Vexatious Pro Se Civil Litigants in the Massachusetts Courts

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Introduction

Allowing universal access to the courts has a downside. Vexatious pro se litigants, although few in number, can clog court systems, frustrate jurors and court staff, and impose undue expense on both defendants and the public. Those who abuse the court system may also cast the process as a whole into disrepute. Such a situation must be handled carefully to avoid closing access unnecessarily while at the same time protecting the dignity of the court and the financial interests of the state and the defendants. As judicial commissions and other policy bodies recommend procedural and other improvements to help pro se litigants, these dangers are brought into sharper relief.

This Paper examines the way Massachusetts courts currently handle vexatious pro se civil litigants and recommends a court rule to improve consistency, predictability, and perceived fairness. After laying out the problem, I discuss how other jurisdictions approach vexatious pro se civil litigants. I then spell out the nature of the current remedy in Massachusetts, the authority on which that remedy rests, and some problems with the current state of affairs. Finally, I recommend a solution that aims to minimize abuse of the system and waste of judicial resources while at the same time hewing as closely as possible to the ideals of access to the courts, transparency, and consistency.

I. The Importance of Self-Representation

Access to the courts is an important part of the American system. The Massachusetts Constitution guarantees "recourse to the laws, for all injuries . . . in . . .

person, property, or character."[1] The First Amendment of the United States Constitution decrees that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for redress of grievances,"[2] a restriction that has been construed to guarantee a right to be heard in court.[3] As a nation, we believe everyone should have access to the courts.

Self-represented litigants represent an important part of that ideal. Particularly in civil actions and in criminal appeals, where indigent parties have reduced or nonexistent rights to appointment of counsel, the chance to represent oneself may make all the difference in having one's grievances addressed. A constitutional right to proceed pro se is recognized for criminal defendants,[4] and a right for all parties to represent themselves in federal courts is codified in statute.[5] Massachusetts has a similar statutory right,[6] and has since at least the Massachusetts Body of Liberties of 1641.[7]

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[1] MASS. CONST. art. XI.
[2] U.S. CONST. amend. I.
[3] See Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 582-84 (discussing Supreme Court cases construing the Petition Clause to include access to the courts). Due process considerations rooted in Fifth and Fourteenth Amendment guarantees also mandate court access. *Id.* at 559-60.
[4] Faretta v. California, 422 U.S. 806, 814-17 (1975); Adams v. United States, 317 U.S. 269, 279 (1942) ("The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms.").
[5] 28 USC § 1654 (2000) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . . ."). This language traces its lineage back to Chapter XX, Section 35 of the Judiciary Act of 1789. 1 Stat. 73, 92 (1789).
[6] MASS. GEN. LAWS ch. 221, § 48 (2005) ("Parties may manage, prosecute or defend their own suits personally . . . .").
[7] "Every man . . . shall have liberty to come to any public Court . . . and . . . move any lawful, seasonable, and material question, or to present any necessary motion, complaint, petition, Bill or information." MASS. BODY OF LIBERTIES OF 1641, § 12, *reprinted in* 43 AMERICAN HISTORICAL DOCUMENTS, 1000–1904, ch. 8 (P.F. Collier & Son 1909-14) *available at* http://www.bartleby.com/43/8.html (last visited May 31, 2006). *See also*

Anecdotally, many judges report being indulgent to pro se litigants – allowing them to amend defective complaints, forgiving them procedural lapses, and generally trying to make the courts usable by those not admitted to the Bar.[8] Court personnel, too, often act sympathetically toward those who represent themselves. Recently, both a commission of the Boston Bar Association and the Massachusetts Supreme Judicial Court Steering Committee on Self-Represented Litigants have recommended making the courts more accessible to unrepresented litigants.[9] On the other hand, the Massachusetts Supreme Judicial Court has held that pro se litigants are subject to the same procedural and substantive rules as represented litigants.[10] It would appear, then, that the leeway granted to pro se litigants, while commonplace, is informal and entirely at the discretion of judges and court personnel.

Iannaccone v. Law, 142 F.3d 553, 557-58 (2d Cir. 1998) (discussing colonial roots of right to self-representation in civil actions).

[8] *See, e.g.*, Camoscio v. Hanley, 5 Mass. L. Rep. 197 (Mass. Sup. Ct. 1996) ("this court will view a pro-se plaintiff's complaint and pleadings liberally").

[9] See "Recommendations from Boston Bar Association Task Force on Unrepresented Litigants," *available at* http://www.unbundledlaw.org/Recommendations/Sourcematerials/BostonBar.htm (last visited May 25, 2006); Press Release, "Chief Justice Margaret H. Marshall Announces New Initiatives To Broaden Access to Justice; Cites Major Progress in Court Management Reform," March 25, 2006, *available at* http://www.mass.gov/courts/press/pr032506.html (last visited May 25, 2006).

[10] Mains v. Commonwealth, 433 Mass. 30, 36 (2000) (citing Commonwealth v. Jackson, 419 Mass. 716 (1995), Int'l Fid. Ins. Co. v. Wilson, 387 Mass. 841 (1983)); *see also* Devon Servs. v. Wellman, 432 Mass. 1013, 1013 (2000) (The Massachusetts Supreme Judicial court, in denying plaintiffs' request to amend an appeal: "The petitioners' failure to follow the proper appellate route cannot be excused simply because they were appearing pro se.").

II. The Problem of Vexatious Pro Se Civil Litigants

Self-represented litigants do present some challenges to the courts.[11] For one thing, they are not as sensitive to sanctions as litigants represented by counsel. Massachusetts General Laws, chapter 231, section 6F allows for attorney's fees and costs to be assessed in the event the claims brought were "wholly insubstantial, frivolous and not advanced in good faith."[12] But the section does not apply to pro se litigants, providing sanctions only for actions "made by any party who was represented by counsel during most or all of the proceeding."[13] And of course an indigent litigant is judgment-proof and will not be swayed by the threat of costs.

According to Massachusetts Rules of Civil Procedure, although unrepresented parties are required to sign their pleadings, they are not by the letter of the rule held to the same standards as attorneys who sign pleadings.[14] In the federal courts, unrepresented litigants are subject to Rule 11 sanctions because of the wording of Rule 11 (b) and (c) of the Federal Rules of Civil Procedure.[15]

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[11] *See Iannaccone*, 142 F.3d at 557-58 ("[A] person appearing pro se in federal court may, on occasion, burden the court by filing illogical or incomprehensible pleadings, affidavits and briefs. And sometimes a pro se litigant appears simply for the purpose of using the courtroom to advance a political or social agenda, or to pursue a matter that is legally unredressable.").

[12] MASS. GEN. LAWS ch. 231, § 6F (2005).

[13] *Id.*

[14] MASS R. CIV. PRO. 11(a) ("The signature *of an attorney* to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay.") (emphasis added).

[15] FED. R. CIV. PRO. 11 (c) ("[T]he court may . . . impose an appropriate sanction upon the attorneys, law firms, *or parties* that have violated subdivision (b)") (emphasis added). Subdivision (b) states that by signing a pleading, an unrepresented party certifies, just as an attorney signing such a pleading would certify, that the pleading is accurate and made in good faith. FED. R. CIV. PRO. 11 (b).

