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I. Introduction

Attorneys and law firms know that the consequences for submitting meritless pleadings and pursuing frivolous claims in federal court can be serious.[1] When attorneys bring frivolous claims or act to delay or otherwise impede litigation, they violate the code of professional legal ethics and courts may sanction them according to federal district court local rules.[2] Both attorneys and firms may also face sanctions under the Federal Rules of Civil Procedure,[3] 28 U.S.C. § 1927,[4] and the court's inherent authority.[5] This Note examines the circuit split regarding whether 28 U.S.C. § 1927 authorizes district courts to sanction law firms and argues that, in the context of today's legal landscape, the statute should apply to law firms to satisfy its original purpose of deterring frivolous litigation.[6]

Section 1927 provides that

> [a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceeding in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[7]

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1. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572, 1583 (11th Cir. 1991) (affirming sanctions against a law firm for over $1 million); Carl W. Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 513–14 (1989) (discussing the heightened awareness and more conservative litigation of attorneys in light of Rule 11 changes).

2. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N, Discussion Draft 1983) ("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 . . . ."); *infra* note 42 and accompanying text (noting that most federal district courts adopt the rules of professional conduct of the state in which they are located).

3. *See, e.g.*, FED. R. CIV. P. 11(c)(1) (providing for sanctions against parties, attorneys, or firms that file frivolous claims with the court).

4. *See* 28 U.S.C. § 1927 (2012) (giving federal courts authority to issue sanctions if counsel "unreasonably and vexatiously" multiplies proceedings).

5. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 41–47 (1991) (finding that neither Rule 11 nor § 1927 supersede the inherent authority of federal courts to sanction parties or attorneys).

6. *See infra* Parts III–V (detailing the circuit split and proposing possible solutions).

7. § 1927.

Frivolous litigation is not a new issue; federal courts have long had the authority under § 1927 and its predecessor statutes to sanction attorneys who bring unreasonable or vexatious lawsuits.[8] Historically, courts and litigants rarely relied on § 1927 because it did not include attorney's fees.[9] Following the amendment of § 1927 in 1980 and the revision of Rule 11[10] in 1993, however, courts and parties have more frequently sought sanctions under § 1927.[11]

Courts award sanctions against lawyers and law firms for conduct that impedes the judicial process and frustrates judges and opposing parties.[12] This conduct can take many forms.[13] Attorneys may vexatiously file and withdraw motions or appeals, creating unnecessary work for the opposing party and the court.[14] Law firms may knowingly bring or prolong meritless suits.[15] By

8. *See* Glenn J. Waldman, *Federal Court Sanctions Against Attorneys Under 28 U.S.C. § 1927—The 11th Circuit Court of Appeals Attempts to Divide the Standard for Multiplying the Proceedings in Bad Faith*, 81 FLA. B.J. 16, 19 n.12 (2007) (providing a brief summary of § 1927's legislative history, which is substantially derived from the Congressional Acts of 1813 and 1853); *infra* Part II.A (detailing § 1927's two-hundred-year history).

9. *See* Seth Katsuya Endo, *The Propriety of Considering an Attorney's Ability to Pay Under § 1927*, 61 DRAKE L. REV. 291, 293 (2013) (noting that courts invoked § 1927 in only seven reported cases in the first 150 years after the statute's enactment).

10. *See* FED. R. CIV. P. 11(a) (requiring an attorney's signature on court filings to confirm that any claims filed have merit, and authorizing sanctions for attorneys and firms who file frivolous claims).

11. *See, e.g.*, Endo, *supra* note 9, at 293 (observing that § 1927's more frequent usage has resulted in a circuit split regarding whether a district court may consider an attorney's financial status when issuing sanctions).

12. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 36–40 (1991) (describing Chambers's continued actions, despite warnings from the court, to thwart and prolong litigation); Claiborne v. Wisdom, 414 F.3d 715, 717 (7th Cir. 2005) ("In the words of the district court judge, '[t]his case has a long and tortured history.'").

13. *See infra* notes 14–16 and accompanying text (surveying various examples of unethical conduct).

14. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 141 (2d Cir. 2012) (noting the principal attorney's repeated actions—filing then withdrawing a temporary restraining order, a Rule 60 motion, and a defective appeal—resulting in sanctions of over $300,000).

15. *See, e.g.*, BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 754–55 (6th Cir. 2010) (finding meritless a suit claiming that a party misappropriated trade secrets because the sale of the partner's product occurred two years before releasing the partnership's product).

allowing their attorneys to pursue unethical schemes, law firms may prolong and delay litigation, contest decisions agreed by the parties to be final, and fail to follow basic rules of civil procedure.[16] Not all sanctions mechanisms, however, apply equally to both lawyers and law firms.[17]

For example, different interpretations of § 1927 have resulted in an unresolved split among the federal circuit courts of appeals on the question of whether courts may apply § 1927 sanctions to law firms.[18] The U.S. Courts of Appeals for the Sixth, Seventh, and Ninth Circuits have held that § 1927 applies only to individual attorneys.[19] Conversely, the U.S. Courts of Appeals for the Second, Third, Eighth, Eleventh, and D.C. Circuits have upheld § 1927 sanctions against law firms.[20] The U.S. Supreme Court has not

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16. *See, e.g.*, Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1291–92 (9th Cir. 2015) (describing the series of motions Kaass Law filed that led Wells Fargo to bring its motion for sanctions); Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 206–08 (3d Cir. 1985) (addressing the parties' agreement to abide by the referee's final decision and the losing party's subsequent objection in direct violation of the agreement).

17. *See infra* Parts II.A–B (discussing the current uncertainty regarding § 1927's application to law firms in contrast to Rule 11).

18. *See* Kirk Swanson, *Wells Fargo Won't Get Sanctions from 'Vexatious' Law Firm*, BNA'S CORP. COUNSEL WKLY. (Sept. 16, 2015) [hereinafter Swanson, *Wells Fargo*], https://www.bloomberglaw.com/s/news/58d080d243f348d7e6bff8ad1605f5d5/document/NUD6XN3H0JK0?highlight=swanson+wells+fargo+won%26%2339%3Bt+get+sanctions (last visited Nov. 19, 2016) (reporting on the Ninth Circuit's opinion, which "deepens a circuit split" by holding that courts may not sanction law firms under § 1927) (on file with the Washington and Lee Law Review).

19. *See, e.g.*, *Kaass Law*, 799 F.3d at 1293–95 (examining other circuit courts' decisions and agreeing that § 1927's language does not reach law firms); *BDT Prods., Inc.*, 602 F.3d at 751–57 (applying the reasoning from *Claiborne* to deny § 1927 sanctions for a law firm that knowingly brought a meritless suit); Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (finding, upon analysis of the statute and previous case law, that § 1927 does not apply to law firms).

20. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 148 (2d Cir. 2012) (citing sister courts' decisions and confirming that the district court had authority to sanction a law firm); Lee v. First Lenders Ins. Servs., 236 F.3d 443, 446 (8th Cir. 2001) (applying § 1927 sanctions of $15,000 to a law firm implicitly); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 904 (D.C. Cir. 1998) (affirming district court discretion to apply § 1927 to a law firm in issuing sanctions for the firm's unreasonable behavior); Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) ("A court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith."); *Baker Indus., Inc.*, 764 F.2d at 211–12 (finding § 1927 sanctions appropriate when a law firm agreed that a decision would be final and subsequently filed objections

addressed this issue, although it has stated that § 1927 does not apply to a non-lawyer party who is represented by counsel.[21]

Both the legal landscape and the use of § 1927 have changed substantially since the provision's original enactment, calling into question the adequacy of limiting its traditional application to individual attorneys.[22] When Congress enacted § 1927 in 1813, there were no law firms.[23] With more resources—more money and manpower—most law firms today can out-litigate single-attorney practices.[24] The large companies involved in complex litigation sometimes retain multiple law firms rather than multiple attorneys to handle their cases.[25] Attorneys in large law firms today often work in teams rather than individually.[26] Many large litigation cases today may involve whole teams of lawyers selected and authorized by their law firm to litigate the case, which may span years and involve hundreds of thousands of dollars in awards and attorneys' fees.[27] In its most conservative interpretation, § 1927 only reaches cases when an individual attorney,

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to the decision). Cases and other texts reference "attorney's fees" and "attorneys' fees," often without any apparent specific intention. *See* Search results for "attorney's fees" and "attorneys' fees," LEXIS ADVANCE RES., https://signin.lexisnexis.com/lnaccess/app/signin/aci/la (sign in; then enter "attorney's fees" in search box; then select "Date (oldest-newest)" at "Sort by"; repeat for "attorneys' fees") (last visited Nov. 19, 2016) (reflecting courts' use of "attorney's fees" and "attorneys' fees" in 1791 and 1797 respectively) (on file with the Washington and Lee Law Review).

21. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 48 (1991) (affirming that nothing in § 1927's language provides for assessing fees against a party rather than against an attorney).

22. *See infra* notes 23–27 and accompanying text (discussing developments that affect § 1927's ability to achieve its purpose).

23. *See infra* Part II.D (relating how partnerships and solo practices characterized the early nineteenth century legal profession).

24. *See infra* notes 25–26 and accompanying text (providing an overview of the modern legal landscape).

25. *See, e.g.*, Am. Bldg. Maint. Indus., Inc. v. Maint. Serv. Sys., Inc., 1989 WL 90274, at *3 (D. N.M. Mar. 29, 1989) (noting that two law firms represented the plaintiff).

26. *See* Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 700 (1988) ("[M]any lawyers practicing in the largest and most powerful American law firms now work in task-sharing teams.").

27. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572, 1575–76 (11th Cir. 1991) (noting that the appellant law firm's conduct allowed discovery delays to prolong litigation for two years, resulting in sanctions of over $1 million).

representing a client, engages in unethical conduct;[28] today's practical litigation realities mean that § 1927 arguably may not apply in large scale, high stakes litigation cases—where some of the most egregious and expensive litigation ensues.[29]

Exposing firms to sanctions for frivolous suits and vexatious actions under § 1927 holds significant policy implications for both firms and parties.[30] Applying § 1927 to firms would make them accountable for the actions of their individual attorneys and potentially allow parties to sue the deep-pocketed firms of individual attorneys.[31] 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.

This Note examines whether federal courts have the authority to sanction law firms—in addition to individual attorneys—under § 1927. To address this question, this Note considers the interpretation of the statute through the lens of historical and modern applications of sanctions to law firms.[32] Part II explores the various methods that courts use to sanction parties, attorneys, and law firms for unethical actions that multiply litigation proceedings.[33] Part III describes the current circuit split regarding the application of § 1927 to law firms.[34] Part IV then suggests

28. *See infra* Part III.A (describing the circuit court decisions favoring this narrow application of § 1927).

29. *See, e.g.*, *Avirgan*, 932 F.2d at 1575–76 (providing an example of a case where the court awarded sanctions of over $1 million).

30. *See infra* Part V (considering the policy implications for sanctioning law firms).

31. *See infra* Part V (noting that applying § 1927 to law firms could have far-reaching implications for sanctions litigation). This is significant because courts disagree about whether an individual attorney's ability to pay the attorneys' fees awarded pursuant to § 1927 sanctions should factor into the court's decision to award the full amount. *See* Endo, *supra* note 9, at 297–98 (surveying the circuit split regarding district court consideration of an attorney's ability to pay). When litigation involves many lawyers at one firm or multiple firms, the amount of attorneys' fees awarded in § 1927 sanctions can be very high. *See, e.g.*, BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 743–44 (6th Cir. 2010) (reversing the district court's sanctions award of over $5 million); *Avirgan*, 932 F.2d at 1575 (awarding over $1 million in attorneys' fees).

32. *See infra* Parts II–III (discussing sanctions issued to law firms under § 1927, Rule 11, and the court's inherent authority).

33. *See infra* Part II (examining the historical developments and case law of sanctioning methods).

34. *See infra* Part III (comparing the decisions of circuit courts that favor

possible solutions for resolving the circuit-split question regarding the application of § 1927.[35] First, it offers judicial solutions: encouraging circuit courts to clearly articulate their reasoning when deciding whether or not to sanction law firms under § 1927, and inviting a Supreme Court decision.[36] Second, it provides legislative solutions: considering the addition of a note to the statute, and proposing language for an amendment to the statute.[37] Ultimately, Part V advocates that Congress amend the statute, arguing that § 1927 should authorize district courts to sanction law firms that engage in, or allow their attorneys to engage in, conduct that vexatiously and unreasonably multiplies litigation proceedings.[38]

II. The History of Sanctions for Frivolous Litigation

The purpose of sanctioning parties who bring unreasonable or vexatious lawsuits is deterrent rather than punitive.[39] Parties may seek monetary sanctions to recoup the costs and attorneys' fees associated with frivolously filed and maintained suits, but not punitive damages.[40] Depending on the sanctions mechanism and the conduct, a court may assess sanctions against the client as a party, the party's attorney, or the party's law firm.[41]

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applying § 1927 to law firms with those that do not).

35. *See infra* Part IV (providing judicial and legislative approaches to resolving the confusion that the current circuit split has created).

36. *See infra* Part IV.A (outlining the possible judicial constructions of § 1927).

37. *See infra* Part IV.B (detailing the potential outcomes and viability of legislative options).

38. *See infra* Part V (discussing one recommendation and its policy implications).

39. *See* Endo, *supra* note 9, at 296–303 (basing the conclusion that § 1927's purpose is deterrent rather than compensatory on several circuit court opinions). Thus, financial sanctions act more like restitution.

40. It seems fair that if a party incurs costs resulting directly from another party's conduct causing unreasonable delays, the transgressing party should pay those costs. The threat of these financial reparations is meant to discourage attorneys and parties from engaging in unethical conduct.

41. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 41–47 (1991) (discussing the three sources of authority that courts possess to issue sanctions, which each allow for different applications to parties, attorneys, or law firms).

Federal district court local rules governing professional conduct represent one measure for disciplining lawyers—and firms—that act unethically.[42] Disciplinary sanctions under rules of professional conduct take many forms but do not typically provide parties with financial compensation.[43] The nature of these sanctions gives parties little motivation to pursue discipline via district court local rules because the party seeking sanctions will not receive any compensation for its effort.[44] Additionally, most disciplinary action under codes of professional conduct modeled on the Model Rules of Professional Conduct applies to individual attorneys, not to law firms.[45] Parties seeking discipline for a law firm's unethical actions under federal district court local rules thus have limited incentives and options.[46]

Parties seeking monetary compensation or sanctions for law firms instead rely on other federal sanctioning authority.[47] Section 1927, the Federal Rules of Civil Procedure, and the court's

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42. *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 463 (1996) ("In federal judicial proceedings, however, the regulation of lawyers has been characterized by uncertainty and disharmony. The conduct of lawyers in federal proceedings is governed by the rules of the federal, not state, courts. The federal district courts, however, do not currently apply a uniform set of professional rules.").

43. *See, e.g.*, Kirk Swanson, *Opposing Former Client in Same Matter Warrants Lawyer's Reprimand*, ABA/BNA LAWYER'S MANUAL PROF. CONDUCT, CURRENT REP. (Nov. 18, 2015), https://www.bloomberglaw.com/s/news/231f3b138c8aeb2157296054a9de34f9/document/NXZF7C3H0JK0?highlight=swanson+%26quot%3Bopposing+former+client%26quot%3B (last visited Nov. 19, 2016) (reporting that the state disciplinary committee would publicly reprimand an attorney who opposed his former client) (on file with the Washington and Lee Law Review).

44. *See, e.g.*, Rentz v. Dynasty Apparel Indus., 556 F.3d 389, 400 (3d Cir. 2009) ("If compensation was not a recognizable basis for Rule 11 awards, aggrieved litigants would have very little incentive to pursue sanctions thus diminishing the important deterrent effect of Rule 11." (quoting Brandt v. Schal Assocs., Inc., 960 F.2d 640, 646 (7th Cir. 1992))).

45. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N, Discussion Draft 1983) (stating that "a lawyer," rather than a law firm, "shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous").

46. *See supra* notes 43–45 and accompanying text (explaining why the unsatisfactory results from state bar disciplinary bodies motivate parties to seek sanctions elsewhere).

