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Abusing Taxation of Court Costs by Government Lawyers to Chill Pro Se Civil Rights Claimants

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Gregory C. Sisk (Laghi Distinguished Chair in Law)
Alexandra Liebl (J.D. 2020)
Nicole Zeman (J.D. 2020)

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Abusing Taxation of Court Costs by Government Lawyers to Chill Pro Se Civil Rights Claimants

Gregory Sisk, Alexandra Liebl & Nicole Zeman*

Abstract*: Attorneys in state attorney general offices regularly employ the threat of court imposition of costs on pro se plaintiffs to convince them to dismiss or settle federal civil rights claims against public officials or entities. Persons of limited means may fear being held liable for hundreds or thousands of dollars in court costs if they don't win their civil rights lawsuits. Pro se litigants especially may be intimidated by attorneys who exert their authority as public officials to pressure abandonment of even meritorious civil rights claims.*

Awarding court costs, however, is reserved to the discretion of the federal district court and, while presumed against an unsuccessful litigant, are not automatic or irreducible. Several federal appellate courts have articulated public interest factors for reducing or eliminating court costs against pro se parties for various reasons, including the poverty of the litigant and the public importance of a civil rights claim.

Under professional conduct rules requiring lawyer honesty and regulating communications with an unrepresented party, reinforced by higher expectations of candor and civility for attorneys who represent the public, government attorneys are ethically obliged to inform civil rights litigants that awards of court costs are a matter of discretion and may be reduced or excused for public policy reasons.

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* Gregory Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas School of Law (Minnesota). Alexandra Liebl and Nicole Zeman received their J.D.s from the University of St. Thomas in 2020.

Introduction

Ron Pettit was an inmate in the custody of the Arizona Department of Corrections. On April 16, 2011, preparing to be escorted back to his cell after a shower, Pettit followed routine protocol by stepping forward out of the shower.[1] A correctional officer slammed him back into the shower wall face first and ordered him to exit backward.[2]

When they arrived at his cell and the door had been closed, Pettit moved backward toward the door for his handcuffs to be removed through the food slot.[3] The correctional officer yanked the chain attached to the cuffs, painfully pulling his hands backward through the slot.[4] After the cuffs were removed, Pettit placed his hands on the tray of the food slot in order to speak to the other correctional officers and complain about the abuse.[5] The abusive officer used his gloved hands to pound hard down on Pettit's hands, delivering what Pettit described as "hammer punches."[6] After failing to intervene at any prior point, another correctional officer threw her body into that of the abusive officer and told him to stop.[7] (The videotape of the assault, as well the report of the incident by a superior officer, were destroyed afterward, later resulting in a spoliation ruling by the court.[8])

Pettit suffered permanent damage to his right hand, leaving him unable to pull his fingers into a fist and unable to properly move his pinky.[9] Being right-handed, he now has great difficulty writing.[10] For more than a year afterward, he continued to suffer pain in his neck, shoulders, and upper right arm from being pulled backward through the food slot.[11]

During the subsequent civil rights lawsuit for excessive force in federal district court, Pettit (who was fortunate to have

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1 Reporter's Partial Transcript of Proceedings: Trial Day 1 at 107 (Sept. 29, 2014), Pettit v. Ryan, No. 2:11-cv-02139-DGC (D. Ariz.).

2 *Id.*

3 *Id.* at 111-12.

4 *Id.*

5 *Id.* at 117-19.

6 *Id.* at 120.

7 *Id.* at 121-22.

8 *Id.* at 43.

9 *Id.* at 153-55.

10 *Id.* at 157-58.,

11 *Id.* at 164, 184-85.

counsel) repeatedly offered to settle.[12] In response to an early settlement offer, the assistant attorney general handling the case responded that "you would be hard-pressed to find a jury in this State that would give Mr. Pettit $5."[13] During the trial, when plaintiff's counsel offered to settle for about a third of the eventual verdict,[14] the assistant attorney general retorted: "Sorry to rain on the parade, but there will be no settlement."[15]

At the trial, the jury unanimously returned a verdict for the plaintiff, awarding Pettit $100,000 in compensatory damages and another $45,000 in punitive damages.[16]

As an exhibit to the petition for attorney's fees after the verdict, a letter from the assistant attorney general to Pettit, delivered through Pettit's attorney shortly before trial, came to light.[17] The letter "propose[d] that you walk away from this lawsuit," in exchange for the state not pursuing an award of court costs.[18] The assistant attorney general warned Pettit that he had "something to lose" in the coming trial and asked him to consider that, after he was released from prison in just a few months "what if you are not truly free when you get out? What if, just as you are walking out of ASPC-Eyman, one of the correctional officers hands you a judgment that indicates that you owe the State of Arizona $5,000."[19] The assistant attorney general asserted that "[i]f and when the jury returns a verdict in favor of the Defendants, the Judge will award us our defense costs."[20] (As later noted by defense counsel, "[t]he letter nowhere mentioned that such award of costs was discretionary, not automatic."[21])

The assistant attorney general's letter explicitly and in some detail portended economic catastrophe for Pettit in finding

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[12] Declaration of Daniel C. Barr in Support of Plaintiff's Motion for Attorneys' Fees, Exs. 1, 4, 5 (Sept. 29, 2014), Pettit v. Ryan, No. 2:11-cv-02139-DGC (D. Ariz.) [hereinafter Barr Declaration].

