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Introduction

A significant question about federal statutes that protect the civil rights of individuals is whether they allow claimants in civil rights cases to receive attorney fees from their adversaries. Often, the answer makes the difference between going to court or not. Our federal legislators have recognized that civil rights statutes are ineffectual without a guarantee that prevailing parties will be awarded attorney fees in their cases. The United States Congress pointed out that victims must be encouraged to prosecute their claims individually because the government by itself is incapable of protecting the civil rights of all persons. In turn, Congress passed the Civil Rights Attorney's Fees Awards Act (section 1988) in 1976 to permit fee awards under certain civil rights statutes that previously did not explicitly grant them.

Without section 1988, many persons who are victimized by civil rights violations would not bring their actions to court, due to the time and expense involved. Hence, section 1988 is designed to encourage litigation in which prevailing litigants may recover attorney fees.

The issue of granting attorney fees to prevailing claimants raises questions, however, about claimants who litigate their actions pro se. The

3. Section 1988 reads in pertinent part:
   In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, 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.

The civil rights statutes covered by § 1988 are broadly summarized as follows: § 1981 (no discrimination in contracts, transactions, civil litigation, and criminal proceedings); § 1982 (no discrimination in real or personal property transactions); § 1983 (no violations of federal constitutional or statutory rights by state and local officials); § 1985 (no conspiracies to violate civil rights); § 1986 (no official neglect in preventing civil rights violations); title IX (no discrimination based on sex or visual impairment in certain programs receiving federal financial assistance); and title VI (no racial discrimination in federally funded programs).

6. Pro se means "for one's own behalf" and is used to describe litigants who represent themselves in legal cases. Black's Law Dictionary 1221 (6th ed. 1990). Another term used is in propria persona, which means "in one's own proper person" (also known as pro per). Id. at 792. The latter term has sometimes been used to identify a pro se litigant who is an attorney. For purposes of this note, pro se will be used to refer to all claimants, attorneys, and nonattorneys, who litigate without counsel.
federal circuit courts have reached conflicting opinions on whether attorney pro se litigants are entitled to collect attorney fees.\textsuperscript{7} \textit{Kay v. Ehrler}\textsuperscript{8} is the most recent federal circuit court case addressing this issue. In \textit{Kay}, the Sixth Circuit resoundingly rejected awarding attorney fees to an attorney pro se litigant.\textsuperscript{9} The Sixth Circuit's decision was subsequently affirmed by the United States Supreme Court, thus resolving the conflicting results among the circuit courts.\textsuperscript{10}

This note will demonstrate that attorneys who litigate their claims pro se should collect attorney fees under section 1988, just as other claimants may if they win their cases. The note begins with a background explanation of section 1988 and provides some brief comments on the legislative intent behind the statute. Next, the note discusses and critiques the reasoning of the Sixth Circuit Court of Appeals in \textit{Kay} and why that decision should not have been affirmed by the Supreme Court.

Finally, this note points out that the \textit{Kay} court failed to fully analyze section 1988, relying instead on inapposite circuit court opinions in making its decision. Had the \textit{Kay} court delved into section 1988, it would have found that section 1988 is meant to encourage civil rights litigation in many forms by private parties, even if it means awarding attorney pro se litigants with attorney fees.

\textbf{Historical Origin of Section 1988}

In \textit{Alyeska Pipeline Co. v. Wilderness Society},\textsuperscript{11} the United States Supreme Court settled the issue of whether claimants are automatically entitled to attorney fees if they prevail.\textsuperscript{12} The Supreme Court held that under the so-called "American rule,"\textsuperscript{13} litigants are not to be awarded fees as a matter of practice.\textsuperscript{14} However, the Court recognized three exceptions to this rule.\textsuperscript{15} First, attorney fees are recoverable when a party preserves a fund or a right for the benefit of others.\textsuperscript{16} Second, a court may award fees when the losing party has brought a claim in bad faith.\textsuperscript{17}

\textsuperscript{7} The Ninth Circuit and Eleventh Circuit have permitted fee awards. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), cert. denied, 475 U.S. 1129 (1986). The Sixth Circuit has not. See Kay v. Ehrler, 900 F.2d 967 (6th Cir. 1990).
\textsuperscript{8} 900 F.2d 967 (6th Cir. 1990).
\textsuperscript{9} \textit{Id.} at 972.
\textsuperscript{11} 421 U.S. 240 (1975).
\textsuperscript{12} \textit{Practising Law Inst., Court Award of Attorneys' Fees: Litigating Antitrust, Civil Rights, Public Interest, and Securities Cases} 13 (1987).
\textsuperscript{13} "The traditional 'American rule' is that attorney's fees are not awardable to the winning party . . . unless statutorily or contractually authorized." \textit{Black's Law Dictionary} 82 (6th ed. 1990).
\textsuperscript{14} \textit{Alyeska}, 421 U.S. at 247.
\textsuperscript{15} \textit{Id.} at 257.
\textsuperscript{16} \textit{Id.} This "common fund" doctrine arises, for example, in class action suits, antitrust cases, and securities litigation.
\textsuperscript{17} \textit{Id.} at 258. "[A] court may assess attorneys' fees for the 'willful disobedience of a court order' . . . or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for
Third, fees may be granted to the prevailing party under statutory authority.\textsuperscript{18} Nearly 200 fee-shifting statutes exist at the federal level.\textsuperscript{19} Depending upon their language, fee-shifting statutes are either mandatory or discretionary.\textsuperscript{20} Among the various federal statutes allowing an award of attorney fees, section 1988 is the most commonly used.\textsuperscript{21} Title 42, section 1988 of the United States Code was passed by Congress partly in response to the holding in \textit{Alyeska}.\textsuperscript{22} In that case, the Supreme Court refused attorney fees to the claimant because a civil rights statute failed to authorize the imposition of attorney fees.\textsuperscript{23} Section 1988 remedies this result by providing that prevailing parties may be awarded reasonable attorney fees as part of their costs under various civil rights laws that in themselves do not address the question of attorney fees.\textsuperscript{24}

Since passage of section 1988 in 1976, prevailing plaintiffs have almost always been awarded attorney fees "unless special circumstances would render such an award unjust."\textsuperscript{25} Most "special circumstances" alleged by losing parties have been rejected by the courts, except when a defendant is actually a minor participant in a case primarily involving other defendants.\textsuperscript{26} By contrast, the courts have been reluctant to grant attorney fees to prevailing defendants.\textsuperscript{27} Instead, the rule for remitting legal fees to a defendant is invoked when the plaintiff's suit is considered frivolous and vexatious.\textsuperscript{28}

Despite an ostensibly liberal use of section 1988 in most civil rights cases,\textsuperscript{29} the federal courts have overwhelmingly declined — except in the