47. *See infra* Parts II.A–C (describing various sanctioning mechanisms).

inherent authority are the three primary mechanisms federal courts use to issue sanctions for frivolous litigation.[48] Currently, each mechanism for sanctioning bears certain elements in common with and unique to the others, providing overlapping tools that courts may employ depending on the entity, conduct, litigation stage, or type of litigation.[49]

A. 28 U.S.C. § 1927 Sanctions

This one-sentence statute has provoked significant controversy.[50] Although rarely invoked before its amendment in 1980, § 1927 is the subject of much scholarly attention and has generated a jurisprudential maelstrom.[51] For example, one unresolved question is whether district courts may consider an attorney's financial status when issuing monetary sanctions under § 1927.[52] Another question concerns whether courts require actual bad faith conduct for § 1927 to apply.[53] Other § 1927 scholarship discusses the extent of the statute's relationship and interaction with Rule 11.[54] Scholars and courts have also considered whom

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48. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 41–47 (1991) (providing an overview of each sanctioning mechanism and its limitations).

49. *See, e.g.*, *id.* (distinguishing the utilities of Rule 11, § 1927 and the court's inherent authority); FED. R. CIV. P. 11 (requiring that documents filed with the court satisfy certain standards and providing for sanctions if a party fails the meet those standards); FED. R. CIV. P. 37 (providing for sanctions if a party violates the rules relating to discovery).

50. *See infra* notes 51–57 and accompanying text (outlining the distinct issues addressed in § 1927 scholarship and identified by circuit splits).

51. *See, e.g.*, Endo, *supra* note 9, at 293 (reviewing a circuit split regarding whether district courts should consider an attorney's financial status in issuing sanctions).

52. *See id.* at 293–94 (examining the differing opinions regarding what factors courts should address when issuing financial sanctions against an attorney).

53. *See* Kevin J. Henderson, *When Is an Attorney Unreasonable and Vexatious?*, 45 WASH. & LEE L. REV. 249, 253–64 (1988) (discussing the standards courts have applied in finding an attorney's actions subject to § 1927 sanctions).

54. *See, e.g.*, Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-a-Vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 646–47 (2004) (observing the increased reliance on § 1927 and inherent power as a result of Rule 11 amendments creating stricter standards).

courts have authority to sanction under § 1927.[55] One of these controversies—whether courts may apply § 1927 to pro se litigants—has resulted in a circuit split among the federal circuit courts of appeals.[56] In other cases, courts have decided whether § 1927 sanctions apply to clients in addition to attorneys.[57]

This Note focuses on the particular question of whether § 1927 allows courts to issue sanctions to law firms because it is the source of growing disagreement among the federal circuit courts of appeals.[58] In a legal landscape characterized by large firms and litigation involving massive amounts of manpower, money, and time,[59] the uncertain scope of § 1927 increasingly reduces its effectiveness in achieving its stated purpose.[60] When there is doubt

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55. *See, e.g.*, Motion Picture Patents Co. v. Steiner, 201 F. 63, 64 (2d Cir. 1912) (addressing the question of whether § 1927 sanctions could be applied to clients as parties to the action); Kelsey Whitt, *Split on Sanctioning Pro Se Litigants Under 28 U.S.C. § 1927: Choose Wisely when Picking a Side, Eighth Circuit*, 73 MO. L. REV. 1365, 1366 (2008) (describing a circuit split regarding § 1927's application to pro se litigants).

56. *See* Whitt, *supra* note 55, at 1371 (suggesting that a pro se litigant may be considered a "person admitted to conduct cases" under the statute). The interpretation of "other person admitted to conduct cases" played an important role in the question regarding pro se litigants. *See id.* at 1380 (arguing that § 1927 should not apply to pro se litigants because they, unlike attorneys, "do not have to gain approval from the court before they can appear"). Whitt notes that Congress made clear its intent that "'other person' covers only those admitted to act in a lawyerlike capacity." *Id.* at 1381 (quoting Sassower v. Field, 973 F.2d 75, 80 (2d Cir. 1992)).

57. *See, e.g.*, *Motion Picture Patents Co.*, 201 F. at 64 (determining that the statute was so plain that it clearly did not apply to parties).

58. *See* Swanson, *Wells Fargo*, *supra* note 18 (reporting on a Ninth Circuit opinion that deepens the circuit split regarding whether district courts may sanction law firms under § 1927); *infra* Part III (describing the circuit courts' conflicting approaches).

59. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 148 (2d Cir. 2012) (assessing sanctions totaling $354,559, in which roughly $260,000 of the sanctions award "related to litigating the sanctions motion itself"); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 902 (D.C. Cir. 1998) (considering the attorneys' fees submitted by the party seeking sanctions, which the party "based on a total of 333.5 hours of work by six partners, seven associates, two legal assistants, and four other staffers," totaling over $80,000); Avirgan v. Hull, 932 F.2d 1572, 1575 (11th Cir. 1991) (sanctioning a law firm for over $1 million in costs and attorneys' fees); *see also* Waldman, *supra* note 8, at 20 (discussing an Eleventh Circuit case involving litigation solely on the issue of sanctions for over ten years).

60. *See infra* note 63 and accompanying text (noting that § 1927's stated purpose is to deter the vexatious and unreasonable multiplication of suits).

about the scope of § 1927's authority, litigation regarding the application of § 1927 ensues, further consuming the valuable resources of the court and the litigants.[61]

Section 1927 is over 200 years old and has remained substantially the same during that time.[62] The statute's stated purpose is to deter a "multiplicity of suits or processes, where a single suit or process might suffice."[63] The Supreme Court in *Roadway Express v. Piper*[64] stated that § 1927 "is indifferent to the equities of a dispute and to the values advanced by the substantive law. It is concerned only with limiting the abuse of court processes."[65]

Although the statute contains largely the same language it did in 1813, Congress has modified three key components of § 1927 to clarify the statutory language and to make the statute more practically useful to courts and litigants.[66] The three elements of § 1927 that Congress has amended concern: (1) to whom the statute applies, (2) which actions it addresses, and (3) the resulting penalties for those actions.[67] Section 1927's interpretation and application have developed in tandem with its amendments.[68]

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61. *See infra* Part III (summarizing several cases that consider whether § 1927 authorizes district courts to sanction law firms).

62. *See infra* notes 63–138 and accompanying text (detailing § 1927's legislative history).

63. 26 ANNALS OF CONG. 29 (1813) (Gales and Seaton 1854). This language comes from a Senate decision in June 1813 to create a committee to explore legislative solutions for addressing these issues. *Id.* Just over a month later, Congress enacted the language of what is now § 1927 in the Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1813).

64. 447 U.S. 752 (1980) (considering whether § 1927 includes attorneys' fees).

65. *Id.* at 762.

66. *See* Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) ("When [C]ongress amended § 1927 in 1980 to include attorneys' fees among the category of expenses that a court might require an attorney to satisfy personally, it made clear that the purpose of the statute was 'to deter unnecessary delays in litigation.'" (quoting H.R. REP. NO. 96-1234 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 2781, 2782)).

67. *See infra* notes 69–138 and accompanying text (detailing the statute's amendments).

68. *See infra* notes 69–138 and accompanying text (describing § 1927's evolution and its corresponding case law).

The Congressional Act of 1813[69] created § 1927 in its original form.[70] A Senate Committee, "appointed 'to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice,'" drafted the statute.[71] The statute's earliest language said that it applied to "any attorney, proctor, or other person admitted to manage or conduct cases."[72] Parties and courts could invoke the statute when a party's representative multiplied proceedings "so as to increase costs unreasonably and vexatiously."[73] The court could require the person violating the statute "to satisfy any excess of costs" incurred.[74]

Case law invoking this original version of § 1927 is extremely rare.[75] The U.S. Supreme Court decided not to apply the statute in several early reported cases that refer to it.[76] In one case, a party

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69. Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1813).

70. *See* Waldman, *supra* note 8, at 22 n.12 (surveying the legislative history of § 1927). The text of the 1813 statute reads:

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

ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION, AND PRACTICE OF THE COURTS OF THE UNITED STATES 8 (1831).

71. Roadway Express v. Piper, 447 U.S. 752, 759 (1980) (quoting 26 ANNALS OF CONG. 29 (1813) (Gales and Seaton 1854)).

72. CONKLING, *supra* note 70, at 8. *Black's Law Dictionary* defines "proctor" as "one appointed to manage the affairs of another or represent him in judgment." *Proctor*, BLACK'S LAW DICTIONARY 1435 (3d ed. 1933). Webster's dictionary from 1828 defines "proctor" as "one who is employed to manage the affairs of another" and "a person employed to manage another's cause in a court of civil or ecclesiastical law, as in the court of admiralty, or in a spiritual court." *Proctor*, WEBSTER'S DICTIONARY 1828—ONLINE EDITION, http://webstersdictionary1828.com/Dictionary/proctor (last visited Nov. 19, 2016) (on file with the Washington and Lee Law Review).

73. CONKLING, *supra* note 70, at 8.

74. *Id.*

75. *See* Endo, *supra* note 9, at 292 ("[I]n the 150 years following its enactment in 1813, § 1927 was invoked in only seven reported cases.").

76. *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 460, 461–62 (1856) (acknowledging that the 1813 statute supported the lower court's jurisdiction to grant costs, but denying review). The Court stated, "There must be an end of litigation." *Id.* at 463.

relied on the 1813 statute, claiming that a U.S. attorney had brought nine cases when he only should have brought one.[77] Courts considering the statute used the terms "attorney" and "counsel" interchangeably but did not address law firms.[78] These cases considered the excess costs associated with the suits.[79]

The Congressional Act of 1853,[80] which "standardized the costs allowable in federal litigation,"[81] incorporated the 1813 version of the statute with only slight variations to the statutory language.[82] In 1873, Congress codified the statute as § 982 of Title XIII in the Revised Statutes of the United States to organize the growing body of federal law.[83] The Judicial Code of 1911 incorporated § 982, and, in 1926, when Congress established the first United States Code, it codified the statute as 28 U.S.C. § 829.[84] These versions of the statute all retained "any attorney,

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77. *See* Field v. United States, 34 U.S. 182, 182 (1834) (reversing the lower court's decision on other grounds, but including in the case's prior history the lower court's finding that the U.S. attorney had not unreasonably multiplied the proceedings).

78. *See, e.g.*, *Wheeling & Belmont Bridge Co.*, 59 U.S. at 463 (referring to the parties' attorneys as "counsel for the respective parties").

79. *See id.* at 461–62 (restating the 1813 act, which made it "the duty of the court to make rules or orders avoid unnecessary costs" and provided that a person who appeared to multiply proceedings "may be required to satisfy any excess of costs so incurred").

80. Act of Feb. 26, 1853, ch. 80, 10 Stat. 162.

81. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 251 (1975) ("[T]here was great diversity in practice among the courts and that losing litigants were being unfairly saddled with exorbitant fees for the victor's attorney.").

82. *See* Waldman, *supra* note 8, at 22 n.12 (documenting § 1927's legislative history).

83. Section 982 stated:

> If any attorney, proctor, or other person *admitted to conduct causes* in any court of the United States, or of any territory, *appears to have multiplied the proceedings* in any cause before such court, so as to increase costs unreasonably and vexatiously, *he shall be required, by order of the court, to satisfy any excess of costs so increased*.

Motion Picture Patents Co. v. Steiner, 201 F. 63, 64 (2d Cir. 1912) (emphasis added). The Revised Statutes of the United States predate the United States Code. *See* Will Tress, *Lost Laws: What We Can't Find in the United States Code*, 40 GOLDEN GATE U. L. REV. 129, 134–36 (2010) (describing the enactment of the Revised Statutes in 1873 and the subsequent "updated version" published in 1878 to correct numerous errors and omissions).

84. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 255–57 (relating the legislative evolution of § 1927's predecessors throughout the late nineteenth and

proctor, or other person" but omitted "manage," instead reading simply "admitted to conduct."[85] The statute used "appears" rather than "shall appear" but otherwise maintained substantially the same language for describing sanctionable actions.[86] Instead of "such person," the statute provided that "he shall be required . . . to satisfy any excess of costs," again preserving the same meaning as the 1813 statute.[87] The use of "he" designates the individual as liable for the excess costs resulting from multiplied proceedings,[88] indicating that Congress at this time still contemplated parties represented by a singular attorney.

Courts considering the statute in the late-nineteenth and early-twentieth centuries focused narrowly on whether attorneys vexatiously multiplied proceedings "so as to increase costs."[89] One district court imposed limited sanctions on an attorney who waited until "the moment of trial" to dismiss the case.[90] Another district court decided not to sanction the attorney upon its finding that the attorney's multiple claims were necessarily distinct and thus not vexatious.[91] The Sixth Circuit affirmed a district court judgment that counsel had multiplied the proceedings in a case involving cross-examinations.[92] The Second Circuit refused to affirm

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early twentieth centuries).

85. *Motion Picture Patents Co.*, 201 F. at 64 (quoting the 1853 version of § 1927).

86. *Id.* See *supra* note 83 for the language of the amended statute that contains the "appears to have multiplied" language.

87. *Id.*

88. *Id.*

89. *Id.* at 64 (quoting the early language of the statute); *see infra* notes 90–93 and accompanying text (discussing early-twentieth century cases considering the pre-1948 version of § 1927).

90. *See* Bone v. Walsh Constr. Co., 235 F. 901, 902 (S.D. Iowa 1916) ("The only enactment by Congress of a statute intended to penalize for vexatious proceedings is section 982 (Rev. Statutes), which permits an allowance, not against the parties, but against the attorneys who engage in such practice.").

91. *See* The Young Mechanic, 30 F. Cas. 879, 880–81 (D. Me. 1856) (concluding that multiple claims are acceptable if each is distinct and necessary). "[A]uthority is given, where any attorney or proctor has multiplied processes unnecessarily and vexatiously, to require him to pay the costs himself." *Id.*

92. *See* Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1915) (affirming sanctions for excessive cross-examinations of two witnesses).

sanctions against an attorney where it found no evidence of unreasonably increased costs in the record.[93]

Congress re-adopted the statute in 1948 as § 1927 of Title 28.[94] This version dropped "proctor" from the list of entities the court may sanction and changed "causes" to "cases."[95] The 1948 version of § 1927 still required that actions multiply proceedings "so as to increase costs unreasonably and vexatiously," just as the previous two versions did.[96] Congress partially modified the remedies, allowing courts to require an offending attorney or other person "to satisfy personally such costs."[97] The insertion of the word "personally" in the statute's 1948 version came from the 1912 case *Motion Picture Patents Co. v. Steiner*,[98] which noted that the statute permitted a district court to order an offending attorney—but not a complainant or defendant—to pay the excess of costs.[99] Congress apparently agreed with the Second Circuit's statutory interpretation.[100]

Reported cases applying § 1927 between 1948 and the statute's most recent amendment in 1980 were still uncommon.[101]

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93. *See Motion Picture Patents Co.*, 201 F. at 64 (considering whether a party seeking sanctions had paid unnecessary costs resulting from the opposing party's conduct). The language in this Second Circuit opinion played a significant role in the statute's amendment thirty-six years later. *See infra* notes 98–99 and accompanying text (elaborating on the inclusion of "personally" in the 1948 adoption of § 1927).

94. *See* Pub. L. No. 80-773, § 1927, 62 Stat. 869, 957 (1948) (providing the statutory version before 1980 amendment). The revised language 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 as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such costs." *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. 201 F. 63 (2d Cir. 1912).

99. *See id.* at 64 ("[T]he section permits the court to order that an attorney who has unnecessarily increased the costs shall pay *personally* the excess of such costs over the amount which was properly incurred." (emphasis added)). But see note 193, *infra*, for further discussion of the implications associated with the addition of "personally" to the statute.

100. *See* Pub. L. No. 80-773, § 1927, 62 Stat. 869, 957 (1948) (requiring that a sanctioned attorney personally pay costs he or she unreasonably caused to be increased).

101. *See* Endo, *supra* note 9, at 293 (discussing the infrequence of § 1927 cases). A Lexis search revealed ninety-two federal cases citing § 1927 between

Several circuit court decisions mentioned the statute, either in the course of remanding a case to the district court[102] or in referencing the court's sources of authority for disciplining attorneys.[103] The Second Circuit noted in one case that the court would invoke § 1927 if the plaintiff pursued further frivolous claims.[104] In a Second Circuit decision from 1961, the court required the attorney to pay court costs for "having so multiplied the proceedings as to increase costs unreasonably."[105] No circuit court cases from this period discuss or sanction law firms.[106]

Finally, as part of the Antitrust Procedural Improvements Act of 1980, § 1927 entered its current form.[107] The Act's primary

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1948 and 1980, a period of thirty-two years. Search results for "28 U.S.C. s 1927," LEXIS ADVANCE RES., https:// signin.lexisnexis.com/lnaccess/app/signin/aci/la (sign in; then enter "28 U.S.C. s 1927" in search box; then follow "Shepardize this document" hyperlink; then select desired date range) [hereinafter Lexis § 1927 Search] (last visited Nov. 19, 2016) (on file with the Washington and Lee Law Review). Compare this to the thirteen-year period between 1980 and 1993, when federal courts considered the statute in 1,782 cases. *Id.*

102. *See, e.g.*, Weade v. Trailways of New Eng., Inc., 325 F.2d 1000, 1001 (D.C. Cir. 1963) (remanding a case regarding a driver's liability to the district court for fact-finding and conclusions of law with recommendations for methods of relief the district court should consider, including § 1927).

