

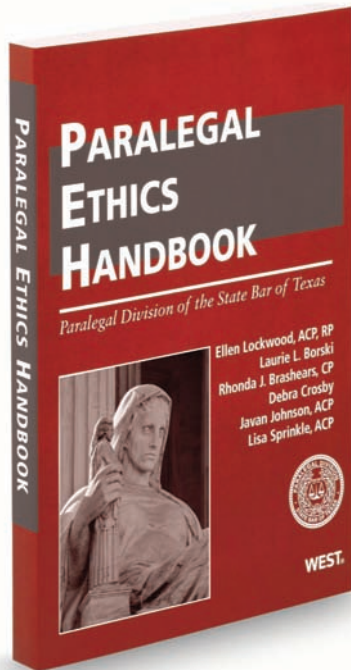
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TPJ

Texas Paralegal Journal

The Texas
AntiSLAPP
Statute:
Issues for
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PARALEGAL ETHICS HANDBOOK

By: **Ellen Lockwood, Et Al**

This handbook is an essential resource for experienced paralegals, those new to the profession, and attorneys working with them.

Paralegal Ethics Handbook discusses topics such as defining ethics and ethical obligations and remaining ethical, and addresses ethical considerations for in-house, corporate, freelance, administrative, governmental, and regulatory law paralegals as well as paralegals working in the area of alternative dispute resolution. It also covers specific ethical considerations in 17 practice areas and provides resources for state information and paralegal association ethics cannons and related information.

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PRESIDENT'S *Message*

by Joncilee Davis, ACP, President, Paralegal Division

Happy 2013, Paralegal Division! Even though we are all back to work or school now, I hope everyone had a wonderful holiday season!

Jean Louise Finch, better known as Scout, is the very unusual six-year-old daughter of an attorney. As narrator of *To Kill A Mockingbird*, the reader immediately learns of her intelligence. Atticus Finch has taught her to read and Calpurnia has taught her to write, all before beginning the first grade. Scout is a tomboy, through and through, as she wears overalls and fights with boys. She is definitely not a prim and proper southern belle! Lastly, Scout is extremely thoughtful. She worries about good versus evil, others' well-being, and her family and friends. Atticus instilled in both Scout and her brother Jem a sense of morality. He answers their questions truthfully, and encourages them to act morally at all times.

Atticus Finch is the reason Scout is the person she is in the novel. He has nurtured her mind, conscience, and instilled individuality in her. While most little girls in the Deep South during that time period would be wearing dresses and learning proper manners, Scout wears overalls and plays with Jem and her best friend, Dill. We learn she is very passionate, as she speaks up if anyone challenges her. At the end of the book, Scout declares that she has "learned probably all there is to learn [in school], except for Algebra." She understands



that while formal education is important, much of what is learned is learned through life's experiences.

Because of the trial of Tom Robinson and Mr. Ewell's vengefulness, Scout develops into a person capable of understanding that no matter what evil she encounters, she will not become cynical or jaded.

While she is still an innocent child at the end of the book, her perspective on life has become very grown-up. No matter what, she believes in the goodness of people.

Each of us has our own story about how we came to be a paralegal. At the beginning of our paralegal career, we are similar to Scout. Many of us had some education and/or training before beginning a paralegal program. Did you have an Atticus or Calpurnia? While I was working as an adult probation officer in the Dallas County Courthouse, I had the opportunity to work with several district attorneys and public defenders. One of the public defenders taught criminal law at a post-graduate paralegal program and suggested I would make a great paralegal. He encouraged me to go speak to the head of the program and see if it was the right career for me. After meeting the program head, I knew the paralegal field was my calling. I, like Scout, understood the importance of a formal paralegal education.

If you are currently a paralegal student, your education is very important. However, your education will not stop when you graduate. Many other skills will

be learned once you begin working as a paralegal. Scout would agree that some things you need to learn by doing! If you are a twenty-year paralegal, hopefully your learning has not stopped. The Paralegal Division has amazing Continuing Legal Education opportunities for you, such as TAPS, webinars, webcasts, and District CLE events.