Pro se litigants are likewise immune from many of the other pressures that would cause attorneys to desist from frivolous or harassing litigation. For one thing, an attorney is a repeat player whose livelihood is at stake – a reputation as a bad-faith litigant can harm an attorney's career long before formal sanctions apply. Attorneys are also subject to discipline from the Bar and to disbarment proceedings. A pro se litigant, therefore, is not subject to the same wide range of disincentives to vexatious, frivolous or harassing litigation. And there is an additional problem, often left unspoken. Many of the most egregious vexatious pro se civil litigants appear from their pleadings to be suffering from mental illness.[16] Such litigants cannot be expected to respond rationally to the threat of penalties.

As a result, some pro se litigants impose undue burdens on the courts. Litigants who file harassing, duplicative or incomprehensible pleadings, and whose motion practice is meritless and disproportionate to the action at bar create a drag on the system and poison the well of goodwill toward other litigants who represent themselves. Additionally, such proceedings make a mockery of the court system and threaten the respect for the judiciary that is essential to its functioning in society. Contemplating this reality, the Massachusetts Supreme Judicial Court has indicated that an injunction preventing future filings might be appropriate.[17]

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[16] *See, e.g.*, Kelly Order, *infra* note 65 (alleging two others in her group home were really men disguised as women and were gassing her as she slept), Wyatt Order, *infra* note 65 (claiming the mayor and the "neighborhood block watch" were feeding him hormones and broadcasting images of his naked body over the airwaves).

[17] Brookline v. Goldstein, 388 Mass. 443, 448 n.6 (1983) ("If it could be shown that the party filing a frivolous action would be judgment proof or otherwise undeterred by the threat of liability under G. L. c. 231, § 6F, an injunction might become appropriate.")

Two examples of pro se civil litigants follow.[18] The first litigant is under orders in several jurisdictions preventing him from filing future actions. The second is subject to no such order – his behavior is offered as a glimpse into the type of behavior currently *tolerated* by the Massachusetts courts.

Chukwuma E. Azubuko had his driver's license suspended in 1995 and filed an unsuccessful appeal in the United States District Court for the District of Massachusetts.[19] He appealed the dismissal to the United States Court of Appeals for the First Circuit,[20] and when he lost there, he sought a writ of certiorari from the United States Supreme Court.[21] Azubuko has also filed suit, pro se, against Framingham State College for incorrectly grading his exams and unreasonably lowering his grades.[22] Four years after that action was dismissed, Azubuko sought to relitigate the same claims in separate suits in two different counties and also filed suit against the judge who had ruled against him.[23] Azubuko is consequently under order from the Suffolk County Superior Court that he is precluded from filing actions in that court without prior written approval

[18] For anecdotal summaries of vexatious litigants in other jurisdictions, see Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool To Deny The Clever Obstructionists Access?* 72 S. CAL. L. REV. 275, 292-94 (1998).
[19] See Azubuko v. Registrar of Motor Vehicles, 95 F.3d 1146 (1st Cir. 1996) *cert. denied* 520 U.S. 1157 (1996), full unpublished opinion at 1996 U.S. App. LEXIS 22985 (per curiam) (dismissing the appeal of Judge Young's decision).
[20] *Id.*
[21] Azubuko v. Registrar of Motor Vehicles, 520 U.S. 1157 (1996).
[22] Azubuko v. Board of Trustees of Framingham State College, Suffolk Superior Court C.A. No. 91-6590-D.
[23] Azubuko v. Board of Trustees of Framingham State College, Middlesex Superior Court, C.A. No. 97-5562, Azubuko v. Peter Lauriat, Justice of the Superior Court, Suffolk Superior Court, C.A. No. 97-5016-C, Azubuko v. Board of Trustees of Framingham State College, Suffolk Superior Court, C.A. No. 97-5015-B.

of the Regional Administrative Justice.[24] Azubuko has also filed suit against private parties, airlines, credit card companies, and court personnel. In the federal courts, where he has "filed or appealed more than 100 actions,"[25] it is the same story. Under order by Judge Young since 1995 that further filings would not be accepted in United States Courts of the District of Massachusetts unless approved by a judge, Azubuko began filing cases in District Courts in Georgia, Florida, Pennsylvania, Delaware, North Carolina, Louisiana, Rhode Island, Tennessee, Texas, and most recently New Jersey.[26] The Supreme Court denied nineteen petitions for certiorari, rehearing, reconsideration or mandamus by Mr. Azubuko between 1994 and 2004.[27] This pattern of relitigating real or perceived injustices, and of exhausting every right to appeal, only amplifies the drain on court resources caused by Mr. Azubuko's filings.

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[24] Memorandum of Decision and Order, Feb. 20, 1998 (Hinkle, J.), Azubuko v. Bd. of Trs. of Framingham State Coll., Suffolk Superior Court, C.A. No. 97-50150-B.
[25] Henriette Campagne, *Enough Already*, MASS. LAW. WKLY., Nov. 14, 2005 at 5.
[26] *See, e.g.*, Azubuko v. Boston Pub. Schs., 2005 U.S. Dist. LEXIS 31318 (D.N.J. 2006); Azubuko v. Adams, 2005 U.S. Dist. LEXIS 21673 (N.D. Tex 2005); Azubuko v. MBNA Am., 2005 U.S. Dist. LEXIS 26592 (E.D. Tenn. 2005); Azubuko v. Young, 2005 U.S. Dist. LEXIS 40961 (M.D.N.C. 2005); Azubuko v. Story, 2005 U.S. Dist. LEXIS 25161 (M.D. Fla. 2005); Azubuko v. Mass. State Police, 2005 U.S. Dist. LEXIS 12062 (E.D. Pa. 2005); Azubuko v. Comm'r of Police - City of Boston, 2005 U.S. Dist. LEXIS 6558 (D. Del. 2005); Azubuko v. State, 2004 U.S. Dist. LEXIS 20982 (E.D. La. 2004); Azubuko v. Berkshire Mut. Ins., 2003 U.S. Dist. LEXIS 26768 (N.D. Ga. 2003); Azubuko v. Bd. of Trs., 1998 U.S. Dist. LEXIS 15604 (D.R.I. 1998).
[27] Azubuko v. Berkshire Mut. Ins., 543 U.S. 998 (2004); Azubuko v. Berkshire Mut. Ins., 543 U.S. 803 (2004); In re Azubuko, 522 U.S. 806 (1997); Azubuko v. Registrar of Motor Vehicles, 520 U.S. 1225 (1997); Azubuko v. Montgomery, 520 U.S. 1225 (1997); Azubuko v. First Nat'l Bank, 520 U.S. 1205 (1997); Azubuko v. Liberty Mut. Ins. Group, 520 U.S. 1188 (1997); Azubuko v. Bd. of Dirs., British Airways, 520 U.S. 1188 (1997); Azubuko v. Bd of Trs., Framingham State Coll., 520 U.S. 1193 (1997); Azubuko v. Mass. Comm'r of Registry, 516 U.S. 919 (1995); Azubuko v. Murdoch, 515 U.S. 1125 (1995); Azubuko v. Chief Adult Prob. Officer, 515 U.S. 1119 (1995); Azubuko v. Chief Adult Prob. Officer, 514 U.S. 1070 (1995); Azubuko v. Comm'r of Parking, 513 U.S. 1137 (1995); Azubuko v. Comm'r of Parking, 513 U.S. 983 (1994).

