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Sword and Shield: Ethical Considerations of the Texas Anti-SLAPP Statute in Local Government Litigation

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The Texas Citizens Participation Act

- Texas Civ. Prac. & Rem. Code Chapter 27
- Passed in 2011
- Expedited ruling and attorneys fees for first amendment defenses
- Texas version of Anti-SLAPP legislation

What is a SLAPP?

Strategic Lawsuit Against Public Participation

A SLAPP suit is intended to burden a person with costly litigation in order to silence that person's opposition or public criticism.

> *Example*: Developer sues a Mayor for defamation based on her statements that his developments flood

Ethics Rules - Meritorious Claims

Rule 3.01. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Minimizing Burdens and Delays

Rule 3.02. In the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.

TCPA minimizes delay

Comment 1. those situations where a lawyer or the lawyer's client perceive the client's interests as served by conduct that delays resolution of the matter or that increases the costs or other burdens of a case. Because such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are "unreasonable" are prohibited.

Ethics Obligation to Minimize Delay

Comment 5: On the other hand, a client may seek to have a lawyer delay a proceeding primarily for the purpose of harassing or maliciously injuring another. Under this Rule, a lawyer is obliged not to take such an action. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay undertaken for the purpose of harassing or malicious injuring. The fact that a client realizes a financial or other benefit from such otherwise unreasonable delay does not make that delay reasonable.

Professional Responsibilities

As advisor, a lawyer provides a client with an ***informed understanding*** of the client's legal rights and obligations and explains their ***practical implications***.

“Informed understanding” of the TCPA

- This chapter shall be construed liberally to effectuate its purpose and intent fully.
- The purpose of [the TCPA] is to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.

How does it work?

- Movant files a motion to dismiss
- Court must hold a hearing within 60 days of date motion is filed
- Court must rule within 30 days of the hearing, or motion is denied by operation of law
- Appeal, interlocutory or otherwise, is expedited
- Mandatory costs and attorney's fees

Burdens of Proof

Movant: preponderance of the evidence that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, right to petition or right of association.

Nonmovant: clear and specific evidence a prima facie case for each essential element of the claim

One more way out…

The court shall dismiss a legal action if the movant establishes by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim

Evidence

- Pleadings and affidavits stating the facts on which the liability or defense is based
- On motion by a party or on the court's own motion and showing of good cause, the court may allow specified and limited discovery relevant to the motion

More Ethics Rules - Evidence

Rule 3.03. Candor Toward the Tribunal

- A lawyer shall not knowingly…offer or use evidence that the lawyer knows to be false.

Don’t Delay

“If a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association, that party may file a motion to dismiss the legal action…not later than the 60th day after the date of service of the legal action.” TCPA Sec. 27.003

Definitions

"Legal action" means a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim ***or any other judicial pleading or filing that requests legal or equitable relief***.

"Exercise of the right of association"

Means a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.

- "Communication" includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.

"Exercise of the right of free speech"

Means a communication made in connection with a matter of public concern.

- "Matter of public concern" includes an issue related to health or safety; environmental, economic, or community well-being; the government; a public official or public figure; or a good, product, or service in the marketplace.

"Exercise of the right to petition"

a communication in or pertaining to

- a judicial proceeding
- an official proceeding, other than judicial, to administer the law
- executive/proceeding before a dept. of the state/fed. gov't
- legislative proceeding, including a legislative committee
- proceeding that requires public notice by rule
- a managing board of an educational institution supported directly or indirectly from public revenue
- the governing body of any political subdivision of this state
- a public meeting dealing with a public purpose, including statements and discussions at the meeting or other matters of public concern occurring at the meeting

“Exercise of the right to petition” also includes

A communication:

- in connection with an issue under consideration or review by a legislative, executive, judicial, or other gov’t body or in another gov’t or official proceeding;
- reasonably likely to encourage consideration or review of an issue by one of the above groups
- reasonably likely to enlist public participation in an effort to effect consideration of an issue by one of the above groups

Practical Implications: TCPA as sword

- Expedites a ruling on the claimant's prima facie case and on affirmative defenses
- Claimants are forced to provide evidence of their claim in response to a TCPA motion in order to avoid dismissal
- limits discovery
- provides for attorneys fees
- Minimizes burdens and delays of litigation

Broad Sword

- TCPA is broader than the first amendment…?
- claim against a public official will likely relate to “a communication made in connection with a matter of public concern” if the official has an immunity defense
- Courts may work backwards – defense analyzed first

Case Examples

City of Montebello v. Vasquez

- votes of the councilmembers were protected by the anti-SLAPP statute when the City of Montebello sued three of its former councilmembers, claiming they violated California conflict of interest law by voting on a contract
- CA-statute applied when the source of speech was a gov't rep. "if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."

Shahbazian v. City of Rancho Palos Verdes

- issuance of a City construction permit was not government speech protected by the anti-SLAPP statute

TCPA as shield

- Exemptions:
  - Commercial speech, PI/wrongful death, insurance code
  - Government enforcement actions
    - **No Texas case law yet on city lawsuits
    - “an act or process which compels compliance with a law or mandate.”CA suit brought “in the name of the people by the city attorney acting as a public prosecutor.” *Harper v. Best*.
    - *Castleman* was commercial speech exemption case limiting exemption based on capacity of non-movant

Who is the client?

Rule 1.12. Organization as a Client - (a) A lawyer employed or retained by an organization represents the entity. …the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents…

Potential Conflicts of Interest

Rule 1.12. (b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

(1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;

(2) the violation is likely to result in substantial injury to the organization; and

(3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

Government Clients

Comment 9. The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations. Therefore, ***defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context.***

Professional Responsibility - Zealous Advocacy

- In all professional functions, a lawyer should zealously pursue clients' interests within the bounds of the law.
- As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.

TCPA Protection of Zealous Advocacy

Youngkin v. Hines, 546 S.W.3d 675 (Tex. 2018)

- Nonclient brought action against attorney
- asserting fraud and conspiracy claims
- alleged that attorney entered into settlement agreement on behalf of clients knowing that clients had no intention of complying
- also alleged attorney helped his clients avoid compliance with the agreement by preparing land transfer documents and filing lawsuit
- Court held that TCPA protected attorney's in-court statements on behalf of his client during a judicial proceeding (dismissal on immunity defense)

Conclusion

- You received an hour of ethics credit!!!
- You have an informed understanding of the TCPA
- TCPA is both a sword and shield for local governments
- TCPA helps lawyers comply with the ethics rules