Exposing Litigants Who Fabricate Evidence

by Frank J. Mastro

I first suspected that something might be amiss when my co-counsel received a telephone call instructing him to "disregard" the documents that had been produced to him the previous day. He said that "new documents" would be forthcoming from the key adverse witness who had provided the original set. The call had come from a secretary for the witness's attorney, who also asked that we not let her boss know she had produced documents to us the day before.

My suspicions grew once the new documents arrived. At first glance, the new documents—which were several letters purportedly authored by the witness—appeared to be identical to the letters produced the day before. Upon closer inspection, however, it was evident that the new letters were different—one now sported a different font, while another had a different date. In addition, the signatures did not match exactly. It was clear that the letters were not photocopies.

It was all very odd, to say the least. I wondered what to make of it. Should I assume that the "new" documents were merely additional letters the witness had sent? If so, why would the witness send the same person two letters identical in syntax but in different fonts? And why would the witness send identical letters to someone else on two different days? And, most perplexing of all, why did the secretary want us to conceal that we had obtained the first set of letters from her? I couldn't come up with any answers to these questions—except the strong suspicion that the letters might be fakes.

At the time, I was a young attorney and perhaps still naïve enough to think that nobody would ever produce forged documents in response to a deposition subpoena. Had I done some research, however, I would have realized that this kind of behavior was not new. Indeed, there is no shortage of cases recounting instances in which a litigant has been caught fabricating or destroying documents, suborning perjury, and so on.

To get a flavor for these ignominious cases strewn across the landscape of the federal courts, *see, e.g.*, *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115 (1st Cir. 1989) (plaintiff fabricated purchase agreement for acquisition of service station franchise and attached it to complaint for equitable relief seeking to compel oil company to accept transaction); *Sun World, Inc. v. Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992) (defendant fabricated notice of termination and gave perjured deposition testimony in attempt to create defense to grape grower's claim for restitution of money advanced); *Vargas v. Peltz*, 901 F. Supp. 1572 (S.D. Fla. 1995) (plaintiff in sexual harassment case found to have presented false evidence where pair of panties, which she produced in deposition and testified were given to her by defendant supervisor who allegedly made suggestive remarks, were not even sold by manufacturer until more than a year after incident alleged to have occurred); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107 (S.D. Fla. 1987) (high-ranking official of defendant company ordered numerous documents destroyed on day defendant received plaintiff's antitrust complaint and request for production of documents); *Eppes v. Snowden*, 656 F. Supp. 1267 (E.D. Ky. 1986) (defendant horse breeder who counterclaimed for insurance coverage following mysterious death of thoroughbred horse drafted and backdated ten letters after death of horse in attempt to inflate actual cash value of horse); *Pope v. Federal Express Corp.*, 138 F.R.D. 675 (W.D. Mo. 1990), *aff'd in relevant part*, 974 F.2d 982 (8th Cir. 1992)

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(plaintiff in sexual harassment case manufactured alleged handwritten note containing improper remarks from supervisor).

Forgery and other dastardly deeds like this are not limited to the federal forum. Unfortunate incidents like these also pepper the jurisprudence of state court tribunals. *See, e.g.*, *Jemison v. National Baptist Convention USA, Inc.*, 720 A.2d 275 (D.C. 1998) (fabrication of letters and falsification of more than 40 affidavits in attempt to obtain temporary restraining order preventing implementation of election results); *Synanon Found., Inc. v. Bernstein*, 517 A.2d 28 (D.C. 1986) (company executives deleted and burned incriminating information in company's archives in effort to avoid discovery of these materials); *Rockdale Mgt. Co. v. Shawmut Bank, N.A.*, 638 N.E.2d 29 (Mass. 1994) (president of plaintiff corporation fabricated offer letter in attempt to bolster damages case against seller of real property who allegedly failed to disclose environmental contamination of property); *Young v. Johnny Ribiero Bldg., Inc.*, 787 P.2d 777 (Nev. 1990) (plaintiff who brought action for accounting following dissolution of partnership produced in discovery a business diary containing fabricated entries regarding alleged oral guarantee of certain compensation).

Cases involving such nefarious deeds have even reached the Supreme Court. In *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), for example, the plaintiff fraudulently obtained a patent by concocting a bogus trade-journal article praising its glass-making device as "revolutionary." He used the article to persuade the Patent Office to issue a patent. The plaintiff then relied on the bogus article to obtain a judgment for patent infringement against a business competitor. When the fraud was uncovered, the Court set aside the judgment. Justice Hugo Black, undoubtedly incensed by the plaintiff's manipulation of the judicial process, gave this now oft-quoted explanation:

> [T]ampering 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.

