Persuading Courts to Impose Sanctions on Your Adversary

by Douglas J. Pepe

We've all been there.

You're embroiled in a knock-down, drag-out fight. Your adversary crosses the line separating forceful advocacy from misconduct. Not once. Not innocently. Not trivially. Sanctions are in order. Yet, most judges don't like them. So, how do you persuade the court to impose them? What kinds of sanctions can you ask for? Here are five tips for filing an effective sanctions motion.

Tip Number 1: Know the rules of the game before you play. An extensive body of law exists on litigation abuse and sanctions, but few of us find ourselves steeped in the issues as part of our daily practice. I suppose that is a good thing. Sanctions law is full of traps for the unwary or the uninitiated. Knowing the rules of the game—and following them—is essential to persuading a court to sanction your adversary.

The sources of sanctions law are as myriad as the abuses they are designed to address. Each state has its own set of sanctions powers. Often, but not always, they are modeled after those in federal court. Appellate rules differ from those in the trial courts. Statutory provisions like 28 U.S.C. § 1927, which provides for attorneys' fees directly from opposing counsel in all federal courts, operate outside the rules and apply across the full spectrum of trial and appellate courts. Federal courts also possess broad "inherent powers" to award sanctions. Each source comes with its own set of requirements. A detailed discussion of all of them is more appropriate for a book than an article. For our purposes, a brief description of the main bases for federal sanctions law will suffice to give a flavor. There are four.

Rule 11. When many people think of sanctions, they think of Rule 11 of the Federal Rules of Civil Procedure. It stands at the apex of sanctions law. Given the amount of litigation and commentary Rule 11 generates, it is surprisingly narrow and frequently misused. Here are a few things to consider.

If you want attorneys' fees, Rule 11 is not the best place to start. The rule authorizes the imposition of deterrent, not compensatory, sanctions. Attorneys' fees are awardable only if "warranted for effective deterrence" (Rule 11(c)(4)). Other sanctions powers, like 28 U.S.C. § 1927 or the inherent power of the court, are not so limited.

If you face discovery misconduct on the part of your opponent, don't use Rule 11. It has nothing to do with discovery. Rule 11 was amended in 1993 to make this clear. *See* Rule 11(d). Despite the amendment, cases are legion involving counsel seeking Rule 11 sanctions for discovery abuses. There are even a few where lower courts award them, only to be reversed. Look instead to the discovery sanctions rules—Rules 26(g), 30(d), and 37—or, absent a governing rule, the court's inherent power.

If you're dealing with something other than a paper presented to the court, don't use Rule 11. The rule applies only to the "presenting" of pleadings, motions, or other papers. "Presenting" means signing, filing, or later advocating the paper. The list of Rule 11 motions attempted by litigants, and rejected by the courts for being beyond the scope of the rule, is long. Letters exchanged between counsel are not covered. Misrepresentations in settlement discussions or communications are not covered. Oral motions, no matter how baseless, are not covered. Misconduct during trial is not covered. Your adversary can flat out lie about the law and the facts at oral argument. If your opponent is not advocating a position taken in his brief, he is free from the grip of Rule 11 (but behold the wrath of the court's inherent power!).

Just because your opponent loses, it doesn't mean the losing arguments are sanctionable. The duties created by Rule 11 are relatively few. They boil down to two basic categories. When presenting a paper to the court, the presenter certifies that (1)

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the paper is not presented for an improper purpose; and (2) reasonable inquiry was made into the factual and legal contentions made. These are not high hurdles, and the touchstone is not the ultimate merit of the arguments (unless the arguments are so entirely frivolous that the absence of factual or legal inquiry is obvious).

An example will illustrate the limitations. Assume you are in federal court in a diversity case and your adversary files a motion on an issue of state law. The state's highest court has said no fewer than three times in cases of recent vintage that the argument doesn't hold water. The Circuit Court of Appeals has said it, too. Two judges down the hall in federal court have so held. The adversary's motion cites all of these cases, claims that the state high court and court of appeals statements are dictum, further says the other federal cases are not controlling, and then argues that their position is the better one. They cite to older cases, commentators, or dissenting opinions.

