem with this flawed analysis, however, is that victims of fraudulent discovery find themselves as a square-peg trying to fit into a round hole. But each case is unique and must be assessed and adjudicated according to its own facts.

Accordingly, this article suggests that courts engage in a four-step process that requires (1) examination of the offender and his duties to the court, (2) evaluation of the conduct and its effect, (3) consideration of the victim's status (the equitable component), and (4) consideration of the relief being sought. By engaging in this four-step process, courts may be more willing to set aside judgments under Rule 60(d)(3) when abusive discovery occurs that influences the decisions of courts.

#### A. *The Offender and His Duty*

When abusive discovery is at issue, the offending party will likely be an attorney.<sup>187</sup> Why is the offender's status important to the analysis? "An attorney is an officer of the court and owes the court fiduciary duties and loyalty."<sup>188</sup> Accordingly, "[w]hen an attorney misrepresents or omits material facts to the court, or acts on a client's perjury or distortion of evidence, his conduct may

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<sup>186</sup> See, e.g., *Murray v. Ledbetter*, 144 P.3d 492, 498 (Alaska 2006) (discussing *Hazel-Atlas*'s "strict" definition of the elements necessary to prove fraud on the court, the tracing of the rule, and whether, "[i]n keeping with *Hazel-Atlas*," the activity at hand constituted a fraud on the court).

<sup>187</sup> Obviously, there may be some situations where pro-se litigants are the one conducting abusive discovery, but that appears to be a rare occurrence.

<sup>188</sup> *Trehan v. Von Tarkanyi*, 63 B.R. 1001, 1007 (Bankr. S.D.N.Y. 1986).

constitute a fraud on the court.”<sup>189</sup> Furthermore, when an officer of the court fails to correct a misrepresentation or retract false evidence submitted to the court, it may also constitute fraud on the court.<sup>190</sup> Notwithstanding, examination of the offender and his duty is not limited solely to an attorney’s duty of candor toward the tribunal.<sup>191</sup> Rather, the analysis requires courts to examine certain duties that arise well before the offender involves the court.

At the outset, Rule 26(g) of the Federal Rules of Civil Procedure requires that an attorney of record sign discovery-related filings, and prescribes that the signature certifies that “to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry” the discovery request, response, or objection is “consistent with these rules and warranted by existing law.”<sup>192</sup> The signature also certifies that the request, response, or objection is “not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”<sup>193</sup> Accordingly, Rule 26 obligates “each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection”<sup>194</sup> and to make a reasonable inquiry into the factual and legal basis of his response, request, or objection. The Model Rules of Professional Conduct provide further guidance.

Lawyers are professionally and ethically responsible for accuracy in their representations to the court. Rule 3.1 of the Model Rules of Professional Conduct states that lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law.”<sup>195</sup> Similarly, Rule 3.3 provides that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”<sup>196</sup>

In addition to the rules of professional conduct and an attorney’s duty of candor as an officer of the court, “Rule 11 [of the F.R.C.P.] imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legally tenable, and not interposed for any improper purpose.”<sup>197</sup> The United States Supreme Court has held that Rule 11,

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<sup>189</sup> *Id.*

<sup>190</sup> *In re McCarthy*, 623 N.E.2d 473, 477 (Mass. 1993).

<sup>191</sup> *See, e.g.*, NEV. RULES OF PROF’L CONDUCT 3.3 (stating that lawyers shall not make false statements of fact or law to the court or fail to correct false statements of material fact to the court).

<sup>192</sup> FED. R. CIV. P. 26(g).

<sup>193</sup> *Id.*

<sup>194</sup> FED. R. CIV. P. 60 advisory committee’s note to 1983 amendment.

<sup>195</sup> MODEL RULES OF PROF’L CONDUCT r 3.1 (AM. BAR. ASS’N 2013).

<sup>196</sup> *Id.* at 3.3(a).