Hazel-Atlas, 322 U.S. at 246. When you consider that the bogus trade-journal article in the *Hazel-Atlas* case was fabricated and published 80 years ago—in July 1926—it underscores the reality that unscrupulous litigants have been around a long time.

What you probably won't find in the annals of caselaw, though, is advice on what to do when you're about to depose a witness you think may have provided you with a fabricated document, or what to do when the other side is creating or destroying evidence. In fact, I'm not sure there are resources that provide such advice. Fortunately, this type of bad faith litigation does not occur frequently. Although I would imagine (and hope) that most litigators would never encounter an adversary bent on litigating based on a fraud, some of you undoubtedly will.

That incident with the suspicious letters—the first instance in which I found myself facing this most devious species of litigant—began as a seemingly typical finder's fee dispute. On one side was a guy claiming he was entitled to a fee because he introduced a nascent company to an underwriter poised to move forward with an IPO. On the other side were the company and its president, who contended that the guy claiming the fee was not the true finder because a third person had made the initial contact with the underwriter (Other Finder).

The company and its president were the plaintiffs. They instituted the litigation after the underwriter backed out of the deal and the proposed IPO fell through. The company blamed the jilted finder (and his attorney, whom I represented) for the collapse, contending that the finder's insistence on being paid a fee to which he was not entitled caused the underwriter to withdraw its proposed financing. The finder counterclaimed for his fee.

The letter of introduction allegedly sent to the underwriter by the Other Finder had been attached to the complaint. We had some doubts about the allegation that there was another finder and also about the authenticity of this person's letter of introduction. Naturally, we wanted to question the Other Finder, so we subpoenaed him to produce documents and testify at deposition.

The two sets of letters we received prior to the deposition supposedly had been sent by the Other Finder to other potential sources of financing for the company. I guess it would have looked mysteriously coincidental if the Other Finder had made only one attempt to obtain financing and fortuitously had chosen to contact the exact underwriter who had proposed to do an IPO. Thus, it appeared to us that these letters were intended to bolster the authenticity of the letter of introduction attached to the complaint, by making it appear that the Other Finder was engaged in a genuine search for financing on behalf of the company.

Because the Other Finder was scheduled to be deposed the day after we received the second set of letters, there wasn't a lot of time to plan our deposition strategy. We didn't know for sure what the Other Finder was going to say, but we knew that whatever the testimony, we needed to pin the Other Finder down to a story. Since the Other Finder (and the plaintiffs) presumably did not know we had obtained the first set of letters, we decided to withhold the letters, at least initially, and let the Other Finder tell his "story" based on the second set of letters.

At deposition, the Other Finder testified that the second set of letters was the only one responsive to the subpoena. We had the witness describe the manner in which all of his alleged letters to potential sources of financing had been prepared, including the alleged letter of introduction to the underwriter of the proposed IPO. He testified that his assistant had typed all of the letters, signed his name, and mailed the letters. He did not know where the assistant had typed the letters but indicated that the office had a computer that she often used. The Other Finder also testified that, in response to the subpoena, he had the assistant retrieve hard copies of the letters from a file cabinet in the office. Curiously, the alleged letter of introduction to the underwriter had not been maintained in the Other Finder's files, although he supposedly kept the other alleged letters to potential sources of financing.

It is essential to get as much detail as possible about the creation of any document you suspect might be forged. By doing so, you create more opportunities to expose the fraud. If a document is fabricated, the details about its creation likewise will be fabricated. In situations where it

may be difficult to attack the questioned document on its face, circumstantial evidence surrounding its creation should be explored as a means to challenge the veracity of the document.

After asking all the relevant background details regarding the second set of letters, we sprang the first set on the Other Finder. The Other Finder had no idea where these came from and could not explain their existence. He would not, however, concede on the record that the letters were forged.

We were concerned that, once our adversary knew we suspected the letters were fakes, he might try to destroy or alter evidence relating to the letters. After all, a party inclined to create evidence probably also would not hesitate to make evidence disappear. We could not link our opponent with the creation of the letters at this point. The letters had been subpoenaed from a third-party witness, we obtained the letters from the secretary for the witness's attorney, and the only testimony we had was from the third-party witness. We moved quickly to subpoena testimony from the assistant who had allegedly typed and mailed the letters, as well as from the secretary who had provided both sets to us. It was important to go after the assistant and the secretary. Unlike the plaintiffs in our case, these third-party witnesses had no stake in the litigation and, we believed, had nothing to gain by lying or running the risk of perjuring themselves.

