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Attorney Fee Shifting: The Sanctioning Power of Section 1927 of Title 28, United States Code

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COMMENT

Attorney Fee Shifting: The Sanctioning Power of Section 1927 of Title 28, United States Code

I. INTRODUCTION

In America, courts have generally prohibited the shifting of attorneys' fees in routine litigation.[1] Courts have, however, recognized the importance of attorney sanctioning to prevent misuse of the judicial system,[2] and the shifting of attorneys' fees for sanctioning purposes is presumed to deter such misuse.[3] Fee shifting may increase the quality and decrease the quantity of litigation.[4] To take advantage of such benefits, therefore, several exceptions to the American non-fee shifting rule have been recognized.[5]

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1. Fee shifting, or the shifting of an attorney's fees from one party in a lawsuit to the opposing party, is a system that includes attorneys' fees as damages for the prevailing party. *See generally* Leubsdorf, *Recovering Attorney Fees as Damages*, 38 RUTGERS L. REV. 439 (1987). In America, the system of including attorneys' fees in an award of damages was rejected at common law. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). However, in England, the early common-law system allowed fee shifting as routine between the prevailing party and the losing party to recoup the damages caused by the bringing of the suit or to reward the successful defense of the suit. Fee shifting was not, however, used by the courts in early common law as a form of sanctions for attorney misconduct. *See generally* McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages*, 15 MINN. L. REV. 619 (1931) [hereinafter McCormick].

2. Misuse of the system includes, but is not limited to: action that is done in bad faith, *see* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); action done without prior "reasonable inquiry", *see* FED. R. CIV. P. 11; and action done to unreasonably or vexatiously multiply a suit. *See* 28 U.S.C. § 1927 (1982). For a more exhaustive list of system misuses *see generally* 1-3 M. F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES (1988).

3. *See, e.g.*, Nelken, *Sanctions Under Amended Federal Rule 11-Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1333 (1986).

4. *See* Starr, *The Shifting Panorama of Attorneys' Fees Awards: the Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L.J. 189, 189 (1986).

5. *See infra* notes 7-18 and accompanying text.

One exception to the non-fee shifting rule appeared early in American judicial history when courts recognized an inherent power to sanction attorneys by shifting fees.[6] A court's inherent power, however, is limited to handing down sanctions for actions taken in bad faith.[7] Bad faith refers to conduct done with the subjective intent of the attorney to misuse the judicial system.[8] Thus, because a court's power to sanction attorney misconduct does not apply to objectively unreasonable acts, it is a weak exception to the non-fee shifting rule.

Another exception to the American rule is Federal Rule of Civil Procedure 11 (hereinafter Rule 11),[9] which allows the shifting of attorneys' fees as a sanction for attorney misconduct. Rule 11 gives a court power to sanction attorneys for failing to make a "reasonable inquiry" into the facts of a case.[10] This "reasonable inquiry" is an

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6. *See, e.g.*, Alyeska Pipline Service v. Wilderness Soc'y, 421 U.S. 240 (1975); F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116 (1974); Hall v. Cole, 412 U.S. 1 (1973); Callow v. Amerace Corp., 681 F.2d 1242 (9th Cir. 1982). *See also* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812); *Roadway Express, Inc.*, 447 U.S. at 757. This sanctioning power is provided through the general authority of the court to control judicial procedure. *See Roadway Express*, 447 U.S. 752. The inherent power arose out of the courts' traditional criminal contempt authority. *See* Roddy & Webb, *Practices and Procedure Under Amended Rule 11 of the Federal Rules of Civil Procedure*, 1987 DEFENSE L.J. at 495, n.27 (1986).

7. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). Contrast this with the court's power to impose sanctions for conduct which is based on an "unreasonable inquiry". FED. R. CIV. P. 11. For an analysis of the courts power to imposed sanctions under Rule 11 *infra* notes 57-88 and accompanying text.

8. *See e.g. Roadway Express*, 447 U.S. 757.

9. FED. R. CIV. P. 11.

10. Rule 11 was amended by the Federal Rules Advisory Committee in 1983 to provide that:

> Every pleading, motion, and other paper of a party represented by an attorney shall be singed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of

objective standard based on what a reasonable "filer" would do in a similar situation.[11] In applying the objective standard test, however, courts have narrowly interpreted Rule 11's power and do not use it in many cases.[12] Because a courts' inherent power is limited to sanctions for bad faith acts and Rule 11's objective test is narrowly applied, these exceptions to the non-fee shifting rule fail to provide courts with a comprehensive sanctioning power.

Another exception to the non-fee shifting rule is Section 1927 of Title 28, United States Code.[13] In 1813, Congress enacted this statute authorizing attorney sanctioning. Section 1927[14] provides that "any

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litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Id.

11. *See generally* Advisory Committee Notes, 97 F.R.D. 165, 199. (This standard is different from the subjective intent standard courts apply pursuant to the inherent power, which looks at what their "filer" actually knew). *See supra* text accompanying note 8.

12. Courts have found that Rule 11 only applies when papers are filed in a lawsuit. Thus, the rule does not impose a "continuing duty" throughout the suit to maintain a reasonable standard. *See* Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied* 107 S. Ct 1373 (1987). *See infra* text accompanying notes 60-65. In addition, it has been held that if a removable suit is filed in state court and later removed to federal court, Rule 11 does not apply to the filings done in state court. *See* Brown v. Capitol Air, Inc. 797 F.2d 106 (2nd. Cir. 1986). *See infra* text accompanying notes 60-77. Courts have also determined Rule 11 only applies to unreasonable actions. Thus, conduct done reasonably but with an improper purpose, may not be sanctionable under Rule 11. *See* Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987). *See also infra* text accompanying notes 78-83. Finally, because Rule 11 is a civil rule of procedure it is bound by FED. R. CIV. P. 1. Rule 1 limits the FEDERAL RULES OF CIVIL PROCEDURE to federal cases of a civil nature. Additionally, FED. R. CIV. P. 81 restricts the federal rules from applying to bankruptcy and copyright proceedings. *See infra* text accompanying notes 84-88.

13. 28 U.S.C. § 1927 (1982).

14. 28 U.S.C § 1927 (1982). This statute 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 or vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Id.

attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously . . ." may have to pay the opponent's reasonable attorney fees.[15] The "unreasonably and vexatiously" language of section 1927 has been difficult for courts to interpret.[16] The majority of courts limit section 1927 to authorizing sanctions solely for actions taken in subjective bad faith.[17] Directed by the majority interpretation, courts are restricted from imposing sanctions on attorneys who unreasonably misuse the system.

Due to the bad faith requirement of the inherent powers, the narrow application of Rule 11, and the majority bad faith interpretation of section 1927, courts lack a uniform and comprehensive scheme for imposing sanctions.

