
THE CALIFORNIA VEXATIOUS LITIGANT STATUTE: A VIABLE JUDICIAL TOOL TO DENY THE CLEVER OBSTRUCTIONISTS ACCESS?[†]

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“It is axiomatic in our system of justice that every person is entitled to his day in court; however, a litigant is not entitled to two days in court.”¹

INTRODUCTION

Patricia Alice McColm is “a legal bully,”² “the quintessential professional litigant,”³ and “an atomic bomb right in the middle of our neighborhood.”⁴ That is, at least, how some familiar with her litigation see her.⁵ Since 1977, Ms. McColm has filed more than thirty lawsuits against her tenants and neighbors, major corporations, and the U.S. government.⁶ Af-

[†] See Richard B. Schmitt, *Heavy Caseload: Is Patricia McColm a ‘Vexatious Litigant,’ or Accident Prone?*, WALL ST. J., May 5, 1993, at A1 (referring to vexatious litigants as “clever obstructionists”).

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1. *First Western Dev. Corp. v. Superior Court* (Andrisani), 261 Cal. Rptr. 116, 122 (Ct. App. 1989).

2. William Carlsen, *She Sued, Neighbors, Her Health Plan, a Bank, a Rug Cleaner—and the State Bar*, S.F. CHRON., Jan. 2, 1996, at A1 (quoting Anita Theoharis, President of the Westwood Park [Homeowners] Association).

3. Schmitt, *supra* note [†] (quoting Stephanie Wald, a deputy California attorney general).

4. *ABC News Special: The Trouble with Lawyers* (ABC television broadcast, Aug. 7, 1997) (reporting on vexatious litigants, including interviews regarding Ms. McColm) [hereinafter *Trouble*].

5. See Ken Garcia, *One-Woman S.F. House of Horrors*, S.F. CHRON., Oct. 21, 1997, at A17 (“[S]he has sued her neighbors so many times that some of them just refer to her now as ‘Patty Sue.’”).

6. See Schmitt, *supra* note [†]; Garcia, *supra* note 5 (“[Ms. McColm] even sued the judges quoted in . . . newspaper articles [written about her].”). See also *Trouble*, *supra* note 4 (quoting the number of Ms. McColm’s suits at “forty . . . but there may be more”).

ter twice failing the bar exam she sued the California State Bar—she lost.⁷ Despite the fact that her string of litigation began in 1977, it was not until 1992 that one of Ms. McColm's suits concluded in a verdict on the merits.⁸

In 1991, a California superior court judge declared Ms. McColm to be a vexatious litigant.⁹ The determination of vexatiousness would have reduced, to a certain extent, Ms. McColm's access to the state judicial system and her ability to pursue additional lawsuits. However, the judge later reversed himself, stating that her incessant appeals were too much for him to tolerate.¹⁰ Another California state court judge later declared Ms. McColm to be a vexatious litigant and limited her ability to file additional suits without receiving prior permission from the court, citing her "indescribable morass of intertwining litigation" and her failure to obey court orders and pay court-awarded sanctions.¹¹

The court's ability to make such a determination originated from an obscure and little-known state statute. In 1963, the California legislature passed the Vexatious Litigant Statute ("VLS"), defining and regulating vexatious litigants.¹² In 1990, the California Legislature amended the VLS to provide state court judges the power to issue "prefiling orders," which, once issued, bar individuals previously or contemporaneously classified as vexatious litigants from filing additional complaints without first obtaining leave from the court where the litigation is proposed to be filed.¹³ The VLS is relatively unique among state statutes and represents a distinctive step by the California legislature towards curtailing frivolous litigation.¹⁴

Since its creation in 1963, the VLS has been subjected to repeated constitutional challenges, an expansion of its scope, and infrequent—and sometimes inconsistent—applications of its sanctioning provisions. This Note argues that, as currently applied within the California courts, the VLS

7. See Garcia, *supra* note 5. See also Carlsen, *supra* note 2 ("[She] sued the State Bar for infliction of emotional distress."). One of her suits against the State Bar alleged that an examiner at the bar exam "chewed gum too loudly . . . causing her to lose her concentration during the test." *Id.*

8. See Schmitt, *supra* note †.

9. See *id.*

10. See *id.* (quoting San Francisco Superior Court Judge Jack Berman). See also Carlsen, *supra* note 2 ("[The judge] backed off, saying that it was more hassle dealing with her subsequent appeals than it was worth.").

11. Carlsen, *supra* note 2 (quoting San Francisco Superior Court Judge David Garcia).

12. See CAL. CIV. PROC. CODE §§ 391-391.6 (West 1973).

13. See *id.* § 391.7 (West Supp. 1998).

14. While other states have specific statutes aimed at curtailing frivolous litigation, California is the only state to go so far as to restrict certain individuals access to the judicial system. See *infra* Part II.A.3.

is not a viable judicial tool.¹⁵ The problems evident from its historical application render it an irregular sanctioning device, infrequently applied by the courts to “definitionally appropriate situations.”¹⁶

This Note, organized into three parts, explores the purpose, language, and application of the VLS and presents several solutions to the problems currently limiting the efficacy of the statute. As a foundation for the examination of this subject, Part I briefly details the problem of frivolous litigation. Part II examines the text of the VLS and analyzes its historical development, application, and judicial interpretation. Part III illustrates several problems evident from the previous review of the historical application of the VLS. This part then concludes by offering several proposals on how to correct the imperfections and past misapplications of the statute.

I. THE PROBLEM OF FRIVOLOUS LITIGATION

Before continuing, it is important to acknowledge the difficulty in analyzing the effects of frivolous litigation. First, there are several different concepts of frivolous litigation and the resulting definitions are often significantly varied or even conflicting.¹⁷ Such variations make it difficult to reach conclusions based on information from heterogeneous sources.¹⁸ Thus, to understand the arguments asserted below, it is important to define a key term. For the purposes of this Note, frivolous behavior, litigation, or other litigant action shall be defined as behavior that is totally and completely without merit or brought (engaged in) for the sole purpose of har-

15. Within this Note, the author does not attempt to address the normative question of whether the VLS is an appropriate response to problems associated with frivolous litigation. Rather, the purpose of this Note is to analyze potential problems of the historical implementation of the VLS and to offer potential solutions in an effort to aid the ends originally designed for the VLS.

There are several prior articles questioning the value of attempting to eliminate frivolous litigation through the imposition of sanctions. See, e.g., Melvyn I. Weiss, *A Practitioner's Commentary on the Actual Use of Amended Rule 11*, 54 *FORDHAM L. REV.* 23, 24 (1985) (“I happen to be in basic disagreement with those who complain there is something wrong with the number of lawsuits that are instituted. . . . I believe our society is a great society, in part, because we have access to the courts as we do.”). For one perspective on the normative question of whether the VLS is an appropriate judicial tool, see Edmund R. Manwell, Comment, *The Vexatious Litigant*, 54 *CAL. L. REV.* 1769 (1966), arguing that the VLS is an inappropriate means to deter vexatious litigation.

16. For the purposes of this Note, “definitionally appropriate situations” shall be defined as situations where courts have before them litigants who fall within the scope of the VLS because they have previously or are currently engaged in the requisite behavior defined by the VLS as vexatious in nature. See *CAL. CIV. PROC. CODE* § 391.7.

17. Throughout this Note, the terms “frivolous” and “vexatious” and their derivatives are considered terms of art. As such, they should not be read as being interchangeable.

18. This discrepancy is largely due to the fact that different authors and publications use different operational definitions for key terms.

assing an opposing party or for delaying the resolution of a previously concluded action.¹⁹

Second, studying vexatious behavior is difficult because society knows “remarkably little about frivolous litigation.”²⁰ The major complexity in addressing the problem of frivolous lawsuits is that it is difficult to determine the extent of the problem.²¹ Having defined frivolous litigation for the purposes of this Note, it is unrealistic to assume that this definition is used by all judges to determine the vexatiousness of litigants appearing before them. Echoing this problem, Judge William W. Schwarzer stated, “the total amount of behavior that would be sanctionable [as frivolous] . . . is not determinable by ordinary quantitative measures.”²² The result is that there are few studies actually detailing incidents of frivolous activities. With that in mind, the following is a brief discussion of the problems arising from frivolous litigation within our judicial system.

A. IMPACTED DOCKETS AND CONSUMPTION OF SCARCE JUDICIAL RESOURCES

Practitioners, commentators and lay persons alike, have often bemoaned the increasing caseloads burdening our judicial system.²³ In fact,

19. This definition is based, in large measure, on CAL. CIV. PROC. CODE § 128.5(b)(2) (West 1982 & Supp. 1998).

20. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997). Vexatious litigation or behavior is, at its most basic level, a subset of frivolous litigation. Vexatious behavior may occur when a litigant representing himself *in propria persona* or, under specific conditions, represented by counsel, engages in certain types of frivolous conduct. See *infra* notes 143-50 and accompanying text. For the definitional requirements of vexatiousness for the purposes of the California judicial system, see *infra* notes 73-78 and accompanying text. Due to the total absence of studies specifically tracking vexatious behavior, and because vexatious behavior is a subset of frivolous behavior, evidence regarding the more general category of frivolous litigation is relied upon to detail the landscape in which to consider the purpose of the VLS. In essence, the VLS is one of several tools available to the judiciary to address a *specific* type of frivolous behavior—vexatious litigation.

Additionally, it should be noted that the use of the term “vexatious litigant” shall refer to an individual officially determined by a California court of law (and record) to be vexatious under section 391 of the California Code of Civil Procedure. Accordingly, the use of this term should not be construed to be the author’s value judgment regarding the case, litigant, or behavior at issue.

21. See, e.g., Sydney B. Hewlett, Comment, *New Frivolous Litigation Law in Texas: The Latest Development in the Continuing Saga*, 48 BAYLOR L. REV. 421, 423 (1996) (“[D]ebate continues over whether there is a frivolous litigation problem . . .”).

22. T. E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* 67 n.130 (Federal Judicial Ctr. 1988).

23. See, e.g., Bone, *supra* note 20, at 520 (“[T]here is widespread belief that frivolous litigation is out of control.”); Marc. S. Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6 (1983) (“Our courts, overwhelmed by a flood of litigation, are incapable of giving timely, inexpensive, and effective relief . . .”); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning*

within the federal system in 1988, “the number of [civil] cases filed . . . more than tripled, roughly from 80,000 to 280,000—a 250% increase, compared with an increase of less than 30% in the preceding quarter-century.”²⁴ In 1996, case filings in U.S. district courts increased to 317,021.²⁵ This number represents an eight percent increase over filings during 1995.²⁶

In recent years, many have blamed the growing phenomena of impacted dockets on the filing of frivolous lawsuits.²⁷ Some legal scholars argue that “[f]or the system to work efficiently, it must deter the filing of unmeritorious claims and claims brought for improper reasons, both of which clog the system.”²⁸ Those in academia are not alone in this belief. “[J]udges perceive that a principal factor in the increasing size of their dockets is litigation abuse—in particular, frivolous filings.”²⁹ In 1993, when the California Fourth District Court of Appeal temporarily stopped hearing civil cases, the justices blamed frivolous appeals.³⁰ As Judge Schwarzer noted, there is “considerable opinion, supported by at least anecdotal evidence, that misuses and abuse of the litigation process have

Frivolous Suits: An Economic Analysis, 82 GEO. L.J. 397 (1993) (stating that “[a]n often-voiced concern in the United States is that there are too many frivolous lawsuits”); Raymond A. Nolan, Comment, *Ohio’s Frivolous Conduct Statute: A Need for Stronger Deterrence*, 21 CAP. U. L. REV. 261 (1992) (stating that “the increased caseloads burdening the court system today” increased along with “a dramatic increase in frivolous conduct”).

