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Note

Punishing the Pettifogger's Practice: Applying the Sanction Power of 28 U.S.C. § 1927 to Law Firms

*Joseph T. Janochoski**

As is likely the case in most fields, the legal profession will inevitably suffer from the occasional bad lawyer, a pettifogger.[1] The pettifoggery that such lawyers occasionally unleash upon the judiciary can vary from the rather insignificant,[2] to situations arguably deserving of stern condemnation.[3] Such behavior impacts the judicial system in at least two ways: improper attorney conduct undermines the public's faith in the justice system,

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1. Black's Law Dictionary defines a pettifogger as "a lawyer lacking in education, ability, sound judgment, or common sense," or alternatively, "a lawyer who clouds an issue with insignificant details." *Pettifogger*, BLACK'S LAW DICTIONARY (10th ed. 2014).

2. *See generally* Adam Liptak, *Judge Finds a Typo-Prone Lawyer Guilty of Bad Writing*, N.Y. TIMES (Mar. 4, 2004), http://www.nytimes.com/2004/03/04/us/judge-finds-a-typo-prone-lawyer-guilty-of-bad-writing.html (reducing a plaintiff's lawyer's award of fees due to unintelligible prose and arguments in his submissions to the court).

3. A recent example of insidious pettifoggery can be seen in the Prenda Law copyright trolling enterprise, where two attorneys filed lawsuits against thousands of defendants across the country accusing them of illegally downloading pornographic movies. After subpoenaing the identity of subscribers behind IP addresses suspected of the downloads, the attorneys sent threatening letters that usually induced the defendants to settle "either out of fear of humiliation or inability to pay for litigation. . . . Each defendant would typically pay around $4,000." Both attorneys were later found to have "engaged in abusive litigation, fraud on courts across the country, and willful violation of court orders." *See* Joe Mullin, *Prenda Lawyers Lose Key Appeal, Will Pay $230k Sanction*, ARSTECHNICA (June 10, 2016), http://arstechnica.com/tech-policy/2016/06/appeals-court-upholds-sanctions-against-prenda-law-copyright-scheme.

and it undermines the role of an attorney as an officer of the court.[4]

In order to minimize any damage to the justice system or the public, courts rely on a "panoply of procedural and substantive" tools and approaches that can be utilized to discourage and deter attorney misconduct.[5] One such tool, found in a variety of authorities,[6] is the ability of courts to sanction individual attorneys. Sanctions against attorneys, as one court recognized, are crucial to preventing abuses in litigation and promoting the efficient administration of the entire judicial system.[7] Abuses of the litigation process can lead to delay, and delay causes hardship

4. *See generally* Butler v. Biocore Med. Techs, Inc., 348 F.3d 1163, 1173 (10th Cir. 2003) ("[A]ttorney misconduct both implicates the attorney's fitness to function as an officer of the court and triggers the court's responsibility to protect the public from unscrupulous or unqualified practitioners."); Cannon v. Loyola Univ. of Chi., 676 F. Supp. 823, 830 (N.D. Ill. 1987) ("Attorneys are officers of the court, and their first duty is to the administration of justice."). Punishment of such misconduct is crucial in order to maintain positive public perception of the profession. *See* Jennifer M. Kraus, Comment, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273, 289 (2000) (noting that "the attorney discipline system[s] must continually combat criticism with policies that inspire public confidence"); Staci Zaretsky, *Lawyers: The Most Despised Profession in America*, ABOVE THE LAW (July 15, 2013), http://abovethelaw.com/2013/07/lawyers-the-most-despised-profession-in-america (describing the legal profession as one the public routinely classifies as the least contributive to society's well-being).

5. Indeed, this panoply of tools includes Rules 11 and 37 of the Federal Rules of Civil Procedure, as well as various discovery rules. Furthermore, "[j]udges can supplement these rules with their own creative responses using the court's inherent power." Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1427 (2004) (discussing the attitudes of the judiciary regarding confronting attorney misconduct and the tools available to judges in that capacity).

6. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980) (recognizing, though not for the first time, the inherent power of courts to sanction attorneys who litigate in bad faith or abuse the litigation system). *See also* FED. R. CIV. P. 11 (authorizing a court to sanction an attorney who signs a "paper" lacking any basis in existing law, fact, or a good faith argument for the modification, reversal, or extension of said law); FED. R. CIV. P. 16(f) (authorizing courts to sanction a party or a party's attorney who fails to attend pretrial conferences); FED. R. CIV. P. 26(g) (authorizing sanctions against parties or a party's attorney for particular discovery abuses); FED. R. CIV. P. 37(b) (authorizing sanctions for failing to comply with discovery orders); FED. R. APP. P. 38 (authorizing sanctions against a party or a party's attorney for frivolous appeals).

7. Oliveri v. Thompson, 803 F.2d 1265, 1267 (2d Cir. 1986) (noting that severe abuse of the litigation system may lead to appropriately severe sanctions).

on both the courts and the litigants.[8] Consequently, while sanctions are ideally a rare remedy,[9] they serve an important role in preventing delay from plaguing the judiciary.

An important source of sanction power is 28 U.S.C. § 1927, the federal statute that allows a court to require "any attorney or other person admitted to conduct cases in any court of the United States" to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred" from conduct that "multiplies the proceedings in any case unreasonably and vexatiously."[10] The statute, first enacted in 1813,[11] was originally designed to prevent attorneys from filing multiple lawsuits where one suit would suffice.[12] Over time, the statute's text and underlying purpose have been expanded to include—and perhaps even primarily target—a multitude of delay-inducing activities in which attorneys engage.[13] Indeed, in § 1927's most recent amendment, Congress explained that its purpose in amending the statute was to "expand[] the category of expenses the judge might require an attorney to satisfy personally" to address dilatory conduct.[14]

Recent developments in how modern law firms function, however, pose problems for the effectiveness of § 1927's sanction power to deter delaying tactics. As the legal profession has

8. *See* O'Donnell v. Watson Bros. Transp. Co., 183 F. Supp. 577, 581 (N.D. Ill. 1960) ("Delay causes hardship . . . brings our courts into disrepute . . . [and] results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done . . . .").

9. Constant use of sanctioning power can cause a chilling effect on the "paramount principle of free access to the courts" by presenting such a potent threat to uncertain litigants that they may not bring the claim in the first place. *See* David Allen Shaneyfelt, Comment, *Courts Are No Place for Fun and Frivolity: A Warning to Vexatious Litigants and Over-Zealous Attorneys*, 20 WILLAMETTE L. REV. 441, 445 (1984). Access to the courts remains important, as even "[a] man with a poor case is as much entitled to have it judicially determined by usual legal processes as the man with a good case." Bartholomew v. Bartholomew, 132 P.2d 297, 302 (1942).

10. 28 U.S.C. § 1927 (2012).

11. Act of July 22, 1813, ch. 14, § 3, 3 Stat. 19, 21 (current version codified at 28 U.S.C. § 1927).

12. 26 ANNALS OF CONG. 29 (1813) (noting the need for a "Legislative provision" to "prevent multiplicity of suits" where a single lawsuit or process "might suffice for the administration of justice").

13. For example, in 1980 Congress amended § 1927 by adding to the phrase "excess costs" to "expenses, and attorneys' fees reasonably incurred because of such . . . conduct." The purpose of these additions was "to deter unnecessary delays in litigation." *See* H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.).

14. *Id.*

evolved, it has become increasingly specialized.[15] This specialization has been driven by increased demand for legal services; law firms seeking to tap into this demand have chosen to market their legal expertise by highlighting their specializations.[16] Specialization, particularly in commercial firms, has led to the decline of *individual* attorney autonomy and the increased emulation of a corporate structure,[17] which in turn decreases individual attorney autonomy over particular client matters.[18] It is here where the modern practice of law presents a problem for § 1927's effectiveness: on its face, the statute's language seeks to sanction individual attorneys for their dilatory conduct, but the modern reduction in individual attorney autonomy over particular client matters indicates that even if an attorney is a signatory on a motion or request, it is more likely the law firm as a whole that has pursued the dilatory conduct.[19] In such a situation, sanctioning the individual attorney does little to prevent delay-inducing conduct. Furthermore, sanctioning the law firm as a whole appears, on its face, to be outside § 1927's purview.[20]

15. Richard Moorhead, *Lawyer Specialization—Managing the Professional Paradox*, 32 LAW & POL'Y 226, 227 (2010) (noting that specialization within the legal profession is both "well established" and "growing in impact").

16. *Id.* at 228 (noting that "elite law firms solidify their position [on the market] . . . by expanding and underlining their reputation for excellence through that process of specialization.").

17. *See id.* at 229 ("In commercial firms, specialization is said to have advanced alongside a decline in lawyer autonomy while commercial lawyers become wealthier . . . and increasingly emulate the business structures of their clients.").

18. *See id.* (noting specializations parallel development alongside decline in attorney autonomy). *See also* Luis Garicano & Thomas N. Hubbard, *Specialization, Firms, and Markets: The Division of Labor Within and Between Law Firms*, 25 J.L. ECON. & ORG. 339, 360 (2009) (noting that specialized firms tend to increase the division of labor across individuals).

19. Indeed, in some cases, misconduct is the *underlying result* of structural or cultural pressures within a firm. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 100–01 (Erwin Chemerinsky et al. eds., 4th ed. 2016).

20. 28 U.S.C. § 1927. The law firm, on its face, is arguably not a person for the purposes of § 1927. However, modern day conceptions of corporations as "moral" persons suggest that as a matter of statutory interpretation, it is plausible that a law firm emulating a corporate structure could be considered a person under § 1927. *See, e.g.*, Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 207 (1979) (laying the philosophical groundwork for a theory that allows treatment of corporations as members of the moral community, "of equal standing with the traditionally acknowledged residents: biological human beings, . . . [and therefore making] responsibility ascriptions [to corporations] perfectly proper.").

