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WHEN IS AN ATTORNEY UNREASONABLE AND VEXATIOUS?

When an attorney exceeds the bounds of the law or unduly burdens the court system, courts may sanction the offending attorney.¹ In sanctioning the offending attorney, courts can remove some of the abuses in the litigation system and, consequently, promote judicial efficiency in resolving disputes.²

1. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). The Supreme Court in *Roadway Express* recognized the inherent power of courts to sanction attorneys who litigate in bad faith or abuse the litigation system. *Id.* Before *Roadway Express* the United States Supreme Court had recognized the authority of a court to impose sanctions against a party. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975) (allowing prevailing defendant to recover attorneys' fees when plaintiff in bad faith brings or maintains meritless suit); *Link v. Wabash Ry.*, 370 U.S. 626, 632 (1962) (recognizing that court may levy sanctions against party for abuse of litigation system). The *Roadway Express* Court extended the authority of courts to sanction by permitting courts directly to sanction an attorney. *Roadway Express*, 447 U.S. at 766.

In addition to sanctions that courts may impose as an exercise of inherent power, section 1927 of the Judiciary Code (section 1927), the Federal Rules of Civil Procedure (F.R.C.P.), and the Federal Rules of Appellate Procedure (F.R.A.P.) authorize courts to levy sanctions against attorneys. *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987); see 28 U.S.C. § 1927 (1982) (authorizing court to sanction attorney who multiplies litigation); FED. R. Civ. P. 11 (authorizing a court to sanction an attorney who signs a pleading in violation of F.R.C.P. 11); FED. R. APP. P. 38 (authorizing court to sanction attorney who makes frivolous appeal). Section 1927 provides for sanctions against an attorney for multiplying litigation. 28 U.S.C. § 1927 (1982); see *infra* note 5 and accompanying text (discussing legislative history of § 1927); *infra* notes 7-15 and accompanying text (discussing legislative history and application of § 1927). Both the F.R.C.P. and the F.R.A.P. empower courts to sanction attorneys. FED. R. Civ. P. 11; FED. R. Civ. P. 16(f); FED. R. Civ. P. 26(g); FED. R. Civ. P. 37(b); FED. R. APP. P. 38. Rule 11 of the F.R.C.P. requires an attorney to sign every paper that the attorney files during the course of litigation. FED. R. Civ. P. 11. Rule 11 provides that the attorney's signature serves as certification that to the best of the signing attorney's knowledge, the paper is factual and states a basis in existing law or a good faith argument for modifying or reversing existing law. *Id.* Rule 11 provides, further, that the attorney's signature certifies that the filing of the paper with the court is not for an improper purpose. *Id.* Rule 11 authorizes a court to sanction the attorney or the party when an attorney signs a paper in violation of Rule 11. *Id.* Rule 16 of the F.R.C.P. authorizes courts to sanction a party or the party's attorney who fails to attend a pretrial conference. FED. R. Civ. P. 16(f). Rule 26(g) of the F.R.C.P. empowers courts to sanction parties or the parties' attorney for abuse of the discovery process. FED. R. Civ. P. 26(g). Rule 37 of the F.R.C.P. provides for sanctions against attorneys for failure to comply with discovery orders. FED. R. Civ. P. 37(b). Additionally, Rule 38 of the Federal Rules of Appellate Procedure provides for sanctions against a party or a party's attorney when the party or the party's attorney makes a frivolous appeal. FED. R. APP. P. 38.

2. See *Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir. 1986) (noting that sanctions against attorneys are necessary to administration of judicial system and, by removing abuses in litigation and promoting efficiency, provide means to make judicial system more efficient), *cert. denied*, 107 S.Ct. 1373 (1987). In *Oliveri* the United States Court of Appeals for the Second Circuit noted that severe abuse of the litigation system may lead to penalties more severe than monetary sanctions, such as contempt citations, proceedings by bar associations, suspension, and disbarment. *Id.*

Courts may sanction an attorney under the courts' inherent power, under the Federal Rules of Civil Procedure, or under statutory provisions authorizing sanctions.³ Section 1927 of the Judiciary Code⁴ (section 1927) authorizes courts to assess costs, including attorneys' fees, against counsel who unreasonably and vexatiously multiply the litigation process.⁵ In determining

3. See *supra* note 1 and accompanying text (noting authority of courts to sanction attorneys under courts' inherent power, F.R.C.P., and § 1927).

4. 28 U.S.C. § 1927 (1982). Title 28 of the United States Code is entitled "Judiciary and Judicial Procedure." Act of June 25, 1948, PUB. L. NO. 80-773, 62 STAT. 869 (codified as amended at 28 U.S.C. § 1 (1982)).

5. 28 U.S.C. § 1927 (1982). In 1813 Congress enacted section 1927 of the Judiciary Code to prevent attorneys from filing multiple suits when the matter only required a single proceeding. 26 ANNALS OF CONG. 29 (1813). A letter from the Secretary of the Treasury to the House of Representatives in 1842 suggested that section 1927 attempted to halt the practice of United States attorneys, whose pay depended on the number of cases that the attorney handled, of filing unnecessary lawsuits to increase compensation. H.R. DOC. NO. 25, 27th Cong., 3d Sess. 21-22 (1842).

In *Roadway Express, Inc. v. Piper* the Supreme Court held that sanctions under section 1927 did not include awards of attorneys' fees. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980); see *infra* notes 41-48 and accompanying text (discussing *Roadway Express* Court's interpretation of § 1927). After the Supreme Court decided *Roadway Express*, Congress amended section 1927 to include attorneys' fees in the costs that a court may assess against an attorney under section 1927. See Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156 (codified at 28 U.S.C. § 1927 (1982)) (including attorneys' fees in scope of § 1927 sanction).

In amending section 1927 in 1980, Congress intended to prevent delays in litigation proceedings. See H.R. CONF. REP. NO. 1234, 96th Cong., 2d Sess. 8 (1980), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS, 2716, 2782 (stating congressional intent in amending § 1927). The Senate version of the bill proposed that section 1927 allow courts to impose liability on an attorney who intentionally acted to delay litigation proceedings or to increase litigation costs. See S. 390, 96th Cong., 1st Sess., 125 CONG. REC. 19,915 (1979) (proposed amendment to § 1927 of Judiciary Code to impose sanction on attorneys who intentionally delay litigation or increase litigation costs). The Senate version of section 1927 also would have required a court to warn the attorney that the attorney's conduct violated section 1927. *Id.* The Senate version, further, would have allowed a court to impose the section 1927 sanction only if the attorney continued to delay the litigation or increase the costs. *Id.* The House version of the Antitrust Procedural Improvements Act of 1980 did not contain an amendment to section 1927. See H.R. CONF. REP. NO. 1234, *supra*, at 8 (noting that House of Representatives did not introduce amendment to § 1927 as part of Antitrust Procedural Improvements Act of 1980).

In amending section 1927 Congress eventually adopted a compromise version reached by the House and Senate Conference Committee on the Antitrust Procedural Improvements Act of 1980 (Conference Committee). *Id.* Congress failed to indicate, however, the appropriate standard for courts to apply in determining whether to sanction attorneys under section 1927. See *id.* (failing to discuss the proper standard under § 1927); Comment, *Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper*, 60 B.U.L. REV. 950, 951 (1980) (noting that 1980 amendment to § 1927 did not establish standard for courts to apply for § 1927 sanction). The Conference Committee Report stated that the high standard required by the 1980 amendment before courts could impose a section 1927 sanction would not hinder an attorney in representing a client. H.R. CONF. REP. NO. 1234, *supra*, at 8. The Conference Committee Report, however, does not define the high standard. See *id.* (containing no definition of term "high standard"). In presenting the Conference Committee's compromise version of

whether to sanction an attorney under section 1927, federal courts have disagreed on the standard against which to measure an attorney's conduct before a court may sanction the attorney by assessing attorneys' fees.⁶

Section 1927 of the Judiciary Code authorizes a court to sanction an attorney who delays the litigation process.⁷ Section 1927 provides for a sanction only against the attorney and not against the party whom the attorney represents.⁸ The section 1927 sanction consists of the costs incurred by the opposing party because of the offending attorney's delay.⁹ Section 1927 imposes a sanction on the vexatious attorney regardless of whether the attorney represents the plaintiff or the defendant, or the prevailing or losing party.¹⁰ Section 1927 historically has provided for an attorney to be

section 1927, House members of the Conference Committee stated that because the Senate version would have lowered the standard applicable to bad faith, the Conference Committee rejected the Senate version of the amendment. See 126 CONG. REC. 23,627 (1980) (statement of Rep. McClory) (stating that Senate version of amendment to § 1927 would have lowered standard applicable to § 1927). Testimony before the House Subcommittee on Monopolies and Commercial Law indicated, however, that the Senate version would have required bad faith. *Hearings on H.R. 3271, H.R. 4046, H.R. 4047, H.R. 4048, H.R. 4049, and H.R. 4050 Antitrust Procedural Improvements and Jurisdictional Amendments Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 61 (1979) (hereinafter *Hearings*) (statement of Hon. Charles B. Renfrew, United States District Court Judge From the Northern District of California).