[13] *Id.*, Ex. 1.

[14] *Id.*, Ex. 4.

[15] *Id.*, Ex. 5.

[16] Reporter's Partial Transcript of Proceedings: Trial Day 4 at 144-46 (Oct. 2, 2014), Pettit v. Ryan, No. 2:11-cv-02139-DGC (D. Ariz.).

[17] Declaration of Daniel C. Barr in Support of Plaintiff's Motion for Attorneys' Fees, Ex. 6 (Sept. 29, 2014), Pettit v. Ryan, No. 2:11-cv-02139-DGC (D. Ariz.).

[18] *Id.* at 2.

[19] *Id.* at 1.

[20] *Id.* at 2.

[21] Barr Declaration, *supra* note 12, at 8-9.

employment and paying off the heavy debt of court costs after his release:

> Consider that you will be presumably looking for some sort of productive work once you are released, the last thing you need is some state collector garnishing your wages from your job. I probably do not have to tell you that the State is very effective at collecting its debts. I saw this happen with an inmate who was incarcerated for 27 years, and [that inmate] was very unhappy about it. Although he only owed a few hundred dollars, the debt made it difficult for him to move on and find work.
>
> You also probably know that it is hard to find companies willing to hire guys with multiple felonies in their past. If you are fortunate to find work for $10/hour, consider the fact that it would take you 185 hours (more than 4 and a half weeks of 40 hours a week) to pay back the State . . . . If the post-trial judgment is for $5,000, it would take you 500 hours (or 3.5 months at $10/hour x 40 hours/week) to pay it off.[22]

Very shortly after this letter was revealed in the Pettit case, the defendants through the state attorney general's officer informed the court that the parties had settled the case.[23]

Even when a court has acted on public policy grounds to reduce the burden of court costs against an unsuccessful civil rights plaintiff, a state legal official may be reluctant to let loose of the cudgel. In one federal district court case,[24] a state deputy attorney general vehemently objected to a ruling reducing costs on public policy grounds. Although holding that desecration by a correctional officer of a Muslim prisoner's Quran did not rise to a constitutional violation, the magistrate judge described these acts, if proven, as "disrespectful and even repugnant," said the case "was by no means easy," and reduced costs from nearly $1200 to $500.[25] The state deputy attorney general then asked

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[22] *Id.*, Ex. 6 at 2.

[23] Notice of Settlement (Nov. 17, 2014), Pettit v. Ryan, No. 2:11-cv-02139-DGC (D. Ariz.).

[24] As disclosure, the lead author was appointed by the Ninth Circuit as pro bono counsel for the appellant Darrell Harris in this case.

[25] Order Granting in Part Defendant's Request for Costs at 3 (Aug. 21, 2017), Harris v. Escamilla, No. 1:13-cv-01354-DAD-MJS (E.D. Cal.).

the district court judge, not merely to impose the full award of costs, but to sanitize the record by striking passages from the magistrate judge's ruling to which state counsel objected.[26] The district judge rejected both requests.[27]

On appeal in that case, the state's legal official objected even to citation of the magistrate judge's public ruling on court costs, contended that prison officials were exempt from landmark Supreme Court decisions upholding free exercise of religion, and insisted that vandalizing a prisoner's Quran did not cross a constitutional line because the state could have barred this central religious text altogether from California prisons.[28] The court of appeals upheld the constitutional claim for desecration of the Quran, reversing the district court and remanding the case for trial on the merits.[29] The case subsequently settled.[30]

Most readers will assume the foregoing are extraordinary but rare episodes of what Pettit's attorney aptly called "threats and scare tactics" involving the imposition of court costs.[31] Unfortunately, while the particularity of the shakedown in the first case and the fervor of the objection to reduction of costs in the second case are perhaps unusual, the nature of the threat relayed by a government attorney was far from unusual.

As attorneys appointed on appeal for civil rights plaintiffs who were pro se at the trial level know all too well, these court cost threat tactics are "regular fabric" of these cases.[32] Attorneys in state attorney general offices regularly assert the certainty of court imposition of costs on pro se plaintiffs and use that financial club to try to convince them to voluntarily dismiss federal civil

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[26] Request for Reconsideration by the District Court of Magistrate Judge's Ruling at 1-2 (Aug. 31, 2017), Harris v. Escamilla, No. 1:13-cv-01354-DAD-MJS (E.D. Cal.).

