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## Making the Best of an Imperfect World: An Argument in Favor of Judicial Discretion to Reduce § 1927 Sanction Awards\*

### I. INTRODUCTION

In a perfect world, litigants injured by attorneys' abusive litigation practices would receive full compensation for their injuries. The world, however, is far from perfect. In the American legal system, the general rule is that litigants are responsible for their own attorney fees, whether they prevail or not.<sup>1</sup> However, strict adherence to this rule sometimes creates a situation in which innocent litigants are unjustly penalized for an attorney's dilatory or abusive litigation practices.<sup>2</sup> One way of correcting this injustice is prescribed by 28 U.S.C. § 1927, which 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.<sup>3</sup>

Unlike Federal Rule of Civil Procedure 11, § 1927 is not limited to

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1. *See* *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (explaining that the prevailing party is not ordinarily entitled to payment of its attorney fees by the losing party). This rule is colloquially referred to as the "American Rule." *See, e.g.,* *Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986) (explaining the American Rule dictates that prevailing parties are not entitled to collect attorney fees from losing parties); Lindsey Simmons-Gonzalez, Comment, *Abandoning the American Rule: Imposing Sanctions on an Empty Head Despite a Pure Heart*, 34 OKLA. CITY U. L. REV. 307, 307 (2009).

2. *See* *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 768 (1980) (Blackmun, J., concurring in part, dissenting in part) (expressing concern that an interpretation of § 1927 that prevents a losing party subject to a fee-shifting provision from recovering excess attorney fees from its own counsel "penalizes the innocent client").

3. 28 U.S.C. § 1927 (2006).

motions and pleadings signed by attorneys.<sup>4</sup> Section 1927 applies to any type of proceeding in federal court.<sup>5</sup> This Comment discusses whether district courts have the discretion to consider attorneys' financial ability to pay when determining the amount of sanction awards pursuant to § 1927. The issue arises out of a recent split between the Second and Ninth circuits on the one hand, and the Seventh and Tenth circuits on the other.<sup>6</sup>

In *Haynes v. City and County of San Francisco*, the Ninth Circuit joined the Second Circuit in holding that district courts have discretion to consider attorneys' ability to pay when determining the amount of sanction awards.<sup>7</sup> In explicitly rejecting the Seventh Circuit's opposite holding and rationale in *Shales v. General Chauffeurs, Sales Drivers & Helpers Local Union No. 330*,<sup>8</sup> the *Haynes* court reasoned that the "plain meaning" of § 1927's text permits district courts to "reduce the amount of a § 1927 sanctions award because of the sanctioned attorney's inability to pay."<sup>9</sup>

Despite the *Haynes* court's best attempts to pass its interpretation of § 1927 as the statute's plain meaning, reliance on plain meaning alone to reach the court's conclusion is tenuous. While the statute plainly permits recovery of attorney fees, the language of § 1927 does not explicitly address whether courts may reduce a § 1927 sanction award at all—let alone what factors courts may consider if such a reduction is permissible. That is, the text of the statute gives courts discretion regarding *whether* to award sanctions,<sup>10</sup> but it is unclear whether that discretion extends to the *amount* of such sanctions. Thus, plain meaning alone may not provide much support for reducing § 1927 sanction awards because an attorney is unable to pay.

Determining the purpose of the statute may provide more clarity as to whether Congress intended to confer on courts the discretion to reduce

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4. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 378 (3d ed. 2000).

5. *Id.*

6. See *Haynes v. City of S.F.*, 688 F.3d 984, 988 (9th Cir. 2012); *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1206 (10th Cir. 2008); *Oliveri*, 803 F.2d at 1281.

7. *Haynes*, 688 F.3d at 987 (citing *Oliveri*, 803 F.2d at 1281).

8. The *Shales* court held that courts do not have the discretion to reduce a sanction award because of an attorney's inability to pay the full amount. *Shales*, 557 F.3d at 749; see also *infra* notes 53–68 and accompanying text.

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

10. See 28 U.S.C. § 1927 (2006) (providing that courts *may* require attorneys who engage in dilatory practices to satisfy the costs, expenses, and attorney fees incurred by their adversaries).

the amount of sanctions for such reasons as inability to pay. It is clear the statute is designed to shift fees to an offending attorney.<sup>11</sup> What is not clear is whether the purpose of shifting fees is compensatory, deterrent, punitive, or some combination of the three. On the one hand, a compensatory purpose implies that the sanction award serves to make the victim whole.<sup>12</sup> To do so, however, would seemingly require compensating the victim *in full*.<sup>13</sup> On the other hand, a deterrent or punitive purpose implies partial compensation may be sufficient.<sup>14</sup> However, the three purposes are not mutually exclusive. Each potential purpose or combination thereof has different implications for the question at hand. Therefore, determining the statute's purpose, and the implications thereof, provides a better foundation on which to answer questions concerning courts' power to reduce § 1927 sanction awards.

Additional considerations weigh in favor of reducing § 1927 sanction awards because an attorney is unable to pay. For instance, the degree to which the conduct was willful; the knowledge, experience, and expertise of the offender; whether the offending attorney has demonstrated a pattern of sanctionable conduct; the victim's need for full compensation; and other factors all relate to whether courts have the power to reduce awards generally, as well as specifically for inability to pay.<sup>15</sup>

While the plain meaning argument *alone* may not provide much support for interpreting § 1927 as granting courts discretion to reduce an award because an attorney is unable to pay, the totality of arguments in favor of this interpretation show why it is a much more realistic, reasonable approach to the problem. Part II of this Comment examines the different possible purposes underlying the statute, as well as the implications of each. Part II also provides a brief history of the rule, and addresses the relevant case law. Part III explores the relationship between § 1927 and other fee-shifting provisions. In some respects, § 1927 is largely similar to other fee-shifting provisions but with one key difference: § 1927 shifts fees specifically to the offending attorney, not

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11. *Id.*

12. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 659 (1982) (discussing the theory that the purpose of compensation is to redress the victim's injuries, thereby making the victim whole again).

13. *Id.*

14. *See* *Oliveri v. Thompson*, 803 F.2d 1265, 1271, 1281 (2d Cir. 1986) (explaining that while fee shifting may be viewed as compensatory or punitive in nature, its underlying purpose is to deter abusive litigation practices).

15. JOSEPH, *supra* note 4, at 412.

the party itself.<sup>16</sup> Part III also considers what effect this has on the question of discretion to reduce awards under the statute. Part IV argues for interpreting § 1927 as conferring discretion to reduce sanction awards under the statute based on inability to pay and other factors. In doing so, Part IV puts forth a set of factors courts should weigh in making their determinations.

In a perfect world, victims of abusive litigation practices would be compensated in full without the need to weigh factors. Unfortunately, the problem cannot be resolved in a vacuum. Solving the problem requires a functional approach capable of adapting to the different circumstances in which litigation abuses occur. Discretion provides the mechanism through which the courts can do just that; it *compensates* victims of dilatory practices by *punishing* offending attorneys for misconduct with the hope that the punishment will *deter* similar conduct in the future.

## II. HISTORY & PURPOSE: COMPENSATION, DETERRENCE, OR PUNISHMENT

The disagreement among the circuits does not necessarily boil down to a mere disagreement about the purpose of the statute.<sup>17</sup> Yet, understanding the purpose of § 1927 makes a significant difference in how one interprets the statute. A compensatory purpose will have different implications than deterrent or punitive purposes, and vice versa. This Part begins by briefly tracing the historical evolution of § 1927. It

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16. 28 U.S.C. § 1927 (2006).

17. Compare *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009) (“[T]he award under § 1927 is compensatory, not punitive.”), and *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205–07 (10th Cir. 2008) (“[T]he text of § 1927, unlike that of Rule 11, indicates a purpose to compensate victims of abusive litigation practices, not to deter and punish offenders.”), with *Haynes v. City S.F.*, 688 F.3d 984, 987 (9th Cir. 2012) (“The purpose of § 1927 may be to deter attorney misconduct, or to compensate the victims of an attorney’s malfeasance, or to both compensate and deter.”), and *Oliveri v. Thompson*, 803 F.2d 1265, 1271, 1281 (2d Cir. 1986) (explaining that while fee shifting may be viewed as compensatory or punitive in nature, its underlying purpose is to punish and deter abusive litigation practices). While the courts do not necessarily disagree that compensation is one purpose, it is worth noting that both the *Shales* and *Hamilton* courts cast their arguments from a predominantly compensatory focus. *Shales*, 557 F.3d at 749; *Hamilton*, 519 F.3d at 1205–07. The *Haynes* and *Oliveri* courts, on the other hand, acknowledge that compensation may be *one* purpose of the statute, but both courts appear to view deterrence as the underlying purpose. *Haynes*, 688 F.3d at 987; *Oliveri*, 803 F.2d at 1271, 1281. One could perhaps make an argument that the split among the courts is really a product of their respective views regarding the purpose of the statute, but such an argument would overlook concerns about fairness, feasibility, propriety, and effectiveness of the different approaches to reducing § 1927 sanction awards.

then examines the different purposes, their implications, and the different courts' arguments for or against reducing awards based on each purpose.

