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Affirming Firm Sanctions: The Authority to Sanction Law Firms Under 28 U.S.C. § 1927

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AFFIRMING FIRM SANCTIONS: THE AUTHORITY TO SANCTION LAW FIRMS UNDER 28 U.S.C. § 1927

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A circuit split exists as to whether 28 U.S.C. § 1927 allows for an award of sanctions against nonattorneys or nonrepresentatives. Five federal courts of appeals—the Second, Third, Eighth, Eleventh, and the District of Columbia Circuits—hold that, to further the purpose of 28 U.S.C. § 1927, courts have the authority to sanction a law firm for the conduct of its attorneys, in addition to the authority to sanction individual officers of the court. The Sixth, Seventh, and Ninth Circuits disagree, concluding that the statute allows federal courts to sanction only individuals—"attorney[s] or other person[s] admitted to conduct cases in any court of the United States."

In In re MJS Las Croabas Properties, Inc.*, the U.S. Bankruptcy Appellate Panel of the First Circuit recently recognized this split of authority. The appellate panel discussed the text of § 1927 as well as policy considerations supporting its applicability to law firms. Although the panel noted that the statute does not expressly provide for vicarious liability, it nonetheless concluded that § 1927 implicitly allows for the imposition of sanctions against a law firm.*

This Note analyzes federal courts' interpretations of § 1927 and argues that law firms ought to be within reach of the statute.

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INTRODUCTION

Imagine that a plaintiff brings an action against several defendants: an apartment complex and its manager, the general property manager of the complex, and the company that owns the building. The plaintiff alleges that she was harassed by the apartment manager and ultimately evicted when she rejected the apartment manager's advances. In the complaint, the plaintiff's attorney certifies that she conducted interviews with many former tenants who were victims of similar treatment by the defendants.

The plaintiff's attorney fails to answer the defendants' interrogatories and document requests, fails to comply with deposition notices, and withholds disclosure of the names and addresses of witnesses the plaintiff expects to call at trial. The defendants then move for summary judgment, and the plaintiff's attorney does not respond to the motion.

More than twelve months pass and the plaintiff's counsel finally commits to several of the defendants' requested witness depositions. None of the witnesses deposed—all of whom were mentioned in the plaintiff's complaint and whose accounts were certified by the plaintiff's attorney—corroborate the plaintiff's allegations. The plaintiff then voluntarily moves to dismiss the action. At this point, the defendants have accrued over $100,000 in attorneys' fees and litigation costs due to the plaintiff's counsel's delay, unreasonable litigation conduct, and bad faith.

The district court grants the motion and invites the defendants to move for sanctions. The defendants do so pursuant to 28 U.S.C. § 1927,[1] which allows a court to award attorneys' fees and costs for opposing counsel's unreasonable and vexatious multiplication of proceedings. The plaintiff's counsel opposes the motion and files its own, alleging new arguments and submitting new affidavits to support the plaintiff's previously dismissed claims. This motion is opposed by the defendants and four months later the court denies the plaintiff's motion.

Soon after, the district court grants the defendants' motion for attorneys' fees and costs and imposes $107,845.77 in sanctions against the plaintiff's attorney and her law firm, holding them jointly and severally liable for the award. The plaintiff's attorney's law firm appeals the decision of the district court.

The circuit court upholds the sanctions imposed against the attorney but reverses the lower court's imposition of sanctions against the law firm, notwithstanding the following findings: (1) there is a close connection between the plaintiff's attorney's actions and those of her firm, (2) every paper the plaintiff's attorney filed also bears the name of her law firm, (3) the law firm was on notice that its attorney's litigation conduct was questionable, and (4) the plaintiff's attorney's law firm had been previously directed in a separate action by another judge in the same district court to monitor the attorney's litigation conduct because of her unreasonable behavior in cases unrelated to this suit.

Now assume that the plaintiff's attorney cannot individually pay the $107,845.77 sanctions award. The defendants cannot recoup the monies expended to defend against the plaintiff's meritless claims and the plaintiff's attorney's bad faith litigation conduct. Even though the plaintiff's attorney's law firm might have endorsed—or even encouraged—its attorney's litigation practices, the defendants cannot collect the award from the firm.

These facts (other than the assumption of the judgment-proof counsel) and holdings are not fiction.[2] Some circuit courts hold that sanctions pursuant to 28 U.S.C. § 1927 may be imposed against law firms.[3] Other circuits do not allow such impositions.[4] If the above case was tried in a jurisdiction that allows for the imposition of sanctions against law firms under § 1927, then

1. 28 U.S.C. § 1927 (2012).
2. *See* Claiborne v. Wisdom, 414 F.3d 715, 718–21 (7th Cir. 2005).
3. *See generally infra* Part II.A.
4. *See generally infra* Part II.B.

the defendants would be able to recover costs and fees incurred fighting the meritless and prolonged litigation. Thus, whether a party has adequate redress to collect costs and fees incurred as a result of unreasonable and vexatious litigation conduct turns solely on federal statutory interpretation within a given jurisdiction.

This Note examines the federal circuit courts' inconsistent interpretations and applications of § 1927 regarding the authority to sanction law firms. Part I provides background information necessary to understand the circuit split at issue in this Note. In particular, Part I sets forth the historical imposition of sanctions on law firms under relevant legislative and judicial guidelines. Part II details how different circuits approach the question of § 1927's applicability. Part III then analyzes each approach's strengths and shortcomings. It proposes a novel solution that would reconcile the split of authority and command interpretive uniformity.

This Note argues that § 1927's authority reaches law firms and entities that employ individuals as attorneys.[5] Furthermore, this Note urges Congress to intervene and remedy the federal courts' differing interpretations. Section 1927 should be amended to meet its initial purpose—deterring frivolous litigation conduct.[6] This Note concludes with an appendix containing proposed amendments to § 1927.

As an alternative to statutory amendment, this Note invites the federal judiciary to utilize its inherent authority to sanction[7] in order to impose sanctions on law firms for unreasonable and vexatious litigation conduct of any attorneys under their employ.[8] Such implementation would remedy the mischief § 1927 was meant to address since its inception.[9]

I. A HISTORY AND OVERVIEW OF THE IMPOSITION OF SANCTIONS AGAINST THE LAW FIRM

The ability to impose sanctions on litigants and their representatives serves an important judicial function.[10] This authority maintains the integrity of the judicial system, regulates the behavior of parties and their representatives, and encourages good faith litigation.[11] This authority also helps courts police bad faith conduct and preserve an orderly system of justice.[12]

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5. Some scholarship has addressed § 1927's application to law firms, but general attention to this issue has been minimal. *See, e.g.*, GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 21(C)(2) (5th ed. 2013); *see also* 1 RONALD E. MALLEN, LEGAL MALPRACTICE § 11:59 (2017 ed. 2017) (stating that "[t]he language of [§] 1927 is explicit, applying exclusively to an 'attorney or other person admitted to conduct cases'" (quoting 28 U.S.C. § 1927)).

6. *See infra* Part III.B.1.

7. *See infra* Part I.C.

8. *See infra* Part III.B.2.

9. *See infra* notes 28–29 and accompanying text.

10. *See* Douglas R. Richmond, *Sanctioning Clients for Lawyers' Misconduct—Problems of Agency and Equity*, 2012 MICH. ST. L. REV. 835, 835–36.

11. *See generally* JOSEPH, *supra* note 5.

12. *Id.*

Federal courts are granted power to impose sanctions pursuant to several authorities, including 28 U.S.C. § 1927.[13] This statute provides courts with authority to sanction "[a]ny attorney or other person admitted to conduct cases in any court"[14] for certain behavior. The text and applicability of this statute have been construed and examined by multiple circuit courts to determine, among other things,[15] whether the language of the statutory scheme allows for sanctions against law firms.[16] The statute does not explicitly mention an authority to sanction firms, and courts have interpreted this issue in different ways.[17] Some circuits have answered this inquiry in the affirmative,[18] while others have disagreed, declining to impose sanctions against firms in light of § 1927's text.[19]

Whether law firms—in addition to individual attorneys or representatives—may be sanctioned under § 1927 is a significant legal concern. The modern legal landscape is characterized by exponential law firm growth,[20] diminished opportunities for attorney upward mobility,[21] and

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13. The statute, titled "Counsel's liability for excessive costs," reads as follows:

> Any 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. 28 U.S.C. § 1927 (2012).

14. *Id.*

15. A split of authority exists on whether § 1927 requires a showing of subjective bad faith. *See generally* James F. Holderman, *Section 1927 Sanctions and the Split Among the Circuits*, 32 LITIG. 44 (2005) (discussing varying degrees of conduct required by the circuits to find violation of § 1927). This Note does not contemplate this issue. For an interesting discussion of the dichotomy between objective and subjective bad faith, see generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016).

16. *See generally infra* Part II.

17. *See generally infra* Part II. As the Ninth Circuit aptly noted, whether law firms may be sanctioned under the statutory scheme "is 'purely' an issue of law." Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1293 (9th Cir. 2015).

18. *See infra* Part II.A.

19. *See infra* Part II.B.

20. *See* Roy Strom, *After Record, More Firm Mergers Expected*, CHI. DAILY L. BULL. (Mar. 17, 2016, 2:26 PM), http://www.chicagolawbulletin.com/Archives/2016/03/17/mergers-03-17-16.aspx [https://perma.cc/X4Z9-UKJK] (stating law firm growth is needed to overcome generational issues currently plaguing firms at a time where large firm mergers already exist in record numbers); *see also* Jeremy Nobile, *Appetite for Growth Leading to More Law Firm Mergers*, CRAIN'S CLEVELAND BUS. (Feb. 16, 2016), http://www.crainscleveland.com/article/20160214/NEWS/160219904/appetite-for-growth-leading-to-more-law-firm-mergers [https://perma.cc/B58E-YDAY]. Large law firm mergers have become a common occurrence as well. *See, e.g.*, Christine Simmons, *Arnold Porter and Kaye Scholer Confirm $1bn Merger Deal*, LEGALWEEK (Nov. 10, 2016), http://www.legalweek.com/sites/legalweek/2016/11/10/arnold-porter-and-kaye-scholer-confirm-1bn-merger-deal/?slreturn=20170706185854 [https://perma.cc/L9ED-9268]; Christine Simmons, *Merger Madness Hits Crowell & Moring, Herrick Feinstein*, N.Y. L.J. (Dec. 13, 2016), http://www.newyorklawjournal.com/id=1202774564776/Merger-Madness-Hits-Crowell-amp-Moring-Herrick-Feinstein?mcode=1202615704879&slreturn=20161115192248 [https://perma.cc/K2G2-7LAW]; Debra Cassens Weiss, *Norton Rose and Chadbourne Complete Merger*, ABA J. (June 30, 2017), http://www.abajournal.com/news/article/norton_rose_and_chadbourne_complete_merger [https://perma.cc/522K-8DGR].

21. Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 347–48 (2011).

heightened market and competition pressures.[22] In fact, both the number of large law firms and the number of attorneys employed by such firms have grown exponentially since the mid-1980s.[23] These factors exemplify a market trend in which a growing number of small and midsized firms have realized that diverse geographic platforms, sufficient resources for investment, and adequate strength across various practice areas may be necessary to achieve objectives or merely to survive.[24] In addition, such factors might have deleterious effects on the way attorneys "zealously" assert their clients' positions.[25] An attorney faced with the pressures discussed above[26] might be tempted to pursue a frivolous claim or handle a client's interests unprofessionally and unreasonably, thus delaying proceedings or multiplying them as a function of some dilatory litigation strategy.[27]

The following sections discuss the origins and development of the imposition of sanctions against law firms pursuant to § 1927 as well as two other well-known sanctioning authorities: Rule 11 of the Federal Rules of Civil Procedure and the federal courts' inherent authority to sanction.

A. 28 U.S.C. § 1927's Legislative History, Scope, Nature, and Purpose

In 1813, Congress enacted the predecessor statute to § 1927.[28] The principal directive of the congressional committee responsible for the

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22. *See* Jennifer Smith, *Law Firms, Market Pressure and Change: How Soon Is Now?*, WALL ST. J. (May 14, 2014, 4:54 PM), http://blogs.wsj.com/law/2014/05/14/law-firms-market-pressure-and-change-how-soon-is-now/ [https://perma.cc/NG98-RMLM].

23. *See infra* notes 150–58 and accompanying text. The *National Law Journal* (NLJ), an industry affiliate, annually publishes data of the largest U.S. law firms. No firm had more than 500 attorneys when NLJ published in 1978 its inaugural list of the 200 largest law firms. *See Introducing the NLJ 350*, NAT'L L.J. (Apr. 16, 2012), http://www.nationallawjournal.com/id=1202489565842.?id=1202489565842 [https://perma.cc/B4DF-NAUU]. Since 2015, however, more than twenty firms employ more than 1,000 lawyers and at least eighty-five firms staff 500 or more attorneys. *See Chart: The 2015 NLJ 350*, NAT'L L.J. (June 8, 2015), http://www.nationallawjournal.com/home/id=1202728576002 [https://perma.cc/7KLJ-7VWP].

24. *See, e.g.*, Christine Simmons, *For Midsize NYC Firms, 2016 Highlighted Need to Merge*, N.Y. L.J. (Dec. 20, 2016), http://www.newyorklawjournal.com/id=1202775184586/For-Midsize-NYC-Firms-2016-Highlighted-Need-to-Merge [https://perma.cc/7X5E-CRR9] (discussing the increase in large-scale law firm mergers and current state of the legal landscape).

25. MODEL RULES OF PROF'L CONDUCT pmbl. 2 (AM. BAR ASS'N 2016).

26. *See supra* notes 20–22 and accompanying text.

27. Although association with a large firm is by no means an indication that an attorney may be more likely to abuse the litigation process, a correlation between judicial conduct and employment pressure is a concern meriting attention in today's legal landscape given the increasing concentration of attorneys employed by larger firms and the exponential growth of law firms over the past thirty years. *See Introducing the NLJ 350*, *supra* note 23 and accompanying text.

28. Act Concerning Suits and Costs in Courts of the United States, ch. 14, sec. 2, 3 Stat. 19, 21 (1813) (codified at 28 U.S.C. § 829 (1940) and amended by 28 U.S.C. § 1927 (1980)). This statute read:

> 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

statute's construction was "to inquire what [l]egislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice."[29] The result was § 1927 in its earliest form.[30]

Section 1927's predecessor statute was reenacted in 1853 when Congress introduced comprehensive guidelines for costs and litigation fees in federal actions.[31] For the 127 years that followed, the statute's substance remained unchanged.[32]

In 1980, § 1927 was amended as part of a congressional objective to reduce costs and expedite judicial processes involving antitrust litigation.[33] The purpose of the amendment was to "broaden the range of increased expenses which *an attorney* . . . may be required by the judge to satisfy *personally*."[34] This congressional activity was a direct response to the U.S. Supreme Court's decision in *Roadway Express, Inc. v. Piper*,[35] in which the Court held that § 1927 authorized only statutory "costs"[36] and not awards of attorneys' fees or expenses.[37] Thus, Congress amended the statute to correct the Court's holding in *Roadway*.

Since 1980, § 1927 has read as follows:

> Any 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.[38]

The statute does not expressly state that law firms or other entities may be subject to sanctions for unreasonable or vexatious conduct.[39] Five federal courts of appeals, including the Second Circuit, have upheld the imposition of § 1927 sanctions against law firms.[40] Three circuits have declined to reach

> unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Id. (emphasis added).

29. *See* 26 ANNALS OF CONG. 29 (1813); *see also* JOSEPH, *supra* note 5, § 20.

30. *See supra* note 28 and accompanying text.

31. *See* Act to Regulate Fees and Costs to Be Allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, ch. 80, 10 Stat. 160, 162 (1853).

32. *See* JOSEPH, *supra* note 5, § 20; *see also infra* notes 186–87 and accompanying text.

33. *See* Antitrust Procedural Improvements Act, Pub. L. No. 96-349, 94 Stat. 1154, 1156 (1980) (codified at 28 U.S.C. § 1927 (2012)); *see also* H.R. REP. NO. 96–1234, at 7 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 2781, 2782.

34. H.R. REP. NO. 96–1234, at 8–9 (Conf. Rep.) (emphasis added).

35. 447 U.S. 752 (1980).

36. *See* 28 U.S.C. § 1920 (2012) (setting forth fees which may be taxed as costs by a judge or clerk of any court of the United States).

37. *See Roadway*, 447 U.S. at 757–60 (construing "costs" and concluding that attorneys' fees were not contemplated by the drafters of § 1927 in light of Congress's adoption of § 1920).

38. 28 U.S.C. § 1927 (1982).

39. *See id.*

40. *See generally* Enmon v. Prospect Capital Corp., 675 F.3d 138 (2d Cir. 2012); Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443 (8th Cir. 2001); LaPrade v. Kidder Peabody & Co., 146 F.3d 899 (D.C. Cir. 1998); Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204 (3d Cir. 1985).

the same conclusion, holding that the statute's construction and legislative intent bar courts from imposing sanctions on law firms.[41]

B. Rule 11 and Authority by Amendment to Sanction the Firm

Rule 11 of the Federal Rules of Civil Procedure was first adopted in 1938[42] and has been touted as the "most prominent provision authorizing sanctions for litigation abuse."[43] The rule bestows an affirmative duty on lawyers for the duration of court proceedings, requiring them to make reasonable inquiries into the facts of their cases to ensure valid bases of their clients' claims.[44] Notwithstanding its renown, the scope of Rule 11 is, in fact, fairly limited.[45] The only behavior that may be sanctioned under the Rule is an attorney or representative's signing or "later advocating" a pleading, motion, or other paper that has no firm ground in fact and law.[46] Thus, the rule's focus is on document filings—"pleading[s], written motion[s], and other paper[s]"[47]—that are unreasonable, harassing, delaying, frivolous, fraudulent, and the like.[48]

Despite this limited scope, Rule 11 expressly permits imposition of sanctions against law firms.[49] But this has not always been the case.[50] In 1989, the Supreme Court granted certiorari in *Pavelic & LeFlore v. Marvel Entertainment Group*[51] to address the applicability of Rule 11 sanctions against a law firm and, in addition, the vicarious liability of law firms when sanctions are imposed against a firm's attorney.[52] The Court noted that there was a split of authority among the circuit courts on these two issues.[53] In an eight-to-one decision, the Court ultimately concluded that Rule 11 sanctions may not be imposed on law firms.[54] The majority of the Court relied heavily

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41. *See generally* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290 (9th Cir. 2015); FM Indus., Inc. v. Citicorp Credit Servs., Inc., 614 F.3d 335 (7th Cir. 2010); Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389 (6th Cir. 2009).

42. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1028 (1982).

43. JOSEPH, *supra* note 5, § 1.

44. Stephen R. Ripps & John N. Drowatzky, *Federal Rule 11: Are the Federal District Courts Usurping the Disciplinary Function of the Bar?*, 32 VAL. U. L. REV. 67, 68 (1997).

45. *Id.*

46. FED. R. CIV. P. 11; *see also* JOSEPH, *supra* note 5, § 1.

47. FED. R. CIV. P. 11(a).

48. *See* FED. R. CIV. P. 11(b).

49. *See* FED. R. CIV. P. 11(c); *see also* JOSEPH, *supra* note 5, § 5(E)(1).

50. JOSEPH, *supra* note 5, § 5(E)(1) ("Under the 1983 version [of] Rule 11, there was no vicarious liability. Liability was personal to the signer and the signer's client.").

51. 493 U.S. 120 (1989), *aff'g* Calloway v. Marvel Entm't Grp., 854 F.2d 1452 (2d Cir. 1988).

52. *See generally Pavelic*, 473 U.S. 120.

53. *Id.* at 122–23. In *Calloway*, the Second Circuit affirmed a district court's imposition of sanctions on a law firm pursuant to Rule 11, in "square disagreement" with the Fifth Circuit, which held in *Robinson v. National Cash Register Co.*, 808 F.2d 1119, 1128–30 (5th Cir. 1987), that Rule 11 authorizes sanctions only against individual lawyers who sign court papers. *Calloway*, 854 F.2d at 1479.

54. *Pavelic*, 493 U.S. at 127.

on the plain meaning of "person who signed"[55] within the context of Rule 11 to conclude that the Rule applies only to an individual attorney—not an entity or law firm—even where the signature on the document at issue is unambiguously made on behalf of a firm.[56]

In 1993, Congress approved amendments to Rule 11,[57] effectively reversing the Court's decision in *Pavelic* by providing federal courts the express authority to sanction law firms pursuant to Rule 11(c).[58] The amendments to Rule 11 further provide that, absent any exceptional circumstances, "a law firm *must* be held jointly responsible for a violation committed by its partner, associate, or employee."[59] Thus, not only does the current form of Rule 11 allow for sanctions against a law firm, but it demands, absent exceptional circumstances, vicarious liability for law firms for sanctions imposed against their attorneys or other employees.[60]

C. The Common Law Standard: Inherent Authority to Sanction

Rule 11, like § 1927 and other judicial sanction authorities, allows courts to impose sanctions for particular, limited conduct.[61] But Rule 11 and other rules[62] and statutes[63] do not place limits on the authority of the federal judiciary to impose sanctions for conduct that is outside the scope of such rules or statutes.[64] To this end, there is judicial and scholarly agreement that

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55. *See id.* at 124 (quoting then-current Rule 11, which stated that "[i]f a [document] is signed in violation of this rule, the court . . . shall impose upon the *person who signed* it, a represented party, or both, an appropriate sanction" (emphasis added)).

