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A GAME OF TELEPHONE: WHY § 1927 SHOULD NOT APPLY TO PRO SE LITIGANTS

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INTRODUCTION

The headnote, heading, synopsis, or syllabus writing process is like a game of telephone. The court writes the slip opinion and provides it to the publisher.[1] The publisher must then summarize the information.[2] Despite the publisher's best efforts to do so accurately, errors are inevitably introduced.[3] As Frank Wagner, the fifteenth Reporter of Decisions,[4] stated, "A few times, attorneys queried whether they could cite the syllabus as

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[1] *See* Paul R. Baier, *Double Revolving Peripatetic Nitpicker*, 1980 Y.B. SUP. CT. HIST. SOC'Y 10, 11 (1980) (explaining the process for the Supreme Court).

[2] *See id.*

[3] *Id.* at 14; Frank D. Wagner, *How Not to Write a Syllabus*, 15 SCRIBES J. LEGAL WRITING 153, 154 (2013).

[4] The Reporter of Decisions is the statutory officer responsible for editing and publishing Supreme Court opinions. 28 U.S.C. § 673 (2019).

authority, in preference to the opinion itself. A simple question, but it indicated . . . a belief that the syllabus said something different from the case it summarized."[5]

True, these errors are usually inconsequential. However, sometimes the errors are substantive, probably even causing the circuit split over whether 28 U.S.C. § 1927 applies to *pro se* litigants.

Part I of this Note describes this circuit split.[6] In short, the Ninth Circuit allows § 1927 to be used to sanction *pro se* litigants, but the Second Circuit does not. Part II argues that the Ninth Circuit's position contravenes the statutory language and is based on a misinterpretation of its own precedent. Part III explains how the Ninth Circuit was probably misled by errors introduced by the publisher, West. The Note concludes that § 1927 should not apply to *pro se* litigants and proposes that publishers add a warning not to rely on anything not written by the court, i.e., syllabi, headnotes, etc.

I. THE CIRCUIT SPLIT

The use of § 1927 has increased dramatically.[7] § 1927 allows courts to sanction an attorney or "other person admitted to conduct cases" for unreasonably and vexatiously multiplying the proceedings.[8] For the first 150 years after the statute was enacted in 1813, it was invoked in only seven reported cases.[9] Since then, however, the statute has seen much greater use.[10]

[5] Wagner, *supra* note 3, at 154.

[6] For another discussion of the circuit split over whether § 1927 applies to *pro se* litigants, see Kelsey Whitt, Note, *The Split on Sanctioning Pro Se Litigants under 28 U.S.C. 1927: Choose Wisely When Picking a Side, Eighth Circuit*, 73 MO. L. REV. 1365 (2008). Although the author's reasoning differs from the reasoning in this Note, she comes to the same conclusion that *pro se* litigants should not be subject to § 1927.

[7] *See id.*

[8] 28 U.S.C. § 1927 (2019).

[9] Gregory P. Joseph, *Rule 11 is Only the Beginning*, A.B.A. J., May 1, 1988, at 62.

[10] *See* Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) ("Since 1980,

At the same time, the number of *pro se*[11] litigants in federal court has been increasing.[12] A study by the Federal Judicial Center examining ten federal district courts from 1991 to 1994 found that *pro se* plaintiffs filed 21% of civil actions in those courts.[13] By 2018, *pro se* plaintiffs were filing approximately 27% of the civil actions in federal district courts.[14] Moreover, this increase occurred despite the Prison Litigation Reform Act, which caused *pro se* prisoner civil rights filings to plummet.[15]

At the crossroads of these two phenomena is the circuit split over whether § 1927 applies to *pro se* litigants.[16] § 1927 can be used to sanction

however, when [§ 1927] was amended by adding attorneys' fees as part of the sanction, much greater use has been made of this section.").

[11] A *pro se* party is defined as one "who represents oneself in a court proceeding without the assistance of a lawyer." *Pro Se*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[12] *See* Whitt, *supra* note 6, at 1365.

[13] David Rauma & Charles P. Sutelan, *Analysis of Pro Se Case Filings in Ten U.S. District Courts Yields New Information*, 9 FJC DIRECTIONS 5, 6 (1996), https://www.fjc.gov/sites/default/files/materials/21/FJC-Directions-Number-9.pdf [https://perma.cc/N5UU-U4SN].

