THE PROPRIETY OF CONSIDERING AN ATTORNEY'S ABILITY TO PAY UNDER § 1927

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ABSTRACT

Since Congress amended 28 U.S.C. § 1927 to include attorney's fees as part of the sanction that could be imposed on attorneys who unreasonably multiply proceedings, the use of § 1927 has significantly risen. Over the years, a split has emerged within the federal appellate courts as to whether a district court may consider an attorney's financial status when issuing monetary sanctions under § 1927. The circuit split creates substantial inconsistencies among the five circuits that have addressed the issue. Likewise, the split might also create uncertainty in jurisdictions where courts have not yet determined the extent of the penalties that a district court may impose on an attorney pursuant to § 1927.

This Article analyzes the five federal appellate cases that have addressed the issue, determining that § 1927's plain language, purpose, and legislative history all support permitting district courts to consider an attorney's ability to pay when calculating a sanction award. This Article then turns to the policy ramifications and concludes that these interests—which include the possibility of interference with the federal Bankruptcy Code, a potential chilling effect on zealous advocacy, and the judiciary's role in policing bad lawyers—generally favor permitting district courts to consider an attorney's ability to pay. However, this Article also cautions that the judiciary should not ignore its role in policing bad attorneys and their misconduct. Rather, this Article argues that the use of referrals to state bar associations is a better solution compared to using the blunt instrument of direct monetary sanctions.

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I. INTRODUCTION

Until 1980, sanctions imposed pursuant to 28 U.S.C. § 1927 were limited to "excess costs and expenses,[1] which only rarely involved

1. *Compare* 28 U.S.C. § 1927 (1976) ("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 excess costs."), *with* 28 U.S.C. § 1927 (Supp. IV 1976) ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Since the 1980 amendment, 28 U.S.C. § 1927 has remained unchanged. *See* 28 U.S.C. § 1927 (2006).

significant sums."[2] As a result, these sanctions were seldom the subject of litigation.[3] Illustrating this point, in the 150 years following its enactment in 1813, § 1927 was invoked in only seven reported cases.[4] Since 1980, when Congress amended the section by authorizing the inclusion of attorney's fees as part of the sanction, much greater use has been made of § 1927.[5] In the past several years, a split has arisen within the federal appellate courts as to whether a district court may consider an attorney's financial status when issuing monetary sanctions under § 1927.[6]

In *Shales v. General Chauffeurs*, the Seventh Circuit held that district courts may not consider the sanctioned attorney's ability to pay.[7] The Seventh Circuit stands alone in its affirmative prohibition of a district court's discretion to consider an attorney's financial status in its calculation of § 1927 sanctions.[8]

Four other federal appellate courts have held that district courts may, but are not always required to, consider an attorney's ability to pay when determining an appropriate award under § 1927. In 2008, the Tenth Circuit rejected an appellant's argument that the district court was required to consider an attorney's ability to pay, and the court used language that arguably indicated its disapproval of using an attorney's ability to pay as a factor.[9] In *Haynes v. City of San Francisco*, the Ninth Circuit answered the

2. Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986).

3. *Id.*

4. *See, e.g.*, Weade v. Trailways of New England, Inc., 325 F.2d 1000, 1001 (D.C. Cir. 1963); Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 734 & n.3 (3d Cir. 1962), *overruled by* Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985); Bardin v. Mondon, 298 F.2d 235, 238 (2d Cir. 1961); Weiss v. United States, 227 F.2d 72, 73 (2d Cir. 1955); Garriga, Jr. v. Tribunal Superior, 88 P.R. Dec. 245, 253 & n.12 (P.R. 1963); *see also* Gregory P. Joseph, *Rule 11 is Only the Beginning*, A.B.A. J., May 1, 1988, at 62.

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

6. *Compare, e.g.*, Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009) ("[A] lawyer's ability to pay does not affect the appropriate award for a violation of § 1927."), *with* Haynes v. City of S.F., 688 F.3d 984, 986 (9th Cir. 2012) ("We now hold that a district court may reduce a § 1927 sanctions award in light of an attorney's inability to pay.").

7. *Shales*, 557 F.3d at 749.

8. *See id.*

9. *See* Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1205–06 (10th Cir. 2008) ("The statute fits much more comfortably with a victim-centered approach, and we would be reluctant to supply a parsimony provision where Congress has not done so." (citations omitted)).

complementary question, holding that district courts may consider the financial status of the sanctioned attorney and explicitly rejecting the Seventh Circuit's reasoning to the contrary.[10] In a similar vein, in 1986, the Second Circuit approved, in dicta, a district court's consideration of an attorney's ability to pay in determining an appropriate award under § 1927.[11] While the Ninth Circuit affirmatively disclaimed that it was limiting awards to that which the sanctioned attorney could pay,[12] in 2010, the First Circuit described its view of the outer limits of a district court's discretion.[13] The First Circuit held that a district court abused its discretion by awarding a sanction of nearly $65,000 pursuant to § 1927, reasoning that the award was designed to deter and punish the sanctioned attorney's misconduct rather than to compensate for delay; the original figure would "likely threaten financial disaster" for the attorney, thereby exceeding the minimum sum necessary for deterrence.[14] Interestingly, although the First Circuit's analysis seems furthest from the holding in *Shales*, it is only with the Ninth Circuit's explicit rejection[15] that the circuit split on this issue gained national attention.[16]

The circuit split creates substantial inconsistencies across the five circuits discussed above and might create uncertainty in jurisdictions where courts have not yet determined the extent of the penalties that a district court may impose on an attorney pursuant to § 1927.[17] As one

10. *Haynes*, 688 F.3d at 989.

11. *See* Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) ("[I]t lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay." (citations omitted)).

12. *See Haynes*, 688 F.3d at 988 ("We do not suggest by this holding that when the district court decides to reduce an amount on account of a sanctioned attorney's inability to pay, it must reduce the amount to that which it determines that the attorney is capable of satisfying. Just as it is within the discretion of the district court to decide whether to reduce the amount at all, the amount to which the sanction will be reduced is equally within the court's discretion.").

13. *See* Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 247–50 (1st Cir. 2010).

14. *Id.* at 248–49 (reducing a § 1927 sanction amount of $64,936 to $5,000).

15. *See Haynes*, 688 F.3d at 989.

16. *See, e.g.*, Michelle Olsen, *Circuit Split Watch: A Divide Over Sanctions Against Lawyers Who Can't Afford to Pay*, NAT'L L.J. (Aug. 29, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202569449785.

17. *Cf.* Norelus v. Denny's, Inc., 628 F.3d 1270, 1279 (11th Cir. 2010) (stating that the district court rejected the magistrate judge's decision not to impose sanctions on an attorney because the legal conclusions were based on a flawed understanding of

commentator noted, "[w]hile costs will never grab the headlines in the way that affirmative action, same-sex marriage, and other cases in the Supreme Court's current inbox will, they have gotten the Court's attention as a day-to-day part of litigation that affects many people."[18] Accordingly, it is reasonable to project that, if appealed, the Supreme Court might grant certiorari to *Haynes* or a similar case.

This Article analyzes the five federal appellate cases referenced above, determining that § 1927's plain language, purpose, and legislative history all support permitting district courts to consider an attorney's ability to pay when calculating a sanction award. This Article then turns to the policy ramifications and concludes that these interests, which include the possibility of interference with the federal Bankruptcy Code, the potential chilling effect on zealous advocacy, and the judiciary's role in policing bad lawyers, generally favor permitting district courts to consider an attorney's ability to pay. However, this Article also cautions that the judiciary should not ignore its role in policing bad attorneys, which was the overriding concern in *Shales*. Rather, this Article argues that the use of referrals to state bar associations is a better solution than using the blunt instrument of direct monetary sanctions to drive underperforming attorneys out of business.

