March 2012

Does Rule 41(d) Authorize an Award of Attorney's Fees?

Edward X. Clinton Jr.
DOES RULE 41(d) AUTHORIZE AN AWARD OF ATTORNEY'S FEES?

EDWARD X. CLINTON, JR.*

INTRODUCTION

Rule 41 of the Federal Rules of Civil Procedure governs the dismissal of actions, with subsection (a) governing voluntary dismissals.1 Rule 41(d) applies where a plaintiff voluntarily dismisses a case in one jurisdiction and then refiles the same or similar case in another jurisdiction.2 The Rule allows the defendant, once the case has been refiled in another jurisdiction, to recover the costs associated with defending a previously dismissed action.3 The Rule is designed to discourage plaintiffs from forum shopping and to compensate defendants for expenses incurred in defending the same case twice.4

---

* Litigation associate with the Chicago law firm of Katten, Muchin & Zavis. The views reflected herein are those of the author, not necessarily those of Katten, Muchin & Zavis or its clients.

1 Rule 41(a) provides for voluntary dismissals by the plaintiff or by order of the court. FED. R. CIV. P. 41(a). Rule 41(a)(1) allows a plaintiff to dismiss "without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action." Id.

2 Id. § 41(d). Rule 41(d) provides that:
   If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

3 The costs awarded under the Rule are determined according to the "continuing value" test. Under this test, a defendant can only recover costs for "the preparation of work product rendered useless by the dismissal of [plaintiff's previous action]." Esquivel v. Arau, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996) (alteration in original) (quoting Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993)). A defendant cannot recover for work which continues to have value in the second forum. The test ensures that the amount awarded is narrowly tailored to compensate the defendant for extra costs incurred by the shift in forums.

4 See 5 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 41.16 (2d ed.
Recently, courts have split on the issue of whether the Rule allows an award of attorney's fees. Most courts that have addressed the issue have held that fees may be awarded. A minority have held that fees may not be awarded. Courts have reasoned that the Rule's purpose, the discouragement of forum shopping, will be furthered by the award of attorney's fees. One recent decision awarding fees has argued that Rule 41(d) should be construed in a manner consistent with Rule 41(a)(2), which has been interpreted to allow a court to award attorney's fees to the defendant upon granting a plaintiff a voluntary dismissal. Other courts awarding attorney's fees under Rule 41(d) have not explained the bases for their rulings.

This Article asserts that the Rule's text does not support an award of attorney's fees and that the reasoning of the federal district courts which have awarded such fees is inconsistent with Supreme Court precedent. Part I discusses the Supreme Court's

1996); see also Simeone v. First Bank Nat'l Ass'n, 971 F.2d 103, 108 (8th Cir. 1992) (stating that “[c]osts awarded under Rule 41(d) ... are intended to serve as a deterrent to forum shopping and vexatious litigation”). For a detailed discussion on the use of Rule 41 for forum shopping, see David J. Comeaux, Comment, Avoiding Nonjudicial Nonsuits: Hearing the Defendant on Rule 41(a)(2) Motions, 32 Hous. L. Rev. 169 (1995).

5 See Evans v. Safeway Stores, Inc., 623 F.2d 121, 122 (8th Cir. 1980) (affirming fee award of $200 as within district court’s discretion); Esquivel, 913 F. Supp. at 1388-92 (allowing attorney’s fee award); Behrle v. Olshansky, 139 F.R.D. 370 (W.D. Ark. 1991) (awarding same); Zucker v. Katz, No. 87 CIV. 7595, 1990 WL 20171, at *2 (S.D.N.Y. Feb. 21, 1990) (holding attorney’s fees for court attendance in first action were “clearly covered” because they could not be used in defense of second action); Whitehead v. Miller Brewing Co., 126 F.R.D. 581, 582-83 (M.D. Ga. 1989) (allowing fee award); Eager v. Kain, 158 F. Supp. 222, 223 (E.D. Tenn. 1957) (holding court may require payment of costs, including attorney’s fees of previous action, prior to allowing filing of second action).

6 See Anders v. FPA Corp., 164 F.R.D. 383, 388-91 (D.N.J. 1995) (rejecting reasoning of Behrle and refusing to award attorney’s fees under Rule 41(d); Simeone, 125 F.R.D. at 155 (holding attorney’s fees are not recoverable as “costs” under Rule 41(d)).

7 See Behrle, 139 F.R.D. at 372 (noting that term “costs” must include reasonable attorney’s fees to promote fairness in law); cf. Marlow v. Winston & Strawn, No. 90 C 5715, 1994 WL 171437, at *3-4 (N.D. Ill. May 3, 1994) (supporting proposition that plaintiff seeking dismissal to obtain more favorable forum must bear consequences of his strategic behavior).

8 Esquivel, 913 F. Supp at 1391. The court also noted that the Rule is designed to curb “indiscriminate and vexatious litigation.” Id. The court reasoned that it would be inconsistent to allow a court to have discretion to condition dismissal under Rule 41(a)(2) on the payment of attorney’s fees, but not to allow such discretion under Rule 41(d). Id.