[14] See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS REPORT TABLE C-13 – CIVIL PRO SE AND NON-PRO SE FILINGS 1 (2018), https://www.uscourts.gov/statistics/table/c-13/judicial-business/2018/09/30 [https://perma.cc/UPN2-GESZ] for the data regarding how many *pro se* cases were filed in 2018. Keep in mind that, while 27% of all filings were filed by parties representing themselves, that percentage does not include cases with a *pro se* defendant and a represented plaintiff. In a study of 229 cases involving a *pro se* party, once disbarment proceedings and appeals from the bankruptcy court were removed from the sample, 21% were cases with a *pro se* defendant and a represented plaintiff. Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 829 n.21 (1997). Thus, the percentage of cases involving either a *pro se* plaintiff or defendant is probably closer to 34%.

[15] *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 158 (2015) (showing how prisoner civil rights filings decreased after the Prison Litigation Reform Act); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610 (2003) (noting that inmate civil rights cases are "vastly more likely than cases in any other category to be litigated *pro se*"); Rauma & Sutelan, *supra* note 13, at 6, 9 fig.5 (showing that, from 1991 to 1994, 60% of the cases filed by *pro se* prisoners were civil rights claims and 63% of the total cases filed by *pro se* litigants were filed by prisoners).

[16] *See* Whitt, *supra* note 6, at 1365.

pro se litigants in the Ninth Circuit.[17] In contrast, § 1927 cannot be used to sanction *pro se* litigants in the Second Circuit.[18] The remaining circuit courts have stayed neutral.[19]

A. The Ninth Circuit

The case establishing the Ninth Circuit's rule that § 1927 applies to *pro se* litigants is *Wages v. IRS*.[20] In *Wages*, the district court dismissed the *pro se* plaintiff's complaint with prejudice because it would have been impossible to cure its defects.[21] Nevertheless, the plaintiff filed a substantially similar amended complaint.[22] The district court struck the amended complaint and sanctioned the plaintiff under § 1927.[23] The Ninth Circuit affirmed, holding that § 1927 sanctions may be imposed on *pro se* litigants.[24] However, the court offered no reasoning,[25] merely citing another Ninth Circuit case, *Wood v. Santa Barbara Chamber of Commerce*.[26]

Wood was a consolidation of thirty-six cases filed across the country by the *pro se* plaintiff.[27] The complaint involved almost 300 defendants, and it was impossible to understand the allegations against any particular defendant.[28] Recognizing that the plaintiff was acting *pro se*, the district

[17] Wages v. IRS, 915 F.2d 1230, 1235–36 (9th Cir. 1990) (citing Wood v. Santa Barbara Chamber of Com., 699 F.2d 484, 485–86 (9th Cir. 1983)).

[18] Sassower v. Field, 973 F.2d 75, 80 (2d Cir. 1992).

[19] *See e.g.*, Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283, 286 (3d Cir. 2004); Simmons v. Methodist Hosps. of Dallas, 632 F. App'x 784, 787 n.5 (5th Cir. 2015); Alexander v. United States, 121 F.3d 312, 316 (7th Cir. 1997); Ayala v. Holmes, 29 F. App'x 548, 550–51 (10th Cir. 2002); Meidinger v. Healthcare Indus. Oligopoly, 391 F. App'x 777, 779 (11th Cir. 2010).

[20] 915 F.2d 1230 (9th Cir. 1990).

[21] *Id.* at 1233.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1235–36.

[25] *Id.*

[26] 699 F.2d 484 (9th Cir. 1983).

[27] *Id.* at 485.

[28] *Id.*

court permitted the plaintiff to state his complaint orally and then instructed him on how to amend the complaint.[29] However, the plaintiff failed to comply with the court's instructions and filed another incomprehensible complaint.[30] The district court dismissed the case with prejudice.[31]

The plaintiff obtained counsel and appealed the dismissal.[32] The Ninth Circuit affirmed, noting that the district court was within its discretion because the plaintiff had ignored the district court's instructions.[33] The court noted:

> [Plaintiff's] allegations, in their various incarnations, have been considered by this court and the district courts of this circuit on numerous occasions. Each time, the district court has dismissed the complaint because of [Plaintiff's] flagrant abuse of the discovery process and/or his failure to comply with the Federal Rules of Civil Procedure, local rules, and various court orders, and each time, this court has affirmed. Still, [Plaintiff] doggedly persists in resubmitting the same action and conducting himself in the same manner.
>
> We dispensed with oral argument of this latest appeal because it is frivolous, vexatious, and entirely unmeritorious. By this appeal and the several motions relating to it, [Plaintiff] and his counsel, Christopher A. Brose, have caused unnecessary expenditure of judicial time as well as harassment of the numerous parties involved. Federal Rule of Appellate Procedure 38 grants this court discretion to award damages, attorneys' fees, and single or double costs as a sanction against bringing such a frivolous appeal. Further, 28 U.S.C. § 1927 authorizes this court to award fees and excess costs against counsel who "multiplies the proceedings of any case unreasonably and vexatiously." Pursuant to this authority, we award damages of $1,250, including costs and attorneys' fees, to each of the eight groups of appellees filing a brief in this appeal, for a total award of $10,000. We make this award jointly and severally against [Plaintiff] and attorney Brose.[34]

[29] *Id.*; *see also* Haines v. Kerner, 404 U.S. 519, 520–21 (1972) (providing that *pro se* litigants' pleadings should be liberally construed).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* (internal citations omitted).