This problem has manifested in a federal circuit split pertaining to the scope of § 1927.[21] The Courts of Appeal for the Sixth, Seventh and Ninth Circuits have all held that § 1927 cannot be used to sanction law firms,[22] whereas the Courts of Appeal for the District of Columbia, Second, Third, Eighth, and Eleventh Circuits, and the First Circuit Bankruptcy Appellate Panel, have all held that § 1927 may be used to sanction law firms.[23] The Supreme Court has yet to take up the issue, which renders § 1927's application inconsistent nationwide. Such inconsistency in application is particularly disconcerting considering the rise of national and international law firms that operate on a nationwide basis.[24] If, for example, a highly specialized international law firm with a broad division of labor and low individual attorney autonomy is litigating in numerous courts around the country, the potential dilatory tactics on the part of the firm may go unaddressed. Furthermore, even if such tactics are addressed by

21. This problem has been explored in the past, albeit at a time when the circuit split was less pronounced. *See generally* Jessica A. Winn, Note, *A Firm Law for Sanctions: Taking a Stance on Whether 28 U.S.C. § 1927 Should Apply to Law Firms*, 73 WASH. & LEE L. REV. 2135 (2016). That note explored possible remedies for resolving the circuit split by proposing that circuit courts align their positions, encouraging the Supreme Court to review the issue, and proposing statutory language changes to encompass law firms. *Id.* at 2176–84. This Note, on the other hand, expands the existing literature by analyzing more recent decisions that have widened the circuit split. Furthermore, this Note argues that statutory interpretation principles, the purpose of § 1927, changes in how modern law firms operate, and ethical considerations all counsel applying the statute to law firms. *See also* Kevin C. Kifer, *Law Firms Are People, Too? Law Firm Sanctions Under 28 U.S.C. § 1927 and the Strained Reading of "Person"*, 61 ST. LOUIS U.L.J. 547 (2017) (taking the position that the language of § 1927 does not encompass law firms); Vincent J. Margiotta, Note, *Affirming Firm Sanctions: The Authority To Sanction Law Firms Under 28 U.S.C. § 1927*, 86 FORDHAM L. REV. 265 (2017) (taking the position that a Congressional amendment, or the use of inherent authority, should be the primary method of resolving the circuit split).

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

23. *See generally* Enmon v. Prospect Capital Corp., 675 F.3d 138 (2d Cir. 2011); Smith v. Grand Bank & Tr. of Fla., 193 F. App'x 833 (11th Cir. 2006); Lee v. First Lenders Ins. Servs., 236 F.3d 443 (8th Cir. 2001); LaPrade v. Kidder Peabody & Co., 146 F.3d 899 (D.C. Cir. 1998); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204 (3d Cir. 1985); MJS Las Croabas Props., Inc. v. FDIC, 545 B.R. 401 (B.A.P. 1st Cir. 2016).

24. James F. Holderman, *Section 1927 Sanctions and the Split Among the Circuits*, LITIG., Fall 2005, at 44, 47 (noting "[t]he need for consistency in the application of Section 1927 is heightened by the proliferation of national and international law firms and the ever-increasing mobility of the trial lawyers who litigate in courts throughout the country").

the circuits that permit sanctions against law firms under § 1927, the inconsistent nature of the statute's application presents only a patchwork solution to the problem. The lack of a uniform application of § 1927 may also have the effect of chilling zealous advocacy on a nationwide basis.[25]

This Note argues that the historical development and purpose of § 1927, coupled with modern statutory interpretation, policy, and ethical considerations, supports reading § 1927 as enabling sanctions to be levied against law firms. Part I presents an overview of the historical formation and purpose of § 1927, tracing the statute from its 1813 roots through its various iterations, leading up to its modern-day language. Part II explores and analyzes the reasoning and positions of the above-mentioned circuit split over whether § 1927 may be used to sanction an attorney's law firm. Part III argues that innovative statutory interpretation principles, forward-looking policy surrounding the treatment of corporations and businesses as persons, and strong ethical considerations pertaining to zealous advocacy calls for § 1927 to be interpreted as permitting sanctions against a law firm. In short, this Note argues that in light of the modern, specialized practice of law, and the way modern law firms function, law firms should necessarily be considered persons under the purview of § 1927.

I. THE LEGISLATIVE FORMATION AND DEVELOPMENT OF 28 U.S.C. § 1927

To understand the modern version of § 1927, it is essential to trace its history back to its original enactment. Section A explores the statute's original enactment, Section B traces the historical development of the statute, and Section C evaluates § 1927's current language and status. By following the statute's gradual growth and expansion over the last 200 years, this analysis suggests that the purpose of § 1927 is to provide a broad remedy to address dilatory conduct and increased costs in litigation.

25. *Id.* ("[T]he adoption of one standard for the application of Section 1927 would otherwise assist in allowing busy trial attorneys, who also have a duty to zealously advocate for their clients, to know with greater certainty what is and is not acceptable behavior in the federal district courts of all 94 districts, regardless of location.").

A. THE ENACTMENT OF THE ORIGINAL § 1927

Over 200 years ago, Congress passed an act designed to prevent parties from recovering the costs incurred in filing numerous lawsuits "whenever there [are] several actions or processes against persons who might legally be joined in one action or process, touching any demand or matter in dispute before a court of the United States."[26] The Act gave federal courts the broad power to consolidate actions for the purposes of avoiding unnecessary costs or delays,[27] and specifically prohibited recovery of the incurred costs of more than one joinable action "unless special cause" for filing several actions is "satisfactorily shown on motion in open court."[28] In an effort to deter this behavior in the first place, the Act also stated in Section 3 that "if any attorney . . . or other person admitted to manage and conduct causes in a court of the United States" appears to have "multiplied the proceedings in any cause before the court" in such a way as to "increase costs unreasonably and vexatiously," that person "may be required by order of court to satisfy any excess . . . costs so incurred."[29]

The 1813 law was the first formulation of what would later become § 1927, and was designed to prevent multiple lawsuits where a single suit would suffice.[30] It would be another twenty-nine years, however, before a more detailed explanation of the Act's primary purpose would be provided. In 1842, in response to the request for a study on the judicial expenses of the United States, the Secretary of the Treasury published a letter to the House of Representatives which mentioned the 1813 law.[31] In that letter, the Secretary detailed the practices of certain United States district attorneys who, to increase their compensation,

26. Act of July 22, 1813, ch. 14, § 1, 3 Stat. 19, 19–20.

27. *Id.* § 3 (noting the federal courts may "make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay . . . and accordingly causes may be consolidated").

28. *Id.* § 1.

29. *Id.* § 3.

30. 26 ANNALS OF CONG. 29 (1813) (noting the need for a "[l]egislative provision" to "prevent multiplicity of suits" where a single lawsuit or process would suffice).

31. H.R. DOC. NO. 27-25, at 20–22 (1842).

filed numerous and unnecessary lawsuits.[32] The statute's purpose was to counteract such practices and rein in the judicial costs of the United States, though according to the Secretary the provision was, at the time, "insufficient to prevent the abuses or mischiefs which have occurred."[33] Consequently, at its very beginning, the congressional purpose underlying the language later incorporated into § 1927 was to prevent attorneys from unreasonably and vexatiously multiplying both the costs and sheer number of lawsuits in litigation.

B. HISTORICAL DEVELOPMENT OF § 1927

The 1813 law was not addressed again until 1853, when Congress returned to the problems facing the federal courts. In an act setting comprehensive fees and costs for all federal actions, Congress reenacted substantially the same language of the 1813 act.[34] In 1901, Congress moved the provision to Section 982 of the Revised Statutes, but retained substantially the same language enacted in the 1853 act.[35] The language remained the same up until 1948, when Congress modified the text to make it clear that the increased costs from any unreasonable and vexatious conduct that multiplied proceedings were to be assessed against the attorneys themselves, *not* clients.[36] Specifically, Congress modified the statute to read: "*Any attorney* . . . who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."[37] This change was based on *Motion Picture Patents Co. v. Steiner*, which held that the purpose behind the "vexatious" statute was to punish *attorneys* who unreasonably and vexatiously multiplied legal costs, rather than the parties to the suit.[38]

32. *Id.* This letter was also noted by the Supreme Court in a 1980 decision interpreting the 1980 version of 28 U.S.C. § 1927. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 n.6 (1980).

33. H.R. DOC. NO. 27-25, at 21.

34. Act of Feb. 26, 1853, ch. 80, § 1, 10 Stat. 161, 162.

35. COMPILED STATUTES OF THE UNITED STATES, 1901, tit. 8, ch. 18, § 982 (Mallory 1902).

36. Act of June 25, 1948, ch. 123, 62 Stat. 869, 957 (1948) (codified as amended at 28 U.S.C. § 1927).

37. *Id.* (emphasis added). Congress also moved the statute to its current position, title 28, in the United States Code.

38. *See* Motion Picture Patents Co. v. Steiner, 201 F. 63 (2d Cir. 1912). The House Report explaining the amendment stated that, unlike the general phra-

The language of the statute remained untouched until 1980 when, in response to a narrow interpretation handed down in a Supreme Court case, Congress expanded the costs that could be assessed against attorneys who violated the statute's provisions. In 1980, the Supreme Court decided *Roadway Express, Inc. v. Piper*, which interpreted the word "costs" in § 1927 as not including attorney's fees.[39] In response to *Roadway Express*, Congress amended § 1927 by modifying the kinds of costs able to be assessed to include "excess costs, expenses, and attorneys' fees reasonably incurred because of such [unreasonable and vexatious] conduct."[40] The legislative history behind the change explained that the purpose of the modifications was to "broaden the range of increased expenses which an attorney who engages in dilatory litigation practices may be required by the judge to satisfy personally."[41] In light of the *Piper* decision, Congress wanted to ensure that if an attorney did violate the existing standard covering the dilatory conduct, and "by such conduct cause[d] the other parties to incur expenses and fees" that would not have occurred without said violation, the attorney should be "required to satisfy personally [the] *full range of excess costs* attributable to such conduct."[42] In short, Congress expanded the kinds of costs that could be assessed personally against the attorney responsible for the offending conduct in an effort to give § 1927 broad reach.

C. THE CURRENT STATUS OF § 1927

Congress has not modified or moved § 1927 since the 1980 amendments discussed above. The statute reads:

> 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

seology changes, the word personally was "inserted upon the authority of *Motion Picture Patents Co. v. Steiner*, 1912, 201 F. 63." H.R. REP. 88-308, at A164 (1947).

39. Roadway Express, Inc. v. Piper, 447 U.S. 752, 761–62 (1980).

40. Antitrust Procedural Improvements Act of 1980 § 3, § 1927, 94 Stat. 1154, 1156.

41. H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.). The Conference Report noted that § 1927 referred, prior to the amendments, to "excess costs," which was a phrase "construed to cover only the narrow category of taxable costs, such as filing fees." *Id.* The fact that Congress acted on this statute the same year that the Supreme Court handed down *Piper* suggests that the narrow construction referred to in the legislative history was the Supreme Court's narrow construction in *Piper*.

42. *Id.* (emphasis added).

> the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.[43]

Congressional modifications to the statute over time have expanded the kinds of costs that courts can assess against individual attorneys. Perhaps as a result of the lack of congressional attention the statute has received, § 1927 has found a place at the center of a wide circuit split pertaining to its application to law firms.

