

The Split on Sanctioning Pro Se Litigants Under 28 U.S.C. § 1927: Choose Wisely When Picking a Side, Eighth Circuit

I. INTRODUCTION

In recent years, an increasing number of pro se¹ litigants have appeared in federal courts.² Between October 2003 and September 2004, federal district courts had over 20,000 cases filed by pro se litigants.³ In fact, “pro se litigants appeared in thirty-seven percent of all cases.”⁴ The increase of pro se litigation is attributed to several factors, including the rising cost of litigation combined with the decrease of funding for legal services, the negative public perception of lawyers, and the rise of do-it-yourself legal resources.⁵ Once pro se litigants enter the federal court system, their presence multiplies the resources spent by the court and by the parties on the proceedings, as pro se litigants generally are unfamiliar with the procedural rules and the substantive law governing their claims.⁶

At the same time the presence of pro se litigants has been increasing in the federal courts, imposing sanctions under 28 U.S.C. § 1927 has also become more common. This statute allows the court to impose sanctions for behavior that multiplies the proceedings.⁷ Under 28 U.S.C. § 1927, the court may order the offending party to compensate the opponent for excess costs, expenses, and attorneys’ fees.⁸ In 1998, one scholar observed that attorneys sought, and courts imposed, sanctions under 28 U.S.C. § 1927 more

1. In this Note, pro se is used to describe litigants who choose to represent themselves in civil litigation rather than being represented by an attorney. With respect to civil litigation, this Note excludes prisoner litigation.

2. Drew A. Swank, Note and Comment, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 377 (2005). Pro se litigants are most likely to appear in matters involving employment and housing discrimination. *Id.*

3. Kara Scannell, *Legal Eaglet: In Phoenix Court, Sales Rep Battles Aventis on Her Own*, WALL ST. J., Aug. 9, 2005, at A1.

4. Swank, *supra* note 2, at 377.

5. JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 10 (1998). For an example of a do-it-yourself legal publication, see PAUL BERGMAN & SARA J. BERMAN-BARRETT, REPRESENT YOURSELF IN COURT: HOW TO PREPARE AND TRY A WINNING CASE (Mary Randolph & Ralph Warner eds., 1993).

6. *See infra* notes 30-34 and accompanying text.

7. 28 U.S.C. § 1927 (2000).

8. *Id.*

frequently since the 1993 amendment to Rule 11.⁹ However, because this conclusion was based solely on anecdotal information, a curious scholar empirically tested the observation's accuracy.¹⁰ This study revealed that in the four federal district courts examined, the frequency of imposing 28 U.S.C. § 1927 sanctions has risen since 1993.¹¹

These two trends, the increasing number of pro se litigants in federal courts and the increasing use of 28 U.S.C. § 1927 sanctions, have collided to create a split in the United States Courts of Appeals as to whether 28 U.S.C. § 1927 sanctions may be applied against pro se litigants. While the United States Court of Appeals for the Second Circuit determined that 28 U.S.C. § 1927 is inapplicable against pro se litigants, the United States Court of Appeals for the Ninth Circuit held 28 U.S.C. § 1927 may be applied against pro se litigants. Although the United States Court of Appeals for the Eighth Circuit has not yet expressed an opinion on the matter, the Federal District Court of Nebraska recently recognized the split and chose to apply 28 U.S.C. § 1927 sanctions against pro se litigants. This Note examines the split in the circuits as to whether pro se litigants may be sanctioned under 28 U.S.C. § 1927 and proposes that the United States Court of Appeals for the Eighth Circuit should choose the position with textual support, the position that meets Congress' intent, and the position that achieves the proper policy result – the Eighth Circuit should follow the Second Circuit's lead and decline to apply 28 U.S.C. § 1927 sanctions against pro se litigants.

II. LEGAL BACKGROUND

A. *Pro Se Litigants*

The Supreme Court of the United States has recognized the constitutional right to come into federal court and sue.¹² Many parties

9. Danielle Kie Hart, *And the Chill Goes On – Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. § 1927 and the Court's Inherent Power*, 37 LOY. L.A. L. REV. 645, 660 (2004) (citing Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 643 (1998)). The 1993 amendment to Rule 11 is noted only to explain the rising use of 28 U.S.C. § 1927 sanctions and is outside the scope of this Note.

10. *Id.*

11. *Id.* at 661 tbl.1, 662. The district courts studied were the Southern District of New York, the District of New Jersey, the Eastern District of Louisiana, and the Northern District of California. *Id.* at 661. The study compared the use of 28 U.S.C. § 1927 in a five-year period preceding the 1993 amendment to Rule 11 and the use of 28 U.S.C. § 1927 in a five-year period following the 1993 amendment to Rule 11. *Id.* at 661 & n.90.

12. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (recognizing that the right of access to the courts stems from the First Amendment's right to petition the government). The right of access to the courts has been rooted in

exercise that right while represented by an attorney. However, “[o]ne of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone,”¹³ even those who choose to litigate their cases without assistance of counsel. Federal statutory law allows parties to “plead and conduct their own cases” as pro se litigants.¹⁴

Once parties decide to represent themselves, they enter the federal court system as “stranger[s] in a strange land.”¹⁵ In addition to learning and applying the underlying law to their claims, pro se litigants must comply with the Federal Rules of Civil Procedure and the local rules of the particular district court.¹⁶ While pro se litigants may expect leniency from the court with respect to complying with the procedural requirements,¹⁷ the Supreme Court has granted leniency in only one area – pleadings.¹⁸

In *Haines v. Kerner*, an inmate in the Illinois prison system sought to recover damages for injuries and civil rights deprivations.¹⁹ Prison officials placed the inmate in solitary confinement after he “struck another inmate on the head with a shovel.”²⁰ In his complaint, the inmate alleged that he did not receive due process before being placed in solitary confinement and that he suffered physical injuries as a result of the prison’s actions.²¹ The district court dismissed the case for failure to state a claim on which relief could be granted.²² However, the Supreme Court reversed because the inmate’s allegations, “however inartfully pleaded, [were] sufficient to call for the opportunity to offer supporting evidence”²³ and decided that pro se complaints are held “to less stringent standards than formal pleadings drafted by lawyers.”²⁴

four constitutional provisions, “the privileges and immunities clause, the First Amendment, the due process clause, and equal protection clause.” *GOLDSCHMIDT ET AL.*, *supra* note 5, at 21.

