On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions

John W. Wade
FRIVOLOUS LITIGATION

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I. INTRODUCTION

The problem of frivolous civil litigation has plagued the common law since the court system became mature and, indeed, prior to that time. Frivolous lawsuits cause appreciable harm to many persons, and in many ways. The person against whom the groundless suit is brought is subjected to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property. The court system itself becomes more clogged, disrupted, and delayed, thus affecting the taxpayers in general, and other litigants who have their suits delayed. The situation cries out for remedies to avert these harms.

On the other hand, the courts were established for the purpose of providing a peaceful means for settling disputes and reaching just results on the basis of established legal principles. One who believes that he has been aggrieved should be entitled to approach the courts for relief without having to guarantee that he is correct. The courts

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have always regarded themselves as open to the public for the purpose of letting parties learn whether a disputed claim is valid; and they have jealously preserved and guarded this significant function.¹

Obviously, a fine line must be drawn, delicately balancing important conflicting interests, in order to decide whether the bringing of a cause of action is justifiable or not.² To do this, the common law developed a special tort action, specifically designed to take care of this problem. This tort—although there is no consensus on the name to be given to it—has a number of elements, or requirements, directed primarily to the task of establishing a standard for determining whether the bringing of the original action was wrongful (tortious). Because of their jealous protection of the position that they should always be open for the public to use, the courts have frequently declared that they do not favor the action.³ The scope of the requirements has varied in England and the United States, and even within the states themselves. All of this has made the use of the tort action rather spotted and its effectiveness quite doubtful. Efforts have been made to adapt other tort actions to this situation, with the hope that they might prove more effective, but they have not met

1. Indeed, most state constitutions have provisions commanding open access to the courts. They are collected, with citations, and quoted in Johnson & Cassady, *Frivolous Lawsuits and Defensive Responses to Them—What Relief is Available?*, 36 ALA. L. REV. 927, 928 n.8 (1985).

2. This idea is frequently expressed by judges and law review writers. From the many examples that might have been chosen, I have selected one to quote. It is taken from an opinion of Judge Henry Edgerton, written over forty years ago:

> The law tries to avoid both too much discouragement and too much encouragement of litigation. Some sort of balance has to be struck between the social interests in preventing unconscionable suits and in permitting honest assertion of supposed rights. These interests conflict because a suit which its author thinks honest may look unconscionable to a jury.

Soffos v. Eaton, 152 F.2d 682, 683 (D.C. Cir. 1945). He resolved this case because the person bringing the original action had brought several of them in succession.

> We see no good reason why the law should tolerate repeated abuse of its processes. To allow redress for such abuse will not seriously hamper the honest assertion of supposed rights. No one is likely to be deterred from litigating an honest claim by fear that some future jury may erroneously decide that he has brought two suits maliciously and without probable cause.

_Id_. We do not often have the luxury of successive suits to make the decision easier. The task is to protect the harassed defendant by affording him appropriate relief, but to accompany it with sufficient limitations and restrictions to avoid injury to the honest plaintiff.

with much success.

Other devices, largely procedural, have been employed, with more indications of success. Thus, some damages may be included in the allocation of costs of an action, either by statute or under the inherent powers of the court. Contemporary rules of civil procedure often grant the trial court authority to impose a sanction for misuse of procedural rights, powers, or privileges, including the bringing of a suit itself. This sanction, or punishment, may include an award of attorney's fees to the other party.

The whole problem of frivolous litigation necessarily exists in any country that establishes a court system to settle civil disputes among its citizens. The civil law countries have developed a broad tort concept of abuse of rights, covering many types of situations, and they apply it to the right of bringing a lawsuit. The results are similar to those under the common law. Even though there is no such broad principle, or tort action, in this country, we have numerous individual applications of the same idea.

In recent years, the whole problem has been substantially exacerbated, due perhaps to the continued increase in population, to the so-called litigation explosion, to the substantial increase in very complex cases involving multiple parties, to the influence of inflation.


6. Currently, both the American Law Institute and the National Conference of Commissioners on Uniform State Laws have committees seeking solutions to the difficult problem of highly complex cases.
on damage verdicts, and to the steadily broadening application of the law of torts.\(^7\) Added to this is a growing tendency on the part of both parties to a civil action to utilize procedural rights and other opportunities to stretch out the time taken for trial of a case and to make the trial as expensive as possible for the other party, primarily for the purpose of harassing him, inducing a favorable outcome or settlement of the case, or making him think twice before engaging in another, similar case. All of this has had the effect of adding greatly to the court clog and the exasperation of the courts and the public. It has also produced calls for increased action to curtail frivolous suits and could perhaps result in hasty and unwise action.

The past several years have brought concerted efforts on the part of two professions to discourage tort actions against their members. These are the medical profession (malpractice actions)\(^8\) and the news media (defamation actions).\(^9\) A survey of many of the reported cases creates the impression that the courts began to recognize this and to react adversely. Without expressly saying so, these courts apparently concluded that the retaliatory suits were often brought for the purpose of discouraging malpractice and defamation suits in general, not just those that are frivolous. Some appellate opinions have become almost sophistic in responding adversely to suits in tort for bringing a frivolous action. The medical attack has now become counterproductive and is waning, although restrictive legislation has been enacted in many states.\(^10\) The media attack has not reached the appellate courts in sufficient numbers to warrant a conclusion as to its effect. It may possibly be that the first amendment can prove a talisman here.

All of this suggests that a study of frivolous actions (in the

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7. See J. Lieberman, supra note 5, at ch. 2.
8. There are many law review articles and student notes on this subject. See, e.g., Birnbaum, Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions, 45 Fordham L. Rev. 1003 (1977); Greenbaum, Physician Countersuits: A Cause Without Action, 12 Pac. L.J. 745 (1981). See also articles cited infra note 12. The reported cases are very numerous. Representative cases will be cited throughout this Article.
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broad sense of that term) and the various efforts to exert reasonable controls over them may prove helpful. The purposes of the law of torts are to provide compensation for harm, to declare and vindicate rights, to deter wrongful conduct, and to punish it when appropriate. To do this, tort law should establish a clear standard for determining when the conduct is wrongful, thus making relief available without undue difficulty.

This Article represents an attempt to undertake a study, first of the tort actions and then of the procedural controls, to describe and analyze the solutions and techniques that have been developed, and to offer a view of a fair, balanced, and comprehensive solution, based on a synthesis of the ideas expressed in cases and legislation.

II. THE TORT ACTIONS

A. Malicious Civil Prosecution

The tort action developed by the common law to provide a remedy for the bringing of a baseless or unjustifiable civil action is unlike most torts in that it has not acquired a name commonly used to identify it. It developed after the tort of malicious prosecution had

11. "Frivolous litigation" applies primarily to the bringing of a lawsuit that has no merit. But the expression is broad enough to include the use of elements and techniques of litigation that are unjustifiable under the circumstances, whether resorted to by plaintiff or defendant.


been established and had acquired certain attributes. Malicious prosecution was the name given to the tort of bringing or instigating a baseless criminal prosecution against another. Many courts lumped the two torts together, and applied the same name to a groundless civil action as well as to an unwarranted criminal prosecution. Others spoke of malicious prosecution for a civil action. The Restatement of Torts uses the expression “wrongful use of civil proceedings.” Frivolous litigation is a broadly inclusive title using the adjective “frivolous” in a strictly legal sense, meaning litigation that is groundless, unwarranted, or palpably lacking in merit. For the tort action itself, I adopt here the appellation “malicious civil prosecution.”

The courts have placed stringent restrictions upon this tort action. In some states, the restrictions are so stringent as to render the cause of action essentially unavailable. There is general agreement, however, that these restrictions can be reduced to five specific requirements, on all of which the plaintiff in the suit for malicious civil prosecution (the present plaintiff) has the burden of proof. They are: (1) the present defendant must have taken an active part in the initiation, continuation, or procurement of the original civil proceeding; (2) the original proceeding must have terminated in favor of the present plaintiff; (3) there must be damage of the type that the court regards as appropriate for an action of this nature; (4) there must be a lack of probable cause for the original action; and (5) there must have been “malice” in the bringing of the original action. More detailed treatment is needed for each of these requirements.

1. Commencement of the Original Action.— One “commences” an action when he takes an active part in initiating, continuing, or procuring it. This includes not only the person who is named as the

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15. See Restatement (Second) of Torts § 674 reporter’s note (1977).
16. It is very easy to confuse the parties in an action for malicious civil prosecution, as they always change titles in the two actions. Note that the original plaintiff (plaintiff in the first suit) becomes the present defendant (defendant in the retaliatory suit) and vice versa. In identifying a party, I regularly use the adjectives original or present to make clear which person I have in mind.
17. In Eastin v. Bank of Stockton, 66 Cal. 123, 4 P. 1106 (1884), the issuance of a summons alone was held to be a commencement. Note that even if the original plaintiff (or his attorney) reasonably believes he has a valid suit when the complaint is filed, the requirement may be met if he later finds he is in error and still continues with the suit.
plaintiff, but also his attorney and any other person who plays an active role in promoting or producing the commencement of the suit. A counterclaim counts as a suit in this regard.  

2. Favorable Termination.—A final ruling for the present plaintiff, whether by motion to dismiss, summary judgment, or jury verdict, suffices as a favorable termination. Dismissal without prejudice may require additional evidence. The requirement of favorable termination has meant that it is generally held not to be possible for a defendant to file a counterclaim for malicious civil prosecution to the original complaint, even though he conceives that the suit against him was frivolous.

18. The counterclaim here involves a claim that the original defendant asserts against the original plaintiff in the same action. For that purpose he is acting as plaintiff, and the counterclaim may be frivolous. This does not apply, however, to a counterclaim for malicious civil prosecution on the ground that the initial action was baseless.

19. If the defendant wins the original suit on the basis of the statute of limitations and there is no indication that plaintiff was aware of the running, however, it has been held that this is a technical or procedural, as distinguished from a substantive, termination, and will not, therefore, qualify as a favorable termination. Lackner v. LaCroix, 25 Cal. 3d 747, 751-52, 602 P.2d 393, 395-96, 159 Cal. Rptr. 693, 695-96 (1979).

20. See Weaver v. Superior Court, 95 Cal. App. 3d 166, 184-85, 156 Cal. Rptr. 745, 755 (1979). A “settlement” connotes a compromise, with each party receiving something. But cf. Young v. First State Bank, 628 P.2d 707, 710 (Okla. 1981) (settlement on payment by one original defendant does not prevent action by another defendant if the other defendant “neither procured, consented to nor participated in the settlement upon which the original action was dismissed”). See also Wong v. Tabor, 422 N.E.2d 1279, 1284-85 (Ind. Ct. App. 1980) (consenting to a summary judgment without inducement from the other side would indicate that a settlement had not occurred).

21. Even a dismissal with prejudice may be found not to be a “favorable termination.” See, e.g., Weaver v. Superior Court, 95 Cal. App. 3d 166, 156 Cal. Rptr. 745 (1979), where suit was brought but necessarily dropped when original defendants sought to make the expense of suit so great that it would exceed the amount of damages incurred by the original plaintiff. Perhaps this could be better explained on the ground that there was no lack of probable cause.

See also Moses v. Hoebel, 646 P.2d 601 (Okla. 1982), where a plaintiff brought suit, dismissed it, and then later brought it again. The trial judge in the second suit issued a writ forbidding the plaintiff from maintaining that suit until he had paid the legal expenses in the first suit. The supreme court held that the trial judge's action was unconstitutional. Id. at 605.

22. See Babb v. Superior Court, 3 Cal. 3d 841, 845-46, 479 P.2d 379, 381, 92 Cal. Rptr. 179, 181 (1971) (lower court would not allow a declaratory judgment in the original suit on grounds that the suit was unjustified). See also Brand v. Hinchman, 68 Mich. 590, 598, 36 N.W. 664, 668 (1888) and Embassy Sewing Stores, Inc. v. Leumi Fin. Corp., 39 A.D.2d 940, 941, 333 N.Y.S.2d 106, 108 (1972) (action for malicious prosecution cannot be instituted until present plaintiff has been granted a favorable termination in original suit). Some courts have allowed counterclaims, however. See, e.g., Sonnichsen v. Streeter, 4 Conn. Cir. Ct. 659, 239 A.2d 63 (1967); Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 83 A.2d 246 (1951), aff'd, 9 N.J. 605, 89 A.2d 242 (1952). A counterclaim against the plaintiff in the original suit and a third-party cross-claim against the latter's attorney were apparently allowed in Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978), but no one recovered.

See also Note, Counterclaim for Malicious Prosecution in the Action Alleged to be Ma-
3. Damage.—A person contemplating the requirement of damages without a study of its historical background would probably assume that meeting this element of the case should involve no difficulty because anyone who has to defend against an unjustifiable action is certain to have incurred attorney’s fees and other normal expenses of litigation, such as the loss of time from his business. This is pecuniary loss, easily proved. But there is a completely different rule in England from that in a majority of the American states; and a sharp distinction has also developed within the American states themselves, with a substantial minority of them following what is often called the “English rule.” This distinction derives from the historical development of the cause of action.

Originally, many centuries ago, the common law remedy for bringing a groundless action was amercement, a kind of fine, of variable amount, the precise sum in the particular case to be set by “affereors” and normally to be measured by reasonable attorney’s fees incurred by the defendant. The fine went not to the defendant, but to the court; and the remedy was thus in the form of a sanction serving solely as a deterrent, rather than as compensation to the injured defendant. The writ of conspiracy came into use as providing relief to the injured party, but its application was very limited. Eventually, after the enactment of the Statute of Westminster II in 1285, permitting actions in consimili casu, and the origin of trespass on the case, an action in case for malicious prosecution began to develop.

Icelous, 58 Yale L.J. 490 (1949) and Note, Groundless Litigation, supra note 12 (both urging that the counterclaim be made compulsory).

23. The English rule requires a showing that the underlying suit has caused special damages. See O’Toole v. Franklin, 279 Or. 513, 517, 569 P.2d 561, 563 (1977). Special damages are a form of damages beyond those generally resulting from similar litigation. Special damages include interference with the person, see, e.g., Woodley v. Coker, 119 Ga. 226, 228, 46 S.E. 89, 90 (1903) (arrest under civil process), as well as proceedings that interfere with property, see, e.g., Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 83 A.2d 246 (1951), aff’d, 9 N.J. 605, 89 A.2d 242 (1952) (injunction preventing company from conducting normal business constitutes a “special grievance”).

24. The leading English case was Savile v. Roberts, 1 Ld. Raym. 374, 91 Eng. Rep. 1147 (K.B. 1698), also the subject of nine other reports. Holt, C.J. is quoted in the report cited above as saying that there are three sorts of damages, any of which would be sufficient ground to support this action. 1. The damage to a man’s fame, as if the matter whereof he is accused be scandalous. . . . 2. The second sort of damages . . . are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty. . . . 3. The third . . . is damage to a man’s property, as where he is forced to expend his money . . . to acquit himself of the crime of which he is accused. . . . [But this was a criminal prosecution, and] there is a great difference between the suing of an
Beginning in 1275 with the Statute of Gloucester, a series of statutes, together with relevant judicial interpretations, had the combined effect of providing that costs would regularly be imposed upon the losing party in a lawsuit in favor of the winning party. More important, if the original suit was a civil action, "costs" to the winner came to include attorney's fees (covering both solicitor's fees and money paid to counsel) and other normal litigation expenses. As a result, they were not elements of damage that could be recovered in the subsequent tort action as "extra costs." Other types of damage were required for the action to lie.