A. *Historical Evolution of § 1927*

Until 1980, the language of § 1927 did not allow for recovery of expenses or attorney fees reasonably incurred as a result of an attorney's unreasonable and vexatious multiplication of the proceedings.<sup>18</sup> The Supreme Court's decision in *Roadway Express, Inc. v. Piper*, however, prompted Congress to pass an amendment to § 1927 broadening the scope of the statute to include recovery of excess expenses and attorney fees reasonably incurred.<sup>19</sup>

At the time of the Court's decision in *Roadway Express*, the language of § 1927 only permitted courts to require attorneys who "so multiplie[d] the proceedings in any case as to increase costs unreasonably and vexatiously . . . to satisfy personally such excess costs."<sup>20</sup> In *Roadway Express*, plaintiffs' counsel failed to cooperate with opposing counsel and repeatedly ignored the district court's orders.<sup>21</sup> In particular, plaintiffs' counsel failed to respond to Roadway's interrogatories, failed to appear for both an initial hearing and a subsequent rescheduled hearing for argument on Roadway's motion to compel responses to the interrogatories, and failed to submit a brief as ordered by the court "evaluating the impact of a recent decision in a related case."<sup>22</sup> The district court dismissed the case with prejudice and awarded costs and attorney fees to Roadway.<sup>23</sup>

On appeal, the Fifth Circuit "found no clear error in the ruling that [plaintiffs' counsel] had violated § 1927. The appellate court held, however, that [plaintiffs' counsel] were not liable for attorney's fees."<sup>24</sup> The Supreme Court granted certiorari to address the question whether the statute's use of the word "costs" included attorney fees, and held that

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18. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758 (1980) (denying the expansion of recoverable fees to those not explicitly listed in 28 U.S.C. § 1920); see also *Simmons-Gonzalez*, *supra* note 1, at 309–11 (tracking the historical interpretations and use of the language in § 1927).

19. *Simmons-Gonzalez*, *supra* note 1, at 310–11.

20. *Roadway Express*, 447 U.S. at 756 n.3 (quoting 28 U.S.C. § 1927 (1978)).

21. *Id.* at 754–55.

22. *Id.* at 755.

23. *Id.* The district court bifurcated the issues of dismissal and costs. *Id.* In the second suit, the court sanctioned plaintiffs' counsel for their dilatory actions, and ordered counsel to pay a total judgment of \$17,000, which included attorney fees. *Id.* at 756.

24. *Id.* at 756 (internal citation omitted).

attorney fees were not included.<sup>25</sup> The Court restricted recoverable costs to those explicitly listed in 28 U.S.C. § 1920,<sup>26</sup> in light of the fact the two statutes stem from the same initial Act, and there was no legislative history to the contrary.<sup>27</sup> By reading the two statutes together, the Court effectively “prevented recovery of attorney’s fees.”<sup>28</sup>

In August of 1980, just two months after the Court’s *Roadway Express* decision, Congress passed an amendment to § 1927 intended “to broaden the range of increased expenses which an attorney who engages in dilatory litigation practices may be required by the judge to satisfy personally.”<sup>29</sup> The newly amended language of the statute included explicit provisions permitting recovery of “excess costs, expenses, and attorneys’ fees.”<sup>30</sup> Congress also provided direction for the application of the new statutory language, explaining that the “high standard which must be met to trigger § 1927 insures that the provision in no way will dampen the legitimate zeal of an attorney in representing his client.”<sup>31</sup> The high standard also serves to protect against enterprising attorneys who will seek to take advantage of it. In general,

[I]t . . . is recognized that the federal courts should exercise care and restraint when awarding attorney’s fees. Undue generosity might encourage some members of the bar to seek out clients and encourage litigation over disputes that otherwise might not reach the courts. Were this to become widespread practice both the American system of civil litigation and the legal profession might fall into public disrepute.<sup>32</sup>

### B. *Making Victims Whole Through Compensation*

Turning now to the statute’s purpose, the word *victim* in the above subheading is no mistake. Rather, it makes clear that adversaries of attorneys who vexatiously multiply proceedings have been wronged. They may not be victims of violent crimes, but they are victims nonetheless. They have suffered legal harm—potentially extreme harm,

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25. *Id.* at 757, 759–63.

26. Such costs include, among others, clerk and marshal fees, transcript fees, and witness fees. See 28 U.S.C. § 1920 (1978).

27. Simmons-Gonzalez, *supra* note 1, at 310 (citing *Roadway Express*, 447 U.S. at 760).

28. *Id.* (citing *Roadway Express*, 447 U.S. at 760–61).

29. H.R. REP. NO. 96-1234, at 8 (1980), reprinted in 1980 U.S.C.C.A.N. 2781, 2782.

30. *Id.*

31. *Id.*

32. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2675.1 (3d ed. 2004).

as was the case in *Haynes*<sup>33</sup>—at the hands of an attorney.<sup>34</sup> Consider the following question posed, albeit rhetorically, by Professor Thomas D. Rowe, Jr.: “On what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor’s bill but not his lawyer’s bill?”<sup>35</sup> This question is valuable beyond its rhetorical force; at the most basic level, the victim has suffered a single harm, with nothing to distinguish the doctor’s bill from the lawyer’s bill. While the law cannot repair a broken leg, it permits the victim to obtain considerable monetary damages.<sup>36</sup> Why, though, should the victim only be compensated for the money spent on medical assistance? The lawyer’s assistance was as important, if not more so. Even though the legal system permits recovery of monetary damages, without an attorney’s assistance the victim likely would not have recovered any such damages.<sup>37</sup> Just like the doctor’s bills, the victim would not have incurred the attorney’s bills but for the car accident. This example demonstrates the implication of a compensatory purpose: those who have been injured ought to be made whole, which requires fully compensating them for their injuries.<sup>38</sup>

The question, then, is whether § 1927 has a compensatory purpose. Courts and scholars have asserted that the statute is, at least to some extent, compensatory in nature.<sup>39</sup> The Tenth Circuit’s decision in *Hamilton v. Boise Cascade Express* is particularly helpful at this point, as it focuses on the specific portion of the statutory text that most strongly supports a compensatory purpose—the text that “allows a court to require an attorney to ‘satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of [vexatiously

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33. The attorney in *Haynes* caused the opposing party to incur more than \$360,000 in excess costs, expenses, and fees as a result of his conduct. *Haynes v. City of S.F.*, 688 F.3d 984, 986 (9th Cir. 2012).

34. Rowe, *supra* note 12, at 659 (arguing that the persuasiveness of a compensatory approach is that the movant suffered “a legal wrong”).

35. *Id.* at 657 (quoting Judicial Council of Massachusetts, *First Report*, 11 MASS. L.Q. 7, 64 (1925)).

36. Arguably, whatever other injuries both victims—the car accident victim and the vexatious litigation victim—experience, they share a pecuniary loss. This is the common denominator, as it were, between the two. What is more, both face potentially devastating pecuniary loss: the driver from any medical bills she may incur; the litigant from litigating any multiplicative claims, motions, or other proceedings.

37. If nothing else, pro se representation would have made recovery much more difficult.

38. See Rowe, *supra* note 12, at 657 (noting the tension between the traditional American rule and the make-whole foundation for remedies).

39. See JOSEPH, *supra* note 4, at 375 (noting that the statute “has obvious compensatory aspects to it” while at the same time emphasizing that the underlying purpose of the statute is penal); see also *supra* notes 12–17 and accompanying text.

multiplicative] conduct.”<sup>40</sup> The court reasoned that this language best supports a victim-centered interpretation of § 1927.<sup>41</sup> In this provision, the victim’s injuries, specifically those injuries caused by the attorney’s misconduct, are the measure of damages. The measure of damages is not the entirety of the injured party’s legal fees incurred; nor is there a predetermined punitive amount to be imposed against an attorney who violates § 1927. Instead, any amount imposed against the offending attorney *necessarily* bears a direct relationship to the victim’s injuries. Specifically, any amount must bear a direct relationship to the costs reasonably incurred by the victim as a result of the attorney’s misconduct.<sup>42</sup> As such, this provision supports the theory that § 1927 is compensatory.