[27] Order Denying Motion for Reconsideration at 1-2 (Oct. 5, 2017), Harris v. Escamilla, No. 1:13-cv-01354-DAD-MJS (E.D. Cal.).

[28] Defendant-Appellee's Answering Brief at 15-19, 24 (Dec. 8, 2017), Harris v. Escamilla, No. 17-15230 (9th Cir.).

[29] Memorandum at 2-3, Harris v. Escamilla, No. 17-15230 (9th Cir. May 24, 2018).

[30] Minute (Jan. 14, 2020), Harris v. Escamilla, No. 1:13-cv-01354-DAD-MJS (E.D. Cal.); Stipulation for Voluntary Dismissal With Prejudice (Mar. 16, 2020), Harris v. Escamilla, No. 1:13-cv-01354-DAD-MJS (E.D. Cal.).

[31] Barr Declaration, *supra* note 12, at 9.

[32] *Cf.* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 83 (1997) (discussing "frequent and widespread" impermissible advice-giving to unrepresented persons in New York City housing courts).

rights claims. And these government legal officers do this presumably because they've seen it work in fending off lawsuits. Persons of limited means may fear being held liable for hundreds or thousands of dollars in court costs if they don't win their civil rights lawsuits. Pro se litigants especially may be intimidated by attorneys who exert their authority as public officials to pressure abandonment of even meritorious civil rights claims.

Awarding court costs, however, is reserved to the discretion of the federal district court and, while sometimes presumed against an unsuccessful litigant, are not automatic or irreducible.[33] Several federal appellate courts have articulated public interest factors for reducing or eliminating court costs against pro se parties for various reasons, including the poverty of the pro se litigant and the public importance of a civil rights claim.[34]

In light of the established case-law, state law officers should never present a direct and unqualified threat of thousands of dollars in court costs against a civil rights plaintiff, especially one that is not represented by counsel. Professional conduct rules demand honesty by lawyers and restrict communications with an unrepresented party. The federal courts have higher standards of candor and civility for attorneys who represent the public. Government attorneys are ethically obliged to inform civil rights litigants that awards of court costs are a matter of discretion and may be reduced or excused for public policy reasons.[35]

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[33] *See infra* Part I.

[34] *Id.*

[35] *See infra* Part II.

I. Taxing Court Costs and the Public Interest in Federal Court

Obstacles to Pro Se Civil Rights Litigation: To say that high obstacles loom before an indigent person who seeks a court remedy for alleged official wrongdoing is an understatement. For most potential civil rights plaintiffs with limited resources, the inability to retain a lawyer means the lawsuit fails before it even gets started. As Professor Deborah Rhode aptly describes it, "[o]ur justice system is designed by and for lawyers, and anyone who attempts to navigate without counsel is generally at a disadvantage. That disadvantage is particularly great among the poor, who typically lack the skills and information necessary for effective self-representation."[36]

The possibility of shifting attorney's fees to the defendant government or official, or the use of a contingency fee should the plaintiff recover damages, may secure legal representation for some. But most potential civil rights claimants will be unable attract a lawyer to their cause, especially if the amount of potential damages are low and thus the economic upside of the case for the lawyer is minimal.

Consider for example claims by prisoners of wrongful conduct by prison officials or unconstitutional prison conditions. "Prisoner cases are particularly unpopular" and the courts rarely can find "counsel willing to represent pro se civil rights litigants."[37] Prisoner civil rights cases, even the most meritorious, can be difficult to initiate and maintain, beginning with time-consuming and frustrating navigation of the special procedural restrictions

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[36] Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 53 J. LEGAL EDUC. 413, 431 (2003); *see also* DAVID LUBAN, LAWYERING AND JUSTICE: AN ETHICAL STUDY 244 (Princeton U. Press, 1988) ("It is an obvious fact . . . that all of our legal institutions (except small claims court) are designed to be operated by lawyers and not by laypersons. Laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations, court schedules, even courthouse architecture are designed around the needs of the legal profession."); Model R. Prof'l Conduct 6.1 cmt. 2 (ABA 2020) (recognizing "the critical need for legal services that exists among persons of limited means").

[37] LaPlante v. Pepe, 307 F. Supp. 2d 219, 223 (D. Mass. 2004); *see also* Kelly v. Wengler, 822 F.3d 1085, 1104 (9th Cir. 2016) (citing district court finding that, "due to the inadequacy" of attorney's fees, attorneys "have been unwilling to accept appointment in prisoner civil rights cases seeking injunctive and declaratory relief");

on prisoner complaints through the defense of qualified immunity to preclude damages unless prior precedent already spoke clearly to the constitutional wrong.[38] And for the lawyer taking on a prisoner case for other than pro bono purposes, the prospect of meaningful compensation is slim because "the [Prison Litigation Reform Act] restricts the hourly rate for attorneys' fees below market."[39] Not surprisingly, a report by the U.S. Department of Justice found that "ninety-six percent of all prisoners proceed *pro se*; only four percent have counsel whether court appointed or otherwise."[40]

