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NOTES

Awarding Attorney's Fees to Pro Se Litigants Under Rule 11

Jeremy D. Spector

INTRODUCTION

Among the myriad rules and statutes designed to curb litigation abuse, Rule 11 of the Federal Rules of Civil Procedure ("FRCP") is "the most widely used and most controversial of the sanctions rules."¹ The increased use of Rule 11² during the last fifteen years³

1. Melissa L. Nelken, *Introduction to SECTION OF LITIG., AMERICAN BAR ASSN., SANCTIONS: RULE 11 AND OTHER POWERS 1* (Melissa L. Nelken ed., 3d ed. 1992) [hereinafter SANCTIONS]; see also GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* § 1, at 2 (1989) (finding Rule 11 to be "the most prominent provision authorizing sanctions for litigation abuse"). For other views on the "controversy" over Rule 11, see THOMAS E. WILLING, *THE RULE 11 SANCTIONING PROCESS* 169-70 (1988) (finding that over 75% of judges and 67% of attorneys support the rule); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014 n.3 (1988) (reporting that 93% of judges and 77% of attorneys agreed that Rule 11 sanctions are necessary to deter frivolous arguments (citing NEW YORK STATE BAR ASSN., *REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEYS' FEES* 3 (June 8, 1987))).

2. Rule 11 requires a party to certify that the legal and factual contentions in any pleadings or other papers she submits to the court are not frivolous and that she is not offering the papers for any improper purpose. See FED. R. CIV. P. 11(b). The rule also sets forth a list of potential sanctions against any party who violates it; included in the list is an award of reasonable attorney's fees to the offended party. See FED. R. CIV. P. 11(c). Rule 11 provides in pertinent part:

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) [proscribing improper or frivolous papers] has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* . . . If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

3. From the inception of the FRCP in 1938 until 1983, there were only a few dozen published cases discussing the rule. See Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 257 (1991). Between August 1, 1983, when Rule 11 was amended to make the imposition of sanctions mandatory upon a finding of a violation, and August 1, 1985 alone, there were more than 200 reported decisions. See Melissa L. Nelken,

and the recent proliferation of fee-shifting provisions in federal statutes⁴ have led to an onslaught of motions for attorney's fees in the federal district courts.⁵ Simultaneously, these courts are seeing an increasing number of pro se litigants appear before them.⁶ The confluence of these two trends has produced the seemingly paradoxical result of pro se parties seeking attorney's fees awards.⁷

Over the past twenty years, pro se litigants have attempted to avail themselves of the attorney's fees provisions contained in such statutes as the Equal Access to Justice Act ("EAJA"),⁸ the Freedom of Information Act ("FOIA"),⁹ and the Civil Rights Attorney's Fees Awards Act ("§ 1988").¹⁰ They have met with limited success.¹¹ Very few pro se parties, however, have sought simi-

Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 GEO. L.J. 1313, 1326 (1986). Rule 11 was amended in 1993 to make sanctions permissive again — and not mandatory — and to provide for a 21-day safe-harbor period during which litigants could retract the violative paper without incurring any sanction. See FED. R. CIV. P. 11(c). Although there is no available data on this point, one may assume that since the 1993 amendment, the number of Rule 11 motions filed and Rule 11 sanctions granted has decreased significantly.

4. A fee-shifting provision allows a litigant to recover attorney's fees from the opposing party; usually these provisions are enacted to encourage meritorious actions by plaintiffs who otherwise would not have adequate means to bring a lawsuit. See *infra* section III.A (discussing the goals of several fee-shifting statutes). Such provisions, of course, constitute exceptions to the default American Rule, under which each party to a lawsuit pays its own costs and fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240 (1975). As of 1993, there were 153 federal statutes that provided for a fees award. See ALBA CONTE, ATTORNEY FEE AWARDS § 28.01 (2d ed. 1993).

5. One court has opined, "[t]o the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases." Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).

6. A pro se litigant is one who appears on "one's own behalf . . . as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1221 (6th ed. 1990).

In 1993, pro se parties appeared in approximately 16,800 appeals in the federal courts. See STATISTICS DIVISION, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRO SE APPEALS: PRO SE CASE PROCESSING IN THE U.S. COURTS OF APPEALS 3 (July 1995). The Administrative Office does not keep track of the number of pro se parties at the district court level. Approximately 27% of the pro se appeals were civil filings, and approximately 66% were prisoner cases. See *id.* at 4. By 1996, the number of pro se appeals — cases in which either the appellant, the appellee, or both, proceeded without an attorney — had risen to 22,258. See Statistics Division, Administrative Office of the U.S. Courts, Pro Se Table B-9A, at 1 (Sept. 30, 1996) (reporting data for the twelve months ending September 30, 1996) (unpublished data on file with author).

7. The paradox, of course, manifests itself in the assumption that a pro se litigant, who has not hired an attorney, could possibly recover attorney's fees.

8. 28 U.S.C. § 2412 (1994 & Supp. I 1997).

9. 5 U.S.C. § 552(a)(4)(E) (1994).

10. 42 U.S.C. § 1988(b) (1994) (providing fees for cases involving, inter alia, § 1983).

11. See, e.g., *Kay v. Ehrler*, 499 U.S. 432 (1991) (denying fees under § 1988); *Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993) (denying fees under the FOIA); *Crooker v. EPA*, 763 F.2d 16 (1st Cir. 1985) (per curiam) (denying fees under the EAJA); *Cazalas v. U.S. Dept. of Justice*, 709 F.2d 1051 (5th Cir. 1983) (denying fees under the FOIA). Most courts that deny fees requests under these statutes rely on both statutory language and legislative intent. See *infra* Part III.

lar awards under FRCP 11.¹² For this reason, the question of whether a court can award fees to a pro se party under Rule 11 has had little opportunity to percolate in judicial opinions and academic literature.

In the three cases in which courts have examined this issue, the decisions are split as to whether or not to award the fees.¹³ As with the statutory fee-shifting provisions, the debate in the Rule 11 context pits arguments based on policy against arguments based on language. Those who support the award contend that granting attorney's fees furthers Congress's intent of deterring conduct that violates Rule 11; those who disfavor the award assert that the words *attorney's fees* necessarily contemplate the existence of an attorney-client relationship. Therefore, they conclude, by definition a pro se litigant is not entitled to the fees award.

This Note argues that courts should grant a pro se litigant reasonable attorney's fees when the opposing party has violated Rule 11.¹⁴ Part I examines the goals of Rule 11 and concludes that Congress intended deterrence of abusive practices to drive the Rule 11 inquiry. Other, less important goals that inform the analysis include compensation of the offended party and punishment of the offending party. Part II discusses the factors that influence a judge in choosing a particular sanction and demonstrates that both practical and policy-oriented criteria support an award of attorney's fees

12. See *infra* note 13.

13. Only one published and two unpublished decisions discuss an award of attorney's fees to a pro se litigant under Rule 11. See *Committe v. Dennis Reimer Co.*, 150 F.R.D. 495 (D. Vt. 1993) (denying fees, though conceding that an award would further the underlying policy of the rule), *discussed infra* notes 60-62 and accompanying text; *Salamon v. Messina*, No. 87-C-2097, 1991 U.S. Dist. LEXIS 6118 (N.D. Ill. May 1, 1991) (denying fees on grounds that movant acted pro se), *aff'd*, Nos. 91-2248, 91-2400, 1997 U.S. App. LEXIS 5884 (7th Cir. Mar. 25, 1997), *discussed infra* note 62; *Rynkiewicz v. Jeanes Hosp.*, Civ. A. No. 86-5209, 1987 WL 7842 (E.D. Pa. Mar. 11, 1987) (awarding fees in light of Rule 11's goals), *discussed infra* notes 42-44 and accompanying text; cf. *Chemiakin v. Yefimov*, 932 F.2d 124 (2d Cir. 1991) (awarding attorney's fees to a pro se litigant under Federal Rule of Appellate Procedure 38), *discussed infra* note 52. The *Committe* court observed: "Although the Court is certain that this question has been presented to the federal courts previously, it has been unable to find a discussion of this precise issue in the reported case law." *Committe*, 150 F.R.D. at 501.

It is unclear why pro se litigants have not sought fees under Rule 11 more often. It may be that, because these parties often are not trained attorneys, they do not catch those instances in which the opposition files a frivolous or harassing paper. Nonetheless, given the flurry of pro se activity under the fee-shifting statutes, one might expect to see Rule 11 fees petitions being filed more frequently. Anecdotal evidence and the paucity of reported cases, however, suggest that pro se parties are not making these motions. See Telephone Interview with Judy Christie, Administrative Manager, United States District Court for the Eastern District of Michigan (June 18, 1997) (stating that she could not recall ever having seen such a motion).

