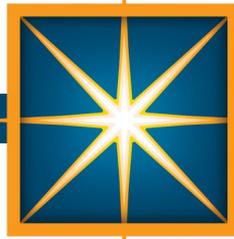


California Research Bureau

California State Library



# Frivolous Action Filings in California Courts

February 2017

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## Authors

Primary Author: Benjamin Tang

Research Assistance and Data Management: Carley Herron

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## Executive Summary

Assembly Bill 2494 (Stats. 2014, Ch. 425) was passed in 2014 to expand the legal options available to deter frivolous litigation. The statute revived section 128.5, an expired section of the California Code of Civil Procedure that allowed sanctions against bad faith claims and misconduct, and tasked the California Research Bureau with gauging the impact of that revival on the frequency and severity of sanctions. A report by the Judicial Council of California made a similar evaluation of the creation in 1995 of section 128.7, which allowed sanctions against delaying or harassing tactics using legal paperwork.

AB 2494 requires the parties who file motions for sanctions under either section 128.5 or 128.7 to report their filings to the Research Bureau. To date, the Research Bureau has received 129 filings, indicating motions for sanctions have been filed in only 0.05 percent of all civil trials and court hearings in California since January 1, 2015, when AB 2494 went into effect. While the Research Bureau can neither verify if the 129 filings represent all motions for

sanctions nor some fraction of the total, the Judicial Council found a comparable low filing rate of 0.49 percent in its study 20 years ago.

There are at least six possible explanations for the low use or reported use of sanction motions. Attorneys might be unaware of the revived section 128.5, might doubt the utility of sanction requests or might not be reporting their 128.5 or 128.7 filings to the Research Bureau as required by statute. Sanctioning mechanisms might also be working as intended in deterring frivolous claims and bad faith actions and tactics. It is also possible that attorneys interpret AB 2494 to not require the reporting of section 128.7 motions. Finally, frivolous litigation could in fact be rare.

Three methodological challenges made an accurate evaluation difficult: there was no data prior to AB 2494 for a baseline comparison, the self-reporting of motion filings was insufficient, and quantifying deterrence is inherently problematic.

## AB 2494 and Frivolous Litigation Laws in California

### Background

Sanctions against frivolous lawsuits and legal tactics in California state courts can be sought under sections 128.5 and 128.7 of the California Code of Civil Procedure.<sup>1</sup> Section 128.5 authorizes a trial court to impose sanctions of reasonable expenses, including attorney fees, against litigants acting in bad faith, while section 128.7 allows sanctions against legal tactics that involve court documents, such as filing insincere motions with the intent to delay or harass.<sup>2</sup> Section 128.5 had not been in force since 1995, when it was superseded by section 128.7. Then in 2014, California enacted Assembly Bill 2494 (Stats. 2014, Ch. 425), which reestablished section 128.5 while retaining section 128.7. (The text of AB 2494 is included as Appendix A.)

Section 128.5 was replaced in 1995 because critics had deemed it “too lenient” toward legal misconduct, such that sanctions became “so rare as to be nearly unheard of.”<sup>3</sup> It defines “frivolous” as “totally and completely without merit” or “for the sole purpose of harassing the opposing party.” The courts interpreted these definitions to mean that both a subjective (bad-faith motives) and an objective (meritless action or tactic) standard were required to warrant sanctions.<sup>4</sup> According to the critics, this double standard was difficult to prove.

To facilitate the use of sanctions against frivolous legal action, the state in 1994 enacted AB 3594 to implement a simple, objective threshold for judges to assess sanctions.<sup>5</sup> The statute created section 128.7 to replace section 128.5 and was inspired by Federal Rule 11, which had recently undergone major revision in 1993.<sup>6</sup> Supporters of AB 3594 believed that “federal conformity” with a reformed Rule 11 was appropriate.<sup>7</sup>

Section 128.7 follows Rule 11 by requiring lawyers to conduct “reasonable inquiry” into the merits of a case or motion before filing papers with the court, and to sign every filing to affirm that due diligence. Accordingly, sanctions are imposed only against misconduct or tactics involving any written motions and papers.<sup>8</sup> Like Rule 11, section 128.7 also provides a safe harbor provision for frivolous filings to be withdrawn within 30 days of notice to avoid sanctions. Section 128.7 is more limited in scope than section 128.5, which applies to all bad-faith actions and tactics and not just abuse of paperwork.

By replacing section 128.5 with section 128.7, AB 3594 created two different sanctioning regimes in California: one regime covered by section 128.5 (broader in scope but high standard for sanctions) for those cases filed before January 1, 1995<sup>9</sup>, and another under section 128.7 (narrower in application but requires declaration of merit) for all new cases from January 1, 1995, onward. Section 128.7 had originally been set to end on January 1, 1999, but subsequent legislation eventually eliminated the sunset provision and made the section permanent. (A legislative chronology of section 128.5 and related laws is included as Appendix B.)

However, critics believed section 128.7 was still insufficient in deterring frivolous litigation. Its inapplicability to tactics outside of written filings and the advance warning provided by its safe harbor grace period decreased its utility.<sup>10</sup> AB 2494 was introduced to revive section 128.5 because the courts had “lost an important tool used to ensure bad faith actions that can materially harm the other party or the fairness of a trial are discouraged.”<sup>11</sup> The author of AB 2494 noted that the maximum financial penalty for contempt of court – the standard remedy for punishing improper conduct by counsel – is minimal.<sup>12</sup> AB 2494 still recognizes section 128.7, and amended the original section 128.5 to work in tandem with section 128.7 by requiring any sanctions “shall be imposed

consistently with standards, conditions, and procedures set forth in ... Section 128.7.”<sup>13</sup>

The revived section 128.5 came into effect on January 1, 2015, and applies to any pending lawsuit, even those initiated before 2015.<sup>14</sup> Section 128.5 sunsets on January 1, 2018, after which time the section 128.5 sanctions would again apply only to ongoing cases filed prior to 1995.

## Claims of Frivolous Actions in California, 2015-2016

AB 2494 requires any party that files a motion under section 128.5, requesting awards of cost for bad-faith actions or tactics, to also transmit to the California Research Bureau: (1) an endorsed copy of the motion caption page, (2) a copy of any related notice of appeal or petition for a writ, and (3) a conformed copy of the court order granting or denying the motion, including award amount if sanctions were granted. The filing party should indicate if a

**Table 1: Frivolous actions filings submitted to California Research Bureau (as of February 10, 2017)**

| Jurisdiction      | Civil Filings (2015) | Motions Submitted |           |            | Motions Granted |           |           | Motions Denied |           |           | Known Missing Orders |           |           |
|-------------------|----------------------|-------------------|-----------|------------|-----------------|-----------|-----------|----------------|-----------|-----------|----------------------|-----------|-----------|
|                   |                      | 2015              | 2016      | Total      | 2015            | 2016      | Total     | 2015           | 2016      | Total     | 2015                 | 2016      | Total     |
| <b>CALIFORNIA</b> | <b>480,506</b>       | <b>58</b>         | <b>71</b> | <b>129</b> | <b>5</b>        | <b>10</b> | <b>15</b> | <b>20</b>      | <b>11</b> | <b>31</b> | <b>33</b>            | <b>50</b> | <b>83</b> |
| Alameda           | 13,463               | -                 | 2         | 2          | -               | 1         | 1         | -              | -         | -         | -                    | 1         | 1         |
| Contra Costa      | 8,129                | 1                 | 3         | 4          | -               | 1         | 1         | -              | -         | -         | 1                    | 2         | 3         |
| Fresno            | 10,878               | -                 | 1         | 1          | -               | -         | -         | -              | 1         | 1         | -                    | -         | -         |
| Kern              | 3,632                | -                 | 3         | 3          | -               | -         | -         | -              | -         | -         | -                    | 3         | 3         |
| Kings             | 1,648                | -                 | 1         | 1          | -               | -         | -         | -              | -         | -         | -                    | 1         | 1         |
| Los Angeles       | 184,436              | 23                | 31        | 54         | 1               | 2         | 3         | 8              | 4         | 12        | 14                   | 25        | 39        |
| Napa              | 1,006                | -                 | 1         | 1          | -               | 1         | 1         | -              | -         | -         | -                    | -         | -         |
| Orange            | 29,253               | 10                | 7         | 17         | 2               | 1         | 3         | 3              | 2         | 5         | 5                    | 4         | 9         |
| Placer            | 4,895                | 2                 | 1         | 3          | -               | -         | -         | -              | -         | -         | 2                    | 1         | 3         |
| Riverside         | 19,790               | 2                 | 1         | 3          | -               | -         | -         | 2              | -         | 2         | -                    | 1         | 1         |
| Sacramento        | 49,806               | 1                 | -         | 1          | -               | -         | -         | -              | -         | -         | 1                    | -         | 1         |
| San Bernardino    | 18,185               | -                 | 1         | 1          | -               | -         | -         | -              | 1         | 1         | -                    | -         | -         |
| San Diego         | 45,487               | 5                 | 3         | 8          | 1               | -         | 1         | 2              | -         | 2         | 2                    | 3         | 5         |
| San Francisco     | 15,125               | 7                 | 5         | 12         | -               | 3         | 3         | 3              | -         | 3         | 4                    | 2         | 6         |
| San Mateo         | 5,499                | 2                 | -         | 2          | 1               | -         | 1         | -              | -         | -         | 1                    | -         | 1         |
| Santa Clara       | 10,856               | 4                 | 3         | 7          | -               | -         | -         | 2              | 1         | 3         | 2                    | 2         | 4         |
| Santa Cruz        | 1,714                | -                 | 1         | 1          | -               | -         | -         | -              | -         | -         | -                    | 1         | 1         |
| Sonoma            | 3,611                | -                 | 5         | 5          | -               | 1         | 1         | -              | 1         | 1         | -                    | 3         | 3         |
| Stanislaus        | 3,701                | 1                 | 1         | 2          | -               | -         | -         | -              | 1         | 1         | 1                    | -         | 1         |
| Ventura           | 6,462                | -                 | 1         | 1          | -               | -         | -         | -              | -         | -         | -                    | 1         | 1         |

**Source:** California Research Bureau, *Frivolous Action Filings*. <https://www.library.ca.gov/crb/frivolous-action>. Civil filings numbers exclude unlawful detainers, judicial reviews, enforcement of judgment and small claims. The sum of civil filings for the 20 counties listed here is less than the statewide 480,506 total, which includes all 58 counties. Civil filings data provided by the Judicial Council of California. The “Known Missing Orders” columns list motions submitted to the Research Bureau without the corresponding court orders ruling on those motions.

motion for sanctions under section 128.7 was also pursued.<sup>15</sup> The statute requires the California Research Bureau to examine “the impact and effect of the changes made by the act adding this section [128.5],” including the number of motions for sanctions filed and granted, and whether these changes were effective in “reducing the frequency and severity of bad-faith actions or tactics.”