B. The Second Circuit

In *Sassower v. Field*,[35] the Second Circuit split with the Ninth Circuit, concluding that § 1927 sanctions cannot be imposed on *pro se* litigants.[36] In *Sassower*, two *pro se* plaintiffs filed a complaint alleging housing discrimination.[37] Some of the defendants were granted summary judgment, and judgment was entered for the remaining defendants after a jury trial.[38] The district court awarded the defendants $92,000 in attorneys' fees under § 1927 because the plaintiffs pursued the litigation as if it were "a holy war" and "vexatiously, wantonly, and for oppressive reasons increased the legal fees enormously."[39]

The plaintiffs appealed the sanction.[40] With respect to the first plaintiff, the Second Circuit reversed.[41] The district court had ruled that § 1927 may be applied to non-lawyer *pro se* litigants.[42] The Second Circuit disagreed for two principal reasons.[43] First, *pro se* litigants are not "admitted to conduct cases" because *pro se* litigants have a right to represent themselves.[44] Second, the phrasing of the pre-1948 version of § 1927, which allowed courts to sanction "any attorney, proctor, or other person admitted

[35] 973 F.2d 75 (2d Cir. 1992).
[36] *Id.* at 80.
[37] *Id.* at 77.
[38] *Id.*
[39] *Id.* at 77–78.
[40] *Id.* at 78 ("Plaintiffs appeal from the award of attorney's fees.").
[41] *Id.* at 80.
[42] *Id.*
[43] *Id.* at 80–81. The Second Circuit also considered Chambers v. NASCO, Inc., 501 U.S. 32, 41 (1991). *Sassower*, 973 F.2d at 80. In *Chambers*, the Supreme Court quoted the district court below, which "declined to impose sanctions under § 1927 . . . because the statute applies only to attorneys." 501 U.S. at 41. In *Sassower*, the Second Circuit noted that this statement implied § 1927 does not apply to *pro se* litigants. 973 F.2d at 80. However, the issue in *Chambers* was not whether § 1927 applied to *pro se* litigants, and the Court did not expressly agree with the quotation. 501 U.S. at 35, 41.
[44] *Sassower*, 973 F.2d at 80; *see also* 28 U.S.C. § 1654 (2019) (providing a right to represent oneself in civil cases).

to conduct cases," suggests that § 1927 only applies to those admitted to act in a lawyerlike capacity.[45]

With respect to the second plaintiff, the Second Circuit affirmed.[46] Although the second plaintiff was acting *pro se*, she was also a lawyer.[47] The court reasoned that because § 1927 is designed to curb litigation abuse by attorneys, it should apply to attorneys that represent themselves.[48] Therefore, only non-lawyer *pro se* litigants are immune from § 1927 sanctions.

Recently, district courts within the Second Circuit have expressed confusion about the continuing validity of *Sassower*.[49] These district courts erroneously noted that, in *Davey v. Dolan*,[50] the Second Circuit affirmed the imposition of § 1927 sanctions against a non-attorney *pro se* plaintiff.[51] However, the *pro se* plaintiff in *Davey* was an attorney.[52] True, the Second Circuit's opinion did not expressly state that the plaintiff was an attorney.[53] However, the district court's opinion did.[54] Nevertheless, even if the plaintiff in *Davey* were not an attorney, *Sassower* would still be good law in the Second Circuit because *Davey* was an unpublished decision.[55]

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[45] *Sassower*, 973 F.2d at 80.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Neroni v. Coccoma, No. 3:13-CV-1340, 2014 WL 3866307, at *1 n.4 (N.D.N.Y. Aug. 6, 2014), *aff'd sub nom*. Neroni v. Hinman, Howard & Kattell, LLP, 607 F. App'x 113 (2d Cir. 2015); Hewett v. Triple Point Tech., No. 3:13-CV-1382, 2015 WL 6675529, at *6 n.7 (D. Conn. Oct. 30, 2015), *modified sub nom*. Hewett v. Triple Point Tech., Inc., No. 3:13-CV-1382, 2015 WL 7451152 (D. Conn. Nov. 23, 2015); Koziol v. King, No. 6:14-CV-946, 2016 WL 1298133, at *1 n.1 (N.D.N.Y. Mar. 31, 2016).

