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## Law Firms are People, Too? Law Firm Sanctions Under 28 U.S.C. § 1927 and the Strained Reading of “Person”

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## LAW FIRMS ARE PEOPLE, TOO? LAW FIRM SANCTIONS UNDER 28 U.S.C. § 1927 AND THE STRAINED READING OF “PERSON”

### INTRODUCTION

The nightmare scenario for any potential litigant is filing a slam-dunk lawsuit and, instead of moving seamlessly toward trial, spending years responding to motions and discovery requests, ultimately settling for pennies on the dollar.<sup>1</sup> This is a familiar scenario, as parties often settle lawsuits for reasons unrelated to the merits of a case or the likely verdict. Forcing an opponent to respond to unnecessary filings can make the decision to settle hinge on a party’s ability and willingness to pay ever-increasing litigation costs.<sup>2</sup> Indeed, it is relatively inexpensive to draft a bloated complaint or unnecessary discovery requests but often extremely costly for an opponent to respond.<sup>3</sup> Although filing unnecessary motions can damage a litigant’s credibility,<sup>4</sup> one attorney’s “diligent” litigation strategy and another attorney’s “unethical” abuse of judicial process may have the same practical effect in

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1. See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 997 (1998) (“[A]ttorneys report that the time they devote to a case will depend more upon the events of that case—e.g., the extent of discovery and motion practice—than upon the case’s characteristics—e.g., stakes and complexity.”).

2. A related but separate issue is the filing of frivolous *lawsuits*, which needlessly inflict the costs of responding even if a case is eventually dismissed. Out of a perceived need to reduce the number of frivolous lawsuits, the U.S. House of Representatives passed the Lawsuit Abuse Reduction Act of 2015, which would *require* federal district courts to levy sanctions that are currently discretionary under FRCP 11(c) and would remove the 21-day safe harbor. According to GOVTRACK.US, the bill only had an eight percent chance of being enacted, and it expired with the new Congress after failing to pass the Senate. *H.R. 758 (114th): Lawsuit Abuse Reduction Act of 2015*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/114/hr758> [https://perma.cc/Z73W-TVDP]. More recently, the bill was reintroduced as the Lawsuit Abuse Reduction Act of 2017 and passed in the House on March 10, 2017. GOVTRACK.US gives the bill a seventeen percent chance of being enacted. *H.R. 720: Lawsuit Abuse Reduction Act of 2017*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/115/hr720> [https://perma.cc/E5DP-QQ A8]. Notably, the bill would not broaden the scope of 28 U.S.C. § 1927. An attorney cannot be sanctioned under 28 U.S.C. § 1927 for merely *filing* a frivolous lawsuit. *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008) (“[W]e join an unbroken band of cases across the courts of appeals holding that a lawyer cannot violate section 1927 in the course of commencing an action.”).

3. Molot, *supra* note 1, at 996.

4. Glenn A. Ballard, Jr., *The State of Trial Work - 2007*, HOUS. LAW., January/February 2007, at 6.

terms of cost.<sup>5</sup> However, in addition to the discipline attorneys face from state bar authorities, courts can discourage expensive litigation tactics by drawing on several sanctioning powers, including a court's inherent powers, the Federal Rules of Civil Procedure, and 28 U.S.C. § 1927.<sup>6</sup>

In full, 28 U.S.C. § 1927, entitled "Counsel's liability for excessive costs," states that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."<sup>7</sup> While courts have found a variety of behaviors to justify sanctions for unreasonably and vexatiously multiplying the proceedings in a case, courts have disagreed vigorously on the limits of the sanctioning power. The grounds required by each sanctioning authority may overlap in important ways, such as the "bad faith" element required by some courts for sanctions under *either* § 1927 or the court's inherent powers.<sup>8</sup> Other courts require a showing of recklessness, bad faith, *or* improper motive to justify § 1927 sanctions.<sup>9</sup> As a result, courts may sometimes conflate the sources of authority underlying a decision to award sanctions, especially in cases of sanctions levied against law firms for the conduct of individual attorneys.<sup>10</sup>

The conflation of sanctioning authorities has contributed to a circuit split on the question of who can be sanctioned under § 1927. More specifically, the federal circuits are split on the question of whether the class of entities described in § 1927—"any attorney or other person admitted to conduct cases"—includes law firms. The majority of circuits answering that question has implicitly or explicitly endorsed § 1927 law firm sanctions, while the Sixth, Seventh, and Ninth Circuits have definitively rejected them. However, by clearly demarcating the boundaries of the various sanctioning authorities,

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5. Molot, *supra* note 1, at 997. As the First Circuit has recognized, "[d]istinguishing between what is a vigorous but reasonable attempt to salvage a case that is going badly and a stubbornly capricious attempt to gain advantage by prolonging matters is not easy." *Jensen*, 546 F.3d at 67.

6. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1336 (3d ed. 2016). Although the arsenal of sanctioning powers extends beyond this list, I will be focusing solely on these three sources for purposes of this Comment.

7. 28 U.S.C. § 1927 (2012).

8. *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1252 (11th Cir. 2007). The Eleventh Circuit went so far as to equate the high standard of each type of sanction, noting that "the threshold of bad faith conduct for purposes of sanctions under the court's inherent powers is at least as high as the threshold of bad faith conduct for sanctions under § 1927." *Id.*

9. *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 906 (D.C. Cir. 1998).

10. *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1294–95 (9th Cir. 2015) (noting that several courts affirming § 1927 sanctions against law firms conflate the source of the authority).

the circuit split surrounding law firm sanctions under § 1927 should be easily resolved. Based on the recent history of district court sanctioning powers, the statute's relationship with other sanctioning powers, and sound statutory interpretation, the federal circuits should follow the Ninth Circuit's recent decision in *Kaass Law v. Wells Fargo Bank* and hold that law firm sanctions are inappropriate under § 1927.<sup>11</sup>

## I. BACKGROUND

### A. *Notable Examples of § 1927 Sanctions*

Before turning to the question of who can be appropriately sanctioned under the statute, it is important to get a sense of the types of behavior sanctionable under § 1927. Often these sanctions are awarded in addition to those awarded under Rule 11 and the court's inherent powers.

When an attorney violates Rule 11 by wrongly certifying the contents of a filing, the course of conduct attached to that filing may justify § 1927 sanctions. In *Shales v. General Chauffeurs*, the court upheld § 1927 sanctions of \$80,000 against an individual attorney.<sup>12</sup> There, the losers of a union election sued the winners under a number of theories based on "fanciful" allegations, including intentional infliction of emotional distress on the basis of a contrived threat of being fired and an asthma attack—by someone who had previously suffered asthma attacks for twenty-five years.<sup>13</sup> During discovery, it became clear that many of the claims were not based in fact, and the plaintiffs ignored letters by the defense demanding that those claims be dropped.<sup>14</sup> Once all of the claims were resolved in the defendants' favor, they sought sanctions against the plaintiffs' attorney under Rule 11 and § 1927 for failing to investigate the claims before filing the complaint and for pursuing the claims "long after it became clear that the allegations were unfounded."<sup>15</sup> After the district court reduced the requested sanctions from \$200,000 to \$80,000, the sanctioned attorney sought to have them reduced further, arguing that he had no malpractice insurance and that his only assets were "\$2,000 in cash, his watch, his clothing, and his wedding band."<sup>16</sup>

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11. *Id.* at 1295.

12. *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 748, 750 (7th Cir. 2009).

13. *Id.* at 747.

14. *Id.*

15. *Id.* at 747–48.