If a civil rights plaintiff is determined to go forward without legal representation, court "costs" will be a further deterrent. Beyond filing fees and the expenses of producing and filing documents or responding to discovery, not to mention the huge investment of time in learning legal procedures, the pro se litigant may be troubled by the prospect of paying courts costs should the lawsuit fall short. For non-indigent plaintiffs, the possibility of paying a few hundred or even a few thousand dollars in court costs should the defendant prevail may be a relatively minor consideration in whether to proceed. For a poor individual, or a prisoner who has little means to earn money, even a few hundred dollars may leave the person in long-term debt or having to forgo basic living necessities.

Award of Court Costs as Discretionary: In the federal courts, the ordinary presumption is that court costs will be awarded to the prevailing party, whether plaintiff or defendant. Costs in the courts system typically include filing fees, service fees, witness fees, mediation fees, and sometimes appeal fees.[41] Under Federal Rule of Civil Procedure 54, the prevailing party

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[38] *See* Gregory C. Sisk, et al., *Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. Crim. L. & Criminology 559, 609-32 (2019).

[39] *Graves*, 633 F. Supp. 2d at 847.

[40] Roger A. Hanson & Henry W.K. Daley, U.S. DEPT. OF JUSTICE, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation* 21 (1994) (for Section 1983 civil rights suits,), available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=544 [https://perma.cc/65VP-DUHJ.

[41] *See* 10 CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE & PROCEDURE §2666 (4d ed. 2014) ("'Costs' refers to those charges that one party has incurred and is permitted to have reimbursed by the opposing party as part of the judgment in the action.").

generally is to be awarded recovery of these court costs as part of the judgment.[42]

Importantly, however, the federal courts of appeals agree that awarding costs against indigent plaintiffs is a matter of judicial discretion—and some courts have expressly incorporated indigency and public interest concerns into the discretionary analysis. While the circuits vary on what factors should guide the analysis, the overarching theme remains that the judge gets to decide. For this reason, the casual assumption that court costs are invariably a roadblock to individuals who pursue vindication of their rights, even if their claim ultimately fails, is simply not correct. To be sure, such costs may indeed be imposed, indeed may ordinarily be imposed (especially if the lawsuit is entirely meritless). But, without confessing that the court has discretion to alleviate that burden, government lawyers are misleading their pro se adversaries when they threaten the imposition of court costs to convince them to voluntarily dismiss civil rights claim.

Every circuit to address the issue agrees that the award of court costs against indigent is a matter of discretion for the district courts.[43] The text of Rule 54(d) may suggest a presumption by saying that "costs shall be allowed as of course to the prevailing party."[44] However, the rule is twice qualified, by referring to an exception "when express provision therefore is made either in a statute of the United States or in these rules," and, more generally, by conferring broad discretion on the judge

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[42] Fed. R. Civ. P 54(d).

[43] *See, e.g.,* Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001) *abrogated on other grounds by* Bruce v. Samuels, 136 S. Ct. 627 (U.S. 2016) ("[D]istrict courts retain discretion to limit or deny costs based on indigency."); Flint v. Haynes, 651 F.2d 970, 974 (4th Cir. 1981) ("[T]he taxation of costs is a matter left to the sound discretion of the district court."); Lay v. Anderson, 837 F.2d 231 (5th Cir. 1988); Singleton v. Smith, 241 F.3d 534, 539 (6th Cir. 2001) (holding Fed. R. Civ. P 54(d) allows district courts discretion to deny costs); Rivera v. City of Chicago, 469 F.3d 631, 635 (7th Cir. 2006) (ruling Fed. R. Civ. P 54(d) allows district courts discretion to deny costs); Lampkin v. Thompson, 337 F.3d 1009, 1017 (8th Cir. 2006); Draper v. Rosario, 836 F.3d 1072, 1087 (9th Cir. 2016) ("Rule 54(d)(1) . . . 'vests in the district court discretion to refuse to award costs.'"); Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180 (10th Cir. 2004) (affirming discretionary power of court to deny court costs); Harris v. Forsyth, 742 F.2d 1277, 1278 (11th Cir. 1984) ("The decision to enter judgment for costs is clearly discretionary.").

[44] Fed .R. Civ. P. 54(d) ("Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs.").

by saying courts are imposed "unless the court otherwise directs."[45]

Factors Guiding Discretion on Court Costs: Many circuits have provided further guidance on the exercise of this discretion by setting forth factors to be considered. Among these are such factors as the party's ability to pay court costs, good faith or the closeness of the merits, and the public importance of the litigation. For the pro se litigant bringing a civil rights action against public officers or government entities, these factors are particularly salient.

