

ITEM 3.02 | SELECTED CASES ON FRAUD ON THE COURT

In summary, the requisite fraud on the court for dismissal occurs only where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion an unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense. When reviewing a case for fraud, the court should consider the proper mix of factors and carefully balance a policy favoring adjudication on the merits with competing policies to maintain the integrity of the judicial system. An order granting a dismissal or default for fraud on the court will almost always require an evidentiary hearing and must include express written findings supported by the evidence demonstrating that the trial court has carefully balanced the equities and supporting the conclusion that the moving party has proven, clearly and convincingly, that the non-moving party implemented a deliberate scheme calculated to subvert the judicial process. The appellate court will review using an "abuse of discretion" standard narrowed by the clear and convincing evidence requirement for fraud.

Misconduct that falls short of the rigors of this test, including inconsistency, nondisclosure, poor recollection, dissemblance, and even lying, is insufficient to support a dismissal for fraud, and potential harm must be managed through cross-examination. In some cases, even where fraud is shown, the trial court may impose lesser sanctions than dismissal when warranted.

Cases in the following chart show how the respective district courts of appeal handle fraud on the court.



<u>CASE</u>	<u>RULING</u>	<u>UPHELD?</u>	<u>NOTES</u>
First DCA			
<i>Wells Fargo Bank, N.A. v. Reeves</i> , 92 So. 3d 249 (Fla. 1st DCA 2012)	Dismissal	REVERSED	Mortgage foreclosure case dismissed for allegedly fraudulent allegations in the complaint regarding ownership of the paper at issue; assertions in a motion to dismiss the complaint do not provide an evidentiary basis for finding fraud upon the court.
<i>Jesse v. Commercial Diving Acad.</i> , 963 So. 2d 308 (Fla. 1st DCA 2007)	Dismissal	Affirmed	Record disclosed that appellant intentionally falsified testimony on material issues. No abuse of discretion with sanction of dismissal.



<i>Johnson v. Swerdzewski</i>, 935 So. 2d 57 (Fla. 1st DCA 2006)	JNOV after verdict	REVERSED	Dental malpractice case in which Defendant moved for directed verdict based on fraudulent answers to pretrial discovery that were uncovered during cross-examination; court deferred ruling until after verdict and granted JNOV for fraud on court; REVERSED because review of dismissal for fraud prior to trial (abuse of discretion) is not equivalent to standard of review for JNOV; review is far less deferential to trial judge once jury verdict is entered.
<i>Hutchinson v. Plantation Bay Apartments, LLC</i>, 931 So. 2d 957 (Fla.1st DCA 2006)	Dismissal	Affirmed	Failure to disclose past attack by dog and pre-existing symptoms rose to level of effort to stymie discovery on central issue amounting to fraud.

<i>Distefano v. State Farm Mut. Auto. Ins. Co.</i> , 846 So. 2d 572 (Fla. 1st DCA 2003)	Dismissal	Affirmed	Plaintiff gave false deposition testimony by not disclosing subsequent accident and prior treatment and symptoms that were central to case; faulty memory not an excuse under these facts; this case has been cited in later cases.
<i>Baker v. Myers Tractor Services, Inc.</i> , 765 So. 2d 149 (Fla. 1st DCA 2000)	Dismissal	Affirmed	Trial judge found that plaintiff intentionally omitted prior knee injury and treatment which was central to case; appellate court noted that court could have fashioned a lesser sanction, but "while this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion."

Second DCA			
<i>Pena v. Citizens Prop. Ins. Co.</i> , 88 So. 3d 965 (Fla. 2d DCA 2012)	Dismissal	REVERSED in favor of fees and costs sanction	Affidavits submitted by Plaintiffs in opposition to summary judgment were false hampering the presentation of Defendant's procedural defense; fraud was proven, but dismissal with prejudice too severe where liability was admitted.
<i>King v. Taylor</i> , 3 So. 3d 405 (Fla. 2d DCA 2009)		Dismissal of Appeal	Divorce support enforcement case in which former husband filed appeal from lower court ruling but then sent fraudulent correspondence to the entity responsible for disbursing the military retirement benefits and also supplied it with phony court orders in an effort to unburden him from requirements of lower court's order.