The California Research Bureau received 129 total submissions for section 128.5 or 128.7 motions filed since January 1, 2015 (see Appendix C for data collection methodology). Of the 129 motions: 15 (11.6 percent) were granted and 31 (24 percent) were denied. However, with 83 motions (64.4 percent), the filing parties did not submit the corresponding court orders that ruled whether those motions were granted or denied. Table 1 lists the submissions of frivolous action filings by county and year. Los Angeles County is the jurisdiction with the most frivolous action requests (54), followed by Orange (17), San Francisco (12), San Diego (8) and Santa Clara (7) counties. Sonoma (0.14 percent), Napa (0.10 percent) and Kern (0.08 percent) counties have the highest frivolous action filing rates compared to total civil filings (in 2015).<sup>16</sup>

The vast majority of motions (91 of 129) submitted to the Research Bureau requested sanctions under section 128.5, but not 128.7 (see Table 2). Seven of these 128.5 motions also cited other sections of the California Code of Civil Procedure, including: section 177.5, which grants judicial officers discretion to impose sanctions for court order violations<sup>17</sup>; section 425.16, which is California’s anti-SLAPP law<sup>18</sup>; section 437c, which allows motions for summary judgment to dispose of cases without trial<sup>19</sup>; and section 575.2, which allows sanctions imposed under local jurisdiction rules.<sup>20</sup> Another 17 submitted motions cited both sections 128.5 and 128.7, while two motions cited only section 128.7 (and not 128.5 or any other sections of the civil code). This disparity is explained by the fact that AB 2494

**Table 2: Sanctioning rule cited in submissions, 2015-2016**

| Year  | 128.5, not 128.7 | 128.5 and 128.7 | 128.7 only | Other or Unknown |
|-------|------------------|-----------------|------------|------------------|
| 2015  | 39               | 9               | 2          | 8                |
| 2016  | 52               | 8               | -          | 11               |
| Total | 91               | 17              | 2          | 19               |

**Source:** California Research Bureau, *Frivolous Action Filings*. <https://www.library.ca.gov/crb/frivolous-action>. For discussion of submissions with other or unknown sanctioning rules, see Appendix C.

requires filing parties to report specifically those motions pursuant to section 128.5, and not necessarily report section 128.7 motions unless they are filed in addition to section 128.5.

For a sense of scale, the state and county total civil filings for 2015 are also listed. Small claims cases are excluded because the amount of sanctions for reimbursement of attorney’s fees in small claims is limited to \$150.<sup>21</sup> The 58 cases with motions submitted for 2015 represent 0.01 percent of 480,506 total statewide civil filings in 2015.<sup>22</sup> The total 2016 civil filings are still unpublished, but the 71 filings submitted in 2016 should comprise a similarly low fraction of the total.

Regarding the nature and amount of sanctions: of the 46 submissions that included court orders, about one-third (15 of 46) of the frivolous action requests were granted. Six of the 15 awards were for full attorney’s fees, which tended to be larger dollar amounts than those awards of sanctions against legal counsel for bad faith tactics, which were usually not for full attorney’s fees. The average award amount of the 15 sanctions is \$8,833. The highest award amount is \$37,146. The lowest award amount is \$1,000, granted in two section 128.5 motions that disciplined legal counsel.<sup>23</sup>

For comparison of the award amounts, the State Bar of California maintains a record of

**Table 3: Sanctions for bad faith or frivolous actions, 2015-2016 (as of February 10, 2017)**

| Database                          | Count | Award Amounts |          |          |
|-----------------------------------|-------|---------------|----------|----------|
|                                   |       | Low           | Average  | High     |
| Research Bureau frivolous actions | 15    | \$1,000       | \$8,833  | \$37,146 |
| State Bar reportable actions      | 73    | \$1,000       | \$10,980 | \$60,000 |

**Source:** Reportable actions and sanctions data provided by the State Bar of California. Attorneys can be sanctioned under rules other than section 128.5 or 128.7, but State Bar records do not specify which sanctioning rule.

attorneys personally sanctioned for \$1,000 or more (for infractions under any sanctioning rule). This disciplinary record is based on both court reports and self-reporting by the attorneys.<sup>24</sup> The award amounts for section 128.5 sanctions are roughly comparable to the award amounts for bad faith, delay, frivolous and harassment actions reported to the State Bar (see Table 3).

## Analysis of Motions Filed under AB 2494

The frivolous action filings data suggest that the use of section 128.5 motions is rare, a conclusion similar to the Judicial Council’s with its examination of 128.7 motions filed in 1995. As noted earlier, the 58 frivolous action filings in 2015 represent only 0.01 percent of 480,506

**Table 4: Comparison of frivolous action filing rates**

| Motions  | Total Cases | Motions Filed | Filing Rate |
|--|-------------|---------------|-------------|
| 128.5 and 128.7 motions vs. civil cases filed (2015) | 480,506     | 58            | 0.01%       |
| 128.5 and 128.7 motions vs. civil trials (2015)      | 38,188      | 58            | 0.15%       |
| 128.7 motions found by Judicial Council (1995)       | 822         | 4             | 0.49%       |

**Source:** Total civil filings and trials in 2015 from Judicial Council of California. Small claims cases are excluded.

total civil cases initiated that year. Compared to the 38,188 civil cases that actually went to trial in 2015 (excluding the cases that were dismissed or settled before trial), the 58 filed motions still constitute only 0.15 percent.<sup>25</sup> Additionally, only five of the 58 requests for sanctions are known to be granted (10 motions filed in 2016 were granted). Both the Research Bureau and Judicial Council studies find frivolous action motions filed in less than one-half of 1 percent of civil cases (see Table 4).

Note that some of the 58 frivolous action motions from 2015 could have been filed for cases initiated before 2015. Some of the motions could also have been filed for cases that did not go to trial in 2015. Nevertheless, the comparisons of 128.5 and 128.7 motions filed in 2015 against the total cases filed (480,506) or tried (38,188) that year provide reasonable estimates of the frivolous action filing rate.

## Findings of Judicial Council Report on AB 3594 (1994)

In 1994, the State Legislature instructed the Judicial Council to present a similar report on the effect of AB 3594 on the frequency of frivolous action motions filed under the newly created section 128.7. The Administrative Office of the Courts made two-day visits to three counties (Alameda, San Diego and Shasta) to review randomly selected general civil cases from 1995.<sup>26</sup>

Motions for sanctions were rare: Administrative Office staff discovered only 4 out of 822 cases (0.49 percent) with a section 128.7 motion (see Table 5). This filing rate of 0.49 percent implies that, from the 75,812 total cases in fiscal year 1995 in those three counties, 369 civil cases would have section 128.7 motions filed.<sup>27</sup> The Judicial Council stated that the volume of filings they sampled was not sufficient for a proper analysis of the nature of section 128.7 motions.

**Table 5: Section 128.7 filings found by Judicial Council, 1995**

| County       | Civil Filings (FY 1995) | Civil Cases Sampled | Motions Found |
|--------------|-------------------------|---------------------|---------------|
| Alameda      | 28,667                  | 314                 | 1             |
| San Diego    | 42,398                  | 230                 | 0             |
| Shasta       | 4,747                   | 278                 | 3             |
| <b>TOTAL</b> | <b>75,812</b>           | <b>822</b>          | <b>4</b>      |

**Source:** Fiscal year 1995 civil filings from Judicial Council of California, *Annual Data Reference for 1994-1995*. <http://www.courts.ca.gov/13421.htm>.

### Explanations for Low Filing Rate of Frivolous Action Motions

The Judicial Council provided three possible explanations for the low use of section 128.7 motions in 1995, and those explanations are still plausible for the sanctions regime instituted with AB 2494.<sup>28</sup> There are at least three additional explanations for the current low filing rate of section 128.5 motions: one methodological problem concerning self-reporting, another problem with statute requirements and finally an empirical problem regarding frivolous litigation.

First, if attorneys were not aware that AB 2494 revived section 128.5 as a sanctioning tool, then the number of frivolous action filings would be lower than it might be otherwise. Regarding section 128.7, the Judicial Council had posited that filings would increase with time as more attorneys became aware of the new statute. Twenty years later, however, the rate of reported frivolous action filings to the Research Bureau is smaller than what the Judicial Council had observed, even though lawyers can now avail themselves of both sections 128.5 and 128.7. The number of 128.5 motions submitted to the Research Bureau did increase from 2015 (48 motions) to 2016 (60 motions), so perhaps attorneys became more aware of AB 2494 during the two-year period.