Another reason to obtain as much background as possible about any questionable document is that you may uncover the involvement of others. The more people involved in or connected to a fabrication, the more difficult it becomes for everyone to stick to the same story. Remember the telephone game you played when you were a child, where you stand in a line and whisper a message to the child next to you, who whispers it to the next child, and so on, so that the last child receives a message completely different from the first? The same principle applies here: As the story gets further away from the source of the fabrication, it will change.

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Exposing the Fraud

We also subpoenaed the Other Finder's office computer (on which the letters were likely created) for a physical examination. The Federal Rules of Civil Procedure and analogous state law rules provide the authority with which to conduct a physical examination of a computer or other tangible object. Rule 45 allows a subpoena to command a person "to produce and permit inspection and copying of books, documents or tangible things in the possession, custody and control of that person." *See* Fed. R. Civ. P. 45 (a)(1)(C). Rule 34, meanwhile, allows for the service upon a party of a request "to inspect and copy, test or sample any tangible things." *See* Fed. R. Civ. P. 34(a)(1). As it turned out, our forensic analysis of certain computer files would later provide us with one of the most compelling pieces of evidence exposing the fraud.

Our aggressive pursuit of this evidence paid off fairly quickly, although not in a way we had anticipated. Before we were able to conduct further depositions or examine the computer, the Other Finder retained a new attorney who quickly claimed that copies of the letters the Other Finder supposedly had sent to different potential sources of financing did not exist in the Other Finder's files (contrary to his sworn testimony). Further, he claimed the Other Finder had "caused" his assistant to "re-create" the letters in an "overzealous effort" to comply with the subpoena served on him. The letter also requested that we refrain from deposing the assistant because her involvement was asserted to have been nothing more than "clerical."

Although we took this to be an admission that the letters produced by the Other Finder at his deposition were not genuine, we had trouble believing the explanation that the letters were "re-creations" of actual letters that had ever existed. Why go through all this trouble? Why not just testify that you sent letters to certain individuals but that you do not have any copies in your files? And if you're going to re-create letters, why not disclose them as re-creations instead of attempting to pass them off as originals? Needless to say, we were committed to press on with our depositions of the assistant and the secretary. We also decided to set up depositions of the alleged recipients of the letters, as well as another deposition of the Other Finder because his original testimony obviously was not entirely truthful.

By this time, we suspected that the individual plaintiff in our case was involved in the fabricated re-creations. We viewed the whole re-creation story as an attempt to conceal the plaintiff's involvement and to discourage us from pursuing the re-creations. It did not seem likely to us, however, that the Other Finder would have gone to such lengths voluntarily, without any assistance or direction from the plaintiff. So we decided to do some investigating.

Fortunately for us, the Other Finder and the plaintiff lived in different states, and all telephone communications between them required long-distance toll calls. Because we knew the plaintiff's home, business, and cell phone numbers, we served subpoenas on his phone carriers to obtain billing records showing all toll calls made by the plaintiff both before and after the deposition of the Other Finder. Today, thanks to the Internet, it's fairly easy to determine the identity of the carrier for a particular phone number. One of my favorite websites is Search Bug, www.searchbug.com, which contains a wealth of search tools to locate individuals and businesses. One allows users to determine whether a given telephone number is a landline or cell phone and also identifies the carrier associated with the number. *See* www.searchbug.com/peoplefinder/landline-or-cellphone.aspx.

Keep in mind that the landline carrier typically provides only local switching service and does not itemize the list of local calls on the monthly bill. Long-distance carriers, on the other hand, typically show all long-distance calls made during each billing cycle, although Search Bug does not carry this information. Nonetheless, subpoenaing the local carrier is still a good idea because long-distance calls may appear on the local carrier's bill (usually by agreement or because the same company provides both local and long-distance service). Cell-phone billing statements, on the

other hand, are usually a veritable goldmine because they report both outgoing and incoming calls (although not always by originating phone number). Most cell-phone plans are based on monthly air time (i.e., the number of minutes the phone is in use either making or receiving calls), so most cell-phone providers assiduously track and report this data on their monthly bills. As cell-phone usage continues to expand, billing records of wireless carriers likely will become an increasingly critical investigatory tool.

Telephone billing records, by the way, are treated by the courts as ordinary business records. A telephone subscriber can have no legitimate expectation of privacy in a telephone company's records of the subscriber's calls. *See Smith v. Maryland*, 442 U.S. 735, 742 (1979) ("We doubt that people in general entertain any actual expectation of privacy in the numbers they dial. All telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed"). Although phone records are readily discoverable, consult the law in your jurisdiction before serving a subpoena to determine whether there are any special requirements (as frequently may exist where financial and medical records are concerned). Also, make sure the period for which you are seeking billing records falls within any applicable statutory record-retention requirements.