<i>Ramey v. Haverty Furniture Cos. Inc.</i>, 993 So. 2d 1014 (Fla. 2d DCA 2008)	Dismissal	Affirmed	The court stated that the evidence concerning Mr. Ramey's conduct "demonstrated clearly and convincingly that the plaintiff sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate this matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." The court further stated that "the injuries that were lied about are the nexus of the case." App ct found that The trial court properly exercised its discretion in imposing the severe sanction of dismissal for the clearly established severe misconduct of fraud on the court.
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<i>Kubel v. San Marco Floor & Wall, Inc.</i> , 967 So. 2d 1063 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Plaintiff's husband got report from treater with info inconsistent with wife's testimony and gave it to his lawyer; report by treating doctor was then changed at request of plaintiffs. Defendant failed to produce clear and convincing evidence of fraud; issue best managed on cross at trial.
<i>Miller v. Nelms</i> , 966 So. 2d 437 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Complaint was dismissed as sham pleading; App ct found that trial court lacked evidentiary basis for dismissal.
<i>Howard v. Risch</i> , 959 So. 2d 308 (Fla. 2d DCA 2007)	Dismissal	REVERSED	Trial judge dismissed for failure to disclose criminal history and full medical history; app ct found that trial ct did not have evidence to support findings of fact based on heightened clear and convincing standard and no showing criminal record had anything to do with issues in trial and medical omissions involved minor incidents.

<i>Myrick v. Direct General Ins. Co.</i>, 932 So. 2d 392 (Fla. 2d DCA 2006)	Dismissal	REVERSED	Trial judge took no evidence at dismissal hearing, so appellate court had same cold record as the trial judge and found that finding of fraud was an abuse of discretion; stringent standard for extreme sanction not met.
<i>Laschke v. R. J. Reynolds Tobacco Co.</i>, 872 So. 2d 344 (Fla. 2d DCA 2004)	Dismissal	REVERSED	Plaintiff in tobacco case asked oncologist to put in records that smoking caused her cancer then denied doing so on deposition; dismissal too stringent, as this thwarted effort would not hamper defense.

<i>Jacob v. Henderson</i>, 840 So. 2d 1167 (Fla. 2d DCA 2003)	Dismissal	REVERSED	Plaintiff stated under oath that she could not do several things that surveillance video demonstrated that she was capable of doing; trial judge dismissed for fraud; DCA reviewed the same surveillance tape and deposition as trial judge, so less deference is given; when degree of injury as opposed to fact of injury is involved, it is a credibility issue for jury and not a calculated scheme to impede the defense.
<i>Morgan v. Campbell</i>, 816 So. 2d 251 (Fla. 2d DCA 2002)	Dismissal	Affirmed	Plaintiff claimed no prior back treatment when she had been treated 16 times; at evidentiary hearing, judge weighed credibility of plaintiff (deference given); Plaintiff's disclosure of some treatment does not constitute "truthful disclosure."

Third DCA			
<i>Lerner v. Halegua</i> , 154 So. 3d 445 (Fla. 3d DCA 2014)	Order Striking Pleadings	REVERSED and remanded	Trial court based finding of fraud on still digital photos from surveillance video. Because the underlying video was not properly authenticated, there was not competent clear and convincing evidence of fraudulent litigation conduct.
<i>E.I. DuPont De Nemours & Co. v. Sidran</i> , 140 So. 3d 620 (Fla. 3d DCA 2014)	Order Striking Pleadings	REVERSED and remanded for new trial	Trial court did not base findings of fraud on the court on evidence of record and findings were inconsistent with evidence.
<i>Diaz v. Home Depot USA, Inc.</i> , 137 So. 3d 1195 (Fla. 3d DCA 2014)	Dismissal	REVERSED and remanded for evidentiary hearing	Trial court did not provide proper notice and hold hearing from which to make requisite findings supporting dismissal.

<i>Faddis v. City of Homestead</i>, 121 So. 3d 1134 (Fla. 3d DCA 2013)	Striking of Pleadings	Affirmed	Record demonstrates plaintiff "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 of fact or unfairly hampering the presentation of the opposing party's claim or defense."
<i>Empire World Towers, LLC v. Cdr Créances</i>, 89 So. 3d 1034 (Fla. 3d DCA 2012)	Striking of Pleadings	Affirmed as to certain Defendants, REVERSED as to one Defendant	Trial court made specific factual findings supported by clear and convincing evidence that Defendants attempted to defraud the court and conceal ownership interests by: (1) producing fabricated corporate documents; (2) committing perjury in affidavits and depositions; and (3) suborning the perjury of material witnesses and providing them with scripts of lies to repeat under oath;

			supported by overwhelming clear and convincing evidence.
<i>Suarez v. Benihana Nat'l of Fla. Corp.</i> , 88 So. 3d 349 (Fla. 3d DCA 2012)	Dismissal	VACATED and REMANDED to Reinstate Case	P.I. case alleging failure to provide adequate security; answers in depo in P.I. case differed from testimony in criminal case three years earlier; record fails to show clearly and convincingly a scheme to hide the truth; contradictions do not "go to the very heart" of claims in P.I. case.
<i>Sky Dev., Inc. v. Vistaview Dev., Inc.</i> , 41 So. 3d 918 (Fla. 3d DCA 2010)	Dismissal	Affirmed	Officers of plaintiff corporation passed note to witness during depo and text message to witness during trial; ample evidence for the trial court to conclude unconscionable scheme was underway.