Mark Reznik filed suit in Massachusetts District Court against the developers of his housing complex.[28] His appeal of an adverse decision was accompanied by sixty pages of appendix, including "copies or duplicate copies of Sudbury newspaper articles, transcripts of Reznik's electronic mail ('e-mail') correspondence with a local reporter, and selected pages of pleadings filed by subcontractors or other Frost Farm residents in lawsuits unrelated to this one"[29] as well as "a membership certificate in a professional organization issued 24 years ago and a 1988 letter he sent to Congressman Barney Frank."[30] Reznik had also boasted in an e-mail to a reporter about providing legal advice, document drafting, and oral argumentation for another resident of the development, resulting in two cease and desist orders from the Massachusetts Attorney General's office regarding his practice of law without a license.[31] The Appellate Division of the Massachusetts District Court characterized Reznik's filings in a prior lawsuit as "increasingly sarcastic, offensive and inappropriate, liberally laced with groundless vilifications of the personal character and professional integrity of trial court judges, [defendant]'s counsel and, eventually, even [defendant] herself."[32] In *Reznik v. Digimarc*

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[28] *See* Reznik v. Garaffo, 2006 WL 467351 (Mass. App. Div. Feb. 22, 2006).
[29] *Id.* at *1
[30] *Id.* at n.2
[31] *Id.* at n.12. The Attorney General's office itself, according to the court, "was soon forced to restrict Reznik to written communications based on what it indicated was his misrepresentation of the contents of their telephone conversations." *Id.*
[32] *Id.* at *4 (citing Reznik v. Friswell, 2003 Mass. App. Div. 42, 44). The prior tort case resulted, in less than six months, in a docket containing sixty-seven entries, including "motions (or multiple motions) to disqualify Friswell's counsel, to strike Friswell's pleadings, to quash or modify Friswell's deposition subpoenas to medical and mental health providers, to strike Friswell's interrogatories, to strike Friswell's responses to Reznik's interrogatories and requests for production of documents, for a court order for production of documents before a request was ever served on Friswell, for the removal of the judge who ruled unfavorably on Reznik's motions, for a complaint for contempt

ID Systems,[33] Reznik filed more than one hundred motions in eleven months before Reznik's refusal to participate in a pretrial conference resulted in dismissal. Reznik is not currently subject to any filing prohibitions in Middlesex or Suffolk County, although in some of the matters discussed above he has received orders to refrain from contacting parties or filing additional motions.

III. Federal Courts and Vexatious Pro Se Litigants.

Federal courts issue pre-filing orders, as in the case of Azubuko, above. The basis for these orders is sometimes held to be the inherent power,[34] and at other times these orders rest on authority granted by the All Writs Act.[35] Federal courts have the authority under the All Writs Act to enjoin litigants from filing in state courts, as well.[36] In a widely-cited decision, the Ninth Circuit held that "orders restricting a person's access to the courts must be based on adequate justification supported in the record and narrowly

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against Friswell's counsel, and for reconsideration of almost every motion upon which the court had acted." Reznik v. Friswell, 2003 Mass. App. Div. 42. An earlier motor vehicle accident resulted in a claim by Reznik for $787.00 in damages and over $1.6 million in what he called "punitive damages." That case was twice appealed to Middlesex Superior Court, where Reznik filed eighteen motions relating to discovery problems. Reznik v. Williams, No. CA9400226, 1995 WL 808642 (April 14, 1995).

[33] Sup. Ct. No. MICV 2003-02757 (2004).

[34] Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir.1989) ("There is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.").

[35] 28 U.S.C. § 1651(a) (2000) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[36] Newby v. Enron Corp, 302 F.3d 295, 301 (5th Cir. 2002) ("[I]t is widely accepted that federal courts possess power under the All Writs Act to issue narrowly tailored orders enjoining repeatedly vexatious litigants from filing future state court actions without permission from the court.").

tailored to address the abuse perceived."[37] According to the Ninth Circuit, such orders require: 1) a hearing;[38] 2) "an adequate record for review" listing "all cases and motions that led the district court to conclude that a vexatious litigant order was needed;"[39] 3) "'substantive findings as to the frivolous or harassing nature of the litigant's actions.'"[40] The Ninth Circuit further requires that pre-filing orders be "narrowly tailored."[41] Such orders are reviewed for abuse of discretion.[42]

IV. Other States' Statutory Solutions

California, Florida, Texas, Hawaii, and Ohio have all adopted statutes to curb vexatious litigation.[43] All five statutes outline procedures by which litigants can be declared vexatious. All have a range of remedies: a vexatious litigant may be required to post a bond for the defendant's costs and fees before an action can be commenced, or a

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[37] De Long v. Hennessey 912 F.2d 1144, 1149 (9th Cir. 1990) (vacating pre-filing order imposed below and remanding in the light of requirements that the pre-filing order be supported by findings on the record and be narrowly tailored).
[38] *Id.* at 1147.
[39] *Id.*
[40] *Id.* (quoting In re Powell, 851 F.2d 427, 431 (DC Cir. 1988)). *See also* Kane v. New York, 468 F. Supp. 586, 590 (S.D.N.Y 1979) ("It is true that litigious affinity alone does not support the grant of an injunction, for access to the Courts is one of the cherished freedoms of our system of government.") (internal quotation omitted).
[41] De Long, 912 F.2d at 1148 (citing lack of narrow tailoring as one reason to vacate and remand).
[42] *Id.*
[43] CAL CIV. PROC. CODE § 391 (2006); FLA. STAT. § 68.093 (2006); HAW. REV. STAT. § 634J (2006); OHIO REV. CODE ANN. § 2323.52 (LexisNexis 2006); TEX. CIV. PRAC. & REM. CODE ANN. § 11.054 (2005). *See* Erin Schiller & Jeffrey A. Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909, 920-930 (2001) (review of California, Texas, and Hawaii statutes); Christine Lane, Comment, *Pay Up Or Shut Up: The Supreme Court's Prospective Denial Of In Forma Pauperis Petitions*, 38 NW. U. L. REV. 335, 352-53 (2003) (discussing California, Florida, Texas, and Ohio statutes); Deborah L. Neveils, Note, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?*, 25 NOVA L. REV. 343, 359-60 (2000) (comparing Florida statute to those in Ohio, California, Hawaii, and Texas).

judge can make a pre-filing order under which the litigant is restrained from filing any further actions unless and until leave is given by a judge. And in each case, failure to abide by the statute is punishable by contempt of court. Ohio's statute differs most from the others, and so will receive separate consideration; the others will be treated together.