II. THE CIRCUIT SPLIT OVER PUNISHING LAW FIRMS UNDER 28 U.S.C. § 1927

Almost all the federal circuit courts have weighed in on whether § 1927 applies to law firms. While the reasoning in each court varies slightly, the disagreement appears to center around ascribing literal authority to the exact text of the statute, as opposed to contextualizing the reasoning and purpose of the statute into the modern practice of law. The Sixth, Seventh, and Ninth Circuit Courts of Appeals all hold that § 1927 does not permit the imposition of sanctions against a law firm,[44] whereas the D.C., Second, Third, Eighth, and Eleventh Courts of Appeals, along with the First Circuit Bankruptcy Appellate Panel, have all held that the statute may apply to law firms.[45] Section A of this Part explores the reasoning employed by the Circuits who have rejected the use of § 1927 to punish law firms, while Section B analyzes the reasoning used by the Circuits who have supported the use of § 1927 to punish law firms. Ultimately, the differing treatment the statute has received illustrates the need for a circuit reconciliation.

43. 28 U.S.C. § 1927 (2012).

44. *See, e.g.*, Kaass Law v. Wells Fargo Bank, 799 F.3d 1290, 1290 (9th Cir. 2015); FM Indus. v. Citicorp Credit Servs., 614 F.3d 335, 341–42 (7th Cir. 2010) (stating that liability under § 1927 is direct, not vicarious); BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 742 (6th Cir. 2010); Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 396–97 (6th Cir. 2009); Claiborne v. Wisdom, 414 F.3d 715, 715 (7th Cir. 2005).

45. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 138 (2d Cir. 2011); Smith v. Grand Bank & Trust of Fla., 193 F. App'x. 833, 838 (11th Cir. 2006); Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443, 443 (8th Cir. 2001); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 907 (D.C. Cir. 1998); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 212 (3d Cir. 1985); MJS Las Croabas Props., Inc. v. FDIC, 545 B.R. 401, 401 (B.A.P. 1st Cir. 2016).

A. CIRCUITS REJECTING THE USE OF § 1927 TO PUNISH LAW FIRMS

The Sixth, Seventh, and Ninth Circuit Courts of Appeal have all held that § 1927 does not permit the imposition of sanctions against a law firm. Each circuit's ruling is explored below in chronological order.

1. The Seventh Circuit Has Held that § 1927 Does Not Encompass Law Firms

The Seventh Circuit's holding that § 1927 should not be applied to law firms has been foundational for other circuits.[46] In *Claiborne v. Wisdom*, the Seventh Circuit dealt with several claims filed by an individual alleging she and other similarly situated women had been sexually harassed while they were tenants of the defendant's property, in violation of federal housing law.[47] Her complaint represented that the plaintiff and her lawyer interviewed corroborating witnesses before filing suit.[48] However, shortly after removal to federal court, plaintiff moved to voluntarily dismiss the action because "[t]o the complete surprise and shock of Plaintiff and her counsel, the witnesses denied making the above-referenced statements and they accused Plaintiff and her counsel of fabricating the claims."[49] The district court dismissed the case with prejudice and granted sanctions under § 1927 in the amount of $107,846.77 against the plaintiff, her lawyer, and the lawyer's firm, all of whom appealed.[50]

The Seventh Circuit affirmed the sanctions against the plaintiff and her lawyer, but reversed the sanctions against the attorney's law firm.[51] The court noted that § 1927 refers specifically to "[a]ny attorney or other person admitted to conduct cases

46. *See, e.g.*, *BDT Prods.*, *Inc.*, 602 F.3d at 751; *Rentz*, 556 F.3d at 396 n.6.

47. *See Claiborne*, 414 F.3d at 717–18.

48. *Id.* at 718.

49. *Id.* The district court was unsatisfied with this explanation. As the Seventh Circuit explained, citing the lower court's opinion, "[the attorney] did not exhibit the diligence, professionalism, or competency that one would expect from an officer of the court . . . [h]ad [she] done her job in an objectively reasonable manner, she would have realized that her client did not have a case . . . ." *Id.* at 721–22.

50. The district court assessed only one dollar in liability against the plaintiff herself. The remaining amount, $107,845.77, was assessed against her attorney and her law firm after a finding that her law firm was "jointly and severally liable." *Id.* at 718.

51. *Id.* at 717.

in any court of the United States," not law firms.[52] Furthermore, the court noted that it was "too much of a stretch to say that a law firm could also be characterized as [another] person" for the purposes of § 1927,[53] since only individual lawyers, not firms, are admitted to practice.[54] In the court's opinion, the "other persons" language in § 1927 refers only to those limited circumstances where "non-attorneys may appear in judicial proceedings, such as in patent proceedings or where law students receive special permission to conduct cases before they are admitted to the bar."[55] The Seventh Circuit also noted that its reasoning was consistent with the rationale used by the Supreme Court in *Pavelic & LeFlore v. Marvel Entertainment Group*, which dealt with whether an earlier version of Rule 11 of the Federal Rules of Civil Procedure could be used to sanction a law firm.[56] In *Pavelic*, the Supreme Court construed Rule 11 language that permitted sanctions only against "the person who signed" the offending document.[57] Reversing the lower courts, the Supreme Court held that "[the] context [of] the phrase 'the person who signed' could only mean the individual signer, not his partnership, either in addition to him or in the alternative."[58] The Seventh Circuit found that the reasoning in *Pavelic* mirrored its own reasoning pertaining to § 1927 and threw out the sanctions against the law firm.[59]

In *FM Industries, Inc. v. Citicorp Credit Services, Inc.*, the Seventh Circuit reaffirmed *Claiborne* and its holding that § 1927

52. *Id.* at 723.

53. *Id.*

54. *Id.* (citing, among other rules, FED. R. APP. P. 46(a) as an example of a rule governing the admission of attorneys to conduct cases).

55. *Id.* (citing, among others, 37 C.F.R. § 10.14, which permits nonattorneys to practice before the U.S. Patent and Trademark office).

56. Pavelic & Leflore v. Marvel Entm't Grp., 493 U.S. 120, 120 (1989) ("Rule 11 sanctions may be imposed only upon [the] individual attorney who signs papers and not on attorneys' law firm."). As the Seventh Circuit noted, Rule 11 was later amended to explicitly include law firms under its sanction authority. *See Claiborne*, 414 F.3d at 723.

57. *Pavelic*, 493 U.S. at 122–23 ("Just as the requirement of [a] signature is imposed upon the individual, we think the recited import and consequences of signature run as to him.").

58. *See Claiborne*, 414 F.3d at 723 (citing *Pavelic*, 493 U.S. at 122–23).

59. *Id.* at 723–24. The court noted that, despite its ruling, the record demonstrated a "close connection between [the attorney's] actions and those of her firm . . . it seems that the firm was on notice of the fact that the attorney's litigation practice was questionable." *Id.* at 724. Still, the court also noted that other avenues for sanctions, specifically Rule 11 and a court's inherent power, were available. *Id.*

only applies to individual attorneys. In that case, the Seventh Circuit faced an appeal from sanctions levied against both the lead attorney, and a consulting attorney who had worked on the case.[60] The court acknowledged appropriateness of sanctions against the plaintiff's attorney,[61] but reversed the sanctions against the consulting attorney.[62] Specifically, the court noted that sanctions under § 1927 are "direct, not vicarious."[63] Section 1927 "does not require every lawyer who files an appearance to review and vet" documents filed by other lawyers in the case, as "[n]either the text of § 1927, nor any decision of which [the Seventh Circuit is] aware, imposes on any lawyer a duty to supervise . . . another lawyer's work."[64] As much as the lower court may have wanted to impose sanctions across the board, the Seventh Circuit cautioned that "personal responsibility remains essential to an award of sanctions under § 1927."[65]

2. The Sixth Circuit Has Aligned Itself with the Seventh Circuit and Held that § 1927 Does Not Encompass Law Firms

In two key cases, the Sixth Circuit aligned itself with the Seventh Circuit and held that § 1927 may not be used to sanction law firms.[66] In the first of these cases, *Rentz v. Dynasty Apparel Industries, Inc.*, an individual who felt he had been cheated out of a one percent commission on a lucrative sports-apparel licensing deal sued those who allegedly owed him that commission, and filed what were ultimately determined to be frivolous claims.[67] The district court granted sanctions against the two attorneys under both Rule 11 and § 1927, but not the plaintiff or the lawyers' firms.[68] On appeal, the defendants alleged that the district court had abused its discretion by, among other things,

60. FM Indus., Inc. v. Citicorp Credit Servs., 614 F.3d 335, 337–38 (7th Cir. 2010).

61. *Id.* at 340 (noting that the litigation had been "marked by excessive and unnecessary filing that richly deserve the label vexatious" and that "[the plaintiff's attorneys] objections are quibbles").

62. *Id.*

63. *Id.* (citing *Claiborne*, 414 F.3d at 722–24).

64. *Id.* at 341 (noting that "[the consulting attorney] was not hired to [vet the plaintiff's submissions], and no lawyer undertakes such a role for free").

65. *Id.*

66. *See* BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742 (6th Cir. 2010); Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389 (6th Cir. 2009).

67. *See Rentz*, 556 F.3d at 391–93 ("[R]uling that Rentz's testimony demonstrated subsequent attorney misconduct warranting sanctions .").

68. *Id.* at 394.

failing to sanction one of the law firms involved under either Rule 11 or § 1927.[69]

The Sixth Circuit affirmed the district court's refusal to sanction any law firm involved in the case, noting explicitly, that "[the statute] authorizes the imposition of sanctions only against an 'attorney or other person admitted to conduct cases.'"[70] The court cited the Seventh Circuit's *Claiborne* case for its position, and aside from clarifying the standard under which an individual attorney could be sanctioned using § 1927, offered no further refinement on the rule.[71]

In the second case, *BDT Products, Inc. v. Lexmark International, Inc.*, the plaintiff sued Lexmark for, among other things, the misappropriation of trade secrets related to a printer tray used in Lexmark printers.[72] Ultimately, the district court determined that the lawsuit "should never have been brought, and in which no attorney should have persisted,"[73] and imposed sanctions on BDT, its attorneys, and the attorneys' law firm under state statutes, § 1927, and its inherent power.[74] BDT, its attorneys, and the attorneys' law firm appealed on the grounds that § 1927 does not permit the imposition of sanctions on a law firm.[75]

The Sixth Circuit reversed the district court's imposition of sanctions under § 1927 against the law firm of the plaintiff's attorney, holding that while the prior *Rentz* decision offered no additional analysis itself, that panel had cited *Claiborne* and the Seventh Circuit's "well-reasoned explanation of why, under § 1927, judges may not appropriately sanction law firms."[76] The *BDT Products* panel further quoted the *Claiborne* decision extensively, noting that they found the "analysis and reasoning of the *Claiborne* court persuasive" and confirmed what the *Rentz* court stated in dicta: "28 U.S.C. § 1927 does not authorize the

69. *Id.* at 391.

70. *Id.* at 395–96.