9 See Evans, 623 F.2d at 122; Whitehead, 126 F.R.D. at 582; Eager, 158 F. Supp. at 223.
RULE 41(d)

jurisprudence concerning whether a statute allows an award of attorney's fees. Parts II and III analyze the text of Rule 41(d), the interpretation of the term "costs," and the use of "costs" in other Federal Rules of Civil Procedure. Part IV highlights the policy considerations urged by the courts that award attorney's fees under the Rule. Part V then analyzes the argument made by one court that Rule 41(d) should be construed in the same manner as Rule 41(a)(2). Finally, the Article concludes that these policy considerations are overcome by sound principles of statutory construction and Supreme Court precedent.

I. SUPREME COURT DECISIONS ON ATTORNEY'S FEES

Before analyzing the text of Rule 41(d), this Article will discuss recent Supreme Court decisions analyzing whether statutes authorize awards of attorney's fees. These decisions make clear that the general rule, known as "the American Rule," requires that absent an express statutory authorization, a court may not award attorney's fees. 1

A. Alyeska Pipeline

The leading decision concerning the issue of awarding attorney's fees is *Alyeska Pipeline Service Co. v. The Wilderness Society.* The lawsuit arose out of the discovery of a major oil field in Alaska. After the oil was discovered, oil companies applied for permits to build a pipeline across Alaska to a seaport on the Pacific Ocean. The plaintiff environmental groups sued the Secret-
tary of the Interior, arguing that the Secretary intended to issue permits for the pipeline in violation of several federal statutes. Plaintiffs initially obtained an injunction against the issuance of the permits. Congress then passed a statute allowing the pipeline to proceed. Plaintiffs next sought to recover their attorney’s fees on the ground that they had vindicated important statutory rights. Plaintiffs claimed that they were acting as a “private attorney general.” The Court of Appeals agreed with this reasoning and awarded attorney’s fees to be paid by the defendant pipeline company.

The Supreme Court reversed. The Court observed that under “the American Rule” no attorney’s fees are awarded to the System which requested the right-of-way permits. Id. at 242 n.2. The application requested a right-of-way of 54 feet for the pipeline, plus additional land for a road and construction purposes. Id. at 242 n.3.

Alyeska Pipeline, 421 U.S. at 242. The Wilderness Society, Environmental Defense Fund, and Friends of the Earth all brought the action for declaratory and injunctive relief, claiming that issuance of the permits would violate section 28 of the Mineral Leasing Act of 1920, as amended, and would be in violation of the National Environmental Policy Act of 1969. Id. at 241-43.

Id. at 243; see also Wilderness Soc’y v. Hickel, 325 F. Supp. 422, 424 (D.C. 1970) (granting preliminary injunction after concluding width requested in permit was excessive). A later decision which dissolved the preliminary injunction and dismissed the action was reversed. Wilderness Soc’y v. Morton, 479 F.2d 842 (D.C. Cir. 1973) (en banc).

Congress amended the Mineral Leasing Act and passed the Trans-Alaska Pipeline Authorization Act to allow the granting of permits, rendering the litigation moot. Alyeska Pipeline, 421 U.S. at 244-45.

See Morton, 495 F.2d at 1032.

The Hall court held that fees could be awarded where a plaintiff’s victory “confers a substantial benefit on the members of an ascertainable class, and where the court’s jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.” Hall v. Cole, 412 U.S. 1, 5-7 (1973) (quoting Mills v. Electric Auto Light Co., 396 U.S. 375, 391-92 (1970). The reason for this exception was explained in Knight v. Auciello, 453 F.2d 852, 853 (1st Cir. 1972):

The violation of an important public policy may involve little by way of actual damages, so far as a single individual is concerned, or little in comparison with the cost of vindication, as the case at bar illustrates. If a defendant may feel that the cost of litigation, and, particularly, that the financial circumstances of an injured party may mean that the chances of suit being brought, or continued in the face of opposition, will be small, there will be little brake upon deliberate wrongdoing. In such instances public policy may suggest an award of costs that will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right.

Id.

Morton, 495 F.2d at 1030-31.

Alyeska Pipeline, 421 U.S. at 241.
prevailing party in civil lawsuits.\textsuperscript{21} The Court noted that common law courts in England have been authorized to award attorney's fees to the prevailing party since the Middle Ages.\textsuperscript{22} There is an exception to the American Rule only where Congress has passed a statute expressly authorizing the award of attorney's fees.\textsuperscript{23} The Court declined to create an exception to the rule for plaintiffs vindicating a statutory right, because the creation of such a right would usurp congressional authority.\textsuperscript{24}