Indigency: Some circuits have singled out indigency itself as a factor the district court should consider. In *Singleton v. Smith,* the Sixth Circuit focused the discretion analysis on the poverty of the party.[46] The court outlined several equitable factors that district courts may apply when evaluating the effect of indigency, such as the "'purpose of the rule,' 'the litigation history' of the party, 'good faith,' and 'the actual dollars involved.'"[47] The Eighth Circuit has also identified indigency of a losing party as an appropriate factor to consider when assessing court costs.[48]

Similarly, in *Rivera v. City of Chicag*o, the Seventh Circuit recognized two situations where the prevailing party may not be denied court costs under Rule 54(d): when the party seeking court costs has committed misconduct and when the losing party is indigent.[49] The Seventh Circuit explained that the district court must make a threshold factual finding that the losing party is "incapable of paying the court-imposed costs at this time or in the future."[50] In making this determination, the court should look to the finances of the losing party: the amount of the costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by a case when exercising discretion to deny costs.[51]

To be sure, "[i]ndigency *per se* does not automatically preclude an award of costs."[52] And not every circuit is on the same page in

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45 *Id.*
46 241 F.3d 534, 539 (6th Cir. 2001).
47 *Id.* at 540.
48 Lampkin v. Thompson, 337 F.3d 1009, 1017 (8th Cir. 2006).
49 469 F.3d 631, 634 (7th Cir. 2006).
50 *Id.* at 635 (citing McGill v. Faulkner, 18 F.3d 456, 459 (7th Cir. 1994)).
51 *Id.*
52 *Whitfield*, 241 F.3d at 270.

evaluating the significance of indigency as a basis for denying court costs.

In contrast, the Fourth and Fifth Circuits have invoked policy reasons for holding that indigent prisoners not be regularly exempt from paying costs. The Fifth Circuit bemoaned the "significant increase in the number of pro se, usually prisoner, civil actions," the majority of which "are without even arguable legal footing."[53] The court therefore reasoned that "[t]axing costs against an unsuccessful in forma pauperis litigant at the conclusion of his appeal is one way to defray the judicial and social burden imposed by these lawsuits."[54] Likewise, the Fourth Circuit insisted that the assessment of costs against indigent plaintiffs merely requires them to do what non-indigent plaintiffs must do—"decide whether their claim is 'worth it.'"[55] Otherwise, indigent plaintiffs will have "virtually 'nothing to lose and everything to gain.'"[56]

Neither the Fourth nor the Fifth Circuit addressed the "good faith" or "closeness" of the merits factor that was set out by the Sixth and Seventh Circuit, by which an indigent litigant would be spared the burden of court costs only for non-frivolous claims that proved to be difficult on the merits.[57]

One circuit has ruled that indigency is indeed an automatic factor in a particular context. In *Maida v. Callahan*, the Second Circuit held that "when the United States is a party to a proceeding, no costs can be taxed in favor of or against an *in forma pauperis* litigant."[58] The court observed that indigent plaintiffs who proceed under 28 U.S.C. §1915(f) are prevented from recovering costs against the United States if they are the prevailing party.[59] Similarly, the Third Circuit in *Souder v. McGuire*[60] and *James v. Quinlan*[61] held that when the United States or its officers are involved, costs will not be imposed

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53 *Lay*, 837 F.2d at 232.
54 *Id.* at 232–33.
55 *Flint,* 651 F.2d at 974.
56 *Id.*
57 See *supra* notes 46-51 and accompanying text.
58 148 F.3d 190, 193 (2d Cir. 1998).
59 *Id.* at 193.
60 516 F.2d 820 (3d Cir. 1975).
61 886 F.2d 37 (3d Cir. 1989).

against *in forma pauperis* appellants. In affirming the "'consistent and longstanding policy' of not taxing costs in favor of or against the United States in *in forma pauperis* appeals,"[62] the Third Circuit explained that since the United States is not entitled to pay costs if it loses under Rule 39(b), neither is it entitled to recover costs if it wins.[63]

Public Interest: Beyond indigency, other circuits have put public interest concerns in the forefront of court costs analysis. In *Draper v. Rosario,* the Ninth Circuit applied its court cost analysis where a prisoner brought a § 1983 action asserting Eighth Amendment excessive force claims against correctional officers.[64] The court identified several overlapping and appropriate reasons for denying court costs: (1) the substantial public importance of the case, (2) the closeness and difficulty of the issues in the case, (3) the chilling effect on future similar actions, (4) the plaintiff's limited financial resources, and (5) the economic disparity between the parties.[65] Importantly, the court noted that this is not an exhaustive list but a "starting point for the analysis."[66]

The Tenth Circuit followed suit in *Rodriguez v. Whiting Farms, Inc.,* holding that the presumption of awarding courts costs to the prevailing party will be awarded may be overcome by the non-prevailing party.[67] In *Shapiro v. Rynek*, a district court in the Tenth Circuit considered a suit by a prisoner against two prison guards, alleging that one of them was responsible for group strip searches in front of other prisoners in violation of the Fourth Amendment.[68] Applying the rules articulated by the Tenth Circuit in *Rodriguez,* the district court found that it would not exceed its discretion by denying court costs where (1) the prevailing party was obstructive and acted in bad faith during the course of litigation; (2) only nominal damages were awarded; (3) the issues were close and difficult; (4) the costs were