In the United States, on the other hand, the concept of "costs" has developed in a quite different fashion. There is no regular practice of awarding attorney's fees or other litigation expenses to the winning party. Instead, each party to a lawsuit pays his own litigation expenses, and costs cover designated amounts for court expenses, rather than the tort litigation expenses of a party. These costs are

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*Id.* at 378-79, 91 Eng. Rep. at 1149-50. See also Waterer v. Freeman, Hob. 266, 80 Eng. Rep. 412 (K.B. 1617); cf. Temple v. Killingworth, 12 Mod. 4, 88 Eng. Rep. 1127 (K.B. 1692) (one may sue another for a suit brought without a cause of action if original suit was brought with malice and vexatious design).


26. *Id.* at 856-59. See C. McCormick, *Damages* § 60 (1935).

27. See Quartz Hill Consol. Gold Mining Co. v. Eyre, 11 Q.B.D. 674, 682-83 (C.A. 1883) (Brett, M.R.); see also *Id.* at 690 (Bowen, L.J.). The original suit was a petition under the Company's Act to wind up a company. This was regarded as affecting the company's "fair fame and credit," and the tort action for malicious civil prosecution would lie. Injury to "fair fame" was a consequential injury, not a litigation expense.

See also the more contemporary case of Berry v. British Transp. Comm'n, 1 Q.B. 306 (C.A. 1961), where a criminal prosecution against the present plaintiff, an offense subject only to a fine, was quashed on appeal, and she was awarded 15 guineas as costs for attorney's fees. These fees were inadequate, and the plaintiff brought this action of malicious prosecution for adequate attorney's fees. The court of appeals held that she might raise the issue, differentiating this problem from one in which the original suit was a civil action. There the authorities were found to hold that she could not raise the issue that the award of attorney's fees was inadequate. The three Lord Justices had considerable trouble in explaining the basis of the rule, and Devlin, L.J., criticized it sharply. *Id.* at 319-25. For a further discussion of this case, see Note, *The Perils of Pulling a Communication Cord*, 25 Mod. L. Rev. 89 (1962).

paid to the court and do not inure to the benefit of the other party. As a result of this historical difference, a majority of the American states have held that attorney's fees and other litigation expenses are an appropriate element of damages in the tort action for malicious civil prosecution. Since there are almost always some litigation expenses incurred by the defendant in a wrongful civil action brought against him, there is no difficulty in meeting the damage requirement in the present action; and this requirement plays no significant part in determining whether liability should be imposed. Of course, other damage elements may add to the amount of the judgment, if properly proved.

A substantial minority of the American states, however, have declined to accept this position; declaring that they are following the English rule, they hold that the present plaintiff cannot prevail in his suit if his only proof of damages is of attorney's fees and other litigation expenses in the original action. For the suit to succeed, they declare, he must prove special damages. This position may quite properly be called perverse. It means that even if all of the other requirements of the action for malicious civil prosecution are fully met, the plaintiff in the present suit cannot prevail if the only damage shown is that which is necessarily involved in the wrongful conduct of the original plaintiff in bringing the frivolous action, and recovery is allowed only if he can prove special damage rather than that which normally occurs. In some instances, the position may be explained by the fact that the court thought it was following the classic English common law rule and did not advert to the vital difference of the English and American practices regarding the nature of costs. Other cases, however, make

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The majority and minority states are classified in several places. See RESTATEMENT (SECOND) OF TORTS § 674 reporter's note (appendix vol. 1981); see also O'Toole v. Franklin, 279 Or. 513, 518 nn. 3 & 4, 569 P.2d 561, 564 nn. 3 & 4 (1977); Note, Malicious Prosecution, supra note 12, at nn. 86 & 88.
clear that the court was fully aware of what it was doing. They offer rationalizations that are unconvincing. Perhaps the most frequent argument is that the courts should always be open and available for the settlement of disputes, and litigants should not be chilled from resorting to courts because of the fear of being subjected to legal liability for bringing the action.1 Despite the force in the argument that an action for wrongful civil proceedings should be carefully restricted to keep its availability from discouraging meritorious suits, however, it should be apparent that the special injury restriction is not truly relevant to that purpose. It has nothing to do with whether the original action was meritorious or not. It cuts down drastically on the number of suits for malicious civil prosecution that can be maintained, but not on the basis that the original action was groundless. It bars the action for malicious civil prosecution regardless of whether the initial action was quite meritorious or completely frivolous, and without even giving consideration to that issue. The position cannot be justified on the basis of either logic or social policy.

Under the minority American rule, a plaintiff can recover if the original suit involved an interference with his person or property, and perhaps also with a proceeding charging insanity or insolvency, or with repeated civil actions for harassment of the other party.2

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1. There are dissenting opinions on the issue of the English rule in many of the cases, but the best presentation of the conflicting arguments is found in the several opinions in Friedman v. Dozorc, 412 Mich. 1, 312 N.W.2d 585 (1981). For a similar debate at an earlier time, see Potts v. Imlay, 4 N.J.L. 382 (1816). In Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980), an intermediate court urged a "reassessment" of the special damage requirement.


It is also generally held under the minority rule that special damages will not apply to harm to professional reputation, the incurring of mental distress and embarrassment, or the loss of liability insurance or increase of insurance premiums. See, e.g., Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), cert. denied, 444 U.S. 828 (1979). This is inconsistent even with the English rule, which the minority purport to follow. Costs under the English rule include attorney's fees and other expenses of litigation. These damages are not expenses of the litigation process but are consequential—arising as a result of the litigation and the appropriate basis for tort action. England allows damages for injury to reputation. See Quartz Hill Consol. Gold Mining Co., 11 Q.B.D. 674 (C.A. 1883); supra note 23.

2. The Restatement espouses the American rule in not requiring proof of special damages. See RESTATEMENT (SECOND) OF TORTS § 681 (1977). But in recognition of the minority English rule, it provides separate sections for the kinds of special damage that may satisfy the minority rule. See id. §§ 677 (civil proceedings causing an arrest or deprivation of property), 678 (proceedings alleging insanity or insolvency), 679 (repetition of civil proceedings) and 680 (proceedings before an administrative board). Apparently, however, the presence of one of these elements of damages, giving rise to a cause of action, does not permit recovery of litiga-
Under the majority American rule, in addition to these elements of damage, the present plaintiff can recover for any harm normally resulting from the original action, including harm to reputation and emotional distress. He can also recover punitive damages if the facts indicate that they are appropriate.

4. Lack of Probable Cause.—Perhaps the most vital single requirement, this element of the cause of action combines with the next one (malice) to identify the real “sting” of the tortious conduct.

This requirement is unusual in that it places the burden on the present plaintiff to prove a negative—that there was no probable cause for bringing the original suit. It speaks of probable cause instead of reasonable grounds. The distinction between the two terms is that the determination of whether there is probable cause is made by the court as an issue of law, while the determination of whether there are reasonable grounds is made by the jury as an issue of fact. Of course, if the pertinent facts are in dispute, the issue may go to the jury, but the instructions should inform the jury how their findings of fact will affect the ultimate determination. Sometimes a better way of handling this matter is for the judge to submit special interrogatories to the jury and then to use its responses in ruling on the issue of probable cause.

Observe that this requirement is expressed in terms of the nature of the original cause of action itself, rather than the nature of the defendant's conduct in bringing it. Obviously, the suit need not be certain to prevail; it need not even be more likely to prevail than not. But the claim must be “tenable”—that is, colorable, plausible,
logically capable of being maintained, arguably sustainable, not palpably insufficient, have a sound chance of succeeding, justify a reasonable belief in the possibility that the claim will be held valid.38

The claim may be insufficient from the standpoint of the law or from the standpoint of the existence of the assumed facts and whether they can be proved. In the first situation, a natural reaction may be that if the existing decisions in the state are to the effect that these facts do not constitute a valid cause of action, then the requirement of lack of probable cause has automatically been met. But this is not necessarily so. Changes in the law are sometimes made judicially; in a particular jurisdiction, if the trend of legal development on the subject suggests the possibility of further development, or if it appears that existing precedents on this subject do not accord with current mores and ideals, either circumstance may give rise to a reasonable inference that this suit might be the vehicle for producing a change in the law. This would mean that probable cause exists for bringing the suit.39

In the second situation (the facts stated in the complaint are adequate for a cause of action but the question is whether the proof can sustain them), the language used above in describing the potential adequacy of the claim still applies. The presence of a sound chance of producing the required proof makes the claim tenable and supplies the necessary probable cause. But if the original plaintiff either knows that the alleged facts are not true or does not have an honest belief in their truth, then the courts usually hold that probable cause is lacking.40 A jury verdict for the plaintiff in the original

38. All of these expressions have been used, and they may be regarded as essentially synonymous—different ways of expressing the same idea. Another way of putting the general idea is to say that lack of probable cause must be very clearly proven or must have been very palpable.


40. In Tool Research and Eng'g Corp. v. Henigson, 46 Cal. App. 3d 675, 683, 120 Cal. Rptr. 291, 297 (1975), the court stated:

An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried. . . . The test is twofold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard.

The requirement of a subjective belief for probable cause may have come about through confusion of the elements of lack of probable cause and presence of malice. On the other hand, it may be an analog to the rule that the party is held to a knowledge only of the facts that he
suit has been treated as conclusive proof of probable cause, even though it is set aside by the court.\textsuperscript{41}

The suit for the tort of malicious civil prosecution may be brought against the original plaintiff or his attorney, or both. The original plaintiff may contend, as a defense to the present suit, that he relied on the advice of his attorney that the suit was warranted. The success of this defense will depend upon the client’s being able to show that he made full disclosure to the attorney of all pertinent facts in his possession and honestly relied on the attorney’s opinion.\textsuperscript{42}

Courts sometimes purport to lay down a rule of law on whether an attorney should be expected to check his client’s statement of the facts for the contemplated suit and to make a reasonable investigation before reaching a decision.\textsuperscript{43} It would seem, however, that the determination should depend on his knowledge of the client and his character and the nature of the circumstances—under many circumstances the client might have misunderstood or erroneously interpreted the actual facts.\textsuperscript{44} The attorney who takes a case after an adequate investigation and a good faith evaluation may properly be regarded as exercising a professional judgment, which is not subject to second-guessing by a jury unless it is palpably wrong.\textsuperscript{45} But in
order to reach a mature judgment entitled to this credence, the attorney must have collected the pertinent data and other information needed for reaching a true professional judgment.46

An attorney may be placed in a difficult predicament when a client with whom he has no previous acquaintance appears with a case for which the limitations period is about to expire. It may be necessary for the attorney to make a hasty judgment to commence suit without an adequate investigation, and then to conduct his investigation to determine whether to discontinue the suit. If he does this and finds that the cause of action is not meritorious, he has another difficult decision to make, and may find himself caught between the Scylla of a malpractice suit by his client and the Charybdis of a malicious prosecution suit by the other party.47 His only way to


46. See Smith v. Lewis, 13 Cal. 3d 349, 360-61, 530 P.2d 589, 596, 118 Cal. Rptr. 621, 628 (1975), overruled on other grounds sub nom. In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 621, 126 Cal. Rptr. 633 (1976). The cases in this and the preceding note involve the liability of an attorney to his client. Clearly no greater responsibility will be imposed on him in his relationship to a third party whom he is considering suing for his client.

47. In Kirsch v. Duryea, 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 218 (1978), plaintiff/client sued his attorney for malpractice in withdrawing from a suit after it was filed. The client had come to defendant shortly before running of the limitations period. After a hasty investigation, defendant filed the suit but subsequently withdrew after a more thorough investigation and after properly offering to assist the client in obtaining a substitute attorney. When the case was dismissed, the client sued the attorney and obtained a jury verdict for over $230,000. The case was reversed by the state supreme court. The essence of the opinion is expressed in this statement:

When apparent conflict exists between the attorney's duty to his client on the one hand and his public obligation on the other, it is not sufficient to show that some or many prudent attorneys would not have made the mistake. The attorney's choice to honor the public obligation must be shown to have been so manifestly erroneous that no prudent attorney would have done so.

Id. at 304, 578 P.2d at 939, 146 Cal. Rptr. at 222. Would the same principle have relieved the attorney of liability if he had decided to continue the case?

Cf. Wong v. Tabor, 422 N.E.2d 1279 (Ind. Ct. App. 1981), where an attorney acting under pressure of the statute of limitations joined his client's family physician in an action against an orthopedic surgeon who had been recommended by the physician, and under the assumption that the physician was present at the operation (which rendered the client a paraplegic). Later, on discovering that the physician had not participated in the operation, he agreed not to contest a summary judgment for defendant in the malpractice case. The physician sued for malicious civil prosecution, contending lack of probable cause for the malpractice action or for continuing it, and obtained a verdict for $25,000. The appellate court reversed, declaring that the standard is whether the claim merits litigation against the defendant in question on the basis
avoid this is to explain to the client from the beginning the significance of the statute of limitations and his reasons for each step in his course of action.

A practice sometimes followed by plaintiff’s attorney in a medical malpractice case is to join as defendants the hospital and all doctors who had any possible connection with the treatment of the patient, and to sort them out at his convenience and dismiss those against whom he does not wish to proceed. Unless he is impelled by the proximity of the limitations period, he is likely to find this practice dangerous. Joining as defendant a doctor known not to have been negligent, for the purpose of using the discovery process against him, is likely to produce liability.48

5. Malice.—“Malice” is a chameleon word in the law of torts, carrying a variety of distinct meanings and producing a considerable amount of confusion in the state of the law of torts as a whole. As used here for the tort of malicious prosecution (whether of a criminal prosecution or a civil proceeding), it means the misuse of a right or a privilege for a purpose different from that for which it was established.49 The right of bringing a civil action against another is established for the purpose of giving the person exercising the right an opportunity to determine whether his claim is legally justified and, if it is, to obtain a remedy that the law provides. This opportunity is not properly available to him if his claim lacks probable cause. If he is aware of the fact that his claim does lack probable cause, then he is bringing it for a purpose other than that for which the tort action was established, and malice, or ulterior purpose, is present.50

This element of awareness that the original suit was without merit is similar to the element of fraud (scienter) in the tort of deceit, which Lord Herschell declared in 1889 exists when a “false representation has been made (1) knowingly, or (2) without belief in its

of the facts known to the attorney when suit is commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of facts known by the attorney who instituted suit.

Id. at 1288 (footnote omitted).


49. The Restatement even changes the name of this requirement from “malice” to “propriety of purpose.” Restatement (Second) of Torts § 676 (1977).

50. Cf. authorities cited supra note 4 (discussing the continental doctrine of abuse of rights).
From this developed the concept of "actual malice" (more appropriately called constitutional malice), held in New York Times Co. v. Sullivan to be necessary in a defamation action brought by a public official, and defined as proof that the defendant made the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." As in defamation, malice may be shown by circumstantial evidence. Indeed, the very existence of a palpable lack of probable cause for the original suit constitutes circumstantial evidence that the original plaintiff must have been aware of this and thus must have had an ulterior motive in bringing the suit.