<i>Hair v. Morton</i>, 36 So. 3d 766 (Fla. 3d DCA 2010)	Dismissal	REVERSED	P.I. Plaintiff failed to disclose past back problems; burden on moving party to prove fraud, which almost always requires evidentiary hearing; inconsistencies may bar some back claims but impact on liability and remaining claims best dealt with on cross examination.
<i>Gilbert v. Eckerd Corp. of Fla, Inc.</i>, 34 So. 3d 773 (Fla. 3d DCA 2010)	Dismissal	REVERSED	Premises liability case; Plaintiff claimed lost wages from a company she never worked for according to deposition testimony. Evidence on employment was conflicting, so trial judge should have held a hearing and made findings to resolve inconsistency; but if matter would not meet summary judgment standards, then it is not proper for dismissal.



<i>Laurore v. Miami Auto. Retail, Inc.</i> , 16 So. 3d 862 (Fla. 3d DCA 2009)	Dismissal	REVERSED	Inconsistencies in sworn discovery responses in P.I. case may have given rise to dismissal of some claims but not entire case; failure to disclose preexisting disability due to mental stress may result in loss of some damage claims but not liability issue and back injury claims.
<i>Ibarra v. Izaguirre</i> , 985 So. 2d 1117 (Fla. 3d DCA 2008)	Dismissal	REVERSED	Discovery response did not reveal prior slip and fall in which there was no attorney and no case filed; could be misinterpretation not fraud.
<i>Papadopoulos v. Cruise Ventures</i> , 974 So. 2d 418 (Fla. 3d DCA 2007)	Dismissal	Affirmed	Plaintiff made material representations about medical and litigation history that were established in the record.
<i>Austin v. Liquid Distributors, Inc.</i> , 928 So. 2d 521 (Fla. 3d DCA 2006)	Dismissal	Affirmed	Judge's order recited extensive discrepancies in discovery that go to the heart of the claim and are so extensive that they belie the claim plaintiff was confused or forgot.



<i>Medina v. Florida East Coast Ry. L.L.C.</i> , 921 So. 2d 767 (Fla. 3d DCA 2006)	Dismissal	REVERSED	We reverse for a jury trial because it is clear the alleged misconduct did not rise to the level of egregiousness required to merit the extreme sanction of dismissal.
<i>Canaveras v. Continental Group, Ltd.</i> , 896 So. 2d 855 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff informed opposing counsel of the prior incident and the treatment he received as a consequence early on and medical history stemming from that incident was known and investigated by the defendants; fact that prior injury was not fully admitted in deposition does not warrant dismissal.
<i>Rios v. Moore</i> , 902 So. 2d 181 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Although plaintiff did not accurately describe her injuries in a prior accident, inconsistencies did not rise to level of fraud.

<i>Bertrand v. Belhomme</i> , 892 So. 2d 1150 (Fla. 3d DCA 2005)	Dismissal	REVERSED	Plaintiff claimed defendant took inconsistent position re ownership of funds in dispute in prior bankruptcy and divorce case; judge dismissed for fraud; DCA held that plaintiff will not be denied day in court, there was no concealment in this case; inconsistencies can be used to impeach.
<i>Long v. Swofford</i> , 805 So. 2d 882 (Fla. 3d DCA 2001)	Dismissal	Affirmed	P.I. Plaintiff lied about pre-existing back injury; false or misleading statement given under oath concerning issues central to her case amounted to fraud.
<i>Metropolitan Dade County v. Martinsen</i> , 736 So. 2d 794 (Fla. 3d DCA 1999)	Denial of Motion to Dismiss	REVERSED and case dismissed	DCA: Plaintiff's misrepresentations and omissions about her accident and medical history in interrogatories and in deposition went to the heart of her claim and subverted the integrity of the action. The extensive nature of plaintiff's history belie her contention that

			she had forgotten about the incidents, injuries and treatment; "[t]he integrity of the civil litigation process depends on truthful disclosure of facts."
<i>Hanono v. Murphy</i> , 723 So. 2d 892 (Fla. 3d DCA 1998)	Denial of Motion to Dismiss	REVERSED and case dismissed	Plaintiff found guilty of perjury for testimony in the very case in which dismissal was sought; trial judge ruled that case should go before jury; DCA reversed because of fraudulent attempts to subvert the process.
<i>Young v. Curgil</i> , 358 So. 2d 58 (Fla. 3d DCA 1978)	Dismissal	REVERSED	Trial court inferred collusion on the part of plaintiffs based on suspicious circumstances; matter debatable and the issue should have been determined by the jury; dismissal should be used cautiously and sparingly and only upon blatant showing of fraud, pretense, collusion. Fourth DCA

