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TIPS FROM THE TRENCHES

Don't Overlook The Common Law and Statutory Paths To Discovery Sanctions.

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Recently, the Alabama Supreme Court adopted changes to Rule 30(c) and (d), Alabama Rules of Civil Procedure, which governs depositions. The changes to Rule 30(c) make clear that speaking objections or objections suggesting an answer "must" not be made. They also confirm that one may instruct a witness not to answer only to make a motion to limit or terminate the deposition as provided in Rule 30(d)(2).

The change to Rule 30(d) adds a new subsection (1) which states:

> *Sanction.* The court may impose an appropriate sanction -- including awarding the reasonable expenses and attorney's fees incurred by any party -- on any person who impedes, delays, or frustrates the fair examination of the deponent.

The Committee Comments to the addition of the new subsection (1) state that although courts may have had this authority previously, the Rule was amended to confirm that Rule 30 "explicitly empowers the court to award appropriate remediation and to issue appropriate sanctions for violations of the rule." Compare *Walden v. Disciplinary Bd. of Alabama State Bar*, [Ms. SC-2023-0507, Dec. 8, 2023], ___ So. 3d ____ 2023 WL 8508246, at *3 (Ala. 2023) (holding that courts have "inherent authority" to sanction for abuse of the judicial process).

These changes to Rule 30 were mentioned as possible changes by Justice Cook in a concurring opinion in *Ex parte Hankook Tire America Corporation* [Ms. SC-2023-0210, Dec. 22, 2023], ___ So. 3d ___, 2023 WL 8857184 (Ala. 2023). In *Hankook*, the court granted a tire manufacturer's petition for a writ of mandamus and reversed the Dallas County Circuit Court's order imposing discovery sanctions for conduct by the manufacturer's Ala. R. Civ. P. 30(b)(6) witness and its attorney (conduct characterized as both willful and done in bad faith). The decision in *Hankook* and the Rule 30 changes serve as a reminder that discovery sanctions may be grounded in Alabama's Rules of Civil Procedure, Alabama's Litigation Accountability Act ("ALAA"), and Alabama trial courts' *inherent authority* – derived from the common law – to manage and control their dockets and the parties, attorneys, and witnesses appearing before them.

We do not know precisely how bad the conduct was that prompted the circuit court to strike Hankook's affirmative defenses and award attorney's fees because the appellate record is "sealed." The manuscript opinion describes what happened this way:

> The first day of [the 30(b)(6) witness's] deposition lasted 7 hours and 43 minutes; the second day lasted 7 hours and 28 minutes. The deposition was at times contentious. At several points over the course of the two-day deposition, plaintiffs' counsel threatened to involve the trial court, and, true to his word, the plaintiffs moved the trial court for sanctions three months later. The plaintiffs argued that [the 30(b)(6) witness] had been unable or unwilling to answer even simple questions during the deposition and that Hankook's counsel had 'bombard[ed] the deposition with argumentative interruptions, speaking objections, and instructions not to answer.'

Ms. *2.

According to the opinion,[4] the plaintiff moved for sanctions pursuant to Rule 37(b) or Rule 37(d), Alabama Rules of Civil Procedure, and did not rely on the trial court's inherent authority or the ALAA. The Dallas County Circuit Court conducted a hearing on plaintiffs' motion for sanctions "at which it reviewed excerpts from the video taped deposition and heard from counsel on both sides, including the attorneys who had participated in the deposition." Ms. *3. The circuit court then entered an order

observing:

> [O]ne of four things occurred almost every time [the 30(b)(6) witness] was asked a substantive question. He either was not prepared to answer the question; answered the question in an evasive manner; was instructed not to answer by Hankook's counsel; or was unnecessarily interrupted by Hankook's counsel's speaking objections.

Id.

The circuit court entered sanctions against Hankook, including: (1) a prohibition on Hankook from having any corporate representative give testimony other than Choi's deposition testimony; (2) barring Hankook from disputing at trial that the failed tire was defective; and (3) striking Hankook's affirmative defenses of contributory negligence, assumption of risk, and misuse.