There are other situations in which an ulterior purpose may supply the requirement of malice. For example, the original plaintiff may be suing solely (or primarily) for the purpose of harassing the defendant. This is similar to malice in the sense of hostility or ill will, but the mere presence of ill will does not meet the requirement in this situation. For another example, the original action may be brought as a nuisance suit with knowledge that it is without merit, but with the purpose of forcing the defendant to agree to a settlement in order to avoid the greater expenses of litigation. If the attorney for the original plaintiff is aware of his client’s ulterior motive he also may be held to have the necessary malice, but the client’s malice is not imputed to an attorney who was unaware of it and who has been found to have acted in good faith.

It must be quite apparent that the two requirements of lack of probable cause and malice are inextricably connected, and neither can be fully explained without bringing in the other. Thus, the comments set out in the discussion of lack of probable cause concerning the relationship between the client and the attorney in bringing the original action are equally relevant here in the discussion of malice.

These two elements combine to constitute the gist of the tort of malicious civil prosecution. The courts hold that both must be found to be present in order to prevail in a suit for malicious civil prosecu-

52. 376 U.S. 254 (1964).
53. Id. at 279-80.
54. The converse is not true. Existence of malice does not constitute circumstantial evidence of lack of probable cause.
55. See RESTATEMENT (SECOND) OF TORTS § 676 comment c (1977).
tion. The expression "bad faith" is sometimes used as indicating the combined effect of the two concepts. Each concept, however, carries a separate meaning of its own, and both ideas should be borne in mind in reaching a balanced result.

B. Abuse of Process

Abuse of process is a separate tort, often confused with malicious civil prosecution. It is concerned not with the institution and conduct of a cause of action, but with the use made of an individual legal process.

In *Grainger v. Hill*, the first case in which the tort was recognized, defendants, who held a mortgage on a ship owned by the plaintiff, brought an action of debt against him and used the process of arrest to require him to deliver the register of the ship to them. Unable to raise bail and obtain his release, he was compelled to deliver the register, without which he could not sail. Action was upheld for abuse of the process of arrest.

The case of *Board of Education v. Farmingdale Classroom Teachers Association*, is more contemporary. In litigation between the parties, the Teachers Association served subpoenas on all of the teachers in a school system, requiring them to report to court at the same time, thus seriously interfering with the operation of the schools. Again, abuse of the subpoena process was held to be actionable.

Various kinds of legal process can be abused and thus subject the actor to liability under this tort. In addition to seizure of the person and subpoena for appearance, liability has been imposed for abuse of garnishment or attachment, levy of execution, sequestration, and discovery proceedings. See, e.g., *Haggerty v. Moyerman*, 321 Pa. 555, 558-59, 184 A. 654, 655 (1936) (execution); *Twyford v. Twyford*, 63 Cal. App. 3d 916, 923-24, 134 Cal. Rptr. 145, 149 (1976) (abuse of discovery); cf. *Hauser v. Bartow*, 273 N.Y. 370, 374, 7 N.E.2d 268, 270 (1937) (no abuse of process and no recovery in suit to have present plaintiff declared incompetent).

Observe that in both of these cases the process was actually and effectively issued. The procurement of the process was not the tort; it was the use of it for an improper purpose that constituted the abuse. The name of this tort action frankly says as much, and does not resort to use of the word “malicious” in an unnatural fashion.

Observe also that the process issued without the participation of the injured party or any opportunity on his part to appear and contest its issuance. The proceeding was ex parte. As a result, there was no need in the lawsuit for abuse of process to allege or prove that the outcome of the issuance of the process was favorable to the present plaintiff or to show lack of probable cause. These elements are not necessary when there is no opportunity for a hearing. Indeed, in the case of malicious civil prosecution, there is also no requirement of showing favorable termination when the proceedings are ex parte and the original defendant had no opportunity to contest them.

Courts have looked with more favor on abuse of process than on malicious civil prosecution. Although the two torts are quite different and need to be carefully distinguished, their similarity has not infrequently produced confusion in the understanding of some courts, with erroneous decisions resulting.

C. Negligence and Other Standard Torts

In an action for negligence, the plaintiff’s injury to his person or property does not have to be physical. It may instead be economic. There have been numerous suits based on negligence brought by an original defendant against the person who brought the original suit against him and lost. Most frequently, the suit is brought against the lawyer who brought the original suit for his client, apparently on the theory that it is easier to prove negligence on the part of the attor-
ney. Uniformly, these suits have been unsuccessful. Some courts have relied on the traditional requirement of privity of contract, despite the continuing and broadening erosion of that requirement. Others cite the conflict of interests that would be created if the attorney must temper his zeal and efforts on behalf of his client with an awareness that he must be careful to protect his personal interest in not subjecting himself to a possible negligence suit in case he should go too far.

The principal reason why the courts have not been ready to recognize the availability of a negligence suit in this situation, I suggest, is that we already have a tort action developed by the common law specifically as a remedy for the bringing of an ungrounded civil action. Over the years this remedy of malicious civil prosecution has been carefully constructed and delicately balanced to give due weight to the different interests involved. To apply the open-ended action of negligence to this factual situation now would result in discarding all of the refinements and restrictions specially developed by the law. True, the particular action of malicious civil prosecution is proving in some states to be too restrictive and therefore not adequate. The solution to this problem, however, is to adjust the action in the light of experience, and not to cast it aside in favor of a general action of negligence.

In some suits for frivolous action, the complainants have relied on various ethical rules and standards of professional conduct and responsibility, and have contended that the attorney for the plaintiff in the original action violated a specific rule or standard in bringing the action. This appears to amount essentially to an action in negligence, with the violation being treated as negligence per se. Two


Recovery was granted on the basis of negligence in Shahrokhfar v. State Farm Mut. Auto Ins. Co., 634 P.2d 653 (Mont. 1981), but the facts were distinguishable. Defendant insurance company negligently sued the wrong plaintiff, who notified defendant that he was not the right person but did not defend the case. Judgment by default was entered against him and he brought this action in negligence. The jury awarded $850 for compensatory damages and $80,000 for punitive damages. The supreme court let the award for punitive damages stand but reduced the actual damages award for contributory negligence.

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comments seem appropriate: (1) calling the conduct negligence per se still leaves the action as one in negligence, and negligence actions are not available in this situation; and (2) ethical rules and standards for the legal profession have not been construed as adopted for the protection of third persons (persons other than the client) and have therefore not been regarded as a suitable basis on which to raise a cause of action.68

The contention has sometimes been made that the law should impose liability on an attorney for willful and wanton conduct in bringing a groundless suit or for intentionally bringing one that he knows to lack any merit.67 This, of course, is essentially what the tort of malicious civil prosecution purports to do, and the courts have shown no inclination to try to create a new and different cause of action.

D. Other Suggested Tort Bases for Imposing Liability

Some states, notably New York, have espoused a view known as the prima facie tort theory, which would impose liability upon a defendant who commits an intentional act, knowing that it will cause injury to the plaintiff, provided the injury was actually incurred and the defendant does not have suitable justification for his conduct.68 Application of this concept to the bringing of a frivolous lawsuit received a short-lived acceptance by the Appellate Division of the Supreme Court of New York,69 but the case was reversed by a memo-


On the Code of Professional Responsibility and the contention that the court should create or recognize a private cause of action for intentional violation, see Bob Godfrey Pontiac, Inc. v. Roloff, 291 Or. 318, 630 P.2d 840 (1981).

67. This contention was upheld by the trial court in Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978), cert. denied, 444 U.S. 828 (1979), but it was repudiated by the appellate court. See also Pantone v. Demos, 59 Ill. App. 3d 328, 336, 375 N.E.2d 480, 484 (1978) (in order to safeguard access to the courts this new action will not be recognized). See generally Thode, The Groundless Case—the Lawyer's Tort Duty to His Client and to the Adverse Party, 11 St. Mary's L.J. 59 (1979).


random decision of the court of appeals. No other courts have been ready to accept the tort concept in this situation.

Reference has sometimes been made to constitutional and statutory provisions providing that there shall be a remedy for every wrong and to the common law maxim to the same effect, but they have not been made the basis of any holding of liability. Similar reference to the nature of the common law action of trespass on the case or to the Statute of Westminster II has also been ineffective. The same is true of efforts to revive the common law crimes of champerty, maintenance, and barratry, and to turn them into torts applicable to the bringing of a frivolous lawsuit.

E. Appraisal of the Tort Actions

This survey of the tort actions that have been resorted to in seeking to recover tort damages for the bringing of an unjustifiable civil action should make it clear that there is only one tort that the courts are ready to recognize as suitable for that purpose—the one here designated as malicious civil prosecution. Courts have looked openly with disfavor on this tort, and there are comparatively few cases in which it has been successfully maintained. The restrictions


72. ILL. CONST. art. I, § 12 provides: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." This was held not applicable to a frivolous action because it is "an expression of a philosophy and not a mandate that a 'certain remedy' be provided in any specific form or that the nature of the proof necessary to the award of a judgment or decree continue without modification." Berlin v. Nathan, 64 Ill. App. 3d 940, 950, 381 N.E.2d 1367, 1374 (1978) (quoting Sullivan v. Midlothian Park District, 51 Ill. 2d 274, 277, 281 N.E.2d 659, 662 (1972), cert. denied, 444 U.S. 828 (1979). See also O'Toole v. Franklin, 279 Or. 513, 520, 569 P.2d 561, 565 (1977) (discussing art. I, § 10 of Oregon Constitution and stating that "it would be ironic to derive a looser test of malicious prosecution from a constitutional guarantee of access to the courts").

74. The action for abuse of process is not counted here because it is not a remedy for the bringing of a frivolous action, but for the improper use or abuse of a particular process.


In a number of additional cases, a holding for the defendant at the trial court was sent
placed on it are quite onerous, and the special damage rule adopted in many states makes the action completely unavailable in the normal situation where plaintiff incurred no special damages. Quite clearly, there is real need for a careful reevaluation of the policies underlying the action.

One objection made to the action is that it contends that the first suit should not have been brought, and then seeks to cure one unnecessary suit clogging the courts by the bringing of another suit, clogging them even further. Is it an anomaly to bring one suit to alleviate the harm caused by another? The superficiality of this argument becomes apparent with the realization that all torts require an action in order to obtain a remedy.

Another objection sometimes made to the action is that a plaintiff's knowledge that he and his attorney may be subject to tort liability if his cause of action proves to be groundless will have the effect of chilling their readiness to seek relief in the courts and thus acts as a deterrent to bringing suit at all. The answer to this is that a significant purpose of tort law is to deter tortious conduct, and it is only when the original suit was not even tenable—i.e., susceptible of a reasonable argument—that the second action may lie. Another purpose of tort law is to provide compensation to the injured party, and a person subjected to a groundless suit has certainly suffered pecuniary loss.

Still a third objection is the "shuttlecock" argument. If the original defendant brings an action against the original plaintiff for malicious civil prosecution and loses, the latter may then retaliate with a similar action, and the shuttlecock would be passed back and forth indefinitely. This is not just the product of an uncontrolled imagination; it has actually happened on occasion. But it hardly seems a serious danger that should have the effect of eliminating the availability of a suitable remedy for a true tort injury.


76. There is real need for a change in the special damage rule in the states taking the minority view, if the tort is to prove useful. The medical malpractice cases in jurisdictions following the doctrine of special damage demonstrate that no tort remedy is available at all.

77. The analogy of the "chilling argument" to the law of defamation and the first amendment is apparent. There, the solution was not to abolish the tort action but to put the tight restriction of constitutional malice on it. See supra text accompanying notes 52-53. A similar solution may be applied here.

78. See, e.g., Smith v. Michigan Buggy Co., 175 Ill. 619, 629-30, 51 N.E. 569, 572 (1898). And see Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1978), where the facts indicate that the "shuttlecock" situation may have developed.
On the other side, it has been argued strongly that the tort action should be expanded to cover a broader range of tort liability. Thus, a recent article urges that the defendant, like the plaintiff, should also be subject to tort liability if he is aware that his defense has no merit, and he is acting only to harass the plaintiff by delaying the action and making the recovery more expensive. Judicial support for this position has been slight, and there are few cases in which the issue has been raised. The courts might be hesitant to allow recovery in a separate tort action against either the original plaintiff or defendant if there was a tenable count or defense and the party had added another count or defense that clearly had no merit.

A second suggestion urges that the original defendant be permitted to file a counterclaim to the original action, so that both torts may be handled in the same trial. This would probably require statutory action, since the original defendant cannot, at the time he files the counterclaim, claim that the action had terminated in his favor. This idea has engendered some support.

Before attempting to present a complete appraisal of the tort action of malicious civil prosecution, however, I think it would be desirable to consider other remedies, sanctions, and legal devices for controlling the bringing of frivolous actions. Then a more comprehensive evaluation of the total problem will be possible.


80. See dicta in Kolka v. Jones, 6 N.D. 461, 469-70, 71 N.W. 558, 561 (1897); Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 43, 186 S.E.2d 822, 825 (1972). For a case holding that an action will not lie, see Baxter v. Brown, 83 Kan. 302, 111 P. 430 (1910) (verified general denial with alleged knowledge that complaint was true; no affirmative defense).

81. But see Singleton v. Perry, 45 Cal. 2d 489, 289 P.2d 794 (1955), involving a criminal prosecution, instituted by the present defendant against the present plaintiff, with separate charges of theft of an automobile and theft of other personal property. Both charges were dismissed after a preliminary hearing, and plaintiff brought two actions for malicious prosecution, which were consolidated into one. The jury found a reasonable basis for the personal property charge, but none for the automobile charge. The court held that the plaintiff could recover on the one charge, recovering attorney's fees for defending both. Id. at 496-98, 289 P.2d at 799-800.

82. See Note, Groundless Litigation, supra note 12, at 1233.

83. See statutes cited infra notes 146, 147.
III. OTHER LEGAL METHODS FOR TREATING THE PROBLEM OF FRIVOLOUS LITIGATION

A. State Statutes and Rules

1. Statutory Treatments of Frivolous Civil Litigation.—During recent years a number of state legislatures have sought to alter or improve the common law remedies for frivolous litigation. One state has modified its common law action for malicious civil prosecution, and others have provided a remedy for the frivolous action by authorizing or directing the judge to award attorney’s fees in that same action to the other party.