The motion is plainly without merit. It is a waste of your time and your client's money to respond to it. But is it sanctionable under Rule 11? No. *See* Adv. Comm. Note (1993) to Fed. R. Civ. P. 11 ("[T]he extent to which a litigant has researched the issues and formed some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should be taken into account in determining whether [Rule 11] has been satisfied."); *Brunt v. SEIU*, 284 F.3d 715, 721 (7th Cir. 2002) ("Although Appellants' claims were barred by existing Supreme Court and Seventh Circuit caselaw, it does not follow that sanctions must be imposed. Appellants did attempt to distinguish their case from [the controlling authorities] . . ., and we defer to the district court's finding that Appellants' complaint was not so frivolous that Rule 11 sanctions are warranted.").

When faced with a situation like this, table the sanctions motion. Win on the merits and move on. The only thing worse than a frivolous motion is an even more frivolous sanctions motion in response.

If you've already won a point, it's too late for Rule 11. You have to give your opponent at least 21 days to withdraw the sanctionable paper, and that's impossible if the motion has already been decided. This stems from the "safe harbor" in Rule 11(c)(2). It requires that you serve your Rule 11 motion on your adversary, but refrain from filing it with the court for 21 days so your adversary can withdraw or correct the offending paper.

Assume that your opponent files a frivolous (and, you believe, sanctionable) motion. You oppose it on the merits and win. From that point on, your adversary is no longer "presenting" the baseless motion. Also, nothing is left for your adversary to correct or withdraw under the "safe harbor." Your window of opportunity for Rule 11 sanctions has come and gone.

If you want Rule 11 sanctions, consider ways to lock your adversary into a sanctionable position. Generally, the "safe harbor" gives your opponent a window into your arguments and a chance to fix any defects before the court ever sees your sanctions motion. That does not always have to be the case.

Other rules can be used to your tactical advantage. As an example, assume that your adversary's complaint states no cognizable claim and is ripe for dismissal. You also believe that it is sanctionable. You can certainly seek dismissal under Rule 12(b)(6). But if the court dismisses the complaint as you expect, you have missed your opportunity to file a Rule 11 motion. If you serve a separate sanctions motion, your opponent can wiggle out of it by amending the complaint with the full benefit of the deficiencies highlighted in your motion—assuming the defective pleading is the first complaint, *see* Fed. R. Civ. P. 15(a)(1)(A)—and the court will never see your motion. You can get around this through your knowledge of the rules.

Prior to December 1, 2009, rather than file a Rule 12(b)(6) motion to dismiss, you could have filed an answer and a simultaneous Rule 12(c) motion for judgment on the pleadings, coupled with a separately served Rule 11 motion. Your adversary would have been precluded by Rule 15(a)(1) from amending the complaint without court permission and would have been forced either to meet your Rule 11 motion head-on, or to seek leave to amend. The errant filing would have been exposed to the court. The tactical issue presented by this hypothetical is: What motion should I file and when? The important lesson is: Know the rules and use them to your advantage.

Note that the details of how to address this situation changed under the new time computation rules, effective December 1, 2009. The new Rule 15(a)(1)(B) permits service of an amended complaint as of right at any time within 21 days following service of the answer or motion to dismiss. Under the new rule, (1) serve your answer, wait 21 days, then simultaneously serve Rule 12(c) and sanctions motions, or (2) serve a motion to dismiss and follow it up after 21 days with a sanctions motion. You've accomplished the same result. The tactics have changed, but the lesson is the same. Know the rules and use them.

Rules 26(g), 30(d), and 37. When your opponent abuses the discovery process in one way or another, look first to Rules 26(g), 30(d), and 37 of the Federal Rules of Civil Procedure. But don't be surprised if your adversary's conduct isn't expressly covered. Each rule has its own narrow sphere of influence. Together or separately, they don't come close to covering the full range of discovery misconduct encountered in daily practice. All have their own tricks and traps to consider in formulating a persuasive case for sanctions.

Rule 26(g) is the rule to consult when dealing with many formal written discovery abuses. Only two things are covered by the rule: (1) initial and pre-trial disclosures (by signing these, your opponent certifies that they are true and correct when signed), and (2) formal written discovery requests, responses, and objections (by signing these, your opponent certifies that they are grounded in law, not served for an improper purpose, and are not unreasonable or unduly burdensome).