Fourth DCA			
<i>Herman v. Intracoastal Cardiology Ctr.</i> , 121 So. 3d 583 (Fla. 4th DCA 2013)	Dismissal	AFFIRMED	Party's diary contradicted his testimony and false testimony he procured from another witness at trial. Where repeated fabrications undermine the integrity of a party's entire case, the trial court has the right and obligation to deter fraudulent claims from proceeding in court.
<i>Chacha v. Transp. USA, Inc.</i> , 78 So. 3d 727 (Fla. 4th DCA 2012)	Dismissal	REVERSED and remanded to make specific findings	P.I. case in which Plaintiff allegedly concealed prior back problems from treating doctors and defendants; abuse of discretion to dismiss an action without express written findings of fact

<i>Bass v. City of Pembroke Pines</i> , 991 So. 2d 1008 (Fla. 4th DCA 2008)	Dismissal	Affirmed	Patient's unexplained inconsistencies in discovery answers about prior medical problems and having been in a prior case (albeit a divorce) meant that reasonable minds could differ on the remedy, so trial judge affirmed.
<i>Sunex Intern Inc. v. Colson</i> , 964 So. 2d 780 (Fla. 4th DCA 2007)	Dismissal on Motion to Strike	REVERSED	Trial judge dismissed claim on Motion to Strike as sham pleading but app ct reversed on grounds that the fact that trial ct perceived little chance of success on merits is not grounds for dismissal as sham. Hearing on such a motion is not to try issues but instead to determine whether there are any issues to try.
<i>Gray v. Sunburst Sanitation Corp.</i> , 932 So. 2d 439 (Fla. 4th DCA 2006)	Dismissal	Affirmed	Judge's order sets out proper standard and analysis; PCA.

<i>Cherubino v. Fenstersheib and Fox, P.A.</i>, 925 So. 2d 1066 (Fla. 4th DCA 2006)	Dismissal	REVERSED	Legal malpractice case in which most of the inconsistencies attributed to plaintiffs occurred in the underlying automobile action; not clear and convincing evidence of scheme to defraud in the malpractice case.
<i>Cross v. Pumpco, Inc.</i>, 910 So. 2d 324, (Fla. 4th DCA 2005)	Dismissal	REVERSED	Plaintiff who failed to recall neck injury from five years prior to accident argued that he did not intentionally withhold information from the defense, but rather, was confused as to the date of the prior accident and did not recall the full extent of his injuries; that this was not a scheme calculated to interfere with ability to impartially adjudicate; that extent of his injuries related to present accident is a question for the jury.

<i>McKnight v. Evancheck</i> , 907 So. 2d 699 (Fla. 4th DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries set forth in prison records justified dismissal.
<i>Piunno v. R. F. Concrete Const., Inc.</i> , 904 So. 2d 658 (Fla. 4th DCA 2005)	Dismissal	Affirmed	Extent of misrepresentation and concealment of prior injuries relating to same damages alleged in instant case justified dismissal.
<i>Bob Montgomery Real Estate v. Djokic</i> , 858 So. 2d 371 (Fla. 4th DCA 2003)	Dismissal	REVERSED	Real estate broker's attachment of a forged and an altered document to complaint did not warrant sanction of dismissal in action against real estate agents for tortious interference with contractual relationships, where source of additions to documents remained open to speculation, and there was no evidence that broker submitted documents with intent to deceive.

<i>Amato v. Intindola</i> , 854 So. 2d 812 (Fla 4th DCA 2003)	Dismissal	REVERSED	Court compared testimony to surveillance video and dismissed for fraud; DCA reviewed same record and REVERSED based on Jacob, supra.
<i>Arzuman v. Saud</i> , 843 So. 2d 950 (Fla. 4th DCA 2003)	Dismissal	REVERSED	Contract action in which trial judge dismissed due to conflicting testimony on ownership of a corporation; this testimony was not intended to deceive but was the result of Arzuman's ignorance of corporate structure.
<i>Savino v. Florida Drive In Theatre Management, Inc.</i> , 697 So. 2d 1011 (Fla. 4th DCA 1997)	Dismissal	Affirmed	Plaintiff in PI case shown to have lied about pre-accident mental abilities; produced a false diploma for a college degree; and lied about not working post-accident; fraud permeated the case.

