Trial Under Fire:
*Litigating Under Threat of Sanctions*

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I. Introduction

Welcome to pharmaceutical and medical device trial practice in the year 2017. It’s a world where many times substance, science and sanity are subjugated to collateral issues, personal attacks on witnesses, and trial by threat of sanction. Indeed, the plaintiffs’ bar in certain areas of the country has developed a concerted scheme designed to entrap defendants and defense counsel in an ever-escalating maze of sanction motions which culminate in repeated demands that the court enter default judgment against defendants on liability. In these scenarios, in the twinkling of an eye, even an experienced defense attorney can find himself in danger of suffering the ultimate penalty—for completely proper conduct. Below we walk through a fictional fact pattern in a hypothetical pharmaceutical failure-to-warn case, the minimal relevant case law on the practice and practical pointers to help practitioners who find themselves staring down the barrel of the sanctions gun.

II. A Hypothetical Fact Pattern

Plaintiff’s counsel files in state court two motions that at first blush seem laughable: 1) a motion in limine to exclude any mention that the FDA approved the subject drug’s label; and 2) a motion in limine to exclude any suggestion that the learned intermediary doctrine applies.

From the bench, the trial court grants both: The defense will not be able to discuss FDA approval of the subject drug’s label because the court determines the potential for prejudice outweighs the probative value (but the defense may discuss other FDA conduct and communications); and, based on unpublished trial court opinions and the state pattern jury instructions, the learned intermediary defense does not apply, meaning warnings to physicians will be excluded.

The defense, of course, vehemently objects, to no avail.

Unlike most cases where the transcript of the limine hearing acts as the court order on those motions, in this case, plaintiff prepares eight- and nine-page written orders for each limine motion, using broader and less concise language than that emanating from the bench. The court signs the orders without waiting for input from the defense and seemingly with little review. Where the court orally stated that only FDA approval of the label could not be mentioned, the written order states that reference to the FDA may not be made “in instances where it will be prejudicial.”

Defense counsel does everything it can to preserve the record for appeal, including filing objections to the orders and re-urging the appropriate legal analysis. Those filings are ignored by the court, and the defense adjusts its trial strategy and questioning to comply with the orders.

Disgruntled but prepared to go forward, defense counsel then watches in amazement as plaintiff’s counsel presents to the jury an opening statement that repeatedly opens the door to the very issues on which he procured those exclusionary rulings: he states that the defendant, when confronted with risk information about the drug buried its head in the sand, ostrich-like (when in fact, the defendant had provided all of that information to the FDA), actually misrepresented the results of certain studies to the FDA (in the approval process), and failed to advise physicians and consumers of the risks associated with the drug, “speak-no-evil-monkey-like” (although warnings existed in the original label).

Defense counsel keeps a careful record of each instance in which plaintiff has waived his limine motions and opened the door to the FDA approval and warnings to doctors. The defense then requests the
court rule on those waivers prior to the beginning of defense counsel's opening statement, so defense counsel will not be in violation of the limine orders.

Plaintiff’s counsel strongly objects to the proposed hearing and claims it is imperative that defense counsel not be given additional time to prepare and/or delay the trial. Plaintiff’s counsel claims he is agreeable to simply objecting to the defense opening when he feels it appropriate in light of his decisions on opening. The trial court, anxious to get the trial moving, accepts the plaintiff’s proposed course of action over the defense's objection.

Defense counsel begins his opening taking the position, as he must, that FDA approval and learned intermediary are now appropriate subjects. The minute the words FDA come out of defense counsel's mouth, plaintiff objects that the defense is in violation of the court's orders. This pattern will be repeated five times during the course of the defense's opening statement. Each time the court will find—not that the plaintiff failed to open the door (the real issue)—but that the defense has actually violated the court's limine orders (the issue the plaintiff has waived by objecting to the hearing). This, despite the insistence of both plaintiff and the court that the defense not be allowed to be heard on such matters prior to bringing them up in front of the jury.

Following a protracted two-day defense opening statement, plaintiff’s counsel files its first motion for sanctions, requesting that the court enter default judgment on liability for the defense's five flagrant violations of the court's orders. The court denies the motion but warns defense counsel that the court is watching and additional infractions may well result in such sanctions.

When plaintiff calls her first witness, a pharmacovigilance expert, to the stand, the expert testifies that the defendant failed to meet “appropriate standards” for safety surveillance of the drug. On cross, defense counsel asks the expert on what specific standards she bases her opinion. Plaintiff’s counsel objects and claims that the question violates the court's limine order on FDA. The defense counsel responds that the only ruling made by the court was that the defense could not introduce into evidence the FDA's approval of the label and that nothing about the subject question implicated approval. The court turns to the written order and now takes the position that the order is very broad – the FDA may not be mentioned at all, in any context.