14. This Note assumes throughout that the trial judge has already determined that one party has violated Rule 11 and that sanctions are warranted. The Note therefore is limited to that part of the Rule 11 inquiry in which the judge chooses exactly what sanction to impose. For an excellent discussion of the criteria informing the violation analysis, see *SANCTIONS*, *supra* note 1. See also *JOSEPH*, *supra* note 1, § 3, at 29-30.

even when the movant acts pro se. Part III contrasts the policy of Rule 11 with the goals of the fee-shifting provisions in three federal statutes.¹⁵ Part III concludes that, although courts almost uniformly deny pro se litigants fees under those statutes, the policies behind the fee-shifting provisions do not implicate the concerns addressed by Rule 11; therefore, courts are not bound by the cases denying fees under those statutes. Finally, Part IV suggests a means of calculating the ultimate award to the pro se litigant.

I. THE GOAL(S) OF RULE 11

Deterrence must underlie any Rule 11 decision because "the purpose of Rule 11 sanctions is to deter" abusive practices and frivolous arguments.¹⁶ The 1983 amendments to the rule reinforced this notion by adding the word "sanctions" to the rule's title.¹⁷ In making this change, the committee intended to "stress[] a deterrent orientation" for courts addressing violations of Rule 11.¹⁸ Finally, the Supreme Court has recently declared that "the central purpose of Rule 11 is to deter baseless filings."¹⁹

The Supreme Court may recognize punishment as an additional rationale for imposing a Rule 11 sanction,²⁰ even though its recent cases have emphasized deterrence. Moreover, the advisory committee has previously noted that "punishment of a violation . . . is part of the court's responsibility for securing the system's effective operation."²¹ Though several lower courts and commentators have echoed this position,²² they have not always seen punishment as a

15. The three statutes that have formed the bulk of the case law discussing awards of attorney's fees to pro se litigants are the EAJA, the FOIA, and § 1988. See *supra* notes 8-10 and accompanying text.

16. See FED. R. CIV. P. 11 advisory committee's note para. 13; see also *Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 752 (7th Cir. 1988). Rule 11 provides: "A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct . . ." FED. R. CIV. P. 11(c)(2). The long-term goals of the rule include increasing the professionalism of the bar and ensuring that parties bring only legitimate disputes to the court. See WILLGING, *supra* note 1, at 172.

17. The rule's full title is "Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions." FED. R. CIV. P. 11.

18. See FED. R. CIV. P. 11 advisory committee's note para. 12 (1983 amendment).

19. *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 552 (1991) (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (internal quotation marks omitted)); cf. *In re Yagman* (Brown v. Baden), 796 F.2d 1165, 1183 (9th Cir. 1986) (noting that Rule 11's "primary purpose . . . is to deter subsequent abuses").

20. See *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (finding that Rule 11's "purpose is not reimbursement but 'sanction'").

21. FED. R. CIV. P. 11 advisory committee's note para. 14 (1983 amendment). Although the 1993 committee note does not contain similar language, it does not renounce the punishment rationale found in this earlier comment.

22. See, e.g., *In re Kunstler* (Robeson Defense Comm. v. Britt), 914 F.2d 505, 522 (4th Cir. 1990) (noting that punishment and compensation are valid goals, but that courts should focus on deterrence); *McMahon v. Shearson/American Express, Inc.*, 896 F.2d 17, 21 (2d Cir.

goal in and of itself as much as a means of achieving the deterrence objective.²³ Given that view, and considering the Court's and advisory committee's hesitancy to rely solely on a punishment-based theory, courts should consider punishment only as a secondary factor in the Rule 11 sanction analysis.

Though also subordinate to the deterrence goal, a third, compensatory objective inheres in the rule as well.²⁴ Providing for a sanction such as attorney's fees — whose amount correlates to the expenses incurred by the offended party — appears to suggest a policy more akin to compensation than deterrence.²⁵ The committee note makes clear, however, that a Rule 11 sanction, though potentially calculated on the basis of the movant's monetary expenditures, still has deterrence as its primary objective.²⁶ Thus "a district court may take into account compensation of other parties

1990) (same); *Danik, Inc. v. Hartmarx Corp.*, 875 F.2d 890, 895 (D.C. Cir. 1989) ("Rule 11 sanctions . . . are . . . punitive and deterrent in purpose (though they are also compensatory in effect)."), *modified sub nom. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1180 (D.C. Cir. 1985) (commenting that Rule 11's two goals are punishment and deterrence (citing William W. Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 201 (1985))); Schwarzer, *supra*, at 185 (contending that the rule "is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party"); *id.* at 201 ("The rule reflects a dual purpose: compensating the offended party for the expenses caused by a violation as well as penalizing the offender to achieve . . . deterrence.").

23. *See, e.g., Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (en banc) (citing FED. R. CIV. P. 11 advisory committee's note para. 12 (1983 amendment)); *Oliveri v. Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986).

24. *See Salamon v. Messina*, No. 87-C-2097, 1991 U.S. Dist. LEXIS 6118, at *2 (N.D. Ill. May 1, 1991) ("Rule 11 sanctions are designed to serve three purposes: (1) to compensate . . . (2) to punish . . . and (3) to deter . . ."), *affd.*, 1997 U.S. App. LEXIS 5884 (7th Cir. Mar. 25, 1997); JOSEPH, *supra* note 1, § 16(C)(1) (claiming that courts "uniformly accept the multiple — deterrent, compensatory and punitive — purposes of the Rule," although deterrence certainly remains the principal goal); *see also* cases cited *supra* note 22.

Support for the compensatory rationale has endured notwithstanding the advisory committee's assertion that "the purpose of Rule 11 sanctions is to deter rather than to compensate." FED. R. CIV. P. 11 advisory committee's note para. 13; *cf. Pavelic & LeFlore*, 493 U.S. at 126 (stating that "[t]he purpose of the provision in question . . . is not reimbursement but 'sanction.'"). The committee note itself, however, provides a basis for the broader interpretation of the rule's purposes: in listing the factors to be considered in choosing the sanction, the committee includes one criterion that is compensatory in nature — the effect of the violation on the expense of the litigation. *See* FED. R. CIV. P. 11 advisory committee's note para. 12.

One court has ventured that the rule "effectively picks up the torts of abuse of process . . . and malicious prosecution." *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987). Under this rubric, the compensatory element would receive more attention. No other court, however, has relied on this language from *Szabo*; furthermore, the Supreme Court expressly rejected the malicious-prosecution analogy in *Business Guides*, 498 U.S. at 553 (citing *Cooter & Gell*).

25. *See* William A. McCormack et al., *First Circuit*, in *SANCTIONS*, *supra* note 1, at 19, 26.

26. *See* FED. R. CIV. P. 11 advisory committee's note paras. 12-13.

and punishment of the offender, but deterrence remains the touchstone of the Rule 11 inquiry."²⁷

When the movant acts pro se, emphasizing deterrence over compensation makes all the difference: because an unrepresented party's expenses will be relatively low, little if any deterrent effect would accrue from forcing the nonmovant to reimburse only those expenses. Were a court to focus on compensation, it would transform Rule 11 into a fee-shifting statute, thereby undermining the Supreme Court's insistence that the rule remain a mechanism for preventing litigation abuse.²⁸ With deterrence as the overriding theme, the actual amount of fees incurred becomes less important than the size of sanction required to send an effective message both to the offender and to the bar in general.²⁹

II. DETERMINING THE APPROPRIATE SANCTION

A grant of attorney's fees to a pro se litigant follows directly from the legislative objective of deterrence. This Part illustrates the reasons for, and addresses the potential objections to, making an attorney's fees award to an unrepresented party. Section II.A explains that while trial judges have significant discretion in determining the type and severity of sanctions that they can impose under Rule 11, attorney's fees are by far the most frequent and most logical choice. Section II.A concludes that courts should make that same choice when the movant acts pro se. Section II.B refutes arguments against making the award — including those based on statutory language and on fears of granting movants potential windfalls — in favor of honoring the deterrence rationale that controls Rule 11.

27. *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991) (per curiam) (citing 1983 advisory committee's note).

28. See *Business Guides*, 498 U.S. at 533; cf. *In re Kunstler* (Robeson Defense Comm. v. Britt), 914 F.2d 505, 522 (4th Cir. 1990). In a study of seventeen federal trial judges, only three viewed compensation as the rule's primary goal. See WILLING, *supra* note 1, at 23.