The statutes of Florida, Texas, and Hawaii took the California statute as their model. California first passed a vexatious litigant statute in 1963, but it was little more than a fee-shifting provision until 1990, when the legislature dramatically expanded its scope[44] and added the pre-filing order in section 391.7.[45] The statute labels as "vexatious" any litigant who in the past seven years brought at least five suits in propria persona (other than small claims suits) that have been either resolved against that person, or else permitted to remain pending at least two years without justification.[46] In 1990, the definition expanded to include a person who, "while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay;" and anyone who "[h]as previously been declared to be a vexatious litigant by any state or federal court"[47] in a similar proceeding. Texas and Hawaii have very similar statutory definitions[48] and very similar pre-filing order provisions.[49] Florida's statute only

[44] 1990 CAL. STAT. 621.
[45] 1990 CAL. STAT. 621 § 3, *codified at* CAL. CIV. PROC. CODE § 391.7 (2006).
[46] CAL. CIV. PROC. CODE § 391 (b) (2006).
[47] *Id.*
[48] HAW. REV. STAT. § 634J-1 (2006), TEX. CIV. PRAC. & REM. CODE ANN. § 11.054 (2005).
[49] HAW. REV. STAT. § 634J-7 (2006), TEX. CIV. PRAC. & REM. CODE ANN. § 11.101 (2005).

looks back five years in totting up the requisite five actions.[50] The Florida statute also lacks the alternate definitions of a vexatious litigant added by California's 1990 amendments. Otherwise it tracks California's trailblazing statute quite closely.

The Ohio statute takes a different tack. It defines a vexatious litigator as a "person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions . . . whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties."[51] Vexatious conduct is behavior in a civil action that "obviously serves merely to harass or maliciously injure another party to the civil action . . . is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law . . . [or] is imposed solely for delay."[52] The Ohio statute, therefore, does not focus solely on repeat litigators – by the language of the statute, one action attended by sufficiently vexatious conduct would suffice.[53] Under the Ohio law, anyone who has defended against an action by the litigant may initiate a counterclaim or a separate civil action to have the litigant declared vexatious.[54] Merely alleging as a defense that the litigant is vexatious does not suffice.[55] If the action is successful the court of common pleas "may" impose a pre-filing requirement as a sanction.[56]

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[50] FLA. STAT. § 68.093 (2) (d) (1) (2006).
[51] OHIO REV. CODE ANN. § 2323.52 (A) (3) (LexisNexis 2006).
[52] OHIO REV. CODE ANN. § 2323.52 (A) (2) (LexisNexis 2006).
[53] See OHIO REV. CODE ANN. § 2323.52 (A) (3) (LexisNexis 2006) ("action or actions").
[54] OHIO REV. CODE ANN. § 2323.52 (B) (LexisNexis 2006).
[55] State ex rel. Naples v. Vance, 2003 Ohio App. LEXIS 4277 (2003) (per curiam).
[56] OHIO REV. CODE ANN. § 2323.52 (D) (1) (LexisNexis 2006).

V. Massachusetts Courts' Approach to Vexatious Pro Se Civil Litigants

A. Milder Sanctions and the Inherent Power.

When pro se litigants engage in vexatious conduct, the courts have a wide range of options to control their conduct. Anecdotal evidence suggests there is first a gradual tightening of procedural leeway, followed by orders specific to certain kinds of behavior in the action at hand, or against a certain set of defendants. This is in keeping with the requirement that the inherent power of the courts be used sparingly, and mirrors the requirement that sanctions in such cases be narrowly drawn.

According to the Massachusetts Rules of Civil Procedure, those who disobey court orders or fail to follow the rules of procedure are subject to dismissal of their actions on defendant's motion.[57] The first step for a judge faced with a difficult pro se litigant, then, is to cut back on the "slack" often given to pro se litigants, and to insist that the rules of procedure be followed. On defendant's motion, the case can be dismissed if the rules are not followed. The court can dismiss on its own initiative as well for failure to follow an order or observe rules of the court.[58] A court need not exhaust milder

[57] MASS R. CIV. PRO. 42(b)(2) ("On motion of the defendant, with notice, the court may, in its discretion, dismiss any action for failure of the plaintiff to prosecute *or to comply with these rules or any order of court*.") (emphasis added).

[58] Nickerson v. Glines, 220 Mass. 333, 336 (1915) ("If the court does not possess the power to enforce its just order of this nature, it would be impotent in the face of a recalcitrant party. The making of an order without authority to enforce it would be a vain ceremony. The entry of a nonsuit is the appropriate means of dealing with a refusal to comply with such an order as this.")

sanctions or act on its own initiative to cure defects in pleading or procedure before dismissing a case.[59]

In addition, a "court may safely rely on its inherent power" to assess costs as a sanction for bad proceeding in "bad faith."[60] The court can also, sua sponte, dismiss a suit in the event of a fraud on the court,[61] or if a party engages in conduct "utterly inconsistent with the orderly administration of justice."[62] The court relies in these actions on its "inherent power."[63] The inherent power of the court derives from common law and guarantees the ability of the court to ensure compliance with its mandates and remove obstacles to its smooth functioning. Those who file frivolous, harassing or vexatious motions in their actions are therefore subject to dismissal. It is worth noting two things,

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[59] Friedman v. Globe Newspaper Co., 38 Mass. App. Ct. 923 (1995) ("when 'a noncompliant litigant has manifested a disregard for orders of the court and been suitably forewarned of the consequences of continued intransigence, a trial judge need not first exhaust milder sanctions before resorting to dismissal.'") (quoting Ruiz v. Alegria, 896 F.2d 645, 649 (1st Cir. 1990)).

[60] Chambers v. NASCO, 501 U.S. 32, 51 (1991). *See also* Boyajian v. Hart, 312 Mass. 264, 266 (1942) ("Vexatious litigation may in itself become a ground for equitable relief.").

[61] *See* Munshani v. Signal Lake Venture Fund II, 60 Mass. App. Ct. 714, 718 (2004) (citing Aoude v. Mobil Oil, 892 F.2d 1115, 1118 (1st Cir. 1989) ("It strikes us as elementary that a federal district court possesses the inherent power to deny the court's processes to one who defiles the judicial system by committing a fraud on the court.")). The inherent power of the federal courts and that of the Massachusetts courts derive from the same common-law principles and should be congruent.

[62] United States v. Shaffer Equip., 11 F.3d 450, 462 (4th Cir. 1993). ("[W]hen a party deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process, the court has the inherent power to dismiss the action.")

[63] *Id.* at 461 ("Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers."); *see also* Avelino-Wright v. Wright, 51 Mass. App. Ct. 1 (2001) ("There is no question that both the power to sanction and the power of contempt are derived from the same source, namely the inherent power of a court to do what is necessary to secure the administration of justice.")

however. The first is that the inherent power, while underlying all other powers of the courts, "must be exercised sparingly."[64] The second is that any of these sanctions would affect only the case at bar.

B. The Pre-Filing Requirement

Massachusetts judicial practice is to use the inherent power of the courts to subject vexatious litigants to a similar "pre-filing" requirement to that imposed by the state statutes discussed above. In the Massachusetts District and Superior Court settings, such litigants are typically enjoined from filing future actions unless they receive leave to proceed from the Regional Administrative Justice.[65] I examined all of the pre-filing

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[64] Commonwealth v. Dube, 796 N.E.2d 859, 869 (Mass. App. Ct. 2003). See also Roadway Express v. Piper, 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.").

