first case only.

To: Barbara
From: Brad
Re: Fraud upon the court, research findings
Date: January 26, 1984

Lockwood v. Bowles, 46 F.R.D. 625 (D.D.C. 1969)

Defendants in a 1954 action made a motion in 1969 for relief from the '54 judgement against them, claiming that the plaintiffs in the '54 action perpetrated a fraud upon the court. Judge Aubrey Robinson denied the motion.

Movants claimed that one of the 1954 plaintiffs testified falsely. She had testified that her ovaries and fallopian tubes had been removed before the birth of the defendants, and that the defendants were thus not her children. Movants had a confession from this plaintiff who, since the '54 action, had been ajudged incompetent. The confession was said to have been acquired during one of the woman's lucid moments.

which states that the testimony was false

Movants also claimed that both plaintiffs had developed a scheme to show that the defendants were not their issue. The object of the scheme was to eliminate the defendants as takers under a will. Hospital records showing the woman plaintiff's hysterectomy prior to defendant's birth were claimed to be manufactured as part of this scheme.

Judge Robinson decided that the movant's fraud argument did not entitle them to relief. The alleged scheme was to defraud the defendants and not the court. The alleged perjury and false records were not sufficient to constitute fraud upon the court because neither the court nor its officers were involved: "... we believe the better view to be that where the court or its officers are not involved, there is no fraud upon the court within the meaning of Rule 60(b)." Id. at 632.*

Judge Robinson adopts Moore's definition of fraud upon the court. Id. at 631. See 7 Moore's Federal Practice, ¶60.33 at 60-357. (2d ed. 1983) ~~512-13~~. Also, note 26 points out that both the 2nd Circuit in Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798, 801 (1960) and the 7th Circuit in Kenner v. ~~Internal Revenue Service~~ IRS, 387 F.2d 689, 691 (1968) have adopted this definition as well.

*This reference is to the unnumbered part of Rule 60(b). Rule 60(b)(3), which is subject to the one year limitation, is interpreted to include perjury.

Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180 (8th Circuit 1976)

In this patent infringement action, the District Court found that plaintiff Pfizer had committed fraud upon the court through its concealment of critical facts, and refused to enforce the patent in question. Partial summary judgement was granted in favor of defendant for other reasons. Plaintiff appealed this result.

The actions that the District Court characterized as fraud involved memoranda that Pfizer's counsel thought were exempt from discovery under the work product privlege. Pfizer had refused to produce these memos after its opponent moved to compel production. Under discoveryground rules in this case, documents that were attorney work product and never disclosed to anyone outside the law firm were exempt from discovery. Pfizer counsel realized,after it had maintained that the memos were privileged, that they had if fact been in files loaned to the client and were thus not exempt.

The Court of Appeals found that the actions of Pfizer in misrepresenting the nature of the memos "did not evidence a scheme to improperly influence or impair the court's function." Id. at 195. While argeeing that the conduct did impede discovery, it was not of the kind that justified the district court's fraud upon the court finding.

The Court of Appeals follows the analysis that has emerged in the course of my research on this topic, and defines fraud upon

the court as "the most egregious misconduct directed to the court itself, such as ... fabrication of evidence by counsel..." Id. at 195. The fraud "can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing counsel from fairly presenting his case of defense." Id. at 195, citing Kupferman and England v. Doyle, infra.

England v. Doyle, 281 F.2d 304 (9th Cir. 1960)

In this case, a bankruptcy trustee moved to set aside a district court order, complaining that the attorney who sought the order witheld a stipulation and a referee's notice of decision which, it was asserted, would have affected the district judge's ruling.

The Court of Appeals said that the standard necessary to show fraud upon the court is "an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Id. at 309, citing Hazel, infra.

Applying this standard, the court found "no material fact concealed by the attorney" and that the nondisclosure was not an unconscionable plan to influence the court. Id. at 310. This finding grew out of the court's examination of the stipulation and notice that were the basis of the fraud claim. The attorney was under no obligation to produce either item to the district court because the stipulation was not in fact a stipulation and because the notice did not affect the rights of the parties.

Southerland v. Irons, 628 F.2d 978 (6th Cir. 1980)

Plaintiff's attorney in a civil rights action was found by the district court to have perpetrated a fraud upon the court through his representations at the settlement hearing. The attorney appealed and the 6th Circuit affirmed, saying only that on the basis of the record before them, they could not say that the district judge's findings of fact were erroneous. No discussion of the principles of fraud upon the court is in this opinion. Id. at 980.

The district judge in the case below, Southerland v. County of Oakland, 77 F.R.D. 727 (E.D. Mich. 1978), did elaborate on the meaning of "fraud upon the court," adopting the descriptions from Moore's Federal Practice, supra, and Hazel. After an evidentiary hearing on the motion to set aside the settlement, the judge decided that the plaintiff's attorney never intended to pay a lien out of his fee, as he had said he would. This fraudulent behavior, combined with other acts designed to ensure that only he, the attorney, would be the payee of the settlement check (i.e., verbal assurances, confirmed in a letter, that he would pay the lien) led the court to conclude that the attorney had carried out a scheme which amounted to fraud upon the court.

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Kupferman v. Consolidated Research and Manufacturing Corp., 459 F.2d 1072 (2nd Cir. 1972)

Defendant moved to set aside an adverse district court judgement in a breach of contract action, alleging that plaintiff's attorney knew of a release plaintiff had made in connection with the contract, and that this attorney failed to bring the release to the attention of the court. Defendant argued that the district court's result would have been different had the release been known to the court. District court denied the motion.

(writing for the court)

Judge Friendly affirmed on appeal, finding that the attorney's behavior did not constitute fraud upon the court. After citing Moore's definition of fraud upon the court, Id. at 1078, Friendly states that the attorney reasonably could have thought that the defendant's attorney had knowledge of the release and had decided not to use it in his defense. This accounts for the failure to bring the release to court's attention. While hindsight might indicate that it would have been wiser to bring the release to the court's attention, Friendly decided that "it would be going too far..." to characterize this behavior as fraud against the court. Id. at 1081.

Hazel-Atlas Glass v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944)

Court of Appeals below denied a motion to set aside a judgement obtained by fraud, and movant appealed to the Supreme Court.

The act complained of was an article published in the trade press in 1926. This article, appellant maintained, was written by attorneys and officials at Hartford in order to aid a patent application. These officials and attorneys managed to get the president of a trade union to sign this article as if he himself had written it. Hartford got the patent and later sued Hazel for patent infringement. After a dismissal in district court, Hartford appealed and received a favorable decree in the Circuit Court. At this appeal, Hartford produced the trade journal article and quoted from it extensively to emphasize the patented process in question.

Some years later, after Hazel discovered the fraud, Hazel wanted to ~~have~~ set aside the judgement based on the fraudulent article. The Supreme Court in 1944 did this, holding that the acts complained of amounted to a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." 64 S.Ct. 997, 1001. The facts indicated "such a fraud upon that [Circuit] Court as demands, under settled equitable priciples, the interposition of equity to devitalize the ... judgement." Id. at 1002.

While the Court here did not emphasize the fact that an attorney had been involved in the perpetration of the fraud, Moore has found this to be an important factor in making ~~this kind of~~ fraud upon the court that special species of fraud which warrants setting aside judgements even

after the one year limitation of Rule 60(b) has passed.

7 Moore's Federal Practice, ¶60.33 at 60-359.