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

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Introduction[1]

The Texas Citizens Participation Act ("TCPA"), TEX. CIV. PRAC. & REM. CODE §§ 27.001-27.011, is an anti-SLAPP (strategic lawsuits against public participation) law. "Offensive operations, often times, is the surest, if not the only means of defence [sic]." George Washington (1799). A SLAPP suit is an offensive operation designed to burden a person with costly litigation in order to silence that person's opposition or public criticism. Anti-SLAPP laws are designed to balance the right to file a meritorious lawsuit with a person's right to free speech. The TCPA provides litigators a sword and shield to combat frivolous claims, and courts a sword and shield to combat unethical conduct by attorneys.

The TCPA's express purpose 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."[2] However, as one court stated,"[i]t does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should only apply to constitutionally guaranteed activities."[3] "The hypothetical situations and communications to which the TCPA could apply are endless," and "any skilled litigator could figure out a way to file a motion to dismiss under the TCPA in nearly every case."[4]

Moreover, anti-SLAPP laws in general,[5] and the TCPA specifically, serve to codify rules of legal ethics. The legislative history of the TCPA includes notice that "… abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens ...."[6] Rule 3.01 of the Texas

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[1] Portions of this paper were previously included in an article in the Fall 2018 edition of the Advocate.

[2] TEX. CIV. PRAC. & REM. CODE § 27.002; *cf* Dale Wainwright, Gregory Casas & Justin Bernstein, *Texas Citizens Participation Act: A Broad Dismissal Tool*, Texas Law 360, (January 9, 2018)(available at: https://www.law360.com/articles/999985/texas-citizens-participation-act-a-broad-dismissal-tool); Andrew Wipke & Morgan Vaugan, *'SLAPP' back against frivolous suits from former employees*, The Texas Prosecutor, Vol. 48 #3 (2018).

[3] *Youngkin v. Hines*, No. 16-0935, 2018 WL 1973661, at *4 (Tex. Apr. 27, 2018) ("It does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should only apply to constitutionally guaranteed activities."); TCPA has been deemed applicable to defamation, breach of contract, breach of fiduciary duty, negligence, gross negligence, malicious prosecution, false imprisonment, and other claims. *See e.g., ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895 (Tex. 2017); *Murphy USA, Inc. v. Rose*, 2016 WL 5800263 (Tex. App.—Tyler Oct. 5, 2016, no pet.); *Kinney v. BCG Attorney Search, Inc*., 2014 WL 1432012 (Tex. App.—Austin Apr. 11, 2014, pet. denied).

[4] *Neyland v. Thompson*, No. 03-13-00643-CV, 2015 WL 1612155, at *12 (Tex. App.--Austin Apr. 7, 2015, no. pet.) (Field, J., concurring); *See also* Geoff A. Gannaway & Alex B. Roberts, *Anti-SLAPP and Rule 91a Motions Update: Ending the Lawsuit Before It Begins*, 79 The Advoc. (Texas) 326, 335-36 (2017).

[5] *Finton Constr., Inc. v. Bidna & Keys, APLC*, 238 Cal. App. 4th 200, 210, 190 Cal. Rptr. 3d 1, 9 (2015) (in analyzing a claim under the California anti-SLAPP statute "…plaintiff must state and substantiate a legally sufficient claim, thereby demonstrating his case has at least minimal merit.") Internal citations omitted; Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang A Popular and Powerful Weapon Against Frivolous Litigation*, 40 Colum. J.L. & Arts 431, 437 (2017) ("…the typical anti-SLAPP law seeks to root out and end frivolous cases--those brought only to harass or punish one's critics--before the costs of litigation escalate and prevent a defendant from fighting.").

[6] HOUSE COMM.ON JUDICIARY &CIVIL JURISPRUDENCE, BILL ANALYSIS, Tex. H.B. 2973, 82nd

Disciplinary Rules of Professional Conduct provides that a "lawyer shall not…assert or controvert an issue unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."[7] Under the TCPA, if a movant proves that a claim "is based on, relates to, or is in response to" the movant's exercise of the right of free speech, then the burden shifts to the non-movant to prove a prima facie case for each essential element of that claim, or the claim is dismissed.[8] If the non-movant meets their burden, the movant may still provide evidence of any defenses.[9] Thus, if a movant is able to bring a claim under the umbrella of the TCPA, the non-movant must effectively prove the claim is not frivolous and that there is a reasonable basis for each essential element of the claim.