[50] 292 F. App'x 127 (2d Cir. 2008).

[51] *Neroni*, 2014 WL 3866307, at *1 n.4; *Hewett*, 2015 WL 6675529, at *6 n.7; *King*, 2016 WL 1298133, at *1 n.1.

[52] Davey v. Dolan, 453 F. Supp. 2d 749, 751 (S.D.N.Y. 2006), *aff'd*, 292 F. App'x 127 (2d Cir. 2008).

[53] 292 F. App'x at 127–28.

[54] 453 F. Supp. 2d at 751.

[55] *See* 2D CIR. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect.").

C. Other Courts

The remaining circuit courts have stayed neutral.[56] Within these neutral circuits, however, most district courts have determined that § 1927 does not apply to *pro se* litigants.[57] And the courts that have determined that § 1927 does apply to *pro se* litigants have often relied on other sanctioning authority in addition to § 1927.[58]

II. THE STATUTE SHOULD NOT APPLY TO PRO SE LITIGANTS

The language of § 1927 and its history suggest that the statute should not apply to *pro se* litigants.[59] Further, it seems that the Ninth Circuit adopted the contrary rule by mistake, misinterpreting its precedent. Part II.A and II.B address each issue in turn.

A. The Statutory Language and Its History

> 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.[60]

Whether § 1927 applies to *pro se* litigants hinges on whether *pro se* litigants are "other person[s] admitted to conduct cases." On the one hand,

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[56] *See supra* note 19.

[57] *See* Memorandum Opinion and Order at 43, McKinstry v. Ikon Office Sols., Inc., No. 1:05-CV-03119 (N.D. Ga. August 10, 2006), ECF No. 55 (collecting cases).

[58] Debra T. Landis, Annotation, *What conduct constitutes multiplying proceedings unreasonably and vexatiously so as to warrant imposition of liability on counsel under 28 U.S.C.A. § 1927 for excess costs, expenses, and attorney fees*, 81 A.L.R. FED. 36, §§ 3–5 (1987).

[59] *See* Sassower v. Field, 973 F.2d 75, 80 (2d Cir. 1992); Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283, 287 (3d Cir. 2004).

[60] 28 U.S.C. § 1927 (emphasis added).

the most natural interpretation of "other person admitted to conduct cases" is probably one who is admitted to the bar.[61] Indeed, *pro se* litigants do not need to be "admitted" in court because they have a statutory right to represent themselves.[62] Furthermore, because § 1927 is a penal statute, it should be strictly construed against the party invoking it.[63]

On the other hand, as the Third Circuit stated, "since the only people who may conduct cases in court beside attorneys are parties representing themselves, limiting § 1927 to attorneys would seem to read the reference to 'others admitted' right out of the statute."[64]

Luckily, these views can be harmonized by looking at the pre-1948 version of § 1927.[65] The pre-1948 version of § 1927 authorized sanctions against "any attorney, *proctor*, or other person admitted" to conduct cases.[66]

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[61] *See, e.g.*, Godwin v. Marsh, 266 F. Supp. 2d 1355, 1359 (M.D. Ala. 2002); Hunter v. Hamilton Cnty., No. 1:15-CV-540, 2017 WL 35445, at *4 (S.D. Ohio Jan. 3, 2017), *report and recommendation adopted*, No. 1:15CV540, 2017 WL 366364 (S.D. Ohio Jan. 25, 2017).

[62] *Sassower*, 973 F.2d at 80; *see also* 28 U.S.C. § 1654 (providing right to represent oneself in civil cases).

[63] *E.g.*, Monk v. Roadway Express, Inc., 599 F.2d 1378, 1382 (5th Cir. 1979), *aff'd sub nom*. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980), *superseded by statute*, Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1154, 1156.

[64] Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283, 286, 286 n.2 (3d Cir. 2004).

[65] One might argue that consideration of the pre-1948 version of § 1927 is improper. Indeed, when the legislature amends a provision, a significant change in language is presumed to entail a change in meaning. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (1st ed. 2012). However, "a well-established principle governing the interpretation of provisions altered in the 1948 revision is that 'no change is to be presumed unless clearly expressed.'" Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972) (quoting Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228 (1957)). To the contrary, committee reports in the House and the Senate made clear that "proctor" was omitted because it was superfluous. *See* H.R. REP. NO. 80-308, at A164 (1947) ("Reference to 'proctor' was omitted as covered by the revised section."); *see also* H.R. REP. NO. 80-308, at 7 (1947) ("The reviser's notes are keyed to sections of the revision and explain in detail every change made in text."); S. REP. NO. 80-1559, at 2 (1948) ("Appended to the report are the revisers' notes to each section . . . . These explain in great detail the source of the law and the changes made . . . .").