29. This is not to say that a compensatory element does not enter the equation at all. Indeed, Part IV argues that the best method for calculating an appropriate award is based on the compensation an attorney would receive for responding to the violative motion. The point here is that compensation of the pro se movant should not be the impetus behind the decision of what type of award to issue in the first place. Instead, the district court enjoys wide latitude to mete out a sanction that serves the rule's deterrent objective. See *infra* notes 45-50 and accompanying text. Once a judge decides, for deterrence-related reasons, to impose a significant monetary sanction, he can calculate that figure using compensatory considerations. The choice of sanction is examined *infra* Part II.

A. Why Choose Attorney's Fees?

Among all the sanctions a trial judge could choose, only attorney's fees will fulfill the goals of Rule 11.³⁰ Only if a court imposes a substantial monetary sanction — only if it “hits them where it hurts” — will parties be dissuaded from violating the rule's prescriptions. A sanction imposing the mere costs incurred by a pro se litigant — for example, filing and copying costs — would be insignificant and thus would not deter future abusive conduct.³¹ A fees award, on the other hand, carries a large enough price tag that it will serve the appropriate deterrent effect.

As an alternative, one might suggest assessing a fine payable directly to the court.³² This approach would provide the same deterrent effect as a fees award and simultaneously would avoid awarding fees when none were incurred. Such a route, however, would be unfavorable for several reasons. First, judges should strive to treat represented and unrepresented parties consistently

30. One might argue that the very stigma associated with incurring a Rule 11 sanction could, by itself, dissuade some potential violators of the rule. If the case reports and attendant scholarship are any indication, however, neither judges nor academics consider that stigma sufficient to meet the rule's objectives. See *infra* note 51 and accompanying text; see also *infra* note 40 (discussing Rule 11 sanctions other than attorney's fees).

31. The 1983 amendment to Rule 11 added attorney's fees to the list of possible sanctions. See FED. R. CIV. P. 11 advisory committee's note para. 3 (1983 amendment). This conspicuous change exemplified Congress's intent to put some bite in the rule and to discourage violations of it more forcefully. Awarding unrepresented parties an amount equivalent to an attorney's fee furthers this goal. See *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc) (holding that the “imposition of a monetary sanction is a particularly reasonable use of a court's discretion under Rule 11”).

32. Some have argued that ordering a monetary sanction in any amount greater than the attorney's fees actually incurred would constitute an imposition of a criminal fine for contempt; such a sanction would require the procedural safeguards afforded by Federal Rule of Criminal Procedure 42(b), including a higher burden of proof and, in many cases, the right to a jury trial. See *Cotner v. Hopkins*, 795 F.2d 900, 903 (10th Cir. 1986) (per curiam); *Nelken*, *supra* note 3, at 1338 & n.163. But see *Eisenberg v. University of N.M.*, 936 F.2d 1131, 1137 (10th Cir. 1991). In *Eisenberg*, the Tenth Circuit distinguished — and severely limited — its earlier decision in *Cotner* and held that a fine is a proper Rule 11 sanction when it is neither arbitrary nor levied simply “to emphasize a point.” See *Cotner*, 936 F.2d at 1136 (quoting *Magnus Elecs., Inc. v. Masco Corp.*, 871 F.2d 626, 634 (7th Cir. 1989)); cf. *In re Yagman* (*Brown v. Baden*), 796 F.2d 1165, 1180-81 (9th Cir. 1986) (upholding a \$250,000 award imposed without the Rule 42 safeguards, but noting that a Rule 11 sanction could constitute a criminal fine if the amount was “grossly disproportionate to the attorney's misconduct or otherwise [fell] outside the bounds of the authority for the sanction”).

Perhaps the most persuasive reason to refrain from equating a Rule 11 monetary sanction with a fine for criminal contempt is that “[n]othing in the text of Rule 11 or in the Advisory Committee Note indicates that due process requires a court to follow the procedures called for by [Rule 42]. . . . Both the note and policy considerations [such as limiting the sanction hearing to facts in the record] tend to the opposite conclusion.” *Donaldson*, 819 F.2d at 1558. Rule 11 requires only that, in imposing any sanction, including a fine, the court afford the nonmovant notice and the opportunity to be heard. See FED. R. CIV. P. 11(c).

The Ninth Circuit has suggested that courts employ the phrase “monetary sanction” instead of “fine” to avoid the connotations and procedural requirements that attach to that latter term. See *In re Yagman*, 796 F.2d at 1180; *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983), discussed in *Eisenberg*, 936 F.2d at 1136-37.

— that is, they should impose similar sanctions for similarly offensive conduct, regardless of who the offended party might be. Because represented parties whose opponents violate Rule 11 are almost always granted attorney's fees,³³ pro se litigants should receive that same award.³⁴ Second, requiring the nonmovant to pay the fine into court would deprive the pro se litigant of any compensation, which is a lesser yet significant goal of the rule.³⁵ This litigant, after all, did experience some compensable harm — whether in terms of opportunity costs or in terms of the administrative costs of responding to the offensive paper.³⁶ Third, the advisory committee itself suggests that there exist some circumstances in which the objectives of Rule 11 can be achieved only if the sanction is paid directly to the other party and not into court.³⁷ Fourth, and perhaps most important, denying the unrepresented litigant any award, or compensating him solely for his costs, would reduce the incentive pro se parties have to bring Rule 11 actions — and thus would reduce enforcement of the rule itself. Once a litigant is aware that her pro se adversary is unlikely to institute a Rule 11 proceeding, that litigant may become more lax in monitoring and curbing her own potentially violative behavior.³⁸

When a party does violate Rule 11, the sanction should be only as severe as necessary to deter the offending party and the bar.³⁹ A

33. See *infra* notes 51-52 and accompanying text.

34. Given that a pro se litigant himself can be sanctioned under Rule 11, see FED. R. CIV. P. 11 advisory committee's note para. 2 (adopting the principle that the rule applies to "attorneys and pro se litigants"), equity demands that a pro se party's adversary abide by — and suffer the same consequences of — the rule as well.

35. For a discussion of the compensatory goal, see *supra* notes 24-27 and accompanying text.

36. For a discussion of opportunity costs, see *infra* notes 113-15 and accompanying text.

37. The committee note states that

if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation.

FED. R. CIV. P. 11 advisory committee's note para. 13. Unfortunately, the committee does not explain the rationale behind this position. It is possible that the committee finds a certain moral appeal in having the offending party pay the offended party directly.

38. As a compromise, one might suggest assessing a sanction payable partly to the movant and partly to the court. Cf. *supra* note 37 (quoting advisory committee note recognizing that some situations will require splitting the award between the court and the movant, instead of paying it all into court). Doing so would obviate many of the concerns of awarding fees when none were incurred. See *infra* section II.B.2. Furthermore, a court could still grant the pro se litigant an amount sufficient to compensate him for any expenses incurred and to retain the incentive to bring the action. On the other hand, adopting this "split payment" approach would frustrate the consistency and "moral appeal" goals discussed above. See *supra* notes 33-34 and accompanying text; *supra* note 37.

39. Rule 11 admonishes that any sanction "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct." FED. R. CIV. P. 11(c)(2). For cases invoking this premise, see *Hilton Hotels Corp. v. Banov*, 899 F.2d 40, 46 (D.C. Cir. 1990);

fees award therefore might not be necessary if a court could meet the deterrence goal through other, nonmonetary sanctions.⁴⁰ The reverse, however, is also true. A court may impose a sanction in excess of the movant's attorney's fees if the court believes that such a sanction is necessary to deter further violative conduct.⁴¹

Consider the case of *Rynkiewicz v. Jeanes Hospital*.⁴² There the defendants moved to dismiss the pro se plaintiff's ADEA claim even though there was no legal basis for that motion.⁴³ In denying the motion and imposing sanctions, the trial judge wrote, "I see no reason why the fact that plaintiff is proceeding pro se should redound to the benefit of defendants' attorney insofar as Rule 11 sanctions are concerned." That no fees were incurred was immaterial. The court therefore awarded the pro se litigant the amount of a reasonable attorney's fee.⁴⁴

Because trial judges are entrusted with much discretion in effectuating the underlying policy of the FRCP,⁴⁵ "the Civil Rules place virtually no limits on judicial creativity."⁴⁶ Thus the advisory committee encourages district courts engaging in the sanctioning calculus to consider many different factors relating to the offending paper.⁴⁷ Specifically, the court may weigh certain equitable factors that do not necessarily reflect the expenses or fees incurred.⁴⁸

Jackson v. Law Firm of O'Hara, Ruberg, Osborne & Taylor, 875 F.2d 1224, 1229 (6th Cir. 1989); Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988) (en banc); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987).