This comment focuses on the three exceptions to the general rule against fee shifting. In Section II the comment reviews the English and American history of fee shifting sanctions. Next, Section III examines the inherent power exception to the non-fee shifting rule. Section IV scrutinizes Rule 11 and discusses the rule's inability to impose a duty throughout the lawsuit or to authorize sanctions for reasonable but subjective bad faith filers. Additionally, Section IV concentrates on Rule 11's inapplicability to federal criminal, bankruptcy, and copyright proceedings, as well as state-federal removal actions. Section V discusses the current application and interpretation of section 1927 as a sanction for intentional misuse of the court system. Additionally, this section will examine an alternate objective interpretation of section 1927 and argue that, based on the textual interpretation and congressional history of section 1927, the statute imposes this objective standard in addition to the existing subjective component. Finally, Section VI recommends that section 1927 should be used as a uniform sanctioning statute.

II. HISTORY

English courts have long exercised a system of attorney fee shifting.[18] Prior to emerging into a structure of sanctions, fee shifting began as a response to England's overcrowded court dockets.[19] Under

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15. *Id.*

16. For a full discussion of the different court interpretations of § 1927 *see infra* notes 97-131 and accompanying text.

17. The majority interpretation parallels the courts' inherent power bad faith standard. *See infra* note 101 and accompanying text.

18. *See supra* note 1.

19. During the rule of Elizabeth, the litigious spirit was dominant. Fee shifting was an attempt to control "'the infinite number of small and trifling suits. . . .'" Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929) (quoting 43 ELIZ. c. 6, f. 2 (1601) [hereinafter Goodhart].

the "English rule" of fee shifting, the prevailing litigant in a lawsuit recovered his attorney's fees.[20] The common law fee shifting rule was codified in 1275 by the Statute of Gloucester.[21] This statute allowed for the recovery of "costs"[22] in the amount of the litigants writ purchased.[23] Although the statute only provided the "[d]emandant may recover against the [t]enant the [c]osts of his [w]rit purchased, together with the [d]amages . . .,"[24] this language was liberally interpreted. One English legal scholar indicated only measurable costs should be allowed as damages in litigation.[25] Thus, if professional skill could be measured by law, then recovery for such cost should follow.[26]

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20. McCormick, *supra* note 1, at 619-20. This rule applied "except in some cases where the plaintiff recovers only trivial damages. . . ." *Id.* McCormick, *supra* note 1, at 619.

21. 6 EDW. I. c. 1 (1275), *noted in* Goodhart, *supra* note 19, at 852. This statute differed from the common law fee shifting approach by setting the transferrable amount at the cost of the plaintiff's writ purchased, whereas in equity courts the amount transferred was full costs of litigation. Goodhart, *supra* note 19, at 851-52.

22. Goodhart, *supra* note 19, at 852. The term "costs" as used in the Statute of Gloucester differs in definition from the American common law term of "costs." Costs in England are allowed to a party for expenses incurred in conducting his suit; whereas fees are a compensation to an officer for services rendered in the progress of the cause. *See* Musser v. Good, 11 S.& R. 248 (Pa. 1924), *quoted in* Goodhart, *supra* note 19, at 849-50 n.3. In England, the attorney, who was not an officer of the court, had his fees included in the final "costs" of litigation. *See* McCormick, *supra* note 1, at 619-20. In America, the term "costs" has taken a different definition. American courts have generally interpreted "costs" as those which fall under 28 U.S.C. § 1920. *See* Roadway Express, Inc., v. Piper, 447 U.S. 752 (1980). "Costs" under § 1920 include marshal's fees, clerk fees, docket, copying and printing fees, and witness fees. *See* 28 U.S.C. § 1920 (1982). In America, "costs" do not include attorney fees. *Id.*

23. 6 EDW. I. c. 1 (1275), *noted in* Goodhart *supra* note 19, at 852. To bring a suit in early common law, the litigants' facts must have fallen within the scope of a limited and arbitrary list of writs. The litigant was required to pay a filing fee, or to purchase the writ to bring the claim. *See generally* J. KOFFLER & A. REPPY, COMMON LAW PLEADING 33 (1969).

24. 6 EDW. I. c. 1 (1275), *quoted in* Goodhart *supra* note 19, at 852.

25. *See* E. COKE, 2d INSTITUTES 288 (1642), *quoted in* Goodhart *supra* note 21, at 852. stating:

> [h]ere is expresse mention made but of costs of his writ, but it extendeth to all the legall cost of the suit but not to the cost and expences of his travell and losse of time, and therefore costage commeth of the verb conster, and that again of the verb constare, for these costage must constare to the court to be legall costs and expenses.

Id.; In interpreting the quotation by Coke, WORDS AND PHRASES LEGALLY DEFINED

In practice, the Statute of Gloucester only allowed the successful plaintiff to recover costs.[27] However, as the fee shifting structure evolved into a sanction system, the successful defendant was allowed to recover costs through a series of statutes enacted during the sixteenth and seventeenth centuries.[28]

As the emphasis of fee shifting developed into a sanctioning rule courts began to enlarge its application beyond granting costs only if the litigant was successful. Although, the English fee shifting system was originally devised to discourage the bringing of "frivolous and vexatious actions,"[29] the rule controlled more than just the bringing of the suit. Fee shifting also censored the enlarging and delay of proceedings as well as the frivolous or unreasonable use of the appeal process.[30] Proceedings were further controlled by granting an attorney's costs for the production of undisputed or cumulative evidence.[31] Thus, the English rule emerged into an attorney sanctioning scheme.[32]

As seen, English courts have developed a complete attorney sanctioning system. Early in America's history, the United States Supreme Court adopted the "American rule" which prohibits courts from shifting fees to the prevailing party. In *Arcambel v. Wiseman*,[33] the Court stated "[t]he general practice of the *United States* is in

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states: "His meaning seems to be that only legal costs which the court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes." 1:A-C WORDS AND PHRASES LEGALLY DEFINED 358-59 (J. Saunders 2d ed. 1988).

26. The measurability of professional skills is possible through professional standards or by set rate statutes. *See generally* RELATIVE VALUES: DETERMINING ATTORNEY FEES (McGraw-Hill Book Co. 1985 & Supp. Jan. 1989).

27. Goodhart, *supra* note 19, at 852.

28. Goodhart, *supra* note 19, at 853 nn.23-24 and accompanying text. In 1531, a statute provided for the shifting of costs for the defendant in certain limited actions. *See* 23 HEN. VIII, c. 15 (1531), *noted in* Goodhart, *supra* note 19, at 853. This concept was expanded in 1566 under a statute which extended the shifting "where the plaintiff doth delay or discontinue his suit, or is nonsuit[ed]." 8 ELIZ, c. 2 (1566), *quoted in* Goodhart, *supra* note 19, at 853 n.23. Finally, in 1607, the fee shifting theory was fully applied to the defendant when he was allowed to recover all costs successful plaintiffs could recover. *See* 4 JAC. I, c. 3 (1607), *noted in* Goodhart, *supra* note 19, at 853.

29. *See* 8-9 W. III., c. 11, f.2 (1696), *noted in* Goodhart *supra* note 19, at 853-54 n.26.