Second, if section 128.5 is deterring frivolous litigation as intended, then fewer frivolous

action charges would be filed. The combined effect of sections 128.5 and 128.7 could encourage more settlement or withdrawal of meritless cases.<sup>29</sup> The majority of cases in California are settled before reaching trial – in 2015, for example, only 24 percent of all civil cases (123,411 out of 515,682 dispositions) went to trial.<sup>30</sup> It is also possible that attorneys and litigants have learned to file fewer frivolous claims after 20 years of section 128.7 sanctions, but no data exist on the frequency of section 128.7 motions over time and an effective section 128.7 rule undermines the rationale for AB 2494.

Third, attorneys might avoid using section 128.5 or 128.7 because they perceive that the statutes are actually ineffective, or at least less effective than other legal remedies. The old section 128.5 in effect before 1995 was difficult to implement because it required a double standard of both subjective, bad-faith motives and objective, meritless action to justify sanction awards. If the new section 128.5 instituted by AB 2494 is (or thought to be) similarly difficult to use, then any added deterrence from AB 2494 would be minimal.<sup>31</sup> The sponsors of AB 2494 understood that sanction awards under the new section 128.5 must clear a high standard to be justified, and intended for the statute to be used in a limited number of cases with clearly egregious conduct.<sup>32</sup> Within that narrow band of cases, however, legal options other than frivolous action sanctions might prove more expedient: summary judgment can dismiss truly meritless cases, and contempt of court can rein in trial misconduct. Specific cases might allow other sanctioning tools to be used together with section 128.5, such as section 425.16 for anti-SLAPP motions.<sup>33</sup>

Fourth, it is possible that fewer frivolous action filings are being observed because self-reporting by the filing parties is likely inadequate. The Research Bureau has found section 128.5 and 128.7 motions in the public record that have not been submitted for its

online database.<sup>34</sup> The State Bar record of reportable actions, which relies partly on reports from the sanctioned attorneys themselves, lists 224 self-reported incidents since 2015.<sup>35</sup> These incidents cover both federal and state courts and include sanctions for other than frivolous actions, such as incompetence, misrepresentation, negligence and court order violations. It may be difficult to incentivize attorneys to submit additional paperwork if there is no penalty for noncompliance.<sup>36</sup>

Fifth, AB 2494 does not require filing parties to report frivolous action motions filed under section 128.7, unless also filing a section 128.5 motion. Of the 129 submissions received by the Research Bureau, only 2 known submissions cite section 128.7 without also mentioning section 128.5. It is possible that most attorneys prefer to challenge frivolous actions with section 128.7 instead of 128.5, but do not report their filings. The true frivolous action filing rate combining both section 128.5 and 128.7 filings could be higher than what the Research Bureau has discovered. However, because the current known filing rate is only 0.15 percent (58 motions) out of 38,188 civil case trials, there would have to be five or six times more section 128.7 motions filed to make the combined filing rate approach one percent of trials.

Finally, frivolous action filings could be low because frivolous litigation is actually rare. “Frivolous” denotes truly flagrant cases or actions, as the high standards for using section 128.5 and 128.7 indicate. It is also possible there was a temporary lull in frivolous litigation in 2015-16, due to factors other than the availability of sanctioning methods.<sup>37</sup>

### General Effect of Sanctions against Frivolous Litigation

The experiences of other states indicate mixed results from using attorney’s fee awards as a deterrent against frivolous litigation. The National Center of State Courts surveyed Alaska

Bar Association members on the effects of Alaska’s Civil Rule 82, which automatically requires losers to pay partial attorney’s fees for the winners in civil lawsuits.<sup>38</sup> Only a minority of respondents believed that Rule 82 “almost always” or “usually” prevents frivolous lawsuits (9.4 percent) or discourages bad faith conduct (8.6 percent). However, 44 percent of survey respondents said Rule 82 is still needed to deter frivolous litigation. (The sanctioning experiences of Alaska, Florida and Louisiana and a list of statutes citing frivolous lawsuits in the 50 states are summarized in Appendices D and E.)

California has a comprehensive sanctions regime to deter frivolous litigation and legal misconduct that includes not only sections 128.5 and 128.7, but also a discipline record of sanctioned attorneys (who can be disbarred), a blacklist of known vexatious litigants, anti-SLAPP statutes and other sanctioning rules.<sup>39</sup> However, commenters in the survey on Alaska’s Rule 82 suggested that legal or financial barriers are not enough to deter most vexatious litigants, who are emotionally invested, ideologically motivated or “judgment-proof” (lack the means to pay sanction awards anyways, or have ample enough resources to be unconcerned). Frivolous litigation could persist despite any legal or financial sanctions to reduce it.

### Limitations on Studying the Impact of AB 2494

AB 2494 tasked the California Research Bureau to examine “the impact and effect of the changes made by the act adding this section [128.5].” The study should include the number of section 128.5 and 128.7 motions filed, the number and dollar amounts of awarded sanctions, and whether the changes “had a demonstrable effect on reducing the frequency and severity of bad-faith actions or tactics that would not be subject to sanction under Section 128.7.”

The impact of changes made by AB 2494 to the frequency and severity of frivolous litigation in California seems minimal. The revived section 128.5 broadens the scope of legal actions that could be found frivolous, and sanctions under section 128.5 have definitely been sought and granted. However, the overall filing rate of 128.5 and 128.7 motions for sanctions remains low: only 0.15 percent of civil trials, compared to a rate of 0.49 percent sampled 20 years ago for just section 128.7 motions.

Three constraints complicate efforts to discover whether AB 2494 had a demonstrable impact on frivolous litigation:

- **No data before AB 2494 for baseline comparison.** To isolate and evaluate the additional deterrence brought by a revived section 128.5 requires having data on sanctioning motions prior to AB 2494 for comparison. The best baseline data found comes from the Judicial Council's report to the Legislature on section 128.7 filings in 1995. However, the frivolous action filings submitted for AB 2494 are explicitly and predominately section 128.5 filings, therefore the comparison is between the filing rates of two different sections of the civil code, 20 years apart and in the respective first years of operation. It is possible that the filing rate of section 128.7 motions had changed by 2015: the extent of decline would determine whether reviving section 128.5 has increased or decreased the frequency of sanctions.
- **Self-reporting of motion filings is not enforceable.** An accurate count of the number of motions filed and sanctions awarded is fundamental, but difficult to obtain. The Research Bureau did not receive every section 128.5 or 128.7 motion filed. Although county superior courts track sanctions data, they cannot confirm specific motion filings because the reasons for sanctions (including for offenses not subject to section 128.5 or 128.7) are not coded.<sup>40</sup>

Additionally, the self-reported documents submitted to the Research Bureau suffer two general complications: (1) a lack of uniformity in reporting, and (2) a lack of context and case details, not only regarding procedural errors or tactics, but also identifying the parties in the motion filing and corresponding lawsuit (see Appendix C on complications with submissions).

- **Quantifying deterrence is problematic.** The number of frivolous lawsuits or bad-faith actions that would have been filed absent section 128.5, but were not pursued because of AB 2494, cannot be known. A typical measure of deterrence uses cost-benefit analysis to arrive at a probabilistic estimate, but in the context of frivolous litigation, such analysis would require estimates of damages sought (benefits) in civil cases and sanctions imposed (costs). The Research Bureau does not have access to the details of lawsuits with filed sanctions motions. Various factors influence decisions to pursue or settle lawsuits, and isolating the impact of financial sanctions as a deterrent would be extremely difficult.

## Appendix A: Text of Assembly Bill 2494 (Statutes 2014, Chapter 425)

### Assembly Bill No. 2494

#### CHAPTER 425

An act to amend, repeal, and add Section 128.5 of the Code of Civil Procedure, relating to courts.

[Approved by Governor September 18, 2014. Filed with Secretary of State September 18, 2014.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 2494, Cooley. Courts: frivolous actions or proceedings.

Existing law authorizes a trial court to order a party, the party's attorney, or both to pay 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, if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. In addition to the reasonable expenses award, existing law authorizes the court to assess punitive damages against the plaintiff on a determination that the plaintiff's action was maintained by a person convicted of a felony against the person's victim for injuries arising from the acts for which the person was convicted, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

Existing law also requires every pleading, petition, written notice of motion, or other similar paper to be signed by the attorney of record or an unrepresented party, as applicable, thereby certifying to the best of the person's knowledge, information, and belief that, among other things, the paper is not being presented primarily for an improper purpose, as specified, and that the claims, defenses, and legal and factual contentions are warranted, as specified. Existing law authorizes a trial court to impose sanctions upon an attorney, law firm, or party that violates these provisions in a complaint, petition, or other paper filed on or after January 1, 1995.

This bill would delete the December 31, 1994, date limitation on a trial court's authorization to award reasonable expenses incurred as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay, thus making both of the provisions described above applicable commencing January 1, 2015. The bill would include in the definition of "actions or tactics" the filing and serving of an answer or other responsive pleading, and would exclude from that definition disclosures and discovery requests, responses, objections, and motions. The bill would require a party filing a motion pursuant to these provisions to promptly transmit to the California Research Bureau a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any resulting order. The bill would also require the party to indicate whether a motion for sanctions was made for a violation of the certification provisions described above. The bill would require that the bureau maintain a public record of these documents for at least 3 years, except as specified. The bill would require certain standards, conditions, and procedures to apply to sanctions imposed pursuant to its provisions. The bill would repeal these provisions on January 1, 2018.

The bill would also require the California Research Bureau, on or before January 1, 2017, to submit a report to the Legislature examining the impact and effect of the changes made by the bill.

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Section 128.5 of the Code of Civil Procedure is amended to read:

**128.5.** (a) A trial court may order a party, the party's attorney, or both to pay the 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. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers or, on the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff on a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(f) Any sanctions imposed pursuant to this section shall be imposed consistently with the standards, conditions, and procedures set forth in subdivisions (c), (d), and (h) of Section 128.7.