That § 1927 establishes the victim’s injuries as the measure of damages has important implications for the larger question regarding courts’ power to reduce an award.<sup>43</sup> Intuitively, anything less than full compensation results in an injustice to the victim.<sup>44</sup> A compensatory purpose therefore implies making the victim whole by requiring the offending attorney to satisfy the *full* amount of costs, expenses, and attorney fees reasonably incurred because of the attorney’s conduct. This is, at least in part, the basis for the Tenth Circuit’s decision in *Hamilton* and the Seventh Circuit’s decision in *Shales*, in which the courts prohibited reducing an award under § 1927 based on the offending attorney’s inability to pay the full amount.<sup>45</sup>

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40. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205 (10th Cir. 2008) (quoting 28 U.S.C. § 1927 (2006)).

41. *Id.*

42. See JOSEPH, *supra* note 4, at 375 (explaining that “the amounts awarded under [the statute] cannot be punitive sums unrelated to the amounts actually inflicted on the opposing party by the misconduct”).

43. These implications are not unique to the question whether a court may reduce an award based on an attorney’s ability to pay. The power to reduce an award because, for example, the attorney acted merely in objective bad faith rather than subjective bad faith is similarly questionable if the purpose of § 1927 is to compensate victims of dilatory conduct by attorneys.

44. See Rowe, *supra* note 12, at 657; cf. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 768 (1980) (Blackmun, J., concurring in part, dissenting in part) (arguing that the majority’s construction of § 1927, which prohibited the recovery of attorney fees, “penalizes the innocent client while insulating [a] wrongdoing attorney”). Justice Blackmun argued that this approach to § 1927 “clashes with common sense, basic fairness, and the plain meaning of the statute.” *Roadway Express*, 447 U.S. at 768 (Blackmun, J., concurring in part, dissenting in part). In support of his position, Justice Blackmun cited *Owen v. City of Independence*, 445 U.S. 622, 654 (1980), in which the court stated that “[e]lemental notions of fairness dictate that one who causes a loss should bear the loss.” *Id.* at 768 (Blackmun, J., concurring in part, dissenting in part) (emphasis added).

45. See *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205–06 (10th Cir. 2008) (recognizing at least one purpose of § 1927 is to compensate victims of abusive litigation).



In *Hamilton*, the Tenth Circuit held that it is not appropriate to reduce a § 1927 sanction award because of an attorney's inability to pay.<sup>46</sup> Attorney Mark Hammons was sanctioned \$7,974.20 for "filing a motion to enforce a settlement agreement that misstated opposing counsel's position without a reasonable basis . . . ."<sup>47</sup> Hammons argued on appeal that sanctions under § 1927 required application of a parsimony principle much like that in Federal Rule of Civil Procedure 11(c)(4), under which a sanction award must be limited to an amount no more than necessary to deter the sanctioned attorney or any other attorney from repeating the sanctioned act.<sup>48</sup> The court rejected this argument, reasoning that, unlike Rule 11 sanctions, an award under § 1927 is tantamount to compensation for damages incurred because of an attorney's abusive litigation practices.<sup>49</sup> The court reasoned that the amount of fees incurred by a victim of an attorney's dilatory practices is the measure of damages in an action under § 1927, which provides a strong argument that—despite legislative history espousing a deterrent purpose—the statute's purpose is to provide compensation to the injured party for the increased costs, expenses, and attorney fees.<sup>50</sup>

Moreover, the *Hamilton* court reasoned that even if the Conference Committee's intended purpose was nothing more than to deter offenders, an interpretation of the statute permitting "recovery of *all* excess costs, expenses, and fees" reasonably incurred achieved the desired deterrent effect as easily, if not more so, than allowing courts to reduce sanction amounts for one reason or another.<sup>51</sup> Using this interpretation of the 1980 amendment's purpose, the court found nothing to support application of a parsimony principle as suggested by Hammons.<sup>52</sup>

In *Shales*, attorney James Gordon Banks was ordered to pay \$80,000 for making unfounded allegations in the complaints of several union worker plaintiffs whom Banks represented.<sup>53</sup> Banks petitioned the court

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

46. *Hamilton*, 519 F.3d at 1206.

47. *Id.* at 1199.

48. *Id.* at 1205. Federal Rule of Civil Procedure 11(c)(4) provides "[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." FED. R. CIV. P. 11(c)(4).

49. *Hamilton*, 519 F.3d at 1205.

50. *Id.* at 1206. In contrast, Congress has explicitly stated that the purpose of § 1927 sanctions is deterrence. H.R. REP. NO. 96-1234, at 8 (1980), reprinted in 1980 U.S.C.C.A.N. 2781, 2782.

51. *Hamilton*, 519 F.3d at 1206 (emphasis added).

52. *Id.*

53. *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746,

to reduce the amount because “his only assets [were] \$2,000 in cash, his watch, his clothing, and his wedding band.”<sup>54</sup> In its review of the case, the Seventh Circuit reasoned “a lawyer’s ability to pay does not affect the appropriate award for a violation of § 1927.”<sup>55</sup> The court rejected Banks’s argument that § 1927 should be interpreted in the same manner as Rule 11,<sup>56</sup> which requires courts to limit awards to an amount which “suffices to deter repetition of the conduct or comparable conduct by others similarly situated.”<sup>57</sup> The court reasoned that § 1927 did not require the same limitation as Rule 11.<sup>58</sup>

The *Shales* court provided four basic rationales in support of its holding. First, it analogized a violation of § 1927 to an intentional tort.<sup>59</sup> As a threshold matter, the Seventh Circuit requires the district courts to find that an attorney acted in bad faith before imposing sanctions pursuant to § 1927.<sup>60</sup> The Seventh Circuit reasoned that, when awarding damages for intentional torts, courts do not look to the tortfeasor’s financial resources to determine the amount of damages; rather, courts look to the victim’s loss.<sup>61</sup> Just as “[a] physician who injures a patient by an act of medical malpractice will be ordered to pay whatever injury the malpractice causes[,]” so too will a lawyer who injures an opposing party by his professional misconduct.<sup>62</sup> Indeed, had Banks injured his own client, he would be liable under malpractice law for the damages reasonably incurred; “the proposition is no different when he injures his client’s adversary.”<sup>63</sup> The *Shales* court found that the function of sanction awards under § 1927 is therefore the same as damages in an intentional tort action: to compensate the victim for losses caused by the wrongdoing of another.

Second, the *Shales* court reasoned that prohibiting district courts from reducing § 1927 sanction awards because of an attorney’s inability

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747–48 (7th Cir. 2009).

54. *Id.* at 748. Banks also claimed not to have any significant assets, though the defendants and the district court suspected he fraudulently conveyed his valuable assets to his wife to appear destitute. *Id.*

55. *Id.* at 749.

56. *Id.* at 748–49.

57. FED. R. CIV. P. 11(c)(4).

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

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

to pay ensures that the district courts will not engage in the work of the bankruptcy courts.<sup>64</sup> The court suggests two benefits to this approach: (1) it avoids discharging debts on a debt-by-debt basis, thereby ensuring efficiency of the courts and limiting the expense of litigation; and (2) it avoids false positives where an attorney represents that he is insolvent when, in fact, he is not.<sup>65</sup> A quasi-bankruptcy proceeding such as this would give a sanctioned attorney “some debt relief . . . but without the forms of [the bankruptcy] process—forms that would include the opportunity for assets to be brought into the estate in a fraudulent-conveyance action.”<sup>66</sup>

Third, the *Shales* court concluded that prohibiting courts from reducing a § 1927 sanction award because of an attorney’s inability to pay “avoids disparate treatment of identically situated litigants.”<sup>67</sup> If district court judges may reduce a § 1927 sanction award at their discretion, there is a serious potential for such disparate treatment because “judges differ substantially in how they use discretion.”<sup>68</sup> That judges may exercise discretion differently is not unique to the § 1927 context; but the potential costs of such variance in judges’ exercise of discretion are extreme given the costs of defending against multiplicative proceedings.<sup>69</sup> According to *Shales*, this problem can be avoided by applying rules uniformly, forcing any discharge of sanction awards to go through the bankruptcy courts.<sup>70</sup>

Lastly, the court found that this approach to § 1927 sanction awards achieves deterrence. *Shales* follows *Hamilton* in interpreting the text of § 1927 as providing a fee-shifting mechanism designed to compensate victims of attorneys’ abusive litigation practices, while at the same time deterring such abusive practices by sanctioned and non-sanctioned attorneys alike.<sup>71</sup>

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64. *Id.*

65. *Id.* at 749–50.