103. *See, e.g.*, Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 734 n.3 (3d Cir. 1962) (Biggs, J., dissenting) (noting that § 1927 allowed courts to hold counsel liable for his or her bad acts, rather than passing the costs along to the client), *overruled by* Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985).

104. *See* Weiss v. United States, 227 F.2d 72, 73 (2d Cir. 1955) (denying appellant relief based on an insurance claim she had attempted to bring four times on similar grounds).

105. Bardin v. Mondon, 298 F.2d 235, 238 (2d Cir. 1961) ("Although a litigant is ordinarily bound by the mistakes of his counsel, in this instance, we think it would serve a better purpose to require counsel himself to pay for the inconveniences caused by his own dilatory conduct.").

106. *See supra* notes 102–105 and accompanying text (providing a sample of mid-twentieth century § 1927 cases that consider sanctions against attorneys).

107. *See* 28 U.S.C. § 1927 (2012), amended Sept. 12, 1980, Pub. L. 96-349, § 3, 94 Stat. 1156 (enacting new language in § 1927). The statute in its current form reads:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiples proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id.

purpose in its entirety was to "expedite and reduce the cost of antitrust litigation."[108] Amending § 1927 was a minor feature of the Act.[109] In hearings about this provision, advocates of the amendment voiced their concerns about judicial reluctance to issue sanctions.[110] The proposed amendment would have removed "vexatiously" from the statute and made the intent standard more explicit.[111] Ultimately, the 1980 version of § 1927 retained much of its previous character, with slight changes.[112]

In drafting the statute's 1980 iteration, Congress preserved the 1948 language providing that the statute applied to "[a]ny attorney or other person admitted to conduct cases."[113] Congress did not contemplate including law firms in the 1980 amendment.[114] The 1980 amendment removed the language requiring that the

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108. Pub. L. 96-349, § 3, 94 Stat. 1156.

109. The Legislature's timely addition of attorneys' fees to § 1927 occurred months after the Supreme Court's decision in *Roadway Express* on June 23, 1980, which held that § 1927 did not allow sanctions in the form of attorneys' fees. *See* Roadway Express v. Piper, 447 U.S. 752, 761 (1980) ("Roadway offers no evidence that Congress intended to incorporate those attorney's fee provisions into [the pre-amendment version of] § 1927.").

110. *See Antitrust Procedural Act of 1979, S. 390: Hearings Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 96th Cong. 60 (1979) (statement of David L. Foster) [hereinafter *Hearings on Antitrust Procedural Act of 1979*] ("It is my prediction that the vast majority of district judges will never require an attorney to pay the opposing client's counsel fee under the amended section.").

111. *See id.* at 8 (statement of John H. Shenefield) ("[I]t would substitute for the uncertain and restrictive intent requirement of 'vexatiousness' an easily understood standard authorizing imposition of sanctions whenever unreasonable conduct had been undertaken 'primarily for the purpose of delaying or increasing the cost of the litigation.'").

112. *See infra* notes 113–117 and accompanying text (describing the 1980 amendment).

113. 28 U.S.C. § 1927 (2012).

114. The committee hearings on the section of the bill amending § 1927 did not raise the issue of law firms. *See Hearings on Antitrust Procedural Act of 1979*, *supra* note 110 (discussing only the intent standard and addition of attorneys' fees to the statute). This was likely due to two factors. First, courts had so rarely invoked § 1927 before 1980 that Congress did not have a clear idea of how courts and parties would enforce the amended statute. *See supra* note 9 and accompanying text (noting the extremely rare application of § 1927). Second, even if courts had more frequently utilized § 1927 sanctions before 1980, the fact that large law firms and large-scale litigation did not exist until the mid-twentieth century (*supra* Part II.A.2) would have significantly limited any jurisprudence about the application of § 1927 to law firms.

acting party's conduct be motivated "so as to increase costs"; the amended statute reads, "who so multiplies proceedings in any case unreasonably and vexatiously."[115] Cases applying § 1927 earlier in the twentieth century considered whether the attorney had acted "so as to increase costs" and would not issue sanctions unless the party's attorney had actually done so.[116] Although the 1980 amendment of the statute no longer includes the phrase "so as to increase costs," courts still require bad faith on the part of the actor.[117]

Perhaps most significantly, the amended statute included expenses and attorney's fees in the sanctions the court may issue.[118] Before the 1980 amendment, the monetary penalties arising out of § 1927 sanctions were relatively small.[119] The inclusion of attorney's fees caused § 1927 sanction awards amounts to increase dramatically, incentivizing parties to make § 1927 motions and to litigate the validity of § 1927 motions brought by opposing parties, and increasing § 1927's usage.[120]

As the number of cases considering § 1927 sanctions gained momentum throughout the 1980s,[121] the issue of whether § 1927 applied to law firms began to gain traction. Before the Third

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115. § 1927; *see also* Roadway Express v. Piper, 447 U.S. 752, 761 (1980) (finding that, before its 1980 amendment, § 1927 did not allow courts to assess attorneys' fees). Compare this with the pre-1980 language of the statute, *supra* note 83 and accompanying text.

116. *See, e.g.*, Motion Picture Patents Co. v. Steiner, 201 F. 63, 64 (2d Cir. 1912) (refusing to affirm sanctions where the record contained no evidence of increased costs).

117. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (finding that an attorney must act with bad faith for § 1927 sanctions to apply). The application of the bad faith standard is one of the ongoing controversies associated with § 1927.

118. *See* § 1927 (stating that an attorney or other person "may be required by the court to satisfy personally the *excess costs, expenses, and attorneys' fees reasonably incurred* because of such conduct" (emphasis added)).

119. *See Oliveri*, 803 F.2d at 1273 (observing that a party could not recoup attorneys' fees, which are typically the largest costs incurred in a lawsuit, under § 1927 before 1980).

120. *See* Henderson, *supra* note 53, at 252 (noting that very little litigation resulted in § 1927 sanctions before the statute's 1980 amendment because the sanction amounts were usually insignificant).

121. *See* Lexis § 1927 Search, *supra* note 101 (noting that federal courts reviewed sanctions under § 1927 1,782 times between 1980 and 1993). Of those 1,782 cases, 1,505 cases date from after 1985. *Id.*

Circuit's decision in *Baker Industries, Inc. v. Cerberus, Ltd.*[122] in 1985, several district courts had considered and sanctioned law firms under § 1927.[123] Other district courts considered but declined to issue sanctions against firms based on their finding that the moving party did not show that opposing counsel had met the requisite bad faith standard.[124]

In the years after *Baker*, there were several other significant Supreme Court and circuit court decisions regarding whom courts may sanction under § 1927.[125] In 1980, the Supreme Court held that § 1927 did not extend to non-lawyer parties represented by counsel; it did not consider law firms.[126] In 1990, in *Blue v. U.S. Department of the Army*,[127] the Fourth Circuit noted that courts often rely on several overlapping sanctions mechanisms but, nevertheless, declined to sanction the party's law firm.[128] In 1991, *Avirgan v. Hull*[129] affirmed the application of § 1927 against a law firm.[130] These cases did not analyze whether the text of § 1927 explicitly included law firms.[131]

Rule 11's revision in 1993 motivated parties and courts to rely more frequently on § 1927.[132] The 1993 version of Rule 11 still in

122. 764 F.2d 204, 206 (3d Cir. 1985) (sanctioning a law firm under § 1927).

123. *See, e.g.*, Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 168 (D. Colo. 1983) (ordering that the law firm acting as counsel for defendant "pay the reasonable expenses," "including a reasonable attorney's fee"); Glover v. Libman, 578 F. Supp. 748, 769 (N.D. Ga. 1983) (assessing sanctions against a law firm and its clients pursuant to pre-1993 Rule 11, § 1927, and a local court rule for vexatiously seeking to disqualify the opposing party's counsel).

124. *See, e.g.*, *In re* Silverman, 13 B.R. 270, 273 (Bankr. S.D.N.Y. 1981) (deciding not to retroactively award attorneys' fees sanctions against a law firm after § 1927's amendment).

125. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 41–47 (1991) (considering whether Rule 11 and § 1927 negated the court's inherent authority to issue sanctions).

126. *See id.* at 48 (addressing the question of whether the court could issue § 1927 sanctions against a party for its bad faith conduct).

127. 914 F.2d 525 (4th Cir. 1990).

128. *See id.* at 536, 549 (determining, after a thorough assessment of available sanctions, to affirm only some of the sanctions imposed by the district court).

129. 932 F.2d 1572 (11th Cir. 1991).

130. *Id.* at 1582–83 (deciding that the party's lead counsel and official law firm were liable pursuant to several sanctions rules).

131. *See Blue*, 914 F.2d at 549 (challenging the sanctions on their merits).

132. *See* Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress' Attempt to Put Out "Frivolous" Lawsuits Burns a Hole Through the Constitution*, 30 SETON

effect today applies to law firms but its safe harbor provision[133] created a chilling effect on its usage, leading to greater reliance on § 1927.[134] Increased utilization has multiplied the issues related to the application of § 1927.[135] Although the circuit split regarding the application of § 1927 to law firms represents only a tiny fraction of cases addressing § 1927, it reveals the range of conduct that courts may sanction under § 1927.[136] Despite the numerous § 1927 cases[137] and the range of issues they raise, Congress has not amended § 1927 since 1980.[138]

B. Federal Rules of Civil Procedure

Several Federal Rules of Civil Procedure provide courts with authority to issue sanctions against participants in civil cases distinct from § 1927.[139] Rule 37[140] addresses discovery issues

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HALL LEGIS. J. 249, 311 (2006) (noting the increased reliance on § 1927 and the court's inherent authority following the 1993 revision to Rule 11). In an American Bar Association journal article from 1988, Gregory P. Joseph observed that "[b]efore the 1983 amendment to Rule 11 and all of the attendant publicity on litigation abuse, virtually no one knew that [§] 1927 existed." Gregory P. Joseph, *Rule 11 Is Only the Beginning*, 74 A.B.A. J. 62, 62 (1988).

133. *See infra* note 155 and accompanying text (describing the safe harbor provision, which gives parties an opportunity to resolve issues with filings).

134. There have been nearly 7,000 § 1927 cases since Rule 11's amendment in 1993. Lexis § 1927 Search, *supra* note 101. In the past two decades (1996-2016), courts have decided seventy times the number of § 1927 cases considered in the thirty years between 1948 and 1980. *See* Lexis § 1927 Search, *supra* note 101 (illustrating the scarcity of early § 1927 cases).

135. *See, e.g.*, Whitt, *supra* note 55, at 1365–66 (discussing the development of a circuit split related to whether pro se litigants should be sanctioned under § 1927).

136. *See infra* Part III (detailing the cases involved in the current circuit split regarding whether § 1927 authorizes district courts to sanction law firms).

137. *See supra* note 134 and accompanying text (noting that § 1927 has appeared in just under 7,000 cases since 1993).

138. *See* 28 U.S.C. § 1927 (2012) (reflecting the unchanged language of the 1980 amendment).

139. *See, e.g.*, FED. R. CIV. P. 11 (describing the requirements for filing papers with the court); FED. R. CIV. P. 37 (enumerating the procedures for sanctioning discovery actions in violation of Federal Rule of Civil Procedure 26, which addresses discovery).

140. FED. R. CIV. P. 37.

within the system of sanctions,[141] but Rule 11 and § 1927 more closely resemble each other and courts often draw parallels between them.[142] Rule 11 provides very specific requirement for documents filed with the court.[143]

While the rules have many similarities to § 1927, courts should employ them as distinct sanctions mechanisms.[144] For example, the scope of conduct subject to sanctions under § 1927 is broader than that of Rule 11.[145] In addition to the text of the rule, courts may use the Advisory Committee notes accompanying each amendment of the rule to help construe the rule's application.[146] When considering § 1927, courts are limited to the statute's text and the precedent established by its case law.[147] The legislative histories of Rule 11 and Rule 37 further underscore the differences between § 1927 and the Federal Rules.[148]

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141. *See id.* (providing guidelines for parties and courts regarding civil discovery and sanctions for failure to provide discovery materials).

142. *See, e.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 41–47 (1991) (considering the characteristics of Rule 11 and § 1927).

143. FED. R. CIV. P. 11 (describing the procedural and substantive requirements for all papers filed with the court).

144. *See, e.g.*, Philip Talmadge et al., *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 SEATTLE U. L. REV. 437, 451 (2010)

> Despite the apparent similarity of § 1927 to Rule 11, the two rules have significant substantive and procedural differences and cannot be imposed as an alternative to one another. . . A court may find cause to impose sanctions under Rule 11 while finding no cause to impose sanctions under § 1927.

145. *See id.* ("[Section 1927] is not triggered by the mere filing of frivolous claims; instead, it imposes a continuing restraint upon an attorney's conduct throughout the course of the proceedings."). By contrast, Rule 11 requires at least one attorney to sign pleadings, written motions, and other documents submitted to the court. FED. R. CIV. P. 11(a). The attorney's signature certifies that, to the best of the signer's knowledge, information, and belief, the document presents a proper purpose and brings nonfrivolous claims that have evidentiary support. *Id.* at 11(b). Frivolous and unsubstantiated claims may result in court-imposed sanctions. *Id.* at 11(c).

146. *See, e.g.*, Lamboy-Ortiz v. Ortiz-Velez, 630 F.3d 228, 248 (1st Cir. 2010) ("Some guidance can be found in the Advisory Committee notes to Rule 11, which offer a non-exhaustive list of factors relevant to this determination.").

147. *See supra* Part II.A (reviewing the statute's development and application).

148. *See infra* notes 149–168 and accompanying text (elaborating on the distinctive characteristics of Rules 11 and 37).

In comparison to § 1927, which Congress enacted before the existence of law firms in 1813, the original Federal Rules of Civil Procedure became effective in 1938 in a legal landscape more similar to today's.[149] Rule 11 has undergone several significant changes.[150] In 1983, Congress adopted a revised version of Rule 11 that led to a proliferation of Rule 11 litigation.[151] Congress revised Rule 11 in 1993 to limit abuse of the rule and to address the question of whether Rule 11 applied to law firms as well as attorneys.[152] Before its 1993 amendment, Rule 11 did not explicitly include law firms.[153]

Although Congress broadened Rule 11 to include law firms, Rule 11's so-called "safe harbor" provision, also added in 1993, has made parties less inclined to rely on Rule 11.[154] The safe harbor

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149. *See* Charles E. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 436 n.8 (1958) (noting "the initial adoption of the rules on December 20, 1937 (effective on September 16, 1938)").

150. *See* FED. R. CIV. P. 11 advisory committee's notes on 1993 amendments (describing the purpose of the 1993 changes to the rule in response to the abuse of the 1983 version).

151. *See* FED. R. CIV. P. 11 advisory committee's notes on 1983 amendments (stating that the amendment's purpose was improving the rule's deterrent effects).

152. *See* FED. R. CIV. P. 11 advisory committee's notes on 1993 amendments ("This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule."). The rule provides that

> if, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on *any attorney, law firm, or party* that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

FED. R. CIV. P. 11(c) (emphasis added).

153. *Compare* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126 (1989) (concluding that because the 1983 version of Rule 11 did not explicitly refer to law firms, a law firm could not be sanctioned under Rule 11), *with* FED. R. CIV. P. 11 advisory committee's notes to 1993 amendments (noting that Rule 11 sanctions "should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule or who may be determined to be responsible for the violation"). The U.S. Supreme Court held that the rule did not apply to law firms in *Pavelic & LeFlore*. *See Pavelic & LeFlore*, 493 U.S. at 126 (finding that the rule's language limited its application to the individual signer). This decision appears to be the catalyst for the rule's 1993 amendment.

154. *See* Vansuch, *supra* note 132, at 311 (discussing the Rule 11 revisions that made it more difficult to get court sanctions).

provision provides parties with twenty-one days to correct any defects in their filings before the opposing party may file its motion for sanctions.[155]

While the safe harbor provision effectively cut back on Rule 11 sanctions, it also encouraged courts and attorneys to pursue sanctions under § 1927 or the court's inherent authority.[156] These other sanctioning mechanisms do not have comparable limitations in the form of safe harbor provisions, thus allowing parties to seek sanctions without giving the offending party an opportunity to resolve the alleged issue.[157] The absence of a safe harbor provision in § 1927 reinforces the need for § 1927 to be clear and its scope certain, as counsel has no opportunity to correct defects under § 1927.