Pennsylvania (1980)\textsuperscript{84} is the state codifying the common law tort action.\textsuperscript{85} The new provisions follow the Restatement (Second) of Torts rather closely, naming the tort action “wrongful use of civil proceedings” (thus eliminating serious semantic confusion with abuse of process), and specifically changing the minority special damage rule by providing that seizure of the person or property of the plaintiff is no longer necessary. Malice and lack of probable cause are both requirements of the action, but proof that the defendant acted “in a grossly negligent fashion” may substitute for lack of probable cause.\textsuperscript{86} Malice is acting “primarily for the purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim.”\textsuperscript{87} A person has probable cause if he “reasonably believes in the existence of the facts on which the claim is based” and either:

(1) Reasonably believes that under those facts the claim may be valid under the existing or developing law; (2) Believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or (3) Believes as an attorney of record, in good faith that [the suit] is not intended to merely harass or maliciously injure the opposite party.\textsuperscript{88}

There is no reference in the Act to attorney’s fees or a “malicious defense,” and it has been held under the Act that a counterclaim

\textsuperscript{84} The date in parentheses after the name of a state indicates when the statute was passed. Several dates indicate amendments.
\textsuperscript{85} 42 PA. CONS. STAT. ANN. §§ 8351-8354 (Purdon 1982).
\textsuperscript{86} Id. § 8351(1).
\textsuperscript{87} Id.
\textsuperscript{88} Id. § 8352(3).
cannot be filed.\footnote{Sheridan v. Fox, 531 F. Supp. 151 (E.D. Pa. 1982).}

The several statutes providing for award of litigation expenses or attorney’s fees in the original action are numerous enough to be treated individually.

California (1981, 1984, 1985) uses as its test “bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.”\footnote{Id. § 128.5(a) (West 1982 & Supp. 1987).} Frivolous is defined as “totally and completely without merit or . . . for the purpose of harassing an opposing party.”\footnote{Id. § 128.5(b)(2).} Actions or tactics “include filing and serving of a complaint or cross-complaint and the making and opposing of motions.”\footnote{Id. § 128.5(b)(1).} The court’s action is discretionary, and may be taken against a party, his attorney, or both. This remedy is in addition to other existing ones. It would apparently apply to defenses, and such matters as the filing of motions.\footnote{There are numerous decisions under the California statute. Perhaps the one of most significance is Atchison, Topeka & Santa Fe Ry. v. Stockton Port Dist., 140 Cal. App. 3d 111, 189 Cal. Rptr. 208 (1983). Plaintiff’s property had been damaged by failure of a levee. It sued several defendants for negligence and included the Port District because of a six-month limitations period for action against a governmental agency. Not knowing whether the Port was negligent, plaintiff used discovery processes against the other defendants and on the basis of the information acquired, dismissed the action against the Port District with prejudice. The trial court awarded attorney fees, but the court of appeals reversed, holding that there was no improper motive. See also People v. Johnson, 157 Cal. App. 3d Supp. 1, 6, 204 Cal. Rptr. 563, 565 (1984) (criminal prosecution dismissed because People not ready; trial judge should have given notice and opportunity to be heard); Corralejo v. Quiroga, 152 Cal. App. 3d 871, 872-74, 199 Cal. Rptr. 733, 734-35 (1984) (requirement of notice and written statement of trial court reciting circumstances justifying sanctions); Gumabao v. Gumabao, 150 Cal. App. 3d 572, 578, 198 Cal. Rptr. 90, 94 (1984) (failure of attorney to notify other party or court of his being unable to appear); Karwasky v. Zachay, 146 Cal. App. 3d 679, 681, 194 Cal. Rptr. 292, 294 (1983) (motion to disqualify defendant’s attorney not made in good faith); Ellis v. Roshei Corp., 143 Cal. App. 3d 642, 648-50, 192 Cal. Rptr. 57, 61-62 (1983) (attorney filing demurrer to cross complaint on grounds initially valid, but cured by other party’s offer to supply needs, subject to sanctions for insisting on demurrer for purposes of harassment or delay).} The current Colorado statute (1986) comprises six sections, including a “legislative declaration,” or finding.\footnote{Colo. Rev. Stat. §§ 13-17-101 to 13-17-106 (Cum. Supp. 1986).} It provides for the court, upon motion of any party or the court itself, to award “reasonable attorney fees against any attorney or party who has brought or defended a civil action, either in whole or in part,” if it finds that the action or defense: (1) “lacked substantial justification,” (2) was “interposed for delay or harassment” or (3) was “unnecessarily ex-
panded . . . by other improper conduct," including discovery abuses.95 The expression "lacked substantial justification" is defined to mean "substantially frivolous, substantially groundless, or substantially vexatious."96 Other provisions state that fees are not to be awarded if the party or attorney voluntarily dismisses the action when he becomes aware or should have been aware that the action would not succeed, or if the action was based on "a good faith attempt to establish a new theory of law in Colorado."97 A separate section provides for "judicial discretion" in assessing the amount of the fees and states eight factors to be taken into consideration in making the determination.98

Connecticut has a code section going back to the last century, which provides:

Any allegation or denial made without reasonable cause and found untrue shall subject the party pleading the same to the payment of reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party by reason of such untrue pleading; provided no expenses for counsel fees shall be taxed exceeding $10 for any one offense.99

The same provision is also found in the Superior Court Rules100 with two changes: (1) the cap for counsel fees is increased from $10 to $250; (2) an added sentence states that the "expenses shall be taxed against the offending party whether he prevails in the action or not."101 An early case under the code held that "[a] plea of a gen-

95. Id. § 13-17-102 (2), (4). Subsections (1) and (2) disagree on whether the court "may" or "shall" award "reasonable attorney fees."
96. Id. § 13-17-102(4). "Frivolous" apparently refers to the legal basis for the suit.
97. Id. § 13-17-102(7).
98. Id. § 13-17-103. In International Technical Instruments v. Engineering Measurements Co., 678 P.2d 558, 563 (Colo. Ct. App. 1983), the appellate court adopted two definitions from the trial court. A claim or defense is frivolous "if the proponent can present no rational argument based on the evidence or law in support of his or her claim or defense . . . ." A groundless claim is "one in which the complaint contains allegations sufficient to survive a motion to dismiss for failure to state a claim, but which are not supported by any credible evidence at trial." Id. The state supreme court, in Mission Denver Co. v. Pierson, 674 P.2d 363, 366 (Colo. 1984), utilized the test for frivolousness in regard to a claim for frivolous appeal under Appellate Rule 38, but added to it, "or the appeal is prosecuted for the sole purpose of harassment or delay." The last clause would seem more appropriate as a definition for "vexatious." See also Morton v. Allied Stores Corp., 90 F.R.D. 352, 357 (D. Colo. 1981) (court used Webster's Third New International Dictionary definition of vexatious).
101. This sentence may have been derived from the holding in Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 141 A. 866 (1928).
eral denial, when there are any material allegations in the complaint which the defendant knows to be true, subjects him to the payment of any reasonable expenses necessarily incurred by the plaintiff to establish their truth. A more recent Connecticut amendment (1986) further provides that:

Any person who commences and prosecutes any civil action or complaint against another . . . or asserts a defense to any civil action or complaint commenced and prosecuted by another (1) without probable cause, shall pay such other person double damages, or (2) without probable cause, and with a malicious intent unjustly to vex and trouble . . . such other person, shall pay him treble damages.

Florida (1978) has a short section providing for a reasonable attorney's fee, which the court "shall" award. The test is "a complete absence of a justiciable issue of either law or fact raised by the losing party." Georgia's statute (1986) provides that "attorney's fees and expenses of litigation shall be awarded" against a party (and his attorney) who "asserted a claim, defense or other position" for which "there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept" it. Another part of the section provides for the awarding of attorney's fees or expenses of litigation if a party or attorney

102. Hatch v. Thompson, 67 Conn. 74, 76, 34 A. 770, 771 (1895).
105. Id. The section has been held constitutional. Whitten v. Progressive Casualty Ins. Co., 410 So. 2d 501, 505 (Fla. 1982) (statute's purpose is to discourage baseless claims, stone-wall defenses and sham appeals). There is a surprisingly large number of cases construing the section. For a few of the more meaningful ones, see Builders Shoring and Scaffolding v. King, 453 So. 2d 534 (Fla. Dist. Ct. App. 1984) (statute does not apply when party raises novel application of law or merely because the plaintiff's position was held erroneous on the merits or when at least some of the counts were arguable); Friedman v. Backman, 453 So. 2d 938 (Fla. Dist. Ct. App. 1984) (attorney successfully defending frivolous suit against him can recover for his own time and effort); Ferm v. Saba, 444 So. 2d 976, 977 (Fla. Dist. Ct. App. 1983) (action must be so clearly devoid of merit, both on facts and law, as to be completely untenable); Wright v. Acieno, 437 So. 2d 242, 244 (Fla. Dist. Ct. App. 1983) (the penalty is mandatory if the court finds there is no justiciable issue raised by the losing party); T.I.E. Communications, Inc. v. Toyota Motors Center, Inc., 391 So. 2d 697, 698 (Fla. Dist. Ct. App. 1980) (action must be frivolous to permit recovery, so as not to deter the future growth of the law), See Spence & Roth, Closing the Courthouse Door: Florida's Spurious Claims Statute, 10 STETSON L. REV. 397 (1981).
"brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or . . . unnecessarily expanded the proceeding by other improper conduct, including . . . abuse of discovery procedures." \(^{107}\) The phrase "lacked substantial justification" is defined as meaning "substantially frivolous, substantially groundless, or substantially vexatious." \(^{108}\)

The state supreme court supplemented the statute in its decision of *Yost v. Torok*, \(^{109}\) redesigning the common law actions into a single cause of action, which it redefined as follows:

Any party who shall assert a claim, defense, or other position with respect to which there exists such a complete absence of any justiciable issue of law or fact that it reasonably could not be believed that a court would accept the asserted claim, defense, or other position; or any party who shall bring or defend an action, or any party thereof, that lacks substantial justification, or is interposed for delay or harassment; or any party who unnecessarily expands the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures, shall be liable in tort to an opposing party who suffers damage thereby. \(^{110}\)

Hawaii (1980) provides that the court may assess an attorney's fee up to twenty-five percent of the amount claimed by the party assessed upon a "specific finding that the claim was completely frivolous. . . ." \(^{111}\)

Illinois (1982) provides:

Allegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorneys' fee to be summarily taxed by the court upon motion made within 30 days of the judgment or dismissal. \(^{112}\)

Prior to 1976, the quoted sentence included the phrase "and not in good faith," immediately following "without reasonable cause," and meant that the cases prior to that time usually turned on the issue of

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\(^{108}\) *Id.*

\(^{109}\) 256 Ga. 92, 344 S.E.2d 414 (1986).

\(^{110}\) *Id.* at 96, 344 S.E.2d at 417-18.


\(^{112}\) *ILL. ANN. STAT.* ch. 110, para. 2-611 (Smith-Hurd 1983).
good faith. The current language is construed to mean that the moving party "knew or reasonably should have known" that the statements of fact were untrue. Indeed, prior to 1961, the statute was essentially unenforced. The statute has been treated as both penal and remedial, but as the court declared in Dayan v. McDonald's Corp., "once it has been established that a litigant has abused his right of free access to our court system by intentionally or recklessly pleading false matters, no rational purpose is served by strictly construing the scope of the resulting section 2-611 award." This case also holds that: (1) destruction of evidence or presentation of false evidence permits an inference of lack of reasonable cause, (2) amendment of the pleadings does not prevent application of the statute if the amended pleading still has the false allegation; and (3) attorney's fees may cover the whole preparation and trial, including a preliminary injunction granted to the offending party on the basis of its false allegations, argument on the motion under the statute and appeal, and trial and interpreter fees. The statute is applicable to statements in or about a motion. The court may act on its own motion when the falsity is apparent in a pleading. The court may apply the sanction without the need of a hearing.

Kansas (1982) provides:

At the time of assessment of the costs . . . if the court finds that a party, in a pleading, motion or response thereto, has asserted a claim or defense, including setoffs and counterclaims, or has denied the truth of a factual statement in a pleading or during discov-

111. There is a good treatment of the historical development of the section in Dayan v. McDonald's Corp., 126 Ill. App. 3d 11, 466 N.E.2d 945 (1984).
117. Id. at 24, 466 N.E.2d at 954. See Levine, Section 41 of the Civil Practice Act: The Sleeper Awakes, 54 Ill. B.J. 388 (1965).
118. 126 Ill. App. 3d at 21-22, 25-26, 28-29, 466 N.E.2d at 953, 955, 958. The facts in Dayan are quite interesting. Dayan sued McDonald's as the franchisee for the restaurants in Paris, France, to enjoin it from terminating the franchises for failing to maintain proper quality service and cleanliness standards. The court affirmed the action of the trial court in awarding McDonald's $1,536,472.55 as attorney's fees and $306,433.13 in expenses pursuant to § 2-611.
120. Id.
121. Brokaw Hospital v. Circuit Court, 52 Ill. 2d 182, 287 N.E.2d 472 (1972).
ery, without a reasonable basis in fact and not in good faith, the court shall assess against the party as additional costs of the action, and allow to the other parties, reasonable attorney fees and expenses incurred by the other parties as a result of such claim, defense or denial.\textsuperscript{122}

The attorney is also liable individually or jointly and severally "where the court finds that the attorney knowingly and not in good faith asserted such a claim, defense or denial or, having gained knowledge of its falsity, failed to inform the court promptly . . . ."\textsuperscript{123} The purpose of the section is said "not to prevent a party from litigating bona fide claims or defenses but to protect litigants from harassment and expense in clear cases of abuse."\textsuperscript{124}

Maryland (1984), in the Rules of General Provisions, provides:

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.\textsuperscript{125}

Court decisions indicate that this rule applies to both plaintiff and defendant,\textsuperscript{126} does not cover a reasonable attempt to introduce a new cause of action in tort,\textsuperscript{127} and treats "bad faith" as including an action taken for the purpose of causing unjustifiable delay.\textsuperscript{128}

Massachusetts (1978) uses as a test, whether the "claim[s], defenses, setoffs or counterclaims [were] wholly insubstantial, frivolous and not advanced in good faith," but the finding may not be made "solely because a novel or unusual argument or principle of law was advanced."\textsuperscript{129} Motion is made at the end of the trial and the "court may determine, after a trial and distinct finding" to award "reasonable counsel fees and other costs and expenses incurred in defending

\begin{itemize}
\item \textsuperscript{122} KAN. STAT. ANN. § 60-2007(b)(d) (1983).
\item \textsuperscript{123} Id. § 60-2007(b).
\item \textsuperscript{124} Id. § 60-2007(d).
\item \textsuperscript{125} MD. GEN. PROV. CODE ANN. § 1-341 (1986).
\item \textsuperscript{126} See Bastian v. Laffin, 54 Md. App. 703, 719, 460 A.2d 623, 632 (1983) (court discussing rule 604(b), predecessor of § 1-341).
\item \textsuperscript{129} MASS. GEN. LAWS ANN. ch. 231, § 6F (West 1985).
\end{itemize}
against such claims." If a frivolous defense causes the withholding of money, interest at one hundred and fifty percent of the statutory rate is granted. This remedy is in addition to any existing remedy.

Michigan (1986) recently enacted a statute which provides:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(3) As used in this section:
   (a) "Frivolous" means that at least 1 of the following conditions is met:
      (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
      (ii) The party had no reasonable basis to believe that the facts underlying the party's legal position were in fact true.
      (iii) The party's legal position was devoid of arguable legal merit.

Minnesota (1982, 1986) uses as a test, whether a "party or attorney . . . acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the court." The test does not include "a good faith argument for an extension, modification, or reversal of the existing law." The court acts on motion of a party and at its discretion may award "costs, disbursements, reasonable attorney fees and witness fees."