(g) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

(h) (1) A party who files a motion pursuant to this section shall, promptly upon filing, transmit to the California Research Bureau of the California State Library, by email, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying the motion. The party shall also indicate whether a motion for sanctions was made pursuant to Section 128.7.

(2) The California Research Bureau shall maintain a public record of information transmitted pursuant to this section for at least three years, or until this section is repealed, whichever occurs first, and may store the information on microfilm or other appropriate electronic media.

(i) This section shall remain in effect only until January 1, 2018, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2018, deletes or extends that date.

**SEC. 2.** Section 128.5 is added to the Code of Civil Procedure, to read:

**128.5.** (a) A trial 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. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint or cross-complaint only if the actions or tactics arise from a complaint filed, or a proceeding initiated, on or before December 31, 1994. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers, or the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(d) In addition to any award pursuant to this section for conduct described in subdivision (a), the court may assess punitive damages against the plaintiff upon a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

(f) This section shall become operative on January 1, 2018.

**SEC. 3.** On or before January 1, 2017, the California Research Bureau of the California State Library shall submit a report to the Legislature, in accordance with the requirements of Section 9795 of the Government Code, examining the impact and effect of the changes made by the act adding this section, including the number of motions made pursuant to Sections 128.5 and 128.7 of the Code of Civil Procedure, the number of motions made pursuant to those sections resulting in an award of sanctions, the nature and amount of any sanctions awarded pursuant to those sections, and whether the changes made to Section 128.5 of the Code of Civil Procedure has had a demonstrable effect on reducing the frequency and severity of bad-faith actions or tactics that would not be subject to sanction under Section 128.7 of the Code of Civil Procedure.

## Appendix B: Brief Chronology of California Sanctioning Rules

- 1978** – California Supreme Court in *Bauguess v. Paine* held that trial courts did not have inherent power, without statutory authority, to award attorney fees as sanctions against misconduct.<sup>41</sup>
- 1981** – In reaction to *Bauguess v. Paine*, California passes SB 947 (Davis) and creates §128.5 to “provide for the expeditious processing of civil actions by authorizing monetary sanctions now not presently authorized by the interpretation of the law in *Bauguess v. Paine* (1978).”<sup>42</sup> Frivolous actions or delaying tactics are broadly defined as “making or opposing motions without good faith.”<sup>43</sup>
- 1983** – Due to perceptions of excessive civil proceedings and judicial reluctance to impose sanctions, Rule 11 of the Federal Rules of Civil Procedure is amended to require mandatory sanctions.<sup>44</sup>
- 1984** – AB 2752 (Harris) amends §128.5 to apply to arbitration proceedings.<sup>45</sup>
- 1985** – SB 379 (Ellis) amends wording of §128.5 to allow sanctions, including awarding attorney fees, for bad-faith actions or tactics that are frivolous.<sup>46</sup> The statute is interpreted to require a high standard for sanctions.<sup>47</sup>
- 1991** – U.S. Supreme Court in *Chambers v. NASCO Inc.* declares that “[f]ederal courts have the inherent power to manage their own proceedings” and punish misconduct beyond Rule 11.<sup>48</sup>
- 1993** – To address widespread criticism of 1983 amendments, Rule 11 is amended again to make sanctions discretionary and to include a safe harbor provision that allows claims to be withdrawn within 21 days of notice to avoid sanctions.<sup>49</sup>
- 1994** – AB 3594 (Weggeland) adopts the revised Federal Rule 11 as §128.7 to replace §128.5. AB 3594 also creates §128.6, which effectively reinstates the provisions of §128.5 after §128.7 sunsets on January 1, 1999.<sup>50</sup>
- 1997** – California Court of Appeal in *Transaction Commercial Investors, Ltd. v. Firmaterr, Inc.* rules that California courts, unlike federal courts and courts in the majority of other states, lack inherent power and possess only those sanction powers conferred by the Legislature and that §128.7 does not apply to misconduct outside of written filings.<sup>51</sup>
- 1998** – SB 1511 (Haynes) extends the §128.7 sunset from January 1, 1999, to January 1, 2003, and amends §128.6 accordingly to start after the new 2003 sunset date.<sup>52</sup>
- 2002** – SB 2009 (Morrow) extends §128.7 to January 1, 2006, and shortens the safe harbor period from 30 days to 21 days.<sup>53</sup>
- 2004** – California Supreme Court in *Olmstead v. Gallagher & Co.* rules that the enactment of §128.6 clarifies legislative intent that §128.5 does not apply while §128.7 is in effect.<sup>54</sup>
- 2005** – AB 1742 (Committee on Judiciary) deletes the sunset provision for §128.7, making it permanent.<sup>55</sup>
- 2008** – AB 1891 (Niello), which revives and expands §128.5, fails in committee.<sup>56</sup>
- 2011** – SB 1330 (Committee on Judiciary) repeals §128.6, which became inconsistent with a permanent §128.7.<sup>57</sup>
- 2014** – AB 2494 (Cooley) revives §128.5 by extending the January 1, 1995, limitation of its application (inserted by AB 3594 in 1994) to January 1, 2018.

## Appendix C: Data Collection Methodology for AB 2494 Study

To determine the effects of AB 2494 and the new sanctions regime, the California Research Bureau reviewed the submissions of section 128.5 and 128.7 motion and court order filings sent by filing parties. A motion's caption page shows basic case information, such as the parties involved and filing dates, and a court order details whether sanctions had been granted and the awarded dollar amounts. The Research Bureau sent informational letters to each county superior court on January 1, 2015, when the revived section 128.5 came into effect, to publicize how to contact the Research Bureau and submit the required documents.

The Research Bureau received copies of motions and orders via email throughout 2015 and 2016. A webpage was launched in October 2016 to publish the information online (at [www.library.ca.gov/crb/frivolous-action](http://www.library.ca.gov/crb/frivolous-action)). Also in October, the Research Bureau sent reminders to those individual law firms that submitted their filed motions to the Bureau, but failed to include the court orders.

Additionally, the Research Bureau contacted the Superior Courts of the 12 largest counties (by population) to verify the frequency of section 128.5 and 128.7 filings being collected. Ten courts replied to confirm that they do not actively track frivolous litigation data in their judicial administrative records.<sup>58</sup> Recent data on section 128.5 or 128.7 motions was requested from Shasta County Superior Court to enable comparison with the 1995 Judicial Council data, but unfortunately no records of those motions are maintained there either.

### Complications with Submissions

The Research Bureau's *Frivolous Action Filings* web page currently does not show all documents received by the Bureau: 33 submissions were not uploaded due to various complications with the paperwork. Of these 33,

eight unpublished motions involved estate, trust or guardianship cases without clear petitioners and respondents. Five submissions were missing filing dates and thus were not official, conformed documents. Two submissions were even claimed afterward to not pertain to section 128.5 or 128.7 or not to have been filed by the submitting law offices.

Interestingly, two of the unpublished motions were not uploaded because each of the filing parties had prevailed with a section 425.16 anti-SLAPP motion, an alternative statutory instrument against a specific type of frivolous lawsuit.<sup>59</sup> Seven other motions were quashed, moot, withdrawn or had cases settled, dismissed or vacated before the court ruled on sanctions.

Sometimes, the California Code of Civil Procedure section under which sanctions were sought is not listed on the caption pages sent to the Research Bureau, but in the text of the unsent pages. Multiple motions can also be filed together. Sixteen submissions published on the *Frivolous Action Filings* web page did not specify the section code under which sanctions were requested, and three submissions cited sections other than 128.5 or 128.7 on their caption pages (see Table 2). These nineteen submissions are still included, but their sanctioning rule (whether section 128.5 or 128.7) is unknown.

## Appendix D: Fee-Shifting as Sanctions in Other States

The core sanctioning device in sections 128.5 and 128.7 is the fee shifting of attorney's fees from the prevailing party to the frivolous party.<sup>60</sup> Other states have used fee shifting to deter frivolous litigation, and their experiences provide some perspective on the effect of fee shifting on frivolous litigation.

### Alaska: Attorney Surveys on Rule 82

Alaska is the only state in which the “loser pays” the legal costs in all civil cases. Civil Rule 82 states:

Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.<sup>61</sup>

Up to 30 percent of attorney's fees can be recovered, depending on who prevails (plaintiff or defendant) and the stage of the lawsuit when resolved. However, the court has discretion to vary the award given certain factors, such as for “vexatious or bad faith conduct.”<sup>62</sup>

The majority of attorneys surveyed by the Alaska Judicial Council and the National Center of State Courts believed Rule 82 does not reduce the number of frivolous lawsuits or discourage bad-faith conduct.<sup>63</sup> Respondents commented that most litigants of frivolous suits filed for emotional or ideological reasons (rather than financial) or were “judgment-proof,” meaning they lacked the means to pay shifted fees. Many judgment-proof litigants were self-represented, which usually meant they could not afford legal counsel (and thus unable to pay shifted fees).

However, Rule 82 does affect middle-income litigants, who file fewer low-merit cases or feel greater pressure to settle claims (fee awards do not concern the judgment-proof or individual and corporate litigants with resources).<sup>64</sup> A criticism of Rule 82 as deterrence against frivolous litigation is that losing parties are

punished for the conduct of their attorneys, who decide if a claim has merit.<sup>65</sup>

### Florida: Loser Pays for Malpractice

Unlike Alaska, Florida applied a “loser pays” rule limited exclusively to medical malpractice cases in hopes of reducing abusive litigation.<sup>66</sup> The law was in effect from 1980 to 1985, and repealed after several expensive cases lost by physicians and hospitals, including a case involving a multimillion-dollar attorney's fee.<sup>67</sup> Many plaintiffs were also judgment-proof.