66. *Id.* at 749.

67. *Id.* at 750.

68. *Id.*

69. *See Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986) (reducing a sanction award from \$51,112.50 to \$5,500 based on counsel’s ability to pay).

70. *Shales*, 557 F.3d at 749–50.

71. *Id.* at 750; *see also Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1205–06 (10th Cir. 2008) (explaining that even if the language of the statute indicates a principal purpose of compensation, administering sanctions may serve a deterrent purpose as well).

C. *Detering (and Punishing) Abusive Litigation Practices*

Unlike compensation, there is no mystery whether Congress intended § 1927 to achieve deterrence. In its 1980 amendments to § 1927, Congress stated that “[t]he amendment to section 1927 is one of several measures taken in this legislation to deter unnecessary delays in litigation.”<sup>72</sup> What, though, does this mean for reducing awards for inability to pay? Here, Rule 11 is instructive. Rule 11(c)(4) requires that sanctions be limited to whatever suffices to deter repeated misconduct.<sup>73</sup> At the very least, then, deterrence implies that partial payment of damages resulting from attorney misconduct is acceptable so long as the payment is large enough to be painful. Indeed, it *must* be painful; if the amount is too low to be painful, the offending attorney may have no incentive to stop multiplying proceedings.

Both the Second Circuit in *Oliveri v. Thompson* and the Ninth Circuit in *Haynes v. City and County of San Francisco* acknowledge the deterrent purpose of § 1927 and its implication that partial payment may be effective so long as it is justified by the circumstances of each particular case.<sup>74</sup> In *Oliveri*, the district court sanctioned attorney Arthur Graseck, Jr. for pursuing § 1983 claims for which there was no basis in law or fact.<sup>75</sup> On appeal, the Second Circuit reversed the district court’s decision, finding that Graseck’s pursuit of the claims at issue did not amount to unreasonable and vexatious multiplication of the proceedings.<sup>76</sup> For this reason, the court did not need to review the district court’s rationale for reducing the § 1927 sanction award against Graseck based on his inability to pay the full amount. However, the court explained:

[G]iven the underlying purpose of sanctions—to punish deviations from proper standards of conduct with a view toward encouraging future compliance and deterring further violations—it 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

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

73. FED. R. CIV. P. 11(c)(4).

74. *See Oliveri*, 803 F.2d at 1281 (explaining that given the underlying punishment and deterrent purposes of sanctions, the district court may exercise its discretion to reduce awards based on an attorney’s ability to pay); *Haynes v. City of S.F.*, 688 F.3d 984, 988 (9th Cir. 2012) (noting that imposing sanctions many times greater than the attorney is able to pay will do little to deter future violations of § 1927).

75. *Oliveri*, 803 F.2d at 1275.

76. *Id.* at 1277–80.

to pay.<sup>77</sup>

The Second Circuit's interpretation of the underlying purpose of sanctions provides some significant insights into sanction awards, whatever their source. In particular, the court noted that "sanctions for misconduct and abuse of the legal system seem to be inevitably interwoven with the problems of shifting the burden of attorneys' fees, which have become the primary cost factor in litigation."<sup>78</sup> In this respect, shifting the burden of attorney fees from an innocent party to an offending attorney, as in the case of § 1927 sanction awards, "could be viewed as an aspect of compensation for damages inflicted by the other party."<sup>79</sup> As discussed above, this connection between attorney fees and compensation, especially in the context of § 1927, is important because requiring attorneys to pay the *total* amount of costs, expenses, and fees incurred as a result of their actions will best serve to eliminate the injustice inherent in applying the American Rule to abuses of litigation, while at the same time promoting the deterrent function Congress expressed in the Conference Committee Report.<sup>80</sup> Similarly, the deterrent function of the statute comports well with the victim-centered approach of compensation. Expediting litigation by deterring unnecessary delays certainly serves to increase the efficiency of the courts. Expediting litigation also benefits litigants by lowering the cost and duration of litigation.<sup>81</sup> In this sense, the deterrent purpose of the 1980 amendment supports a victim-centered interpretation of § 1927. Interpreting § 1927 as *requiring* courts to award the full amount of costs, expenses, and attorney fees, however, would have to be considered against the Second Circuit's admonition that "[c]ourts should be sensitive to the impact of sanctions on attorneys"<sup>82</sup> and the possibility that imposing large sanctions could "inhibit the effectiveness of attorneys' representation of clients" by stifling attorney creativity and zeal in representing clients with meritorious claims.<sup>83</sup>

In *Haynes*, the Ninth Circuit held that district courts have the discretion to reduce a § 1927 sanction award because of, among other

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77. *Id.* at 1281.

78. *Id.* at 1271.

79. *Id.*

80. H.R. REP. NO. 96-1234, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2781, 2782. *See also supra* note 50 and accompanying text.

81. *See Oliveri*, 803 F.2d 1265.

82. *Id.* at 1280.

83. WRIGHT & MILLER, *supra* note 32, at § 1332.

reasons, an attorney's inability to pay the full amount of the award.<sup>84</sup> The district court imposed sanctions under § 1927 against plaintiff's attorney Gregory Haynes in the amount of \$362,545.61 for "engag[ing] in a wide variety of incompetent and unprofessional actions" that resulted in unnecessary depositions, discovery disputes, and other proceedings.<sup>85</sup> The district court noted that the Ninth Circuit had not addressed the issue of whether district courts had the discretion to reduce a § 1927 sanction award because of an attorney's inability to pay, and upon finding that Haynes had unreasonably and vexatiously multiplied the proceedings, applied the *Shales* reasoning.<sup>86</sup> The Ninth Circuit held that the district court abused its discretion<sup>87</sup> and remanded for further proceedings on the ground that the district court did not believe it had the discretion to reduce the award in light of Mr. Haynes's inability to pay.<sup>88</sup>

The Ninth Circuit put forth two basic rationales underlying its decision to permit district courts to reduce § 1927 sanction awards because of an attorney's inability to pay. First, the court said that it was adopting the "plain meaning" of § 1927.<sup>89</sup> The court put special emphasis on the word "may" in the following portion of § 1927: "Any 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."<sup>90</sup> According to the court, the use of "may" in this instance affords courts "substantial leeway" when levying sanctions under the statute.<sup>91</sup> The Ninth Circuit thus concluded that courts not only have the discretion to determine *whether* to award sanctions, but also the discretion to determine *the amount* of sanction awards.<sup>92</sup> The only

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84. *Haynes v. City of S.F.*, 688 F.3d 984, 988 (9th Cir. 2012). The court's decision is somewhat remarkable in that the scope of its ruling extends beyond what was necessary to answer the question presented to it, thereby opening the door for courts to reduce awards for other reasons beyond an attorney's inability to pay. *Id.* The court does not, however, give any indication of what such other reasons might be. Presumably, the court's rationale in so holding was to reduce future questions regarding reduction of § 1927 sanction awards to an abuse-of-discretion test. Questions regarding the propriety of such a rationale are best left for another comment.

85. *Id.* at 986.

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

87. Despite this holding, it was more likely an error of law than abuse of discretion. The district court did not know it had the discretion in the first place.

88. *Haynes*, 688 F.3d at 988–89.

89. *Id.* at 989.

90. 28 U.S.C. § 1927 (2006).

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

92. *Id.*

limitation is that courts may not award more than the amount reasonably incurred, which is capped at the total excess costs, expenses, and attorney fees.<sup>93</sup> As far as the court was concerned, “nothing in the statute would preclude it from [reducing an award] in light of the sanctioned attorney’s ability to pay.”<sup>94</sup>

In its opinion, the *Haynes* court also notes that this approach is consistent with the underlying purpose of § 1927. The court addressed both the deterrent purpose and the compensatory purpose.<sup>95</sup> Whatever the purpose, the court reasoned that imposing sanctions greater than an attorney could pay would be ineffective in compensating victims or deterring future abusive litigation practices.<sup>96</sup> The court did not elaborate on this point other than to call the imposition of greater sanctions than an attorney could pay a “futile gesture.”<sup>97</sup> Presumably the court’s concern was the same as that of the *Oliveri* court, namely that crippling sanctions would stifle attorneys’ creativity and zeal. Additionally, the *Haynes* court presumably foresaw the likelihood that such an award would send the sanctioned attorney into bankruptcy, thereby reducing—if not nullifying—any recovery the victim would receive. Based on this reasoning, the Ninth Circuit permitted, but did not mandate, district courts to consider an attorney’s ability to pay when determining the amount of sanctions to award under § 1927.<sup>98</sup>

### III. SECTION 1927 AND OTHER FEE-SHIFTING PROVISIONS

Like § 1927, a number of other statutory provisions facilitate fee shifting. For example, Section 706(k) of the Civil Rights Act of 1964 provides that the prevailing party may recover attorney fees,<sup>99</sup> and Federal Rule of Civil Procedure 26(g)(3) mandates sanctions which may include expenses and attorney fees for improper certification, whether on a party’s motion or by the court on its own.<sup>100</sup> Rule 26(g)(3) differs from Section 706(k) in that the court “*must* impose an appropriate sanction on

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93. *Id.* This limitation conforms to the fee-shifting nature of the statute, and thus prohibits award of punitive damages.