Rule 3.02 of the Texas Disciplinary Rules of Professional Conduct states that "a lawyer shall not take a position that unreasonably increases the costs or other burdens of a case."[10] A movant must assert the TCPA within 60 days of service of the claim and the court must hear the TCPA motion within 60 days.[11] The court must then rule within 30 days of the hearing or the motion is denied by operation of law, entitling the movant to an accelerated interlocutory appeal. So, the TCPA applies mandatory time limits to lawsuits in order to minimize the costs, burdens and delays of litigation.

The Ethics Sword

In one California case, *Finton Constr., Inc. v. Bidna & Keys, APLC*, a home builder sued the law firm defending its opponent in an underlying case. Following a deposition in the original lawsuit, the home builder filed suit alleging damages for conversion and receipt of stolen property, and for injunctive relief.[12] The defendant law firm then filed an anti-SLAPP motion, asserting that the actions of its attorneys were all in the course and scope of representing their clients.[13] Similar to the TCPA, the California anti-SLAPP statute applies to, for example, "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law."[14] On appeal, the Court found that "[i]t is unquestionable and undisputed that the acts alleged in the complaint all arise out of defendants' representation of their clients in the underlying case…it seems they are being sued for representing their

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Leg., R.S. (2011) (available at http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=82R&Bill=HB2973); *See also* Geoff A. Gannaway & Alex B. Roberts, *Anti-SLAPP and Rule 91a Motions Update: Ending the Lawsuit Before It Begins*, 79 The Advoc. (Texas) 326, 336 (2017).

[7] Tex. Disciplinary Rules Prof'l Conduct R. 3.01

[8] TEX. CIV. PRAC. & REM. CODE §§ 27.003(a) & 27.005(b)-(c).

[9] TEX. CIV. PRAC. & REM. CODE § 27.005(d).

[10] Tex. Disciplinary Rules Prof'l Conduct R. 3.02

[11] TEX. CIV. PRAC. & REM. CODE §§ 27.003-04.

[12] *Finton*, 238 Cal. App. 4th at 207.

[13] *Id.*

[14] Cal. Civ. Proc. Code § 425.16(e)(1); TEX. CIV. PRAC. & REM. CODE § 27.001(4)(B) (The TCPA applies to "a communication in connection with an issue under consideration or review by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding.").

clients."[15] The California Court of Appeals affirmed the trial court's granting of an anti-SLAPP motion despite settlement between the parties and a request to dismiss the appeal.[16]

> This is a particularly egregious SLAPP, filed against defendants for the sole "crime" of representing their clients in the underlying action. The lack of civility demonstrated in this case is a matter of public interest. Moreover, while we cannot be certain, it appears that FCI deliberately decided to keep this action pending until the last possible moment in order to avoid the opinion we write today. We therefore decide in defendants' favor and publish this case as an example to the legal community of the kind of behavior the bench and the bar together must continually strive to eradicate.[17]

"My client made me do it" is not an excuse for unethical behavior by attorneys,[18] and anti-SLAPP statutes provide courts with specific opportunities to drive this point home.

In addition to mandatory awards of attorneys fees to a successful movant, the TCPA authorizes an award of costs and attorneys fees to successful non-movants "[i]f the court finds that a motion to dismiss filed under [the TCPA] is frivolous or solely intended to delay…".[19] In *Miller v. Talley Dunn Gallery, LLC*, the Dallas Court of Appeals upheld a discretionary award of attorneys fees for a frivolous TCPA motion.[20] Consequently, the TCPA provides an "ethics sword" to movants and non-movants alike.

