

# PROPOSED VEXATIOUS LITIGANT STATUTE

HB 2520

## Problem:

- Presently litigants can file and re-file, argue and re-argue, whatever they want, regardless of the first result.
- The judicial system is strained and abused by continuous frivolous filings.
- Judges and lawyers can presently do very little to stop a vexatious litigant.
- The statistical magnitude of the problem is unknown, but could be worsened by failure to take preventive action.

## Solution:

A statute creating judicial authority to identify a party as vexatious will contain and/or eliminate the problem by:

- requiring the litigant to post a bond to cover his opponent's court costs
- requiring the person to obtain court permission before filing another lawsuit
- dismissal of the vexatious litigant's filings
- holding the person in contempt

**Four Statutory Requirements** To be a vexatious litigant, a party must have:

- Lost at least five pro se lawsuits in the preceding seven years
- Sued the same defendant for the same alleged wrong after losing.
- Repeatedly filed meritless papers
- Used frivolous tactical devices or already been declared a vexatious litigant

## Related Concerns

- Nearly identical statutes have been held to be constitutional.
- Statutory procedural requirements guarantee due process of law
- Fiscal impact is minimal with electronic indexing of vexatious litigants
- Lawyers are not subject to the statute; only parties acting on their own.

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## VEXATIOUS LITIGANTS

(Rep. Jim Thompson)

### Introduction

The words "vexatious litigant" stir up an emotional reaction in *anyone* who has confronted an abusive or harassing litigator. But to be considered vexatious, a litigant must really step over the line. Indeed, a judicial determination that a party is vexatious is a powerful tool for any opponent, either plaintiff or defendant. Under this proposed statute, a court can require the litigant to post a bond to cover his opponent's court costs, and can require the person to obtain court permission before filing another lawsuit. The magnitude of the problem in Oregon is by the author known only by anecdote, but no less significant and frustrating.

### Constitutionality

Even though such status can bar a person from the courthouse, nearly identical statutes have been held to be constitutional. (See California Code of Civil Procedure Section 391; *Moran v. Murtaugh Miller Meyer & Nelson, LLP*, 40 Cal. 4<sup>th</sup> 780 (2007); and *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007).

### Four Statutory Requirements

A vexatious litigant typically is a pro se litigant who, without an attorney representing them, has brought a complaint or counterclaim and who has:

**(1) Lost at least five pro se lawsuits in the preceding seven years** that were either determined adversely to the litigant, or remained pending without good cause for two years without being brought to trial. The proposed statute defines litigation as "any civil action or proceeding, commenced, maintained or pending in any state or federal court." Four or fewer adverse litigations in the past seven years won't qualify; nor will five adverse litigations if one of them lies beyond the seven-year cutoff. Nor will five adverse litigations in the past seven years qualify if the plaintiff was represented by counsel in one or more instances. In short, litigants are either vexatious or they aren't.

**(2) Sued the same defendant for the same alleged wrong after losing.** Unlike the first scenario, only a single prior adverse result is required. The subsequent case must be an attempt to relitigate the prior dispute against the same defendants: It must be another bite of the same apple: relitigation of the same, and already determined, cause of action, claim, controversy, or issue of fact or law

**(3) Repeatedly filed meritless papers,** repeatedly files non-meritorious motions, pleadings, or other court papers; conducts unnecessary discovery; or engages in tactics that are frivolous or solely intended to cause unnecessary delay. This requirement is appropriate for claiming vexatious litigant status based entirely on conduct within the present lawsuit. No bright-line rule exists to define "repeatedly" or "non-meritorious" so the determination resides within the discretion of the trial court. "Non-meritorious" is not synonymous with "unsuccessful." The repeated motions must be so devoid of merit and so frivolous that they constitute a flagrant abuse of the system. They must have no reasonable probability of success, and the court must find that they clearly were an attempt to abuse the processes of the courts and to harass the adverse party.

**(4) Used frivolous tactical devices or already been declared a vexatious litigant** for similar reasons. This scenario provides that a person can qualify as a vexatious litigant if he or she has previously been declared to be a vexatious 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.

## **Procedure**

Knowing these requirements sets the stage. To effect the statute, the defendant (or counterclaim-defendant) files a motion requesting such a finding. If a motion is filed prior to trial, the litigation will come to a halt pending the result of the motion. To succeed, the motion must establish both that the opposing party is a vexatious litigant under one of the four scenarios and that there is no reasonable probability it will prevail in the present case against the moving party on the claim or counterclaim. In addition to seeking security, the moving party can request (or the court on its own motion can issue) an order that prohibits the plaintiff from filing any new litigation in an Oregon court in propria persona without permission from the presiding judge.