Rule 37 enforces Rule 26,[158] which provides for discovery procedures and scope,[159] primarily through sanctions.[160] Amendments to both rules and several others became effective December 1, 2015.[161] Neither Rule 26 nor Rule 37 specifically address law firms.[162] The Advisory Committee notes from the 2010 amendment of Rule 26 state that protected communications between an expert and "the party's attorney" often should "not be limited to communications with a single lawyer or a single law firm."[163] The words "law firm" do not appear in the text of Rule

155. FED. R. CIV. P. 11(c)(2); *see also* FED. R. CIV. P. 11 advisory committee's notes to 1993 amendments (emphasizing the importance of the "safe harbor" rule).

156. *See* Vansuch, *supra* note 132, at 311 (noting that the 1993 revision of Rule 11 has increased sanctions litigation in other areas).

157. *See supra* Part II.A (exploring § 1927's development and application); *infra* Part II.C (discussing the court's inherent authority to issue sanctions).

158. FED. R. CIV. P. 26.

159. *See id.* (providing parameters for disclosing information to opposing parties in civil suits).

160. FED. R. CIV. P. 37 (enumerating the consequences for failing to disclose information under Rule 26).

161. *See* Agnieszka A. McPeak, *Social Media, Smartphones, and Proportional Privacy in Civil Discovery*, 64 KAN. L. REV. 235, 251 n.114 (2015) (noting the effective date and anticipating the effects of the amendments).

162. *See* FED. R. CIV. P. 26 (requiring "a party" to disclose certain information upon the request of the opposing party); FED. R. CIV. P. 37 (referring to the parties' responsibilities and the liabilities associated with failure to provide required discovery).

163. FED. R. CIV. P. 26 advisory committee's notes to 2010 amendment.

37.[164] Taking its provisions individually, courts have not applied Rule 37 sanctions to law firms.[165]

Rule 11 and Rule 37 provide courts with alternatives to § 1927 sanctions, but these alternatives cannot serve as substitutes for § 1927.[166] Instead, the rules inform the broad scope of conduct to which § 1927 may apply.[167] The constraints of the Federal Rules of Civil Procedure do not represent the sole alternative to § 1927 for sanctioning frivolous litigation.[168]

C. Inherent Authority to Issue Sanctions

Inherent authority gives courts the power to sanction law firms.[169] Neither § 1927 nor Rule 11 displace the courts' inherent authority to issue sanctions.[170] Although courts prefer to invoke established rules or statutes, they have long maintained the power to impose sanctions pursuant to their inherent authority.[171] This power allows courts to issue sanctions at their discretion when

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164. An examination of Rule 37 revealed that the rule's only mention of "firm" is in reference to a party's relationship with an "outside firm." FED. R. CIV. P. 37.

165. *See, e.g.*, Apex Oil Co. v. Belcher Co. of N.Y., 855 F.2d 1009, 1014 (2d Cir. 1988) ("By its express terms, Rule 37(c) applies only to a party."). *Apex Oil* considered whether Rule 37(c) can be applied against "a party's attorney," but the appellant in that case was a law firm. *See id.* at 1011 ("The law firm of Shea & Gould appeals from Judge McLaughlin's orders imposing monetary sanctions on it for alleged abuses during pretrial discovery in a suit against its client . . . ."). Here, the Second Circuit seemed to conflate the concepts of attorney and law firm.

166. *See supra* notes 144–145 and accompanying text (noting that courts should treat the rules and § 1927 as distinct).

167. *See supra* notes 139–166 and accompanying text (comparing Rule 11's application to law firms and its comparatively narrow scope to § 1927).

168. *See infra* Part II.C (describing the court's inherent power to issue sanctions).

169. *See* Enmon v. Prospect Capital Corp., 675 F.3d 138, 147 (2d Cir. 2012) ("There is no serious dispute that a court may sanction a law firm pursuant to its inherent power.").

170. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991) (finding no basis for the "scheme of the statute and the rules" to displace the court's "inherent power to impose sanctions"); Joseph, *supra* note 132, at 64 ("The murkiest, and most extensive, power to sanction derives from the inherent power of the court."). Joseph notes that "[t]he inherent power to sanction is staggeringly broad." *Id.*

171. *See Chambers*, 501 U.S. at 44 ("Certain implied powers must necessarily result to our [c]ourts of justice from the nature of their institution." (quoting United States v. Hudson, 11 U.S. 32, 34 (1812))).

parties engage in bad-faith conduct or when other sanctions mechanisms are not available.[172] Courts tend to invoke inherent power reluctantly, in cases where "offending parties have practiced a fraud upon the court."[173]

In comparison to the narrow scope of the Federal Rules of Civil Procedure and the nearly infinite potential breadth of the court's inherent power, § 1927 serves an important role.[174] It provides courts with standards for identifying a wide range of sanctionable conduct, including conduct identified in Rules 11 and 37.[175] However, both Rule 11 and the court's inherent authority allow courts to sanction firms,[176] while the application of § 1927 to law firms remains uncertain.[177] This uncertainty prolongs litigation, negating the deterrent purpose of the statute.[178]

D. Lawyers and Law Firms in the Context of § 1927

In light of the circuit split regarding whether § 1927 applies to law firms,[179] it is important to consider lawyers and law firms in historical context.[180] The concept of lawyers has changed dramatically over the last two centuries.[181] When the original text

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172. *See id.* at 50 ("[W]hen 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.").

173. *Id.* at 42 (quoting NASCO, Inc. v. Calcasieu Television & Radio, Inc., 124 F.R.D. 120, 139 (W.D. La. 1989)).

174. *See infra* notes 175–176 and accompanying text (discussing § 1927's specific application in comparison with other sanctioning mechanisms).

175. For example, the Second Circuit found that § 1927 may apply to law firms engaging in discovery abuses, which is significant because Rule 37 sanctions do not encompass law firms. *Compare* Apex Oil Co. v. Belcher Co. of N.Y., 855 F.2d 1009, 1019 (2d Cir. 1988) (affirming § 1927's application in the context of discovery abuse), *with* FED. R. CIV. P. 37 (providing for discovery abuse sanctions against an attorney, but not a law firm).

176. *See supra* Parts II.B–C (observing courts' authority to sanction firms).

177. *See infra* Part III (introducing the divided decisions of the circuit courts).

178. *See supra* Part II.A (discussing § 1927's purpose to deter unreasonable litigation).

179. *See infra* Part III (discussing the circuit court's reasoning for and against applying the statute to law firms).

180. *See infra* notes 181–190 and accompanying text (examining the historical developments of lawyers and law firms in the United States).

181. *See generally* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW

of § 1927 referenced attorneys, proctors, or other persons admitted to conduct cases in 1813, the standards for qualifying as one of these were much lower than they are today.[182] For a short period of time in the early nineteenth century, states distinguished between common law attorneys and solicitors or counselors, who could practice in equity court.[183] Law schools and formal written bar exams developed as the legal industry grew.[184] Notably, the establishment of the Patent Office and the growth of corporations in the mid-nineteenth century demanded lawyers, precipitating an increase in practicing attorneys.[185]

Likewise, law firms are a relatively new addition to the legal system.[186] Until the late nineteenth century, attorneys practiced alone or in two-attorney partnerships.[187] These partnerships were subject to partnership liability, suggesting that the partners shared liability for any sanctions.[188] The first law firms came into

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(2005) (detailing the development of American law from the Colonial Era to the present, including standards for lawyer education and practice).

182. *See id.* at 235–37 (describing the requirements for admission to the bar, which varied by state). There was no law school requirement and few states had strict prerequisites. *Id.* at 236 (explaining New Hampshire's county bar standards between 1805 and 1833, which mandated "five years of preparation for admission to the lower courts," in comparison with Massachusetts in 1836, which "obliged courts to admit anyone of good moral character who had studied law three years in an attorney's office"). Even the bar admission process was more lax. *Id.* at 236–37 (describing anecdotal accounts of several lawyers gaining admission to the bar after a half hour of questioning by a judge).

183. *See id.* (noting that New York and Virginia both subscribed to these distinctions).

184. *See id.* at 238–41 (elaborating on the development of university law schools, which began to gain momentum in the mid-nineteenth century).

185. *See id.* at 325–26 (observing that a few attorneys and law firms built their fortunes on patent cases after Congress established the Patent Office in 1836, which led to an increased number of patents and a corresponding increase in patent litigation).

186. *See id.* at 232 (noting that, in the 1830s, there was "a handful of two-man partnerships, but no firms of any size").

187. *See* Thomas Paul Pinansky, *The Emergence of Law Firms in the American Legal Profession*, 9 U. ARK. LITTLE ROCK L.J. 593, 594 (1986) (discussing the development of lawyer partnerships into law firms over the course of the nineteenth century).

188. *See* Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 339 n.46 (1995) ("Under the principles of partnership law, partners in firms share unlimited liability for the acts or omissions of partners in the scope of the partnership business.").

being after the Civil War.[189] Even then, firms did not become a common form of legal practice until the mid-twentieth century.[190] Thus Congress did not contemplate law firms when it enacted the original text of § 1927 in 1813 or the 1853 version of the statute, because firms simply did not exist.[191]

In 1980, Congress again did not contemplate law firms in the amendment of § 1927.192 This was due to the scant case law regarding § 1927.193 Testimony from the hearings on the bill also indicated skepticism about whether courts would utilize the amended § 1927.194 Given the statute's rare and unlikely

189. *See* Pinansky, *supra* note 187, at 594–95 (noting that, before the Civil War, "the private organization of legal work rarely went beyond the traditional two-man office").

190. *See* Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885, 888 (2008) ("In 1948, there were 248 law firms in the United States with eight or more partners . . . ."). In 2005, law firms with six or more lawyers accounted for nearly a quarter—well over 11,000—of the over 47,000 law firms in the United States. *See* AM. BAR ASS'N, LAWYER DEMOGRAPHICS: YEAR 2015 at 1 (2015). According to the American Bar Association, 49% of private practitioners had solo practices in 2005. *Id.*

191. *See supra* notes 187–190 and accompanying text (establishing that law firms did not exist when Congress enacted the law).

192. *See supra* Part II.A (reviewing the legislative intent of the 1980 amendment to § 1927).

193. *See* Endo*, supra* note 9, at 293 (noting that courts invoked the early versions of § 1927 only seven times in its first 150 years). This may also explain why Congress did not amend § 1927 to include law firms in 1948 when it adopted the statute. The addition of "personally" in 1948 may support the contention that § 1927 should apply only to individual attorneys. *See supra* Part II.A (noting that the source of "personally" in the 1948 version of § 1927 was *Motion Picture Patents*). It may also be construed, given the context of *Motion Picture Patents*, to distinguish the legal representative from the litigant. *See* Motion Picture Patents Co. v. Steiner, 201 F. 63, 64–65 (2d Cir. 1912) (differentiating the award of "costs," which a litigant may pay, from "excess of costs" accrued as a direct result of an offending attorney's unreasonable and vexatious conduct, which the attorney must pay). The statute's purpose, the *Motion Picture Patents* court concluded, was "to punish the pettifogger, or at least, *to make him pay the expenses occasioned by his misconduct*." *Id.* at 64 (emphasis added). A Seventh Circuit decision provides support for this latter interpretation of "personally." *See* 1507 Corp. v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971) ("In our opinion the section does not deal with the question of the nature or amount of costs to be allowed, but authorizes imposition of otherwise allowable costs on counsel personally in place of the party for whom he appeared . . . ."). The use of term "counsel" is interesting because it can also refer to law firms. *See, e.g.*, Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 211–12 (3d Cir. 1985) (affirming district court sanctions against a party's counsel—in this case, a law firm).

194. *See Hearings on Antitrust Procedural Act of 1979*, *supra* note 110

application, it is not surprising that Congress in 1980 did not consider expanding the scope of § 1927 to include law firms. Today, § 1927's more frequent application and the significant role law firms play in high stakes complex litigation make § 1927 ripe for an amendment that clarifies its scope.

III. Circuit Split Regarding § 1927's Application to Law Firms

Several federal circuit courts of appeals disagree about whether § 1927 allows courts to sanction law firms.[195] This disagreement has resulted in a circuit split between the Sixth, Seventh, and Ninth Circuit Courts, which have decided that § 1927 does not include law firms,[196] and the Second, Third, Eighth, Eleventh, and District of Columbia (D.C.) Circuit Courts, which have permitted district courts to sanction law firms under § 1927.[197] When directly considering the issue of whether § 1927 should apply to law firms, the Second, Sixth, Seventh, and Ninth Circuits analyzed the issue as one of first impression.[198] Several of

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(statement of David L. Foster) (suggesting that judges would not issue sanctions against attorneys). This problem extended beyond § 1927; "[b]ecause of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it." FED. R. CIV. P. 26 advisory committee's notes to 1983 amendment (citations omitted).

195. *Compare* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015) (finding that § 1927 does not reach law firms), BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 757 (6th Cir. 2010) (same), *and* Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (same), *with* Enmon v. Prospect Capital Corp., 675 F.3d 138, 148 (2d Cir. 2012) (deciding that the district court had authority to sanction a law firm under § 1927), LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 904 (D.C. Cir. 1998) (same), Avirgan v. Hull, 932 F.2d 1572, 1582–83 (11th Cir. 1991) (same), *and* Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 211–12 (3d Cir. 1985) (same).

196. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (finding that § 1927's language expressly includes attorneys rather than law firms).

197. *See, e.g.*, Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 211 (3d Cir. 1985) (applying § 1927 sanctions to the firm that represented the party in opposing conclusions reached by a referee that the parties agreed would have final authority).

198. *See, e.g.*, Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1293 (9th Cir. 2015) ("[W]e have not previously addressed whether a law firm may be considered an 'attorney or other person admitted to conduct cases.'").

the circuits imposing sanctions on law firms, in comparison, treated the statute as if its scope implicitly reached law firms.[199]

A. Circuits Not Applying § 1927 to Law Firms

The circuit courts holding that § 1927 applies only to "any attorney or other person admitted to conduct cases"[200] base their decisions upon several factors.[201] First, the courts consider the statute's plain language and their own precedent.[202] Second, they look to their sister courts for persuasive guidance.[203] Third, the courts consider whether Rule 11 developments presented a similar question.[204] Finally, the courts address whether lower courts may sanction law firms by any other means.[205]

These courts interpreted the statute's language to mean that § 1927 does not provide for imposing sanctions against a law firm.[206] The plain language of § 1927 expressly includes only attorneys and other persons "admitted to conduct cases."[207] In 2005, in *Claiborne v. Wisdom*,[208] the Seventh Circuit found that a law firm did not satisfy either of these express categories.[209] The

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199. *See, e.g.*, *Baker Indus., Inc.*, 764 F.2d at 208 (finding that § 1927 "provides for the assessment of sanctions directly against counsel").

200. 28 U.S.C. § 1927 (2012).

201. *See, e.g.*, *Claiborne*, 414 F.3d at 722–23 (considering the statute's language, interpretations by other circuit courts, and Rule 11 case law).

202. *See, e.g.*, *Kaass Law*, 799 F.3d at 1293 (noting that its own previous interpretations of § 1927 limited the statute's application to attorneys and other individuals).

203. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (examining the Fourth and Eleventh Circuits' decisions regarding whether § 1927 applies to law firms).

204. *Id.* (drawing a parallel between the current text of § 1927 and the Supreme Court's finding that the text of Rule 11 excluded its application to law firms).

205. *See, e.g.*, BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 751–52 (6th Cir. 2010) (analyzing whether the district court abused its discretion in applying its inherent authority after determining that § 1927 did not apply to the law firm).

206. *See, e.g.*, *Claiborne*, 414 F.3d at 722–23 (deciding whether § 1927's plain language included law firms).

207. 28 U.S.C. § 1927 (2012).

208. 414 F.3d 715 (7th Cir. 2005).

209. *See id.* at 722–23 (finding that law firms were neither attorneys nor

court implicitly rejected the idea that "law firm" could be incorporated into the concept of "attorney."[210] Instead, the Seventh Circuit focused on whether a law firm qualified as a "person admitted to conduct cases" and dismissed that premise as "too much of a stretch."[211] In 2010, the Sixth Circuit, in *BDT Products v. Lexmark International, Inc.*,[212] included a large excerpt of the *Claiborne* decision in its opinion and reached a similar conclusion.[213] In 2015, the Ninth Circuit, agreeing with the Sixth and Seventh Circuits, failed to find any congressional intent to include law firms within the meaning of § 1927.[214]

In making their rulings, these circuit courts considered the precedent set by their own previous interpretations of § 1927.[215] *BDT Products* looked to Sixth Circuit dicta stating that § 1927 did not allow district courts to sanction law firms.[216] Noting that it was not bound by its dicta, the Sixth Circuit nevertheless found its previous statement "sufficiently persuasive"[217] and used it to

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"admitted to conduct cases").