The Ethics Shield

In *Youngkin v. Hines*, a non-client sued the opposing counsel from a previous lawsuit involving a real property dispute. Hines alleged fraud and conspiracy claims based on allegations that the attorney, Youngkin, had entered into settlement agreement on behalf of his clients knowing that clients had no intention to comply with agreement. Hines further alleged that Youngkin helped his clients avoid compliance with the agreement by preparing land transfer documents and filing lawsuit.[21] The Court found that Youngkin was sued for statements made in the scope of representing his clients during a court proceeding, and was therefore entitled to dismissal under the TCPA.[22] Youngkin shows the TCPA provides a

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[15] *Finton*, 238 Cal. App. 4th at 210.
[16] *Finton*, 238 Cal. App. 4th at 204–05.
[17] *Id.*
[18] Fred Hagans, James H. "Blackie" Holmes III, Justice Eugene A. Cook, and Judge Lamar Mccorkle, *Reflections on the Texas Lawyer's Creed*, Vol. 72 #10 Texas Bar Journal 835, 837 (2009).
[19] TEX. CIV. PRAC. & REM. CODE § 27.009(b).
[20] No. 05-15-00444-CV, 2016 WL 836775, at *16 (Tex. App.--Dallas Mar. 3, 2016, no pet.)(mem. op.); *See also* Laura Lee Prather & Justice Jane Bland, *The Developing Jurisprudence of the Texas Citizens Participation Act*, 50 Tex. Tech L. Rev. 633, 677 (2018).
[21] *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018).
[22] Id. at 683-84.

shield for attorneys when sued by non-clients for actions taken during the scope of representation.

However, protection of attorneys by anti-SLAPP statutes does not extend to protecting unethical or illegal conduct by attorneys. For instance, in *Castleman v. Sagaser*, the court declared that "[a] growing body of case law holds that actions based on an attorney's breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the background." [23]

As one commentator noted, the TCPA's broad application may become even more broad in the near future.[24] The TCPA applies to a "legal action" that is based on, relates to, or is in response to a party's exercise of one of the enumerated First Amendment Rights, and the TCPA in turn defines "legal action" as "a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or *any other judicial pleading or filing that requests legal or equitable relief*." [25] The TCPA may apply to a motion for sanctions under Texas Rule of Civil Procedure 13 or Chapter 10 of the Texas Civil Practice & Remedies Code.

The Local Government Sword

"Government can speak, but…does the First Amendment protect government speech?"[26] Often the courts avoid this question because the plain language of the anti-SLAPP statute applies to a claim against a movant, regardless of any First Amendment rights.[27] The TCPA defines "exercise of the right of free speech" as "a communication made in connection with a matter of public concern," including 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.[28]

Indeed, a claim against a public official will likely relate to "a communication made in connection with a matter of public concern", especially if the public official has a viable immunity defense. Similarly, California courts determined that their anti-SLAPP statute applied when the source of speech was a government representative "if the speech or petitioning activity *itself* is the wrong

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[23] Andrew A. Servais, *Anti-SLAPP Motions Brought in Lawsuits Against Attorneys: Constitutionally Protected Speech or Breach of an Attorneys' Professional and Ethical Duties?*, San Diego County Bar Association Ethics in Brief (June 17, 2013), https://www.sdcba.org/index.cfm?pg=Ethics-in-Brief-6-17-2013.
[24] Daniel Correa, *"I'll See Your Anti-SLAPP Motion and Raise Your Burden of Proof"—Doubling Down on Texas Civil Practice & Remedies Code Chapter 27*, Texas Bar Today (January 17, 2018), https://www.creedonpllc.com/blog/2018/1/16/ill-see-your-anti-slapp-motion-and-raise-your-burden-of-proofa-chapter-27-double-down-on-the-first-amendment).
[25] TEX. CIV. PRAC. & REM. CODE § 27.001(6)(emphasis added).
[26] Dave Fagundes, *State Actors as First Amendment Speakers*, Northwestern Univ. Law Review, Vol. 100 (2006); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U. S. ____ , 135 S. Ct. 2239 (2015).
[27] *See also* Geoff A. Gannaway & Alex B. Roberts, *Anti-SLAPP and Rule 91a Motions Update: Ending the Lawsuit Before It Begins*, 79 The Advoc. (Texas) 326, 339 (2017).
[28] TEX. CIV. PRAC. & REM. CODE §§ 27.001(3) & (7).

complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."[29] *City of Montebello v. Vasquez, 1 Cal.5th 409, 425 (Cal. 2016) (*holding the votes of the councilmembers were protected by the anti-SLAPP statute *when t*he City of Montebello sued three of its former councilmembers, claiming they violated California conflict of interest law by voting on a contract); *see also Bradbury v. Superior Court*, 49 Cal. App. 4th 1108, 1116 (Cal. Ct. App. 1997).