94. *Id.*

95. *Id.* at 987–88.

96. *Id.* at 988.

97. *Id.*

98. *Id.*

99. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2006).

100. FED. R. CIV. P. 26(g)(3).

the signer, the party on whose behalf the signer was acting, or both.”<sup>101</sup>

Notice in both Section 706(k) and Rule 26(g)(3) that the sanction may be imposed against the party. Section 1927, on the other hand, applies only to attorneys admitted to practice in the United States or its territories. This is an important distinction because it holds the attorney liable for his or her conduct rather than passing the cost along to the client or party. Given Congress’s stated purpose to deter unnecessary delays in litigation, § 1927 specifically seeks to curtail abusive or enterprising tactics by attorneys to delay litigation, for whatever reason.

Section 1927 is made even stronger by attorneys’ professional responsibilities as officers of the court. Attorneys have a duty under the American Bar Association Model Rules of Professional Conduct (Model Rules) to refrain from engaging in vexatiously multiplicative conduct. Model Rule 3.1 provides in part 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.”<sup>102</sup> The prospect of professional discipline and the potential to *personally* satisfy sanction awards under § 1927 help to effectuate Congress’s goal of deterring unnecessary delays in litigation.

#### IV. MENDING THE SPLIT: AN ARGUMENT IN FAVOR OF DISCRETION

As is evident from the different rationales asserted by the circuit courts, there are compelling arguments on both sides of the circuit split. However, depriving district courts of the discretion to determine the amount of sanction awards pursuant to § 1927 creates nagging problems. Certainly, it would be ideal if every victim would receive full compensation for the excess costs, expenses, and attorney fees caused by an attorney’s misconduct. In reality, however, victims do not always receive full compensation for their injuries, even if courts award the full amount.<sup>103</sup> Many factors, such as a truly insolvent attorney, play a significant role in the amount of compensation a victim actually receives. Therefore, accomplishing the goals of § 1927 requires a more practicable approach. It requires reconciling potentially competing considerations to

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101. *Id.* (emphasis added).

102. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2012) (emphasis added).

103. See John C. P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437 (2006) (“[M]any [tort victims] appropriately obtain a remedy in the form of less-than-full compensation or more-than-full compensation.”).



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achieve the best possible outcome for both the victim and the legal system. To do this, courts must have the discretion to impose an award under § 1927 in whatever amount achieves the greatest fairness under the circumstances, while still staying within the outer limit imposed by the statute. Interpreting § 1927 as having three purposes—compensation, deterrence, *and* punishment—best achieves this goal. This Part addresses the circuit courts’ reasons for and against interpreting § 1927 as conferring to the courts discretion to reduce sanction awards for, among other reasons, an attorney’s inability to pay. Throughout this Part, the arguments draw heavily on the different purposes addressed above, advocating for a tripartite purpose. Interpreting § 1927 as having all three purposes enables courts to use the statute to *compensate* victims of dilatory practices by *punishing* offending attorneys for misconduct with the goal of *detering* similar conduct in the future.

A. *Plain Meaning and the Text of § 1927*

As discussed at the outset of this Comment, the Ninth Circuit talks explicitly about the plain meaning of § 1927, suggesting that the court’s interpretation and application of the statute embodies just that.<sup>104</sup> One can therefore infer that, as far as the Ninth Circuit is concerned, the positions adopted by the Seventh and Tenth circuits do not comport with the plain meaning of the statute. The statute states (with emphasis on terms crucial to its interpretation):

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.<sup>105</sup>

Both of the italicized terms, “*may*” and “*reasonably incurred*,” are discretion-conferring terms. The underlying issue in each of the Courts of Appeals cases is the scope of each of these terms.

At least two things are clear from the text of § 1927: (1) courts have discretion to determine *whether* to sanction an attorney for unreasonable and vexatious multiplication of the proceedings, and (2) courts have discretion to impose a sanction award of only those excess costs,

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104. Haynes v. City of S.F., 688 F.3d 984, 989 (9th Cir. 2012).

105. 28 U.S.C. § 1927 (2006) (emphasis added).

expenses, and attorney fees reasonably incurred.<sup>106</sup> The disagreement between the circuits hinges on whether Congress's use of "may" confers discretion—beyond the discretion *whether* to award sanctions at all—to reduce a sanction award for such considerations as an attorney's inability to pay. The Ninth Circuit in *Haynes* answered this question in the affirmative, arguing for an expansive view of discretion under which courts have "substantial leeway" to determine how much to sanction under § 1927, where the only limitation on courts' discretion is that an award may not exceed the *total* excess costs, expenses, and attorney fees.<sup>107</sup> In fact, the court held "a district court may, in its discretion, reduce the amount of a § 1927 sanctions award, and may do so, *among other reasons*, because of the sanctioned attorney's inability to pay," thus granting courts discretion to consider a variety of factors—though the Ninth Circuit does not say what those factors might be—in deciding whether to reduce an award.<sup>108</sup>

The text of § 1927 supports this interpretation of the statute. First, the use of "may" grants the court discretion to award fees at all. Second, "reasonably incurred because of such conduct" grants the court discretion to determine an amount it finds reasonable. *Hamilton* provides a good example of just how much discretion "reasonably incurred" grants the courts. There, the sanctioned attorney sought determination of reasonable attorney fees by way of a lodestar method, "which would limit the amount recoverable to the prevailing rate charged by local counsel."<sup>109</sup> The Tenth Circuit held that district courts have discretion to choose which method to apply in determining the amount of fees reasonably incurred and provided the following example to explain the difference between reasonably and unreasonably incurred fees:

[B]ringing in expensive out-of-town hired guns to respond to a frivolously multiplicative motion would not be reasonable, and in such a case using the lodestar method would be the better exercise of discretion. . . . A § 1927 movant[, however,] has already chosen his counsel—at what he ordinarily anticipates will be his own expense—and one who chose what he considered appropriate counsel should not be obliged to procure new, cheaper lawyers just to deal with a filing

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106. See *Haynes*, 688 F.3d at 987 (discussing the alleged "substantial leeway" conferred upon courts by Congress's use of "may" and "reasonably incurred").

107. *Id.*

108. *Id.* at 988 (emphasis added).

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

that is, after all, sanctionable.<sup>110</sup>

This example shows just how expansive courts' discretion is under § 1927.

The fact that Congress gave courts discretion in these matters suggests that Congress intended to give the courts discretion to reduce awards based on the circumstances of each individual case. Consider the alternative: by only giving courts discretion *whether* to award damages at all, Congress would have effectively set up an all-or-nothing scenario. When faced with an all-or-nothing decision, a judge is arguably going to award nothing unless the attorney's conduct is exceedingly malicious or egregious. This, however, does not comport with a compensatory, deterrent, *or* punitive purpose, rendering the statute almost meaningless. Yet, Congress specifically stated that the "amendment to § 1927 [was] *one of several measures* taken . . . to deter unnecessary delays in litigation."<sup>111</sup> What reason would Congress have to enact the amendment if it had little to no effect? Victims would rarely, if ever, be compensated. Attorneys would rarely, if ever, be punished; and unnecessary delays in litigation would likely continue.

Thus, mandatory full compensation is simply impracticable. Consider Congress's statement that the amendment to § 1927 "insures that the provision in no way will dampen the legitimate zeal of an attorney in representing his client."<sup>112</sup> Attorneys worried about mandatory full compensation will likely become more risk-averse, which could seriously impair their willingness to zealously advocate for their clients—especially if the case is close or difficult.<sup>113</sup>

Those in favor of prohibiting courts from reducing awards may argue that, if Congress intended to give courts discretion to award just a portion of the excess costs caused by an attorney's multiplicative behavior, it could easily have expressed this intent by explicitly providing for such discretion in the language of the statute. When making changes to the statutory text, Congress could have provided that an attorney who violates § 1927 be required to satisfy, for example, "such excess costs,

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110. *Id.* at 1207.