[66] 28 U.S.C. § 829 (1940) (current version at 28 U.S.C. § 1927); *see also* H.R. REP.

Several courts have reasoned that this phrasing suggests, as a matter of context, the statute only applies to those who gain approval to appear in a lawyerlike capacity.[67]

Except it is not merely context; this sort of reasoning has been canonized in the canon of statutory construction *ejusdem generis*.[68] *Ejusdem generis* provides that when there is a "catchall phrase" at the end of an enumeration of two or more specifics, the "catchall" phrase is limited to the same general class specifically mentioned.[69]

Consider the following example: "Mickey Mantle, Rocky Marciano, Michael Jordan, and other great competitors."[70] Mickey Mantle, Rocky Marciano, and Michael Jordan are clearly great competitors. "Other great competitors," however, "does not reasonably refer to Sam Walton (a great competitor in the marketplace) or Napoleon Bonaparte (a great competitor on the battlefield). It refers to other great athletes."[71]

Similarly, there is no question that "attorneys" and "proctors" are "admitted to conduct cases." However, "other person[s] admitted to conduct cases" is also limited to the same general class as "attorneys" and "proctors."

Why then did Congress not simply subject "attorneys" to § 1927 sanctions? The answer lies in the statute's historical context. In England, there were numerous distinctions between different types of lawyers; for example, attorneys, counselors, barristers, sergeants, proctors, etc.[72] When Congress enacted the first version of § 1927 in 1813, several states

NO. 80-308, at A164 (1947) (the 1948 codification of § 1927 was "[b]ased on title 28, U.S.C., 1940 ed., § 829.").

[67] *See, e.g.*, *Sassower*, 973 F.2d at 80; *Doulos*, 110 F. App'x at 286–87.

[68] *See generally* SCALIA & GARNER, *supra* note 65, at 199–213 (explaining the *ejusdem generis* canon).

[69] *Id.* at 199.

[70] *Id.*

[71] *Id.*

[72] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 235 (3d ed. 2005) (noting the distinctions between attorneys, counselors, barristers, and sergeants in England).

maintained some of these distinctions.[73] Thus, it was logical for Congress to include a catchall term to cover the various practices in different states.

In sum, *pro se* litigants fall outside the ambit of § 1927. The pre-1948 version of § 1927 makes clear that "other person[s] admitted to conduct cases" is limited to those similar to "attorneys" and "proctors." And the distinctions between barristers, counselors, solicitors, etc. explains why the reference to "others admitted" was made.

B. Wood Did Not Create the Purported Rule

In *Wages*, the Ninth Circuit held that § 1927 sanctions "may be imposed upon a *pro se* plaintiff."[74] It offered no reasoning to support that statement, merely citing to *Wood*.[75] Thus, it is *Wood* that is the foundation of the Ninth Circuit's rule. However, *Wood* does not support the Ninth Circuit's rule.

For one, the plaintiff in *Wood* was not *pro se* on appeal.[76] The court was simply not facing the issue of whether § 1927 can be used to sanction *pro se* litigants.[77] Furthermore, there is no dispute among federal courts that represented parties are not subject to § 1927.[78]

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[73] In 1813, the distinction between attorneys and counselors persisted in New York, Massachusetts, and New Jersey. *See* ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 83–84 (1921) (showing how becoming a counselor in Massachusetts and New Jersey in 1813 required more training than becoming an attorney); *In re* Raisch, 90 A. 12, 21 (N.J. Ch. 1914) (finding that New York adopted "the English model which presented legal practitioners as holding two distinct offices" during the relevant time period); *see also* 2 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 226 n.10 (1965).

[74] Wages v. IRS, 915 F.2d 1230, 1235–36 (9th Cir. 1990).

[75] *See id.*

[76] *See* Wood v. Santa Barbara Chamber of Com., 699 F.2d 484, 485 (9th Cir. 1983) (sanctioning the plaintiff and his attorney for "this appeal and the several motions relating to it").

[77] *See id.*

[78] *E.g.*, Inst. for Motivational Living, Inc. v. Doulos Inst. for Strategic Consulting, Inc., 110 F. App'x 283, 286 (3d Cir. 2004) ("We have held that a represented party cannot be punished under § 1927.").

