STATE OF MINNESOTA
IN SUPREME COURT

CX-89-1863

In re:

Supreme Court Advisory Committee
on General Rules of Practice

Recommendations of Minnesota Supreme Court Advisory Committee on General Rules of Practice

Final Report

October 19, 1998

Hon. James Gilbert, Chair

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ADVISORY COMMITTEE ON GENERAL RULES OF PRACTICE

Summary of Committee Recommendations

This Court's Advisory Committee on General Rules of Practice met October 1, 1998, to consider and discuss all comments or suggestions relating to these rules during the past year or so. During the last year these comments have been relatively few, and the result is that there are two recommended rule changes in this report.

By way of status report, the strong consensus of the committee is that the rules are working well and continue to foster a high level of uniformity and efficiency in the courts. The changes recommended in this report will advance those interests.

Advisory Committee Process

As has been the practice of this advisory committee for years, all communications regarding the Minnesota General Rules of Practice are retained until the committee can consider them. As a general matter, the committee meets at least annually to consider developments, problems, and suggestions.

The amendments recommended in this report came to the committee from the courts or from the Conference of Chief Judges. These suggestions have been generally well-taken and quite helpful. The committee believes the involvement of the Conference in proposing and evaluating rules issues is helpful and should be encouraged.

Summary of Advisory Committee Recommendations

The two recommendations contained in this report are summarized as follows:

1. Create a new Rule 9 and corresponding form to establish an explicit procedure for dealing with the infrequent, but occasionally quite burdensome, problems of repetitive frivolous litigation by a few *pro se* parties.
2. Amend Rule 114.09(e)(1) to include a reference to the statutory requirement for payment of a filing fee in order to obviate confusion.

Other Issues

The committee considered three other matters, and recommends that no action be taken on them at this time. First, the committee revisited the issues surrounding notice to the Commissioner of Human Services required by MINN. STAT. § 524.3–801(d)(1) & (3), and possible rule amendments relating to the statute. These matters were discussed in detail in this advisory committee's Supplement to Final Report, dated November 3, 1997. The committee believes this issue is not ripe for any rule at this time. Similarly, the committee considered a suggestion that service by publication be authorized by rule for conciliation court actions, and the committee concluded this development would be fraught with danger of creating more problems than it might solve, and should not be adopted.

Finally, the committee considered again problems relating to 1st District policies imposing fines on lawyers for not filing a statement of the case, certificate of representation, or notice of settlement by the deadlines specified in the rules. The committee continues to view this as an unacceptable local practice that detracts from the uniformity intended to exist under these rules, but believes the matter should be handled by means other than creating additional rules. The committee also is advised this practice may be dying a natural death in the 1st District either by passage of time or informal suasion, which also militates in favor of not taking formal action at this time.

The committee will continue to monitor the operation of the rules and will again report to this Court upon its request.

Public Hearing and Effective Date

The committee has considered the effective date of these rules, and is submitting them to the court in October with the expectation that they could be considered for a possible January 1, 1999, effective date. The committee does not believe these amendments require significant "lead time" between adoption and effective date. However, because of the nature of the proposed rule on frivolous litigation, the committee

recommends that the court consider holding a public hearing on these rules and ensure that notice of the proposed rules be given to the public and the bar.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON GENERAL
RULES OF PRACTICE

Recommendation 1: **Adopt a new Rule 9 and corresponding Form 9 to provide a specific mechanism for controlling litigation abuse in the form of repeated frivolous litigation.**

Rule 9 is a new rule proposed by the Conference of Chief Judges and created by its Pro Se Implementation Committee. The rule provides the court a specific procedure for requiring a frivolous *pro se* litigant, as defined in the rule, to post security before embarking on litigation and, in egregious cases, prohibiting such a litigant from filing litigation without permission of the chief judge of the district.

The rule as proposed by the Conference was derived in part from a California statute that has worked well for a number of years. *See* CAL. CODE OF CIV. PRO. §§ 391.1–.7.