16. *Id.* at 748. The defendants argued that most of the attorney's assets were in his wife's name, raising "the odor of a fraudulent conveyance." *Id.* As a result, the district court denied his motion to reduce the sanctions. *Id.*

The Seventh Circuit upheld the lower court's refusal to reduce the sanctions.<sup>17</sup> Noting that § 1927 is a fee-shifting statute that relies on a finding of bad faith, the court found no reason the attorney should be "let off lightly."<sup>18</sup> According to Judge Easterbrook, a violation of § 1927 is a type of intentional tort, and the damages for punching someone in the mouth should not be reduced based on the batterer's lack of assets.<sup>19</sup> The same goes for a doctor who commits malpractice, regardless of whether the doctor's assets are in a relative's name.<sup>20</sup> As damages under § 1927 are compensatory rather than punitive, deterrence is achieved by making the attorney responsible for the actual cost of multiplying the proceedings, regardless of the attorney's ability to pay.<sup>21</sup>

Although such sanctions can range anywhere from a few hundred dollars to hundreds of thousands, courts have also found reason to sanction entire law firms under § 1927 for the unreasonable conduct of a few attorneys.<sup>22</sup> One egregious example was the subject of *U.S. Bank v. Sullivan-Moore*.<sup>23</sup> There, sixty-nine-year-old Mattie Sullivan-Moore took out a \$140,000 loan from U.S. Bank to refinance her home at 7744 South Carpenter in Chicago.<sup>24</sup> On behalf of U.S. Bank, the Fisher and Fisher law firm handled a foreclosure against Sullivan-Moore's home when she stopped making her mortgage payments.<sup>25</sup> Fisher and Fisher self-identified as a high-volume firm and received 10,000–12,000 cases per year—almost half of which were foreclosure cases.<sup>26</sup> The complaint in this case, however, misidentified Sullivan-Moore's address as 7742 South Carpenter, although the mortgage papers attached to the complaint correctly identified the address.<sup>27</sup> When a process server was unable to serve Sullivan-Moore, he reported to the firm that the resident at 7742 South

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17. *Shales*, 557 F.3d at 750.

18. *Id.* at 749.

19. *Id.*

20. *Id.*

21. *Id.* at 749–50. Judge Easterbrook did not mince words in rejecting the attorney's request for lenient treatment based on his inability to pay. In addition to noting that the attorney could file for bankruptcy if unable to pay the sanctions, the court suggested that if the attorney "really is a bad lawyer (as he depicts himself), and is poor because people are not willing to pay much, or at all, for his services, then he should turn from the practice of law to some other endeavor where he will do less harm." *Id.* at 750.

22. *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1233 (11th Cir. 2007) (reviewing a district court order of \$400,000 in sanctions under § 1927 against two attorneys and their law firm).

23. *U.S. Bank Nat. Ass'n v. Sullivan-Moore*, 406 F.3d 465, 469, 471 (7th Cir. 2005).

24. *Id.* at 467.

25. *Id.*

26. *Id.*

27. *Id.*

Carpenter did not know Sullivan-Moore.<sup>28</sup> The firm then moved for service by publication, and the incorrect address was again used.<sup>29</sup> Following a default order and judgment of foreclosure, the home at 7744 South Carpenter was sold to U.S. Bank.<sup>30</sup> Soon after the sale, the error was discovered only when the resident of 7742 South Carpenter and her lawyer phoned Sutherin, the Fisher and Fisher attorney assigned to the case, about an eviction notice sent to 7742 South Carpenter.<sup>31</sup> At this point, Sutherin and another attorney learned that the pleadings had contained the wrong address.<sup>32</sup>

Rather than determine whether Sullivan-Moore was actually served, Fisher and Fisher sought approval of the sale and later moved to correct the “scrivener’s error” in the complaint.<sup>33</sup> Sullivan-Moore was evicted, but when she attempted to move back in, Fisher and Fisher moved for a renewed order of possession so the Cook County Sheriff’s Department could help re-evict her.<sup>34</sup> The district court finally learned during the hearing on this motion that Sullivan-Moore had never been served.<sup>35</sup> When Sullivan-Moore argued she had never been served, Fisher, the new attorney assigned to the case, argued that Sullivan-Moore must have been served because she had been evicted—and that, at any rate, the case had already been “over for almost four months.”<sup>36</sup> Fisher conferred with Sutherin while the district court clerk retrieved the docket sheet, and the court concluded that the lack of service was not the type of problem to be cured by correcting “scrivener’s error.”<sup>37</sup> Only at that point did Sutherin move to vacate the order approving the sale, void the sale, and vacate the judgment.<sup>38</sup>

A month later, the court issued an order sua sponte requiring Fisher and Fisher to show cause why the firm should not be sanctioned under Rule 11 and § 1927.<sup>39</sup> Sullivan-Moore died while the order was pending.<sup>40</sup> The court released the individual attorneys from personal liability when the firm

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28. *Sullivan-Moore*, 406 F.3d at 467.

29. *Id.* at 467–68.

30. *Id.* at 468.

31. *Id.*

32. *Id.*

33. *Sullivan-Moore*, 406 F.3d at 468.

34. *Id.*

35. *Id.*

36. *Id.* Fisher also sought to prevent Sullivan-Moore’s daughter from speaking for her elderly mother in court, something the district court found especially distasteful. *Id.* at 469.

37. *Id.* at 468.

38. *Sullivan-Moore*, 406 F.3d at 468.

39. *Id.*

40. *Id.* at 469. The appellate court found no error in the lower court’s factual findings that the firm’s behavior was part of a “cover-up,” that its conduct was “indicative of a larger pattern of violations” of the FRCPs, and that its conduct accelerated Sullivan-Moore’s death. *Id.* at 470.

stipulated that any sanctions would run against the firm as a whole.<sup>41</sup> The court then issued sanctions against the firm under both sanctioning authorities.<sup>42</sup> The initial mistake, the court found, was “an honest one” that would not have justified sanctions.<sup>43</sup> However, in addition to wrongfully causing Sullivan-Moore’s eviction, the firm sought to re-evict her after at least two Fisher and Fisher attorneys knew or should have known that she never received adequate process.<sup>44</sup> While the appellate court primarily focused on the Rule 11 sanctions,<sup>45</sup> it also upheld a small award of expenses under § 1927.<sup>46</sup>

A pattern of indifference to the court’s authority may also lead to § 1927 law firm sanctions in addition to Rule 11 sanctions. In *Gurman v. Metro Housing and Redevelopment Authority*, the court awarded sanctions of \$15,000 under § 1927 and \$15,000 under Rule 11 against the entire law firm representing the plaintiffs.<sup>47</sup> There, attorneys in the firm brought three separate “kitchen-sink complaints,” in which it asserted hundreds of frivolous claims against ten defendants.<sup>48</sup> The first amended complaint contained 938 separate claims, and the third kitchen-sink complaint was filed *after* the firm had been sternly warned by the court not to make frivolous claims.<sup>49</sup> Even after being admonished by the court for violating Rules 8 and 11 and warned to “weed out the hundreds of plainly meritless claims,” plaintiffs’ second amended complaint contained 634 separate claims.<sup>50</sup>

While noting that an attorney cannot be sanctioned under § 1927 for filing a frivolous lawsuit,<sup>51</sup> the court found plenty of sanctionable conduct that followed the initial filing. Among other things, plaintiffs’ counsel brought malicious prosecution claims when none of the parties had been prosecuted.<sup>52</sup> The attorneys also asserted a claim for intentional infliction of emotional distress on behalf of a *company*, “even though common sense coupled with a modicum of legal research would have revealed that corporations do not have emotions and therefore cannot bring claims for emotional distress.”<sup>53</sup>

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41. *Id.* at 469.

42. *Id.*

43. *Sullivan-Moore*, 406 F.3d at 469.

44. *Id.*

45. The court found “nothing excessive or overly burdensome” about the lower court’s Rule 11 sanctions requiring “all Fisher and Fisher attorneys admitted in the Northern District of Illinois and any attorneys joining the firm within two years to attend or view a sixteen-hour course in federal subject matter jurisdiction and civil procedure.” *Id.* at 469, 471.

46. *Id.* at 470.

47. *Gurman v. Metro Hous. & Redev. Auth.*, 884 F. Supp. 2d 895, 912 (D. Minn. 2012).

48. *Id.* at 899.

49. *Id.* at 899, n.1.

50. *Id.*

51. *Id.* at 900.

52. *Gurman*, 884 F. Supp. 2d at 902.