Incredulous, the defense states that even under the new interpretation of the limine order, nothing about the subject question implicates the FDA. Plaintiff claims that, for his expert to explain the standards she used to arrive at her opinion, she would have to reference the FDA, and that the defense may not open the door to the FDA themselves by asking a prohibited question. The defense responds that if the plaintiff’s expert is using the FDA as the standard for her opinions, then the plaintiff has clearly opened the door by calling the witness and proffering her opinions.

The court agrees with the plaintiff, strikes the question, rules that the witness need not disclose the basis for her opinion, and holds that the defense has violated the court's pretrial orders by asking the question. Plaintiff’s counsel files its second motion for sanctions in which he rehashes all of the purported five instances of “sanctionable” conduct, along with the alleged latest infractions, calculates that this is now the sixth time defense counsel has ignored the court's orders, again requests a default judgment and insists that at, a minimum, defense counsel's pro hac vice status must be revoked.

The court denies this second motion for sanctions. But sit tight, the plaintiff’s counsel is just getting warmed up…

III. Federal and State Rules on Sanctions

Federal courts—and most state courts—have broad, inherent authority to use sanctions to control proceedings before them. The type of potential sanctions is essentially limitless: monetary fines against the
party or the lawyer, admonitions in front of the jury, instructions to disregard statements or questioning, or even default judgment and jail time for contempt.

The limitations on a court’s sanctioning authority are little comfort to an attorney facing case- or potentially career-altering, sanctions—there’s not much. And the downsides to being the target of a sanction strategy are significant. See, e.g., Adams v. Ford Motor Co., 653 F.3d 299, 309 (3d Cir. 2011) (discussing the negative impact sanctions can have on an attorney’s reputation and career “because sanctions act as a symbolic statement about the quality and integrity of an attorney’s work—a statement which may have a tangible effect upon the attorney’s career” (quoting Fellheimer, Eichen & Braverman, P.C. v. Charter Techs. Inc., 57 F.3d 1215, 1227 (3d Cir. 1995))).

A. The Authority of Federal Courts to Sanction

Federal Courts generally have four sources of sanctioning authority:

1. Federal Rule of Civil Procedure 11;
2. Federal Rule of Civil Procedure 37;
3. 28 U.S.C. §1927; and
4. The inherent power of the court.

The rules, statutory and inherent powers frequently overlap and are not mutually exclusive. Since Rule 37 is based on discovery abuses, and 11 and §1927 are related to the filing meritless pleadings and pursuit of frivolous claims, the courts more frequently rely on their inherent authority for sanctions related to alleged misconduct during trial.

In Chambers v. NASCO, Inc., the U.S. Supreme Court held that federal judges have all of the power necessary to manage their own proceedings and to control the conduct of those who appear before them, including the inherent power to punish abuses of the judicial process. 501 U.S. 32, 42-43 (1991). Necessarily, then, a federal court has the power to control admission to its bar and to discipline attorneys who appear before it. See Ex parte Burr, 6 L.Ed. 152 (1824).

Other courts and commentators consider that the inherent power to impose sanctions is generally included among “those powers necessary to exercise all others.” United States v. Hudson, 3 L.Ed. 259 (1812); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735, 742 (2001). The power to sanction is generally acknowledged as being necessary “to protect against the disruption or abuse of judicial processes and to ensure obedience to a court’s orders, thereby preserving [the court’s] authority and dignity.” Id. at 764-65.

The authority to sanction emanating from this inherent power of the court clearly is not limited to what is enumerated in statutes or in the rules of civil procedure. See Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse 26(A)(1) (5th ed. 2013). Unlike the specific rules and statutes, this power is only governed by the control necessary “to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Chambers, 501 U.S. at 43 (citation omitted).

More to the point at hand, a trial court’s inherent power has been described as “unlimited,” and therefore obviously reaches the full range of litigation “misconduct and abuses.” Chambers, 501 U.S. at 68 (Kennedy, J., dissenting). While the U.S. Supreme Court has always suggested that the exercise of the power be limited to the “least possible power adequate to the end proposed” United States v. Wilson, 421 U.S. 309, 319 (1975) (quoting Anderson v. Dunn, 19 U.S. 204, 231 (1821), appropriate court action approved by courts runs the gamut: from minor sanctions such as curative instructions or awarding small attorney’s fees and costs, to
draconian measures such as dismissing a lawsuit, granting default judgment, striking the party’s pleadings, or withdrawing pro hac vice consent.

The target of the sanction may be the client, the lawyer, or, well, any person before the court “responsible for wrongdoing.” Chambers, 501 U.S. at 60 (Scalia, J., dissenting). The power is inherent in a court, not a case, and the power applies even in a diversity case in which the controlling state law would not allow a sanction. Chambers, 501 U.S. at 51-55.