6. Compare *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (before imposing § 1927 sanction, court must find that attorney clearly acted with bad faith), *cert. denied*, 107 S.Ct 1373 (1987); *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984) (holding that terms "vexatious and unreasonable" in § 1927 require courts to consider attorneys' bad faith); and *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983) (requiring court to find that attorney acted recklessly or in bad faith); with *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) (imposing § 1927 sanctions when court objectively determined that regardless of whether attorney acted in bad faith attorney unreasonably and vexatiously multiplied litigation), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Nov. 17, 1987) (No. 87-710); and *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 (5th Cir.) (establishing that conduct required for § 1927 sanction is vexatious multiplication of litigation), *aff'd in part, vacated and remanded in part*, 722 F.2d 209 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

7. See *supra* note 5 (discussing legislative history and application of § 1927 and noting Congress' intent in enacting § 1927 to deter attorneys from delaying litigation process).

8. 28 U.S.C. § 1927 (1982); see *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (contrasting § 1927 that authorizes court only to sanction attorney with federal statutes that shift attorneys' fees from one party to other party), *cert. denied*, 107 S.Ct. 1373 (1987); see also 15 U.S.C. § 15 (1982) (providing that prevailing plaintiff in antitrust action may recover reasonable attorneys' fees); 42 U.S.C. § 1988 (1982) (providing that prevailing parties in civil rights action may recover reasonable attorneys' fees); *infra* notes 24-25 and accompanying text (noting that Congress has enacted statutes that authorize awards of attorneys' fees as exceptions to American Rule that prevailing party does not recover attorneys' fees).

9. 28 U.S.C. § 1927 (1982). Section 1927 authorizes a court to assess excess costs, including attorneys' fees, incurred by an opposing party when an attorney delays litigation. *Id.*

10. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). The *Roadway Express* Court noted that in determining whether to sanction an attorney under section 1927, a court does not need to consider whether the attorney represents the prevailing party or the losing party. *Id.*

liable only for excess costs resulting from the attorney's multiplying the proceedings.¹¹ Courts imposing section 1927 sanctions, however, traditionally had not included attorneys' fees as a component of excess costs.¹² Because costs did not include attorneys' fees, sanctions under section 1927 involved insignificant amounts, and consequently, very little litigation over section 1927 sanctions resulted.¹³ In 1980, however, Congress amended section 1927 expressly to include attorneys' fees as a cost that courts could impose under section 1927.¹⁴ Since the 1980 congressional amendment, parties more frequently have attempted to invoke section 1927 sanctions.¹⁵

Courts traditionally have applied the American Rule, which recognizes that each party typically bears the cost of the party's attorneys' fees.¹⁶ Section 1927, however, is a departure from the general American Rule.¹⁷ Federal courts also have fashioned three exceptions to the American Rule under which courts may allow a party to recover attorneys' fees.¹⁸ First, a party who preserves or recovers a fund for the benefit of others (common fund) may recover attorneys' fees from the fund or from the other parties who benefit from the fund.¹⁹ Second, a party may recover attorneys' fees from an opposing party when the opposing party or the opposing party's attorney has disobeyed a court order.²⁰ Third, a party may recover attorneys' fees from an opposing party when the opposing party acts in bad faith.²¹

11. See *supra* note 5 and accompanying text (noting the legislative and statutory history of § 1927).

12. See *supra* note 5 and accompanying text (discussing *Roadway Express* Court's interpretation of § 1927, before Congress amended § 1927, that excluded attorneys' fees from definition of term "costs" in § 1927).

13. See *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (noting that prior to Congress' amendment in 1980, § 1927 did not include attorneys' fees, and, therefore, sanctions under § 1927 did not involve large dollar amounts), *cert. denied*, 107 S.Ct. 1373 (1987).

14. See *supra* note 5 (discussing the legislative history of § 1927 and, in amending § 1927 in 1980, Congress' intent to include attorneys' fees in sanction under § 1927).

15. See *Oliveri*, 803 F.2d at 1273 (noting that since Congress in 1980 added attorneys' fees to § 1927, courts have imposed § 1927 sanctions more frequently than before amendment).

16. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (noting that rule in United States is that prevailing party ordinarily does not recover attorneys' fees from losing party); *F.D. Rich. Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 128-31 (1974) (affirming American Rule that each party pay own attorneys' fees); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (recognizing long standing general rule that party may not recover attorneys' fees).

17. See *Oliveri*, 803 F.2d at 1271, 1273 (discussing § 1927 as exception to American Rule).

18. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975); see *infra* notes 19-21 and accompanying text (noting exceptions to American Rule).

19. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 390-97 (1970). The Supreme Court in *Mills* defined the term "common fund" as a fund for the benefit of an entire class, such as an estate. *Id.*

20. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923); see *Alyeska*, 421 U.S. at 258 (noting that award of attorneys' fees may be part of sanction imposed on party or party's attorney for disobeying court order).

21. *Alyeska*, 421 U.S. at 258-59.

In *Alyeska Pipeline Service Co. v. Wilderness Society*²² the United States Supreme Court refused to allow further judicially created exceptions to the American Rule and held that only Congress should determine other situations in which courts can award attorneys' fees.²³ The Supreme Court in *Alyeska* reasoned that by enacting statutes providing for a court to award attorneys' fees to a party, Congress would exercise its authority to create exceptions to the American Rule.²⁴ Congress has created exceptions to the American Rule most notably in civil rights and antitrust cases.²⁵ Ordinarily, a prevailing plaintiff in an antitrust or civil rights action automatically recovers attorneys' fees from the defendant.²⁶

Although the Supreme Court in *Alyeska* and Congress had addressed the sanction of attorneys' fees against a party for bad faith, neither the Supreme Court nor Congress had addressed the sanction of attorneys' fees against a party's attorney.²⁷ In *Roadway Express, Inc. v. Piper*²⁸ the United States Supreme Court considered whether section 1927 or the bad faith exception to the American Rule authorized a court to assess attorneys' fees against counsel.²⁹ In *Roadway Express* two former employees of Roadway Express, Inc. (Roadway) and an unsuccessful applicant for a position at Roadway instituted a civil rights class action against Roadway alleging racial discrimination in Roadway's employment practices.³⁰ The plaintiffs' attorneys failed to answer Roadway's interrogatories, failed to attend a hearing on Roadway's motion for an order compelling answers to the interrogatories, and refused to comply with a court-ordered deadline for filing answers and delayed, therefore, the litigation.³¹ Roadway successfully moved the district court to dismiss the civil rights class action under Rule 37 of the Federal

22. 421 U.S. 240 (1975).

23. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 241, 262 (1975).

24. *See id.* at 260 nn.32-35 (listing statutes that authorize awards of attorneys' fees); *supra* note 25 and accompanying text (noting statutes that assess attorneys' fees against party).

25. *See* 15 U.S.C. § 15 (1982) (providing that prevailing plaintiff in antitrust action may recover reasonable attorneys' fees from losing defendant); 42 U.S.C. § 1988 (1982) (providing that prevailing parties in civil rights actions may recover reasonable attorneys' fees from losing parties).

26. *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (holding that unless special circumstances make award unjust, prevailing plaintiff in civil rights action ordinarily recovers attorneys' fees).

27. *See supra* note 21 and accompanying text (noting that *Alyeska* Court held that courts may assess attorneys' fees against party who acts in bad faith); *supra* note 24-25 and accompanying text (noting that Congress has enacted statutes that authorize courts to assess attorneys' fees against party). The *Alyeska* Court addressed only the issue of when a court may assess attorneys' fees against a party. *Alyeska*, 421 U.S. at 260.

28. 447 U.S. 752 (1980).

29. *See Roadway Express, Inc. v. Piper* 447 U.S. 752, 754 (1980) (stating that *Roadway Express* Court considered what powers courts may use to assess attorneys' fees against attorney).

30. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 754 (1980). The style of the case was *Monk v. Roadway Express, Inc.* in the district court. *See id.* (discussing plaintiffs' suit filed in district court). The plaintiff's attorneys appealed, but the plaintiff did not. *Id.* The style of the case on appeal, therefore, was *Roadway Express, Inc. v. Piper. Id.*

31. *Id.* at 755.