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\item \textsuperscript{18} \textit{Id.} (quoting Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 426-28 (1923), and F. D. Rich Co. v. United States \textit{ex rel.} Industrial Lumber Co., 417 U.S. 116, 126-31 (1974)).
\item \textsuperscript{19} \textit{Id.} at 260-61.
\item \textsuperscript{21} \textit{Practising Law Inst., supra} note 12, at 31.
\item \textsuperscript{22} S. Rep. No. 94-1011, \textit{supra} note 1, at 4. See \textit{supra} notes 11-18 on \textit{Alyeska}.
\item \textsuperscript{23} \textit{Alyeska Pipeline Co. v. Wilderness Soc'y}, 421 U.S. 240, 267-69 (1975).
\item \textsuperscript{24} See \textit{supra} note 3.
\item \textsuperscript{25} Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).
\item \textsuperscript{26} \textit{Practising Law Inst., supra} note 12, at 32-33.
\item \textsuperscript{28} \textit{Id.} at 276.
\item \textsuperscript{29} The statutory language, intent, and standard for attorney fees under § 1988 are the
\end{itemize}
District of Columbia Circuit — to grant attorney fees to nonlawyer pro se litigants who prevailed on their claims. However, a distinction has been drawn when the pro se litigants happened to be attorneys. Until the United States Supreme Court decision in Kay v. Ehrler, questions still loomed among the federal courts as to whether section 1988 permitted the payment of attorney fees for lawyers who bring civil rights claims independently and without legal counsel.

The lack of unanimity stemmed from the failure of section 1988 to address pro se litigants. Consequently, whenever the question of pro se litigants arose, courts resorted to statutory interpretation to find an answer. According to the United States Congress, section 1988 is meant to be interpreted broadly. The Senate Judiciary Committee wrote in its report on section 1988 (Senate Report) that "[C]ongress has instructed the courts to use the broadest and most effective remedies available to achieve the goals of our civil rights laws." The Senate Report explains that the chief purpose of section 1988 is to "remedy the anomalous gaps in our civil rights laws" that resulted from the Alyeska decision in the United States Supreme Court. In addition, the Senate Report also underscores the fact that attorney fees are to be encouraged because of the government's dependence on private parties to enforce civil rights legislation and because they eliminate cost barriers to

same for 42 U.S.C. § 2000a-3(b) (which awards counsel fees in suits arising under title II of the Civil Rights Act of 1964, a law prohibiting discrimination or segregation based on race, color, religion or national origin in places of public accommodation) and 42 U.S.C. § 2000e-5(k) (which grants attorney fees in suits arising under title VII of the Civil Rights Act, a law barring discrimination in employment based on race, color, religion, sex or national origin). Thus, the reasoning in § 1988 cases has applied equally to § 2000a-3(b) and § 2000e-5(k) cases. See Annotation, supra note 27, at 249-50; Lawrence v. Staats, 586 F. Supp. 1375, 1378 n.3 (D.D.C. 1984).


31. See supra note 7.

32. See supra note 10.

33. The Supreme Court observed, in United States v. Sisson, 399 U.S. 267, 279-98 (1970), "The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances [are] not plainly covered by the terms of a statute . . . " See also International Tel. & Tel. v. General Tel. & Elec., 518 F.2d 913, 917-18 (9th Cir. 1975).

34. S. Rep. No. 1011, supra note 1, at 3.

35. Id. Several courts have also ruled that § 1988 should be interpreted broadly. See Williams v. Fairburn, 702 F.2d 973, 976 (11th Cir. 1983) ("The basis for allowing such broad [statutory] interpretation is to 'facilitate private enforcement.'"); see also Northcross v. Board of Educ. of Memphis City Sch., 611 F.2d 624, 633 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).


37. This concept is sometimes known as the "private attorney general" theory mentioned
courts.\textsuperscript{38} The House of Representatives report on section 1988 (House Report) also recognizes these same two reasons for granting attorney fees, but it devotes more attention to providing access to legal counsel for those who cannot afford to use the courts to resolve their grievances.\textsuperscript{39} The House Report notes that plaintiffs in civil rights cases are typically disadvantaged persons who are victims of unlawful discrimination.\textsuperscript{40} The House Report concludes that "[i]t would be unfair to impose upon [disadvantaged persons] the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts."\textsuperscript{41}

\textit{Kay v. Ehler and Section 1988}

In \textit{Kay v. Ehler},\textsuperscript{42} the Sixth Circuit used a unique approach in solving the riddle of pro se litigants and attorney fees. Instead of examining the intent behind section 1988, the Sixth Circuit borrowed the reasoning from another case involving legal fees under a different statute.\textsuperscript{43} By focusing on the Freedom of Information Act,\textsuperscript{44} the court unfortunately missed an opportunity to examine section 1988 directly and clarify the differences of opinion on fee awards for pro se litigants in civil rights cases.

Richard Kay, a licensed attorney and resident of Florida, ran for the Democratic nomination for president of the United States in the 1988 election. When Kay was denied the opportunity to place his name on the Kentucky presidential preference primary ballot,\textsuperscript{45} he filed an action in 1988, seeking a temporary restraining order and preliminary injunction against the attorney general and the secretary of state of Kentucky.\textsuperscript{46} He won a summary judgment that declared that two Kentucky statutes were unconstitutional and in violation of Kay's civil rights.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{Newman} in Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968), in which the U.S. Supreme Court said, "If [a plaintiff] obtains an injunction, he does so not for himself alone, but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest importance." See \textit{supra} note 25.
\bibitem{Id.} \textit{Id.} at 5.
\bibitem{Id.} \textit{Id.}
\bibitem{900 F.2d} 900 F.2d 967 (6th Cir. 1990).
\bibitem{Id.} \textit{Id.} at 971.
\bibitem{infra} \textit{See infra} note 52.
\bibitem{Kay} Kay also ran for president in the election of 1980 and faced several campaign obstacles in Kentucky, whose Board of Elections refused to place his name on its primary ballot. As a result, Kay filed a suit against the state and successfully won an injunction to stop the enforcement of § 118.580 of the Kentucky Revised Statutes, which declared that the "board of elections shall nominate as presidential preference primary candidates all those generally advocated and nationally recognized as candidates . . . for the office of President of the United States," KY. REV. STAT. ANN. § 118.580 (Baldwin 1986); see Kay v. Mills, 490 F. Supp. 844 (E.D. Ky. 1980).
\bibitem{Kay} Kay, 900 F.2d at 968.
\bibitem{Id.} \textit{Id.} The language of § 118.581 requiring candidates to be "nationally recognized" before
\end{thebibliography}
The federal district court awarded actual court costs to Kay, but refused to grant him attorney fees.\textsuperscript{48} The district court reasoned that it should follow the Sixth Circuit precedent in denying attorney fees to pro se litigants.\textsuperscript{49} The Sixth Circuit, relying heavily on a decision it made regarding attorney fees in *Falcone v. Internal Revenue Service*,\textsuperscript{50} affirmed the decision of the district court.\textsuperscript{51}

The Sixth Circuit offered no analysis for refusing attorney fees specifically under section 1988. Instead, the court borrowed its own reasoning from *Falcone*, a case involving the recovery of attorney fees under the Freedom of Information Act (FOIA),\textsuperscript{52} and applied it to section 1988, although the two statutes are entirely different fee-shifting statutes.