40. Other sanctions available include oral or written reprimand, referral to disciplinary authorities, exclusion of evidence, dismissal or admission of certain elements of a pleading, and continuing-education classes. See FED. R. CIV. P. 11 advisory committee's note ¶ 12; WILLING, *supra* note 1, at 127.

41. See *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991) (per curiam).

42. Civ. A. No. 86-5209, 1987 WL 7842 (E.D. Pa. Mar. 11, 1987).

43. See 1987 WL 7842, at *2.

44. See 1987 WL 7842, at *3. For a discussion of what is "reasonable," see *infra* Part IV.

45. See *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 252 (2d Cir. 1985); cf. FED. R. CIV. P. 11 advisory committee's note ¶ 12 (declining to restrict a district court's choice of sanctions).

46. *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir. 1990); see also *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987) (en banc) (affirming that trial judges have discretion to select the type of sanction to be imposed).

For examples of truly creative sanctions, see *Curran v. Price*, 150 F.R.D. 85, 87 (D. Md. 1993) (ordering attorney who blatantly disregarded requirements of the federal removal statute to copy out, by hand, the whole section on removal in *Wright, Miller & Cooper's Federal Practice and Procedure*); *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519, 1522-23 (N.D. Cal. 1984) (ordering counsel's law firm to pay the adversary's attorney's fees and to circulate the judge's order to that effect among all partners and associates in the firm), *affid.*, 790 F.2d 1421 (9th Cir. 1986).

47. See FED. R. CIV. P. 11 advisory committee's note ¶ 12 (listing relevant factors).

48. See JOSEPH, *supra* note 1, § 16(B)(4), at 226 (citing cases); *id.* § 15B, at 214; see also *Brown v. Federation of State Med. Bds.*, 830 F.2d 1429, 1439 (7th Cir. 1987) (noting that the fashioning of sanctions is an equitable process).

In fact, equity would permit federal courts to award these fees even absent Rule 11. See *Hall v. Cole*, 412 U.S. 1, 4-5 (1973) (holding that an award of attorney's fees is within courts'

Interpreting Rule 11 to include these considerations allows judges to assess an award substantial enough to force the offending party "to answer for [her] act."⁴⁹ At bottom, the express grant of judicial latitude, coupled with the requirement that judges match sanctions to the requisite degree of deterrence, ensures that courts will impose sanctions, including attorney's fees, that reflect the offensiveness of the violation and not the representation vel non of the movant.⁵⁰

There is a final important reason to choose attorney's fees as the proper sanction. The use of sanctions other than attorney's fees is rare under Rule 11.⁵¹ Presumably judges would not consistently award these fees if the sanction did not serve the goals of the rule. To continue achieving those goals, judges should punish similar violations with similar sanctions, regardless of the movant's status.⁵² Thus, when a movant is unrepresented, the judge should choose the same effective sanction that he would apply if the movant were not proceeding pro se — that is, a fees award.

"equitable powers"); cf. Timothy B. Phelps, Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 348 (1987) (stating that the amended version of Rule 11 "clarifies that the drafters intended the courts to invoke all equitable powers" in meeting the rule's goals). The thesis of this Note, however, is that judges need not rely on equity, nor on their inherent power to award fees, see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991), nor on the fees-award provision of 28 U.S.C. § 1927 (1994) (providing for attorney's fees when one party "unreasonably and vexatiously" multiplies the proceedings), but instead need only avail themselves of Rule 11 to award attorney's fees to pro se litigants.

49. *Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1079 (7th Cir. 1987) (analogy a Rule 11 sanction to a sanction for contempt). An offending party usually cannot be made to "answer for [her] act" without paying a substantial sum, often equivalent to a reasonable attorney's fee. See text accompanying notes 30-32 & 37.

50. See *infra* notes 73-74 and accompanying text.

51. See WILLING, *supra* note 1, at 5 (analyzing 85 published Rule 11 decisions and finding nonmonetary sanctions in only two cases); Raymond Bragar, *Second Circuit, in SANCTIONS*, *supra* note 1, at 41, 47 (finding attorney's fees the "sanction of choice" in the Second Circuit); Nelken, *supra* note 3, at 1333 (finding attorney's fees awarded in 96% of Rule 11 cases studied); Jerold S. Solovy et al., *Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, in 1 CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS § II-J-3, at 51 (Sol Schreiber et al. eds., 5th ed. 1992) (asserting that though Rule 11 provides for many types of sanctions, "courts most commonly award attorney's fees").

52. See *supra* text accompanying note 50; *infra* notes 73-74 and accompanying text.

The Second Circuit relied on a similar rationale in *Chemiakin v. Yefimov*, 932 F.2d 124 (2d Cir. 1991), in which the court found the appellant's appeal frivolous and awarded the pro se appellees attorney's fees under Federal Rule of Appellate Procedure ("FRAP") 38. See 932 F.2d at 125. That rule, similar to FRCP 11, provides: "If a court of appeals determines that an appeal is frivolous, it may . . . award just damages and single or double costs to the appellee." FED. R. APP. P. 38. The advisory committee's note to FRAP 38 states that "damages" includes attorney's fees. See FED. R. APP. P. 38 advisory committee's note (1967 amendment). In granting the fees, the Second Circuit found that the appellees "suffered considerable vexation" and that they were therefore entitled to the award notwithstanding the fact that they had incurred no attorney's fees. See *Chemiakin*, 932 F.2d at 130. Because FRCP 11(b) proscribes the very type of offensive (i.e., vexatious and frivolous) conduct found in *Chemiakin*, the Second Circuit's FRAP 38 analysis firmly supports an attorney's fees award to a pro se party under FRCP 11.

When the violation is wilful,⁵³ judges are similarly more likely to impose a fees award than any other sanction.⁵⁴ Therefore, when a party has taken advantage of a pro se litigant's status, for example, by inundating him with excessive motions or stimulating significant filing costs — significant in terms of the pro se party's financial resources — assessing an attorney's fee against the offending party has even more appeal.

B. *Arguments for Denying the Award*

Those who challenge the construction of Rule 11's attorney's fees provision advanced in this Note launch two types of objections.⁵⁵ Section B.1 discusses the first type, which is based on a literal interpretation of the rule's text. The phrase *attorney's fees*, the argument goes, plainly precludes an award when there is no attorney. Section B.1 demonstrates why, in light of the ramifications of this strict-constructionist approach, that attack falls short.⁵⁶ The second category of objections encompasses more general policy concerns about awarding fees. Section B.2 evaluates these objections, including those based on fears of granting movants a windfall and of significantly increasing the number of Rule 11 motions filed in the district courts, and concludes that they too are unpersuasive.

1. *Statutory Construction*

Rule 11 speaks of "attorney's fees . . . incurred."⁵⁷ The literal meaning of these words presents a potential bar to any fees recovery by a pro se movant. Indeed, the Supreme Court has asserted that it will "give the Federal Rules of Civil Procedure their plain meaning . . . and generally with them as with a statute, '[w]hen we find the terms . . . unambiguous, judicial inquiry is complete.'⁵⁸

53. See FED. R. CIV. P. 11(b)(1) (proscribing any filing made for an "improper purpose").

54. See WILLGING, *supra* note 1, at 31.

55. Of course, to speak of these opponents as if they were a unified force is somewhat misleading, as the issue discussed in this Note has not received much attention in the legal community. See *supra* note 13 and accompanying text. These "opponents" instead represent an amalgam of the few judges who have issued opinions on the subject, see *supra* notes 42-44 and *infra* notes 60-62 and accompanying text, those judges and commentators who have made similar objections in related contexts, see *infra* Part III, and jurists who generally invoke the principles of strict statutory construction, see *infra* section II.B.1.

56. This Note thus encourages judges to interpret the existing language of the rule to achieve the proposed result. The same result could be reached outright by amending the language of Rule 11, although following that course is not necessary. See *infra* notes 66-72 and accompanying text (discussing interpretation of the Federal Rules beyond their strict statutory language).

57. FED. R. CIV. P. 11(c)(2).

58. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989) (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980), and quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); see also *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 541 (1991).