30. Used in this manner the fee shifting process was a form of sanctioning against either party for system abuse. Goodhart *supra* note 19, at 862-66.

31. Goodhart, *supra* note 19, at 866-67. The production of undisputed evidence was a waste of the court's time and was only done to extend the proceedings.

32. *See* Goodhart, *supra* note 19, at 662-72.

33. 3 U.S. (3 Dall.) 306 (1796).

oposition [sic] to [fee shifting]; and even if [the] practice [of non-fee shifting was] not strictly correct in principle, it is entitled to the respect of the court, until it is changed, or modified, by statute."[34]

The reasons why the English rule was not adopted in America are a matter of recent academic discussion.

One rationale for the American rule suggested by a recent commentator is:

> [d]uring the late colonial period, legislation provided for fee recovery as an aspect of comprehensive attorney fee regulation. But this regulatory scheme did not long survive the Revolution. During the first half of the nineteenth century, lawyers freed themselves from fee regulation and gained the right to charge clients what the market would bear. As a result, the right to recover attorney fees from an opposing party became an unimportant vestige. This triumph of fee contracts between lawyers and clients as a financial basis of litigation prepared the way for legislators and judges to proclaim the principle that one party should not be liable for an opponent's legal expenses.[35]

Another premise suggests the American rule was established because of suspicion placed on attorneys by American courts.[36] The American judiciary, fearful of extensive misuse of the English rule,[37] felt the rule would encourage deceptive multiplication of fees. Thus, courts attempted to protect the system from such abuse by not allowing fee shifting.[38] Finally, another hypothesis intimates early American courts might have been influenced by American sentiment.[39] During the late eighteenth century, the American public felt a general mistrust of the English governmental system.[40] This mistrust may have extended into the courts and caused the judiciary to rebuff the English tradition.[41]

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34. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796).

35. Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 9 (Winter 1984).

36. *See* Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189, 190 (1986).

37. *Id.*

38. *Id.*

39. *See* Starr, *The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Courts*, 28 S. TEX. L. REV. 189, 190-91 (1986).

40. *Id.*

41. *Id.* at 190-91.

However, courts have recognized several exceptions to the American rule against fee shifting.[42] For example, courts maintain an inherent power to punish when litigants act in willful disobedience, or wanton bad faith.[43] This inherent power includes the courts' own contempt authority.[44] A second exception, allowing fee shifting, is Federal Rule of Civil Procedure 11.[45] Under the authority of this rule, courts have the power to sanction attorneys for filing pleadings without "reasonable inquiry".[46] Third, Congress has enacted statutes to effectuate the sanctioning of unreasonable and vexatious actions.[47]

III. INHERENT POWER OF THE COURT

American courts have always maintained an inherent power to respond to abusive litigation practices.[48] The inherent power of courts to sanction is "necessary to the exercise of all others."[49] The sanctioning power is one "which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the courts. . . ."[50] In explaining the necessity of the court's inherent power, Justice Harlan stated:

> [t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition

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42. For common law and statutory exceptions to the American rule not discussed in this comment *see* Johnson & Cassady, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available*, 36 ALA. L. REV. 827. *See also* 1-3 M. F. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES (1988).

43. *See, e.g.*, Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 259 (1975); F. D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129-30 (1974); Hall v. Cole, 412 U.S. 1, 4-5 (1973); Callow v. Amerace Corp., 681 F.2d 1242, 1243 (9th Cir. 1982). *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980). *See also infra* notes 48-56 and accompanying text (willful disobedience and wanton bad faith refers to the subjective intention of the actor to abuse the system).

44. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

45. FED. R. CIV. P. 11. The text of FED. R. CIV. P. 11 is set out *supra* in note 10.

46. *See infra* notes 57-88 and accompanying text.

47. *See* 28 U.S.C. § 1927 (1982). For a discussion of § 1927, *see infra* notes 89-131 and accompanying text. *See generally supra* note 42.

48. *See generally Roadway Express*, 447 U.S. at 764. *See id.* at 766. *See also infra* notes 54-56 and accompanying text.

49. United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812).

50. Cooke v. United States, 267 U.S. 517, 539 (1925).

> of pending cases and to avoid congestion in the calendars of the District Courts.[51]

Pursuant to its inherent powers, a court may award attorney's fees even in the absence of express statutory authority.[52] In *Guardian Trust Co. v. Kansas City S. R.R.*,[53] the Court of Appeals for the Eighth Circuit found there were two types of cases which might call for sanctions under this exception:

> First. Where gross charges of fraud and misconduct have been made and not sustained, and where the main ground of the suit is shown to be false, unjust, vexatious, wanton or oppressive . . . Second. Where a fiduciary relation exists between the parties . . . and where the fiduciary is put to the expense in the defense of an unfounded suit. . . .[54]

The weakness of the inherent powers exception is that courts can only implement it when an attorney acts in conscious bad faith.[55] Courts, therefore, are helpless under their inherent powers to sanction negligent misconduct and must idly witness such misuse. Lacking the ability to sanction unreasonable conduct, the inherent powers exception is a very limited one.[56]

IV. RULE 11

Rule 11 requires the pleader to base a claim on facts "well grounded" and investigated by a "reasonable inquiry."[57] In defining appropriate sanctions available to courts upon a violation of its provisions, Rule 11 expressly provides for the shifting of "reasonable attorney's fee[s]."[58] The purposes of this sanctioning power are "to penalize the violator, to compensate the offended party, and to deter others from engaging in similarly abusive conduct."[59]

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51. Link v. Wabash R.R., 370 U.S. 626, 629 (1962) (citations omitted).

52. *See, e.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

53. 28 F.2d 233 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1930) (This case dealt with the inherent powers of the court to sanction from party to party).

54. *Id.* at 234.

55. Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

56. *Id.* "Counsel's conduct [must] constitut[e] or [be] tantamount to bad faith . . . to precede any sanction under the courts inherent powers." *Id.* at 767.

57. FED. R. CIV. P. 11.

58. *Id.*

59. S. Kassin, An Empirical Study of Rule 11 Sanctions 29 (Federal Judicial Center 1985), *quoted in*, Vairo *Rule 11: A Critical Analysis*, 118 F.R.D. 189, at 203 n.65 (1988).

The language in Rule 11, requiring certification after "reasonable inquiry" on "motions, or other papers", has been interpreted so as to limit the reach of the rule.[60] The movant need not maintain the "reasonable inquiry" standard throughout the entire suit.[61] The Advisory Committee Notes to Rule 11 pronounce that courts need only "inquir[e] what was reasonable to believe at the time the pleading . . . was submitted."[62] This narrow view of Rule 11 was elaborated upon by the Court of Appeals for the Second Circuit in *Oliveri v. Thompson*,[63]stating:

> [l]imiting the application of rule 11 to testing the attorney's conduct at the time a paper is signed is virtually mandated by the plain language of the rule. . . .
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> . . . [A]mended Rule 11 applies to every paper signed during the course of the proceedings and not only to the pleadings. While the drafters of the rule could easily have further extended its application by referring to the entire conduct of the proceedings, they failed to do so and instead chose to expand only the categories of papers to which the rule applies.[64]

Thus, courts have found the Advisory Committee intended to limit Rule 11 to the reasonableness of the pleadings. Current commentaries have also recognized the Advisory Committee's intention to implement this strict translation.[65]

Moreover, the application of Rule 11 may also be restricted by the rule's limited continuing duty interpretation when applied to state-federal removal actions. As stated above, most courts have read Rule 11 as only applying to papers filed in the action.[66] However, as stated in Rule 1, the Federal Rules of Civil Procedure apply only to ". . .