The Petition filed by Hankook was granted and the sanctions vacated on the basis that sanctions under Rule 37(b) require that the moving party ***first*** obtain an order compelling discovery in order to obtain sanctions, and that sanctions under Rule 37(d) are available only if the witness fails to appear and give testimony. The Court declined to deem Choi's evasive answers as a failure to appear. The Court did not reference the trial court's inherent authority to impose sanctions pursuant to the common law or the ALAA.

Given these circumstances, the manuscript opinion provides an opportunity to reexamine the bases of courts' authority to deal with bad actors and wrongful conduct.

I. The United States Supreme Court expressly recognizes the inherent authority of courts to enter sanctions for wrongful conduct without a prior court order

Over two hundred years ago, the United States Supreme Court ruled that the inherent powers of federal courts are those which "are necessary to the exercise of all others." *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812). Over time, the Supreme Court provided representative examples of appropriate uses of such inherent powers, including dismissing an action for litigation abuses despite no prior trial court order addressing such abuses (*Link v. Wabash R. Co.,* 370 U.S. 626 (1962)), imposing sanctions for discovery abuses (*Roadway Exp, Inc. v. Piper,* 447 U.S. 752 (1980)), and imposing sanctions for vexatious conduct including intentional delays and other conduct disruptive of the litigation process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 33 (1991) ("Although a court ordinarily should rely on such rules when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the rules, the court may safely rely on its inherent power if, in its informed discretion, neither the statutes nor the rules are up to the task.")

In *Roadway Exp.*, supra, the Supreme Court cited one commentator's synopsis of the inherent authority principle, stating:

> Courts also have inherent power to impose sanctions for abuse of the judicial process, including abuse of discovery. Rule 37(b) is not the only source of authority to impose sanctions for abuse of discovery. In situations in which the rule applies, there is no reason not to treat it as the exclusive source of authority because its authorization to impose any sanction that is just makes resort to any other source of authority unnecessary. But the coverage of rule 37(b) has gaps. Foremost among them is its failure explicitly to authorize sanctions for discovery abuse that does not involve noncompliance with a court order. An example of this would be a party's false representation that a requested document does not exist, which causes the requesting party to forego seeking a court order compelling production. Sanctions may be appropriate in such cases, and the authority for them comes from the courts' "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs as to achieve the orderly and expeditious disposition of cases. The Federal Rules of Civil Procedure were not intended to circumscribe this essential power, and courts have the authority to deal with litigants and lawyers who undermine the litigation process that the Federal Rules were intended to facilitate. An amendment of rule 37 explicitly authorizing such sanctions is desirable, but not essential.

Id., 447 U.S. 752, ___, quoting Charles B. Renfrew, *Discovery Sanctions: A Judicial Perspective*, 67 Cal. L. Rev. 264, 268 (1979).

Similarly, in *Chambers*, supra, the Supreme Court amplified that inherent authority is *not* governed by rules or statute.

> It has long been understood that "[c]ertain implied powers must necessarily result to our courts of justice from the nature of their institution," powers "which cannot be dispensed with in a court, because they are necessary to the exercise of all others." For this reason, "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 mandates." These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

Chambers, 501 U.S. at 43 (internal citations omitted). The Supreme Court emphasized that, within courts' inherent discretionary authority is "the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers* at 44-45. In that case, the Court upheld sanctions, including a substantial attorney fee award, that was imposed by the lower courts for a party's bad faith conduct, which included intentional delays and disruption of the litigation process, stating:

> We discern no basis for holding that the sanctioning scheme of the statute and the rules displaces the inherent power to impose sanctions for the bad-faith conduct described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, **whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices.**
> *Id.* at 46 (emphasis added).
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> ***
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> Furthermore, when there is bad faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. **But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.**
> *Id.* at 50 (emphasis added).

II. Numerous lower federal court opinions also recognize trial courts' inherent authority.

Many federal trial court and appellate court opinions also recognize the inherent authority possessed by trial courts to sanction parties or attorneys for misconduct.