Rule 26(g) is the written discovery counterpart to Rule 11, and it was modeled after the 1983 version of Rule 11. Rule 11 has since been substantively amended, however, so the two rules have taken divergent paths. The differences can be significant in practice and are important to bear in mind.

For example, if your opponent advocates from initial disclosures or interrogatory responses that were reasonably believed to be true when made but, over the course of litigation, have become demonstrably false, Rule 26(g) sanctions are improper. Rule 26(g) is tested from the date of signing. Unlike the current Rule 11, later advocacy is irrelevant. That is not to say that this example demonstrates acceptable practice—your adversary should have supplemented as required under Rule 26(e) and can be sanctioned for failing to do so under Rule 37(c)(1)—but it does mean that you've got the wrong rule.

If your opponent does violate Rule 26(g)—for example, by serving discovery for some improper purpose—there is no opportunity to correct the error, and sanctions are mandatory. Unlike the current Rule 11, Rule 26(g) has no "safe harbor," and the court "must impose an appropriate sanction" if there is a violation. *See* Rule 26(g)(3).

Rule 26(g) has no general application to the countless other ways litigants and counsel may abuse the discovery process, including improper deposition conduct, incomplete document production, spoliation of evidence, frivolous discovery motions, non-compliance with discovery orders, and refusal to provide legitimate discovery. Other rules, and the court's inherent power, must be consulted to address this behavior.

If your opponent misbehaves in a deposition, turn to Rule 30(d). It deals with some, but not all, deposition abuses. But beware, the rule is lopsided. If you are the one asking the questions and your adversary "impedes, delays or frustrates" your examination of the witness, you can get an "appropriate sanction"—including, but not limited to, expenses and fees—for your opponent's misbehavior. *See* Rule 30(d)(2).

Not so if you are defending the witness. There is no provision for an "appropriate sanction" for bad faith questioning. Rule 30(d)(3) gives you one option if your opponent asks your client harassing or improper questions: Stop the deposition and move to terminate or for a protective order. If you win, you are entitled to fees and expenses incurred in bringing the motion. *See* Rules 30(d)(3)(C) and 37(a)(5)(A). If you lose, your adversary is entitled to fees and expenses incurred in defending against it. *See* Rules 30(d)(3)(C) and 37(a)(5)(B). There is no rule-based sanction for bad faith questioning—that is the province of the court's inherent power.

Disobedience of a court order carries potentially heavy costs. So if you're dealing with a situation where your adversary has violated an order of the court, Rule 37(b)(2)(A) empowers the court to issue "further just orders." Rule 37(b)(2)(A)(i)–(vii) contains a non-exhaustive list of seven possible sanctions, including dismissal of the action; striking pleadings; barring evidence, claims, or defenses; adverse inferences; and entering a default judgment against the wrongdoer. In addition, violation of a discovery order triggers Rule 37(b)(2)(C), requiring sanctions on the disobedient party or counsel for costs and fees caused by an unjustified failure to comply. The problem with Rule 37(b) lies not in the breadth of available sanctions but in the scope of its application. Most of the discovery abuses encountered in practice do not run afoul of any order.

When your adversary is playing games with disclosure, look to Rule 37(c) and (d). But not all disclosure gamesmanship is covered. The biggest gap lies in the most surprising place: document discovery.

For example, you serve a valid document request. Your opponent serves formal written responses and objections and agrees to provide a key category of documents. As the close of document discovery approaches, you recognize that your adversary's production is woefully deficient. Because no objection was lodged, your adversary was required to make a full production under Rule 34, but the rule contains no provision for sanctions for failure to do so.