However, under the loser pays rule, more malpractice claims were voluntarily dropped and the percentage share of lawsuits that went to trial halved.<sup>68</sup> Claims also tended to be settled more.<sup>69</sup> For cases that went to trial, plaintiffs more often prevailed and the average award amount nearly tripled, but both results were likely due to a pool of stronger lawsuits after frivolous cases had dropped.<sup>70</sup>

### Louisiana: Subjectivity in Appeals

Louisiana grants appellate judges discretion to “award damages, including attorney fees, for frivolous appeal or application for writs.”<sup>71</sup> However, fewer than three appeals have been found frivolous on average each year.<sup>72</sup> In the past 30 years, sanctions were imposed in only 83 cases, many involving emotional issues, such as divorces with alimony, harassment between former romantic partners or feuding neighbors, and repetitive filings of family law cases.<sup>73</sup>

Two reasons probably explain the unwillingness to impose sanctions: the dislike of being reversed by the Louisiana Supreme Court (which is not known for upholding sanctions)<sup>74</sup>, and more importantly, the highly subjective standard that damages for frivolous appeal are allowed only when “it is obvious that the appeal was taken solely for delay or that counsel is not sincere.”<sup>75</sup>

## Appendix E: Fifty-State Survey of Frivolous Lawsuit Statutory Citations



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Statutory Citations regarding Frivolous Lawsuits  
December 12, 2016

### Frivolous Lawsuit Definition

A frivolous lawsuit is a lawsuit having no legal basis, generally brought solely to harass the defendant. Therefore, generally, a reasonable good faith basis must exist in order to give rise to the claim. Basically, where any reasonable review of plaintiff's claim would show that the lawsuit has no factual or legal basis, the suit is likely frivolous.

Please see the following court rules for sample language:

Kentucky Supreme Court Rule 3.130(3.1)

Tennessee Supreme Court Rule 3.1

| State      | Award of Attorney Fees and Payment of Court Costs*   | Relating to Prisoners                                      | Frivolous Appeals (Civil/Criminal)                                     | Pleading or Security Requirement   |
|------------|--|--|--|--|
| Alabama    | \$6-5-156.5<br>\$8-19-10<br>\$12-19-270 <i>et seq.</i>   |  |  |  |
| Alaska     | \$09.60.010<br>\$45.50.537   |  |  |  |
| Arizona    | \$3-367<br>\$41.1092.12  |  | \$12-2106  | \$12-3201  |
| Arkansas   | \$8-7-1015<br>\$16-22-305<br>\$16-68-508<br>\$20-16-1110<br>\$25-19-107  | \$16-68-607<br>\$16-106-201 <i>et seq.</i><br>\$16-106-302 |  |  |
| California | Business & Professions Code §809.9<br>Civil Code §1363.09<br>Civil Code §1365.2<br>Civil Code §1947.15<br>Code of Civil Procedure §128.5<br>Education Code §56507<br>Elections Code §14030 |  | Code of Civil Procedure §907<br>Public Resources §30620 <i>et seq.</i> | Code of Civil Procedure §391 <i>et seq.</i><br>Code of Civil Procedure §1029.6 |

|                      |  |                                 |          |                                |
|----------------------|--|---------------------------------|----------|--------------------------------|
|                      | Financial Code §17331.3<br>Government Code §3260<br>Government Code §3309.5<br>Government Code §6259<br>Government Code §9079<br>Government Code §11130.5<br>Government Code §11455.3<br>Government Code §12598<br>Government Code §12652<br>Government Code §31000.6<br>Government Code §54960.5<br>Government Code §65589.5<br>Government Code §65914<br>Health & Safety Code §25249.7<br>Insurance Code §1871.7<br>Labor Code §2692<br>Labor Code §5813<br>Penal Code §11161.9<br>Penal Code §11172<br>Public Resources Code §14591.3 |                                 |          |                                |
| Colorado             | §1-4-501<br>§1-11-203.5<br>§1-11-217<br>§13-16-123<br>§13-17-101 <i>et seq.</i><br>§22-12-106<br>§24-6-402<br>§24-72-204<br>§38-12-219   | §13-17.5-101 <i>et seq.</i>     |          |                                |
| Connecticut          | §17b-301f<br>§52-568<br>§52-568a   |                                 | §1-206   |                                |
| Delaware             | Title 6, §1205<br>Title 6, §5005<br>Title 29, §10005   | Title 10, §8801 <i>et seq.</i>  |          | Title 10, §8801 <i>et seq.</i> |
| District of Columbia | §36-303.06   |                                 |          |                                |
| Florida              | §68.086<br>§112.3187<br>§120.595<br>§501.211<br>§626.9927  | §903.132<br>§944.279<br>§944.28 | §120.595 | §68.093                        |

|           |   |   |                                    |                         |
|-----------|---|---|------------------------------------|-------------------------|
|           | §718.1255   |   |                                    |                         |
| Georgia   | §8-3-213<br>§8-3-218<br>§10-1-702<br>§20-2-1000<br>§49-4-168.2  | §§42-12-2 <i>et seq.</i>  | §5-3-31<br>§5-6-46<br>§8-3-215     |                         |
| Guam      | Title 5, §10112<br>Title 10, §91A107  |   | Title 7, §25106<br>Title 8, §40.85 |                         |
| Hawaii    | §46-177<br>§84-31<br>§92F-27<br>§97-6<br>§165-5<br>§431:10C-211<br>§507D-7<br>§607-14.5<br>§661-12<br>§661-27<br>§671D-12     |   |                                    | §634J-1 <i>et seq.</i>  |
| Idaho     | §12-123<br>§31-3220   | §20-209E<br>§20-628<br>§31-3220A  |                                    | §39-8701 <i>et seq.</i> |
| Illinois  | Chapter 5, §120/3<br>Chapter 215, §5/155<br>Chapter 215, §105/13<br>Chapter 740, §92/25<br>Chapter 740, §175/4                | Chapter 705,<br>§105/27.9<br>Chapter 730, §5/3-3-<br>2<br>Chapter 730, §5/3-4-<br>3<br>Chapter 730, §5/3-<br>12-5<br>Chapter 735, §5/22-<br>105 |                                    |                         |
| Indiana   | §5-11-5.5-6<br>§5-14-1.5-7<br>§5-14-3-9<br>§24-4-7-5<br>§27-1-3.1-17<br>§31-17-4-3<br>§34-13-3-21<br>§34-13-4-4<br>§34-52-1-1 |   | §33-35-5-10                        |                         |
| Iowa      | §216.16<br>§625.22<br>§625.29   | §610A.1 <i>et seq.</i>  |                                    | §617.16                 |
| Kansas    | §25-4714<br>§40-3111<br>§43-173<br>§74-7311<br>§75-3079   |   |                                    |                         |
| Kentucky  |   | §197.045<br>§454.400 <i>et seq.</i>   |                                    |                         |
| Louisiana | R.S. §3:3605<br>R.S. §39:2157<br>R.S. §39:2163<br>R.S. §39:2165.6<br>R.S. §39:2165.12   | R.S. §§15:1178<br>R.S. §15:1181 <i>et seq.</i>  | R.S. §47:9017<br>C.C.P. Art. 2164  |                         |

Frivolous Action Filings in California Courts

|               |  |   |  |  |
|---------------|--|---|--|--|
|               | R.S. §46:439.1<br>R.S. §46:1820<br>R.S. §49:146  |   |  |  |
| Maine         | Title 5, §209<br>Title 10, §1344<br>Title 10, §1456<br>Title 15, §806  | Title 4, §1058  | Title 10, §1169<br>Title 14, §1802   |  |
| Maryland      | Commercial Law §13-408<br>State Finance & Procurement §19-109<br>State Government §15-517  | Courts & Judicial Proceedings §5-1004<br><i>et seq.</i> | Labor and Employment, §9-749   |  |
| Massachusetts | Chapter 90, §7N1/4<br>Chapter 112, §5G<br>Chapter 183, §64<br>Chapter 184, §15<br>Chapter 231, §6F<br>Chapter 258, §11<br>Chapter 262, §64 | Chapter 127, §129D                                      | Chapter 90, §7N1/2<br>Chapter 211, §10<br>Chapter 211A, §15<br>Chapter 231, §108 |  |
| Michigan      | §324.61503c<br>§400.610a<br>§570.588<br>§600.2421c<br>§600.2591<br>§600.4915<br>§600.4963<br>§752.1068                                     | §600.5501 <i>et seq.</i>                                | §600.2421d   |  |
| Minnesota     | §13.08<br>§13D.06<br>§15C.12<br>§145.4247<br>§484.74   | §563.01 <i>et seq.</i>                                  | §430.03<br>§462.14<br>§465.43  |  |
| Mississippi   | §11-1-54<br>§53-9-67<br>§75-24-15  | §47-5-76  |  |  |
| Missouri      | §67.138<br>§105.957<br>§514.205  | §217.262  |  |  |
| Montana       | §2-2-144<br>§3-15-205<br>§15-1-222<br>§25-10-711<br>§46-8-103<br>§50-5-306   |   |  |  |
| Nebraska      | §25-824 <i>et seq.</i><br>§25-21,188.01<br>§25-2211<br>§25-2306<br>§28-3,109<br>§30-2620.01<br>§30-2643<br>§43-1412                        | §25-3401  | §25-1711   |  |
| Nevada        | §41.0393   |   |  |  |
| New Hampshire | §91-A:8<br>§356-C:10   | §623-B:3  | §490:14-a  |  |

