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Grounding Frequent Filers:

The Trend of Revoking the Special Status of Overly Litigious Pro Se Litigants

Michael G. Langan*

Since the early 1990s, federal courts in the Second and Third Circuits have, with increasing frequency, revoked the special status of pro se civil litigants who have been overly litigious. This article discusses the reasons for this trend's appearance in the Second and Third Circuits, the rationales for the trend, the fairness of the trend, and some practical advice for courts and practitioners wrestling with the issue of whether or not the special status of a particularly litigious pro se litigant should be revoked.

I. NATURE OF SPECIAL STATUS AND TREND

As a general rule, every federal court in the United States affords "pro se"[1] civil litigants special status, although courts often differ on the way they describe that status.[2] This general rule is followed, to varying degrees, by state courts.[3]

Uniformly, this special status consists of a right to have one's pleadings construed more liberally than those of a represented litigant.[4] For example, this liberal construction might result in a court recognizing a pro se plaintiff's complaint as alleging a fact or claim, even if the complaint makes no express mention of such a fact or claim.[5] However, a pro se litigant's pleadings are not the only documents that are routinely afforded a liberal reading. Also liberally construed are a pro se litigant's briefs,[6] affidavits,[7] and notices of appeal.[8]

Moreover, depending on the court, this special status may confer a variety of other benefits on pro se litigants: (1) a right to have one's complaint treated as amended by one's papers in opposition to a defendant's motion to dismiss for failure to state a claim;[9] (2) a right to file an amended complaint, including a *second* amended complaint;[10] (3) a right to be specifically notified of the consequences of failing to respond to a summary judgment motion before being subjected to those consequences;[11] (4) a right to be excused from complying with service deadlines, discovery deadlines, motion-filing deadlines, and page limits;[12] and (5) a right to be presumed to have been acting in good faith when sanctions are being con-

* The views expressed in this article are those only of the author and do not necessarily reflect the views of the United States District Court for the Northern District of New York, where the author is employed.

1. "Pro se" is a Latin term meaning "[f]or oneself" or "on one's own behalf." BLACK'S LAW DICTIONARY 1236 (7th ed. 1999). When used in a legal setting, the term means acting "without a lawyer." Similar Latin terms include "pro persona" and "in propria persona."
2. *See*, *e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("less stringent standards"); Ruotolo v. IRS, 28 F.3d 6, 8 (2d Cir. 1994) ("special solicitude"); Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992) ("great leniency").
3. *See*, *e.g.*, In re Marriage of Abdulwadud Abbas, No. H028443, 2006 WL 788900, at *5 (Cal. Ct. App., March 29, 2006); Barrett v. City of Margate, 743 So.2d 1160, 1162 (Fla. Dist. Ct. App. 1999); Myers v. Estate of Wilks, 655 A.2d 176, 177-178 (Pa. Super. Ct. 1995); Barnes v. Texas, 832 S.W.2d 424, 426 (Tex. Ct. App. 1992); Du-Art Film Labs., Inc. v. Wharton Int'l Films, Inc., 457 N.Y.S.2d 60, 61-62 (N.Y. App. Div., 1982).
4. *See*, *e.g.*, Boag v. MacDougall, 454 U.S. 364, 365 (1982); Estelle, 429 U.S. at 106; Haines v. Kerner, 404 U.S. 519, 520-521 (1972).
5. *See*, *e.g.*, Phillips v. Girdich, 408 F.3d 124, 130 (2d Cir. 2005); Vinnedge v. Gibbs, 550 F.2d 927, 928 n.2 (4th Cir. 1977); Merriweather v. Zamora, 04-CV-717076, 2005 WL 2448946, at *1 n.1 (E.D. Mich. May 4, 2005); Fiore v. City of N.Y., 97-CV-4935, 1998 WL 755134, at *1 (S.D.N.Y. Oct. 26, 1998); Coleman v. Runyon, 93-CV-0016, 1996 WL 528855, at *1 n.3 (E.D. Pa. March 11, 1996).
6. *See*, *e.g.*, Dotson v. Griesa, 398 F.3d 156, 159 (2d Cir. 2006); U.S. v. Arnold, 114 F. App'x 76, 78 (11th Cir. 2005); Melencio Legui Lim v. INS, 224 F.3d 929, 933-934 (9th Cir. 2000); Whitford v. Boglino, 63 F.3d 527, 535 n.10 (7th Cir. 1995); SEC v. AMX, Int'l, 7 F.3d 71, 75 (5th Cir. 1993).
7. *See*, *e.g.*, Smith v. McMichael, 153 F. App'x 566, 568-69 (11th Cir. 2005); Wilson v. Weisner, 43 F. App'x 982, 986 n.1 (7th Cir. 2002); Connor v. Sakai, 15 F.3d 1463, 1470 (9th Cir. 1992), *vacated on other grounds*, 61 F.3d 751 (9th Cir. 1995); Williams v. Vincent, 508 F.2d 541, 544 (2d Cir. 1974).
8. *See*, *e.g.*, U.S. v. Garcia, 65 F.3d 17, 19 (4th Cir. 1995); U.S. v. Willis, 804 F.2d 961, 963 (6th Cir. 1986); Yates v. Mobile County Pers. Bd., 658 F.2d 298, 299 (5th Cir. 1980); *see also* 8A Moore's Fed. Prac. & Proc. § 37.04[2] (2d ed. 1986) [collecting cases].
9. *See*, *e.g.*, Boguslavsky v. Kaplan, 159 F.3d 715, 719 (2d Cir. 1998); Gill v. Mooney, 824 F.2d 192, 195 (2d Cir. 1987); Donhauser v. Goord, 314 F. Supp. 2d 119, 212 (N.D.N.Y.), *vacated on other grounds*, 317 F. Supp. 2d 160 (N.D.N.Y. 2004).
10. *See*, *e.g.*, Denton v. Hernandez, 504 U.S. 25, 34 (1992); Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795 (2d Cir. 1999); Davidson v. Flynn, 32 F.3d 27, 31 (2d Cir. 1994).
11. "The Second, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuit Courts of Appeals mandate that notice of summary judgment requirements be given to pro se litigants." Jessica Case, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?* 90 KY. L.J. 701, 704 n.24 (Spring 2001) [citations omitted]. "The Ninth Circuit requires notice of summary judgment requirements for pro se prisoner litigants only." *Id.*
12. *See*, *e.g.*, LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001); Habib v. GMC, 15 F.3d 72, 74 (6th Cir. 1994); Sule v. Gregg, No. 92-36888, 1993 U.S. App. LEXIS 17169, at *3 (9th Cir. July 7, 1993); Bates v. Jean, 745 F.2d 1146, 1150 (7th Cir. 1984); Jackson v. Nicoletti, 875 F. Supp. 1107, 1111 & n.6 (E.D. Pa. 1994).

templated.[13] The rationale for conferring this special status is that pro se litigants need help since they are often inexperienced or unfamiliar with legal procedures or terminology.[14]

Historically, federal courts across the United States have been willing, on occasion, to diminish or look past this special status when pro se litigants abuse the litigation process.[15] This willingness has been shared by many state courts.[16] Moreover, since the early 1990s, federal courts in the Second and Third Circuits have, with increasing frequency, revoked the special status of pro se civil litigants who have been overly litigious.[17] While courts outside the Second and Third Circuits have also, during this time period, diminished or looked past the special status of such pro se civil litigants, they have done so less frequently.[18]