24. 1 FEDERAL COURTS STUDY COMM. OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, WORKING PAPERS AND SUBCOMMITTEE REPORTS, July 1, 1990, at 27. See also Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 443 (1983) (stating that from 1953 to 1983, district court filings and appellate court filings grew from 99,000 and 3,200, respectively, to 240,000 and 28,000, respectively—representing increases of 142% and 775%).

25. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1996 REPORT OF THE DIRECTOR 18 (1997).

26. See *id.*

27. See, e.g., Scott S. Partridge, *A Complaint Based on Rumors: Counter Frivolous Litigation*, 31 LOY. L. REV. 221, 222 (1985) (citing courts’ concerns with the “rising tide of unfounded legal actions that presently flood our courts”); Bone, *supra* note 20, at 520 (citing frivolous lawsuits “as the cause of the litigation system’s most serious ills—huge case backlogs, long delays and high trial costs”); Committee on Admin. of Justice, *Selected 1963 Legislation*, 38 CAL. ST. B.J. 663 (1963) [hereinafter *Selected 1963 Legislation*] (“Courts and the bar have been concerned with the problem of [vexatious] litigants who constantly file groundless actions These suits waste valuable court time.”).

28. Hewlett, *supra* note 21, at 422.

29. Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1134 (1994).

30. See Rene Lynch & Davan Maharaj, *Appellate Court Stops Hearing Civil Cases Law: Justices Blame Frivolous Appeals, More Criminal Cases and a State Mandate for Clogging the System. The Stopgap Measure Means That Litigants Must Wait Longer for Resolutions of Their Cases*, L.A. TIMES, Oct. 27, 1993, at B1. The then current estimate for appellate cases between date of filing and date of decision was “two years or more.” *Id.*

contributed to the problem [of the expense and delay currently associated with civil litigation].”³¹

Anecdotal stories of meritless actions clogging judicial dockets and needlessly expending our judicial resources are anything but scarce.³² On occasion, frivolous lawsuits are so incredible as to be indisputably unfounded.³³ For example, one case in New York alleged that, as a cyborg, the plaintiff was privy to silent telepathic communications detailing the “facts” that, inter alia, “President Clinton and Ross Perot . . . are responsible for the murder of at least 10 million black women in concentration camps, their bodies sold for meat and their skin turned into leather products.”³⁴ Another suit, which sought over \$7 trillion in damages, five firearms (including a M-16 Rifle), and a “United States Marshals Badge” for injuries suffered as a result of CIA torture via, among other means, “portable dental laser equipment,” was determined to be frivolous.³⁵

In contrast to these indisputably unfounded suits that at least one commentator has referred to as “‘nut’ cases”³⁶ are the less extreme, but nevertheless, frivolous actions. Suits alleging unnecessary imposition of tax on thirty cents,³⁷ denial of the ability to open a checking account at a

31. William W. Schwarzer, *Sanctions Under the New Federal Rule 11—a Closer Look*, 104 F.R.D. 181, 182 (1985).

32. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS* 257-58 (1994) (discussing the hapless Tom Horsley, a beguiled and disappointed young suitor who sued his date after she failed to show up at the appointed time).

The lay person’s definition of frivolous litigation may differ from that used within this Note, which includes litigation of questionable merit that nevertheless contains novel or unique questions of law. See *supra* note 31 and accompanying text. See also, e.g., *Miles v. City Council*, 710 F.2d 1542 (11th Cir. 1983) (questioning whether the commercial promotion of a talking cat was an “occupation” or “business” within the meaning of a certain ordinance). For the purpose of this Note, lawsuits of “questionable merit” are excluded from the definition of frivolous litigation. For this Note’s definition of vexatious litigation, see *infra* notes 74-78 and accompanying text.

33. See, e.g., *Tyler v. Carter*, 151 F.R.D. 537 (S.D.N.Y. 1993), *aff’d*, 41 F.3d 1500 (2d Cir. 1994) (dismissing complaint); *Kazmaier v. CIA*, 562 F. Supp. 263 (E.D. Wis. 1983) (holding that case is frivolous); *Neal v. Miller*, 542 F. Supp. 79, 80 (S.D. Ill. 1982) (holding that complaint is “frivolous and clearly without any merit”).

34. *Tyler*, 151 F.R.D. at 537-38. In dismissing the case, the *Tyler* Court stated “[a] plaintiff asserting fantastic or delusional claims should not, by payment of a filing fee, obtain a license to consume the limited judicial resources and put defendants to effort and expense.” *Id.* at 540.

35. *Kazmaier*, 562 F. Supp. at 263.

36. Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 70 (1996).

37. See George Raine, *High Court Puts Clamps on “Vexatious” [sic] Plaintiff Frequent Oakland Litigant Can’t Present Nickel-and-Dime Complaints Without Paying Filing Fee*, S.F. EXAMINER, Oct. 12, 1994, at A2 (reporting that Fred Whitaker, among at least 40 suits, sued “when a clerk assessed the sales tax before subtracting the 30 cents” from a coupon). See generally *In re Whitaker*, 8 Cal. Rptr. 2d 249 (Ct. App. 1992) (holding that Whitaker is a vexatious litigant).

local bank,³⁸ and emotional distress as a result of a little league manager asking a parent not to smoke near the dugout³⁹ are not unusual examples of frivolous litigation brought by *propria persona* litigants. While these suits may appear to be clearly frivolous, the mere filing of the suits requires the named defendants to, at the very least, file a demurrer. Arguably, the costs to society for these actions are not insignificant.

In addition to impacting the docket and thus causing delays in the legal system, frivolous suits consume substantial amounts of our scarce judicial resources.⁴⁰ One vexatious litigant, who has filed more than eleven lawsuits and forty appeals,⁴¹ has generated many “hours of work by filing meaningless documents, using the marshal’s office to serve papers on dozens of defendants, and arguing with judges about their [previous] decisions on his cases.”⁴² With respect to another vexatious litigant, a California appellate court judge stated succinctly, “[the litigant’s] antics have done little more than consume precious judicial resources.”⁴³ One study detailed that in Los Angeles County, during the period from 1959 to 1960, “nine persons appearing in pro per filed 159 actions in the Superior Court that consumed 117.7 court days.”⁴⁴

B. PRIVATE COST OF DEFENDING AGAINST FRIVOLOUS PURSUITS

Beyond the delay and judicial resource expenditures resulting from frivolous behavior, there is also the cost to private individuals who must defend against these frivolous actions.⁴⁵ One insurance company, refusing

38. See Matt Lait, ‘Vexatious Litigant’ Gets on Court Officials’ Cases, L.A. TIMES, Mar. 15, 1992, at B1. See generally *In re Luckett*, 283 Cal. Rptr. 312 (Ct. App. 1991) (holding that Luckett is a vexatious litigant).

39. See Peter Hartlaub, *Smoke-Filled Suits; Frivolous Litigation Lights Up Courts*, DAILY NEWS L.A., Sept. 29, 1997, at N3.

40. While the preceding anecdotal evidence does not conclusively demonstrate that frivolous litigation is the primary cause of the increasing size of the judiciary’s docket, it does offer support for the conclusion that frivolous litigation *is a factor* which contributes to the expanding docket. There need not be a conclusion as to the precise magnitude of frivolous litigation’s contribution to the burgeoning docket before considering how to minimize its effects becomes a legitimate goal.

41. See Lait, *supra* note 38.

42. Pat Brennan, *Man of Many Lawsuits Isn’t Very Appealing to County’s Court Officials*, ORANGE COUNTY REG., Aug. 13, 1990, at B1.

43. Carroll Lachnit, *Bill Aims to Stop Frivolous Lawsuits: Vexatious Litigants Bother Judges*, ORANGE COUNTY REG., June 27, 1990, at B2 (chiding litigant Howard Hershops “for dragging out [one frivolous] case for nearly eight years”).

44. Committee on Admin. of Justice, *Report*, 38 CAL. ST. B.J. 485, 489 (1963) [hereinafter *1963 Report*]. Concluding that many of these *propria persona* suits were frivolous, the Legislature would cite this finding as one reason for enacting the VLS.

45. See *Selected 1963 Legislation*, *supra* note 27, at 663 (“Even though the defendant prevails he usually pays legal fees or public funds are expended in his behalf if he is a public officer.”).

to settle, ran up an estimated \$200,000 defending itself against a vexatious litigant.⁴⁶ San Francisco State University expended \$132,824 defending itself against the same vexatious litigant—a cost eventually passed on to the taxpayers of California.⁴⁷ Additionally, San Mateo County officials “estimate that in the decade before [another plaintiff] was declared a vexatious litigant in 1992, [she] cost the county between \$20,000 and \$30,000 a year in litigation costs.”⁴⁸

The problem of frivolity does not end with the judge’s decision to dismiss or otherwise dispose of the frivolous case. “Frivolous appeals are extraordinarily costly to appellees, who needlessly incur added litigation expense [and are equally costly] to other litigants, whose legitimate claims are delayed”⁴⁹ In some select cases, the problems of frivolous litigation expand beyond costs incurred within the judicial system. In one case, a vexatious litigant’s propensity to file suits of questionable merit actually depreciated the property value of homes in her neighborhood.⁵⁰ These stories are not exceptional. Defendants named in frivolous suits have two choices: expend money defending the suit⁵¹ or settle the case for as small an amount as possible.

C. THE ADVERSE IMPACT ON THE SETTLEMENT OF SUITS

Beyond the costs apparent in defending against frivolous lawsuits, there are the societal costs of settling frivolous cases.⁵² Often defendants

46. See Schmitt, *supra* note †.

47. See *id.*

48. Charley Roberts, *Serial Litigators Pursue Justice with Vengeance*, L.A. DAILY J., Oct. 17, 1996, at 9 [hereinafter Roberts, *Serial Litigators*]. While not all of these amounts necessarily reflect costs and expenditures resulting from frivolous behavior, the plaintiff, by definition, engaged in some activities warranting her status as a vexatious litigant.

49. David Lopez, *Why Texas Courts Are Defenseless Against Frivolous Appeals: A Historical Analysis with Proposals for Reform*, 48 BAYLOR L. REV. 51, 53 (1996). See also Lynch & Maharaj, *supra* note 30.

50. See Eric Brazil, *S.F. Woman ‘Vexatious Litigant’*, S.F. EXAMINER, Dec. 19, 1995, at A6 (reporting that one real estate firm “advised its brokers to make sure those considering buying homes in [the vexatious litigant’s] neighborhood knew about her habit of filing lawsuits”).

51. For the nominal cost of a filing fee, a plaintiff can place the named defendants in the difficult position of having to retain counsel—if only to make an appearance and file a motion to dismiss. “For [a plaintiff] to file costs \$40 [or] \$50. For me to defend myself will cost thousands.” Nicholas Riccardi, *Valley Man Becomes Legal Legend as Prolific Plaintiff*, L.A. TIMES, July 7, 1996, at A1 (quoting businessman Art Davis).

52. Additionally, Robert Bone makes a strong case that the most damaging result of frivolous lawsuits is the negative effect on the settlement of *legitimate* suits. See Bone, *supra* note 20, at 525, 542-77.

in arguably frivolous suits⁵³ choose to settle rather than expend large sums of money defending the suit.⁵⁴ This, in turn, creates incentives for frivolous litigation, particularly for those who have previously received similar nuisance payments.⁵⁵ According to one defendant, “[The vexatious litigant’s] pitch was, essentially, that [the defendant] should pay money to settle, without regard to the merit of her claim, because it would be expensive to defend the case in court.”⁵⁶ Many counsel for insurers and defendants “justify [settling meritless suits] on economic grounds, but acknowledge the effect can be to encourage litigation.”⁵⁷ Settling these arguably frivolous suits further prevents judges from being able to determine the vexatiousness of the suits—thus allowing the potentially vexatious litigants to continue their meritless pursuits which, in turn, perpetuates the problem of frivolous litigation.