II. BACKGROUND

A. *Authority to Impose Monetary Sanctions on Attorneys*

The authority for federal courts to impose monetary sanctions on attorneys for bad-faith misconduct stems from several sources. Based on the need to manage their courtrooms and dockets, courts have the inherent power to sanction bad-faith attorney misconduct.[19] There also are statutory

§ 1927 standards).

18. Olsen, *supra* note 16; *see also* Taniguchi v. Kan Pac. Saipan, Ltd., No. 10-1472, slip op. at 5–15 (U.S. May 21, 2012) (deciding in a recent opinion whether the costs that may be awarded to prevailing parties under 28 U.S.C. § 1920 include the cost of translating documents).

19. *See, e.g.*, Chambers v. Nasco, Inc., 501 U.S. 32, 44 (1991); Shepherd v. Am. Broad. Cos., Inc., 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("As old as the judiciary itself, the inherent power enables courts to protect their institutional integrity and to guard against abuses of the judicial process with contempt citations, fines, awards of attorneys' fees, and such other orders and sanctions as they find necessary, including even dismissals and default judgments.").

bases for this power of the court.[20] For example, a district court may impose a fine for contempt.[21] It also may sanction an attorney for failure to follow a pretrial order[22] or for baseless discovery requests.[23] The two provisions that are of particular relevance for this article are 28 U.S.C. § 1927, of course, and Rule 11 of the Federal Rules of Civil Procedure, which also focuses on prohibiting attorneys from filing baseless or improperly motivated papers.[24]

Section 1927 currently provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[25]

Rule 11 requires that every written submission must be signed by an attorney in civil cases.[26] The rule further provides that by submitting the signed paper to the court, the attorney certifies that the document is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, and that there is a factual and legal basis for the contentions.[27] The court may impose sanctions for violations,[28] but such sanctions are "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[29]

20. *See, e.g.*, 18 U.S.C. § 401 (2006) (granting the court the power to fine or imprison for contempt of court); 28 U.S.C. § 1927 (2006) (allowing costs to be assessed for unreasonably increasing costs of litigation).

21. *See* 18 U.S.C. § 401.

22. FED. R. CIV. P. 16(f).

23. *See id.* R. 26(g).

24. *Id.* R. 11.

25. 28 U.S.C. § 1927; *see also infra* Part III.B (detailing the elements and legislative history of § 1927).

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

27. *Id.* R. 11(b).

28. *Id.* R. 11(c).

29. *Id.* R. 11(c)(4).

B. *Cases Discussing Whether a District Court Can or Should Consider an Attorney's Ability to Pay When Calculating § 1927 Sanctions*

Five federal appellate courts have directly addressed whether a district court may consider an attorney's ability to pay when calculating a sanctions award pursuant to § 1927. The relevant cases are described below, starting with the earliest and continuing through to the Ninth Circuit's recent decision in *Haynes v. City of San Francisco*.[30]

1. Oliveri v. Thompson

In *Oliveri*, an attorney appealed a § 1927 sanction of $5,000 in attorney's fees for instituting and maintaining a civil rights action for which the district court found no factual basis.[31] The Second Circuit reversed the district court as to the underlying claims, and thus no sanctions could be imposed.[32] The court, however, observed that there had been a marked increase in the use of sanctions against attorneys and determined that it would address the important issues presented by the case.[33]

Taking this opportunity, the Second Circuit identified the underlying purpose of § 1927 sanctions as punishing improper conduct with the aim of "encouraging future compliance and deterring further violations."[34] Based on this understanding, the Second Circuit stated that a district court may take into account the financial status of a sanctioned attorney in its determination of an award under § 1927.[35] Yet, the Second Circuit acknowledged that its statement was dicta because it had already determined that no sanction could be imposed in the case.[36]

In *Oliveri*, the Second Circuit cited to four cases in support of its proposition that a district court may take into account the financial status of a sanctioned attorney in its determination of an award under § 1927.[37]

30. Haynes v. City of S.F., 688 F.3d 984 (9th Cir. 2012).

31. Oliveri v. Thompson, 803 F.2d 1265, 1267–68 (2d Cir. 1986).

32. *Id.* at 1276–81.

33. *Id.* at 1268.

34. *Id.* at 1281.

35. *See id.*

36. *See id.*

37. *See id.* (citing Munson v. Friske, 754 F.2d 683, 697 (7th Cir. 1985); Arnold v. Burger King Corp., 719 F.2d 63, 68 (4th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984); Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 916–17 (11th Cir. 1982); Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028 (2d Cir. 1979)).

The cited decisions declared fee awards to be an equitable matter, thereby permitting the district court to consider the relative wealth of the parties.[38] All of the cited cases, however, involved fee-shifting under civil rights statutes.[39] In *Roadway Express, Inc. v. Piper*, the U.S. Supreme Court rejected the appellant's suggestion that the court was free under § 1927 to define costs according to other statutes—specifically, civil rights statutes that allow the award of attorney's fees as part of the costs of litigation—involved in the litigation.[40] Accordingly, it is unclear why the Second Circuit cited exclusively to fee-shifting civil rights cases in support of its comment that district courts may consider the financial status of sanctioned attorneys when determining awards under § 1927.[41]

2. Hamilton v. Boise Cascade Express

In *Hamilton*, the Tenth Circuit affirmed a § 1927 sanction of approximately $8,000 that was imposed on an attorney who filed a meritless motion to enforce a settlement, misstated the opposing counsel's position without a reasonable basis, and created excess costs and attorney's fees totaling $7,974.20.[42] The sanctioned attorney appealed the award, arguing that the district court abused its discretion by failing to consider his ability to pay, among other factors, when setting the sanction amount.[43]

In rejecting the attorney's argument, the Tenth Circuit began with the observation that Rule 11 expressly provides that its sanctions are "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[44] The Tenth Circuit contrasted this with the

38. *Munson*, 754 F.2d at 697; *Arnold*, 719 F.2d at 68; *Durrett*, 678 F.2d at 917; *Faraci*, 607 F.2d at 1028.

39. *Munson*, 754 F.2d at 687 (involving fees sought pursuant to 42 U.S.C. §§ 1983 and 1985(3) for an alleged violation of the plaintiff's First and Fourteenth Amendment rights); *Arnold*, 719 F.2d at 65 (involving fee-shifting under Title VII of the Civil Rights Act of 1964); *Durrett*, 678 F.2d at 913 (involving fee-shifting under Title VII of the Civil Rights Act of 1964); *Faraci*, 607 F.2d at 1026 (involving fee-shifting under Title VII of the Civil Rights Act of 1964).

40. Roadway Express, Inc. v. Piper, 447 U.S. 752, 758–63 (1980).

41. *See Oliveri*, 803 F.2d 1265 (naming *Munson*, 754 F.2d at 697, *Arnold* 719 F.2d at 68, *Durrett*, 678 F.2d at 916–17, and *Faraci*, 607 F.2d at 1028, as cases in support of its position on the ability to pay).

42. Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1199 (10th Cir. 2008).

43. *Id.* at 1202.

44. *Id.* at 1205 (quoting FED. R. CIV. P. 11(c)(4)) (internal quotation marks omitted).

language of § 1927, which permits a court to require an attorney to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of [vexatiously multiplicative] conduct."[45] The court determined that the statute "indicates a purpose to compensate victims of abusive litigation practices, not to deter and punish offenders."[46] The court then found that "[t]he statute fits much more comfortably with a victim-centered approach" and that it "would be reluctant to supply a parsimony provision where Congress has not done so."[47]

The Tenth Circuit, who recognized that the congressional record of the 1980 amendment that broadened the previously awardable "excess costs" to include "excess costs, expenses, and attorneys' fees," stated that "the amendment was made, in part at least, to deter unnecessary delays in litigation."[48] However, the court noted that the original law dates back to 1813, and there is nothing indicating whether the enacting "Congress intended it as a compensatory or a deterrence mechanism."[49]

The Tenth Circuit then reasoned that "it would make no difference . . . if Congress' purpose was [a] deterrent one" because permitting the recovery of all excess costs, expenses, and attorney's fees would have at least as much deterrent effect as limiting the amount awardable under § 1927 based on the lawyer's financial status.[50] The court further observed that, unlike punishment, deterrence does not ordinarily call for the application of the parsimony principle.[51]

The Tenth Circuit's ultimate holding was that the district court was not required to "consider such factors as the minimum amount that will serve as a deterrent and the attorney's ability to pay" when determining an appropriate award under § 1927.[52] Although the inflection of the opinion

45. *Id.* (alteration in original) (quoting 28 U.S.C. § 1927 (2006)) (internal quotation marks omitted).

