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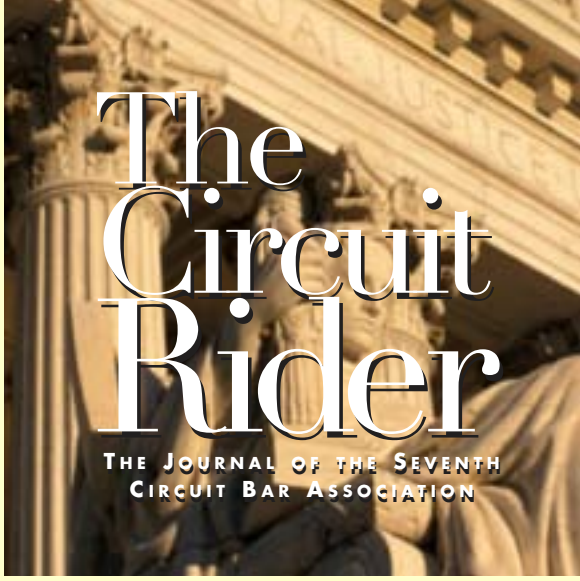
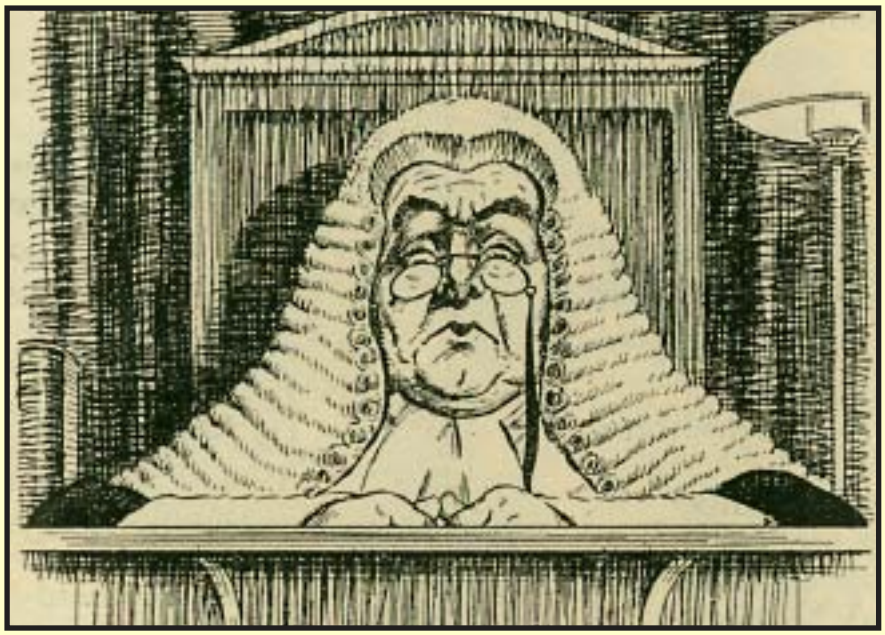


Perspectives



Sanctions Beyond Rule 11

*By Justin M. Ellis**

Federal Rule of Civil Procedure 11 has become well known since its 1983 overhaul as a potent weapon to deter attorney misconduct in the federal courts through the threat and imposition of sanctions. The rule has been invoked hundreds of times to punish attorneys for filing frivolous papers and has been cited thousands of times more in the federal cases. Peter Joy, *The Relationship Between Civil Rule 11 And Lawyer Discipline,* 37 Loyola L.A. L. Rev. 765, 787–91 (2004). Some lawyers may not know, however, that Rule 11 (or its appellate counterpart, Fed. R. App. P. 38) is not the only means under general federal practice to sanction opposing counsel or parties. Two powerful tools — Section 1927 of the Judicial Code and the federal courts' inherent powers — can provide relief where Rule 11 might fail. While those sanctions require stronger proof of misconduct than Rule 11, they also provide flexibility and power beyond what Rule 11 can offer.

Section 1927 states that "[a]ny attorney" admitted to the federal bar "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 attorney's fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. A version of the statute has been on the books for nearly two hundred years. *See* Act of July 22, 1813, ch. 14, § 3, 3 Stat. 19, 21. However, the statute has only gained traction since 1980, when Congress overruled the Supreme Court's decision in *Roadway Express v. Piper,* 447 U.S. 752 (1980), to provide explicitly that attorney's fees (and not just costs) can be recovered to redress unreasonable and vexatious conduct. *See* Antitrust Procedural Improvements Act of 1980, Pub. L. 96-349, § 3(2), 94 Stat. 1154, 1156 (Sept. 12, 1980).