D. INCREASING THE PUBLIC OUTRAGE

Finally, the abundance of frivolous lawsuits also contributes to the public outrage expressed against the judicial system and the legal profession in general. One “major reason” for the general public’s negative perception of the legal profession is the frivolous conduct engaged in by some litigants.⁵⁸

As detailed above, the negative externalities resulting from the filing of frivolous actions extend well beyond the immediate courtroom. Not only are the instant parties to the proceeding affected, but the extensive costs to society and the legal profession are substantial. In response to this problem, legislatures throughout the nation have, for many decades, attempted to draft sanctioning statutes that balance the societal interest of

53. These settled suits cannot be defined as “frivolous” for certain since they are never heard on their merits—which, again, is part of the problem in quantifying the incidence of frivolous behavior.

54. See Riccardi, *supra* note 51 (“Some who’ve settled with [the California litigant] say they felt bullied into it.”). “[I]t is an economic decision.” *Id.*

55. The economic decision of settling these suits spurs many plaintiffs to demand larger amounts in future suits. “You just can’t fight a \$10,000 suit over a \$300 piano.” *Id.* (quoting attorney Robert A. Schwartz).

56. *Trouble*, *supra* note 4 (quoting attorney Greg Spencer regarding a lawsuit brought against his client by a vexatious litigant). This same vexatious litigant reportedly sent a letter to another defendant in a suit she brought stating, “By settling this matter as indicated above, the attorneys don’t get rich, your company saves money, I avoid economic strangulation, and we both avoid considerable hassle.” Schmitt, *supra* note † (quoting December 1986 letter).

57. Schmitt, *supra* note †.

58. See Nolan, *supra* note 23, at 262 (“A major reason for this negative perception results from . . . frivolous conduct.”).

free access to the courts with the community's need to deter frivolous lawsuits.

II. DEVELOPMENT, APPLICATION, AND INTERPRETATION OF THE VLS

In addressing the question of whether California's VLS is a viable judicial tool to curb needless vexatious litigation, it is important to consider the development of the current version of the statute.

A. THE DEVELOPMENT OF THE VLS

1. *The 1963 VLS*

In response to a perceived need to curb frivolous litigation within California, the state legislature passed, and on July 13, 1963, the Governor signed, the original VLS.⁵⁹ The purpose of the new legislation was to address the problems "created by the persistent and obsessive litigant, appearing *in propria persona*, who has constantly pending a number of groundless actions, sometimes against judges and other court officers who were concerned in the adverse decisions of previous actions."⁶⁰ The 1963 VLS was modeled after statutes allowing courts to require the posting of security in certain derivative shareholder suits.⁶¹ Compared to its modern version, its definition of vexatious litigants was rather narrow. Specifically, a "vexatious litigant" meant any person:

- (1) Who, in the immediately preceding seven-year period has commenced, prosecuted or maintained in *propria persona* at least five litigations other than in a small claims court that have been (i) finally determined adversely to him; or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing; or
- (2) Who, after a litigation has been finally determined against him, repeatedly relitigates or attempts to relitigate, in *propria persona*, either (i)

59. See 1963 Cal. Stat. 1471, §1 (codified as amended at CAL. CIV. PROC. CODE §§ 391-391.6 (West 1973)). See also Charley Roberts, *Vexatious Law Evolves*, L.A. DAILY J., Oct. 16, 1996, at 22 ("California's original vexatious-litigant law was enacted in 1963 in response to concern by the bench and bar about litigants, acting as their own attorneys, who repeatedly filed groundless actions and, when they lost, relitigated the same issues over and over again.").

60. 1963 Report, *supra* note 44, at 489. See also *Taliaferro v. Hoogs*, 46 Cal. Rptr. 643 (Ct. App. 1965) (noting that the VLS was enacted to protect persons—often judges or other court personnel—targeted by obsessive and persistent litigants).

61. See *Muller v. Tanner*, 82 Cal. Rptr. 738, 741 n.2 (Ct. App. 1970). See also CAL. CORP. CODE § 834 (repealed 1975) (providing for defendant corporations to request that plaintiffs in derivative shareholder actions be required to post security for costs and fees).

the validity of such 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 such final determination against the same defendant or defendants as to whom the litigation was finally determined.⁶²

The 1963 VLS was little more than a fee-shifting provision that required, upon a defendant's motion,⁶³ that a vexatious⁶⁴ plaintiff "furnish security" for the costs of the lawsuit.⁶⁵ If the security, once ordered, was not furnished, the litigation was required to be dismissed "as to the defendant for whose benefit it was ordered furnished."⁶⁶ Once the security was furnished and the lawsuit was "terminated" or concluded, the defendant was entitled to "recourse to the security in such amount as the court shall determine."⁶⁷ The 1963 VLS remained as originally drafted until 1975 when it received the first of two key amendments.

2. *The 1975 Amendment*

The first amendment to the VLS occurred in 1975.⁶⁸ The 1975 amendment changed the time period during which a party could request that security be posted. In effect, the 1975 amendment removed the thirty-day time limit immediately following service of summons or process. Thereafter, a party could request the posting of security at any time "until

62. CAL. CIV. PROC. CODE § 391(b).

63. The occurrence of a defendant's motion requesting the posting of security stays the litigation. After making the motion, "the defendant need not plead, until 10 days after the motion [was] denied, or if granted, until 10 days after the required security has been furnished and the . . . defendant [has been] given written notice to thereof." *Id.* § 391.6. Section 391.6 was amended in 1975. *See infra* notes 68-70 and accompanying text.

64. As the California VLS has been amended over the years, so too has the definition of a vexatious litigant. *See, e.g.*, 1990 Cal. Stat. 621, § 1. *See also infra* notes 74-78 and accompanying text.

65. *See* CAL. CIV. PROC. CODE § 391.1 (amended 1975). The exact language of the statute stated:

In any litigation, at any time within 30 days after service of summons or other and equivalent process upon him, a defendant may move the court, upon notice and hearing, for 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 vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant.

Id. The 1975 amendment removed the 30-day time limit. *See infra* notes 68-70 and accompanying text.

66. CAL. CIV. PROC. CODE § 391.4. Prior to being ordered, the plaintiff at issue must have been provided notice and an opportunity to be heard in conformity with his or her due-process rights. *See id.* § 391.1.

67. *Id.* § 391.5. This assumes that the litigation in question was terminated in favor of the defendant designed to benefit from the required posting of security.

68. *See* 1975 Cal. Stat. 381, § 1.

final judgment is entered.”⁶⁹ The 1975 amendment also slightly modified the duration of the stay that results when a defendant makes a motion requesting the posting of security.⁷⁰

3. *The 1990 Amendment*

According to a Committee Report, the 1990 amendment’s primary purpose was “to reduce the state’s costs of defending frivolous suit[s] filed against the state.”⁷¹ To that end, the California legislature sought to strengthen the VLS through two significant additions. First, the definition of what constitutes a vexatious litigant was expanded.⁷² Second, the 1990 amendment granted courts the power to issue “prefiling orders.”⁷³

The California VLS currently provides four possible definitions of a vexatious litigant.⁷⁴ First, a judge may issue a vexatious litigant determination to a litigant who has “commenced, prosecuted, or maintained in propria persona at least five litigations” in the immediately preceding seven years that have reached finality adverse to the litigant or that have “unjustifiably” remained pending for two or more years without action.⁷⁵ Second, a judge may hold that a litigant is vexatious if, after a litigation has been finally determined, the litigant repeatedly relitigates or attempts to relitigate *in propria persona* (1) “the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined” or (2) “the cause of action, claim, controversy or any of the issues of fact or law, determined or concluded by the final determina-

69. *Id.*

70. *See id.*, § 2. Section 391.6 of the California Code of Civil Procedure, as currently constituted, states:

When a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been 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 Section 391.1 is made at any time thereafter, 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.

CAL. CIV. PROC. CODE § 391.6 (West 1973 & Supp. 1998).

71. S. 1989-90-SB2675, 2d Legis. Sess. 2 (Cal. 1990). “According to the sponsor [State Senator Marks], the Attorney General’s office spends substantial amounts of time defending unmeritorious lawsuits brought by vexatious litigants The sponsor contends existing California law should be strengthened to prevent the waste of public funds required for the defense of frivolous suits.” *Id.*

72. *See* 1990 Cal. Stat. 621, § 1. For definition of a vexatious litigant, see *infra* notes 74-78 and accompanying text.

73. *See* 1990 Cal. Stat. 621, § 3.

74. Originally, the definition consisted of only section 391(b)(1)-(2). *See supra* note 62 and accompanying text.

75. CAL. CIV. PROC. CODE § 391(b)(1). For the purposes of determining the status of a given litigant as vexatious, even those cases which the litigant voluntarily dismisses without prejudice may be considered. *See* *Tokerud v. CapitolBank Sacramento*, 45 Cal. Rptr. 2d 345, 346 (Ct. App. 1995).

tion against the same defendant or defendants as to whom the litigation was finally determined.”⁷⁶ Third, a litigant acting *in propria persona* who “repeatedly files unmeritorious motions . . . , conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay” may be determined to be vexatious under the VLS.⁷⁷ Finally, the California VLS definition of a vexatious litigant includes an individual that 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.”⁷⁸

In addition to expanding the definition of what connotes vexatiousness, the 1990 amendment allows judges to issue an additional sanction—the “prefiling order.”⁷⁹ Under this new subsection, a court,⁸⁰ having

76. CAL. CIV. PROC. CODE § 391(b)(2). A litigation is deemed to be “finally determined” when all avenues for direct review have been exhausted. *Compare* Childs v. PaineWebber, Inc., 35 Cal. Rptr. 2d 93, 100 (Ct. App. 1994) (holding action was not final), *with* First Western Dev. Corp. v. Superior Court (Andrisani), 261 Cal. Rptr. 116, 118 (Ct. App. 1989) (concluding action was final).

A worthy example of a vexatious individual relitigating the same issues—in this case issues stemming from a divorce action brought by his wife—occurred during and just prior to consideration of the original VLS. *See generally* Taliaferro v. Hoogs, 46 Cal Rptr. 643 (Ct. App. 1965); Taliaferro v. Hoogs, 46 Cal. Rptr. 147 (Ct. App. 1965); Taliaferro v. Davis, 34 Cal Rptr. 120 (Ct. App. 1963); Taliaferro v. Hoogs, 33 Cal. Rptr. 415 (Ct. App. 1963); Taliaferro v. Taliaferro, 31 Cal. Rptr. 774 (Ct. App. 1963); Taliaferro v. Davis, 31 Cal. Rptr. 690 (Ct. App. 1963); Taliaferro v. Davis, 31 Cal. Rptr. 443 (Ct. App. 1963); Taliaferro v. Crola, 31 Cal. Rptr. 442 (Ct. App. 1963); Taliaferro v. Davis, 31 Cal. Rptr. 164 (Ct. App. 1963); Taliaferro v. Davis, 27 Cal. Rptr. 650 (Ct. App. 1963); Taliaferro v. Davis, 27 Cal. Rptr. 152 (Ct. App. 1962); Taliaferro v. Taliaferro, 21 Cal. Rptr. 870 (Ct. App. 1962); Taliaferro v. Taliaferro, 21 Cal. Rptr. 868 (Ct. App. 1962); Taliaferro v. Taliaferro, 21 Cal. Rptr. 864 (Ct. App. 1962); Taliaferro v. Taliaferro, 19 Cal. Rptr. 220 (Ct. App. 1962); Taliaferro v. Giroloni, 11 Cal. Rptr. 196 (Ct. App. 1961); Taliaferro v. Hays, 10 Cal. Rptr. 429 (Ct. App. 1961); Taliaferro v. Taliaferro, 4 Cal. Rptr. 696 (Ct. App. 1960); Taliaferro v. Taliaferro, 4 Cal. Rptr. 693 (Ct. App. 1960); Taliaferro v. Taliaferro, 4 Cal. Rptr. 689 (Ct. App. 1960); Taliaferro v. Taliaferro, 2 Cal. Rptr. 719 (Ct. App. 1960); Taliaferro v. Taliaferro, 2 Cal. Rptr. 716 (Ct. App. 1960); Taliaferro v. Taliaferro, 339 P.2d 594 (Cal. Ct. App. 1959); Taliaferro v. Taliaferro, 316 P.2d 393 (Cal. Ct. App. 1957); Taliaferro v. Taliaferro, 309 P.2d 839 (Cal. Ct. App. 1957); Taliaferro v. Taliaferro, 300 P.2d 726 (Cal. Ct. App. 1956); Taliaferro v. Taliaferro, 270 P.2d 1036 (Cal. Ct. App. 1954).