<sup>197</sup> *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (internal quotation marks omitted).

imposes on any party who signs a pleading, motion, or other paper—whether the party’s signature is required by the Rule or is provided voluntarily—an affirmative duty to conduct a reasonable inquiry into the facts and the law before filing, and that the applicable standard is one of reasonableness under the circumstances.<sup>198</sup>

An examination of the offender and his duties is important because, as discussed below, violations of Rule 26, Rule 11, or even the rules of professional conduct may give rise to a fraud-on-the-court claim, even if those violations were not specifically directed to the court itself.

### *B. Evaluation of the Conduct*

After evaluating the offender and his duties, courts should analyze the conduct at issue. In examining the conduct, however, this Article suggests that the heightened standard adopted by several courts for fraud on the court does not comport with the rationale for employing Rule 60(d)(3) to set aside judgments. Instead, this Article suggests that courts examine one specific question when evaluating the conduct: did the conduct cause the court not to perform in the usual manner in its impartial task of adjudging cases?

While some suggest that the fraud or deceit committed by the attorney must be aimed directly at the court to constitute fraud on the court, this position seems faulty; however, it raises an important issue: since “[f]raud between the parties and fraud on the court are two distinct bases for post-judgment relief,”<sup>199</sup> how can a victim use Rule 60(d)(3) to ever set aside a judgment? In other words, abusive discovery is aimed at the opposing party rather than the court, and, thus, it would appear a victim has no claim under Rule 60(d)(3). But that is not necessarily true. Fraud on the court can originate from abusive discovery and find its way, sometimes unintentionally, to the steps of the courthouse. Accordingly, it is a myopic approach to only examine the arrow that the attorney shot towards the court and then decide whether the arrow was sufficiently harmful to constitute fraud on the court. Rather, a proper approach will examine all of the arrows the attorney shot at the victim and then analyze which arrows found their way to the court and the impact those arrows caused on the judgment.

Thus, for example, if an adversary misrepresents certain relevant information, fails to disclose such information, requests admissions that he knows to be false, lies during a deposition, or engages in any other deceitful form of discovery, he has clearly violated Rule 26 and has potentially engaged in fraud, misrepresentation, or other misconduct prohibited by ethical rules and state and federal rules of civil procedure. Admittedly, fraud on the court requires more than misconduct between the adverse parties—it must be some sort of misconduct that hampers the judicial machinery. Therefore, the critical component to

<sup>198</sup> *Bus. Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 551 (1991).

<sup>199</sup> *Zurich N. Am. v. Matrix Serv., Inc.*, 426 F.3d 1281, 1291 (10th Cir. 2005).

the analysis is whether the offending party utilizes the information it obtained through abusive discovery practices to obtain a favorable judgment.

In *Kupferman v. Consolidated Research & Manufacturing Corp.*,<sup>200</sup> the court stated that

[w]hile an attorney “should represent his client with singular loyalty that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court.” And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.<sup>201</sup>

In other words, “[s]ince attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.”<sup>202</sup>

In order to establish fraud on the court, some courts require the movant to prove by clear and convincing evidence *intentional* fraudulent conduct *specifically directed* at the court itself.<sup>203</sup> For example, the Tenth Circuit had held that the fraud must directed to the judicial machinery itself and cannot be fraud or misconduct between the parties or fraudulent documents exchanged between the parties.<sup>204</sup> Other courts have held that an action for fraud on the court is available only when the movant can show an “unconscionable *plan* or *scheme*” to improperly influence the court’s decision.<sup>205</sup> Under this strict approach, one could argue that the only cases of fraud on the court would be those of bribery of a judge or members of a jury. In fact, the strict approach would arguably take away any consideration of the conduct that occurred between the parties or an attorney making filings to the court without making “an inquiry reasonable under the circumstances,” as required under Rule 11(b).<sup>206</sup>

This strict approach in evaluating the conduct that occurred, however, seems inconsistent with the purpose of Rule 60(d)(3). If the judicial machinery is unable to perform in the usual manner in its impartial task of adjudicating cases because of attorney misconduct, why does fraud on the court require the conduct at issue to be intentional and aimed directly at the court itself? Why does it have to be an intentional “plan” or “scheme”?<sup>207</sup> On the contrary, if a party is responsible for undermining the integrity of the judicial process because it chose to recklessly present misleading or false evidence to the court and the court’s judgment was influenced by the conduct at issue, the judgment should be set aside as a fraud on the court.