We more or less hit the jackpot with our subpoena of the individual plaintiff's phone records. In the three days leading up to the deposition of the Other Finder, we discovered 18 calls from the plaintiff to the home and/or office numbers of the Other Finder, his assistant, and the attorney's secretary. We were also able to identify six other calls from the plaintiff's business-fax number to the Other Finder's business-fax numbers, which we perceived to be fax transmissions. Additionally, in the hours immediately after the conclusion of the deposition, we discovered a series of cell-phone communications between the plaintiff and the Other Finder, including one ten-minute and one 26-minute conversation.

The phone records, much to our delight, also provided us with a link between the plaintiff and the Other Finder's new attorney—the one who emerged after the deposition and promulgated the story that the letters had been "re-created" in an "overzealous effort" to comply with the subpoena. In the two days following the deposition, the plaintiff initiated telephone calls to the new attorney's residence lasting 35, 73, 32, and 22 minutes. Over the course of the three and a half weeks that elapsed between the Other Finder's deposition and the date the new attorney wrote a letter setting forth the re-creation explanation, the plaintiff placed more than 30 calls to the new attorney that totaled more than 280 minutes.

Armed with these phone records, we achieved a major breakthrough when we deposed the assistant. She testified that the plaintiff contacted her shortly before the deposition of the Other Finder and directed her to re-create the letters. She also testified that after she had manufactured the first set of letters, the plaintiff had called again and ordered her to change the font on the letters to match the font on the alleged letter of introduction to the underwriter. This helped explain why there were two sets of letters. Then, the Other Finder, during his second deposition, recanted his original testimony and admitted that the letters he produced at his first deposition were not genuine. Although both the Other Finder and his assistant still maintained that the letter of introduction to the underwriter (which was not among the re-created letters) was genuine and had actually been sent, the significance of establishing the plaintiff's direct involvement in the scheme to re-create letters cannot be understated. By showing that the plaintiff directed the assistant's fabrication of documents that were then passed off as originals by the Other Finder, we could create a powerful inference that the Other Finder's alleged letter of introduction to the underwriter also was not genuine. As Professor Wigmore has explained:

> It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

2 Wigmore, *Evidence* § 278, at 133 (Chadbourn ed. 1979).

One of the biggest mistakes made by the plaintiff in our case was attempting to cover up his involvement in the re-creations. Once we were able to expose the re-created evidence and the associated cover-up, the plaintiff's case began to unravel. You could draw a parallel to the Watergate scandal. It was not so much the bungled break-in at the Watergate Hotel that undermined the presidency of Richard Nixon as it was the cover-up and resulting exposure of his involvement in the sordid activities that ultimately forced Nixon to resign his office. Trying to conceal wrongdoing usually ends up only compounding the error. Although we had a very good circumstantial argument at this point that the Other Finder's alleged letter of introduction to the underwriter was bogus, we still hoped to develop some additional evidence.

Our hopes were realized through forensic computer evidence. We were able to copy two Word files from the hard drive of the Other Finder's office computer onto a three-and-a-half-inch floppy disk. One file contained the letter of introduction to the underwriter. The other file was a draft of the letter. We retained a forensic computer expert to analyze the files. Our expert determined that the letter had been backdated—the "created" date of each file was several weeks after the date on the face of the letter.

When a new Word document is saved for the first time, the software enters the date and time of the save as its created date. This information is viewable by accessing File\Properties\General. The source of date/time is the computer's internal clock (often displayed on the lower right of the Windows desktop). Document-management applications such as PC DOCS also create logs, which are accessible at File\Properties\Document Profile\History. Once established, the "created" date cannot be changed by

the user; it is essentially an indelible time stamp that provides very compelling evidence as to the date and time of the document's creation.

Especially in a case where you suspect your adversary of purging evidence, a complete forensic analysis of the computer's internal hard disk is preferable to simply copying a questionable file or two to a disk for examination. Typically, the forensics expert will want to image (i.e., make an exact copy of) the computer's hard disk and examine all files on the hard disk, even deleted files. A common misperception is that once data on a hard disk is deleted or placed in a recycle bin, it has been purged from the computer. In fact, deleting simply makes that file's space on the hard disk available to be overwritten with new data. Whether—and when—that occurs is determined by the computer. Thus, a good computer forensics expert may be able to retrieve files or fragments of files that have been "deleted." Although there are ways to "wipe" a hard disk clean of all data, the fact of the wipe cannot be concealed. If your expert finds such evidence, pursue the opponent's motives to establish a missing evidence or spoliation-type inference.