77. CAL. CIV. PROC. CODE § 391(b)(3). This subsection of the VLS was added by 1990 Cal. Stat. 621, § 1.

78. CAL. CIV. PROC. CODE § 391(b)(4). This subsection of the VLS was added by 1990 Cal. Stat. 621, § 1.

79. CAL. CIV. PROC. CODE § 391.7. The text of this section states:

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in *propria persona* without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. Disobedience of such an order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding judge shall permit the filing of such litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in section 391.3.

deemed a particular litigant to be vexatious, may require—*sua sponte* or on motion by a party to the instant litigation—the litigant to seek and obtain leave from the presiding judge to file any new litigation.⁸¹ Thus, under the modern version of the VLS, courts may effectively bar vexatious litigants from filing additional claims. However, this approach to reducing vexatious litigation is only available if judges actually afford themselves the powers codified in the VLS.

B. APPLICATION OF THE VLS

Since its inception thirty-five years ago, California judges have applied the VLS numerous times. In examining the historical application of the VLS it is important to focus on both the available statistical evidence as well as specific anecdotal instances of the imposition of VLS sanctions.

1. *Statistical Evidence*

“[R]eliable data [regarding frivolous lawsuits] is scarce.”⁸² Neither the California State Bar nor the California Judicial Conference collects statistics on how often the VLS is used.⁸³ Similarly, the National Center

(c) The clerk shall not file any litigation presented by a vexatious litigant subject to a pre-filing order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without such an order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a pre-filing order as set forth in subdivision (a). The filing of such a notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of such notice obtains an order from the presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding judge 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) The clerk of the court shall provide the Judicial Council a copy of any pre-filing orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to such pre-filing orders and shall annually disseminate a list of such persons to the clerks of the courts of this state.

Id.

80. It is also important to note that the scope of the VLS has extended beyond California state courts. Rule 27A of the United States District Court for the Central District of California provides that “the Court may, at its discretion, proceed by reference to the [VLS] of the State of California” for the purpose of issuing sanctions against vexatious litigants. C.D. CAL. R. 27A.

81. See CAL. CIV. PROC. CODE § 391.7. See *In re Lockett*, 283 Cal. Rptr. 312, 314 (Ct. App. 1991) (establishing process for issuing pre-filing orders). The actual language of the statute restricts the ordered prohibition of new litigation to the filing *in propria persona*. However, in *Camerado Insurance Agency, Inc. v. Superior Court*, the Court of Appeal extended the statute to include actions filed through an attorney. See 16 Cal. Rptr. 2d 42 (Ct. App. 1993). For a detailed discussion of this expansion, see *infra* notes 143-50 and accompanying text.

82. Bone, *supra* note 20, at 522-23.

83. See Telephone Interview with Vicky Muzny, Court Services Analyst for the Judicial Council of California (Jan. 29, 1998) (notes on file with author).

for State Courts keeps neither *propria persona* filing data regarding how often the VLS has been implemented nor basic information regarding sanctions issued for general frivolous conduct.⁸⁴ However, since 1991, as required by the 1990 amendment to the VLS, the Judicial Council of California has maintained certain limited data on the prefilings orders issued by California state courts.⁸⁵ This data is collected and maintained according to the name of the vexatious litigant, the case file number, and the date of the order.

As Table 1 below indicates, the use of the prefilings order has increased since its creation in 1990.⁸⁶ What was originally an infrequently used judicial tool has become increasingly popular among California courts. While the statistical data shows little more than that the use of the

84. See Telephone Interview with Margaret Fonner, Research Division of the National Center for State Courts (Jan. 29, 1998) (notes on file with author).

85. See generally Judicial Council of California, *Vexatious Litigant Prefiling Orders List*, Feb. 5, 1992; Judicial Council of California, *Quarterly Dissemination of Vexatious Litigant Prefiling Orders List*, May 18, 1992; Judicial Council of California, *Quarterly Dissemination of Vexatious Litigant Prefiling Orders List*, Aug. 7, 1992; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 11, 1993; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Apr. 12, 1993; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, July 12, 1993; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Oct. 15, 1993; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 20, 1994; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, July 13, 1994; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Oct. 11, 1994; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 19, 1995; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Apr. 24, 1995; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, July 14, 1995; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Oct. 13, 1995; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 16, 1996; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Apr. 10, 1996; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, July 31, 1996; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Oct. 23, 1996; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 15, 1997; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Apr. 15, 1997; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, July 18, 1997; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Oct. 17, 1997; Judicial Council of California, *Dissemination of Vexatious Litigant Prefiling Orders List*, Jan. 16, 1998 (on file with author) [hereinafter, collectively referred to as *Vexatious Litigant Lists*]. As required by the statute, the Vexatious Litigant Lists are disseminated to every clerk of the California appellate, superior, and municipal courts.

86. The information contained in Table 1 was compiled from the *Vexatious Litigant Lists*, *supra* note 85. As Table 1 reflects, during the first year of their availability, prefilings orders were issued on 30 occasions. By 1997, California courts had issued a total of 344 prefilings orders.

VLS has grown over the years, it does reflect the fact that the number of individuals on the list is higher today than ever before.⁸⁷

TABLE 1

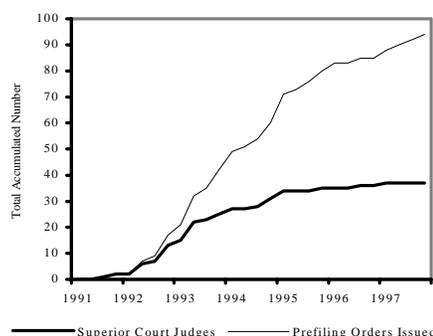
Year	Quarter	Prefiling Orders Entered	Filings at Appellate Courts	Filings at Superior Courts	Filings at Municipal Courts
1991	Q1				
	Q2	3		3	
	Q3	20	1	10	9
	Q4	7		5	2
1992	Q1	5		5	
	Q2	21	2	17	2
	Q3	8	1	4	3
	Q4	12		10	2
1993	Q1	15		11	4
	Q2	22		18	4
	Q3	12	4	7	1
	Q4	20	6	11	3
1994	Q1	14	1	11	2
	Q2	13	1	12	
	Q3	17	1	14	2
	Q4	19	2	15	2
1995	Q1	16	2	13	1
	Q2	12	1	8	3
	Q3	10	1	8	1
	Q4	20	5	13	2
1996	Q1	11	1	9	1
	Q2	4		4	
	Q3	8		7 ⁸⁸	1
	Q4	6		5	1
1997	Q1	14	1	11	2
	Q2	7		5	2
	Q3	12		11	1
	Q4	14		14	2
Total		344	30	261	53

87. The pure numbers recited in Table 1 do not, on their face, reflect a tremendous growth in the use of the VLS. However, it should be recognized that of all the individuals subjected to prefiling orders under the VLS, only five litigants have ever been dropped from the Vexatious Litigant Lists. See *infra* notes 167, 189, and accompanying text. But see Charley Roberts, *Council Fails to Take Vexatious Litigant Off List*, L.A. DAILY J., Oct. 29, 1996, at 1 [hereinafter Roberts, *Council Fails*] (reporting that the judicial council failed to properly and timely remove a litigant's name from the vexatious litigant list).

88. One prefiling order was a joint determination between the Sacramento Superior and Municipal Courts. For the purposes of this Table, the prefiling order is reflected in the Superior Court column. See David L. Bryant, Case No. JC-2081 (Aug. 5, 1996) (Vexatious Litigant Prefiling Order List).

Additionally, a survey of the previous applications of the VLS within the Los Angeles County Superior Court system indicates that by the end of 1991, the first year the prefiling order sanction was available to the judiciary, only two superior court judges had applied the sanction.⁸⁹ As Figure 1 demonstrates, the number of Los Angeles County Superior Court judges implementing the prefiling-order sanction has grown. By the end of 1997, thirty-seven of fifty superior court judges had issued a grand total of ninety-four prefiling orders.⁹⁰ Of the prefiling orders issued, twenty-seven originated from five judges.⁹¹ These statistics may support the conclusion that in 1991 when the VLS was first available, relatively few judges were either aware of the VLS or felt comfortable applying it to the litigants appearing before them.⁹²

FIGURE 1. SURVEY OF LOS ANGELES COUNTY SUPERIOR COURT JUDGES



On the other hand, the disproportionate number of prefiling orders issued by certain judges may simply be the result of the random assignment of judges to these cases. These judges, by pure random chance, may have

89. The information contained in this survey was compiled from the *Vexatious Litigant Lists*, *supra* note 85, and certain limited information available from the Los Angeles Superior Court docket files. The notes are on file with the author.

90. See *Vexatious Litigant Lists*, *supra* note 85.

91. See *id.*

92. At least one judge believes that state court judges are hesitant to invoke the VLS. See Kim Boatman, *State Throws the Book at 'Vexatious Litigant'*, L.A. DAILY NEWS, Feb. 25, 1996, at N18 (stating that Santa Clara County Superior Court Judge LaDoris Cordell believes judges are "reluctant to invoke the statute").

received cases which involved vexatious behavior. However, because a determination of vexatiousness generally requires vexatious, or at least questionable, behavior manifesting itself prior to the instant action, it is less likely that random chance is the sole reason behind the disparate numbers of prefilings issued. It is more likely that some judges feel more comfortable applying the VLS than some of their colleagues.⁹³ Beyond these assertions, however, the statistics yield little information regarding whether the VLS is being considered in appropriate situations or whether it is being used efficiently.⁹⁴

2. Anecdotal Evidence⁹⁵

An examination of several anecdotal cases provides some evidence that the VLS, and especially the requirement of a prefiling order, is being applied only in the most extreme cases.⁹⁶ The anecdotal evidence suggests that the VLS is not being regularly used or considered in definitionally appropriate situations.⁹⁷ This is evident in the frequency of cases reported where *propria persona* litigants have “commenced, prosecuted, or maintained” significantly more than five frivolous actions in the past seven years.⁹⁸

For example, Liag-Houh Shieh filed “innumerable complaints,” had previously been deemed a vexatious litigant by several California courts

93. Evidence of this reluctance on the part of some judges may also be inferred from the delay that often occurs between when a litigant meets the definitional requirements of the VLS and when the VLS is applied to that litigant. *See infra* notes 153-60 and accompanying text.

94. Again, the lack of analysis on this problem lends credence to the argument that the VLS has largely been ignored as a resource for controlling vexatious litigation.

95. The anecdotal evidence detailed in this Note was collected by the author from published cases, the Los Angeles County Superior Court docket, and newspaper articles addressing the implementation of the VLS. This anecdotal evidence was not collected under controlled conditions and does not necessarily constitute a representative sample of vexatious litigant cases. However, these cases demonstrate that the VLS often, if not regularly, is not implemented when it is *definitionally appropriate* to do so. *See supra* note 16 and accompanying text.