13. *NAACP v. Meese*, 615 F. Supp. 200, 205-06 (D.D.C. 1985).

14. 28 U.S.C. § 1654 (2000). While the right to appear pro se currently is statutorily guaranteed, “[t]he right to represent oneself in the federal courts can be traced to medieval England” through the Magna Carta. Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 *VAND. L. REV.* 983, 987 (2007).

15. *BERGMAN & BERMAN-BARRETT*, *supra* note 5, at 1/4.

16. *See Farnsworth v. City of Kansas City*, 863 F.2d 33, 34 (8th Cir. 1988) (per curiam).

17. *GOLDSCHMIDT ET AL.*, *supra* note 5, at 53.

18. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

19. *Id.* at 519.

20. *Id.* at 520.

21. *Id.*

22. *Id.* The district court partly based its decision on the suggestion that federal courts generally should not inquire into the internal operations of state prisons. *Id.*

23. *Id.*

24. *Id.*

Even at the pleadings stage, pro se litigants must include enough facts to support their allegations²⁵ and set forth a claim upon which relief may be granted as a matter of law.²⁶ Beyond the pleadings stage, leniency for pro se litigants in federal court is mixed. The Eighth Circuit has granted leniency to pro se litigants with respect to motions²⁷ and has determined that “[a] pro se litigant should receive meaningful notice of what is expected of him.”²⁸ Beyond those situations, though, the Eighth Circuit has not treated pro se litigants as favorably.²⁹

Although the Eighth Circuit does not require the federal district courts to treat pro se litigants with more leniency than represented parties, the very presence of a pro se litigant in a case affects the amount of time and resources the court and the parties spend on that case. Judicial efficiency decreases because “[p]ro se litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.”³⁰ In an attempt to understand the procedural rules, pro se litigants usually spend more time than practicing attorneys in the clerk’s office asking questions.³¹ However, explaining procedures does not end in the clerk’s office. In survey responses, judges described how they must explain technical objections to pro se litigants and how pro se litigants’ lack of understanding of simple procedures causes delay.³² In addition, pro se litigants may file “rambling, illogical pleadings, motions, and briefs.”³³ Responding to those filings and waiting while the judge explains procedures to the pro se litigant causes the represented litigant

25. *Stringer v. St. James R-1 Sch. Dist.*, 446 F.3d 799, 802 (8th Cir. 2006).

26. *Cunningham v. Ray*, 648 F.2d 1185, 1186 (8th Cir. 1981) (per curiam).

27. *See Miller v. Norris*, 247 F.3d 736, 739 (8th Cir. 2001) (construing the pro se litigant’s motion liberally).

28. *Burgs v. Sissel*, 745 F.2d 526, 528 (8th Cir. 1984) (per curiam); *see also Schooley v. Kennedy*, 712 F.2d 372, 373 (8th Cir. 1983) (per curiam) (“A pro se litigant should receive meaningful notice of what is required of him . . .”).

29. Pro se litigants who fail to make discovery requests waive the right to conduct that type of discovery. *See Hawkins v. Minn. Mining & Mfg. Co.*, 601 F.2d 362, 363 (8th Cir. 1979) (per curiam) (noting that a pro se litigant who failed to make a request to take depositions waived the right to take depositions). In addition, federal courts may dismiss a pro se litigant’s case for failing to comply with discovery rules, *see Lindstedt v. City of Granby*, 238 F.3d 933, 937 (8th Cir. 2000) (per curiam), or for failing to effectuate service on the defendants, *see Bullock v. United States*, 160 F.3d 441, 442 (8th Cir. 1998) (per curiam). With respect to motions of summary judgment filed against pro se litigants, the district court does not have to instruct pro se litigants how to respond, *see Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001), or when to respond, *see Bennett v. Dr Pepper/Seven Up, Inc.*, 295 F.3d 805, 808 (8th Cir. 2002).

30. Swank, *supra* note 2, at 384.

31. *Id.*

32. GOLDSCHMIDT ET AL., *supra* note 5, at 53.

33. Swank, *supra* note 2, at 384.

to incur higher attorneys' fees and costs.³⁴ Because no litigant wishes to spend more money than necessary, the represented party might seek sanctions against the pro se litigant for causing excessive costs, expenses, and attorneys' fees. One sanction that the represented party might seek is reimbursement under 28 U.S.C. § 1927.

B. 28 U.S.C. § 1927

Title 28 U.S.C. § 1927 allows a court to award “the excess costs, expenses, and attorneys’ fees” from “[a]ny attorney or other person admitted to conduct cases . . . who so multiplies the proceedings . . . unreasonably and vexatiously.”³⁵ The original purpose of the statute was to control the practice of United States Attorneys.³⁶ Because some United States Attorneys were paid by the number of lawsuits filed, they “filed unnecessary lawsuits to inflate their compensation.”³⁷ Congress wanted to limit “multiplicity of suits or processes, where a single suit or process might suffice.”³⁸ While today’s version of the statute may seem compensatory, 28 U.S.C. § 1927 is “a penal statute designed to discourage unnecessary delay in litigation.”³⁹ The statute meets its purpose by requiring violators of the statute to personally pay the excess costs caused by their misconduct.⁴⁰

A party can recover those excess costs by filing a motion with the court to impose 28 U.S.C. § 1927 sanctions on the offending attorney.⁴¹ Before a party can recover excess costs under 28 U.S.C. § 1927, the court must find that two elements have been met.⁴² First, the court must find that the “attorney or other person admitted to conduct cases”⁴³ multiplied the

34. Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge’s Perspective*, 42 U. RICH. L. REV. 93, 97 (2007).