210. *See id.* (discussing only the second part of the statute's introductory clause).

211. *See id.* ("The fact that § 1927 refers to 'other persons' admitted to conduct cases is of no help to the defendants. This language reflects the fact that in limited circumstances non-attorneys may appear in judicial proceedings.").

212. 602 F.3d 742 (6th Cir. 2010).

213. *See id.* at 751 ("Even if firms can admittedly be personified in a literary sense through briefs, there is no reason to consider a law firm a 'person' under the statute. More importantly, law *firms* are not 'admitted' to 'conduct cases' in court.").

214. *See* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015) ("We believe that if Congress had intended to permit federal courts to impose sanctions against law firms pursuant to [§ 1927], it would have included an express authorization to do so in the statute."). Recall that § 1927 has changed very little since its enactment before the existence of law firms and that parties invoked it infrequently until its most recent amendment added attorneys' fees to its list of remedies. *See supra* Part II.A (relating the statutory development of § 1927 and its historical context).

215. *See, e.g.*, *Kaass Law*, 799 F.3d at 1293–94 (referring to previous decisions for its construction of the statute); *BDT Prods., Inc.*, 602 F.3d at 750 (considering a previous Sixth Circuit case that included a comment regarding § 1927 sanctions against firms in its dicta).

216. *See BDT Prods., Inc.*, 602 F.3d at 750 ("[Section] 1927 does not authorize the imposition of sanctions on a represented party, nor does it authorize the imposition of sanctions on a law firm." (quoting Rentz v. Dynasty Apparel Indus., Inc., 556 F.3d 389, 396 n.6 (6th Cir. 2009))).

217. *Id.* (quoting PDV Midwest Ref., L.L.C. v. Armada Oil & Gas Co., 305 F.3d

bolster the *BDT Products* decision denying the application of § 1927 to law firms.[218] In *Kaass Law v. Wells Fargo Bank*,[219] the Ninth Circuit analogized sanctioning law firms to two other Ninth Circuit cases to support its narrow interpretation of the statute.[220] In the first case, the Ninth Circuit had denied a district court authority to sanction a financial consultant employed by attorneys in a case.[221] In the second case, the Ninth Circuit had overturned a § 1927 sanction imposed "jointly on counsel and the client" because "§ 1927 authorizes sanctions only upon counsel."[222]

The Sixth, Seventh, and Ninth Circuits also looked to their sister courts for persuasive guidance in determining whether § 1927 applies to law firms.[223] The Seventh Circuit concluded that it must conduct its own independent analysis after noting that two circuit courts had imposed sanctions on law firms "without any discussion of the question"[224] and another "expressed doubt."[225] The Ninth Circuit relied on the Seventh Circuit's reasoning in *Claiborne*, holding that Congress intended § 1927 to apply only to attorneys or other individuals.[226] It looked to the

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498, 510 (6th Cir. 2002)).

218. *See id.* (concluding that, although the court had not directly ruled on the question, it could follow its own dicta regarding § 1927's application to firms).

219. 799 F.3d 1290 (9th Cir. 2015).

220. *See id.* at 1293 (describing previous Ninth Circuit decisions construing § 1927).

221. *See* FTC v. Alaska Land Leasing, Inc., 799 F.2d 507, 508–10 (9th Cir. 1986) (remanding the district court's issuance of sanctions against an attorney without proper notice, and agreeing that § 1927 authorizes recovery "only from an attorney or otherwise admitted representative of a party," against a non-attorney financial consultant).

222. *See* Sneller v. City of Bainbridge Island, 606 F.3d 636, 640 (9th Cir. 2010) (refusing to issue § 1927 sanctions jointly imposed upon the party and its counsel after the sanctioned party corrected its motions pursuant to Rule 11's safe harbor provision).

223. *See infra* notes 224–228 and accompanying text (discussing the circuit courts' findings regarding their sister court interpretations of § 1927).

224. Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005) (referring to decisions from the Third and D.C. Circuits).

225. *Id.* (citing Blue v. Dep't of the Army, 914 F.2d 525, 549 (4th Cir. 1990)).

226. *See* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1294 (9th Cir. 2015) ("[T]he 'specificity and precision' of § 1927, allowing for sanctions only against 'attorneys' or 'other persons admitted to conduct cases[,]' was designed to exclude sanctions against a law firm." (quoting Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1312–13 (9th Cir. 1992))).

Sixth Circuit's opinion in *BDT Products* for further confirmation of its analysis[227] and reviewed contradictory decisions from the Second, Third, and Eleventh Circuits with skepticism.[228]

In reaching the conclusion that § 1927 operates with a more limited scope, the Sixth, Seventh, and Ninth Circuits considered whether Rule 11's developments provide any guidance for interpreting § 1927.[229] In 2005, the Seventh Circuit found that its decision not to apply § 1927 to law firms was "consistent" with the Supreme Court's 1989 decision in *Pavelic & LeFlore v. Marvel Enterntainment Group*.[230] Five years later, the Sixth Circuit incorporated the Rule 11 analysis from *Claiborne* directly into its opinion.[231] In *Kaass Law*, the Ninth Circuit likewise agreed with the Seventh Circuit's finding that "[t]he language of § 1927 raises exactly the same problem as the earlier version of Rule 11" and relied heavily on the *Claiborne* coverage of Rule 11.[232]

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227. *See id.* (noting the Sixth Circuit's conclusion that "28 U.S.C. § 1927 does not authorize the imposition of sanctions on law firms" (quoting BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 751–52 (6th Cir. 2010))).

228. *See id.* at 1294–95 (finding the Second, Third, and Eleventh Circuits' reasoning unpersuasive). In *Kaass Law*, the Ninth Circuit suggested that the Second and Eleventh Circuits "conflated" § 1927 sanctions on law firms with those authorized by the court's inherent power. *Id.* The *Kaass Law* court also observed that the Third Circuit "sanctioned a law firm pursuant to [§ 1927] before [Rule 11] was amended to include law firms explicitly, and did not address the limited statutory language of [§ 1927]." *Id.*

229. *See infra* notes 230–232 and accompanying text (considering a similar question about whether a previous version of Rule 11 applied to law firms).

230. 493 U.S. 120 (1989). *See* Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005) ("Even if *Pavelic & LeFlore* does not strictly dictate the outcome here, it points strongly in the direction we have taken.").

231. *See* BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 751 (6th Cir. 2010) ("Our sister circuits have come to differing conclusions without focusing on the precise legal question at stake . . . . [T]hese decisions are inconclusive. We therefore consider for ourselves whether a law firm is subject to sanctions under § 1927." (quoting *Claiborne*, 414 F.3d at 722–23)).

232. *See* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1294 (9th Cir. 2015) (including an entire paragraph of the *Claiborne* decision within the opinion's text). In 1989, the Supreme Court decided that the existing (pre-1993) version of Rule 11 did not apply to law firms. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 127 (1989) (reversing the lower court's decision to uphold Rule 11 sanctions against a law firm). Congress subsequently amended Rule 11 to expressly include law firms in its language. *See supra* Part II.B (detailing Congress's revisions to Rule 11). This response to the Supreme Court's ruling in *Pavelic & LeFlore* may be an indication that Congress would amend § 1927 if the Supreme Court found that it did not apply to law firms, which seems

Finally, the Seventh Circuit alone addressed whether lower courts may sanction law firms by any other means in its discussion of whether district courts may apply § 1927 to law firms.[233] The court in *Claiborne* concluded that courts may have authority for such sanctions under state law, Rule 11, and the court's inherent power, precluding the need for § 1927 to apply to law firms.[234] While both the Sixth and Ninth Circuits acknowledged that Rule 11 and the court's inherent authority allow district courts to sanction law firms, they did not consider this a factor in favor of the narrow interpretation of § 1927.[235] The Sixth Circuit examined whether or not a district court abused its inherent power by sanctioning the law firm in the case, but did not directly address the *Claiborne* court's point about its obviating effect.[236] The Ninth Circuit also focused narrowly on the question of § 1927.[237]

These circuit courts were aware of other courts' decisions to sanction law firms under § 1927.[238] In *Claiborne*, the Seventh Circuit acknowledged that many district courts "have held or assumed that sanctions may be imposed against a law firm."[239] The Ninth Circuit addressed the opinions of the Second, Third, and

to conflict with the Sixth, Seventh, and Ninth Circuit rulings.

233. *See infra* note 234 and accompanying text (reviewing the alternative means available for sanctions); *cf., e.g.*, *BDT Prods., Inc.*, 602 F.3d at 751–52 (reviewing a district court's error in applying § 1927 and its abuse of discretion in exercising its inherent authority without mentioning other alternative sources for law firm sanctions).

234. *See Claiborne*, 414 F.3d at 724 (noting that Indiana common law may allow courts to hold law firms liable, that the 1993 version of Rule 11 "expressly permits sanctions against 'the attorneys, law firms, or parties,'" and that "the defendants never mention the court's inherent power").

235. *See infra* notes 236–237 and accompanying text (discussing the lack of consideration given to the alternative means of sanctioning law firms in *BDT Products* and *Kaass Law*).

236. *See BDT Prods., Inc.*, 602 F.3d at 751–52 (considering the district court's application of its discretion in applying its inherent authority to sanction a law firm).

237. *See Kaass Law*, 799 F.3d at 1294–95 (analogizing the 1983 version of Rule 11 to § 1927 and refusing to consider sanctions under the court's inherent authority because the party did not request those sanctions at the district court level).

238. *See infra* notes 239–240 and accompanying text (addressing the Seventh and Ninth Circuit analyses of the conflicting opinions from other courts).

239. Claiborne v. Wisdom, 414 F.3d 715, 722 (7th Cir. 2005).

Eleventh Circuits, noting the reasons it disagreed with their conclusions.[240] Concluding that the language of § 1927 clearly excludes law firms and finding support in the analogous jurisprudence of Rule 11, the Sixth, Seventh, and Ninth Circuits chose not to consider the broader context of § 1927.[241]

B. Circuits Applying § 1927 to Law Firms

In contrast, over the past three decades, several other federal circuit courts of appeals have applied § 1927 to law firms.[242] In reaching the conclusion that § 1927 authorizes federal district courts to issue sanctions against law firms, the Second, Third, Eighth, Eleventh, and D.C. Circuits consider the issue very differently from their sister courts.[243] Of the federal circuit courts applying § 1927 sanctions to law firms, the Third, Eighth, Eleventh, and D.C. Circuits make no distinction between law firms and individual attorneys in their analyses.[244] The Second Circuit alone distinguishes law firms from individual attorneys, following the precedents set by other circuit courts' earlier decisions but incorporating additional analysis.[245]

The Third, Eighth, Eleventh, and D.C. Circuit decisions predate the circuit court decisions narrowly construing the

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240. *See* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1294–95 (9th Cir. 2015) (finding that the opposing sister courts had either conflated sanctioning powers or failed to address the statutory language § 1927).

241. *See supra* notes 200–240 and accompanying text (interpreting the statute based on language, precedent, persuasive authority, and the comparable Rule 11 case law).

242. *See* Enmon v. Prospect Capital Corp., 675 F.3d 138, 148 (2d Cir. 2012) (affirming sanctions against a law firm under § 1927); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 904 (D.C. Cir. 1998) (same); Avirgan v. Hull, 932 F.2d 1572, 1582–83 (11th Cir. 1991) (same); Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 211 (3d Cir. 1985) (same).

243. *Compare Baker Indus., Inc.*, 764 F.2d at 208 (analyzing § 1927's "bad faith" requirement without directly addressing the distinction between law firm and attorney), *with Claiborne*, 414 F.3d at 721–23 (considering the specific question of whether § 1927 may apply to a law firm as a case of first impression).

244. *See, e.g.*, *Baker Indus., Inc.*, 764 F.2d at 208 (addressing the merits of the sanctions rather than the district court's authority to issue § 1927 sanctions against a law firm).

245. *See Enmon*, 675 F.3d at 148 (deciding whether district courts may sanction a law firm for an individual attorney's actions).

statute[246] and the more recent Second Circuit decision affirming its application explicitly to law firms.[247] In these early cases,[248] three factors buttress affirming the district courts' application of § 1927.[249] First, the law firms appealed the district court's award of sanctions on the merits rather than directly challenging the district court's authority under § 1927 to award sanctions against a law firm.[250] Second, the circuit courts used "attorney" and "counsel" interchangeably, citing the language of the statute and referring to the offending law firm as a party's "counsel."[251] Third, in two cases, the court applied § 1927, Rule 11, and the court's inherent authority jointly.[252] These similarities provide a starting point for the early jurisprudence regarding the application of § 1927 to law firms.

The first federal circuit court to affirm the application of § 1927 to law firms was the Third Circuit in *Baker*.[253] The law firm

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246. The Seventh Circuit decided *Claiborne* in 2005, twenty years after *Baker*. *Compare* Claiborne v. Wisdom, 414 F.3d 715 (7th Cir. 2005), *with* Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204 (3d Cir. 1985). The Sixth Circuit decided *BDT Products* in 2010, and the Ninth Circuit decided *Kaass Law* in 2015. Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290 (9th Cir. 2015); BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742 (6th Cir. 2010).

247. The Second Circuit decided *Enmon* in 2012, twenty-seven years after *Baker*. Enmon v. Prospect Capital Corp., 675 F.3d 138 (2d Cir. 2012).

248. LaPrade v. Kidder Peabody & Co., 146 F.3d 899 (D.C. Cir. 1998); Avirgan v. Hull, 932 F.2d 1572 (11th Cir. 1991); Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204 (3d Cir. 1985).

249. *See infra* notes 250–252 and accompanying text (noting the appellant's arguments and the circuit courts' reasoning in response).

250. *See, e.g.*, Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 210 (3d Cir. 1985) ("[The firm] contends that its reliance on [cases in support of its position] was reasonable, thus barring a finding of willfulness and bad faith as a matter of law.").

251. *See, e.g.*, *id.* at 212 (examining the text of § 1927, noting the importance of an "attorney's obligation to the court," and reviewing the bad faith actions of counsel to determine whether the actions met the required standard).

252. *See* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) ("In its clarification order, the district court explained that Daniel Sheehan, as lead counsel, and the Christic Institution, as the official law firm, were liable pursuant to the bad-faith exception, [§ 1927], and [Rule 11] . . . .").

253. *See Baker Indus., Inc.*, 764 F.2d at 208 (affirming the district court's § 1927 sanctions against a law firm in 1985). In the case, the appellant's law firm, Cravath, Swaine, and Moore, filed a 101-page brief supporting its objections after agreeing that the special master's decision would be final. *Id.* at 207–08. The court duly read the document, and respondent filed a thirty-six-page response to the

did not challenge the district court sanctions on the grounds that the district court lacked authority under § 1927 to sanction the firm.[254] Instead, it appealed, contending that the firm's objections, which had multiplied the proceedings, were reasonable and thus should not be sanctioned.[255] The Third Circuit used the term "counsel" in place of "attorney" several times in its opinion.[256] It noted that the district court found the actions of appellant's counsel—the law firm—frivolous and vexatious.[257] The Third Circuit concluded that the district court "properly imposed attorneys' fees and costs against [the firm of] Cravath under [§ 1927]."[258]

Six years after *Baker*, the Eleventh Circuit similarly affirmed district court sanctions under § 1927 against a party's law firm without considering the statute's technical limitations.[259] Rather than challenging the sanctions directed against the official law firm, the primary parties and their attorneys appealed sanctions

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objections, as well as a forty-three-page response to appellant's legal memorandum. *Id.* at 208.

254. *See id.* at 210 (reviewing Cravath's arguments on appeal, which all dealt with the merits of the sanctions).

255. *See id.* (summarizing Cravath's contentions that its objections "were based on the referee's erroneous legal rulings" and were supported by a line of other circuit court cases).

256. *See id.* at 208 ("Baker moved for an award of counsel fees pursuant to [§ 1927]."). In its analysis, the Third Circuit also used "attorney" and "offending attorney." *Id.* at 209.

257. *See id.* at 208 (stating the district court's finding "that Cravath's conduct in asserting [the position that the referee's legal conclusions were reviewable] was sufficiently vexatious to justify the award of attorneys' fees directly against it under [§ 1927]").

258. *Id.* at 212.