96. The author contends neither explicitly nor implicitly that the VLS or the prefiling order should be a common sanction of frivolous litigation. Rather, this Note seeks only to identify potential problems of the VLS as applied and offer possible remedies to make the application more uniform. The fact that some proposed solutions may make the frequency of application increase should not be understood to be an endorsement of applying the statute in a capricious manner. As Judge Stuart Polak, a past presiding judge of the San Francisco Superior Court, stated, the VLS is used “sparingly as it should be, but it does seem to take a lot of time to get the procedures invoked.” Charley Roberts, *Barring the Courthouse Door*, L.A. DAILY J., Oct. 16, 1996, at 22 [hereinafter Roberts, *Barring the Courthouse Door*]. Again, this Note is not attempting to answer the normative question of whether the VLS is a “good” statute.

97. *See supra* note 16 and accompanying text.

98. CAL. CIV. PROC. CODE § 391(b)(1) (West 1973 & Supp. 1998) (requiring at least five suits).

and the U.S. District Court for the Central District of California, had a bench warrant issued against him, and had \$305,326.90 pending in unpaid sanctions resulting from previous vexatious litigation before he was subject to a pre-filing order.⁹⁹ Mr. Shieh is not alone in amassing large amounts of sanctions. In 1992, Ms. Patricia Alice McColm was ordered to pay her opponents' court costs of \$72,949.¹⁰⁰ Among other sanctions assessed against her, Ms. McColm was ordered to pay \$7,500 to another opponent in an unrelated case.¹⁰¹ It is doubtful that those sanctions will ever be paid off as there are many other sanctions claimants "lined up ahead of [these claimants]."¹⁰²

Nor is Mr. Shieh alone in filing his "innumerable" lawsuits. Ms. McColm filed over thirty lawsuits before she was held to be a vexatious litigant.¹⁰³ Another person, Lawrence Bittaker, filed over forty lawsuits "including one against his prison cafeteria for serving him a [soggy sandwich] and a broken cookie."¹⁰⁴ Christopher Gregory Michaels was declared to be a vexatious litigant after he "filed 13 identical lawsuits in 1993."¹⁰⁵

There are many more vexatious litigants whose determination of vexatiousness occurred well after they had met the definitional requirements.¹⁰⁶ However, even the most stringent application of the VLS would

99. See *In re Shieh*, 21 Cal. Rptr. 2d 886, 891-93, 895 (Ct. App. 1993). By the time Mr. Shieh left the United States for Taiwan, he had "\$600,000 in outstanding sanctions against him and three outstanding bench warrants . . ." David Fetterman, *Los Angeles Lawyers, Judges Are the Targets of Suits Filed in Taiwan*: Liang-Houh Shieh, Disbarred in California for Vexatious Litigation, *Keeps on Suing*, METROPOLITAN NEWS-ENTERPRISE, July 29, 1997, at 5.

100. See Carlsen, *supra* note 2.

101. See *id.*

102. *Id.*

103. See Brazil, *supra* note 50 (noting that determination was based on eight cases which were resolved against Ms. McColm, the denial of 36 motions in the same case, and Ms. McColm's failure to appear for depositions on seven different occasions). See also Carlsen, *supra* note 2 (noting that Ms. McColm's vexatious behavior "has had such a devastating impact on the neighborhood that property values have dropped dramatically in recent years"); *Trouble*, *supra* note 4 (covering vexatious litigants, including Ms. McColm).

104. Pamela Warrick, *The Convict Who Sued Over a Broken Cookie Qualified for this List*, SACRAMENTO BEE, Nov. 26, 1995, at F3. See also *In re Bittaker*, 64 Cal. Rptr. 2d 679, 681 (Ct. App. 1997) (reiterating that 1993 vexatious litigant determination was based on the facts underlying the 19 prior suits); Charley Roberts, *Inmate Suits Cost California \$25 Million Annually*, L.A. DAILY J., Oct. 18, 1996, at 1 (stating that Bittaker's suit regarding the soggy sandwich and the broken cookie cost the state \$1,862 to defend).

105. Kenneth Ofgang, *C.A. Upholds Dismissal of Suits Charging Bias at Courthouse Filing Window*, CAP. NEWS SERV., June 11, 1997, at 5.

106. See, e.g., *In re Whitaker*, 8 Cal. Rptr. 2d 249 (Ct. App. 1992) (holding that litigant who filed at least 24 actions within seven years was a vexatious litigant); Julio V. Cano, *Homeowner Pleads Not Guilty Courts: She Denies Neglect of Huntington Harbour Home, Subject of Long-Standing Feud with*

not bring all “career litigants” within its scope. One California litigant has filed at least 100 lawsuits and may have filed up to 200 suits. He cannot remember his grand total.¹⁰⁷ Yet he does not fall within any of the VLS’s definitions of a vexatious litigant because he wins or settles almost all of his suits.¹⁰⁸

While these anecdotal cases lend credence to the suggestion that the VLS is not regularly included in a court’s arsenal of judicial tools aimed at eliminating frivolous lawsuits, the lack of statistics presents a significant impediment to reaching a reliable conclusion. Without accurate data, the significance of the VLS as a judicial resource is arguably unfathomable. However, the very lack of statistics and research addressing the VLS’s implementation suggests that the VLS is not realistically considered by the courts to be a viable judicial tool.¹⁰⁹

C. THE INTERPRETATION OF THE VLS

During its thirty-five year history, the VLS has been subjected to constitutional challenges and various judicial efforts to expand particular portions of the statute. This section begins with a brief examination of the constitutional challenges brought against the VLS. Immediately following that discussion is an analysis of how California courts have extended the scope of the statute.

1. *Constitutionality of the VLS*

Arguably, the statute’s potential sanctions—requiring the posting of security and, especially, the prefiling order—represent significant obsta-

Her Neighbors, L.A. TIMES, Jan. 21, 1998, at B4 (reporting case in which Elena Zagustin was held to be a vexatious litigant); Boatman, *supra* note 92 (noting case in which Harold Rucker was declared to be a vexatious litigant). *But see* Childs v. PaineWebber Inc., 35 Cal. Rptr. 2d 93, 97 (Ct. App. 1994) (holding party to be vexatious based on five actions within seven years). For the definitional requirements of vexatiousness, see *supra* notes 74-78 and accompanying text.

107. See Riccardi, *supra* note 51.

108. See *id.* (noting that the litigant has either settled or won all but four of his cases). The author, by highlighting this litigant, is not suggesting that the number of suits alone should be sufficient to deem an individual a vexatious litigant. This particular litigant is mentioned only because his litigious behavior suggests that several of his lawsuits were frivolous or, at the very least, of a questionable nature. He is mentioned only to illustrate that the VLS does not prevent *all* frivolous litigation brought *in propria persona*.

109. For example, the lack of research conducted during the 1990 legislative session on the pre-filing order amendment suggests that little thought was given to the efficacy of the existing statute. Another example of this lack of interest in the VLS is the fact that there are no set procedures for how a previously determined vexatious litigant subject to a pre-filing order should go about petitioning the presiding judge for leave to file new actions. Currently litigants have no information on what such a motion requires. For suggestions regarding a possible procedure, see discussion *infra* Part III.B.4.

cles that vexatious litigants must overcome in order to bring their claims in state court. Thus, it should be of little surprise that the constitutionality of the VLS has often been challenged in court.

The first significant constitutional challenge to the VLS reached an appellate court in 1965. In *Taliaferro v. Hoogs*,¹¹⁰ the appellant argued that the VLS is unconstitutional on its face because, inter alia, (1) the VLS discriminates against litigants proceeding *in propria persona*, (2) the VLS discriminates against a group of litigants who are too poor to afford counsel,¹¹¹ (3) the VLS deprives certain litigants of due process of law because it unreasonably determines which litigation the state will permit to proceed, and (4) the VLS is too vague.¹¹²

The court in *Taliaferro* drew comparisons between the VLS and section 834 of the California Corporations Code (“section 834”) which provided, in relevant part, that a corporation or other defendant may request that the plaintiff in a stockholder’s derivative suit furnish security for attorney’s fees and litigation costs.¹¹³ In finding that the VLS does not violate equal protection as against litigants appearing *in propria persona* the court relied on *Beyerbach v. Juno Oil Co.*,¹¹⁴ which held that section 834’s provision granting defendants the opportunity to request that plaintiffs in derivative suits post bond was not a violation of equal protection.¹¹⁵ The *Taliaferro* court held that “a state may set the terms on which it will permit legislation in its courts.”¹¹⁶ Additionally, the Court found that the security requirement of the VLS was not “arbitrary or unreasonable” and was based on distinctions between represented and unrepresented parties that have a “substantial relation to the purpose of the legislation.”¹¹⁷

110. 46 Cal. Rptr. 147 (Ct. App. 1965).

111. This is a slightly different class of litigants than those described in the first category in that not all *propria persona* litigants are too poor to afford counsel. Some *propria persona* litigants cannot secure counsel willing to prosecute their claims for reasons other than purely financial considerations.

112. See *Taliaferro*, 46 Cal. Rptr. at 151-53. The appellant also challenged the VLS on the basis that it deprived the appellant his right to a jury trial and that the VLS was adopted by a legislature elected from districts unconstitutionally apportioned. However, because the court held that the appellant waived his right to a jury trial, it did not reach the merits of this contention. See *id.* at 152-53. The court also dismissed appellant’s argument regarding the validity of the districts’ apportionment as “frivolous and without authority.” *Id.* at 153.

113. See CAL. CORP. CODE § 834 (repealed 1975).

114. 265 P.2d 1 (Cal. 1954).

115. See *id.* at 6.

116. *Taliaferro*, 46 Cal. Rptr. at 151 (citing *Beyerbach*, 265 P.2d at 6).

117. *Id.* at 151-52. One distinction cited was the absence of any prescribed rules of ethics and professional conduct, as well as a lack of defined disciplinary sanctions against litigants appearing *in propria persona*. See *id.* at 151.

Furthermore, the court held that the VLS does not violate the equal-protection rights of poor litigants simply because they are uniformly unlikely to be able to afford representation.¹¹⁸ Were the opposite to be true, “any statute which required the payment of a fee or the furnishing of security as a prerequisite to the filing of a complaint, the issuance or levying of a writ, or the procurement of a record on appeal . . . would be unconstitutional.”¹¹⁹ The *Taliaferro* court also concluded that the VLS, on its face, does not violate the due process rights of litigants appearing *in propria persona*. Relying on *Cohen v. Beneficial Industrial Loan Corp.*¹²⁰ and *Vinnicombe v. State*,¹²¹ the court held that provisions like the VLS, which protect “the state against the costs and expenses of defending unfounded and baseless claims,” are not unreasonable uses of the state’s power.¹²² “[I]t is within the power of a state to close its courts to [*propria persona*] litigation if the condition of reasonable security is not met.”¹²³

In *Taliaferro* the appellant also argued that section 391.3’s requirement that there be “no reasonable probability that [the plaintiff] will prevail” is unconstitutionally vague. The court, in rejecting this argument, held that similar language in section 834 had previously been found constitutional in *Beyerbach* and that the wording of the VLS provision was acceptable.¹²⁴ In short, the *Taliaferro* court held that the VLS was constitutional under both the U.S. and California Constitutions.¹²⁵

Following the 1990 amendment, a second round of challenges occurred that specifically challenged the constitutionality of the prefiling order provision.¹²⁶ The first published case to address the constitutionality of the newly amended VLS (but not the actual 1990 amendment) was decided in 1992.¹²⁷ The appellate court, hearing the case of *In re Whitaker*,

118. *See id.* at 152.