35. 28 U.S.C. § 1927 (2000). The complete text of the statute is as follows:

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

Id.

36. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 n.6 (1980).

37. *Id.*

38. *Id.* at 759 (quoting 26 ANNALS OF CONG. 29 (1813)).

39. GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTIVE MEASURES* 760 (Richard G. Johnson ed., 3d ed. 2004); *see also Roadway Express*, 447 U.S. at 762 (The statute “is concerned only with limiting the abuse of court processes.”).

40. Hart, *supra* note 9, at 652.

41. *See VAIRO*, *supra* note 39, at 762.

42. Hart, *supra* note 9, at 652.

43. 28 U.S.C. § 1927 (2000).

proceedings,⁴⁴ which generally means that the conduct must create “needless proceedings” or “prolong[] litigation.”⁴⁵ Second, the court must find that the conduct was vexatious as well as unreasonable.⁴⁶ The unreasonableness standard poses little difficulty for the courts, but “the issue is not . . . the reasonableness of the position asserted.”⁴⁷ Instead, the inquiry is whether asserting the position is reasonable in the circumstances.⁴⁸ The vexatious standard poses more difficulty because courts do not have a single standard to describe what constitutes vexatious conduct.⁴⁹ The vexatious standard “requires something more than mere negligence,”⁵⁰ and conduct that constitutes bad faith is enough to meet the standard in any circuit.⁵¹ In the Eighth Circuit,⁵² “[s]anctions are proper . . . ‘when attorney conduct, viewed objectively, manifests either intentional or reckless disregard of the attorney’s duties to the court.’”⁵³

Once the court finds that the two elements are met, the court may require the “attorney or other person admitted to conduct cases . . . to satisfy personally the *excess* costs, expenses, and attorney’s fees reasonably incurred.”⁵⁴ Because the statute only allows the court to award excess costs, expenses, and fees, the court cannot award all costs, expenses, and fees unless the entire proceeding was baseless.⁵⁵ Instead, the court will award costs, expenses, and fees that are “incurred in reacting to, and attempting to staunch, the multiplication of the proceedings.”⁵⁶ The award may include only what is “reasonably incurred.”⁵⁷ Therefore, a party seeking a sanction should “take all reasonable steps to minimize” costs, expenses, and fees incurred because

44. *Id.*; see also Hart, *supra* note 9, at 652.

45. GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 384 (3d ed. 2000). For examples of conduct that multiplies proceedings, see *id.* at 384-86.

46. Hart, *supra* note 9, at 652.

47. JOSEPH, *supra* note 45, at 395.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 396.

52. For a discussion of the standard in other circuits, see *id.* at 396-400.

53. *Lee v. First Lenders Ins. Servs., Inc.*, 236 F.3d 443, 445 (8th Cir. 2001) (quoting *Lee v. L.B. Sales, Inc.*, 177 F.3d 714, 718 (8th Cir. 1999)). In this case, the court found the attorneys unreasonably and vexatiously multiplied the proceedings by filing a class action suit and abandoning the suit without explanation after a year and a half. *Id.* During that year and a half, the defendants treated the case as though it would be a class action and “incur[red] additional costs to defend the case as a class action.” *Id.* In addition, the assertion that the case was a class action “dominated discovery and motion practice” during that time. *Id.*

54. 28 U.S.C. § 1927 (2000) (emphasis added).

55. JOSEPH, *supra* note 45, at 410.

56. *Id.*

57. 28 U.S.C. § 1927.

the court will not award what “could have been avoided or was self-imposed.”⁵⁸

Once the court awards reasonably incurred costs, expenses, and fees, the following question arises: Who has to pay? The language of the statute indicates that “[a]ny attorney or other person admitted to conduct cases . . . may be required by the court to satisfy personally.”⁵⁹ The language is clear that the offending attorney will be the financially responsible party.⁶⁰ However, the statute also applies to “other person[s] admitted to conduct cases.”⁶¹ Pursuant to statute, parties may appear pro se in federal courts, but the statute does not indicate that litigants who appear pro se in federal courts are admitted to conduct cases.⁶² While scholars contend that lawyers are the only persons to whom 28 U.S.C. § 1927 may be applied,⁶³ the circuits are split as to whether 28 U.S.C. § 1927 allows costs, expenses, and fees to be assessed against pro se litigants.⁶⁴

C. The Second Circuit Disallows § 1927 Sanctions Against Pro Se Litigants

In *Sassower v. Field*, the United States Court of Appeals for the Second Circuit considered whether 28 U.S.C. § 1927 sanctions could be applied

58. JOSEPH, *supra* note 45, at 411.

59. 28 U.S.C. § 1927.

60. JOSEPH, *supra* note 45, at 379.

61. 28 U.S.C. § 1927.

62. 28 U.S.C. § 1654 (2000).

63. *See, e.g.*, JOSEPH, *supra* note 45, at 379 (noting that pro se litigants “are not ‘admitted to conduct cases,’ as § 1927 requires, but merely permitted by statute to ‘conduct their own cases’”).