53. *Id.*

Furthermore, the attorneys persisted in this argument, ignoring the court's instructions to specify which plaintiffs were asserting which claims against which defendants.<sup>54</sup>

The attorneys also made indisputably false allegations of defamation against each defendant, allegations that were contradicted by the exhibits attached to the complaint.<sup>55</sup> Incredibly, the court had even instructed the firm on *how to plead* defamation claims, but the firm's attorneys filed a second amended complaint that "blatantly disregarded" the court's specific instructions.<sup>56</sup> Criticizing the firm's "sue-everyone-for-everything approach" and unreasonable and vexatious multiplication of the proceedings, the court found that the firm violated Rule 11 and § 1927 through "reckless disregard" for its duties to the court.<sup>57</sup>

One would have trouble finding a more clear-cut case of vexatious and unreasonable conduct, and common sense would suggest that such conduct by the law firm is sanctionable.<sup>58</sup> However, despite common firm-wide involvement in the unreasonable and vexatious multiplication of proceedings, the federal circuits do not agree on whether such sanctions are appropriate. The history of the statute should give courts some guidance for finding § 1927 law firm sanctions inappropriate.

#### B. History of 28 U.S.C. § 1927

The history of 28 U.S.C. § 1927 until its revision in 1980 is neatly collected by the U.S. Supreme Court in *Roadway Express, Inc. v. Piper*.<sup>59</sup> The first version of the statute, which closely resembles the current version, appeared in 1813 and stated in full,

And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.<sup>60</sup>

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54. *Id.*

55. *Id.* at 903.

56. *Id.* at 904.

57. *Gurman*, 884 F. Supp. 2d at 905, 911–12.

58. The *Gurman* court acknowledged the circuit split on § 1927 law firm sanctions but followed the Eighth Circuit's implicit authorization of such sanctions. *Id.* at 905 n.6 (citing *Lee v. First Lenders Ins. Servs.*, 236 F.3d 443, 446 (8th Cir. 2001)).

59. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759–60 (1980).

60. An Act Concerning Suits and Costs in Courts of the United States, 3 Stat. 21 (1813). The statute initially arose from efforts by the Senate Committee appointed "to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice. . . ." *Roadway Express*, 447 U.S. at 759 (quoting 26 Annals of Cong. 29 (1813)).



The Court noted that, although the sparse legislative history makes the statute difficult to interpret, an 1842 letter from the Secretary of the Treasury to the U.S. House of Representatives suggests the statute was originally passed to address the perverse incentives for U.S. Attorneys, who were paid for their work on a piecemeal basis, to file unnecessary lawsuits to inflate their compensation.<sup>61</sup> In 1853, Congress approved a scheme setting fees and costs for all federal actions and re-enacting the predecessor statute, which eventually took its current position as 28 U.S.C. § 1927 in 1948.<sup>62</sup>

The Court found that the 1853 statute re-authorizing sanctions for “excess costs” and defining costs in the surrounding sections represented an intent by Congress to limit the available sanctions to costs alone, excluding attorney’s fees.<sup>63</sup> Roadway argued that since prevailing parties could now recover attorney’s fees in civil rights suits under a different statute, those recoveries should be read into the text of § 1927.<sup>64</sup> The Court rejected this line of reasoning, noting that selecting features of other rules “on an ad hoc basis” to be read into § 1927 would amount to “standardless judicial lawmaking.”<sup>65</sup> Although Congress was considering legislation to amend § 1927 to include “costs, expenses and attorney’s fees” at the time of *Roadway Express*, the Court found it should not look beyond the 1853 Act in determining costs—absent express modification of the statute by Congress.<sup>66</sup>

In late 1980, following *Roadway Express*, Congress amended § 1927, deleting “as to increase costs” following “any case” and substituting “the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct” for “such excess costs.”<sup>67</sup> Apart from these changes, the statute retained much of its original language. The statute itself provides little guidance on the meaning of its terms, and several circuit splits have grown out of each individual element, such as whether pro se litigants may be sanctioned,<sup>68</sup> the requisite mental state of the offending attorney,<sup>69</sup> and whether

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61. *Roadway Express*, 447 U.S. at 759 n.6.

62. *Id.* at 760 n.7.

63. *Id.* at 760.

64. *Id.* at 761.

65. *Id.* at 762.

66. *Roadway Express*, 447 U.S. at 760.

67. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156.

68. Kelsey Whitt, *The Split on Sanctioning Pro Se Litigants Under 28 U.S.C. § 1927: Choose Wisely When Picking a Side*, *Eighth Circuit*, 73 MO. L. REV. 1365, 1366 (2008).

69. Janet Eve Josselyn, *The Song of the Sirens – Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477, 481 (1990).

an attorney's ability to pay should factor into a court's determination of the appropriate amount of sanctions under § 1927.<sup>70</sup>

Despite the long history and seemingly straightforward wording of the statute, the federal circuits currently diverge on the question of whether law firms, in addition to individual attorneys, may be sanctioned under § 1927 for unreasonably and vexatiously multiplying the proceedings in a case. Some sources take it for granted that § 1927 sanctions against law firms are impermissible, despite the existence of the circuit split.<sup>71</sup> In 2010, Douglas J. Pepe even advised, "Don't try to get Section 1927 sanctions from a law firm."<sup>72</sup> Nevertheless, the majority of circuits with clear precedent on the issue have upheld law firm sanctions under § 1927, while a minority of circuits have rejected such sanctions. The U.S. Supreme Court has yet to chime in on the subject.

### C. History of the Circuit Split<sup>73</sup>

#### 1. Circuits Authorizing Law Firm Sanctions Under § 1927

The Second Circuit has upheld § 1927 law firm sanctions arising from attorney misconduct during discovery. In *Apex Oil v. Belcher Co. of New York*, the Second Circuit ordered § 1927 sanctions against a law firm for various discovery abuses that forced the opposing party to move to compel "complete production of documents, supplemental responses to requests for admissions,

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70. Ardiola Sinaj, *Attorneys' Ability to Pay Sanctions Under 28 U.S.C. § 1927*, 15 J. L. SOCIETY 335, 337 (2014).

71. See, e.g., 35B C.J.S. *Federal Civil Procedure* § 1406 (2014) ("Sanctions under the statute governing counsel liability for unreasonable and vexatious multiplication of proceedings may not be imposed on law firms but are limited to individual attorneys."); Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-Vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 682 (2004) ("Who can be sanctioned also depends on the sanctioning provision being used. Sanctions under 28 U.S.C. § 1927, for example, may only be imposed on attorneys; it does not apply to clients or pro se litigants. Sanctions under both Rule 11 and the court's inherent power, in contrast, can be imposed against attorneys and their law firms, the parties, and pro se litigants.").

72. Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, LITIGATION, Winter 2010, at 24.

73. This section discusses the stances of the federal circuits that have either implicitly or explicitly answered the question of § 1927 law firm sanctions. Not all circuits have given a definitive answer. For instance, the Fourth Circuit reversed an order of law firm sanctions under the court's inherent powers (there dubbed the "bad faith exception to the American Rule"), Rule 11, and § 1927 for failure to adequately specify the sanctionable conduct, but declining to definitively answer the question of whether law firms may be sanctioned under any of those sanctioning powers. *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 549 (4th Cir. 1990). However, in the context of pre-1993 Rule 11 analysis, the Fourth Circuit did note that it was "doubtful that the other sanctions theories will support sanctions against an entire firm rather than against the individual lawyers who acted improperly." *Id.*

and identification of Belcher's expert witness."<sup>74</sup> The court did not stop to consider whether Rules 26 or 37 provided a remedy for Belcher's failure to cooperate during discovery until facing a motion to compel.<sup>75</sup> Rather than simply comply with Apex's discovery requests, defense counsel repeatedly told them to "make a motion" and "mysteriously" complied with Apex's requests only after Apex went to the expense of making each motion.<sup>76</sup> Violation of the local rules requiring a good faith effort to settle such disputes informally was enough for the court to conclude that § 1927 sanctions against the law firm were justified.<sup>77</sup>

The Third Circuit has found that attempts to avoid an agreed-upon arbitration may justify § 1927 law firm sanctions. One of the earliest cases cited in recent § 1927 decisions discussing the circuit split is *Baker Industries v. Cerberus*, in which the Third Circuit affirmed a lower court's sanctions against a law firm under § 1927.<sup>78</sup> In *Baker*, the law firm waived its client's right to review, instead stipulating to the appointment of a referee to help avoid costly and time-consuming litigation.<sup>79</sup> Once the firm found the arbitration unfavorable, it attempted to avoid the stipulation that the matter was unreviewable and instead sought judicial review of the matter.<sup>80</sup> The Third Circuit did not explicitly draw a distinction between attorneys and law firms for purposes of the statute and instead focused much of its attention on the question of bad faith.<sup>81</sup>

The Eighth Circuit has upheld § 1927 law firm sanctions for lengthy discovery and motion practice attached to a frivolous lawsuit. In *Lee v. First Lenders*, the Eighth Circuit implicitly held that law firm sanctions are authorized by § 1927 by simply affirming the lower court's award of § 1927 sanctions against a law firm.<sup>82</sup> Without first investigating the claims asserted, the law firm in that case filed a baseless class action lawsuit that dominated discovery and motion practice for over a year and a half before abandoning the class allegations without explanation.<sup>83</sup> The court found the firm's conduct multiplied the proceedings vexatiously and unreasonably and affirmed the \$15,000 award against the firm under § 1927.<sup>84</sup>

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74. *Apex Oil Co. v. Belcher Co. of NY*, 855 F.2d 1009, 1019–20 (2d Cir. 1988).