Continued on page 32

**Justin Ellis: Associate, MoloLamken LLP. Law Clerk, Hon. Frank Easterbrook, United States Court of Appeals for the Seventh Circuit, 2009-2010; J.D., The University of Chicago Law School, 2009.*

Sanctions Beyond Rule 11

Continued from page 31

Accordingly, a litigant in the Seventh Circuit may move for costs, expenses, and attorney's fees under Section 1927 against any attorney who employs bad-faith tactics he knows or should know are unsound. *Riddle & Assocs. v. Kelly,* 414 F.3d 832, 835 (7th Cir. 2005) (*citing Kapco Mfg. Co. v. C & O Enters.,* 886 F.2d 1485, 1491 (7th Cir. 1989). The statute applies both to lawyers representing others and lawyers acting *pro se,* although its applicability to *pro se* lay litigants is an open question in the Seventh Circuit. *Carr v. Tillery,* 591 F.3d 909, 919 (7th Cir. 2010). "Bad faith" can mean either subjective bad intent or objective proof that the attorney was indifferent or recklessly unaware of the law. *Kotsilieris v. Chalmers,* 966 F.2d 1181, 1184 (7th Cir. 1992); *In re TCI Ltd.,* 769 F.2d 441, 445 (7th Cir. 1985).

Section 1927 can be invoked in the court of appeals or the district courts. *See Alexander v. United States,* 121 F.3d 312 (7th Cir. 1997) (court of appeals). The Seventh Circuit has stated in *dicta* that bankruptcy judges, as "courts of the United States," may enforce Section 1927 as well, *see Adair v. Sherman,* 230 F.3d 890, 895 & n.8 (7th Cir. 2000), but a circuit split on the issue makes the force of the Seventh Circuit's statement as precedent unclear.[1] Magistrates judges, on the other hand, may recommend sanctions but not order them directly. *Retired Chicago Police Ass'n v City of Chicago,* 76 F.3d 856 (7th Cir, 1996); *Alpern v. Lieb,* 38 F.3d 933 (7th Cir. 1994).[2] Section 1927 also only applies to conduct occurring *in* litigation, and cannot be used to reach bad acts done before a case begins. *Bender v. Freed,* 436 F.3d 747, 751 (7th Cir. 2006).

The second source of potential sanctions beyond Rule 11 are the inherent powers the federal courts may wield to manage their dockets and regulate their proceedings. While these powers are sometimes referred to as "Article III powers," their proper source, as Judge Posner has noted, is federal common law, *Carr v. Tillery,* 591 F.3d 909, 919 (7th Cir. 2010), since such powers may also be invoked by Article I courts, such as the bankruptcy courts, *see e.g., In re Rimsat, Ltd.,* 212 F.3d 1039, 1048–49 (7th Cir. 2000), and possibly by federal magistrate judges as well.[3] As the Marshall Court recognized just over two centuries ago, "[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution . . . to fine for contempt — imprison for contumancy — inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *United States v. Hudson & Goodwin,* 7 Cranch (11 U.S.) 32, 33 (1812). The court's common-law powers flow from the same source that justifies the federal contempt power, the power to control bar membership, and the doctrine of *forum non conveniens. See Chambers v. NASCO, Inc.,* 501 U.S. 32, 43–45 (1991).

The modern force of common-law sanctions dates from a 1991 Supreme Court opinion confirming the Court's earlier *dicta* to hold that a court's inherent powers allow attorney's fees to be taxed against both attorneys and parties who litigate "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers,* 501 U.S. at 32, 45–46 (*citing Aleyska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 258–59 (1975)). That power is available even where other laws, such as Rule 11 or Section 1927, cover similar ground. *Id.* at 49.

Continued on page 33

Sanctions Beyond Rule 11

Continued from page 32

Common-law powers can extend far beyond Rule 11's scope. They can be applied to attorneys' actions occurring before a suit has been filed, after it has ended, or even if the court lacked jurisdiction in the first place. *Carr,* 591 F.3d at 919–920. Remedies can reach beyond monetary penalties to compass such varied orders as dismissing a case in egregious cases of dilatory conduct, *Link v. Wabash R.R. Co.,* 370 U.S. 626 (1962); *Montano v. Chicago,* 535 F.3d 558, 563 (7th Cir. 2008), ordering a corporation's CEO to appear personally at a settlement conference upon pain of sanctions, *Miller Brewing Co. v. G. Heileman Brewing Co.,* 871 F.2d 648, 656–57 (7th Cir. 1989) (*en banc*), requiring a disbarred attorney to return client fees and notify other state bars of his punishment, *In re Riggs,* 240 F.3d 668, 671 (7th Cir. 2001), or deeming repeated collateral attacks by a prisoner automatically rejected without an order, *Alexander v. United States,* 121 F.3d 312, 315 (7th Cir. 1997). The court's inherent powers thus offer a powerful and flexible tool to combat opposing counsel's misbehavior.