B. Key Tronic

A recent Supreme Court decision considered whether the term "costs of response" in an environmental statute authorized the recovery of attorney's fees. In \textit{Key Tronic Corp. v. United States},\textsuperscript{25} the Court considered whether attorney's fees are "costs of response" within the meaning of section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").\textsuperscript{26} Writing for the majority, Justice Stevens commented: "Our cases establish that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'"\textsuperscript{27} The Court continued, "Recognition of the availability of attorney's fees therefore requires a determination that 'Congress intended to set aside this long-standing American rule of law.'"\textsuperscript{28} The Court initially noted that neither section 107 (liabilities and defenses) nor section 113 (contribution claims) "expressly mention[ed] the recovery of attorney's fees."\textsuperscript{29} The Court made clear that there was no re-

\textsuperscript{21} \textit{Id.} at 247. The opinion contains a detailed discussion of the history and development of the "American Rule," noting the difference between the English system and that of the United States. The debate over the benefits of each system has been fueled in recent years by the Republican party's "Contract with America," which proposed some changes toward that of the British system. \textit{See generally} Joshua P. Davis, \textit{Toward a Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure 68}, 48 ALA. L. REV. 65 (1996) (arguing that attorney's fees should be awarded to winning parties based on amount offered as pre-trial settlement).

\textsuperscript{22} \textit{Alyeska Pipeline}, 421 U.S. at 247-48 n.18.

\textsuperscript{23} \textit{Id.} at 254-55.

\textsuperscript{24} \textit{Id.} at 289-271.

\textsuperscript{25} 511 U.S. 809 (1994).

\textsuperscript{26} \textit{Key Tronic}, 511 U.S. 814-19 (analyzing 42 U.S.C. § 9607(a)(4)(B)).

\textsuperscript{27} \textit{Id.} at 814 (quoting \textit{Runyon v. McCarry}, 427 U.S. 160, 185 (1976)).

\textsuperscript{28} \textit{Id.} at 815 (quoting \textit{Runyon}, 427 U.S. at 185-86).

\textsuperscript{29} \textit{Id.}
requirement that the statute specifically refer to attorney's fees. An award of fees may be authorized, even if not expressly provided for, "if the statute otherwise evinces an intent to provide for such fees." The Key Tronic Court then analyzed whether the term "necessary costs of response" in section 107 included attorney's fees. The Court held that section 107 did not authorize an award of attorney's fees for three reasons. First, section 107 did not expressly authorize private suits for contribution from other potentially responsible parties. Although the statute impliedly authorized private suits against third parties, the Court refused to read into the section a provision allowing the recovery of attorney's fees. Second, the Court noted that Congress included two express provisions for the recovery of attorney's fees in amendments to the CERCLA statute, without including a similar provision in section 107 or section 113, which authorizes contribution claims. The Court stated: "These omissions strongly suggest a deliberate decision not to authorize such awards." Third, the Court believed that the phrase "enforcement activities" could not be read to encompass an award of attorney's fees absent more explicit statutory guidance.

C. Marek v. Chesny

In Marek v. Chesny, the Supreme Court analyzed whether Rule 68 of the Federal Rules of Civil Procedure authorized an

---

30 Id.
31 Key Tronic, 511 U.S. at 815.
32 Id. at 815-16.
33 Id. at 817.
34 Id. at 818. The Court stated, "[t]o conclude that a provision that only impliedly authorizes suit nonetheless provides for attorney's fees with the clarity required by Alyeska would be unusual if not unprecedented." Id.
35 Key Tronic, 511 U.S. at 818; see 42 U.S.C. § 9659(f) (1994) (allowing award of "reasonable attorney and expert witness fees" to prevailing party); 42 U.S.C. § 9606 (b)(2)(E) (1994) (providing award of counsel fees in some circumstances to persons erroneously ordered to pay response costs).
36 Key Tronic, 511 U.S. at 818-19.
37 Id. at 820. The Court, however, found the work performed by attorneys in identifying other responsible parties came within the scope of § 107(a)(4)(B), and was therefore recoverable because non-lawyers could have performed it and the fees were "not incurred in pursuing litigation." Id. (quoting FMC Corp. v. Aero Indus., 998 F.2d 842, 847 (10th Cir. 1993)).
award of attorney’s fees in a civil rights case. In Marek, defendant police officers responded to a domestic disturbance call. When they arrived, the officers shot and killed plaintiff’s adult son. Plaintiff brought a section 1983 claim against the officers. Prior to trial, the defendants made a settlement offer of $100,000 which plaintiff rejected.

After trial, plaintiff was awarded $52,000 on the section 1983 claim. Plaintiff subsequently filed a request for a substantial amount of costs and attorney’s fees pursuant to 42 U.S.C. § 1988. Section 1988 allows a plaintiff prevailing in a suit pursuant to section 1983 to recover attorney’s fees and costs. Defendants, however, argued that Rule 68, which shifts to a plaintiff all “costs” incurred subsequent to an offer of judgment not exceeded by the ultimate recovery at trial,” barred plaintiff’s claim for costs. After noting that the Rule did not define the term “costs,” the Court reasoned that the omission of “attorney’s fee’s” within the definition of “costs” was intentional and therefore concluded that the term “costs” referred to those amounts that could be awarded pursuant to the underlying substantive statute. Consequently, the Court held that because