Second, the court did not sanction the plaintiff for his prior misconduct as a *pro se* litigant. It is questionable whether the court would have even had jurisdiction to enter such a sanction.[79] Indeed, eleven years after *Wood*, the Ninth Circuit held that conduct occurring before other courts is not sanctionable under § 1927.[80]

True, the *Wood* court discussed the plaintiff's prior misconduct.[81] Only in the following paragraph, however, did the court sanction the plaintiff and his attorney, stating that "[b]y this appeal and the several motions relating to it," they had harassed the defendants and wasted the court's time.[82] The fact that the plaintiff and his attorney were made jointly and severally liable for the sanction also indicates that its basis was only conduct that they both engaged in.[83]

Third, the text of the opinion indicates that § 1927 was directed at the plaintiff's counsel, not the plaintiff. The court stated:

> Federal Rule of Appellate Procedure 38 grants this court discretion to award damages, attorneys' fees, and single or double costs as a sanction against bringing such a frivolous appeal. Further, 28 U.S.C. § 1927 authorizes this court to award fees and excess costs against *counsel* who "multiplies the proceedings of any case unreasonably and vexatiously." Pursuant to this authority, we award . . . $10,000 . . . jointly and severally against [Plaintiff] and [his] attorney . . . .[84]

If the court intended to use § 1927 against the plaintiff, it probably would not have limited its authority under § 1927 to "counsel." Because the court expressly noted that § 1927 authorized sanctions against counsel,

[79] *See* CJC Holdings, Inc. v. Wright & Lato, Inc., 142 F.R.D. 648, 653 (W.D. Tex. 1992), *rev'd on other grounds*, 989 F.2d 791 (5th Cir. 1993) (determining that the court lacked "jurisdiction to sanction any parties or attorneys for the conduct that occurred in" another district court).

[80] GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 (9th Cir. 1994).

[81] *Wood*, 699 F.2d at 485.

[82] *Id.*

[83] *See id.* at 486 ("We make this award jointly and severally.").

[84] *Id.* (citations omitted) (emphasis added).

while not doing the same for Rule 38, § 1927 was probably meant to apply only to the plaintiff's attorney.

Fourth, the historical interplay between Rule 38 and § 1927 suggests that the plaintiff's sanction was based only on Rule 38. Rule 38 was historically interpreted only to allow sanctions against the parties themselves; it did not include their attorneys.[85] When courts also wanted to sanction a party's attorney, they cited § 1927 along with Rule 38.[86] While the rationale behind that practice has changed—Rule 38 can today be used to sanction a party's attorney—§ 1927 continues to be cited with Rule 38 to shift fees to counsel.[87] Therefore, it is likely the court only cited § 1927 to support its sanction against counsel.

III. A GAME OF TELEPHONE: ERRORS IN THE REPORTER

In *United States v. Detroit Timber & Lumber Co.*[88]—which Justice Ginsburg called "the most frequently cited of all Supreme Court cases"[89]—the Supreme Court famously admonished an attorney for citing a headnote.[90] According to the Court, the headnote was "a misinterpretation of the scope of the decision."[91] Now, every Supreme Court opinion contains a citation to *Detroit Timber* and warns the reader that the "syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader."[92]

[85] GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 376–77 (3d ed. 2000).

[86] *Id.*

[87] *Id.*

[88] 200 U.S. 321 (1906).

[89] Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 J. SUP. CT. HIST. 9, 19 (2001).

[90] *Detroit Timber*, 200 U.S. at 337.

[91] *Id.*

[92] Wagner, *supra* note 89, at 19.

This is a similar story of how errors introduced by the publisher can have far-reaching consequences.[93] Here, the version of *Wood* contained in the Federal Reporter had a heading stating that the plaintiff was *pro se*.[94] The original slip opinion issued by the Ninth Circuit, however, does not contain this heading.[95] Of course, this heading was a mistake. Not only did the body of the court's opinion note that the plaintiff was represented by counsel, but it also made the plaintiff's attorney jointly and severally liable for the sanction.[96]

Headnote one and the synopsis of *Wood* also probably led to confusion. Synopses and headnotes contained in the Federal Reporter are written by West's internal staff.[97] Headnote one and the synopsis in *Wood* may have suggested that the plaintiff was sanctioned for conduct that occurred when he was representing himself:

> [B]ecause plaintiff's allegations, in various incarnations, had been considered by the Court of Appeals and the district courts of the circuit on numerous occasions, and each time dismissed *because of* plaintiff's flagrant abuse of discovery process and/or his failure to comply with applicable rules, damages of $1,250, including costs and attorney fees, would be awarded to each of the eight groups of appellees filing a brief in the appeal.[98]

However, as explained *supra*, the basis for the plaintiff's sanction did not include his prior misconduct.[99] The court never stated that it sanctioned the plaintiff *because* he continued to file the same claim and abuse the

[93] However, it is a curious coincidence that Judge Cynthia Hall, who wrote the opinion in *Wages*, also presided over *Wood*.