[65] *See, e.g.*, Injunction, Aug 10, 2005 (McDonald, J.), Gen. Hosp. v. Deery, Suffolk Superior Court, C.A No. 05-3344-H [hereinafter, "Deery Order"]; Memorandum of Order on Plaintiff's Motion to Dissolve the Temporary Restraining Order, Jan. 26, 2005 (Gershengorn, J.), Camoscio v. Phelan, Middlesex Superior Court, C.A. No. 02-5383 [hereinafter, "Middlesex Camoscio Order"]; Memorandum and Order, Aug. 20, 2004 (per curiam), Pandey v. Two Assoc. Justices of the Superior Court (and a Companion Case), Mass Ct. App., unpublished opinion [hereinafter "Pandey Opinion"], order reported at 61 Mass. App. Ct. 1122 (2004) (affirming pre-filing orders entered in Hampden Superior Court C.A. Nos. 03-P-277 and 03-P-379) [hereinafter "Pandey Order"]; Order, Mar. 30, 2004 (Brassard, J.), Melrose Wakefield Trust v. Powell, Middlesex Superior Court, C.A. No. 75-2442 [hereinafter "Powell Order"]; Order on Plaintiff's Reqest for Waiver of Filing Fees and Costs Due to Indigency and Order Prohibiting Filings by Andre Merghart or Issuance of Court Process Without Prior Approval of a Justice, Mar. 19, 2004 (Walker, J.), Bristol Superior Court, C.A. No. 04-0251 [hereinafter "Merghart Order"]; Memorandum of Decision and Order on Plaintiff's Complaints for Restraining Orders, June 18, 2003 (Troy, J.), Kelly v. Viola & Kelly v. Budryk, Suffolk Superior Court C.A. Nos. 03-2227-G & 03-2228-H [hereinafter "Kelly Order"]; Order, Mar. 14, 2003 (Neel, J.), Karpowicz v. Commonwealth, Middlesex Superior Court C.A. No. 03-1176 (order made permanent when Karpowicz failed to appear for hearing) [hereinafter "Karpowicz Order"]; Final Judgment, Oct. 21, 2002 (Lauriat, J.), Kurker v. Kassler, Middlesex Superior Court C.A. No. MICV2002-02192 [hereinafter "Kurker Order"]; Memorandum

orders that the clerks at the Suffolk and Middlesex Superior Courts could show me.[66] Those are collected in Appendix I.[67] Because there is no statute granting authority to bar

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of Decision and Order Upon Motions to Dismiss and for Injunctive Relief of Defendants the City of Boston, Mayor Thomas Menino, and Police Commissioner Paul Evans, Aug. 23, 2002 (Giles, J.), Wyatt v. City of Boston, Suffolk Superior Court, C.A. No. 02-1749-H [hereinafter "Wyatt Order"]; Injunction, Jan 02, 2002 (Kottmeyer, J.), Harvard Sch. of Dental Med. v. Lu, Suffolk Superior Court, C.A. No. 01-5150 [hereinafter, "Lu Order"]; Findings of Fact, Rulings of Law and Order Regarding Plaintiff's Filing of Multiple Frivolous Lawsuits, Dec. 2001, Nesbitt v. Ne. Employment & Training, Suffolk Superior Court, C.A. No. 01-03407 [hereinafter "Suffolk Nesbitt Order"]; Order, Aug. 2, 1999 (Zobel, J.), Janes v. Cambridge Sav. Bank, Middlesex Superior Court C.A. No. 99-1608 [hereinafter "Janes Order"]; Order, Mar. 10, 1999 (Gants, J.), Russell v. Nichols, Middlesex County C.A. No. 99-1230 [hereinafter "Russell Order"]; Order Entered After Show Cause Hearing, May 29, 1998 (Hinkle, J.), In re Daniel Medina, Suffolk Superior Court, C.A. No. 98-1447-B [hereinafter "Suffolk Medina Order"]; Memorandum of Decision and Order, Feb. 20, 1998 (Hinkle, J.), Azubuko v. Bd. of Trs. of Framingham State Coll., Suffolk Superior Court, C.A. No. 97-50150-B [hereinafter "Suffolk Azubuko Order"]; Order, June 16, 1997 (Lauriat, J.), Dowd v. Law Offices of Charles S. Mancuso, Kevin G. McIntyre & John J. Roscoe, Suffolk Superior Court, No. 97-2429-B [hereinafter "Dowd Order"]; Order Concerning Complaints Filed by Daniel Medina, Apr. 22, 1997 (Botsford, J.), Medina v. Wilkins, Middlesex Superior Court, C.A. No. 97-1826 [hereinafter "Middlesex Medina Order"]; Findings of Fact, Rulings of Law and Order Regarding Plaintiff's Filing of Multiple Frivolous Lawsuits, Sept. 5, 1996 (Gershengorn, J.), Nesbitt v. Ciampa, Middlesex Superior Court, C.A. No. 96-03700 (not included in Appendix I, as not posted in Middlesex Clerk's Office) [herinafter "Middlesex Nesbitt Order"]; Order, May 17, 1996 (Lopez, J.), Erickson v. Maziarz, Middlesex Superior Court, C.A. No. 96-2759 [hereinafter "Middlesex Erickson Order"].

[66] However, Frank Camoscio's order for Suffolk County, alluded to in *Camoscio v. Hanley*, 5 Mass. L. Rep. 197 (Sup. Ct. Mass. 1996), was not in the binder I was shown. And Heidi Erickson is subject to a pre-filing order in Suffolk Superior Court, but that order is not in the Clerk's binder, and at least one action has proceeded to hearing before the judge was made aware of the order. *See* infra, note 72. Similarly, Michael Nesbitt's pre-filing order in Middlesex County is the subject of *Nesbitt v. Ciampa*, 6 Mass. L. Rep. 131 (Sup. Ct. Mass. 1996), but is not among those orders posted in the Middlesex Superior Court Clerk's office. This leads me to believe that other orders may be missing as well. The fact that the Clerks of the Superior Court do not have a complete set of pre-filing orders highlights the need for more uniform administrative practices.

[67] Appendix I collects the contents of the Suffolk Superior Court vexatious litigant binder and the various orders taped to the side of the Filing Clerk's cabinets in Middlesex Superior Court. Some of the orders are incomplete, some are what appear to be early drafts, with the judge's corrections handwritten, some seem to serve merely as reminders. Where possible, I tracked down the final orders on which to base my analysis.

vexatious litigants to Massachusetts judges, the power must spring from the inherent power of the courts.[68]

The Massachusetts Supreme Judicial Court has itself resorted to this form of order at least once. In *Camoscio v. Board of Registration in Podiatry*,[69] the Supreme Judicial Court, without setting out any other findings relevant to the matter, "ordered that neither the clerk of this court for Suffolk County (single justice session) nor the clerk for the Commonwealth (full court) accept any further filings from the plaintiff unless at least four Justices of this court authorize the filing."[70] The four-justice requirement seems a heavier burden even than the approval of the Regional Administrative Justice typically required at lower levels of the Massachusetts court system. Frank Camoscio is also under pre-filing orders in Suffolk County Superior Court, Middlesex County Superior Court, Plymouth County Superior Court, and the United States District Court for the District of Massachusetts.[71]

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[68] For the clearest assertion that the inherent power is at work in these pre-filing orders, see Pandey Opinion, *supra* note 65, at 8 ("The Superior Court may prudentially exercise its inherent discretion to enjoin a plaintiff from bringing future legal proceedings without prior leave of court when such injunction is necessary to put 'a stop to harassing, vexatious, and repetitious litigation.'" (quoting State Realty Co. of Boston v. Macneil, 341 Mass. 123, 124 (1960))).