---

23 Id. at 3.
40 Id.
41 Id.
42 42 U.S.C. § 1983 creates a right of suit where a citizen of the United States has been deprived of his or her civil rights by one who acts under the color of state law. 42 U.S.C. § 1983 (1994).
43 Marek, 473 U.S. at 3-4.
44 Id. Plaintiff was also awarded $5,000 for his state law claim of wrongful death and $3,000 in punitive damages, rendering a total award of $60,000. Id. at 4.
45 Id.
46 Section 1988(b) provides, in pertinent part: “In any action or proceeding to enforce a provision of section[... 1983] ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988(b) (1994).
47 Marek, 473 U.S. at 4. Rule 68 provides, in pertinent part: “If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” FED. R. CIV. P. 68.
48 Marek, 473 U.S. at 8-9. The Court took notice that of the 35 statutes relating to “costs” listed in the Advisory Committee’s Note to Rule 54(d), at least 11 included attorney’s fees as part of “costs.” Id. The Court added “given the importance of ‘costs’ to [Rule 68], it is very unlikely that this omission was a mere oversight.” Id. at 9.
49 Id. “The most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority.” Id. In reaching this conclusion, the Court noted that lower courts had also applied Rule 68 in accordance with the substantive law upon which
the statute governing the litigation, section 1988, defined "costs" to include attorney's fees, attorney's fees were subject to the cost-shifting provision of Rule 68. The decision made clear that the recovery of costs depended on the underlying statute. Thus the term "costs" in Rule 68 does not by itself authorize an award of attorney's fees. For instance, in a breach of contract lawsuit based on diversity jurisdiction, the American Rule would be undisturbed and attorney's fees would not be awarded under Rule 68.

II. THE TEXT OF RULE 41(d)

The text of Rule 41(d), which does not refer to "attorney's fees," suggests that "costs" do not include "attorney's fees." The Rule provides:

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action case itself rested. Id.; see also Fulps v. City of Springfield, 715 F.2d 1088, 1093 (6th Cir. 1983) (holding that Rule 68 "costs" included attorney's fees given definition of costs in underlying statute included attorney's fees); Waters v. Heublein, Inc., 485 F. Supp. 110, 113-15 (N.D. Cal. 1979) (holding same); Scheriff v. Beck, 452 F. Supp. 1254, 1259-60 (D. Colo. 1978).

See supra note 46 and accompanying text (stating provisions of 42 U.S.C. § 1988(b)).


The Court stated: "[A]bsent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." Marek, 473 U.S. at 9.

See supra notes 48-51 and accompanying text.

In prefacing its determination in Marek with an overview of federal statutes relating to "costs," the Supreme Court noted that exclusion from a statute of any mention of attorney's fees bears significantly on the determination of whether the award of such fees was intended. Marek, 473 U.S. at 8-9. Additionally, in light of the long standing American rule of law which requires that each party pay their own litigation expenses, the Court has historically expressed hesitance to depart from this rule absent explicit congressional authority. Key Tronic Corp. v. United States, 511 U.S. 809, 815 (1994); Runyon v. McCrary, 427 U.S. 160, 185 (1976); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).
until the plaintiff has complied with the order.\textsuperscript{55}

The Rule refers to, but does not define, what constitutes “costs.” Neither the Rule nor the Advisory Committee Notes mention “attorney’s fees.”\textsuperscript{56} Providing some insight as to the scope of costs, 28 U.S.C. § 1920 sets forth the items that may be taxed as costs.\textsuperscript{57} Section 1920 allows recovery of fees of the clerk, the court reporter, witnesses, and printing costs but does not allow the recovery of attorney’s fees.\textsuperscript{58}

Because neither Rule 68 nor Rule 41(d) use the term “costs,” and do not mention the term “attorney’s fees,” one may argue that the term should have the same meaning under both rules. Accepting this proposition, it follows that the holding in \textit{Marek}, excluding attorney’s fees from “costs” recoverable under Rule 68, should also extend to costs recoverable under Rule 41(d). As the Supreme Court indicated in \textit{Key Tronic}, however, the absence of specific reference to attorney’s fees is not dispositive.\textsuperscript{59}

