From: Sai [redacted]
Sent: Wednesday, May 20, 2020 6:38 AM
To: RulesCommittee Secretary
Subject: Proposal for dismissal of meritless cases under FRCvP & FRAP; FRAP adoption of FRCP 11; and vexatious-attorney sanctions

Dear Appellate and Civil Rules Committees —

A. Dismissal of meritless cases

28 USC 1915(e)(2) subjects poor litigants to the sanction of dismissal if *either* (a) the claim of poverty is untrue, *or* (b) the action is meritless.

It is unconstitutional to apply a different substantive due process standard to poor people than to non-poor people. Indeed, non-poor vexatious litigants can easily cause far more harm; extract coercive settlements that are not justified by the law; etc.

I therefore propose a straightforward fix: apply this to everyone.
I.e. under both the civil & appellate rules, *all* cases should be subject to 1915(e)(2)-style scrutiny, and IFP or pro se status explicitly disallowed as a category by which courts may apply internal review. *

It is only fair to subject all cases to the same review for frivolousness — or at least, all cases in whatever nature-of-suit areas the court wishes to scrutinize. Whether someone has paid or not has very little (if anything) to do with whether their claims have merit; it only speaks to their wealth. $400 is nothing to wealthy individuals or corporations, and litigation by intimidation is a serious problem. Courts should not allow a meritless suit to proceed — thereby imposing very significant costs on others, who often will not be able to recoup those costs even if their defense is both obvious and successful — merely because it came with a filing fee payment.

This is obviously within the courts' authority without a statutory change, e.g. in the nature of a sanction, sua sponte MSJ, or fundamental authority to regulate its own docket.

* Note: this does permit "nature of suit" to be a category used — just not a party's pro se / IFP status itself.

I request that the FJC conduct a survey of meritless litigation and propose which NOS categories have the highest proportions and/or severities thereof, which should be the NOSs for which court attorneys should be assigned to pre-screen cases for potential early dismissal.

I expect that this will likely include the ever-popular 500-series "prisoner petitions" and 440 "other civil rights" NOS categories. I suggest that NOS 820 (copyright) should also be included, as a Federal judiciary parallel to anti-SLAPP laws (whose very existence demonstrates that meritless copyright litigation is a problem).

Proposed FRCP 11(e) [see below re FRAP]

(e) Meritless cases.

1. Notwithstanding:
(a) any filing fee, or any portion thereof, that may have been paid;
(b) the status of service, if any; or
(c) a party's failure to appear, plead, or otherwise defend —

2. if the court determines that the action:
(a) is frivolous or malicious,
(b) fails to state a claim on which relief may be granted, or

(c) seeks monetary relief against a defendant who is immune from such relief;

3. the court shall, at any time, pursuant to FRCP 11(c)(3) or 56(f):
(a) dismiss the case, with or without prejudice,
(b) order that summons not be issued until the matter is resolved,
(c) issue a show-cause order,
(d) declare the plaintiff or attorney a vexatious litigant, or
(e) issue any other appropriate order.

4. A court may have a rule, policy, or procedure subjecting filings to review for frivolousness, if and only if:
(a) a party's pro se or IFP status is not a factor for whether review is conducted (although the standard "nature of suit" code may be used), and
(b) the rule, policy, or procedure is published, as required by 28 U.S. Code §§ 332(d)(1), 2071(b, d), or 2077(a).

B. FRAP adoption of FRCP 11

Currently, the appellate rules lack a rule requiring that representations to the court be truthful, reasonable, non-vexatious, well-founded, etc. To the best of my knowledge, it is (formally
speaking) currently backed only by bar rules regarding candor to the tribunal.

FRCP 11 is extremely well developed, understood by both the bar and bench, and well-tailored. To my understanding, most appellate courts already use it in a sort of informal, implicit way. This should be formalized.

This can and should be solved easily: by the wholesale adoption of FRCP 11 into FRAP, by reference.

Because
a) this is also the ideal place to insert the above meritless-case rule,
b) I believe it is best to avoid duplication across the Rules except when some difference needs to be stated (see e.g. FRBP 7025), and
c) the language of FRCP 11 already applies just fine to appellate proceedings, I have not provided a separate proposed FRAP to parallel the proposed FRCP 11(e) above.

Instead, I propose to solve both problems at once, in the simplest possible way, namely:

Proposed FRAP 25.1

F. R. Civ. P. Rule 11 applies in all proceedings under these Rules.

C. Vexatious attorney declarations

In some categories of meritless litigation — copyright, medical malpractice, proposed class action, etc. — the common factor is not a persistently vexatious litigant, but rather the attorney (or firm).

Therefore, in the proposed FRCP 11(e)(3)(d) above, I have included the clause "or attorney", in order to prompt judges to consider whether the attorney is the person actually responsible for promoting meritless litigation — and if so, to consider vexatious-litigant penalties.

This is already present to some degree in FRCP 11(c)(1) (which provides for sanctions against an attorney or firm and not the party).

However, the nature of a vexatious-litigant sanction — typically, an order forbidding case initiation unless case-by-case leave is first granted after initial screening — may well be more appropriate or effective than monetary penalties, especially for legal "trolling"
schemes.

See e.g. the multi-district saga of Prenda Law as an extreme example.

Pre-filing review could have dramatically reduced the harm to a vast number of hapless defendants, for whom the cost of settlement was priced just below the cost of defense, and being in court at all would mean already having effectively lost.

Pre-screening of meritless cases is precisely the tool for this, and it should be applied regardless of fee payment. If an attorney demonstrates a propensity to repeatedly file meritless cases, a "no filing without permission" vexatious-litigant order is precisely the right solution for an immediate way to staunch the damage to innocents (in parallel with the longer-term solution of referral to the bar for suspension proceedings).

If the Committees feel differently about this part of my proposal, "or attorney" — or (e)(3)(d) entirely — can easily be struck out, so as to not impede the adoption of the above.

As always, I request to be notified by email of any developments arising from my proposals, and allowed the opportunity to present (and observe), via videoconference or teleconference, in any hearing that discusses them.

Sincerely,
Sai
President, Fiat Fiendum, Inc., a 501(c)(3)

PS Non-gendered pronouns please. I'm a US citizen.