ARTICLE

"VEX MY SOUL": A PRIMER ON VEXATIOUS LITIGANTS

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How long will ye vex my soul, and break me in pieces with words?[1]

I. INTRODUCTION

Lawrence Bittaker and his accomplice, Roy Norris, were convicted of torturing and murdering five young women in 1979.[2] Bittaker filed forty separate lawsuits against the state of California, including one for being served a broken cookie.[3] In 1993, he was declared a vexatious litigant by the State of California.[4] Unfortunately, this is not uncommon, and examples abound of individuals who have greatly abused the legal system.

The term "vexatious litigant" conjures up visceral feelings: of a broken legal system, of countless hours and dollars wasted, and of needless frustration and hassle. The term can be an accurate description for a multitude of litigants, but a statutory designation for only a few. This is to be expected—the statutory criteria is very narrow[5] and can be readily manipulated to avoid a "vexatious" designation. The result is frustrating—being forced to litigate

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1. *Job* 19:2 (King James), http://www.kingjamesbibleonline.org/Job-Chapter-19/.

2. R. BARRI FLOWERS & H. LORAINE FLOWERS, MURDERS IN THE UNITED STATES: CRIMES, KILLERS AND VICTIMS OF THE TWENTIETH CENTURY, 160 (2001).

3. Pamela Warrick, *Courting Trouble: A Unique Law Turns the Tables on Those Who File Numerous or Frivolous Lawsuits*, L.A. TIMES (Nov. 20, 1995), http://articles.latimes.com/1995-11-20/news/ls-5250_1_vexatious-litigant-list.

4. *Id*.

5. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.054, http://www.statutes.legis.state.tx.us/.

against someone with irrational expectations who is unconstrained by the attorney ethics rules and has little (or zero) litigation expenses. Practitioners need to know not only how to deal with the handful of individuals that meet the statutory criteria for being deemed a "vexatious litigant," but also the myriad of litigants that can nevertheless drag a client into costly litigation, while not technically meeting the statutory definition. In either case, there are concrete principles that can help practitioners avoid the common pitfalls that can needlessly increase time, expense, and frustration in these cases.

II. A BRIEF HISTORY BEFORE THE INTRODUCTION OF THE VEXATIOUS LITIGANT STATUTE

The right to petition for redress of grievances is a right enshrined in the Texas Constitution.[6] Accordingly, when dealing with statutes such as the "vexatious litigant" statute, the legislature is intentionally seeking to curb basic constitutional rights, and such attempts should be subjected to the highest scrutiny. However, the right to petition is not absolute and can be abused to such an extent that curbing an individual's right to petition is in the interest of justice.[7]

The Texas Vexatious Litigant Statute is not the first time Texas has sought to curb "vexatious litigants" and "frivolous lawsuits." In fact, Texas has a number of statutes that seek to limit actions found to be "groundless" or "brought for the purposes of harassment."[8] For example, Texas Civil Practice and Remedies Code § 9.012(c) allows a court, on its own motion or the motion of any party, to impose sanctions on the "signatory, a represented party, or both" of a frivolous pleading or claim.[9] Sanctions include

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6. TEX. CONST. art. I, § 27, http://www.statutes.legis.state.tx.us/.

7. Puckett v. State, 801 S.W.2d 188, 192 (Tex. App.—Houston [14th Dist.] 1990, writ ref'd). *See also* House Comm. on Civ. Prac., Bill Analysis, Tex. H.B. 3087, 75th Leg., R.S. (1997), (stating the purpose of the Texas Vexatious Litigant Statute is to curb a practice that "clogs the courts with repetitious or groundless cases, delays the hearing of legitimate disputes, wastes taxpayer dollars, and requires defendants to spend money on legal fees to defend against groundless lawsuits"), http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=75R&Bill=HB3087.

8. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001 (defining "groundless" for frivolous claims), 10.001 (requiring the signing of pleadings and motions be nonfrivolous), 13.001 (stating that a court may dismiss an affidavit of inability to pay if the claim is frivolous), 14.003 (stating that a court may dismiss an inmate's claim if it is frivolous), http://www.statutes.legis.state.tx.us/; TEX. R. CIV. P. 13 (requiring the parties to certify that their claim is not groundless to the best of their knowledge), http://www.txcourts.gov/rules-forms/rules-standards.aspx.