You would also search Rule 37 in vain to find an applicable sanctions provision. Failure to make or supplement initial, expert, or pre-trial disclosures is covered by Rule 37(c)(1). Sanctions include preclusion of the omitted information. Refusal to admit in response to requests for admission is covered by Rule 37(c)(2). Sanctions include mandatory costs and attorneys' fees incurred in proving the fact unless certain exceptions are met. Failure of a party to attend their own deposition is governed by Rule 37(d)(1)(A)(i). A range of permissive sanctions are available for this. Failure to serve written answers, objections, or written responses to interrogatories or document requests is covered by Rule 37(d)(1)(A)(ii), and failure to supplement those responses are covered by Rule 37(c)(1). Sanctions include attorneys' fees and a host of permissive sanctions. Where is the rule that provides for sanctions when your adversary fails to produce documents in response to a valid document request or their production is incomplete? There isn't one (although some courts erroneously find it in Rule 37 even though it doesn't exist).

In this situation, there are two options under the rules (assuming there is no violation of a pre-existing discovery order, in which case Rule 37(b) would apply).

Option 1: You can wait until the document discovery cutoff—which, presumably, is embodied in the court's Rule 16(b) scheduling order—and move for sanctions for the violation of that order under 16(f)(1)(C). This is ill-advised. Sitting on your hands is no way to persuade a court to enter sanctions, and you will likely find yourself explaining why you did not press the issue sooner.

Option 2: You can move to compel production. To do so, you have to meet and confer first. Rule 37(a)(1) requires that you certify your good faith efforts to the court. If that doesn't kick-start your adversary, you can move to compel under Rules 37(a)(3)(B)(iv) and (a)(4), which together permit a motion to address your adversary's incomplete disclosure. If your motion is successful, you are entitled to your costs in making the motion unless your adversary can show a justification or that you didn't confer in good faith before bringing the motion. Once an order issues, one would think only the foolish or reprobate adversary would violate it. But if (and only if) they do, you would then be entitled to sanctions for violation of the order under Rule 37(b).

Inherent power sanctions are looking good right about now, and they may be available in this circumstance, but inherent power comes with its own set of hurdles. More on those later.

Sitting on your hands is no way to persuade a court to enter sanctions.

28 U.S.C. § 1927. A lawyer who "so multiplies the proceedings in any case unreasonably and vexatiously" is subject to sanctions under 28 U.S.C. § 1927. This phrase covers a broad range of dilatory litigation tactics, from the filing of duplicative complaints and baseless motions, to serving needless discovery, to persisting in a meritless argument or position, to making frivolous appeals—basically any conduct that prolongs the case and causes additional expense and delay. Section 1927 is not, however, without its limitations.

If you want sanctions against a party, as opposed to your adversary, pick another rule because Section 1927 doesn't

apply. Sanctions are only available against lawyers, not litigants. Parties cannot be sanctioned under Section 1927, even if they appear pro se.

If you are looking for a broad range of sanctions, look elsewhere. Section 1927 provides for one, and only one, sanction. When your adversary's conduct "multiplies" the case, you can recover only the excess costs and fees reasonably incurred as a result. That's it.

Don't try to get Section 1927 sanctions from a law firm. Unlike Rule 11 and other rules, Section 1927 sanctions are personal. Most circuits, following the text of the statute, don't allow vicarious liability.

Finally, the standard under Section 1927—"unreasonably and vexatiously"—is relatively high and, in some circuits, requires a showing of bad faith.

Parties cannot be sanctioned under Section 1927, even if they appear pro se.

These limitations may account for Section 1927's relative disuse. Nevertheless, when counsel's dilatory conduct unjustifiably prolongs the case and increases the costs of litigation, courts will not hesitate to foist the burden of those excess costs on the offending lawyer. Section 1927 is therefore an important potential source for sanctions.

Inherent power sanctions. Last, but certainly not least, is the court's inherent power. The power of federal courts to curb abusive litigation practices through the use of inherent powers is well established. Inherent powers are not governed by rules or statutes. They flow from the nature of the judicial institution itself—powers that "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 24 L. Ed. 259 (1812). Inherent powers include the power to issue contempt sanctions; the power to impose obedience, respect and decorum, and submission to lawful court mandates; and—most significantly for present purposes—the "'well-acknowledged' inherent power of a court to levy sanctions in response to abusive litigation practices." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765 (1980).