46. *Id.*

47. *Id.* (citations omitted). In applying the "parsimony principle," courts endeavor to craft sanctions that are sufficient, but not greater than necessary, to deter and punish the offender. *Id.*

48. *Id.* at 1206 (quoting H.R. Rep. No. 96-1234, at 8 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 2781, 2782) (internal quotation marks omitted).

49. *Id.* (citing Act of July 22, 1813, ch. 14, § 3, 3 Stat. 19, 21).

50. *Id.*

51. *Id.*

52. *Id.* (citing White v. Gen. Motors Corp., 908 F.2d 675, 684–85 (10th Cir. 1990)).

seemed to disapprove of taking an attorney's financial status into account, the Tenth Circuit did not explicitly prohibit district courts from doing so.[53]

3. Shales v. General Chauffeurs

In *Shales*, the Seventh Circuit rejected the appeal of an attorney who was sanctioned $80,000 in excess costs and attorney's fees pursuant to § 1927 after it became evident that the complaint in the underlying case lacked a basis in fact.[54] In its order, the Seventh Circuit went beyond the rule set forth in *Hamilton*,[55] holding that "a lawyer's ability to pay does not affect the appropriate award for a violation of § 1927."[56]

Like the Tenth Circuit, the Seventh Circuit started its analysis by distinguishing an award under § 1927 from an award under Rule 11, noting that § 1927 is a "real fee-shifting law."[57] The court also noted that fee-shifting under § 1927 is dependent upon a finding of bad faith and thus a violation of § 1927 is susceptible to characterization as a form of intentional tort.[58] Under general tort law principles, "[d]amages depend on the victim's loss, not the wrongdoer's resources."[59] The Seventh Circuit analogized the behavior of the attorney in *Shales* to that of a doctor who has committed malpractice.[60] The court then noted parenthetically that an award under § 1927 is "compensatory, not punitive."[61]

The Seventh Circuit observed that if a lawyer cannot meet his or her financial obligations, the obligations might be "written down in bankruptcy."[62] The court further explained that if a district court were to reduce the liability for sanctions under § 1927 based on the lawyer's financial status, the only effect "would be to interfere with the Bankruptcy

53. *See id.*

54. Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 748 (7th Cir. 2009).

55. *See Hamilton*, 519 F.3d at 1206 (holding that the application of § 1927 "does not ordinarily call for a parsimony principle" based on the legislative intent of the provision).

56. *Shales*, 557 F.3d at 749.

57. *Id.* at 748–49.

58. *Id.* at 749.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Code."[63]

The Seventh Circuit concluded by identifying four additional benefits to its rule.[64] First, the court asserted that its rule avoids the expense of case-by-case inquiries into the lawyer's ability to pay, which might be complex and duplicate bankruptcy proceedings.[65] For example, in *Shales*, there was concern that the sanctioned lawyer had fraudulently conveyed assets to his wife.[66] Second, the rule discourages sanctioned lawyers from dissembling about their financial status.[67] Third, it ensures similar treatment of identically situated litigants by reducing the discretion of the district court.[68] Lastly, the rule achieves deterrence by encouraging unsuccessful lawyers to turn to other endeavors in which they will do less harm.[69]

Several earlier Seventh Circuit cases assumed that the district court might consider the attorney's financial status in its determination of a § 1927 sanction.[70] And, Judge Easterbrook (who also penned *Shales*)[71] previously described § 1927 as a sanction rule, not a compensation device.[72] The *Shales* court sidesteps these arguably contrary precedents by asserting that the parties and panels in the other cases were treating Rule 11 and § 1927 together.[73]

4. Lamboy–Ortiz v. Ortiz–Vélez

In *Lamboy–Ortiz*, the First Circuit reviewed the district court's imposition of almost $65,000 in § 1927 sanctions imposed on an attorney for his "vexatious conduct and manifest disrespect of the district court."[74] The First Circuit began its analysis of the amount by looking to the purpose of the statute and examining the legislative history and out-of-circuit

63. *Id.* at 749–50.
64. *Id.* at 750.
65. *Id.*
66. *Id.* at 748.
67. *Id.*
68. *Id.*
69. *Id.*
70. *See, e.g.*, Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of the Fox Masonry & Expert Restorations, 140 F.3d 661, 667 (7th Cir. 1998); Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1496 (7th Cir. 1989).
71. *Shales*, 557 F.3d at 747.
72. Samuels v. Wilder, 906 F.2d 272, 273, 276 (7th Cir. 1990).
73. *Shales*, 557 F.3d at 749.
74. Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 231 (1st Cir. 2010).

precedent, and ultimately concluded that the statute has both a deterrent and a compensatory purpose.[75] In light of this determination, the First Circuit observed that district courts were not required to limit sanctions under § 1927 to the "minimum level necessary to deter repeated or similar conduct" if the sanction was designed to compensate "a party for injury caused by an adversary's dilatory tactics."[76]

However, the First Circuit also cautioned against imposing compensatory sanctions that might dampen the attorney's zealous representation of his or her client.[77] In accounting for the specific facts of the case, the First Circuit found that the district court's award of sanctions was intended to deter and punish the attorney's misconduct rather than compensate for the delay, noting that the district court did not identify the actual excess costs or attorney's fees attributable to the misconduct.[78] Thus, given the deterrence focus of the sanctions, the First Circuit borrowed principles from Rule 11 and reduced the sanction to $5,000, in part based on the attorney's financial status.[79]

5. Haynes v. City of San Francisco

In *Haynes*, a plaintiff's attorney appealed § 1927 sanctions of more than $360,000, which the district court imposed after determining that the claims in the underlying case were clearly frivolous and filed in bad faith.[80] The amount was set as the excess costs and fees incurred by the defendants attributable to the sanctioned attorney's misconduct.[81] The district court declined to consider the sanctioned attorney's assertion that "he could not possibly pay such an award" because "he had no assets and his net income for the several preceding years was less than $20,000 per year."[82]

The Ninth Circuit held that a district court may reduce a § 1927 sanctions award in light of an attorney's inability to pay.[83] The Ninth Circuit remanded the matter to the district court because the Ninth Circuit

75. *Id.* at 247.
76. *Id.* at 247–48 (footnote omitted).
77. *Id.* at 248.
78. *Id.*
79. *Id.* at 248–49 & n.3.
80. Haynes v. City of S.F., 688 F.3d 984, 986 (9th Cir. 2012).
81. *Id.*
82. *Id.*
83. *Id.* at 987.

interpreted the district court's order as implying a belief that it could not consider an attorney's financial status based on *Shales*.[84]

The Ninth Circuit based its holding on its interpretation of the plain language of § 1927.[85] The court noted that § 1927 provides that "[a]ny attorney . . . 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."[86] The court explained that the use of the word "may," as opposed to "shall" or "must," indicates that district courts have "substantial leeway . . . when imposing sanctions."[87] The Ninth Circuit further reasoned that the plain language of the statute sets an upper limit on the amount of a sanction under § 1927—the total *excess* costs, expenses and fees incurred by the opposing party—but does not preclude a district court from either imposing a lesser award or taking into account an attorney's ability to pay.[88]

The Ninth Circuit also explained that its rule was consistent with the underlying purposes of § 1927 because "imposing sanctions in an amount many times greater than the attorney will ever be able to pay may in some instances represent only a futile gesture that does little either to compensate victims or to deter future violators."[89] However, the Ninth Circuit clarified that its rule does not require a district court to reduce a § 1927 award to an amount that a sanctioned attorney is capable of paying.[90]

The Ninth Circuit concluded by criticizing the Seventh Circuit's reasoning in *Shales*.[91] The Ninth Circuit noted that the Seventh Circuit could have disposed of the appeal by holding only that a district court is not required to reduce a § 1927 sanctions award based on a lawyer's ability to pay without going on to hold that a district court may not consider that

84. *Id.* at 986, 987; *see also* Cotterill v. City of S.F., No. C 08–02295 JSW, 2010 WL 1910528, at *1 (N.D. Cal. May 11, 2010).