As we enter 2013, the usual resolutions include losing weight, working out more, eating more healthy, and keeping a cleaner house. I want to challenge each of you reading my message to make at least one paralegal resolution. If you are truly passionate about being a paralegal, then go another step and seek certification by taking one of the exams offered by the National Association of Legal Assistants or the National Federation of Paralegal Associations. If you have been a practicing paralegal in your field for more than five years, challenge yourself to take the TBLS examination in 2013. I'm sure Atticus Finch would want us all to take several hours of ethics CLE this year, to ensure we maintain our morality in this legal field. Did you have over 12 hours of CLE in 2012? If so, join the State Bar College. If you work in a specialized field, then challenge yourself to write an article for the TPJ. Maybe your New Year includes being a bit more like Scout.

In the words of President Abraham Lincoln, "Always bear in mind that your own resolution to succeed is more important than any other." The Paralegal Division wishes you success in all your 2013 endeavors. We are here to help you accomplish your paralegal resolutions, so let us know what we can do for you!

TDPJ *Texas Paralegal Journal*

Focus on...

The Texas Anti-SLAPP Statute

The TCPA will likely trigger significant unintended consequences.

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EDITOR'S *Note*

By Heidi Beginski, TBLS-BCP

The Constitution of the State of Texas is the document that describes the structure and function of the government of the U.S. State of Texas. The current document took effect on February 15, 1876, and is the seventh constitution in Texas history.

Article One is the Texas Constitution's bill of rights. The article originally contained 29 sections; four sections have since been added. Most of the article's provisions concern specific fundamental limitations on the power of the state government and certain rights granted to citizens that cannot be ignored under any circumstances. For example,

Sec. 8. FREEDOM OF SPEECH AND PRESS; LIBEL. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Now fast-forward to page 7 for information on Texas' new anti-SLAPP law, which was aimed at preventing frivolous lawsuit from stifling free speech activities and the rights of petition and association. Authors Mark C. Walker and David M. Mirazo explore some of the likely unintended consequences of the Texas Citizens Participation Act ("TCPA").

The Texas Legislature also enacted HB300, which became effective September 1, 2012, and provides for changes and additions to the Health and Safety Code, Business and Commerce Code, Government Code, and Insurance Code to enhance the responsibilities of healthcare providers in maintaining and processing protected health information. The article by Christine Cook, PHP starting on page 23 focuses on changes to the Health and Safety Code.

To start your new year off right, check out the article by Michelle Iglesias, TBLS-BCP, starting on page 25, which provides a look at the latest technology tools for our practice and tips on how to choose the right solutions.



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DEADLINE FOR SPRING 2013 IS MARCH 1, 2013

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The Texas AntiSLAPP Statute: Issues for Business Tort Litigation

By Mark C. Walker and David M. Mirazo

I. INTRODUCTION



On June 17 2011 Texas Governor Rick Perry affixed his neat signature to Texas' new anti-SLAPP¹ law, entitled the Texas Citizens Participation Act (the "TCPA"), and in so doing Texas joined 28 states and the District of Columbia in enacting various forms of legislation purportedly aimed at preventing frivolous lawsuits from stifling free speech activities and the rights of petition and association.² As drafted, however, the TCPA will likely trigger significant unintended consequences, especially for persons and entities who file suit to protect their reputation and various property interests. The TCPA introduces what one judge called a "draconian" motion to dismiss that places a heavy burden on the aggrieved plaintiff to prove that its suit is not frivolous at the inception of the litigation without the benefit of any meaningful discovery.³ The Act does not define the shape or parameters of a SLAPP suit or distinguish between causes of action subject to or protected from the anti-SLAPP statute.

So long as a defendant in a business torts suit can characterize the suit as "based on," "relating to," or "in response to" the exercise of free speech, petition or association, the motion to dismiss can be filed, and unless the plaintiff presents prima facie evidence of each element of his claim, the motion to dismiss must be granted.⁴ The potential for abuse of this newly crafted dispositive motion is significant. Here are two hypothetical examples:

Example 1: Disgruntled Vocal Car Buyer: Car Dealer sells a new car to a customer who is dissatisfied, and takes her dissatisfaction to the internet and consumer protection agencies. Buyer expresses views that accuse the dealership not only of misrepresentations about worthiness of the vehicle, but that the dealer engages in fraud, illegal kick-back schemes, and violations of state and federal advertising laws, some of which carry criminal penalties, and organizes a boycott. Customer sues Car Dealer under the DTPA. Dealer counterclaims for tortious interference and business disparagement, and seeks injunctive relief. How does the TCPA apply?