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62 *James*, 886 F.3d at 41.
63 *Id.* at 40.
64 836 F.3d 1072 (9th Cir. 2016).
65 *Id* at 1087.
66 *Id.*
67 360 F.3d 1180, 1189 (10th Cir. 2004).
68 250 F.Supp.3d 775 (D. Colo. 2017).

unreasonably high or unnecessary; or (5) the non-prevailing party was indigent.[69]

While the First Circuit has not addressed the issue of court costs in suits involving a public defendant, the court has provided guidance on denying costs to the prevailing party in private suits. Mirroring the Second, Eighth, Ninth, and Tenth Circuits, the First Circuit held that a district court has discretion to award or not award costs, but must articulate its reasons for doing so "if the basis for denying costs is [not] readily apparent on the face of the record."[70] The First Circuit has also stated more generally that "the exercise of authority to tax costs under Rule 54(d) is discretionary when IFP [*in forma pauperis*] status is involved."[71]

In court cost decisions, these courts affirming discretion to deny courts in indigency and public interest settings have placed the burden on the non-prevailing party to show why costs should not be awarded against them.[72] Furthermore, "[i]n light of the general rule, when a prevailing party is denied costs, the district court must articulate its reasons for doing so."[73]

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[69] *Id*. at 779 (*citing* Rodriguez*,* 360 F.3d at 1190).

[70] In re Two Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litigation, 994 F.2d 956, 963 (1st Cir. 1993).

[71] Papas v. Hanlon, 849 F.2d 702, 704 (1st Cir. 1988).

[72] *See* Whitfield v. Scully, 241 F.3d 264, 270 (2d Cir. 2001); Rivera v. City of Chicago, 469 F.3d 631, 634 (7th Cir. 2006); Thompson v. Wal-Mart Stores, Inc., 472 F.3d 515, 517 (8th Cir. 2006); Draper v. Rosario, 836 F.3d 1072, 1087 (9th Cir. 2016); Rodriguez v. Whiting Farms, Inc., 360 F.3d 1180, 1189 (10th Cir. 2004).

[73] *Whitfield*, 241 F.3d at 270; *see also Thompson*, 472 F.3d at 517; *Rodriguez,* 360 F.3d at 1190.

II. The Ethical Duty of Government Law Officers to Honestly Reveal Public Policy Exceptions to Awards of Court Costs

For a government legal officer to declare to a civil rights plaintiff that he or she *will* suffer the financial detriment of court costs upon losing the case is at best misleading and at worst an outright falsehood. Pressing upon an unrepresented party a narrative of financial disaster in the wake of a judgment of costs crosses the ethical line into offering improper legal advice. And the lawyer who appears on behalf of the public has a higher standard of candor and civility, mandating disclosure that any award of court costs remains subject to the discretion of the court and may be reduced or eliminated for public policy reasons.[74]

The Lawyer's Duty of Fundamental Honesty: While the lawyer's primary ethical responsibilities are directed to clients, the lawyer has defined ethical duties to others, including a duty of fundamental honesty.[75] Under Rule 4.1(a) of the Model Rules of Professional Conduct, a lawyer is prohibited from making "a false statement of material fact or law" to a person other than a client.[76] As one court has put it, "[i]t is the responsibility of every attorney at all times to be truthful."[77]

To be sure, under Rule 4.1(a), the lawyer's duty is to be honest, not necessarily to be transparently candid (although, as explained below,[78] candor indeed is expected of government lawyers). In distinguishing being truthful from being candid, Professor Bruce Green explains that to "make a false statement is to lie, but to withhold relevant information—to fail to be candid—is to be reticent.[79]

Does a government lawyer's forecast of an award of court costs against a civil rights plaintiff, without revealing the discretionary nature of such an award, qualify as a "false statement of material

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[74] *See supra* Part I.

[75] On the lawyer's ethical duty of truthfulness, see generally GREGORY C. SISK, LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 4-11.2, at 658-63 (2018).

[76] MODEL R. PROF'L CONDUCT 4.1(a) (ABA 2020).

[77] In re Kahil's Case, 773 A.2d 647, 648 (N.H. 2001).

[78] *See infra* notes 93 to 98.

[79] Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105, 1108 (2016).

. . . law" or instead slide past an ethical breach as a permissible failure to volunteer information? While one might imagine a cynical reference to court costs that touches so lightly on the subject as to avoid being dishonest, the lawyer who refers to such an award as a genuine risk to the plaintiff without also disclosing its contingent nature engages in "outright dishonesty regarding a material element" of the subject being raised.[80] As noted in Comment 1 to Rule 4.1, "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[81] The lawyer would be raising the prospect of court costs for the very purpose of cajoling the plaintiff to act on the risk by surrendering the civil rights claim, thus inducing material reliance. Omitting the crucial element that such an award remains discretionary is anything but honest.