64. The Second Circuit has held that 28 U.S.C. § 1927 does not apply against pro se litigants, while the Ninth Circuit has held that pro se litigants may be sanctioned under the statute. *See infra* Parts II.C-D. Other circuits have not been quite as clear. The Seventh and Third Circuits have recognized the split but have refused to resolve the issue because the court could sanction under its inherent authority. *See Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc.*, 110 F. App’x 283, 286-87 (3d Cir. 2004); *Alexander v. United States*, 121 F.3d 312, 316 (7th Cir. 1997). The Tenth Circuit has commented that “§ 1927 is available against only attorneys,” *Steinert v. Winn Group, Inc.*, 440 F.3d 1214, 1222 (10th Cir. 2006), but has never considered the issue with respect to pro se litigants. The Fifth Circuit has noted that 28 U.S.C. § 1927 sanctions may only be imposed against attorneys; the clients “may not be ordered to pay.” *Matta v. May*, 118 F.3d 410, 413-14 (5th Cir. 1997). In an unpublished opinion, the Sixth Circuit ordered a pro se appellant to pay attorneys’ fees as a sanction on appeal but did not consider whether a pro se litigant could be sanctioned under 28 U.S.C. § 1927. *Blachy v. Butcher*, 142 F. App’x 919, 920 (6th Cir. 2005). Finally, the First, Fourth, Eighth, Eleventh, D.C., and Federal Circuits have not expressed an opinion.

against a pro se litigant.⁶⁵ Doris and Elena Sassower filed a suit claiming a Fair Housing Act violation in 1988.⁶⁶ After the jury found for the defendants, the district court imposed 28 U.S.C. § 1927 sanctions⁶⁷ for the Sassowers' "tactics of delay, oppression and harassment."⁶⁸ When determining whether to impose a sanction, the district court considered that the Sassowers engaged in the following activities during litigation: filed "unsupported bias recusal motions," made "personal attacks on the opposing parties and counsel," filed numerous motions to reargue if they lost a ruling, "filed two improper interlocutory appeals," made a motion for a new trial that essentially reargued the merits, "attempted to communicate directly with the defendants rather than through counsel," and committed several discovery abuses.⁶⁹ The district court judge awarded the defendants \$42,000 under 28 U.S.C. § 1927.⁷⁰

On appeal, the Second Circuit agreed that the Sassowers' conduct was unreasonable and vexatious.⁷¹ The district court judge decided that 28 U.S.C. § 1927 could be "applied against non-lawyer pro se litigants," a decision with which the Second Circuit disagreed.⁷² The district court judge reasoned that pro se litigants were "person[s] admitted to conduct cases because they had been granted permission to proceed pro se."⁷³ In reversing the district court's decision that pro se litigants could be sanctioned under 28 U.S.C. § 1927, the appellate panel noted that pro se litigants have the right to appear without representation pursuant to federal statute.⁷⁴ In this case, when the Sassowers' former attorney withdrew from the case, the Sassowers did not have to obtain permission from the court before appearing pro se.⁷⁵ Therefore, the Second Circuit concluded that "the word 'admitted' . . . suggest[ed] application to those who, like attorneys, gain approval to appear in a lawyerlike capacity"

65. 973 F.2d 75 (2d Cir. 1992).

66. *Id.* at 77. More specifically, the Sassowers claimed that the owner of a cooperative apartment building "had discriminated against them by rejecting their application to acquire an apartment in the building" because they were "single, Jewish women." *Id.*

67. The court also imposed sanctions under Rule 11 and the court's inherent power. *Id.*

68. *Id.* (internal quotation marks omitted). The district court judge noted that "[t]he Sassowers pursued this litigation as if it was [sic] a holy war and not a court proceeding." *Id.* at 78.

69. *Id.* With respect to the discovery abuses, the magistrate judge recommended dismissal of the case because Doris Sassower refused to be deposed and was uncooperative when she finally was deposed. *Id.* In addition, Doris Sassower assisted in conducting the harassing depositions. *Id.*

70. *Id.* at 80.

71. *Id.*

72. *Id.* (emphasis omitted).

73. *Id.* (emphasis omitted) (internal quotation marks omitted).

74. *Id.*

75. *Id.*

rather than to pro se litigants.⁷⁶ In addition, the court concluded that Congress did not intend for pro se litigants to be sanctioned under 28 U.S.C. § 1927 because of the statute's language.⁷⁷ Under the prior version of the statute, the sanctions applied against “any attorney, proctor, or other person admitted.”⁷⁸ The court determined that the prior language of the statute suggested that Congress intended “other person’ [to] cover[] only those admitted to act in a lawyerlike capacity.”⁷⁹ The court also recognized that the United States Supreme Court mentioned, without elaboration or “disagreement, . . . that section 1927 ‘applies only to attorneys.’”⁸⁰ Thus, the Second Circuit reversed the 28 U.S.C. § 1927 sanction award against Elena Sassower.⁸¹ However, the court upheld the award against Doris Sassower because she was a licensed attorney representing herself at the time of the litigation and the purpose of the statute is to “curb abusive tactics by lawyers.”⁸²

D. The Ninth Circuit Allows § 1927 Sanctions Against Pro Se Litigants

The United States Court of Appeals for the Ninth Circuit considered whether 28 U.S.C. § 1927 sanctions could be applied against a pro se litigant in *Wood v. Santa Barbara Chamber of Commerce, Inc.*⁸³ This case came to the circuit court from a dismissal of Wood's complaint.⁸⁴ The case was “a consolidation of 36 suits filed by Wood throughout the country” and “[was] the latest in a series of suits brought by Wood . . . arising out of the same or similar alleged incidents.”⁸⁵ Wood filed a complaint against 300 defendants charging “copyright infringement, common-law unfair competition, violation of the Sherman Act, and conspiracy to commit trade libel.”⁸⁶ The first complaint was incomprehensible, so the district court allowed Wood to orally state the complaint in court because he was a pro se litigant.⁸⁷ Then, the court told Wood how to amend the complaint to comply with the Federal Rules of

76. *Id.*

77. *Id.*

78. *Id.* (citing *Motion Picture Patents Co. v. Steiner*, 201 F. 63, 64 (2d Cir. 1912)).

79. *Id.*

80. *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 41 (1991)).

81. *Id.*

82. *Id.* The court noted, however, that Doris Sassower's status as a member of the bar, at the time of the appeal, was in doubt. *Id.* at 77.

83. 699 F.2d 484 (9th Cir. 1983) (per curiam).

84. *Id.* at 485.