85. *Haynes*, 688 F.3d at 987.

86. *Id.* (alteration in original) (quoting 28 U.S.C. § 1927 (2006)) (internal quotation marks omitted).

87. *Id.*

88. *Id.*

89. *Id.* at 987–88.

90. *Id.* at 988.

91. *See id.* at 988–89.

factor.[92] In addition to the implied judicial-restraint argument, the Ninth Circuit observed that this approach would have been more clearly consistent with the Seventh Circuit's own precedent and *Hamilton*, with which the *Shales* court purportedly agrees.[93] The Ninth Circuit also asserted that traditional torts differed from § 1927 violations in that intentional torts require the amount of damages be determined by a finder of fact, while the amount of sanctions awarded under § 1927 is a matter of discretion conferred upon the district court.[94]

III. EXAMINING THE STATUTE

A. *Considering the Plain Language of § 1927*

Every federal appellate court, including the Seventh Circuit, acknowledges the general rule that all statutory analysis should begin with the plain language of the statute.[95] Interestingly, the decision in *Shales* ignores this principle.[96] The *Shales* court does not provide, much less discuss, any of the statute's language, other than noting that it is a fee-shifting statute and suggesting that it describes a form of intentional tort.[97]

In stark contrast to the *Shales* decision, the Ninth Circuit began its analysis in *Haynes* by parsing the language of § 1927 and interpreting its use of the permissive "may" as implying that the statute should be read as

92. *Id.* at 988.

93. *Id.* at 988 n.3.

94. *Id.* at 988–89.

95. *See* Recovery Grp., Inc. v. Comm'r, 652 F.3d 122, 125 (1st Cir. 2011); United States v. I.L., 614 F.3d 817, 820 (8th Cir. 2010); United States v. Clayton, 613 F.3d 592, 596 (5th Cir. 2010); *In re* Visteon Corp., 612 F.3d 210, 219 (3d Cir. 2010); United States v. Santos, 541 F.3d 63, 67 (2d Cir. 2008); United States v. Turner, 465 F.3d 667, 671 (6th Cir. 2006); Wright v. Fed. Bureau of Prisons, 451 F.3d 1231, 1234 (10th Cir. 2006); Campbell v. Allied Van Lines Inc., 410 F.3d 618, 620 (9th Cir. 2005); Citizens Coal Council v. Norton, 330 F.3d 478, 482 (D.C. Cir. 2003); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124, 1133 (4th Cir. 1996); United States v. McLymont, 45 F.3d 400, 401 (11th Cir. 1995) (per curiam); United States v. Wagner, 29 F.3d 264, 266 (7th Cir. 1994); *see also* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." (citations omitted)).

96. *See* Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746 (7th Cir. 2009).

97. *Id.* at 749.

giving district courts significant discretion.[98] The Ninth Circuit also observed that the language of the statute sets an upper limit on the amount of a sanction under § 1927, but does not expressly prohibit a district court from either imposing a lesser award or taking into account an attorney's ability to pay when considering the amount of an award.[99]

The Ninth Circuit's plain-language analysis in *Haynes*[100] is clear and persuasive, particularly in contrast to the absence of any plain-language analysis in *Shales*.[101] Ultimately, the text of the section does not expressly address, either in approbation or disapproval, whether a district court may consider an attorney's ability to pay.[102] After all, just because a district court has broad discretion does not mean that every possible factor it could consider is legitimate. This point is highlighted by contrasting § 1927 with Rule 11.[103] Rule 11 explains that any "sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others *similarly situated*."[104] This language describes Rule 11's focus on deterrence and the need for district courts to consider the specific situation of the sanctioned attorney.[105] In fact, the ability of an attorney to pay is a well-accepted factor as to the amount of a monetary sanction imposed under Rule 11.[106]

Given the absence of similarly clear language in § 1927,[107] the next

98. *Haynes*, 688 F.3d at 987.

99. *Id.*

100. *Id.*

101. *See Shales*, 557 F.3d at 746.

102. *See* 28 U.S.C. § 1927 (2006).

103. FED. R. CIV. P. 11.

104. *Id.* R. 11(c)(4) (emphasis added).

105. *See id.*; Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1230 (6th Cir. 1989) (requiring that a district court consider an attorney's ability to pay sanctions in order to prevent Rule 11 from shifting from a deterrent to a punitive mechanism).

106. *See, e.g*, Doering v. Union Cnty. Bd. of Chosen Freeholders, 857 F.2d 191, 195–96 (3d Cir. 1988); *see also* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 16(D)(10) (4th ed. 2008 & Supp. 2012).

107. *Compare* FED. R. CIV. P. 11(c)(4) ("A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."), *with* 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

step is to examine whether the plain text or legislative history of the statute reveals an intent that either validates or illegitimates a district court's consideration of an attorney's ability to pay when calculating a sanction award. In fact, the analyses of the federal appellate courts in *Hamilton*,[108] *Shales*,[109] *Lamboy–Ortiz*,[110] and *Haynes*[111] appear to hinge on a few interrelated factors stemming from this inquiry: (1) whether the primary purpose of § 1927 sanctions is to deter, compensate, or both; and (2) whether considering an attorney's financial status is consistent with either deterrent or compensatory purposes.[112]

B. *Analyzing the Purpose of the Statute: A Look at Congressional Intent*

When the legislature expressly states its intent, courts must give effect to that intent.[113] The starting place for examining legislative intent is, again, the language of the statute.[114]

Only the Tenth Circuit engaged in this text-based analysis of the legislative intent.[115] In *Hamilton*, the Tenth Circuit discussed § 1927's provision that a district court may require an attorney to "satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of [vexatiously multiplicative] conduct."[116] The Tenth Circuit reasoned that this language indicated the section's purpose was "to compensate victims of abusive litigation practices, not to deter and punish offenders."[117] The

108. Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1206 (10th Cir. 2008).

109. Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 748–50 (7th Cir. 2009).

110. Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 247–49 (1st Cir. 2010).

111. Haynes v. City of S. F., 688 F.3d 984, 986–89 (9th Cir. 2012).

112. *See* discussion *supra* Part II.B.2–5 (discussing in detail each court's interpretation and application of § 1927).

113. *See, e.g.*, Miller v. French, 530 U.S. 327, 336 (2000) ("But where Congress has made its intent clear, we must give effect to that intent." (quoting Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962)) (internal quotation marks omitted)).

114. *See, e.g.*, United States v. Passaro, 577 F.3d 207, 213 (4th Cir. 2009) ("When interpreting any statute, we must first and foremost strive to implement congressional intent by examining the plain language of the statute." (citing Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002))).

115. *See* Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1205–06 (10th Cir. 2008).

116. *Id.* at 1205 (alteration in original) (quoting 28 U.S.C. § 1927 (2006)) (internal quotation marks omitted).

117. *Id.*

Tenth Circuit concluded that, given this purpose, the district court was not required to consider an attorney's ability to pay when calculating a sanctions award under § 1927.[118]

No other federal appellate court offers a text-based analysis of the section's purpose and the Tenth Circuit's overall reasoning is sound, as acknowledged by the *Haynes* and *Lamboy–Ortiz* courts.[119] Accordingly, it appears clear that compensation must be, at least, one of the primary purposes of the statute.