259. *See* Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) ("A court may assess attorney's fees against litigants, counsel, and law firms who willfully abuse judicial process by conduct tantamount to bad faith."). This case involved a RICO claim that the "attorneys for the plaintiffs, The Christic Institute, must have known prior to suing that they had no competent evidence to substantiate." *Id.* at 1581 (quoting Avirgan v. Hull, 705 F. Supp. 1544, 1545 (S.D. Fla. 1989)). The lead attorney in the case filed an affidavit that "was the impetus for the two years of discovery" that "did not yield any witnesses who could link the alleged criminal enterprise to the bombing." *Id.* at 1582. The Eleventh Circuit affirmed the district court's finding. *See id.* at 1582–83 ("Since [the lawyer, law firm, and primary parties] chose not to abandon this case, the district court properly awarded attorney's fees and costs to the appellees.").

of over $1 million on the merits.[260] The Eleventh Circuit had the opportunity to distinguish between the "lead counsel" and the "official law firm" for sanctioning purposes, and the court treated them indistinguishably.[261] The circuit court affirmed the district court's joint application of three sanctions mechanisms—§ 1927, Rule 11, and the court's inherent authority—to both entities.[262]

In 1998, the D.C. Circuit likewise agreed that district courts could impose sanctions on law firms.[263] The appellant law firm appealed its sanctions on the merits, contending that the district court lacked jurisdiction and abused its discretion.[264] In its consideration of the appeal, the D.C. Circuit quoted directly from the district court opinion to support affirming the sanctions against "plaintiff's counsel."[265] The circuit court subsequently used the term "offending attorney" in addressing the bad faith requirement for § 1927, but it drew no distinction between "counsel" and "attorney" in upholding the sanction.[266]

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260. The appellants argued that the district court had improperly granted summary judgment, "erred in issuing certain orders prior to summary judgment," and erred in awarding sanctions. *Id.* at 1577.

261. *See id.* at 1582 (reflecting the court's identical treatment of lead counsel and the law firm while distinguishing the court's treatment of the parties). The parties, counsel, and law firm appealed the district court's order. *Id.* at 1577. The Christic Institute, the appellant law firm, "is a tax-exempt law firm which funded the litigation." *Id.* at 1577 n.3.

262. *See id.* at 1582 (combining its analysis of the sanctions upon appellant law firm, lawyer, and parties). The Eleventh Circuit affirmed the district court's sanctions against the parties under the court's inherent authority via the "bad-faith exception." *Id.*

263. *See* LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 907 (D.C. Cir. 1998) (affirming the district court's sanctions against a law firm that sought a stay of arbitration in state court without telling the state court of the federal court's stay of litigation due to an existing arbitration agreement between the parties). The appellant law firm had delayed arbitration proceedings for over three years. *See id.* at 901 (noting the initial federal district court stay of litigation in 1992, the subsequent commencement of arbitration in 1995, its further delay and the state court stay of arbitration in 1996). The district court's order cited the "vexatious and dilatory tactics" of the appellant law firm. *Id.* at 900.

264. *See id.* at 902–07 (dismissing the appellant law firm's arguments that the district court lacked jurisdiction and abused its discretion in imposing sanctions).

265. *See id.* at 905 ("[T]he court ordered, 'pursuant to [§ 1927], that plaintiff's counsel, the law firm of Liddle & Robinson, shall compensate [defendants], for the vexatious and dilatory tactics of plaintiff's counsel . . . .").

266. *See id.* at 906 ("According to the language of [§ 1927], the district court must find that 'the offending attorney's multiplication of the proceedings was both

Finally, in 2001, the Eighth Circuit implicitly held that § 1927 allows district courts to sanction law firms, but it has yet to directly address the question.[267] In *Lee v. First Lenders Insurance Services*,[268] the appellant law firm challenged the district court's sanctions as improper and the award amount as an abuse of the court's discretion.[269] The Eighth Circuit, like its sister circuits, used "counsel" and "attorney" interchangeably and affirmed the sanctions against the law firm.[270]

Enmon v. Prospect Capital Corporation,[271] decided in 2012, represents the most recent circuit court decision favoring the broader application of § 1927.[272] In *Enmon*, the Second Circuit—alone among the circuit courts in explicitly applying § 1927 to law firms—analyzed whether the statute authorizes district courts to sanction law firms as well as attorneys.[273] The decision upheld Second Circuit precedent established in *Apex Oil Company v.*

'unreasonable' and 'vexatious.''" (quoting Travelers Ins. Co. v. St. Jude Hosp., 38 F.3d 1414, 1416–17 (5th Cir. 1994))).

267. *See* Lee v. First Lenders Ins. Servs., 236 F.3d 443, 445–46 (8th Cir. 2001) (affirming § 1927 sanctions against a law firm, finding that the firm's conduct "multiplied the proceedings . . . vexatiously and unreasonably" and that the imposition of sanctions was not an abuse of the court's discretion).

268. 236 F.3d 443 (8th Cir. 2001).

269. *See id.* at 445–46 (addressing the law firm's argument that the district court should have pursued Rule 11 sanctions instead of sanctions under § 1927).

270. *See id.* at 445 (noting that "[s]anctions are proper under § 1927 'when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court'" (quoting Lee. v. C.B. Sales, Inc., 177 F.3d 714, 718 (8th Cir. 1999))). The court also gave substantial deference to the district court because of "that court's 'intimate familiarity with the case, parties, and counsel.'" *Id.* (quoting O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987)).

271. 675 F.3d 138 (2d Cir. 2012).

272. The notable circuit court decisions extending § 1927 to law firms date from 2001, 1998, 1991, 1988, and 1985. *See First Lenders Ins. Servs.*, 236 F.3d at 446 (applying § 1927 sanctions to a law firm); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 900 (D.C. Cir. 1998) (same); Avirgan v. Hull, 932 F.2d 1572, 1575 (11th Cir. 1991) (same); Apex Oil Co. v. Belcher Co. of N.Y., 855 F.2d 1009, 1012 (2d Cir. 1988) (same); Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 206 (3d Cir. 1985) (same). *But see* Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1291 (9th Cir. 2015) (finding that § 1927's language does not authorize district courts to sanction law firms).

273. *See Enmon*, 675 F.3d at 147–48 (discussing the inherent authority, precedent, district court practice, and sister courts' decisions as support for affirming the imposition of § 1927 sanctions on the law firm).

Belcher Company of New York[274] and was also inclusive of favorable sister court decisions.[275] In addition, the decision appeared to be responsive to the Sixth and Seventh Circuits' narrow construction of the statute.[276]

In its analysis, the Second Circuit supported its conclusion that a law firm may be liable for the actions of one of its attorneys with five assertions.[277] First, the circuit court concluded that district courts have authority to sanction law firms under § 1927 in the same way that they have authority via their inherent power.[278] Second, the court pointed to its own precedent.[279] Third,

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274. 855 F.2d 1009, 1011–12 (2d Cir. 1988) (affirming sanctions under § 1927 for discovery abuse).

275. *See Enmon*, 675 F.3d at 148 ("The practice of imposing § 1927 sanctions on law firms has also been approved by our sister circuits.").

276. The Sixth and Seventh Circuit decisions holding that § 1927 does not extend to law firms date from 2010 and 2005, respectively, predating the 2012 *Enmon* decision. *See* BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 744 (6th Cir. 2010) (vacating sanctions against a law firm); Claiborne v. Wisdom, 414 F.3d 715, 717 (7th Cir. 2005) (same).

277. *See* Enmon v. Prospect Capital Corp., 675 F.3d 138, 147–48 (2d Cir. 2012) (considering the reasons for upholding the district courts assessment of sanctions).

278. *See id.* at 147 (noting that the district court had "imposed sanctions pursuant to both its inherent powers and § 1927" and affirming the imposition of sanctions on the law firm in the case). Like the Eleventh Circuit, the Second Circuit in *Enmon* found that

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

Id. at 144 (quoting Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986)). The Second Circuit also appeared to decide that "attorney" and "law firm" were synonymous for the purposes of applying § 1927. *See id.* at 147 (stating that "a court may sanction a law firm pursuant to its inherent power" and saw "no reason that a different rule should apply to § 1927 sanctions").

279. *See id.* ("[I]n any event, we have previously upheld the award of § 1927 sanctions against a law firm."). The precedent-setting Second Circuit case is *Apex Oil*, in which the court affirmed applying § 1927 sanctions against a law firm for discovery abuse. *Apex Oil Co.*, 855 F.2d at 1020. This decision, like other early federal circuit court of appeals decisions that affirmed district court authority to sanction law firms under § 1927, did not directly address the law firm question but instead focused on the application of Rule 37 and § 1927 in the context of discovery abuse. *See id.* at 1014–20 (finding that, although Rule 37 did not encompass law firms, the district court could sanction a law firm abusing the

the court noted that district courts in the Second Circuit have sanctioned law firms pursuant to § 1927, which, while not binding, could be persuasive.[280] Fourth, the court selectively recognized the concurring opinions of its sister circuits.[281] Fifth, the court agreed that the district court properly held the law firm liable for the principal attorney's actions.[282] Based on these conclusions, the Second Circuit stated that "nothing in the language of [§ 1927], in our case law regarding that statute or a district court's inherent powers, or in counsel's actions in this case leads us to think that the District Court was without authority to impose sanctions on [the law firm] as a whole."[283]

The court in *Enmon* did not answer the same question posed to the Sixth and Seventh Circuits.[284] In *Enmon*, appellants challenged both the § 1927 and inherent power sanctions issued by the district court on the grounds that a court may not sanction a firm as a whole for an attorney's actions.[285] The appellants in

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discovery process under § 1927). It is interesting to note that the Second Circuit in *Apex Oil* distinguished "attorney" and "law firm" for the purposes of sanctions under Rule 37, but not for § 1927, suggesting the court's inclination to more broadly interpret statutes than rules.

280. *See Enmon*, 675 F.3d at 147–48 ("[W]e would upset a relatively long-standing practice among district courts in our Circuit if we were to hold that law firms may not be sanctioned under § 1927 for the acts of certain attorneys."). The *Enmon* court referenced three federal district court cases. *See id.* (noting cases from the Southern and Northern Districts of New York in 2008, 1997, and 1995).

281. *See id.* at 148 (citing the Third, Eleventh, and D.C. Circuit opinions that affirm § 1927's application to law firms).

282. *See id.* (agreeing with the district court's assessment that the attorney's "actions were indistinguishable from those of Arnold & Itkin as a firm" and that "the firm consistently accepted responsibility for conducting the underlying litigation").

283. *Id.*

284. *See infra* notes 285–287 and accompanying text (distinguishing the Second Circuit's approach to applying § 1927 from that of the Sixth and Seventh Circuits).

285. *See* Enmon v. Prospect Capital Corp., 675 F.3d 138, 147 (2d Cir. 2012) (observing the appellant law firm's challenge "on the grounds that [the district court] improperly sanctioned the law firm as a whole, rather than sanctioning [the lead attorney] and the other individual attorneys who participated directly in the litigation"). The Second Circuit stated that it disagreed "with Arnold & Itkin's assertion that the District Court was without authority under [§ 1927] to award sanctions against the 'firm as a whole' for the 'actions of various lawyers.'" *Id.*

Claiborne, in comparison, appealed only the question of whether the district court could issue a joint and several sanctions award against a law firm under § 1927.[286] The appellant law firm in *BDT Products* challenged the district court's sanctions on the grounds that § 1927 did not grant district courts authority to sanction law firms.[287] These distinctions indicate that there may be multiple ways to frame the issue of § 1927's application.

Several other circuit courts have not yet addressed the question of whether § 1927 applies to law firms.[288] The Fourth Circuit heard a case that raised the issue, but avoided addressing it by dealing with a threshold question.[289] The First Circuit similarly avoided the question of whether the district court had firm-sanctioning authority under § 1927 by deciding cases on other grounds.[290] This third undecided category of circuit courts underscores the significance of the current circuit split; without resolution, these circuits will have to choose which interpretation of § 1927 to adopt, further deepening the split.

Five circuit courts have affirmed § 1927 sanctions against law firms, while three have not.[291] If the Third, Eighth, Eleventh, and D.C. Circuits directly addressed the question of whether § 1927

286. *See* Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (addressing the district court's authority to sanction a law firm jointly and severally under § 1927).

287. *See* BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 750–51 (6th Cir. 2010) (considering whether the district court erred in its award of sanctions).

288. *See, e.g.*, Blue v. U.S. Dep't of the Army, 914 F.2d 525, 549 (4th Cir. 1990) (avoiding the question of whether § 1927 applies to law firms). The First, Fifth, Tenth, and Federal Circuit Courts have not yet addressed this question.

289. *See id.* (reversing § 1927 sanctions in their entirety and thus not reaching the question of whether § 1927 applied to the law firm). Notably, the Fourth Circuit did not reject the district court's authority to issue sanctions against the law firm, instead expressing doubt and considering the question of whether the sanctions were appropriate. *Id.*

290. *See, e.g.*, Jensen v. Phillips Screw Co., 546 F.3d 59, 68 (1st Cir. 2008) (finding that no § 1927 sanctions were available for the appellant law firm's specific actions but not specifically addressing whether the court could sanction a firm under § 1927); United States v. Kouri-Perez, 187 F.3d 1, 7 (1st Cir. 1999) (affirming sanctions against a firm because the lower court cited both the court's inherent power and § 1927, allowing the circuit court to sidestep a § 1927 analysis).

291. *See supra* notes 242–287 and accompanying text (discussing the circuit court decisions favoring the broader application of § 1927); Part III.A (detailing the circuit court decisions opposing § 1927's application to law firms).

authorizes district courts to sanction law firms, these circuits would likely affirm their precedents and expressly apply § 1927 to law firms.[292] The statute's effectiveness as a deterrent depends upon courts applying it consistently, so that counsel can predict when it may or may not be liable for sanctions. The current version of § 1927 has caused confusion among the circuit courts, reducing its effectiveness. Resolving the circuit split will increase the courts' ability to apply § 1927 consistently to law firms and, consequently, enhance the statute's deterrent effect.

IV. Strategies for Resolving the Application of § 1927 to Law Firms

There are three ways to resolve the existing circuit split.[293] First, consensus and clarity among the federal circuit courts of appeals represent a possible solution.[294] Second, the Supreme Court could also grant certiorari and address the issue.[295] Third, legislative alternatives include adding a note to the statute or amending § 1927 to clarify its scope.[296]

A. Judicial Resolution

Until Congress acts to clarify § 1927, federal courts have interpretive authority and may continue to decide whether § 1927 applies to law firms.[297] Circuit court interpretations are binding on the district courts within the circuit.[298] Only Congress or a decision

292. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 147 (2d Cir. 2012) (referring to its precedent to bolster the court's opinion).

293. *See infra* Parts IV.A–B (suggesting judicial and legislative methods of resolution).

294. *See infra* Part IV.A.1 (discussing the unlikely possibility that the circuit courts will agree on the application of § 1927 to law firms without a ruling from the Supreme Court or a legislative amendment).

295. *See infra* Part IV.A.2 (elaborating on the Supreme Court's consideration of § 1927).

296. *See infra* Part IV.B (describing how a statutory note or amendment could resolve the circuit split regarding the application of § 1927 to law firms).

297. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

298. *See* Donald H. Zeigler, *Gazing into the Crystal Ball: Reflections on the*

from the Supreme Court can compel the circuit courts to treat § 1927 uniformly with regards to law firms.[299] Both congressional action and Supreme Court intervention are unlikely while the circuit split remains unclearly articulated.[300] A consensus among the divided circuit courts is also unlikely, given the stances already articulated and judicial respect for precedent.

1. Clear Circuit Court Interpretation

One possible solution is consensus among the circuit courts. Currently, three circuit courts favor a narrow interpretation of § 1927, while five circuit courts have sanctioned law firms pursuant to § 1927.[301] Several circuit court decisions imposing § 1927 sanctions on law firms lack desired clarity or analysis.[302] Thus, these courts, by directly addressing the question of whether § 1927 may extend to law firms, may arrive at a result that does not expressly conflict with their precedent. The Second Circuit's decision in *Enmon* poses a significant obstacle to achieving a consensus among the circuit courts against § 1927's application to law firms because its analysis and decision were very clear.[303]

Even if the circuit courts will not apply § 1927 sanctions according to the same narrow standard, definitive decisions from the circuit courts will add clarity and will encourage congressional or Supreme Court intervention.[304] Deepening the split among the federal circuit courts of appeals is one way to motivate the

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Standards State Judges Should Use to Ascertain Federal Law, 40 WM. & MARY L. REV. 1143, 1216 (1999) (noting the enforcement hierarchy among the federal courts).

299. *See id.* (describing how Congress and the Supreme Court may place restrictions on lower court judgments in the context of federal habeas corpus).