If your opponent's conduct is not covered by a rule or statute, the only place to look is the inherent power of the court. Inherent power sanctions are the quintessential gap filler of sanctions law. In the leading modern decision, *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991), the Supreme Court made clear that the existence of a sanctioning scheme in statutes and rules does not displace the court's inherent power to impose sanctions for bad faith conduct. "These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than the other means of imposing sanctions." *Id.* at 46. Whereas rules-based sanctions "reach[] only certain individuals or conduct, the inherent power extends to a full range of litigation abuses" and, "at the very least . . . must continue to exist to fill in the interstices." *Id.*

Following *Chambers*, courts have employed inherent powers to sanction bad faith conduct both (1) where there is no rule or statute covering the precise conduct at issue, as is frequently the case where there is spoliation not covered by Rule 37 or deposition misconduct not covered by Rule 30(d); and (2) in extraordinary cases, where a statute or rule otherwise governs but, in the "informed discretion of the court, neither the statute nor the Rules are up to the task." *Id.*

Despite the breadth of the inherent power, the Supreme Court has repeatedly admonished the lower courts to exercise "restraint and discretion" in its use. Stringent requirements—including the requirement of subjective bad faith—counsel against the use of inherent power where other rules, with less stringent requirements, potentially apply. When there is no governing rule, if some of your opponent's conduct is covered in part but not entirely (as was the case in *Chambers*), or if the conduct is particularly egregious so as to warrant a type of sanction not provided for in the governing rule (rare, but possible), consider seeking inherent power sanctions.

To sum this all up, it should be clear by now that federal sanctions law is a tangled web. Each rule covers a limited sphere of conduct. Each has its own unique requirements. Some rules overlap with others. Some of the most egregious conduct faced every day by courts and litigants is not covered at all. The omnipresent inherent power is both broader in scope and more circumspectly applied than the rules and can be used to fill the gaps when the rules fall short. Assisting the court in navigating the thicket will go a long way toward persuading the court to grant your application.

Tip Number 2: Show bad faith, even if it's not required. Demonstrating bad faith is not always required by the law, but it is almost always required as a matter of effective advocacy. Everybody makes mistakes. Judges understand that. Showing bad faith can have a significant impact both on the court's willingness to impose sanctions and on the type of sanction available.

Sanctions powers vary in terms of the level of culpability that must be shown. Some sanctions are triggered automatically, without the need to demonstrate a culpable state of mind at all. The classic example is Rule 37(c)(1). If your adversary doesn't disclose a witness or information required by the initial expert and pre-trial disclosure rule (Rule 26(a)), or timely supplement those disclosures or prior discovery responses (Rule 26(e)), there had better be a good reason for it. Absent a substantial justification, preclusion is presumptively automatic.

Rules requiring a culpable state of mind are far more common. Rules 11 and 26(g) sanctions, for example, are generally triggered by objective unreasonableness. I say "generally" because a higher standard is required for sua sponte sanctions under Rule 11(c)(3) in some circuits, and "improper purpose" sanctions under Rule 11(b)(1) present some unique issues.

Section 1927 requires something more than objective unreasonableness. The statutory language is "unreasonably *and* vexatiously." The courts have not quite come to agreement on what "vexatiously" means, but two things are clear: One, "vexatiously" means something more than "unreasonably." Two, if bad faith is shown, sanctions are clearly warranted.

Inherent power sanctions lie at the far end of the spectrum. Bad faith is a prerequisite to inherent power sanctions awarding attorneys' fees or other sanctions for misconduct in the course of litigation. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766, 767–78 (1980). One recent and glaring potential exception exists. Under the Second Circuit's decision in

Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002) and its progeny, the bastion of bad faith may be crumbling in the spoliation context where rule-based and inherent power sanctions overlap. *Residential Funding* held that the negligent delay in the production of discovery alone is sufficient to warrant an adverse inference sanction. That holding would have been unremarkable if the Second Circuit had based its decision exclusively on one of several potentially applicable rules. But it didn't. The *Residential Funding* panel relied, in part, on the district court's inherent power. So, at least in the Second Circuit, spoliation inferences—whether grounded in Rule 37 or, unless and until *Residential Funding* is clarified, on the court's inherent power—require a showing of negligence only. Bad faith is required for non-spoliation inherent power sanctions brought by motion in the Second Circuit and elsewhere.