75. *Id.* at 1019.

76. *Id.* at 1020.

77. *Id.* For more on the Second Circuit's endorsement of § 1927 law firm sanctions, see *infra*, Section II-0.

78. *Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 212 (3d Cir. 1985).

79. *Id.* at 211.

80. *Id.*

81. *Id.* at 208.

82. *Lee v. First Lenders Ins. Servs.*, 236 F.3d 443, 446 (8th Cir. 2001).

83. *Id.* at 445.

84. *Id.* at 446.

The Eleventh Circuit has upheld § 1927 law firm sanctions where the costs of maintaining a frivolous lawsuit far exceed any potential recovery. Recent cases cite *Avirgan v. Hull*, in which the Eleventh Circuit upheld a district court's award of sanctions against a public interest law firm for filing and maintaining a frivolous lawsuit.<sup>85</sup> The appellants admitted during oral argument that they had spent over two million dollars litigating their claim despite not expecting to recover even half that amount, so the court found no difficulty in holding that the firm had unreasonably and vexatiously multiplied the proceedings.<sup>86</sup> The court drew no distinction between "litigants, counsel, and law firms" subject to sanctions under a "bad-faith exception" and affirmed the lower court's § 1927 sanctions against the law firm.<sup>87</sup>

The D.C. Circuit has upheld § 1927 law firm sanctions where indefinite delay of the proceedings appears to be the primary purpose of attorney conduct. In *LaPrade v. Kidder Peabody & Co.*, the D.C. Circuit affirmed a district court award of § 1927 sanctions against a law firm.<sup>88</sup> Although providing little rationale for its decision to sanction the firm as such, the court found the firm's behavior satisfied the standard of vexatious and unreasonable multiplication of the proceedings.<sup>89</sup> Four and a half years after the initial lawsuit in federal district court was stayed and following extensive discovery, the law firm filed an ex parte action in New York state court to stay the hearings—which were set to restart after a seventeen-month delay.<sup>90</sup> The firm failed to inform the state court of the federal district court's orders and ongoing jurisdiction, which the D.C. Circuit found to justify § 1927 sanctions against the firm.<sup>91</sup>

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85. *Avirgan v. Hull*, 932 F.2d 1572, 1582–83 (11th Cir. 1991). There, the plaintiffs' law firm claimed to have seventy-nine witnesses who knew the defendants set the bomb that injured the plaintiffs, but the firm refused to identify the majority of them until ordered to do so by the court. *Id.* at 1581. Appealing this order delayed discovery by many months, but once the firm complied with the order, it became clear that the named witnesses either did not know the lead attorney or the plaintiffs, denied the statements attributed to them, or could only provide inadmissible hearsay. *Id.*

86. *Id.* at 1582 n.13.

87. *Id.* at 1582. The lower court ordered sanctions against the law firm "coextensively" under the bad faith exception, Rule 11, and § 1927. *Avirgan v. Hull*, 705 F. Supp. 1544, 1549 n.5 (S.D. Fla. 1989) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975) (acknowledging the court's inherent power to award attorney's fees—under an exception to the general rule that successful litigants cannot recover attorney's fees—when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons.")).

88. *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 907 (D.C. Cir. 1998).

89. *Id.* at 905.

90. *Id.*

91. *Id.*

## 2. Circuits Rejecting Law Firm Sanctions Under § 1927

The Seventh Circuit has definitively rejected the possibility of § 1927 law firm sanctions, even where a law firm was on notice of its attorney's past misconduct. The Seventh Circuit reversed a trial court order of § 1927 sanctions against a law firm in *Claiborne v. Wisdom*, an influential case in the history of the circuit split.<sup>92</sup> In support of its decision, the court compared the language of § 1927 with that of the pre-1993 version of Rule 11.<sup>93</sup> Prior to the 1993 Amendment, Rule 11 empowered federal courts to impose sanctions on "the person who signed" an offending document.<sup>94</sup> The U.S. Supreme Court eventually decided that such language could not authorize sanctions on a law firm and applied only to the individual who signed the offending document.<sup>95</sup> The *Claiborne* court saw an identical situation in interpreting § 1927 and held that the statutory language could not be stretched to include law firms as persons.<sup>96</sup> Furthermore, as law firms cannot be admitted to practice before any tribunal, the § 1927 sanctions against the firm were reversed, despite the close connections between the attorney's actions and those of the firm and the fact that the firm had been on notice of the attorney's subpar performance in previous cases.<sup>97</sup> In fact, a court had previously directed the firm's senior partner to supervise the offending attorney.<sup>98</sup> Although the court recognized the law firm's conduct as egregious, the defendant's reliance on § 1927 rather than Rule 11 or the court's inherent powers resulted in no sanctions against the law firm.<sup>99</sup>

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92. *Claiborne v. Wisdom*, 414 F.3d 715, 724 (7th Cir. 2005). Interestingly, the § 1927 law firm sanctions in *Sullivan-Moore* were upheld a mere three months prior to the landmark decision in *Claiborne*. *U.S. Bank Nat'l Ass'n v. Sullivan-Moore*, 406 F.3d 465, 469, 471 (7th Cir. 2005). In *Claiborne*, the plaintiff filed a complaint alleging she had suffered sexual harassment in her apartment building by the apartment manager and was evicted after rejecting his advances, an experience that *Claiborne* alleged several other women had suffered. *Claiborne*, 414 F.3d at 717–18. The complaint also alleged that *Claiborne* and her attorney had interviewed these corroborating witnesses prior to filing suit. *Id.* at 718. However, after several of those witnesses were deposed, *Claiborne* moved to voluntarily dismiss the action, claiming that "[t]o the complete surprise and shock of Plaintiff and her counsel, the witnesses denied making the above-referenced statements and they accused Plaintiff and her counsel of fabricating the claims." *Id.* After dismissing the claims with prejudice, the district court eventually found the attorney and her law firm jointly and severally liable for \$107,845.77 under § 1927. *Id.*

93. *Claiborne*, 414 F. 3d at 723.

94. *Id.*

95. *Id.* (citing *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 121 (1989)).

96. *Id.*

97. *Id.* at 724.

98. *Claiborne*, 414 F.3d at 724.