300. *See infra* Part IV.A.1 (suggesting that circuit courts engage in textual analysis and consider the policy implications associated with § 1927).

301. *See supra* Part III (elaborating on the circuit split and the reasoning utilized by the circuit courts on either side of the split).

302. *See supra* Part III.B (discussing the Third, Eighth, Eleventh, and D.C. Circuits' implicit extension of § 1927 to law firms).

303. *See supra* notes 271–283 and accompanying text (reviewing the Second Circuit's analysis in *Enmon*).

304. To compel circuit courts to address the question directly, sanctioned firms must appeal and challenge district court authority to sanction law firms under § 1927.

Supreme Court to grant certiorari[305] and to bring the issue to Congress's attention.[306] In reviewing lower court judgments, circuit courts can help to clarify the meaning of § 1927 by writing clear and decisive opinions analyzing the statute's language and purpose.[307] If the Third, Eight, Eleventh, and D.C. Circuits, along with the undecided circuit courts, clearly state that § 1927 authorizes district courts to sanction law firms, the circuit split could motivate Supreme Court resolution or congressional action.

Circuits that have considered whether § 1927 applies to law firms should continue to follow their precedent.[308] Based on the issues raised by the circuit split,[309] undecided courts should adopt the broader construction of § 1927. The undecided circuit courts should conclude that, while § 1927's text suggests a narrower statutory construction, the statute's historical context and purpose support finding that § 1927 applies to law firms. Although this approach conflicts with the interpretation of the statute based on its plain language[310] along with the arguably analogous Rule 11 precedent from the Supreme Court[311] and appears to ignore the lack of analysis from the circuits that have applied § 1927 to law firms,[312] it is the better approach.

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305. *See, e.g.*, Roadway Express v. Piper, 447 U.S. 752, 759–64 (1980) (resolving a circuit split regarding the awarding of attorneys' fees under § 1927).

306. Congress added the word "personally" to § 1927 because of the Second Circuit's decision in *Motion Picture Patents*. *See* § 1927 statutory notes (noting the source of the new language).

307. *See, e.g.*, Claiborne v. Wisdom, 414 F.3d 715, 722–23 (7th Cir. 2005) (providing a thorough analysis of the construction of § 1927 and concluding that it does not give district courts authority to sanction law firms).

308. *See supra* Part III (identifying the three circuit courts that have construed § 1927 narrowly and the five circuit courts that have applied § 1927 to law firms).

309. *See supra* Part III (distinguishing the circuit court decisions favoring a narrower interpretation of § 1927 from those applying a more expansive construction of the statute).

310. *See* 28 U.S.C. § 1927 (2012) (applying to "any attorney or other person admitted to conduct cases").

311. *See supra* note 153 and accompanying text (discussing the Supreme Court's holding that the pre-1993 version of Rule 11 did not apply to law firms).

312. *See supra* Part III.B (surveying the circuit court decisions that have extended the application of § 1927 to law firms and noting apparent implicit leaps or conflated terms).

If no circuit consensus occurs, even well-reasoned circuit court decisions cannot ultimately provide a definitive outcome regarding the interpretation of the statute and are therefore only useful for inducing more long-term solutions. A clearly defined circuit split can motivate the Supreme Court to help clarify controversial statutory interpretation issues.

2. Supreme Court Ruling

The Supreme Court could grant certiorari to hear a case regarding the question of district court authority to sanction law firms pursuant to § 1927. In *Pavelic & LeFlore*, when deciding whether Rule 11 applied to law firms, the Court stated that its "task is to apply the text, not to improve upon it."[313] Although Rule 11 and § 1927 are distinct sanctions mechanisms,[314] it is possible that the Supreme Court may construe the statute narrowly, as it did with Rule 11.[315]

Although this outcome may not provide the desired resolution for the circuit split in the short term, a Supreme Court decision with which Congress disagrees may lead Congress to respond by amending the statute.[316] If the Supreme Court pursues a conservative, text-based approach to interpreting whether § 1927 applies to law firms, congressional intervention seems likely based on Congress's past interest in § 1927's utility and in Rule 11's application to law firms.[317]

It is also possible, given the potential abuses of § 1927 and the changes in legal climate between 1993 and today,[318] that the

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

314. *See supra* Parts II.A–B (noting the differences between § 1927 and Rule 11).

315. *See Pavelic & LeFlore*, 493 U.S. at 126 (holding that, because the pre-1993 version of Rule 11 did not explicitly include law firms, it did not apply to them).

316. *See supra* Parts II.A–B (discussing the changes made to § 1927 and Rule 11 as a direct result of Supreme Court decisions with which Congress disagreed).

317. *See supra* Parts II.A–B (documenting the legislative amendments enacted after the Supreme Court decided *Roadway Express* and *Pavelic & LeFlore*).

318. *See supra* Part II (considering the Rule 11 and § 1927 amendments and the corresponding developments in practices of seeking sanctions under the rule and statute).

Supreme Court may find, in line with five circuit courts, that § 1927 grants district courts law firm-sanctioning authority. In either case, while a Supreme Court ruling is the standard means of resolving a circuit split, the Court selects its docket and is unlikely to hear a case dealing with this § 1927 issue soon.[319]

B. Legislative Solutions

Instead of letting the federal courts resolve the existing circuit split, Congress could take action. This approach puts control in the hands of the Legislature. Two possibilities exist: adding a note to § 1927 or amending the statute itself.[320]

1. Add a Note to the Statute

Many federal statutes have statutory or editorial companion notes.[321] Editorial notes accompany most sections of the U.S. Code.[322] These notes often relate the "historical and revision" information pertaining to the statute.[323] They also reflect notes

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319. *See* Karen Rubin, *Ninth Circuit Agrees Law Firms Are Not "Persons" for § 1927 Sanctions; Circuit Split Deepens*, THOMPSON HINE: L. FOR LAW. TODAY (Oct. 29, 2015), http://www.thelawforlawyerstoday.com/2015/10/law-firms-are-not-persons-no-sanctions-in-ninth-circuit-under-%C2%A7-1927/ (last visited Dec. 11, 2016) (noting that "[i]t is possible that the now-deepened [circuit] split will prompt Supreme Court review—eventually") (on file with the Washington and Lee Law Review).

320. *See infra* Parts IV.B.1–2 (discussing potential legislative solutions).

321. *See Detailed Guide to the United States Code Content and Features*, OFF. L. REVISION COUNS., http://uscode.house.gov/detailed_guide.xhtml#statutory (last visited Dec. 11, 2016) [hereinafter *Detailed Guide*] (differentiating between the types of notes that follow statutes) (on file with the Washington and Lee Law Review).

322. *See id.* (observing that these "notes are prepared by the Code editors to assist users of the Code").

323. *See, e.g.*, 28 U.S.C. § 1927 notes (2012) (providing the historical origin of § 1927 and documenting the sources of specific changes); 28 U.S.C. § 1911 notes (2012) (noting that Congress added the second paragraph of the statute governing Supreme Court fees to give "statutory sanction to existing practice").

about specific amendments.[324] Statutory notes contain a provision of federal law and can sometimes encompass an entire act.[325]

Notes following U.S. Code sections differ from Federal Rules of Civil Procedure Advisory Committee notes.[326] In addition to detailing a rule's amendment history, federal rule Advisory Committee notes provide guidance for courts applying the rule by examining how a specific change attempts to address past issues.[327] By comparison, U.S. Code section notes represent an objective record of the changes to a statute.[328] Adding an editorial note to a statue merely provides context and background, while a statutory note is law that courts must enforce.[329]

If Congress adds a note to § 1927, it may help courts interpret the statute. For example, an editorial note might define or provide a reference for "attorney or other person admitted to conduct cases."[330] A statutory note defining "attorney or other person admitted to conduct cases"[331] could potentially resolve the circuit split, but it seems unlikely that Congress would want to set these definitions in stone given the changing standards and roles of attorneys over time.[332] An editorial note could also clarify whether

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324. *See, e.g.*, § 1927 (describing the changes in the statute's 1980 amendment); 28 U.S.C. § 1915 notes (2012) (listing each subsequent amendment for the amended subsections, focusing on particular word changes).

325. *See Detailed Guide*, *supra* note 321 ("[W]hether a provision in an act . . . appears in the Code as a section or as a statutory note is an editorial decision based on a number of factors."); *see also, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 notes (2012) (containing additional provisions in the body of the notes, including the Protected National Security Documents Act of 2009, Pub. L. 111-83, Title, V § 565, 123 Stat. 2184 (2012)).

326. *See infra* notes 327–328 and accompanying text (discussing the objective nature of federal statute notes compared to Federal Rules of Civil Rules advisory committee notes).

327. *See, e.g.*, FED. R. CIV. P. 11 advisory committee's notes on 1993 amendments (noting the past failings of the rule's "interpretation and application" and providing both a broad overview of the rule's principle and more detailed remarks for specific subsections).

328. *See, e.g.*, 28 U.S.C. § 1927 statutory notes (documenting the statutory word changes for successive amendments).

329. *See Detailed Guide*, *supra* note 321 (distinguishing between the two types of notes).

330. § 1927; *see Detailed Guide*, *supra* note 321 (stating that notes can define terms).

331. § 1927.

332. *See supra* Part II.D (discussing the development of lawyers and law

courts should treat "admitted to conduct cases in any court of the United States or any Territory thereof"[333] as a clause that modifies both "attorney" and "other person." Additionally, a new note could state the purpose of the statute[334] and address whether sanctioning law firms conflicts or concurs with that purpose. None of these editorial note suggestions will achieve a circuit split resolution.[335]

Adding a note with any legal significance will require the same level of congressional intervention, with less comprehensive results, as amending the statute.[336] Unless Congress adds a statutory note to the statute, the note will have little influence on resolving the circuit split. Thus, Congress should amend the language of § 1927 instead of simply modifying the statute's notes.

2. Amend Title 28 with Clearer Language

Another solution for resolving the divided interpretations of § 1927 is to amend the statute. Congress should amend the statute either to expressly include law firms, like Rule 11,[337] or to foreclose the sanctioning of law firms. Congress has amended § 1927 responsively in the past when lawmakers either agreed or disagreed with court rulings.[338] In 1980, significant salient, timely

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firms).

333. § 1927.

334. This would give Congress the opportunity to clarify whether it intends § 1927 to be deterrent or punitive.

335. *See Detailed Guide*, *supra* note 321 (distinguishing the authority of editorial and statutory notes).

336. Congress votes to adopt the text of statutory notes the same way it enacts legislation. *See Detailed Guide*, *supra* note 321 (noting that "[a] provision of a Federal statute is the law whether the provision appears in the Code as a section or as a statutory note").

337. *See* FED. R. CIV. P. 11 (reflecting the 1993 revisions proposed by the Standing Committee on Rules of Practice and Procedure and approved by the Supreme Court and Congress); FED. R. CIV. P. 11 advisory committee's notes to 1993 amendment (noting that the rule applies to law firms, which may be jointly and severally liable for their attorneys' conduct).

338. *See* 28 U.S.C. § 1927 notes (2012) (reflecting the Legislature's agreement with the Second Circuit's decision in *Motion Picture Patents* to hold sanctioned attorneys personally liable). The 1980 amendment of § 1927 also illustrates Congress's immediate reaction to the Supreme Court decision that § 1927 did not allow courts to award attorneys' fees in *Roadway Express*. *See supra* Part II.A

legislation allowed Congress to include the amendment of § 1927 in the body of a much larger act.[339]

The current circuit split indicates that the existing plain language of the statute is not clear.[340] This Note proposes language for both possible interpretations of § 1927, denying district courts authority to sanction firms and granting them that authority. In its proposed text, this Note strives to maintain the integrity of the statute.[341]

This proposed language would exclude law firms from § 1927 sanctions:

> Any **individual** attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

The addition of "individual" will help to clarify the intention that courts sanction only individuals, rather than law firms. This small change would make it more difficult for parties and courts to argue that the statute includes law firms. This proposed language has the advantage of bearing a strong resemblance to § 1927's existing text.[342]

Alternatively, based on the model established in the 1993 amendment of Rule 11,[343] the following proposed language would include law firms:

(noting the legislation's timing and purpose).

339. *See* Antitrust Procedural Improvements Act of 1980, Pub. L. 96-349, § 3, 94 Stat. 1156 (codified as amended at 15 U.S.C. § 1311) (enacting legislation to limit abuses in antitrust litigation).

340. *See supra* Part III (describing the conflicting decisions among circuit courts regarding § 1927's application to law firms).

341. *See supra* Part II.A (noting the constants within § 1927 over its 200-year life). These proposed amendments do not contemplate any of the other controversies surrounding § 1927's application. *See supra* Part II.A (discussing the existing scholarship and case law concerning § 1927).

342. *See* 28 U.S.C. § 1927 (2012) (comprising the exact language above without the proposed changes).

343. *See* FED. R. CIV. P. 11(c)(1) ("The court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.").

> The court may require any attorney, or other person admitted to conduct cases in any court of the United States or any Territory thereof, or any law firm, who so multiplies or allows multiplication of the proceedings in any case unreasonably and vexatiously to satisfy, either personally or jointly, the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Because a law firm as an entity is not "admitted to conduct cases," the placement of "law firm" comes after this clause. The phrase "or allows multiplication of the proceedings" provides for cases in which an attorney acts on behalf of his or her law firm.[344] "Either personally or jointly" resolves the ambiguity regarding whether "personally" limited § 1927 to individual attorneys.[345]

Statutory amendments require congressional passage; the last amendment to § 1927 occurred in 1980.[346] It seems unlikely that Congress will soon amend an apparently minor statute to resolve an issue that affects only law firms involved in federal cases.[347] But if the circuit split continues to deepen, the Supreme Court rules on the issue contrary to Congress's intent, or a particularly relevant piece of legislation arises,[348] Congress may take action.[349]

V. Recommendation that § 1927 Should Apply to Law Firms

This Note argues that Congress should amend § 1927 to include law firms to accomplish the statute's purpose in the context

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344. *See supra* Part III.B (noting the Second Circuit's consideration in *Enmon* of whether a law firm should be liable for an attorney's actions).

345. *See supra* note 193 and accompanying text (considering the significance of the word "personally" in the context of § 1927).

346. *See supra* Part II.A (discussing the 1980 addition of attorneys' fees to § 1927).

347. Recall, however, that over half the lawyers in private practice now practice in law firms. *See supra* note 190 and accompanying text (reviewing the growth of law firms).

348. *See supra* Part II.A (noting Congress's incorporation of § 1927 into the 1980 Antitrust Procedural Improvement Act just after the Supreme Court decided *Roadway Express*).

349. The question of whether § 1927 includes law firms is not the only issue related to § 1927; if Congress amends the statute, it should also consider other questions of § 1927's application. *See supra* Part II.A (highlighting the debates regarding whether to consider an attorney's ability to pay assessed sanctions and whether § 1927 includes pro se litigants).

of the modern legal landscape, the current circuit split, and the resulting confusion about the scope of § 1927's application. The purpose of § 1927 is to deter the abuse of court process and unnecessary multiplication of suits.[350] Large firms dominate the litigation landscape today, and teams of lawyers shepherd major litigation through years and sometimes decades of court process.[351] This litigation can involve several million dollars in fees and lead to a decade of dispute solely on the issue of sanctions.[352]

Depending on the interpretation of § 1927 in a particular circuit, law firms may avoid liability when they are responsible for unreasonably and vexatiously multiplying proceedings.[353] Section § 1927 cannot deter these large firms and lawyer teams from behaving unethically in their clients' interests if the statute does not authorize courts to sanction firms. Furthermore, the statute's intended deterrent effect weakens when attorneys and firms are not certain whether they may be liable for engaging in certain conduct.

Parties and their legal counsel should be able to predict who will be accountable when the court finds that one side has acted unreasonably or vexatiously. If § 1927 applies only to individual attorneys, each attorney may exercise more care when pursuing certain actions.[354] Alternatively, if § 1927 includes law firms, firms may be more reticent to expose themselves to sanctions liability and may more carefully direct their attorneys.[355] To achieve

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350. *See supra* Part II.A (describing the original impetus for enacting the statute in 1813 and its subsequent application).

351. *See supra* Part II.D (examining the modern practices of law firms in comparison to early solo practices or partnerships).

352. *See supra* note 59 and accompanying text (providing examples of sanctions amounts and highlighting the extended litigation resulting from § 1927 sanctions).

353. Law firms—like attorneys—wish to avoid liability, creating the potential for litigation pursued solely on the issue of winning or appealing sanctions awards. *See* Waldman, *supra* note 8, at 20 (noting one unresolved case, "[d]espite [ten] years of litigation on the sole issue of sanctions" and an "enormous amount of judicial resources").