North Dakota (1977) states a test of whether the "claim for

130. Id. (emphasis added). See Lewis v. Emerson, 391 Mass. 517, 522 n.6, 462 N.E.2d 295, 301 n.6 (1984) (in assessing damages, attention should be paid to conduct of the defendant during litigation, not to conduct prior to trial).
134. Id.
135. Id. Although not expressly stated, the "bad faith" clause is confined to bad faith as to an issue in litigation. See Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Ass'n, 294 N.W.2d 297 (Minn. 1980).
relief was frivolous.”138 The “court may, in its discretion, . . . award reasonable actual or statutory costs, or both, including reasonable attorney’s fees” if it finds that “there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor.”137 The prevailing party must have alleged the frivolous nature of the claim in responsive pleading.138

Oregon (1983) provides that “the court may, in its discretion, award reasonable attorney fees appropriate in the circumstances to a party against whom a claim, defense or ground for appeal or review is asserted” if the court finds that the other party “wilfully disobeyed a court order or acted in bad faith, wantonly or solely for oppressive reasons.”139

South Dakota (1984) provides:

If a cause of action against any person is dismissed, and the court determines that the cause of action was frivolous or brought for malicious purposes, the court may order the plaintiff to pay any or all costs incurred by the person in defending the cause of action, including reasonable attorney’s fees.140

Utah (1981) succinctly provides that “the court may award reasonable attorney’s fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith.”141

Washington (1983) provides that if a trial judge in a civil action “upon final judgment” makes written findings “that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, [he may] require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing” the pleading of the non-

137. Id.
138. Id. See Moritz v. Medical Arts Clinic, P.C., 315 N.W.2d 458 (N.D. 1982); In re Buchholz, 326 N.W.2d 203 (N.D. 1982) (both construing the section).
141. UTAH CODE ANN. § 78-27-56 (Supp. 1986). See Cady v. Johnson, 671 P.2d 149 (Utah 1983) (action may be without merit, but must also lack good faith; this means action lacking an honest, although ill-formed, belief in the claim, an intent to take an unconscionable advantage of the other party, or an intent to hinder, delay or defraud the other party). See also Note, Attorney’s Fees in Bad Faith, Meritless Actions, 1984 UTAH L. REV. 593.
prevailing party. Determination is "made upon post-trial motion." Wisconsin (1977) declares that the court "shall award . . . reasonable attorney fees" if it finds "an action or special proceeding . . . or a counterclaim, defense or cross complaint . . . to be frivolous." This requires a finding that the action was brought or continued "in bad faith, solely for purposes of harassing or maliciously injuring another" or that the party or the attorney "knew, or should have known" that the action "was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

Some states have adopted a rule of court corresponding to Rule 11 of the Federal Rules of Civil Procedure, some of them without its 1983 modifications and some with them. Since this rule will be given more detailed treatment later, I merely give citations here.

Other states have statutory provisions applicable to frivolous litigation in particular types of suits or certain aspects of the litigation process. For example, two states authorize a counterclaim based on the concept of malicious civil prosecution. Tennessee provides that the principal action must have been "instituted with improper intent and without probable cause," and also includes abuse of process. Washington requires the principal action to be "instituted with knowledge that [it] was false, and unfounded, malicious and without probable cause." This statute also abolishes the special damage

142. WASH. REV. CODE ANN. § 4.84.185 (Supp. 1986).
144. Id. The constitutionality of § 814.025 was upheld in Estate of Bilsie v. Bilsie, 100 Wis. 2d 342, 302 N.W.2d 508 (1981). Sommer v. Carr, 99 Wis. 2d 789, 299 N.W.2d 856 (1981) contains a good treatment of the requirement of a finding by the trial court and the issues of notice and hearing. Robertson-Ryan & Assocs. v. Pohlhammer, 112 Wis. 2d 583, 334 N.W.2d 246 (1983) treats the subject of frivolous defense. In Pohlhammer, the defendant disappeared as the parties were going to another courtroom, and the trial judge refused a continuance. Defendant's attorney did what he could, without defendant as a witness, by cross-examining plaintiff. The court found for the plaintiff and assessed attorney's fees against defendant and his counsel. The supreme court reversed the holding that the defense counsel was liable.

rule in a suit against certain government officials. A number of states, in their rules governing summary judgment, provide that if the court finds that an affidavit filed in regard to the motion is presented in bad faith or solely for the purpose of delay, the court shall direct that the person filing the affidavit pay the other party reasonable expenses incurred as a result, including reasonable attorney's fees.\(^{148}\)

Frivolous appeals, especially when filed solely for delay, are made the basis of action against the appellant in several states. The appellate court may impose sanctions, including attorney's fees, double costs, and damages that seem just.\(^{149}\)

Arizona provides that in "any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees."\(^{150}\) They are to be awarded "upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith."\(^{151}\)

2. Adoption of the English Rule on Costs and Attorney's Fees.—The state of Alaska follows the English rule on attorney's fees, that they are to be included in the costs of an action and are therefore awarded to the prevailing party. Apparently starting from a 1900 Congressional Act for the Territory of Alaska, providing that "there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action or defense thereto, which allowances are termed costs."\(^{152}\) The current statute directs the supreme court to "determine by rule or order the costs, if any, that may be allowed a prevailing party in a civil action."\(^{153}\) Rule 54(d) now provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise di-


\(^{151}\) Id. § 12-341.01(C) (emphasis added).


rects," and Rule 82(a) contains a table stating the measure of attorney fees normally allowed.\textsuperscript{164} These provisions have withstood constitutional attack,\textsuperscript{165} and the decisions indicate that "[t]he purpose of . . . the allowance of attorneys' fees is to partially compensate a prevailing party."\textsuperscript{166}

Some other states had adopted the English rule in special factual situations. For example, Florida (1980) provided for the award of reasonable attorney's fees to the prevailing party "in any medical malpractice action."\textsuperscript{167} The constitutionality of the section was vigorously attacked but consistently upheld,\textsuperscript{168} until it was repealed in 1986.\textsuperscript{169}

Almost all of the states have special statutes providing for the recovery of attorney's fees in certain types of situations. These are passed for reasons of public policy, because the state wants to encourage the bringing of certain actions, because of the likelihood of economic inequality of the parties, because the recovery is likely not to be sufficient to make it feasible for an attorney to take the cases, because the amount in issue is less than a designated amount, or for other reasons.\textsuperscript{170} In any event, these statutes have not been passed in an effort to solve the problem of frivolous litigation, and they are therefore not fully relevant to the subject of this Article.

B. Federal Decisions, Statutes, and Rules

1. Judicial Establishment of the Bad-Faith Rule.—The distinction between the English rule that the prevailing party may recover his attorney's fees from the loser and the American rule that each party pay his own attorney's fees has already been stated. The United States Supreme Court has consistently been a strong adherent of the American rule. Its first decision concerning this matter

\begin{itemize}
\item \textsuperscript{154} Alaska R. Civ. P. 54(d), 82(a).
\item \textsuperscript{155} See Stepanov v. Gavriloich, 594 P.2d 30, 36-37 (Alaska 1979).
\item \textsuperscript{157} Fla. Stat. Ann. § 768.56 (West Supp. 1985).
\item \textsuperscript{158} See Davis v. North Shore Hosp., 452 So. 2d 937 (Fla. App. 1983); Young v. Altenhaus, 488 So. 2d 1039 (Fla. App. 1983); Karlín v. Denson, 447 So. 2d 897 (Fla. App. 1983); Pohlmans v. Mathews, 440 So. 2d 681 (Fla. App. 1983); Florida Medical Center v. Von Stetina, 436 So. 2d 1242 (Fla. App. 1983).
\item \textsuperscript{159} For the statute replacing § 768.56, see Fla. Stat. Ann. § 768.595 (West 1986).
\end{itemize}
was in 1796. Since then, the Court has frequently referred to the American rule and supported it vigorously.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, for example, Chief Justice Warren traced the historical development in an oft-quoted paragraph. The Court held to the American rule and refused to construe the Lanham Act to permit a prevailing party to recover attorney's fees from an intentional trademark infringer.

Two potential exceptions gradually came to be recognized and established. The first derived from

the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, [and allowed him] to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit.

The second exception allowed "a court [to] assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant,' or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"

Still a third exception had been developing in the lower federal courts...
courts, known as the "private attorney general" exception. It would permit the court to award attorney's fees to a plaintiff who obtained a judicial decision, the benefits of which would inure to the public as a whole or to a large portion of it. The problem was presented in *Alyeska Pipeline Service Co. v. Wilderness Society.*\(^{167}\) The suit by the Wilderness Society was to obtain a declaratory injunction to the effect that the planned Alaska pipeline was not in compliance with statutory provisions. The court of appeals granted relief and awarded attorney's fees. The Supreme Court declined to recognize this exception and held that the policy decisions involved were more appropriately made by Congress.

Obviously, the only one of these exceptions that directly concerns frivolous litigation is the second one. Just as obviously, the numerous congressional acts\(^{168}\) making special provision for attorney's fees as a means of encouraging the suits have no direct concern with means for controlling frivolous litigation. There is some interplay, however, as demonstrated in two later Supreme Court cases. Both involved suits under the Civil Rights Act. The first is *Christiansburg Garment Co. v. Equal Employment Opportunity Commission,*\(^ {169}\) which involved a suit under the Civil Rights Act of 1964.\(^ {170}\) The EEOC had notified an employee of the garment company that she had the right to sue the company for racial discrimination, and when she failed to sue, the EEOC brought action two years later. The company's motion for summary judgment was granted on the ground that the discrimination charge had not been pending before the Commission at the appropriate time. The company sought an award of attorney's fees under section 706(k) of the Act, providing that the court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."\(^ {171}\) The refusal to grant the award was affirmed by the court of appeals and the Supreme Court. Had the employee sued on her own and prevailed, she would have been entitled to the award, the Court said, but the trial court acted within its discretion in not awarding the fees to a defendant who had simply prevailed; and it might have awarded fees "upon a finding that the

\(^{167}\) 421 U.S. 240 (1975).


\(^{171}\) Id.
plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

The second case, Roadway Express, Inc. v. Piper, also involved the Civil Rights Act and racial discrimination. In this class action, counsel for the plaintiff served interrogatories on the defendant, which answered and served interrogatories of its own. The plaintiff’s counsel failed to answer or to respond to an order compelling answers, or to appear for an argument or the taking of a deposition, or to file a brief on an issue submitted by the trial court. The trial court granted a motion to dismiss, and awarded court costs and attorney's fees to the defendant (exceeding $17,000). The court of appeals affirmed on the basis of 28 U.S.C. § 1927, which provides that an attorney “who so multiplies the proceedings in any case [as to increase costs] unreasonably and vexatiously may be required . . . to satisfy . . . such excess costs.” The Supreme Court held that this provision gave no authority to assess attorney's fees.

The Court agreed with the defendant, however, that the trial court's ruling was a proper exercise of the court's inherent powers. Declaring on the basis of Alyeska that the American rule on attorney's fees does not apply when the opposing party has acted in bad faith, it added: "The bad-faith exception for the award of attorneys' fees is not restricted to cases where the action is filed in bad faith. ".[B]ad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." [175]

Alyeska and Roadway Express have clearly established the position that the federal courts have inherent power to impose sanctions on both a party and his attorney who files and pursues a frivolous action (one that is not at all “colorable”) or who uses certain procedural actions, including pleadings and motions, to accomplish an improper ulterior purpose. The key expression is “bad faith.” It is to be compared with the words “malicious” and “abuse” in the common law tort actions. The decisions in the federal district and appeals courts rely on the pronouncements of these two cases.

2. 28 U.S.C. § 1927.—The opinion in Roadway Express on

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172. 434 U.S. at 421. The Court found that the legal issue settled by the summary judgment was one of first impression, and the argument was therefore not frivolous.
174. Id. at 762-63.
175. Id. at 766 (quoting Hall v. Cole, 412 U.S. 1, 15 (1973)). There is an extensive discussion of the case in Comment, Awards of Attorneys' Fees Against Attorneys: Roadway Express, Inc. v. Piper, 60 B.U.L. REV. 950 (1980).
June 23, 1980, would seem to indicate that section 1927 would thereafter play no significant part in providing a remedy for frivolous litigation. The section had been in effect since 1813\textsuperscript{176} without substantial change and was referred to by the courts very seldom. Under the American rule, an award of “costs” alone would not serve as an effective sanction or provide needed compensation. But as an immediate reaction to the holding in \textit{Roadway Express}, Congress amended section 1927 so that, since September 12, 1980, it reads in full:

> Any attorney or other person admitted to conduct cases in a court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred of such conduct.\textsuperscript{177}

This gave significant effect to the section, both for imposing a sanction and for providing a compensatory remedy to the other party. Observe that the imposition of the award is on the attorney and not on a party to the suit, and that it is discretionary (“may”), rather than mandatory. Observe also that its prime target is not the filing of a meritless action but multiplying “proceedings . . . unreasonably and vexatiously,”\textsuperscript{178} so that it appears to be laying down an objective test. Influenced, however, by the language of the Supreme Court in the cases on the inherent powers of the court, the courts imported the language of “bad faith,” and have made the test subjective.\textsuperscript{179} This has meant that the two bases for imposing a sanction

\textsuperscript{176} 3 Stat. 21 (1813).

\textsuperscript{177} 28 U.S.C. § 1927 (1982). The words in italics were added by the amendment. A few cases, rendered prior to the amendment and prior to \textit{Roadway Express}, were decided under the belief that attorney’s fees could be awarded. They may therefore be appropriately referred to with the cases decided after the amendment.

\textsuperscript{178} “The mere fact that an action is without merit does not amount to bad faith.” \textit{Miracle Mile Assocs. v. City of Rochester}, 617 F.2d 18, 21 (2d Cir. 1980) (frivolous appeal) (citing \textit{Runyan v. McCrary}, 427 U.S. 160, 183-84 (1976)). Bad faith “does not require that the legal and factual bases for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy or \textit{mala fides}, the assertion of a colorable claim will not bar the assessment of attorneys’ fees against him.” \textit{Lipsig v. National Student Marketing Corp.}, 663 F.2d 178, 182 (D.C. Cir. 1980) (quoting \textit{In re National Student Marketing Litig.}, 78 F.R.D. 726, 728 (D.D.C. 1978)).

\textsuperscript{179} “An action is brought in bad faith when the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons”; “procedural bad faith or harassment” is sufficient. \textit{Browning Debenture Holders’ Committee v. Dasa Corp.}, 560 F.2d 1078, 1088 (2d Cir. 1977). Whether defense counsel increased the costs “unreasonably and vexatiously” within the meaning of § 1927 depends on whether the language “unreasonably and vexatiously” is applied literally or whether it implies a bad faith or
for some forms of frivolous litigation are largely construed as applying the same test. 180

Any part of the litigation process may be abused—that is, used "unreasonably and vexatiously." The sanction may apply to the initial filing of a suit, 181 to its continuation after the lack of merit became evident, 182 to the filing of a motion, 183 to the taking of an appeal, 184 and to a combination of procedural devices. 185 The section applies to the action of either the plaintiff or the defendant.