56. *Id.* at 127.

57. It should be noted that Congress is not responsible for drafting additions or amendments to the Federal Rules of Civil Procedure. These rules are promulgated by the Supreme Court pursuant to the Rules Enabling Act, after which Congress may veto the rules within a certain time frame. *See* 28 U.S.C. §§ 2072, 2074(a) (2012); *cf.* Sibbach v. Wilson & Co., 312 U.S. 1, 14–15 (1941) (discussing how federal rules are submitted to Congress "so that [it] might examine them and veto their going into effect if contrary to the policy of the legislature"). If Congress does not veto proposed or amended rules, they become part of the Federal Rules of Civil Procedure. *See* 28 U.S.C. § 2074.

58. FED. R. CIV. P. 11(c) (stating that a "court may impose an appropriate sanction on any attorney, *law firm*, or party that violated the rule or is responsible for the violation" (emphasis added)).

59. *Id.* (emphasis added). In comments accompanying the amendment, the 1993 Advisory Committee stated that it is appropriate for a law firm to be jointly responsible for its employees' conduct under "established principles of agency." *See* FED. R. CIV. P. 11 advisory committee's note to 1993 amendments.

60. FED. R. CIV. P. 11(C).

61. *See, e.g.*, *supra* Parts I.A (discussing conduct that falls within the scope of § 1927) and I.B (identifying conduct that triggers sanctions under Rule 11).

62. *See, e.g.*, FED. R. CIV. P. 37. Rule 37 deals primarily with attorneys' failures to make requested disclosures or cooperate in discovery matters. *Id.*

63. *See, e.g.*, *supra* Part I.A (discussing the scope of § 1927).

64. *See* JOSEPH, *supra* note 5, § 26(A)(1).

federal courts exhibit an inherent authority[65] to exercise certain powers,[66] including the authority to sanction "abusive litigation practices."[67] This authority reaches individual litigants, counsel, and law firms that abuse the judicial process through bad faith conduct.[68] The leading Supreme Court decision recognizing the authority of federal courts to use their inherent authority to impose sanctions is *Chambers v. NASCO, Inc.*[69]

In *Chambers*, the plaintiff and defendant entered into a purchase agreement for the defendant's facilities and television broadcast licenses.[70] Under the purchase agreement, both parties had an obligation to file documents with the FCC by a certain date to obtain the agency's approval of the deal.[71] Before the filing deadline, the defendant changed its mind and attempted to talk the plaintiff out of the agreed-upon purchase, but the plaintiff refused.[72] The defendant then told the plaintiff it would not comply with the necessary federal regulations.[73] After this exchange, the plaintiff informed the defendant that it planned to commence an action for specific performance under the contract.[74] In an attempt to place its property outside the reach of the federal courts, the defendant quickly deeded the property to a trust and subsequently alleged such transfer was a proper sale to a third party, which precluded the plaintiff's suit.[75] The Western District of Louisiana concluded that the defendant had frivolously filed documents, delayed proceedings, and initiated fraud upon the court.[76] The court described the defendant's conduct as having "emasculated and frustrated the purposes of [the Federal Rules of Civil Procedure] and the powers of [the District] Court by . . . prevent[ing the defendant's] access to the remedy of specific performance."[77] After acknowledging that the scopes of both Rule 11 and § 1927 would not reach

65. *See* Link v. Wabash R.R., 370 U.S. 626, 630–31 (1962) (discussing courts' inherent authority, "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"); *see also* JOSEPH, *supra* note 5, § 26(A)(1).

66. *See* United States v. Hudson, 11 U.S. 32, 34 (1812) (holding that federal courts have, pursuant to the nature of the judicial system, implied powers which are necessary for courts to exercise all other powers vested in the judiciary); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (stating that the most prominent inherent power of the federal courts is the authority to sanction).

67. JOSEPH, *supra* note 5, § 26(A)(1). One scholar has framed this authority as one that "flows from the powers possessed by a court simply because it is a court; it is an authority that inheres in the very nature of a judicial body and requires no grant of power" from a constitution, statute, or written rule. Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805 (1995).

68. *See* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991).

69. 501 U.S. 32 (1991); *see also* Thomas E. Baker, *The Inherent Power to Impose Sanctions: How a Federal Judge Is Like an 800-Pound Gorilla*, 14 REV. LITIG. 195, 196–97 (1994).

70. *Chambers*, 501 U.S. at 35–36.

71. *Id.* at 36.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 36–37.

76. *See generally* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 623 F. Supp. 1372 (W.D. La. 1985), *aff'd*, 797 F.2d 975 (5th Cir. 1986).

77. *Id.* at 1383.

the defendant's conduct,[78] the court relied on powers inherent in its judicial authority to sanction the conduct at issue.[79]

Although the Court acknowledges such judicial power, the type of fee-shifting that the inherent authority to sanction endorses is generally contrary to the "American Rule,"[80] which has deep origins in judicial history and legislative policy.[81] Indeed, federal courts' inherent powers, including the authority to sanction, "must be exercised with restraint and discretion" because such authority has been established outside the bounds of democratic controls and is, in fact, shielded from them.[82] The *Chambers* Court reasoned that exceptions to the general standard may arise, therefore bestowing on federal courts an inherent authority to assess sanctions for vexatious, wanton, oppressive, or other bad faith conduct.[83] Thus, the scope of federal courts' inherent power to sanction has been deemed limited.[84] Because the language of § 1927 seems to limit the scope of sanctions for unreasonable and vexatious behavior to individuals only, the inherent power is often expressly disregarded or overlooked altogether where sanctions against a firm might be warranted.[85]

D. The Importance of Uniform Analysis and Treatment of 28 U.S.C. § 1927

One major question regarding whether law firms are, or should be, sanctionable under § 1927 is whether the effect of a resolution of the issue is de minimis;[86] that is, whether an authority to sanction law firms pursuant to

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78. After specific performance was ordered by the district court and affirmed on appeal, the matter was remanded to fix an award of sanctions. *See generally* NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120 (W.D. La. 1989), *aff'd*, 894 F.2d 696 (5th Cir. 1990), *aff'd*, 501 U.S. 32 (1991). The court opined that Rule 11 sanctions were not appropriate because evidence supporting allegations of fraudulent filings did not surface until the beginning of trial. *Id.* at 138–39. Section 1927 sanctions were likewise inappropriate and "outside the reach of [the] statute" because: (i) the plaintiffs alleged fraudulent conduct against the defendant, not his counsel, and (ii) the violations were not committed by an attorney but by the sole shareholder of the defendant. *Id.* at 139; *see also* JOSEPH, *supra* note 5, § 21(C)(1).

79. *NASCO*, 124 F.R.D. at 139–42.

80. For a detailed discussion of the American Rule on fee-shifting in litigation, see generally John F. Vargo's article written for the 1993 Symposium on Civil Justice Reform. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993).

81. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) (stating that normally a winning litigant is not entitled to reasonable attorneys' fees from the opposing party).

82. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991); *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

83. *Chambers*, 501 U.S. at 45–46.

84. This limitation is congruent with the Court's holding in *Roadway Express*, 447 U.S. at 752. In *Roadway*, the Court reasoned that federal courts may access attorneys' fees and costs "in narrowly defined circumstances" constituting bad faith. *Id.* at 765.

85. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715, 724 (7th Cir. 2005) (disallowing sanctions against a law firm under both § 1927 and inherent powers due to the textual limitations of the former and the defendants' failure to mention the latter, even though recognition by a party of such authority is not required).

86. *Cf.* Baker, *supra* note 69, at 200 ("Presumably, any sanction contemplated under federal statutes and rules can be imposed incident to the inherent power as well.").

§ 1927 is even necessary. After all, federal courts have an inherent authority[87] to sanction persons[88] involved in litigation, regardless of whether that person is a litigant, attorney, or law firm.[89] The Court has stated that the judiciary's inherent powers must be utilized sparingly[90] and only when bad faith conduct predicates the imposition of sanctions.[91] Thus, the inherent authority to sanction particular conduct that is not subject to rule or statute is quite narrow.[92]

In *Chambers*, the Court further illustrated the reach of the inherent sanctions power when the behavior at issue is contemplated by rule or statute.[93] Under such circumstances, courts ordinarily should rely on the rules or statutes rather than the inherent authority;[94] when the legislature has spoken, judges should adhere to Congress's approved standards.[95] Where "neither the statute nor the Rules are up to the task, [a] court may safely rely on its inherent power."[96]

The above example illustrates why § 1927 is an important statutory tool and why uniform treatment is warranted. Because § 1927 sanctions must be predicated on unreasonable or vexatious conduct,[97] any bad faith conduct that would provoke the statute's application would presumably also warrant the imposition of sanctions under the courts' inherent authority.[98] To date, however, no court in any of the circuits that refuse to uphold or impose sanctions against law firms under § 1927 has utilized the inherent authority to sanction firms that were wholly, or even partially, responsible for bad faith conduct.[99] Thus, courts in these circuits are hesitant to invoke the inherent authority to sanction law firms in lieu of express statutory authority.[100]

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87. *See supra* Part I.C.

88. "Persons" in this context, being a term of art, includes litigants, counsel, and law firms. *See Roadway*, 447 U.S. at 752; *see also* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) (holding that using their inherent authority, courts "may assess attorney's fees against litigants, counsel, and law firms who willfully abuse [the] judicial process by conduct tantamount to bad faith").

89. *See, e.g.*, *Chambers*, 501 U.S. at 32.

90. *See Roadway*, 447 U.S. at 764; *see also* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450–51 (1911) (stating that federal inherent authorities come with an implied warning that they may never be implemented where neither proper nor necessary).

91. *Cf. Chambers*, 501 U.S. at 46 (stating that "whereas . . . other mechanisms reach[] only certain individuals or conduct, the inherent power extends to a full range of litigation abuses").

92. *Id.*

93. *Id.* at 50.

94. *Id.*

95. *See* Leading Cases, *Courts' Inherent Authority to Sanction in Diversity Cases:* Chambers v. NASCO, Inc., 105 HARV. L. REV. 349, 356 (1991).

96. *Chambers*, 501 U.S. at 50.

97. 28 U.S.C. § 1927 (2012).

98. *See generally supra* Part I.C.

99. *See generally infra* Part II.B.

100. *See* Leading Cases, *supra* note 95, at 350; *see also infra* Part II.B.

The application of federal statutes within the federal judicial system should promote convenience and uniformity.[101] It is rarely efficient for federal courts to maintain differing views of federal legislation that may lead to diverse results.[102] When contrary outcomes under federal law are principally due to jurisdictional boundaries and geographical locations, such inefficiency becomes even more evident.[103] Section 1927 should be analyzed and applied consistently to promote the primary goal of uniformity within our federal judicial structure.[104] This has not occurred under current judicial interpretations of § 1927.[105] As this Note demonstrates, a remedy must be implemented for these reasons.