9. TEX. CIV. PRAC. & REM. CODE ANN. § 9.012(c), http://www.statutes.legis.state.tx.us/.

"the striking of a pleading[,] . . . the dismissal of a party[,] or . . . an order to pay to a party . . . reasonable expenses incurred because of the filing of the pleading."[10]

For individuals filing claims *in forma pauperis*, Texas Civil Practice and Remedies Code § 13.001 allows the court, when an affidavit of inability to pay costs has been filed, to dismiss the action on the grounds that "(1) the allegation of poverty in the affidavit is false; or (2) the action is frivolous or malicious."[11] The statute provides that when determining if a lawsuit is frivolous or malicious, the court could consider the lawsuit's chance of success, whether the claim has an arguable basis in law or fact, or whether the party can prove facts that support the claim.[12]

Even though Texas has a number of statutes that seek to deter "vexatious litigants" and "frivolous lawsuits" by sanctioning litigation conduct, a statute the penalizes a litigant for bringing a groundless action is substantially different than a statute that restricts the right to bring suit in the first place. To accomplish the latter goal, Texas courts have traditionally relied on the court's equitable power to grant injunctions.[13]

III. THE TEXAS VEXATIOUS LITIGANT STATUTE

Over the years, injunctions proved to be an insufficient deterrent, and the Texas legislature undertook the task of implementing a statute that would provide attorneys and courts with a means of deterring frivolous suits brought by vexatious litigants *before* a lawsuit is filed, thus greatly expanding the protection against vexatious litigants.[14]

The Texas Vexatious Litigant Statute begins with several important definitions.

> (1) "Defendant" means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.
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> (2) "Litigation" means a civil action commenced, maintained, or pending in any state or federal court.
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> (3) ["Local administrative judge" repealed].

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10. *Id*. § 9.012(e)(1)-(3).

11. *Id*. § 13.001(a)(1)-(2).

12. *Id*. § 13.001(b)(1)-(3).

13. *See* Golden Rule Ins. Co. v. Harper, 925 S.W.2d 649, 651 (Tex. 1996) (holding that anti-suit injunctions are proper "1) to address a threat to the court's jurisdiction; 2) to prevent the evasion of important public policy; 3) to prevent a multiplicity of suits; or 4) to protect a party from vexatious or harassing litigation.").

14. House Comm. on Civ. Prac., Bill Analysis, Tex. H.B. 3087, 75th Leg., R.S. (1997), http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=75R&Bill=HB3087.

> (4) "Moving defendant" means a defendant who moves for an order . . . determining that a plaintiff is a vexatious litigant and requesting security.
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> (5) "Plaintiff" means an individual who commences or maintains a litigation pro se.[15]

In order to begin the process under the Texas Vexatious Litigant Statute, Section 11.051 provides:

> In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order: (1) determining that the plaintiff is a vexatious litigant; and (2) requiring the plaintiff to furnish security.[16]
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> PRACTICE POINTER: The first practice pointer is to act fast. Ninety days, in the life of a litigation file, is very short. Fortunately, services such as Westlaw and Lexis Advance allow for searches by party name, making it easier to compile a list of cases that the plaintiff has filed previously.

Once a motion under Section 11.051 is filed, litigation is stayed. Section 11.052(a) provides:

> On the filing of motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead: (1) if the motion is denied, before the 10th day after the date it is denied; or (2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.[17]

Once a motion has been filed under Section 11.051, a hearing is held on the motion. Section 11.053, provides:

> (a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.
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> (b) The court may consider any evidence material to the ground of the motion, including:
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> (1) written or oral evidence; and
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> (2) evidence presented by witnesses or by affidavit.[18]
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> PRACTICE POINTER: As the plain language of the statute provides, the defendant has no limit on the evidence that can be used at the hearing, as long as it is

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15. TEX. CIV. PRAC. & REM. CODE ANN. § 11.001(1)–(5), http://www.statutes.legis.state.tx.us/.

16. *Id*. § 11.051.

17. *Id*. § 11.052(a).

18. *Id*. § 11.053(a)–(b).

> relevant to the motion.[19] This affords defendants an opportunity to bring in evidence of the plaintiff's conduct that shows their "vexatious" character beyond the rote recitation of cases filed by the plaintiff. Also, defendants are given an opportunity to highlight the weaknesses in the plaintiff's case, as one of the elements of the statute is likelihood of success on the merits. Even if the motion is ultimately denied, this is a great opportunity to preview the case for the judge and set up a summary judgment motion.

Whether a plaintiff is ultimately found to be a vexatious litigant is subject to strict criteria. Section 11.054 provides:

> A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:
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> (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in small claims court that have been:
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> (A) finally determined adversely to the plaintiff;
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> (B) permitted to remain pending at least two years without having been brought to trial or hearing; or
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> (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;
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> (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:
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> (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or
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> (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or
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> (3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.[20]

To distill this down, first the plaintiff must be proceeding *in propria persona* or pro se. Lawyers are governed by rules of

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19. *Id*. § 11.053(b).
20. *Id*. § 11.054.

professional conduct and are subject disbarment or sanctions for filing numerous frivolous suits. These professional constraints do not apply to pro se litigants.