13. *See*, *e.g.*, Maduakolam v. Columbia Univ., 866 F.2d 53, 56 (2d Cir. 1989); *see also* Brian L. Holtzclaw, *Pro Se Litigants: Application of a Single Objective Standard Under FRCP 11 to Reduce Frivolous Litigation*, 16 PUGET SOUND L. REV. 1371, 1373-1375 & n.15-16 (Spring 1993) [citing cases].
14. *See*, *e.g.*, Korsunskiy v. Gonzales, 461 F.3d 847, 850 (7th Cir. 2006); Int'l Bus. Prop. v. ITT Sheraton Corp., 65 F.3d 175, at *2 (9th Cir. 1995); Flynn, 32 F.3d at 31; Salahuddin v. Coughlin, 781 F.2d 24, 29 (2d Cir. 1986); Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979); Zaczek v. Fauquier County, 764 F. Supp. 1071, 1078 (E.D. Va. 1991); Life Science Church v. U.S., 607 F. Supp. 1037, 1039 (N.D. Oh. 1985); *see also* John C. Rothermich, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2697 (Apr. 1999) [citing cases].
15. *See*, *e.g.*, Day v. Allstate Ins. Co., 788 F.2d 1110, 1111-1113 (5th Cir. 1986); In re Martin-Trigona, 763 F.2d 503, 506 (2d Cir. 1985); McCutcheon v. N.Y. Stock Exch., 88-CV-9965, 1989 U.S. Dist. LEXIS 8141, at *2, 24 & n.3-6 (N.D. Ill. July 7, 1989); Williams v. Giant Supermkt. Store, 88-CV-2434, 1989 WL 10600, at *1 (D.D.C. Jan. 31, 1989); Castro v. U.S., 584 F. Supp. 252, 264 (D. Puerto Rico 1984); Welsh v. Steinmetz, 84-CV-1846, 1984 WL 13132, at *5 (D.N.M. Dec. 20, 1984); Hosley v. Bass, 519 F. Supp. 395, 407 n.27 (D. Md. 1981); Raitport v. Chem. Bank, 74 F.R.D. 128, 133 (S.D.N.Y. 1977).
16. *See*, *e.g.*, Colo. v. Dunlop, 623 P.2d 408, 410-411 (Colo. 1981); Birdo v. Holbrook, 775 S.W.2d 411, 412-413 (Tex. Ct. App. 1989); Kondrat v. Byron, 579 N.E.2d 287, 288-289 (Ohio Ct. App. 1989); Mullen v. Renner, 685 S.W.2d 212, 215 (Mo. Ct. App. 1985); Bardacke v. Welsh, 698 P.2d 462, 466-471 (N.M. Ct. App. 1985); Hunnewell v. Hunnewell, 445 N.E.2d 1080, 1083 (Mass. App. Ct. 1983); Muka v. Hancock, Estabrook, Ryan, Shove & Hust, 465 N.Y.S.2d 416, 416-417 (N.Y. Sup. Ct. 1983); Hotel Martha Wash. Mgmt. Co. v. Swinick, 324 N.Y.S.2d 687, 694 (N.Y. Civ. Ct. 1971).
17. **Second Circuit:** *See*, *e.g.*, Iwachiw v. N.Y.S. Dep't of Motor Veh., 396 F.3d 525, 529 (2d Cir. 2005); Johnson v. Eggersdorf, 8 F. App'x 140, 143 (2d Cir. 2001), *aff'g*, 97-CV-0938, Decision and Order (N.D.N.Y. May 28, 1999); Johnson v. Gummerson, 201 F.3d 431, at *2 (2d Cir. 1999), *aff'g*, 97-CV-1727, Decision and Order (N.D.N.Y. June 11, 1999); Flynn, 32 F.3d at 31; Edwards v. Selsky, 04-CV-1054, 2007 WL 748442, at *2-3 (N.D.N.Y. March 6, 2007); Rolle v. Garcia, 04-CV-0312, 2007 WL 672679, at *4 (N.D.N.Y. Feb. 28, 2007); Mora v. Bockelmann, 03-CV-1217, 2007 WL 603410, at *4 (N.D.N.Y. Feb. 22, 2007); Brown v. Goord, 04-CV-0785, 2007 WL 607396, at *2-3 (N.D.N.Y. Feb. 20, 2007); Mitchell v. Harriman, 04-CV-0937, 2007 WL 499619, at *3 (N.D.N.Y. Feb. 13, 2007); Sledge v. Kooi, 04-CV-1311, 2007 WL 951447, at *3-4 (N.D.N.Y. Feb. 12, 2007); Gill v. Pidylpchak, 02-CV-1460, 2006 WL 3751340, at *2 n.3-4 (N.D.N.Y. Dec. 19, 2006); Saunders v. Ricks, 03-CV-0598, 2006 WL 3051792, at *2 & n.11 (N.D.N.Y. Oct. 18, 2006); Tibbetts v. Stempel, 97-CV-2561, 2005 WL 2146079, at *7 (D. Conn. Aug. 31, 2005); Gill v. Frawley, 02-CV-1380, 2006 WL 1742738, at *3 & n.2 (N.D.N.Y. June 22, 2006); Davidson v. Talbot, 01-CV-0473, 2005 U.S. Dist. LEXIS 39576, at *18-20 & n.10 (N.D.N.Y. March 31, 2005); Gill v. Riddick, 03-CV-1456, 2005 U.S. Dist. LEXIS 5394, at *7 & n.3 (N.D.N.Y. March 31, 2005); Yip v. SUNY, 03-CV-0959, 2004 WL 2202594, at *3-4 & n.7, 10 (W.D.N.Y. Sept. 29, 2004); Davidson v. Dean, 204 F.R.D. 251, 257 (S.D.N.Y. 2001); Santiago v. Campisi, 91 F. Supp. 2d 665, 670 (S.D.N.Y. 2000); McGann v. U.S., 98-CV-2192, 1999 WL 173596, at *2 (S.D.N.Y. March 29, 1999); Jones v. City of Buffalo, 96-CV-0379, 1998 U.S. Dist. LEXIS 6070, at *16-19 & n.7-8 (W.D.N.Y. Apr. 23, 1998); Brown v. McClellan, 93-CV-0901, 1996 U.S. Dist. LEXIS 8164, at *3-4 & n.3 (W.D.N.Y. June 10, 1996); Brown v. Selsky, 93-CV-0268, 1995 U.S. Dist. LEXIS 213, at *2 n.1 (W.D.N.Y. Jan. 10, 1995); Baasch v. Reyer, 827 F. Supp. 940, 944 (E.D.N.Y. 1993); Kissel v. DiMartino, 92-CV-5660, 1993 WL 289430, at *9 (E.D.N.Y. July 20, 1993); Hussein v. Pitta, 88-CV-2549, 1991 WL 221033, at *4 (S.D.N.Y. Oct. 11, 1991).

    Third Circuit: *See*, *e.g.*, Tilbury v. AAmes Home Loan, 05-CV-2033, 2005 WL 3477558, at *1-5 (D.N.J. Dec. 12, 2005); Hollis-Arrington v. PHH Mort. Corp., 05-CV-2556, 2005 WL 3077853, at *9 (D.N.J. Nov. 15, 2005); Perry v. Gold & Laine, P.C., 371 F. Supp. 2d 622, 629 (D.N.J. 2005); Smith v. Litton Loan Serv., LP, 04-CV-2846, 2005 WL 289927, at *13 (E.D. Pa. Feb. 4, 2005); Douris v. Bucks County, 04-CV-0232, 2005 U.S. Dist. LEXIS 1279, at *14-15, 40-41 & n. 19 (E.D. Pa. Jan. 31, 2005); Weber v. Henderson, 275 F. Supp. 2d 616, 618, 622 (E.D. Pa. 2003); Frempong-Atuahene v. City of Phila., 99-CV-4386, 2000 WL 233216, at *3 (E.D. Pa. Feb. 28, 2000); Frempong-Atuahene v. Transam. Fin. Consum. Disc. Co., 99-CV-0965, 2000 U.S. Dist. LEXIS 324, at *7-8 (E.D. Pa. Jan. 19, 2000); Frempong-Atuahene v. Redev. Auth. of City of Phila., 99-CV-0704, 2000 U.S. Dist. LEXIS 113, at *2, 4, 8-9 & n.1-2 (E.D. Pa. Jan. 12, 2000), *aff'd*, 250 F.3d 755 (3d Cir. 2001); Armstrong v. Sch. Dist. of Phila., 99-CV-0825, 1999 WL 773507, at *2 (E.D. Pa. Sept. 29, 1999); Broad. Music, Inc. v. La Trattoria East, Inc., 95-CV-1784, 1995 WL 552881, at *2 (E.D. Pa. Sept. 15, 1995); Wexler v. Citibank, 94-CV-4172, 1994 U.S. Dist. LEXIS 14992, at *19-20 (E.D. Pa. Oct. 21, 1994); Hollawell v. Leman, 94-CV-5730, 1994 U.S. Dist. LEXIS 14139, at *1-3 (E.D. Pa. Sept. 30, 1994); Lyden v. Susser, 93-CV-3949, 1994 WL 117794, at *8 (D.N.J. March 30, 1994); Kupersmit v. Nat'l Mort., 91-CV-4049, 1992 WL 108967, at *1 (E.D. Pa. May 12, 1992).
18. **State Courts:** *See*, *e.g.*, Martin v. D.C. Ct. of App., 506 U.S. 1, 2-3 (1992); Hamilton v. Fla., 945 So.2d 1121, 1122-1124 (Fla. 2006); Karr v. Williams, 50 P.3d 910, 913-916 (Colo. 2002); Corley v. U.S., 741 A.2d 1029, 1029-1031 (D.C. 1999); Matter of Burns, 542 N.W.2d 389, 389-390 (Minn. 1996); Turner-El v. West, 811 N.E.2d 728, 733-736 (Ill. App. Ct. 2004); Vinson v. Benson, 805 So.2d 571, 573, 576-577 (Miss. Ct. App. 2001); Kan. v. Lynn, 975 P.2d 813, 815-816 (Kan. Ct. App. 1999); Thomas v. Sibbett, 925 P.2d 1286, 1286-1287 (Utah Ct. App. 1996); Mullen v. GMAC, 919 S.W.2d 7, 9 (Mo. Ct. App. 1996); Sud v. Sud, 642 N.Y.S.2d 893, 893-894 (N.Y. App. Div. 1996); Cain v. Buehner, 839 S.W.2d 695, 697 (Mo. Ct. App. 1992); Cronen v. County Storage Lot, 831 S.W.2d 895, 898-899 (Tex. Ct. App. 1992); Lepiscopo v. Hopwood, 791 P.2d 481, 483 (N.M. Ct. App. 1990); Melnitzky v.