The Conference of Chief Judges Committee on the Treatment of Litigants and Pro Se Litigation has studied the problems facing, and presented by, *pro se* litigants and made the following recommendation, among others:

> "State statutes and court rules should restrict the ability of *pro se* litigants to engage in frivolous litigation and abusive behavior" that is directed at judges, court staff, and other litigants.

Committee Report at 15, quoted in Hon. John M. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 301-02 (1998). This proposed rule change is directed to this recommendation.

[Text of Rule 9 and Form 9 are entirely new; underscoring to indicate this is not included with this rule.]

RULE 9. FRIVOLOUS LITIGATION

Rule 9.01. Motion for Order Requiring Security; Grounds

In any action or proceeding pending in any court of this state, at any time until final judgment is entered, the court, upon the motion of any party or on its own initiative and after notice and hearing may enter an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a frivolous litigant and that there is not a reasonable probability that the plaintiff will prevail in pending litigation.

Rule 9.02. Scope of Hearing; Ruling Not Deemed Determination of Issues

At the hearing upon such motion the court shall consider such evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. No determination or ruling made by the court upon the motion shall be, or be deemed to be, a determination of any issue in the litigation or of the merits thereof.

Rule 9.03. Dismissal for Failure to Furnish Security

If security is required and not furnished as ordered, the litigation shall be dismissed with prejudice as to the plaintiff.

Rule 9.04. Stay of Proceedings

When a motion pursuant to Rule 9.01 is filed prior to trial, the litigation is stayed and the moving defendant need not plead, until 10 days after the motion is denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Rule 9.01 is made at any time after commencement of trial, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine.

Rule 9.05. Prefiling Order Prohibiting the Serving or Filing of New Litigation; Sanctions; Conditions

(a) In addition to any other relief provided in this rule, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a frivolous litigant from serving or filing any new litigation in the courts of this state *pro se* without first obtaining leave of the chief judge of the judicial district, or designee, of the court where the litigation is proposed to be served or filed. An order granting leave to serve or file shall have no effect if it is obtained without disclosure of the existence of a prefiling

order. Disobedience of a prefiling order by a frivolous litigant may be punished by sanctions.

(b) The chief judge of the judicial district, or the chief judge's designee, shall permit the serving or filing of new litigation by a frivolous litigant, or the serving or filing of motions, pleadings, letters, or other papers, or both, only if it appears that the litigation is not frivolous and has not been served or filed for the purposes of harassment or delay. For the purposes of carrying out duties under paragraphs (b) and (d) of this rule, a chief judge or designee shall not be subject to removal except for cause.

(c) The court administrator shall not file any litigation presented by a frivolous litigant subject to a prefiling order unless the frivolous litigant first obtains an order from the chief judge of the judicial district, or designee, permitting the filing. If the court administrator mistakenly files the litigation without such an order, any party or the court on its own motion may file with the court administrator and serve on the plaintiff and other parties a notice stating that the plaintiff is a frivolous litigant subject to a prefiling order as set forth in Rule 9.05(a). The filing of such a notice shall automatically stay the litigation. The litigation shall be automatically dismissed with prejudice unless the plaintiff within 10 days of the filing of such notice obtains an order from the chief judge of the judicial district, or designee, permitting the filing of the litigation as set forth in Rule 9.05(b). If the chief judge, or designee, issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of any such order.

(d) Each court administrator shall provide the State Court Administrator a copy of all prefiling orders issued pursuant to Rule 9.05(a). The State Court Administrator shall maintain a record of frivolous litigants, including alias names, if any, subject to such prefiling orders and shall regularly disseminate a list of such persons to each court administrator of this state. The chief judge of the judicial district, or designee, shall have discretion, upon the finding of good cause, to remove the name of an individual from the record of frivolous litigants maintained by the state court administrator.