Next, the defendant must first establish that "there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant."[21] This requires some fact finding and, as discussed above, can be established by affidavit, live testimony, and documentary evidence.

Next, the defendant must establish a pattern of vexatious litigation. There are three ways to accomplish this. First is the "numerosity method." The statute looks back at the plaintiff's conduct in the previous seven years. The plaintiff must have commenced, prosecuted, or maintained *in propria persona* five litigations, other than small claims cases, that have been finally determined adversely against the plaintiff, pending at least two years, or determined to be frivolous by a court. The second method is the "relitigation method." Simply put, if a plaintiff attempts to relitigate a final determination of a claim, action, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant, the plaintiff satisfies the "relitigation" standard. The third method is the "previous determination method." If "the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence," this method is satisfied.[22]

> PRACTICE POINTER: Look to appeals, not only trial court opinions. One Texas court held "[l]itigation is a civil action commenced, maintained, or pending in any state or federal court. The language of these statutes plainly encompasses appeals."[23] This could allow for a mandamus action to count towards the numerosity requirement, greatly increasing the chances of meeting the five actions in seven years requirement.

The "numerosity method" seems straightforward enough, but is difficult to apply in practice. First, a plaintiff can be extraordinarily vexatious in filing numerous suits in small claims court, seeking $10,000 each time, and these cases do not count towards the numerosity requirement. Next, a plaintiff can be extraordinarily vexatious by filing suit after suit, only to dismiss the suit before a final adjudication on the merits. These suits do not count towards the numerosity requirement under the language of the statute.

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21. *Id*.

22. *Id*. § 11.054(3).

23. Retzlaff v. GoAmerica Commc'ns. Corp., 356 S.W.3d 689, 699 (Tex. App.—El Paso 2011, no pet.) (quoting, in part, TEX. CIV. PRAC. & REM. CODE ANN. § 11.001(2)) (internal quotation marks and citations omitted).

> PRACTICE POINTER: A defendant can argue that dismissals should count. The Court of Appeals in El Paso, citing to a case involving the nearly-identical California vexatious litigant statute, held that dismissals are "finally determined" against the litigant.[24] In the California case, the appellate court stated:
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> > An action which is ultimately dismissed by the plaintiff, with or without prejudice, is nevertheless a burden on the target of the litigation and the judicial system, albeit less of a burden than if the matter had proceeded to trial. A party who repeatedly files baseless actions only to dismiss them is no less vexatious than the party who follows the actions through to completion. The difference is one of degree, not kind.[25]

Attempting to satisfy the "relitgation method" or the "previous determination method" proves to be much easier than the "numerosity method," for the reasons stated above. Not only is it easier to establish, but an attorney representing the same defendant will know immediately if the current suit is an impermissible "relitigation," or if there has been a "previous determination," and can take steps to seek a vexatious determination well within the ninety-day timetable required by the statute.

Should the court determine that the plaintiff is a vexatious litigant, the court then orders the plaintiff to furnish security.[26] Section 11.055 provides:

> (a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.
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> (b) The court in its discretion shall determine the date by which the security must be furnished.
>
> (c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.[27]

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24. *Id*. *at* 700.

25. *Id*.

26. TEX. CIV. PRAC. & REM. CODE ANN. § 11.055, http://www.statutes.legis.state.tx.us/.

27. *Id*. § 11.055(a)–(c).

> PRACTICE POINTER: In the order deeming the plaintiff a vexatious litigant, be sure to include that the amount of security is "to assure payment . . . of defendant's reasonable expenses . . . including costs and attorney's fees."[28] This is to ensure the order stands up to a challenge of arbitrariness on appeal.

Once an amount of security has been determined, the statute mandates dismissal of the lawsuit should the plaintiff fail to post the required security.[29] If the plaintiff does post the required security, and "the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court."[30] Importantly, the recovery is mandated only when a case is "dismissed on its merits."[31] "Dismissal," according to Black's Law Dictionary, is "an order or judgment finally disposing of an action . . . without trial."[32] Under that definition, the language of the statute does not provide recovery of the security by the moving defendant should the case proceed to trial.[33] Texas has yet to clarify if a trial on the merits determined against a vexatious litigant counts as a "dismissal" under the vexatious litigant statute.