|                |   |   |                                  |                              |
|----------------|---|---|----------------------------------|------------------------------|
|                | §358-C:4<br>§491:24<br>§507:15<br>§507-G:1 <i>et seq.</i>   |   |                                  |                              |
| New Jersey     | §2A:32C-8<br>§2A:61A-3  | §30:4-16.2                                    | §56:12-83                        |                              |
| New Mexico     | §47-8-33<br>§47-9-7<br>§48-1A-2<br>§57-16A-9<br>§57-27-5  |   | §17-2-43.1<br>§17-2A-3           |                              |
| New York       | Civil Practice Law and<br>Rules §8303-a<br>Civil Rights §70<br>Executive Law §297<br>Executive Law §621<br>Executive Law §625<br>Executive Law §631   | Correction Law §803<br>Correction Law<br>§806 |                                  |                              |
| North Carolina | §1D-45<br>§6-21.4<br>§6-50<br>§7A-228<br>§20-351.8<br>§24-10.2<br>§41A-7<br>§50-13.6<br>§75-16.1<br>§75-105<br>§75-118<br>§95-25.22<br>§95-243<br>§99D-1<br>§131E-188                                 | §1-110  |                                  |                              |
| North Dakota   | §32-40-10<br>§61-32-07  |   |                                  |                              |
| Ohio           | §101.15<br>§121.22<br>§901.261<br>§2307.52<br>§2307.53<br>§2323.51 <i>et seq.</i><br>§4111.14<br>§4113.71<br>§5709.22   | §2969.21 <i>et seq.</i><br>§5120.011          | §3702.60                         |                              |
| Oklahoma       | Title 12, §941<br>Title 12, §2003.2<br>Title 12, §2011<br>Title 12, §2011.1<br>Title 50, §1.1<br>Title 51, §24A.17<br>Title 62, §373<br>Title 63, §1-738n<br>Title 63, §1-740.4a<br>Title 63, §5053.4 | Title 57, §566 <i>et seq.</i>                 | Title 12, §995<br>Title 37, §531 | Title 76, §35 <i>et seq.</i> |
| Oregon         | §20.098<br>§243.672   | §30.642 <i>et seq.</i><br>§423.425            | §656.390                         |                              |

Frivolous Action Filings in California Courts

|                |  |  |  |   |
|----------------|--|--|--|---|
|                | §343.175<br>§646A.476<br>§697.087  |  |  |   |
| Pennsylvania   | Pa. Cons. Stat. tit. 3,<br>§317<br>Pa. Stat. tit. 43, §1475<br>Pa. Stat. tit. 65,<br>§67.1304  |  |  | Pa. Cons. Stat. tit. 18,<br>§5109                           |
| Puerto Rico    |  |  |  |   |
| Rhode Island   | §5-55-8<br>§9-1.1-4<br>§9-29-21<br>§23-4.12-4<br>§28-33-17.3   |  | §8-8-31<br>§31-5.2-7.1   |   |
| South Carolina | §1-23-670<br>§7-17-275<br>§15-36-10<br>§39-65-40<br>§44-7-220<br>§59-150-300   | §16-1-100<br>§24-27-300  | §47-17-30<br>§47-19-40   |   |
| South Dakota   | §15-17-51<br>§16-2-29.4<br>§21-10-25.6<br>§34-23A-22   | §21-62-4<br>§23A-38-7<br>§23A-43-16<br>§24-2-29.1  | §15-26A-21<br>§39-5-22   |   |
| Tennessee      | §4-18-104<br>§6-58-104<br>§20-12-130<br>§20-12-132<br>§39-13-216<br>§45-20-107<br>§47-32-107<br>§47-50-114<br>§50-1-310<br>§71-5-183   | §41-21-801 <i>et seq.</i>  | §4-51-127<br>§27-1-122<br>§50-6-225<br>§53-7-203   |   |
| Texas          | Civil Practices &<br>Remedies Code §13.001<br>Civil Practices &<br>Remedies Code<br>§105.002<br>Education Code §11.161<br>Education Code<br>§22.055<br>Government Code<br>§101.061<br>Government Code<br>§101.081<br>Government Code<br>§101.1211<br>Government Code<br>§101.141<br>Government Code<br>§101.151<br>Human Resources<br>Code §36.112<br>Insurance Code<br>§541.153 | Civil Practices &<br>Remedies Code<br>§§14.001 <i>et seq.</i><br>Government Code<br>§498.0045<br>Health & Safety<br>Code §841.123<br>Code of Criminal<br>Procedure §11.072<br>Code of Criminal<br>Procedure §42.09 | Civil Practice &<br>Remedies Code<br>§13.003<br>Code of Criminal<br>Procedure Art. 56.43 | Civil Practice &<br>Remedies Code<br>§11.001 <i>et seq.</i> |

|                |   |                          |                    |  |
|----------------|---|--------------------------|--------------------|--|
|                | Insurance Code<br>§541.253<br>Occupations Code<br>§160.008<br>Occupations Code<br>§202.457<br>Occupations Code<br>§261.104<br>Occupations Code<br>§303.009<br>Occupations Code<br>§505.603<br>Occupations Code<br>§555.012<br>Occupations Code<br>§1802.302<br>Property Code §27.0031 |                          |                    |  |
| Utah           | §17C-1-412<br>§59-1-1005<br>§62A-3-314<br>§78-7-43  |                          |                    |  |
| Vermont        | Title 10, §6246<br>Title 12, §5771  |                          |                    |  |
| Virginia       | §6.1-422.1<br>§6.2-1628<br>§8.01-216.7<br>§22.1-214<br>§59.1-207.14   |                          | §15.2-2314         |  |
| Virgin Islands | Title 4, §483<br>Title 4, §513  |                          |                    |  |
| Washington     | §4.84.185<br>§7.70.160<br>§19.98.140<br>§34.05.598<br>§42.30.120<br>§49.44.135  |                          | §10.73.140         |  |
| West Virginia  | §6-9A-7<br>§16-5G-6<br>§30-3C-4   | §§25-1A-1 <i>et seq.</i> | §14-2A-19          |  |
| Wisconsin      | §802.05<br>§846.40<br>§995.50   |                          | §230.87<br>§809.25 |  |
| Wyoming        | §1-11-401   |                          |                    |  |

\* Generally, where a person brings an action that is frivolous (a lawsuit having no legal basis, generally brought solely to harass the defendant), the court will charge the plaintiff with the payment of both court costs and the defendant's attorney fees.

## Endnotes

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<sup>1</sup> Further references to code sections (§128.5 and §128.7 in text and endnotes; §177.5 in endnote 17; §425.16, §425.17 and §425.18 in endnote 18; §391 in endnote 39) are to the California Code of Civil Procedure, unless otherwise specified.

<sup>2</sup> The awarding of attorney fees – requiring the loser to pay the winner’s attorney fees – is called fee shifting. The main argument for fee shifting in the United States is deterrence against frivolous litigation abuse. In the U.S. civil justice system, fee shifting as a deterrent or punitive measure in frivolous lawsuits is a statutory exception to the general practice, known as the American Rule, in which both parties in a lawsuit pay their own attorney fees. The U.S. Supreme Court endorsed the American Rule doctrine in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796) and affirmed with exceptions in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). <https://supreme.justia.com/cases/federal/us/421/240/case.html> While U.S. federal courts lack the unilateral authority to shift attorney’s fees, they still possess inherent power to sanction misconduct (see endnote 48).

Other theoretical arguments for fee shifting are that prevailing parties should be “made whole” or fully compensated, which includes legal costs; that it encourages public interest lawsuits by private citizens who otherwise would not benefit financially; and that it broadens court access to people with legitimate claims but have limited means to litigate without fee-shifting. In one-way fee shifting, only the plaintiff is awarded attorney fees upon prevailing, but a successful defendant is not granted the same benefit. In two-way fee shifting, also known as “loser pays,” the loser, whether plaintiff or defendant, pays the prevailing party’s attorney fees. The English Rule of two-way fee shifting for all civil cases governs most of the rest of the world. Alaska practices the English Rule, the exception in the United States.

For fee shifting in general, see Feuerstein, L. (1995). *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*. Pepperdine Law Review 23(1), 122-173 and Gryphon, M. (2008). *Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System*. Manhattan Institute for Policy Research. Proposals to expand fee shifting in the United States to deter frivolous litigation are usually discussed as part of tort reform, an issue beyond the scope of this report.

<sup>3</sup> Senate Committee on Judiciary. (1994, Aug. 16). Analysis of AB 3594 (1993-94 Regular Session), p.3.

<sup>4</sup> *West Coast Development v. Reed* (1992) 2 Cal. App. 4<sup>th</sup> 693. <http://law.justia.com/cases/california/court-of-appeal/4th/2/693.html>. On how meritless action could imply bad faith motive, see *Dolan v. Buena Engineers, Inc.* (1994) 24 Cal. App. 4<sup>th</sup> 1500. <http://law.justia.com/cases/california/court-of-appeal/4th/24/1500.html>. On how meritless action do not imply such, see *Summers v. City of Cathedral City* (1990) 225 Cal. App. 3d 1047. <http://law.justia.com/cases/california/court-of-appeal/3d/225/1047.html>

<sup>5</sup> AB 3594 (Stats. 1994, Ch. 1062). <http://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-1994>. For an “objective unreasonable” standard for the new section 128.5, unlike for the former version, see endnote 31.