354. This was the Supreme Court's argument in favor of a narrow Rule 11 construction in *Pavelic & LeFlore*. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 127 (1989) ("[T]here will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him . . . .").

355. *See id.* ("To be sure, the partnership's knowledge that it was subject to

certainty and promote § 1927's effectiveness, either Congress or the Supreme Court needs to clarify the law.

One argument in favor of retaining the more limited interpretation of § 1927 is that the current version of Rule 11 and the court's inherent power to issue sanctions negate the need for § 1927.[356] Because Rule 11 and the court's inherent power give courts authority to sanction law firms, [357] § 1927 is arguably an unnecessary addition to these existing sanctions mechanisms. The statute's scope can sometimes include the conduct sanctionable by Rule 11.[358] In those rare, narrow cases, it might seem redundant for both Rule 11 and § 1927 to authorize sanctions against a law firm because Rule 11 is already available. Furthermore, in cases where Rule 11 does not apply, inherent authority serves as a comprehensive sanctions mechanism, encompassing some of § 1927's sanctionable conduct in particularly egregious cases.[359] If courts can invoke their inherent authority to sanction firms for all actions, it might seem like there is no need to rely on § 1927.[360]

This Note contends, however, that the power to sanction law firms under Rule 11 and the court's inherent authority indicates unequivocally that § 1927 should apply to law firms. The firm-sanctioning power these other sanctioning mechanisms possess clearly demonstrates Congress's and the courts' recognition that some law firm actions compel sanctions to achieve deterrence.[361]

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sanction might induce it to increase 'internal monitoring . . . .'").

356. The circuit courts favoring a narrower construction of § 1927 appear to favor this argument. *See supra* Part III.A (describing circuit court decisions that advocate relying upon Rule 11 or the court's inherent authority to issue sanctions to law firms).

357. *See supra* Part III.B (discussing the Second and Eleventh Circuits' recognition that the 1993 version of Rule 11 and the court's inherent authority give district courts the power to sanction law firms).

358. *See supra* Parts II.A–B (elaborating on the situations and cases in which § 1927 overlaps with Rule 11).

359. *See supra* Part II.C (discussing the court's broad sanctioning power pursuant to its inherent authority).

360. *See supra* Part II.C (examining the limitations on the court's inherent authority).

361. *See supra* Parts II.B–C (noting Rule 11's amendment to include law firms and the categorical finding of courts that inherent authority extends to law firms).

Additionally, there are significant limitations on courts' use of Rule 11 and inherent authority.[362] On the one hand, § 1927 encompasses more conduct than Rule 11, but has more limited utility because it does not reach parties and its application to law firms is uncertain.[363] On the other hand, Rule 11 relates only to a very narrow, specific set of actions but currently encompasses parties, attorneys, and firms.[364] Amending § 1927 would give courts the authority to award sanctions against firms for conduct that Rule 11 does not encompass, not only in Rule 11 cases where law firms file frivolous claims that multiply the proceedings. Including law firms in § 1927's authority thus does not negate the need for Rule 11 because not all Rule 11 cases involve unreasonably multiplied proceedings.

With respect to inherent authority's limitations, courts will not use their inherent power to sanction all the conduct possible under § 1927.[365] Courts only rely upon their inherent authority in extreme circumstances, whereas § 1927 sets a lower threshold by allowing courts to sanction behavior provided the conduct in question "multiplies the proceedings."[366] Thus, amending § 1927 to include law firms would allow district courts to rely on a clearly worded statute to sanction firms in circumstances to which inherent authority may not reach.

Another argument against including law firms in § 1927's sanctioning authority is that, like the 1993 pre-amendment version of Rule 11, § 1927 does not explicitly reference law firms.[367] Several circuit courts have analogized the pre-1993 version of Rule

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362. *See supra* Parts II.B–C (describing Rule 11's narrow scope and courts' reluctance to invoke their inherent authority).

363. *See supra* Part II.B (providing an in-depth discussion of the different conduct and entities that § 1927 and Rule 11 respectively address).

364. *Compare* 28 U.S.C. § 1927 (2012) (reaching all actions that "unreasonably and vexatiously" multiply the proceedings), *with* FED. R. CIV. P. 11 (contemplating documents signed and filed with the court that bring frivolous claims).

365. *See supra* Part II.C (noting the simultaneously narrow and broad scope of the court's inherent authority).

366. *See supra* Parts II.A & II.C (distinguishing the standards for awarding sanctions pursuant to § 1927 from those used to sanction under the court's inherent authority).

367. *See supra* Part III.A (describing the circuit court opinions finding Rule 11's history analogous with § 1927 and concluding that the application of § 1927 should follow the Rule 11 precedent that *Pavelic & LeFlore* set).

11 to § 1927.[368] The Supreme Court held that the pre-1993 version of Rule 11 did not apply to law firms based on its finding that the rule's express language demonstrated a lack of congressional intent to include law firms.[369] Because § 1927 does not expressly include law firms, the Seventh Circuit found that it merited the same narrow interpretation as the previous version of Rule 11.[370]

Similarities exist between Rule 11 and § 1927,[371] but this Note proposes that the differences between the rule and the statute warrant different treatment for § 1927. Both rules seek to deter frivolous litigation by allowing courts to sanction a party's legal counsel for its unethical behavior.[372] However, § 1927 originally became law in 1813, long before Congress adopted the Federal Rules of Civil Procedure in 1938.[373] Rule 11 addresses one very specific aspect of litigation—signing court documents—while § 1927 expansively considers any action that unreasonably or vexatiously multiplies litigation proceedings.[374] Finally, the source of authority for § 1927 sanctions differs from that of Rule 11.[375] For these reasons, the analogy between the pre-1993 version of Rule 11 and § 1927 has limited value and should not be given unnecessary weight.[376]

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368. *See supra* Part III.A (noting the Sixth, Seventh, and Ninth Circuit opinions favoring the pre-1993 interpretation in *Pavelic & LeFlore*).

369. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 127 (1989) (reversing the Second Circuit judgment allowing sanctions under Rule 11 against a law firm).

370. *See* Claiborne v. Wisdom, 414 F.3d 715, 723 (7th Cir. 2005) (pointing to *Pavelic & LeFlore* as a source of strong support for its conclusion that district courts do not have authority under § 1927 to sanction law firms).

371. *See supra* Parts II.A–B (emphasizing the relationship between § 1927 and Rule 11).

372. *See supra* Parts II.A–B (describing the scope and purpose of § 1927 and Rule 11).

373. *See supra* Parts II.A–B (distinguishing § 1927's history, which predated the existence of law firms, from Rule 11's development in the early twentieth century).

374. *See supra* Parts II.A–B (noting that § 1927 applies throughout litigation to any actions that multiply the proceedings, while Rule 11 provides for sanctions when a party, attorney, or law firm file documents that lack merit).

375. *See* Talmadge et al., *supra* note 144, at 451 (noting that courts may not simply use Rule 11 justifications to apply § 1927).

376. *See* Christopher D. Wolek, *Practice and Procedure: The "Safe-Harbor" Amendment to Rule 11 . . . Any Port in a Storm?*, 47 OKLA. L. REV. 319, 350 (1994) ("Federal district court judges should strive to consider the Rule 11 sanctions

Even without drawing a parallel to Rule 11, the circuit courts favoring a narrow statutory construction of § 1927 assert that the plain language of § 1927 does not permit its application to law firms because it does not explicitly include "law firms."[377] A law firm is neither an attorney nor a "person admitted to conduct cases," clearly limiting the statute's scope according to these courts' interpretation.[378] Advocates of this approach contend that if Congress intended the statute to include law firms, it could have added the necessary language when it amended § 1927 in 1948 or in 1980.[379] Law firms had clearly become a reality by the time of those amendments.[380]

Although it is true that Congress did not consider § 1927's application to law firms in the 1980 amendment,[381] the issue is conspicuously absent only in hindsight. In 1980, Congress did not consider whether § 1927 could or should authorize district courts to sanction firms because there was virtually no record of the statute's application—to either attorneys or law firms.[382] The 1980 amendment considered two immediate issues raised by the very limited existing § 1927 case law: the intent standard required by the statute and whether to include attorneys' fees.[383] Congress's lack of consideration does not indicate that it would find § 1927 limited to individual attorneys. Now that a substantial body of

structure as mutually exclusive of sanctions under [§ 1927] or inherent authority.").

377. *See supra* Part III.A (describing the reasoning of circuit courts limiting § 1927's application to attorneys).

378. *See supra* notes 206–214 and accompanying text (noting that law firms are not "admitted to conduct cases").

379. The same argument exists for § 1927's application to pro se litigants. *See* Whitt, *supra* note 55, at 1381 ("If Congress wanted to extend the application to pro se litigants, it would have amended the language of the statute to reach 'other persons conducting cases in any court of the United States' when it removed 'proctor.'").

380. *See supra* Part II.D (outlining the development of law firms in the United States).

381. *See supra* Parts II.A & II.D (discussing § 1927's most recent legislative history and the coextensive existence of law firms).

382. *See supra* Part II.A (reviewing the sparse § 1927 jurisprudence before 1980).

383. *See supra* Part II.A (noting the hearings regarding the proposed amendment).

§ 1927 jurisprudence exists, Congress should consider the scope of § 1927's application.

This Note argues that Congress should amend § 1927 to explicitly include law firms to remove the prevailing confusion regarding the statute's scope. Even with the current language, however, the statute's purpose allows for the implicit leap that many courts have made from "attorney"[384] to "counsel"[385] to "law firm."[386] Courts frequently use these terms interchangeably.[387] Given the partnership liability's presence in the nineteenth century,[388] there may also be historical support for the notion that Congress did not intend to limit liability under § 1927 to a single attorney.[389]

Even if courts favoring a narrow interpretation agree that § 1927 sanctions apply to multiple individual attorneys working on a case, law firms are comprised of attorneys and non-attorneys,[390] arguably making them ineligible. Attorneys are, however, responsible for the work of non-attorneys,[391] and law firms include the costs associated with non-attorney work in their assessment of

384. 28 U.S.C. § 1927 (2012).

385. *See* Field v. United States, 34 U.S. 182, 182–203 (1834) (referring to the party's attorney as "counsel"); Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1915) (finding that "counsel multiplied the proceedings in the case" involving a patent dispute for collapsible stroller).

386. *See supra* Part III.B (describing circuit court decisions that employed these terms as if their meanings were synonymous).

387. *See supra* Part III.B (demonstrating the blending of these three terms in circuit court cases over the course of the past twenty years).

388. *See supra* Part II.D (noting the predominance of solo practices and partnerships in the first century of § 1927's enactment and the liability shared by partners).

389. Even with the 1948 amendment of § 1927, which inserted the word "personally" into the statute, Congress appears to be attempting to prevent sanctioned attorneys from passing the costs of sanctions on to their clients, rather than precluding attorneys from sharing costs within a partnership or firm. *See supra* note 193 and accompanying text (suggesting that *Motion Picture Patents* used the word "personally" to distinguish attorney and client liability).

390. *See* LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 902 (D.C. Cir. 1998) (noting the "work by six partners, seven associates, two legal assistants, and four other staffers" that went into the firm's assessment of its unreasonably incurred expenses).

391. *See* MODEL RULES OF PROF'L CONDUCT r. 5.3 (AM. BAR ASS'N, Discussion Draft 1983) (providing that a lawyer should "make reasonable efforts to ensure" that the non-attorney's conduct "is compatible with the professional obligations of the lawyer").

fees.[392] No single attorney should be liable for the costs incurred by the opposing party's team of attorneys and assistants[393] if he or she litigated the case as an associate authorized by a firm or as a member of a legal team.

If § 1927 applies to law firms, one concern is that parties will seek sanctions against law firms because firms have deeper pockets than individual attorneys and will be able to pay the full amount of attorney's fees and costs.[394] This outcome may be fair where the firm directly authorized the actions of its attorneys. The deterrent effect of sanctioning a firm could arguably be negligible in the context of large firms, however, which may have branches across multiple states or countries and hundreds or even thousands of practicing attorneys.[395] Yet, if courts sanction law firms under § 1927 for frivolously pursued litigation, perhaps the issuance of sanctions will induce these law firms to manage more carefully the actions of their legal teams and associates. In addition to sanctioning firms, courts could also maintain the statute's individual deterrent effect by continuing to sanction individual attorneys when the attorneys are identifiable.[396]

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392. *See LaPrade*, 146 F.3d at 902 (including the work done by two legal assistants and four other law firm staffers in calculations for a sanctions award).

393. The amounts of sanctions can be significant, ranging from tens of thousands dollars to as much as several million dollars. *See, e.g*, BDT Prods., Inc. v. Lexmark Int'l, Inc., 602 F.3d 742, 743 (6th Cir. 2010) (reversing a lower court judgment for over five million dollars); *LaPrade*, 146 F.3d at 900 (assessing sanctions of almost $75,000 against a law firm).

394. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 126–27 (1989) (considering the policy implications of applying the pre-1993 version of Rule 11 to law firms). Ultimately, the Court decided that allowing law firm liability would not serve the rule's deterrent effect on the individual. *See id.* at 127 (noting that "there will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will impose its sanction entirely upon him"). The Court conceded that extending Rule 11's application to law firms would "better guarantee reimbursement of the innocent party for expenses caused by the Rule 11 violation, since the partnership will normally have more funds than the individual signing attorney." *Id.* at 126.

395. *See* FRIEDMAN, *supra* note 181, at 539 (describing the exponential growth of American law firms in the twentieth century).

396. *See, e.g.*, Avirgan v. Hull, 932 F.2d 1572, 1582 (11th Cir. 1991) (noting the sanctions issued against the attorney and the law firm). One concern is that amending the statute to include law firms might create more uncertainty about whether courts should sanction the offending attorney, the firm, or both. *See Pavelic & LeFlore*, 493 U.S. at 127 ("[T]here will be greater economic deterrence upon the signing attorney, who will know for certain that the district court will

Alternatively, if § 1927 does not include law firms, parties may be unable to get redress in cases where the law firm, and not one individual lawyer, is the bad actor.[397] This is also true when sanctions make one attorney liable for the excess costs and attorneys' fees of an opposing party's law firm and the attorney is unable to satisfy the amount.[398] Although courts have stated that the purpose of § 1927 is not compensation,[399] part of the statute's deterrent intent is redressing the costs generated by the opposing party as a result of the offending counsel's unreasonable and vexatious behavior. Thus, allowing law firms to be jointly and severally liable serves the purpose of § 1927 by increasing the likelihood that the offending party pays the full amount of the sanctions.

VI. Conclusion

Examining the sanctions mechanisms available to courts for deterring the unethical behavior of attorneys and law firms, as well as the statutory development, case law, and historical context of § 1927, this Note contends that § 1927 should extend to law firms. Although § 1927 did not originally contemplate law firms, its purpose—to deter unnecessary litigation—supports courts using the statute to sanction law firms engaging in conduct that vexatiously and unreasonably multiplies litigation proceedings. Historically, courts invoked § 1927 very rarely, but in the context of the modern legal landscape and the dramatic increase in reliance on § 1927 sanctions, courts should also sanction law firms—which can outspend and out-resource solo practitioners—under the statute.

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impose its sanctions entirely upon him, and not divert part of it to a partnership of which he may not (if he is a only an associate) be a member . . . .").

397. *See Pavelic & LeFlore*, 493 U.S. at 126–27 (discussing whether Rule 11, if applied to law firms, would achieve its intended purpose).

398. *See* Endo, *supra* note 9, at 293–95 (noting that some circuit courts require, and some allow, district courts to consider an attorney's ability to pay when assessing § 1927 sanctions in cases where the costs and attorneys' fees ranged from $5,000 to more than $360,000).

399. *See id.* at 300 ("Judge Easterbrook . . . described § 1927 as a sanction rule, not a compensation device.").

Judicial construction in favor of applying § 1927 to law firms is useful, but this Note advocates a statutory amendment that definitively resolves the question by including the words "law firm." Although such an amendment may seem initially distasteful to law firms, it will encourage better enforcement of ethical behavior and provide more certainty in terms of liability for conduct deemed unethical. In cases where one law firm seeks sanctions against another and wants compensation for its accumulated attorneys' fees, this result is certainly equitable. This Note's proposed amendment to § 1927 will resolve the current split among the federal circuit courts regarding whether district courts have authority under § 1927 to sanction law firms, allowing courts to focus on the merits of cases and providing them, at their discretion, with statutory means to hold law firms, as well as attorneys, accountable for conduct that vexatiously and unreasonably multiplies litigation proceedings.