Regardless of whether the plaintiff posts security or not, the court may issue an order requiring the vexatious litigant to obtain a "prefiling order" before bringing any lawsuits in the future.[34] Section 11.101 provides:

> (a) A court may, on its motion or the motion of any party, enter an order prohibiting a person from filing, pro se, a new litigation in a court to which the order applies under this section without permission of the appropriate local administrative judge . . . to file the litigation if the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.
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> (b) A person who disobeys an order under Subsection (a) is subject to contempt of court.
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> (c) A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.
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> (d) A prefiling order entered under Subsection (a) by a justice or constitutional county court applies only to the court that entered the order.

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28. *Id*. § 11.055(c)
29. *Id*. § 11.056.
30. *Id*. § 11.057.
31. *Id.*
32. *Dismissal*, BLACK'S LAW DICTIONARY (6th ed. 1990).
33. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 11.057, http://www.statutes.legis.state.tx.us/.
34. *Id*. § 11.101.

> (e) A prefiling order entered under Subsection (a) by a district or statutory county court applies to each court in this state.[35]

The Office of Court Administration of the Texas Judicial System maintains a list of the all vexatious litigants subject to prefiling orders.[36] This list is available online and readily searchable.[37]

> PRACTICE POINTER: While it is the duty of the court clerk to screen filings of plaintiffs subject to a prefiling order, it is a good idea to check the online vexatious litigant list when you suspect you may be dealing with a vexatious litigant and immediately notify the court if the plaintiff is subject to a prefiling order.

Once a plaintiff is subject to a prefiling order, the administrative judge can allow the plaintiff to bring a new lawsuit if two requirements are satisfied.[38] First, the plaintiff must make a showing that the new case has merit.[39] Second, the plaintiff must show that the new case has not been filed for the purposes of harassment and delay.[40] Whether the two elements are satisfied is within the discretion of the administrative judge.[41]

IV. TIPS WHEN DEALING WITH A VEXATIOUS LITIGANT

Regardless of whether a plaintiff is ultimately deemed a vexatious litigant, there are certain principles that will help bring the case to a quick(er) resolution and ultimately reduce the time and expense of the frivolous litigation.

- Act fast. A defendant only has ninety days to seek a determination that the plaintiff is a vexatious litigant.
- Send everything certified mail with return receipt requested—vexatious litigants are at their weakest in the courtroom, where a lack of legal training in rules of evidence and procedure are most pronounced. As a result, vexatious litigants will seek to avoid court appearances and will claim they did not receive notice of the hearing, motion, etc. While mandatory e-filing can help, it is a good practice to send all

35. *Id*. § 11.101(a)–(e).

36. *Id*. § 11.104(a).

37. *Vexatious Litigants*, TXCOURTS.GOV, http://www.txcourts.gov/judicial-data/vexatious-litigants.aspx.

38. TEX. CIV. PRAC. & REM. CODE ANN. § 11.102(d), http://www.statutes.legis.state.tx.us/.

39. *Id*. § 11.102(d)(1).

40. *Id*. § 11.102(d)(2).

41. *Id*. § 11.102(d).

correspondence, motions, etc., via certified mail with return receipt requested. Having proof of mailing and receipt will eliminate this vexatious litigant strategy and help ensure your hearing goes forward as scheduled.

- Get to court early and often. Having formal training in legal analysis, drafting, and rules of evidence and procedure is a precipitous advantage over the vexatious litigant. Legal forms and internet searches can help a vexatious litigant perform basic legal tasks and drag out the litigation, but internet searches are no substitute for legal training in the courtroom.
- Document your conversations with the vexatious litigant—it is not uncommon for a vexatious litigant to misconstrue, misconvey, misremember, or outright misinform. Accordingly, your conversations regarding scheduling, discovery, settlement, etc., need to be documented. It is best to communicate via a written medium such as a letter or email. If you must communicate via telephone or in person, send a letter or email as close to the conversation as possible confirming what was discussed. A contemporaneous record of the conversation can be used in a subsequent "he said, she said" argument in court.
- Do not underestimate your opponent—just because the vexatious litigant lacks formal legal training does not mean they cannot cause you and your client considerable time, expense, and hassle. There is an increasing wealth of information on the internet designed to assist those who cannot afford traditional legal services, and vexatious litigants are happy to co-opt this information to drag out frivolous litigation. Given the broad discovery rules (especially document requests and depositions) and the length of time it takes to take a case to trial, even a frivolous case can cause you and your client significant disruption.

V. CONCLUSION

Whether Texas expands the statute to include a wider variety of outcomes to make the process more useful—such as counting voluntary dismissals, small claims cases, and appeals—remains to be seen. But while the Texas Vexatious Statute only provides relief in narrow circumstances, it is the best tool available for the worst litigation offenders; and, at the very least, it provides some finality to cases where judgments are entered, prohibiting endless relitigation of final judgments at the outset of cases.