[69] 408 Mass. 1001 (1990).

[70] Id. at 1002. *See also* Gorod v. Tabachnick, 428 Mass. 1001 (1998) (applying a pre-filing order preventing any further interlocutory appeals in the matter at bar, unless four Justices of the Supreme Judicial Court gave leave to file); Berkson v. Palmer & Dodge LLP, 428 Mass. 1002 (1998) (applying a pre-filing order preventing new filings regarding the matter at bar in any court in the Commonwealth absent authorization to proceed by a judge of the court in question, and further requiring that any such application for leave to file be accompanied by a copy of the decision itself).

[71] *See* Camoscio v. Hanley, 5 Mass. L. Rep. 197, 209 n.10 (Mass. Sup. Ct. 1996) (listing orders in other jurisdictions, but declining to impose a similar order in Middlesex County). An order was eventually imposed on Frank Camoscio in Middlesex County. Middlesex Camoscio Order, *supra* note 65.

VI. Problems with Massachusetts Pre-Filing Orders

Several problems attend the current system for dealing with vexatious pro se civil litigants in Massachusetts courts. These problems are both administrative and jurisprudential.

A. Administrative Problems

Administratively, the informality of the pre-filing requirement means there are no systems in place for tracking these litigants between courthouses or even reliably within the same court.[72] There are no formal procedures for dealing with the pre-filing orders. Suffolk County Superior Court has a three-ring binder of the orders, but the binder appears to be incomplete.[73] Middlesex County Superior Court's Filing Clerk tapes the pre-filing orders to his cabinets. My research uncovered an order extant in Middlesex County that was not on the cabinet.[74] One clerk instructed me to look in the dockets of the cases out of which the orders issued. When I asked how I would know which cases or which litigants were subject to orders, he didn't know. I asked how *he* would know if a new action would be subject to such an order, and he assured me that he remembered all such litigants' names when he saw them on filings.

Across jurisdictions there seem to be no safeguards at all. A pro se civil litigant who is under a pre-filing order in one jurisdiction can just begin with a clean slate in

[72] *See* Memorandum of Decision and Order on Plaintiff's Motion for Preliminary Injunction, Sept. 10, 2004 (Cratsley, J.), Erickson v. Mass. Dept. of Agric. (finding that Erickson was indeed subject to a pre-filing order in Middlesex County Superior Court, and also acknowledging that the action had proceeded to hearing "because it came to [the judge] without any notice of the restrictive orders...")).
[73] *See supra* note 66.
[74] *See supra* note 66.

another jurisdiction, unless a member of the court staff is familiar with the litigant.[75] Many litigants simply shift the focus of essentially identical complaints to another county after coming under a pre-filing order in Middlesex or Suffolk counties.[76] It is not clear why these orders should be limited in jurisdiction. Nothing indicates that a litigant who has exploited the judicial resources of one Massachusetts county to the point of being subjected to a pre-filing requirement will have more meritorious claims in an adjacent county. Although narrow tailoring of these orders is necessary due to the importance of the right of access to the courts, restricting an order to one Massachusetts county makes little sense.

B. Jurisprudential Problems

Such orders represent a gray area of the law. Their bases, their terms, and their justifications are all vague. No consistent test spells out when such an order should issue, no authoritative guidance dictates what its conditions should be, and no explicit act of government grants the authority to issue them.

Additionally, many inconsistencies cloud the underlying similarities. Some of the orders spell out the number of claims made by the party and the dispositions of those

[75] Vijai Pandey and Sheila Deery are under orders that extend to any Massachusetts court, but these two are the exception. *See* Pandey Order, *supra* note 65; Deery Order, *supra* note 65.

[76] Michael Nesbitt, Daniel Medina, and Frank Camoscio all fit this pattern. *See* Middlesex Nesbitt Order, *supra* note 65; Suffolk Nesbitt Order, *supra* note 65; Middlesex Medina Order, *supra* note 65; Suffolk Medina Order, *supra* note 65 (same claims also litigated in Berkshire, Bristol, Dukes, Hampden, Hampshire, Middlesex, Norfolk, and Plymouth Counties).

claims.[77] Some merely refer to "a number"[78] or "a large number"[79] of actions. Still others refer only to the action at hand in making the order. Some of those listed are on the motion of opposing parties,[80] or even in a separate proceeding brought by prior defendants.[81] Others are ordered by the judge sua sponte.[82] A clerk told me that often court staff will mention to a judge that a particular litigant is causing undue delay or harassing court staff, and that becomes the impetus for such a sua sponte order.

Pre-filing orders generally contain a requirement that any actions be subject to approval by the Regional Administrative Justice for the county before they may be filed. As noted, the Supreme Judicial Court has required four justices to approve before Frank Camoscio may file a new action.[83] Some of the orders contain a requirement that the order itself be appended to any such request. [84] And some require the Regional Administrative Justice to hold a "brief hearing" on any such matter, where the litigant

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[77] See, e.g. Suffolk Medina Order, *supra* note 65 (thirty-five complaints in Suffolk county in five months, fifty-five pending complaints at the time of the order, an appendix to the order lists docket numbers of pending cases);
[78] Kelly Order, *supra* note 65.
[79] Janes Order, *supra* note 65.
[80] *See, e.g.,* Kurker Order, *supra* note 65.
[81] See Lu Order, *supra* note 65.
[82] *But see* Pavilonis v. King, 626 F.2d 1075,1079 (1st Cir. 1980) ("Generally, this kind of order should not be considered absent a request by the harassed defendants."). In the case of a vexatious litigant who does not focus on one defendant or one cause of action, however, it is hard to imagine that any given defendant would make such a motion, having once achieved dismissal or other favorable outcome of his or her own matter.
[83] Camoscio v. Bd. of Registration in Podiatry, 408 Mass. 1001, 1002 (1990).
[84] *See, e.g.,* Lu Order, *supra* note 65; Azubuko Order, *supra* note 65; Pandey Order, *supra* note 65.

will have a chance to explain why his or her case is meritorious,[85] while others allow only for the pleadings to be submitted to the Justice for approval.[86]

Although these orders presumably rest on the inherent power of the courts, none of them explicitly indicate the authority under which they are granted.

There is no indication of a consistent threshold for vexatious litigants. Certainly, each case is different, but the orders do not even use the same legal language in making their determinations.[87] It appears that conduct by a litigant in front of one judge, or in one courthouse, that might result in an order would go unpunished another day.