(e) The chief judge of the judicial district, or designee, shall have discretion to impose sanctions upon a frivolous litigant who violates this statute, including any or all of the following: court costs in an amount not less than $250.00, a civil fine in an amount not less than $250.00, attorneys fees and costs, or a finding of contempt of court.

(f) Unless otherwise ordered by the court, a prefiling order issued under this statute shall be effective for ten years from the date of its issuance.

Rule 9.06. Appeal

A final order under this rule, including but not limited to a prefiling order prohibiting a frivolous litigant from serving or filing new litigation without approval and

an order denying an application to make a specific filing, shall be deemed a final, appealable order. Any appeal under this rule may be taken to the court of appeals as in other civil cases within 60 days after filing of the order to be reviewed . In addition to the service and filing required by the appellate rules, the appealing party shall serve a copy of the notice of appeal and statement of the case on the Attorney General.

Rule 9.07. Definitions

As used in this rule, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, including third-party complaints and counter-claims, commenced, maintained, or pending in any federal or state court, including conciliation court.

(b) "Frivolous litigant" means:

(1) A *pro se* plaintiff who in the immediately preceding five-year period has commenced or maintained *pro se* at least three litigations that have been finally determined adversely to the person; or

(2) A *pro se* plaintiff who, after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate either

(i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined, or

(ii) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; or

(3) A person who in any litigation while acting *pro se* repeatedly serves or files frivolous motions, pleadings, letters, or other papers, conducts unnecessary discovery, or engages in oral or written tactics that are frivolous or intended to cause delay; or

(4) A person who has previously been declared to be a frivolous litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) “Five-year period” includes the five years immediately preceding the effective date of this rule.

(d) “Security” means either

(1) an undertaking to assure payment, issued by a surety authorized to issue surety bonds in the State of Minnesota, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be

instituted, or maintained or caused to be maintained by a frivolous litigant or

(2) cash tendered to and accepted by the court administrator for that purpose.

(e) "*Pro se* plaintiff" means the person who or entity that commences, institutes, or maintains a litigation, or causes it to be commenced, instituted, or maintained, including an attorney at law acting *pro se*.

(f) "Defendant" means a person (including corporation, association, partnership, firm, or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

(7) "*Pro se*" means not represented by an attorney at law.

Advisory Committee Comment—1998 Amendment

This rule is intended to curb frivolous litigation that is egregiously burdensome on the courts, parties, and litigants. This rule is intended to apply only in the most egregious circumstances of abuse of the litigation process, and the remedies allowed by the rule can be viewed as drastic. The rule permits the court to enter an order requiring a frivolous litigant to provide security for the costs of the pending action. In addition, the court may enter any order restricting the right of a frivolous litigant to file future actions, and authorizes other sanctions. Because of the very serious nature of the sanction under this rule, courts should be certain that all reasonable efforts have been taken to ensure that affected parties are given notice and an opportunity to be heard. Failure to give notice or allow a hearing would raise the specter of constitutional infirmity to the order. *See generally Cello-Whitney v. Hoover*, 769 F. Supp. 1155 (W.D. Wash. 1991). Rule 9.01 also requires that the court enter findings of fact to support any relief ordered under the rule, and this requirement should be given careful attention in the rare case where relief under this rule is necessary.

This rule conditions or limits the filings of *pro se* litigants, and does not apply to actions filed by attorneys at law. The authority to regulate the filings of *pro se* parties in some ways complements the disciplinary power the courts directly have over attorneys.

The power to limit the filing of future cases following abuse of the litigation process is well-established. *See, e.g., Werner v. State of Utah*, 32 F.3d 1446 (10th Cir. 1994); *Demos v. U.S. District Court for Eastern Dist. of Wash.*, 925 F.2d 1160 (9th Cir. 1991), *cert. denied*, 498 U.S. 1123 (1991); *Anderson v. Mackall*, 128 F.R.D. 223 (E.D. Va. 1988). Despite the fact this action is readily supported as a proper exercise of the court's inherent powers, the committee believes it is desirable, however, to establish a rule that creates a uniform procedure. It is appropriate for the court to tailor the sanction imposed under this rule to the conduct and to limit the sanction to what is necessary to curb the inappropriate conduct of the frivolous litigant. *See Cello-Whitney v. Hoover*, 769 F. Supp. 1155 (W.D. Wash. 1991).