II. THE CIRCUIT SPLIT: AUTHORITY TO SANCTION LAW FIRMS PURSUANT TO § 1927

The federal circuit courts are split as to whether sanctions against law firms are permitted under § 1927.[106] Part II.A examines the policy justifications and cases that support sanctioning firms pursuant to this statutory scheme. Part II.B then analyzes the contradictory views.

A. The Majority View: Law Firms Are Sanctionable

Part II.A.1 discusses the majority courts' reliance on the purposivist method of statutory interpretation in its analysis of § 1927. Then, Part II.A.2 sets forth the majority courts' dependence on implicit authority under § 1927 to conclude that law firms may be sanctioned under the statutory scheme. Part II.A.3 introduces the policies that the majority has considered in authorizing and affirming sanctions under § 1927 against law firms.

1. The Purposivist Nature of the Majority Approach

The federal judiciary's purposivist[107] approach to statutory interpretation was first annunciated by the Court in *Church of the Holy Trinity v. United States*.[108] This approach dictates that courts should construe statutory

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101. *See* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 540–44 (2010). *See generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

102. *See* Dragich, *supra* note 101, at 540–44.

103. *See id.* at 536.

104. *See, e.g.*, COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 3 (1975), *reprinted in* 67 F.R.D. 195, 206–07 (1975).

105. *See infra* Parts II.A–B.

106. *See generally supra* Part I.A.

107. This Note focuses on the purposivist approach, as it has dominated the analyses of courts that construe § 1927 to provide for sanctions against law firms. This Note does not contend that the purposivist approach supersedes any other doctrines of statutory interpretation and acknowledges that numerous alternative approaches exist. *See, e.g.*, R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 PEPP. L. REV. 37 (1997).

108. 143 U.S. 457 (1892).

language to meet the purposes that Congress intended statutes to achieve.[109] Under the purposivist doctrine, courts should give heightened attention to the overall purpose underlying a legal enactment where the "letter"—or text—might otherwise preclude further consideration.[110]

Some courts utilize the principles of the purposivist approach and embrace a view that sanctions under § 1927 may be assessed upon law firms, thus concluding that the legislative text reaches past the conduct of individual attorneys and representatives.[111] In *Malautea v. Suzuki Motor Co.*,[112] the Eleventh Circuit concluded that law firms may be sanctioned under § 1927 because "th[e] statute was designed to curb exactly the kinds of abuses that [the law firm, as counsel] committed in [the] case."[113] The court noted that the uncontested principal purpose of § 1927—"the deterrence of intentional and unnecessary delay in the proceedings"[114]—was met by its imposition of sanctions against a firm.[115]

In another case, the Southern District of New York concluded that the statute's reference to an attorney "or other person admitted to conduct cases" highlights the legislature's focus on regulating entities who "conduct cases."[116] The court concluded that both attorneys and law firms "naturally fall" into this class.[117] In addition, the court found that "personally"[118] satisfying excess costs, expenses, and attorneys' fees is best construed as targeting attorney-like conduct, as opposed to actions of a client or party.[119] Thus, the phrase "personally," as used in § 1927, is appropriately understood not to preclude the imposition of sanctions on law firms but to preclude their imposition on clients and other represented parties.[120]

2. An Implicit Grant of Authority to Sanction Firms

In addition to various courts' analyses of congressional intent under the purposivist approach, some courts that have imposed sanctions against law firms under § 1927 have recognized an implicit grant of authority within the statute to impose such sanctions.[121] Recently, the First Circuit's Bankruptcy Appellate Panel stated that "courts implicitly have upheld the practice" of

109. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113.

110. *Holy Trinity Church*, 143 U.S. at 461.

111. *See, e.g.*, LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 906–07 (D.C. Cir. 1998); Avirgan v. Hull, 932 F.2d 1572, 1582–83 (11th Cir. 1991).

112. 987 F.2d 1536 (11th Cir. 1993).

113. *Id.* at 1544.

114. Beatrice Foods Co. v. New Eng. Printing & Lithographing Co., 899 F.2d 1171, 1177 (Fed. Cir. 1990).

115. *Malautea*, 987 F.2d at 1544, 1546.

116. Brignoli v. Balch Hardy & Scheinman, Inc., 735 F. Supp. 100, 102 (S.D.N.Y. 1990) (quoting 28 U.S.C. § 1927 (2012)).

117. *Id.*

118. *See* 28 U.S.C. § 1927.

119. *Brignoli*, 735 F. Supp. at 101.

120. *Id.*

121. *See, e.g.*, Lee v. First Lenders Ins. Servs. Inc., 236 F.3d 443, 445–46 (8th Cir. 2001); Apex Oil Co. v. Belcher Co. of N.Y., 855 F.2d 1009, 1020 (2d Cir. 1988); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 211–12 (3d Cir. 1985).

imposing sanctions on law firms under § 1927 "where appropriate."[122] In addition, a district court judge in the Southern District of New York concluded that § 1927 does not "disfavor requiring a law firm . . . to 'satisfy personally'" fees and costs, so long as the firm's conduct meets the statutory behavioral requirements.[123] Thus, the basis for this implicit authority is fairly straightforward: section 1927 affords the federal courts authority to sanction law firms because courts already have the authority to do so.[124] Furthermore, because of this implicit authority, courts may utilize statutory requirements (in this case, the elements of § 1927) as a basis to sanction law firm conduct.[125]

For example, in *Avirgan v. Hull*,[126] the plaintiffs' attorney attached an affidavit to an amended complaint that included alleged testimony of seventy-nine unnamed individuals.[127] The plaintiffs' counsel withheld the alleged witnesses' identities until the district court ordered disclosure and after all appeals of the order were exhausted.[128] This practice, "the impetus for . . . two years of discovery,"[129] yielded a finding that no alleged witnesses had any credible testimony, and, even more strikingly, that approximately twenty of the alleged witnesses' identities and accounts of the controversy were fabricated by the attorney.[130] The district court sanctioned both lead counsel and his law firm under § 1927 for their bad faith conduct, reminding the bar that "[a] court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith."[131]

Thus, some courts have constructed an implicit authority under § 1927 to sanction firms from the overlapping nature of legislative and judicial authorities.[132] In *Enmon v. Prospect Capital Corp.*,[133] the Second Circuit affirmed a lower court's imposition of sanctions under § 1927 against a law firm for the vexatious multiplication of proceedings.[134] The court concluded

122. Castellanos Grp. Law Firm, L.L.C. v. Fed. Deposit Ins. Corp. (*In re* MJS Las Croabas Props., Inc.), 545 B.R. 401, 420 (B.A.P. 1st Cir. 2016). In *Smith v. Grand Bank & Trust of Florida*, 193 F. App'x 833 (11th Cir. 2006), the Eleventh Circuit upheld an award of sanctions against a law firm, for which at least one reason being that in a prior decision the circuit "implicitly determined that § 1927 applies to law firms," *id.* at 838.

123. *Brignoli*, 735 F. Supp. at 102 (quoting 28 U.S.C. § 1927 (2012)).

124. *See id.*

125. *Id.*

126. 932 F.2d 1572 (11th Cir. 1991).

127. *Id.* at 1581.

128. *Id.*

129. *Id.* at 1582.

130. *Id.*

131. *Id.*; *see also* Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1544 (11th Cir. 1993).

132. Section 1927, Rule 11, and the courts' inherent power often overlap in scope and sanctionable conduct. *See* 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, 653 (2004). For example, Rule 11, § 1927, and the inherent power all might apply where a filed opposition in response to a motion is completely baseless in law or fact and without merit. *Id.*

133. 675 F.3d 138 (2d Cir. 2012).

134. *Id.* at 147–49.

that law firms are, by implication, sanctionable under the statute.[135] Yet, while describing the difference between the legislation and the courts' inherent authority to sanction, the circuit panel proclaimed:

> the only meaningful difference between an award made under § 1927 and one made pursuant to the court's inherent power is . . . that awards under § 1927 are made only against attorneys or other persons authorized to practice before the courts while an award made under the court's inherent power may be made against an attorney, a party, or both.[136]

This result is curious. The appellate panel explicitly stated that § 1927 sanctions may be imposed "only against attorneys or other persons," but nonetheless upheld sanctions against the defendant's counsel's law firm pursuant to § 1927.[137] Attempting to overcome this inconsistency, the *Enmon* court found "no serious dispute" as to whether the judiciary may impose sanctions on law firms under its inherent power, and that, for consistency's sake, the same rule and logic should apply to its interpretation of § 1927.[138]

3. Public Policy Dictates Authority to Sanction the Firm

It is well understood that § 1927 exists to remedy a certain mischief.[139] After all, the statute describes unreasonable and vexatious multiplication of proceedings as the basis for imposing sanctions.[140] The majority courts[141] have contended that, because Congress has decreed it provident to hold individual attorneys or representatives authorized to conduct cases in court liable for these negative behaviors, those victimized by such mischief must have the ability to obtain costs and fees associated for any defense against that misconduct.[142] Victims are more likely to gain compensation when sanctions are imposed against a large law firm rather than an individual person.

Additionally, the majority circuits have also relied on the past practices of district courts in their respective circuits in holding that, as a matter of policy, law firms should be subject to sanctions under § 1927.[143] The pinnacle of this argument is judicial acquiescence. Circuit courts would "upset a relatively long-standing practice among district courts [in their respective circuits] if [they] were to hold that law firms may not be sanctioned under [the statute] for the acts of certain attorneys."[144]

135. *See generally id.*

136. *Id.* at 144 (alteration in original) (quoting *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986)).

137. *Id.*

138. *Id.* at 147.

139. Before the legislative enactment of what would become § 1927, the Senate formed a committee to "inquire what [l]egislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice." 26 ANNALS OF CONG. 29 (1813).

140. 28 U.S.C. § 1927 (2012).

141. *See supra* note 40 and accompanying text.

142. *See generally supra* Part II.A.

143. *See, e.g.*, *Enmon*, 675 F.3d at 147–48.

144. *Id.* at 147.