II. REASONS FOR TREND'S APPEARANCE IN SECOND AND THIRD CIRCUITS

What is different about the Second and Third Circuits that has caused the trend to appear there first? Is it that those two circuits have more pro se litigation than do other federal circuits? The answer appears to be no.

It is beyond cavil that, over the past two decades, it has become more common for parties to litigate pro se in federal and state court.[19] As one commentator has observed, causes for this trend include "increased literacy, consumerism, a sense of rugged individualism, the costs of litigation and attorneys' fees, antilawyer sentiment, and the breakdown of family and religious institutions that formerly resolved many disputes that are now presented to courts instead."[20] However, it does not appear that the rise in pro se litigation in the Second and Third Circuits has been any greater than the average rise in such litigation in other circuits. For example, between 1990 and 2005, the Second Circuit experienced a 5.9-fold increase in the number of reported decisions involving pro se litigants, while the Third Circuit experienced a 5.7-fold increase in the number of such decisions.[21] However, 6 of the 13 other federal circuits (counting the D.C. Circuit and Federal Circuit) experienced a *greater* increase in the number of such decisions.[22] Indeed, the rate of increase of such decisions in the Second Circuit and Third Circuits was below the national average rate of increase (a 14.5-fold increase) of such decisions.[23]

Nor does it appear that, in the Second and Third circuits, pro se cases comprise an unusually large percentage of all civil cases filed there. Based on an analysis of the number of civil pro se cases filed and the total number of civil cases filed by circuit (excluding the Federal Circuit) during the twelve-month period ending September 30, 2004, it appears that the Second and Third Circuits were in ninth and twelfth place (respectively).[24]

Nor does there appear to be an unusually high ratio of pro se cases per judge in the Second and Third Circuits. Among all 13 federal circuits, the Second and Third Circuits issued the fifth and fourth most reported decisions (respectively) involving pro se litigants in 2005.[25] Taking into account the number of authorized federal judgeships in each of those circuits, the Second and Third Circuits remain in fifth and fourth place (respectively) in terms of the number of such decisions issued per judge in 2005.[26] If the ratio of pro se cases per judge were the reason for the trend's appearance in the Second and Third Circuits, then how would one explain the fact that the trend does not appear to be occurring in the two circuits with the most such decisions issued per judge in 2005, namely, the Fourth and Fifth Circuits?[27]

Is it that the Second and Third Circuits have experienced a rise in the number of prisoners incarcerated there, coupled with the fact that prisoners file most of the pro se cases in fed-

Uribe, 806 N.Y.S.2d 446, *2 (N.Y. Sup. Ct. 2005); Spremo v. Babchik, 589 N.Y.S.2d 1019, 1023-1024 (N.Y. Sup. Ct. 1992).
Federal Courts: *See*, *e.g.*, Adams v. Nankervis, No. 89-35511, 1990 WL 61990, at *2 (9th Cir. May 10, 1990); Greathouse v. City of Plymouth, Ohio, 06-CV-2014, 2006 U.S. Dist. LEXIS 79770, at *4-5, 16-19 (N.D. Ohio Nov. 1, 2006); Williams v. Smith, 05-CV-0845, 2006 WL 2192470, at *10 (S.D. Ohio Aug. 1, 2006); Whitfield v. Walker, 04-CV-3136, 2006 WL 618893, at *3 (C.D. Ill. March 10, 2006); Vongrabe v. Sprint PCS, 312 F. Supp. 2d 1313, 1319-1321 (S.D. Cal. 2004); Jiricko v. Moser and Marsalek, P.C., 184 F.R.D. 611, 615 (E.D. Mo. 1999); U.S. v. Barker, 19 F. Supp. 2d 1380, 1382, 1385 & n.1 (S.D. Ga. 1998); Cok v. Forte, 877 F. Supp. 797, 804 (D.R.I. 1994). It is worth noting that ten such decisions come from within the Tenth Circuit. See Jenkins v. MTGLQ Inv., No. 05-4057, 2007 WL 431498, at *4-5 (10th Cir. Feb. 9, 2007); Garrett v. Selby, 425 F.3d 836, 841 (10th Cir. 2005); Judd v. Univ. of New Mexico, 204 F.3d 1041, 1044 (10th Cir. 2000); Washington v. Dorsey, No. 95-2081, 1995 U.S. App. LEXIS 17080, at *5 (10th Cir. July 13, 1995); DePineda v. Hemphill, 34 F.3d 946, 948 (10th Cir. 1994); Werner v. Utah, 32 F.3d 1446, 1449 (10th Cir. 1994); In re Winslow, 17 F.3d 314, 315 (10th Cir. 1994); Ketchum v. Cruz, 961 F.2d 916, 921 (10th Cir. 1992); Lynn v. Roberts, 01-CV-3422, 2006 WL 2850273, at *3-5 (D. Kan. Oct. 4, 2006); Nutter v. Wefald, 90-CV-1436, 1997 WL 833298, at *1 (D. Kan. 1997); Housley v. Burrows, 97-CV-1532, 1997 U.S. Dist. LEXIS 23049, at *12-13 (W.D. Ok. Oct. 28, 1997). However, generally, the link between the special status of the pro se litigants and the remedial or punitive action taken by the court in those cases is less direct than is that link in the cases from within the Second and Third Circuits.

19. This phenomenon has been well documented by systematic studies, and confirmed by the reports of judges and court managers. *See*, *e.g.*, Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 Case W. Res. J. Int'l Law 103, 112 (Fall 2002); Case, *supra* note 11, at 701-702 & n.2, 11, 12; Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 Fam. Ct. Rev. 36, 36 (Jan. 2002); Admin. Office of U.S. Courts, *Table 2.4: U.S. Court of Appeals (Excludes Federal Circuit): Pro Se Cases Filed* http://www.uscourts.gov/judicialfactsfigures/Table204.pdf_(last visited on Jan. 3, 2007).
20. *See* Goldschmidt, *supra* note 19, at 36.
21. These figures come from a chart on file with the author. The chart was prepared by the author, using data obtained by running simple searches in the relevant LexisNexis files, for example, "counsel (pro se) and date(geq (01/01/1990) and leq (12/31/1990))" in the LexisNexis "1st" file.
22. *Id.*
23. *Id.*
24. These figures come from a chart on file with the author. The chart was prepared by the author, using data obtained from the Administrative Office of the U.S. Courts, specifically, (1) *Table S-24: Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2005* http://www.uscourts.gov/judbus2005/tables/s24.pdf (last visited on Jan. 3, 2007), and (2) *Table 4.2: U.S. District Courts: Civil Cases Filed by District* http://www.uscourts.gov/judicialfactsfigures/Table402.pdf (last visited on Jan. 3, 2007).
25. *See supra* note 21.
26. *See supra* note 21. The number of judges per circuit was determined by adding the number of district judges per circuit, as listed in title 28, section 133 of the United States Code, to the number of circuit judges per circuit, as listed in title 28, section 44 of the United States Code.
27. *Id.*; *see also supra* note 18 (not listing any cases from Fourth or Fifth Circuits).

eral court?[28] Again, the answer appears to be no. The three states whose federal courts have issued the most status-revoking decisions from within the Second and Third Circuits since 1990 are New York, Pennsylvania, and New Jersey.[29] However, between 1977 and 2004, the prison populations in New York and New Jersey grew about as fast as the average prison population nationally.[30] Granted, the prison population in Pennsylvania grew slightly faster than did the average prison population nationally.[31] However, of the 15 status-revoking decisions found from courts in the Third Circuit, 11 of those decisions were issued by the Eastern District of Pennsylvania, which does not contain as many prisons as do the Middle or Western Districts of Pennsylvania.[32] More important, only one of those 15 decisions involved a pro se inmate.[33]

What, then, is the reason for the trend's appearance in the Second and Third Circuits? In analyzing the 15 status-revoking decisions from courts in the Third Circuit, it becomes clear that seven of those decisions were in actions involving mortgages.[34] While only four of these decisions came from the Eastern District of Pennsylvania (the other three coming from the District of New Jersey),[35] those decisions are consistent with news articles reporting a surge in the number of borrowers alleging predatory practices by certain lenders in the greater Philadelphia area in the past decade.[36] The cases are also consistent with news reports of a shortage of pro bono lawyers able to represent such borrowers.[37] As a result, one of the reasons for the trend's occurrence in the Third Circuit appears to have been district courts' frustration with a handful of particularly abusive pro se litigants who were complaining about lending practices in the greater Philadelphia area.