When acting under Rule 9.05(b) or (c), the chief judge or designee is not subject to a notice to remove under Minn. R. Civ. P. 63.03 or MINN. STAT. § 542.16. When exercising this administrative authority the chief judge or designee is not sitting as a judge assigned to the case. The chief judge or designee is not, however, immune from disqualification when it would not be proper for the judge

to act, and the rule permits removal for cause. In addition, the rule is not intended to preclude the use of a notice to remove against a chief judge or designee for other participation in the case. Thus, if litigation is mistakenly filed and the chief judge or designee has been removed before the service and filing of a notice under Rule 9.05(c), it would be inappropriate for that chief judge or designee to act under Rule 9.05(b). If a chief judge or designee permits the service or filing of new litigation, such participation should not be considered as "presiding at a motion or other proceeding" in the case so as to preclude the filing of a notice to remove against that chief judge or designee under MINN.R.CIV.P. 63.03.

This rule includes a specific provision relating to the possible appeal of an order for sanctions. The rule provides that an appeal may be taken within 60 days, the same period allowed for appeals from orders and judgment, but specifies that the 60-day period begins to run from entry of the date of filing of the order. This timing mechanism is preferable because the requirement of service of notice of entry may not be workable where only one party may be interested in the appeal or where the order is entered on the court's own initiative. The date of filing can be readily determined, and typically appears on the face of the order or is a matter of record, obviating confusion over the time to appeal. Notice to the Attorney General is required to permit participation by the Attorney General, if appropriate. That participation may be as counsel for a party to the appeal, or the court, or, if allowed by proper motion, as an intervenor or as *amicus curiae*. The rule does not create a right to participate, however, and the Attorney General must either appear for a party or seek leave to participate in accordance with the Minnesota Rules of Civil Appellate Procedure.

[New Form 9 is set forth on the following pages.]

Form 9. Order Relating to Frivolous Litigation

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF _____ _____ JUDICIAL DISTRICT

COURT FILE NO.:_____

IN RE:

_____ **PREFILING ORDER**

Name of Litigant

FINDINGS

The Court finds that _____ ("the litigant") is a frivolous litigant as defined in Rule 9 of the Minnesota General Rules of Practice, because:

___ (1) In the immediately preceding five-year period the litigant has commenced or maintained *pro se* at least three litigations that have been finally determined adversely to the litigant.

___ (2) After a litigation has been finally determined against the litigant, the litigant has repeatedly relitigated or attempted to relitigate *pro se* either:

___ (i) the validity of the determination against the same individual or individuals as to whom the litigation was finally determined,

OR

___ (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same individual or individuals as to whom the litigation was finally determined.

___ (3) In a litigation while acting *pro se* the litigant has repeatedly served or filed frivolous motions, pleadings, letters, or other papers, conducted unnecessary discovery, or engaged in oral or written tactics that were frivolous or intended to cause delay.

___ (4) The litigant has previously been declared to be a frivolous litigant by a state or federal court of record in an action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

This determination is based upon the following additional findings of fact:

1. The litigant was given notice of hearing before entry of this order, and a hearing was held on _____.

2. * * *

ORDER

Based upon the above finding(s), IT IS HEREBY ORDERED:

1. Pursuant to Rule 9 of the Minnesota General Rules of Practice and the inherent powers of this Court, the litigant shall not serve or file any new litigation, and in any pending matter shall not serve or file any motions, pleadings, letters, or other papers, in the courts of this State, *pro se*, without first obtaining leave of the chief judge of the judicial district, or designee, of the court where the litigation is pending or proposed to be served or filed.