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60. *See e.g.*, Olivera v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987).

61. *Id.*

62. FED. R. CIV. P. 11 advisory committee's notes.

63. 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987).

64. Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987).

65. *See* Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, at 339 ("[a]lthough it may be difficult to employ the present Rule 11 as a basis for the attorney's post-filing certification responsibilities, local court rules or the inherent authority of the federal courts may provide the authorization for those duties"); *see also* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 205 (1988).

66. *See supra* notes 60-65 and accompanying text.

United States district courts. . . ."[67] Although, rule 81(c) of the Federal Rules of Civil Procedure[68] provides that the rules cover actions removed from state court, when a party removes an action from state court to federal court[69] new filings must be originated in federal court for Rule 11 to apply.[70] Therefore, the concept of a removal power, combined with a limited continuing duty interpretation, has created an inconsistency in the power of a federal court to impose sanctions under Rule 11.[71]

The Court of Appeals for the Second Circuit recently confronted the problem of removal cases and Rule 11 sanctioning in *Brown v. Capitol Air, Inc.*[72] In *Brown,* a plaintiff brought an action in a New York state court.[73] The plaintiff, simultaneously, brought a seperate action in federal court for claims founded on the same ultimate issues. The state claim was removed to federal court and joined with the federal action. The primary issue which faced the Second Circuit was the applicability of Rule 11 sanctions to pleadings originally certified in state court.[74]

In holding Rule 11 fails to provide sanctioning power for unreasonable filings in state court, the Second Circuit stated: "Rule 11, of course, does not purport to authorize sanctions for actions taken in state courts. It does, however, apply to proceedings following removal, and sanctions may be imposed in appropriate circumstances for post-removal proceedings in the federal court."[75] Thus, the Second Circuit seemed to rely on a reading of rule 81(c)[76] to determine Rule 11 was

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67. *See infra* note 84; *see, e.g.*, 28 U.S.C. § 2072 (1982) (the Rules were promulgated for the civil procedure of the United States court system under The Supreme Court's power to prescribe general rules).

68. FED. R. CIV. P. 81(c).

69. *See* 28 U.S.C. § 1441. This statute provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Id.

70. *See* Brown v. Capitol Air, 797 F.2d 106 (2d Cir. 1986).

71. *See e.g.*, Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Pogo Producing Co. v. Southern Natural Gas Co., 599 F. Supp. 720 (La. 1984).

72. 797 F.2d 106 (2d Cir. 1986).

73. Brown v. Capitol Air, Inc., 797 F.2d 106 (2d Cir. 1986).

74. *Id.*

75. *Id.* at 108 (citations omitted).

76. FED. R. CIV. P. 81(c) provides:

> These rules apply to civil actions removed to the United States district courts

inapplicable to original pleadings when the action was removed. By so holding, the court in *Brown* recognized a narrow exception to the imposition of sanctions for unreasonable filings. By filing motions or other papers in state court in an action which later is removed to federal court, the filer cannot be sanctioned under Rule 11 unless new filings are originated in federal court.[77]

In addition to the lack of a continuing duty and related problems in the state-federal removal context, Rule 11 may also be unavailable to sanction subjective bad faith. The rule provides "to the best of the signor's knowledge, information, and belief formed after reasonable inquiry [the pleading must be] well grounded in fact. . . ."[78] The Advisory Committee stated this is a more rigorous test than the original bad faith inquiry because it submits the pleader to an objective standard.[79]

In 1987, the Court of Appeals for the Ninth Circuit considered this issue in *Rachel v. Banana Republic, Inc.*[80] In *Rachel,* the court confronted the problem of applying a Rule 11 sanction to an attorney acting in subjective bad faith. The attorney failed to "produce admissible evidence sufficient to raise any genuine issue of fact [and the] inclusion of [defendant] as a co-defendant was completely lacking in factual basis."[81] The court reviewed the rule's standard and responded "[b]ecause of the objective standard applicable to Rule 11, a complaint that is well-grounded in fact and law cannot be sanctioned regardless of counsel's . . . intent."[82] Thus, the court observed that rule does not authorize any inquiry into the subjective intent of the filer.[83]

Beyond Rule 11's failure to impose sanctions for bad faith, but reasonable filings, the rule is limited in scope by Federal Rule of Civil Procedure 1.[84] Rule 1 states "[t]hese rules govern the procedure in

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from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. . . .

Id.

77. *See Brown*, 797 F.2d 106.

78. FED. R. CIV. P. 11.

79. FED. R. CIV. P. 11, advisory committee's note.

80. 831 F.2d 1503 (9th Cir. 1987).

81. Rachel v. Banana Republic, Inc., 831 F.2d 1503, 1508 (9th Cir. 1987).

82. *Id.*

83. *Id.*

84. FED. R. CIV. P. 1. This rule provides in full:

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exception stated in Rule 81. They shall be construed to

. . . all suits of a civil nature. . . ."[85] Thus, by definition, Rule 11, as well as the other civil procedure rules, does not apply to federal criminal actions.[86] Although, actions in criminal court maybe executed in an unreasonable manner courts cannot rely on Rule 11 procedures for sanctioning in criminal actions.[87] Inasmuch as Rule 11's limited power only applies to civil cases, criminal courts are forced to look elsewhere for sanctioning authorization. This leads to a lack of uniformity between civil and criminal courts in applying a system of attorney sanctions.

In addition to the civil action requirement, Rule 81 further limits the applicability of Rule 11 by stating the Federal Rules of Civil Procedure are inapplicable to ". . . proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C. . . . ."[88] Thus, courts which handle bankruptcy proceedings and intellectual property rights are powerless to apply Rule 11 sanctions. The court's sanctioning scheme, therefore, further suffers from inconsistancy and nonuniformity.

In summary, Rule 11's lack of a continuing duty upon one certifying a pleading, especially when combined with a state federal removal action, and its inapplicability to criminal, bankruptcy, and copyright proceedings has resulted in sanctioning voids for many areas of federal practice.

V. 28 U.S.C. SECTION 27

The American rule's statutory exception to non-fee shifting was enacted by Congress in 1813.[89] The Act was drafted by a Senate

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secure the just, speedy, and inexpensive determination of every action.

Id.