71. *Id.* at 396, n.6.

72. BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 743 (6th Cir. 2010).

73. *Id.* at 749 (citation omitted).

74. *Id.* A court's inherent power to sanction always exists; indeed, "[t]he sanctioning procedures contained in statutes and court rules merely reflect the inherent authority of a court to control its proceedings." J.D. Page & Doug Sigel, *The Inherent and Express Powers of Courts To Sanction*, 31 S. TEX. L. REV. 43, 46 (1990).

75. *BDT Prods.*, 602 F.3d at 750.

76. *Id.* at 750–51 (citing Claiborne v. Wisdom, 414 F.3d 715, 722 (7th Cir. 2005)).

imposition of sanctions on [a] law firm[]."[77] In particular, the Court noted that "[e]ven if [a] firm[ ] can admittedly be personified in a literary sense through briefs, there is no reason to consider a law firm a 'person' under [§ 1927] . . . ."[78] Consequently, the court vacated the award of attorney's fees against the law firm.[79]

3. The Ninth Circuit Has Also Held that § 1927 Does Not Encompass Law Firms

The last circuit to take the position that § 1927 cannot be applied against law firms is the Ninth Circuit. In *Kaass Law v. Wells Fargo Bank, N.A.*, the plaintiff and her attorney filed a lawsuit against ten different defendants, including Wells Fargo Bank, alleging that the defendants had reported adverse information about the plaintiff to credit agencies which reflected negatively on the plaintiff's credit report.[80] Following dismissal due to pleading defects, Wells Fargo filed a motion to recover attorneys' fees and costs from the plaintiff and her attorney's law firm under § 1927.[81] The district court granted the motion with regard to the law firm of the plaintiff's attorney, finding the firm had "acted in bad faith by knowingly raising frivolous arguments against Wells Fargo and other defendants. "[82]

On appeal, the Ninth Circuit reversed the imposition of sanctions against the law firm.[83] The Ninth Circuit explained

77. *Id.* at 751 (noting that "there is no reason to consider a law firm a 'person' under the statute" and "law *firms* are not 'admitted' to 'conduct cases' in court").

78. *Id.*

79. *Id.* at 757. The Sixth Circuit also conducted an extensive analysis of whether sanctions would have been permissible under the district court's inherent power, but ultimately concluded that the district court had misinterpreted Sixth Circuit precedent. *Id.*

80. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1291 (9th Cir. 2015).

81. *Id.* at 1292 (filing a motion to recover $11,236.50 in attorneys' fees and costs).

82. *Id.* at 1292–93 (noting that the law firm of the plaintiff's attorney"fail[ed] to plead specific allegations or differentiate between defendants in the Complaint . . . fail[ed] to oppose defendants' motions to dismiss . . . [and] fail[ed] to meet and confer or communicate with opposing counsel." (citation omitted)).

83. *Id.* at 1292–93. The court noted that the plaintiff's attorney's law firm advanced two grounds for appeal: the first was that § 1927 did not apply to law firms, whereas the second argued that § 1927 only prohibited conduct that "multiplies the proceedings, not for the filing of initial pleadings." *Id.* at 1292. Because the Ninth Circuit agreed with the first argument, they did not reach the

that it had never addressed "whether a law firm may be considered an 'attorney or other person admitted to conduct cases'" prior to this case, but ultimately concluded after "consideration of the persuasive reasoning of some of [the Ninth Circuit's] sister circuits . . . that 28 U.S.C. § 1927 does not permit the award of sanctions against a law firm."[84] The court noted that § 1927 authorizes recovery "only from an attorney or otherwise admitted representative of a party."[85] It then went on to extensively quote both the Seventh Circuit's decision in *Claiborne* and the Sixth Circuit's adoption of that decision in *BDT Products*.[86] The Court observed that Rule 11 now "explicitly allows sanctions 'on any attorney, law firm, or party that violated the rule or is responsible for the violation,'" whereas § 1927 does not."[87] In addition, the Court stated that the principle of statutory construction expressio unius[88] suggests that the "specificity and precision of § 1927 allow[s] for sanctions only against 'attorneys' or 'other persons admitted to conduct cases.'"[89] This specificity, the court noted, indicates an intention to exclude law firms from the sanction power of § 1927.[90] The Ninth Circuit concluded that the Sixth and Seventh Circuits' reasoning, coupled with the expressio unius principle, was superior to any other sister circuits' reasoning and held that § 1927 does not permit the imposition of sanctions against law firms.[91]

second. *Id.* at 1293.

84. *Id.*

85. *Id.* at 1293 (citing Fed. Trade Comm'n v. Alaska Land Leasing, Inc., 799 F.2d 507, 508–10 (9th Cir. 1986) (overturning sanctions against a financial consultant employed by attorneys representing two of the parties to the suit)).

86. *Id.* at 1293–94 (emphasizing that in both cases, the court held that a law firm cannot be considered a person under § 1927 (citing Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005); BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 750–51 (6th Cir. 2010)).

87. *Id.* (citing FED. R. CIV. P. 11).

88. The full phrase, *Expressio Unius Est Exclusio Alterius*, means "the expression of one excludes others." The rule serves to apply negative implication to statutory language, so that "[t]he presence of [a] specific term or specific list [in a statute] leads to the implication that the legislature intended to include only what was explicitly stated and no others." RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 102–03 (2d ed. 2011) (citing Gotkin v. Miller, 379 F. Supp. 859 (E.D.N.Y. 1974)).

89. *See Kaass Law*, 799 F.3d at 1294 (citing 28 U.S.C. § 1927 (2012)).

90. *Id.* (citing Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312–13 (9th Cir. 1992)).

91. *Id.* at 1294 (noting reasoning from both the Sixth and Seventh Circuits, and specifically stating that it found "[the Seventh Circuit's] reasoning persuasive").

With regards to other circuit interpretations, the Court took issue with the Second, Third, and Eleventh Circuit's positions on § 1927. The Court criticized the Second Circuit, noting that "[one panel had] permitted a district court to impose sanctions against a law firm, but seemed to buttress its reasoning on the inherent powers of the district court, not on the express language of 28 U.S.C. § 1927."[92] Such a "conclusory statement[ ]," in the Ninth Circuit's opinion, "that 'nothing in the language' of [§ 1927] forecloses the imposition of sanctions against a law firm" was unpersuasive because the Second Circuit ignored plaintiff's citations to *Pavelic*, *Claiborne*, and *BDT Products*, all of which point to specific language in the statute.[93]

Similarly, the Ninth Circuit found both the Third Circuit and Eleventh Circuit's reasoning lacking. It noted that "the Third Circuit sanctioned a law firm [under § 1927] before Rule 11 was amended to explicitly include law firms, and did not address the limiting statutory language of 28 U.S.C. § 1927."[94] The Eleventh Circuit's position was criticized by the Ninth Circuit for a similar reason; specifically, the court concluded that the Eleventh Circuit had "conflated the sanctioning powers in two different rules when it upheld sanctions against lead counsel and his law firm pursuant 'to the bad-faith exception, 28 U.S.C. § 1927, and Rule 11.'"[95] Ultimately, the Ninth Circuit found no reason to detour from the Sixth and Seventh Circuit's conclusions and concluded that § 1927 cannot be used to sanction law firms.[96]

The Sixth, Seventh, and Ninth Circuits have all concluded that § 1927 does not permit the imposition of sanctions on law firm.[97] Each circuit, leaning on each other's reasoning for support, has taken the position that the express language of the statute, coupled with the availability of other sources of sanction

92. The Ninth Circuit quoted extensively from *Enmon*, noting that the case's reasoning, and the source of its authority, was somewhat unclear. *Id.* at 1294–95 (citing Enmon v. Prospect Capital Corp., 675 F.3d 138, 147–48 (2d Cir. 2012)).

93. *Id.* at 1295 (citing Brief for Appellant at 49, Enmon v. Prospect Capital Corp., 675 F.3d 138 (2d Cir. 2012) (No. 10-2811-cv) 2010 WL 4715535).

94. *Id.* at 1294 (citing Baker Indus. Inc. v. Cerberus Ltd., 764 F.2d 204, 209 (3d Cir. 1985)).

95. *Id.* at 1294.

96. *Id.* at 1295 ("If Congress had intended to permit federal courts to impose sanctions against law firms pursuant to 28 U.S.C. § 1927, it would have included an express authorization to do so in the statute.").

97. *See* cases cited *supra* note 44.

powers, makes it improper to impose sanctions under § 1927.[98] The reasoning employed by these circuits necessarily rests upon a deliberative view of statutory interpretation, which assumes that the legislature acts as a deliberate body that considers problems and possible solutions critically.[99] In this situation, it assumes that the legislature deliberately excluded law firms from § 1927's reach.[100] In addition, that same underlying reasoning necessarily "rejects the possibility that the legislature might not have meant exactly what it said."[101] In contrast, the circuits that support using § 1927 to impose sanctions on law firms read the statute broadly, utilizing a different interpretation.[102]

B. CIRCUITS SUPPORTING THE USE OF § 1927 TO PUNISH LAW FIRMS

Other circuits differ on their view of statutory interpretation and have thus reached a different conclusion with regards to § 1927's application to law firms. Specifically, the D.C., Second, Third, Eighth, and Eleventh Circuits, along with the First Circuit Bankruptcy Appellate Panel, each permit the imposition of § 1927 sanctions against attorneys and law firms.[103] Their reasoning is explored chronologically.

1. The Third Circuit Has Held That § 1927 Encompasses Law Firms

The Third Circuit was one of the earlier circuits to take a position on the issue, though it did so without providing any actual reasoning for applying § 1927 to law firms. In *Baker Industries, Inc. v. Cerberus Limited*, the plaintiff, Baker Industries, sought to enjoin defendant Cerberus from terminating a long-term patent license for the manufacture of smoke detectors.[104] After extended litigation, the district court granted a motion for sanctions under § 1927 against the defendant's law firm; the court found that filing hundreds of pages of objections to a referee decision that both parties had agreed to consider binding

98. *See, e.g.*, *Kaass Law*, 799 F.3d at 1294–95 (citing the Sixth and Seventh Circuits as persuasive).

99. BROWN & BROWN, *supra* note 88, at 35 (describing the deliberative view of statutory interpretation).

100. *See Kaass Law*, 799 F.3d at 1295.

101. BROWN & BROWN, *supra* note 88, at 35.

102. *See infra* Part II.B.