119. *Id.*

120. 337 U.S. 541 (1949) (finding constitutional a New Jersey statute requiring plaintiff stockholders in derivative suits to provide security).

121. 341 P.2d 705 (Cal. Ct. App. 1959).

122. *Taliaferro*, 46 Cal. Rptr. at 152.

123. *Id.* (quoting *Cohen*, 337 U.S. at 551-52). *See also* *Muller v. Tanner*, 82 Cal. Rptr. 738, 743 (Ct. App. 1970) (“It is, however, generally established that the state may set reasonable terms on which it will permit litigation in its courts.”). The classification of persons and the terms imposed by the VLS are reasonable. *See id.*

124. *See Taliaferro*, 46 Cal. Rptr. at 152. *See also* *Beyerbach v. Juno Oil Co.*, 265 P.2d 1, 6 (Cal. 1954).

125. *See generally Taliaferro*, 46 Cal. Rptr. at 151-52.

126. *See, e.g.,* *Wolfgram v. Wells Fargo Bank*, 61 Cal. Rptr. 2d 694 (Ct. App. 1997), *cert. denied*, 118 S. Ct. 347 (1997); *In re Whitaker*, 8 Cal. Rptr. 2d 249 (Ct. App. 1992).

127. *See Whitaker*, 8 Cal. Rptr. 2d at 249. Appellant *Whitaker*, in an earlier unpublished opinion, *Whitaker v. Bay Area Rapid Transit Dist.*, No. A049779 (Ct. App. Apr. 23, 1991) (unpublished), may

dismissed as meritless the appellant's claims that the VLS is unconstitutional.¹²⁸ "Whitaker is again contending that the vexatious litigant statutes are unconstitutional, an argument we expressly rejected in one of his cases only last year. . . . By coming forward again with this [identical] argument, Whitaker is engaging in frivolous conduct."¹²⁹ The new amendments to the VLS would have to wait until 1997 before again being challenged.

In *Wolfgram v. Wells Fargo Bank*, the appellant asserted that the VLS—specifically the prefiling order—unconstitutionally chilled the right to petition, was a "prior restraint," violated due process, and was overbroad.¹³⁰ With respect to the alleged infringement of the right to petition, the court noted that despite the high premium the United States and California place on the First Amendment and, specifically, political speech, "the general rights of persons to file lawsuits—even suits against the government—does not confer the right to clog the court system and impair everyone else's right to seek justice."¹³¹ However, "any impairment of the right to petition, including any penalty exacted after the fact, must be narrowly drawn."¹³² In concluding that the VLS and its prefiling order provision meet this standard, the court held that the VLS "does not impermissibly 'chill' the right to petition and does not 'penalize' the filing of unsuccessful, colorable suits."¹³³

Additionally, the court held that the issuance of the prefiling order does not subject the vexatious litigant's speech to "content discrimination" because it is not based on the content of future filings. Therefore, the pre-filing order does not constitute a prior restraint.¹³⁴ Rather, it is a "necessary method of curbing those for whom litigation has become a game."¹³⁵

have been the first to challenge the constitutionality of the VLS since the 1990 amendment added the prefiling order sanction. See *Whitaker*, 8 Cal. Rptr. 2d at 250.

128. See *id.* at 250-51. The court, stating that the claims were identical to those raised by the same appellant only one year earlier, rejected the allegations without substantial review. See *id.*

129. *Id.* In short, Whitaker was engaging in frivolous appeals over the decision declaring him to be a vexatious litigant because of his earlier frivolous behavior.

130. 61 Cal. Rptr. 2d 694 (Ct. App. 1997).

131. *Id.* at 703.

132. *Id.*

133. *Id.* at 705. One of the appellant's claims was that the prefiling order punished individuals who lost previous meritorious cases. However, in dismissing this argument, the court noted that "[o]nly those citizens who decline to hire lawyers, lose five suits in seven years, then undertake a sixth suit which lacks merit, will be labeled vexatious." *Id.* at 704. In making this statement, the *Wolfgram* court errs in defining those subject to the prefiling order. In addition to this avenue, litigants can also be deemed vexatious and subject to the prefiling orders under three other definitional prongs. See *supra* notes 74-78 and accompanying text.

134. See *Wolfgram*, 61 Cal. Rptr. 2d at 705.

135. *Id.*

In fact, the court reasoned, “[t]o the extent it keeps vexatious litigants from clogging courts, it is closer to ‘licensing or permit systems which are administered pursuant to narrowly draw [sic], reasonable and definite standards’ which represent ‘government’s only practical means of managing competing uses of public facilities.’”¹³⁶

The court also rejected Wolfgram’s due process claim, concluding that the prefiling order does not violate due process because “[t]he vexatious litigant has the right to petition the presiding judge of any court for permission to file any litigation he chooses,¹³⁷ or to employ an attorney to file suit.”¹³⁸ Furthermore, the court rejected Wolfgram’s claim that the prefiling order is overbroad because it “prevents the filing of writs of habeas corpus and petitions for dissolution of marriage, resolution of paternity and adoption.”¹³⁹ The court stated that, with regard to a claim implicating “family rights,” the prefiling order would not represent an unreasonable hurdle or cause anything more than “minimal delay.”¹⁴⁰

With regard to filing a writ of habeas corpus, the court held that the prefiling order requirement would not impact this procedure because the “presiding judge would consider the special nature of the Great Writ in deciding whether to allow the filing of a petition therefor.”¹⁴¹ In fact, less than four months after *Wolfgram*, the First District Court of Appeal held that a “petition for writ of habeas corpus is not a civil action or proceeding within the meaning of the [VLS],” and therefore is not subject to the command of the VLS.¹⁴²

2. *Judicial Expansion of the VLS*

In addition to repeated constitutional challenges, the scope of the VLS has undergone significant judicial expansion. The VLS has expanded, in limited situations, to include parties represented by counsel. In 1993 an appellate court ruled that the statute is not limited to only those vexatious

136. *Id.* (quoting LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1051 (2d ed. 1988)).

137. One problem of the current VLS is that there is no set procedure for the vexatious litigant subject to a prefiling order to petition the presiding judge for leave to file a presumably meritorious pleading. See discussion *infra* at Part III.A.2.

138. *Wolfgram*, 61 Cal. Rptr. 2d at 705. *But see infra* notes 143-45 and accompanying text (discussing rule whereby parties who employ attorneys to act as “mere puppets” do not escape the scope of the VLS).

139. *Wolfgram*, 61 Cal. Rptr. 2d at 705.

140. *Id.* at 705-06.

141. *Id.*

142. *In re Bittaker*, 64 Cal. Rptr. 2d 679, 684 (Ct. App. 1997).

litigants who bring new litigation *in propria persona*.¹⁴³ In *Camerado Insurance Agency*, the court held that the trial judge erred in construing the definition of vexatious litigants so narrowly as to apply only to *propria persona* litigants.¹⁴⁴ According to the court, litigants currently represented by counsel, who otherwise meet VLS criteria regarding their prior frivolous judicial behavior while acting *in propria persona*, may be subject to sanctions under the VLS in the instant proceeding.¹⁴⁵

Along the same lines, in *Say & Say, Inc. v. Ebershoff*,¹⁴⁶ the court held that the plaintiff-corporation was an “alter-ego” of Liang-Houh Shieh, a previously determined vexatious litigant, and that the inclusion of the corporation as a co-plaintiff did not render the previously ordered posting of security moot.¹⁴⁷

Although corporations generally must have legal representation when appearing in California courts, the court in *Say & Say* held that the VLS applied to the instant circumstances despite the VLS text limiting itself to unrepresented parties.¹⁴⁸ In piercing the veil under the theory that the corporation was an “alter-ego” of Mr. Shieh, the court concluded that the “purpose for which the corporation was formed was to protect Mr. Shieh from the consequences of litigation [and the VLS].”¹⁴⁹ As such, the court

143. See *Camerado Ins. Agency, Inc. v. Superior Court (Stolz)*, 16 Cal. Rptr. 2d 42 (Ct. App. 1993). It is important not to read this opinion as extending the VLS to *all* situations in which a party, represented by counsel, brings litigation or engages in frivolous behavior. *Camerado Insurance Agency* is limited to specific circumstances where the attorney is abdicating his ethical duties and acting as a “strawman” or “puppet” attorney.

144. See *id.* at 44.

145. See *id.* (“A plain reading of the statute indicates the Legislature intended it to apply . . . to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past.”). In other words, if the litigant, while previously proceeding *in propria persona*, conducted herself in a vexatious manner, then the fact that she was represented by counsel in the instant matter would not relieve her of potential VLS sanctions or burdens. Thus, a new action filed by an attorney may be subject to the command of the VLS based on the client’s previous vexatious behavior.

146. 25 Cal. Rptr. 2d 703 (Ct. App. 1993).

147. Including this case, the previously determined vexatious litigant had joined *Say & Say* as a co-plaintiff in 12 different cases in an attempt to forestall dismissal of the cases for failure to post security as required by orders issued under the provisions of the VLS. See *id.* at 707. One of these cases included the joining of *Say & Say* in a suit against Judge Edward Y. Kakita and Presiding Justice Vaino Spencer who wrote the opinion in *In re Shieh*, 21 Cal. Rptr. 2d 886 (Ct. App. 1993) (declaring Mr. Shieh a vexatious litigant). See *Say & Say*, 25 Cal. Rptr. 2d at 707.

148. *Say & Say* was represented by counsel in every case under consideration by the court. See *Say & Say*, 25 Cal. Rptr. 2d at 709.

149. *Id.* at 711.

held that Say & Say was a vexatious litigant and subject to the security requirements and prefiling order issued.¹⁵⁰

III. PERCEIVED PROBLEMS AND PROPOSED SOLUTIONS

Assuming that the anecdotal and statistical evidence detailed above represents symptoms of the judiciary's failure to consider and apply the VLS on a regular and definitionally appropriate basis, the problem thus becomes one of identification of the causes of the inefficient use of the VLS. This part will address this question and examine problems inherent within the VLS which have resulted from the application of the VLS. This part details these problems manifested from the evidence above and attempts to resolve them by asserting several solutions designed to improve the implementation, clarity, and efficacy of the VLS.

A. SEVERAL PROBLEMS EVIDENT FROM THE APPLICATION OF THE VLS

Based on the limited evidence presented above, and relying on the assumption that this evidence is indicative of what complete information would demonstrate—such as comprehensive statistics regarding VLS implementation, frivolous pleadings, and *propria persona* filings—there are several problems evident from the current application of the VLS.

1. *The Delay in Applying the VLS After Vexatious Behavior Is Manifested*

As the evidence indicates above, there appears to be a significant delay in many instances between the time when vexatious behavior¹⁵¹ is first manifested by a *propria persona* litigant and when the court acts under the VLS. Arguably, additional resources could be saved if the VLS were applied in a less arbitrary and capricious manner.¹⁵² In fact, reducing the un-

150. *See id.* It should be noted that the court narrowly tailored this decision to the specific facts in this case. Relying specifically on the fact that the corporation was *created for the purpose* of thwarting the VLS and the prefiling orders issued against Mr. Shieh, the court concluded that Say & Say was an alter ego of Mr. Shieh and therefore falls within the scope of the VLS.