85. *Id.*

86. Federal criminal actions are governed by the Federal Rules of Criminal Procedure, *see* FED. R. CRIM. P. 1.

87. Federal criminal courts must rely on Federal Rules of Criminal Procedure 42(a). FED. R. CRIM. P. 42(a) provides:

> [A] criminal contempt may be punished summarly if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.

Id. In addition, courts have found that relevant factors in determining issues of "material obstruction" such as is required for a holding of contempt include reasonably expected reactions of those in the court room. *See, e.g.*, In re Gustafson, 619 F.2d 1354 (9th Cir. 1980).

88. FED. R. CIV. P. 81(a)(1).

89. Act of July 22, 1813, ch. 14, § 3, 3 Stat. 21 (1813), *superseded by* 28 U.S.C. § 1927 (1948), *amended by* 28 U.S.C. § 1927 (1982). This act provided:

Committee whose purpose was "to inquire what legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice. . . ."[90] It is generally hypothesized this Act was passed in reaction to the practice of attorneys who, while working on a percentage basis, "apparently had filed unnecessary lawsuits to inflate their compensation."[91]

In 1948, the Act was codified at Title 28, United States Code Section 1927.[92] As amended in 1980,[93] it reads in part:

> . . . *And be it further enacted*, That whenever causes of like nature, or relative to the same question shall be pending before a court of like of the the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. 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 causes before the court so as to increase costs unreasonable and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Id.

90. 26 ANNALS OF CONG. 29 (1813); *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 759 (1980).

91. *Roadway Express*, 447 U.S. at 759 n.6. *See, e.g.*, H.R. 25, 27th Cong., 3d Sess., 21-22 (1842), 26 ANNALS OF CONG., 29 (1813).

92. 28 U.S.C. § 1927 (1948).

93. 28 U.S.C. § 1927 (1982).

Until 1980, before the act was amended, the statutory provision provided little relief for parties injured by attorney actions because courts defined the term "costs", as used in the statute, to exclude attorneys' fees. By excluding attorneys' fees from the term "costs", the sanctioning power of § 1927 was left with little force. *See generally Roadway Express*, 447 U.S. 752.

Most courts defined the term "costs" as those expenditures expressly stated in 28 U.S.C. § 1920. *See supra* note 22. Section 1920 lists the fees which may be assessed by a judge or clerk to determine what costs an injured party could recoup under § 1927. 28 U.S.C. § 1920 (1987). In June of 1980, the Supreme Court affirmed this view in Roadway Express, Inc. v. Piper. 447 U.S. 752 (1980). In *Roadway Express*, the Court, because of a joint reading of § 1927 and § 1920, held that costs under § 1927 do not embrace attorneys' fees. *Id.* at 761. After limiting costs under § 1927 to those defined in § 1920, however, the Court ruled attorneys' fees could by granted to the injured party under the court's inherent power. *Id.* at 767. Under the inherent powers of the court the attorney's conduct in the case must "constitute or" be "tantamount to bad faith". *Id.* at 767.

The Court in *Roadway Express* recognized a clear distinction between the inherent powers of courts under contempt authority, and the codification of cost shifting in § 1927. That difference being, mainly, that costs include attorneys' fees under the

> 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.[94]

This amendment was enacted to make an attempt to control swelling court dockets.[95] However, even though section 1927 now allows the recovery of attorneys' fees, most courts have ignored this fee shifting statute.[96]

Section 1927 sets out three statutory elements which must be met before a court may impose sanctions: First, there must be a multiplication of the proceedings; second, the attorney's conduct must be unreasonable and vexatious; third, there must be an increase in court costs due to the abusive practice.[97] The second requirement of unreasonable and vexatious conduct has proven the most difficult provision of section 1927 for the courts to interpret.[98]

Since the statute's enactment, the various courts of appeal have adopted one of three interpretations as to the "unreasonably and vexatiously" requirement. One minority view states the interpretation is a verbatim reading of the statute and imposes only an objective test to determine whether section 1927 has been violated.[99] Another

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inherent powers, but not under § 1927.

However, It is debated as to whether the 1980 amendment was due in part to *Roadway Express*. Jones v. Continental Corp., 789 F.2d 1225, 1229 (6th Cir. 1986), suggests that Congress intended the amended § 1927 go beyond the "bad faith" standard of the court's inherent powers. This meant Congress had acted in direct response to *Roadway Express*. However, congressional history suggests the amendment process started months before the *Roadway Express* ruling. *See generally* S.390, 96th. Cong., 1st. Sess., 125 CONG. REC. 2148 (1979).

94. 28 U.S.C. § 1927 (1982).

95. *See* Joseph, *Rule 11 is Only the Beginning*, 74 A.B.A. J. 62 (May 1, 1988).

96. *Id.*

97. *See* Pollak, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619, 623-29 (1977). It should be noted courts under § 1927 reserve a right to impose sanctions upon the court's own motion, or upon motion of a party opponent. *See also* Roadway Express, Inc. v. Piper, 447 U.S. 757 (1980).

98. *See infra* notes 99-131 and accompanying text.

99. The First Circuit Court of Appeals found that attorneys whose conduct included filing hundreds of irrelevant documents, citing unrelated cases, and making repetitive motions without rational basis were sanctionable under § 1927. The Court stated "[w]hen an attorney fails to take an objective look at his case and appeals

minority opinion states section 1927 requires either objective unreasonableness or subjective bad faith for a violation to occur.[100] Conversely, the majority of the courts of appeal have imposed only a requirement of subjective bad faith to violate section 1927.[101]

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simply because the rules allow him to appeal, he commits a wrong against the courts and against the parties who must respond to his appeal." Limmerick v. Greenwald, 749 F.2d 97, 101 (1st Cir. 1984). *See also* United States v. Nesglo Inc., 744 F. 2d 887, 891 (1st Cir. 1984) (a "serious and studied disregard for the orderly process of justice" will warrant an award of attorneys' fees under § 1927).

The Fifth Circuit authorized the shifting of attorneys' fees to defendants only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Lewis v. Brown & Root Inc., 711 F.2d 1287, 1291 (5th Cir. 1983) (*citing* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978), *cert. denied*, 464 U.S. 1069 (1984). *See also* Hagerty v. Succession of Clement, 749 F.2d 217, 222-23 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985) (the award of double cost and attorney's fees was appropriate under the *Lewis* rule).

100. The Sixth Circuit, in an employment discrimination case, awarded costs against an attorney for "unreasonably and vexatiously" multiplying a suit under § 1927. It stated when "an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assesssing fees attributable to such actions against the attorney." Jones v. Continental Corp., 789 F.2d 1225, 1230 (6th Cir. 1986). The Sixth Circuit reasoned that to find subjective bad faith is necessary to impose sanctions under § 1927 "would be to assume that the amendment added nothing to the inherent powers of the court [found in the *Roadway Express, Inc.* rule]." *Id.* In the Seventh Circuit, the court stated, "[e]ven if only negligence was at work, counsel must learn to be alert." If not, the court will "accordingly use [its] power under 28 U.S.C. § 1927 and impose a penalty of $1,000." Westinghouse Electric Corp. v. N.L.R.B., 809 F.2d 419, 425 (7th Cir. 1987). *See also In re* TCI Ltd., 769 F.2d 441, 447 (7th Cir. 1985) ("[t]he amended Rule 11 sets out a standard that we think applies equally to § 1927 . . .").