The Sixth Circuit relied on three major conclusions from the *Falcone* case when it decided that attorney fees should not be granted to pro se attorney-litigants.\textsuperscript{53} First, the FOIA was meant to encourage claimants to obtain legal counsel, through which they would receive professional advice about the merits of their claims.\textsuperscript{54} Second, compensating pro se litigants with attorney fees should be prevented because it would otherwise spark a "cottage industry"\textsuperscript{55} of inactive lawyers who support themselves through self-generating litigation.\textsuperscript{56} Finally, in drafting the FOIA, Congress did not contemplate opportunity costs — the billable hours a lawyer forgoes in litigating the case at hand — as actual pecuniary loss which should be compensated.\textsuperscript{57}

In *Kay*, the Sixth Circuit used these arguments about the FOIA to deny attorney fees to the petitioner. The Sixth Circuit concluded, without

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\textsuperscript{48} *Kay*, 900 F.2d at 968-69.

\textsuperscript{49} *Id.* at 969.

\textsuperscript{50} 714 F.2d 646 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984).

\textsuperscript{51} *Kay*, 900 F.2d at 969.7

\textsuperscript{52} Pub. L. No. 93-502, 88 Stat. 1561, 1562 (1974) (codified at 5 U.S.C. § 552(a)(4)(E) (1988)). The statute reads in pertinent part that a "court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." *Id.*

\textsuperscript{53} *Kay*, 900 F.2d at 971.

\textsuperscript{54} *Id.* (citing *Falcone*, 714 F.2d at 647). The Sixth Circuit in *Falcone* also reasoned that the FOIA was intended to relieve plaintiffs of the burden of legal costs, but this was not mentioned in the majority opinion in *Kay*.

\textsuperscript{55} *Id.* (citing *Falcone*, 714 F.2d at 647). A cottage industry describes "the production, for sale, of goods at home" or "any small-scale, loosely organized industry." *RANDOM HOUSE DICTIONARY* 459 (2d ed. 1987). The Sixth Circuit Court used the term disparagingly to describe a venture in which lawyers thrive and create their own work through fee-shifting statutes without seeking clients.

\textsuperscript{56} *Kay*, 900 F.2d at 971 (citing *Falcone*, 714 F.2d at 647).

\textsuperscript{57} *Id.*
explanation, that although Falcone is a FOIA case, it was not distinguishable from the issues raised in Kay. The court also added that a statutory provision for attorney fees assumes an attorney-client relationship and that no reason exists why pro se attorneys should be treated any differently from pro se nonattorneys, who are routinely denied attorney fees.

Judge Jones’ dissenting opinion in Kay viewed Falcone as a distinguishable case because of the very fact that it pertained to the FOIA. Judge Jones noted that the two underlying reasons for section 1988 are to alleviate the cost of litigation and to reward successful claimants who vindicate their constitutional rights. Therefore, the statute should not have been compared with the FOIA.

After the United States Supreme Court heard the case on appeal, it affirmed the Sixth Circuit’s holding, but provided its own rationale for denying fees to attorney pro se litigants. In its very brief decision, the Court concluded that the statutory intent behind section 1988 is not entirely clear.

In light of section 1988’s partial intent to help plaintiffs acquire the assistance of counsel and various public policy concerns, the Court reasoned that attorneys should not be awarded fees. The practical considerations raised by the Court were the preference for objective third party representation to ensure the effective prosecution of claims and the possibility of ethical violations by employing oneself as an attorney.

Analysis

The Discrepancy Between Kay and Falcone

Although some of the arguments of the Sixth Circuit may seem convincing, each of its arguments should be questioned. First, the Kay court adopted the reasoning used in Falcone, which considered the award of counsel fees under a separate fee-shifting statute. Not only is the language between the FOIA and section 1988 different, the two statutes are unquestionably designed to achieve different goals. Second, section 1988

58. Id.
59. Id. at 971-72. See infra note 128.
60. Id. at 972.
61. Id. at 972-73.
62. Id. at 973.
64. Id. at 1437.
65. Id. at 1437-38.
66. The Court criticized the Sixth Circuit’s contention that section 1988 was intended to ensure that attorneys filter out meritless claims. Id. at 1438. The Court concluded that the statute was meant to encourage the effective prosecution of meritorious claims. Id. at 1439.
67. See infra note 105.
68. The FOIA was passed to encourage the government at all levels to provide classified documents requested by private citizens. H.R. Rep. No. 1487, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418. Section 1988 was passed to ensure that private entities and state and local governments respect civil rights laws in a wide variety of transactions. See supra note 3.
deals with cases inherently more numerous and complicated than those under the FOIA.\textsuperscript{69} Third, the Sixth Circuit incorrectly viewed the \textit{Falcone} reasoning as conclusive even though other circuit courts had reached entirely different opinions about fee awards for pro se litigants\textsuperscript{70} prior to the Supreme Court's affirmance of \textit{Kay}.\textsuperscript{71}

\textbf{The Requirement of Legal Expenses}

The \textit{Kay} majority presumed that legal expenses must be incurred under section 1988 before attorney fees are to be granted.\textsuperscript{72} The court held that the petitioner had not "incurred any expenses for legal representation, and, therefore, he [could not] recover under section 1988."\textsuperscript{73} However, no language in section 1988 or in the Senate and House reports on the statute directly suggests that a litigant must incur legal expenses to receive counsel fees.\textsuperscript{74} The most persuasive evidence against the requirement of legal expenses is the litany of cases in which attorney fees were awarded in section 1988 cases to litigants not charged for legal services or to litigants whose attorneys were assisted by law clerks and paralegals.\textsuperscript{75}

The United States Supreme Court in \textit{Blum v. Stenson}\textsuperscript{76} overturned a lower court's refusal to grant counsel fees because the plaintiffs were served by a free legal aid organization. The Court noted that the legislative history behind section 1988 gave no indication that Congress intended to distinguish between private counsel or nonprofit legal service organizations in calculating fee awards.\textsuperscript{77} In addition, the federal district court in \textit{Keyes v. School District No. 1}\textsuperscript{78} awarded fees to a lawyer working \textit{pro bono publico},\textsuperscript{79} holding that the fact the attorney did not charge for his services should have no effect on the court's judgment to award attorney fees.\textsuperscript{80}