Appellate courts have been careful to insist on the granting of a

intentional misconduct requirement not explicit in the statute. The latter approach is suggested by Asai v. Castillo, 593 F.2d 1222, 1225 (D.C. Cir. 1979) (bad faith requirement); United States v. Ross, 535 F.2d 346, 349 (6th Cir. 1976) (intent or recklessness); Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163, 1167 (7th Cir. 1968) (a "serious and studied disregard for the orderly processes of justice"); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir. 1971) ("a clear showing of bad faith"). See also Barnd v. City of Tacoma, 664 F.2d 1339, 1343 (9th Cir. 1982) ("We are persuaded by those decisions which require intent, recklessness or bad faith."); Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984):

We believe that a rule permitting the imposition of attorneys' fees only where the attorney intentionally acts without a plausible basis is proper. . . . In determining whether an attorney acted intentionally, a court need not rely solely on direct evidence of the attorney's subjective knowledge. A court may infer intent from a total lack of factual or legal basis for a suit. . . . A court may also look to extrinsic or circumstantial evidence, such as research memoranda or letters to the client.

Id. (footnote and citation omitted).

180. See Gianna Enterprises v. Miss World (Jersey) Ltd., 551 F. Supp. 1348 (S.D.N.Y. 1982), where the court stated: "Thus, the court's equitable and § 1927 powers are guided by the similar if not identical standard." Id. at 1359 (citing and quoting from Nemeroff v. Abelson, 620 F.2d 339, 348 (2d Cir. 1980)).

In a number of cases the claim has been founded on both bases, and the court does not attempt to select a single basis for the decision. See, e.g., Barnd v. City of Tacoma, 664 F.2d 1339 (9th Cir. 1982); cf. Lipsig v. National Student Marketing Corp., 663 F.2d 178 (D.C. Cir. 1980) (no indication of any basis). On the other hand, in Overnite Transportation Co. v. Chicago Industrial Tire Co., 697 F.2d 789 (7th Cir. 1983), the court tracked the language of § 1927 carefully, using the dictionary on "vexatious," and finding that the attorney's conduct was not "multiplicious."

181. E.g., Nemeroff v. Abelson, 620 F.2d 339, 349 (2d Cir. 1980) (bad faith not found).

182. E.g., Nemeroff v. Abelson, 704 F.2d 652, 660 (2d Cir. 1983) (continuation of suit found to be in bad faith).


184. E.g., Olympia Co. v. Celotex Corp., 771 F.2d 888, 892-93 (5th Cir. 1985).

185. In Pfister v. Delta Air Lines, Inc., 496 F. Supp. 932 (N.D. Ga. 1980), and Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908 (1969), the opinions go into considerable detail about the multifarious acts of a plaintiff's counsel and a defendant's counsel, which the first court described as "the most outrageous and unprofessional conduct on the part of an attorney that this Court has ever encountered," 496 F.Supp. at 932, and the second court described as "acts of misconduct . . . correctly found to be intentional, involving serious breaches of the Canon of Ethics," 404 F.2d at 1167. Sanctions were imposed in both cases.
hearing to give the attorney an opportunity to explain his reasons.\textsuperscript{186} The sanction of attorney's fees does not apply to the total case unless the whole suit should never have been brought, but only to the expense involved in refuting the vexatious action.\textsuperscript{187}

3. Rule 11 of the Federal Rules of Civil Procedure.—(a) The Original Rule.—In 1938, the Federal Rules of Civil Procedure were adopted. They contained many provisions seeking to expedite the trial of cases, to prevent abuses, and to insure a fair result. One method for attaining these ends was to provide for sanctions in case of violation of a rule. Several of the rules are pertinent to the subject of frivolous litigation, but Rule 11 is particularly directed to alleviating that problem.

As originally promulgated, the Rule provided that every pleading must be signed by an attorney of record. This signature constitutes a certificate . . . that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action . . . \textsuperscript{188}

For many years, the Rule was essentially ignored by judges and lawyers alike.\textsuperscript{189} One of the difficulties was that the only specific remedy referred to is the striking of a pleading as sham. This remedy was used in \textit{Freeman v. Kirby},\textsuperscript{190} an unusual and confusing case in which the court found that the attorney had found a person willing to lend his name as a plaintiff, and, without knowledge of the facts, to act the role of plaintiff in the expectation of being paid for his time. The court concluded that an “attorney’s certification under such circumstances runs flagrantly afoot of the purpose of the

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  \item \textsuperscript{186} E.g., Textor v. Board of Regents, 711 F.2d 1387, 1394 (7th Cir. 1983).
  \item \textsuperscript{187} 28 U.S.C. § 1927 (1982) provides that the attorney may be required to “satisfy personally the excess costs, expenses and attorneys’ fees reasonably incurred because of such conduct” (emphasis added).
  \item \textsuperscript{188} Fed. R. Civ. P. 11 (1938).
  \item \textsuperscript{189} Risinger, \textit{Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11}, 61 MINN. L. REV. 1 (1976), provides a very thorough treatment of Rule 11 up to the date of the Article. See id. at 34-37 for further indication of the ineffectiveness of the Rule as shown by the cases.
  \item \textsuperscript{190} 27 F.R.D. 395 (S.D.N.Y. 1961). See Risinger, \textit{supra} note 189, at 39-42 for a discussion of the \textit{Freeman} case, which was decided 23 years after promulgation of the Rule.
\end{itemize}
rule." Subsequent federal cases decided within the next few years after *Freeman* did raise questions of groundless suits; these cases usually talked about the tort actions of malicious civil prosecution and abuse of process, and the inherent equitable power of the courts, but made no reference to Rule 11.

In 1973, a proper utilization of Rule 11 took place. In *Kinee v. Abraham Lincoln Federal Savings & Loan Association*, a class action was brought by mortgage borrowers against mortgage lenders on the ground of conspiracy to violate the antitrust laws by agreeing not to pay interest on escrow accounts to cover taxes due on the mortgaged property, in order to eliminate this item as a basis for competition. Not knowing which mortgage lenders were parties to the conspiracy, plaintiff's lawyers utilized the device of suing every institution listed in the Philadelphia phone book under "mortgages." All lenders who responded that they were paying interest on the escrow account were voluntarily dismissed.

Motion was made by the defendants to strike the complaint as being a sham and false on the basis of Rule 11. The court declined to do this because the complaint had merit against the remaining defendants. Under the authority for "appropriate disciplinary action," however, it found the action of the plaintiff's lawyers improper and declared that they should be censured for adopting this method of identifying those parties who might be subject to liability. Then it held that it would notify the attorneys for the dismissed defendants "that they have a right to file with the Court a bill of costs for the expenses incurred by their respective clients in having been forced improperly to appear and to defend this suit. Those costs will then be taxed to the attorneys for the plaintiffs." At last, there was an appropriate interpretation of Rule 11.

This holding did not fully settle the issue of whether Rule 11 authorized the awarding of attorney's fees, however. In *United

191. 27 F.R.D. at 399 (footnote omitted). In Bertucelli v. Carreras, 467 F.2d 214, 216 (9th Cir. 1972), part of a complaint was stricken as false, but the plaintiff was given "at least one opportunity to correct his defective complaint."

192. Lawrence v. Fuld, 32 F.R.D. 329 (D. Md. 1963) (attorney's fees not included in "costs"); Smoot v. Fox, 353 F.2d 830 (6th Cir. 1965), cert. denied, 384 U.S. 909 (1966) (writ of prohibition issued to trial court against allowing attorney's fees). In *Smoot*, the court held that allowing attorney's fees would violate the right to a jury trial under the seventh amendment.


194. Id. at 982.

195. Id. at 983.
States v. Standard Oil Co.,\(^{196}\) the Ninth Circuit held that “no statute authorizes the imposition of attorney’s fees.”\(^ {197}\) The footnote to this statement referred to Rule 11, quoting parts of it, and declared that it “says nothing about disciplining a party by imposing attorney’s fees upon him for any act of his lawyer, even if his lawyer willfully violated Rule 11.”\(^{198}\) After section 1927 was amended in 1980 to provide for awarding attorney’s fees, however, the decisions began to apply the same rule to Rule 11.

As the 1970’s were expiring and the 1980’s beginning, litigation regarding Rule 11 became more frequent. And while reliance was often placed not only on the Rule, but also on the inherent equitable power of the courts and section 1927, and sometimes on other statutory provisions, the Rule usually played a significant role. An award of attorney’s fees became the usual sanction, and striking a pleading as sham was not often sought or granted.

The major issue for the courts was whether the party filing the pleading acted in bad faith. The courts recognized that the test to be imposed was subjective. The “disciplinary action” was to be imposed for a “wilful violation of [the] rule.” The signature certified that the attorney had read the pleading and that “to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay.”\(^ {199}\)

In Driscoll v. Oppenheimer & Co.,\(^ {200}\) a securities case, the district court granted a motion to strike and dismiss the complaint, and defendant moved for attorney’s fees. The court denied the petition, saying that the party could rely on his attorney and that it was possible to reach the conclusion that the attorney acted in good faith.\(^ {201}\)

In McCandless v. Great Atlantic & Pacific Tea Co.,\(^ {202}\) an employment case, the district court dismissed the action for failure to exhaust internal union remedies and assessed fees of $1,000 against the plaintiff’s attorney, who admitted that he knew of the exhaustion requirement but claimed that he had filed the suit at his client’s insistence. He also misquoted a case by omitting a sentence that refuted his argument and did not respond to the defendant’s allega-

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196. 603 F.2d 100 (9th Cir. 1979).
197. Id. at 103.
198. Id. at 103 n.2.
199. FED. R. CIV. P. 11.
201. Id. at 176.
202. 697 F.2d 198 (7th Cir. 1983).
tions of bad faith until it became apparent that he might be personally responsible for the fee. The appellate court affirmed the award.

The four cases of *Nemeroff v. Abelson* all refer to Rule 11. *Nemeroff I* explains that whether the question of awarding attorney's fees is considered under Rule 11, the Securities Exchange Act of 1974, or the court's equitable power, "[t]he ultimate question . . . is whether the plaintiff and/or counsel instituted the action 'in bad faith, vexatiously, wantonly or for oppressive reasons.'" *Nemeroff II* declares that "Rule 11 speaks in plainly subjective terms," and adds that the "standard under Rule 11, therefore, is bad faith . . . . Assuming arguendo that an award of attorneys' fees is a permissible sanction under Rule 11, our conclusion that the instant action was not without foundation and hence not commenced in bad faith necessarily precludes the award of such fees under Rule 11." *Nemeroff III* and *IV* simply held the bad faith test applicable without indicating a particular source. They also held that continuation of the action after further information had become available amounted to conduct in bad faith, and awarded attorney's fees amounting to $50,000 for one set of defendants and $26,000 for another. The case was followed in *Andre v. Merrill Lynch Ready Assets Trusts*, which quoted and relied on Rule 11.

(b) The Amended Rule.—The amendments to Rule 11 had been proposed sometime earlier, but they became effective on August 1, 1983. The time was clearly ripe. The original Rule had by that time broken through the indifference of earlier years and was being resorted to more frequently. Courts were showing themselves more ready to award attorney's fees as a sanction, at times, perhaps, because they had seen the proposed amendments. But as the advisory committee noted, the old Rule had "not been effective in deter-

203. *Id.* at 201-02.


206. 620 F.2d at 350 (citations omitted).


208. For a comprehensive treatment of the federal law prior to the amendment of Rule 11, see Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System, 61 N.C.L. Rev. 613* (1983).
ring abuses.\textsuperscript{209}

The major changes are numerous: \textsuperscript{210} (1) the requirement of signing a pleading now expressly applies to a "motion or other papers," as well as a pleading; (2) the certificate that to the best of his knowledge, information, and belief "there is good ground to support it and that it is not interposed for delay," is now changed to add "formed after reasonable inquiry," and to certify that the pleading or other paper "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"; and (3) if the Rule is violated, it provides that the court "shall impose\textsuperscript{211} . . . an appropriate sanction" on the attorney or the client, or both, which may include "reasonable expenses incurred because of the filing . . . , including a reasonable attorney's fee."\textsuperscript{212}

The new language thus requires a reasonable inquiry by the attorney. Instead of the broad and indefinite phrase "good ground," it refers specifically to the two types of problems involved—adequate proof to sustain the allegations ("well grounded in fact") and ade-

\textsuperscript{209} 97 F.R.D. at 198.

\textsuperscript{210} The text of Rule 11, as amended, reads as follows:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

\textsuperscript{211} The change from "may" to "shall" makes the directive mandatory.

\textsuperscript{212} Now that the most significant changes have been pointed out, it may be helpful to look back to note 210 and read the entire Rule.
quate basis in law ("warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"). The advisory committee notes that this "standard is more stringent than the original good faith formula and thus it is expected that a greater range of circumstances will trigger its violation." The committee also declares that the "rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."1

One difficulty with the original version lay in its use of the subjective test of "bad faith." Bad faith is a standard leaving considerable discretion with the trial judge, but its subjective aspect normally leaves a sense of doubt in the judge's mind. As one judge put it: "Given the nature of advocacy it would be well nigh impossible even to establish that an advocate acted in 'subjective bad faith.' If that were the criteria [sic] the Rule might as well be repealed."

The new version is confessedly more "stringent" than the old one and purports to be objective. A major basis for this position is the requirement of making a "reasonable inquiry" before signing a

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213. 97 F.R.D. at 198-99 (advisory committee's note).
214. Id. at 199. The committee adds that the "court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted." Id. On this, see Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985).
215. This was also true of the cases based on the inherent equitable power of the courts, and the cases under § 1927. In Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 856 (C.D. Cal. 1984), rev'd on other grounds, 780 F.2d 823 (9th Cir. 1986), the court declared that it was inappropriate to cite cases under the original Rule.
216. Wells v. Oppenheimer & Co., 101 F.R.D. 358, 359 (S.D.N.Y. 1984), vacated, 106 F.R.D. 258 (S.D.N.Y. 1985). A footnote to the statement added, "Having been many years at the Bar before being on the Bench, we know from our own experience that there is no position—no matter how absurd—of which an advocate cannot convince himself." Id. at 359 n.3.
217. See, e.g., Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985): [w]e cannot say for a certainty that Eastway or its counsel acted in subjective bad faith in bringing or maintaining this lawsuit, or that its actual motive was to harass the City. After its travails of the preceding decade, it might just as well have been acting out of frustration or desperation. We can say, however, that its claim of an antitrust violation by non-competitors, without any allegation of an antitrust injury, was destined to fail. Moreover, a competent attorney, after reasonable inquiry, would have had to reach the same conclusion.

Id. See also Kendrick v. Zanides, 609 F. Supp. 1162 (N.D. Cal. 1985); Mohammed v. Union Carbide Corp., 606 F. Supp. 252, 262 (E.D. Mich. 1985) ("Plaintiff's failure to conduct any investigation whatsoever into these claims is apparent from the present record, and this failure requires the court to impose sanctions under Rule 11."). Other cases involving no inquiry include Florida Monument Builders v. All Faiths Memorial Gardens, 605 F. Supp. 1324 (S.D. Fla. 1984); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984); Goldman v. Belden, 580 F. Supp. 1373 (W.D.N.Y. 1984).
pleading, motion, or other paper, and thus certifying that it meets the three standards imposed by Rule 11. When it is clear that the party filing the paper has not made a reasonable inquiry, the courts have customarily seized upon this and have been quite ready to impose an appropriate sanction. Apparently, however, in all of the cases where this has occurred, the pleading, motion, or other paper failed to meet one of the three standards. It would appear that if all three criteria have been met, the lack of a reasonable inquiry would not be treated as controlling.