85. *Id.*

86. *Id.*

87. *Id.*

Civil Procedure.⁸⁸ However, Wood failed to comply with the district court's instructions and, instead, filed another incomprehensible complaint, which the court dismissed.⁸⁹

On appeal, the Ninth Circuit observed that Wood filed several complaints about the same or similar incidents, all of which had been dismissed because of his failure to comply with the Federal Rules of Civil Procedure or court orders, but Wood kept filing essentially the same complaint.⁹⁰ Then the court noted that it refused oral argument because the entire appeal was "frivolous, vexatious, and entirely unmeritorious."⁹¹ Therefore, the Ninth Circuit sanctioned Wood through Rule 38 of the Federal Rules of Appellate Procedure⁹² and 28 U.S.C. § 1927.⁹³ The court awarded each group of defendants \$1,250.⁹⁴ However, Wood had an attorney representing him on appeal,⁹⁵ so the court made Wood and the attorney jointly and severally liable.⁹⁶ Because sanctions under Rule 38 "may be imposed upon represented parties, their counsel and pro se litigants,"⁹⁷ the circuit was unclear in this case under which provision the court imposed sanctions on the pro se litigant. However, a later case in the Ninth Circuit involving sanctioning a pro se litigant under 28 U.S.C. § 1927 interpreted *Wood* to determine that a pro se litigant could be sanctioned under the statute.⁹⁸

In *Wages v. Internal Revenue Service*, the Ninth Circuit again considered whether 28 U.S.C. § 1927 sanctions could be applied against pro se litigants.⁹⁹ In this case, the Ninth Circuit reviewed whether the district court correctly imposed a 28 U.S.C. § 1927 sanction against a pro se litigant.¹⁰⁰ *Wages* brought a suit claiming that "IRS audits and collection practices violated her first, fourth, fifth, seventh, eighth, ninth, and fourteenth amendment rights by depriving her of liberty and property through extortion,

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* Rule 38 states, "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee." FED. R. APP. P. 38.

93. *Wood*, 699 F.2d at 485.

94. *Id.* Because there were eight groups of defendants, the total award was \$10,000. *Id.* at 485-86.

95. *Id.* at 485. Although the opinion notes that Wood had an attorney on appeal, the heading of the case designates Wood as appearing "pro per." *Id.* at 484.

96. *Id.* at 486.

97. JOSEPH, *supra* note 45, at 475.

98. *See Wages v. Internal Revenue Serv.*, 915 F.2d 1230, 1235-36 (9th Cir. 1990).

99. 915 F.2d 1230.

100. *Id.* at 1235.

theft, fraud, and coercion.”¹⁰¹ The defendants moved to dismiss the complaint, but before the district court could rule on the motion, Wages sought to dismiss her complaint without prejudice or, in the alternative, to amend her complaint with help from the court.¹⁰² The district court granted the defendants’ motion to dismiss the complaint because amending the complaint would not cure the defects in Wages’ case.¹⁰³ Nonetheless, Wages filed an amended complaint, which contained nearly the same allegations as the dismissed complaint.¹⁰⁴ In response, the district court dismissed the amended complaint and sanctioned Wages under 28 U.S.C. § 1927.¹⁰⁵

On appeal, the Ninth Circuit considered whether the district court properly sanctioned Wages under 28 U.S.C. § 1927.¹⁰⁶ The court first noted that filing an amended complaint containing essentially the same allegations as the dismissed complaint was conduct in bad faith.¹⁰⁷ Then, the court held that 28 U.S.C. § 1927 “sanctions may be imposed upon a pro se plaintiff, despite Wages’s protestations to the contrary.”¹⁰⁸ In making that statement, the court relied on *Wood v. Santa Barbara Chamber of Commerce, Inc.* and cited the case as allowing 28 U.S.C. § 1927 sanctions to be applied against pro se litigants.¹⁰⁹ However, the court offered no other support for applying the statute against pro se litigants.

E. The Eighth Circuit’s Federal District Courts: Assuming that § 1927 Sanctions Apply Against Pro Se Litigants

The United States Court of Appeals for the Eighth Circuit has not had the opportunity to express an opinion as to applying 28 U.S.C. § 1927 sanctions against pro se litigants. However, the federal district courts in the Eighth Circuit have had such opportunities. In each instance, the court has assumed that 28 U.S.C. § 1927 applies against pro se litigants.

The first case in which a federal district court in the Eighth Circuit’s jurisdiction considered whether 28 U.S.C. § 1927 sanctions could be imposed

101. *Id.* at 1232.

102. *Id.* at 1233.

103. *Id.* More specifically, the district court informed Wages that amending the complaint would not make the Internal Revenue Service subject to suit because it had sovereign immunity; nothing in the pleadings can change that fact. *Id.* In addition, “the individual defendants were not liable for fourth amendment violations under *Bivens.*” *Id.*

104. *Id.*

105. *Id.* The court also imposed sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Id.*

106. *Id.* at 1235.

107. *Id.* Therefore, the conduct met the unreasonable and vexatious element. *See supra* notes 46-53 and accompanying text.

108. *Wages*, 915 F.2d at 1235-36.

109. *Id.*

against a pro se litigant was *Holker v. United States*.¹¹⁰ In that case, Holker sought “an abatement of a \$500 penalty” imposed by the Internal Revenue Service pursuant to 26 U.S.C. § 6702.¹¹¹ The Service imposed the penalty because Holker filed Form 1040 but failed to sign or complete it with the information from his W-2 forms.¹¹² In addition, Holker filed his W-2 forms with the Service but wrote “INCORRECT” across the forms without any explanation.¹¹³

In determining whether to abate the \$500 penalty, the court relied on two cases that it decided two months previously.¹¹⁴ In both cases, the facts were nearly the same as the *Holker* case.¹¹⁵ In those cases, the court decided that the \$500 penalty was properly imposed by the Service because the penalty’s purpose was to deter that type of behavior.¹¹⁶ The court came to the same conclusion in the *Holker* case.¹¹⁷ However, in response to the Service’s request for a 28 U.S.C. § 1927 sanction, the court declined.¹¹⁸ Because the penalty was new law and had not received much judicial construction, the court held that awarding attorneys’ fees was not proper.¹¹⁹ However, the court noted that it may impose a 28 U.S.C. § 1927 sanction “in future cases presenting the same issue.”¹²⁰