Yet another policy justification that has effectuated the majority circuits' determination on this issue is the approval of the practice by sister circuits.[145] In *Enmon*, the Eleventh Circuit bolstered its decision to uphold sanctions on a law firm under the statute by referencing other circuits' determinations on the same issue.[146] In *In re MJS Las Croabas Properties, Inc.*,[147] the First Circuit Bankruptcy Appellate Panel did just the same.[148]

The changing nature of the legal landscape also lends some policy support to the majority view.[149] When § 1927 was enacted in its original form in 1813,[150] lawyers predominantly were solo practitioners.[151] By 1980—the last time the statute was amended—190,188 attorneys were affiliated with or employed by law firms[152] and the total number of firms reached 38,482.[153] By 2000, the national attorney population nearly doubled to 1.02 million.[154] And, by 2005, law firms across the United States numbered 47,562[155] while the total percentage of lawyers associated with law firms reached approximately 51 percent, an increase of 16 percent over twenty years.[156] In addition and as stated above, large law firms have grown even larger since the mid-1980s, in both size and number.[157] But while the total number of firms and the percentage of practitioners associated with them have increased annually, the growth of the national lawyer population has flattened since 2000.[158] Thus, today more lawyers are affiliating with firms while firms themselves are growing in size.[159]

These data portray a legal field in which a majority of attorneys practice under the umbrellas of firms, a phenomenon that the drafters of § 1927 simply could not have envisioned nor accounted for when the statute was enacted.[160]

145. *See, e.g.*, *id.* at 148; *see also* Smith v. Grand Bank & Tr. of Fla., 193 F. App'x 833, 838 (11th Cir. 2006).

146. *See Enmon*, 675 F.3d at 148 (referencing decisions of the Third, Eleventh, and D.C. Circuits).

147. 545 B.R. 401 (B.A.P. 1st Cir. 2016).

148. *Id.* at 419–21.

149. *See infra* notes 150–60 and accompanying text.

150. *See supra* Part I.A; *see also supra* note 28 and accompanying text.

151. *See* JOSEPH, *supra* note 5, § 21(C)(2).

152. *See* BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 29 (1985). Data compiled by the American Bar Foundation indicate that there were 542,205 lawyers admitted to practice in the United States in 1980. *Id.* at 4. That same year, roughly 35 percent of all practitioners were affiliated with a law firm. *See id.* at 29.

153. *See Lawyer Demographics*, AM. BAR ASS'N (2013), http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf [https://perma.cc/AC8R-YX5G].

154. *See* Wood R. Foster, Jr., *Jobs in the Law: A Profession Hits "Pause,"* BENCH & BAR OF MINN. (June 3, 2016), http://www.mnbenchbar.com/2016/06/jobs/ [https://perma.cc/6FVB-WYGX].

155. *See Lawyer Demographics*, *supra* note 153.

156. *Id.*

157. *See supra* note 23 and accompanying text.

158. *See* Foster, *supra* note 154. From 2001 to 2015, the number of attorneys in the United States grew from roughly 1.05 million to 1.3 million, an annual increase of about 1.4 percent. *Id.*

159. *See supra* notes 152–58 and accompanying text.

160. *See* JOSEPH, *supra* note 5, § 21(C)(2); *see also supra* note 28 and accompanying text.

Thus, as the majority of circuits argue, the reach of § 1927 seemingly should not be interpreted to prevent its application to law firms because direct or vicarious liability of firms could not have been analyzed appropriately in the 19th century. This was not an issue that warranted attention in or before 1980.[161]

B. The Statutory Scheme Provides Authority to Sanction Only Attorneys and Representatives

This section discusses the counteranalyses and arguments of the Sixth, Seventh, and Ninth Circuits. These minority circuits reject the imposition of sanctions against law firms based on § 1927's text, legislative history, and Congress's lack of subsequent legislative action. In addition, the minority circuits are unpersuaded by the majority circuits' arguments.

1. The Minority Approach: It All Comes Down to the Text

Arguments in favor of the minority coalition's[162] approach are based heavily on § 1927's construction and presumed legislative intent. In *Rentz v. Dynasty Apparel Industries, Inc.*,[163] the Sixth Circuit focused on the language of the statutory scheme to conclude that its text fails to authorize sanctions against a represented party[164] or a law firm.[165] In doing so, the court compared the text of § 1927[166] with that of Rule 11 as amended in 1993,[167] which expressly allows for the imposition of sanctions on law firms.[168]

In *BDT Products, Inc. v. Lexmark International, Inc.*,[169] the Sixth Circuit reasoned that, under its plain language, the statute precludes the imposition of sanctions against a law firm because a law firm cannot reasonably be considered a "person" nor can law firms be admitted to "conduct cases" in court.[170] This interpretation conflicts with the Southern District of New York's analysis of § 1927 in *Brignoli v. Balch Hardy & Scheinman, Inc.*,[171] where the court concluded that law firms "naturally fall" into the subset of "person[s]" that the statute reaches.[172]

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161. *See supra* notes 152–58 and accompanying text.

162. *See supra* note 41 and accompanying text (noting the Sixth, Seventh, and Ninth Circuits' resistance to concluding that § 1927 reaches beyond individuals).

163. 556 F.3d 389 (6th Cir. 2009).

164. *See supra* notes 117–20 and accompanying text.

165. *Rentz*, 556 F.3d at 403.

166. *See* 28 U.S.C. § 1927 (2012) (defining the scope of the statute as "[a]ny attorney or other person admitted to conduct cases in any court of the United States").

167. FED. R. CIV. P. 11(c); *see also supra* Part I.B.

168. *Rentz*, 556 F.3d at 395–96; *see also supra* Part I.B.

169. 602 F.3d 742 (6th Cir. 2009).

170. *Id.* at 751.

171. 735 F. Supp. 100 (S.D.N.Y. 1990).

172. *Id.* at 101–02; *see also supra* notes 117–20 and accompanying text. *Brignoli*'s reasoning has also been adopted by the First Circuit's Bankruptcy Appellate Panel. *See* Castellanos Grp. Law Firm, L.L.C. v. Fed. Deposit Ins. Corp. (*In re* MJS Croabas Props., Inc.), 545 B.R. 401, 419–21 (B.A.P. 1st Cir. 2016).

The Seventh Circuit has taken a stance identical to that of the Sixth Circuit.[173] As for "other person[s] admitted to conduct cases," the Seventh Circuit has concluded that the statutory language covers only the conduct of nonattorneys admitted to practice for limited purposes, such as law students or those involved in patent litigation—not law firms as figurative persons.[174]

In *Kaass Law v. Wells Fargo Bank, N.A.*,[175] the Ninth Circuit adopted this interpretation as well, citing *BDT Products* for its textual analysis outlined above.[176] In the same opinion, the circuit court relied on *expressio unius*[177] as further support to conclude that law firms are excluded from § 1927's reach.[178]

Academics who have researched and written on federal sanctions law also favor this textual interpretation.[179] For example, the American Bar Association has taken this position, stating that pursuant to the statute's construction, § 1927 cannot reach the conduct of law firms nor hold them vicariously liable for attorneys' or other representatives' conduct or behavior.[180]

2. Legislative Intent and Historical Limitations

The legislative history of § 1927 also lends support to the minority circuits' analyses and has been invoked to bolster their position.[181] As discussed in Part I.A,[182] the predecessor statute to § 1927 was first enacted in 1813[183] and allowed for the imposition of sanctions only against "any attorney, proctor, or other person admitted to manage and conduct [cases] in a court of the

173. *See* Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005) ("No one argues that the . . . firm as a whole is actually 'admitted to conduct cases' before any court."). In *Claiborne*, Judge Diane P. Wood concluded that only individual attorneys could be admitted to practice before the courts. *Id.*

174. *Id.*; *see also* BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d at 742, 751 (6th Cir. 2010).

175. 799 F.3d 1290 (9th Cir. 2015).

176. *Id.* at 1294; *see also supra* note 169 and accompanying text.

177. This canon of statutory construction, short for *expressio unius est exclusio alterius*, holds that the expression or inclusion of one thing implies exclusion of the other or of the alternative. *Expressio unius est exclusio alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

178. *Kaass Law*, 799 F.3d at 1294.

179. *See* JOSEPH, *supra* note 5, § 21(c)(1) (stating that, unlike Rule 11, § 1927 does not expressly authorize sanctions against law firms because it applies "only to '[a]ny attorney, or other person admitted to conduct cases in any court of the United States'"); *see also* MALLEN, *supra* note 5, § 11:59 ("The language of [§] 1927 is explicit, applying exclusively to an 'attorney or other person admitted to conduct cases.'").

180. *See* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 45 (2d ed. 2016) ("[O]nly a lawyer can be sanctioned for violating [the statute], not a party, and, unlike the vicarious liability that attends Rule 11, not a law firm in which the lawyer practices.").

181. *See supra* Part I.A.

182. *See supra* notes 28–30 and accompanying text.

183. The statutory language was approved by the Thirteenth Congress on July 22, 1813. *See* Act Concerning Suits and Costs in Courts of the United States, ch. 14, sec. 2, 3 Stat. 19, 21 (1813).

United States."[184] In 1853, when this statute was reenacted as § 1927 of Title 28 of the U.S. Code,[185] its language was not altered.

When § 1927 was codified in the Revised Statutes of the United States, the language was changed minimally and law firms were not mentioned.[186] The title of the provision, which was added as a marginal notation, reads: "Attorney liable for costs vexatiously increased by him."[187] Although it is well settled that the title of an act cannot "control plain words in the body of the statute," it nonetheless may be considered to shed light on ambiguity therein.[188] Here, even assuming that the text is ambiguous, the title suggests that § 1927 applies only to individual attorneys.[189]

When § 1927 was amended in 1980,[190] Congress altered its language by striking out the phrases "as to increase costs" and "such excess costs" and inserting "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[191] The congressional record states that the principal reason for amending the statute was to preclude courts from narrowly construing its text to authorize sanctions "only in . . . egregious instances."[192] The amendment's purpose, according to the drafters, was to expand costs that a court may impose to discourage counsel from employing litigation strategies that impede cases from nearing disposition.[193] Moreover, the imposition of sanctions under § 1927 on anyone other than individual attorneys or representatives was never discussed during the 1979 congressional floor debates regarding the proposed amendments.[194]

In addition to the legislative history set forth above, at least one scholar has reasoned that the history of § 1927 is telling of its allegedly limited reach.[195] Because law firms did not exist as common entities in 1813 when the original form of § 1927 was enacted,[196] law firms were not included within the language of the statute.[197] When the legislation was reenacted in 1853,[198] the text of the statute was not changed to include law firms as sanctionable entities because law firms were still uncommon.[199] However,

184. *Id.* This statute and its approval were published in the Public Statutes at Large in 1846. *Id.*

185. *See* Act to Regulate Fees and Costs to be Allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, ch. 80, 10 Stat. 160, 162 (1853); *see also supra* notes 31–32 and accompanying text.

186. *See supra* note 185.

187. *See supra* note 185.

188. *See* United States v. Fisher, 2 Cranch 358, 386 (1805).

189. *See supra* note 185.

190. *See supra* notes 33–39 and accompanying text.

191. *See* Antitrust Procedural Improvements Act of 1980, sec. 3, 94 Stat. 1154, 1156 (codified as amended at 28 U.S.C. § 1927 (2012)).

192. *See* 96 CONG. REC. 1347 (Feb. 8, 1979).

193. *See id.* at 1344.

194. *See Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 96th Cong. 390 (1979).

195. *See* JOSEPH, *supra* note 5, § 21(C)(2).