Rules of Civil Procedure and to award attorneys' fees and court costs under section 1927.³² The district court in *Roadway Express* dismissed the action with prejudice.³³ The district court, in a separate opinion, awarded Roadway its attorneys' fees and costs and assessed the fees and costs against the plaintiffs' attorneys.³⁴ The district court reasoned that sections 1988 and 2000e-5(k) of the Civil Rights Act of 1964 authorized a court to award costs, including attorneys' fees, to a prevailing party.³⁵ The district court reasoned, further, that because the case was a civil rights class action, the costs assessable under section 1927 also should include attorneys' fees.³⁶ The district court assessed, therefore, the attorneys' fees and costs against the plaintiffs' attorney.³⁷ The plaintiffs successfully appealed to the United States Court of Appeals for the Fifth Circuit.³⁸ On appeal the Fifth Circuit ruled that section 1927 did not depend on the civil rights statutes for a definition of the term "costs" and that section 1927 did not authorize courts to assess attorneys' fees.³⁹ Subsequently, Roadway appealed the Fifth Circuit's holding to the Supreme Court.⁴⁰

On appeal the Supreme Court noted that Congress simultaneously enacted sections 1920 and 1927 of the Judiciary Code.⁴¹ The *Roadway Express* Court also noted that section 1920 defines costs recoverable by a prevailing party in federal courts.⁴² The *Roadway Express* Court reasoned, therefore, that to determine the appropriate scope of the term "costs" in section 1927, courts must consider the scope of the term "costs" in section 1920.⁴³ The Supreme Court noted that section 1920 does not include attorneys' fees as a component of recoverable costs.⁴⁴ The *Roadway Express* Court concluded, therefore, that for courts to include attorneys' fees as costs under section 1927 would exceed judicial authority.⁴⁵ The *Roadway*

32. *Id.* at 755 & n.2.

33. *Id.*

34. *Id.* at 756.

35. *Id.*

36. *Id.*

37. *Id.*

38. *See Monk v. Roadway Express, Inc.*, 599 F.2d 1378, 1383 (5th Cir. 1979) (vacating district court's decision to sanction plaintiff's attorney under § 1927), *aff'd sub nom. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980).

39. *Id.* at 1381.

40. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (affirming Fifth Circuit's holding that § 1927 did not authorize courts to include attorneys' fees in § 1927 sanction).

41. *See id.* at 759-60 (discussing legislative history of §§ 1927 and 1920 and noting that Congress enacted two sections together); *see also supra* note 5 (discussing legislative history of § 1927).

42. *Roadway Express*, 447 U.S. at 757.

43. *Id.* at 760-61. Section 1920 of the Judiciary Code allows prevailing parties to recover specific costs, including fees of clerks, reporters, and witnesses, costs of printing, docket fees, and compensation of court appointed experts. 28 U.S.C. § 1920 (1982).

44. *See Roadway Express*, 447 U.S. at 760-61 (noting that § 1920 does not include attorneys' fees in definition of term "costs" recoverable by prevailing party).

45. *Id.* at 762.

Express Court held, accordingly, that section 1927 does not authorize courts to assess attorneys' fees against counsel.⁴⁶ Although refusing to include attorneys' fees as costs under section 1927, the *Roadway Express* Court held that the bad faith exception to the American Rule authorizes courts to assess attorneys' fees directly against an attorney who conducts the litigation in bad faith.⁴⁷ The *Roadway Express* Court remanded, therefore, the case to the district court to consider whether the attorney acted in bad faith.⁴⁸

Because the *Roadway Express* Court did not recognize that courts could sanction attorneys by assessing attorneys' fees under section 1927, the *Roadway Express* Court did not consider the appropriate standard against which to measure attorney conduct to determine whether to sanction an attorney under section 1927.⁴⁹ Subsequent to *Roadway Express*, however, Congress amended section 1927 to include attorneys' fees as part of recoverable costs under section 1927.⁵⁰ Since the congressional amendment of section 1927, courts inconsistently have applied section 1927.⁵¹ Some courts hold that the standard under section 1927 is a high, subjective bad faith standard.⁵² Other courts, however, hold that the section 1927 standard is a low, objective unreasonableness standard.⁵³

In *Suslick v. Rothschild Securities Corp.*⁵⁴ the United States Court of Appeals for the Seventh Circuit noted two requirements for the imposition of sanctions under section 1927.⁵⁵ In *Suslick* the plaintiff claimed in the United States District Court for the Northern District of Illinois that in handling an options trading account, the defendants had violated securities

46. *Id.* at 763.

47. *See id.* at 766 (holding that because court may sanction party litigating in bad faith through award of attorneys' fees, court also may sanction party's attorney for intentionally abusing litigation process).

48. *Id.* at 767-68.

49. *See* Comment, *supra* note 5, at 951, 954 (noting that *Roadway Express* Court held that attorneys' fees were not recoverable under § 1927, and thus, did not consider proper standard for courts to sanction attorneys under § 1927).

50. *See supra* note 5 (first, noting that after Supreme Court's decision in *Roadway Express*, Congress in 1980 amended § 1927 and, second, discussing legislative history of amendment to § 1927).

51. *See supra* note 6 and accompanying text (comparing circuit courts differing interpretations of standard that courts should apply in determining whether to sanction attorney under § 1927).

52. *See* *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (requiring court to find that attorney acted with bad faith), *cert. denied*, 107 S.Ct. 1373 (1987); *Suslick v. Rothschild Sec. Corp.*, 741 F.2d 1000, 1006 (7th Cir. 1984) (holding that for court to impose § 1927 liability court must find subjective bad faith).

53. *See In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) (applying objective standard to determine whether to sanction attorney under § 1927); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 (5th Cir.) (holding that § 1927 standard is objective), *aff'd in part, vacated and remanded in part*, 722 F.2d 209 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

54. 741 F.2d 1000 (7th Cir. 1984).

55. *Suslick v. Rothschild Sec. Corp.* 741 F.2d 1000, 1006 (7th Cir. 1984).

laws.⁵⁶ The defendants, however, claimed that *res judicata* and the statute of limitations barred the plaintiff's suit.⁵⁷ The defendants, therefore, moved the court to dismiss the complaint.⁵⁸ The district court ruled that the statute of limitations barred the action and, consequently, dismissed the suit.⁵⁹ The plaintiff then filed two amended complaints, but because the plaintiff failed to allege a basis for tolling the statute of limitations, the court dismissed both amended complaints.⁶⁰ The defendants also successfully moved the district court to award attorneys' fees to the defendants under section 1927 and Rule 11 of the Federal Rules of Civil Procedure.⁶¹ Both the plaintiff and the plaintiff's attorney appealed to the Seventh Circuit.⁶² On appeal the Seventh Circuit concluded that for section 1927 to apply, first, the attorney's conduct must multiply the litigation, and, second, the attorney's conduct must be unreasonable and vexatious.⁶³ The Seventh Circuit ruled that for a court to deem an attorney's conduct unreasonable and vexatious, the court must find that the attorney acted in bad faith.⁶⁴ The Seventh Circuit reasoned that the complex interaction between state and federal law concerning the tolling of the statute of limitations in securities cases gave rise to the possibility that the plaintiff would prevail on the securities claim.⁶⁵ The Seventh Circuit refused, therefore, to conclude that the attorney's actions amounted to bad faith.⁶⁶ The Seventh Circuit held, accordingly, that no basis existed for sanctioning the attorney under section 1927.⁶⁷ The Seventh Circuit reversed, therefore, the district court's assessment of attorneys' fees under section 1927 against the plaintiff's attorney.⁶⁸

56. *Id.* at 1002. In *Suslick* the plaintiff was the executrix of her husband's estate. *Id.* The defendants managed an options trading account on behalf of the decedent. *Id.* The plaintiff sued the defendants and claimed that the defendants violated several securities laws in the handling of the decedent's account. *Id.*

57. *Id.* The *Suslick* court noted that the plaintiff had brought a prior action, which alleged securities law violations, on behalf of the plaintiff and the plaintiff's children as the decedent's heirs. *Id.* at 1002 n.1. The United States District Court for the Northern District of Illinois had dismissed the previous action because the plaintiff failed to bring the suit within the time required by the statute of limitations. *Id.* The defendants claimed that the previous action rendered the issue raised by the plaintiff in the present action *res judicata*. *Id.*

58. *Id.*

59. *Id.* In *Suslick* the district court noted that the plaintiff failed to allege any facts that would have tolled the statute of limitations. *Id.*

60. *Id.*

61. *Id.* at 1002-03.