103. *See* cases cited *supra* note 45

104. Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 206 (3d Cir. 1985).

constituted sufficiently "vexatious to justify the award of attorneys' fees directly against it under 28 U.S.C. § 1927."[105] The defendant's law firm appealed.[106]

The Third Circuit affirmed the imposition of sanctions, but made no mention of why it found it appropriate to apply § 1927 to law firms; the court's discussion focused entirely on the standard used to apply § 1927.[107] Despite explicitly requiring bad faith on the part of an offending attorney, the *Baker* court routinely referenced the defendant's law firm throughout the opinion as the target of the sanctions.[108] Consequently, it appears that the Third Circuit implicitly stated that the bad faith of a firm's attorneys is attributable to the law firm as a whole.

2. The Eleventh Circuit Has Held That § 1927 Encompasses Law Firms

The Eleventh Circuit is in accord with the Third Circuit with respect to § 1927. In *Avirgan v. Hull*, two journalists and their lawyers filed a lawsuit against numerous "Central Intelligence Agency operatives, military intelligence personnel, arm[s] merchants, mercenaries, and Colombian drug lords" alleging RICO violations pertaining to the Nicaraguan Contra affair.[109] After two years of discovery, it became clear that the plaintiffs lacked any real evidence, and that they were aware of their lack of evidence prior to initiating suit.[110] The district court granted summary judgment for the defendants, and awarded attorneys' fees and sanctions under both § 1927 and Rule 11 of the Federal Rules of Civil Procedure against the plaintiffs, lead counsel for

105. *Id.* at 207–08.

106. *Id.* at 208.

107. *Id.* at 208–09 ("We . . . read section 1927 to require a showing of actual bad faith before attorneys' fees may be imposed."). Interestingly, despite explicitly requiring bad faith on the part of an offending attorney, the Third Circuit routinely referenced the defendant's law firm (Cravath) throughout the opinion as the target of the sanctions.

108. *Id.* at 208–09, 211 (focusing on the bad faith of an attorney's conduct but concluding that "Cravath's post-decision conduct was a flagrant breach of its stipulation . . . [that] transcend[ed] the bounds of zealous advocacy on behalf of a client.").

109. Avirgan v. Hull, 932 F.2d 1572, 1575 (11th Cir. 1991). The court also noted that "[m]ost of the allegations [were] based geographically in Nicaragua, but some allegations accuse various appellees of anti-Communist operations in Cuba, Southeast Asia, Iran, and Libya." *Id.*

110. *Id.* at 1581 ("The attorneys for the plaintiffs, the Christic Institute, must have known prior to suing that they had no competent evidence to substantiate the theories alleged in their complaint."). The Christic Institute is a tax-exempt law firm which funded the litigation. *Id.* at 1576 n.3.

the plaintiffs, and the Christic Institute as the official law firm behind the litigation.[111]

On appeal, the Eleventh Circuit affirmed the award of attorneys' fees against both lead counsel, the individual plaintiffs, and the law firm supporting the litigation.[112] With regards to the Christic Institute's status as a law firm, the court noted that "[s]tatus as a public interest law firm or the nature of a claim does not confer immunity from attorneys' fees for bringing and maintaining frivolous lawsuits."[113] Consequently, the Eleventh Circuit implied that for the purposes of § 1927, sanctioning a law firm is no different than sanctioning an attorney, at least in the eyes of that particular panel.

This decision was later reaffirmed by the Eleventh Circuit in *Smith v. Grand Bank & Trust of Florida*.[114] There, the Eleventh Circuit explicitly held that § 1927 permits sanctions against a law firm.[115] The court cited the *Avirgan* decision, noted above, stating that as a result, "this court has implicitly determined that § 1927 applies to law firms . . . [the court is] not bound by other circuits that have reached the opposite conclusion."[116] Despite finding that sanctions could be imposed against law firms under § 1927, the Court affirmed the district court's decision to not impose sanctions because "the [firm's] conduct falls short of the bad faith requirement necessary for sanctions under § 1927."[117]

3. The D.C. Circuit Court of Appeals Has Held That § 1927 Encompasses Law Firms

The D.C. Circuit has also implicitly applied § 1927 against law firms. In *LaPrade v. Kidder Peabody & Co.*, the plaintiff, a former employee of Kidder Peabody, sued the company alleging

111. *Id.* at 1582.

112. *Id.* at 1583.

113. *Id.* at 1582–83.

114. Smith v. Grand Bank & Trust of Fla., 193 F. App'x 833, 838 (11th Cir. 2006) (citing *Avirgan*, 932 F.2d at 1582).

115. *Id.* at 838 ("Grand Bank correctly argues that § 1927 allows for sanctions against a law firm.").

116. While the Eleventh Circuit was certainly resolute in its holding, it did not attempt to explore other circuits' reasoning. *Id.*

117. *Id.* at 839.

common law and statutory violations stemming from her employment and termination.[118] After a series of vexatious procedural maneuvers, the district court granted sanctions against the law firm of the plaintiff's attorney.[119] The firm appealed the order.

On appeal, the D.C. Circuit affirmed the sanctions, though none of the arguments advanced by the law firm on appeal dealt with precluding sanctions under § 1927 against them due to their status as a law firm.[120] Consequently, while the case stands for the proposition that sanctions may be applied against a law firm under § 1927, the D.C. Circuit's opinion lacks any clear explanation of why that is the case.

4. The Eighth Circuit Has Held That § 1927 Encompasses Law Firms

The Eighth Circuit has faced a similar situation; it has applied § 1927 sanctions against a law firm but has not expressly dealt with the question of whether the statute should be used in such a way. In *Lee v. First Lenders Insurance Services, Inc.*, nine automobile purchasers filed a putative class action against numerous defendants, alleging violations of the Minnesota Retail Installment Sales Act, Minnesota usury laws, the federal Truth in Lending Act, and RICO.[121] One of the attorneys involved, Thomas J. Lyons, made the decision fairly far into the litigation to withdraw plaintiffs' motion to certify the class, citing the need for "more time to file a third amended complaint, complete additional discovery, and reformulate the class certification motion with the help of new national class counsel."[122] However, Lyons never filed a third amended complaint, "effectively abandoning plaintiffs' class action allegations."[123] The district court granted

118. LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 900–01 (D.C. Cir. 1998).

119. *Id.* at 901 ("The law firm of Liddle & Robinson . . . shall compensate Kidder, Peabody, & Co., for the vexatious and dilatory tactics of plaintiff's counsel in filing *ex parte* papers in the State Court proceeding.").

120. The law firm Liddle & Robinson advanced three arguments for vacating the district court's decision: (1) the district court abused its discretion; (2) the district court did not support its order with sufficient findings of fact; and (3) the district court abused its discretion in awarding an "outrageously unreasonable" figure. All were rejected. *Id.* at 903–06.

121. Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443, 444 (8th Cir. 2001).

122. *Id.* at 444.

123. *Id.* No reason was given explaining why the suit was abandoned. *See id.*

summary judgment in the defendant's favor, and when the defendants requested an award of $83,284.64 under § 1927, granted $15,000 in sanctions.[124]

The Eighth Circuit affirmed the imposition of sanctions against Lyons' law firm, noting that Lyons had filed "baseless class action claims" and numerous motions on those claims before "abandon[ing] the class allegations without explanation."[125] Such conduct forced the defendants to "incur additional costs to defend the case as a class action."[126] Still, the question of whether § 1927 applies to law firms was not raised on appeal. Consequently, while the *Lee* decision stands for the proposition that § 1927 may be applied against law firms, there is no explanation as to precisely why the statute may be used in such a way.

5. The Second Circuit Has Held, with Explicit Reasoning, That § 1927 Encompasses Law Firms

The Second Circuit has weighed in on the issue, and unlike several of the circuit courts discussed above, it has provided far more of an explanation for its position. In *Enmon v. Prospect Capital Corp.*, Arnold & Itkin, a Texas-based law firm, appealed from a judgment sanctioning the firm as a whole for its conduct in opposing the arbitration of a dispute between its client and Prospect Capital Corporation.[127] Specifically, the law firm "challenge[d] the form and amount of the District Court's sanctions on [among other things] the grounds that it improperly . . . sanctioned the law firm as a whole, rather than sanctioning . . . [the] individual attorneys who participated directly in the litigation."[128]

The Second Circuit disagreed with the firm's argument and affirmed the sanctions, holding instead that § 1927 grants courts the authority to award sanctions against the "'firm as a whole' . . . for the 'actions of various lawyers.'"[129] The court compared the § 1927 power to the inherent power that a court holds to sanction litigants, noting that it saw "no reason that a different

124. *Id.* at 444–45 (citing 28 U.S.C. § 1927 (2012)).

125. *Id.*

126. *Id.* (holding that "[i]n these circumstances, there was clearly 'a causal connection between the objectionable conduct of counsel and multiplication of the proceedings'" (quoting Peterson v. BMI Refractories, 124 F.3d 1386, 1396 (11th Cir. 1997)).

127. Enmon v. Prospect Capital Corp., 675 F.3d 138, 140 (2d Cir. 2012).

128. *Id.* at 147.

129. *Id.*

rule should apply to § 1927 sanctions[.]"[130] Furthermore, the court stated, holding otherwise would "upset a relatively long-standing practice among district courts in [the Second Circuit]" of applying § 1927 to law firms.[131] In fact, under the circumstances, the Court found it particularly justifiable to impose sanctions on the entire firm for the actions of one attorney. Itkin, the lawyer at issue, was a "founding, named partner of a firm that, according to counsel at oral argument, had ten or fifteen lawyers during the relevant time period."[132] As a result, "Itkin's actions were indistinguishable from those of Arnold & Itkin as a firm . . . [and] the firm consistently accepted responsibility for conducting the underlying litigation."[133] Ultimately, the Second Circuit found that "nothing in the language of 28 U.S.C. § 1927, . . . [or] case law regarding that statute . . . leads us to think that the district court was without authority to impose sanctions on Arnold & Itkin as a whole."[134] As such, for the Second Circuit, the issue is relatively settled.

6. The First Circuit's Bankruptcy Appellate Panel Has Held That § 1927 Encompasses Law Firms

The most recent court to weigh in on the issue, the First Circuit's Bankruptcy Appellate Panel (B.A.P.), undoubtedly has the most in-depth analysis of any of the circuits noted above, on either side of the split.[135] In *MJS Las Croabas Properties, Inc. v. FDIC*, as a result of the misconduct of the Castellanos firm, the

130. *Id.*

131. *Id.* (citations omitted). The court also noted that "[e]ven when [district courts in the Second Circuit] have refrained from imposing sanctions . . . [they still] have assumed that § 1927 sanctions are available against law firms." *Id.* at 148 n.5 (citations omitted).

132. *Id.* at 148.