Whatever the required standard is under the applicable sanctions power, establishing your adversary's bad faith will enhance your request for sanctions. Three principal reasons to show bad faith are, first, greater culpability means more severe sanctions. Courts have broad discretion in fashioning an appropriate sanction for litigation misconduct. Bad faith is directly relevant to the court's determination of what type of sanction to impose. Some sanctions, including dismissal or default for discovery violations under Rule 37, are considered so severe that the lower courts must make specific findings of bad faith, even when lesser sanctions under the same rule do not require it. Demonstrating that your adversary's misbehavior lies on the more egregious end of the sliding scale of culpability increases the likelihood that the more significant sanctions will issue.

Showing bad faith even where not required can, in certain cases, alleviate the necessity of proving other elements. Cases involving spoliation or delay in the production of evidence, like *Residential Funding*, exemplify this. Under *Residential Funding*, negligence alone is a sufficiently culpable state of mind to warrant an adverse inference instruction for the delay or destruction of evidence. But there is a catch: The party asking for an adverse inference must also show that the missing evidence was relevant to a claim or defense. *Residential Funding* held that proof of bad faith itself gives rise to an inference that the missing information was unfavorable to the spoliator, satisfying the relevance test. When the party seeking sanctions rests on proof of mere negligence, however, relevance must still be independently established. This can be a problem in the case of negligent destruction. Proving that the destroyed evidence would have been harmful to your adversary when you can't see the evidence because your adversary destroyed it presents an almost metaphysical catch-22. That problem is avoided, at least in the Second Circuit, by proving that the destruction resulted from your adversary's bad faith.

Third, demonstrating your adversary's bad faith is persuasive. Sanctions are fundamentally punitive. Many judges want to know that they are addressing real misconduct before they break out the big stick. An adversary with an empty head and a pure heart may warrant sanctions in some cases under an objective standard such as Rule 11, but showing that your adversary acted intentionally or willfully, or was motivated by an improper purpose such as harassment or delay, will go a long way toward persuading the court that the misconduct is worthy of judicial attention and punishment.

Imagine your client is served with a complaint. The complaint is riddled with innuendo, false accusations, and conspiracy theories. It reads like a Mickey Spillane novel. You read it and recognize immediately that the complaint is frivolous and dismissible. It is clear to you that the merits are not driving this complaint or this lawsuit. Opposing counsel has other motivations and, you learn, has done this kind of thing before. You suspect the case will never be about the merits with this lawyer in it. You contemplate moving for sanctions based on the pleading itself. Then an opportunity presents itself. Your opponent is from out of state (he has counsel in your state assisting him) and cannot participate in the proceedings without pro hac vice admission. You decide to make your stand there. Although not a sanction in the strictest sense, you oppose the request for admission.

Bad faith is not an express element for pro hac vice denial, but you intend to show it. And show it you do. You identify counsel's motivations and explain why they are collateral to the merits. You show the court that counsel has done this kind of thing before. You highlight for the court past instances where courts have rebuked or reprimanded your opponent for similar behavior. All of these factors make for a persuasive case, and the court takes the extraordinary step of denying admission. And the judge got it right. Now, the case will be about the merits, as it should be. Dismissal follows.

This hypothetical presents a classic example of the benefits of showing bad faith even where it is not strictly required. Sure, the frivolousness of the complaint may have been sufficient to warrant a sanction standing alone, but juxtaposing the pleading with the motivations behind it, and the past conduct of the lawyer responsible for it, enhanced the persuasive force of the request. The lesson of this hypothetical is: Show bad faith, even if it is not required.

Tip Number 3: Show prejudice, even if you don't have to. No harm, no foul. There is truth in this principle. While many sanctions rules do not require proof of prejudice as an express element, the principle of "no harm, no foul" is a ubiquitous undercurrent in the law of sanctions. Meet it head-on by showing the court not only that your opponent misbehaved, but also that your case and your client have suffered as a result.