The legislative history of § 1927 illustrates that another primary purpose of the statute is deterrence. For example, in *Hamilton*, the Tenth Circuit recognized that the House Committee's report on the 1980 amendment to § 1927 indicates that the amendment was made "to deter unnecessary delays in litigation."[120] Likewise, the First Circuit noted that a number of circuits have found that the primary purpose of § 1927 is deterrence based on the House Committee's report.[121]

Additionally, in *Roadway Express v. Piper*, the U.S. Supreme Court examined the legislative history of § 1927 and concluded that it was designed to prevent the abuse of court processes.[122] The Court observed that the section "was drafted by 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."[123] The Court also referenced a letter from the Secretary of the Treasury to the House of Representatives in 1842 that suggested the provision was prompted by the

118. *See id.* at 1205–06.

119. Haynes v. City of S.F., 688 F.3d 984, 987–88 (9th Cir. 2012); Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 247 (1st Cir. 2010).

120. *Hamilton*, 519 F.3d at 1206 (quoting H.R. REP. NO. 96–1234, at 8 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N 2781, 2782) (internal quotation marks omitted); *see also* Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (quoting an identical passage from § 1927's legislative history).

121. *See Lamboy–Ortiz*, 630 F.3d at 247. The *Lamboy–Ortiz* court cited four cases in support of its proposition. *Id.* (citing *In re* Schaefer Salt Recovery, Inc., 542 F.3d 90, 101 (3d Cir. 2008); Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater, 465 F.3d 642, 646 (6th Cir. 2006); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991); Beatrice Foods Co. v. New England Printing & Lithographing Co., 899 F.2d 1171, 1177 (Fed. Cir. 1990)).

122. Roadway Express, Inc. v. Piper, 447 U.S. 752, 762 (1980).

123. *Id.* at 759 (quoting 26 ANNALS OF CONG. 29 (1813)) (internal quotation marks omitted).

practices of certain U.S. Attorneys who were paid on a piecework basis and apparently filed unnecessary lawsuits to inflate their compensation.[124]

As the U.S. Supreme Court noted,[125] § 1927 was originally introduced by a resolution appointing a committee "to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice for the administration of justice in any cause to which the United States may be party, or before any court of the United States."[126] This resolution focuses on *preventing* unnecessary suits or processes,[127] which supports the view that § 1927 is meant to be a deterrent. Additionally, the resolution identifies two particular places of interest—when the United States is a party to a case and when a suit is brought before a federal court.[128] Again, this suggests that the initial motivation was mostly a concern about reducing burdens on the federal government (i.e., deterring lawyer misconduct), not compensating private parties for intentional torts.

1. *Deterrent vs. Compensatory Purposes*

In *Lamboy–Ortiz*, the First Circuit determined that the "fairest reading of § 1927 and its legislative history suggests that the statute's purpose is both to deter frivolous litigation and abusive practices by attorneys *and* to ensure that those who create unnecessary costs also bear them."[129] Given the analysis above, this seems correct. However, having recognized that § 1927 has both deterrent and compensatory purposes does not imply that a district court may, or should, consider an attorney's ability to pay when calculating an award under the section.

124. *Id.* at n.6.

125. *See id.* at 759.

126. 26 ANNALS OF CONG. 29, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=026/llac026.db&recNum=12 ("*Resolved*, that a committee be appointed to inquire what Legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice for the administration of justice in any cause to which the United States may be party, or before any court of the United States, and that the committee have leave to report by bill or otherwise.").

127. *See id.*

128. *Id.*

129. Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 247 (1st Cir. 2010) (quoting Riddle & Assocs., P.C. v. Kelly, 414 F.3d 832, 835 (7th Cir. 2005)) (internal quotation marks omitted).

For example, in *Hamilton*, the Tenth Circuit asserted that it would make no difference to its holding if the purpose of the statute was deterrence because deterrence does not necessarily call for the application of the parsimony principle.[130] While this is true as a matter of logical necessity, the Tenth Circuit's textual analysis offered in support of the conclusion is a bit of a stretch. The Tenth Circuit stated,

> A purpose of deterrence is as easily satisfied, if not more easily, by an interpretation in accord with the text of the statute—allowing recovery of all excess costs, expenses, and fees—as by the interpretation urged now, which would needlessly impute to the statute a limitation on the amount recoverable.[131]

Yet, nowhere in the statute does it suggest that *all* excess costs, expenses, and fees must be recovered.[132]

In *Shales*, the Seventh Circuit makes the same assumption as the Tenth Circuit, relying on § 1927's fee-shifting provision to find that its purpose is primarily compensatory.[133] At least one commentator has suggested that the Seventh Circuit's position is arguably inconsistent with U.S. Supreme Court cases that have characterized the imposition of § 1927 sanctions as a penalty that is concerned with limiting the abuse of court processes.[134]

130. Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1206 (10th Cir. 2008).

131. *Id.*

132. *See* 28 U.S.C. § 1297 (2006).

133. Shales v. Gen. Chauffers, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 748–49 (7th Cir. 2009).

134. *See* Gregory P. Joseph, *Developments in the Federal Law of Sanctions*, A.L.I.-A.B.A., SANCTIONS DEV., TSTI14 ALI-ABA 7, at *10 (2012) ("It is difficult to reconcile the Seventh Circuit's premise in *Shales*—that a violation of Section 1927 is a form of intentional tort with a compensatory purpose—with the Supreme Court's declarations that Section 1927 'allows the imposition of costs *as a penalty* on attorneys for vexatiously multiplying litigation' and 'is concerned *only* with limiting the abuse of court processes.' If the statute is penal, not compensatory, in nature, then the impact of the penalty on the offender is not irrelevant (just as it would not be irrelevant in considering the appropriate fine in the exercise of discretion in setting a criminal fine)." (quoting Marek v. Chesny, 473 U.S. 1, 9 n.2 (1985) (emphasis added); Roadway Express v. Piper, 447 U.S. 752, 762 (1980) (emphasis added))). Although supportive, when examined in context, the quotations are not as directly on-point as the author suggests. In the second quotation, which appears in *Roadway*, the U.S. Supreme Court was contrasting § 1927 with fee-shifting civil rights statutes. *Roadway*, 447 U.S. at 762. The quotation from *Marek* was comparing *Roadway* with the the Federal Rule of Civil

On the other hand, in *Haynes*, the Ninth Circuit argued that its rule was consistent with the underlying purposes of § 1927 because "imposing sanctions in an amount many times greater than the attorney will ever be able to pay may in some instances represent only a futile gesture that does little either to compensate victims or to deter future violators."[135] This viewpoint seems more grounded in a practical understanding of the world and is equally consistent with the language and history of the section.

Whether a district court may consider an attorney's ability to pay when calculating a sanctions award pursuant to § 1927 is not the only issue dividing the federal appellate courts with regard to the section.[136] These other issues—particularly whether subjective or objective bad faith is required and whether courts may be awarded the § 1927 sanction—theoretically might both reflect the differing views as to the section's purpose and reinforce such understandings.

2. *Subjective vs. Objective Bad Faith*

Federal appellate courts disagree as to whether a finding of subjective bad faith is required before a district court may impose sanctions on an attorney pursuant to § 1927.[137] Subjective bad faith generally is characterized as a higher standard than the objective standard.[138] The higher standard of subjective bad faith is arguably more compatible with notions of personal responsibility and punishment, which are closely linked with deterrence, not compensation.[139] Accordingly, one might expect to see

Procedure 68. *Marek*, 474 U.S. at 9 n.2.

135. Haynes v. City of S.F., 688 F.3d 984, 988 (9th Cir. 2012).

136. *See* discussion *infra* Part III.B.2–3.

137. *Compare, e.g.*, Salkil v. Mount Sterling Twp. Police Dep't, 458 F.3d 520, 532 (6th Cir. 2006) ("Section 1927 imposes an objective standard of conduct on attorneys, and courts need not make a finding of subjective bad faith before assessing monetary sanctions under § 1927." (citations omitted)), *and* Jolly Grp., Ltd. v. Medline Indus., Inc., 435 F.3d 717, 720 (7th Cir. 2006) (allowing a court to impose § 1927 sanctions after an attorney has acted in an objectively unreasonable manner), *with* Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000) (requiring a finding of subjective bad faith before impositing § 1927 sanctions).