The requirement that the inquiry be reasonable obviously poses an objective test. When is it reasonable? The advisory committee offers a list of pertinent factors: "how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading. . . . whether the pleading . . . was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar." 218

The first of these factors (amount of time available for the inquiry) involves the thoroughness of the inquiry and a possible excuse for an inadequate one. Obviously, with a limitation period about to expire (and no fault of the attorney in creating the predicament), he must act on the information immediately available to him in preparing the complaint. But the obligation to complete the inquiry remains, and what he does about it may determine whether his inquiry is reasonable under the existing facts of his case.

The other factors listed by the advisory committee also involve the scope of the inquiry, how thorough and how independent it must be, but they also go directly to the three tests in the Rule itself, and they may be more appropriately treated under those topics.

According to the Rule, the three items that the attorney certifies to by affixing his signature are that the pleading, motion, or other paper: (1) is "well grounded in fact"; (2) is "warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"; and (3) is "not interposed for any improper purpose," such as harassment, delay, or unnecessary expense. Reading this for the first time, one instinctively feels that it could be more clearly and adequately expressed, but judges and writers have

218. 97 F.R.D. at 199 (advisory committee's note). There is a detailed treatment of the reasonableness of an inquiry in Unioil, Inc. v. E. F. Hutton & Co., 802 F.2d 1080 (9th Cir.), superseded, 809 F.2d 548 (9th Cir. 1986); and see Southern Leasing Partners, Ltd. v. McMul-
not succeeded in saying it much better, after what must have been a frustrating experience of trying.

"Well grounded in fact" sounds literally as if the attorney is expected to certify that his proof will sustain all of the stated facts. This is obviously not what is intended, and the courts have never felt that they were required to grant a motion for attorney's fees whenever there is a judgment on the merits\footnote{See, e.g., Robinson v. C. R. Laurence Co., 105 F.R.D. 567 (D. Colo. 1985); Leema Enterprises, Inc., v. Willi, 582 F. Supp. 255 (S.D.N.Y. 1984).} or a summary judgment for the party.\footnote{Heimbaugh v. City of San Francisco, 591 F. Supp. 1573 (N.D. Cal. 1984).} Yet experienced judges and lawyers have a sufficiently clear concept of the intended idea to act upon it, even though they have difficulty in putting it into words. This is a reason why in the fact cases the court usually talks about the existence or adequacy of the inquiry.

Judge Schwarzer perhaps comes closest to stating the idea by explaining that the "facts must consist of admissible evidence or at least be calculated to lead to such evidence. They need not be undisputed or indisputable but they must be sufficiently substantial to support a reasonable belief in the existence of a factual basis for the paper. Suspicion, rumor, or surmise will not do."\footnote{Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 187 (1985) (footnotes omitted) (citing Wold v. Minerals Eng'g Co., 575 F. Supp. 166, 167 (D. Colo. 1983)).} Judge Kaufman makes the test more clearly objective by declaring that the test is whether "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact . . . ."\footnote{Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).}

The second item that the attorney certifies to in signing the pleading, motion, or other paper is that it "is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."\footnote{Id.} This item is more clearly expressed than the first one. The signature of the person filing the pleading, motion, or other paper is certifying that both of these requirements are met. The reference to modification of existing law is wise in allowing for development of the law in accordance with the common-law wont. The phrase "good faith argument" is somewhat unfortunate, with its connotation of a subjective rather than objective standard. Perhaps a more neutral word, like tenable, plausible, or colorable, would have been better. Each has a precise dictionary meaning that is more
nearly what is needed. There have been numerous cases involving imposition of sanction for violation of this requirement.224

The third item that the signature certifies to is that the pleading, motion, or other paper "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Violation of this requirement, like that of each of the first two, is in itself a sufficient basis for the imposition of a sanction. This item is expressed in the negative; it is also subjective in nature. Although some courts have indicated that they regard this requirement as objective, they seem to be concerned with the circumstantial nature of the evidence resorted to in order to reach a conclusion; this evidence concerns "improper purpose" or motive and state of mind.225 But most of the time the conclusion is based entirely on the conduct of the individual. One question that the Rule does not answer, and the cases do not appear to have considered, is whether the improper purpose should be the sole one, the primary one, or merely a significant one.226

Although the requirement of lack of an improper purpose clearly applies to the complaint and the defensive pleadings,227 the courts have found the first two requirements more suitable for dealing with these pleadings. Instead, this requirement has been most appropriate in dealing with motions. There, it is easier to judge by valid inference from the act of filing the motion whether the movant was acting from an improper purpose. An experienced judge can instinctively trust his intuitive deductions in deciding whether the real purpose was harassment, delay, or increase in litigation costs. The


226. In the tort action for malicious civil prosecution, the Restatement says that the improper motive must be a primary one. RESTATEMENT (SECOND) OF TORTS § 676 (1977).

227. See Hudson v. Moore Business Forms, Inc., 609 F. Supp. 467 (N.D. Cal. 1985) (plaintiff employee sued defendant employer for discrimination and breach of the covenant of good faith and fair dealing, and defendant counterclaimed for breach of the same covenant and demanded $4,000,000 in punitive damages; court granted a sanction of $14,692 against the defendant); Kendrick v. Zanides, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) ("The only reasonable conclusion is that Kendrick and his attorneys filed the amended complaint, and the subsequent declarations, not to prevail in the action, which they knew they could not, but to serve their vindictive purpose to damage the defendants' reputations and subject them to personal harassment.").
cases show many types of conduct for which sanctions have been imposed. They include motions to dismiss, for removal to federal court or for remand, for change of venue, to disqualify the opposing counsel, a motion to impose a sanction for moving for a sanction, and false charge of fraud against an opposing law firm.

District Judge Schwarzer has strongly argued for what would amount to a fourth requirement—the requirement of candor. To quote him:

A court has the right to expect that counsel will state the controlling law fairly. . . . A lawyer must not misstate the law, fail to disclose adverse authority not disclosed by his opponent of which he knows or should know, or omit facts critical to the application of the rule of law relied on. If the rule on which he relies is circumscribed or conditioned so as to preclude its application to the case, he is obligated to disclose that fact. If he knows another rule such as the statute of limitations, res judicata or collateral estoppel categorically bars his client’s claim, he cannot fail to disclose it in the hope that it will be overlooked.

He had earlier held to this effect in Golden Eagle Distributing Corp. v. Burroughs Corp., where he imposed the sanction of attorney’s fees on a law firm filing a motion for summary judgment. Though the motion raised two appropriate questions of law, Judge Schwarzer objected to the form of the argument in the motion. First, on the issue of statute of limitations, the argument cited a Supreme Court case, and relied upon it as if it had decided in favor of the firm’s

228. E.g., National Survival Game, Inc. v. Skirmish, U.S.A., Inc., 603 F. Supp. 339 (S.D.N.Y. 1985); Lucha, Inc. v. Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983). In Miller v. Affiliated Fin. Corp., 600 F. Supp. 987 (N.D. Ill. 1984), defendant filed a motion to dismiss one count on the ground that the cited statute did not support the claim. There was obviously a typographical error in citing the section number, but the text of the statute had been set out; a sanction was imposed.


234. Schwarzer, supra note 221, at 193.

argument, when the case had merely raised the issue without deciding it. Second, on the issue of whether mere economic damage could be recovered in a products liability action, the argument cited and relied on an earlier Supreme Court case without referring to three later state cases casting doubt on the applicability of the first case.

The law firm appealed, and the court of appeals reversed two years later in an important decision which carefully and thoroughly treated the matter. It held that the purpose of Rule 11 is “to reduce the burden on district courts by sanctioning and, hence deterring, attorneys who submit motions or pleadings which cannot reasonably be supported in law or in fact,” and not to enforce ethical standards expressed elsewhere. “In short, the fact that the court concludes that one argument or sub-argument in support of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding that the motion or pleading is frivolous or that the Rule has been violated.”

Brief reference can be made to some problems that have arisen, or are likely to arise, in the administration of Rule 11. For example, to what extent can the attorney rely on his client in making his inquiry? The quick answer is that the reliance must be reasonable. That is the basis of the attorney’s decision, and that is the basis of the judge’s decision in reviewing it. The problem is a practical one, and some very helpful practical suggestions have been made by three attorneys in a recent article.

Suppose there is a conflict between the attorney and the client, with the client insisting on continuing the case and the attorney very dubious about it. The cases seem to say that if the court decides that the complaint is frivolous, the attorney is not excused by the fact that he was following the demands of his client.

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237. Id. at 1542.
238. Id. at 1541.
239. See supra note 210 and text accompanying notes 210-18.
240. See Rothschild, Fenton & Swanson, Rule 11: Stop, Think, and Investigate, 11 LITIGATION 13, 14 (1985). In Friedgood v. Axelrod, 593 F. Supp. 395 (S.D.N.Y. 1984), the client was held subject to sanction because of a fraudulent claim, but the court-appointed attorney was found to have made reasonable inquiry and investigation, and, so, was not subject to sanction.
An attorney is obligated to dissuade his client from pursuing specious claims, and thereby avoid possible sanctions by the court, as well as unnecessary costs of litigating a worthless claim. Although reasonable attorneys may differ about whether a
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What about confidential communications between the attorney and the client? Answers are equivocal. The advisory committee's note declares that the "rule does not require a party or an attorney to disclose privileged communications . . . in order to show that the signing of the pleading, motion or other paper is substantially justified."242 But Judge Schwarzer describes situations in which this may come about.243

What about joining additional parties either in order to get discovery from them or to prevent the statute of limitations from running in their behalf, if sufficient evidence develops during the trial to impose liability on them? These are very dubious practices. The first is likely to be regarded as an improper purpose, and the second apparently comes within the scope of Kinee v. Abraham Lincoln Federal Savings & Loan Association,244 decided under the old rule.

Suppose information developing during the trial or as a result of discovery makes it apparent that the claim is not justified? The rule ought to be that there is a duty to dismiss the suit voluntarily at that point, but there is doubt whether this is required by Rule 11.245

May the sanction of payment of litigation expenses and attorney's fees be rendered in favor of someone other than a party to the action? There are a few cases in which this has been done. In Westmoreland v. CBS Inc.,246 a witness called by the defendant for a deposition appeared and was ready to testify, but declined to do so on videotape. The defendant petitioned for an order to show cause why he should not be held in civil contempt of court. This developed into a satellite dispute, with the district court denying an award of

243. Schwarzer, supra note 221, at 199.
245. See Oliveri v. Thompson, 803 F.2d 1265, 1274-75 (2d Cir. 1986), which held that, according to the advisory notes to Rule 11, the "signer's conduct is to be judged as of the time the pleading or other paper is signed," so that there is no obligation to take action to withdraw a complaint on the basis of later acquired information. Amendment of the Rule is recommended. See Parness, Three Suggestions for Trial Judges Overseeing Certification Standards, Nat'l L.J., Mar. 3, 1986, at 28. Oliveri does suggest that an obligation might arise on the basis of § 1927 but subjective bad faith is required for it to apply. 803 F.2d at 1273.
246. 770 F.2d 1168 (D.C. Cir. 1985).
costs and attorney’s fees to the witness, and the court of appeals granting the award for attorney’s fees but declining to award travel expenses incurred in coming to testify. In *Eash v. Riggins Trucking Inc.*, defendant’s attorney declined to agree to a settlement until after a jury had been fully impanelled. The court of appeals upheld the power of the district court to require that defendant’s attorney pay the U.S. Government the cost of impaneling the jury for one day, but remanded the case due to questions regarding due process.

In addition to the sanctions, litigation expenses, and attorney’s fees, can the injured party also recover for consequential damages of various sorts, such as interference with person or property or emotional distress? It seems clear that the answer is no. The sanctions are within the proper function of the trial judge in the litigation itself, for the purpose of maintaining efficient and orderly procedure in the litigation process, and it is regarded as appropriate to allocate money charges to compensate a party to the trial who has been put to unnecessary litigation expense. Consequential damages, however, would come within the scope of the guaranties of jury trial in the tort action for malicious civil prosecution.

Procedural aspects leading to the imposition of sanctions are treated in the advisory committee’s note. Sanction proceedings may be started by motion of either party or by the court *sua sponte*. Due process requirements such as a hearing must be met. Timing is at the discretion of the court.

Several cases have emphasized that if the “court finds that an attorney has violated rule 11, it *must* impose sanctions,” but the type of attorney’s fees and the measure of attorney’s fees is at the

247. 757 F.2d 557 (3d Cir. 1985).
248. *Id.* at 568.
249. In remanding *Eash*, the court noted that “like ‘other sanctions, attorney’s fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.’” 757 F.2d at 570 (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1979)).
250. An action can be maintained in federal court under state law for malicious civil prosecution or abuse of process if there is diversity of citizenship and requisite jurisdictional amount, but even this would have to be a separate suit. Cf. *Steele v. Morris*, 608 F. Supp. 274 (S.D. W.Va. 1985) (separate suit required only if state law so dictates, not as an inherent universal rule).
251. *Uniol Inc. v. E. F. Hutton & Co.*, 802 F.2d 1080, 1091 (9th Cir.), *superseded*, 809 F.2d 548 (9th Cir. 1986). *See Albright v. Upjohn Co.*, 788 F.2d 1217, 1221-22 (6th Cir. 1986); *Zaldiver v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986).
discretion of the judge. They can, for example, be for the total attorney’s fees of the injured party or for the time involved in preparation to defend against a particular motion. The extent of experience of the attorney against whom the sanction is imposed may be relevant. The Rule itself provides that the sanction may be imposed against the party to the action or his attorney, or both.

Two recent cases contain significant opinions amounting, in essence, to legal essays on the Rule and its interpretation. Anyone concerned with application of the Rule should regard these opinions as “must-reads.” The cases are Zaldivar v. City of Los Angeles and Eastway Construction Corp. v. City of New York.

In Zaldivar, Judge Wiggins of the Ninth Circuit laid down an authoritative standard for review by the appellate court of the district court’s sanction orders, discussed the “kind of conduct or neglect by counsel which may appropriately trigger sanctions under the Rule,” considered briefly the “essential elements” of the “frivolousness clause” and the “improper purpose clause,” and dis-


256. 780 F.2d 823 (9th Cir. 1986).


258. 780 F.2d at 828:

Appellate review of orders imposing sanctions under Rule 11 may require a number of separate inquiries. If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion de novo. Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

259. Id. at 829-30.

260. Id. at 830-31. The court regards the first clause as applicable if the certified paper “is frivolous, legally unreasonable, or without factual foundation, even though the paper was not filed in subjective bad faith,” id. at 831, and indicates that decisions under “the rule for the payment of fees to prevailing defendants in litigation under the civil rights acts,” id., may appropriately be followed in Rule 11 cases. The court raises the issue of the meaning of harassment under the “improper purpose” clause and declares that the term “focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer’s
discussed in detail the application of its stated interpretations to the facts of the case, ruling that the conduct did not justify the imposition of sanctions.