62. *Id.* at 1003.

63. *See id.* at 1006 (indicating that § 1927 requires that attorney both delay litigation and unreasonably and vexatiously cause delay).

64. *Id.* The *Suslick* court noted that although lack of merit in a suit evidences bad faith, the claim must be without a credible basis in law before the court may assess attorneys' fees under section 1927. *See id.* (noting that complexity of statute of limitations issues in securities cases demonstrate that plaintiff at least had a credible basis for bringing the action).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* The *Suslick* court also held that Rule 11 of the F.R.C.P. requires a court to find

Agreeing with the *Suslick* court's interpretation of section 1927, the United States Court of Appeals for the Second Circuit in *Oliveri v. Thompson*⁶⁹ adopted a bad faith standard for sanctioning an attorney under section 1927.⁷⁰ In *Oliveri* the plaintiff claimed in the United States District Court for the Eastern District of New York that by using excessive force, police had effected an unconstitutional arrest of the plaintiff.⁷¹ At trial the jury found for the defendants on all claims.⁷² The defendants then moved the district court to sanction under section 1927 and Rule 11 of the Federal Rules of Civil Procedure the plaintiff and the plaintiff's attorney for filing a meritless action and continuing the prosecution knowing that the claims were without basis.⁷³ The district court in *Oliveri* awarded attorneys' fees to the defendant and assessed the attorneys' fees under section 1927 against the plaintiff's attorney.⁷⁴ The plaintiff's attorney appealed to the Second Circuit.⁷⁵ The Second Circuit noted that *Roadway Express* established courts' inherent power to sanction an attorney, as well as a party, who acts in bad faith.⁷⁶ The Second Circuit reasoned, however, that section 1927 differed from the courts' inherent power to sanction in that a court could sanction only an attorney under section 1927.⁷⁷ The Second Circuit concluded, therefore, that section 1927 could apply only when the attorney acted in bad faith.⁷⁸ The Second Circuit held, accordingly, that the district court's findings did not meet the bad faith standard that section 1927 requires.⁷⁹ The Second Circuit reversed, therefore, the district court's sanction against the plaintiff's attorney.⁸⁰

bad faith. *Id.* at 1007. Because the court did not find bad faith, the *Suslick* court reversed the district court award of attorneys' fees as a sanction under Rule 11. *Id.* at 1007; *see supra* note 1 (discussing the requirements of Rule 11 of the F.R.C.P.).

69. 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S.Ct 1373 (1987).

70. *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1373 (1987). The *Oliveri* court noted that the Second Circuit always did not make the bad faith requirement for sanctioning an attorney under section 1927 explicit. *Id.*; *see Cheng v. GAF Corp.*, 713 F.2d 886, 891 n.3 (2d Cir. 1983) (noting that court does not need to decide whether § 1927 requires bad faith or simply unreasonableness). The Second Circuit in *Oliveri* clearly stated that the Second Circuit applies a bad faith standard when determining whether to sanction an attorney under section 1927. *Oliveri*, 803 F.2d at 1273.

71. *Oliveri*, 803 F.2d at 1269.

72. *Id.* at 1270.

73. *Id.* at 1270-71.

74. *Id.* at 1271. In *Oliveri* the district court also based impositions of sanctions against the plaintiff's attorney on Rule 11 of the F.R.C.P. *Id.*; *see FED. R. Civ. P.* 11 (authorizing court to sanction attorney who signs pleading which has no legal or factual basis).

75. *Oliveri*, 803 F.2d at 1271.

76. *Id.* at 1273.

77. *Id.*

78. *Id.*

79. *Id.* at 1277. In *Oliveri* the district court stated that the plaintiff's testimony was completely incredible. *Id.* at 1270. The Second Circuit noted, however, that section 1927 did not require a sanction against an attorney whose judgment of the client's credibility conflicted with the district court's perception of the client's credibility. *Id.* at 1277-78.

80. *Id.* at 1281.

Disagreeing with the Second Circuit in *Oliveri* and the Seventh Circuit in *Suslick*, the United States Court of Appeals for the Sixth Circuit in *In re Ruben*⁸¹ considered whether the section 1927 sanction standard should be a subjective, bad faith standard or an objective, unreasonableness standard.⁸² In *Ruben* the plaintiff filed a sex discrimination claim in the United States District Court for the Northern District of Ohio.⁸³ At the close of the plaintiff's case, the defendants successfully moved the court to dismiss the plaintiff's sex discrimination claim pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.⁸⁴ The defendants then successfully moved the court to award attorneys' fees to the defendants and assess the fees under Rule 11 of the Federal Rules of Civil Procedure and section 1927.⁸⁵ The plaintiff and the plaintiff's attorney appealed to the Sixth Circuit.⁸⁶ On appeal the Sixth Circuit ruled that section 1927 requires an objective determination that despite the absence of impropriety, the attorney unreasonably and vexatiously multiplied the litigation process.⁸⁷ The Sixth Circuit reasoned that by enacting section 1927, Congress intended to prevent dilatory litigation tactics.⁸⁸ The Sixth Circuit noted that attorneys cannot ethically burden the federal courts by bringing meritless actions or delaying the litigation process.⁸⁹ The Sixth Circuit reasoned, therefore, that an objective standard under section 1927 would not cause an attorney to violate the attorney's ethical duty to represent zealously the client.⁹⁰ The Sixth Circuit concluded, therefore, that when an attorney multiplies the proceedings, a

81. 825 F.2d 977 (6th Cir. 1987).

82. *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Nov. 17, 1987) (No. 87-710).

83. *Id.* at 980.

84. *Id.* at 981. In *Ruben* the district court determined that the plaintiff's case was without factual or legal basis. *Id.* at 980 n.2. The district court did not indicate, however, whether the plaintiff in bad faith brought or maintained the suit. *Id.* at 981.

85. *Id.* In *Ruben* the district court did not indicate clearly the grounds for sanctioning the attorney, but the *Ruben* court noted courts' sanctioning authority under courts' inherent power, section 1927, and Rule 11 of the F.R.C.P. *Id.*; see *Roadway Express, Inc. v. Piper* 447 U.S. 752, 766 (1980) (holding that under courts' inherent power, court may sanction attorney who acts in bad faith); 28 U.S.C. § 1927 (1982) (providing that court may sanction attorney who unreasonably and vexatiously multiplies litigation); FED. R. CIV. P. 11 (providing that court may sanction attorney who signs pleading that is not, to best of attorney's knowledge, well grounded in fact and warranted by existing law or good faith argument for extension, modification, or reversal of existing law, or interposed for proper purpose).

86. See *Ruben*, 825 F.2d at 991 (reversing district court's sanction against plaintiff and remanding case to district court for reconsideration of § 1927 sanction against plaintiff's attorney).

87. *Id.* at 984.

88. *Id.* at 983.

89. *Id.* at 984; see *infra* note 114 and accompanying text (discussing attorneys' ethical obligations in representing clients); *infra* notes 170-73 and accompanying text (discussing objective standard's effect on attorney's ethical obligations to client).

90. See *Ruben*, 825 F.2d at 984 (noting that because ethical obligation zealously to represent client does not include pursuing frivolous claims or multiplying litigation on behalf of client, objective standard does not deter attorneys from fulfilling ethical obligations).

court may impose sanctions on the attorney under section 1927 regardless of the attorney's motive.⁹¹ The Sixth Circuit remanded, consequently, the case to the district court for reconsideration of sanctions under the Sixth Circuit's interpretation of section 1927.⁹²

In accord with the Sixth Circuit in *Ruben*, the United States Court of Appeals for the Fifth Circuit in *Lewis v. Brown & Root, Inc.*⁹³ established the standard for determining whether to sanction the attorney under section 1927 as vexatious multiplication of the litigation process.⁹⁴ In *Lewis* the plaintiff filed a civil rights suit in the United States District Court for the Southern District of Texas.⁹⁵ The plaintiff alleged that Brown & Root, Inc. (Brown & Root) engaged in racial discrimination in hiring and promoting employees.⁹⁶ The district court dismissed the suit for want of prosecution when the plaintiff and the plaintiff's attorney failed to appear for trial.⁹⁷ The district court subsequently granted, however, the plaintiff's motion for reinstatement.⁹⁸ The plaintiff further delayed the proceedings because the plaintiff failed to appear on time for the rescheduled trial, and neither the plaintiff nor the plaintiff's counsel returned to trial following a recess.⁹⁹ The district court dismissed the case both as unsupported by the evidence and for want of prosecution.¹⁰⁰ The district court awarded attorneys' fees to the defendant and assessed the fees under section 1927 against the plaintiff's attorney.¹⁰¹ The plaintiff's attorney appealed to the Fifth Cir-

91. *Id.* The *Ruben* court noted, however, that a trial judge's frustration with an attorney does not provide a basis for a section 1927 sanction. *Id.* The *Ruben* court reasoned that section 1927 requires an attorney's act that causes delay and creates excess costs for the opposing party. *Id.*

92. *Id.* at 991. In *Ruben* the Sixth Circuit noted that the district court did not determine the impact of the attorney's misconduct on the defendants. *Id.* at 990. The court directed, therefore, that the district judge consider the extent to which the plaintiff's attorney's actions caused the defendants to incur excess costs and attorneys' fees. *Id.*

93. 711 F.2d 1287 (5th Cir.), *aff'd in part, vacated in part and remanded in part*, 722 F.2d 209 (5th Cir. 1983), *cert. den.*, 464 U.S. 1069 (1984).