138. *See* McCandless v. Great Atl. & Pac. Tea Co., 697 F.2d 198, 201 (7th Cir. 1983); Kevin J. Henderson, Note, *When is an Attorney Unreasonable and Vexatious?*, 45 WASH. & LEE L. REV. 249, 260 n.108 (1988).

139. *See* Henderson, *supra* note 138, at 263 (stating that courts imposing the subjective bad-faith standards seek to allow attorneys to represent their clients zealously, while punishing only willfully wrongful conduct).

a subjective bad-faith requirement in jurisdictions that focus on the deterrent effects of § 1927 and an objective bad-faith standard in jurisdictions that focus on the compensatory effects of a sanction under the section.

The case law is consistent with this hypothesis. For example, both the Seventh and Tenth Circuits—the two courts that have written most approvingly of disregarding an attorney's ability to pay when calculating an award sanction under § 1927—have held that the appropriate predicate is objective bad faith.[140] On the other hand, the Second and Ninth Circuits have commented that subjective bad faith is the standard by which a court must gauge an attorney's conduct before imposing sanctions pursuant to the section.[141]

3. *Courts as Recipients of Sanction Award*

Federal appellate courts also differ as to whether § 1927 sanctions are payable to the court.[142] To the extent that a federal appellate court views

140. *See* Hamilton v. Boise Cascade Express, 519 F.3d 1197, 1203 (10th Cir. 2008) ("Where, 'pure heart' notwithstanding, an attorney's momentarily 'empty head' results in an objectively vexatious and unreasonable multiplication of proceedings at expense to his opponent, the court may hold the attorney personally responsible." (citing Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987))); *Jolly Grp., Ltd.*, 435 F.3d at 720 (affirming § 1927 sanctions are proper when an attorney "pursue[s] a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound" (quoting Kapco Mfg. Co. v. C & O Enters., Inc., 886 F.2d 1485, 1491 (7th Cir. 1989)) (internal quotation marks omitted)); *see also* Jones v. Metro. Sch. Dist., No. 1:12-cv-00650-JMS-DML, 2012 WL 5331293, at *8 (S.D. Ind. Oct. 26, 2012) (requiring objective bad faith while stating that the nature of § 1927 damages are compensatory, not punitive in nature).

141. *See Pac. Harbor Capital*, 210 F.3d at 1118 ("We assess an attorney's bad faith under a subjective standard. Knowing or reckless conduct meets this standard." (citations omitted) (internal quotation marks omitted)); Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) ("Like an award made pursuant to the court's inherent power, an award under § 1927 is proper when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." (citing Acevedo v. INS, 538 F.2d 918, 920 (2d Cir. 1976))); *see also* Parker v. Upsher-Smith Labs., Inc., No. 3:06-CV-0518-ECR(VPC), 2009 WL 418596, at *5 (D. Nev. Feb. 18, 2009) (requiring subjective bad faith after recognizing that § 1927 is a penal statute designed to discourage unnecessary delay in litigation).

142. *Compare* Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 249 n.34 (1st Cir. 2010) (requiring § 1927 fees to be made payable to the opposing party), *and* Prosser v. Prosser, 186 F.3d 403, 407 (3d Cir. 1999) ("Like Rule 38, section 1927 only allows the

compensation as the primary purpose of a § 1927 action, such a court might determine that a § 1927 award is not payable to the court.[143] Conversely, interpreting § 1927 as permitting awards payable to the court might be viewed as more naturally consistent with a deterrent purpose.[144] The case law, however, does not always reflect this consistency.

In *Lamboy–Ortiz*, the First Circuit followed the Third Circuit's decision in *Prosser v. Prosser*, holding that § 1927 sanctions are not payable to the court.[145] In *Prosser*, the Third Circuit reasoned that a § 1927 sanction may not be awarded to the court because the section focuses on the party's excess costs incurred, not harm to the judicial system.[146] As to the interplay between the purpose of § 1927 and whether the sanctions may be awarded to the court, the First Circuit stated "[t]hat the award of sanctions is paid to the moving party in no way undercuts the deterrent function of the sanctions."[147] Although the First Circuit did not further explain its statement, it suggests that the deterrent effect hinges on the amount of the sanctions, not the ultimate recipient of the awarded funds. The Ninth Circuit has not yet directly addressed the issue.[148]

On the other hand, the Seventh Circuit has interpreted § 1927 as permitting the award of sanctions to the court.[149] In *Jolly Group, Ltd. v. Medline Industrial Inc.*, the Seventh Circuit affirmed an order in which a district court assessed a $450 sanction payable to the court for wasting its

court to award costs and attorney fees payable to the opposing party, not payable to the court." (citing Laitram Corp. v. Cambridge Wire Cloth Co., 919 F.2d 1579, 1584 (Fed. Cir. 1990))), *with Jolly Grp., Ltd.*, 435 F.3d at 719, 721 (affirming § 1927 sanctions payable, in part, to the court), *and* Williams Enters., Inc. v. Sherman R. Smoot Co., 938 F.2d 230, 239 (D.C. Cir. 1991) (ordering counsel to pay a § 1927 sanction to clerk of appellate court).

143. *See, e.g.*, Mellott v. MSN Commc'ns, Inc., No. 11-1478, 2012 WL 3008923, at *2 (10th Cir. July 24, 2012) (noting that the compensatory nature of § 1927 precludes payment to the court).

144. *See, e.g.*, *Williams Enters., Inc.*, 938 F.2d at 239 (requiring payment to be made to the court).

145. *Lamboy–Ortiz*, 630 F.3d at 249 n.34.

146. *See Prosser*, 186 F.3d at 407 n.7.

147. *Lamboy–Ortiz*, 630 F.3d at 249 n.34.

148. *See* Miranda v. S. Pac. Transp. Co., 710 F.2d 516, 519–20 (9th Cir. 1983) (declining to resolve whether payment of § 1927 sanctions must be made to the court or opposing party).

149. *See* Jolly Grp., Ltd. v. Medline Indus., Inc., 435 F.3d 717, 719–20 (7th Cir. 2006); Westinghouse v. NLRB, 809 F.2d 419, 425 (7th Cir. 1987).

time and resources.[150] And, in an earlier case approving a § 1927 sanction payable to the court, the Seventh Circuit identified deterrence as its goal.[151]

In sum, the decisions of federal appellate courts are not consistent as to the purpose of this aspect of § 1927.

4. *Interpreting § 1927 as a Signal of Court's Leniency*

A theory that reconciles the Seventh Circuit's rulings with regard to the bad faith and court-as-recipient issues is that the Seventh Circuit generally adopts a less-than-sympathetic stance towards lawyer misconduct.[152] This is also consistent with its relatively extreme position that a district court may not consider an attorney's ability to pay when calculating an award under § 1927.[153] Across the spectrum, the First and Second Circuits largely take opposite stances on these issues.[154] Accordingly, one might argue that the various interpretations of § 1927 signal the extent to which the circuit courts are disposed to be lenient toward attorneys[155] and that this concept, in turn, has some predictive

150. *Jolly Grp., Ltd.*, 435 F.3d at 719–20.

151. *See Westinghouse*, 809 F.2d at 425.

152. *See, e.g.*, *id.* ("Lawyers must comply with the rules and our orders rather than hope to put one over on the court and to apologize when caught. The penalty for a violation should smart. Even if only negligence was at work, counsel must learn to be alert.").

153. *See* Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009).