\section*{III. THE TEXT OF OTHER FEDERAL RULES}

Under a comparative plain meaning analysis, the text of other federal rules strongly suggests that Rule 41(d) does not authorize an award of attorney’s fees. Several federal rules ex-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{55} \textit{FED. R. CIV. P. 41(d)}.
\item \textsuperscript{56} See \textit{FED. R. CIV. P. 41} advisory committee’s note.
\item \textsuperscript{57} 28 U.S.C. § 1920 (1994). Section 1920 provides:
\begin{itemize}
\item A judge or clerk of any court of the United States may tax as costs the following:
\begin{itemize}
\item (1) Fees of the clerk and Marshal;
\item (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
\item (3) Fees and disbursements for printing and witnesses;
\item (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
\item (5) Docket fees under section 1923 of this title;
\item (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
\end{itemize}
\end{itemize}
A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
\item \textsuperscript{58} See Smoot v. Fox, 353 F.2d 830, 832 (6th Cir. 1965) (holding that attorney’s fees are not includable in “costs” because not defined in Rule 68 or Section 1920); Anders v. FPA Corp., 164 F.R.D. 383, 390-391 (D.N.J. 1995) (holding same); Kramer v. Jarvis, 86 F. Supp. 743, 744 (D. Neb. 1949) (finding same).
\item \textsuperscript{59} \textit{Key Tronic}, 511 U.S. at 815.
\end{itemize}
\end{footnotesize}
pressly provide for the recovery of attorney's fees.\textsuperscript{60} For example, Rule 37(c)(1) provides for sanctions when a party fails to disclose information required to be disclosed by Rule 26 and allows a party to recover "reasonable expenses," including "attorney's fees."\textsuperscript{61} The text of the other federal rules allowing the recovery of "attorney's fees" suggests that their drafters understood the difference between "costs" and "attorney's fees" and intended to distinguish between the two forms of relief. It is logical to conclude, therefore, that had they wanted to allow the award of attorney's fees under Rule 41(d), they would have included the term "attorney's fees" in the text of the rule. Using similar logic, the Court in \textit{Key Tronic} noted that other provisions of the CERCLA statute expressly allowed the recovery of attorney's fees while the provision at issue in \textit{Key Tronic} did not.\textsuperscript{62} The Court therefore reasoned that the failure to mention attorney's fees indicated "a deliberate decision not to authorize such awards."\textsuperscript{63} Thus Rule 41(d)'s text, when compared with the texts of other Federal Rules of Civil Procedure and with other federal statutes, strongly indicates that the drafters intended only to authorize awards of costs, not attorney's fees.\textsuperscript{64}

\textsuperscript{60} See \textit{FED. R. Civ. P. 11(c)(2)} (allowing recovery of "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation" of Rule 11); \textit{FED. R. Civ. P. 26(g)(3)} (allowing recovery of "reasonable expenses incurred because of the violation [of Rule 26], including a reasonable attorney's fee"); \textit{FED. R. Civ. P. 30(g)(2)} (allowing court to award "reasonable expenses ... including reasonable attorney's fees" for failure to attend or serve subpoena); \textit{FED. R. Civ. P. 37(a)(4)(A) & (B)} (allowing court to award reasonable expenses, including attorney's fees, incurred in making or opposing motion to compel discovery); \textit{FED. R. Civ. P. 37(c)(1)} (allowing recovery of "reasonable expenses, including attorney's fees" for failure to disclose information required by Rule 26(a)); \textit{FED. R. Civ. P. 37(c)(2)} (allowing recovery of "reasonable expenses ... including attorney's fees" for failure to comply with Rule 36 request); \textit{FED. R. Civ. P. 37(d)} (allowing recovery of "reasonable expenses, including attorney's fees" for failure to respond to request for inspection); \textit{FED. R. Civ. P. 56(g)} (allowing recovery of "reasonable expenses ... including reasonable attorney's fees" for presenting affidavit made in bad faith).

\textsuperscript{61} \textit{Key Tronic}, 511 U.S. at 816-17.

\textsuperscript{62} \textit{Id.} at 819; see also \textit{Marek v. Chesny}, 473 U.S. 1, 8 (1985) (noting omission of "attorney's fees" from text of Rule 68 was relevant in light of inclusion of term in other federal statutes).

\textsuperscript{63} Applying this interpretation of Rule 41(d), the District Court of Minnesota, in \textit{Simeone v. First Bank National Association}, 125 F.R.D. 150, 155 (D. Minn. 1989), \textit{rev'd on other grounds}, 971 F.2d 103 (8th Cir. 1992), denied a defendant's request for attorney's fees. The \textit{Simeone} court recognized that the language of Rule 41(d) "speaks only generally of payment of 'costs' and does not specifically mention attor-
The use of the term "reasonable expenses" in several of the Federal Rules of Civil Procedure, such as Rule 37(d),\textsuperscript{65} indicates that the drafters understood the difference between the "expenses" allowed by the Rules and the term "costs" as used in 28 U.S.C. § 1920.\textsuperscript{66} For example, if one party fails to disclose information required to be disclosed by the Rules, the other party may incur various "expenses" to obtain the information. An example of such an "expense" is the cost of travel to a city to take a deposition for the second time. Such an expenditure would not be recoverable as a "cost" under section 1920.\textsuperscript{67} The drafters

\textsuperscript{65} FED. R. CIV. P. 37(d) (allowing recovery of "reasonable expenses, including attorney's fees").

