

Invitation to Comment

Title	Civil Cases: Vexatious Litigants (Code Civ. Proc., §§ 391.7 and 391.8).
Summary	This proposal would: amend Code of Civil Procedure section 391.7(b) to authorize the presiding justice or presiding judge to order that notice be given of a vexatious litigant’s status if the clerk mistakenly files litigation without a prefiling order; amend Code of Civil Procedure section 391.7 to add “presiding justice or” before “presiding judge” and to add “or his or her designee” to clarify that the provision applies to matters in the Court of Appeal and that a presiding justice or judge may delegate authority to make the prefiling determination; and add Code of Civil Procedure section 391.8 to provide for an application to vacate a prefiling order and remove a vexatious litigant’s name from the Judicial Council’s list of vexatious litigants.
Source	Civil and Small Claims Advisory Committee Hon. Dennis M. Perluss, Chair Trial Court Presiding Judges Advisory Committee Hon. Mary Ann O’Malley, Chair
Staff	Susan R. McMullan, Senior Attorney, 415-865-7990, susan.mcmullan@jud.ca.gov

Code of Civil Procedure section 391.7(c) provides that if the clerk mistakenly files new litigation by a vexatious litigant even though the presiding judge has not issued an order approving it, “any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order.” The filing of the notice automatically stays the litigation. This proposal would amend section 391.7(c) to authorize a presiding judge, in addition to a party, to give notice or order that notice be given of this defect in the filing. A defendant may not be aware that a plaintiff is a vexatious litigant subject to a prefiling order and this amendment would allow a presiding judge to ensure that a vexatious litigant followed the required procedures and sought and received prefiling approval before the litigation proceeds.

A vexatious litigant subject to a prefiling order is entitled to seek to be removed from the vexatious litigant list. (*Luckett v. Panos* (2008) 161 Cal.App. 4th 77.) The statutes governing vexatious litigants (Code Civ. Proc., §§ 391–391.7) do not address being removed from the list, and there are no procedures or standards for presiding judges who are confronted with a vexatious litigant’s request to be removed from the list. The criteria for reversing or vacating a prefiling order and removing a vexatious litigant from the vexatious litigant list are if either (1) there has been a material change in the facts upon which the order was entered, or (2) the ends of justice would be served. (*PBA, LLC v. KPOD, Ltd.* (2003) 112 Cal.App.4th 965, 978.) This proposal would provide, in new Code of Civil Procedure section 391.8, a means for a vexatious litigant subject to a prefiling order to seek to have the order reversed. To assist both a vexatious litigant seeking to be removed from the vexatious litigant list and a presiding judge presented with a vexatious litigant’s request to be removed from the list, section 391.8 would set out what must be shown. It would require the vexatious litigant to demonstrate that his or her application is supported by a change in the facts (i.e., he or she is no longer a vexatious litigant) or by the

ends of justice. It would specify that an application for removal must be filed in the court that entered the prefiling order and in the action in which the prefiling order was entered or in conjunction with a request to the presiding justice or judge to file new litigation under section 391.7. Finally, it would limit the frequency with which a vexatious litigant can apply for removal from the vexatious litigant list to no more than once every 180 days. Presiding judges have indicated that some vexatious litigants request removal on a weekly or monthly basis. If a vexatious litigant is unable to make the necessary showing of a change in the facts or the ends of justice supporting his or her removal from the list, it is unlikely that he or she will be able to do so without the passage of a significant amount of time between requests. The advisory committees are interested in comments on the appropriate duration of time between a vexatious litigant's requests for removal from the vexatious litigant list.

In addition, this proposal would amend to section 391.7 to add the words "presiding justice or" before "presiding judge" everywhere the latter words appear to clarify that the statute applies in the courts of appeal. The proposal would also amend section 391.7 to clarify that a presiding justice or presiding judge may delegate authority to another judicial officer to make the determination of whether the proposed litigation has merit and is not being filed for the purposes of harassment or delay.

Code of Civil Procedure section 391.7(a) authorizes a judge to enter a prefiling order that prohibits a vexatious litigant from filing any new litigation as a self-represented litigant without first obtaining leave of the presiding judge. Upon application by a vexatious litigant, the presiding judge must permit the filing if it appears that the litigation has merit and is not being filed for purposes of harassment or delay. Currently, the prefiling requirement applies only to a self-represented vexatious litigant filing new litigation. (Code Civ. Proc., § 391.7(a).)

An individual subject to a prefiling order could retain counsel for the sole purpose of avoiding the order's requirement that a presiding judge must give leave to file a new lawsuit. Because a vexatious litigant can engage in the same sort of conduct described in the definition of "vexatious litigant" in section 391 while represented by an attorney, some have suggested that section 391.7 be amended to apply to a vexatious litigant represented by an attorney. The advisory committees are interested in comments on whether section 391.7 should be amended to expand its applicability to a vexatious litigant with legal representation.

Code of Civil Procedure section 391.7 would be amended and section 391.8 would be added to read as follows:

§ 391.7 Vexatious litigant; Prefiling order prohibiting filing of new litigation

- (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge, or his or her designee, of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.
- (b) The presiding justice or presiding judge, or his or her designee, shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge, or his or her designee, may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.
- (c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge, or his or her designee, permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk, or the presiding justice or presiding judge, or his or her designee, may direct the clerk, to file and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge, or his or her designee, permitting the filing of the litigation as set forth in subdivision (b). If the presiding justice or presiding judge, or his or her designee, issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.
- (d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.
- (e) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.

§ 391.8 Order to Vacate Prefiling Order and Remove Name from Statewide Vexatious Litigant List

- (a) A vexatious litigant subject to a prefililing order under section 391.7 may file an application to vacate the prefililing order and remove the vexatious litigant's name from the Judicial Council's list of vexatious litigants subject to prefililing orders. The application must be filed in the court that entered the prefililing order and in the action in which the prefililing order was entered or in conjunction with a request to the presiding justice or judge to file new litigation under section 391.7.
- (b) An application by a vexatious litigant under (a) may not be made more than once in a 180-day period.
- (c) The court may vacate a prefililing order and order removal of a vexatious litigant's name from the Judicial Council's list of vexatious litigants subject to prefililing orders upon a showing that there has been a material change in the facts upon which the order was granted or that the ends of justice would be served by vacating the order.

Item LEG10-03 Response Form

Title: Civil Cases: Vexatious Litigants (Code Civ. Proc., §§ 391.7 and 391.8)

- Agree with proposed changes
- Agree with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

- Commenting on behalf of an organization

Address: _____

City, State, Zip: _____

To Submit Comments

Comments may be submitted online, written on this form, or prepared in a letter format. If you are *not* commenting directly on this form, please include the information requested above and the proposal number for identification purposes. Please submit your comments online or email, mail, or fax comments. You are welcome to email your comments as an attachment.

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DEADLINE FOR COMMENT: 5:00 p.m., Friday, June 18, 2010

Circulation for comment does not imply endorsement by the Judicial Council or the PolicyCoordination and Liaison Committee. All comments will become part of the public record of the council's action.