133. *Id.* The *Enmon* court does not appear to consider these facts dispositive; rather, the firm's choice to own the attorney's actions throughout the litigation appears to be only a strong factor in imposing § 1927 sanctions on the firm. *See id.*

134. *Id.*

135. Interestingly, there is also a circuit split over whether bankruptcy courts are "Courts of the United States" for the purposes of § 1927. *See generally* Daniel Gill, *6th Cir.: Bankruptcy Courts Can Sanction as "U.S. Court,"* BLOOMBERG B.N.A. (June 22, 2016), https://www.bna.com/6th-cir-bankruptcy-n57982074578. The Sixth Circuit has held bankruptcy courts fall within the language of the statute. *See In re* Royal Manor Mgmt, Inc., 652 F. App'x. 330 (6th Cir. 2016), *cert denied*, 137 S. Ct. 831 (2017).

B.A.P. was squarely presented with the question of whether § 1927 applies to law firms.[136]

In conducting its analysis, the B.A.P. acknowledged the presence of the circuit split over the question, and noted that "[t]he statute does not expressly provide for vicarious liability [against a firm]."[137] After walking through the cases involved in the circuit split, the B.A.P. narrowed in on *Brignoli v. Balch Hardy & Scheinman, Inc.*, a district court decision out of the Southern District of New York.[138] Specifically, the B.A.P. noted that the district court in *Brignoli* had set forth a unique analysis that, coupled with similar cases from the prosanction circuits above, persuaded the B.A.P. to find that § 1927 applied to law firms.[139] The B.A.P. cited with approval the *Brignoli* court's reasoning which noted that although the term "personally" in § 1927 "takes on a rather distinctive meaning of ensuring that it is the attorney personally . . . who is taxed the costs of satisfying the award the court has imposed to cover the additional costs . . . [of] vexatious lawyering[,]" the statutory language roping in any ""other person admitted to conduct cases' discloses an intended focus of the legislation on the regulating of those entities who 'conduct cases,' a statutory class or category into which law firms naturally fall."[140] In essence, because law firms are entities that "conduct cases," in line with the language of § 1927, the *Brignoli* court held that "[t]he language of § 1927 . . . does not . . . disfavor requiring a law firm that is 'conducting cases' in a court in a manner that multiplies the proceedings unreasonably and vexatiously to 'satisfy personally' the fees and costs reasonably incurred[.]"[141] Such reasoning, the B.A.P. held, was sufficient to hold § 1927 applicable to law firms, and to uphold the lower court's imposition of sanctions against the Castellanos law firm.[142]

136. MJS Las Croabas Props., Inc. v. FDIC, 545 B.R. 401, 419 (B.A.P. 1st Cir. 2016).

137. *Id.* at 419–20 (citing IRA LEESFIELD & MARK SYLVESTER, 2 LITIGATING TORT CASES § 20:19 (2014)).

138. *Id.* at 420 (citing Brignoli v. Balch Hardy & Scheinman, Inc., 735 F. Supp. 100, 102 (S.D.N.Y. 1990)).

139. *Id.* at 421 (noting that the B.A.P. "[found] the reasoning of *Brignoli* . . . and cases similarly decided, persuasive. We, therefore, conclude that the bankruptcy court did not err when it ruled that § 1927 permits sanctions against law firms.").

140. *Id.* at 420 (citing *Brignoli*, 735 F. Supp. at 101–02).

141. *Id.*

142. *Id.* at 423 (upholding the lower court's imposition of sanctions).

Ultimately, the circuits upholding the application of § 1927 to law firms, all appear to follow (at least with respect to § 1927) a public service statutory interpretation model that enforces the statutes underlying purpose of punishing and deterring vexatious conduct. Their interpretations, while perhaps out of step with the plain text of the statute, align with the view that "legislat[ors] passed each statute to serve the greater good and the appropriate role for the court is to help the legislature accomplish that goal."[143] By enforcing § 1927 against law firms, and leaning on their sister circuits' implicit or explicit endorsement of sanctioning law firms under the statute, these courts arguably assist Congress in implementing the goal of § 1927 by preventing conduct that unreasonably increased the costs of litigation.[144] Indeed, given the modern practice of law in law firms and considerations of ethical limits on attorney advocacy, these circuits have reached the correct conclusion.

III. SANCTIONING LAW FIRMS UNDER 28 U.S.C. § 1927 SHOULD BE PERMITTED AS A MATTER OF STATUTORY INTERPRETATION, SOUND POLICY, AND THE PROMOTION OF STRONG PROFESSIONAL ETHICS

Attorney sanctions may not be among the headline-grabbing topics the Supreme Court usually chooses to hear,[145] but the national scale of the current circuit split over § 1927 has far-reaching consequences that warrant the Court's consideration.[146] Careful review of the positions of the various circuit decisions discussed above supports favoring the circuits that have imposed sanctions against law firms under § 1927 in light of principles of statutory interpretation, sound policy contextualized in the modern practice of law, and the importance of ethical guidelines in a

143. *See* BROWN & BROWN, *supra* note 88, at 36. The public view also holds that "legislators are primarily motivated by the desire to serve the public." *Id.*

144. *See* H.R. DOC. NO. 27-25, at 20–22 (1842); 26 ANNALS OF CONG. 29 (1813).

145. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726 (2015) (holding that the use of a questionable lethal drug for executions was not cruel and unusual punishment under the Eighth Amendment); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the Constitution guarantees a right to same-sex marriage).

146. The website for the U.S. Courts notes that "[t]he [Supreme] Court usually is not under any obligation to hear [any particular] case[ ] . . . it usually only does so if the case could have national significance, [or] *might harmonize conflicting decisions in the federal Circuit courts*." *Supreme Court Procedures*, U.S. COURTS, http://uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Apr. 1, 2018) (emphasis added).

profession that may, at times, walk a thin line between zealous advocacy and improper conduct. Section A argues that innovative principles of statutory interpretation support interpreting the word "persons" in § 1927 as encompassing law firms. Section B explains that sound policy underlying changes in the modern practice of law supports reading the scope of § 1927's sanction power to include law firms. Finally, Section C argues that sanctioning law firms under § 1927 gives courts an effective, efficient tool for policing the line between zealous and vexatious attorney advocacy on an institutional basis. Ultimately, Part III argues that it is appropriate and necessary to apply § 1927's sanction power to law firms.

A. Principles of Statutory Interpretation Support Interpreting the Word Persons in § 1927 as Encompassing Law Firms Under a Public View Model

Careful consideration of the so-called public view of statutory interpretation, which demands interpretation of statutes in accordance with the broader greater good behind each statute, as well as evolving concepts of the word "persons" in the legal profession, suggests interpreting § 1927 to apply to law firms.

1. The Public View of Statutory Interpretation Aligns with the Underlying Purpose of § 1927

Interpreting § 1927 in conformance with the greater good underlying its text is not necessarily the first approach a court might take to reading the statute. After all, the text of § 1927 currently reads, "Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiples the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs" arising from such conduct.[147] Under a deliberative view of statutory interpretation, which assumes that the legislature acts to deliberately exclude that which is not mentioned in a statute,[148] the express language of § 1927 applying costs personally to the offending attorney—without mentioning law firms—implies that sanctions under its authority cannot be ascribed to law firms. However, under the public-view approach to statutory interpretation, which assumes legislators "passed each statute to serve the greater good" and that "the appropriate role for the

147. 28 U.S.C. § 1927 (2012).

148. BROWN & BROWN, *supra* note 88, at 35 (describing the deliberative view of statutory interpretation).

court is to help the legislature accomplish that goal[,]"[149] express terms in a statute can be interpreted to allow a reviewing court to assist the legislature to accomplish whatever goals the statute sought to achieve. The public view pushes back on a strict textualism approach and attempts to consider the context surrounding the statute's ideal implementation.

The statute's original purpose sought to ensure the efficient administration of justice in the judicial system by punishing attorneys who engage in conduct that unreasonably increases both the volume and costs of litigation.[150] In fact, the language of § 1927 is quite broad; it does not restrict the term vexatious beyond its effect on multiplying the proceedings, nor does it set forth any clear limitation on the degree of unreasonableness necessary to trigger § 1927's sanctions. The underlying purpose of decreasing litigation delays and costs, coupled with broad textual elements designed to achieve that purpose, suggests that the statute constitutes a rule designed to serve the greater good. Indeed, as the costs of seeking and receiving justice fall, the ease of access to the vindication of rights by the public increases. As such, utilizing § 1927 to impose penalties on firms that vexatiously inhibit access to, and consequently raise the cost of, the vindication of legal rights enhances the greater good. Indeed, the purpose and language of § 1927 aligns well with the goals of the public view of statutory interpretation and favors consideration under such a theory.

2. In the Context of the Modern Practice of Law, the Word "Person" in § 1927 Should Be Interpreted to Encompass Law Firms

While not strictly persons in the eyes of the law, modern legal developments support considering law firms to be persons for the purposes of § 1927. The statute explicitly applies to "attorney[s] or other person[s] admitted to conduct cases in any court of the United States[.]"[151] While law firms are not technically persons, § 1927's use of the word persons should be read to encompass law firms because (1) modern developments in the law have shifted towards the view that certain kinds of entities, including law firms, should be considered persons in the eyes of the law; and (2) in many situations, the actions of a law firm in

149. *Id.* at 36 (describing the public view of statutory interpretation).

150. *See* H.R. DOC. NO. 27-25, at 20–22 (1842); 26 ANNALS OF CONG. 29 (1813).

151. 28 U.S.C. § 1927.

a case are indistinguishable from those of an individual, and indeed may involve many individual people.

The theory that a law firm can constitute a legal person is not a recent development in legal scholarship: the partnership that makes up a law firm was considered to be a person, separate from its individual members, as far back as the Roman Empire.[152] In fact, the concept of a firm as an institution "greater than the sum of its parts . . . [with its own] legal existence, recognizable identity, and loyalty claims independent of the individuals who may own it or control it" is a fairly popular idea.[153] As discussed above, the *Brignoli* court built on this foundation by holding that law firms to fall naturally into the category of "other person[s] admitted to conduct cases" under § 1927 due to their unique nature as entities who try cases in courts of the United States.[154] Far from being novel, the personhood of a law firm is historically established.[155]

Even setting aside the distinct entity that is a law firm, the actions of an individual attorney working for a law firm may be indistinguishable from the actions of the law firm itself. The Second Circuit noted in *Enmon* that part of its justification in imposing sanctions upon the law firm at issue was that the attorney who had engaged in the improper conduct was a "founding, named partner of a firm that, according to counsel at oral argument, had ten or fifteen lawyers during the relevant time period."[156] The actions of this named partner "were indistinguishable from those of [the firm itself] . . . [and] the firm consistently accepted responsibility for conducting the underlying litigation."[157]

152. *See* William Hamilton Cowles, *The Firm as a Legal Person*, 57 CENT. L.J. 343, 343 (1903) (applying the principle of firm personality as a test for the distribution of firm assets upon liquidation); *see also* Teague v. Lindsey, 17 So. 538, 542 (Ala. 1895) ("A partnership in contemplation of law, is an entity distinct from the members who compose it"); Curtis v. Hollingshead, 14 N.J.L. 402, 410 (N.J. 1834) ("A partnership is considered in law as an artificial *person*, or *being*, distinct from the individuals composing it.").