The Court has noted that even if it were to agree that a novel interpretation would effectuate the legislative policy underlying Rule 11, "[o]ur task is to apply the text, not to improve upon it."⁵⁹

The district court adopted this view in *Committe v. Dennis Reimer Co.*,⁶⁰ one of the few reported decisions that ask whether pro se movants may obtain fees under Rule 11. In that case, the court denied fees for the pro se plaintiff based on the rule's language. While the court agreed with the movant that an attorney's fees award would further Rule 11's deterrence goal and would be consistent with the advisory committee's note,⁶¹ it felt bound by the plain meaning of the word "incurred" and therefore refused to grant the fees motion.⁶²

A second language-based argument asserts that because the word *attorney* implies that an agency relationship exists between two individuals,⁶³ "the terms '*pro se*' and '*attorney*' are mutually exclusive."⁶⁴ The notion of an attorney's fee assumes that there is one person — an attorney — charging another.⁶⁵ Consequently, this argument suggests, any of the policy justifications above — including those founded on the multiple goals of deterrence, compensation, and punishment, and those seeking to maintain consis-

Caminetti v. United States, 242 U.S. 470, 485 (1917), provides an early articulation of this "plain meaning rule": "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." See also 242 U.S. at 485 (stating that when "the language is plain and admits of no more than one meaning the duty of interpretation does not arise").

One influential commentator, however, has suggested that lower courts do not uniformly heed the Supreme Court's advice: "[C]ontrary to the traditional operation of the plain meaning rule, courts are increasingly willing to consider other indicia of intent and meaning from the start rather than beginning their inquiry by considering only the language of the act." 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.07, at 126 (5th ed. 1992).

59. *Pavelic & LeFlore*, 493 U.S. at 126. Though one could argue that this statement is mere dictum and thus does not bind lower courts in fashioning an effective Rule 11 sanction, there are stronger reasons for not adopting a strict plain-meaning approach. See *infra* notes 66-72 and accompanying text.

60. 150 F.R.D. 495 (D. Vt. 1993).

61. The court further noted that the goals of Rule 11 differ significantly from those of § 1988 and that therefore the cases denying fees under that statute should not resolve the Rule 11 inquiry. See *Committe*, 150 F.R.D. at 501-02; see also *infra* section III.A.3 (discussing and distinguishing the goals of § 1988).

62. See *Committe*, 150 F.R.D. at 502 (requiring "payment" of fees before the award can be granted). The district court in *Salamon v. Messina*, No. 87-C-2097 1991 U.S. Dist. LEXIS 6118 (N.D. Ill. May 1, 1991), *aff'd*, Nos. 91-2248, 91-2400, 1997 U.S. App. LEXIS 5884 (7th Cir. Mar. 25, 1997), similarly denied a Rule 11 fees motion made by a pro se party because the movant represented himself. See *Salamon*, 1991 U.S. Dist. LEXIS 6118, at *3.

63. See *Duncan v. Poythress*, 777 F.2d 1508, 1519-21 (11th Cir. 1985) (en banc) (Roney, J., dissenting) (providing 24 dictionary definitions to support the claim).

64. *Duncan*, 777 F.2d at 1518 (Roney, J., dissenting) (discussing attorney's-fees provision in § 1988).

65. See *Jones v. Lujan*, 883 F.2d 1031, 1037 (D.C. Cir. 1989) (Silberman, J., concurring).

tent practice under Rule 11 — would appear to fail in the face of clear statutory language.

The literalist approach, however, falters once one appreciates the flexibility actually afforded by the Supreme Court's interpretive methodology for Rule 11 cases. Although the Court refused to construe the rule beyond its literal meaning in *Pavelic & LeFlore v. Marvel Entertainment Group*,⁶⁶ the language of that opinion does allow for latitude in interpreting and enforcing Rule 11 in some situations. The Court implied that it might give weight to congressional policy if doing so would not require an "unnatural" construction of the text.⁶⁷ Applying Rule 11 so as to deter future violative conduct — as this Note proposes — furthers the congressional objectives that *Pavelic & LeFlore* sought to protect⁶⁸ and thus seems quite consistent with a "natural" reading of the rule.

A pro se litigant's request for an attorney's fees award constitutes one of those "rare cases" in which, because "the literal application of a [rule would] produce a result demonstrably at odds with the intentions of its drafters . . . those intentions must be controlling."⁶⁹ Unlike a case such as *Pavelic & LeFlore*, in which the Court had to decide whether to extend the liability of one attorney to the whole law firm,⁷⁰ the case of the pro se litigant asks whether a court will impose any significant liability at all. A court that declined to impose this liability certainly would be producing "a result demonstrably at odds" with the goal of Rule 11 — prevention of baseless and harassing litigation conduct.⁷¹ Because the Court has stated

66. 493 U.S. 120 (1989); see *supra* notes 58-59 and accompanying text.

67. See *Pavelic & LeFlore*, 493 U.S. at 126 ("[W]e would not feel free to pursue that [legislative] objective at the expense of a textual interpretation as unnatural as [has been proposed].").

68. See *Pavelic & LeFlore*, 493 U.S. at 126; cf. *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (finding that the "plain-meaning rule is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists" (internal quotation marks omitted) (quoting *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928))). Moreover, canons of statutory interpretation provide that the Federal Rules are to be construed liberally. See 3A SINGER, *supra* note 58, § 67.10, at 87; cf. FED. R. CRV. P. 1 (stating that the Rules are to "be construed . . . to secure the just . . . determination of every action"). For decisions that advocate forgoing strict construction in favor of legislative policy, see *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 979 (2d Cir. 1991); *Rod Warren Ink v. Commissioner*, 912 F.2d 325, 326 (9th Cir. 1990); *Commodity Futures Trading Commn. v. P.I.E., Inc.*, 853 F.2d 721, 725 (9th Cir. 1988); *Lawrence v. Staats*, 640 F.2d 427, 429 (D.C. Cir. 1981). But see *In re Erickson Partnership* (*United States v. Erickson Partnership*), 856 F.2d 1068, 1070 (8th Cir. 1988) (holding that a conflict between legislative history and statutory language is insufficient to justify departure from clear provisions).

69. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); accord *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); see also *Rector of Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

70. See *Pavelic & LeFlore*, 493 U.S. at 121.

71. See *supra* Part I.

that it will consider legislative intent when that intent clearly contradicts statutory language⁷² — and because fulfilling the deterrence objective of Rule 11 necessitates reading the “attorneys’ fees . . . incurred” language more liberally than its strict construction would permit — the plain-meaning argument ultimately must fail.

2. Policy Concerns in Making the Award

In addition to positing objections based on statutory language, those who oppose fees awards for pro se parties proffer broader policy arguments to support their interpretation. They argue, for instance, that granting fees in any amount greater than actual expenses incurred would prove a windfall for the movant. This argument loses force in light of two countervailing factors. First, Rule 11 is not primarily a compensatory provision; it is about deterring future litigation abuse.⁷³ Therefore, in fixing the amount of a fees award, a district court need not rely as heavily on what the pro se party lost as much as on the quality of the violative action.

Second, if the choice is between granting a litigant more than he may actually “deserve” and not punishing or not deterring behavior that violates the norms of civil procedure, adherence to the goals of Rule 11 counsels in favor of the former option.⁷⁴ For example, in *Pelletier v. Zweifel*,⁷⁵ the Rule 11 movant “lost” nothing because his insurance carrier paid for his defense; strictly speaking, he incurred no fees. The court, however, found that the offending party was not entitled to a “free” violation of Rule 11 on account of the defendant’s prudence in procuring insurance. The court therefore allowed the movant to recover fees.⁷⁶ Granting a pro se litigant reasonable attorney’s fees constitutes an excessive award only if one erroneously measures what is “reasonable” by actual costs and fees

72. See *Ford Motor Credit Co. v. Cenace*, 452 U.S. 155, 158 n.3 (1981) (per curiam) (interpreting the Truth in Lending Act); *supra* note 69 and accompanying text. The Fifth Circuit similarly has stated: “[S]tatutory construction must not occur in a vacuum. Statutes are contextual as well as textual. . . . Courts must also look to the . . . broad national policy which prompted the legislation.” *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968) (citing *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943)).

73. See *supra* Part I. Indeed, the Supreme Court has approved a sanction that incidentally conferred a benefit on the moving party when the sanction was necessary to carry out Rule 11’s objective. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 551-53 (1991) (affirming fees award over objection based on the Rules Enabling Act, 28 U.S.C. § 2072 (1994), which prohibits courts from enacting any rules that “abridge, enlarge or modify any substantive right” embodied in the FRCP).

74. See *supra* Part I.

75. 987 F.2d 716 (11th Cir. 1993) (per curiam).

76. See 987 F.2d at 719.

incurred and not by the other systemic costs⁷⁷ that the underlying policy of the rule seeks to reduce.