196. *See supra* notes 28–29 and accompanying text.

197. *See supra* notes 28–29 and accompanying text; *see also supra* Part I.A.

198. *See supra* notes 31–32 and accompanying text.

199. *See* JOSEPH, *supra* note 5, § 21(C)(2).

when the statute was last amended in 1980,[200] law firms were widespread,[201] and Congress included nothing in the amendments to § 1927 to suggest a statutory grant of authority to impose sanctions on law firms.[202]

To bolster their analyses, the minority circuits also rely on the Supreme Court's decision in *Pavelic*[203] to vacate sanctions imposed on a law firm under the pre-1993 version of Rule 11.[204] Part II.B.3 below compares *Pavelic*'s seemingly analogous facts and circumstances to those associated with § 1927. This Part also discusses the congressional silence surrounding the application of § 1927 and its support of the minority view.

3. Continual Congressional Silence

Another major premise supporting the minority circuits' approach is lack of congressional involvement. In addition to the absence of foundational text that explicitly authorizes courts to impose sanctions on law firms under the statute,[205] the minority courts have relied on Congress's failure to intercede on the issue and amend the statute.[206]

In *Rentz*, the Sixth Circuit noted that law firms may be sanctioned under Rule 11[207] only because that authority has been expressly provided for in the federal rule.[208] In doing so, the court found sanctions permissible under Rule 11 but not under § 1927, which the court concluded did not authorize sanctions against law firms.[209] Thus, the court reasoned that only express legislative permission would give the court the power to sanction a firm under § 1927.[210]

The Seventh Circuit has also relied on congressional silence to support its analysis of § 1927's reach. In *Claiborne v. Wisdom*,[211] the court reversed a lower court's order holding a law firm jointly and severally liable for sanctions imposed on the plaintiff's attorney.[212] The court referenced the Supreme Court's decision in *Pavelic*, reminding the bar that in *Pavelic* the Court concluded that "the person who signed," as articulated in the prior

200. *See supra* Part I.A; *see also supra* note 39 and accompanying text.

201. *See supra* notes 152–53 and accompanying text (noting that the national law firm population exceeded 35,000 by 1980).

202. *See* H.R. REP. NO. 96-1234, at 9 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 2781, 2782 (stating that "the *attorney* should be required to satisfy *personally* [the] full range of excess costs attributable to" the conduct that § 1927 seeks to address (emphasis added)).

203. Pavelic & LeFlore v. Marvel Entm't Grp., 489 U.S. 1009 (1989).

204. *See supra* notes 50–56 and accompanying text.

205. *See supra* Part II.B.1.

206. Congressional silence may be used to support both the majority and minority approaches. However, the minority circuits have expressly relied on Congress's silence in their analyses on the matter, which is why this Note categorizes congressional noninvolvement as a minority argument.

207. 556 F.3d 389, 396 (6th Cir. 2009).

208. *See generally supra* Part I.C; *see also supra* notes 49–59 and accompanying text.

209. *Rentz*, 556 F.3d at 395–96.

210. *Id.* at 395–403.

211. 414 F.3d 715 (2005).

212. *Id.* at 724.

version of Rule 11,[213] "could only mean the individual signer, not his partnership, either in addition to him or in the alternative."[214] The court concluded that the facts and circumstances of *Claiborne* posed the same problem as *Pavelic*, and thus the court lacked statutory authority to sanction law firms under § 1927.[215] The Seventh Circuit thus concluded that its hands were tied because Congress had not amended the statute to expressly provide for such authority.[216]

Similarly, the Ninth Circuit held in *Kaass Law* that congressional silence precludes the applicability of § 1927 sanctions on law firms.[217] In a case involving an allegedly erroneous credit report, the district court imposed sanctions for attorneys' fees and costs against Kaass Law, the plaintiff's counsel's law firm.[218] The district court noted that Kaass Law acted in bad faith by and through its attorney by failing to (1) properly plead under Rule 8,[219] (2) oppose Wells Fargo's motion to dismiss, and (3) meet or communicate with Wells Fargo's counsel, which prolonged the litigation.[220] Thus, because Kaass Law had knowledge of and failed to correct "glaring pleading and legal errors,"[221] the law firm "recklessly and knowingly" multiplied the proceedings.[222] The Ninth Circuit reversed the imposition of sanctions, holding that "[i]f Congress had intended to permit federal courts to impose sanctions against law firms, it would have included an express authorization to do so in the statute."[223]

4. The Majority's Allegedly Unpersuasive Arguments

The minority circuits have also noted that the majority circuits' analyses lack sufficient support to conclude that § 1927 reaches law firms.[224] In *Claiborne*, the Seventh Circuit posited that, although the Eleventh Circuit has upheld § 1927 sanctions against a law firm,[225] it offered no plausible reason for including law firms among persons or entities that may be sanctioned under the statutory scheme.[226] Similarly, the Ninth Circuit has stated that "[t]he Eleventh Circuit seemingly conflated the sanctioning powers in

213. *See supra* note 55 and accompanying text.

214. *Claiborne*, 414 F.3d at 723 (citing Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 121 (1989)).

215. *See id.* Rule 11 was not amended through legislation. Whether a sanctions authority has been amended by judicial or legislative action, however, is unimportant because each has the same result. *See supra* note 57 and accompanying text.

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

217. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015).

218. *Id.* at 1292.

219. *See* FED. R. CIV. P. 8 (prescribing the general rules of pleading in federal court).

220. *Kaass Law*, 799 F.3d at 1292.

221. *Id.*

222. *Id.*

223. *Id.*

224. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005); *see also Kaass Law*, 799 F.3d at 1294–95.

225. *See* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991).

226. *Claiborne*, 414 F.3d at 722–23 (discussing the Eleventh Circuit's misapplication of *Roadway Express* to support its conclusion, even though that case did not involve law firm liability under § 1927 but, rather, liability under the court's inherent power to sanction).

[§ 1927 and Rule 11] when it upheld sanctions against lead counsel and his law firm."[227] The minority circuits have also criticized[228] decisions of the District of Columbia[229] and Third Circuits,[230] both of which have implicitly[231] affirmed sanctions against law firms without any discussion of the legal issue[232] this Note contemplates.

The Ninth Circuit has called into question the Second Circuit's holding in *Enmon*[233] by reasoning that the Second Circuit supported its decision to uphold sanctions against a law firm on the courts' inherent power to sanction rather than the text of § 1927.[234] The Ninth Circuit went on to state that the Second Circuit's conclusion that the statutory language allows the imposition of sanctions on law firms[235] lacks legal merit because the court overlooked citations to *Pavelic* and *Claiborne* in the appellant's brief and failed to address those cases in its decision.[236] Furthermore, the Seventh Circuit has noted[237] that in *Blue v. United States Department of the Army*[238] the Fourth Circuit expressed doubt as to whether law firms may be sanctioned under § 1927,[239] even though the circuit court did not resolve the issue in that matter.[240]

III. RESOLVING THE CIRCUIT SPLIT

The circuit courts' inconsistent interpretations of § 1927 and the authority to impose sanctions on law firms demonstrate the need for a clear resolution. Federal law should be administered consistently within the federal system,[241] and courts should uniformly interpret the statute to provide predictability and consistency.[242] Part III.A analyzes the specific problems plaguing both the majority and minority approaches of the circuit courts.[243] Part III.B affords two solutions to these problems and describes the implications of each.

227. *Kaass Law*, 799 F.3d at 1294.
228. *Id.*; *see also Claiborne*, 414 F.3d at 722.
229. *See, e.g.*, LaPrade v. Kidder Peabody & Co., 146 F.3d 899 (D.C. Cir. 1998).
230. *See, e.g.*, Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204 (3d Cir. 1985).
231. *See supra* Part II.A.2.
232. *See supra* note 17 and accompanying text (identifying § 1927's application to law firm conduct as a matter of law).
233. Enmon v. Prospect Capital Corp., 675 F.3d 138 (2d Cir. 2012).
234. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1294–95 (9th Cir. 2015).
235. *Enmon*, 675 F.3d at 148.
236. *Kaass Law*, 799 F.3d at 1295; *see also* Brief for Appellant at 49, *Enmon*, 675 F.3d 138 (No. 10-2811-cv), 2010 WL 4715535.
237. Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005).
238. 914 F.2d 525 (4th Cir. 1990).
239. *Id.* at 549 ("[W]e are doubtful that [§ 1927 and other sanctions authorities] support sanctions against an entire firm rather than against the individual lawyers who acted improperly.").
240. *Id.* It should be noted, however, that *Blue* was decided prior to the adoption of the 1993 amendments to Rule 11, which expressly authorized sanctions against law firms. *See supra* notes 49–60 and accompanying text.
241. *See* COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., *supra* note 104, at 206–07.
242. *Id.* at 207.
243. *See supra* Parts II.A–B.

A. Problems Underlying Each Approach

Part III.A.1 argues that the majority circuits' approach[244] is questionable because it lacks express foundation and expands judicial boundaries. Although grounded in sound policy, this approach interprets § 1927 broadly due to the statute's text and legislative history. Part III.A.2 argues that minority circuits' analysis[245] fails to recognize and meet the statute's purpose. The text and history of § 1927 justify the minority's conclusion, but that conclusion does not account for important and reasonable policy considerations.