Example 2: Medical Group Divorce: When Doctor A leaves the practice over the weekend, he takes lists of all patients of the clinic, not just his own, along with all medical files A-K, prior to obtaining any patient consents. Over the weekend Doctor A calls a number of patients and informs them that Doctors B and C are currently under investigation by the Texas Medical Board and are about to lose their licenses because of “rampant allegations” of improper contact with female patients, and urges the patients to leave the clinic to become his patients, and call all their friends and tell them the same thing. When Doctors B and C find out, they file suit against Dr. A seeking injunctive relief for the return of patient files and protected health information, to prevent Dr. A from continuing his communications, and for damages for defamation, business disparagement, and tortious interference. How does the TCPA apply?

II. THE TEXAS CITIZENS PARTICIPATION ACT: WHAT IS IT?

A. Background and Enactment of the TCPA.

1. What is a SLAPP lawsuit?

The general consensus view among commentators is that SLAPP suits are “legally meritless suits designed, from their inception, to intimidate and harass political critics into silence.”⁵ Hawaii defines a SLAPP suit as “a lawsuit that lacks substantial justification or is interposed for delay or harassment and that is solely based on the party’s public participation before a governmental body.”⁶ According to some views, the typical SLAPP plaintiff “does not seek victory on the merits, but rather victory by attrition.”⁷ The “object is to quell opposition by fear of large recoveries and legal costs, by diverting energy and resources from opposing the project into defending the lawsuit, and by transforming the debate from a political one

to a judicial one, with a corresponding shift of issues from the targets’ grievances to the filers’ grievances.”⁸ The goal of a SLAPP suit is to “stop citizens from exercising their political rights or to punish them for having done so.”⁹

By definition, in the “typical” SLAPP case the motivation of the plaintiff is not to achieve a legal victory resulting in a judgment, but instead to make it prohibitively expensive and burdensome for the defendant to continue participation in her constitutionally protected activity. The concept assumes that the SLAPP plaintiff enjoys a great advantage in resources to fund litigation, and can afford to overwhelm the defendant with lawsuit expenses and fees. As one commentator explained, “[t]he typical SLAPP suit is brought by a well-heeled “Goliath” against a “David” with fewer resources, trying to keep David from opposing, for example, Goliath’s development plans or other goal.”¹⁰ The developer tale is a frequently cited example of a SLAPP suit.¹¹

2. Stated Purpose: Prevent Frivolous Suits.

The Citizens Participation Act was theoretically enacted to provide an expedited procedure to dismiss retaliatory, frivolous lawsuits that chill free speech. In adding a new chapter to the Texas Civil Practice and Remedies Code,¹² the Legislature included a brief statement of purpose:

The purpose of this chapter 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.

TEX. CIV. PRAC. & REM. CODE 27.002.

The Act’s legislative history states that it was intended to target “frivolous law-

suits aimed at silencing citizens who are participating in the free exchange of ideas” and “frivolous lawsuits aimed at retaliating against someone who exercises the person’s right of association, free speech, or right of petition.”¹³ Yet the Legislature did not discuss the applicability of existing anti-frivolous lawsuit rules and statutes,¹⁴ or how such established body of law was inadequate to curtail any perceived harm. Nothing in the legislative history of the Act discusses why the existing statutory framework for discouraging frivolous suits of all kinds was found lacking, or why Chapters 9 and 10 of the Texas Civil Practice and Remedies Code should not be amended to address an unmet need.¹⁵ Cases involving speech and traditional First Amendment rights are not exempted from the frivolous case deterrence functions of Rule 13 and Chapters 9 and 10. In fact, Chapter 9 specifically applies to cases involving defamation and tortious interference.¹⁶

The Legislature did not otherwise define a frivolous lawsuit in the context of the statute, or define what constitutes a “meritorious lawsuit” that would otherwise not be subject to the anti-SLAPP motion to dismiss. Despite the stated legislative intent, the Legislature did not require that a movant prove that a suit was frivolous in order to have it dismissed under the TCPA. The disconnect between the statutory provisions and the anti-frivolous suit rhetoric of the legislative history suggests that we dig deeper into the history of this law in order to understand it.