For example, in *Thomas v. Hoffmann-LaRoche, Inc.*, 126 F.R.D. 522, 525 (N.D. Miss. 1989), the court, citing its inherent authority, rather than Fed. R. Civ. P. 37, held that "[s]anctions are appropriate when a party fails to comply with a request under Rule 30(b)(6) to produce knowledgeable deponents to testify on behalf of the organization. A party may be sanctioned for disregarding the obligations imposed by the discovery rules without a direct violation of a court order." The *Thomas* court cited numerous other cases to the same effect.

Similarly, in *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 294 (S.D.N.Y. 1987) the court imposed sanctions for conduct during a deposition without a prior court order and cited numerous cases for the same proposition. The court cited its inherent authority to manage its docket as its basis for doing so.

In *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 126 (S.D. Fla. 1987), the court recognized the numerous cases holding that a court has inherent authority to enter a default judgment for bad faith conduct, including hiding or destroying evidence, despite the lack of a court order. It reasoned that its inherent authority is "broader and more flexible than the authority to sanction found in the Federal Rules of Civil Procedure." *Id.*

The Ninth Circuit affirmed a district court's dismissal of an action for deposition misconduct without a prior court order in *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 488 (9th Cir. 1991). There, the attorney had made false revisions to a deposition and signed the witness's name. Recognizing that such misconduct did not fall precisely within the language of any rule of civil procedure, the court used its inherent authority to sanction the attorney and party. In doing so, it cited *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985), another case in which that court found that abusive tactics in a deposition could subject a party to sanctions outside of Rule 37 pursuant to the court's inherent authority.

Most recently, in *Consumer Fin. Prot. Bureau v. Brown*, 69 F.4th 1321 (11th Cir. 2023) the Eleventh Circuit affirmed the Northern District of Georgia's dismissal of fraud claims brought by the Consumer Financial Protection Bureau against 18 debt collectors and their service providers as an appropriate sanction for the Bureau's repeated failure to obey discovery orders. Contrary to the Alabama Supreme Court's holding in *Ex parte Hankook Tire America* (which reads Ala. R. Civ. P. 37(d) as literally requiring a designated Rule 30(b)(6) witness not to appear for a deposition before sanctions may be imposed), the Eleventh Circuit affirmed the Georgia District Court's imposition of the severe sanction of dismissal when the Bureau's designated Rule 30(b)(6) witnesses repeatedly gave canned responses rather than fulsome answers because the Bureau took

the position that fulsome responses would violate its work product privilege. *Id*. at 1330-31. The Eleventh Circuit explained that trial courts are afforded "wide discretion" when imposing discovery sanctions:

> When reviewing discovery motions, 'wide discretion' is proper because '[a] judge's decision as to whether a party or lawyer's actions merit imposition of sanctions is heavily dependent on the court's first hand knowledge, experience, and observation.

Id. at 1329, quoting *Harris v. Chapman*, 97 F.3d 499, 506 (11th Cir. 1996). Accordingly, the standard of review for a discovery sanction order is "whether the district court abused its discretion… " *Id.* at 1329, citing *Aztec Steel Co. v. FL Steel Corp.*, 691 F.2d 480, 481 (11th Cir. 1982).

Most important, the Eleventh Circuit explained that "Rule 37, on its face, does not require that a court formally issue an order compelling discovery before sanctions are authorized." *Id*. at 1330, quoting *United States v. Certain Real Prop. Located at Route 1, Bryant, Ala.*, 126 F.3d 1314, 1317 (11th Cir. 1997).

Many similar reported opinions could be catalogued here, but the overwhelming consensus is clear: trial courts possess inherent discretion and authority to manage their dockets and to control parties, attorneys, and witnesses who appear before them.