Fees are routinely awarded to court-appointed lawyers, although such attorneys are assigned at no cost to litigants.\textsuperscript{81} Moreover, courts generally

\begin{itemize}
  \item \textsuperscript{69} Section 1988 is a far-reaching law covering disparate civil rights laws relating to discrimination based on race, sex or disability. See supra note 3.
  \item \textsuperscript{70} Indeed, the Sixth Circuit would follow a precedent established in the same circuit. However, even under the FOIA, there are different rulings among the circuit courts about fee awards for pro se litigants. See infra note 163.
  \item \textsuperscript{71} See supra note 10.
  \item \textsuperscript{72} Kay v. Ehrler, 90 F.2d 967, 971 (6th Cir. 1990).
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} The requirement of attorney fees under the FOIA is also unresolved. For example, the court in Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977), held that legal expenses do not have to be incurred to obtain counsel fees, despite the conclusion in \textit{Falcone}.
  \item \textsuperscript{75} See infra note 82.
  \item \textsuperscript{76} 465 U.S. 886 (1984).
  \item \textsuperscript{77} Id. at 894. Accord Oldham v. Ehrlich, 617 F.2d 163, 168 (8th Cir. 1980) ("[W]e conclude it is inappropriate to consider that the prevailing plaintiff's attorney was working for a legal aid organization. The basic purpose of section 1988—to encourage enforcement and observance of civil rights—permits no distinction between private attorneys and legal aid organizations.").
  \item \textsuperscript{78} 439 F. Supp. 593 (D. Colo. 1977).
  \item \textsuperscript{79} \textit{Pro bono publico} is defined as "for the public good" or "for the welfare of the whole." \textsc{Black's Law Dictionary} 1203 (6th ed. 1990).
  \item \textsuperscript{80} Keyes, 439 F. Supp. at 406.
  \item \textsuperscript{81} See, e.g., Miller v. Carson, 563 F.2d 741, 756 (5th Cir. 1977) ("To allow fees to court-
recognize that plaintiffs can recover expenses for law clerks and paralegals as part of their attorney fees, although research expenses are not attorney fees in the literal sense.82

Thus, incurring legal expenses is not a prerequisite to a fee award. Further, the Kay majority's apprehension of creating a "cottage industry" of lawyers is exaggerated. Many courts, including the Sixth Circuit, have routinely granted attorney fees to litigants who do not incur legal expenses.83 Accordingly, attorney fees may be awarded to prevailing parties upon the discretion of the court, regardless of whether the litigants are actually charged for legal expenses by their attorneys.

The Requirement of an Attorney-Client Relationship

The Kay majority also determined that an attorney-client relationship must exist before collecting attorney fees under fee-shifting statutes.84 In general, the retention of an attorney is never required. Claimants have long brought their grievances to court by litigating pro se. Litigants also bear the right to self-representation under the Judiciary Act of 1789.85 However, must a lawyer be hired before one can collect attorney fees?

The Sixth Circuit refused attorney fees to the petitioner without offering a direct examination of section 1988. Other courts analyzing section 1988 have also required an attorney-client relationship before awarding attorney fees to prevailing parties.86 For example, in Davis v. Parratt,87 a case

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appointed counsel will encourage the vindication of civil rights which is the purpose of [§ 1988]."

82. Ramos v. Lamm, 713 F.2d 546, 558-59 (10th Cir. 1983); see also Jones v. Armstrong Cork Co., 630 F.2d 324, 325 (5th Cir. 1980) (services of attorney's employee would have been recompensed had she been a paralegal); Lamphere v. Brown Univ., 610 F.2d 46, 48 (5th Cir. 1979) (attorney fees may include expenses for paralegals); Proulx v. Citibank, 709 F. Supp. 396, 399 (S.D.N.Y. 1989) (petitioner could collect attorney fees for law students who counseled him in school clinical program).

83. The Sixth Circuit in Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974), held that "[t]he fact that Appellee's counsel was a legal services organization, partially supported by public funds, is irrelevant in determining if an award is proper."

84. The court ruled that the language of a statutory provision for attorney fees "assumes a paying relationship between an attorney and a client." Kay v. Ehrler, 900 F.2d 967, 971 (6th Cir. 1990) (quoting Falcone v. Internal Revenue Serv., 714 F.2d 646, 648 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984)). The U.S. Supreme Court was not so definitive as the Sixth Circuit, but said that "it seems likely that Congress contemplated an attorney-client relationship as the predicate for an award under § 1988." Kay v. Ehrler, --- U.S. ----, 111 S. Ct. 1435, 1437 (1991) (emphasis added). The Supreme Court reasoned that the term attorney assumed an agency relationship based upon the definition of the word. Id. at 1437 n.6.


86. See, e.g., Morrow v. Dillard, 580 F.2d 1284, 1299-1300 (5th Cir. 1978).
87. 608 F.2d 717 (8th Cir. 1979).
involving an inmate who was denied a fee award in his pro se action against a correctional facility, the Eighth Circuit Court of Appeals held that section 1988 "presupposes a relationship of attorney and client." The Davis court and other courts concluded that because section 1988 is partially designed to give judicial access to the poor, an attorney-client relationship must exist so that the poor may fully enjoy the benefits of the legal system.

The Kay court argued that without legal advice, claimants will be unobjective and tend to file meritless claims. The Sixth Circuit previously raised this question of objectivity in Falcone, asserting that when a lawyer is also the claimant, there can be no filtering of meritless claims by objective attorneys and that one of the major objectives of the FOIA would be frustrated.

Meanwhile, the United States Supreme Court disagreed that the statutory intent behind section 1988 was primarily motivated by filtering out meritless claims. The Court held that the more important interest of the law was to ensure "the effective prosecution of meritorious claims." 

Fee awards should not be denied to pro se litigants because of the possible lack of objectivity. In Kay, for example, objectivity was never an issue. The petitioner was not accused of partiality or filing a frivolous suit. Indeed, he prevailed substantially on his claim at the lower court. Nothing in section 1988 indicates that fees are impermissible if counsel is unobjective. Section 1988 is intended to promote attorney-client relations, but as explained below, its main goal is to encourage litigation for the private enforcement of civil rights.