3. Underlying Purpose: Protection of Media Defendants.

It appears that the statute is a solution in search of a problem. The legislative history of the TCPA provides little guidance as to what evidence of SLAPP lawsuits the Legislature considered, if any. The House Committee on Judiciary and Civil Jurisprudence report was silent about whether any studies or data existed to demonstrate a particular need for the bill, other than generally stating that “abuses of



the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas.¹⁷ There was no data suggesting that there was any widespread abuse of suits involving speech issues, nor was there any indication that the bill was intended to correct any specific case. The report did not discuss any correlation of the bill with media interests.

The legislative history of the TCPA is devoid of any scientific or statistical evidence regarding the frequency or impact of SLAPP lawsuits in Texas, or how often individuals or businesses face meritless defamation or disparagement lawsuits. The author has yet to find any such studies or research, or any published data on the frequency or significance of any SLAPP lawsuits in Texas.

According to the H.R.O., supporters of the bill argued that “SLAPP suits chill public debate because they cost money to defend, even if the person being sued was speaking the truth.”¹⁸ Supporters claimed: “[u]nder current law, the victim of a SLAPP suit must rely on a motion for summary judgment. While summary judgment disposes of a controversy before a trial, both parties still must conduct expensive discovery. By allowing a motion to dismiss, [the TCPA] would allow frivolous lawsuits to be dismissed at the outset of the proceeding, promoting the constitutional rights of citizens and helping to alleviate some of the burden on the court system.”¹⁹

Further research reveals the impetus behind the passage of the Act. Corpus Christi representative Todd Hunter was the principal designated legislative author of H.B. 2973. Representative Hunter worked with the Freedom of Information Foundation of Texas (“FOIFT”)²⁰, represented by lawyer Laura Prather,²¹ in passing the legislation. The FOIFT receives its funding principally from state and national newspaper publishers, along with other media interests.²² Media organizations, including FOIFT, were the principal

proponents of both the TCPA²³ and the 2009 adoption of the reporter’s privilege, codified in TEX. CIV. PRAC. & REM. CODE 22.021 *et seq.*

Ms. Prather, for the media groups, publicly states that she drafted the TCPA and proposed, organized, and supported its passage.²⁴ In her most recent online biography, Ms. Prather states that she “was the lead author and negotiator for the two most significant pieces of First Amendment legislation in recent history in Texas – both the reporters’ privilege and the anti...SLAPP statute.”²⁵ She also states that “[t]he bill is designed to deter frivolous lawsuits directed at newsrooms and media personnel.”²⁶

Given the context of the media organizations’ viewpoint and their efforts to further insulate the press from legal liability for its actions, the proposal of a summary mechanism to allow media to have their counsel attempt dismissal of defamation suits without discovery may have been a logical next step. Recognizing that the media was the principal proponent of the TCPA helps us better understand the purpose of the statute.

In true winning legislative fashion, the media interests caused the statute to be named the “Citizens Participation Act,” rather than the “Make It Harder to Sue the Media Act,” which may more accurately reflect the law’s true purpose.

According to the Bill Analysis and legislative records, the principal witness before the House Judiciary and Civil Jurisprudence Committee was Ms. Prather, appearing for the FOIFT, the Texas Association of Broadcasters, the Better Business Bureau, and the Texas Daily Newspaper Association. Despite the overarching media protection purpose, the only example of alleged abuse that House Research Organization cited in its Bill Analysis was a doctor who sued “a woman who complained to the Texas State Board of Medical Examiners about the doctor and later complained to a television station.”²⁷ According to the H.R.O.,

“[t]he suit eventually was dismissed, but the television station was forced to pay \$100,000 in legal expenses.”²⁸ The H.R.O. did not give any other details about the case, or how it constituted a victory for the woman.

The bill was brought up for testimony on March 28, 2011 before the House Judiciary and Civil Jurisprudence Committee,²⁹ which heard comments from several witnesses, mostly associated with the media.³⁰ At the hearing, Rep. Hunter commented that “[i]t [TCPA] also provides for an expedited motion to dismiss if lawsuits like these are filed frivolously.”³¹

The TCPA was one of 31 bills considered by the Committee that day, and the Committee devoted 33 minutes of its schedule to the discussion of the bill. Following the Committee hearing, there is no record of any further discussion in a committee, conference, or on the floor of the House. The bill passed the House on May 4, 2011.