<sup>6</sup> See Rule 11 of Federal Rules of Civil Procedure at [https://www.law.cornell.edu/rules/frcp/rule\\_11](https://www.law.cornell.edu/rules/frcp/rule_11). Rule 11 before 1993 actually made sanctions mandatory rather than discretionary, which increased satellite litigation that applied Rule 11 itself as an intimidation or delaying tactic, enabled discriminatory and vindictive use by judges and possibly caused a “chilling effect” that discouraged legal innovation and legitimate civil rights claims. Other criticism included a disincentive for parties to drop or settle claims, applied bias against plaintiffs, a growing norm of fee-shifting rather than the preferred nonmonetary sanctions, and increased conflict between counsel. Vairo, G. (1994). *The New Rule 11: Past as Prologue?* Loyola of Los Angeles Law Review 28, 39-88. <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1870&context=llr>

Much has been written about Rule 11, as “[n]o other single procedure rule in the nation’s history was ever given so much critical attention.” Carrington, P. and Wasson, A. (2004). *A Reflection on Rulemaking: The Rule 11 Experience*. Loyola of Los Angeles Law Review 37, 563-572. For short overview, see Feuerstein, L. (1995). *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*. Pepperdine Law Review 23(1), 122-173. For legislative history, see Joseph, G. (2012). *Sanctions: The Federal Law of Litigation Abuse* (4<sup>th</sup> ed.). LexisNexis. On how Rule 11, the model for section 128.7, is sidestepped in favor of other available sanctioning mechanisms, see Hart, D. (2004). *And the Chill Goes on – Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-Vis 28 U.S.C. 1927 and the Court’s Inherent Power*. Loyola of Los Angeles Law Review 37, 645-690. <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2415&context=llr>

The House of Representatives recently passed the Lawsuit Abuse Reduction Act of 2015 (H.R. 758), which would make Rule 11 sanctions mandatory again. <https://www.govtrack.us/congress/bills/114/hr758/summary>

<sup>7</sup> Assembly Committee on Judiciary. (1994, May 11). Analysis of AB 3594, p.3. Opponents of AB 3594 had argued the new Rule 11 was “untested” and its adoption in California as section 128.7 was premature. Senate Committee on Judiciary. (1994), p.5.

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- <sup>8</sup> AB 3594 (Stats. 1994, Ch. 1062), §3(g) grants an important exemption from sanctions for disclosures and discovery requests, responses, objections and motions. This exemption is intended to reduce satellite litigation, which are secondary lawsuits over details within a primary lawsuit.
- <sup>9</sup> Even in 2014, §128.5 continued to apply to a small number of still-active cases that were filed on or before December 31, 1994. Assembly Committee on Judiciary. (2014, Apr. 29). Analysis of AB 2494, p.1. See also endnote 54.
- <sup>10</sup> Assembly Committee on Judiciary. (1998, Jun. 9). Analysis of SB 1511, p.5.
- <sup>11</sup> Assembly Committee on Judiciary. (2014, Apr. 29). Analysis of AB 2494, p.3. [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140AB2494](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB2494)
- <sup>12</sup> *ibid.*, p.2.
- <sup>13</sup> AB 2494 (Stats. 2014, Ch. 425), §1(f). [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB2494](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2494)
- <sup>14</sup> On whether the new §128.5 applies to ongoing litigation filed before January 1, 2015, see *San Diegans for Open Government v. City of San Diego* (2016) 247 Cal. App. 4th 1306. <http://law.justia.com/cases/california/court-of-appeal/2016/d068421.html>
- <sup>15</sup> AB 2494 (Stats. 2014, Ch. 425), §1(h).
- <sup>16</sup> The 2015-2016 filing rates are compared to only the 2015 civil filings for each county because the 2016 civil filing numbers are not finalized yet (see endnote 22). Compared to county population, San Francisco (0.0014 sanctions motions filed per capita) leads all counties, followed by Sonoma (0.0010), Placer (0.0008) and Napa (0.0007). County populations from the U.S. Census Bureau 2015 Population Estimates. <https://factfinder.census.gov>
- <sup>17</sup> §177.5: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=177.5](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=177.5)
- <sup>18</sup> A strategic lawsuit against public participation (SLAPP) is a specific type of frivolous lawsuit that censors or harasses critics who speak to the government or on issues of public interest by burdening them with legal costs. SLAPPs are typically ordinary tort claims such as defamation (libel or slander), but intended to impede rights of free speech and redress of grievances.
- There is no federal anti-SLAPP law. Among the 28 states with statutory protections, California has unique anti-SLAPP statutes: §425.16 provides a special motion to strike that stays all discovery (which greatly reduces legal costs) and makes awards of attorney’s fees mandatory, §425.17 curbs the abuse of §425.16 anti-SLAPP motions by prohibiting them in certain public interest lawsuits and §425.18 helps facilitate recovery of damages against SLAPP filers and attorneys. §425.16: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=425.16](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=425.16)
- SB 1264 (Stats. 1992, Ch. 726) created §425.16. If the special motion to strike is itself frivolous, then the prevailing defendant is required an award of attorney’s fees pursuant to §128.5. <http://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-1992>. SB 786 (Stats. 2009, Ch. 65) restricted such §128.5 awards in cases involving the public records act or open meetings law. [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=200920100SB786](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200920100SB786). SB 1304 (Stats. 2014, Ch. 71) added a provision, similar to AB 2494’s instruction for the California Research Bureau to maintain a public record of §128.5 and §128.7 motions, that directs the Judicial Council to keep a public record of §425.16 motions. [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB1304](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB1304)
- <sup>19</sup> Summary judgment is one legal remedy against frivolous lawsuits. §437c: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=437c](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=437c) On the intent of summary judgment to promptly dispose of meritless cases, see “Notes of Advisory Committee on Rules – 1937” for Federal Rule 56 at [https://www.law.cornell.edu/rules/frcp/rule\\_56](https://www.law.cornell.edu/rules/frcp/rule_56)
- <sup>20</sup> §575.2: [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=CCP&sectionNum=575.2](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=575.2)
- <sup>21</sup> On sanctions in small claims court, see California Rules of Court Rule 2.30. [http://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2\\_30](http://www.courts.ca.gov/cms/rules/index.cfm?title=two&linkid=rule2_30). On limits to sanctions in small claims, see California Code of Civil Procedure 116.780. [http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=116.780.&lawCode=CCP](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=116.780.&lawCode=CCP)
- <sup>22</sup> The total civil filings for state and counties in 2015 are provided by the Judicial Council of California. Included in the unlimited and limited civil filings are: auto tort, personal injury, property damage, wrongful death, other tort, employment, contracts, real property and other civil cases. Unlawful detainers, judicial reviews, enforcement of judgment and small claims appeals are not included. Data for 2016 are still being compiled.

The Judicial Council's 2016 *Court Statistics Report* provides the most recent publicly available caseload data, which is for fiscal year 2015 (not calendar year 2015). <http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf>. The Court Statistics Project by the National Center for State Courts also has fiscal year data for state court caseloads, but not at county-level. LaFountain, R., Schauffler, R., Holt, K. and Lewis, K. (2016). *Court Statistics Project DataViewer*. [www.courtstatistics.org](http://www.courtstatistics.org). Unlike the Court Statistics Project, the Judicial Council does not include certain categories in its total civil filings data, such as probate, mental health, civil appeals and non-criminal habeas corpus cases.

- <sup>23</sup> In *Vranesh v. The Commission of Professional Competence* (Alameda case RG15786168 in the *Frivolous Action Filings* database), the counsel for plaintiff was ordered to pay sanctions. In *Incomm Financial Services v. Stan Schuldiner* (San Francisco case CPF-15-514368), Mr. Schuldiner was acting *in propria persona*, but held to the same standards as licensed attorneys.
- <sup>24</sup> California Business and Professions Code §6068(o) lists attorney duties, including the self-reporting of sanctions greater than \$1,000. [http://leginfo.ca.gov/faces/codes\\_displaySection.xhtml?lawCode=BPC&sectionNum=6068](http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC&sectionNum=6068)
- <sup>25</sup> Data on civil case dispositions in 2015 provided by Judicial Council of California. Small claims civil cases have court hearings, while limited and unlimited civil cases have trials (jury or bench).
- <sup>26</sup> Judicial Council of California. (1999, Aug. 16). *Legislative Report on Motions Under Code of Civil Procedure Section 128.7*.
- <sup>27</sup> This is an admittedly imperfect comparison, as §128.7 was in effect for only the last six months of fiscal year 1995, which overlaps with the first half of calendar year 1995.
- <sup>28</sup> Judicial Council, *Legislative Report on Section 128.7*, pp.3-4.
- <sup>29</sup> Attorneys in Alaska believe that Alaska's fee-shifting Rule 82 has increased case settlement (see endnote 63). A strict sanctioning regime that works too well, however, might "chill" and deter legitimate claims as well as frivolous ones (see endnote 6 on the history of Federal Rule 11).
- <sup>30</sup> Data on civil case dispositions in 2015 provided by Judicial Council of California. The U.S. legal culture encourages settlement: only about 7 percent to 9 percent of lawsuits proceed to trial. Kritzer, H. (2004). *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States*, p.177, quoted in Gryphon, *Greater Justice, Lower Cost*, p.7.
- <sup>31</sup> However, a new judicial interpretation of a new §128.5 – requiring an "objectively unreasonable" legal standard for frivolous action and eliminating the old subjective standard – could make the new sanctioning option easier to leverage. See endnote 14 for *San Diego for Open Government v. City of San Diego* (2016).
- <sup>32</sup> Senate Judiciary Committee. (2014, Jun. 24). Analysis of AB 2494, p.5.
- <sup>33</sup> See endnote 18 for using §425.16 in conjunction with §128.5.
- <sup>34</sup> For example, the California Attorney's Fees legal blog summarizes multiple lawsuits with §128.5 or §128.7 sanctions that have not been reported to the Research Bureau. The blog independently tracks and discusses sanctions cases that result in published or unpublished appellate opinions (but not trial court cases). [http://www.calattorneysfees.com/cases\\_sanctions/](http://www.calattorneysfees.com/cases_sanctions/)
- <sup>35</sup> Data on attorney sanctions and reportable actions provided by State Bar of California.
- <sup>36</sup> There is also the potential for self-selection bias in the filing submissions: large law firms with administrative resources and small independent law practices fearful of penalties could be more likely to self-report motion filings.
- <sup>37</sup> Rates of litigation in general (and possibly frivolous litigation as a subset) could be cyclical. Patent litigation has been found to be highly negatively correlated with the business cycle: patent lawsuits are low when the economy is doing well, and vice versa. Riel, B. and Meiklejohn, P. (2010). "A Correlation Between the State of the US Economy and Patent Litigation Activity." *Journal of the Patent and Trademark Office Society*. [http://files.dorsey.com/files/upload/Meiklejohn\\_JPTOS\\_Winter10.pdf](http://files.dorsey.com/files/upload/Meiklejohn_JPTOS_Winter10.pdf)
- Total state civil filings have steadily trended downward since a spike in fiscal year 2009 (the beginning of the recent recession), and are 21 percent lower than 10 years ago. Judicial Council, *2016 Court Statistics*. See summary at <https://jcc.legistar.com/View.ashx?M=F&ID=4747137&GUID=157A4D01-BBA6-44F9-96B3-BC6CBFC3D269>. Frivolous filings could possibly decline in similar fashion. If the decline is merely temporary and tied to the economic cycle, then litigation (and frivolous filings) could spike again if the economy enters another recession.