153. June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 963–64 (2016) (noting that "[p]opular accounts sometimes read [the Supreme Court's] *Hobby Lobby* and similar decisions as conferring rights on the [corporate] entity. ").

154. Brignoli v. Balch Hardy & Scheinman, Inc., 735 F. Supp. 100, 102 (S.D.N.Y. 1990).

155. The personhood of other business entities, such as corporations, has recently been acknowledged, albeit in the context of First Amendment rights. *See generally*, Citizens United v. FEC, 558 U.S. 310 (2010).

156. Enmon v. Prospect Capital Corp., 675 F.3d 138, 148 (2d Cir. 2012).

157. *Id.*

In fact, "[t]he modern, large law firm is not a world of individuals, but rather a team-based workplace."[158] As a result, courts have, "as an evidentiary matter," difficulty assigning blame to particular lawyers, "each of whom has an incentive to shift responsibility . . . onto others in the firm."[159] Indeed, in a team context, "the probability that [a] particular offending individual faces liability for any wrongful act is relatively low."[160] In larger law firms, even the individual signing the various vexatious court documents may not have been the person who actually made the decision that lead to delay and increased costs. As such, "the difficulty of identifying a single lawyer as the actual transgressor in the law firm's team-based setting means that individual-aimed sanctions . . . are basically moot as deterrents."[161] Utilizing a sanction against the firm, however, deploys § 1927 in a manner that may actually have an effect. As one author eloquently stated:

> Given the evidentiary problems of pinning . . . misconduct on one or more members of a lawyering team, the reluctance to scapegoat some lawyers for sins potentially shared by others in their firm, and especially the importance of a law firm's ethical infrastructure . . . a disciplinary regime that targets only individual lawyers in an era of large law firms is no longer sufficient. Sanctions against firms are needed as well.[162]

The application of § 1927 to larger law firms also retains the statute's ability to strike individuals where the vexatious conduct is truly attributable to one individual, especially in smaller law firms. Truly individual vexatious actions should necessarily be sanctioned as such; this Note does not argue otherwise. Rather, courts considering sanctions against a law firm under this proposed reading of § 1927 should carefully review the context and nature of the litigation, as well as the vexatious conduct, in order to determine whether a firm-wide sanction best fits the circumstances.[163]

158. Note, *Collective Sanctions and Large Law Firm Discipline* (hereinafter "*Collective Sanctions*"), 118 HARV. L. REV. 2336, 2339 (2005).

159. *Id.* While this source is contextualized in breaches of ethical rules, the principle arguably remains the same.

160. *Id.*

161. *Id.* at 2345.

162. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 8 (1991).

163. The exact scope of review that a court should utilize is outside the confines of this Note. As a possible alternative, which should perhaps be considered by courts considering firm-wide sanctions, at least one author has proposed a disciplinary scheme where each individual lawyer in the team responsible for

Ultimately, even where individuals engage in egregious conduct, the nature of the partnership[164] in which they are engaged indicates that a law firm has the capability of being considered a person in the eyes of § 1927, or at the very least some sort of entity equivalent to a person for the purposes of the statute. Imposing § 1927 sanctions against a law firm simply acknowledges the reality of the modern practice of law, at least in the context of a large law firm. While firm-wide sanctions under § 1927 may be a closer question with respect to smaller law firms, ascertaining the context surrounding the vexatious conduct permits a court to carefully target either the responsible individual, or the firm as a whole.

B. SOUND POLICY SURROUNDING THE MODERN PRACTICE OF LAW IN LAW FIRMS SUGGESTS THAT SANCTIONS AGAINST LAW FIRMS WILL BETTER ACHIEVE THE PURPOSES OF THE STATUTE

Section 1927 should be applied to law firms to ensure that internal tribalism and absorbed behaviors do not infect a law firm's culture. The modern practice of law has evolved immensely in recent years, and the development of massive 2000-or-more-person law firms has fundamentally altered the way in which law is practiced both domestically and on the international stage.[165] No longer is an apprenticeship the primary form of learning to practice law. The development of large law firms has given rise to a form of internal tribalism that attorneys

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the vexatious conduct faces sanctions *unless* the group produces a culpable individual. See *Collective Sanctions*, *supra* note 158, at 2336. Doing so would ensure that "[t]he responsible group facing punishment [would] be the smallest identifiable group from which the offense . . . originated." *Id.* at 2336–37. While perhaps viable, such a disciplinary scheme may run into difficulties where individual responsibility is truly lacking, such as when the vexatious action taken is ingrained in the law firm's normal litigation strategy.

164. Drawing distinctions between different types of law firm business arrangements (for example, LLCs versus LLPs) under the scope of § 1927's power may be necessary for court's considering sanctions, though this Note does not explore that possibility. Each business arrangement offers differing benefits to those involved. *See generally* Eric Feigenbaum, *Limited Liability Partnership Vs. Limited Liability Company*, CHRON, http://smallbusiness.chron.com/limited-liability-partnership-vs-limited-liability-company-3736.html (last visited Apr. 1, 2018).

165. Stephen M. Sheppard, *The American Legal Profession in the Twenty-First Century*, 62 AM. J. COMP. L. SUPP. 241, 260–61 (2014) (noting that in 2013, "the largest five [law firms in the United States] were over two thousand attorneys ."). The United States certainly leads the world in developing the law firm to its logical extreme, at least in terms of size. *Id.* (citing David Scott Clark, *Legal Professions and Law Firms*, *in* COMPARATIVE LAW AND SOCIETY 362, 384–85 (David Scott Clark ed., 2012)).

within law firms tend to associate with; specifically, the "law firms and attorneys who . . . generally represent[ ] one form of client . . . tend to adopt a worldview contrary to the worldview of the lawyers representing clients with adverse interests."[166] This tribalism creates a unique environment in which the attitudes and norms of senior attorneys, or even a legal-service institution as a whole, are often absorbed by lawyers employed alongside those senior attorneys, or within the legal-service institution itself.[167] Indeed, even the American Bar Association has noted that "the ethical atmosphere of a firm can influence the conduct of all its members."[168]

In addition to the uniform ethical atmosphere inside large law firms, the division of labor inherent within massive law firms favors attributing individual attorney conduct to the firm in its entirety. The development of large law firms, coupled with increases in technology and connectivity, has caused the legal profession to become increasingly specialized.[169] Coupled with increased demand for legal services, law firms seeking further expansion have chosen to market their legal expertise by highlighting their specializations.[170] This specialization has led to the decline of individual attorney autonomy and the increased emulation of a corporate structure.[171] The corporate structure

166. *Id.* at 261. An excellent example of this tribalism can be found in the different club-like attitudes that characterize the Defense Bar and the "Plaintiff's Bar." *Id.* At least one author has argued that the isolated nature of individual practice groups in large firms helps alleviate this practice. *See, e.g.*, Kifer, *supra* note 21, at 569 n. 172. However, this argument ignores a potential firm-wide culture of improper aggressiveness that stems from *ethical* structures, and not just practice group structures. A pervasive attitude towards ethics can certainly infect multiple practice groups.

167. LERMAN & SCHRAG, *supra* note 19, at 12–13 (noting that the absorption process can occur "even if what is going on around [the attorneys] is inconsistent with published or official professional norms").

168. MODEL RULES OF PROF'L CONDUCT r. 5.1 cmt. (AM. BAR ASS'N 1983).

169. *See* Moorhead, *supra* note 15 (noting that specialization within the legal profession is both "well established" and "growing in impact").

170. *Id.* at 228 (noting that "elite firms solidify their position [on the market] . . . by expanding and underlining their reputation for excellence through that process of specialization").

171. *Id.* at 229 ("In commercial firms, specialization is said to have advanced alongside a decline in lawyer autonomy while commercial lawyers become wealthier . . . and increasingly emulate the business structures of their clients.").

serves to decrease an individual attorney's autonomy over a particular client matter.[172] That individual autonomy is exactly what § 1927 targets when it is used to sanction individual attorneys for their own individual conduct. However, the statute's effectiveness and vitality are substantially diminished when sanctions are imposed against an attorney whose individual conduct is but one part of a large division of labor within a modern law firm. Put another way, large modern law firms and their division of labor renders sanctions against individual attorneys about as effective as removing one of the mythical hydra's heads; it might slow down the creature, but in the end two more heads will grow to replace the one lost without any real change to the nature of the creature itself.[173]

It is also no longer the case that attorneys remain geographically isolated; they can spread pettifoggery nationally—or even internationally—by simply catching a flight to wherever a hearing is located.[174] As one district court judge noted, "More and more, I look across the bench to see lawyers not just from my home state of Illinois but also those who are appearing before me pro hac vice from New York, Boston, Washington, D.C., Miami, Dallas, Houston, Los Angeles, or San Francisco."[175] This increased mobility undermines one of the most powerful deterrent effects of sanctions: the reputation of a lawyer in their community.[176] By practicing nationally, the effect of a sanction upon an attorney's reputation is dampened through sheer distance. A sanction against that attorney's law firm, on the other hand, has an impact on the reputation of the firm itself. Consequently, using § 1927 against a law firm to reinforce the reputational deterrence of sanction power helps compensate for the national reach enjoyed in the modern practice of law.

172. *Id.* (noting specializations parallel development alongside decline in attorney autonomy); *see also* Garicano & Hubbard, *supra* note 18 (noting that specialized firms tend to increase the division of labor across individuals).

173. For a general explanation of the properties of a Hydra creature, see *Hydra*, ENCYCLOPEDIA BRITANNICA (Dec. 28, 2017), https://www.britannica.com/topic/Hydra-Greek-mythology.

174. Holderman, *supra* note 24, at 47 (noting "the proliferation of national and international law firms and the ever-increasing mobility of the trial lawyers who litigate in courts throughout the country.").

175. *Id.*

176. *Id.* at 44 ("Although sanctions can impact attorneys' pocketbooks . . . perhaps even more powerful is the negative effect that sanctions can have on an attorney's standing in the legal community. Sanctions are . . . an official statement from a court that an attorney . . . [requires] reprimand[ing].").