111. H.R. REP. NO. 96-1234, at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2781, 2782 (emphasis added).

112. *Id.*

113. *Cf.* Rowe, *supra* note 12, at 656–57 (discussing the pitfalls of general indemnity in the English legal system). While Professor Rowe's comment pertains to general indemnity in the English legal system, his point is similarly applicable in the § 1927 context.

expenses, and attorney fees as determined by the court in which the violation occurred.” Congress, however, did not include such language. Yet, Congress has enacted similar provisions in other instances, including Federal Rule of Civil Procedure 11(c)(4)<sup>114</sup> and 42 U.S.C. § 1988.<sup>115</sup>

The absence in § 1927 of explicit reference to courts’ power to reduce an award does not entail that Congress did not give such power to the courts. The logic of the argument is flawed at best. The problem with this argument is simple: even if Congress has provided language granting courts discretion to reduce awards in other provisions or rules, Congress has in other instances also provided language mandating full awards. Thus, if Congress sought to deprive courts of the power to reduce § 1927 sanction awards in situations where attorneys are unable to pay, it could have easily done so. Congress, however, did not deprive courts of this power. Consider 28 U.S.C. § 1918, which mandates the imposition of costs “in any judgment, order, or decree . . . for the violation of an Act of Congress in which a civil fine or forfeiture of property is provided for.”<sup>116</sup> In § 1918, Congress effectively tied courts’ hands by imposing on courts a mandatory course of action—imposing costs in any judgment meeting the statute. Congress sought to deprive courts of the power to waive costs for “the violation of an Act of Congress,” and accomplished just that by expressly mandating the imposition of such costs.<sup>117</sup> The point is simple: Congress’s failure to include specific language in § 1927 granting courts discretion to reduce an award does not entail that the statute prohibits courts from reducing such awards. The same argument can be made with equal force from the other side—if Congress sought to deprive courts of discretion to reduce an award under § 1927, it could just as easily have added language mandating that courts award the full amount of costs, expenses, and attorney fees incurred. Accordingly, this objection fails.

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114. See FED. R. CIV. P. 11(c)(4) (providing sanctions must be limited to an amount necessary to deter similar conduct).

115. 42 U.S.C. § 1988(c) (2000) (granting courts discretion to include expert fees as part of an award of attorney fees under the statute).

116. 28 U.S.C. § 1918(a) (2006).

117. Congress’s express language in § 1918 that “[c]osts *shall* be included” as provided in the statute creates an obligation on courts that is not present in § 1927. If Congress wanted to “tie courts’ hands,” it could just as easily have provided in § 1927 that an attorney *shall* be required by courts to satisfy costs, expenses, and attorney fees in the event the attorney is found to have violated the statute.

*B. The Intentional Tort Analogy*

Recall the Seventh Circuit's intentional tort analogy from *Shales v. General Chauffeurs, Sales Drivers & Helpers Local Union No. 330* in which the court compared unreasonable and vexatious multiplication of the proceedings to an intentional tort, such as battery.<sup>118</sup> The court reasoned that whereas the victim's injury is the measure of damages in an intentional tort action, so too the victim's injury is the measure of damages when an attorney vexatiously multiplies proceedings.<sup>119</sup> Thus, full compensation would appear to be required without exception. While the analogy is strong in two respects, ultimately it suffers from a fatal flaw—full compensation is impossible to achieve in all cases, and therefore cannot be required.

The first strength of the *Shales* court's analogy is that the victim's injuries are the measure of damages under § 1927. As with tort damages, the purpose of measuring the damages by the costs incurred by the victim is to put the victim back in the status quo ante.<sup>120</sup> In that respect, the statute certainly has a compensatory purpose.

The second strength of the analogy is the fact that attorneys have a professional responsibility not to engage in such vexatiously multiplicative conduct, as outlined by the Model Rules. For example, Model Rule 3.1 provides in part 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.”<sup>121</sup> Comment 1 to Model Rule 3.1 further states that “[t]he advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.”<sup>122</sup> The Model Rules consistently proscribe attorneys from engaging in vexatiously multiplicative conduct. Specifically, Rules 3.1, 3.2, and 3.4 all forbid, either implicitly or explicitly, attorneys from engaging in unreasonable, frivolous, or vexatious conduct during the different stages of litigation.<sup>123</sup>

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

119. *Id.*

120. See Goldberg, *supra* note 103, at 435.

121. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2012) (emphasis added).

122. *Id.* at cmt. 1.

123. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (prohibiting lawyers from bringing or defending claims or issues that have no basis in law or fact or those that are frivolous); MODEL RULES OF PROF'L CONDUCT R. 3.2 (“A lawyer shall make reasonable efforts to expedite litigation

Thus, in addition to § 1927, an attorney's professional responsibilities prohibit engaging in dilatory or abusive conduct.

Viewing attorneys' abusive litigation practices in light of their professional responsibilities supports the tort analogy.<sup>124</sup> This is especially true in cases where attorneys are found to have acted in bad faith. In most circuits, a finding of bad faith indicates the attorney's conduct was intentional.<sup>125</sup> When an attorney acts in bad faith, multiplicative conduct is an intentional violation of his professional responsibilities, causing injury to his adversary by needlessly increasing the costs, expenses, and attorney fees the adversary incurs. In this sense, the analogy is quite strong. The tort analogy is equally applicable to situations where an attorney unreasonably and vexatiously multiplies the proceedings by acting recklessly, rather than intentionally. Failure, either recklessly or in bad faith, to live up to responsibilities is akin to a tort, in which case courts look to the victim's loss to determine the amount of damages, not the offender's resources. When the wrongdoer is an attorney who engages in abusive litigation practices, the same approach arguably should apply.<sup>126</sup>

The analogy, however, suffers a fatal flaw. It assumes that full compensation is possible in every case. Tort law "authorizes the factfinder to award full indemnification as the measure of satisfaction to which a given tort victim is entitled."<sup>127</sup> This, however, "is . . . not to say that a successful claimant is entitled to receive, and may only receive, an award of damages that fully indemnifies . . . her."<sup>128</sup> In practice, tort

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consistent with the interests of the client."); MODEL RULES OF PROF'L CONDUCT R. 3.4 (prohibiting conduct unfair to the other party, such as obstructing access to evidence).

124. I use the term "tort analogies" to refer to both the intentional tort analogy in *Shales* and the corresponding tort analogy for cases involving reckless conduct as in *Hamilton*. *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, (7th Cir. 2009); *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1206 (10th Cir. 2008).

125. *Simmons-Gonzalez*, *supra* note 1, at 314–16 (explaining that all courts require conduct constituting bad faith be intentional, but also stating that "the Seventh Circuit has acknowledged 'that the bad faith standard has an objective component, and extremely negligent conduct, like reckless and indifferent conduct, satisfies this standard'").

126. *See id.* at 1280–81 (noting that if the offending attorney had injured his own client by malpractice, he would be liable for the full amount of damages arising from his misconduct). One may be tempted to confuse the method for determining compensatory damages with the method for determining punitive damages. As the Seventh Circuit cautions, the purpose of § 1927 is compensatory, not punitive. *Id.* at 1271. Therefore, whereas an offender's resources may be relevant in determining punitive damages, they are not relevant in determining compensatory damages. *Id.*

127. *Goldberg*, *supra* note 103, at 437.

128. *Id.*

victims are not guaranteed full compensation; indeed, they often wind up with less-than-full compensation.<sup>129</sup> Given the realities of tort compensation, perhaps the analogy is better cast as the ideal situation rather than the norm.<sup>130</sup>

Despite the analogy's flaw, it still serves a valuable function as a picture of what § 1927 should strive to achieve. Maximizing compensation to the victim and complying with rules of professional conduct are worthy endeavors, and should be factors in courts' determinations whether to reduce sanction awards. If courts may reduce sanction awards because an attorney is unable to pay, fairness to the victim ought to be the primary concern. Where reducing an award would provide little compensation to the victim, courts should refrain from reducing an award. Just as it would be unfair to require victims in a wrongful death suit to bear the costs of the culpable party's conduct, it would be unfair to require victims of an attorney's abusive litigation practices to bear the costs of such practices.