<sup>200</sup> 459 F.2d 1072 (2d Cir. 1972).

<sup>201</sup> *Id.* at 1078 (internal citation omitted).

<sup>202</sup> *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976).

<sup>203</sup> *Herring v. United States*, 424 F.3d 384, 386–87 (3d Cir. 2005).

<sup>204</sup> *Robinson v. Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995).

<sup>205</sup> *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added) (quoting *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)).

<sup>206</sup> FED. R. CIV. P. 11(b).

<sup>207</sup> *See, e.g., Fierro v. Johnson*, 197 F.3d 147, 154 (5th Cir. 1999) (holding that in order to establish fraud on the court, it is “necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its discretion.”) (citation omitted).

Accordingly, lawyers that use information obtained through discovery that has no basis in law or fact to support motions filed with the court are clearly misleading the court, even if they have no intent to defraud the court. Indeed, “an attorney might commit fraud upon the court by instituting an action ‘to which he knew [or should have known] there was a complete defense.’”<sup>208</sup> Similarly, lawyers that choose to conduct discovery without making an inquiry reasonable under the circumstances and then present false or misleading information to the court in order to obtain a favorable judgment may be guilty of fraud on the court. For example, kneejerk discovery requests served without consideration of existing law can, and should, rise to the level of fraud on the court under Rule 60(d)(3) if the court is influenced by the discovery that was improperly obtained.

Some cases may be opening the door for a more relaxed approach to the conduct component. For example, in *Eastern Financing Corporation v. JSC Alchevsk Iron and Steel Works*,<sup>209</sup> the court found that an attorney committed fraud on the court when he filed a motion for default judgment.<sup>210</sup> Absent from the court’s opinion is any analysis of the attorney’s intent.<sup>211</sup> Instead, the court focuses on a few areas of conduct that suggest a more relaxed approach to the fraud on the court standard.<sup>212</sup> Admittedly, the case does not involve abusive discovery, but it is illustrative of a softened approach when analyzing whether certain conduct rises to the level of fraud on the court.

Of particular importance in *Eastern Financing* is the court’s continued reference to Rule 11 violations and a lawyer’s duty to conduct a reasonable inquiry before filing documents with the court. Interestingly, Rule 11 does not speak to fraud, nor does a violation of Rule 11 require the movant to prove intent. Yet the court seemed content relying, at least in part, on this rule to find that a fraud on the court had occurred.<sup>213</sup> In fact, a Rule 11 violation can occur when an attorney acts recklessly. Indeed, the court found that the attorney filed the complaint “without making an inquiry reasonable under the circumstances as required under Rule 11(b).”<sup>214</sup> The court held that this was “irresponsible” for the attorney to rely on his client’s “oral recitation of facts” in preparing the complaint.<sup>215</sup>

The most compelling evidence against the attorney, however, was that he knowingly sponsored his client’s nondisclosure and misrepresentations when

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<sup>208</sup> *Alexander v. Robertson*, 882 F.2d 421, 424 (9th Cir. 1989) (citing *Kupferman v. Consol. Research & Mfg. Corp.*, 456 F.2d 1072, 1079 (2d Cir. 1972)).

<sup>209</sup> 258 F.R.D. 76 (S.D.N.Y. 2008).

<sup>210</sup> *Id.* at 88.

<sup>211</sup> *But see, e.g.*, *Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005) (requiring intentional fraudulent conduct by an officer of the court in order to come within the purview of fraud on the court under Rule 60(d)(3)).

<sup>212</sup> *See Eastern Financing*, 258 F.R.D. at 85.