151. By this, the author means behavior sufficient for a finding of vexatiousness.

152. The author is not suggesting that the VLS should be the judicial sanction of choice for deterring meritless lawsuits, but rather that as presently applied, the VLS is not fulfilling its stated purpose in an efficient manner. As the court in *First Western Development Corp. v. Superior Court*, 261 Cal. Rptr. 116 (Ct. App. 1989), held:

The unreasonable burden placed upon the courts by groundless litigation prevents the speedy consideration of proper litigation and the tremendous time and effort consumed by unjustifiable suits makes it imperative that the courts enforce the vexatious litigant statutes enacted by the Legislature. . . . The court cannot permit such litigation to continue without offering the protection provided in the vexatious litigant statutes to the targets of the repeated attempts to relitigate the same issues.

certainty about when the VLS would be applied by a judge may actually further general deterrence. The delay in applying the statute is, most likely, the collective product of several factors.¹⁵³

One cause of the inefficiency is that judges are reluctant to use the VLS because of the perceived severity of the sanction. For example, Judge Stuart Pollak, past presiding judge of the San Francisco Superior Court, stated: “[I]t does seem to take a lot of time to get the [VLS] invoked.”¹⁵⁴ Judges may delay imposing the pre-filing order for sanctions out of a belief that the sanction is unduly harsh.¹⁵⁵ In examining situations where VLS sanctions may be an appropriate response to a litigant’s behavior, courts are “always worried about taking away someone’s rights.”¹⁵⁶ According to Judge LaDoris Cordell, there is “a real tension between giving people access to the court system and limiting the use that people can make of that very system.”¹⁵⁷

Some judges unfamiliar with the statute decline to use it despite concluding that the situation warrants it. Rather than acting out of concern for a litigant’s rights, at least one judge reconsidered applying the VLS because he was concerned with how the sanctioned litigant would react.¹⁵⁸

Additionally, the discrepancy between when the behavior meets the threshold for vexatiousness and when the VLS is applied may be the result of judges acting on the belief that a person who exhibits vexatious behavior with the same claim, and/or against the same defendants, is more deserving of the vexatious status than the person who has brought frivolous

Id. at 122-23. Nor is the author suggesting that improvements in recognition of vexatious behavior will completely eliminate the delay that is currently manifested. In fact, it may be the case that some form or level of recognition delay is inherent within the VLS.

153. It is entirely possible that one or more of these factors contributes a disproportionate share to the problem. This Note does not attempt to attribute precise allotments to each factor; nor is such a determination necessary to apply the solutions as proposed.

154. Roberts, *Barring the Courthouse Door*, *supra* note 96.

155. On the other hand, some judges believe that better clarifying the threshold for what behavior constitutes vexatiousness is appropriate. *See id.* (quoting Judge Pollak, who suggests that the VLS should be “tighten[ed] up”). *Cf. First Western*, 261 Cal. Rptr. at 122 (“[I]t [is] imperative that the courts enforce the vexatious litigant statutes enacted by the Legislature.”). The author, while avoiding consideration of the normative question of whether the VLS is a “good” statute, acknowledges that some judges may have concluded this question in the negative. Assuming this to be true, it is understandable that these judges would be reticent to apply the VLS.

156. Roberts, *Barring the Courthouse Door*, *supra* note 96 (quoting Attorney Ralph Loyd).

157. Boatman, *supra* note 92.

158. *See* Carlsen, *supra* note 2 (“[The judge] backed off, saying that it was more hassle dealing with her subsequent appeals than it was worth.”). *See also supra* notes 8-11 and accompanying text.

lawsuits in the past.¹⁵⁹ Judges who subscribe to this view would be less likely to impose a prefilng order based on the number of past frivolous actions.¹⁶⁰ Rather, they would require frivolous behavior in the present action before considering the issuance of a prefilng order. Thus, the number of prior frivolous actions brought by the litigant would have little, if any, role in these judges' consideration of the prefilng order.

Another possible contributing factor is the "lack of automation in some courts," which "enables vexatious litigants to avoid detection in filing a new suit."¹⁶¹ In some courts, it has been suggested that the filing clerks simply accept new *propria persona* complaints without checking the vexatious litigant list.¹⁶² Additionally, some litigants forum shop. After losing a case in one jurisdiction, some individuals refile essentially the same claim (or exactly the same claim) in another forum.¹⁶³ This makes tracking vexatious behavior especially difficult.¹⁶⁴

2. *No Procedure for Previously Determined Vexatious Litigants to Request Leave to File a New Complaint*

Currently there is no explicit policy in place for previously determined vexatious litigants to seek leave to file new, and presumably meritorious, complaints. Should a vexatious litigant desire to file a new complaint in state court it is unclear how she should go about filing it. The

159. In other words, litigants meeting the VLS's criteria under section 391(b)(1) of California Code of Civil Procedure, as opposed to those meeting the requirements of section 391(b)(2), have engaged in less culpable behavior—for lack of a better term—and thus should not be declared vexatious litigants immediately upon meeting the explicit criteria.

160. See CAL. CIV. PROC. CODE § 391(b)(1) (West 1973 & Supp. 1998).

161. Roberts, *Barring the Courthouse Door*, *supra* note, 96. See also Boatman, *supra* note 92 ("In Santa Clara County, workers don't have time to consult the list each time a case is filed So, some vexatious litigants slip through the system until an opposing attorney notices."). As San Diego Municipal Judge Larry Stirling concisely stated, "Unless and until the California trial courts are unified and fully automated . . . the most common court activity for judges, jurors, press, witnesses and citizens will continue to be simply waiting." Larry Stirling, *Letter to the Editor*, L.A. TIMES, Mar. 26, 1998, at B8.

162. See Roberts, *Barring the Courthouse Door*, *supra* note 96.

163. See, e.g., Warrick, *supra* note 104. See also *In re Bittaker*, 64 Cal. Rptr. 2d 679, 681 (Ct. App. 1997).

164. See Roberts, *Barring the Courthouse Door*, *supra* note 96. See also Roberts, *Serial Litigators*, *supra* note 48. According to Judge Robie, past presiding judge of the Sacramento Superior and Municipal Courts, "If a person sued seven different people in seven different counties, you will never find out about it." Roberts, *Barring the Courthouse Door*, *supra* note 96. Judge Parkin, assistant presiding judge of the Los Angeles Superior Court, agrees: "What happens in L.A. County is a party files a lawsuit in Torrance and gets an unfavorable ruling. Then they file the same suit downtown or in Norwalk. Eventually, the defendant will file some sort of demurrer and that will trigger the judge's inquiry." *Id.*

VLS provides only that the vexatious litigant must “first [obtain] leave of the presiding judge of the court where the litigation is proposed to be filed.”¹⁶⁵ It is unclear what documentation the court requires from the vexatious litigant to adequately consider the request.

Additionally, it is unclear what factors the court should consider once it has the request before it. As Judge Stuart Pollak, former presiding judge of the San Francisco Superior Court, explicitly stated, “[T]here are no well-specified procedures for . . . how the court is to deal with applications for leave to file by the vexatious litigant”¹⁶⁶

3. *Removing Individuals from the Vexatious Litigant Prefiling Order List*

An additional, albeit minor, problem is the inability of court docket clerks to determine when an individual previously subject to a prefiling order is removed from the vexatious litigant prefiling order list and, therefore, is no longer classified as a vexatious litigant. The statute currently requires only that the vexatious litigant prefiling order list be updated and issued every quarter. There is no formal policy on how to alert the state’s docket clerks as to when an individual is no longer subject to the prefiling order. As one former vexatious litigant discovered, this can be a significant problem. Charles P. Littlejohn’s name continued to be published in the quarterly vexatious litigant list for almost two years after a state court of appeal ordered it removed.¹⁶⁷

As evident above, there are several factors which contribute to the irregular application of the VLS. While the magnitude of each factor’s effect may be unclear, the proposed solutions below offer realistic opportunities to resolve the problems.

B. POTENTIAL SOLUTIONS TO THE PERCEIVED PROBLEMS OF THE VLS

The following are several modest proposals designed to make VLS a better judicial tool to combat frivolous litigation and to promote ease of understanding among those subject to the statute.

165. CAL. CIV. PROC. CODE § 391.7(a).

166. Roberts, *Barring the Courthouse Door*, *supra* note 96. See also Roberts, *Council Fails*, *supra* note 87 (stating that among the complaints about the VLS, it lacks “guidelines for how to create a proper record . . . and how to handle prefiling approval requests”).

167. See Roberts, *Council Fails*, *supra* note 87. Mr. Littlejohn was declared a vexatious litigant on April 24, 1992, by Santa Barbara Superior Court Judge William L. Gordon. In an unpublished opinion, the Second District Court of Appeal reversed Mr. Littlejohn’s vexatious litigant status. See *id.*

1. Automate the California Judicial System

One approach to reducing the delay between the manifestation of vexatious behavior and the point at which the court first considers applying the VLS is to automate the California judicial system. Because a court will often not consider VLS sanctions if it does not have evidence of prior vexatious behavior before it,¹⁶⁸ automating the judicial system will alert courts to prior actions in which the parties have been involved. This will assist courts in considering questionable behavior in the instant case by providing a context and background to the litigants appearing before it. Arguably, this is only one of many potential benefits of automating the judicial system.¹⁶⁹ However, consideration of this approach must be tempered in light of the high cost of automating the entire California judicial branch.¹⁷⁰

2. Implement the Vexatious Litigant Affidavit or Declaration

Another possible solution would be to require, as a precondition to the filing of *propria persona* civil complaints in California state courts, an affidavit or declaration¹⁷¹ of nonvexatiousness which affirms that the potential plaintiff is not a vexatious litigant.¹⁷² The proposed declaration would function similarly to the current requirement for indigent individuals to apply to the court for permission to proceed *in forma pauperis*.¹⁷³ Like an *in forma pauperis* application, or a civil cover sheet, the proposed declaration would simply be an additional form to be completed and filed along with

168. Three of the four definitional provisions of the VLS require prior vexatious behavior that is unrelated to the current proceeding. See CAL. CIV. PROC. CODE § 391(b)(1), (2), (4).

169. See Stirling, *supra* note 161.

170. While acknowledging that there are several levels of automation to choose from—anything from simply automating docket numbers to providing remote electronic access to every judicial order—it must be conceded that the expense of providing even the most basic level of automation is high. Furthermore, given that the California government is grappling with the costs of the “Year 2000 Problem”—updating computer software and hardware so that basic governmental programs will be able to function beyond December 31, 1999—it is unlikely that this approach is a feasible answer to the problem.

171. For purposes of clarity, hereinafter the proposed affidavit or declaration will be referred to simply as the “declaration.”

172. Inclusion of this form in court filings would be required only when the plaintiff is proceeding *in propria persona*. Although the *Camarado Insurance Agency* opinion extended the VLS to certain cases where the party is represented by counsel, the decision was *extremely* limited in its scope. See *supra* notes 143-50 and accompanying text. Because the proposed declaration would be limited to those instances where the plaintiff is proceeding *in propria persona*, the proposed declaration would not cover situations akin to the facts in *Camarado Insurance Agency*.

173. See CAL. CT. R. 985.

the complaint. The information contained in this affirmative statement, in what could essentially be a preprinted declaration form, would include:

- (1) the number, if any, of civil cases the litigant has commenced, prosecuted, or maintained in any California court during the last seven years;¹⁷⁴
- (2) the number of times, if any, the litigant has sought judicial or administrative relief against the party or parties named as defendants in the proposed complaint;
- (3) the number of times, if any, the litigant has been determined to be a vexatious litigant under section 391 of the California Code of Civil Procedure; and
- (4) the number of times, if any, the litigant has been required by any court to post security resulting from a determination under, inter alia, sections 391.1 or 128.5 of the California Code of Civil Procedure.¹⁷⁵

Requiring this information would provide judges with helpful information that can place the instant action within the context of any prior litigation between the parties or on substantially similar issues. This information would help create a record by which to assess the possible vexatiousness of the litigant.

For those judges who may have been reluctant to implement the VLS, the declaration provides them with the imprimatur of acceptability.¹⁷⁶ Thus, previously hesitant judges may be more likely to use the statute when circumstances warrant, thereby increasing the uniformity of implementation and reducing the likelihood that the arbitrary lottery system of assigning judges to cases would play an unduly significant role in determining whether sanctions are imposed for vexatious behavior.