III. The Alabama Supreme Court likewise recognizes the inherent authority of Alabama's courts to act.

The holdings from the Alabama Supreme Court are no different from its federal counterparts. For example, in *F.R. Hoar & Son, Inc. v. Florence*, 287 Ala. 158, 161-162, 249 So. 2d 817, 820 (1971), the Court recognized that the basis for a trial court to strike pleadings was derived from its "inherent power…to make reasonable rules for the conduct of the business of the courts."

In *Jones v. Hydro-Wave of Alabama, Inc.*, 524 So. 2d 610 (Ala. 1988), the Court upheld entry of a default judgment upon "a finding of intentional 'conduct evidencing disrespect for the judicial system.'" *Id*. at 614-15 (citing *Ex parte Illinois Central Gulf R.R.*, 514 So. 2d 1283, 1288 (Ala. 1987)). The Court recognized that punishing such intentional conduct "[e]ncourages compliance with the procedural rules" and "[p]reserves the integrity of the court process." *Jones*, 524 So. 2d at 616.

In *Ex parte Leverton*, 536 So. 2d 41 (Ala. 1988), a plaintiff and his expert witness engaged in abusive conduct during a deposition which was conducted out of state. The circuit court ordered that the plaintiff produce the witness at the plaintiff's expense in Jefferson County, Alabama. In affirming the circuit court's order, the Court recognized that Rule 37(a) did not apply to the situation and held that the trial judge was authorized to enter its discovery order under its "general power to control his court and his trial docket." *Id.* at 45.

The Court's decision in *Iverson v. Xpert Tune, Inc.*, 553 So. 2d 82 (Ala. 1989) is particularly instructive. There, the Court affirmed a circuit court's dismissal of an action when the plaintiff allowed a critical piece of evidence to be destroyed. The Supreme Court recognized that "[t]he trial is vested with broad and considerable discretion in controlling the discovery process and in making rulings on all matters pertaining to discovery, including the authority to make such rulings as are necessary to protect the integrity of the discovery process. *Id*. at 86-7 (internal citations omitted). The Court continued:

> **Furthermore, deeply rooted in the common law is the court's power to manage its affairs in order to achieve the orderly and expeditious disposition of cases, including the authority to impose reasonable and appropriate sanctions for failure to comply with discovery.**

Id. at 87 (emphasis added). The Court cited the 1962 United States Supreme Court decision in *Link v. Wabash*, supra, for the proposition that litigation abuses may result in a dismissal even without a prior court order in place. *Ibid.*

Notably, although the Court mentioned Rule 37(d) in *Iverson*, the facts fit almost perfectly within a trial court's inherent authority, not Rule 37. In *Iverson*, the plaintiff had served a written response to a request for production and inspection of a critical piece of evidence - a fuel pump. The plaintiff then provided misleading information that the fuel pump could be inspected at an expert deposition. Prior to the deposition, the plaintiff allowed the fuel pump to be destroyed.

From a technical and academic standpoint, the plaintiff in *Iverson* complied with his Rule 34 and Rule 37 obligations. He *had* filed a *written* response to the request for production. Thus, pursuant to its own language, Rule 37(d) was not applicable, as it applies *only* when a party fails to serve a *written* response to a request for inspection. Yet, the plaintiff failed to live up to his obligations to protect "the integrity of the discovery process." *Id.* at 87. Hence, the trial court sanctioned him and held that a Rule 37(a) motion to compel was not a prerequisite to doing so. *Id.* at 88.

More recently, in 2016, the Court again affirmed an imposition of sanctions despite the lack of a prior Rule 37(a) order. It again cited a trial court's broad, inherent authority for its ability to do so. See *Ex parte Sikes,* 218 So.

3d 839 (Ala. 2016).

Only when it released its manuscript opinion in *Ex parte Hankook Tire America* did we see the Court for the first time overlook or disregard its long history of ensuring trial courts enjoy inherent discretionary authority to act when necessary.

IV. Recognition of trial courts' inherent authority to control discovery abuses is consistent with Ala. Code, 1975, § 12-19-271, *et seq*., The Alabama Litigation Accountability Act.