Only one month after *Holker*, the United States District Court for the District of Minnesota decided three cases with facts similar to *Holker*.¹²¹ In

110. No. 4-83-1007, 1984 WL 207 (D. Minn. Feb. 15, 1984).

111. *Id.* at *1. At the time, the Internal Revenue Service could impose a civil penalty of \$500 pursuant to 26 U.S.C. § 6702(a) if:

- (1) any individual files what purports to be a return of the tax imposed by subtitle A but which-
 - (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
 - (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
- (2) the conduct referred to in paragraph (1) is due to-
 - (A) a position which is frivolous, or
 - (B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws

Id. The purpose of the penalty was “to deter the filing of protest tax returns.” *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at *2.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See* Funk v. United States, No. 3-83-1573, 1984 WL 192 (D. Minn. Mar. 20, 1984); Luesse v. United States, No. 3-83-1536, 1984 WL 178445 (D. Minn. Mar. 19, 1984); Funk v. United States, No. 3-83-1537, 1984 WL 1038 (D. Minn. Mar. 19, 1984).

each of these cases, though, the court sanctioned the pro se litigants under 28 U.S.C. § 1927 without any discussion as to whether the statute could be applied against pro se litigants.¹²² Instead, the court determined in each case that the position asserted by each pro se litigant was frivolous because it had already been rejected by the Eighth Circuit, and the United States should receive attorneys' fees as a result.¹²³

The next two cases by federal district courts in the Eighth Circuit declined to impose 28 U.S.C. § 1927 sanctions but again failed to consider whether the statute was applicable to pro se litigants.¹²⁴ In *Lien v. Hartman*, Lien appeared pro se and alleged two claims against the defendants.¹²⁵ As reviewed broadly by the court, Lien's two claims were a civil rights action under 42 U.S.C. § 1983 and a claim under the Federal Tort Claims Act.¹²⁶ The court dismissed the case because the actions the federal officials took were not susceptible to a § 1983 claim.¹²⁷ In addition, her claim under the Federal Tort Claims Act was not valid because Lien had not yet "presented the claim to the appropriate federal agency and the claim [had not yet] been denied."¹²⁸ Because Lien's case was dismissed, the defendant sought attorneys' fees and costs under 28 U.S.C. § 1927,¹²⁹ but the court denied the request.¹³⁰ In denying to award costs and attorneys fees under 28 U.S.C. § 1927, the court mentioned that Lien was a pro se litigant¹³¹ but said nothing further. Thus, it is not clear whether the court denied the request because Lien was a pro se litigant or because Lien's actions as a pro se litigant did not support a 28 U.S.C. § 1927 sanction.

In *Milsap v. Feeney*, the court dismissed a case that was essentially the same as three prior cases that had been dismissed.¹³² Milsap filed the case as a pro se litigant and complained that he "[had] been denied equal access to community grants," more specifically Department of Housing and Urban

122. See *Funk*, 1984 WL 192, at *2; *Luesse*, 1984 WL 178445, at *3; *Funk*, 1984 WL 1038, at *3.

123. See *Funk*, 1984 WL 192, at *2; *Luesse*, 1984 WL 178445, at *3; *Funk*, 1984 WL 1038, at *3.

124. See *Milsap v. Feeney*, No. 4-92-CV-836, 1993 WL 95366 (D. Minn. Mar. 31, 1993); *Lien v. Hartman*, No. 4-87-534, 1988 WL 56920 (D. Minn. June 1, 1988).

125. *Lien*, 1988 WL 56920, at *1.

126. *Id.* at *2.

127. *Id.* The federal officials acted pursuant to federal law. *Id.* The federal officials would have had to be acting under state law for Lien to be successful in a § 1983 action. *Id.*

128. *Id.* at *3.

129. The defendant also asked for attorneys' fees and costs under Rule 11 of the Federal Rules of Civil Procedure.

130. *Id.*

131. *Id.* ("In this pro se action the Court declines to grant costs and attorneys' fees." (emphasis omitted)).

132. No. 4-92-CV-836, 1993 WL 95366, at *3 (D. Minn. Mar. 31, 1993).

Development (HUD) grants.¹³³ The court dismissed the case for three reasons: (1) it was barred by *res judicata*;¹³⁴ (2) Milsap failed to exhaust administrative remedies before filing the case;¹³⁵ and (3) the case was “entirely frivolous.”¹³⁶ In the order to dismiss the case, the court noted that if Milsap brought another case that was essentially similar to the four previous cases it had dismissed, the court “[would] entertain a motion to require a bond to which recourse may be sought in the event of the imposition of penalties under . . . 28 U.S.C. § 1927.”¹³⁷ However, the court did not elaborate on whether Milsap could be sanctioned under 28 U.S.C. § 1927 as a *pro se* litigant.

Until 2007, federal district court cases in the Eighth Circuit merely assumed that 28 U.S.C. § 1927 sanctions could be applied against *pro se* litigants. In *Wallace v. Kelley*, the United States District Court of Nebraska directly addressed the application of 28 U.S.C. § 1927 to *pro se* litigants.

III. RECENT DEVELOPMENTS

In 2007, a federal district court in the Eighth Circuit stopped assuming that 28 U.S.C. § 1927 sanctions applied against *pro se* litigants and directly considered whether the statute allows its application.¹³⁸ In *Wallace v. Kelley*, the United States District Court of Nebraska considered whether to award attorneys’ fees against *pro se* litigants pursuant to 28 U.S.C. § 1927.¹³⁹ Three *pro se* litigants brought an action against trustees of various trust funds and attorneys who worked with the trust assets alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) and violations of state law.¹⁴⁰ The court granted the defendants’ motion to dismiss because the *pro se* litigants failed to allege sufficient facts to demonstrate a RICO violation.¹⁴¹ Because the RICO violation was the basis of the court’s

133. *Id.* at *1.