As for the Second Circuit, while an analysis of prisoner-population growth may not explain the trend's appearance in that circuit, a further analysis of prisoner litigation in general in that circuit might offer some explanation for the trend's appearance there. This is because, of the 27 status-revoking decisions that were issued from courts in the Second Circuit since 1990, 18 of those decisions involved pro se prisoners suing for alleged civil-rights violations.[38] But is prisoner litigation in the Second Circuit somehow different from prisoner litigation in other circuits, and if so, why?

It appears that the answer to this question is yes in the sense that, together, the New York State Department of Correctional Services (DOCS) and the federal district courts located in New York State appear to foster the creation of experienced pro se prisoner litigants. This conclusion is based on four pieces of evidence. First, all 18 of the aforementioned status-revoking decisions were issued by federal district courts located in New York State and involved pro se New York State prisoners.

Second, the New York State DOCS maintains prison law libraries of a relatively high quality as compared to many other state prison law libraries. "Nearly $2.5 million was spent in Fiscal [Year] 2005-06 [alone] to maintain all the [state correctional facility] law libraries [in New York State], including the updates of the law book and periodical collections, and also the supply of pens, paper and photocopying materials."[39] Such expenditures are in stark contrast to the cuts in funding of prison law libraries by other states (such as Arizona, California, Florida, Idaho, Iowa, New Mexico, and Washington).[40] The result of such expenditures by New York State is a network of 93 law libraries that appears to generally

28. *See* Admin. Office of U.S. Courts, *Table S-24: Civil Pro Se and Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2005* http://www.uscourts.gov/judbus2005/tables/s24.pdf (last visited on Jan. 3, 2007); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 Fordham Urb. L.J. 305, 314 & n.40 (Nov. 2002).
29. *See supra* note 17 (citing cases).
30. George Hill and Paige Harrison, *Prisoners Under State or Federal Jurisdiction: 1977-2004*; *United States Department of Justice, Bureau of Justice Statistics* (Dec. 6, 2005) http://www.ojp.usdoj.gov/bjs/data/corpop02.csv (last visited Dec. 13, 2006).
31. *Id.*
32. *See supra* note 17; *see also* Pennsylvania Department of Corrections, *Institutional Map* http://www.cor.state.pa.us/portal/cwp/view.asp?a=376&q=126815&portalNav=| (last visited Dec. 28, 2006).
33. *See* Hollawell, 1994 U.S. Dist. LEXIS 14139.
34. *See* Tilbury, 2005 WL 3477558, at *4; Hollis, 2005 WL 3077853, at *2; Litton Loan Serv., LP, 2005 WL 289927, at *4; Transam., 2000 U.S. Dist. LEXIS 324; Wexler, 1994 U.S. Dist. LEXIS 14992, at *3, 15; Lyden, 1994 WL 117794, at *8; Kupersmit, 1992 WL 108967, at *1.
35. *See* Tilbury, 2005 WL 3477558, at *4 (D. N.J. 2005); Hollis, 2005 WL 3077853, at *2 (D. N.J. 2005); Litton Loan Serv., LP, 2005 WL 289927, at *4 (E.D. Pa. 2005); Transam., 2000 U.S. Dist. LEXIS 324 (E.D. Pa. 2000); Wexler, 1994 U.S. Dist. LEXIS 14992, at *3, 15 (E.D. Pa. 1994); Lyden, 1994 WL 117794, at *8 (D. N.J. 1994); Kupersmit, 1992 WL 108967, at *1 (E.D. Pa. 1992).
36. *See, e.g.*, Joseph N. DiStefano, *Have Speadsheet, Will Travel: The Pa. Banking Department Is Going Into the Law Enforcement Business*, Phila. Inquirer, at C-1 (Feb. 24, 2005); Michael Hinkelman, *In a Deep Financial Hole, Man Tries to Save House*, Phila. Daily News, at 4 (March 9, 2004); Paul D. Davies, *Predatory-Loan Foes Score Again: Some See Shift in Battle Momentum*, Phila. Daily News, at 6 (Aug. 21, 2001); Paul D. Davies, *Housed in Debt They Are Poor, in Debt and Have Bad Credit*, Phila. Daily News, at 3 (Feb. 5, 2001).
37. *See, e.g.*, Paul Davies, *Private Lawyers Sought for Predatory-Loan Cases*, Phila. Daily News, at 6 (May 18, 2001).
38. *See supra* note 17.
39. New York State DOCS, *Prison Safety in New York*, at 41 http://www.docs.state.ny.us/PressRel/06CommissionerRpt/06PrisonSafetyRpt.pdf (last visited on Dec. 29, 2006).
40. *See, e.g.*, Richard D. Vogel, *Silencing the Cells: Mass Incarceration and Legal Repression in U.S. Prisons*, 56 Monthly Rev. 37 (May 1, 2004); *Nationwide, State DOCs Face Deepest Budget Cuts in 20 Years*, 7 Corr. Prof. 10 (Feb. 12, 2002); Steve Terrell, *Prison Contention*, Sante Fe New Mexican, at A-4 (Jan. 22, 2002); *Prisons Get Those Pens Ready*, The Fla. Times-Union, at B-6 (June 30, 2001); David Neiwert, *Prison Shell Game*, Seattle Wkly., at 14 (Feb. 14, 2001); *Amid Controversy, Arizona DOC Facilities Are Free of Law Libraries*, 6 Corr. Prof. 3; *Corrections Director Wants to Phase Out Prison Law Libraries*, Ass'd Press State and Local Wire (Feb. 15, 1999); Paul Davenport, *Corrections Chief Says Troubled Paralegal Program Back on Track*, Ass'd Press State & Local Wire (Dec. 1, 1998); *DOCS Change Inmate Legal Access Policies*, 3 Corr. Prof. 18 (June 5, 1998); *Idaho Dismantles Law Library System*, 1 Corr. Educ. Bull. 9 (June 1998).

exceed the Supreme Court's minimum requirements for "adequate" prison law libraries.[41] Indeed, the collections of New York State's prison law libraries appear to exceed even the requirements set forth by the American Association of Law Libraries' Special Committee on Law Library Services to Prisoners.[42] Furthermore, New York State is one of the few states that has *four* non-prison libraries that provide legal materials to prisoners.[43] In this regard, New York State prisoners appear to have greater legal resources at their disposal than do the prisoners in other states.

Third, the New York State DOCS appears to formally educate more of its inmates in the law each year than do the correctional departments of other states. Specifically, "[b]etween 350 and 400 [New York State] inmates earn legal research certificates each year."[44] Again, these efforts seem in contrast to the efforts of other states (such as Arizona, Pennsylvania, and Washington), which appear to be cutting the funding of such vocational-education programs.[45] Clearly, the New York State inmates receiving this legal training are better equipped, and perhaps more inclined, to file suit.[46] In addition, many of the New York State inmates receiving this training provide legal guidance to other New York State inmates. For example, New York State's prison law libraries are staffed, in part, by certified inmate law clerks, who assist inmates in preparing their own legal papers.[47]

Fourth, federal district courts located in New York State make a concerted effort to help pro se prisoner litigants, without, of course, providing substantive legal advice to them.[48] For example, both the Northern District of New York and the Western District of New York provide rather lengthy self-help manuals to pro se litigants free of charge,[49] while the Eastern District of New York provides a number of shorter instructional materials for pro se litigants, also free of charge.[50] In addition, the Eastern District of New York has created an additional magistrate judge's position specifically to improve "the decisionmaking for pro se litigants" and to "direct greater attention to those pro se cases involving potentially meritorious claims."[51] Finally, the Southern District of New York has what one former court staff attorney calls "one of the most progressive and largest pro se offices in the country" with "eight attorneys and seven writ clerks."[52]

Perhaps as a result of all these efforts, it appears that, over the past decade, the experience of pro se prisoner litigants in the Second Circuit has generally increased. For example, a recent study conducted of pro se cases in the Southern District of New York during the second half of the 1990s revealed that, during that time period, the number of "repeat filers" of pro se prisoner cases rebounded in 1999 following a temporary drop after the enactment of the Prison Litigation Reform Act in 1996, which placed certain restrictions on such filings.[53] Moreover, the success rate of prisoner civil-rights actions appears to have increased somewhat.[54]

Also appearing to increase is the complexity of pro se prisoner complaints. For example, in the Southern District of New York, pro se prisoner civil-rights complaints that named multiple defendants increased in complexity in the sense that they named more defendants per complaint over the course of the latter half of the 1990s.[55] It is noteworthy that an increase in