94. *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1292 (5th Cir.), *aff'd in part, vacated in part and remanded in part*, 722 F.2d 209 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

95. *Id.* at 1288.

96. *Id.* at 1288-89.

97. *Id.* at 1289.

98. *Id.* In *Lewis* the plaintiff's motion to reinstate the lawsuit stated that the plaintiff's failure to appear resulted from counsel's mistake and failure to record the scheduled trial date. *Id.*

99. *Id.* In *Lewis* the district court had granted the recess at the request of the plaintiff's counsel. *Id.* Because the plaintiff's attorney had indicated that the plaintiff had called the plaintiff's only witness, the plaintiff's attorney indicated that after the recess the attorney would need only a short time to conclude the presentation of the plaintiff's case. *Id.* Before dismissing the case, the district court, consequently, awaited for fifteen minutes the return of the plaintiff and the plaintiff's attorney. *Id.* The Fifth Circuit in *Lewis* noted that the district court dismissed the case for lack of evidentiary support for plaintiff's allegations and for failure to prosecute. *Id.*

100. *Id.* at 1289.

101. *Id.*

cuit.¹⁰² On appeal the Fifth Circuit ruled that unless clearly erroneous, the Fifth Circuit must affirm the district court's sanction of the attorney.¹⁰³ The Fifth Circuit reasoned that the correct standard under section 1927 is vexatious multiplication of litigation.¹⁰⁴ The Fifth Circuit agreed with the district court that by failing to appear for the trial and failing to return to trial after a recess, the plaintiff's attorney irresponsibly and vexatiously multiplied the litigation.¹⁰⁵ The Fifth Circuit held, accordingly, that the district court correctly sanctioned the plaintiff's attorney under section 1927.¹⁰⁶

Although courts agree that an attorney must multiply the litigation process before a court may sanction the attorney under section 1927, courts disagree on whether to apply a subjective bad faith standard or an objective unreasonableness standard in determining whether to sanction an attorney under section 1927.¹⁰⁷ Courts characterize the bad faith standard as a high standard and the objective standard as a low standard.¹⁰⁸ Courts interpreting section 1927 to require bad faith on the part of an attorney before sanctioning the attorney present a variety of reasons to support the courts' choice of the bad faith standard.¹⁰⁹ First, courts reason that courts should apply the same standard in sanctioning attorneys under section 1927 as under the courts' inherent power.¹¹⁰ Second, courts recognize that when considered in light of the Supreme Court's decision in *Roadway Express*, the legislative history of the 1980 amendment to section 1927 supports the courts' application of a bad faith standard in sanctioning attorneys under section 1927.¹¹¹ Third, courts recognize exceptions to the American Rule, other than the bad faith exception, only in situations that generate common funds or for which a statute specifically provides for a fee award to the prevailing party.¹¹² Thus, courts recognize that because section 1927 is not a statute that allows the prevailing party to recover attorneys' fees or that generates common funds, bad faith must be the section 1927 standard.¹¹³

102. *Id.*

103. *Id.* at 1292 & n.7.

104. *Id.* at 1292.

105. *Id.*

106. *Id.*

107. *See supra* note 6 and accompanying text (comparing courts that require bad faith before sanctioning an attorney under § 1927 with courts that do not require bad faith).

108. *See McCandless v. Great Atl. & Pac. Tea Co.*, 697 F.2d 198, 201 (7th Cir. 1983) (characterizing objective standard as lower standard than bad faith standard).

109. *See infra* notes 110-14 and accompanying text (discussing reasoning of courts that require bad faith).

110. *See Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (comparing § 1927 sanction to inherent power sanction).

111. *See In re TCI Ltd.*, 769 F.2d 441, 447 (7th Cir. 1985) (holding that legislative history of § 1927 indicates that Congress intended to adopt bad faith standard in amending § 1927).

112. *See supra* notes 16-26 and accompanying text (discussing American Rule, which recognizes that prevailing parties do not recover attorneys' fees and exceptions to American Rule).

113. *See TCI*, 769 F.2d at 445 (concluding that § 1927 is not statute that permits award of attorneys' fees to prevailing party and, therefore, that bad faith should be § 1927 standard).

Finally, courts reason that an attorney's ethical obligations to clients require that courts apply the bad faith standard.¹¹⁴

In contending that the standard for section 1927 sanctions should be the same as the standard for courts' inherent power sanctions, courts reason that only one significant difference exists between a section 1927 sanction and an inherent power sanction.¹¹⁵ Under section 1927 courts may assess a sanction only against an attorney.¹¹⁶ Under the courts' inherent power to sanction, however, courts may assess a sanction against either the party or the party's attorney.¹¹⁷ Courts, therefore, reason that because under the inherent power courts may sanction a party or the party's attorney only when the party or the attorney acts in bad faith, a court should sanction an attorney under section 1927 only when the attorney acts in bad faith.¹¹⁸

Courts applying the bad faith standard also reason that courts should examine the legislative history of the 1980 amendment to section 1927 in light of the Supreme Court's decision in *Roadway Express*.¹¹⁹ Courts relying on the legislative history of section 1927 note that the House and Senate Conference Committee on the Antitrust Procedural Improvements Act of 1980 (Conference Committee), which considered the 1980 amendment to section 1927, indicated in the Conference Committee Report that section 1927 requires a high standard of bad faith before courts may impose sanctions.¹²⁰ The courts reason, therefore, that the reference to a high standard refers to the Supreme Court's admonishment in *Roadway Express* that courts should not assess lightly sanctions.¹²¹ Although the *Roadway*

114. *Id.* at 447. The Seventh Circuit in *TCI* reasoned that if an attorney knows that a court will apply an objective standard in determining whether to sanction the attorney under section 1927, the attorney would hesitate to represent zealously a client *Id.* The *TCI* court concluded, therefore, that the use of an objective standard under § 1927 would impede attorneys in fulfilling ethical obligations to clients. *Id.* See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). The American Bar Association Code of Professional Responsibility (the "Model Code") requires an attorney to represent zealously a client within the bounds of the law. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Additionally, the disciplinary rules of the Model Code prohibit an attorney from filing an action or delaying litigation proceedings to simply harass or injure the opposing party. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980).

115. See *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (noting that courts' inherent power allows courts to sanction party or party's counsel, whereas under § 1927 court may sanction only party's attorney), *cert. denied*, 107 S.Ct. 1373 (1987).

116. 28 U.S.C. § 1927 (1982). See *Oliveri*, 803 F.2d at 1273 (noting that § 1927 only authorizes sanction against attorney).

117. *Oliveri*, 803 F.2d at 1273.

118. See *id.* (reasoning that because § 1927 sanction is virtually identical to inherent power sanction, standard for § 1927 sanction should be identical to standard for inherent power sanction).

119. See *Oliveri v. Thompson*, 803 F.2d 1265, 1273 (2d Cir. 1986) (discussing legislative history of § 1927 and *Roadway Express*), *cert. denied*, 107 S.Ct. 1373 (1987).

120. See H.R. CONF. REP. NO. 1234, *supra* note 5, at 8 (stating that § 1927 requires high standard before court may impose sanctions on attorney).

121. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980) (indicating that courts should not impose sanctions on attorneys without careful consideration).