134. *Id.* at *3.

135. *Id.*

136. *Id.*

137. *Id.* at *4.

138. *See Wallace v. Kelley*, No. 4:06CV3214, 2007 WL 2248105 (D. Neb. Aug. 1, 2007).

139. *Id.*

140. *Wallace v. Kelley*, No. 4:06CV3214, 2006 WL 3750291, at *1 (D. Neb. Dec. 18, 2006).

141. *Id.* at *3. More specifically, the *pro se* litigants failed to allege “that defendants engaged in conduct of an enterprise through a pattern of racketeering activity.” *Id.*

jurisdiction, the court denied supplemental jurisdiction over the state law claims and dismissed those claims as well.¹⁴²

Eleven days *after* the court dismissed the pro se litigants' claims, one plaintiff "recorded a notice of lis pendens in the . . . land records," which stated that the plaintiff "ha[d] filed a [f]ederal lawsuit . . . involving her claims and interest in" certain properties.¹⁴³ Granting a motion from the defendants, the court entered an order to release and discharge the lis pendens filed because its continued operation would be "harsh or arbitrary."¹⁴⁴ Real estate sales with respect to the property on which the notice of lis pendens were filed had already been approved by state trial and appellate courts.¹⁴⁵

The defendants moved for an award of attorneys' fees under 28 U.S.C. § 1927 because they had to incur additional costs in responding to the notice of lis pendens.¹⁴⁶ At the time the plaintiff filed the notice of lis pendens, the plaintiff already knew the action had been dismissed by the court.¹⁴⁷ The court found that filing the notice of lis pendens after the court had already dismissed the case was "a bad faith attempt to oppress the [d]efendants."¹⁴⁸ Plus, this was not the first sanctionable behavior by the pro se litigant; other federal and state courts placed filing restrictions on the plaintiff for filing "frivolous or malicious actions" regarding the same trust property in question in this case.¹⁴⁹ Because the pro se litigant acted in bad faith and had a history of sanctionable behavior, the court decided to award attorneys' fees to the defendants pursuant to 28 U.S.C. § 1927.¹⁵⁰

142. *Id.* The court declined to speculate whether the state claims were ones under which relief could be granted in state court but dismissed the state law claims without prejudice. *Id.*

143. *Wallace*, 2007 WL 2248105, at *1. A notice of lis pendens operates to notify "potential purchasers that there is pending litigation that may affect their title to real property and that the purchaser will take subject to the judgment." 51 AM. JUR. 2D *Lis Pendens* § 2 (2000).

144. *Wallace*, 2007 WL 2248105, at *2.

145. *Id.*

146. *Id.* at *3. In the alternative, the defendants asked the court to award attorneys' fees using its inherent power. *Id.*

147. *Id.*

148. *Id.* Because filling the notice of lis pendens was an act in bad faith, the plaintiff's actions met the vexatious standard. See *supra* text accompanying notes 49-53.

149. *Wallace*, 2007 WL 2248105, at *3 n.3. The courts that had placed filing restrictions on the pro se litigants include the United States District Court for the Northern District of Oklahoma, the Bankruptcy Court for the Northern District of Oklahoma, and the District Court of Tulsa County. *Id.*

150. *Id.* at *3. The court also enjoined the pro se litigants "from filing any document, including any lis pendens notice, with any governmental office wherever situated concerning any purported claim, lien, right, title, or other asserted interest, arising out of or relating to this case, in any real property." *Id.*

However, before the court awarded the attorneys' fees under 28 U.S.C. § 1927, it had to determine whether the sanctions applied against pro se litigants. The court noted that while other circuits had considered whether 28 U.S.C. § 1927 applies against pro se litigants, the Eighth Circuit had not.¹⁵¹ While the court cited the courts of appeals' decisions and parenthetically noted them,¹⁵² it did not elaborate as to the underlying reasoning of the decisions. In addition, the court did not consider Congress' intent. Instead, the court simply said that it would "follow the approach of the Ninth Circuit Court of Appeals and apply the statute to pro se litigants" without further explanation.¹⁵³

IV. DISCUSSION

When the United States Court of Appeals for the Eighth Circuit faces the decision, it should choose more wisely than its district court. While the district court made progress in *Wallace v. Kelley* because it actually considered whether 28 U.S.C. § 1927 could be applied against pro se litigations, the court failed to provide reasoning behind its decision to apply 28 U.S.C. § 1927 against pro se litigants. When the Eighth Circuit decides whether 28 U.S.C. § 1927 may be applied to pro se litigants, it should choose the position with textual support, the position that meets Congress' intent, and the position that achieves the proper policy result. The Eighth Circuit should decline to apply 28 U.S.C. § 1927 sanctions against pro se litigants.

Unlike the *Wallace v. Kelley* court and the Ninth Circuit, the Eighth Circuit needs to consider the statute's text when determining whether 28 U.S.C. § 1927 applies to pro se litigants. The statute allows the court to require "[a]ny attorney or other person admitted to conduct cases in any court of the United States" to pay the opponent's "excess costs, expenses, and attorneys' fees."¹⁵⁴ In *Sassower v. Field*, the Second Circuit focused on the word "admitted" and concluded that it applies only to "those who . . . gain approval [from the court] to appear in a lawyerlike capacity."¹⁵⁵ Unlike attorneys, pro se litigants do not have to gain approval from the court before they can appear in court. Instead, pursuant to statute, parties have the right to "plead and conduct their own cases personally"; in other words, parties have a right to appear pro se without leave of the court.¹⁵⁶ Therefore, "admitted to conduct cases" would have no meaning if 28 U.S.C. § 1927 is to be applied against pro se litigants. The statute would effectively read, "any attorney or other person conducting cases in any court of the United States." However, Congress did not write the statute in that manner, so the Eighth Circuit should

151. *Id.*

152. *Id.*

153. *Id.*

154. 28 U.S.C. § 1927 (2000).