### C. *Avoiding Bankruptcy at All Costs*

Perhaps one of the strongest arguments for reducing awards when attorneys are unable to satisfy the full amount is that an excessive award might force the sanctioned attorney into bankruptcy. The *Shales* court opposed permitting district courts to reduce sanction awards because of concerns that district courts would act as bankruptcy courts—discharging debt on a debt-by-debt basis—without all the forms and consistency of the bankruptcy courts.<sup>131</sup> However, under a *Shales* approach, victims may never receive any compensation from an insolvent attorney because, in bankruptcy, secured creditors will be the first to receive proceeds from the attorney's liquidated assets.<sup>132</sup> Whether the victim will receive any compensation for the costs she incurred depends on the number and value of the attorney's assets, as well as the number and status of the

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129. *See id.* (noting that some victims receive less-than-full compensation, while other victims receive more-than-full compensation).

130. While the *Shales* court does not specifically address whether its analogy is supposed to represent the norm or the extraordinary situation, the language the court uses strongly suggests that the analogy is supposed to represent the norm. *See Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 748–49 (7th Cir. 2009) (“A violation of § 1927 is a form of intentional tort. And there is no principle in tort law that damages depend on a tortfeasor's assets.”).

131. *Id.* at 749–50.

132. *See, e.g.*, 11 U.S.C. § 704(a) (2010) (outlining duties of a Chapter 7 bankruptcy trustee).

attorney's other creditors.<sup>133</sup> As a judgment creditor, a victim has only unsecured creditor status and therefore is only entitled to proceeds in excess of those owed to creditors with a greater priority of interests.<sup>134</sup>

On the other hand, forcing attorneys into bankruptcy may not deprive victims of compensation entirely. By not reducing an award at the front end, if an attorney cannot or does not fulfill the judgment against him, the victim may have some legal recourse to recover as much of the debt as she is owed. Suppose, for example, an attorney pays some of the sanctioned amount, but is ultimately forced to file for bankruptcy because he cannot pay the total amount. In this situation, the victim may be able to recover some portion of the amount still owed as a judgment creditor against the attorney provided the attorney has sufficient assets.<sup>135</sup> While neither this nor the *Haynes* approach is a perfect system that will ensure the victim receives full compensation, by forcing sanctioned attorneys to seek discharge of their debts through bankruptcy, victims may have the opportunity to recover a larger percentage of the costs incurred when sanctioned attorneys' assets are distributed among their creditors. The Tenth Circuit reasoned in *Hamilton* that an interpretation like the Ninth Circuit's in *Shales* would "needlessly impute to the statute a limitation on the amount recoverable."<sup>136</sup> However, the risk associated with an absolute prohibition against reducing sanction awards—that the attorney is truly insolvent with little to nothing of value to his name—likely outweighs any potential benefit.

The *Shales* court proffered two additional bankruptcy-related rationales in favor of its full compensation requirement: (1) it is the most efficient and fair way to discharge debt—avoiding both disparate treatment of similarly situated individuals and false positives; and (2) it avoids the *expense* of suit-by-suit determinations of ability to pay.<sup>137</sup> By "false positives," the *Shales* court meant a person who claims to be

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133. See *Shales*, 557 F.3d at 749–50 (arguing that "district judges should let the bankruptcy proceeding handle all debts and all creditors at one go, according to the Bankruptcy Code—which governs not only which claims are paid first but also how much a debtor with a given level of income must pay to creditors in the aggregate").

134. See LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 469–76 (7th ed. 2012) (explaining priority between lien creditors—including judgment creditors—and secured creditors); *id.* at 112–19 (explaining in detail the treatment of secured and unsecured claims in bankruptcy and the relative amounts creditors holding such claims can expect to recover).

135. See *id.* at 112–19 (explaining in detail the treatment of secured and unsecured claims in bankruptcy and the relative amounts creditors holding such claims can expect to recover).

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

137. *Shales*, 557 F.3d at 750.



indigent but is not.<sup>138</sup>

Both rationales, however, face a similar problem—the reduction of a sanction award does not discharge the debt, it *defines the debt*. Casting reduction of a sanction award as discharge of debt incorrectly describes what the court is doing when it reduces the award. The problem is that, if reduction is tantamount to discharge of debt in a quasi-bankruptcy proceeding, so too is remittitur of a damages award. Yet remittitur does not discharge debt; it defines it. The same follows for reduction of a § 1927 sanction award for inability to pay.<sup>139</sup>

#### *D. Avoiding Disparate Treatment of Similarly Situated Individuals*

Critics of the Ninth Circuit's interpretation of § 1927 as permitting reduction of a sanction award may also object that it has the potential to treat similarly situated *litigants* differently depending on the forum in which a case is litigated and the judge presiding over the case.<sup>140</sup> The proposed objection continues that there is no rational basis for such disparate treatment. Surely one litigant's physical location (within the same circuit) does not provide an adequate reason to treat her differently than a similarly situated litigant in a different location. Moreover, the mere chance that she chose a judge who resists reducing § 1927 sanction awards does not provide an adequate reason to treat her differently. This proposed counterargument to the Ninth Circuit's approach, however, postulates that this is exactly what results if courts may reduce § 1927 sanction awards because of an attorney's inability to pay. Indeed, if this argument were followed to its logical conclusion, the Ninth Circuit's interpretation would appear to leave open the possibility that similarly situated litigants in the same court, or with the same presiding judge, would be treated differently.

For this scenario to have its intended force, however, similarity of situation is not enough. Identical situations would be necessary, but the

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138. *Id.* (“Some people who claim to be indigent aren't. Indeed, the very assertion ‘I'm indigent, so please excuse me’ implies solvency.”).

139. One might be inclined to challenge this last statement on the grounds that such a reduction is functionally a discharge of debt *precisely because* the reason for the reduction is the attorney's inability to pay, whereas the reasons for remittitur have nothing to do with ability to pay. This challenge fails because a court may order remittitur precisely because the damage award exceeds the party's ability to pay it.

140. See Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 158–60 (1999) (arguing the frequency and severity of sanctions are influenced by the particular judge and the type of claim).

chance of identical situations is slim to none. Take two thirty-year-old women with claims against offending counsel. They may be similar in age and gender, but when one goes beyond the macroscopic details, they are likely very different. One may have children and the other no children. Or both could have children, but one suffered more physiological and emotional stress than the other as a result of the attorney's conduct. Perhaps they are economically or financially dissimilar. Maybe one was more respectful to the judge while the other frequently disobeyed orders. The basic point of the challenge is understandable, but it does not present the serious worry it is supposed to present. Circumstances differ. No two cases are alike. Disparate treatment, if present, will be the product of the inherent differences among cases.

*E. Factors to Guide Courts in Reducing § 1927 Sanction Awards*

The purposes underlying § 1927 and the arguments discussed in the foregoing sub-Parts play an integral role in how one answers the question whether courts have the power to reduce a § 1927 sanction award based on an attorney's inability to pay the full amount. However helpful each purpose is on its own, the combination of all three provides a better understanding of what § 1927 actually accomplishes: it *compensates* victims of dilatory practices by *punishing* offending attorneys for misconduct with the hope that the punishment will *deter* similar conduct in the future. To guide courts in determining whether to reduce an award or not, it is important to set out specific factors that will provide a foundation for giving appropriate consideration to the circumstances of both victims and attorneys. As a threshold matter, fairness to the victim ought to be the primary factor in a court's determination to reduce a § 1927 sanction award. The following are only some of the additional factors courts should consider:

1. "The degree of willfulness, vindictiveness, negligence or frivolousness involved in the violation"<sup>141</sup>

The degree to which offending counsel willfully, vindictively, negligently or frivolously (as opposed to inadvertently or unknowingly) multiplies proceedings should be weighed in favor of the victim and

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141. JOSEPH, *supra* note 4, at 412.

against the offending attorney. Such conduct shows callous disregard for the victim, the offending counsel's professional responsibilities, and the judicial system. Conduct of this nature is perhaps the most offensive, and should in most cases preclude reduction without consideration of any other factor. As the *Hamilton* court reasoned, "sanctions are not reserved for the worst offenders."<sup>142</sup> However, offending counsel who willfully and vindictively multiply proceedings are among the worst offenders.