Express Court did not address the standard applicable to section 1927, the Supreme Court did require bad faith as the standard for assessing sanctions under the inherent power.¹²² Courts reason, therefore, that because *Roadway Express* preceded the 1980 amendment to section 1927, Congress must have intended the bad faith standard required by the *Roadway Express* Court before sanctioning an attorney under courts' inherent power to apply to sanctions against an attorney under section 1927.¹²³ The courts rationalize, therefore, that Congress recognized bad faith to be the applicable standard for courts' imposing sanctions under section 1927.¹²⁴ Additionally, in presenting the Conference Committee Report to the House during debate on the compromise version of the 1980 amendment to section 1927, House members of the Conference Committee stated that because the Senate version would have applied a lower standard to section 1927 than the standard under *Roadway Express*, the Conference Committee did not adopt the Senate version of section 1927.¹²⁵

In addition to supporting a bad faith standard with the legislative history of the 1980 amendment to section 1927, courts justify a bad faith standard by recognizing that statutes which award attorneys' fees to the prevailing party do not require bad faith, but reasoning that section 1927 is not a statute that awards fees.¹²⁶ For support, courts note that the Supreme Court in *Roadway Express* clearly indicated that section 1927 does not distinguish between a prevailing party and a losing party.¹²⁷ Courts reason that section 1927 operates to penalize an attorney, rather than to reward a prevailing party.¹²⁸ Courts reason, further, that section 1927 simply permits a court to assess fees directly against a party's attorney, rather than

122. See *id.* at 766 (noting that court may assess sanctions under inherent power against attorney who acts in bad faith); see also *supra* note 1 and accompanying text (discussing *Roadway Express* Court's recognition of inherent power of courts to sanction attorney whom court finds to have acted in bad faith).

123. See *Roadway Express*, 447 U.S. at 767 (stating that court must find that attorney acted in bad faith before sanctioning attorney); *supra* note 15 and accompanying text (noting that Congress amended § 1927 after *Roadway Express*).

124. See *Roadway Express*, 447 U.S. at 767 (stating that court must find attorney acted in bad faith before sanctioning attorney); *supra* note 15 and accompanying text (noting that Congress amended § 1927 after *Roadway Express*).

125. See *supra* note 5 and accompanying text (discussing legislative history of 1980 amendment to § 1927 and noting statements by House of Representatives leaders that because Senate version of § 1927 would have established standard lower than bad faith for imposing § 1927 sanctions, Conference Committee rejected Senate version of § 1927).

126. See *Oliveri v. Thompson*, 803 F.2d 1265, 1271, 1273 (2nd Cir. 1986) (reasoning that because § 1927 does not assess prevailing party's attorneys' fees against losing party, § 1927 is not statutory exception to American Rule), *cert. denied*, 107 S.Ct. 1373 (1987); *supra* notes 16-26 and accompanying text (discussing American Rule and exceptions to American Rule).

127. *Oliveri*, 803 F.2d at 1273.

128. See *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985) (noting that § 1927 only operates as penalty against attorney); see also *Oliveri*, 803 F.2d at 1271 (noting that distinction between awarding fees as damages and assessing fees as sanctions is unclear).

against the party.¹²⁹ Courts conclude, therefore, that because section 1927 is not a statute that allows a fee award, section 1927 must be an extension of the bad faith exception to the American Rule.¹³⁰

Furthermore, courts support the bad faith standard by reasoning that an attorney could not fulfill an attorney's ethical obligations to a client under an objective standard.¹³¹ Courts note that an attorney has an ethical duty zealously to represent his client.¹³² Courts reason that because a court more likely would sanction an attorney under section 1927 when applying an objective standard, an objective standard may cause attorneys either to hesitate to represent a client or in representing a client, to act less zealously.¹³³ Courts that require bad faith also note that the Conference Committee Report stated that a high standard for imposing sanctions under section 1927 would allow attorneys to fulfill their ethical obligations to their clients.¹³⁴

Although some courts find several justifications for applying the subjective, bad faith standard, courts interpreting section 1927 to require an objective determination that the attorney unreasonably and vexatiously multiplied the litigation present several arguments to support the objective standard.¹³⁵ First, the Supreme Court in *Roadway Express* intended to distinguish between the bad faith standard for an inherent power sanction and the objective standard in statutory provisions authorizing courts' award of attorneys' fees.¹³⁶ Second, courts recognize that the language of section 1927 supports the use of an objective standard.¹³⁷ Third, the legislative

129. See *In re TCI*, 769 F.2d 441, 445 (7th Cir. 1985) (noting that § 1927 authorizes court to assess attorneys' fees against offending attorney, rather than against attorney's client).

130. See *supra* note 1 and accompanying text (indicating that *Roadway Express* Court viewed inherent power sanction against attorney as extension of inherent power to sanction party which is exception to American Rule).

131. See *supra* note 114 and accompanying text (discussing attorney's ethical obligations to client and reasoning that objective standard would impede attorneys in fulfilling ethical obligations to clients).

132. See *id.* (discussing attorney's ethical obligation zealously to represent client).

133. *TCI*, 769 F.2d at 447. The Seventh Circuit in *TCI* suggested that an objective standard could cause an attorney to be less than zealous in representing a client for fear that zealous representation would lead to section 1927 sanctions. *Id.* The court reasoned that under a bad faith standard, the attorney more easily could fulfill the attorney's ethical obligations to the client. *Id.*

134. H.R. CONF. REP. NO. 1234, *supra* note 5, at 8. The Conference Committee Report stated that because the high standard would not make attorneys afraid to pursue claims on behalf of their clients as might a lower standard, the high standard required under section 1927 would allow attorneys to fulfill ethical obligations zealously to represent clients. *Id.*

135. See *In re Ruben*, 825 F.2d 977, 983-84 (6th Cir. 1987) (justifying courts choice of objective standard in determining whether to impose § 1927 sanction on attorney), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Nov. 17, 1987) (No. 87-710); *infra* notes 158-61 and accompanying text (noting reasoning of courts applying objective standard to § 1927).

136. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980) (discussing standards applicable to provisions of §§ 1988 and 2000e-5(k) of Civil Rights Act of 1964, both of which authorize prevailing party to recover attorneys' fees).

137. See *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (holding that

history of the 1980 amendment to section 1927 supports an objective standard in imposing section 1927 sanctions.¹³⁸ Fourth, the statutory exceptions to the American Rule do not require bad faith, and because section 1927 is a statutory exception to the American Rule, section 1927 does not require bad faith.¹³⁹ Fifth, an objective, unreasonableness standard would not cause an attorney to hesitate to fulfill the attorney's ethical obligations to the client.¹⁴⁰ Finally, courts applying the objective standard disagree with the logic of bad faith courts that section 1927 shifts an assessment of attorneys' fees from the party to the party's attorney.¹⁴¹

Courts recognize that the *Roadway Express* Court distinguished between the subjective bad faith standard for an inherent power sanction and the objective unreasonableness standard for a statutory fee award.¹⁴² Because the district court in *Roadway Express* had based the sanction against the plaintiff's attorney on section 1988 of the Civil Rights Act of 1964, as well as on section 1927, the Supreme Court distinguished between sections 1927 and 1988.¹⁴³ The *Roadway Express* Court noted that section 1988 allows a court to assess attorneys' fees against a plaintiff for vexatious litigation.¹⁴⁴ The *Roadway Express* Court noted, further, that the vexatious litigation standard under section 1988 does not require that the party act in bad faith.¹⁴⁵ Courts conclude, therefore, that because the Supreme Court did not define the term "vexatious" to require bad faith in awarding attorneys' fees in a civil rights action, the use of the term "vexatious" in section 1927 also does not require bad faith.¹⁴⁶

§ 1927 requires objective determination that attorney knew or should have known that action was frivolous or that attorney's conduct would cause delays).

138. See *supra* note 5 (noting that Congress adopted 1980 amendment to § 1927 after Supreme Courts decision in *Roadway Express*).

139. See *infra* notes 164-69 and accompanying text (discussing reasoning of courts that § 1927 is statutory exception to American Rule and, therefore, does not require bad faith standard).

140. See *infra* notes 170-73 and accompanying text (reasoning that objective standard would not cause attorney not to fulfill ethical duties to client).

141. See *In re Ruben*, 825 F.2d 977, 982 n.5 (6th Cir. 1987) (noting disagreement with *Oliveri* court's bad faith standard), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Nov. 17, 1987) (No. 87-710); *infra* notes 174-77 and accompanying text (disagreeing with reasoning of bad faith courts that § 1927 shifts assessment of attorneys' fees from party to party's attorney).

142. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980) (distinguishing § 1927 sanction from §§ 1988 and 2000e-5(k) awards of attorneys' fees to prevailing parties in civil rights actions).

143. *Id.*

144. See *id.* (noting that prevailing plaintiffs in civil rights actions ordinarily recover attorneys' fees, but prevailing defendants only recover attorneys' fees when the plaintiff engages in vexatious litigation).