One potentially adverse effect of permitting firm-wide sanctions under § 1927 stems from the typical structure of compensation in a law firm; partners earn the most as a result of their direct access to firm profits. A firm-wide sanction would disproportionately fall upon partners while almost entirely avoiding associates, because any firm-wide sanction would be paid out of the firm's own pocket, thereby "reduc[ing] a partner's individual draw as it eats into firm profits."[177] Partners may also face personal liability for any shortfall.[178] Associates, on the other hand, remain relatively untouched: associate salaries are typically unharmed by the monetary effects of large financial obligations such as sanctions, and any reputational harm to the firm is rendered less potent by most associates' ability to quickly disassociate themselves from vexatious acts by relocating to a different employer.[179]

However, rather than consider such an impact to be improper, any disproportionate effect that firm-wide sanctions inflict upon partners should be considered a positive feature of § 1927's sanction power. Indeed, it is the partners, not the associates, that typically cause internal tribalism of the kind that triggers vexatious sanction-worthy conduct; the attitudes and norms of senior attorneys are often absorbed by lawyers employed alongside those senior attorneys.[180] As such, allowing the impact of a firm-wide sanction to fall upon partners may actually achieve the desired deterrent effect precisely because the partners are in the best position to potentially modify the attitudes and norms of an entire firm.

Ultimately, sanctioning the law firm itself renders the purpose of § 1927 far more effective in the modern legal profession because it allows a court to directly attack the source of the vexatious behavior and send an institution-wide signal that misconduct will not be tolerated.[181] Furthermore, applying the statute

177. *Collective Sanctions*, *supra* note 158, at 2344.

178. *Id.*

179. *Id.* at 2345.

180. LERMAN & SCHRAG, *supra* note 19, at 12–13 (noting that the absorption process can occur "even if what is going on around [the attorneys] is inconsistent with published or official professional norms").

181. Consider, for example, a situation where multiple senior partners in a large law firm direct the activities of a large team of junior associates working on a case. Those senior partners direct the junior associates to conduct the litigation in a manner considered vexatious and unreasonable. Arguably, the best use of § 1927 in such a situation would be to target the law firm itself to discourage all senior partners, as well as the junior associates, from pursuing such strategies in the first place.

against law firms keeps intact its individual sanction scope; where an attorney retains substantial individual autonomy over a case (such as in a smaller law firm, or solo practice), the statute still permits the imposition of sanctions on an individual attorney. While this distinction may require a court to analyze the responsibility held by an individual attorney in order to evaluate the level of autonomy present over a given matter, courts should not shy from such an inquiry. In fact, in order to ensure that such vexatious conduct is deterred effectively, courts should embrace such a task. Applying § 1927 against law firms serves to modernize the statute's use in line with contemporary law firm practices, while retaining its original scope.

C. SANCTIONING LAW FIRMS REINFORCES A STRONG ETHICAL GUIDELINE TO ATTORNEYS THAT ZEALOUS ADVOCACY DOES NOT NECESSITATE UNFOUNDED LEGAL STRATEGIES

The imposition of sanctions against law firms under § 1927 is particularly important in light of the strong possibility (perhaps even inevitability) that lawyers working in large law firms will absorb and adopt the ethical norms and behaviors of their peers and superiors.[182] Ensuring the integrity of the legal profession is particularly crucial given the unique role attorneys have in ensuring "the recognition and protection of rights and powers in the citizen and in the state"; indeed, "the broad work of the profession will very likely remain central to American life."[183] By enforcing sanctions against law firms under § 1927, the courts could control a unique tool to curb potential overzealous litigation strategies, particularly in civil discovery.[184]

182. LERMAN & SCHRAG, *supra* note 19, at 12–13 (noting that "lawyers tend to absorb the ethical norms of the institutions that employ them, even if what is going on around them is inconsistent with the published or official professional norms").

183. *See* Sheppard, *supra* note 165, at 272. Undermining such a role with misconduct and vexatious litigation strategies will likely only further the already negative public perception of lawyers. *See* Zaretsky, *supra* note 4 (describing the legal profession as one the public routinely classifies as the least contributive to society's well-being).

184. LERMAN & SCHRAG, *supra* note 19, at 741 n.132 (noting that "the empirical literature on civil discovery [describes] an arena in which . . . the prevailing legal culture may be particularly directed toward adversary behavior"). *But see* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984) (arguing that the prevailing moral view of the legal profession, which generally ascribes overzealous behavior to attorneys, is misplaced).

Such a need is particularly apparent when the realities of modern firm practice are considered. Many, if not most, of the tasks performed in large law firms are assigned to teams of lawyers in order to effectuate a relatively efficient work environment.[185] Client appreciation of efficiency aside, teaming up encourages attorneys to take ethical risks that they would not take individually while obscuring responsibility for the team's actions behind a group of individuals united in the common practice of law.[186] Put simply, while a single lawyer may have "sign[ed] the complaint or motion, such filings are often the joint product of 'background preparation and drafting by several attorneys[.]'"[187] Punishing a single lawyer for vexatious conduct that ultimately stemmed from a team of attorneys does nothing but select a scapegoat that, upon the rendering of due punishment, leaves the status quo within the firm untouched. A punishment levied against the firm as a whole, however, encompasses teams of attorneys who act as one while litigating—a method of sanction arguably best utilized under § 1927.

Of course, it could be argued that § 1927 is unnecessary in light of Rule 11 of the Federal Rules of Civil Procedure, and the inherent power possessed by the judiciary to sanction litigants. Rule 11's text explicitly includes law firms within its sanction power, and a court's inherent authority arguably serves as a catch-all to ensure that particularly unethical conduct is not permitted to slip through the cracks.[188] However, there are substantial limitations on the scope of Rule 11's sanction power that suggest § 1927 should serve as a valid—and perhaps even desirable—alternative. Rule 11 sanction power is limited to documents signed and filed with the court that bring frivolous

185. Schneyer, *supra* note 185, at 8.

186. *Id.*; *see also* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 395 (1981) (noting that businessmen in role-playing experiments demonstrated a strong tendency to make riskier choices when decisions were made collectively). Individual attorneys in law firms usually "commit[] ethical or other infraction[s] . . . to capture some perceived benefit" such as "increased revenue, increased personal esteem, or the masking of past mistakes." *Collective Sanctions*, *supra* note 158, at 2340. However, "[t]he team-based nature of the law firm makes it unlikely that any one lawyer will capture all of the benefit of a wrongful act." *Id.*

187. Schneyer, *supra* note 185, at 9.

188. *See* FED. R. CIV. P. 11. *See also* Winn, *supra* note 21, at 2186 ("In those rare, narrow cases [where Rule 11 and Section 1927 overlap], it might seem redundant for both Rule 11 and § 1927 to authorize sanctions against a law firm because Rule 11 is already available.").

claims, whereas § 1927 encompasses all actions that "unreasonably and vexatiously" multiply the proceedings.[189] Furthermore, with respect to any power inherent in a court to sanction and control individuals appearing before it, courts typically prefer to use sanction power drawn from current rules.[190] Doing so permits the imposition of a clear set of standards to guide both future cases and other lawyers, as opposed to case-specific arguments on why inherent authority necessitates sanctions.[191] As an ethical guideline to attorneys and firms moving forward, utilizing § 1927 to create a clear set of standards from a national body of case law provides less uncertainty and more predictability for everyone involved.[192] Indeed, it may trigger a decline in incidents of pettifoggery.

Using § 1927 as a tool to set clear ethical norms for the legal profession also aligns well with the principles advanced in the ABA Model Rules of Professional Responsibility.[193] Rule 3.1, for example, states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[194] The Rule attempts to draw a fine line between "the "duty to use legal procedure for the fullest benefit of the client[]" and "[the] duty not to abuse legal procedure."[195] Section 1927 helps courts clarify the line between client advocacy and abuse of legal procedure by

189. *Compare* 28 U.S.C. § 1927 (2012), *with* FED. R. CIV. P. 11.

190. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43, 50 (noting that while "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution" when "there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the [Federal] Rules, the court ordinarily should rely on the Rules rather than the inherent power").

191.Winn, *supra* note 21, at 2159 ("Section 1927 serves an important role . . . [by] provid[ing] courts with standards for identifying a wide range of sanctionable conduct, including conduct identified in Rules 11 and 37.").

192. *Id.* at 2140 ("Law firms, lawyers, and federal courts should be certain about whether § 1927 sanctions create law-firm liability when frivolous actions are attributable to the firm."). Certainty in the legal profession is highly valued: "Predictability, stability, consistency and transparency are all commonly identified as core components of the rule of law, even though the rule of law is not incompatible with, and even requires, uncertainty and vagueness." *See* Stephen Tang & Tony Foley, *The Practice of Law and the Intolerance of Certainty*, 37 UNSW L.J. 1198, 1198 (2014). Indeed, "there are many advantages to this ideal of certainty . . . [t]he minimisation of arbitrary power and unpredictable behaviour . . . is something to be treasured and protected in a liberal democratic society." *Id.* at 1199.

193. MODEL RULES OF PROF'L RESPONSIBILITY r. 3.1 (AM. BAR. ASS'N 1983).

194. *Id.*

195. MODEL RULES OF PROF'L RESPONSIBILITY r. 3.1 cmt (AM. BAR. ASS'N 1983).

providing a uniform statutory basis that lawyers and judges can rely on in the future. Additionally, § 1927 also applies where claims are not entirely frivolous but are certainly unreasonable and vexatious. In short, applying § 1927 to law firms adds clarity and uniformity to existing ethical rules and gives the judiciary a useful tool in policing the line between zealous advocacy and unethical pettifoggery.

CONCLUSION

Walking the fine line between overzealous and appropriate advocacy is not always easy; such a balancing act is perhaps even more arduous when a law firm to which an attorney belongs promotes the kind of tactics § 1927 specifically seeks to prevent. Pettifoggers in the legal profession, especially those supported by their law firms, impose a heavy burden on the efficient administration of justice. Attorneys who frustrate the smooth administration of justice harm the effectiveness of the judiciary, and ultimately damage both the clients they oppose, and those they represent. Indeed, vexatiously prolonging litigation serves only to undermine the role that attorneys in the United States play in the vindication of legal rights.

The circuit split regarding the use of § 1927 to curb such pettifoggery dulls a potentially poignant tool that could be used to deter such attorney and law firm misconduct on a national scale. For § 1927 to be effective, an unambiguous national standard must exist to avoid protracted proceedings over the scope of the statute itself.[196] By utilizing broad statutory interpretation principles, in light of the context of individual attorney autonomy in the modern practice of law and the importance of unified, clear ethical standards for the legal profession, § 1927 clearly stands out as a tool best suited to quell pettifoggery before it has a chance to permeate the legal profession to any greater extent.

196. Glenn J. Waldman, *Federal Court Sanctions Against Attorneys Under 28 U.S.C. § 1927*, 81 FLA. B.J. 17, 20 (2007) ("Litigation over attorneys' fees in the form of sanctions is an undeniable, ever-burgeoning area of federal practice and demands unambiguous standards to avoid protracted proceedings . . . 'a request for attorney's fees should not result in a second major litigation.'").