<sup>213</sup> *Id.* at 86.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 87.

verifying the complaint and then filing the motion for default judgment.<sup>216</sup> That alone was enough for the court to find that the attorney committed a fraud on the court.<sup>217</sup> The court also found that a letter submitted by the attorney to the court that failed to make mention of a pending bankruptcy case was “less than honest dealing with the court.”<sup>218</sup> When discussing the party’s conduct that contributed to a Rule 11 violation, the court said his submissions to the court show that he is “careless with facts and often misleading, and that he relies on suspicion and hearsay.”<sup>219</sup> Absent again from the court’s analysis, however, is any reference to *intentional* fraudulent conduct *specifically directed* at the court itself.<sup>220</sup> Notably, the court continued to analyze the very question posed by this Article: did the conduct at issue cause the court not to perform in the usual manner its impartial task of adjudging cases?<sup>221</sup>

In further support of a lightened standard, courts that have analyzed fraud on the court claims consistently refer to the “fraud, misrepresentation, *or* conduct” that occurred in procuring the judgment.<sup>222</sup> Again, suggesting that intentional fraudulent conduct specifically directed at the court is not a prerequisite to a successful fraud on the court claim. Even the Supreme Court in *Hazel-Atlas* stated that “[t]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of *deception* and fraud.”<sup>223</sup> There is no plausible explanation why a claim for fraud on the court cannot stand when the deception or misconduct occurs between the litigants during discovery and then, at some point during the case, the conduct at issue impedes the court from performing in the usual manner its impartial task of adjudging the case.

### C. Consideration of the Victim’s Status (The Equitable Component)

The doctrine of fraud on the court allows courts to provide equitable relief. Indeed, “the doctrine of fraud on the court is a judicially devised equitable doc-

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<sup>216</sup> *Id.* at 82–83.

<sup>217</sup> *Id.* at 88.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 90.

<sup>220</sup> *See, e.g.,* *Robinson v. Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995) (holding that fraud on the court requires fraud directed to the judicial machinery itself).

<sup>221</sup> *See Eastern Financing*, 258 F.R.D. at 85.

<sup>222</sup> *See, e.g.,* *Anderson v. New York*, No. 07 Civ. 9599(SAS), 2012 WL 4513410, at \*4 (S.D.N.Y. Oct. 2, 2012) (stating that the “fraud, misrepresentation *or* conduct must have actually deceived the court”) (emphasis added); *see also In re Old Carco, LLC*, 423 B.R. 40, 52 (Bankr. S.D.N.Y. 2010) (stating that “[t]he fraud, misrepresentation *or* conduct must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision”) (internal citation omitted).

<sup>223</sup> *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) (emphasis added).

trine, the application of which is dependent on the facts of the case.”<sup>224</sup> In *Hazel-Atlas*, the Court noted,

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, *this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations.*<sup>225</sup>

Notwithstanding, some courts have held that even if a party can demonstrate conduct that caused the court not to perform in the usual manner its impartial task of adjudging a case, “[a]ny issues that may have been ‘addressed through the unimpeded adversary process’ are not appropriately attacked on the basis of fraud upon the court.”<sup>226</sup> For example, in *Gleason v. Jandrucko*, the court found no fraud on the court where the plaintiff had an opportunity to expose misrepresentations made in discovery at trial.<sup>227</sup> There, the plaintiff moved under Rule 60 after the plaintiff’s case was dismissed.<sup>228</sup> The plaintiff argued that the officers in the case lied during their depositions about having probable cause; however, the district court found that the plaintiff had opportunity to expose those inconsistencies during trial and failed to do so.<sup>229</sup> Other courts have stated that allegations of an opposing counsel’s intentional mischaracterization of the applicable law, evidence, or affidavits submitted to the court does not rise to the level of fraud on the court *if* the movant’s own counsel could have rebutted opposing counsel’s mischaracterization of the law and the record before the court.<sup>230</sup>

This harsh approach is unreasonable, especially if courts consider the victim. The Supreme Court in *Hazel-Atlas* made it clear that the fraud-on-the-court rule should be characterized by flexibility and an ability to meet new situations demanding equitable intervention.<sup>231</sup> Because of the equitable and flexible nature of the rule, this Article contends that courts have ample leeway and discretion to consider the victim’s status—i.e., those parties unable to recognize or combat the fraud prejudgment—in determining whether to set aside a judgment for fraud on the court.