## **Hearing**

At the hearing on the motion, the court considers relevant written or oral evidence furnished by witnesses or affidavits. If the court determines that the party subject of the motion is vexatious and that there is no reasonable probability that it will prevail in the present case, the court shall order the offending party to furnish security in an amount set by the court. Once a vexatious litigant order is on file, the clerk of the court is not supposed to permit the same party to file any new litigation without an order from the presiding judge. If the clerk mistakenly permits a new filing, any party may file a notice that the offending party is a vexatious litigant, which automatically stays the litigation and results in an automatic dismissal unless the vexatious litigant obtains the required filing order from the judge within ten days.

## **Statewide Index**

In every case in which the court issues a prefiling order, the clerk must provide the State Courts Administrator with a copy so it can update a statewide index of vexatious litigants it shall maintain.

## **Sanctions**

Vexatious litigant orders have teeth because if security is not furnished as ordered, the litigation must be dismissed. In addition, disobedience of the prefiling order can be punished as contempt of court

## **Attorneys for Vexatious Litigants**

This proposed vexatious litigant statute apply only to pro se litigant, and not to one represented by counsel. The likely abuse of the process, by serial substitution of counsel, is not an end-run to the vexatious litigant's game. The requirements of a prefiling order under remain in effect throughout the life of a lawsuit, and therefore such an order permits dismissal at any point when a vexatious litigant proceeds without counsel or without permission of the presiding judge.

## **Review**

Even if a litigant has been declared vexatious and a prefiling order is in place, there is no absolute prohibition against filing new lawsuits. If it appears that a new case has merit and has not been filed for purposes of harassment or delay, the presiding judge must permit the case to proceed. Further, a vexatious litigant determination is not permanent in another sense: A prefiling order may be lifted, modified, or removed on an application by the vexatious litigant. Fundamental fairness requires the vexatious litigant brand be erasable in appropriate circumstances. Such "erasure" requires substantial evidence that the vexatious litigant has mended his or her ways or conduct by establishing the following: (1) that he or she has a propensity for honesty, including an accurate reckoning with the facts on which the prior finding was made and a notification of any change in financial condition; (2) that he or she has some genuine remorse for the costs of litigation inflicted on the defendants; (3) that he or she has made some genuine effort at restitution to the previous victims; and (4) that he or she actually has given up the habit of suing people as a way of life, including making "efforts at obtaining gainful employment. Such a motion for relief should be brought in the forum that originally entered the prefiling order.

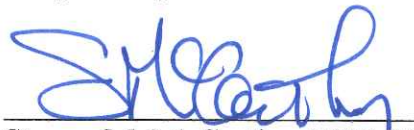
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## Federal Cases

Federal cases recognize that "there is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *DeLong v. Hennessey*, 912 F.2d 1144, 1147 (9th Cir.1990). The Ninth Circuit has recognized that under the All Writs Act (28 U.S.C. § 1651(a)), federal courts have inherent power to enjoin litigants who have abusive and lengthy histories (*DeLong*, 912 F.2d at 1147–48). Within the Ninth Circuit, several trial courts have adopted a vexatious litigant rule that provides that the court may proceed by reference to the vexatious litigant statutes of the forum. (See *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1197 (9th Cir. 1999) (citing USDC CA Central District Local Rule 27A.4 [presently Local Rule 83–8]).) The Eastern District of California also has adopted the California vexatious litigant statute "as a procedural Rule on the basis of which the Court may order the giving of security, bond or undertaking" (See Eastern District Local Rule 65.1–151(b)). Federal courts typically apply five factors to determine vexatious litigant status, but they are not the same factors as set forth in the proposed statute. The factors utilized in the Ninth Circuit stem from a Second Circuit opinion. (See *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1051 (9th Cir. 2007).) The factors include (1) the litigant's history of litigation and, in particular, whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation—for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986).

The Ninth Circuit reviews vexatious litigant orders under a four-part test established in *DeLong*. The test requires that the trial court afford the litigant minimum due process notice, an opportunity to be heard, and an adequate record for review, which should include a showing "that the litigant's activities were numerous and abusive." The trial court must make "substantive findings as to the frivolous or harassing nature of the litigant's actions," and the order must be "narrowly tailored to closely fit the specific vice encountered." (*DeLong* at 1147–48.)

Respectfully submitted



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