101. In the Second Circuit, courts must find a bad faith intent resulting in significant multiplication of the suit. *See* Tedeschi v. Smith Barney, Harris Upham & Co., Inc., 579 F. Supp. 657 (S.D.N.Y. 1984), *aff'd sub nom.* Tedeschi v. Barney, 757 F.2d 465 (2d Cir. 1985), *cert. denied*, 474 U.S. 850 (1986).

The Third Circuit found "[c]ourts in other circuits have been uniform in holding that an attorney's bad faith is a necessary predicate to liability under section 1927. . . . We too read section 1927 to require a showing of actual bad faith before attorneys' fees may be imposed." Baker Industries v. Cerberus Ltd., 764 F.2d 204, 208-09 (3d Cir. 1985).

The Fourth Circuit stated the imposition of sanctions under § 1927 was authorized after a showing of subjective bad faith. *See* Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985).

The Eighth Circuit applied a bad faith standard requirement, stating "an intentional departure from proper conduct, or, at a minimum, . . . a reckless disregard of the duty owed by counsel to the court" is one of the standards to be construed

The majority view, interpreting the unreasonable and vexatious language of section 1927 to require subjective bad faith only, leaves the courts' powers under the statute identical to their inherent powers. Therefore, the courts' powers under section 1927 are as ineffectual as their inherent powers in terms of sanctioning abuse of the judicial process.

However, as will become apparent later in this comment, if the courts interpreted section 1927 as placing an objective standard of conduct on attorneys, the courts would have sufficient power to sanction abuse in the judicial process.[102] Indeed, such a reading of section 1927 is not unwarranted. The intent of the drafters of section 1927 to use an objective standard is illustrated structurally by its framework.[103] In addition, the statute's congressional history demonstrates the intent of an objective standard approach to section 1927.[104]

The majority of courts have fashioned the "unreasonably" language of section 1927 as subordinate to and controlled by the "vexatious[]" part of the inquiry.[105] When the Sixth Circuit Court of Appeals originally faced the interpretation problem in *United States v. Ross,*[106] the court stated:

> [T]he precedents that we have found recognize that the Congress intended to impose a sanction on conduct more culpable

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from § 1927. Jaquette v. Black Hawk County, Ia., 710 F.2d 455, n.16 (8th Cir. 1983) (*citing* United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976)).

The Ninth Circuit agreed with the defendant that the district court erred by imposing sanctions without finding conduct that was willful, intentional, reckless, or in bad faith. *See* United States v. Austin, 749 F.2d 1407 (9th Cir. 1984).

The Tenth Circuit stated, "[w]e believe the proper standard under either Rule 38 or § 1927 is that excess costs, expenses, or attorney's fees are imposable against an attorney personally for conduct that, viewed objectively, manifests either intentional or reckless disregard of the attorney's duties to the court." Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987); *see also* Morris v. Adams-Millis Corp., 758 F.2d 1352 (10th Cir. 1985).

The Eleventh Circuit found § 1927 applies the same bad faith standard as does the inherent powers of the courts. *See* Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1507 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

The District of Columbia Circuit also advocates a bad faith requirement. *See* Asai v. Castillo, 593 F.2d 1222 (D.C. Cir. 1979).

102. *See infra* notes 140-42 and accompanying text.

103. *See infra* notes 108-13 and accompanying text.

104. *See infra* notes 114-31 and accompanying text.

105. *See* United States v. Ross, 535 F.2d 346 (6th Cir. 1976). *See also* Blair v. Shenandoah Women's Center, 757 F.2d 1435 (4th Cir. 1985); Jaquette v. Black Hawk County, Ia., 710 F.2d 455 (8th Cir. 1983); United States v. Austin, 749 F.2d 1407 (9th Cir. 1984).

106. 535 F.2d 346 (6th Cir. 1976).

> than mere unintentional discourtesy to a court when it conjoined the word "vexatiously" with "unreasonably." Webster's Third New International Dictionary (1971) defines "vexatious" as "lacking justification and *intended* to harass."[107]

However, this interpretation of the structure of section 1927 renders the language of "unreasonably" as wholly ineffectual, as if Congress had injected the language for no substantial purpose. The Sixth Circuit's original reading of section 1927 would interpret the statute as requiring only subjective bad faith. However, it would have been irrational for Congress to add the objective "unreasonabl[e]" requirement if it was to be controlled by a subjective "vexatious[]" requirement.

To satisfy a literal reading of the statute, the interpretation of section 1927 must be viewed as having two components. The first component is unreasonableness, and the second component is vexatiousness. Because of the use of the word "and" between the two components, Congress must have intended that both elements be met.

Even though courts seem to ignore the unreasonableness language in section 1927, an objective standard should still be used under the "vexatiously" language. The word vexatiousness was defined by the Supreme Court in *Christiansburg Garment Co. v. E.E.O.C.*.[108] In *Christiansburg Garment*, the Court was faced with the task of clarifying an interpretation by a district court as to the application of a different fee-awarding statute.[109] The Court stated: "[I]f the objective of Congress had been to permit the award of attorney's fees only against defendants who had acted in bad faith, 'no new statutory provision would be necessary,' since even the American common-law allows the award of attorney's fees in those exceptional circumstances."[110] The Court explained further "that the term 'vexatious' in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him."[111]

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107. United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976) (emphasis supplied by the court).

108. 434 U.S. 412 (1978).

109. The Court interpreted Title VII of the Civil Rights Act of 1964, which provided for discretionary awards or attorneys' fees, to require that a claim be "unreasonable, frivolous, meritless, or vexatious" before sanctions can be imposed. Christiansburg Garment Co. v. E.E.O.C. 434 U.S. 412, 421 (1978).

110. *Id.* at 417. *See supra* notes 48-56 and accompanying text.

111. *Christiansburg Garment Co.* at 421.

Accordingly, *Christiansburg Garment* has been interpreted by the Seventh Circuit Court of Appeals as suggesting that vexatiousness, as used in section 1927, may involve both unreasonable behavior or bad faith conduct.[112] Utilizing the Supreme Court's explanation of the term vexatiousness, section 1927 should be read as: "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably . . .",[113] and objectively should have known, or subjectively knew the proceedings would be multiplied can be sanctioned. This application of the "unreasonably and vexatiously" language would effectuate the statute's design and would supply courts with the power to sanction attorneys for unreasonable or subjective bad faith conduct.