The standard for common-law sanctions in the Seventh Circuit, as elsewhere, is nearly identical to the standard required to trigger Section 1927: The party seeking sanctions must show that "the offender has willfully abused the judicial process or otherwise conducted litigation in bad faith." *Salmeron v. Enter. Recovery Sys.,* 579 F.3d 787, 793 (7th Cir. 2009) (*citing Maynard v. Nygren,* 332 F.3d 462, 470–71 (7th Cir. 2003)). Common law or Section 1927 sanctions may be taxed whether or not a party (or her attorney) has filed a paper subject to Rule 11. 501 U.S. at 57; *Samuels v. Wilder,* 906 F.2d 272, 275 (7th Cir. 1990).

Article III and Section 1927 provide several procedural advantages over Rule 11 to an attorney seeking sanctions against his opponent. First, costs and fees under Section 1927 and the courts' inherent powers are not subject to the time limits of either Rule 11's 21-day "safe-harbor" provision or the 14-day time limit under Rule 54 for taxing fees. Fed. R. Civ. P. 54(d)(2)(E); *Overnite Transp. Co. v. Chicago Indus. Tire Co.,* 697 F.2d 789, 793 (7th Cir. 1983). Rather, a motion for such sanctions need only be brought within a "reasonable time," and are still proper even if an appeal to the circuit court is pending. *Overnite Transp.,* 697 F.2d at 793. Second, unlike Rule 11, the offending attorney need not be given any opportunity to withdraw a frivolous paper filed in bad faith; mere notice of possible penalties and an opportunity to defend oneself is usually sufficient. *Method Elecs., Inc. v. Adam Tech., Inc.,* 371 F.3d 923, 928 (7th Cir. 2004).[4] Another divergence is that penalties imposed under Section 1927 cannot be reduced out of consideration for the offending attorney's lack of resources. *Shales v. Local 330,* 557 F.3d 746 (7th Cir. 2009).

Both the Supreme Court and the Seventh Circuit have warned that the inherent powers, in particular, may be used only with "caution and restraint," *Schmude v. Sheahan,* 420 F.3d 645, 650 (7th Cir. 2005) (*citing Chambers,* 501 U.S. at 44), and litigants and courts should take care to seek only punishments that fit the crime. *United States v. Johnson,* 327 F.3d 554, 562 (7th Cir. 2003); *Dietrich v. Northwest Airlines, Inc.,* 168 F.3d 961, 964 (7th Cir. 1999). But those powers, together with Section 1927, can provide attorneys with valuable weapons to combat especially serious attorney misconduct.

Notes:

[1] *Compare, e.g., In re Schaefer Salt Recovery, Inc.,* 542 F.3d 90, 105 (3d Cir. 2008) (holding that bankruptcy courts, as "units" of the district court, may invoke Section 1927) *with In re Courtesy Inns, Ltd.,* 40 F.3d 1084, 1085–86 (10th Cir. 1994) (Section 1927 unavailable to bankruptcy courts).

[2] In the Seventh Circuit, even sanctions under Fed.R.Civ.P. 37 for discovery violations appear to be viewed as "dispositive" matters. *See Retired Chicago Police Ass'n, supra.* The view that Rule 37 sanctions are "dispositive" appears to be unique to the Seventh Circuit, and the point often goes unnoticed, resulting in some division in the Northern District of Illinois. For an extensive discussion of the issue, and the cases throughout the country, see *Cleversafe, Inc. v. Amplidata, Inc.,* 2012 WL 598924 (N.D. Ill. Nov. 29, 2012); Jeffrey Cole, Federal Civil Procedure, Chapter 10 - Practicing Before United States Magistrate Judges, §10.16 (IICLE 2012 Supp.).

[3] *See Chaves v. M/V Medina Star,* 47 F.3d 153, 156 (5th Cir. 1995) (vacating a magistrate judge's monetary sanction while stating that the magistrate judge "undoubtedly" had power to do so); *but see Retired Chicago Police Association, supra; Lieb, supra.* Many cases hold that magistrate judges have no inherent Article III powers; they are creatures of statute. *Reddick v. White,* 456 Fed.Appx. 191, 193 (4th Cir. 2011).

[4] Even the notice requirement can be dispensed with in cases of especially egregious misconduct. *See Bolt v. Loy,* 227 F.3d 854, 856–57 (7th Cir. 2002); *Jackson v. Murphy,* 468 Fed. App'x 616 (7th Cir. 2012).