The TCPA provides a procedural sword for local governments and public officials by forcing the court to expedite a ruling on the claimant's prima facie case and the government's and its officials' immunity defenses. Claimants are forced to provide evidence of their claim in response to a TCPA motion in order to avoid dismissal. The TCPA also limits discovery and provides for attorneys fees[30] that would not otherwise be available under a plea to jurisdiction asserting immunity.

The Local Government Shield

Despite the TCPA's broad application, it contains exemptions that "shield" some prospective non-movants. While most Texas case law involves the "commercial speech" exemption,[31] the TCPA also contains an exemption for government enforcement actions "brought in the name of [Texas] or a political subdivision of [Texas] by the attorney general, a district attorney, a criminal district attorney, or a county attorney."[32] In *Harper v. Best,*[33] the state petitioned for the removal of a county hospital district board member under Chapter 87 of the Texas Local Government Code. The Court held the case was not an "enforcement action" because the state's claims did not involve "an act or process which compels compliance with a law or mandate."[34]

Although the statute does not list city enforcement actions as exempt from the TCPA, the California Supreme Court interpreted a similar provision in its anti-SLAPP statute to exempt a suit brought "in the name of the people by the city attorney acting as a public prosecutor."[35] The Texas Supreme Court has shown a similar willingness to limit exemptions based on the capacity of the non-movant.[36]

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[29] *Park v. Board of Trustees of the Cal. State Univ.*, 2 Cal.5th 1057, 1067 (Cal. 2017); *see also Shahbazian v. City of Rancho Palos Verdes*, 17 Cal. App. 5th 823, 830 (Cal. Ct. App. 2017) (holding that issuance of a City construction permit was not government speech protected by the anti-SLAPP statute).
[30] TEX. CIV. PRAC. & REM. CODE §§ 27.003(c), 27.006(b), & 27.009.
[31] *E.g., Castleman v. Internet Money Ltd.*, No. 17-0437, 2018 WL 1975039 (Tex. April 27, 2018) (per curiam, not yet released for publication).
[32] TEX. CIV. PRAC. & REM. CODE § 27.010(a).
[33] 493 S.W.3d 105, 112 (Tex. App.—Waco 2016, pet. granted June 23, 2017).
[34] *Id.*, at 111.
[35] *City of Montebello v. Vasquez, 1 Cal. 5th at 420.*
[36] *Castleman*, at*4 (TCPA commercial speech exemption required the defendant to have been acting in its capacity as a seller or lessor of goods or services for the exemption to apply).

Conclusion

Judge Holmes, in recalling the drafting of the Texas Lawyers' Creed, opined that "Ethical conduct can be codified, but professionalism must come from within the lawyer." Lawyers have a professional responsibility to "zealously pursue client's interests within the bounds of the law."[37] The Texas ethics rules expressly prohibit the conduct regulated by the TCPA. Yet, the comments to rule 3.02 acknowledge that "such tactics, [delay of a proceeding primarily for the purpose of harassing or maliciously injuring another], are frequently an appropriate way of achieving the legitimate interests of the client" As a codification of the ethics rules, the TCPA strikes a balance between protection of zealous advocacy and prevention of frivolous claims and burdensome lawsuits filed in violation of the Texas Rules of Professional Conduct. Further, the TCPA provides an effective enforcement method for preventing unethical conduct through mandatory awards for attorneys fees.

The TCPA "shield" is not a "get out of jail free card" for either local governments or defendants of local government enforcement actions. But, the TCPA "sword" is a powerful weapon for local governments and its public officials to expedite cases. The TCPA has a broad application, with the possibility of being applied even more broadly based on the plain language of the statute's application to "governmental proceedings" and other "official proceedings." Consequently, an informed understanding of the TCPA and its practical implications in local government litigation are now an ethical and practical necessity for any local government litigator.

[37] Tex. Disciplinary Rules Prof'l Conduct, Preamble.