<sup>224</sup> State *ex rel.* Corbin v. Arizona Corp. Comm’n, 693 P.2d 362, 370 (Ariz. Ct. App. 1984).

<sup>225</sup> *Hazel-Atlas*, 322 U.S. at 248 (emphasis added).

<sup>226</sup> *In re Old Carco*, 423 B.R. at 53 (citing *Weldon v. United States*, No. 99-6142, 2000 WL 1134358, at \*2 (2d Cir. Aug. 9, 2000)).

<sup>227</sup> *Gleason v. Jandrucko*, 860 F.2d 556, 557 (2d Cir. 1988).

<sup>228</sup> *Id.* at 558.

<sup>229</sup> *Id.* at 560.

<sup>230</sup> *Weldon*, 2000 WL 1134358, at \*2.

<sup>231</sup> *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944) (emphasis added).

Is it fair to suggest that pro se litigants or attorney-abandoned litigants have a duty to root out all evil during the discovery process and that any issues that could have been addressed cannot be appropriately attacked on the basis of fraud on the court? Should courts deny these victims relief because they should have, for example, rebutted opposing counsel's mischaracterization of the law and the record before the court? Or should courts, equipped with equitable power to correct transgressions that occur before them, recognize that oftentimes victims of abusive discovery lack both the skill and knowledge to uncover misconduct during discovery or at trial? Pro se litigants and attorney-abandoned litigants do not have the tools to combat abusive discovery. These victims do not understand what a deemed admission means. These victims do not understand how interrogatories can be used fraudulently to support a motion for summary judgment. These victims do not understand how the rules of civil procedure can be employed to thwart abusive discovery before it is too late.

Because courts are endowed with the power to ascertain whether their judgments were obtained by fraud, misrepresentation, or other misconduct, the victim's status should be a consideration. The fact that the misconduct could have been rooted out during discovery should be insignificant in most cases, but it should be especially inconsequential when an attorney does not represent the victim involved. Actions involving these sorts of victims should be governed by even more flexibility to afford necessary relief. The harsh standard other courts have employed should not be the current view because it is contrary to the equitable principles behind the relief afforded by Rule 60(d)(3).

#### *D. Consideration of the Relief Being Sought*

Interestingly, although Rule 60(d)(3) is the only rule that even mentions the fraud-on-the-court doctrine, other Federal Rules of Civil Procedure, including Rules 11, 16, 26, 37, and 41, have been cited in applying the doctrine. For example, courts have dismissed, defaulted, and sanctioned litigants for fraud on the court, and have found the necessary authority outside of Rule 60(d)(3)—often citing the inherent power given to all courts to fashion appropriate remedies and sanctions for conduct which abuses the judicial process.<sup>232</sup> Some courts have premised dismissal or default of a litigant who committed fraud on the court entirely on Rule 11.<sup>233</sup> Other courts have relied on Rule 41(b) for authority to dismiss a plaintiff who has committed fraud on the court.<sup>234</sup> Rule

<sup>232</sup> See, e.g., *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983); *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986).

<sup>233</sup> See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991).

<sup>234</sup> *C.B.H. Res., Inc. v. Mars Forging Co.*, 98 F.R.D. 564, 569 (W.D. Pa. 1983) (dismissing under Fed. R. Civ. P. 41(b) where party's fraudulent scheme, including use of a bogus subpoena, was "totally at odds with the . . . notions of fairness central to our system of litigation").

41(b) provides the court with authority to dismiss a case if a plaintiff fails to comply with the rules of civil procedure or other court orders.<sup>235</sup> Such a dismissal operates as an adjudication on the merits.<sup>236</sup> This rule, however, has no import if the offending party has already obtained a judgment.