2. The Chief Judge of this judicial district, or the Chief Judge's designee, shall permit the serving or filing of new litigation, or the serving or filing of motions, pleadings, letters, or other papers, or both, only if that judge is provided a copy of this order and it appears that the litigation is not frivolous and is not being served or filed for the purposes of harassment or delay.

3. No court administrator in the State of Minnesota shall file or accept for filing in any action or proceeding, any pleading, motion or other paper presented by the litigant unless the litigant first provides a copy of this order to hee Chief Judge of the judicial district, or the Chief Judge's designee, and obtains from that judge an order permitting the filing. If the court administrator mistakenly files the litigation without such an order, any party or the court on its own initiative may file with the court administrator and serve on the litigant and other parties a notice stating that the litigant is a frivolous litigant who is subject to this Prefiling Order. The filing of such a notice shall automatically stay the litigation. The litigation shall be automatically dismissed with prejudice unless the litigant within ten days of the filing of such notice obtains an order from the chief judge of the judicial district, or designee, permitting the filing of the litigation as set forth above in paragraph 2. If the chief judge, or designee, issues an order permitting the filing, the stay of the litigation shall remain in effect, and the other party(s) need not plead until 10 days after they are served with a copy of the order permitting the filing of the litigation.

4. An order granting the litigant leave to serve or file shall have no effect if it is obtained without the litigant disclosing the existence of this Prefiling Order.

5. With respect to all future litigation that may be commenced or maintained by the litigant in this State, and for all litigation that is pending in this State involving the litigant, the litigant shall, within ten days of the date of filing of this Prefiling Order, serve upon all parties and the court in each such litigation a copy of this Prefiling Order.

6. Disobedience of this Prefiling Order may be punished by sanctions, including any or all of the following: assessment of court costs in an amount not less than $250.00, a civil fine in an amount not less than $250.00, attorneys' fees and costs, or a finding of contempt of court.

7. The court administrator shall provide to the State Court Administrator a copy of this Prefiling Order.

8. This Prefiling Order shall be effective for _____ (up to ten) years from the date it is signed by the Court.

9. All *in forma pauperis* orders obtained by the litigant in this State without permission of the chief judge shall have no effect. The litigant is prohibited from seeking a new *in forma pauperis* order in this State, and no new *in forma pauperis* orders shall be issued in this State without authorization from the chief judge of the judicial district, or designee, of the court where the petition is sought to be filed.

DATED:_____ BY THE COURT:

_____

Judge of District Court

Recommendation 2: **Amend Rule 114.09 to refer to the requirement of paying a filing fee.**

Rule 114.09(e) establishes the procedure for obtaining a trial following mandatory, non-binding arbitration. The current rule does not mention the requirement of paying a filing fee, a requirement imposed by the Legislature in MINN. STAT. § 484.73, subd. 4 (1996). This omission has the potential to mislead a litigant to overlook the fee requirement, potentially depriving the litigant of a right to a trial. The committee recommends that the rule be amended to include reference to this requirement. This rule is not intended to modify the practice in any way, but simply to remove a possible trap for the unwary.

RULE 114. ALTERNATIVE DISPUTE RESOLUTION

* * *

Rule 114.09. Arbitration Proceedings

* * *

(e) Trial After Arbitration

(1) Within 20 days after the arbitrator files the decision with the court, any party may request a trial by filing a request for trial with the court, along with proof of service upon all other parties and payment of any required filing fee. This 20-day period shall not be extended.

* * *

Advisory Committee Comment—1996~~8~~ Amendment

The changes to this rule in 1996 incorporate the collective labels for ADR processes now recognized in Rule 114.02. These changes should clarify the operation of the rule, but should not otherwise affect its interpretation. The rule is amended in 1998 to include a reference to the requirement of a filing fee as provided for in MINN. STAT. § 484.73, subd. 4 (1996).