Other worries about awarding pro se litigants attorney's fees are similarly unconvincing. The rule itself allays any concern that the possibility of high awards will result in a proliferation of unwarranted Rule 11 motions, which in turn would detract attention from the underlying causes of action. Any abuse of the judicial system, even in a fees petition, can result in Rule 11 sanctions being imposed on the original movant.⁷⁸ The rule's deterrent aspect thus should forestall any proliferation of distracting motions.⁷⁹ Concerns about enlarging judges' workloads⁸⁰ — even on account of nonfrivolous fees petitions — similarly carry little weight: if courts consistently impose sanctions, those sanctions will deter frivolous actions and motions, and burdens on judicial dockets will decrease. Far from controverting the goal of the attorney's-fees provision — which is the worry in the statutory fee-shifting cases⁸¹ — imposition of Rule 11 sanctions in the form of attorney's fees, even in favor of pro se litigants, furthers the underlying objective of the rule.⁸²

III. FEE-SHIFTING PROVISIONS VERSUS RULE 11

Although courts deny pro se litigants attorney's fees almost without exception under the Equal Access to Justice Act, the Freedom of Information Act, and the Civil Rights Attorney's Fees Awards Act,⁸³ this Part argues that those courts' holdings should

77. These costs include the waste of judicial resources in hearing frivolous motions, delay or even loss of the pro se litigant's legitimate claims, and decreased professionalism in the bar.

78. "[T]he filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions." FED. R. CIV. P. 11 advisory committee's note para. 22; *see, e.g.*, *United States v. City of San Francisco*, 132 F.R.D. 533 (N.D. Cal. 1990).

79. Contrary to most predictions following the 1983 amendments to Rule 11, no cottage industry in Rule 11 motions has arisen in the federal courts. *See WILLING*, *supra* note 1, at 109-10. There seems to be little danger of this litigation explosion because courts still can and do readily deny frivolous motions. *See Vincent M. Waldman, Note, Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants*, 34 *STAN. L. REV.* 659, 673 (1982).

80. *See Waldman, supra* note 79, at 668 (finding that pro se actions often crowd the courts, consume much of the courts' time, and are poorly managed).

81. *See infra* Part III.

82. One final argument against awarding attorney's fees to a pro se litigant, which has appeared in the FOIA context, is that any fees award would be excessive because it would impose a penalty on the opposing party. *See Waldman, supra* note 79, at 668 (citing *Barrett v. Bureau of Customs*, 651 F.2d 1087 (5th Cir. Unit A July 1981)). In the Rule 11 context, this concern is not a concern at all; the rule is geared partially toward punishing offending parties. *See supra* notes 20-21 and accompanying text.

83. *See supra* notes 8-11 and accompanying text. The great majority of cases discussing attorney's fees for pro se parties centers on these three statutes. One court has gone so far as to assert that there is "no fundamental difference" among the policies underlying the fees provisions in the FOIA, the EAJA, and § 1988. *See Crooker v. EPA*, 763 F.2d 16, 17 (1st Cir. 1985) (*per curiam*).

not control the Rule 11 analysis. In rejecting fees petitions under those statutes, courts invoke two separate rationales. The first focuses on the legislative policies underlying the various statutes. Section III.A outlines those policies and demonstrates why they do not apply to Rule 11 motions. The second rationale focuses specifically on those pro se litigants who are attorneys; in that situation courts reason that, because there is no lawyer-client relationship, even a pro se attorney should not receive an attorney's fees award. Section III.B concludes that although the absence of such a relationship is often dispositive in the fee-shifting cases, it should not affect the decision to grant attorney's fees to pro se litigants — lay or legally trained — under Rule 11.

A. Policy Goals

Rule 11 provides sanctions for litigation abuse; it is not a fee-shifting statute.⁸⁴ Thus this section provides examples of cases involving three major fee-shifting provisions and distinguishes the policy concerns in those cases from the goals that drive Rule 11. Insofar as these cases discuss policies that are not implicated in the Rule 11 context, they are inapposite; insofar as the cases discuss broader procedural goals that are not particular to the statutes in question, their reasoning supports an award of attorney's fees to a pro se litigant under Rule 11.

The overriding objective of the fee-shifting provisions is to encourage litigants to seek representation in meritorious cases.⁸⁵

For cases denying fees under the three statutes, see *infra* notes 89, 92, 95. Though a few appellate courts have affirmed an award of fees under these statutes in the past, see, e.g., *Duncan v. Poythress*, 777 F.2d 1508 (11th Cir. 1985) (en banc) (§ 1988); *Cazalas v. United States Dept. of Justice*, 709 F.2d 1051 (5th Cir. 1983) (FOIA); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977) (FOIA), their holdings have now been either expressly — in the case of § 1988 — or implicitly — in the cases of the FOIA and the EAJA — overruled by the Supreme Court's § 1988 decision in *Kay v. Ehrler*, 499 U.S. 432 (1991). See *infra* section III.A.3 (discussing *Kay*). After *Kay*, the D.C. Circuit recognized that it could no longer countenance the award of attorney's fees to pro se litigants under § 1988 or the FOIA. See *Benavides v. Bureau of Prisons*, 993 F.2d 257, 259 (D.C. Cir. 1993) (denying fees under the FOIA). The D.C. Circuit's rationale extends easily to EAJA motions as well.

84. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 553 (1991) (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 409 (1990)); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988) (“[T]he Rule’s primary purpose is not ‘wholesale fee-shifting but [rather] correction of litigation abuse.’” (quoting *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987) (alteration in original))); see also *Melissa Nelken et al., U.S. Supreme Court, in SANCTIONS, supra* note 1, at 9, 12; *supra* notes 28-29 and accompanying text. Thus any attempt to analyze or interpret the rule as a fee-shifting mechanism — or to analogize to other fee-shifting provisions — is misplaced. See *WILLGING, supra* note 1, at 175-76 (citing *Schwarzer, supra* note 1).

85. See *infra* notes 86-99 and accompanying text; Karen Shulman, Comment, *To Fee, or Not to Fee: The Dilemma of the Pro Se Attorney In Collecting Attorney's Fees*, 16 W. Sr. U. L. REV. 303, 311 (1988). Shulman observes that these provisions are designed to “remove economic obstacles to legitimate claims.” *Id.* Obviously, courts enforcing those statutes should seek to honor that objective. To the extent that Rule 11 courts also choose to place that dual

Whereas those provisions concentrate on vindicating the rights of the moving party, Rule 11 focuses on deterring the conduct of the offending party. As such, the particular characteristics of the Rule 11 movant are less important than the quality and degree of the offense.

1. *The Equal Access to Justice Act*

The primary goal of the EAJA is to increase accessibility to the courts for plaintiffs whose means would otherwise preclude them from challenging governmental action.⁸⁶ By granting fees to parties litigating against the government, the statute encourages individuals to vindicate their rights, through an attorney, when the government's position is unreasonable.⁸⁷ Because success on the merits is less probable when a party is unrepresented — a skilled attorney is more likely than a layperson to identify the government's weak arguments⁸⁸ — representation by counsel in an EAJA action is essential to the effectuation of congressional policy. For this reason, courts have been reluctant to grant fees to pro se litigants under the EAJA; doing so, they fear, would implicitly endorse the practice of proceeding pro se and would thereby contradict the EAJA's objectives.⁸⁹ By contrast, legal representation has little bearing on the principles underlying Rule 11. That rule focuses on the conduct of the opposing party, not on the arguments of the movant. The concern is not whether the pro se litigant can put forth his strongest arguments on the underlying cause of action, but whether his opponent will abide by the strictures of Rule 11.⁹⁰ Allowing a party to proceed without an attorney thus does not frustrate the aims of Rule 11's attorney's-fees provision.

One might contend that representation of the pro se litigant could bear on the effectuation of Rule 11 policy in the following

emphasis on economic costs and meritorious arguments, they will grant the attorney's fees and thereby create an economic disincentive to file frivolous, i.e. meritless, papers.

86. See *SEC v. Price Waterhouse*, 41 F.3d 805, 809 (2d Cir. 1994) (Leval, J., dissenting in part) (emphasizing compensation of the plaintiff); *Celeste v. Sullivan*, 988 F.2d 1069, 1070 (11th Cir. 1992) (per curiam) (emphasizing meritorious claims); *Crooker v. EPA*, 763 F.2d 16, 17 (1st Cir. 1985) (per curiam) (emphasizing vindication of private parties' rights); see also Deborah Weinstein, Recent Decision, 63 *TEMP. L. REV.* 865, 867, 868 n.22 (1990) (discussing *Jones v. Lujan*, 883 F.2d 1031 (D.C. Cir. 1989)).