The Alabama Litigation Accountability Act, Ala. Code, 1975, § 12-19-271, *et seq.*, just like common law inherent authority, authorizes sanctions (fees and costs) when a court determines that an action, claim, or defense is "without substantial justification." Ala. Code, 1975, § 12-19-272. Any determination of the Act's sanctions provisions is inherently discretionary.

> The ALAA's enactment provides for the assessment of attorney's fees and costs in any civil action commenced or appealed in any court of record where the judge determines that: (1) the action, claim, or defense was initiated without substantial justification; (2) the action, claim, or defense was asserted for delay or harassment; or (3) such proceedings were unnecessarily expanded by other improper conduct, illustrated by abuse of the rules of discovery. The phrase 'without substantial justification' is defined as any action, claim, defense, appeal, or motion that is frivolous, groundless in fact or in law, vexatious, or interposed for any improper purpose, exemplified by the purpose of causing unnecessary delay or increasing needlessly the cost of litigation.
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> In determining both whether such an assessment should be made and in what amount it is to be made, the court must consider the following factors, among others:
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> 1. The extent to which any effort was made to determine the validity of any action, claim, or defense before it was asserted;
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> 2. The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;
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> 3. The availability of facts to assist in determining the validity of an action, claim, or defense;
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> 4. The relative financial position of the parties involved;
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> 5. Whether the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;
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> 6. Whether issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;
>
> 7. The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;
>
> 8. The extent to which any action, claim, or defense was asserted by an attorney or party in a good-faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;
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> 9. The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;
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> 10. The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;
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> 11. The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and
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> 12. The period of time available to the attorney for the party asserting any defense before such defense was interposed.
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The accountability governed by the ALAA applies to acts of both lawyers and parties to the lawsuit. When the statute has been violated, the fees and costs may be assessed against either the attorneys or the parties or both. It is within the discretion of an assessing court as to how it will allocate the payment of such fees

and costs among the attorneys and parties.

Janelle Mims Marsh, Alabama Law of Damages, § 9:8 (6th ed.) (citations omitted).

V. Common law inherent authority is consistent with the legislative provision of power to courts to preserve order. Ala. Code, § 12-1-7 (1975).

Since 1852, the Alabama Legislature has provided Alabama's courts with statutory authority to insure the administration of justice. Section 12-1-7, the successor to Code 1852, § 562, provides:

> **Powers of courts as to preservation of order, enforcement of judgments, etc., generally.**
> Every court shall have power:
>
> (1) To preserve and enforce order in its immediate presence and as near thereto as is necessary to prevent interruption, disturbance or hinderance to its proceedings;
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> (2) To enforce order before a person or body empowered to conduct a judicial investigation under its authority;
>
> (3) To compel obedience to its judgments, orders and process and to orders of a judge out of court, in an action or proceeding therein;
>
> (4) To control, in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto;
>
> (5) To administer oaths in an action or proceeding pending therein and in all other cases where it may be necessary in the exercise of its powers and duties; and
>
> (6) To amend and control its process and orders so as to make the conformable to law and justice.

Code 1852, § 562. A court's statutorily granted power to control "the conduct of its officers and all other persons connected with a judicial proceeding before it in every matter appertaining thereto" necessarily includes its ability to control, through imposition of sanctions, the parties, the attorneys, and the witnesses involved in a particular action. Ala. Code § 12-1-7(4).

CONCLUSION

While Ala. R. Civ. P. 37 may provide an appropriate basis for imposition of sanctions for discovery abuses in some instances, never overlook Alabama's long-settled common law and statutory rules affording the courts with discretionary authority to manage their dockets and to control the conduct of parties and other participants in litigation.

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4 The trial court pleadings were filed under seal, so the exact text of the motion for sanctions is not available to the authors.
The Eleventh Circuit explained:
The district court [ ] found that the CFPB's witness "failed to appear" pursuant to Rule 37(d) because, even though he was physically present, he was effectively unavailable due to his inability to answer questions without memory aids and [his] refusal to address exculpatory evidence.

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