The problem with the widespread use of the fraud-on-the-court doctrine is that courts continue to apply the heightened standard to prove a fraud on the court has occurred, yet the remedies and relief that flow from making such a finding can be entirely different. As one court observed,

When a fraud on the court is shown through clear and convincing evidence to have been committed in an ongoing case, the trial judge has the inherent power to take action in response to the fraudulent conduct. The judge has *broad discretion to fashion a judicial response* warranted by the fraudulent conduct. Dismissal of claims or of an entire action may be warranted by the fraud, as may be the entry of a default judgment.<sup>237</sup>

The First Circuit has examined the options of a federal district judge confronted by fraud on the court and has held that federal courts possess the inherent power to “order dismissal or default where a litigant has stooped to the level of fraud on the court.”<sup>238</sup> It stated the following:

All in all, we find it surpassingly difficult to conceive of a more appropriate use of a court’s inherent power than to protect the sanctity of the judicial process—to combat those who would dare to practice unmitigated fraud upon the court itself. To deny the existence of such power would, we think, foster the very impotency against which the *Hazel-Atlas* Court specifically warned.<sup>239</sup>

Rule 60(d)(3), however, only serves one purpose: to “set aside a judgment for fraud on the court.”<sup>240</sup> Setting aside a judgment is different from dismissing a claim, an entire action, or entering a default judgment. “[D]ismissal sounds ‘the death knell of the lawsuit’”<sup>241</sup> and is an extreme remedy that “must be exercised with restraint and discretion.”<sup>242</sup> On the other hand, Rule 60 enables courts to set aside judgments when necessary to accomplish justice and return the parties to the status quo that existed prior to the misconduct. In other words, Rule 60(d)(3) does not mandate a court to set aside a judgment *and* dismiss the entire case with prejudice. While dismissal with prejudice is certainly an option,<sup>243</sup> it is not a mandate created by Rule 60(d)(3). Courts repeatedly hold that

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<sup>235</sup> FED. R. CIV. P. 41(b).

<sup>236</sup> *Id.*

<sup>237</sup> *Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 638 N.E.2d 29, 31 (Mass. 1994) (emphasis added).

<sup>238</sup> *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989).

<sup>239</sup> *Id.*

<sup>240</sup> FED. R. CIV. P. 60(d)(3).

<sup>241</sup> *Aoude*, 892 F.2d at 1118.

<sup>242</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

<sup>243</sup> *See, e.g., Root Refining Co. v. Universal Oil Prods. Co.*, 169 F.2d 514, 534–35 (3d Cir. 1948) (stating that “[t]he records of the courts must be purged and the judgments in Universal’s favor, both in this court and in the District Court, must be vacated and the suits by Uni-

cases are to be tried on the merits if possible.<sup>244</sup> Thus, based on the indiscretion at issue, courts may set aside the judgment and additionally take any of the following actions: (1) require a trial on the merits unblemished by the misconduct, (2) sanction the offending party, (3) dismiss a particular cause of action, or (4) dismiss the entire proceeding with prejudice.

The bottom line is that fraud on the court can take many forms and the standard for setting aside a judgment for fraud on the court under Rule 60(d) ought to be flexible. The options afforded to courts confronted by attorney misconduct suggest that courts can and should focus on the egregiousness of the conduct and the relief being sought. While some misconduct might fall short of furnishing a basis for setting aside a judgment *and* dismissal with prejudice, other indiscretions may warrant such a harsh remedy. Courts possess plenary authority “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.”<sup>245</sup> As a result, examination of the *options* of the court confronted by misconduct—whether that is taking additional steps beyond setting aside the judgment such as ordering dismissal or imposing sanctions—is an important component to process litigation to a just and equitable conclusion.