99. *Id.* Acknowledging the outcome of the case as troubling, the *Claiborne* court directed the offending attorney as well as the supervising partner to show cause why they should not be

The Sixth Circuit similarly rejected the prospect of § 1927 law firm sanctions, refusing to stretch the definition of “person” to include law firms. In *BDT Products v. Lexmark*, the Sixth Circuit reversed a district court order of § 1927 law firm sanctions and formalized previous Sixth Circuit dicta that § 1927 “does not authorize the imposition of sanctions on a represented party, nor does it authorize the imposition of sanctions on a law firm.”<sup>100</sup> The court relied primarily on the Seventh Circuit’s “well-reasoned” analysis in *Claiborne* and found that “[e]ven if firms can admittedly be personified in a literary sense through briefs,” a law firm should not be considered a “person” under the statute since law firms are not “admitted” to “conduct cases” in any court.<sup>101</sup>

The Ninth Circuit has held that § 1927 law firm sanctions are an inappropriate application of the statute when it is within Congress’s power to explicitly authorize such sanctions. The Ninth Circuit recently deepened the circuit split in *Kaass Law v. Wells Fargo Bank*, in which the court unambiguously rejected the reasoning of its sister circuits that allow § 1927 law firm sanctions.<sup>102</sup> In 2012, an attorney with Kaass Law filed a complaint alleging misconduct by ten different defendants, including Wells Fargo, for reporting adverse information about the plaintiff to credit agencies, which affected the plaintiff’s credit report.<sup>103</sup> Rather than responding to the defendants’ motions to dismiss, the attorney filed a motion to amend the complaint.<sup>104</sup> In the original complaint, however, the attorney failed to differentiate the defendants’ alleged wrongful acts or provide factual support for the claims, and in its motion to recover attorney’s fees and costs following dismissal, Wells Fargo alleged that Kaass Law had a practice of filing “canned” complaints.<sup>105</sup> The trial court awarded § 1927 sanctions against the law firm rather than the individual attorney, and the firm appealed.<sup>106</sup> After surveying the preceding case law on the subject, including favorable citations to *Claiborne* and *BDT Products*, the Ninth Circuit concluded that if Congress had intended the statute to support sanctions against law firms, it would have expressly authorized the courts to do so in the statute.<sup>107</sup>

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disciplined. *Id.* The court suggested the law firm may still be liable under state law for the actions of its lawyer-employee taken in the scope of employment. *Id.* at 723–24.

100. *BDT Products, Inc. v. Lexmark Int’l, Inc.*, 602 F.3d 742, 750 (6th Cir. 2010) (quoting *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 n.6 (6th Cir. 2009)).

101. *Id.* at 750–51.

102. *Kaass Law v. Wells Fargo Bank*, 799 F.3d 1290, 1293 (9th Cir. 2015).

103. *Id.* at 1291.

104. *Id.*

105. *Id.* at 1292.

106. *Id.*

107. *Kaass Law*, 799 F.3d at 1295. Additionally, the court rejected Wells Fargo’s argument that the sanctions should be upheld under the district court’s inherent powers, as the district court

Although it is not the only case discussing the circuit split, *Kaass Law* is particularly instructive of the weight of authority against law firm sanctions under § 1927 due to its in-depth survey of the circuits and close reading of the statute, whereas the circuits still embracing law firm sanctions under § 1927 generally rely on common practice or conflation of sanctioning authorities rather than analyzing the text and purpose of the statute.

## II. DETERMINING LIMITS ON THE SCOPE OF THE SANCTIONING POWERS

### A. *Conflation of Sanctioning Authority*

Courts have often conflated the source of the sanctioning power when affirming sanctions on appeal.<sup>108</sup> In *Enmon v. Prospect Capital*, for instance, the Second Circuit upheld the lower court's ability to sanction an entire law firm under § 1927 and inherent powers when an attorney in the firm voluntarily withdrew a frivolous motion appealing the lower court's decision to sanction the firm.<sup>109</sup> In upholding the lower court order, the Second Circuit sought to prevent malicious law firms from "manipulat[ing] the appeals process like a yo-yo."<sup>110</sup> Rather than parsing the statute itself, the Second Circuit reasoned that since the district court had authority to sanction law firms under its inherent authority, there was no reason to apply a different rule to its § 1927 sanctioning power.<sup>111</sup> The Second Circuit cited its previous decisions, the longstanding practice among the district courts of the Second Circuit, and decisions by its sister circuits in finding § 1927 sanctions against law firms appropriate.<sup>112</sup> Ultimately, the court upheld a sanction of \$354,559 against the firm for fees accumulated in connection with its representation in the case.<sup>113</sup> It also affirmed the lower court's ability to require the firm's lawyers to submit the sanctions order along with any future pro hac vice applications in the Southern District of New York and merely remanded for the district court to determine whether any time limitations should be placed on the order.<sup>114</sup> However, the Second Circuit did not explicitly distinguish the underlying

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ordered the sanctions solely on the basis of § 1927 and Wells Fargo did not originally request the sanctions under the court's inherent powers. *Id.*

108. See, e.g., *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009) ("These decisions lump together analysis under Rule 11 and § 1927, apparently because the parties did the same. For reasons we have given, it is necessary to distinguish these two sources of authority.").

109. *Enmon v. Prospect Capital Corp.*, 675 F.3d 138, 147 (2d Cir. 2012).

110. *Id.*

111. *Id.*

112. *Id.* at 147–48.

113. *Id.* at 148–49.

114. *Enmon*, 675 F.3d at 148.

authority for the sanctions, adding to the confusion about which sanctioning authority was in play.

*B. Law Firm Sanctions Under Rule 11*

To better distinguish what § 1927 authorizes from what it does not, it is essential to look to the alternative means of sanctions provided by the Federal Rules of Civil Procedure and a court's inherent powers. First, the primary sanctioning authority for individual filings with the court is Rule 11.<sup>115</sup> Under Rule 11, every filing with the court must be signed by at least one attorney or the party if unrepresented, certifying that the representation made to the court is, among other guarantees, "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."<sup>116</sup> Rule 11 also explicitly authorizes sanctions against law firms, although this authorization is a relatively recent milestone in the life of the Federal Rules.<sup>117</sup> The text of Rule 11 prior to the 1993 Amendment authorized sanctions against "the person who signed" but not entire law firms.<sup>118</sup>

Clumsy writing may not be an absolute bar to courts constructing a rule or statute to meet the challenges that rule-makers may have had in mind at enactment. However, in the context of law firm sanctions under Rule 11 prior to the 1993 Amendment, the U.S. Supreme Court stated in *Pavelic & LeFlore v. Marvel Entertainment Group* that "[e]ven if it were entirely certain that liability on the part of [a law] firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual interpretation as unnatural" as to read the phrase "the person who signed" to include the law firm employing the signing attorney.<sup>119</sup> The updated language of Rule 11 provides some support for the argument that § 1927 either should not encompass law firm sanctions or should be amended to explicitly authorize them. Courts have considered whether the standard analysis of § 1927 sanctions should change in light of the 1993 Amendment to Rule 11, authorizing sanctions against "any attorney, law firm, or party" responsible for the violations.<sup>120</sup> The amended rule even provides specific guidance on sanctioning law firms, stating that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee."<sup>121</sup> Naturally, given the 1993

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115. FED. R. CIV. P. 11.

116. FED. R. CIV. P. 11(a)-(b)(1).

117. FED. R. CIV. P. 11(c)(1).

118. FED. R. CIV. P. 11 advisory committee's note to 1993 amendment.

119. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 125-26 (1989). The Court continued, "[o]ur task is to apply the text, not to improve upon it." *Id.* at 126.

120. FED. R. CIV. P. 11(c)(1).

121. *Id.*



expansion of sanctions under Rule 11, it is often invoked in order to recover the costs of responding to unnecessary filings.

*C. Law Firm Sanctions Under the Court's Inherent Powers*

A second alternative to § 1927 sanctions derives from a court's inherent powers in circumstances where a litigant or attorney demonstrates bad faith. As the U.S. Supreme Court has noted, federal courts have authority that does not derive from a statute or rule but by necessity allows them to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."<sup>122</sup> The most prominent of the inherent powers is the contempt power, by which the court preserves the authority and dignity of the court,<sup>123</sup> but other inherent powers include the court's ability to assess attorney's fees when litigants or attorneys act "in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>124</sup> This so-called "bad-faith exception" is not limited to lawsuits filed in bad faith but also extends to conduct during litigation.<sup>125</sup> Due to the limited nature of law firm sanctions under Rule 11 and the inherent textual limitations of § 1927, perhaps law firm sanctions for an egregious course of conduct should be reserved to the court's inherent powers.