\textsuperscript{66} See supra notes 57 and 60. Compare 28 U.S.C § 1920 (1994), with FED. R. CIV. P. 11(c)(2), 26(g)(3), 30(g)(2), 37(a)(4)(A), 37(c)(1)&(2), 37(d), 56(g). Inclusion of fees for the items within the statute is at the discretion of the court, but a court must be conservative when awarding expenses not specifically allowed by statute. See Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964); Hodge v. Seiler, 558 F.2d 284, 287 (5th Cir. 1977). Only attorney services listed in the statute can be taxed. See The Baltimore, 75 U.S. (8 Wall.) 377, 392 (1869); Grant v. Fletcher, 283 F. 243, 274 (E.D. Mich. 1922) (stating that special or extra allowances are not recoverable absent specific statutory authority). Federal courts are not free to create new rules regarding attorney's fees. Anderson v. Thompson, 495 F. Supp. 1256, 1269 (E.D. Wis. 1980), aff'd, 658 F.2d 1205 (7th Cir. 1981).

\textsuperscript{67} The term "cost" has been given a strict statutory interpretation. See, e.g., Daniel D. Mason, Note, Hosner v. The Gibson Partner Warning: "Free" Dismissals Under 41(A)(1)(a) Can Really Cost, 19 CAP. U. L. REV. 233, 236 (1990) (discussing early Ohio Supreme Court decisions stating term "costs" should be given strict interpretation to cover only expenses authorized by statute). Over time, however, some courts have departed from this strict construction with regard to Rule 41(d). See id. at 243. A broader reading of the term "costs" reflects a policy concern that dismissal of a case is an unnecessary expense to the opposing party and disrupts the court's calendar, and that such actions must be deterred by an award of attorney's fees. Id.; see also United States Fidelity & Guar. Co. v. Rodgers, 882 P.2d 1037, 1041 (Mont. 1994) (stating power to award attorney's fees pursuant to rule 41(d) exists in court where second action is commenced).

Notwithstanding the broad reading sometimes given to the term "costs," travel expenses of an attorney for taking a deposition are ordinarily not recoverable as a "cost." See Wahl v. Carrier Mfg. Co., 511 F.2d 209, 217 (7th Cir. 1975); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968); Apostal v. City of Crystal Lake, 165 F.R.D. 508, 513 (N.D. Ill. 1996).
carefully chose the term “expenses” instead of “costs” or “attorney’s fees,” indicating that these three words have distinct meanings.

IV. THE POLICY BEHIND RULE 41(d)

Courts have often awarded attorney’s fees in order to foster Rule 41(d)’s policy against forum shopping. The Rule is designed to prevent a plaintiff from filing a case in one jurisdiction, dismissing the case and filing the same case in another jurisdiction. In Behrle v. Olshansky, the court, in order to ensure that Rule 41(d) had “teeth,” awarded attorney’s fees to the defendant. In Behrle, plaintiff filed a lawsuit in Arkansas state court alleging that defendant had defrauded him in connection with the sale of a business. After remaining in state court for eight years, the case finally came to trial. After only three days of trial, the plaintiff voluntarily dismissed the case. One day later, plaintiff filed an identical lawsuit in federal court. The court critically stated: “[W]e have a lawsuit in this court in which the parties are exactly where they were more than eight years ago. In this court’s view, there is obviously something wrong with that.” Addressing the issue of attorney’s fees, the Behrle court concluded that if Rule 41(d) only permitted the recovery of costs allowed under 28 U.S.C. § 1920, then the provision would have no “teeth” and be rendered useless. The court reasoned that Con-

69 Id. at 374.
70 Id. at 371. Plaintiff alleged that defendant intentionally made false representations of material facts during and after his purchase of plaintiff’s controlling interest in a corporation. Id.
71 Id. at 371.
72 Behrle, 139 F.R.D. at 371. Plaintiff nonsuited the case as a matter of right, pursuant to Rule 41 of the Arkansas Rules of Civil Procedure. Id.
73 Id. By that time, defendant had already spent $141,000 for attorney’s fees. Id.
74 Id. at 371. The general purpose of Rule 41 was to remedy such situations. The Rule establishes the point at which the court’s and the defendant’s resources are so committed that a dismissal without a penalty to the plaintiff would be unjust. See Safeguard Bus. Sys., Inc. v. Hoefeld, 907 F.2d 861, 863 (8th Cir. 1990) (stating that Rule 41 provides for plaintiff who loses privilege of dismissal as matter of right because answer or motion for summary judgment filed); In re Piper Aircraft Distrib. Sys. Antitrust Litig., 551 F.2d 213, 220 (8th Cir. 1977) (holding same).
75 Behrle, 139 F.R.D. at 373. While the Behrle court concluded that attorney’s fees should be permitted because the text of Rule 41(d) allows a court to make an order for the payment of costs “as it may deem proper,” it is similarly plausible that “the phrase ‘as it may deem proper’ refers to the court’s discretion in its initial decision whether to award costs or not; [and] it does not necessarily provide discretion.
gress must have intended for the Rule to have “teeth” and awarded attorney’s fees. 76

There can be no question that the Rule’s policy against forum shopping would be furthered by awarding attorney’s fees to the defendant. A cost award, comprised of only court and other incidental costs, is often insubstantial. Attorney’s fees, however, comprise a majority of the expenses in defending a lawsuit. 77 Although the drafters of Rule 41(d) were almost certainly aware that awarding attorney’s fees would serve the policy considerations of the Rule, they did not use that term in the Rule’s text. Where the drafters of the Federal Rules of Civil Procedure did intend that courts award attorney’s fees, they expressly referred to awards of “attorney’s fees.” 78 The remedial provisions of many federal rules would be strengthened by awarding attorney’s fees to prevailing parties. The drafters of Rule 41(d) were presumably aware of this when they drafted the Rule. Yet, they used the term “costs” rather than “attorney’s fees.”