In fact, under Rule 4.1(b), the lawyer is forbidden to remain silent when failure to disclose "a material fact" would assist a criminal or fraudulent act by the client.[82] If a government lawyer effectively blackmails a pro se litigant into abandoning a civil rights claim by the dishonest suggestion that a substantial award of costs is automatic, the deliberate refusal to disclose the nature of judicial discretion verges on a fraudulent exaction.

Notably, Rule 4.1(a) prohibits not only false statements of fact, but material false statements of law.[83] For that reason, as stated in a legal ethics treatise, "the statements about the law that fall within this prohibition presumably are those that are concrete in expression and that can be objectively evaluated as actually true or false."[84] Moreover, as the American Bar Association's Committee on Ethics and Professional Responsibility has opined, "a lawyer would not violate this rule by making "overstatements

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[80] SISK, *supra* note 75, § 4-11.4(b), at 660.

[81] MODEL R. PROF'L CONDUCT 4.1 cmt. 1 (ABA 2020).

[82] MODEL R. PROF'L CONDUCT 4.1(b) (ABA 2020).

[83] *See* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1064 (9th Cir. 2007) (saying that letters by counsel advising an unrepresented defendant employer that it had "no bona fide defense" to a disability discrimination action, "when in fact this might not be true in a particular case," was a "possibly false statement of law" in violation of Model Rule 4.1).

[84] SISK, *supra* note 75, § 4-11.4(b), at 661.

or understatements of the strengths or weaknesses of a client's position in litigation or otherwise."[85]

Nonetheless, that an award of costs is committed to the discretion of the presiding judge is an objectively verifiable statement of the law. And, depending on the federal jurisdiction, the law is increasingly clear that such discretion may be guided by considerations of public policy. The government lawyer who aggressively insists that such an award is inexorable should not find any shield in the excuse that he or she was advocating a legal position with acceptable hyperbole.

The Prohibition on Legal Advice to an Unrepresented Party: When the civil rights plaintiff is pro se, the government lawyer is also constrained by ethical limits on communications with an unrepresented party.[86] Under Rule 4.3 of the Model Rules of Professional Conduct, a lawyer shall not "shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[87] That Rule 4.3 is implicated here is plain, as the government lawyer representing a public entity or official in a civil rights case obviously has interests that are directly in conflict with the interests of the civil rights plaintiff.

As said by one leading commentator on Rule 4.3 as applied to lawyer negotiation of settlement with pro se civil litigants:

> The prohibition of advice-giving significantly limits permissible attorney behavior in the context of negotiations. An attorney must refrain from giving legal advice, but must also refrain from suggesting a proposed course of action to the unrepresented adversary. The attorney must not mislead the unrepresented person, and must refrain from overreaching.[88]

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[85] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

[86] On the ethical duties of a lawyer communicating with an unrepresented person, see generally SISK, *supra* note 75, § 4-11.4, at 675-78.

[87] MODEL R. PROF'L CONDUCT 4.3 (ABA 2020).

[88] Engler, *supra* note 32, at 82.

Now, this prohibition on offering legal advice to a pro se opponent does not prevent the government lawyer from advocating on behalf of the public client, including attempting to dissuade the pro se plaintiff from proceeding or negotiating a settlement of the dispute. Comment 2 to Model Rule 4.3 states:

> So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.[89]

As with any defense lawyer facing a pro se plaintiff, the government lawyer in a civil rights case may advance the considered position of the government defendant, including "express[ing] a legal opinion or advocat[ing] the client's position concerning the obligations or direction of the law."[90] But, as discussed above[91] and below,[92] expressing or advocating a legal viewpoint may not include false statements of the law or lack of public-regarding candor, such as that imposition of costs is an automatic rule without qualification.

More directly, the government lawyer would violate Rule 4.3 if that client-centered argument included individually-tailored legal advice, even though couched in terms of zealous advocacy. While the government lawyer may suggest the possibility, even perhaps the probability, of an award of court costs, subject to the court's discretion, the government lawyer may not properly advise on the detrimental effects of such an award to the plaintiff's life, employment prospects, or financial security. When the government lawyer transitions from speaking, with appropriate clarity and qualification, about the potential cost award itself to warning about the consequences that may be visited personally on the pro litigant, the lawyer moves from advocacy to counseling. Indeed, it is precisely such conflict-infected advice to an unrepresented opponent that Rule 4.3 was designed to prevent.

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89 *Id.* cmt. 2.

90 SISK, *supra* note 75, § 4-11.4(c), at 676.

91 *See infra* notes 75 to 85.

92 *See infra* notes 93 to 98.