*D. Why Choose § 1927 Over Alternative Sanctioning Authorities?*

Given a court's ability to sanction law firms under Rule 11 and the court's inherent powers, why would a party seek sanctions under § 1927 rather than—or in addition to—Rule 11? Furthermore, why seek § 1927 sanctions despite the inherent limitations of the statute when, as one commentator has noted, the court's inherent sanctioning powers are "as broad as the imagination"?<sup>126</sup> First, the relatively limited scope of Rule 11 could explain a litigator's choice of seeking sanctions under § 1927. Rule 11 sanctions are necessarily tied to individual filings, and the attorney's conduct is judged at the time of signing.<sup>127</sup> In addition, Rule 11 does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.<sup>128</sup> Importantly, Rules 26 through 37 do not specifically address law firm sanctions.<sup>129</sup> Finally, rather than Rule 11, Rule 38 of the Federal Rules of

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122. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

123. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

124. *Id.* at 766.

125. *Id.*

126. Pepe, *supra* note 72, at 27.

127. Josselyn, *supra* note 69, at 477 n.3.

128. FED. R. CIV. P. 11(d).

129. The FRCPs governing discovery practice do not explicitly authorize law firm sanctions of any kind. Rule 26 authorizes sanctions on "the signer, the party on whose behalf the signer was acting, or both." FED. R. CIV. P. 26(g)(3). Rule 30 allows a court to impose sanctions, including expenses, on a "person" who disrupts a deposition. FED. R. CIV. P. 30(d)(2). The "person"

Appellate Procedure governs sanctions at the appellate level on “attorneys responsible for filing frivolous appeals.”<sup>130</sup> Courts have nevertheless upheld § 1927 sanctions related to misconduct in all of those contexts.

Some have also suggested that the revisions to Rule 11 have made it harder to obtain Rule 11 sanctions.<sup>131</sup> Although under Rule 11 a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee, a significant safe harbor limits the applicability of this rule.<sup>132</sup> Rule 11(c)(2) states that the motion for sanctions under Rule 11 must be served on the offending party but “not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.”<sup>133</sup> The court may impose sanctions, including attorney’s fees, on the attorney or law firm only after notice and a reasonable opportunity to respond.<sup>134</sup> These procedural difficulties might explain in part the motivation for seeking sanctions under § 1927 despite the explicit mention of “law firms” in Rule 11. In fact, there is evidence to suggest that requests for sanctions under § 1927 are increasing—and Rule 11 sanctions requests are *decreasing*—due to requestors’ “failure to comply, either as a tactical decision or inadvertently, with Rule 11’s procedural requirements.”<sup>135</sup> One study showed that four district courts have seen increasing reliance on § 1927 in the years following the 1993 Amendment to Rule 11.<sup>136</sup>

Nevertheless, while facially distinct, the main sources of sanctioning authority often overlap in practice, giving a litigant multiple avenues for addressing the same attorney misconduct. For example, whereas Rules 26(g) and 37 are used to discourage specific abuses during discovery, § 1927 applies broadly to an entire course of conduct and has been cited along with Rules 26

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language of Rule 30 poses the same difficulty as the text of § 1927. The advisory committee’s note states that the court may sanction “any person” frustrating a deposition. FED. R. CIV. P. 30 advisory committee’s note to 2000 amendment. Rule 33 does not authorize law firm sanctions. The advisory committee has noted that Rule 33 should be read in light of Rule 26(g), which authorizes sanctions against a party and the party’s attorney for unfounded objections to interrogatories. FED. R. CIV. P. 33 advisory committee’s note to 1993 amendment. The force of Rule 36’s prohibition on failure to admit or failure to inform oneself before answering rests on the sanctioning power of Rule 37. FED. R. CIV. P. 36 advisory committee’s note to 1970 amendment. However, Rule 37 contains no explicit authorization of law firm sanctions, authorizing only sanctions against a party or the party’s attorney. FED. R. CIV. P. 37(d)(3).

130. Josselyn, *supra* note 69, at 477 n.3.

131. Sinaj, *supra* note 70, at 345.

132. FED. R. CIV. P. 11(c).

133. FED. R. CIV. P. 11(c)(2).

134. FED. R. CIV. P. 11(c)(1).

135. Hart, *supra* note 71, at 662–63.

136. Whitt, *supra* note 68.

and 37 as a source of sanctions for e-discovery misconduct.<sup>137</sup> Given this possibility of overlap, it appears that § 1927 could potentially be used as a catchall sanctioning authority once a pattern of abusive behavior becomes apparent.<sup>138</sup> As a result, substantial monetary sanctions under § 1927—well in excess of those available under Rule 11 for any individual filing—may come without warning and without the possibility of Rule 11’s safe harbor protection.<sup>139</sup>

Next, some support for the decision to seek sanctions under § 1927 can be found in notes by the drafters of Rule 11. The advisory committee’s note following the 1993 amendment to Rule 11 explicitly states that Rule 11 should not be construed to supplant statutes authorizing awards of attorney’s fees to prevailing parties or to “alter the principles governing such awards.”<sup>140</sup> According to the advisory committee, Rule 11 also should not be construed as limiting the court’s ability to exercise its inherent powers or to impose sanctions authorized by other rules or § 1927.<sup>141</sup> Furthermore, the advisory committee cites *Chambers v. NASCO*, which cautions against relying on the court’s inherent powers to issue sanctions when appropriate sanctions can be imposed under provisions such as Rule 11.<sup>142</sup> Consequently, a litigant may choose to seek sanctions under § 1927 as an alternative or in addition to other sanctioning powers on the basis of these guidelines.

Finally, an aggrieved party may seek law firm sanctions under § 1927 rather than or in addition to an Federal Rules of Civil Procedure for purely monetary reasons. As the Seventh Circuit noted in *Shales*, the amount of Rule 11 sanctions “must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>143</sup> As a result, the attorney’s ability to pay is relevant to the determination of appropriate monetary sanctions under Rule 11, and awards may be higher or lower depending on the deterrent value of the sanctions. No such limitation exists in the text of § 1927. Although the effect is deterrent, damages under the statute

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137. Dan H. Willoughby, Jr. et. al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 817 (2010).

138. *But see* *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003) (noting the plain language of the statute makes clear that § 1927 is not a catch-all for objectionable conduct and that an attorney’s conduct must be both unreasonable *and* vexatious, necessarily multiplying the proceedings).

139. Glenn J. Waldman, *Federal Court Sanctions Against Attorneys Under 28 U.S.C. § 1927: The 11th Circuit Court of Appeals Attempts to Divide the Standard for Multiplying the Proceedings in Bad Faith*, FLA. B.J., Jan. 2007, at 17.

140. FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment.

141. *Id.*

142. *Id.*; *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991).

143. *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 748–49 (7th Cir. 2009) (noting that “[t]he poorer the lawyer, the lower the sanction can be and still deter repetition by the lawyer or anyone similarly situated”); FED. R. CIV. P. 11(c)(4).

are compensatory, not punitive.<sup>144</sup> Consequently, while a court may have discretion in calculating the amount of “excess costs, expenses, and attorneys’ fees reasonably incurred” due to attorney misconduct,<sup>145</sup> that amount will hinge on the actual costs of litigation.

In sum, for strategic and monetary reasons, a party might reasonably request sanctions against a law firm under § 1927 rather than the other sanctioning authorities at one’s disposal. However, given the Ninth Circuit’s recent decision in *Kaass Law*, there is a growing question as to whether the opposing circuits are appropriately applying the statute. In short, the most well-supported interpretation of the statute, based on its text, history, and purpose, does not support law firm sanctions.

### III. ANALYSIS

#### A. *Law Firm Sanctions Are Not Authorized by the Text of § 1927*

The plain meaning of § 1927 militates against its application to law firms. A similar interpretive question arose in *Pavelic & LeFlore*, where Justice Scalia’s majority opinion concluded that the narrow “person who signed” language of Rule 11 did not permit law firm sanctions.<sup>146</sup> Unsurprisingly, Justice Scalia’s interpretation of Rule 11 relied on the plain meaning of Rule 11 at the time of decision,<sup>147</sup> an approach that would undermine the application of § 1927 used by the majority of federal circuits. Justice Scalia noted that the Supreme Court gives the Federal Rules their plain meaning, and when the Court finds the terms of a statute or Federal Rule to be “unambiguous, judicial inquiry is complete.”<sup>148</sup> For the pre-1993 version of Rule 11, the phrase “person who signed” appeared to be ambiguous on the issue of law firm sanctions only until read in the context of the surrounding words requiring an attorney of record or unrepresented party to sign all pleadings individually.<sup>149</sup> The Court found that since the signature requirement applied to individuals, “the recited import and consequences of signature run *as to him*.”<sup>150</sup>

Considered in isolation, the term “other person” in § 1927 could presumably include both natural and non-natural persons, such as

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144. *Shales*, 557 F.3d at 749. *But see* Josselyn, *supra* note 69, at 480 (arguing that § 1927 is penal in nature, therefore requiring strict construction “so as not to chill an attorney’s creativity in putting forth novel and creative legal theories”).