Expert testimony obviously can be very helpful and persuasive and, at times, absolutely fatal to your opponent's attempted fabrication or destruction of evidence. In addition to a computer forensics expert, you may want to engage a handwriting expert or a forensic document examiner, such as an ink-dating expert, if circumstances warrant. If you believe the signature on a document may be forged, a handwriting expert can compare the questioned signature with existing signatures to determine whether the questioned signature is genuine. If a known signature is not available, you can obtain a handwriting exemplar of the subject individual pursuant to Rule 34 or Rule 45. An ink-dating expert can be helpful where a party is attempting to backdate documents after the fact. For example, ink dating may prove that the ink on a particular document is only two years old even though the document is purported to have been signed five years ago, thus giving rise to the inference that the document was forged and backdated. Along with the rapid developments in technology, the number of programs and effectiveness of forensic tools to combat litigation fraud will also continue to climb.

The computer evidence in my case was the final nail in the coffin. The created date of the letter, the scheme to re-create other letters and pass them off as originals, the attempted cover-up of the plaintiff's involvement—all enabled us to convince the court that the Other Finder's alleged letter of introduction was fabricated. With that crucial determination, the central allegation that the Other Finder had introduced the plaintiff's company to the underwriter was exposed as false, and known by the plaintiff to be false, when the plaintiff filed his complaint. The court, in the exercise of its inherent power, ordered the plaintiffs to reimburse the attorney's fees and costs incurred by my client to defend what proved to be a fraudulent lawsuit.

It is well established that a trial court may use its inherent power to sanction parties that intentionally abuse the litigation process, such as those who perpetrate fraud on the court. *See, e.g., Chambers v. NASCO, Inc*., 501 U.S. 32, 46 (1991). Because this kind of fraud is so insidious, the penalties a court may impose on a bad faith litigant who attempts to defile the sanctity of the judicial process are justifiably stiff and include sanctions of dismissal and default. *See Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 1119-20, 1122 (1st Cir. 1989) ("Appellant chose to play fast and loose with [defendant] and with the district court. He was caught out . . . [A]ppellant's brazen conduct merited so extreme a sanction . . . and the court, jealous of its integrity and concerned about deterrence, was entitled to send a message, loud and clear"); *accord Breezevale Ltd. v. Dickinson*, 759 A.2d 627, 641 (D.C. 2000) (Schwelb, J., concurring) ("when fabrication of evidence or similar fraud has been discovered and exposed, the consequences ought to be severe enough to inhibit repetition"). The court also is free to award attorneys' fees to the innocent party consistent with the bad faith exception to the "American Rule" that each party bears its own litigation costs and counsel fees. *See F.D. Rich Co. v. United States ex. rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974), *accord Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975).

In addition to wielding its inherent power, there are other vehicles by which a court may sanction a bad faith litigant. Federal Rule 11 and its state court analogues can be used to levy sanctions against both a party and an attorney. Keep in mind that under Rule 11, you must provide your adversary with a 21-day "safe harbor" period under which he or she can withdraw or correct the challenged "paper, claim, defense, contention, allegation, or denial." *See* Fed. R. Civ. P. 11(c). If the offending allegation, for example, is withdrawn, sanctions are not permitted. In federal court, 28 U.S.C. Section 1927 also can be used as a means to sanction an attorney (but not a litigant) who "unreasonably and vexatiously" acts to "multiply the proceedings in any case." Both Rule 11 and Section 1927 will permit the victimized party to recover its attorneys' fees and costs.

By the time the court in my case entered its judgment, my client had incurred more than $700,000 in costs and fees, nearly all of which were awarded as a sanction for the plaintiff's bad faith litigation tactics. According to the court, this conduct represented "the grossest kind of abuse of the judicial process." Although the expenses in our case were quite substantial, I imagine that they were not out of line for this type of experience. It can be very costly and time consuming to prove that an adversary is using fabricated documents or destroying key evidence. You must make your client aware of the potential costs involved, which can escalate quickly depending on the stubbornness of your opponent. I was fortunate that my client had both the desire and the financial ability to push forward and expose the fraud. I empathize with those who have become victims of this kind of fraud only because they did not have the financial resources to fight an adversary who was manufacturing evidence.

It takes money to combat litigation fraud, but it doesn't hurt to also have a little good fortune on your side. It gives me pause to think how my case might have turned out, and how much more difficult it would have been to prove the fraud, had the secretary provided us with only the second set of fabricated letters that the Other Finder proceeded to falsely authenticate.

Fortunately, we were able to expose the fraud and vindicate our clients. I hope that you will be able to do the same should you ever find yourself in the unenviable circumstance of tangling with a bad faith litigant.