154. *See id.* at 248–49 (reducing a nearly $65,000 § 1927 sanction to $5,000 to avoid financial ruin for the attorney subject to the sanction); Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 249 n.34 (1st Cir. 2010) (requiring sanctions under § 1927 to be paid to the opposing party, not to the court); United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1346 (2d Cir. 1991) (finding that a § 1927 sanction requires subjective bad faith by counsel.); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986); ("[I]t lies well within the district court's discretion to temper the amount to be awarded against an offending attorney by a balancing consideration of his ability to pay." (citations omitted)). *But see* Cruz v. Savage, 896 F.2d 626, 631–32 (1st Cir. 1990) ("Our prior decisions reveal, however, that while an attorney's bad faith will always justify sanctions under section 1927, we do not require a finding of subjective bad faith as a predicate to the imposition of sanctions." (citations omitted)).

155. I further hypothesize that the federal appellate courts' stances might reflect the degree of leniency seen in each circuit's constituent state bar associations. Using data from a consumer advocacy group, I created a composite "grade point average" for each circuit that weighted the individual states' grades (which took into account the adequacy of discipline imposed, publicity and responsiveness, openness of

power as to whether a circuit court permits a district court to consider an attorney's ability to pay when calculating an award under § 1927. This light correlation, however, does not address whether courts *should* adopt a more or less lenient approach to attorney misconduct. This normative question is discussed in greater detail in the following section.

C. *Policy Issues Associated with Considering an Attorney's Ability to Pay*

1. *Interactions with the Bankruptcy Code*

In *Shales*, the Seventh Circuit voices its concern that if a district court were to reduce the liability for sanctions under § 1927 based on a lawyer's financial status, the reduction would interfere with the Bankruptcy Code, which generally governs the priority of claims and the timing and amount of any ordered repayment.[156] The court also asserts that its rule, which forbids district courts from considering an attorney's ability to pay, enhances judicial efficiency by foregoing a need for individualized inquiries into the lawyer's ability to pay, which duplicate bankruptcy proceedings.[157] There are three ways in which this policy concern (i.e., that permitting district courts to consider an attorney's ability to pay would interfere with and duplicate the functions of the federal Bankruptcy Code) is unpersuasive.

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the process, fairness of the procedures, public participation, and promptness of the courts) by the number of lawyers in each state. *See* AM. BAR ASS'N, ABA NATIONAL LAWYER POPULATION BY STATE: 2002–2012 (2012), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2002_2012natllawyerstate.pdf; HELP ABOLISH LEGAL TYRANNY, 2006 STATE LAWYER DISCIPLINE REPORT CARD, *available at* http://www.halt.org/news-a-publications/report-cards/2006-lawyer-discipline-report-card. The scores of the Second (1.49), Seventh (1.95), and Ninth (1.53) Circuits were consistent with this hypothesis. The First Circuit, however, received the highest score (2.02) and the Tenth Circuit received the lowest score (1.43). The Tenth Circuit's score includes an "F" for Utah (the only state to receive such a grade). *See* HELP ABOLISH LEGAL TYRANNY, *supra*. If one removes Utah's score from the weighted average, the Tenth Circuit's score rises to 1.77, which would place it in its appropriate position relative to the Second, Seventh, and Ninth Circuits. Thus, one can see a light to moderate correlation between each federal appellate court's stance on whether § 1927 permits a district court's consideration of an attorney's ability to pay and the leniency of each circuit's respective state bar associations. *See supra* Part I (detailing each Circuit's relative holding on the consideration of an attorney's ability to pay when considering § 1927 sanctions).

156. *Shales*, 557 F.3d at 749–50.

157. *Id.*

First, the Seventh Circuit is the only appellate court to raise this policy concern.[158] While a federal appellate court's singular position on an issue does not necessarily imply that the position is in error, this is particularly noteworthy because the Seventh Circuit completely ignores the policy concern highlighted by the 1980 amendment to § 1927—that severe sanctions might damper an attorney's zeal—which has been noted in other cases within the circuit.[159]

Second, the Seventh Circuit's concern only has persuasive power if one takes as the starting point the idea that the district court must impose sanctions in an amount necessary to fully compensate the aggrieved party. This concern, in and of itself, does not explain why the district court must impose sanctions that will reduce an attorney to bankruptcy.

Third, sanctions probably are not dischargeable by a bankruptcy court. In an attorney's bankruptcy proceeding in the Northern District of New York, the district court affirmed that the bankruptcy court was barred by the principles of collateral estoppel from revisiting the sanctioning court's decision to impose § 1927 sanctions (which require a showing of bad faith, improper motive, or reckless disregard of duty owed to court) and thus could not be discharged pursuant to 11 U.S.C. § 523(a)(6).[160] Therefore, it is the district court that can best accommodate the equitable concerns that might be present with regard to the attorney's financial status.

2. *The Chilling Effect on Zealous Advocacy*

When § 1927 was amended in 1980, the House Committee acknowledged the policy concern that the provision might "dampen the

158. *See id.*

159. *See, e.g.*, Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984) ("Congress, in allowing attorneys' fees to be assessed under section 1927, was concerned that the provision [would] in no way dampen the legitimate zeal of an attorney in representing his client." (quoting H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.)) (internal quotation marks omitted)); *see also In re* TCI Ltd., 769 F.2d 441, 447 (7th Cir. 1985) (noting that "courts must be careful not to undercut the orderly development of the law and ethical representation").

160. Ball v. A.O. Smith Corp., 321 B.R. 100, 104–05 (N.D.N.Y. 2005), *aff'd*, 451 F.3d 66, 70–71 (2d Cir. 2006); *see also* 11 U.S.C. § 523(a)(6) (2006) (noting that an exception to the discharge rule under bankruptcy law states that discharging is not permitted to discharge debt that encompasses "willful and malicious injury by the debtor to another entity or to the property of another entity").

legitimate zeal of an attorney in representing his client" by noting that it would apply only to attorneys whose misconduct met a high standard of wrongfulness.[161] Numerous circuit courts—including the First Circuit in *Lamboy–Ortiz*—have acknowledged the importance of this issue.[162] In this same vein, courts have noted that they have a duty not to deny the public access to competent attorneys as a result of unduly harsh discipline.[163] Permitting district courts to consider an attorney's ability to pay when calculating an award under § 1927 comports with the goals of ensuring the availability of zealous advocates.

However, in *Shales*, the Seventh Circuit approached the issue from a different angle, suggesting that bad lawyers "should turn from the practice of law to some other endeavor where [they] will do less harm."[164] In support of this perspective, the Seventh Circuit compared attorneys with doctors.[165] The court explained that "[n]o court would say, in a medical-malpractice action, that a doctor whose low standards and poor skills caused a severe injury should be excused because he does not have very many patients. No more is a bad lawyer excused because he has few clients."[166]

There are several problems with applying the Seventh Circuit's reasoning beyond this case. First, in *Shales*, the attorney admitted that he was a "bad lawyer."[167] Moreover, the Seventh Circuit's reasoning assumes that the category of poor—meaning penurious—lawyers is coextensive with the category of poor—meaning incompetent—lawyers.[168] The basis for this view as an efficient one is unclear.[169] Second, it is unclear whether

161. H.R. REP. NO. 96-1234, at 8 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 2716, 2781, 2782.

162. *See, e.g.*, Lamboy–Ortiz v. Ortiz–Vélez, 630 F.3d 228, 248 (1st Cir. 2010); Lee v. L.B. Sales, Inc., 177 F.3d 714, 718 (8th Cir. 1999); FDIC v. Conner, 20 F.3d 1376, 1384 (5th Cir. 1994); Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (en banc); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 216 n.4 (3d Cir. 1985); *Knorr Brake Corp.*, 738 F.2d at 226–27.

163. *See, e.g.*, Fla. Bar v. Wolfe, 759 So. 2d 639, 644 (Fla. 2000).

164. Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 750 (7th Cir. 2009).