The legal standard to be applied by the Regional Administrative Justice in determining whether to allow an action to proceed varies as well. More than half of the pre-filing orders set out no guidance for the Regional Administrative Justice at all. Others say that the action shall be filed if it is "not frivolous,"[88] or it contains "no patently false or unfounded allegations of misconduct."[89] The order against Karen Russell applies only to certain defendants, but against those defendants allows for no filings at all, and does not provide for review by a Regional Administrative Justice.[90] The orders that offer no

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[85] *See, e.g.* Deery Order, *supra* note 65; Lu Order, *supra* note 65; Middlesex Nesbitt Order, *supra* note 65; Suffolk Nesbitt Order, *supra* note 65.
[86] *See, e.g.*, Pandey Order, *supra* note 65; Azubuko Order, *supra* note 65; Suffolk Medina Order, *supra* note 65; Middlesex Medina Order, *supra* note 65; Middlesex Erickson Order, *supra* note 65.
[87] *Compare, e.g.,* Dowd Order, *supra* note 65 ("repetitious, frivolous, and unnecessary actions without justification or excuse") *with* Janes Order, *supra* note 65 ("inordinate burden on judicial personnel and the personnel of the Clerk-Magistrate's office").
[88] *E.g.*, Deery Order, *supra* note 65; Lu Order, *supra* note 65; Suffolk Nesbitt Order, *supra* note 65; Middlesex Nesbitt Order, *supra* note 65.
[89] Middlesex Camoscio Order, *supra* note 65.
[90] Russell Order, *supra* note 65. This Order might suffer from fatal Due Process problems because it is an absolute bar to the claims covered by its terms. However, it was never appealed, and an examination of this issue is beyond the scope of this Paper.

basis for evaluating future claims run up against objections voiced by the Supreme Judicial Court in *Brookline v. Goldstein*.[91]

The inconsistencies in these orders reflect the organic nature of the power that undergirds them, as well as the idiosyncratic situations that give rise to this most severe of remedies. But vexatious litigants, judges, and the public would all benefit if there were at least an articulated legal test for when such sanctions ought to apply. Part of the problem in dealing with these litigants is that they antagonize judges and court personnel, leading perhaps to a difficulty in maintaining impartiality. I am not suggesting that judges are motivated by personal animosity in applying these orders. Quite the contrary, I imagine that judges overcompensate and extend the benefit of the doubt to these litigants long past the time other observers might determine that they were merely using the courts to harass or annoy. A legal test would allow judges to lay their assessment of the situation alongside the test and take its measure more objectively.

VII. The Advantages of a Rule

A clear rule would also forestall the perception that these people are being treated unfairly, or are the victims of the animosity of particular judges. When such a basic right as that of access to the courts is implicated, the value of transparency and consistency is at its apogee. A clear rule would be subject to challenge and clarification in Massachusetts' higher courts as well, adding another type of legitimacy.

[91] 388 Mass. 443, 449 (1983) (stating, as a reason for vacating the order and remanding, "It is also not clear against what standard Goldstein's future pleadings would be measured.").

Moreover, a clear rule would likely set the bar for sanctions lower than that set in the past by individual judges. The statutory solutions enacted in Florida, California, Texas, and Hawaii require only five losing actions before a litigant is vulnerable,[92] whereas the orders in Massachusetts Superior court often list more than a dozen.[93] And in Ohio, even a single action can result in a determination of vexatiousness.[94] In Texas, two actions have so far been held sufficient.[95] No Texas court has held a single action to qualify, and the language of the statute ("repeatedly relitigates or attempts to relitigate"[96]) would seem to set two actions as a floor. In Massachusetts, litigants file dozens of claims before they are labeled vexatious.

Passing a statute might be difficult – the problem is perhaps not regarded as sufficiently pressing to warrant legislative attention.[97] However, the difficulties inherent in passing a statute in Massachusetts can be circumvented. The Massachusetts Supreme Judicial Court promulgates the Massachusetts Rules of Court, and a vexatious-litigant rule could be laid out therein. The rule covering impoundment of judicial records, for example, is uniform across all Massachusetts Trial Courts.[98] Codification of the established practice could thus be left to the Massachusetts Supreme Judicial Court. The

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[92] See *supra,* Part IV.
[93] *See, e.g.,* Suffolk Medina Order, *supra* note 65 (thirty-five complaints in six months), Suffolk Nesbitt Order, *supra* note 65 (listing thirty actions by name and docket number).
[94] *See supra* note 53 and accompanying text.
[95] Forist v. Vanguard Underwriters Ins. Co., 141 S.W.3d 668, 670 (Tex App. Ct. 2004)
[96] TEX. CIV. PRAC. & REM. CODE § 11.054 (2) (2005)
[97] *But see* Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool To Deny The Clever Obstructionists Access?*, 72 S. CAL. L. REV. 275, 278-84 (1998) (outlining the costs of vexatious litigation in terms of impacted dockets, public and private costs to defend against these lawsuits, and diminished public respect for the judicial system, and suggesting that the costs may be much greater than previously thought.).
[98] See ALM Uniform Impoundment Procedure Rule 1 (2006).

inherent power, which impliedly supports the current piecemeal process, should also be able to support a general rule. Pre-filing orders as part of vexatious litigant statutes conform to the respective state constitutions, according to courts in California,[99] Hawaii,[100] and Ohio[101]. Nothing in any of these decisions indicates that the power to create such a statute belongs exclusively to the legislature. In fact the Supreme Court of Ohio wrote that "the ability to curb frivolous litigation practices is an essential part of the inherent powers of courts to control and protect the integrity of their own processes."[102]

VIII. A Proposed Rule for Massachusetts Courts

I propose that Massachusetts courts adopt a rule to handle vexatious litigants. I would follow closely the definition of the Ohio statute. Sample language follows.

Proposed Rule for Massachusetts Trial Courts
Vexatious Litigants

(A) As used in this rule
  (1) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following:
    (a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.
    (b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.
    (c) The conduct is imposed solely for delay.

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[99] Wolfgram v. Wells Fargo Bank, 53 Cal. App. 4th 43, 59-61 (1997) (pre-filing order imposed on John Wolfgram under California's vexatious litigant law constitutional). For John Wolfgram's own views on the vexatious litigant statutes, see Wolfgram, John E., *How the Judiciary Stole the Right to Petition*, 31 UWLA. L. REV. 257 (2000).
[100] Ek v. Boggs, 102 Haw. 289, 291 (2003) (pre-filing order under Hawaii's vexatious litigant statute constitutional).
[101] Mayer v. Bristow, 91 Ohio St. 3d 3, 20 (2000) (Ohio vexatious litigant statute constitutional in its entirety).
[102] *Id.*

(2) "Vexatious litigator" means any person who has persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, in any court of the Commonwealth of Massachusetts, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. "Vexatious litigator" does not include a person who is authorized to practice law in the courts of this Commonwealth unless that person is has proceeded pro se in the civil action or actions.

(B) Anyone who has defended against persistent vexatious conduct in the Massachusetts trial courts may commence a civil action in a Superior court with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator. The civil action may commence while the civil action or actions in which the habitual and persistent vexatious conduct occurred are still pending or within one year after the termination of the civil action or actions in which the habitual and persistent vexatious conduct occurred.

(C) Additionally, a judge of the Massachusetts trial court may, sua sponte, or at the motion of an opposing party, order a hearing to be held as part of any ongoing civil action in which such persistent and vexatious conduct has occurred or is occurring. At such hearing, the litigator shall have an opportunity to present evidence that such conduct is not or has not been vexatious.

(D) Upon conclusion of the trial or the hearing as outlined in (B) or (C), the judge shall issue a finding. A finding that the litigant is vexatious shall set out:

(a) The number of actions on the basis of which such a determination is being made, and the docket numbers of those actions, or else an explanation why these are unavailable.
(b) A finding that the litigant's conduct was indeed vexatious.
(c) A declaration that the litigant is to be considered a vexatious litigant.
(d) Sanctions to be imposed against the litigant, as outlined in Sections (E) and (F) below. Sanctions may be imposed under either Section (E) or Section (F), or both.
(e) An explanation as to how the sanctions imposed are narrowly tailored to the abuse. Such sanctions shall be narrowly tailored to the particular conduct engaged in by the litigant as outlined in Section (G).