1. Section 1927's Authority to Sanction: Lack of Evidentiary and Textual Support

Unambiguous language is the majority approach's worst enemy.[246] The statute clearly defines those who fall within the statute's reach: "[a]ny attorney or other person admitted to conduct cases in any court of the United States."[247] Furthermore, when a statute's ambiguity is not in question—that is, when the legislature has clearly spoken—courts should adhere to Congress's approved standards.[248]

Congress's lack of statutory amendment to date[249] also calls into question the majority's theoretical attempt at judicial activism.[250] When the imposition of sanctions on a law firm under pre-1993 Rule 11 was challenged in *Pavelic*, the Supreme Court relied on the text of the federal rule to conclude a lack of judicial authority.[251] The Court held that the plain language of Rule 11 did not permit the remedy imposed by the lower court and thus declined to uphold the sanctions.[252] After *Pavelic*, Rule 11 was quickly amended to allow such authority.[253]

In addition, the majority's attempts to rely on textual arguments to support the imposition of sanctions against law firms do not hold much water.[254] In *Brignoli*, a district court's conclusion that law firms may "naturally" be considered "other person[s] admitted to conduct cases" so as to fall within the statute's reach[255] seemingly signifies flawed logic. The text of the statute

244. *See supra* Part II.A.
245. *See supra* Part II.B.
246. *See supra* notes 184–202 and accompanying text.
247. *See* 28 U.S.C. § 1927 (2012); *see also supra* note 17 and accompanying text.
248. *See supra* note 95 and accompanying text.
249. *See supra* notes 28–33 and accompanying text.
250. *See supra* Part II.B.3.
251. *See supra* notes 54–56 and accompanying text.
252. *See supra* notes 55–56 and accompanying text.
253. *See supra* notes 57–60 and accompanying text.
254. *See generally supra* notes 117–20 and accompanying text.
255. *See, e.g.*, Brignoli v. Balch Hardy & Scheinman, Inc., 735 F. Supp. 100, 101–02 (S.D.N.Y. 1990) (stating that the phrase "those entities who 'conduct cases'" connotes "a statutory class or category into which law firms naturally fall"). The Bankruptcy Appellate Panel of the First Circuit has also relied on *Brignoli*'s textual reasoning. *See* Castellanos Grp. Law Firm v. Fed. Deposit Ins. Corp. (*In re* MJS Las Croabas Props., Inc.), 545 B.R. 401, 420–21 (B.A.P. 1st Cir. 2016).

expressly allows for sanctions against "[a]ny attorney or other person admitted to conduct cases in any court."[256] Words preceded or surrounded by others in the same statutory phrase "are liable to be affected by other words with which they are associated."[257] This canon of statutory construction[258] is widely accepted and supports consistency in meaning.[259] The plain language of § 1927 implies an understanding that statutory sanctions may be imposed only against individuals,[260] since the term "other person" seems to be modified by "[a]ny attorney,"[261] which precedes it in the statutory scheme. It follows, therefore, that only individuals—not law firms—may be admitted to conduct cases, since only individual lawyers or other representatives may be admitted or allowed to practice before the courts.[262] The text of § 1927 cuts against the grain of the majority's view.[263]

a. Sacrificing Judicial Boundaries for Efficiency

Another issue that belies the majority approach is its expansion of the scope of § 1927.[264] The majority circuits have relied on the statute as the basis on which to impose sanctions against law firms, presumably expanding the scope of the legislative text. Such a finding is ideal from an efficiency standpoint, since the federal judiciary has previously concluded that law firms should be sanctionable as entities in and of themselves for certain conduct.[265] However, federal courts already have the authority to sanction law firms pursuant to the courts' inherent authority to sanction under common law.[266] This authority requires a finding of subjective bad faith, but the text of § 1927 is silent on the matter.[267] Thus, it might be argued that the

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256. *See supra* note 247 and accompanying text.

257. RUPERT CROSS, STATUTORY INTERPRETATION 138–39 (John Bell & George Angle eds., 3d ed. 1995) (discussing *noscitur a sociis* as a popular canon of statutory construction).

258. *See Noscitur a sociis*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A canon of construction holding that the meaning of an unclear word or phrase . . . should be determined by the words immediately surrounding it").

259. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 344 n.91 (1990) (noting that the "maxim" of *noscitur a sociis* suggests "light may be shed on the meaning of statutory words by the words surrounding them").

260. *See supra* notes 163–78 and accompanying text.

261. *See* 28 U.S.C. § 1927 (2012) (identifying those who may be sanctioned as "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof").

262. *See* Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005); *see also supra* Part II.B.1. In *Claiborne*, 414 F.3d at 723, the Seventh Circuit also acknowledged that certain nonattorneys may "conduct cases" before the courts but noted that such authority may be vested only in individuals, not entities.

263. *See generally supra* Part II.A.

264. *See generally supra* Part II.A.

265. This is precisely the issue that brought about the 1993 amendments to Rule 11. *See generally supra* Part I.B.

266. *See generally supra* Part I.C.

267. *See* 28 U.S.C. § 1927 (2012); *see also supra* Part I.A; *supra* notes 84, 91 and accompanying text.

majority has eliminated a finding of bad faith which would otherwise be required to sanction law firms using inherent authority.[268]

Such judicial undertakings have been criticized and presumably ought to be avoided as it is widely held that courts should not expand the scope of statutory text absent express authority to do so.[269] Where Congress has spoken and statutory text warrants one conclusion, nonlegislative entities, including the judiciary, should construe the words of the statute in conformity with explicit congressional intent.[270] Thus, although uniformity is heightened under the majority view,[271] judicial and legislative boundaries are sacrificed for the sake of efficiency.[272]

b. Foundational Nonexistence

The majority approach is plagued by the same issues that affected Rule 11.[273] Rule 11 did not allow for sanctions to be imposed against law firms prior to its amendment in 1993.[274] When the Supreme Court analyzed the legality of sanctions imposed against a law firm in *Pavelic*, it relied on the express language of the rule to denounce such authority.[275] The Court noted that the specific text of Rule 11 requires a court to "impose upon the *person* . . . an appropriate sanction" for certain litigation conduct.[276] It construed "person" to mean an individual and only an individual.[277] The Court's decision in *Pavelic* prompted the Advisory Committee on the Federal Rules of Civil Procedure to amend Rule 11, and Congress acquiesced to its new construction and reach.[278]

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268. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) (stating that, pursuant to the inherent authority, courts "may assess attorney's fees against litigants, counsel, and law firms who willfully abuse [the] judicial process by conduct tantamount to bad faith"); *see also supra* Part I.C. It should be noted, however, that some circuit courts have concluded that bad faith has both an objective and subjective meaning under § 1927, and thus reckless and intentional conduct are equally actionable under the statutory scheme. *See In re* TCI, Ltd., 769 F.2d 441, 445 (7th Cir. 1985); *see also* Mach v. Will Cty. Sheriff, 580 F.3d 495, 501 (7th Cir. 2009) (stating that, within the context of § 1927, bad faith "has both a subjective and objective meaning" and that "reckless and intentional conduct [should be treated] equally"). Furthermore, the *Chambers* Court included "vexatious" conduct in its description of certain behavior that constitutes bad faith. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991).

269. *Cf.* Sheehan v. United States, 896 F.2d 1168, 1172 (9th Cir. 1990) (concluding that "only Congress, not the courts, may expand the scope . . . beyond the exact words of [a] statute"); Grider v. Tex. Oil & Gas Corp., 868 F.2d 1147, 1150 (10th Cir. 1989) ("[I]t is up to Congress, and not the courts, to expand the scope of [statutes]." (citation omitted)); Schofield v. First Commodity Corp. of Bos., 793 F.2d 28, 31 n.2 (1st Cir. 1986) (holding that "it is up to Congress, and not the courts, to expand the scope of [a] statute").

270. *See generally* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

271. *See supra* notes 102–04 and accompanying text.

272. *See supra* notes 264–70 and accompanying text.

273. *See supra* notes 49–56 and accompanying text.

274. *See supra* notes 49–56 and accompanying text.

275. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126–27 (1989); *see also supra* notes 54–56 and accompanying text.

276. *Pavelic*, 493 U.S. at 123 (emphasis added).

277. *Id.* at 123–25.

278. *See supra* note 57 and accompanying text.

To date, the Supreme Court has not had an occasion to evaluate the scope of § 1927 in this context. Although the issue surrounding Rule 11 in *Pavelic* did not pertain to the construction of a federal statute,[279] it is illustrative of the statute's scope. In *Pavelic,* the Court held eight-to-one that the express language of the rule barred courts from sanctioning anyone other than parties and individual representatives.[280] In dissent, Justice Thurgood Marshall construed the meaning of "person" as a signal of the drafters' intent to allow sanctions to be imposed on any "juridical person," including law firms,[281] but that argument and construction did not persuade a majority of the Court, let alone any other Justice.

Additionally, the history of § 1927's enactment, reenactment, and amendments demonstrates a lack of foundational support for the majority rule.[282] This historical backdrop serves as support for the minority approach[283] and the belief that law firms may be sanctioned under statutory schemes only when Congress expressly affirms such authority.[284]

2. Section 1927's Limitations: Textually Certain, Yet Not Necessarily True

Just as the majority block's analysis has its failures, so too does the minority approach. The Sixth, Seventh, and Ninth Circuits' foci in determining the application and scope of § 1927 is grounded in textual scrutiny.[285] Their determination that the text of the statute disallows the imposition of sanctions against nonindividuals is bolstered by the doctrines of *expressio unius*,[286] *noscitur a sociis*,[287] and the plain meaning rule.[288] Such inquiries and analyses, however, consistently fail to consider the policy behind § 1927 and the mischief the statute seeks to address.[289] A narrow, textual focus presupposes alternative concerns and is far less pragmatic as a basis for interpretation.[290] The minority view is seemingly blind to the

279. *See supra* notes 49–60 and accompanying text.
280. *Pavelic*, 493 U.S. at 126–27.
281. *Id.* at 128–29 (Marshall, J., dissenting).
282. *See generally supra* Part I.A; *see also supra* notes 184–87 and accompanying text.
283. *See generally supra* Part II.B.
284. *See supra* Part II.B.1.
285. *See generally supra* Part II.B.1.
286. *See supra* notes 177–78 and accompanying text.
287. *See supra* notes 258–59 and accompanying text.
288. The plain meaning rule stems from the idea that "courts are subordinate policymakers, 'honest agents' who implement the directives of the legislature." William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 404 (1990). Thus, the judiciary is obligated to analyze and interpret legislative enactments pursuant to their plain meanings, "without reference to personal desires or individual conceptions of justice." *Id.* (quoting Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 633 (1949)).
289. *See supra* Part II.A.3.
290. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 249 (2d ed. 2006). When a theory of statutory interpretation is based on a single foundation, any subsequent analysis tends to ignore "the pragmatic insight that our intellectual framework is not single-minded" because such pragmatism fashions a "polycentric, spiral, and inductive" decision-making process that is not "unidimensional, linear, and deductive." *Id.*

purposivist approach of the majority circuits[291] and consequently does not address the issue in full, thus missing the mark in addressing the dispute in its entirety.

a. Legislative Focus: Intentionalism and the Mischief Rule

The minority circuits' reliance on text and syntax does not account for the canons of statutory interpretation at the judiciary's disposal.[292] Mere textual evaluations overlook one of the oldest[293] and still-relevant tools of statutory interpretation: the mischief rule. This doctrine allows courts to identify the "mischief and defect" that an enactment was intended to remedy and utilize the enactment to meet the mischief identified.[294] Implementation of the mischief rule in statutory analysis necessarily provokes an invitation to examine the intent of a given statutory scheme beyond its text.[295] The majority circuits have effectively utilized this canon of construction by recognizing an authority under § 1927 to impose sanctions against law firms when they deem such sanctions appropriate.[296] The minority block has conversely ignored such analysis.

The mischief rule and the majority's purposivist approach[297] afford § 1927 meaning. The principal inquiry which formed the basis for the statute's enactment was "to inquire what [l]egislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice."[298] The causes for such congressional inquiry were rising litigation costs, delays, and other abuses of the judicial process.[299] Attorneys, of course, may be responsible for such conduct, and therefore may be sanctioned for conduct that meets the mischief that § 1927 addresses. The minority coalition, however, consistently holds that represented parties and attorneys' employers cannot be responsible for such conduct.[300]

It is practical to prohibit § 1927 sanctions against a nonattorney party for behavior that would multiply proceedings in the federal courts. For one, parties are normally unsophisticated in the law, and courts ordinarily afford

291. *See supra* Part II.A.3.