165. *See id.*

166. *Id.*

167. *Id.*

168. *See id.*

169. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 968–72 (2000) (discussing the

monetary sanctions will either improve the quality of an incompetent lawyer's services or drive such lawyers out of business.[170] One could imagine that the effect of monetary sanctions would be the opposite, causing incompetent lawyers to scramble for more business and potentially devote less time to each case in order to make up for the financial shortfall. Third, state laws treat legal and medical malpractice differently in many ways thus suggesting that they are not perfect analogs.[171] For example, Oregon is the only state to require attorneys to carry malpractice insurance.[172] Although just seven states require doctors to carry malpractice insurance, as a practical matter, nearly all doctors carry malpractice insurance, because it is generally required to "obtain hospital staff privileges and/or to participate in health insurance plans."[173] Thus, there appears to be a different social tolerance for legal and medical malpractice.

3. *A Court's Ethical and Regulatory Duty to Regulate Poor Lawyering*

Although the persuasive power of *Shales* is limited given the factors discussed above, the underlying concern that the judiciary must police the public from bad lawyers is likely often overlooked by the federal judiciary as a whole.

Canon 3(B)(5) of the Model Code of Conduct for U.S. Judges provides: "A judge should take appropriate action upon learning of reliable

difficulties in evaluating lawyer quality and its relationship to case outcomes); Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 348 (2011) (quoting a state appellate judge who identified the lack of information about the quality of legal representation and its relationship to outcomes, stating: "We have some bad lawyers whose clients would have had good, even winning cases, but for these lawyers" (internal quotation marks omitted)).

170. *See* Posner & Yoon, *supra* note 169, at 348 ("The attitude too often seems to be 'if I can get away with it and not get caught or sanctioned then I will do it.' Money seems to be the only standard by which an attorney is gauged." (internal quotation marks omitted)).

171. *Compare, e.g.*, Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 857 (2011) (stating that only one state requires attorneys to carry malpractice insurance), *with* AM. MED. ASS'N, STATE LAWS MANDATING MINIMUM LEVELS OF PROFESSIONAL LIABILITY INSURANCE 1 (2012), *available at* http://www.ama-assn.org/resources/doc/arc/state-laws-mandating-minimum-insurance.pdf (reporting that seven states require doctors to carry malpractice insurance).

172. *See* Engstrom, *supra* note 171, at 857 & n.249.

173. AM. MED. ASS'N, *supra* note 171, at 1.

evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct."[174] Likewise, the American Bar Association Model Rules of Professional Conduct, which have been used as a format for a majority of state rules,[175] contain two rules that dovetail nicely with § 1927: Rule 3.1, which provides that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law,"[176] and Rule 3.2, which provides that a "lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."[177] Given these precepts, it follows that the judiciary's obligation to police the public from bad lawyers is implicitly at issue whenever a court finds that § 1927 sanctions are warranted.

In policing poor lawyering, federal courts might not always refer sanctioned attorneys to the state boards because the federal courts have their own power to discipline attorneys.[178] However, given the transparency issues at stake and the general ethical obligations to regulate the profession for the benefit of the public,[179] one might expect to see federal courts refer sanctioned attorneys to the state boards for discipline with some regularity.

174. MODEL CODE OF CONDUCT FOR U.S. JUDGES Canon 3(B)(5) (2011), *available at* http://www.uscourts.gov/RulesAndPolicies/CodesofConduct/CodeConductUnitedStatesJudges.aspx.

175. *See State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR. ASS'N., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Jan. 28, 2013) (indicating all states except California have utilized the American Bar Association Model Rules of Professional Conduct as a model for state rules of professional conduct).

176. MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983). ABA Model Rule 3.1 is also very similar to Rule 11. *See* FED. R. CIV. P. 11; Lonnie T. Brown Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 OHIO ST. L.J. 1555, 1586–96 (2001) ("The similarities between [Rule 3.1] and Rule 11 are obvious and manifold.").

177. MODEL RULES OF PROF'L CONDUCT R. 3.2; *see also* Lepucki v. Van Wormer, 765 F.2d 86, 87 (7th Cir. 1985) (per curiam) ("[A]s officers of the court, [lawyers] have both an ethical and a legal duty to screen the claims of their clients for factual veracity and legal sufficiency." (citations omitted)).

178. *See, e.g.*, *In re* Landerman, 7 F. Supp. 2d 1202 (D. Utah 1998).

179. *See* Bates v. State Bar of Ariz., 433 U.S. 350, 361 (1977) (finding the regulation of the legal profession to be at the core of a state's duty to protect the public).

And, occasionally, the federal courts do refer sanctioned attorneys to the state boards, as is illustrated by the federal district court's order in the proceeding that gave rise to *Haynes*.[180] However, a search through the Westlaw database turned up only a few cases in which a federal district court referred an attorney for discipline by the state board for a § 1927 violation.[181] Buttressing this finding, an earlier study that involved searching for Rule 11 referrals resulted in a total of two cases in which an attorney was reported to a state bar association from 1993 to July 2003.[182]

Curiously, the Ninth Circuit has asserted that imposing a monetary penalty on an attorney is a less severe sanction than a referral of the incident to the client or respective bar association.[183] The Ninth Circuit does not explain why a monetary penalty is considered a lesser sanction than a referral to the bar association.[184] This is arguably counterintuitive because a referral to the state bar association might result in no penalty or no public censure, whereas a monetary sanction necessarily carries a cost.[185]

As noted above, when a district court takes into account an attorney's ability to pay, it is not necessarily depriving the opposing party of any meaningful remedy; if an attorney simply cannot pay the full amount of the excessive costs, driving the lawyer into bankruptcy by imposing the full amount is not going to suddenly achieve full compensation, nor is it likely to result in additional deterrence.[186] On the other hand, the federal judiciary has a duty to ensure that incompetent lawyers are encouraged to improve or are counseled out of the profession.[187] Pairing a § 1927

180. *See* Cotterill v. City of S.F., No. C 08-02295 JSW, 2010 WL 1910528, at *1 n.1 (N.D. Cal. May 11, 2010).

181. *Id.*; *see also* Spolter v. Suntrust Bank, 403 F. App'x 387, 391 (11th Cir. 2010) (affirming Rule 11 and § 1927 sanctions that included referral to the state bar); Kramer v. Tribe, 156 F.R.D. 96, 110–11 (D.N.J. 1994) (referring an attorney to the state bar for discipline, in part, for a § 1927 violation).

182. *See* Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 791–95 (2004).

183. Miranda v. S. Pac. Transp. Co., 710 F.2d 516, 520–21 (9th Cir. 1983).

184. *See id.*

185. *See, e.g.*, IOWA CT. R. 34.8–.9, .13 (allowing an attorney disciplinary board, after receipt of a complaint against an attorney, to dismiss, investigate, or deter proceedings on the allegations).

186. *See* Haynes v. City of S.F., 688 F.3d 984, 987–88 (9th Cir. 2012).

187. *See, e.g.*, Byrd v. Hopson, 108 F. App'x 749, 756 (4th Cir. 2004) (noting that a driving force behind a court's ability to sanction is the need to ensure public

monetary sanction with a referral to the state bar association should address this policy concern without constricting a district court's discretion to consider an attorney's financial status or needlessly driving sanctioned attorneys into bankruptcy.

IV. CONCLUSION

A traditional statutory analysis of § 1927 strongly supports an interpretation that allows district courts to exercise their discretion as to whether a sanctioned attorney's ability to pay will be considered when calculating an award under § 1927. The plain text gives district courts wide latitude as to whether to impose a sanction at all, and permitting consideration of an attorney's ability to pay does not generally conflict with the statute's purposes.

Instead, the First Circuit's rule—requiring district courts to consider an attorney's ability to pay when imposing sanctions for deterrence purposes—appears to be the most sensible way to accommodate the different facets of § 1927, acknowledging the wide discretion the statute gives to the district courts but also putting into place procedural safeguards that make explicit a district court's bases for its awards. District courts should also consider coupling the imposition of monetary sanctions with referrals to state bar associations. This would allow incompetent lawyers to receive either professional development assistance or counseling, without fear of judge-imposed monetary sanctions, which may drive lawyers into bankruptcy and obviously benefit no one.

protection and deter attorney misconduct).