In addition to the Court's objective component interpretation in *Christiansburg Garment*, legislative history indicates Congress' own intent to impose an objective reasonableness standard on section 1927. In 1980, the Supreme Court noted "the sparse legislative history [of section 1927] makes this provision difficult to interpret."[114] However, Congress thereafter amended section 1927.[115] The legislative history surrounding the amendment demonstrates the Congressional intent to maintain an objective standard under section 1927.[116]

The proposed amendment to section 1927 was introduced into the Senate by the Antitrust Procedural Improvement Act of 1979.[117] The purpose of the Act was "[t]o expedite and reduce the cost of antitrust litigation. . . ."[118] To reach its purpose, Congress attacked "the widespread, almost commonplace, tactic of using the discovery

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112. *See In re* TCI Ltd., 769 F.2d 441 (7th Cir. 1985). The court stated:

> Subjective bad faith or malice is important only when the suit is objectively colorable. A lawyer who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim, is engaged in abuse of process. This is indepedently tortious, and it may be the basis . . . for an award of fees.

Id. at 445.

113. 28 U.S.C. § 1927.

114. Roadway Express, Inc. v. Piper, 447 U.S 752, 759 (1980).

115. Amended Sept. 12, 1980, Pub.L. 96-349, § 3, 94 Stat. 1156; the amended portions of § 1927 (underlined), along with the deleted portions of the old § 1927 (lined through), are as follows:

> 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 cost~~ unreasonably and vexatiously may be required by the court to satisfy personally ~~such excess costs~~ *the excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.*

116. *See infra* notes 117-31 and accompanying text.

117. S. 390, 96th Cong., 1st Sess., 125 CONG. REC. 2146 (1979).

118. *Id.*

machinery of the Federal Rules to delay the time of judgment, harass the other party, obfuscate the issue, and clog the court's calendar with unnecessary and wasteful motions and discovery requests."[119] In its final form the proposed amendment to section 1927 added "[a]ny attorney . . . who *intentionally* engages in conduct unreasonably and *primarily* for the purpose of delaying or increasing the cost. . . ."[120] Thus, the bill proposed heightening the level of conduct under section 1927 to a specific intent requirement.

The amendment was passed by the Senate on July 20, 1979.[121] However, the bill faced opposition in the House of Representatives.[122]

The House version of S. 390, H.R. 4047, read "[a]ny attorney . . . who engages in conduct *unreasonably* and *primarily* for the purpose of delaying or increasing the cost of litigation may be required by the court to satisfy the excess costs. . . ."[123] The purpose of the amended language in the House bill was to encourage the use of section 1927 by "*clarifying*" the interpretation of the uncertain "vex-

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119. *Antitrust Procedural Improvements and Jurisdiction Amendments: Hearings on H.R. 4047 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 60 (1979) (statement of Hon. Charles B. Renfrew, Judge, U.S. Dist. Ct., San Francisco, Cal.).

120. S. 390, 96th Cong., 1st Sess., 125 CONG. REC. 19,916 (1979) (emphasis added). The proposed amendment read as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who *intentionally* engages in conduct unreasonably and *primarily* for the purpose of delaying or increasing the cost of the litigation may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonable incurred because of such conduct.

Id.

121. *Id.* at 19,917.

122. *See. e.g., The Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 3271, H.R. 4046, H.R. 4047, H.R. 4048, H.R. 4049, H.R. 4059, Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st. Sess. (1979).

123. *The Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 4047 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 6 (1979) (emphasis added). It reads:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who engages in conduct *unreasonably* and *primarily* for the purpose of delaying or increasing the cost of the litigation may be required by the court to satisfy personally the costs, expenses and attorney's fees reasonable incurred because of such conduct.

Id.

atiously" language.[124] The subcommittee heard testimony that "[t]he intent of this legislation is to change the standard to give a sign to the courts, a clear indication, that Congress wants this issue addressed *as it thought it had mandated under 28 U.S.C. 1927*, but apparently, at the time had not been sufficiently clear in the standard adopted."[125] Additional testimony to the subcommittee suggested the adoption of a requirement of "intentional misconduct" as in the Senate bill would only strengthen the courts reluctance to impose sanctions.[126]

H.R. 4048, the House's version of the Antitrust Procedural Improvement Act, was passed in opposition to the bill passed by the Senate.[127] Thus, on August 20, 1980, a Joint-Conference Report was issued on the Antitrust Procedural Improvements Act of 1980.[128] The conference suggested the following compromise; amend secton 1927 by striking out "as to increase costs", and by striking out "such excess costs" to insert "the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." The only change, therefore, was the statute's coverage of attorney's fees. This joint-conference amendment was adopted by the House on August 28, 1980,[129] and by the Senate on August 18, 1980.[130]

The House's rejection of the Senate's bill was a rejection of the attempt to heighten the level of conduct to a solely subjective standard for sanctions under section 1927. Although, Congress was also unable to significantly clarify the existing "vexatiously" standard, it is apparent Congress originally intended an objective interpretation with a subjective component. When Congress originally enacted section 1927 its purpose was "something short of the contempt powers of the courts," which required a specific mental state finding.[131] Thus, Congress intended an objective or "reasonable" component to section 1927.

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124. *Id.* at 23 (statement of John H. Shanefield, Assistant Attorney General) (emphasis added).

125. *Id.* at 37 (emphasis added).

126. *Id.* at 61 (Statement of Judge Charles B. Renfrew).

127. H.R. 4048, 96th Cong., 1st Sess., 126 CONG. REC. 14490 (1980) (H.R. 4047 did not pass the House subcommittee. H.R. 4048, incorporating the provisions of the Antitrust Procedural Improvement act, rejected the Senate's amendment to section 1927).

128. H.R. 1234, 96th Cong., 1st Sess., 126 CONG. REC. 22,123 (1980).

129. *Id.* at 23,625.

130. *Id.* at 21,679.

131. *Antitrust Procedural Improvements and Jurisdiction Amendments: Hearings on H.R. 4048 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 68 (1979) (Statement of Judge Charles B. Renfrew, Judge, U.S. Dist. Ct., San Francisco, Cal.).

Nevertheless, a majority of the courts apply a mere subjective standard under section 1927. Such a limited application of section 1927, when coupled with the courts' limited application of Rule 11 and the inherent sanctioning power, indicates courts still lack a comprehensive attorney sanctioning system for all types of misconduct, including negligent misconduct.

VI. RECOMMENDATION

"To be effective, management of complex litigation will sometimes require that meaningful sanctions be threatened or imposed."[132] Under the current inherent sanctioning power of courts, however, there exists only power to impose sanctions for conduct done in bad faith.[133] This despoils the courts' effectiveness in controlling system abuse because unreasonable conduct done in good faith cannot be sanctioned. The courts must have the power to sanction conduct which is objectively unreasonable to effectively impose comprehensive and uniform sanctions.

The withdrawal of the "pure heart, empty head defense"[134] was the main intent of the Advisory Committee in promulgating Rule 11.[135] The objective standard dictates that the attorney, or filing party, must make a "reasonable inquiry" into the action.[136] One can still fail to make a "reasonable inquiry" in the absence of bad faith. Therefore, adherence to an objective standard allowing the santioning of all unreasonable conduct, better serves the purpose of Rule 11 in avoiding limited sanctioning. However, for reasons stated earlier, Rule 11 is inapplicable to many federal actions.[137] Thus, Rule 11 does not fully supply courts with the comprehensive authority to sanction attorney misuse throughout the system.[138]

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132. President's Nat'l Comm. for the Review of Antitrust Law and Procedures, *Report to the President and the Attorney General* 208 (1979) (complex litigation refers to the large antitrust litigation cases in federal court).

133. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-69 (1980). *See also supra* notes 48-56 and accompanying text.

134. Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 187 (1985).

135. *See* Proposed Amendments to the Fed. R. Civ. P., 97 F.R.D. 165, note 195-98.

136. FED. R. CIV. P. 11.

137. *See supra* notes 60-88 and accompanying text.

138. It may be interesting to note that, Rule 11 imposes a duty on attorneys and "part[ies] who [are] not represented by an attorney." FED. R. CIV. P. 11. Section 1927, however, only applies to an "attorney or other person admitted to conduct

If an objective test is applied to section 1927, courts would be equipped to use the statute as a uniform sanctioning power across the spectrum of federal cases. Currently, many courts will not fully accept an objective component to section 1927.[139] To eliminate the differing of the court interpretations, and to provide a comprehensive statute for the imposition of sanctions, Congress should amend the existing text of section 1927. This procedure need only include the change of one word. That change could be as follows:

> 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 *or* vexatiously may be required by the court to satisfy personally the excess, expenses, and attorney's fees reasonably incurred because of such conduct.

Thus, by either interpreting section 1927 as applying an objective or subjective component, or by changing the text to specifically authorize an objective or subjective test the statute may provide courts with the inclusive powers to sanction in a homogeneous manner.

There are several significant advantages in reading section 1927 with an objective component. First, applying the objective-subjective tests to section 1927 would advance the courts' sanctioning power into the litigation phases of the lawsuit. Second, the purpose of sanctioning is an attempt to reduce the abuses of the legal process.

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cases in any court." 28 U.S.C. 1927 (1987). This application of 1927 has been interpreted as eliminating non-attorneys and pro se representatives from the statute's sphere of enforceability. *See generally* F.T.C. v. Alaska Land Leasing, Inc., 799 F.2d 507 (9th Cir. 1986); Damiani v. Adams, 657 F. Supp. 1409 (S.D. Cal. 1987); Hill v. U.S., 599 F. Supp. 118 (D.C. Tenn. 1984); E.E.O.C. v. Sears Roebuck and Co., 114 F.R.D. 615 (N.D. Ill. 1987). This disparity between the two sanctioning provisions, however, appears to play a minor role in the court's imposition of sanctions. The Advisory Committee to Rule 11 suggested that:

> [a]mended rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations.

FED. R. CIV. P. 11, Advisory Committee Notes, 97 F.R.D. at 199. Courts have recognized that a single standard of reasonableness by litigators is a very high standard for *pro se* filers. *See generally* Haines v. Kerner, 404 U.S. 519, *reh'g denied*, 405 U.S. 948 (1972). Accordingly, only a small amount of sanctions have been applied to *pro se* litigants under rule 11. Thus, rule 11 may stand as an option to 1927 in those few cases were sanctioning a *pro se* litigant is appropriate.

139. *See supra* notes 99-101 and accompanying text.

This purpose is a trait which Rule 11, because of its under-inclusivity, fails to accomplish. Although Rule 11 only employs sanctioning for abuses of the filing system, section 1927 imposes sanctioning at all stages of the action. Accordingly, section 1927 broadens the court's authority in sanctioning, and, hence, further achieves the purpose of the sanction doctrine.

Third, the continuing duty imposed by section 1927 eliminates the state-federal removal problems of Rule 11.[140] When cases are removed to federal court, section 1927 would activate the court's sanctioning power. Thus, any action which is founded on a frivolous legal theory or which becomes frivolous once in federal court may be sanctioned. In addition, any new act in federal court, whether involving filing or not, would be sanctionable if frivolous. Such a use of section 1927 would assist in harmonizing the courts' system of attorney sanctioning.

Finally, section 1927 applies to "[a]ny attorney . . . in any court of the United States . . . in any case."[141] While Rule 11 only applies to some federal civil actions, section 1927 applies to civil and criminal cases in federal court. Thus, unreasonable and vexatious actions, civil as well as criminal, may be appropriately sanctioned under section 1927. In addition, while Rule 11 does not apply to bankruptcy and copyright proceedings, section 1927 extends the court's sanctioning power to all civil proceedings.[142] Consequently, the federal courts need not be powerless, or act in reliance on other inconsistent sanctioning schemes.

VII. CONCLUSION

Section 1927 has been available to the judiciary for one hundred and seventy five years. However, this statute has not been utilized by most federal courts. A major reason courts rarely apply section 1927 is the majority of courts interpret the statute as containing only a subjective intent standard. Therefore, today section 1927 is at best a meager safeguard against attorney misconduct.

Another source of sanctioning power a court may look to is the long-recognized inherent power exception to the American rule against

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140. *See supra* notes 60, 62-65, 67-72, 75-76, 84 and accompanying text.

141. 28 U.S.C. § 1927 (1982).

142. *See generally* In re Wisconsin Steel Corp., 48 B.R. 753 (D.C.Ill 1985); Matter of Plunkett, 47 B.R. 172 (Bankr. Wis. 1985); In re Perez, 43 B.R. 530 (Bankr. Tex. 2984); In re Chantilly Const. 39 B.R. 466 (Bankr. Va. 1984); In re Moskowitz, 15 B.R. 790 (Bankr. N.Y. 1981).

non-fee shifting. However, the weakness of the inherent power exception is its inapplicability to objectively unreasonable misuse of the courts. This weakness leaves courts searching for a more encompassing power of sanctioning.

Courts have turned to Rule 11 as a remedy to the weaknesses touted by section 1927 and the inherent powers exception. Rule 11 imposes a strong objective standard on filers in lawsuits. Courts, under the rule, are able to sanction attorneys for conduct which is unreasonable in the filing of papers. However, the strength of Rule 11 is narrowed by the rule's inapplicability to many court actions. As seen, Rule 11 does not impose a "continuing duty" on filers to maintain reasonableness throughout the lawsuit. In addition, Rule 11 may not authorize the sanctioning of actions done in bad faith but reasonably. Additionally, the rule is limited by its conformity to the federal rules. Thus, the rule does not apply to criminal cases, bankruptcy cases, copyright cases, or cases where the action was originated in state court. Hence, courts are left without a comprehensive uniform attorney sanctioning scheme with an objective and subjective standard applicable to all federal cases.

If the majority of courts continue to interpret section 1927 as only applying a subjective standard, the statute should be amended to make it clear a violation will occur if the attorney's conduct is objectively unreasonable or done in subjective bad faith. In addition, the statute covers all federal criminal and civil actions. Thus, section 1927 should be an exhaustive federal statute that authorizes courts to apply sanctions uniformly in a large variety of situations.

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