Such finding shall remain in force indefinitely, unless the terms of the finding sets a definite expiration date for the finding.

The finding shall be forwarded to the Clerk of the Supreme Judicial Court in whatever manner the Clerk shall prescribe, for the purposes of maintaining and distributing to the various courts of the Commonwealth a list of all those subject to sanctions, so that the sanctions may not be easily evaded.

(E) Posting of Security – Upon determination by a judge at a trial or hearing as set out in Sections (B) and (C) above that the litigant is vexatious, the judge may require that such a litigant post security at the commencement of any future litigation in any of the Trial Courts of Massachusetts. Such security will be in the amount of anticipated legal costs and reasonable attorney's fees to the defendants of such action. Should this sanction be imposed, the Massachusetts Trial Courts may not permit any litigation to commence absent the posting of this security.

(F) Pre-Filing Requirement – Upon determination by a judge at trial or hearing as set out in Sections (B) and (C) above that the litigant is vexatious, the judge may require that the litigant receive leave to proceed from the Regional Administrative Justice before commencing any future litigation in any of the Trial Courts of Massachusetts. A litigant subject to such an order shall submit pleadings or shall otherwise describe the case to the Regional Administrative Justice in writing. The Regional Administrative Justice shall allow such litigation to commence if such litigation is not frivolous.

The Regional Administrative Justice shall issue a Leave to Proceed or Denial of Leave to Proceed, as appropriate.

(G) Narrow tailoring – The sanctions above may be limited to:

(a) Actions filed against particular litigants;
(b) Actions filed against particular classes of litigants (such as public officials, police officers, employers, etc.);
(c) Particular causes of actions, or litigation arising from a particular situation or circumstance.

In any event, the sanctions imposed must be narrowly tailored to the particular litigant's vexatious conduct. Upon determination by a judge at trial or hearing as set out in Sections (B) and (C) above that the litigant is vexatious, the judge shall set out sanctions and indicate how these sanctions are narrowly tailored to the vexatious litigant's vexatious conduct. In the event that a litigant is subject to narrowly tailored sanctions and engages in other vexatious conduct outside the scope of those sanctions, the existence of the prior sanctions may be taken into account when determining the scope of new sanctions.

(H) Violation as Contempt, Violation Requires Dsimissal – Violation of any of the sanctions set forth above may be treated as contempt of court, in addition to any other penalties for frivolous, harassing, or vexatious litigation. Violation of any of these sanctions shall result in dismissal of the action.

(I) Assistance of Counsel – The sanctions in Sections (E) and (F) only apply to cases in which the vexatious litigant appears pro se. Similarly, a member of the Massachusetts Bar who is designated a vexatious litigant shall only be subject to the sanctions in Sections (E) and (F) in actions in which that member of the Massachusetts Bar appears pro se – actions in which the member of the Bar represents another, or is represented by counsel, are not subject to the sanctions.

(J) Inherent Power Unaffected – Nothing in this rule shall be construed to lessen or constrain the inherent power of the courts to maintain order and ensure their smooth functioning.

IX. Discussion

The proposed Rule above hews closely to the Ohio Vexatious litigant statute. I believe this to be a better model than the California model, with explicit thresholds of numbers of actions and time-frames, because I believe the situations in which these sanctions are used are fact-sensitive and widely varying. Mr. Reznik, whose behavior is outlined in Part II above, might be swept up in a rule of this sort, even though he hasn't prosecuted so many actions in so many years. Additionally, the inherent power, upon which these orders ultimately rest, is organic and discretionary, and any Rule should reflect that. Against the background of the Ohio statute, some differences are discussed below.

This Rule allows a judge to call for a hearing sua sponte. I believe that to be an important ramification of the inherent power of the courts. Further, this is already the practice in Massachusetts.

The ground for allowing a litigant subject to a pre-filing order to file a new action has been changed from "not an abuse of process of the court and … reasonable grounds

for the proceedings"[103] to "not frivolous" in part to comport better with Massachusetts Rule of Civil Procedure 11, and in part because many of the extant pre-filing orders in Middlesex and Suffolk County Superior Courts use this language already.

The Rule requires a fairly detailed Finding, including cases and docket numbers of prior actions relied upon in determining that the litigant is vexatious and that sanctions ought to be imposed. This provides a counter-balance to the Rule's lack of a threshold number of actions, tethering the determination of vexatiousness at least to some explicit list of cases. Perhaps most important are the narrow tailoring requirements and the portion of the Finding that requires a judge to explain how the sanctions are narrowly tailored. While a judge shouldn't be restricted to pre-filing orders limited to specific defendants or specific issues, the judge should have to explain why a broader sanction is appropriate. The Finding would of course serve as the basis for an appeal.

One area in which the sanction does *not* need to be narrowly tailored is the scope of its application. As discussed above, a litigant is not any more likely to have meritorious claims in an adjacent county – providing uniform sanctions across the Commonwealth prevents forum-shopping and protects the Commonwealth from those who would waste as much judicial time as they can. To the same end, some central authority should compile and distribute a list of all vexatious litigants and the sanctions to which they are subject, to ensure the sanctions are uniformly applied.

Application to file a new action after a pre-filing order has issued must be done in writing. There is no opportunity for a hearing with the Regional Administrative Justice. Due process doesn't require the hearing (Ohio's statute, for example, was upheld without

[103] OHIO REV. CODE ANN. § 2323.52 (F) (2) (LexisNexis 2006).

one), and the hearing arguably adds little to the Regional Administrative Justice's understanding of the proposed action. Furthermore, the action, if allowed to proceed, would have to do so in written pleadings initially – a litigant who cannot make himself understood on the page will fare poorly regardless.

The pre-filing orders in Appendix I do not specify whether these litigants would be subject to the orders even were they represented by counsel. The proposed Rule makes explicit that retaining counsel provides access to the courts for these litigants. This comports well with our sense of the problem, outlined in Part II above, that pro se litigants are less sensitive to usual sanctions than attorneys. Once these litigants retain counsel, this problem should fade.

Finally, the Rule includes a statement that the inherent power of the courts, while providing a basis for this Rule, is not exhausted by it. Circumstances may yet arise in which sanctions would be appropriate to ensure the smooth functioning of the courts even though the letter of the Rule had not been met.

X. Conclusion

It is very difficult to measure the impact of vexatious pro se civil litigants on the Massachusetts court system – in part because there are no clear procedures or standards for determining if someone is a vexatious litigant and for reporting sanctions that are imposed. It is clear, however, that as the Massachusetts courts try to make proceedings more accessible for self-represented litigants, the problem will only grow unless something is done. A clear rule would allow judges the leeway they need to respond to unique fact situations, while at the same time allowing case-law to develop to flesh out

the contours of acceptable behavior for pro se civil litigants. Further, such a rule would increase consistency and transparency, resulting in greater respect for the courts and their response to these most difficult situations. Finally, reduction of abuse of the courts would save the Commonwealth and her citizens money, and, perhaps more importantly, enhance respect for the court system.

Appendix I