155. 973 F.2d 75, 80 (2d Cir. 1992).

156. 28 U.S.C. § 1654 (2000).

be mindful of the language Congress chose when deciding to whom 28 U.S.C. § 1927 applies.

In addition, the Eighth Circuit should also consider Congress' likely intent when determining whether to apply 28 U.S.C. § 1927 against pro se litigants. Although there is very little legislative history concerning the statute, Congress' original purpose for the statute was to prevent United States Attorneys from inflating their compensation by filing unnecessary lawsuits.¹⁵⁷ At the time of first enactment, Congress wanted to limit the United States Attorneys to filing one suit.¹⁵⁸ Although over 100 years have passed since the first version of 28 U.S.C. § 1927,¹⁵⁹ the purpose remains similar: to discourage unnecessary delay in litigation.¹⁶⁰ Pro se litigants undoubtedly delay litigation,¹⁶¹ but the changes Congress made to the statute since its inception show that Congress' intent is for 28 U.S.C. § 1927 to apply to attorneys.

The text of 28 U.S.C. § 1927 is based on a statute found in the 1940 version of the *United States Code*, 28 U.S.C. § 829.¹⁶² The 1940 version of the statute required "any attorney, proctor, or other person admitted to conduct cases in any court of the United States" to pay costs if that person multiplied the proceedings unreasonably and vexatiously.¹⁶³ When Congress amended the statute in 1948, it removed reference to a "proctor" and kept the references to "attorney" and "other person admitted to conduct cases in any court of the United States."¹⁶⁴ At the time, a proctor was defined as "[o]ne appointed to manage the affairs of another or represent him in judgment."¹⁶⁵ Like an attorney, a proctor represents others in courts.¹⁶⁶ By keeping the "other person admitted to conduct cases in any court of the United States," Congress evidenced its intent that "'other person' covers only those admitted to act in a lawyerlike capacity."¹⁶⁷ If Congress wanted to extend application to pro se litigants, it would have amended the language of the statute to reach "other persons conducting cases in any court of the United States" when it removed "proctor." Therefore, the Eighth Circuit should consider that

157. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 n.6 (1980).

158. *Id.* at 759.

159. According to the legislative history published in the official version of the United States Code, 28 U.S.C. § 1927 is based on a statute found in an 1878 version of the Revised Statutes of the United States. See 28 U.S.C. § 1927; U.S. REV. STAT. § 982 (2d ed. 1878).

160. VAIRO, *supra* note 39, at 760.

161. See *supra* text accompanying notes 30-34.

162. See 28 U.S.C. § 1927.

163. 28 U.S.C. § 829 (1940).

164. Compare 28 U.S.C. § 829 (1940) with 28 U.S.C. § 1927 (1952).

165. BLACK'S LAW DICTIONARY 1435 (3d ed. 1933).

166. See *id.*

167. *Sassower v. Field*, 973 F.2d 75, 80 (2d Cir. 1992).

Congress did not amend the statute to reach pro se litigants, so Congress' intent was to exclude pro se litigants from the reach of 28 U.S.C. § 1927.

Lastly, the Eighth Circuit should consider the policy implication of allowing 28 U.S.C. § 1927 sanctions to be imposed on pro se litigants. An American ideal is that "the courthouse door is open to everyone,"¹⁶⁸ and federal statutory law gives parties the right to choose whether they want to be represented through counsel or whether they want to represent themselves.¹⁶⁹ Pro se litigants are supposed to be welcome participants in the judicial process. However, unlike attorneys, pro se litigants have no legal training and few to no encounters with the judicial process. Each litigant begins the experience in the federal court system as "a 'stranger in a strange land.'"¹⁷⁰ Therefore, federal courts demand less from pro se litigants in the context of pleadings and motions.¹⁷¹ Federal district courts in the Eighth Circuit must also give a pro se litigant meaningful notice of what is required of him.¹⁷² Applying 28 U.S.C. § 1927 to pro se litigants would ignore that federal courts are more lenient toward pro se litigants because they do not have as much education, training, and experience as lawyers. Instead, the "courthouse door [would be] open to everyone" who had enough education, training, and experience to avoid sanctions for acting in a manner the court found unreasonable and vexatious. Therefore, the door of justice would slam shut for many pro se litigants seeking relief for their claims if the Eighth Circuit decided to apply these sanctions to pro se litigants.

Wallace v. Kelley serves as a caution for any future cases the Eighth Circuit decides concerning the applicability of 28 U.S.C. § 1927 to pro se litigants. Instead, the Eighth Circuit should consider the text of the statute, Congress' likely intent, and policy implications and, as a result, should decline to apply 28 U.S.C. § 1927 sanctions to pro se litigants.

V. CONCLUSION

Unfortunately, *Wallace v. Kelley*'s consideration of whether 28 U.S.C. § 1927 sanctions could be applied against pro se litigants did not take the text of the statute, Congress' intent, or policy implications into consideration. Instead, the District Court of Nebraska, like other jurisdictions, chose to apply 28 U.S.C. § 1927 against pro se litigants "without extended analysis [and] without citation of precedent."¹⁷³ When the United States Court of Appeals

168. NAACP v. Meese, 615 F. Supp. 200, 205-06 (D.D.C. 1985).

169. 28 U.S.C. § 1654 (2000).

170. BERGMAN & BERMAN-BARRETT, *supra* note 5, at 1/4.

171. *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (holding pro se litigants to "less stringent standards than formal pleadings drafted by lawyers"); Miller v. Norris, 247 F.3d 736, 739 (8th Cir. 2001) (construing a pro se litigant's motion liberally).

172. Bursg v. Sissel, 745 F.2d 526, 528 (8th Cir. 1984) (per curiam).

173. JOSEPH, *supra* note 45, at 380.

2008]

28 U.S.C. § 1927

1383

for the Eighth Circuit decides whether to apply 28 U.S.C. § 1927 sanctions against pro se litigants, it should choose more wisely than the lower courts and decline.

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