The Government Lawyer's Higher Standard of Candor and Civility: Finally, a government lawyer is not an ordinary member of the legal profession, both by reason of the role to pursue justice and by nature of the client as a public institution. A lawyer for a government agency or official truly acts as an officer of the court with a special responsibility for the public interest. As Professor Bruce Green has written, no less than the duty of prosecutors to "seek justice" in criminal cases, government lawyers in civil litigation have a "distinctive professional role."[93]

Just as the client government agency or official "owes fiduciary duties to the public," the government lawyer "owes some derivative duties to the public."[94] Moreover, a government lawyer engages in outrageously discriminatory conduct if attempting to leverage the opposing party's financial destitution to gain a litigation advantage, as "the Constitution forbids punishing people simply on account of their poverty."[95] The government lawyer should not "engage in every method permitted by law to prevail in litigation."[96] The "power imbalance between an attorney, presumably very familiar with the law and the legal system, and an unrepresented person, potentially unfamiliar with the system and legally unsophisticated,"[97] rises exponentially when the lawyer is also a government official speaking with the presumed imprimatur of a state institution.

Defining that "higher standard" for a government lawyer, Judge Patricia Wald has articulated the five "C's": a higher level of *competence*, greater *candor*, *credibility* by virtue of the attorney's confidence in the position advocated, a greater concern for *civility*, and *consistency* in government positions taken before the courts.[98]

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[93] Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 239-40 (2000). *But see* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 957-58 (1991) (arguing that "the government lawyer may represent the government client the same way that a private lawyer represents a private client").

[94] Green, *supra* note 93, at 269-70.

[95] Brandon L. Garrett, Sara S. Greene & Mark K. Levy, *Foreword: Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463, 1463 (2020).

[96] *Id.* at 270-74.

[97] Engler, *supra* note 32, at 101.

[98] Patricia M. Wald, *"For the United States": Government Lawyers in Court*, 61

In addition to the questionable civility of a government lawyer engaging in an apparent shakedown of a civil rights plaintiff by threatening imposition of court costs, the greater expectation of candor is directly activated here. It simply is not honest for a government lawyer representing the public to warn a civil rights litigant, pro se or not, about the burdens of an award of court costs, without also explaining that the award is discretionary with the court, such as for reasons of poverty and public policy. Even should the lawyer who makes an unqualified threat evade the more limited strictures of honesty placed by Rule 4.1, the heightened duty of candor for a government lawyer should make such a resort to intimidation unthinkable.

In sum, disclosure that an award of court costs is discretionary and may be subject to poverty and public policy limits is ethically required and honorably demanded for the government lawyer. Indeed, failure to do so is compelling evidence of bad faith, which itself is a basis for denying an award of court costs.

Conclusion

The federal courts rightly insist on higher standards of behavior for those lawyers privileged to represent the public as government legal officers. And those lawyers who fail to uphold that public-regarding expectation should be held accountable. Indeed, one federal court of appeals issued a published opinion in an otherwise routine ruling to counter the "remarkable" assertion "that government attorneys ought not be held to higher standards than attorneys for private litigants."[99] The longstanding principle that prosecutors have greater ethical obligations "appl[ies] with equal force to the government's civil lawyers."[100]

Whether to impose court costs on non-prevailing civil rights plaintiffs falls within the sound discretion of the court, which properly may take into account the poverty of the pro se litigant and the public importance of a civil rights claim. While a presumption in favor of costs against the losing party may persist, imposing the full burden of costs is not automatic.

LAW & CONTEMP. PROBS. 107, 109-10, 119-27 (Winter 1998).

[99] Freeport-McMoRan Oil & Gas Co. v. FERC 962 F.2d 45, 46 (D.C. Cir. 1992).

[100] *Id*. at 47.

A government lawyer should not falsely assert the inevitability of potentially crippling financial costs in an attempt to bludgeon a civil rights plaintiff into abandoning a claim. Especially when the civil rights plaintiff is acting without the benefit of counsel, the government lawyer has both an ethical duty and a public-regarding responsibility to be truthful and not to mislead the unrepresented plaintiff, who of course is also a member of that same public to which the government agency has fiduciary responsibilities.

The government lawyer who is necessarily dealing with a pro se litigant of course may negotiate resolution of a civil dispute, including asserting that the plaintiff's case lacks merit and should be voluntarily dismissed and suggesting that court costs *may* be imposed if the plaintiff fails to win a judgment against the government defendant. As a matter of expected candor from a government legal official, as well as an ethical duty not to mislead or provide improper legal advice to an unrepresented opponent, the government lawyer must also acknowledge that awards of costs are a matter of discretion and may be reduced or excused for public policy reasons. Anything less is a breach of ethical and public responsibility for any legal officer who is entrusted to speak as a lawyer on behalf of the public. And the government lawyer may never advise the pro se litigant by foretelling economic catastrophe or employing other scare tactics.