The most severe sanctions, including, for example, dismissal and default under Rule 37, require a showing of prejudice in most courts. For lesser sanctions, courts can and do consider the prejudice to the moving party in weighing the appropriateness of sanctions and the type of sanction to award. Whether it is required or not, demonstrating that your adversary's violation is more than a technicality—that it caused you real harm—is a key ingredient in formulating a persuasive case for sanctions.

When showing prejudice, be specific. If the opposing party lost a set of handwritten notes from a key meeting, show the court precisely how you would use those notes at trial. Establish why the meeting was important. Highlight discrepancies in the testimony of other witnesses. Demonstrate why the notes are important to test the credibility of the witnesses. Explain how you have tried to obtain this information from other sources but are left with no meaningful alternative to the missing notes.

If your adversary failed to produce documents or identify witnesses in a timely manner, explain to the court exactly how the late disclosure has hampered or impeded your discovery efforts. Identify deponents who will need to be recalled or additional depositions that are necessary. Submit proof of the cost and expense your client has incurred, and the expected costs of the additional efforts you will need to undertake. If your opponent continued to use a piece of physical evidence, thereby

altering it, show the court why the evidence is important. Demonstrate how the continued use of the evidence changed it in a material way. Establish how your opponent's failure to preserve it impacts meaningful examination by your expert. Show that your opportunity to prove a key issue in dispute is now lost forever.

These are just examples. The list goes on and on. The important point is that prejudice plays a substantial role in sanctions decisions. The more you can do to show the court that your adversary's conduct had an impact on your case or your client's interests, the more persuasive your request for sanctions will be.

Tip Number 4: Ask for the right sanction. Too often lawyers seek sanctions without paying sufficient attention to *which* sanction is the right tool for the job. That is a mistake. Before filing, ask yourself two questions: What sanctions are available for my adversary's misconduct? Which of these sanctions will further my client's interests the most? The answers to these two questions will identify the right sanction to request from the court. Then ask for it. Directly.

Sanctions can range from the mundane (an award of statutory costs) to the case-dispositive (dismissal with prejudice or entry of default judgment) to the career-toppling (public censure, referral to disciplinary authorities, suspension, or disbarment), and virtually everything in between. Courts generally have broad discretion in fashioning an appropriate sanction. The availability of particular sanctions, and any applicable limitations on the court's power, is a function of the power invoked by the court as the basis for the sanction.

Rule 11 allows for the imposition of an "appropriate sanction." Appropriate sanctions can include a penalty paid to the court, the payment of attorneys' fees and costs, preclusion of evidence, preclusion of issues, preclusion of claims or defenses, dismissal, or default.

There are important limitations, however, on the court's power to impose Rule 11 sanctions. Those limitations include the requirement, under Rule 11(c)(4), that the sanction must be "limited to what suffices to deter repetition" of the offending conduct, and the presumption under the current Rule 11, highlighted in the Advisory Committee Note, that any monetary sanction imposed must be paid to the court, not the opposing party, absent unusual circumstances.

The list of possible sanctions for discovery violations is long. Rule 26(g), like Rule 11, calls for an "appropriate sanction." Sanctions under Rule 26(g), however, are mandatory, and the limitations in the current version of Rule 11 were not imported into Rule 26(g). Available sanctions are similar under both rules.

Rule 37(b)(2)(A) contains an exemplary list of potential sanctions for violating a discovery order. The list is illustrative of the types of sanctions—ranging from directing that facts are established to awarding costs and attorneys' fees—that may be available for other discovery violations, depending on the rule.

Rule 37(c)(1) supplements this list to include automatic preclusion when the discovery abuse involves failure to make Rule 26(a) disclosures, or to timely supplement those disclosures or responses to other discovery, absent some substantial justification for the failure. The court also is empowered to inform the jury of the offending party's failure to disclose.

Unlike the broad discretion granted to courts in the Rule 11 and discovery contexts, 28 U.S.C. § 1927 provides for only one kind of sanction. The offending attorney who has unreasonably and vexatiously multiplied proceedings can be ordered only to pay "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Inherent power sanctions, by contrast, are as broad as the imagination. The list of "usual suspects" includes the entry of default judgment, preclusion of evidence and issues, dismissal, fee awards, contempt citations, disqualification of attorneys, and adverse inferences.