[94] The plaintiff was actually designated *pro per* in the heading. Wood v. Santa Barbara Chamber of Com., 699 F.2d 484, 484 (9th Cir. 1983). However, *pro per* is synonymous with *pro se*. *Pro Per*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[95] I obtained the original slip opinion issued by the *Wood* court from the Ninth Circuit archives.

[96] *See Wood*, 699 F.2d at 485.

[97] Sales Page to Buy Print Copy of the Second Edition of the Federal Reporter, THOMSON REUTERS, https://store.legal.thomsonreuters.com/law-products/Reporters/Federal-Reporterreg-2d-National-Reporter-System/p/100000581 [https://perma.cc/EN4J-MXG2] (last visited Feb. 9, 2020, 6:06 PM).

[98] *Wood*, 699 F.2d at 484 (emphasis added).

[99] *See supra* notes 79–83 and accompanying text.

discovery process.[100] Indeed, the Ninth Circuit has held that § 1927 does not reach conduct that occurred before other courts.[101]

It may seem incredible that two errors introduced by the publisher misled a panel of circuit court judges. However, it would not be the first time a court was misled by an inaccurate headnote.[102] In *Gentry v. Ressnier*,[103] the Kentucky Supreme Court held that the city planning commission was not always an indispensable party to a secondary appeal from the circuit court to the court of appeals. Headnote seven, however, inaccurately extended that holding to cover primary appeals from the board of adjustments to the circuit court.[104] Ultimately, that headnote misled the court of appeals in *Board of Adjustments v. Flood*.[105] There, the circuit court dismissed an appeal from the board of adjustments for failure to name the planning commission as a party, and the court of appeals reversed.[106] The Kentucky Supreme Court reversed again, noting that the "lens which causes the myopia is supplied by headnote 7" in *Gentry*, and reminding "both bench and bar that headnotes are not the work of the court."[107]

Therefore, the two errors introduced by the publisher in *Wood* may very well explain the erroneous decision in *Wages*. Besides, as Sherlock Holmes once said, "[W]hen you have eliminated the impossible, whatever remains, however improbable, must be the truth."[108]

[100] *See Wood*, 699 F.2d at 485.

[101] GRiD Sys. Corp. v. John Fluke Mfg. Co., 41 F.3d 1318, 1319 (9th Cir. 1994).

[102] *See, e.g.*, Bd. of Adjustments v. Flood, 581 S.W.2d 1, 2 (Ky. 1978) (explaining how most of the Kentucky Courts of Appeals were misled by a headnote that misstated the scope of the court's holding); State v. Rocque, 660 P.2d 57, 65–66 (Idaho 1983) (Bistline, J., concurring) (explaining how an incorrect headnote may have led to the defendant's conviction for escape).

[103] 437 S.W.2d 756, 758–59 (Ky. 1969).

[104] *Flood*, 581 S.W.2d at 2.

[105] *Id.*

[106] *Id.* at 1–2.

[107] *Id.* at 2–3.

[108] ARTHUR CONAN DOYLE, THE SIGN OF FOUR 111 (London, Spencer Blackett 1890).

CONCLUSION

§ 1927 should not be applied to *pro se* litigants. The statutory history and the history of the distinctions among attorneys in early America suggest as much. Moreover, the decision in *Wages* was likely erroneous because it offered no reasoning and cited *Wood* for a proposition that it does not support.

Pro se litigants often have difficulty understanding and applying even basic legal concepts.[109] Circuit splits lead to even further confusion; understanding precedent or the difference between mandatory and persuasive authority can prove challenging for a *pro se* litigant.[110] For example, a *pro se* litigant in the Ninth Circuit may believe he is immune from § 1927 sanctions after reading a case from the Second Circuit. And a *pro se* litigant in the Tenth Circuit, where there is an intra-circuit split among the district courts, may be unable to decipher whether he is subject to § 1927 sanctions even if he does understand the difference between mandatory and persuasive authority.[111]

This confusion defeats the purpose that the law is designed to serve. If the applicability of a law is unclear, conforming one's behavior to it is difficult, if not impossible.[112] As one district judge stated, "Divergences of

[109] *See* Redfear v. Thomas, No. 5:06CV137MU1, 2006 WL 3207293, at *1 (W.D.N.C. Nov. 3, 2006) (noting *pro se* plaintiff seeking millions of dollars under the "treaty of peace and friendship of 1787" with Morocco and "the Moorish Great Seal Zodiac Constitution"); Pfeifer v. Valukas, 117 F.R.D. 420, 422 (N.D. Ill. 1987) (noting *pro se* party's five-inch-thick filing has given new meaning to the legal phrase "weight of authority"); Cummings v. Dep't of Corr., 757 F.3d 1228, 1234 n.10, 1235 (11th Cir. 2014) (concluding *pro se* plaintiff waived argument regarding sleeping juror because of his failure to object); Hill v. Wal-Mart Stores, Inc., 510 F. App'x 810, 812 (11th Cir. 2013) (holding *pro se* plaintiff waived right to a jury trial because of failure to request one).