87. See Louise L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 *ARIZ. ST. L.J.* 229, 234 & n.28, 243 (1987).

88. Cf. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. Unit A July 1981) (discussing the benefits of representation under the Privacy Act, which contains fee-shifting language nearly identical to that of the EAJA).

89. See, e.g., *Price Waterhouse*, 41 F.3d at 808; *Hexamer v. Foreness*, 997 F.2d 93 (5th Cir. 1993) (per curiam); *Celeste*, 988 F.2d at 1070; *Demarest v. Manspeaker*, 948 F.2d 655 (10th Cir. 1991); *Naekel v. Department of Transp.*, 845 F.2d 976, 981 (Fed. Cir. 1988); *Merrell v. Block*, 809 F.2d 639, 642 (9th Cir. 1987); *Crooker*, 763 F.2d at 16.

90. See *supra* text accompanying notes 16-19.

way: The pro se litigant's adversary might believe that only an attorney, and not an unrepresented party, would be vigilant enough to recognize and prosecute a Rule 11 violation. If so, the offending party might think twice before running afoul of the rule if the potential movant were to have an attorney. A court might therefore choose to deny the fees and not to "reward" a party who represented himself — with the intention of encouraging parties to retain an attorney, thereby discouraging litigation abuse. The argument falls short, however, on closer examination. In the statutory context refusing to grant pro se litigants attorney's fees gives parties an incentive to hire an attorney at the commencement of the action. The Rule 11 movant, on the other hand, does not decide at the outset of his case whether or not to hire a lawyer simply based on the possibility of suffering a Rule 11 violation down the road. Denying the fees under Rule 11, as opposed to under the EAJA, will not encourage litigants to seek representation in future cases, and thus does not further the goals of Rule 11.

2. *The Freedom of Information Act*

The goal of the FOIA's fees-award provision is to compensate plaintiffs for any costs and fees legitimately incurred in holding the government to the disclosure requirements of the Act.⁹¹ The Sixth Circuit, in *Falcone v. IRS*, observed that because the plaintiff in that case never experienced the financial burden that Congress designed the FOIA's fee-shifting provision to relieve, he was not entitled to the fees award.⁹² *Falcone* thus suggests that an award of attorney's fees hinges on the evil at which the fees provision is directed. Under this policy prescription — as opposed to the statutory goals particular to the FOIA⁹³ — a court should award fees only when the movant experiences the rule's enunciated harm. Accordingly, when a pro se party suffers a Rule 11 violation, courts should not hesitate to award him attorney's fees:⁹⁴ after a Rule 11 violation,

91. See *Falcone v. IRS*, 714 F.2d 646 (6th Cir. 1983). Other courts have interpreted the FOIA's goals similarly, with some slight variations. See, e.g., *Benavides v. Bureau of Prisons*, 993 F.2d 257, 260 (D.C. Cir. 1993) (stating that the goal is "virtually identical" to that found in § 1988 — to facilitate access to the courts); *Cazalas v. United States Dept. of Justice*, 709 F.2d 1051, 1057 (5th Cir. 1983) (stating that the goal is to remove monetary barriers to ensuring governmental compliance with the FOIA); *Cunningham v. FBI*, 664 F.2d 383, 387 (3d Cir. 1981) (asserting that the goal is to "remove obstacles to legitimate claims").

92. See *Falcone*, 714 F.2d at 647 (noting that plaintiff never incurred the "burden of legal [fees]" that the rule was intended to alleviate). For other decisions denying attorney's fees to pro se litigants under the FOIA, see *Benavides*, 993 F.2d at 260; *Cunningham*, 664 F.2d at 388; *Crooker v. United States Dept. of the Treasury*, 634 F.2d 48 (2d Cir. 1980).

93. See cases cited *supra* note 91 and accompanying text.

94. In *Benavides*, 993 F.2d 257, the appellate court chose not to accept the petitioner's argument that the FOIA's underlying goal was one of deterrence, and it denied the fees motion. The court's decision may lend indirect support to an award under Rule 11, however: the *Benavides* opinion characterizes deterrence as a mere "serendipitous by-product" of

the pro se movant (and the judicial system overall) has experienced exactly the type of harm that Congress hoped to curtail — namely, defending against frivolous or abusive pleadings.

3. Section 1988

The Supreme Court's decision in *Kay v. Ehrler*,⁹⁵ a § 1988 case, effectively closed the book on awarding fees to pro se litigants under most statutory fee-shifting provisions. Ironically, however, the reasoning behind the Court's denial of fees supports an award of attorney's fees to pro se litigants under Rule 11. The *Kay* Court relied on Congress's intention of helping civil rights plaintiffs retain competent counsel.⁹⁶ Congress, the Court asserted, was concerned with the "effective prosecution of meritorious claims,"⁹⁷ a goal that could be best met only if a party were represented by an attorney. Because *Kay* proceeded pro se, the Court denied him his fees request. To the extent the *Kay* holding depends on specific legislative policy, it is inapposite, as the goals of Rule 11 are significantly different from those of § 1988.⁹⁸ To the extent the *Kay* opinion exemplifies the Court's desire to encourage meritorious claims and to satisfy legislative intent, it actually supports a fees award under Rule 11: the deterrent effect of such a sanction will be to encourage attorneys to examine the merits of their pleadings more closely before filing them.⁹⁹

B. *The Absence of an Agency Relationship*

Although the *Kay* Court concluded that the goals of § 1983 would be ill served if the Court were to award fees to a plaintiff-attorney who represented himself,¹⁰⁰ this section demonstrates that the goals of Rule 11 can be met equally well no matter whether the

sanctions under the FOIA. See 993 F.2d at 260. This language could suggest that when deterrence is the central goal of a statute, a court might be more amenable to awarding a pro se party attorney's fees.

95. 499 U.S. 432 (1991).

96. See 499 U.S. at 435-36.

97. 499 U.S. at 437. The appellate court in this case similarly noted that "attorney's fees . . . under section 1988 are not awarded as penalties or sanctions." *Kay v. Ehrler*, 900 F.2d 967, 972 (6th Cir. 1990). A Rule 11 award by definition is intended as a sanction. See *supra* note 2 (quoting Rule 11).

98. See *supra* Part I.

99. To be sure, there is a difference between encouraging meritorious actions — the goal of § 1988 — and discouraging meritless ones — the goal of Rule 11. See *Kay*, 499 U.S. at 437. If the goal of § 1988, however, is to allow aggrieved parties to vindicate their rights, it seems appropriate to extend the *Kay* rationale to the Rule 11 context, in which movants defend their right — and the right of the court — to be free from abusive litigation tactics.

100. See *Kay*, 499 U.S. at 438. The Court declared that even though the movant was a competent attorney, he lacked the objective judgment necessary to argue his case most effectively. See 499 U.S. at 437.

movant is represented or not, and no matter whether he is an attorney or not.¹⁰¹

In refusing to award fees, both *Kay* and *Falcone* emphasized the absence of an attorney-client relationship.¹⁰² The *Falcone* court assumed that even though the pro se litigant was an attorney by trade, he did not have the “detached and objective perspective” necessary to fulfill the aims of the Act.¹⁰³ The objectivity of a Rule 11 movant, by contrast, does not implicate the goals of that rule because whether the movant is or is not an attorney has no relation to the opposition’s conduct. Each party bears the burden of conducting itself according to the rules, regardless of whether its adversary has legal representation. Indeed, there should be no need to require a pro se party to hire an attorney just to keep a represented party honest. There is thus no reason to require an attorney-client relationship before punishing a party who violates the rule and awarding attorney’s fees to the pro se movant.

At best, a litigant will engage in behavior that violates Rule 11 regardless of her pro se adversary’s status; at worst, she will try to take advantage of that status and the attendant lack of legal acumen, or lack of objectivity, or both. In that latter case there is all the more reason to impose a significant sanction in order to deter such abuse. The district court underscored this view in *Rynkiewicz v. Jeanes Hospital*: “If anything, this duty [to abide by the requirements of Rule 11] was heightened by the fact that plaintiff was proceeding pro se, and thus without the advantage of having an attorney” who could better recognize the shortcomings of the opposition’s arguments and the nature of its tactics.¹⁰⁴

IV. CALCULATING THE AWARD

Once a court decides that it should award the pro se litigant reasonable attorney’s fees, it must determine the actual sum. The calculation of any fees award in favor of a pro se party is admittedly an inexact process.¹⁰⁵ This Part proposes that courts invoke traditional methods of determining a reasonable fee while also relying

101. The argument in this section is slightly different from that addressed *supra* section II.B.1. That section answers objections based solely on the text of Rule 11 and concludes that that language does not foreclose a fees award. The analysis in this section poses the broader question of whether, as a policy matter, we nonetheless should demand that an attorney be retained before awarding Rule 11 attorney’s fees; this section concludes that we should not.