#### *E. Illustration of the Four-Part Test*

The *Fallini* case cited above provides a logical illustration of the four-part test for several reasons. First, it involved alleged misconduct by an officer of the court.<sup>246</sup> Second, the alleged misconduct originated during the discovery process.<sup>247</sup> Third, the attorney abandoned the victim when the misconduct transpired.<sup>248</sup> And finally, the conduct caused the court not to perform in the usual manner its impartial task of adjudging the case, because the court never heard the merits, but instead entered an order based on a false admission.<sup>249</sup>

In order to address the misconduct in *Fallini*, the victim hired a new attorney and on May 21, 2014, filed a motion for relief from judgment under Rule 60. It alleged that plaintiff’s counsel “knowingly forced fraudulent facts on the

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versal must be finally dismissed. No principle is better settled than the maxim that he who comes into equity must come with clean hands and keep them clean throughout the course of the litigation, and that if he violates this rule, he must be denied all relief whatever may have been the merits of his claim”).

<sup>244</sup> See, e.g., *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (stating that “cases should be tried on the merits rather than the technicalities of pleadings”) (citation omitted).

<sup>245</sup> *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962).

<sup>246</sup> *Estate of Adams v. Fallini*, No. CV 24539 (Nev. 5th Dist. Ct. Aug. 6, 2014), at 1 (court order).

<sup>247</sup> *Id.* at 3.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

court and failed to correct misrepresentations thereby committing fraud upon the court.”<sup>250</sup>

### 1. *The Offending Party and His Duty*

The court, in addressing whether fraud on the court occurred under Rule 60, focused on the offending party—plaintiff’s lawyer—and noted that “as an officer of the court, [he] had a duty to not mislead the court or fail to correct a misrepresentation.”<sup>251</sup> It held that “[s]imple dishonesty of any attorney is so damaging on courts and litigants that it is considered fraud upon the court.”<sup>252</sup> And, citing to rules of professional conduct, the court further held that “[a]n officer of the court perpetrates fraud on the court a) through an act that is calculated to mislead the court or b) by failing to correct a misrepresentation or retract false evidence submitted to the court.”<sup>253</sup>

### 2. *The Conduct*

The court next focused on the conduct at issue. Interestingly, the attorney in *Fallini* denied knowing that the accident occurred on open range,<sup>254</sup> which may have been an attempt to refute that any intentional misconduct occurred. After considering the evidence, however, the court found that the attorney “knew or *should have known* the accident occurred on open range prior to filing his request for admissions.”<sup>255</sup> The court also found that “[a]t the bare minimum, [the attorney] possessed enough information to conduct a reasonable inquiry into the open range status of the location where the accident occurred.”<sup>256</sup> Despite this knowledge, the attorney sought an admission from Fallini stating that the area where the accident occurred was not open range, a false fact that was deemed admitted when Fallini’s attorney failed to respond.<sup>257</sup>

Thus, as an officer of the court, the attorney violated his duty of candor under the rules of professional conduct “by utilizing Defendant’s denial that the accident occurred on open range to obtain a favorable ruling in the form of an unopposed award of summary judgment.”<sup>258</sup> Consequently, the court found a violation of Rule 60(b) because “Plaintiff’s request for admission of a known fact, a fact that was a central component of Defendant’s case, was done when

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<sup>250</sup> *Id.* at 1.

<sup>251</sup> *Id.* at 7.

<sup>252</sup> *Id.* at 6.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 7. (emphasis added).

<sup>255</sup> *Id.* (emphasis added).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 5.

<sup>258</sup> *Id.* at 8.

Spring 2016]

FRAUD ON THE COURT

741

counsel *knew or should have known* that the accident did not occur on open range, thereby perpetrating fraud upon the court.”<sup>259</sup>

### 3. *The Victim*

The court also considered the victim in this case. It noted that the attorney who committed the fraud on the court “may argue that all [Fallini’s prior attorney] had to do was simply ‘deny’ the request for admissions.”<sup>260</sup> While this is certainly true, the court took special consideration of the fact that Fallini’s prior attorney failed “to respond to various motions and requests to the extent that [plaintiff’s attorney] knew or should have known that a response from [Fallini’s attorney] was unlikely.”<sup>261</sup>

The court also recognized the maxim the Supreme Court expressed in *Hazel-Atlas*: the fraud-on-the-court rule should be characterized by flexibility and an ability to meet new situations demanding equitable intervention.<sup>262</sup> The court clearly considered and accepted the inequities of the case, as it acknowledged that “one cannot ignore the apparent injustice that Defendant has suffered throughout this matter. Ms. Fallini [was] responsible for a multi-million dollar judgment without the merits of the case even being addressed.”<sup>263</sup> In other words, it was significant to the court that Fallini’s attorney had abandoned her, and this certainly influenced, at least in part, the court’s decision to set aside the judgment due to a fraud on the court.