41. *See* Lewis v. Casey, 518 U.S. 343 (1996); Bounds v. Smith, 430 U.S. 817 (1977).
42. *Compare* New York State DOCS, *Prison Safety in New York*, at 41-42 & Attach. K (detailing the collections that comprise the holdings of New York State's prison libraries) *with* A JAILHOUSE LAWYER'S MANUAL: VOL. I at 48-53 (Columbia Hum. Rts. Law Rev. 6th ed. 2005) (attaching copy of Am. Ass'n of Law Libraries' *Checklist—Recommended Collection for Prison Law Libraries*).
43. *See* A JAILHOUSE LAWYER'S MANUAL: VOL. I at 54-56 (Columbia Hum. Rts. Law Rev. 6th ed. 2005) (listing two such libraries); Southern Center for Human Rights, *Legal Resources and Organizations by State: New York* http://www.schr.org/prisons-jails/state-resources/ny-ref.pdf (last visited Dec. 29, 2006) (listing two different such libraries); *cf.* Am. Ass'n of Law Libraries, *Law Libraries Serving Prisoners: New York* http://www.aallnet.org/sis/srsis/llsp/state.asp (last visited Dec. 29, 2006) (listing three of the four aforementioned libraries).
44. *See* New York State DOCS, *Prison Safety in New York*, at 42.
45. *See*, *e.g.*, *Nationwide, State DOCs Face Deepest Budget Cuts in 20 Years*, 7 CORR. PROF. 10 (Feb. 12, 2002); Catherine Lucey, *Inmate-Run Legal Clinic at Graterford Prison to Be Closed*, ASS'D PRESS STATE AND LOCAL WIRE (June 5, 2002); *Arizona DOCS Closes 34 Inmate Law Libraries*, 2 CORR. PROF. 22 (Aug. 8, 1997).
46. For example, take the case of former New York State inmate Jeffrey Smith (DOCS Identification Number 96-R-9145). Mr. Smith received legal training while in prison. *See* Smith v. Woods, 03-CV-0048, 2006 U.S. Dist. LEXIS 29745, at *83 (N.D.N.Y. March 17, 2006). He also filed at least six federal court actions as a New York State prisoner, averaging one a year for six years. *See*, *e.g.*, Smith v. Woods, 03-CV-0048 (N.D.N.Y.) (prisoner civil-rights action); Smith v. NYS DOCS, 00-CV-1286 (N.D.N.Y.); Smith v. Taylor, 00-CV-1164 (N.D.N.Y.); Smith v. Albaugh, 00-CV-0404 (S.D.N.Y.); Smith v. NYS DOCS, 99-CV-2157 (N.D.N.Y.); Smith v. Walker, 98-CV-0129 (N.D.N.Y.).
47. *See* New York State DOCS, *Prison Safety in New York*, at 42; *see*, *e.g.*, Smith, 2006 U.S. Dist. LEXIS 29745, at *19, 83.
48. *See* Nat'l Ass'n for Ct. Mgmt., *Model Code of Conduct*, art. II(B), http://www.nacmnet.org/codeofconduct.html (last visited on Jan. 2, 2007); AM. BAR ASS'N'S STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES, RESPONDING TO THE NEEDS OF THE SELF-REPRESENTED DIVORCE LITIGANT, at 24-25 (Am. Bar Ass'n 1994); FED. R. APP. P. 45(a).
49. The Northern District's manual is 66 pages long. U.S. District Court for the N.D.N.Y., PRO SE HANDBOOK ttp://www.nynd.uscourts.gov/documents/Prosehandbook.pdf (last visited Dec. 29, 2006). The Western District's manual is 45 pages long. U.S. District Court for the W.D.N.Y., THE PRO SE LITIGATION GUIDELINES http://www.nywd.uscourts.gov/document/Guidelines2001.pdf (last visited Dec. 29, 2006).
50. *See* U.S. District Court for the E.D.N.Y., *Court Forms: Pro Se Forms* http://www.nyed.uscourts.gov/General_Information/Court_Forms/courts_forms.html (last visited Dec. 29, 2006).
51. *See* Hon. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 N.D. J. L. ETHICS & PUB. POL'Y 475, 493, 495 (2002).
52. *See* Rosenbloom, *supra* note 28, at 307 n.9.
53. *Id.* at 352; *see*, *e.g.*, *Talbot*, 2005 U.S. Dist. LEXIS 39576, at *36.
54. *See* Rosenbloom, *supra* note 28, at 339.
55. *Id.* at 322.

sophistication of pro se New York State prisoner litigants, and a willingness on the part of federal district courts located in New York State to help pro se litigants, would largely explain why, between 2000 and 2005, the Second Circuit was last (of the 12 circuits, including the D.C. Circuit) in terms of the median time to disposition for prisoner civil-rights cases (9.8 months as compared to a national average of 5.7 months).[56] For example, one would expect sophisticated pro se prisoner litigants to be more aware that extensions of time are available and more likely to ask for extensions of time in which to respond to dispositive motions filed by defendants; and one would expect district courts determined to help pro se litigants to be more likely to routinely grant such requests (thus, delaying the ultimate resolution of the cases).

In sum, while the reason for the trend's occurrence in the Third Circuit appears partly to be the result of district courts' frustration with abusive pro se litigants complaining about lending practices in Philadelphia over the past decade, the reason for the trend's occurrence in the Second Circuit appears to be an increase in the skill of pro se inmate litigants due to an effort to educate them by the New York State DOCS and the federal district courts located in New York State. However, more enlightening than the reason for the trend's appearance is an analysis of the rationales for the revocation of special status.

III. RATIONALES FOR TREND

Generally, courts have articulated two distinct rationales for their revocation of the special status of overly litigious pro se litigants. The first rationale is that the pro se litigant's excessive litigiousness demonstrates his *experience*, the lack of which is the reason for conferring the special status upon the pro se litigant.[57] The second rationale is that the pro se litigant's excessive litigiousness is tainted with *abuse* (e.g., frivolousness or vexatiousness), warranting sanctions to curb future abuses.[58]

Courts relying on the "experience" rationale look at a variety of factors in assessing whether or not the pro se litigant is experienced. Most often, these factors include (1) the number of previous federal or state court actions or appeals filed, and (2) the recency or simultaneity of the actions or appeals.[59]

Courts relying on the "abusiveness" rationale also look at a variety of factors in assessing whether a pro se litigant has abused the legal system. Most often, these factors include (1) whether the litigant's previous actions, appeals and/or motions were dismissed or denied, and, if so, whether they were so wholly without merit as to indicate an intent to annoy or harass,[60] (2) whether the previous actions were related to the subject matter of the current proceeding so as to indicate an intent to litigate issues already decided,[61] and (3) whether the litigant has violated a rule of civil procedure or court rule, especially after having been repeatedly advised of the rule so as to indicate willful disobedience.[62] Slightly more important than the number of previous abuses appears to be the magnitude or severity of those abuses.[63] In this regard, the rationale contains a distinct punitive element, unlike the "experience" rationale.[64] For example, the "experience" rationale would likely consider a previous dismissal or a violation of a procedural rule as a sign of inexperience, militating against the revocation of the pro se litigant's special status.[65]