102. See *Kay*, 499 U.S. at 435-36; *Falcone v. IRS*, 714 F.2d 646, 647-48 (6th Cir. 1983).

103. *Falcone*, 714 F.2d at 647 (quoting *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 388 (4th Cir. 1980) (per curiam)); see also *supra* note 100.

104. See *Rynkiewicz v. Jeanes Hosp.*, Civ. A. No. 86-5209, 1987 WL 7842, at *2 (E.D. Pa. Mar. 11, 1987).

105. See *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) (observing that the award is discretionary and lacks “mathematical precision”); *Pilkington v. Bevilacqua*, 522 F. Supp. 906, 910 (D.R.I. 1981) (contending that, under § 1988, there can be

on their discretion to fashion an award that best serves the policies of Rule 11.¹⁰⁶

Rule 11 contemplates an award commensurate with the amount necessary to deter the offensive conduct. Thus although courts may consider the costs incurred by the movant,¹⁰⁷ the reasonable-fees award will not necessarily match the actual amount paid.¹⁰⁸ Courts should look beyond what fees a litigant did or did not incur and instead should ascertain the amount necessary to deter offensive litigation conduct.¹⁰⁹

In determining this amount, courts should consider what an attorney would have charged for the requisite work performed by the pro se litigant. This lodestar approach¹¹⁰ has appeal both in its simplicity and in its acceptance in other areas of the law.¹¹¹ It may have little relation to the value of the pro se litigant's work in a particular case, however, as he can neither command as high a rate nor complete the work in as little time as could a practicing attorney. Nonetheless, the method does provide a judge with a rough indication of how large a sanction may be necessary to prevent future offensive conduct — indeed, the text of Rule 11 suggests that an award equal to reasonable attorney's fees often will serve the appropriate deterrent effect.¹¹²

Courts could choose instead to base the award on the movant's lost opportunity costs.¹¹³ This approach would serve the rule's sec-

no mathematical formula for calculating the award because the pro se litigant incurs no legal fees).

106. Recall Justice Marshall's admonition that "[o]ne of the fundamental purposes of Rule 11 is to strengthen the hand of the trial judge in his efforts to police abusive litigation practices and to provide him sufficient flexibility to craft penalties appropriate to each case." *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 127 (1989) (Marshall, J., dissenting). The advisory committee similarly advocates a discretionary approach. See *FED. R. CIV. P. 11* advisory committee's note paras. 17-18 (committing the determination of a sanction to the trial court's discretion and providing for case-by-case evaluation); see also *Johnson*, 488 F.2d at 720.

107. See *FED. R. CIV. P. 11(c)(2)* (allowing for "reasonable attorneys' fees and other expenses incurred as a direct result of the violation").

108. See *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 879 (5th Cir. 1988) (en banc).

109. See *Pavelic & LeFlore*, 493 U.S. at 126 (stating that the purpose of Rule 11 is to sanction the offending party, not to reimburse the offended party).

110. The "lodestar" is commonly defined as the "number of hours reasonably expended multiplied by [the] prevailing hourly rate in [the] community for similar work." *BLACK'S LAW DICTIONARY* 941 (6th ed. 1990).

111. The Supreme Court, for example, adopted the lodestar approach for § 1988 cases in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

112. See *FED. R. CIV. P. 11(c)(2)*.

113. See Waldman, *supra* note 79, at 680-81 for a discussion of opportunity costs. One district court has intimated that lost income *should* be a factor in awarding fees to a pro se litigant under the EAJA. See *SEC v. Kaufman*, 835 F. Supp. 157, 159 (S.D.N.Y. 1993), *affd. sub nom. SEC v. Price Waterhouse*, 41 F.3d 805 (2d Cir. 1994).

Although the Sixth Circuit based its denial of fees in *Kay* partly on the fact that opportunity costs are not the same as pecuniary losses and thus should not enter the § 1988 analysis,

ondary goal of compensation, though it might achieve minimal deterrence if the opportunity costs were relatively low. Calculating these costs, moreover, presents problems of subjective valuation and high administrative costs.¹¹⁴ Furthermore, because courts do not award opportunity costs to *represented* parties as part of their attorney's fees award, maintaining consistent treatment of all movants requires that courts deny such costs to pro se litigants as well.¹¹⁵ A pro se litigant might receive absolutely nothing, however — and an offending party would get off scot-free — if courts were to deny the movant both opportunity costs and attorney's fees. As noted above, resorting to opportunity costs seems ill advised given Rule 11's emphasis on deterrence. We thus return to reasonable attorney's fees as the most sensible measure of the award.

Perhaps the strongest set of criteria for determining a "reasonable" attorney's fee is found in *Johnson v. Georgia Highway Express, Inc.*¹¹⁶ The twelve *Johnson* factors,¹¹⁷ which generally consider the time and skill required for the work, compose the standard calculus for a Rule 11 sanction in many courts.¹¹⁸ Many of those criteria, however, do not arise in the pro se context, so a court would be better off concentrating not on the distinct factors themselves but on the policy that underlies them. That policy — implicit in the twelve enumerated factors — entails a combination of what amount would be reasonable given, in descending order of importance, the offense and the response required, the necessary degree

see Kay v. Ehrler, 900 F.2d 967, 971 (6th Cir. 1990), the Supreme Court did not address this issue.

114. Courts could reduce those problems by equating the value of leisure time with the value of time spent at work — that is, by using the litigant's hourly wage to calculate opportunity costs. When a litigant has either no job or a low-paying job, however, this calculation would produce a figure too low to serve any deterrent effect. Thus, compensating the pro se party for his time and effort seems a necessary but insufficient approach to the problem.

115. *See Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981); *supra* text accompanying notes 33-34, 52.

116. 488 F.2d 714 (5th Cir. 1974).

117. The twelve factors are time and labor required; novelty and difficulty of the work performed; requisite skill; preclusion of other employment; customary fee in the community; whether the fee was fixed or contingent; time limitations imposed by the court or by other circumstances; amount of money involved and results obtained; experience, ability, and reputation of the attorney; "undesirability" of the case; nature and length of the attorney-client relationship; and awards in similar cases. *See Johnson*, 488 F.2d at 717-19.

118. *See, e.g., Rum Creek Coal Sales, Inc. v. Caperton*, 31 F.3d 169, 175 (4th Cir. 1994); *Davis v. City of San Francisco*, 976 F.2d 1536, 1546 (9th Cir. 1992); *Homeward Bound, Inc. v. Hissom Meml. Ctr.*, 963 F.2d 1352, 1356 (10th Cir. 1992); *Leffler v. Meer*, 936 F.2d 981, 985 & n.2 (7th Cir. 1991); *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989).

Some commentators have suggested that the *Johnson* criteria differ little from that of the simpler lodestar approach. *See Third Circuit Task Force, Court Awarded Attorney Fees*, 108 F.R.D. 237, 244 (1985). The Task Force noted that the first and most heavily weighted *Johnson* factor is time and labor expended. *See id.*

of compensation, and the desire to provide a check against arbitrary awards.

Reading the *Johnson* criteria in this way reinforces the notion that judges calculating an attorney's fees award for a pro se litigant enjoy wide latitude limited only by considerations of deterrence and fairness — considerations that underlie Rule 11 itself. Because a Rule 11 sanction will almost always be case specific,¹¹⁹ tempering rigid formulae such as the lodestar or the *Johnson* approach with judicial discretion ensures that judges will impose attorney's fees awards that adequately deter improper and frivolous filings.

CONCLUSION

“Allowing a citizen who hired an attorney to get fees but not [making the award to pro se litigants] creates a windfall for the defendant who doesn't have to pay the fees . . . just because he had the good fortune to commit his wrong” upon an unrepresented party.¹²⁰ Beyond creating a windfall, denying the pro se party an attorney's-fees award controverts express legislative policy. Any objections to making the award that are based on a strict interpretation of the rule's language or on fee-shifting provisions in other statutes must fail in the face of Congress's, the bar's, and society's insistence on deterring offensive and abusive litigation practices. Granting the pro se litigant attorney's fees does no more than ensure that parties play by the rules and that they suffer the appropriate consequences when they transgress those rules.

119. See FED. R. CIV. P. 11 advisory committee's note para. 12; *supra* note 106.

120. Shulman, *supra* note 85, at 310. Though this statement refers to pro se attorneys who sue under statutory fee-shifting provisions, it is equally applicable to Rule 11 cases.