Courts sometimes fashion creative inherent power sanctions. Requiring lawyers to attend continuing legal education classes, enjoining the further filing of motions, and pre-filing orders preventing or imposing requirements on the filing of future actions are among the more creative.

Once you have identified the range of sanctions available, pick the sanction that best suits your client's needs. If you have caught your adversary dead to rights woodshedding a witness, do you want to ask for monetary sanctions, or do you want the witness's testimony precluded? If your adversary belatedly produced a slew of e-mails, do you want to ask for a postponement of the discovery cutoff and seek to recall witnesses, or request an adverse inference? The answers will depend on the facts and your strategy for the case. The important point is that the strategy should drive the kind of sanctions sought, not the other way around.

Tip Number 5: Anticipate the backfire. If litigation is combat, a sanctions motion signals the onset of thermonuclear warfare. Before you consider going nuclear, anticipate what your opponent—or the court—might have to say about how *you* have conducted the litigation. Full-scale retaliation should be anticipated. Mutually assured destruction will get you nowhere.

A recent case in the Seventh Circuit, *Redwood v. Dobson*, 476 F.3d 462 (7th Cir. 2007), is a perfect example. The case involved some deplorable deposition questioning. The questioning attorney explored such diverse topic areas as the witness's criminal record (for 30 pages of transcript), whether the witness had issues with the state bar association, whether he was ordered to undertake psychiatric and anger management counseling, the marital status of the witness's secretary, and the witness's sexual practices—none of which had any bearing on the issues in the case, according to the panel. The capstone of the deposition came when the questioning attorney asked the witness, "Have you ever engaged in homosexual conduct?"

Inherent power sanctions are as broad as the imagination.

The panel described this conduct as "shameful" and "far below the standards to which lawyers must adhere." Not surprisingly, the questioning attorney was sanctioned.

So far, so good. Here is where the *Redwood* case gets interesting. In addition to sanctioning the questioning attorney, the panel also sanctioned the *defending* attorney. Why? Because he instructed the witness not to answer the offending questions. Shocking!

Intuitively, one might think that a lawyer defending a client faced with patently harassing deposition questioning would be justified in instructing the witness not to answer. The Federal Rules of Civil Procedure say otherwise. Under Rule 30(c)(2), an

instruction not to answer is permissible only to preserve a privilege, enforce a court order, or present a motion to terminate or limit the deposition under Rule 30(d)(3)(A). So, the technically appropriate procedure to follow in this case was either to allow the questions over objection, or to suspend the deposition and make a proper Rule 30(d)(3)(A) motion.

That is what the Seventh Circuit held in *Redwood*. The panel found that when faced with the offensive and irrelevant questions, the witness "would have been entitled to stalk out of the room" and the defending lawyer "justifiably could have called off the deposition and applied for a protective order (plus sanctions)." Instructing the witness not to answer, however, was improper and violated the Federal Rules of Civil Procedure.

As a result of this violation, the *Redwood* panel sanctioned the defending lawyer, giving him the *same sanction* as the questioning lawyer. Both were censured for "conduct unbecoming a member of the bar." In short, the court declared a plague on both houses.

Whether you agree with the *Redwood* case or not, there are lessons to be learned from it. Before contemplating a sanctions motion, make sure you are, "like Caesar's wife, beyond reproach." If there is something to be said, your opponent will say it and use it to maximum advantage. The court might even say it on its own. Anticipate the backfire before you bring your motion.

One Final Thought: Keep your powder dry. Most judges don't like sanctions motions. They don't relate to the merits; they reflect animosity between counsel; and they are additional work that doesn't move the case forward. So when it comes to sanctions, move slowly. Don't fire off a sanctions motion unless there has been egregious or repeated misconduct.

Everybody has been the victim of an adversary's mischief. That isn't enough. Judges are not playground monitors, but sanctions law provides the tools to turn the tables in appropriate cases. When the time comes for you to throw down the gauntlet and request sanctions against your opponent, my five tips can help.

Knowing the rules, demonstrating your opponent's bad faith, showing how your case was prejudiced, asking for the right sanction, and anticipating the backfire will go a long way toward formulating a persuasive and, it is to be hoped, successful sanctions motion.