*Alyeska Pipeline Service Co. v. Wilderness Society* 79 is instructive in this context. In *Alyeska Pipeline*, the plaintiff environmental groups argued that they should be entitled to attorney’s fees because they performed the function of a “private attorney general.” 80 They claimed to have vindicated important
to determine whether attorney’s fees may be included in an award of costs.” *Anders v. F.P.A. Co.*, 164 F.R.D. 383, 390 (D.N.J. 1995).

76 Behrle, 139 F.R.D. at 373. The *Behrle* court “believe[d] and [found] that Congress must have intended when Rule 41(d) was adopted to give the court discretion to include reasonable attorney’s fees in the ‘costs’ that could be imposed.” *Id.* at 374; *see also* Esquivel v. Arau, 913 F. Supp. 1382, 1391 (C.D. Cal. 1996) (basing its award of attorney’s fees, in part, on fact that Rule was designed to curb “indiscriminate and vexatious litigation”). Additionally, the *Esquivel* court wanted to discourage needless expenses to defending parties. *Esquivel*, 913 F. Supp. at 1391. The court believed that it must have the discretion to award attorney’s fees under circumstances of a voluntary dismissal to ensure fairness to the litigants. *Id.*


80 *Id.* at 241. The environmental groups initiated litigation to prevent the Secretary of Interior from issuing permits required for construction of the trans-Alaska
statutory rights, which benefited the public interest.\textsuperscript{81} They argued that policy considerations strongly supported an award of attorney's fees.\textsuperscript{82} The Court agreed that this policy might have merit: "It is ... apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances."\textsuperscript{83} This policy reason, however, did not persuade the Court to depart from the American Rule, which is "deeply rooted in our history and in congressional policy."\textsuperscript{84} The \textit{Alyeska Pipeline} Court posited that policy alone cannot justify a departure from the American Rule. Such reasoning also applies to Rule 41(d).

V. THE ARGUMENT BASED ON RULE 41(a)(2)

In \textit{Esquivel v. Arau},\textsuperscript{85} the District Court for the Central District of California looked to decisions awarding attorney's fees under Rule 41(a)(2) for guidance in determining whether the same construction should be accorded Rule 41(d). In \textit{Esquivel}, the court reasoned that Rule 41(d) permitted an award of fees because Rule 41(a)(2), which governs voluntary dismissals, has been read to allow the imposition of attorney's fees as a condition of dismissal.\textsuperscript{86} The \textit{Esquivel} court found that it would be anomalous to hold that fees may be awarded as a condition of the voluntary dismissal of the first case, but that they could not be awarded upon the refiling of the case in another jurisdiction.

Rule 41(a)(2) provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."\textsuperscript{87} Courts have held that this language allows the trial judge to condition a

\begin{itemize}
  \item \textsuperscript{81} Alyeska Pipeline, 421 U.S. at 245.
  \item \textsuperscript{82} Id. These policy considerations include: (a) ensuring the governmental system functions properly; and (b) encouraging private parties to initiate litigation to ensure that environmental laws are properly enforced. Id. at 246.
  \item \textsuperscript{83} Id. at 271; see also Andrew D. Dorisio & Jacqueline Kerry Heyman, Key Tronic v. United States: The Buck Stops Here, 10 J. NAT. RESOURCES & ENVTL. LAW 125, 128 (1995) (maintaining that encouragement of private action in pursuit of public policy has often been viewed favorably by courts).
  \item \textsuperscript{84} Alyeska Pipeline, 421 U.S. at 262. The Court stated, "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Id.
  \item \textsuperscript{85} 913 F. Supp. 1382 (C.D. Cal. 1996).
  \item \textsuperscript{86} See id. at 1388 (asserting that when purpose of awarding fees is similar, standard for expenses awarded should be same for both rules).
  \item \textsuperscript{87} FED. R. CIV. P. 41(a)(2).
\end{itemize}
voluntary dismissal upon the payment of the defendant's attorney's fees.\(^{63}\) In theory, the Rule gives the court the power to negotiate with the plaintiff. If the plaintiff does not agree with the court's terms for dismissal, the plaintiff may decide not to dismiss the action.\(^{69}\) The *Esquivel* court relied on the above interpretation to argue that attorney's fees should also be authorized by Rule 41(d).\(^{95}\) The *Esquivel* court explained that it would be inconsistent for a court to award fees as a condition of a voluntary dismissal but not to allow an award of fees when a case that was previously voluntarily dismissed is refiled.\(^{91}\)