### 4. *The Relief*

The court recognized that “[f]inality has a particular importance in our legal system.”<sup>264</sup> However, it also noted that a final judgment is one “that disposes of the issues presented in the case, determines the costs, and leaves nothing for future consideration of the court.”<sup>265</sup> But “the issues presented in this case were summarily disposed above due to the negligence of Defendant’s counsel . . . [and] [t]he merits of the case were never actually addressed.”<sup>266</sup> Again, recognizing the victim’s status, the court found that had Fallini’s attorney “properly denied the improper request for admissions, the outcome may have been much different.”<sup>267</sup>

The court’s order states several times throughout that “cases are to be heard on the merits if possible” and that Fallini was unjustly punished without the

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<sup>259</sup> *Id.* (emphasis added).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 9.

<sup>264</sup> *Id.* at 10.

<sup>265</sup> *Id.* (quoting *Alper v. Posin*, 363 P.2d 502, 503 (1961)).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

merits of the case ever being addressed.<sup>268</sup> In addition to its express authority to set aside the judgment under Rule 60, the court clearly had the authority to order further relief, such as sanctions or dismissal with prejudice.<sup>269</sup> Pursuant to the court's *Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice*, the court entered final judgment in favor of Fallini and dismissed the case with prejudice.<sup>270</sup>

#### CONCLUSION

While finality of judgment matters, no worthwhile interest is served in protecting judgments obtained by misconduct. The Federal Rules of Civil Procedure contemplate liberal discovery, but the potential for discovery abuse is ever-present. There are rules in place to remedy abusive discovery, yet those rules are only functional during litigation—they serve no purpose post-judgment. Thus, cheaters are prospering under the judicial system, especially against vulnerable victims that lack both the skill and knowledge to adequately prepare a defense or thwart the abusive conduct before an unfavorable judgment is rendered.

Rule 60(d)(3), however, allows a court to set aside judgments—judgments obtained years earlier—which have been secured by a fraud on the court. But to succeed in setting aside a judgment, several courts require a showing, by clear and convincing evidence, of intentional fraudulent conduct specifically directed at the court itself. This standard is too high. If federal courts were compelled to follow this standard, nearly every claim of abusive discovery would fail. However, the remedial and equitable nature of the fraud-on-the-court doctrine and the great public policy that it embodies militates against making that burden an impossible hurdle for victims of abusive discovery.

Fraud on the court can take many forms. Fortunately, the fraud-on-the-court rule that the United States Supreme Court articulated in *Hazel-Atlas* should be characterized by flexibility and an ability to meet new situations demanding equitable intervention. The equitable and flexible nature of the rule supports the contention that the current standard for evaluating fraud on the court is flawed. The four-step process outlined above—with the ultimate inquiry of whether the abusive conduct caused the court not to perform in the usual manner its impartial task of adjudging cases—further facilitates a court's inherent power to do whatever is reasonably necessary to deter abuse of the judicial process.

<sup>268</sup> *Id.* at 9 (quoting *Passarelli v. J-Mar Dev., Inc.*, 720 P.2d 1221, 1223 (Nev. 1986)).

<sup>269</sup> *See, e.g.*, Rule 41 and 11 discussed *supra* Parts III.B, III.D.

<sup>270</sup> *Order Granting Motion for Entry of Final Judgment and Dismissing Case with Prejudice at 2, Estate of Adams v. Fallini*, No. CV 24539 (Nev. 5th Dist. Ct. Apr. 17, 2015).