56. These figures come from a chart on file with the author. The chart was prepared by the Clerk's Office for the Northern District of New York, using data provided by the Administrative Office of the U.S. Courts. *See*, *e.g.*, Admin. Office of U.S. Courts, *Table C-5: U.S. District Courts–Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending June 30, 2005* http://www.uscourts.gov/caseload2005/tables/C05mar05.pdf (last visited on Jan. 3, 2007).
57. *See*, *e.g.*, Eggersdorf, 8 F. App'x at 143; Gummerson, 201 F.3d at *2; Flynn, 32 F.3d at 31; Saunders, 2006 WL 3051792, at *2; Pidylpchak, 2006 WL 3751340, at *2; Frawley, 2006 WL 1742738, at *3; Talbot, 2005 U.S. Dist. LEXIS 39576, at *20, *accord*, Riddick, 2005 U.S. Dist. LEXIS 5394, at *7; Yip, 2004 WL 2202594, at *3; Dean, 204 F.R.D. at 257 & n.5; Santiago, 91 F. Supp. 2d at 670; McGann, 1999 WL 173596, at *2; Hussein, 1991 WL 221033, at *4.
58. *See*, *e.g.*, Tilbury, 2005 WL 3477558, at *10; Hollis, 2005 WL 3077853, at *9; Perry, 371 F. Supp. 2d at 629; Litton Loan Serv., LP, 2005 WL 289927, at *13 (E.D. Pa. Feb. 4, 2005); Douris, 2005 U.S. Dist. LEXIS 1279, at *2-5, 40-41 & n.19; Weber, 275 F. Supp. 2d at 623; Armstrong, 1999 WL 773507, at *2, *accord*, City of Phila., 2000 WL 233216, at *3; Broad. Music, Inc., 1995 WL 552881, at *2; Wexler, 1994 U.S. Dist. LEXIS 14992, at *6, 19 & n.2; Hollawell, 1994 U.S. Dist. LEXIS 14139, at *2.
59. *See*, *e.g.*, Eggersdorf, 8 F. App'x at 143; Gummerson, 201 F.3d at *2; Flynn, 32 F.3d at 31; Frawley, 2006 WL 1742738, at *3 & n.2; Talbot, 2005 U.S. Dist. LEXIS 39576, at *18-20 & n.10; Riddick, 2005 U.S. Dist. LEXIS 5394, at *7 & n.3; Dean, 204 F.R.D. at 257; Santiago, 91 F. Supp. 2d at 670; McGann, 1999 WL 173596, at *2, 8-10; McClellan, 1996 U.S. Dist. LEXIS 8164, at *3-4 & n.3; Brown, 1995 U.S. Dist. LEXIS 213, at *2 n.1.
60. *See*, *e.g.*, Perry, 371 F. Supp. 2d at 624, 629-632; Douris, 2005 U.S. Dist. LEXIS 1279, at *2-5; Weber, 275 F. Supp. 2d at 618, 622; Wexler, 1994 U.S. Dist. LEXIS 14992, at *4-13; Hollawell, 1994 U.S. Dist. LEXIS 14139, at *1-3.
61. *See*, *e.g.*, Tilbury, 2005 WL 3477558, at *1-5, 10-11; Hollis, 2005 WL 3077853, at *1, 9; Perry, 371 F. Supp. 2d at 624, 629-632; Douris, 2005 U.S. Dist. LEXIS 1279, at *2-5; Weber, 275 F. Supp. 2d at 618, 622; Wexler, 1994 U.S. Dist. LEXIS 14992, at *4-13; Cok, 877 F. Supp. at 799-801, 804.
62. *See*, *e.g.*, Hollis, 2005 WL 3077853, at *4, 7-9; Litton Loan Serv., LP, 2005 WL 289927, at *1, 3 & n.7-8; Transam., 2000 U.S. Dist. LEXIS 324, at *2; Frempong, 2000 U.S. Dist. LEXIS 113, at *2.
63. *See*, *e.g.*, Broad. Music, Inc., 1995 WL 552881, at *2 (imposing sanctions on pro se plaintiff after filing of only *two* actions or appeals); Douris, 2005 U.S. Dist. LEXIS 1279, at *2-5 (imposing sanctions on pro se plaintiff after filing of only *five* federal court actions).
64. *See*, *e.g.*, Tilbury, 2005 WL 3477558, at *11; Hollis, 2005 WL 3077853, at *1, 12; Smith, 2005 WL 289927, at *3; Armstrong, 1999 WL 773507, at *2; Hollawell, 1994 U.S. Dist. LEXIS 14139, at *2.
65. *See*, *e.g.*, Burge, 2006 WL 2805242, at *3 & n.4; Cady, 2004 WL 2032768, at *3 & n.8; *cf.* Bartelli v. "Tradesman" Fedak, 04-CV-0407, 2006 U.S. Dist. LEXIS 20043, at *5, 7 (M.D. Pa. Apr. 13, 2006).

Generally, courts in the Second Circuit have applied the "experience" rationale, while courts in the Third Circuit have applied the "abusiveness" rationale, although there have been some exceptions.[66] Perhaps the most interesting (and instructive) such exception occurred in the winter of 2000 in the Eastern District Pennsylvania. There, U.S. District Judge Herbert J. Hutton faced a litigious pro se plaintiff named Stephen Frempong-Atuahene, who had previously filed a dozen lawsuits in the Eastern District of Pennsylvania.[67] In two decisions, Judge Hutton revoked Frempong-Atuahene's special status on the ground that, because Frempong-Atuahene was an experienced litigant, he was not in need of special status.[68] However, by February, Judge Hutton's patience had apparently worn thin; continuing to revoke Frempong-Atuahene's special status, he based that revocation on the ground that Frempong-Atuahene should be punished for abusing the judicial system.[69] Perhaps this is the inevitable progression of a court's experience of a particularly litigious pro se litigant—liberal leniency, followed by strained patience, followed by downright frustration.

IV. FAIRNESS OF TREND

Is this revocation of special status fair? A litigious pro se litigant might advance a number of arguments in support of his position that the revocation is unfair. First, he might argue that he has a constitutional right (*e.g.*, under the First Amendment to the U.S. Constitution) to use the courts with or without counsel, that he needs to exercise that right in order to remedy certain injustices (*e.g.*, errors in the criminal justice system, abuses in the nation's overcrowded prisons, etc.), and that the revocation of his special status constitutes retaliation for exercising that right.[70] Second, he might argue that, through the denial of a lenient reading of his pleadings, he is being subjected to a "heightened pleading standard,"[71] which runs afoul of the Federal Rules of Civil Procedure and the Supreme Court's prohibition of heightened pleading standards.[72] Third, he might argue that any abusive conduct by pro se litigants is already being remedied by various statutes that inhibit abusive conduct by pro se litigants (*e.g.*, vexatious litigation statutes such as those in California, Connecticut, Florida, Hawaii, and Texas).[73]

The opponents of an overly litigious pro se litigant would, no doubt, have some rather predictable responses to these arguments. With respect to the First Amendment argument, they would probably argue that (1) requiring pro se litigants to present their claims in compliance with the same rules imposed on represented litigants does not deny the pro se litigants access to the courts, (2) the constitutional right of access to the courts is neither absolute nor unconditional (e.g., there is no constitutional right to abuse the litigation process),[74] and (3) the causation element of a retaliation claim is missing under the circumstances (since it is not the exercise of the pro se litigant's constitutional right that has caused the court to revoke his special status but the fact that the pro se litigant is experienced or abusive). With respect to the "heightened pleading standard" argument, opponents of an overly litigious pro se litigant would probably argue that, when the special status of an overly litigious pro se litigant is revoked, the litigant is not being subjected to a "heightened pleading standard" but to an *ordinary* pleading standard (*i.e.*, instead of the *lowered* pleading standard ordinarily conferred to pro se litigants due to their usual inexperience).[75] With respect to the argument that abusive conduct by pro se litigants is being remedied by reliance on various statutes that prohibit abusive conduct by pro se litigants, opponents of an overly litigious pro se litigant would probably argue that, in part because such statutes are so

66. *See*, *e.g.*, Iwachiw, 396 F.3d at 528-529 & n.1; Tibbetts, 2005 WL 2146079, at *7; Kutsa v. Calif. State College, 564 F.2d 108, 111 (3d Cir. 1977); Transam., 2000 U.S. Dist. LEXIS 324, at *2 n.1, *accord*, Frempong, 2000 U.S. Dist. LEXIS 113, at *2 n.1.
67. See Transam., 2000 U.S. Dist. LEXIS 324, at *2 n.1.
68. *See id.*, *accord*, Frempong, 2000 U.S. Dist. LEXIS 113, at *2 n.1.
69. *See* City of Phila., 2000 WL 233216, at *3.
70. U.S. CONST. amend I ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."); *see also* 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally."); *see*, *e.g.*, Graham v. Henderson, 89 F.3d 75, 80 (2d Cir. 1996).
71. *See*, *e.g.*, Chavis v. Zodlow, 128 F. App'x 800, 803 & n.3 (2d Cir. 2005) (characterizing its prior holding in Davidson v. Flynn, 32 F.3d 27 [1994], as constituting an "endorse[ment] [of the application of] a heightened pleading standard with respect to a pro se litigant who 'at one point had at least 30 simultaneously pending suits.'").
72. *See* FED. R. CIV. P. 8; Jones v. Block, 127 S.Ct. 910, 919-920 (2007); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 511 (2002); Leatherman v. Tarrant County Narc. and Intell. Coord. Unit, 507 U.S. 163, 168 (1993).
73. *See*, *e.g.*, 28 U.S.C. § 1915(g) ("three strikes" statute regarding civil-rights litigation); 28 U.S.C. § 2244(b) (habeas-corpus statute providing for dismissal of "second or successive" applications); 28 U.S.C. § 1927 (federal vexatious litigation statute); CAL. CODE CIV. PROC. § 391 (California's vexatious litigation statute); CONN. GEN. STAT. § 52-568 (Connecticut's vexatious litigation statute); FLA. STAT. § 68.093 (Florida's vexatious litigation statute); HAW. REV. STAT. ANN. § 634J1-634J7 (Hawaii's vexatious litigation statute); OHIO REV. CODE ANN. § 2323.52 (Ohio's vexatious litigation statute); TEX. CIV. PRAC. & REM. CODE. ANN. § 11.001 (Texas' vexatious litigation statute).
74. *See*, *e.g.*, Overton v. U.S., 03-CV-0092, 2004 WL 1005577, at *4 (W.D. Tex. March 29, 2004); Housley, 1997 U.S. Dist. LEXIS 23049, at *12-13; Karr, 50 P.3d at 913-914; Vinson, 805 So.2d at 576; Spremo, 589 N.Y.S.2d at 1023-1024. Indeed, limiting an abusive pro se litigant's ability to further proceed pro se has been construed, by some courts, as protecting the First Amendment rights of other litigants. *See*, *e.g.*, Hamilton, 945 So.2d at 1122-1123.
75. *See* Wolfe v. George, 385 F. Supp. 2d 1004, 1015 (N.D. Cal. 2005). Opponents of an overly litigious pro se litigant would also probably argue that the Second Circuit's characterization, in 2005, of the denial of special status to an overly litigious pro se litigant as an imposition of a "heightened pleading standard" was dictum, and simply an unfortunate choice of words. *See* Chavis, 128 F. App'x at 803 & n.3.