Unlike the rules-based authority to sanction for discovery abuses which has recently been significantly limited by amendment, the primary limitation on the inherent power to sanction comes from appellate court instruction that “because inherent powers are shielded from direct democratic controls,” courts are admonished to exercise the inherent powers “with restraint and discretion.” Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Chambers, 501 U.S. at 44 (1991). Similarly, the Court has advised that fee shifting is authorized only for “bad-faith conduct or willful disobedience” of a court’s orders. Chambers, 501 U.S. at 46-47. Of course, bad faith conduct and willful disobedience are in the eye of the beholder.

The Supreme Court might soon elaborate on the limits of monetary sanctions, as it is currently considering (recently heard oral argument on) whether an award of attorney’s fees and costs—imposed under a district court’s inherent authority for bad-faith conduct—must be limited only to fees and costs “directly caused” by the bad faith conduct. Goodyear Tire & Rubber Co. v. Haeger, 813 F.3d 1233 (9th Cir. 2016), cert. granted, 137 S. Ct. 30 (U.S. Sept. 29, 2016) (No. 15-1491).

Yet the defense does have a right to be heard. A federal court may act—sua sponte or upon a motion—to exercise its inherent sanctioning authority, only as long as its actions are consistent with the basic procedural due process guarantees of reasonable notice, a meaningful opportunity to be heard, and particularized findings. Id. at 50.

B. The Authority of State Courts to Sanction

Most states provide their courts with inherent authority similar to those of the federal court. Indeed, state courts’ sanction powers are often modeled on those delineated in federal case law.

For example, Texas courts have the inherent power to sanction litigants or attorneys whose “abusive conduct affects the core functions of the judiciary,” even when the conduct is not specifically proscribed by rule or statute. Lawrence v. Kohl, 853 S.W.2d 697, 700 (Tex. App.—Houston [1st Dist.] 1993, no writ). Although the court’s power to sanction is inherent, it is limited by normal due process considerations. In re Bennett, 960 S.W.2d 35, 40 (Tex. 1997). Notice and hearing are necessary before sanctions may be imposed. See Thuesen v. Amerisure Ins. Co., 487 S.W.3d 291, 304-305 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.) (evidence showed court afforded party notice and reasonable opportunity to be heard before imposing sanctions). Notwithstanding the court’s inherent power to impose sanctions, dismissals with prejudice, so-called “death penalty” sanctions, are generally limited to situations in which a party has exhibited bad faith or callous disregard for discovery rules or other court orders. See JNS Enter., Inc. v. Dixie Demolition, LLC, 430 S.W.3d 444, 452-456 (Tex. App.—Austin 2013, no pet.) (death penalty sanctions appropriate for fabricating evidence).

The New York courts win the prize for the most magniloquent description of their sanction power. In addition to the statutory authority to sanction, “a court has inherent power to address actions which are meant to undermine the truth-seeking function of the judicial system and place in question the integrity of the courts and our system of justice.” CDR Créances S.A.S v. Cohen, 15 N.E.3d 274, 282 (N.Y. 2014).

“Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful man-
dates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution.”

Id. (citing Anderson v. Dunn, 19 U.S. 204, 227 (1821)).

The Illinois courts seem to be more focused on logistics. In Illinois, court may employ sanctions through its inherent authority to control its docket. Sander v Dow Chem. Co., 166 Ill 2d 48, 651 N.E.2d 1071 (Ill. 1995). The recognition of the court’s inherent authority is necessary to prevent undue delays in the disposition of cases caused by abuses of procedural rules, and also to empower courts to control their dockets. See Nicholson v. Chicago Bar Association 599 N.E.2d 1132 (Ill. 1992).

In Nevada, the power is typically expansive. A district court’s inherent powers include the “broad discretion” to issue sanctions for any “litigation abuses not specifically proscribed by statute.” Emerson v. Eighth Jud. Dist. Ct., 263 P.3d 224, 229 (2011). Similar to the other states above, a court’s discretion is not unlimited, and the court may only impose sanctions that are “reasonably proportionate to the litigant’s misconduct.” Id. at 230 (quoting Heinle v. Heinle, 777 N.W.2d 590, 602 (N.D. 2010)). Yet proportionality in Nevada may only be based on precedent: “Proportionate sanctions are those which are ‘roughly proportionate to sanctions imposed in similar situations or for analogous levels of culpability.’” Id. at 230 (quoting In re Disciplinary Proceeding Against Hicks, 214 P.3d 897, 905 (Wash. 2004)).