The declaration would also have the tertiary effect of providing the defendants in the instant action with information regarding the *propria persona* plaintiff.¹⁷⁷ While some might see this as providing an unfair ad-

174. The form would also require information detailing the case captions, case numbers, and courts where the prior litigation was filed.

175. CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1998) provides that a court “may order a party, the party’s attorney, or both to pay any reasonable expenses, including attorney’s fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.” *See also id.* § 128.7.

176. This is accomplished by providing judges with an impression that the VLS has become part of the mainstream—a viable judicial tool with its own defined, uniform policies.

177. While not suggesting that this declaration be required of all plaintiffs regardless of whether they are represented by counsel, the author acknowledges that this may change if the *Camerado Insurance Agency* opinion is extended to situations beyond where attorneys are acting as mere shadow “puppets” for vexatious litigants. Even if the *Camerado Insurance Agency* decision is subsequently

vantage to the defendants, it should be noted that the information contained in the proposed declaration is information that is available through any number of discovery procedures.¹⁷⁸

One major critique of this proposal is that it would increase the burden on the plaintiff appearing *in propria persona*. While it is certainly true that under this proposal the *propria persona* plaintiff would be required to complete a preprinted declaration, the time and effort required to complete the form would be minimal. Only those litigants who had engaged in substantial prior litigation would be required to fill in more than a few simple sentences. Moreover, as *Wolfgram v. Wells Fargo Bank* held, distinctions between *propria persona* suits and suits filed by attorneys are not per se unconstitutional.¹⁷⁹

Another potential critique of the proposed declaration is that requiring the declaration would place a presumption of vexatiousness on the litigant proceeding *in propria persona*. However, disclosing any involvement in prior litigation at the outset of the instant case, through use of the proposed declaration, allows the litigant to be free from any tacit presumption of vexatiousness which the court, opponents, co-plaintiffs, or other interested parties may possess.¹⁸⁰

Finally, another major critique of this proposal is that it would increase the burden on judicial resources. By having to review the declaration, judicial clerks and the judge are expending their limited time on an additional procedure. Based on the information included within a given declaration, these judicial officers may even feel compelled to investigate further (such as seeking certain pleadings from prior cases). This too would consume judicial resources. However, this additional burden must be weighed against the cost of trying obviously frivolous actions, some-

extended, the additional burden on plaintiffs is minor—assuming the form declaration comprises not much more than the few questions suggested above. *Camerado Ins. Agency, Inc., v. Superior Court (Stolz)*, 16 Cal. Rptr. 2d 42 (Ct. App. 1993) (extending the VLS to cover situations where attorneys act as “mere puppets” for their clients—that is, where attorneys sign pleadings without drafting or reviewing them). Additionally, *Wolfgram* held that states may regulate how litigation within their respective judicial systems will proceed. *Wolfgram v. Wells Fargo Bank*, 61 Cal. Rptr. 2d 694 (Ct. App. 1997), *cert. denied*, 118 S. Ct. 347 (1997). Arguably, requiring the proposed declaration falls within the scope of permissible regulation.

178. These questions or questions of a similar nature arguably should be part of any deposition taken in a civil action regardless of whether the parties to the action are appearing *in propria persona*.

179. See *Wolfgram*, 61 Cal. Rptr. 2d at 704 (holding that narrowly drawn partial restrictions on an individual’s ability to file suit is not a per se “prior restraint”). See also *Muller v. Tanner*, 82 Cal. Rptr. 738, 743 (Ct. App. 1970) (“It is, however, generally established that the state may set reasonable terms on which it will permit litigation in its courts.”).

180. As with most issues, additional truthful information dispels false presumptions or prejudices.

times repeatedly.¹⁸¹ Examined in that light, it is unlikely that judges would find the inclusion of the declaration unreasonably burdensome.

3. *Enforce the Posting of Statutorily Imposed Security Bonds Against Previously Determined Vexatious Litigants*

One problem evident from the historical application of the VLS is that previously determined vexatious litigants who have been ordered to post security for suits are often allowed to continue the litigation without actually posting the security bonds.¹⁸² The solution is relatively simple: Enforce the orders. Precluding the prosecution of lawsuits determined to be frivolous until the vexatious litigant posts security saves judicial resources and promotes the very purpose underlying the VLS.¹⁸³ As the California Second District Court of Appeal stated, “We suggest to the trial courts that it would be appropriate, upon notice and an opportunity to be heard, to consider dismissing [the cases where sanctions and security orders have been ignored by a vexatious litigant] for failure to pay sanctions.”¹⁸⁴

4. *Establish a Procedure for Previously Determined Vexatious Litigants to Seek Leave to File a New and Presumably Meritorious Claim*

Currently there is no explicit policy in place for previously determined vexatious litigants to seek leave to file a new, and presumably meritorious, complaint. One approach to solving this problem might be to assign a particular individual—the supervising staff attorney in the pro se office of each county, for example—to review potential new complaints for merit. Such complaints could be accompanied by an affidavit or declaration of a material witness or other minimal documentation to assist the attorney charged with examining the proposed complaint.¹⁸⁵ The attorney

181. See *supra* Part I.B.

182. See *In re Shieh*, 21 Cal. Rptr. 2d 886, 895 (Ct. App. 1993) (detailing vexatious litigant who had over \$305,326.90 in outstanding sanctions and security bonds in five separate cases). Before leaving the country, Mr. Shieh had \$600,000 outstanding. See Fetterman, *supra* note 99. There are other examples of courts failing to require the posting of previously ordered security. See *supra* notes 103-05 and accompanying text.

183. See *First Western Dev. Corp. v. Superior Court (Andrisani)*, 261 Cal. Rptr. 116, 121 (Ct. App. 1989) (“The purpose of the [VLS] is to deal with the problem created by the persistent and obsessive litigant who has constantly pending a number of groundless actions . . .”).

184. *In re Shieh*, 21 Cal. Rptr. 2d at 895. The passage immediately preceding the quoted material is unmistakable in its direction: “Finally, we wish to provide some guidance to the trial courts. Every court has the power ‘[t]o compel obedience to its . . . orders . . .’ Shieh currently has outstanding in the trial courts \$305,326.90 in unpaid sanctions in five separate cases.” *Id.* (citing CAL. CIV. PROC. § 128(a)(4) (West 1982 & Supp. 1998)).

185. This Note is not suggesting an extended discovery period or procedure. Rather, it suggests a simple investigation as to whether the complaint alleges the requisite elements of the claim(s) asserted.

could review the complaint and possible accompanying materials and then write a brief recommendation or summary of the complaint, focusing on what appear to be frivolous or meritorious claims within the pleading. The complaint, accompanying documents, and the summary or review could then be forwarded to the presiding judge for consideration.¹⁸⁶

While this review process would place an additional burden on already strained judicial resources, it arguably would not be unduly severe. First, the VLS already requires that potential new complaints be reviewed by the presiding judge.¹⁸⁷ The procedure offered above adds little, if any, additional cost and may actually reduce the burden on the judge. Second, the office of the pro se staff attorney is already charged with similar duties and is most likely well conditioned to spot questionable claims. Third, having a staff attorney review the pleading first could potentially screen out patently frivolous lawsuits and thereby alert the judges to meritless claims, further reducing the time necessary for the judge to ultimately determine the complaint's merit.¹⁸⁸

In consideration of this problem and its potential solutions, it should be noted that there is currently no sunset clause for the vexatious litigant status. As the VLS exists today, each vexatious litigant subject to a pre-filing order is barred indefinitely from filing a new action without receiving leave from the court. As the pre-filing order sanction ages, more vexatious litigants will become subject to its prohibitions. Similarly, those already subject to pre-filing orders will spend more time under this sanctions schema. As this occurs, it is likely that more and more vexatious liti-

With such a process in place, the possible additional documentation included with the complaint may only be of assistance in unique circumstances.

An alternative approach would require that the previously determined vexatious litigant submit an affidavit or declaration along with the complaint. This statement by the litigant would explicitly state litigation in which he had previously been a party. The declaration would include the case numbers, courts, and parties to the suits. This information would be used by the attorney and judge reviewing the complaint. In a sense, this declaration would create a record of the litigant's prior litigation. This information would assist the reviewers in determining whether the new claims were repetitive or, in the absence of detailed information within the statement, the affidavit would at least provide the reviewers a starting point from which to contact courts that had previous contact with the litigant.

186. Under such a procedure, there may be the concern that the attorney's report would influence the judge's consideration of the merits of the case, should it go to trial. Thus, in lieu of sending it to the presiding judge, the documents could be forwarded to a judge chosen by a lottery system that excludes the judge assigned to hear the merits of the potential suit.

187. See CAL. CIV. PROC. CODE § 391.7(a), (b) (West 1973 & Supp. 1998).

188. This is not to say that the attorney would possess the power to reject a complaint outright, but rather to provide explicit information to the presiding judge about her observations regarding potentially frivolous claims.

gants will petition for leave to file new complaints.¹⁸⁹ Thus, the question of how the courts should consider these requests in an efficient and uniform manner will become an increasingly important issue.

5. *Alert the Judicial Council to Orders Removing Litigants from the Prefiling Order List*

The problem of alerting the Judicial Council to changes in the status of individuals on the vexatious litigant list can be easily modified by requiring judges who declassify individuals as vexatious litigants to forward those names to the Judicial Conference. A simple judicial form could be used so that court clerks and/or docket clerks could forward these names to the Judicial Council in an efficient and uniform manner. The Judicial Conference, in turn, would then be required to publish in some conspicuous manner the names of those individuals no longer subject to the restrictions. These publications should be sent along with the quarterly updates of the vexatious litigant list to every clerk of the California appellate, superior and municipal courts.

CONCLUSION

In 1963 the California legislature, in an attempt to reduce the judicial burden of vexatious behavior, enacted the VLS. Despite the determination that it is “imperative that the courts enforce the [VLS],” courts continue to use the statute in an arbitrary and ineffectual manner.¹⁹⁰ As the above analysis of the text, historical interpretation, and application of the VLS demonstrates, thirty-five years after its inception the VLS has yet to become a viable judicial tool. The text of the VLS, read in its entirety, shows that the statute possesses strong mechanisms for preventing vexatious individuals, once identified, from continuing their frivolous pursuits. However, the anecdotal history of the VLS’s implementation supports, in general, a conclusion that the VLS has not been regularly implemented when vexatious characteristics first appear. While the limited statistics currently available and the anecdotal cases cited above do not, by themselves, lead to a conclusive determination that the VLS is still not being used when cir-

189. As of January 16, 1998, only four individuals have been removed from the Vexatious Litigant Lists. See *Vexatious Litigant Lists*, *supra* note 85 (naming James L. Duncan, Charles P. Littlejohn, Howard Rubinstein, and Soffy Shihata as the only four persons who have been removed from the Vexatious Litigant Lists).

190. *First Western Dev. Corp. v. Superior Court* (Andrisani), 261 Cal. Rptr. 116, 122 (Ct. App. 1989).

cumstances strongly support its implementation, they do provide significant support for that assertion.¹⁹¹

The problems of delaying the imposition of VLS sanctions once vexatious behavior has been identified, the lack of set procedures and policies regarding the Vexatious Litigant List, and the failure to dismiss suits after vexatious litigants ignore orders requiring security have rendered the VLS ineffective. Under such circumstances, the VLS can neither act as a general nor a specific deterrent to those who repeatedly engage in groundless litigation. The solutions offered above are strong steps toward making the VLS fulfill the purposes for which it was created. These solutions, if implemented, either individually or collectively, may provide the courts with a truly viable vexatious litigant statute.

191. Unfortunately, until specific data is regularly collected on, inter alia, annual *propria persona* filings and vexatious litigant determinations, it is unlikely that a more definitive conclusion will be possible.