There are two significant problems with this argument. First, the text of Rule 41(a)(2) does not expressly authorize an award of attorney's fees. The language "upon such terms and conditions as the court deems proper"\(^{2}\) is too ambiguous; it does not suggest whether an award of fees is authorized. Under *Alyeska Pipeline* and *Key Tronic*, an argument can be made that Congress' failure to expressly authorize an award of attorney's fees preserves the American Rule, which does not award attorney's fees. In addition, the Notes of the Advisory Committee do not suggest that attorney's fees can be awarded under Rule 41(a)(2).\(^{93}\) Thus, it is unclear whether Rule 41(a)(2) authorizes courts to award attorney's fees as a condition of a voluntary dismissal.

---

\(^{63}\) See, e.g., *Cauley v. Wilson*, 754 F.2d 769, 771 (7th Cir. 1985) (declaring that Rule 41(a)(2) permits court to condition voluntary dismissal without prejudice on payment of defendant's attorney's fees). An appeal of the conditions imposed on a dismissal is only permissible if the conditions, such as attorney's fees, were prejudicial to the plaintiff. *Id.* The purpose of the award is to compensate the defendant for the monetary loss caused by the discontinued litigation. *Id.* at 772; see also *Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993) (stating that proof of attorney's fees must differentiate between cost of work product rendered unusable by dismissal and work product which can be used in later litigation).

\(^{65}\) See *White v. Telelect, Inc.*, 109 F.R.D. 655, 656 (S.D. Miss. 1986) (explaining that, in requesting voluntary dismissal pursuant to Rule 41(a)(2), plaintiff can either pay costs and accept dismissal or decline to pay costs and continue action).

\(^{93}\) 913 F. Supp. at 1391. According to the court, "[t]he fact that Rule 41(a)(2) has been a basis to impose fee award 'conditions' lends support to the proposition that Rule 41(d) 'costs' awards should also include attorneys' fees." *Id.*

\(^{91}\) See *id.*

\(^{95}\) FED. R. CIV. P. 41(a)(2).

\(^{96}\) The advisory committee notes deal exclusively with procedure, specifically with procedure under Rule 41(a)(1). There is no expression of legislative intent regarding attorney's fees. The sole reference to Rule 41(a)(2) is an explanation that the Rule can provide a voluntary dismissal in the event that the court denies a motion for a directed verdict. FED. R. CIV. P. 41 advisory committee's note.
The second problem with this argument is that the phrase “upon such terms and conditions as the court deems proper” in Rule 41(a)(2), suggests that it operates differently than Rule 41(d). The former contemplates a negotiation between the plaintiff and the court. During the negotiation, the court may allow defendants to recover their attorney’s fees if the plaintiff seeks a voluntary dismissal. If the court indicates that it will award attorney’s fees upon a voluntary dismissal, the plaintiff can decide to proceed with the litigation. Thus, Rule 41(a)(2) contemplates that the decision of whether to award attorney’s fees will be a product of a bargain between well-informed parties. Not only does a plaintiff lack such bargaining power in the context of Rule 41(d), but Rule 41(d) also does not contemplate a negotiation between the parties and the court. Rule 41(d) simply refers to “costs.” This suggests that Rule 41(a)(2) was meant to operate differently from Rule 41(d) and that the drafters intentionally used different language in the two rules to highlight the difference in their operation. Thus, it is not anomalous to allow an award of fees under Rule 41(a)(2) while not allowing the same under Rule 41(d). The drafters intended that the two rules would operate differently.

CONCLUSION

Several courts have awarded attorney’s fees pursuant to Rule 41(d). They have based their decisions on the Rule’s policy against forum shopping and on the trend to allow the recovery of attorney’s fees under Rule 41(a)(2). Certainly, the Rule’s policy against forum shopping would be furthered by awarding attorney’s fees, since dismissing cases would be more expensive for plaintiffs. The Rule’s text, however, only mentions “costs,” while other federal rules specifically mention “attorney’s fees.” The difference in terminology suggests that the drafters recognized the marked distinction between “costs” and “attorney’s fees.”

The comparison of Rule 41(d) with Rule 41(a)(2) does not suggest that Rule 41(d) authorizes an award of attorney’s fees. First, it is unclear whether the text of Rule 41(a)(2) authorizes

---

94 Mason, supra note 67, at 249 (“It was not the intent of the drafters to make the two rules identical.”).

95 White v. Telelect, Inc., 109 F.R.D. 655, 656 (S.D. Miss. 1986). The White court permitted a plaintiff to proceed with his case instead of following through with the dismissal to avoid payment of attorney’s fees to the defendant. Id.
an award of attorney's fees. Second, the drafters used one term in Rule 41(d) and another in Rule 41(a)(2). The meticulous choice of words suggests that the drafters intended the two rules to operate differently. Consequently, the most reasonable conclusion is that the drafters of Rule 41(d) intended only to authorize awards of costs, not attorney's fees.