145. *Id.* The *Roadway Express* Court implied that the vexatiousness standard under section 1988 of the Civil Rights Act of 1964 does not require bad faith. *Id.*

146. *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291-1292 (5th Cir.), *aff'd in part vacated in part and remanded in part*, 722 F.2d 209 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). The Fifth Circuit in *Lewis* reasoned that because the Supreme Court in *Roadway Express* had noted that the term "vexatious" does not require bad faith, courts should define the term "vexatious" in section 1927 to not require bad faith.

Courts also justify an objective standard from the language of section 1927.¹⁴⁷ Courts note that because section 1927 does not contain language requiring intentional acts by the attorney, courts should not apply a subjective standard to a section 1927 sanction.¹⁴⁸ Moreover, the version of section 1927 originally proposed by the Senate required that the attorney intentionally multiply the litigation.¹⁴⁹ The Conference Committee's rejection of the term "intentionally" in the Senate bill, therefore, supports the conclusion that, in determining whether to impose section 1927 sanctions, courts should not consider the attorney's motivation for delaying the proceedings.¹⁵⁰

In addition to distinguishing between an inherent power sanction and a section 1927 sanction and supporting an objective standard from the language of section 1927, courts applying the objective standard conclude that the legislative history of section 1927 supports an objective standard.¹⁵¹ The legislative history does not contain any evidence that in amending section 1927, Congress considered the bad faith requirement of *Roadway Express*.¹⁵² Because the Senate proposed the section 1927 amendment in 1979 before the Supreme Court decided *Roadway Express*, Congress could not have relied on the *Roadway Express* decision to define the standard for courts to apply to section 1927.¹⁵³ Moreover, testimony before the House Judiciary Committee indicated that the Senate version of section 1927 would have required bad faith.¹⁵⁴ The Conference Committee subsequently refused to adopt the Senate version of the amendment to section 1927, and consequently, rejected the bad faith standard.¹⁵⁵ The courts assume, further, that

147. See *infra* notes 148-50 and accompanying text (discussing language of § 1927 and noting courts' reasoning that language supports applying objective standard to determine whether to sanction attorney under § 1927).

148. See *In re Jaques*, 761 F.2d 302, 306 (6th Cir. 1985) (noting that language of § 1927 does not require intent and reasoning, therefore, that attorney's intent to multiply litigation proceedings required under bad faith standard is not relevant to § 1927 sanctions).

149. See *supra* note 5 and accompanying text (discussing legislative history of § 1927 and noting that Congress rejected Senate version of § 1927, which required that attorney intentionally multiply litigation before court could impose § 1927 sanction).

150. See *id.* (noting that Conference Committee rejected Senate version of amendment of § 1927); see also *infra* note 154 and accompanying text (noting that testimony before the House Judiciary Committee urged the House to reject the Senate version of the amendment to § 1927 because the Senate version would require bad faith).

151. See *infra* notes 152-63 and accompanying text (noting courts' reasoning that legislative history of 1980 amendment to § 1927 and Congress' intent in amending § 1927 support applying objective standard to determine whether to sanction attorney under § 1927).

152. See *supra* note 5 (discussing legislative history of 1980 amendment to § 1927); *infra* note 153 and accompanying text (noting that because Senate proposed amendment to § 1927 before the Supreme Court decided *Roadway Express*, Senate did not consider *Roadway Express* in deciding to amend § 1927).

153. See S. 390, 96th Cong., 1st Sess., 125 CONG. REC. 19,915 (1979) (preceding Supreme Court's decision in *Roadway Express*, which did not occur until 1980).

154. See *Hearings, supra* note 5 at 61 (stating that Senate's amendment to § 1927 would have adopted bad faith standard, rather than objective standard for imposing § 1927 sanctions).

155. See *supra* note 5 (noting that legislative history of 1980 amendment to § 1927

Congress intended to give courts a new source of authority to sanction attorneys, rather than simply to codify the existing inherent power to sanction.¹⁵⁶ Courts reason, therefore, that if Congress had intended for courts to sanction attorneys only when the courts find that the attorneys acted in bad faith, Congress did not need to amend section 1927.¹⁵⁷ Courts conclude, consequently, that because the *Roadway Express* Court had recognized the inherent power of courts to sanction attorneys acting in bad faith, Congress amended section 1927 to adopt a lesser standard under which courts could impose sanctions.¹⁵⁸

Furthermore, courts applying the objective standard reason that the legislative history indicates that Congress' intent in amending section 1927 to deter litigation delays is evident in the other portions of the Antitrust Procedural Improvements Act of 1980 (the "Act") and in the portion of the Act that amended section 1927.¹⁵⁹ The Act also amended the Clayton Act to authorize courts to award prejudgment interest.¹⁶⁰ By authorizing the award of prejudgment interest under the Clayton Act, Congress intended to discourage attorneys from using litigation tactics solely to delay litigation.¹⁶¹ Courts reason, therefore, that Congress' primary intent in passing the Act was to discourage attorneys from delaying litigation.¹⁶² The courts conclude, consequently, that the objective standard furthers Congress' intent in enacting section 1927.¹⁶³

indicates that Senate's amendment would have adopted subjective bad faith standard, rather than objective unreasonableness standard for imposing § 1927 sanctions).

156. *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986). The Sixth Circuit in *Jones* reasoned that Congress intended the 1980 amendment to section 1927 to give courts a new source of sanctioning authority. *Id.* The court reasoned, further, that applying a bad faith standard to section 1927 would not give courts any new power, but rather that the 1980 amendment to section 1927 simply would codify the inherent power of courts to sanction an attorney. *Id.* The court concluded, therefore, that courts must use an objective standard under section 1927 to fulfill Congress' intent to add to the inherent power. *Id.*

157. *Id.*

158. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980) (recognizing inherent power of court to sanction attorney who acts in bad faith); *see also supra* notes 120-25 and accompanying text (discussing relationship between *Roadway Express* and 1980 amendment to § 1927).

159. *See H.R. CONF. REP. No. 1234, supra* note 5, at 9 (noting that by amending § 4 of Clayton Act to award prejudgment interest in antitrust cases, and thus, providing incentives not to prolong litigation, Antitrust Procedural Improvements Act of 1980 will deter litigation delays).

160. *See id.* (discussing provision of Act authorizing award of prejudgment interest to prevailing plaintiffs in antitrust actions).

161. *See id.* (noting that award of prejudgment interest will deter attorneys from delaying litigation).

162. *See Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (reasoning that objective standard will deter litigation delays by allowing sanction against attorney when attorney should know that claim is frivolous or tactics will multiply litigation); H.R. CONF. REP. No. 1234, *supra* note 5, at 9 (noting that Congress intended Act to deter attorneys from engaging in litigation delays).

163. *See infra* notes 181-84 and accompanying text (discussing *Oliveri* court's application of § 1927 and noting that bad faith standard thwarts congressional intent of § 1927).

Aside from supporting the objective standard from the legislative history of section 1927, courts reason that because the standards applicable to other statutory exceptions to the American Rule do not require a court to find bad faith, section 1927 should not require a court to find bad faith.¹⁶⁴ The statutes providing for awards of attorneys' fees in antitrust and civil rights cases may represent an intentional legislative decision that defendants whom courts find to have violated the antitrust or civil rights laws should compensate the plaintiff for attorneys' fees that the plaintiff expended in enforcing the antitrust or civil rights laws.¹⁶⁵ The antitrust and civil rights statutes do not require bad faith by the defendant or the defendant's attorney for a court to award attorneys' fees.¹⁶⁶ When amending section 1927 to include the award of attorneys' fees, Congress may have made a similar conscious legislative choice not to require bad faith.¹⁶⁷ The legislative history of section 1927 indicates that in amending section 1927, Congress intended to end multiplicative and dilatory litigation tactics by assessing attorneys' fees against counsel who use these tactics.¹⁶⁸ Courts reason that because a court may assess attorneys' fees against an antitrust or civil rights defendant whom the court finds to have violated the antitrust or civil rights laws, a court, accordingly, may sanction an attorney whom the court finds unreasonably and vexatiously to have multiplied the litigation.¹⁶⁹

Responding to the bad faith courts' reasoning that an objective standard would cause an attorney not to fulfill the attorney's ethical duties to the client, courts applying the objective, unreasonableness standard state that the objective standard would not cause an attorney to hesitate to fulfill the

164. See *supra* notes 24-25 and accompanying text (noting examples of statutory exceptions to American Rule and indicating that court may award attorneys' fees).

165. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (discussing statutory exceptions to American Rule). The *Alyeska* Court recognized that to implement public policy, Congress had decided to rely on private enforcement of the antitrust and civil rights laws. *Id.* The Supreme Court reasoned, further, that awards of attorneys' fees encourage private litigants to bring actions to enforce the antitrust and civil rights laws. *Id.*

166. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (holding that prevailing defendant in civil rights action only recovers attorneys' fees when plaintiff's claim was frivolous); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (holding that unless special circumstances make award of attorneys' fees unjust prevailing plaintiff in civil rights action ordinarily recovers attorneys' fees).

167. See *supra* note 5 and accompanying text (discussing legislative history of 1980 amendment to § 1927 and noting that Conference Committee rejected Senate version of § 1927 that would have required bad faith standard); *Hearings, supra* note 5, at 61 (indicating that Senate version of § 1927 would require courts to apply a bad faith standard to determine whether to sanction attorney under § 1927).

168. See *supra* note 5 (noting that legislative history of 1980 amendment to § 1927 indicates that § 1927 was only one of several measures enacted to end delays by attorneys in litigation process); *supra* notes 159-63 and accompanying text (discussing congressional intent to deter litigation delays in enacting Antitrust Procedural Improvements Act of 1980).

169. See *In re Ruben*, 825 F.2d 977, 983 (6th Cir. 1987) (recognizing that in light of legislative history of 1980 amendment to § 1927, Congress' intent was only to require that attorney unreasonably and vexatiously delay litigation before court may impose § 1927 sanction on attorney), *petition for cert. filed*, 56 U.S.L.W. 3356 (U.S. Nov. 17, 1987) (No. 87-710).

attorney's duties to the client.¹⁷⁰ Courts reason that an attorney's professional responsibilities to the client do not extend to pursuing frivolous claims or employing dilatory litigation tactics on behalf of the client.¹⁷¹ Courts also recognize that in addition to zealously representing the client, an attorney owes a duty to the legal system not to exceed the bounds of the law.¹⁷² Courts conclude, therefore, that an objective standard allows an attorney to fulfill his ethical duties to the legal system and to the client.¹⁷³

In addition to responding to the bad faith courts' reasoning that the objective standard would cause an attorney not to fulfill the attorney's ethical duties to the client, courts that apply the objective standard to section 1927 respond to the reasoning of bad faith courts that courts may interpret section 1927 as shifting an assessment of attorneys' fees from a party to the party's counsel.¹⁷⁴ First, section 1927 addresses the actions of attorneys, rather than the actions of a party.¹⁷⁵ Second, the attorney may cause needless delays in litigation by, for example, failing to respond to the opposing party's discovery requests in a timely fashion as a litigation strategy that the attorney believes will achieve the client's goals, rather than pursuant to the client's instructions.¹⁷⁶ Thus, by reasoning that section 1927 transfers a sanction from the client to the client's attorney, courts ignore the possibility that an attorney acts independently of his client.¹⁷⁷

Although courts that support the subjective, bad faith standard and courts that support the objective, unreasonableness standard both reason that the legislative history supports the courts' use of either position, the objective standard better fulfills the objective of Congress in amending section 1927.¹⁷⁸ The legislative history of the 1980 amendment to section

170. See *id.* at 984 (reasoning that zealous advocacy does not require attorney to delay litigation or multiply proceedings).

171. See *Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) (noting that attorney's ethical obligations do not extend to maintaining frivolous actions or engaging in litigation tactics that delay proceedings or harass opposing party).

172. See *supra* note 114 and accompanying text (discussing ethical standards for attorney in zealously representing a client).

173. See *Jones*, 789 F.2d at 1230 (recognizing that attorney who violates § 1927 by delaying litigation, increasing costs, and bringing and maintaining frivolous actions has exceeded ethical duty zealously to represent client).

174. See *infra* notes 175-78 and accompanying text (noting that § 1927 does not shift liability from party to party's attorney and that the delays caused by party's attorney may be independent of party's direction).

175. See *Motion Picture Patents Co. v. Steiner*, 201 F. 63, 64 (2d Cir. 1912) (noting that regardless of reprehensibility of party's conduct, court may only sanction party's attorney under § 1927).

176. See *McKirdy*, 28 U.S.C. § 1927 - Counselor Beware, 71 ILL. B.J. 708, 710 (1983) (noting that § 1927 protects party from responsibility for costs that party's attorney has caused independent of client's direction).

177. See *id.* (noting that attorneys may act independently of clients).

178. See H.R. CONF. REP. NO. 1234, *supra* note 5, at 8 (noting that Congress intended § 1927 to deter attorneys who delay litigation); *infra* notes 179-84 and accompanying text (reasoning that under subjective standard court will not always sanction attorneys who delay litigation, and, therefore, subjective standard does not fulfill Congress' intent).

1927 clearly indicates that Congress intended to deter attorneys from needlessly delaying litigation.¹⁷⁹ Courts applying the subjective, bad faith standard cannot fulfill Congress' goal to deter litigation delays because courts typically conclude that an attorney's conduct that results in a litigation delay does not amount to bad faith.¹⁸⁰ For example, in *Oliveri* the Second Circuit found that the plaintiff's case was without merit, and that the plaintiff's attorney continued to litigate the case.¹⁸¹ Because the *Oliveri* court applied the subjective, bad faith standard, the court concluded that the plaintiff's attorney did not continue to litigate in bad faith, and, consequently, reversed the sanction against the attorney.¹⁸² If the *Oliveri* court had applied the objective, unreasonableness standard, however, the *Oliveri* court likely would have concluded that the attorney met the standard and likely would have sanctioned the attorney under section 1927.¹⁸³ The objective standard, therefore, would have fulfilled Congress' intent to deter litigation delays, but the subjective standard allowed the attorney to delay without fear of a sanction. Because Congress intended to prevent litigation delays, the courts applying the bad faith standard thwart the congressional intent of section 1927.¹⁸⁴

The different standards applied by the federal courts in imposing section 1927 sanctions affect how an attorney conducts a case.¹⁸⁵ Courts applying the bad faith standard allow practitioners to delay the litigation process without penalty, provided that the practitioner intentionally does not increase the costs to the opposing party.¹⁸⁶ Courts applying the objective standard, however, require a practitioner to refrain from any conduct that may cause needless delays.¹⁸⁷ Because the attorney's intent is irrelevant under the

179. See *supra* note 5 (noting that in enacting 1980 amendment to § 1927, Congress intended to deter delays in litigation process).

180. See McKirdy, *supra* note 176, at 709 (noting that because of difficulties in determining subjective intent of attorney who causes delays, bad faith requirement would not affect litigation delays).

181. See *Oliveri v. Thompson*, 803 F.2d 1265, 1270-71 (2d Cir. 1986) (noting both that plaintiff had no basis for suit and that attorney continued prosecution of meritless action), *cert. denied*, 107 S.Ct. 1373 (1987).

182. See *supra* notes 78-80 and accompanying text (noting that *Oliveri* court applied bad faith standard to § 1927 and reversed sanctions against attorney).

183. See *supra* note 79 and accompanying text (noting that *Oliveri* court held that attorney did not meet bad faith standard). The plaintiff's attorney in *Oliveri* would have met the objective standard because the attorney pursued a frivolous claim. See *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) (holding that attorney meets objective standard when attorney pursues frivolous claims).

184. See *supra* note 156-57 and accompanying text (suggesting that courts' use of bad faith standard would add nothing to courts' powers to sanction other than to codify courts' inherent power to sanction attorneys who litigate in bad faith).

185. See *supra* note 6 and accompanying text (comparing standards used by federal courts to determine whether to sanction attorney under § 1927).

186. See *supra* notes 54-80 and accompanying text (discussing courts' application bad faith standard in sanctioning attorney under § 1927).

187. See *supra* notes 81-106 and accompanying text (discussing courts' application of objective standard in sanctioning attorney under § 1927).

objective standard, the court only must find that the attorney delayed the litigation before sanctioning the attorney under section 1927.¹⁸⁸ Attorneys must promote clients' interests in litigation without ignoring the necessary goals of judicial efficiency and effectiveness.¹⁸⁹ Because Congress intended to discourage delay and, consequently, to provide a more efficient and effective court system, the objective standard clearly serves these goals more effectively.

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188. *See supra* notes 147-50 and accompanying text (noting that under objective standard, attorney's intent to multiply litigation proceedings is not relevant to court determining whether to sanction attorney under § 1927).

189. *See supra* notes 170-73 and accompanying text (noting court's reasoning that attorney owes duty to courts as well as to client, and court should sanction attorney who falls short of duty to courts).