Assuming that objectivity is required under the statute, objectivity may not be attained simply by hiring an attorney. In some situations, attorneys will never be completely impartial. For example, an attorney may have a contingent stake in the outcome of a case, or an attorney may share a

88. Id. at 718.
89. Id.; see, e.g., Pitts v. Vaughn, 679 F.2d 311, 312 (3d Cir. 1982). The same conclusion is reached in cases regarding the FOIA. See, e.g., Cunningham v. F.B.I., 664 F.2d 383, 384 (3d Cir. 1981).
91. Falcone v. Internal Revenue Serv., 714 F.2d 646, 647 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984). It should be noted that in the same year of the Falcone decision, another court held that objectivity was not a critical issue in the FOIA since the statute's real purpose was to ensure that claimants receive zealous representation from attorneys. Cazales v. United States Dep't of Justice, 709 F.2d 1051, 1056 (5th Cir. 1983), cert. denied, 469 U.S. 1207 (1985).
93. Id. at 1438.
95. See infra text accompanying notes 153-62.
social viewpoint with a client and may hope to see the client's cause prevail. If a litigant has obtained access to the courts and has vindicated a right as desired under the statute, should it matter whether the client actually receives objective legal advice? Under section 1988, a court still has the discretionary power to refuse fees to a winning party if a glaring lack of objectivity exists.  

Another weakness of the Kay majority's opinion is the concern that the courts will be flooded with meritless complaints without objective lawyers to filter them out. By contrast, section 1988 was not drafted to maintain judicial economy. Nowhere is this issue raised in the Senate and House reports on section 1988. The Senate Report recognizes that civil rights laws rely heavily on private enforcement. Additionally, the House Report states that section 1988 is designed to guarantee access to the courts. Thus, fee awards are one way to promote such litigation as desired by section 1988.

Other measures besides imposing an attorney-client relationship can be used to ensure that meritless claims will not enter the federal courts. Most important is rule 11 of the Federal Rules of Civil Procedure, which states that an attorney representing a claimant or an unrepresented party must sign each pleading, motion or other document filed in court. The signature by the attorney or unrepresented party indicates that the pleading, motion, or other document is supported by facts and that the claim is maintainable under existing law or by a good faith argument for the "extension, modification or reversal of existing law." If the pleading does not fulfill the requirements, the court may impose "appropriate sanctions" upon the attorney, claimant, or both.

In addition, the Model Rules of Professional Conduct of the American Bar Association contain a proscription against frivolous suits. Rule 3.1 requires that a lawyer bring or defend claims which are not frivolous and which include good faith arguments for "an extension, modification or reversal of existing law." Hence, lawyers who abuse the court system by filing meritless claims may face disciplinary action by their local bar associations.

97. Kay, 900 F.2d at 971-72.
98. Neither the Senate or House reports allude to this concern. As stated in the text, the Senate Report points out that § 1988 is a means to encourage litigation. See S. Rep. No. 1011, supra note 1, at 4-5.
100. H.R. No. 1558, supra note 4, at 1.
101. Fed. R. Civ. P. 11; see also Fed. R. App. P. 38 (stating that an appellate court may single or double an award to an appellee if it determines that the appeal is frivolous).
103. Id.
105. Another issue not raised in Kay about why fee awards are contingent upon the existence
Are Fee Awards a Windfall to Attorneys?

The Kay majority also raised the concern that fee awards for pro se litigants who are attorneys will lead to unfair consequences. The Sixth Circuit Court, referring to Falcone, rejected the argument that an attorney’s opportunity costs are actual pecuniary losses that ought to be reimbursed. The court noted that the petitioner incurred no legal expenses, but merely failed to add to the wealth of his private practice. The court also voiced dismay about the possibility of creating a “cottage industry” of inactive lawyers who survive off statutory fee awards if it were to grant attorney fees to pro se litigants.

Several federal courts have established that when attorneys litigate a cause of action separate from their usual practice, they may in fact be losing money. For example, the Ninth Circuit Court of Appeals in Ellis v. Cassidy, a case involving defendants accused of violating a person’s civil rights during a previous foreclosure action, determined that the claim was frivolous and awarded attorney fees to two of the defendants who were lawyers. The Ellis court held that the attorneys’ involvement in the case resulted in pecuniary losses because they were forced by the action to take time away from their own practices.

The same view was echoed in Rybicki v. State Board of Elections, a case involving a complaint that a legislative redistricting plan in Illinois was unfair to suburban voters outside Chicago. The Rybicki court ruled that two of the plaintiffs who were lawyers deserved attorney fees because of an attorney-client relationship that is that fee awards for pro se litigants encourage lawyers to act as both advocates and witnesses. This dual role violates Rule 3.7 of the ABA Model Rules of Professional Conduct. See, e.g., United States v. Johnston, 690 F.2d 638, 642 (7th Cir. 1982); Rybicki v. State Bd. of Elections, 584 F. Supp. 849, 860-61 (N.D. Ill. 1984). On the other hand, the argument has been refuted by other courts at the state and federal level. For example, the court in Duncan v. Poythress, 777 F.2d 1508, 1515 n.21 (11th Cir. 1985), cert. denied, 475 U.S. 1129 (1986), held that the advocate-witness rule is not applicable to the attorney pro se litigant, because the rules do not forbid attorneys from representing themselves. See also Shakman v. Democratic Org., 634 F. Supp. 895, 901 (N.D. Ill. 1986).


107. Id. (citing Falcone v. Internal Revenue Serv., 714 F.2d 646, 647 (6th Cir. 1983), cert. denied, 466 U.S. 908 (1984)). However, a contrary view was reached in Cazalas v. United States Dep’t of Justice, 709 F.2d 1051, 1057 (5th Cir. 1983), in which the court recognized the notion of opportunity costs under the FOIA. (“Congress evinced its strong desire, by enacting the FOIA, to establish a national policy of open government through the disclosure of government information.”).

108. Kay, 900 F.2d at 971.

109. Id.

110. 625 F.2d 227 (9th Cir. 1980).