C. Appellate Review of Sanctions Orders

When a trial court makes a significant legal ruling—such as holding that a litigant may not mention the FDA, or that the Learned Intermediary Doctrine does not apply—the appellate court will usually review the ruling de novo. Yet, the standard of review under federal law—and most state authority—for significant sanction rulings is mere “abuse of discretion.” See Chambers, 501 U.S. at 55 (decision to impose sanctions under the inherent power was subject to review only under the deferential abuse-of-discretion standard); see also, e.g., Wyssbrod v. Wittjen, 798 So. 2d 352, 357 (Miss. 2001). In other words, a party could have a well-formulated, likely-reversible-error, legal point of appeal that is lost upon entry of a severe sanction order that the appellate court is unlikely to disturb under the abuse of discretion standard.

Intuitively, the practitioner knows that the abuse of discretion standard presents a high hurdle for sanctions appeals. But, it is not insurmountable. “Abuse of discretion” does not mean “the sanction is always affirmed” in every jurisdiction. E. Leo Milonas and Frederick A. Brodie, New York Law Journal (August 26, 2013). Appellate courts—to the contrary—commonly reverse, vacate or modify sanctions orders. For example, the Second Circuit has explained that a district court abuses its discretion when “its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.” Zervos v. Verizon N.Y., 252 F.3d 163, 168-69 (2d Cir. 2001); accord SEC v. Smith, 710 F.3d 87, 96 (2d Cir. 2013). Whether such language means that there merely must be precedent to uphold a court’s action or that the appellate court should look to apply equity in fairness in their review depends on the citing court.

Appellate courts are also the gatekeepers of due process considerations, requiring that a party should receive “a proper opportunity to oppose the motion for sanctions and to augment the record with appropriate countervailing evidence.” Healey v. Chelsea Resources, 947 F.2d 611, 622 (2d Cir. 1991). In some state courts, motion practice may be required so that a party is afforded “a full and fair opportunity” to present evidence against sanctions, as well as adequate notice that sanctions may be imminent. Postel v. New York Univ. Hosp., 262 A.D.2d 40, 42 (1st Dept. 1999). The due process gate, however, may provide on illusory protection; most courts preparing to enter significant sanctions allow full hearings and permit the “offender” to file whatever pleadings they wish.
IV. Conclusion: Practical Tips for Unlucky Practitioners

Trials involving a drug or medical device are always high stakes and necessarily stressful for client and counsel. When plaintiff’s counsel invokes a strategy of trial by escalating threat of sanctions, however, the stakes and stress go up exponentially. Below are listed some practical considerations and tips for the unlucky practitioner who finds himself or herself the target of such a collateral attack.

• Remember that well-founded appellate points can be lost if the court grants the ultimate sanction, as it will be reviewed under an abuse of discretion standard and is potentially quite likely to be upheld.

• Demonstration of inconsistency in the application of the court's rulings may provide the best avenue to demonstrate abuse of discretion; an appellate court will understand it is difficult to comply with “moving target” orders.

• Have appellate counsel present to advise as to the best way to preserve error and demonstrate bias for appeal.

• Vigorously object orally and then in writing to plaintiff’s written orders that do not accurately reflect the court's oral rulings and/or more broadly interpret those than intended.

• As the court's rulings morph and broaden to fit the plaintiff’s agenda, object on the record and then file more fulsome written objections to the application of the order, reflecting the multitude of different interpretations given to the same order, and contrasting the written order with the court's oral rulings.

• Draft extensive written proffers of the evidence improperly excluded and the various points at which the subject evidence would have been—and then was not—admissible.

• Do not be duped by plaintiff’s counsel or the court’s agreement to allow the defense to proceed without first obtaining a ruling on whether the door has been opened on issues which even might be prohibited by any court order.

• Anticipate novel and tortured arguments that the court's orders prohibit seemingly unrelated evidence and have prepare briefs and objections ready to file.

• Assign someone to keep a running tab of plaintiff’s improper conduct from Day 1; it may be difficult to maintain when such conduct is coming as fast and furious as it frequently does, but it will be invaluable to in filing written objections and counter-motions.

• Consider your own offensive motions where plaintiff crosses the line – and be prepared to escalate as necessary.

• Anticipate that you will need motions for mistrial, motions for recusal and motions for disqualification, and be prepared to file them in short order following particularly egregious determinations.

• While it is difficult to successfully argue improper bias by the court, prepare to succinctly articulate on the record at appropriate intervals the two or three ways in which the court's orders or its differing interpretations of its own orders prohibit the defense's presentation of its core defense.

Though there is no sure-fire way to escape a plaintiff’s well-laid escalating sanctions trap, anticipating plaintiff’s maneuvers, keeping detailed notes on plaintiff’s conduct, making sure appellate counsel is available to assist, and creating a detailed written record of the court’s own inconsistent treatment of certain topics throughout the trial to the detriment of the defense will go a long way toward preserving issues for appeal and alerting the trial court to its own error – hopefully, so there’s no “ultimate” sanction ever entered.