On May 12, 2011, the bill was considered in public hearing in the Senate Committee on State Affairs³² and discussed for three minutes, with no discussion beyond a basic description of the bill.³³ The bill passed the Senate on May 18.

The legislative history does not discuss media involvement, provides no examples of media litigation, or how the First Amendment and successive generations of litigation has proved inadequate to protect the media from meritless defamation suits.

The Committee did not discuss why a new expedited dispositive motion or appellate review was necessary for media or other defendants, given the Legislature’s codification of libel law,³⁴ and granting to the media interlocutory appeals in the event that a media defendant’s motion for summary judgment is denied.³⁵

Oponents argued that the TCPA, “if interpreted broadly, could be used to intimidate legitimate plaintiffs. It could stifle suits brought legitimately under libel or slander laws because the plaintiff



in such suits would have to overcome motions testing its pleadings.”³⁶

The media interests successfully cast the legislation as protection for the average citizen, especially persons who faced larger, better-funded litigation opponents. The proponents avoided allowing a discussion of larger, well-funded media entities defending suits brought by individuals or small businesses. The proponents apparently successfully convinced the Legislature that their vote in favor of the legislation was a vote for “the little guy,” since the Legislature passed the TCPA by unanimous vote in both the House and the Senate.

There is nothing in the legislative history for the statute that suggests that the Legislature considered any of the issues raised in this paper before speeding the bill through the approval process.

III. APPLICATION OF THE TCPA.

A. What claims are covered?

The TCPA applies to “a *legal action* [that] 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 . . .”³⁷ Each of these concepts was defined by the Legislature very broadly. A “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.”³⁸ Since a motion to dismiss may be made regarding any “judicial pleading or filing” in which some relief is requested, it appears that motions to dismiss may not be filed in administrative proceedings, although administrative proceedings are clearly included within the ambit of the “exercise of the right to petition,” which includes “an official proceeding, other than a judicial proceeding, to administer the law. . . .”³⁹ Clearly, though, a motion to dismiss may be filed in response to any sort of pleading or filing in a judicial matter, including, conceivably, motions to dismiss.

“Exercise of the right of free speech” means a communication made in connection with a matter of public concern.”⁴⁰

“Communication” includes the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”⁴¹

Importantly, the broad definitions of the First Amendment rights in the statute suggest that a movant may file a motion to dismiss even if the speech or communication is not afforded full protection under the First Amendment.⁴²

A “matter of public concern” is very broad and subject to different interpretations, since it “includes an issue related to:

- (A) health or safety;
- (B) environmental, economic, or community well-being;
- (C) the government;
- (D) a public official or public figure; or
- (E) a good, product, or service in the marketplace.”

TEX. CIV. PRAC. & REM.
CODE 27.001 (7).

What does not constitute a “matter of public concern” will be open to debate and litigation, undoubtedly, for some time to come. In private enterprise, is there anything that is not “a good, product, or service in the marketplace?”

“Exercise of the right of petition” means any of the following: (1) a communication “in or pertaining to” a judicial, administrative, executive, legislative, or public proceeding, including all types of public hearings and meeting before any governmental body, (2) a communication “in connection with” an issue under consideration or review by a legislative, executive, judicial, or other governmental body, (3) a communication that is “reasonably likely to encourage consideration or review of an issue by any governmental body, (4) a communication “reasonably likely to enlist public participation” in an effort to effect consideration of an issue by any

governmental body, and, (5) any communication protected by the Texas or federal constitutions.⁴³

“Exercise of the right of association” means “a communication between individuals who join together to collectively express, promoted, pursue, or defend common interests.”⁴⁴

Although the Legislature went to great pains to define “free speech,” “petition,” “association,” and “communication,” it did not specify what it means by “based on, relates to, or is in response to” Broadly stated, the Act applies to any judicial proceeding⁴⁵ about a communication related to anything in commerce or government.

By its own terms, the Act does not protect any violations of the law. The Act is not limited to common law claims that traditionally involve “speech,” such as defamation, business disparagement, false light, and related actions. The Act may also apply to other business torts, such as tortious interference with contract, fraud, and negligent misrepresentation, some intentional torts, malicious prosecution, and even certain statutory actions, such as violations of the Texas Election Code.