292. *Cf.* Elliot Coal Mining Co. v. Dir., Office of Workers' Comp. Programs, 17 F.3d 616, 631 (3d Cir. 1994) (stating that grammatical rules are not the only resources available to courts when interpreting legislative enactments).

293. The mischief rule was expounded in the sixteenth century by Lord Coke. Heydon's Case (1584) 76 Eng. Rep. 637, 638; *see also Elliot Coal*, 17 F.3d at 631.

294. *See Heydon's Case*, 76 Eng. Rep. at 638; *see also Elliot Coal*, 17 F.3d at 631; *supra* notes 139–42 and accompanying text.

295. *Cf. Heydon's Case*, 76 Eng. Rep. at 638–39.

296. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 147–48 (2d Cir. 2012); *see also* Castellanos Grp. Law Firm v. Fed. Deposit Ins. Corp. (*In re* MJS Las Croabas Props., Inc.), 545 B.R. 401, 419–22 (B.A.P. 1st Cir. 2016).

297. *See generally supra* Part II.A.1.

298. *See* 26 ANNALS OF CONG. 29 (1813); *see also* JOSEPH, *supra* note 5, § 20.

299. *See* Janet Eve Josselyn, Note, *The Song of the Sirens—Sanctioning Lawyers Under 28 U.S.C. § 1927*, 31 B.C. L. REV. 477, 477–78 (1990); *see also supra* notes 29–32 and accompanying text.

300. *See supra* notes 165–69, 173–78 and accompanying text.

relaxed requirements to pro se litigants.[301] Where a party is represented by an attorney employed by a law firm, however, the attorney represents the client while also fulfilling her duties and obligations owed to her employer—the firm. Allowing courts to impose sanctions under § 1927 against both individual attorneys and law firms that employ them protects the integrity of the statute without restricting its reach.[302] Such a determination would meet the misconduct § 1927 was enacted to redress and account for the increased prevalence of the law firm.[303]

In addition, a major gap in the minority's reliance on *Pavelic* is the aftermath of the Court's decision to reverse sanctions against a law firm under the preamendment Rule 11.[304] Congress did not veto the Advisory Committee's decision to amend Rule 11 to provide courts the authority to sanction firms.[305] Similarly, Congress did not contest amended Rule 11's mandate of vicarious liability of law firms for any sanctions imposed against attorneys under their employ.[306] Furthermore, the minority circuits ignore the Advisory Committee's comments to the amended rule, which state it is appropriate for a law firm to be jointly responsible for its employees' conduct under "established principles of agency."[307] In sum, the minority circuits do not account for these circumstantial factors and supporting policy justifications in their analyses of § 1927.

b. Lack of Public Policy Support for the Minority View

The minority circuits' approach lacks public policy justifications.[308] In *Claiborne*, the Seventh Circuit ordered the plaintiff's attorney to pay the defendant's attorneys' fees and costs exceeding $100,000, but declined to affirm an award of sanctions against the plaintiff's counsel's law firm, even though the lower court determined that the firm acted in bad faith.[309] Similarly, in *Kaass Law*, the Ninth Circuit concluded that a defendant had to pay its own legal fees in defense of meritless litigation with no basis in law or fact.[310] Although the minority's textual arguments adhere to one form of statutory interpretation,[311] those arguments often do not lend themselves to equitable outcomes.[312]

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301. *See* 1 STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK CIVIL § 10:20 (2012).
302. *See supra* note 142 and accompanying text.
303. *See supra* notes 20–24, 149–161 and accompanying text.
304. Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 127 (1989).
305. *See supra* notes 57–59 and accompanying text.
306. *See supra* notes 59–60 and accompanying text.
307. *See supra* note 59 and accompanying text.
308. *See supra* notes 289–91 and accompanying text.
309. *See* Claiborne v. Wisdom, 414 F.3d 715, 722–24 (7th Cir. 2005).
310. *See* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015).
311. *See* ESKRIDGE ET AL., *supra* note 290, at 231–45 (describing the textualist theory of statutory interpretation).
312. *See, e.g.*, *Claiborne*, 414 F.3d at 724.

Congress enacted what has become § 1927 more than 200 years ago.[313] In the early 1800s, attorneys were predominantly solo practitioners, and law partnerships were uncommon.[314] The earliest form of the statute called for the imposition of sanctions, where appropriate, upon attorneys, proctors, or others conducting cases before the federal courts.[315] Since the earliest drafters could not foresee problems regarding vicarious or direct liability on attorneys' employers, such liability was likely not needed at the time.[316] Over time, however, the legal landscape has been transformed.[317]

The above explanation does not completely reconcile the inconsistency. The statute was last amended in 1980, and Congress did not change its language to include law firms.[318] Although this notion supports the minority's viewpoint, it still does not account for the exponential growth of the legal field and the rise of law firm practice since the mid-1980s.[319] After all, the 1980 amendments were part of an overall effort to expedite and reduce the costs associated with antitrust litigation.[320] The focus, when the amendments were considered, was attorney dilatory practices.[321] Congress called for a change to the statute to increase the costs that may be available to victims of litigation misconduct.[322] At the time, Congress did not contemplate whether law firms should be held either directly or vicariously liable for such misconduct.[323]

Lack of express deliberation, however, does not connote express declination. As recently as the 1980s, law firms were not as abundant, large, or prevalent as they are today.[324] When legislating in 1980, Congress likely did not comprehend this issue and the policy concerns it raises, the effects of which the majority approach takes into account.[325]

B. The Call for Consistency: Statutory and Judicial Fixes

The ideal resolution of the split at issue in this Note is a congressional amendment. Part III.B.1 calls for a reconfiguration of § 1927 to expressly include law firms within its scope.

If a statutory amendment is unfeasible, however, the federal judiciary may still effectuate redress through its inherent authority to sanction.[326] Part

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313. *See supra* note 28 and accompanying text.
314. *See supra* note 151 and accompanying text.
315. *See supra* notes 28, 186 and accompanying text.
316. *See supra* notes 142–61 and accompanying text.
317. *See supra* notes 154–60 and accompanying text.
318. *See supra* notes 33–34 and accompanying text.
319. *See supra* notes 23, 154–60 and accompanying text.
320. *See supra* notes 33–34 and accompanying text.
321. *See supra* notes 33–34 and accompanying text.
322. *See supra* notes 33–34 and accompanying text.
323. *See supra* notes 33–34 and accompanying text.
324. *See supra* notes 154–59 and accompanying text; *see also* BARBARA A. CURRAN ET AL., *supra* note 152 (indicating that even as recently as 1985, "large" law firms were those that had fifty-one or more attorneys but constituted only 0.7 percent of the entire national firm population).
325. *See supra* Part II.A.3.
326. *See supra* notes 65–79 and accompanying text.

III.B.2 argues this approach would establish uniform treatment of attorneys practicing in the federal system and curb differential interpretation across jurisdictions, since the conduct that § 1927 seeks to remedy is actionable pursuant to the inherent authority.[327]

1. Congressional Involvement and Amendment

Based on federal judicial analyses[328] and the history and development of § 1927,[329] it is evident that the legislation is textually unambiguous.[330] Section 1927 allows for sanctions to be imposed only against "[a]ny attorney or other person admitted to conduct cases in any court of the United States."[331] Such a conclusion, however, would upset the purpose of the statute in today's legal sphere. Attorneys must be protected from the heightened expectations of performance that the modern legal landscape demands,[332] just as parties must be protected from dilatory and vexatious litigation conduct.[333] Public policy as well as increasing law firm growth[334] and mergers[335] exemplify a need for change and accountability. Such recognition would allow the federal judiciary to utilize § 1927 to meet original congressional intent and the statute's purpose. Congress must amend § 1927 to account for this void and give the statute teeth.[336]

2. Judicial Uniformity with Limited Reach

Unless and until Congress amends § 1927, federal courts must be willing to uniformly adopt an interpretation of the statute that promotes its policy objectives. This can be done through use of the federal courts' inherent authority to sanction.

This approach is less desirable than congressional amendment because the inherent authority ought to be predicated on a finding of subjective bad faith.[337] Section 1927 makes no mention of a bad faith requirement, and indeed some circuits do not require such a finding to impose sanctions under the statute.[338] In discussing the scope of the federal judiciary's inherent authority to impose sanctions, the Court concluded that "a court may assess [sanctions] when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[339] Thus, it seems that the inherent authority to sanction may very well be invoked to meet the conduct that § 1927 seeks to remedy—

327. *See supra* notes 101–04 and accompanying text.
328. *See supra* Parts II.A and II.B.
329. *See supra* Part I.A.
330. *See supra* note 39 and accompanying text.
331. 28 U.S.C. § 1927 (2012).
332. *See supra* notes 20–27 and accompanying text.
333. *See generally supra* Part I.A.
334. *See supra* notes 155–59 and accompanying text.
335. *See supra* note 20 and accompanying text.
336. *See infra* Appendix.
337. *See generally supra* Part I.C.
338. *See supra* note 15 and accompanying text.
339. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991); *see also supra* Part III.A.1.a.

unreasonable and vexatious litigation behavior.[340] If § 1927 sanctions are used to deter the misconduct acknowledged in the statute, then a finding of bad faith would normally necessitate their imposition.[341]

CONCLUSION

Several circuits have analyzed, interpreted, and applied § 1927 to provide its intended remedy. Some, though, have failed to do so, thus impairing the effectiveness of the statute while perpetuating marked inconsistencies. This Note proposes an amendment to § 1927 that gives the statute unquestionable and proper application.[342] Such an amendment would provide parties with ample redress and protection against unreasonable litigation conduct, the potential for which has greatly increased in the modern legal landscape. Through adoption of this proposal, the federal circuits may move one step closer to a more uniform and efficient administration of justice.

340. 28 U.S.C. § 1927 (2012).
341. *See supra* Part III.A.2.
342. *See infra* Appendix.

APPENDIX

PROPOSED 28 U.S.C. § 1927:
LIABILITY FOR EXCESSIVE COSTS

(a) Any 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;

(b) If the court requires any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof as set forth in subsection (a) to satisfy personally any excess costs, expenses, and attorneys' fees reasonably incurred, the court may also hold the employer or partnership of the attorney or other person jointly liable to satisfy the excess costs, expenses, and attorneys' fees reasonably incurred;

(c) A court may require an employer or partnership of any attorney or other person as set forth in subsection (a) who so multiplies the proceedings in any case unreasonably and vexatiously to satisfy any excess costs, expenses, and attorneys' fees reasonably incurred due to such conduct even if the court does not also require the individual attorney or person to satisfy the excess costs, expenses, and attorneys' fees reasonably incurred.