145. 28 U.S.C. § 1927 (2012); *see Shales*, 557 F.3d at 748–50 (affirming the lower court’s award of § 1927 sanctions after the lower court reduced the requested sanctions from \$200,000 to \$80,000).

146. *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126–27 (1989).

147. *Id.* at 126.

148. *Id.* at 123 (citing *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

149. *Id.*

150. *Id.* at 124.

corporations.<sup>151</sup> However, any apparent ambiguity quickly dissolves when the phrase is read in context. When contrasted with the term “attorney,” the phrase “other person admitted to conduct cases” appears to target pro se litigants. Although there remains some dispute about whether the phrase adequately specifies pro se litigants,<sup>152</sup> unrepresented parties are in fact authorized by federal statute to “plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”<sup>153</sup> Even if pro se litigants are not covered by § 1927, a natural reading of the statute would also exclude corporate entities, such as law firms. Corporate entities are not “admitted to conduct cases in any court of the United States or any Territory thereof,” as admission to conduct cases is granted to natural persons.<sup>154</sup> Corporations generally cannot appear in court or conduct litigation pro se and may only appear in a federal court through an attorney admitted to practice in that court.<sup>155</sup> Furthermore, the remaining text of the statute narrows the permissible interpretation further by requiring the “attorney or other person admitted to conduct cases” to “satisfy personally” the costs arising from the person’s misconduct during litigation.<sup>156</sup>

None of the circuits authorizing § 1927 law firm sanctions cite any authority suggesting that the definition of “person,” when constrained by the surrounding text of the statute, includes law firms. In addition, as noted by the Ninth Circuit in *Kaass Law*, the *expressio unius* principle of statutory construction supports a limited construction of “‘attorneys’ or ‘other person admitted to conduct cases’” that excludes law firms.<sup>157</sup> Finally, even if law

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151. Justice Marshall, the sole dissenter in *Pavelic & LeFlore*, argued that the drafters of Rule 11 were sufficiently familiar with traditional legal concepts that it is not unreasonable to believe that “person” includes more than natural persons. *Pavelic & LeFlore*, 493 U.S. at 127–28 (Marshall, J., dissenting). Citing the expansive definition of “person” provided by the Administrative Procedure Act and New York partnership law, Justice Marshall found the majority’s plain meaning interpretation of the Rule was not the only reasonable interpretation—and certainly not more plausible than the alternative. *Id.* at 128–29. However, Justice Marshall overstated his case by attempting to distinguish the “person who signed” with the “signer” and appealing to partnership law. *Id.* at 128. Rule 11 sanctions attach to violations of the signer’s non-delegable duty to certify the contents of every pleading, motion, or paper filed with the court.

152. Whitt, *supra* note 68, at 1371 (discussing a circuit split on the question of applicability of § 1927 sanctions to pro se litigants).

153. 28 U.S.C. § 1654 (2012).

154. *See Claiborne v. Wisdom*, 414 F.3d 715, 721, 723 (7th Cir. 2005) (citing local court rules allowing admission of individual attorneys as well as certain non-attorneys, including supervised law students); 28 U.S.C. § 1927 (2012).

155. 19 C.J.S. *Corporations* § 796 (2016).

156. 28 U.S.C. § 1927.

157. *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1294 (9th Cir. 2015). The *expressio unius* canon of statutory construction is based on the Latin maxim, “*expressio unius est exclusio alterius*,” meaning the express inclusion of one term in a statute implies the exclusion of other, unlisted terms. Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 911 n.1 (2016).

firms were not as prominent when the statute was passed in 1813, the statute has been updated over the years without any mention of law firms. As a result, the text of the statute provides no evidence that Congress had corporate, non-natural persons in mind when retaining much of the statute's original language in its most recent revision to § 1927.

A recent Bankruptcy Court case in the First Circuit took a different approach to interpreting the statute.<sup>158</sup> In *MJS Las Croabas Properties, Inc.*, the Bankruptcy Appellate Panel of the First Circuit held that the “attorney or other person” language of § 1927 includes law firms.<sup>159</sup> In addition to finding “tacit approval” of such sanctions by the First Circuit,<sup>160</sup> the court endorsed the rationale of *Brignoli v. Balch Hardy & Scheinman*, a 1990 decision from the Southern District of New York.<sup>161</sup> The *Brignoli* court found the term “personally” to be targeting attorney conduct rather than that of an irresponsible client, giving the term “a rather distinctive meaning.”<sup>162</sup> The *Brignoli* court then focused on the attorney “or other person admitted to conduct cases” language of § 1927 to find a Congressional intent to regulate “entities who ‘conduct cases,’” which the court determined is “a statutory class or category into which law firms naturally fall.”<sup>163</sup> As a result, the *Brignoli* court concluded, the terms of § 1927 do not “disfavor” sanctioning law firms.<sup>164</sup>

Not only are the interpretive gymnastics of *Brignoli* unconvincing, but the *MJS Las Croabas* court provided little analysis of its own while affording a cursory glance at more persuasive, contrary case law from other circuits, including *Claiborne* and *Kaass Law*.<sup>165</sup> Crucially, neither *MJS Las Croabas* nor *Brignoli* analyzed the limiting term “admitted,” which in context requires an attorney or other person who conducts cases in a federal court to be *admitted* to conduct cases. Even if the *Brignoli* court's interpretation is a permissible one, an analysis which gives effect to *each* of the operative terms of the statute should tip the scales in favor of a more limited construction which precludes application to law firms.

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158. *MJS Las Croabas Properties, Inc.*, 545 B.R. 401, 420–21 (B.A.P. 1st Cir. 2016).

159. *Id.* at 421.

160. *Id.* In *Jensen v. Phillips Screw Co.*, the First Circuit reviewed a lower court's award of § 1927 sanctions against a law firm but vacated the sanctions and remanded on unrelated grounds without deciding whether § 1927 applies to law firms. 546 F.3d 59, 68 (1st Cir. 2008).

161. *MJS Las Croabas Properties, Inc.*, 545 B.R. at 420–21 (citing *Brignoli v. Balch Hardy & Scheinman, Inc.*, 735 F. Supp. 100, 101–02 (S.D.N.Y. 1990)).

162. *Id.* (quoting *Brignoli*, 735 F. Supp. at 101).

163. *Id.* (quoting *Brignoli*, 735 F. Supp. at 102).

164. *Id.* (quoting *Brignoli*, 735 F. Supp. at 102).

165. *Id.* at 420–21.

A. *Deterrence Through Reimbursement, the Historical and Contemporary Purpose of the Statute, Does Not Support § 1927 Law Firm Sanctions*

If the primary purpose of sanctions under the statute is deterrence of similar behavior through reimbursement of excess costs, deterrence may be achieved by holding individual attorneys personally responsible. The statutory history collected in *Roadway* suggests the historical purpose of the statute was to affect attorney behavior by removing any incentive an attorney may have otherwise had to increase the costs of litigation in order to line their own pockets.<sup>166</sup> However, the amount of sanctions available under the current formulation of § 1927 does not vary based on criteria other than the actual “excess costs, expenses, and attorneys’ fees reasonably incurred,”<sup>167</sup> suggesting that the purpose of the statute is satisfied once those amounts are paid. That purpose can be achieved regardless of whether those costs are recovered from the attorney of record or an affiliated law firm. Perhaps the deeper pockets of a large law firm would guarantee timely payment of the sanctions,<sup>168</sup> but the statute itself supplies no reason to believe that ability to pay should determine *who* pays. Indeed, in *Shales*, Judge Easterbrook even suggested the offending attorney should file for bankruptcy if unable to pay the § 1927 sanctions.<sup>169</sup>

Luckily, Congress itself provides some guidance on the question. The 1980 House Conference Report discussing the new amendments to § 1927 contains repeated references to “an attorney” or “the attorney” who will be required to satisfy “personally” the costs generated by “his” dilatory conduct in litigation.<sup>170</sup> The Report provides support for the idea that only natural persons are meant to be covered by the statute, as the drafters expressed an intent “that

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166. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759–60 (1980).