[110] *See Park*, *supra* note 14, at 821 (stating that *pro se* litigants often "have problems applying basic, yet crucial, legal concepts like precedent and determining the relevancy of facts").

[111] *See* Guarneros v. Deutsche Bank Tr. Co. Ams., No. 08-CV-01094, 2009 WL 1965491, at *6 (D. Colo. July 7, 2009) (noting the split among the district courts in the tenth circuit).

[112] "It will be of little avail to the people, that the laws are made by men of their own

state law may be a natural and healthy result of our federalist system, but conflicting application of a federal statute like Section 1927 is not desirable."[113] Therefore, § 1927 should not apply to *pro se* litigants.

How can we prevent similar situations in the future? One solution may be to expand the *Detroit Timber* warning to non-supreme court cases.[114] The syllabus or headnotes are often the only information that busy lawyers and judges read.[115] Moreover, headnotes seem to inaccurately summarize court opinions with relative frequency.[116] Therefore, while it may seem elementary that attorneys should not rely on a case's syllabus or headnotes, expanding the *Detroit Timber* warning to other reporters might prevent mistakes that would otherwise occur.

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choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood." THE FEDERALIST NO. 62 (James Madison).

[113] James F. Holderman, *Section 1927 Sanctions and the Split Among the Circuits*, LITIGATION, Fall 2005, at 44, 47.

[114] Perhaps another solution would be to make the syllabus the authoritative expression of the law, rather than the opinion. *See* Gil Grantmore, *The Headnote*, 5 GREEN BAG 2d 157, 161–62 (2002) (arguing the Supreme Court should adopt the Ohio rule); J. David Kirkland Jr., *Rethinking United States v. Detroit Timber & Lumber Co.*, 9 J.L. 98 (2019) (same). As Justice Ginsburg humorously noted, "Many lawyers in Ohio engaged in farming on the side. They did not want to wade through complex decisions spread across many pages. '[I]nstead, they wanted [the law] set out in a neat package that could be quickly digested in the office, along with a good sandwich, presumably after a hard day's work in the fields. Perhaps the farmer-lawyers have it right." Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 GEO L.J. 2119, 2120–21 (1995) (quoting Paul R. Baier, *The True Story of the Ohio Syllabus Rule*, in COURT REPORTERS AND REPORTERS OF DECISIONS: FROM EDMUNDUS PLOWDEN TO HENRY PUTZEL, JR. 204, 205 (1990)).

[115] *See* Wagner, *supra* note 3, at 153–54.

[116] *See, e.g.*, Baker v. Big Star Div. of the Grand Union Co., 893 F.2d 288, 292 n.4 (11th Cir. 1989); Reliford v. Steele, No. 4:07CV1424, 2010 WL 3842561, at *5 (E.D. Mo. Sept. 8, 2010), *report and recommendation adopted*, No. 4:07CV1424, 2010 WL 3842547 (E.D. Mo. Sept. 27, 2010); QSRSoft, Inc. v. Rest. Tech., Inc., No. 06 C 2734, 2006 WL 2990432, at *3–4 (N.D. Ill. Oct. 19, 2006); Meadows v. Commonwealth, No. 2010-CA-001155-DG, 2012 WL 410259, at *4 n.7 (Ky. Ct. App. Feb. 10, 2012); Waters v. Collins & Aikman Prod. Co., 208 F. Supp. 2d 593, 596 n.2 (W.D.N.C. 2002); Czupinka v. Greczuch, No. 09-CV-4454 JBW JO, 2010 WL 3394276, at *2 n.2 (E.D.N.Y. July 19, 2010*), report and recommendation adopted*, No. CV09-4454 JBW, 2010 WL 3394296 (E.D.N.Y. Aug. 23, 2010).

In some jurisdictions, however, the courts are required to prepare the syllabus.[117] The syllabus may be considered the official opinion of that court, even over the opinion.[118] In those jurisdictions, of course, a *Detroit Timber* warning would be inappropriate.

Nevertheless, in most jurisdictions, the syllabus is merely the work of the publisher. A reminder to rely only on the work of the court would come at minimal cost and would help to prevent occurrences like this circuit split.

[117] 21 C.J.S. *Courts* § 242 (2020).
[118] *Id.*