In *Eastway*, Chief Judge Weinstein of the Eastern District of New York received the case on remand from the Second Circuit, after that court had decided that sanctions were warranted, to make "a determination of 1) the proper amount of attorney's fees to be awarded to the municipal defendants, and 2) the person or persons who should pay those fees." His twenty-two page opinion covers this subject thoroughly and very helpfully. It discusses allocation of the sanction between the attorney and his client, and allocation among several causes of action, not all of which were frivolous; calculation of the expenditures of the party seeking the sanctions; mitigating factors, including wilfulness of the violation, first offenders and persons of good repute, ability to pay, need for compensation, degree of frivolousness, desire not to discourage particular types of litigation; and award of fees for time spent on the motion for fees and for time spent on frivolous appeal. The opinion then applies the stated law to the facts of the case. Judge Weinstein also discusses related topics, such as the due process right to a hearing and the right to introduce evidence. On the topic of subjective and objective standards, he calls attention to the fact that, although under Rule 11 the attorney certifies "that to the best of his knowledge, information and belief, formed after a reasonable inquiry," the pleading is well grounded in fact and law, the Second Circuit had stated the requirement of the Rule to be that "sanctions shall be imposed [if], after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law." Judge Weinstein further states that *Eastway I* "holds attorneys strictly liable for mistakes in judgment that lead to the filing of papers later deemed frivolous."

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1. *762 F.2d 243* (2d Cir. 1985) (*Eastway I*).
3. *id. at 569-76.* Subtitles are helpful in locating particular topics.
4. *id. at 576-84.*
5. *id. at 567-69.*
6. *id. at 567* (emphasis in original).
7. *id. Note that this is not true strict liability, but is only applying an objective rea-
On the other hand, he declares that "a pure strict and unmitigated liability standard in determining the form of the sanctions in Rule 11 cases is inappropriate . . . . Since state of mind is not a factor in determining whether the Rule has been violated, it must be introduced in the second stage of the proceeding, and given weight in deciding on the severity of the sanctions."268 One other comment deserves quotation: "Punishment should never exceed the amount required to achieve the result desired. A deterrent is therefore appropriate when it is the minimum that will serve to adequately deter the undesirable behavior."269

In addition to Rule 11, the Federal Rules of Civil Procedure contain a number of other rules and provisions that have come to play an important role in the attempt to establish effective controls on frivolous litigation. They especially include Rule 37 on Refusal to Make or Cooperate in Discovery, and Rule 68 on Offer of Judgment. Their relevance to the general problem is clear, but it would unduly extend the length of this Article to attempt to spell out the details involved. Frivolous appeals are treated in Rule 38, and in Supreme Court Rule 49.2. Under the All Writs Statute, the courts have authority to issue an injunction against vexatious litigation.270

(c) Evaluation of Rule 11.— Since its amendment in 1983, Rule 11 has become increasingly effective.271 As judges and lawyers

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268. Id. at 572 (emphasis in original).
269. Id. at 565.

become more fully acquainted with it, the extent of its use has been growing and apparently the practice of abuse of litigation procedures has been decreasing. For the first year or so after the amendment, there were a number of cases in which the courts relied not only on the Rule, but also on the inherent equitable powers of the courts in bad faith cases or section 1927.272 That practice is now dying out. Rule 11, with its objective test, is so much more effective and so much easier to apply with a real sense of assuredness, that the courts no longer feel the need to buttress the holding under Rule 11 with a discussion of bad faith.

Although there have been criticisms of the Rule273 and although the possibility exists that a judge may abuse his authority under the Rule, the reception seems to be generally favorable.274 The favorable impression may well continue to grow, although some modifications may prove desirable.275

IV. How Should the Law Deal with Frivolous Litigation?

This survey of the legal methods developed by the federal government and the various states for handling the problem of frivolous litigation reveals that, although there are many different approaches, no single one is fully adequate for the purpose. They are all incomplete and imperfect, needing substantial improvement to become properly effective.

A careful and impartial study of the numerous ideas that have been devised, together with an attempt to ascertain how well they have worked in practice, should provide the basis for a synthesis of treating Rule 11 as part of the general subject of frivolous litigation are cited infra note 275.


274. See Snyder, supra note 273.

275. Some very recent law review studies of Rule 11 are much more thorough and detailed than this more general Article. They trace the gradual development of standards under the rules and are able to offer a more precise critique of its performance. See Cavanagh, Developing Standards Under Amended Rule 11 of the Federal Rules of Civil Procedure, 14 HOFSTRA L. REV. 499 (1986); Nelken, supra note 211; Note, Plausible Pleading: Developing Standards for Rule 11 Sanctions, 100 HARV. L. REV. 630 (1987).
the most useful approaches to the overall problem. Curiously, although discussions of the problem have been rife in recent years, almost all of the treatments have been confined to a single type of remedy, usually with little indication that the writer is even aware of the existence of other types of remedies that may supplement or substitute for the remedy being discussed.  

I find only four articles that attempt to provide the more general comparison of the several approaches—two student notes and two leading articles. 277

Before beginning to offer a preliminary synthesis, I should like to refer briefly to an antecedent question that has only a tangential relationship to the main issue. The question is whether we should abandon the general American rule on attorney's fees (that each party bears his own) and shift to the English rule (that the winner receives his attorney's fees from the loser). There have been quite a number of articles arguing for the adoption of the English rule. 278

Only one state follows the English rule, 279 and it has been the [...]
subject of criticism there. The Supreme Court has been a staunch protagonist of the American rule, and state courts and legislatures have shown no inclination to repudiate it. There seems no reason to anticipate a change of the general American doctrine of attorney's fees.

Congress has, however, frequently provided that in certain designated types of suits the fees should be granted to a winning plaintiff, and some of the state legislatures have followed a similar course. Fee-shifting for certain types of suits has provided extensive discussion, and the task of finding a consistent, organized basis for determining the types of situations in which the fees should be shifted is a fascinating one.

This whole issue relates to the general problem of frivolous litigation in only a peripheral fashion, however, and reference to the sources of further study seems adequate for present purposes. I may add my view that adherence to the American position in general is desirable, combined with carefully coordinated, rather than haphazard, selection of any fee-shifting for particular types of suits or factual situations.

Granting of attorney's fees as a sanction for engaging in frivolous litigation is creating an exception to the American rule, but it is done both to protect the court system itself and to compensate the recipient of the award from the exact harm at which the wrongful conduct was aimed. Shifting the litigation expenses from the victim of the wrongful conduct to the wrongdoer is an apt compromise between the general American rule and the English rule.

The problem of frivolous litigation has been dealt with in this country under two distinct categories of the law—tort law and procedural law. The approaches and solutions developed in each category grew up independently and without any real cross-references from one to the other. This has produced a number of differences but it has also demonstrated some surprising similarities.

The most significant similarity is that the two legal systems are-

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derived at what is essentially the same general view of what should be the most suitable basis for taking action. Although they use different words, they both assume that there are two distinct bases for legal action, and the first one can be divided into two parts. This first standard is that the wrongful conduct (bringing a suit, filing a motion, etc.) must be not completely unfounded (groundless, without any merit, frivolous). This standard applies both to the factual aspect (existence and proof of facts to sustain the action) and to the legal aspect (tenable basis for the action under existing or potential law applying to the facts). The second standard is that the actor's conduct must not be motivated by improper reasons ("malice" in tort law, "bad faith" in procedural law).

The second major similarity is that, while both of the basic standards are very hard to define, the greatest amount of difficulty has arisen in handling the element of improper motivation—the circumstances under which it is required and those under which it may be sufficient in itself.

There are many differences between the approaches of the tort system and the procedural system. Some of them can be pointed out specifically:

(1) The most important difference lies in the identification of the conflicting interests to be balanced. Tort law balances the interest of the injured party in being protected from unjustifiable suits or motions against the general public interest in having the courts open and available for use by an individual, in order to ascertain whether he has a valid action, and to obtain relief if he has. Procedural law seeks to protect the judicial system from becoming clogged and overloaded. Both approaches are subject to criticism as being incomplete. All three interests need to be taken into consideration and given their appropriate weight. This method of handling the problem is likely to bring some changes. Instead of thinking solely in terms of sanctions and punishment of the party engaged in frivolous litigation, the court should think also of the injury to the other party and compensating him for it. Instead of thinking solely of the duty of the attorney to his own client, the court should think also of his duty to the judicial system and his profession.

(2) Another difference is that the procedural law concentrates on litigation expenses, including attorney's fees and loss of time, while tort law concentrates on the consequential damages of litigation, such as injury to person or property (including harm to reputation and emotional distress), with a substantial minority of the states
affording no compensation at all for litigation expenses. Here the states following the minority tort rule are clearly in the wrong, and a comprehensive approach would let the two positions complement each other.

(3) Procedural law provides its remedies in the original action, while tort law requires the bringing of a second action, with a different jury having no knowledge of what transpired in the first trial. To the extent that it is possible and feasible to provide the needed relief, the method of the procedural law should be adopted.

(4) Procedural law (at least the federal procedural law) applies to litigation abuses of various types—complaints, defensive pleadings, motions, briefs—while the tort law is often limited in application to the bringing of a purported cause of action. The tort of abuse of process aids in this connection but is inadequate in its coverage.

(5) Both tort and procedure started with the idea that bad faith ("malice") should be required in all actions of this nature. It is apparent now that this was a mistake. Procedure is moving to correct the misstep. The 1983 amendments to Rule 11 are making it much more effective. In the tort action, malice is still generally required in all actions, even though it may be inferred from lack of probable cause.

(6) Procedural law has proved far more adaptable than tort law. Procedural law has developed in this regard with the judicial system and is now much more compatible with the conditions of modern trials. Tort law has been quite rigid in this regard and has not materially changed since the early days of the Republic. Early misinterpretations of English law distorted the tort action and the distortion has been retained even after the error has been pointed out. This is all the more amazing since the appellate judges have openly taken over the responsibility of keeping most common law tort rules up to date and in accord with modern conditions.

What is needed is a conscious effort to coordinate the procedural and tort law, so that the trial can be handled as simply as possible without the interference of frivolous litigation abuses and without inconsistent results in the original and second trials. One suggestion urged for accomplishing this goal is to authorize a counterclaim in the original trial and to make it compulsory if the claim is to be made at all. This has the effect of eliminating the second trial and it would promote consistent results. But it has what appear to me to be some serious drawbacks. A counterclaim filed at the beginning of a suit may distort the nature of the trial and confuse the
jury. Moreover, it would not work regarding frivolous motions during the midst of the trial; and it would take actual control of the trial from the court by having the jury make the decisions. The whole system of sanctions for the purpose of protecting the smooth working of the judicial system would be disrupted. That sanction system, of course, is the device used by the rules of court. An attempt to solve the problem by treating the filing of a complaint differently from other litigation abuses would create some problems of its own.

My view of the way to attain simplicity and consistency is to make use of a rule of court similar to the current Rule 11 of the Federal Rules. Under Rule 11, the trial judge has control of the proceedings and can exercise his authority to require either party or his attorney to pay to the other party appropriate litigation expenses, including attorney's fees. The amount of these expenses and fees varies, of course, depending on whether the violation of the Rule went to the whole cause of action or to a particular motion that did not require much preparation to refute.

In the great majority of cases, this would provide sufficient relief for the injured party and would thus leave no need for a subsequent suit. This would create a situation similar in some respects to that presently existing in England, where the winner gets his attorney's fees. There are very few reported English cases in modern times in which the winner has found it worthwhile to bring an action for consequential damages.

Would it be possible to give the court authority to award damages for consequential injuries and thus dispose of all of the cases? This seems doubtful. The inherent equitable power of the court, as defined by the Supreme Court cases, is not likely to spread that far. In addition, there are constitutional guaranties of trial by jury that might be held to apply. But even here, the finding reached by the court that the conduct of the party or his attorney was in violation of a court rule like Rule 11 should be entitled to the protection of the principle of collateral estoppel, or issue preclusion, as the Restatement calls it. The fact that the first determination that the conduct violated the standard of the rule was made by a judge, and would be made by the jury if it had originated in the second trial, is held not to prevent the application of collateral estoppel. With this issue settled, the only remaining one would be the measure of dam-

283. See Restatement (Second) of Judgments §§ 27-29 (1982).
284. Id. § 27, comment d.
ages. This makes it likely that a settlement would be reached. Of course, it is necessary that the test for frivolous litigation be essentially the same in the two cases.

Careful attention should be given to defining clearly the tests for both factual and legal inadequacy of the complaint, and for improper motive. There should be more meaningful language than is now being used. The first test, in both of its forms, should be clearly objective and the second should be subjective (motive). Instead of requiring both factual or legal inadequacy and improper motivation for the conduct, either should be sufficient, whether the court is acting under a court rule or there is a separate tort action for consequential damages.

An intent to mislead the court, as deduced from circumstantial evidence, should be grounds for imposing a sanction, and attorney's fees should be awarded to the other party to the extent that he sustained expenses.

The attorney or party should be held to a reasonable inquiry, and to an awareness of the information that the reasonable inquiry would have disclosed. The duty of reasonable inquiry should expressly be made a continuing one, with an obligation to change the statements in any existing litigation papers to make them include the new information.

Special consideration should be given to a stonewalling defense and how to treat it. Several states have statutes providing sanctions for untrue statements that the maker should know to be false.

In case of an egregious violation or persistently contumacious conduct, the court should be authorized to impose on the derelict attorney or party the obligation to reimburse not only the other party but also the government itself for its expenses not incorporated in the normal assessed costs. Free access to the courts should not be guaranteed to a person abusing the privilege so flagrantly.

If the details of these suggestions and ideas are worked out, how should they be put into effect? There are several methods that can be used. The first is drafting and enacting a statute. The statutory approach could coordinate the changes in tort law and procedural law and make them fit together. Perhaps a model act or even a uniform act might be drafted and promulgated.

285. What is a "reasonable" inquiry depends upon the varying circumstances that arise in the case.
In a state where the highest court has adequate authority to promulgate rules of court, changes in the procedural law can be adequately handled by the court.

There is always the possibility of persuading the court to modify the common law of torts in order to bring it up to date and in accord with modern ideals. Although the courts have shown themselves reluctant to do this in the area of frivolous litigation, there are instances in which the action has been taken. The action of one court in making the desirable modifications, with a strong opinion setting forth the reasons, might well start a trend.

V. CONCLUSION

The law relating to frivolous litigation needs intensive study in its entirety, rather than in a piecemeal fashion. It presently has serious shortcomings and its several parts sadly lack coordination. But it is certainly corrigible. And the time is fully ripe for taking the right kind of action.

288. See, e.g., City Nat'l Bank & Trust Co. v. Owens, 565 P.2d 4, 7 (Okla. 1977) (Oklahoma Supreme Court adopted the U.S. Supreme Court's doctrine of inherent equitable power of the court to award attorney's fees "when an opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reason," although the state courts had apparently not previously adopted the doctrine as such). See also Cox v. Ubik, 424 N.E.2d 127, 129 (Ind. App. 1981).