limited in scope, they often do not apply;[76] furthermore, even when they do apply, they do not always stop "repeat filers" from continuing to file complaints.[77]

In addition, opponents of an overly litigious pro se litigant would probably argue that, by infusing missing claims and arguments into the papers of the overly litigious pro se litigant, courts are unfairly tipping the scales of justice against the pro se litigant's opponents and in favor of the pro se litigant, who is in fact either experienced or abusive.[78] For example, such opponents might point out that, with increasing frequency, the papers of "pro se" litigants are in fact being "ghostwritten" by attorneys.[79] As a result, they might observe, as did one district court, that the result is that "[undisclosed ghostwriting] necessarily causes the court to apply the wrong tests in its decisional process . . . . The entire process [is] skewed to the distinct disadvantage of the non-offending party."[80] In addition, opponents of an overly litigious pro se litigant might point out that a pro se prisoner litigant "may possess several distinct advantages over the ordinary litigant: time to draft multiple and prolonged pleadings; ability to proceed *in forma pauperis* and thus escape any financial obstacles confronting the usual litigant; and availability of free materials which the state must provide the prisoner, including paper and postage."[81] They might also argue that civilian pro se litigants are increasingly helped by online self-representation resources,[82] and that all pro se litigants are increasingly helped by legal self-help books.[83] Indeed, they might argue that the end result of all of these advantages is that, often, the papers prepared by an experienced pro se litigant are in many ways comparable to the papers prepared by either inexperienced or time-pressed attorneys representing the pro se litigant's opponents.[84]

Similarly, *all* of the courts' represented litigants might argue that any conferral of special status to overly litigious pro se litigants is unfair since it causes the resolution of their cases to be delayed months, perhaps years, as judges (and their law clerks) struggle with the papers of overly litigious pro se litigants in order to imagine every conceivable claim and argument they could have raised, stretching the courts' limited resources. This burden on the courts has been well documented, both anecdotally (*e.g.*, through comments by judges in decisions)[85] and more formally (*e.g.*, through surveys and studies).[86] The courts' represented litigants might also point out that, almost always, the represented litigants have paid the courts' costly filing fees,[87] while, almost always, the overly litigious pro se litigants have not paid those fees, having been

76. 28 U.S.C. § 1915(g); *see*, *e.g.*, Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 778-779 (10th Cir. 1999); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998); Perry, 371 F. Supp. 2d at 629; Hollis, 2005 WL 3077853, at *9.
77. *See* Rosenbloom, *supra* note 28, at 354.
78. *See* Case, *supra* note 11, at 735-740; James M. McCauley, *Unbundling Legal Services: The Ethics of "Ghostwriting" Pleadings for Pro Se Litigants*, 2004 PROF. LAW 59, 59 (2004); Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1148 (Feb. 2002); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 671-673 (Spring 1988).
79. *See* Lauren A. Weeman, *Current Developments 2005-2006: Bending the (Ethical) Rules in Arizona: Ethics Opinion 05-06's Approval of Undisclosed Ghostwriting May Be a Sign of Things to Come*, 19 GEO. J. LEGAL ETHICS 1041, 1041 (Summer 2006); Anthony Zapata, *Legal "Ghostwriting" in Indiana: An Analysis*, 49 RES GESTAE 20, 20 (Sept. 2005); Mark Hansen, *Helping Self-Helpers*, 90 A.B.A.J. 72, 72 (Sept. 2004); Goldschmidt, *supra* note 78, at 1146; Rothermich, *supra* note 14, at 2689.
80. Johnson v. Bd. of County Comm'rs, 868 F. Supp. 1226, 1231 (D. Colo. 1994); *see also* Duran v. Carris, 238 F.3d 1268, 1272 (10th Cir. 2001); Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1078 (E.D. Va. 1997); McCauley, *supra* note 78, at 59; Goldschmidt, *supra* note 78, at 1148.
81. Procup v. Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986).
82. *See* Weeman, *supra* note 79, at 1048; *see*, *e.g.*, Le Parker, *The Manual for the Litigant Filing Without Counsel* (2d ed. 1997) http://www.id.uscourts.gov/pro-se.htm (last visited Jan. 3, 2007).
83. *See*, *e.g.*, PAUL BERGMAN, REPRESENT YOURSELF IN COURT: HOW TO PREPARE & TRY A WINNING CASE (Nolo 5th ed. 2006); A JAILHOUSE LAWYER'S MANUAL: VOLS. I AND II (Columbia Hum. Rts. Law Rev. 6th ed. 2005); RODERIC DUNCAN, WIN YOUR LAWSUIT: A JUDGE'S GUIDE TO REPRESENTING YOURSELF IN CALIFORNIA SUPERIOR COURT (Nolo 2d ed. 2005); L. POWELL BELANGER, THE PRISONER'S GUIDE TO SURVIVAL: A COMPREHENSIVE LEGAL ASSISTANCE MANUAL FOR POST-CONVICTION RELIEF AND PRISONER CIVIL RIGHTS ACTIONS (PSI Pub., Inc., 2001); DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (Oceana Pubs., 3d ed. 1995).
84. *See* Case, *supra* note 11, at 737 ("While a pro se litigant is not necessarily on equal terms with a litigant who is well represented, he may well be on such terms with a litigant who is poorly represented.") [citations omitted]; *cf*. Wechsler v. R. D. Mgmt. Corp., 861 F. Supp. 1153, 1157 (E.D.N.Y. 1994) ("It is hardly an unwarranted leap in logic to extend the command of solicitude [ordinarily afforded to pro se litigants] to a party represented by a less than adequate lawyer who has failed to plead an absolute defense or an incontrovertible cause of action.").
85. *See, e.g.,* Green v. McKaskle, 788 F.2d 1116, 1120 (5th Cir. 1986); Urban v. U.N., 768 F.2d 1497, 1499-1500 (D.C. Cir. 1985); Tilbury, 2005 WL 3477558, at *10; Hollis, 2005 WL 3077853, at *9; Weber, 275 F. Supp. 2d at 622; Culp v. Phila. Newsp. & Mag. Empl. Union, 92-CV-0054, 1992 U.S. Dist. LEXIS 19329, at *11-13 (E.D. Pa. Dec. 10, 1992); Mallon v. Padova, 806 F. Supp. 1186, 1187 (E.D. Pa. 1992).
86. *See*, *e.g.*, Rosenbloom, *supra* note 28, at 306 n.7; Hon. Sharon E. Grubin & Hon. John M. Walker, Jr., *Report of the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 11, 85 (1997); Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revising the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2056 n.308 (1999); Junda Woo, *The Lawyerless: More People Represent Themselves in Court, But Is Justice Served?* WALL ST. J., at A1 (Aug. 17, 1993); Zapata, *supra* note 79, at 20; Sean Munger, *Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts*, 72 TUL. L. REV. 1809, 1820 & n.59 (May 1998).
87. For example, as of the date of publication of this article, the national federal-court filing fees are as follows: $455 in the courts of appeals (raised from $250 on April 9, 2006), and $350 in the district courts (raised from $250 on April 9, 2006).

granted *in forma pauperis* status.[88] Thus, the courts' represented litigants would probably argue that, in terms of time and money, the courts' "paying customers" are shouldering much of the cost imposed by pro se litigation.[89]

For these reasons, it appears that, based on a balancing of the equities, the revocation of special status in the case of overly litigious pro se litigants is generally fair. As one federal district court judge noted more than 20 years ago, "[T]here must come a point at which the solicitude owed the justice system must (like a supply-demand curve) rise to, intersect and surpass the obligation owed a persistent litigant such as [plaintiff]."[90]

V. PRACTICAL ADVICE FOR COURTS AND PRACTITIONERS

When courts and practitioners are considering whether the special status of a particularly litigious pro se litigant should be revoked, they might want to keep four points in mind. First, because the "experience" rationale is remedial in nature and not punitive, it is generally a more narrowly tailored solution to the problems posed by a pro se litigant's litigiousness than is the "abusiveness" rationale. Again, when relying on the "experience" rationale, courts are simply taking away a court-conferred litigation advantage after finding that the advantage is no longer necessary. Conversely, when relying on the "abusiveness" rationale, courts are punishing an overly litigious pro se litigant in a way that is often not directly related to the reason for the punishment. There are a number of sanctions that may be more directly related to an abusive litigant's particular abuses than is the revocation of his special status.[91] Furthermore, courts' application of the "abusiveness" rationale often ignores the fact that the pro se litigant remains (despite his abusiveness) in need of special treatment because of his inexperience. As a result, it appears that, generally, using an "experience" rationale is preferable to using an "abusiveness" rationale, when a choice exists between the two. (A conceivable example of when such a choice might not exist is when a pro se litigant has filed dozens of frivolous actions in a court, necessitating an order barring him from again proceeding pro se in that court without prior leave of the court.)