111. Id. at 231.

112. Id.

they helped investigate the grievances, consulted with other attorneys, and assisted the trial lawyers in preparing the case.\textsuperscript{114}

Lost opportunity costs were also recognized by the Fifth Circuit in \textit{Johnson v. Georgia Highway Express, Inc.},\textsuperscript{115} a case which provided the definitive guidelines widely used by federal courts in calculating attorney fees.\textsuperscript{116} The \textit{Johnson} case lists as one of the criteria "the preclusion of other employment by the attorney due to acceptance of the case."\textsuperscript{117}

In any cause of action, the attorney is burdened with important responsibilities prior to the filing of a petition or the commencement of trial. The lawyer will conduct research, plan strategies, write briefs, and prepare questions for cross-examination. The witness, on the other hand, only prepares and rehearses testimony. Moreover, lost opportunity costs are easy to assess in computing attorney fees because they may be based on the billable hours the attorney forwent by prosecuting the civil rights case.\textsuperscript{118} If a court chooses not to use this formula, there are other methods of calculating fees, such as the twelve-point guidelines of \textit{Johnson}.\textsuperscript{119}

Despite arguments supporting the doctrine that opportunity costs constitute pecuniary losses, the issue of a "cottage industry" of lawyers who support themselves through fee-shifting statutes still remains. However, under section 1988, only prevailing parties are entitled to fee awards, and these fee awards are subject to a court's discretion.\textsuperscript{120} Sanctions exist within the system to preclude abusive practices.\textsuperscript{121} Any fee-shifting statute will ultimately benefit lawyers if its purpose is to intensify litigation.\textsuperscript{122}

The Eleventh Circuit Court of Appeals in \textit{Duncan v. Poythress}\textsuperscript{123} granted a fee award to an attorney pro se litigant who sued the state of Georgia

\begin{footnotes}
\item[114] Id.
\item[115] 488 F.2d 714 (5th Cir. 1974).
\item[116] The guidelines have also been acknowledged as a test by the U.S. Supreme Court. Hensley v. Eckerhart, 461 U.S. 424, 429-30 (1983).
\item[117] Johnson, 488 F.2d at 718.
\item[118] Cazalas, 709 F.2d at 1057. See supra note 85.
\item[119] The Johnson court suggests that the following be considered in each case to calculate the amount of attorney fees: 1) the time and labor required; 2) the novelty and difficulty of the questions involved; 3) the skill required to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee for similar work in the community; 6) whether the fee is fixed or contingent; 7) the time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of professional relationship with the client; and 12) awards in similar cases. Johnson, 488 F.2d at 717-19.
\item[120] A recommendation for assessing attorney fees for pro se litigants who are not lawyers is proposed in Note, \textit{Pro Se Can You Sue?: Attorney Fees for Pro Se Litigants}, 34 STAN. L. REV. 659, 677-83 (1982).
\item[121] See supra text accompanying notes 101-15.
\item[122] Fee-shifting statutes offer another guarantee to attorneys that they will collect their legal fees out of the judgment or settlement.
\item[123] 777 F.2d 1508 (11th Cir. 1985). See supra note 7.
\end{footnotes}
for failing to call a special election. The court recognized that compensating pro se attorneys who search for violations of civil rights promotes the purpose of section 1988.  

Therefore, while some courts worry that fee awards to pro se litigants under fee-shifting statutes constitute a windfall to litigants, the Duncan court, one of only three federal circuit courts considering attorney pro se litigants, held that it is irrelevant whether litigants who advance the congressional purpose of vindicating civil rights choose themselves as their attorneys. The untenable fear of abusive fee generation in rare circumstances is insufficient cause to deny fees to all prevailing litigants. As demonstrated in the Kay case, allowing this fear to control whether fees are to be awarded would be unfair to those who bring meritorious complaints to the court.  

The Distinction between Lawyers and Nonlawyers  

This note maintains that a pro se litigant need not incur legal expenses or hire an attorney prior to receiving counsel fees under section 1988 and that a court may assess fees based on an attorney's billable hours forsaken while pursuing a civil rights matter. However, in maintaining this position, it is important to examine why a court should treat any differently pro se litigants who are not attorneys.  

The Sixth Circuit understandably raises doubts about the distinction between attorneys and nonattorneys. Most circuit courts have regularly denied awarding fees to nonattorney pro se litigants. Nevertheless, some courts have held that fees may be paid out exclusively to pro se litigants who are lawyers. Other courts not faced with such questions have hinted they might treat attorneys differently from laypersons.  

124. Id. at 1515.  
125. See, e.g., Aronson v. United States Dep't of Hous. & Urban Dev., 866 F.2d 1, 6 (1st Cir. 1989); Crooker v. United States Dep't of Justice, 632 F.2d 916, 921 (1st Cir. 1980). These cases pertain to the FOIA.  
126. Duncan, 777 F.2d at 1513.  
127. Kay v. Ehrler, 900 F.2d 967, 971 (6th Cir. 1990) ("Were we to hold that Kay's opportunity costs constituted pecuniary losses, when we had previously held that Falcone's opportunity costs were not, we would begin classifying opportunity costs as legal expenses based upon the substance of the pro se claim. We find no authority for awarding fees based on such a system.").  
129. Both Duncan, 777 F.2d at 1511, and Ellis, 625 F.2d at 230-31, say fees are to be remitted to attorney pro se litigants. See supra note 7.  
130. See, e.g., Smith v. DeBartoli, 769 F.2d 451, 453 (7th Cir. 1985), cert. denied, 475 U.S. 1067 (1986) (the court said that fees were denied to a pro se litigant because of the fact he was not an attorney); Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. Unit A July 1981), cert. denied, 455 U.S. 950 (1982) (the court denied payment of fees to a pro se litigant under the Privacy Act, Pub. L. No. 93-579, 88 Stat. 1896, 1902 (1974) (codified at 5 U.S.C. § 552a(g)(3)(B) (1988)), but noted that the ruling might not apply to attorney pro se litigants);
Courts could avoid making distinctions between pro se attorneys and pro se laypersons in several ways. First, courts might summarily refuse counsel fees to all pro se litigants. In turn, this might produce results conflicting with the purpose behind section 1988, such as blocking access to courts for certain classes of litigants who can seldom retain legal help, even under fee-shifting statutes. Alternatively, the courts might grant attorney fees to all pro se litigants. But arguably, this contravenes the holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, in which the United States Supreme Court ruled that attorney fees should not be granted unless they are authorized explicitly by statute.

Consequently, the courts have seldom used either approach. Instead, the trend among the courts prior to the Supreme Court’s decision in *Kay* suggests that pro se attorneys were treated differently from pro se non-attorneys. Indeed, this contrast has been criticized, as the public might view it as favoritism, a perception detrimental to a profession already held in low regard. On the other hand, some public policy concerns exist that support the distinction. For example, if all pro se litigants were granted attorney fees, nonattorneys would be compensated for legal work even though such laypersons lacked the legal training of attorneys and were not bound by the professional rules of the bar.

*Rybicki v. State Board of Elections* granted attorney fees to plaintiffs who were lawyers, reasoning that compared with laypersons, the services of attorneys can be measured by lost time from their own practice and that attorneys can determine for themselves if a case is meritless. Similarly, the Eighth Circuit in *Duncan v. Poythress* reiterated the distinction that attorneys can sell their legal services on the open market. The *Duncan* court pointed out that the congressional purpose behind section 1988 of promoting

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Crooker v. United States Dep’t of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980) (the court denied fees to a pro se litigant, but suggested they might be available for litigants who forgo certain income-producing opportunities.).