Fifth DCA			
<i>Rocka Fuerta Constr., Inc. v. Southwick, Inc.</i> , 103 So. 3d 1022 (Fla. 5th DCA 2013)	Dismissal	REVERSED	Case plainly fails to present the type of egregious misconduct or extreme circumstance to support dismissal with prejudice. Appellant's behavior is simply not fraud.
<i>Gautreaux v. Maya</i> , 112 So. 3d 146 (Fla. 5th DCA 2013)	Dismissal	REVERSED	The facts of this case do not meet the narrow, stringent standard required for dismissal for fraud on the court. Although Plaintiff showed a "testimonial discrepancy," he failed to show "a scheme calculated to evade or stymie discovery of facts central to the case.
<i>Perrine v. Henderson</i> , 85 So. 3d 1210 (Fla. 5th DCA 2012)	Dismissal	Affirmed	Trial judge held two thorough hearings and determined that Plaintiff made numerous material misrepresentations regarding his medical history and current injuries, which were core issues in the case.

<i>Bologna v. Schlanger</i>, 995 So. 2d 526 (Fla. 5th DCA 2008)	Dismissal	REVERSED	Dismissal in Plaintiff PI case (alleged fraud re lack of disclosure of prior treatment) reversed because there could have been confusion due to broad questioning, plaintiff's interrogatory answers led the defense to the truth, and the judge did not hold an evidentiary hearing. Did not meet Cox v. Burke test (see Cox case below).
<i>Villasenor v. Martinez</i>, 991 So. 2d 433 (Fla. 5th DCA 2008)	Dismissal	REVERSED	Question of whether inconsistencies argued intentional fraudulent conduct, forgetfulness, result of a limited command of the English language, or efforts to unlawfully live and work in the country, trial court erred in dismissing with prejudice without evidentiary hearing.

<i>Granados v. Zehr</i> , 979 So. 2d 1155 (Fla. 5th DCA 2008)	Dismissal	REVERSED	Plaintiff in PI case misrepresented prior condition but revealed names of treating physicians who revealed true problems so defense not hampered.
<i>Saenz v. Patco Trans. Inc.</i> , 969 So. 2d 1145 (Fla. 5th DCA 2007)	Dismissal	Affirmed	Whether dismissal was an appropriate sanction for concealment of prior medical issues presented a close question for DCA, but they affirmed the sanction as being in sound discretion of trial judge.
<i>Gehrmann v. City of Orlando</i> , 962 So. 2d 1059 (Fla. 5th DCA 2007)	Dismissal	REVERSED	Discrepancies between testimony of PI plaintiff and defense investigation not sufficiently tested at hearing to show requisite intent to defraud and that discrepancies were sufficient for dismissal.

<i>Brown v. Allstate Ins. Co.</i> , 838 So. 2d 1264 (Fla. 5th DCA 2003)	Dismissal	Affirmed	Plaintiff in PI case knowingly and intentionally concealed his lack of employment at the time of the accident; misrepresentation was central to the issue of lost wages and that issue was an integral part of his claim.
<i>Ruiz v. City of Orlando</i> , 859 So. 2d 574 (Fla. 5th DCA 2003)	Dismissal	REVERSED	Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, even false statements are well managed through the use of impeachment and traditional discovery sanctions; record in this case does not demonstrate clearly and convincingly a knowing and unreasonable scheme to interfere with the judicial system's ability to impartially adjudicate the claim.

<i>Cox v. Burke</i>,* 706 So. 2d 43 (Fla. 5th DCA 1998)	Dismissal	Affirmed	"In this case, there is a good deal that Burke and Gordon put forth as "fraud" that is either not fraud or is unproven. . . . Cox clearly gave many false or misleading answers in sworn discovery that either appear calculated to evade or stymie discovery on issues central to her case. The integrity of the civil litigation process depends on truthful disclosure of facts. A system that depends on an adversary's ability to uncover falsehoods is doomed to failure, which is why this kind of conduct must be discouraged in the strongest possible way. Although Cox insists on her constitutional right to have her case heard, she can, by her own conduct, forfeit that right. This is an area where the trial court is and should be vested with discretion to
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			fashion the apt remedy. While this court might have imposed a lesser sanction, the question in this case is close enough that we cannot declare the lower court to have abused its discretion.
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*Trial Lawyers Section of the Florida Bar
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Footnotes

*Cox case is frequently cited as authority in cases involving dismissal for fraud on the court.