167. 28 U.S.C. § 1927 (2012). As noted above, the fee-shifting of § 1927 differs from Rule 11 sanctions in that the monetary amount of Rule 11 sanctions can vary according to the deterrent effect, apart from the actual expenses incurred by the requesting party. By contrast, sanctions under § 1927 are necessarily grounded in the “excess costs, expenses, and attorneys’ fees reasonably incurred” by the requesting party as a result of attorney misconduct. See *supra*, Section II-D.

168. However, nothing guarantees the solvency of large law firms. See Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 MO. L. REV. 777, 777 (2013) (discussing recent bankruptcies of several large law firms, one of which employed 1400 attorneys at its peak).

169. *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009).

170. H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.). Appearing under the heading “Sanctions for Attorney Delay,” the provisions of the House Conference Report dealing with § 1927 express the hope that “the high standard which must be met to trigger section 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney in representing his client. The amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary delays in litigation.” *Id.*

judges applying section 1927 will safeguard the rights of an attorney who may be held in violation of the section.”<sup>171</sup> The Report contains no references to law firms, further suggesting that § 1927 law firm sanctions are a purely judicial creation, separate from the original and contemporary purpose of the statute.

*B. Policy Arguments from the Structure of Law Firms Do Not Justify § 1927 Law Firm Sanctions*

Despite the plain meaning of the statute and likely Congressional intent supporting a more limited interpretation of § 1927, one might still argue that § 1927 law firm sanctions are appropriate, since the actions of individual attorneys often implicate the work of others within a law firm. Fairness might require that an abusive litigation strategy formulated by the firm and carried out by one attorney ought to be sanctionable in terms that apply equally to all involved. There are competing considerations here that do not clearly support an inclusive interpretation of the statute. For instance, the larger the firm, generally the less reasonable it would be to sanction the entire firm for the actions of a few attorneys within a discrete practice area.<sup>172</sup>

On the other hand, when an attorney associated with a smaller firm doggedly pursues a course of conduct that runs afoul of § 1927, the entire firm may have contributed to multiplying the proceedings, potentially warranting sanctions on the entire firm. In those circumstances, it may be difficult to determine exactly who played a sanctionable role in multiplying the proceedings without a signed bar number for each participant contributing to a case. At any rate, sanctioning the individual attorney who files a series of frivolous motions may result in passing the costs along to the firm. For example, where a firm relies on an inexperienced associate with a large caseload and little time to prepare or take over a longstanding case, it may be appropriate to sanction the supervising partner or the firm itself for the frivolous actions of the attorney as a form of vicarious liability.<sup>173</sup>

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171. *Id.*

172. In fact, screening techniques in the large firm setting may create a bubble of near-isolation around attorneys in a particular practice area, meaning that lateral hires to the toxic tort group might have little or no contact with attorneys in the workers' compensation group. In determining the effectiveness of screening techniques, courts generally view larger firms as more effective in walling off disqualified attorneys than smaller firms. Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 *GEO. J. LEGAL ETHICS* 71, 98 (2014). Thus, even if a supervising partner in one practice area is aware of the past misconduct of a particular associate in the group, it may be inappropriate to sanction the entire firm if effective screening techniques are in place.

173. Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 *S. TEX. L. REV.* 245, 258 (1998).



However, these sorts of arguments should push a requesting party to invoke a sanctioning authority other than § 1927. Justice Scalia's majority opinion in *Pavelic & LeFlore* is particularly instructive on this point.<sup>174</sup> In rejecting law firm sanctions under the pre-1993 "person who signed" language of Rule 11, the Court reasoned that the individualized language of the rule served the dual purpose of *sanction*—not reimbursement—and of reminding the individual signer of "his personal, nondelegable responsibility."<sup>175</sup> The message conveyed by such a rule is that a failure by the signer to personally validate the content of each filing will result in the court's "retribution" falling directly onto the signer.<sup>176</sup> The economic deterrence arises from the signer's knowledge that the sanction will not be diverted even partly to the associated firm.<sup>177</sup> Although subjecting the law firm to sanction may result in more "internal monitoring," it is also reasonable to believe, instead, that subjecting the *individual signer* to sanctions will increase the signer's incentive to take care when certifying documents.<sup>178</sup> The Court concluded that this belief is "not so unthinkable as to compel the conclusion that the Rule does not mean what it most naturally seems to say."<sup>179</sup>

Despite the salient differences between Rule 11 and § 1927 in terms of incentive structure and deterrence, the economic deterrence rationale of *Pavelic & LeFlore* applies in similar force to § 1927. By making the offending attorney "satisfy personally" the monetary burden unreasonably placed on an opposing party, the onus is on the person most directly responsible for the case in other respects, such as court appearances and settlement negotiations. Since the law firm might nonetheless be sanctionable under the revised Rule 11 or the court's inherent powers, there is no need to rely on an unnatural interpretation of § 1927 to hold a law firm responsible for its bad faith conduct.

### C. *Deference to Congressional Intent Requires Rejection of § 1927 Law Firm Sanctions*

Lastly, the circuit split on this issue implicates proper judicial deference to Congress. Judicial interpretation of § 1927 to authorize law firm sanctions "runs the risk of eviscerating the 1993 amendments to Rule 11 by essentially reading them out of the Rule."<sup>180</sup> In other words, the availability of law firm

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174. *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 126 (1989).

175. *Id.*

176. *Id.* at 126–27.

177. *Id.* at 127.

178. *Id.*

179. *Pavelic & LeFlore*, 493 U.S. at 127.

180. See Hart, *supra* note 71, at 671, 684 (arguing that, in situations where Rule 11 sanctions are more appropriate, the use of § 1927 and the court's inherent powers as a substitute for Rule 11 contributes to inconsistency in the law as well as reading the safe harbor provision out of the rule).

sanctions under § 1927 in addition to Rule 11 provides yet another avenue for sidestepping the procedural requirements of Rule 11.<sup>181</sup> Moreover, applying § 1927 to law firms amounts to reading the features of Rule 11 into § 1927. As noted by the U.S. Supreme Court in *Roadway Express*, reading the features of one rule into another on an ad hoc basis amounts to standardless judicial lawmaking.<sup>182</sup> If it was not Congress's intention to limit § 1927 sanctions to individuals when it last revised the statute, it remains within Congress's power to amend the statute. Just as in *Pavelic & LeFlore*, where the law firm could not be sanctioned under the pre-1993 "person who signed" language of Rule 11, extending the Court's reasoning to the "any attorney or other person" language of § 1927 should have a similar result. Statutes are always subject to revision. However, applying § 1927 as it is *currently* written would exclude law firms from its ambit until the statute is revised to include language that unambiguously references law firms.

#### CONCLUSION

Despite common firm-wide involvement in a lawsuit, the most well-supported interpretation of § 1927 does not support law firm sanctions. Much of the court's reasoning in *Kaass Law* undermines the argument from tradition by offering a close reading of the statute as well as incorporating significant updates in the sanctioning power more generally under the 1993 Amendment to Rule 11. As law firms do not constitute "persons" for purposes of § 1927, they do not fall within the sanctioning power of the court under § 1927. Given the alternative means for sanctioning law firms that do not require strained statutory interpretation, the federal circuits should definitively reject the possibility of § 1927 law firm sanctions. That would also require appellate courts to overturn lower courts' imposition of sanctions against law firms that do not explicitly acknowledge the appropriate basis for those sanctions, such as inherent powers or Rule 11. Litigants may then rest easier with clear guidance on the types of sanctions they may request under the circumstances of a given case and which types of sanctions they themselves may face.

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181. *See supra*, Section II-D.

182. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980).

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