- <sup>38</sup> The survey was drafted with help from Alaska Supreme Court justices and used the free SurveyMonkey online survey tool to email members of the Alaska Bar Association. The survey received a 20 percent response rate. Meade, N. (2012). *Attorney's*

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*Fee Shifting: Perceptions on Its Impact in Alaska*. National Center for State Courts, Institute of Court Management. <http://www.ncsc.org/~media/files/pdf/education%20and%20careers/cedp%20papers/2012/attorneys%E2%80%8C%20fee%20shifting>

<sup>39</sup> Since 1991, the Judicial Council has maintained a list of vexatious litigants, as defined by §391. <http://www.courts.ca.gov/12272.htm>.

<sup>40</sup> As an example of the various reasons for sanctions, the State Bar disciplinary record of sanctioned attorneys lists 15 different categories: bad faith, breach of fiduciary duty, delay, disrespect, failure to appear, frivolous, gross negligence, harassment, incompetence, miscellaneous, misconduct, misrepresentation, negligence, offensive language/actions and violation of a court order.

<sup>41</sup> *Bauguess v. Paine* (1978) 22 Cal.3d 626. <http://scocal.stanford.edu/opinion/bauguess-v-paine-30502>

<sup>42</sup> SB 947 (Stats. 1981, Ch. 762) §2. <http://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-1981>

<sup>43</sup> *Ibid.*, §1(a).

<sup>44</sup> See “Notes of Advisory Committee on Rules – 1983 Amendment” at [https://www.law.cornell.edu/rules/frcp/rule\\_11](https://www.law.cornell.edu/rules/frcp/rule_11)

<sup>45</sup> AB 2752 (Stats. 1984, Ch. 355). <http://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-1984>

<sup>46</sup> SB 379 (Stats. 1985, Ch. 296). <http://clerk.assembly.ca.gov/content/statutes-and-amendments-codes-1985>

<sup>47</sup> See endnote 4 on the high threshold for sanctions in §128.5.

<sup>48</sup> *Chambers v. NASCO, Inc.* (90-256), 501 U.S. 32 (1991). <https://www.law.cornell.edu/supct/html/90-256.ZS.html>

<sup>49</sup> See “Notes of Advisory Committee on Rules – 1993 Amendment” at [https://www.law.cornell.edu/rules/frcp/rule\\_11](https://www.law.cornell.edu/rules/frcp/rule_11)

<sup>50</sup> AB 3594 (Stats. 1994, Ch. 1062), §2.

<sup>51</sup> *Trans-Action Commercial Investors, Ltd. V. Firmaterr, Inc.* (1997) 60 Cal. App. 4<sup>th</sup> 352. <http://law.justia.com/cases/california/court-of-appeal/4th/60/352.html>

<sup>52</sup> SB 1511 (Stats. 1998, Ch. 121). [http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb\\_1501-1550/sb\\_1511\\_bill\\_19980710\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1501-1550/sb_1511_bill_19980710_chaptered.pdf)

<sup>53</sup> SB 2009 (Stats. 2002, Ch. 491). [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200120020SB2009](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200120020SB2009)

<sup>54</sup> *Olmstead v. Gallagher & Co.* (2004) 32 Cal. 4<sup>th</sup> 804 confirmed that §128.5 does not apply to claims filed after December 31, 1994, when §128.7 went into effect. <http://scocal.stanford.edu/opinion/olmstead-v-gallagher-co-33385>

<sup>55</sup> AB 1742 (Stats. 2005, Ch. 706) §9. [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060AB1742](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB1742)

<sup>56</sup> AB 1891 (2008). [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200720080AB1891](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200720080AB1891)

<sup>57</sup> SB 1330 (Stats. 2010, Ch. 328) §31. [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=200920100SB1330](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=200920100SB1330)

<sup>58</sup> The 10 courts that confirmed: Alameda, Contra Costa, Kern, Los Angeles, Orange, Riverside, Sacramento, San Bernardino, San Diego, and San Francisco. The Judicial Council only compiles statistics submitted by the individual Superior Courts.

<sup>59</sup> See endnote 18 on §425.16, California’s anti-SLAPP law.

<sup>60</sup> See endnote 2 on fee shifting.

<sup>61</sup> Alaska Rules of Court. *Rules of Civil Procedure*. <http://www.courtrecords.alaska.gov/webdocs/rules/docs/civ.pdf>

<sup>62</sup> The Alaska Supreme Court interpreted judicial discretion in Rule 82 to include a significant exception for public interest litigants, who do not pay attorney’s fees if losing and recover full fees if prevailing. Another factor for judicial discretion in award amounts is if “the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts.”

<sup>63</sup> Di Pietro, S., Carns, T. and Kelley, P. (1995). *Alaska’s English Rule: Attorney’s Fee Shifting in Civil Cases*. Alaska Judicial Council. See executive summary at <http://www.ajc.state.ak.us/reports/atyfeeexec.pdf>; Meade, *Impact in Alaska* (see endnote 38).

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- <sup>64</sup> Di Pietro, *Alaska's English Rule*, ES-12; Meade, *Impact in Alaska*, pp.34-36, 42-43.
- <sup>65</sup> Kordziel, K. (1993). "Rule 82 Revisited: Attorney Fee Shifting in Alaska." *Alaska Law Review* 10, pp.429-468. <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1307&context=alr>
- <sup>66</sup> Fla. Stat. Ann. §768.56 (West 1984), repealed by 1985 Fla. Laws ch. 85-175, §43.
- <sup>67</sup> Young, B.R. (1983). "Comment: Medical Malpractice in Florida: Prescription for Change." *Florida State University Law Review* 10, pp.593-618. [http://heinonline.org/HOL/Page?handle=hein.journals/flsulr10&div=36&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/flsulr10&div=36&g_sent=1&collection=journals); Snyder, E. and Hughes, J. (1990). "The English Rule for Allocating Legal Costs: Evidence Confronts Theory." *Journal of Law, Economics, and Organization* 6, pp.345-380. [http://masonlec.org/site/rte\\_uploads/files/Manne/Readings/Litigation%20and%20Civil%20Procedure%20Workshop/Snyder%20Hughes%20Englishe%20Rule%20for%20Allocating%20Legal%20Costs.pdf](http://masonlec.org/site/rte_uploads/files/Manne/Readings/Litigation%20and%20Civil%20Procedure%20Workshop/Snyder%20Hughes%20Englishe%20Rule%20for%20Allocating%20Legal%20Costs.pdf)
- <sup>68</sup> Only 44 percent of medical malpractice plaintiffs voluntarily dropped their lawsuits under the American rule versus 54 percent under loser pays. The percentage of malpractice suits going to trial decreased from 11 percent to 6 percent under loser pays. Snyder and Hughes, *The English Rule*, p.364.
- <sup>69</sup> *Ibid.*, pp.377-378.
- <sup>70</sup> Hughes, J. and Snyder, E. (1995). "Litigation and Settlement Under the British and American Rules: Theory and Evidence." *Journal of Law and Economics* 38, p. 226, cited in Gryphon, *Greater Justice, Lower Cost*, p.16.
- <sup>71</sup> Louisiana Code of Civil Procedure article 2164. <https://legis.la.gov/Legis/Law.aspx?d=111403>. Louisiana Code of Civil Procedure article 863 applies in trial courts. <https://legis.la.gov/Legis/law.aspx?d=112283>
- <sup>72</sup> Stephenson, G. (2015). "Sanctions for Frivolous Civil Appeals in Louisiana." *Louisiana Law Review* 75, pp.1125-1163. <http://digitalcommons.law.lsu.edu/lalrev/vol75/iss4/10/>. "No Louisiana appellant has ever been held in contempt for filing a frivolous appeal." *Ibid.*, p.1151.
- <sup>73</sup> *Ibid.*, pp.1131-1133.
- <sup>74</sup> *Ibid.*, p.1162. The Louisiana State Legislature had considered a resolution, similar to AB 2494 §3, that directs the Louisiana Judicial Council to report on the judicial enforcement of sanctions for filing frivolous pleadings. Louisiana HCR 137 (Harrison, 2014). <http://www.legis.la.gov/legis/BillInfo.aspx?s=14RS&b=HCR137>
- <sup>75</sup> *Parker v. Interstate Life & Accident Insurance Co.* (1965). 179 So. 2d 634. <http://law.justia.com/cases/louisiana/supreme-court/1965/248-la-449-0.html>