Second, there is, of course, no formula for determining "How many cases is too many?" However, it appears that, generally, the magic number is about a dozen.[92] Granted, there are some cases revoking the special status of a pro se litigant who has filed *fewer* than a dozen cases.[93] However, there appear to be *more* cases refusing to revoke the special status of a pro se litigant who has filed fewer than a dozen cases.[94] Interestingly, this *de facto* "rule of twelve" is consistent with the California Code of Civil Procedure, which declines to extend a reduction in small-claims-court filing fees to those litigants who have filed more than 12 small-claims lawsuits in the state within the previous 12 months.[95]

Third, when employing the "experience" rationale for revoking special status, courts need not myopically view what factors indicate whether a pro se litigant is "experienced." As explained earlier, when assessing such experience, courts usually look at the number of federal and state court actions and appeals the pro se litigant has previously filed, as well as the

88. *See* Rosenbloom, *supra* note 28, at 324-325.
89. *See*, *e.g.*, Iwachiw, 396 F.3d at 529; Ferdik, 963 F.2d at 1261; Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990); Procup, 792 F.2d at 1074; City of Buffalo, 1998 U.S. Dist. LEXIS 6070, at *16.
90. Antonelli v. Burnham, 582 F. Supp. 1067, 1069 n.4 (N.D. Ill. 1984).
91. Among these sanctions may be the following: (1) refusing to extend a procedural deadline (if the litigant's abuses have to do with procedural delays); (2) treating designated facts as established for purposes of the action, refusing to allow the litigant to support or oppose designated claims, prohibiting the litigant from introducing designated matters in evidence, or drawing an inference adverse to the litigant (if the litigant's abuses have to do with the discovery process); and (3) striking part of the litigant's motion papers or opposition papers (if the litigant's abuses have to do with the filing of frivolous or improper motion papers or opposition papers).
92. *See*, *e.g.*, Eggersdorf, 8 F. App'x at 143 (denying leniency to pro se inmate who had 12 simultaneously pending lawsuits in N.D.N.Y.); Gummerson, 201 F.3d at *2 (denying leniency to pro se inmate who had 12 simultaneously pending lawsuits in N.D.N.Y.); Talbot, 2005 U.S. Dist. LEXIS 39576, at *18-20 & n.10 (denying leniency to pro se inmate who had filed 20 lawsuits in N.D.N.Y.); Riddick, 2005 U.S. Dist. LEXIS 5394, at *7 & n.3 (denying leniency to pro se inmate who had filed 20 lawsuits in N.D.N.Y.).
93. *See*, *e.g.*, Santiago, 91 F. Supp. 2d at 670 (denying leniency to pro se inmate who had 10 lawsuits pending in S.D.N.Y.); Saunders, 2006 WL 3051792, at *2 & n.11 (denying leniency to pro se inmate who had previously filed eight federal court actions or appeals); McClellan, 1996 U.S. Dist. LEXIS 8164, at *3-4 & n.3 (denying leniency to pro se inmate who had filed seven previous lawsuits against prison officials); Brown, 1995 U.S. Dist. LEXIS 213, at *2 n.1 (denying leniency to pro se inmate who had seven lawsuits pending in W.D.N.Y.).
94. *See*, *e.g.*, McEachin v. Faruki, 03-CV-1442, 2006 WL 721570, at *2 n.3 (N.D.N.Y. March 20, 2006) (refusing to deny leniency to pro se inmate who had filed 11 other federal lawsuits since 2000); Pritchett v. Portoundo, 03-CV-0378, 2005 WL 2179398, at *2 n.3 (N.D.N.Y. Sept. 9, 2005) (refusing to deny leniency to pro se inmate who had filed eight other federal lawsuits since 1996); Burke v. Seitz, 01-CV-1396, 2006 WL 383513, at *2 n.5 (N.D.N.Y. Feb. 13, 2006) (refusing to deny leniency to pro se inmate who had filed six other federal lawsuits in previous nine years); Ariola v. Onondaga County Sher. Dep't, 04-CV-1262, 2007 WL 119453, at *3 (N.D.N.Y. Jan. 10, 2007) (refusing to deny leniency to pro se inmate who had previously filed five actions or appeals in federal or state court); Smith, 2006 WL 2805242, at *3 & n.4 (refusing to deny leniency to pro se inmate who had filed five other lawsuits); Loren v. Feerick, 97-CV-3975, 1997 WL 441939, at *1 & n.9 (S.D.N.Y. Aug. 6, 1997) (continuing to afford special status to pro se litigant who had filed five previous actions in state or federal court regarding current matter); Abbas v. Senkowski, 03-CV-0476, 2005 WL 2179426, at *2 n.4 (N.D.N.Y. Sept. 9, 2005) (continuing to afford special status to pro se inmate who had filed three other federal actions since 1997).
95. Cal. Civ. Proc. § 116.230 (2006).

recency or simultaneity of the actions and appeals.[96] However, some courts also look at the pro se litigant's *effectiveness* in litigating the action(s) or appeal(s) in question. Specifically, these courts typically examine things such as (1) the quality of pleadings (e.g., whether they are typed, crafted in accordance with the relevant rules of civil procedure, etc.), (2) the cogency of motion papers (e.g., whether they are supported by applicable legal authorities, filed in accordance with court rules, etc.), and (3) the ultimate success of any motions, actions or appeals the litigant has previously filed (or the failure of any motions previously opposed).[97] Such a practice seems appropriate in that it is consistent with the standard often used by courts to decide whether to appoint counsel to a pro se litigant.[98] Such a practice seems appropriate also as a matter of common sense. Is there a better indicator of experience than skill?

Finally, when applying the "experience" rationale, courts need not treat special status as an "all or nothing" benefit. Courts may confer special status to a pro se litigant on a "sliding scale," treating the litigant more leniently than other represented litigants but not as leniently as inexperienced pro se litigants.[99] Similarly, courts may limit the conferral of the benefit, or the denial of the benefit, to the particular motion or stage of the proceeding in question. Doing this would help mitigate any deleterious effect of mistakenly concluding that a pro se litigant is experienced when in fact he has simply been helped by a ghostwriter on a particular occasion.[100]

VI. CONCLUSION

One of the reasons for the trend's occurrence in the Third Circuit appears to be district courts' frustration with a handful of particularly abusive pro se litigants complaining about lending practices in the Philadelphia area in the past decade, while the main reason the trend's occurrence in the Second Circuit appears to be an increase in the skill of pro se inmate litigants due an effort to educate them by the prison system and federal district courts in New York State. This difference in these reasons for the trend mirrors the difference in the underlying rationales for the trend: (1) that the pro se litigant's excessive litigiousness is tainted with *abuse*, warranting sanctions to curb future abuses; and (2) that the pro se litigant's excessive litigiousness demonstrates his *experience*, the lack of which is the reason for conferring special status onto him. Regardless of which rationale is used, the practice is generally fair. However, courts and practitioners might want to keep four points in mind when wrestling with the issue of whether the special status of an overly litigious pro se litigant should be revoked.

First, the "experience" rationale for the revocation of special status appears to be a more narrowly tailored solution to the problems posed by a pro se litigant's excessive litigiousness than does the "abusiveness" rationale. Second, while there is no formula for determining "How many cases is too many?" generally the magic number appears to be about 12. Third, when using the "experience" rationale for revoking a pro se litigant's special status, courts should not look simply at the number of actions and appeals the pro se litigant has previously filed, and the recency or simultaneity of those actions and appeals; courts should look also at the pro se litigant's *effectiveness* in previously litigating the actions and appeals. Finally, when applying the "experience" rationale, courts should not fall into the trap of believing that special status is an "all or nothing" benefit: rather, it may be conferred on a "sliding scale," and it may be revoked for a discrete phase of the litigation. By keeping these points in mind, courts may more easily balance the need of pro se litigants to special treatment against the right of represented litigants to a playing field that is level and justice that is swift.

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96. *See supra* note 59 and accompanying text.
97. *See*, *e.g.*, Saunders, 2006 WL 3051792, at *2 & n.11; Sekendur, 2004 WL 2434220, at *5; *cf.* Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993).
98. *See*, *e.g.*, Hodge v. Police Officers, 802 F.2d 58, 61 (2d Cir. 1986); Tabron v. Grace, 6 F.3d 147, 155-156 (3d Cir. 1993); Farmer, 990 F.2d at 322; Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Long v. Shillinger, 927 F.2d 525, 527 (10th Cir. 1991).
99. *See*, *e.g.*, Holsey v. Bass, 519 F. Supp. 395, 407 n.27 (D. Md. 1981); Kilkenny v. Greenberg Traurig, LLP, 05-CV-6578, 2006 U.S. Dist. LEXIS 23399, at *18 (S.D.N.Y. Apr. 26, 2006); Bradlow, *supra* note 78, at 660.
100. *See supra* note 79 and accompanying next.