131. For example, claimants might be unwilling to pursue an unpopular and difficult case by themselves due to the time and expense involved, and at the same time, they may be unable to hire lawyers without any assurance that they will win.


133. The Court of Appeals in the District of Columbia Circuit is the most liberal in awarding fees to prevailing pro se litigants under various statutes.

134. See, e.g., Culebras Enters. Corp. v. Rivera Rios, 660 F. Supp. 540, 546 (D.P.R. 1987) (‘‘[O]ne can see the guildlike protectionism inherent in this way of thinking’’); see also Aronson v. United States Dep’t of Hous. & Urban Dev., 866 F.2d 1, 6 (1st Cir. 1989) (a FOIA case).

135. This is a reference to persons not supervised by attorneys, as opposed to legal assistants, paralegals and others who are supervised because they work within the legal community. See, e.g., Owens-El v. Robinson, 694 F.2d 941, 943 (3d Cir. 1982) (‘‘Congress did not anticipate that courts would award attorney’s fees as compensation to litigants representing themselves, who, undaunted and seemingly unharmed by ignorance of legal procedure, successfully pressed a section 1988 claim.’’).


the use of legal services was fulfilled in the *Duncan* case, regardless of the fact that one of the plaintiffs chose to be her own lawyer.\(^\text{138}\)

Despite the rhetoric asserting that fee-shifting statutes primarily benefit attorneys,\(^\text{139}\) several reasons show that fee-shifting statutes ought to treat lawyers differently from other persons because of the public benefit of compensating attorneys. For example, pro se litigants suffer opportunity cost losses, just as lawyers do, but section 1988 and other statutes are specifically intended to promote the public interest bar and encourage more attorneys to accept cases traditionally unrewarding.\(^\text{140}\)

Moreover, denying fees to all pro se litigants could lead to results which are inconsistent only for attorneys, whereas nonattorneys are not affected by such conflicting outcomes. In *Kay*, for example, the petitioner was denied fees simply because he chose himself as his attorney.\(^\text{141}\) Had he hired an attorney or had he represented someone else in the same case as an attorney, he would have received attorney fees. These paradoxes show that the "American" rule may sometimes lead to unfair results if statutes are adhered to rigidly.\(^\text{142}\)

*The Legislative Purpose of Section 1988*

The shortcomings of the Sixth Circuit's reasoning alone probably would not justify a fee award to the petitioner in *Kay v. Ehrler*. Such a grant would have to be supported by examining the statutory intent of section 1988. Although not raised in *Kay*, one strong argument used by other courts against fee awards to attorney pro se litigants is that section 1988 is partially intended to provide access to the courts for the disenfranchised.\(^\text{143}\)

\(^{138}\) *Duncan*, 777 F.2d at 1513.

\(^{139}\) When § 1988 was being debated in the Congress in 1976, some were denouncing it as the "lawyer's relief bill." 122 CONG. REC. S31,852 (daily ed. Sept. 22, 1976) (statement of Sen. Abourezk).


\(^{141}\) *Kay v. Ehrler*, 900 F.2d 967, 972 (6th Cir. 1990).

\(^{142}\) Perhaps one reason why the question of compensation for pro se litigants arises in the first place is because of the inflexibility of the "American" rule, in which fees are compensable only in certain circumstances, resulting in the preclusion of judicial access for some people. In contrast, the losing party in England pays the attorney fees of the winner. Hamilton v. Daley, 777 F.2d 1207, 1211 (7th Cir. 1985). The effect is said to eliminate frivolous litigation and increase access to the courts. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.70[2] (2d ed. 1990).

\(^{143}\) For example, the federal district court in *Lawrence v. Staats*, 586 F. Supp. 1375 (D.D.C. 1984), refused counsel fees to an attorney pro se litigant who brought a suit against the federal government for discriminating against him on the basis of race. The *Lawrence* court stated that the underlying purpose behind § 1988 is to provide access to the courts and reasoned that a pro se attorney "is not hampered from obtaining counsel and gaining access to the courts by poverty; he appears himself." *Id.* at 1379.

The Supreme Court also focused on this argument in reviewing *Kay*. It concluded that the "more specific purpose" of § 1988 was the retention of lawyers for those otherwise unable to afford them. *Kay v. Ehrler*, ___U.S. ___, 111 S. Ct. 1435, 1437 (1991). But even the Supreme Court could not say with absolute certainty that this was the statute's paramount purpose, as it stated that it only seemed likely that Congress envisioned an attorney-client relationship. *Id.*
A reading of the House Report on section 1988 shows that judicial access was one important reason for passing the statute, but not its only purpose. The House Report states that section 1988 is contemplated to ensure "effective access" to the courts for those with civil rights grievances. The federal district court reiterated the same objective in *Sherrill v. J.P. Stevens & Company.* The court explained that the purpose of awarding fees is to attract competent counsel to guarantee the enforcement of civil rights.

Simply because the Act is intended to foster judicial access does not mean that an attorney-client relationship is required. The Senate Report disapproved of a narrow reading of the statute, which is what the Sixth Circuit and the Supreme Court were doing in *Kay.* By contrast, section 1988 is merely intended to open the door to professional legal advice when desired by litigants, not to require an attorney-client relationship.

Indeed, if promoting access to the courts for the poor were the only purpose behind section 1988, the statute is doomed to fail to reach this goal. The disenfranchised would still be denied access to the courts under fee-shifting statutes if lawyers do not take their cases. Civil rights actions seldom yield large damage awards because they generally provide injunctive relief. Lawyers need economic incentives to accept such cases. A plaintiff who may not prevail in an action may have difficulty retaining a lawyer. Even if a plaintiff is likely to win a case, the plaintiff may still have trouble hiring an attorney because of extraneous factors. Thus, for some plaintiffs, pro se litigation may be their only course to justice.

Finally, the other major purpose of section 1988 continuously mentioned in the Senate and House reports is to increase the private enforcement of civil rights. Congress intended for individuals to champion the cause of basic civil liberties because the government is not always able to do so. For example, the Senate Report on section 1988 said that civil rights laws heavily depend upon private enforcement and that fee awards are an essential remedy for private citizens in order to grant them opportunities to vindicate their civil rights within the spirit of congressional policies.