It is necessary to give a cautionary note with respect to negligence. The degree of negligence contemplated under this factor is more akin to recklessness. Where an attorney multiplies proceedings in an objectively unreasonable way—such as the pure-heart-empty-head situation described in *Hamilton*<sup>143</sup>—the court should be reluctant to reduce the amount of sanctions imposed. This argument is even stronger where the attorney has demonstrated a pattern of recklessness in light of the attorney's professional responsibility as an officer of the court.<sup>144</sup> As described above, attorneys are expected to conduct themselves pursuant to the high bar set by the Model Rules.<sup>145</sup> Moreover, attorneys are well aware of the standards to which the legal profession holds them.<sup>146</sup> Reducing the amount of the attorney's sanctions in this case would violate the basic tripartite purpose of § 1927, resulting in unfair treatment of the victim. Moreover, reduction would likely not have the requisite deterrent effect on the offending attorney, but rather would incentivize continued abusive practices. Thus, as noted at the outset of this Comment, it is vitally important to keep in mind the purpose of § 1927 sanction awards.<sup>147</sup> Here, the offending counsel is likely the exact type of attorney Congress had in mind when it amended § 1927 to include attorney fees.<sup>148</sup>

2. "The knowledge, experience and expertise of the offender"<sup>149</sup>

In some respects, this factor is a continuation of the previous factor.

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142. *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1203 (10th Cir. 2008).

143. *Id.* at 1202 (discussing "one who acts with 'an empty head and a pure heart'").

144. *See Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir. 1986) (explaining an attorney's obligations in his role as an officer of the court).

145. *See supra* Part III (discussing professional responsibilities of attorneys).

146. Presumably, by having to take the Model Professional Responsibility Examination, attorneys are or should be familiar with the rules that govern the profession.

147. *See supra* Part II.B (discussing compensatory purpose of sanctions).

148. *See Supra* Part II.A (discussing how § 1927 attorney fees came to be).

149. JOSEPH, *supra* note 4, at 412.

Where the offending counsel lacks knowledge, experience, and expertise, courts may reduce an award.<sup>150</sup> On the other hand, where offending counsel has knowledge, experience, and expertise, this factor should weigh in favor of the victim, too. The court's deference to the attorney, however, should be tempered (for the reasons described above) if the attorney's conduct reaches the threshold level of objective unreasonableness. The Model Rules prescribe a threshold standard of conduct for members of the legal profession.<sup>151</sup> Those who act in an objectively unreasonable manner do not meet the threshold.

One might be inclined to challenge this by arguing that in light of the threshold standard, any attorney admitted to practice law is deemed to have the requisite knowledge, experience, and expertise. This argument comes from the loose standard for competency under the Model Rules.<sup>152</sup> This may be an attractive view, but it ultimately misses the point of the factor. Think of the factor in terms of degrees. Courts ought to give slightly more deference to young attorneys who are still figuring out how to practice. This is not to say that a young, inexperienced attorney should never be required to fully compensate her victim. What may be better in this situation is a warning or admonition from the court informing the attorney that her conduct is improper. From that point on, then, if she persists, she becomes increasingly subject to full compensation.

3. "Any prior history of sanctionable conduct on the part of the offender"<sup>153</sup>

Exhibiting a pattern of sanctionable conduct, whether vexatious multiplication or other, also weighs against the offending counsel. Attorneys admitted to the bar are expected to know how to comport with the rules.<sup>154</sup> With the possible exception of the inexperienced attorney,

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150. See *Hamilton v. Boise Cascade Express*, 519 F.3d 1197, 1203 (10th Cir. 2008) (noting the court has considerable discretion in assigning attorney fees).

151. See *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986) (discussing general standards of conduct for attorneys).

152. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

153. JOSEPH, *supra* note 4, at 412.

154. See *Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009) (analogizing that "[a] physician only four years out of medical school does not get a discount on his malpractice judgments; Banks's observation that he was only four years out of law school when he took this case does not give him a license to injure others by making

counsel who repeatedly engaged in sanctionable conduct should not have the amount of their sanctions reduced.

What good would a reduction do in such a case? It would minimize, rather than maximize, compensation to the victim; it would reward, rather than punish, the offending attorney; and it would incentivize the attorney to continue the sanctionable conduct. As the Conference Committee Report to the 1980 amendment suggests, perhaps courts should issue a warning early in the pattern to instruct the attorney on proper conduct.<sup>155</sup> But issuing warnings like this is not always easy, especially in the case of someone who exhibits a pattern of sanctionable conduct. Presumably, the attorney will not try all of his or her cases in front of the same judge.<sup>156</sup> It will likely be difficult for any one judge to recognize the pattern *and* have the opportunity to reprimand the attorney. Instead, the judge may have had one or two bad experiences with the particular attorney, but may have *heard about* additional instances of sanctionable conduct. However the judge learns of the pattern, the best approach would be to weigh this factor against the offending attorney unless he or she can show cause why the court should reduce the amount of sanctions.

4. “The impact of the sanction on offending counsel, including his or her ability to pay”<sup>157</sup>

As this has been discussed throughout this Comment, it will be enough to note that this factor does not present a significant challenge to requiring full compensation if the offending attorney has exhibited the above factors.<sup>158</sup> Where reduction for inability to pay is most compelling is when the attorney is young and inexperienced, or her conduct has been inadvertent, unknowing, and minimally offensive.

5. “The [victim’s] need for an award”<sup>159</sup>

As with the first factor, the victim’s need for an award in light of the costs, expenses, and attorney fees incurred is among the most important

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unsupported assertions”).

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

156. If the attorney does, though, then the court should most certainly issue a warning.

157. JOSEPH, *supra* note 4, at 412.

158. *See supra* Part II.B (discussing the impact of an attorney’s ability to pay on the sanction amount).

159. JOSEPH, *supra* note 4, at 412.

factors. Compensating the victim is arguably one of the primary goals of § 1927.<sup>160</sup> Recall the discussion above of the statute's plain meaning, which indicates that it is, at least in part, compensatory in nature. This does not mean that deterrence is somehow inferior, but the text of § 1927 sets the victim's injuries as the measure of damages, thereby giving specific focus to the compensatory aspect of the statute.<sup>161</sup> Deterrence for its own sake—such as awarding an amount great enough to materially affect the attorney, both financially and professionally—is a positive step, at least, according to the stated purpose in the Conference Committee Report. However, the text of the statute and its legislative history indicate an intention that deterrence and compensation work in tandem.

6. “The relative magnitude of award necessary to achieve the purpose of the statute”<sup>162</sup>

As with the previous factor, the magnitude of the award should be tailored to compensate, deter, and punish. Too great an award, and punishment appears to be the only purpose achieved. Too small an award, and neither compensation nor deterrence will be achieved. Given the factors already discussed, the natural order in which this factor should be considered would put it near the end. The preceding factors will heavily influence the relative magnitude of award necessary to achieve the tripartite purpose.

7. “Burdens on the court system attributable to the misconduct”<sup>163</sup>

At first pass, this factor may seem less important than the others. In reality, it is equally important. The very purpose stated in the 1980 amendment is to deter unnecessary delays in litigation. Overburdening the court system would create significant delays in litigation for all parties, not just those in the case at hand. The extent to which the offending counsel's conduct burdens the court system should not be taken lightly. Indeed, it may detrimentally affect the “just, speedy, and inexpensive determination of every action and proceeding.”<sup>164</sup> For that

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160. See *supra* Part II.B.

161. See *supra* Part IV.A.

162. JOSEPH, *supra* note 4, at 412.

163. *Id.*

164. FED. R. CIV. P. 1.

reason, when an offending attorney's conduct delays the court system, the courts should weigh this factor heavily in the victim's favor.

## V. CONCLUSION

As the foregoing analysis shows, § 1927 confers upon the courts discretion to reduce a sanction award under the statute because of an attorney's inability to pay, among other reasons. In order to adapt to the different circumstances of cases in federal courts, interpretation and application of § 1927 must comport with a functional approach capable of adapting to a wide range of circumstances. While prohibiting reduction of sanction awards may be attractive on its face as a way of securing compensation for victims of abusive litigation practices, the reality is that such a rigid, inflexible approach will do more harm than good. Indeed, the Ninth Circuit's position that a court may reduce an award because of an attorney's inability to pay, *among other things*, provides the best mechanism for achieving compensation, deterrence, *and* punishment. The plain meaning argument *alone* may not provide ideal support for interpreting § 1927 as granting courts discretion to reduce an award because an attorney is unable to pay, but the totality of arguments in favor of the interpretation show why it is a much more realistic and reasonable approach to the problem. The language of the statute is clear: courts have discretion (1) *whether* to award sanctions at all, and (2) to limit a sanction award to the *total amount* of excess costs, expenses, and attorney fees *reasonably incurred*. Beyond that, the purposes and factors examined in this Comment will guide courts in determining if, when, and how much to reduce a sanction award. Solving the problem requires a functional approach capable of adapting to the different circumstances in which litigation abuses occur. Discretion provides the mechanism through which the courts can do just that; it *compensates* victims of dilatory practices by *punishing* offending attorneys for misconduct with the hope that the punishment will *deter* similar conduct in the future.