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

2. A related but separate issue is the filing of frivolous *lawsuits*, which needlessly inflict the costs of responding even if a case is eventually dismissed. Out of a perceived need to reduce the number of frivolous lawsuits, the U.S. House of Representatives passed the Lawsuit Abuse Reduction Act of 2015, which would *require* federal district courts to levy sanctions that are currently discretionary under FRCP 11(c) and would remove the 21-day safe harbor. According to GOVTRACK.US, the bill only had an eight percent chance of being enacted, and it expired with the new Congress after failing to pass the Senate.

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

In full, 28 U.S.C. § 1927, entitled "Counsel's liability for excessive costs," states that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[7] While courts have found a variety of behaviors to justify sanctions for unreasonably and vexatiously multiplying the proceedings in a case, courts have disagreed vigorously on the limits of the sanctioning power. The grounds required by each sanctioning authority may overlap in important ways, such as the "bad faith" element required by some courts for sanctions under *e,rndeteon a>3i”2ss cf40.3(em)15.6(en)-1(t)4.31.3( )]TJ 0.046*
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the circuit split surrounding law firm sanctions under § 1927 should be easily resolved. Based on the recent history of district court sanctioning powers, the statute's relationship with other sanctioning powers, and sound statutory interpretation, the federal circuits should follow the Ninth Circuit's recent decision in *Kaass Law v. Wells Fargo Bank* and hold that law firm sanctions are inappropriate under § 1927.[11]

I. BACKGROUND

A. *Notable Examples of § 1927 Sanctions*

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

When an attorney violates Rule 11 by wrongly certifying the contents of a filing, the course of conduct attached to that filing may justify § 1927 sanctions. In *Shales v. General Chauffeurs*, the court upheld § 1927 sanctions of $80,000 against an individual attorney.[12] There, the losers of a union election sued the winners under a number of theories based on "fanciful" allegations, including intentional infliction of emotional distress on the basis of a contrived threat of being fired and an asthma attack—by someone who had previously suffered asthma attacks for twenty-five years.[13] During discovery, it became clear that many of the claims were not based in fact, and the plaintiffs ignored letters by the defense demanding that those claims be dropped.[14] Once

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Carpenter did not know Sullivan-Moore.[28]

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

A pattern of indifference to the court's authority may also lead to § 1927 law firm sanctions in addition to Rule 11 sanctions. In *Gurman v. Metro Housing and Redevelopment Authority*, the court awarded sanctions of $15,000 under § 1927 and $15,000 under Rule 11 against the entire law firm representing the plaintiffs.[47] There, attorneys in the firm brought three separate "kitchen-sink complaints," in which it asserted hundreds of frivolous claims against ten defendants.[48] The first amended complaint contained 938 separate claims, and the third kitchen-sink complaint was filed

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

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

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

B. History of 28 U.S.C. § 1927

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

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

54. *Id.*

55. *Id.* at 903.

56. *Id.* at 904.

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

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

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

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

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

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

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

61. *Roadway Express*, 447 U.S. at 759 n.6.
62. *Id.* at 760 n.7.
63. *Id.* at 760.
64. *Id.* at 761.
65. *Id.* at 762.
66. *Roadway Express*, 447 U.S. at 760.
67. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154,

67.

an attorney's ability to pay should factor into a court's determination of the appropriate amount of sanctions under § 1927.[70]

Despite the long history and seemingly straightforward wording of the statute, the federal circuits currently diverge on the question of whether law firms, in addition to individual attorneys, may be sanctioned under § 1927 for unreasonably and vexatiously multiplying the proceedings in a case. Some sources take it for granted that § 1927 sanctions against law firms are impermissible, despite the existence of the circuit split.[71] In 2010, Douglas J.

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

The Third Circuit has found that attempts to avoid an agreed-upon arbitration may justify § 1927 law firm sanctions. One of the earliest cases cited in recent § 1927 decisions discussing the circuit split is *Baker Industries v. Cerberus*, in which the Third Circuit affirmed a lowe

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2. Circuits Rejecting Law Firm Sanctions Under § 1927

The Seventh Circuit has definitively rejected the possibility of § 1927 law firm sanctions, even where a law firm was on notice of its attorney's past misconduct. The Seventh Circuit reversed a trial court order of § 1927 sanctions against a law firm in *Claiborne v. Wisdom*, an influential case in the history of the circuit split.[92] In support of its decision, the court compared the language of § 1927 with that of the pre-1993 version of Rule 11.[93] Prior to the 1993 Amendment, Rule 11 empowered federal courts to impose sanctions on "the person who signed" an offending document.[94] The U.S. Supreme Court eventually decided that such language could not authorize sanctions on a law firm and applied only to the individual who signed the offending document.[95] The *Claiborne* court saw an identical situation in interpreting § 1927 and held that the statutory language could not be stretched to include law firms as persons.[96] Furthermore, as law firms cannot be admitted to practice before any tribunal, the § 1927 sanctions against the firm were reversed, despite the close connections between the attorney's actions and those of the firm and the fact that the firm had been on notice of the attorney's subpar performance in previous cases.[97] In fact, a court had previously directed the firm's senior partner to supervise the offending attorney.[98] Although the court recognizEMC /S63/Sp5(r)2J E1orn -0 0

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The Sixth Circuit similarly rejected the prospect of § 1927 law firm sanctions, refusing to stretch the definition of "person" to include law firms. In *BDT Products v. Lexmark*, the Sixth Circuit reversed a district court order of § 1927 law firm sanctions and formalized previous Sixth Circuit dicta that §

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

B. Law Firm Sanctions Under Rule 11

To better distinguish what § 1927 authorizes from what it does not, it is essential to look to the alternative means of sanctions provided by the Federal Rules of Civil Procedure and a court's inherent powers. First, the primary sanctioning authority for individual filings with the court is Rule 11.[115] Under Rule 11, every filing with the court must be signed by at least one attorney or the party if unrepresented, certifying that the representation made to the court is, among other guarantees, "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needles

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

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

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

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and 37 as a source of sanctions for e-discovery misconduct.[137] Given this possibility of overlap, it appears that § 1927 could potentially be used as a catchall sanctioning authority once a pattern of abusive behavior becomes apparent.[138] As a result, substantial monetary sanctions under § 1927—well in excess of those available under Rule 11 for any individual filing—may come without warning and without the possibility of RulJ -0.001 TcAy itc114.51 Tc 0.0l

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are compensatory, not punitive.[144] Consequently, while a court may have discretion in calculating the amount of "excess costs, expenses, and attorneys' fees reasonably incurred" due to attorney misconduct,[145] that amount will hinge on the actual costs of litigation.

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

III. ANALYSIS

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

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

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

144. *Shales*, 557 F.3d at 749. *But see* Josselyn, *supra* note

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firms were not as promi

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

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

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

On the other hand, when an attorney associated with a smaller firm doggedly pursues a course of conduct that runs afoul of § 1927, the entire firm may have contributed to multiplying the proceedings, potentially warranting sanctions on the entire firm. In those circumstances, it may be difficult to

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However, these sorts of arguments should push a requesting party to invoke a sanctioning authority other than § 1927. Justice Scalia's majority opinion in *Pavelic & LeFlore* is particularly instructive on this point.[174] In rejecting law firm sanctions under the pre-1993 "person who signed" language of Rule 11, the Court reasoned that the individualized language of the rule served the dual purpose of *sanction*—not reimbursement—and of reminding

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