144. H.R. No. 1558, supra note 4, at 1.
146. Id. at 849.
149. Duncan v. Poythress, 572 F. Supp. 776, 778-79 (N.D. Ga. 1983) ("The primary concern of Congress was to increase the level of competence with which [civil rights] complaints are prosecuted . . . .").
151. Id. at 176.
152. For example, the Fifth Circuit Court of Appeals in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 719 (5th Cir. 1974), pointed out that a lawyer's attempt to eliminate a civil rights infraction may not be well received by the community in which the attorney lives, perhaps having an economic impact on the attorney's practice.
The concept of the private attorney general also arose during the congressional debate on section 1988, as members of both the Senate and the House recognized that the federal government is limited in its ability to execute civil rights laws.\textsuperscript{155} Therefore, the public, or more specifically, the very victims of civil rights infractions, had to be given the means to fight against such injustices.\textsuperscript{156} The function of the private attorney general has also been emphasized in the courts, some of which have suggested that private enforcement is the paramount goal of section 1988.\textsuperscript{157}

To achieve the goal of private enforcement, section 1988 must enable the disenfranchised to obtain access to the courts.\textsuperscript{158} The responsibility of private enforcement certainly cannot be left to the public interest lawyers and social activists only. The victims must also be able to prosecute their own causes of action. Thus, section 1988 has a twofold purpose — to encourage litigation and to provide access to legal help if needed.

The Sixth Circuit and, later, the Supreme Court approached the issue of fee-shifting statutes too narrowly. For example, although the Sixth Circuit did not discuss section 1988 directly, the opinion in \textit{Kay} suggests that if litigants do not hire attorneys, as encouraged by fee-shifting statutes, they will thwart the purpose of such legislation.\textsuperscript{159} Thus, the Sixth Circuit would limit the intent of section 1988 to obtaining legal advice. The opinion ignores the fact that the petitioner in \textit{Kay} fulfilled the other fundamental objective of section 1988 — to challenge those who impair the civil rights of other people.\textsuperscript{160} The petitioner brought an action against the state of Kentucky and successfully ended its practice of discriminatorily choosing which candidates will appear on its election ballots. However, the Sixth Circuit completely overlooked the public benefit derived from Kay's suit against Kentucky.

\textsuperscript{155} "The Government obviously does not have the resources to investigate and prosecute all possible violations of the Constitution, so a great burden falls directly on the victims to enforce their own rights. Our laws should facilitate that private enforcement, and should—within reasonable limits—encourage potential civil rights plaintiffs to bring meritorious cases." 122 CONG. REC. H35,123 (daily ed. Oct. 1, 1976) (statement of Rep. Selbering).


\textsuperscript{157} \textit{See Duncan}, 777 F.2d at 1512 ("[A]nother more general purpose of section 1988 is to encourage private citizens to vindicate important constitutional and congressional policies."); Lanasa v. New Orleans, 619 F. Supp. 39, 44 (E.D. La. 1985) ("The fee provision is designed to promote \textit{vigorous} advocacy on behalf of citizens whose civil rights have been violated."); \textit{see also} Hamilton v. Daley, 777 F.2d 1207, 1211 (7th Cir. 1985); Riddle v. Nat'l Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980).

\textsuperscript{158} The Supreme Court enunciated this purpose by relying on the Senate and House reports and subcommittee hearing reports. \textit{Kay v. Ehrler}, ___U.S. ___, 111 S. Ct. 1435, 1437 n.8 (1991).

\textsuperscript{159} \textit{Kay v. Ehrler}, 900 F.2d 967, 971 (6th Cir. 1990).

\textsuperscript{160} Again, this was the second time Kay had to sue Kentucky to prohibit this practice. \textit{See Kay v. Mills}, 490 F. Supp. 844 (E.D. Ky. 1980).
Because *Kay* did not discuss section 1988, its opinion is fundamentally flawed. The court assumed that the *Falcone* reasoning was applicable to the case, even though section 1988 has been distinguished from the FOIA by other courts.\(^{161}\) Even if *Falcone* is opposite, the *Kay* majority’s reasoning is in itself inconsistent. First, legal expenses do not have to be incurred by a client prior to obtaining attorney fees. Second, an attorney-client relationship is not required under section 1988. Third, fee awards to pro se attorney-litigants do not constitute a windfall to attorneys in light of their lost opportunity costs. Fourth, attorneys ought to be distinguished from non-attorneys to maintain professional standards in the legal field. And fifth, the purpose of section 1988 is not limited to providing legal help for the disenfranchised.

Any strict view of any fee-shifting statute might lead to results inherently unfair to aggrieved parties. As discussed above, litigants may still be unable to retain lawyers, even with fee-shifting statutes in place. Furthermore, pro se litigants seeking injunctive relief are vulnerable to protracted litigation tactics if other parties know they will not have to pay for legal fees. Section 1988 is certainly not meant to be examined conservatively, as Congress and the federal courts have indicated that the statute is meant to be interpreted broadly.\(^{162}\)

The *Kay* court’s heavy reliance on *Falcone* is perhaps due to the difficulty in distinguishing between attorneys and nonattorneys and to the division of the federal courts over the issue of granting fees to pro se litigants, even under the FOIA.\(^{163}\) This perhaps explains the similar reasoning behind the Supreme Court’s opinion, in which the Court mainly applied practical considerations to reach its decision rather than clear-cut points of law.

**Conclusion**

Section 1988 is a federal statute intended to enable victims of civil rights violations to collect attorney fees from their opponents in court. Thus, victims will be motivated to bring their actions to court without concerning themselves with the burden of legal expenses. Because the government alone cannot handle the myriad cases of civil rights complaints, Congress meant for section 1988 to be interpreted liberally by the federal courts. Congress realized that receiving attorney fees must be made easy for victims so that private citizens would be encouraged to enforce civil rights laws. Attorney pro se litigants should also receive attorney fees in their actions, as they help promote the purpose of section 1988.


\(^{162}\) See *supra* notes 33-34 and accompanying text.

\(^{163}\) See, e.g., *Cunningham v. F.B.I.*, 664 F.2d 383, 387-89 (3d Cir. 1981) (pro se litigant is not entitled to attorney fees under the FOIA); *Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977) (pro se litigant is entitled to fees under the FOIA).
By contrast, the Sixth Circuit Court of Appeals and the United States Supreme Court did not reach such a conclusion in *Kay v. Ehrler*. The Supreme Court’s brief analysis relied more on public policy arguments than the legislative intent behind section 1988. And the Sixth Circuit’s opinion, relying on *Falcone*, failed to explain why attorney pro se litigants should not be awarded fees under section 1988.

The dissenting opinion in *Kay* points out that the Sixth Circuit was incorrect in applying *Falcone*. Instead, the dissent recognizes that section 1988 is designed to reward successful claimants who vindicate constitutional rights for themselves and for others. This is what the petitioner accomplished in *Kay*. Because he fulfilled one of the primary purposes of section 1988, the petitioner should have received attorney fees, even though he appeared in court as an attorney pro se claimant.

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164. The dissenting opinion in the Sixth Circuit case did, however, make such a conclusion. *Kay*, 900 F.2d at 972-73.