Despite the underlying David/Goliath premise of anti-SLAPP legislation, there is no discussion or requirement in disparity of resources to invoke the TCPA.⁴⁶

B. Exceptions to the TCPA.

Perhaps recognizing the overbroad nature of the statutory definitions, the proponents provided three general categories of exemptions from the application of the statute, including government enforcement actions,⁴⁷ suits for bodily injury, wrongful death, or survival,⁴⁸ and actions brought against a “person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product or a commercial transaction in which the



intended audience is an actual or potential buyer or customer.”⁴⁹

Yet these statutory exemptions fall short of curing the potential for abuse of the TCPA, and actually create a disparate impact on certain businesses. For example, the last noted exemption applies to actions brought *against* a “person primarily engaged in the business of selling or leasing goods or services,” which would include entities such as a new or used car dealer. That is, the motion to dismiss is not available to a car dealer that defends a DTPA suit over alleged misrepresentations about sale or service, because that would be an action “against” the dealer, and because it “arises out of the sale or lease of goods.” In Example 1, Car Dealer cannot avail itself of the motion to dismiss in response to the DTPA suit by Customer, although the Customer can bring a motion to dismiss against Car Dealer in response to its counterclaim.

C. Procedure.

1. A New Form of Dispositive Motion.

To be very clear, the TCPA’s motion to dismiss is a procedure new to Texas civil jurisprudence. The TCPA does not appear to grant any substantive rights. It creates no cause of action, and the motion to dismiss is not a counterclaim. The TCPA simply creates a new procedure for summary dismissal of claims and suits based on matters outside the pleadings. As a dispositive motion, it is very different from any motion for summary judgment or even a federal Rule 12 motion to dismiss.

The only prerequisite for filing the motion is that the movant claims that it is in response to a “legal action” that is based on or relates to the exercise of free speech, petition or association.⁵⁰ The defendant/movant need not wait to file a motion for summary judgment and need not conduct any discovery, or allow any discovery to be conducted, before filing. The motion to dismiss does not mirror or track federal

prompt disposition motions under FED. R. CIV. P. 12. The motion is not required to be sworn, but it may be supported by affidavits, and, presumably, documents and publications.

2. Deadline to File the Motion.

The motion to dismiss must be filed within 60 days following the service of the legal action. The time to file the motion to dismiss may be extended on a showing of good cause.⁵¹ The length, or number, of extensions is not addressed in the statute.

3. Deadline for Hearing and Decision

The hearing on the motion must be set not later than 30 days after the date of service of the motion, unless the court’s docket conditions require a later hearing.⁵² There is no guideline as to how long the hearing may be delayed due to the court’s “docket conditions.” Importantly, there is no provision for a trial court to permit the hearing to be delayed for good cause, unlike the extension available to file the motion. There is no provision to allow the trial court to allow the respondent additional time to respond, for whatever reason. There is also no provision that requires more than the standard default three days’ notice of the hearing.⁵³ There is nothing in the statute to prevent the movant from filing the motion and setting it for hearing with minimum notice under Rule 21. The 21-day notice provision of TEX. R. CIV. P. 166-a does not apply. Even with summary judgment motions, trial courts have long been permitted to alter the hearing date “on leave of court,” which does not necessarily mean good cause.⁵⁴ The TCPA does not include any provision to allow the non-movant to file a response, or even provide any time in which to file a response, contrary to Texas and federal rules of procedure. The TCPA does not even afford the non-movant the limited time to respond to a Rule 12 motion to dismiss in federal court, or extend the time to respond.⁵⁵

Once the hearing is set, the court must

rule on the motion not later than 30 days following the hearing.⁵⁶

4. Discovery Stay.

When the motion is filed, it operates to immediately suspend all discovery in the underlying legal action until the court rules on the motion to dismiss.⁵⁷ This appears to be an automatic suspension that requires no further order of the court. There is no requirement in the statute that the motion to dismiss include a notice to court and parties about the discovery suspension. The suspension of discovery would apparently refer to all discovery, including that unrelated to communication litigation. Nor is there any provision in the statute for remedies in the event that parties attempt to conduct discovery without leave of court, or whether the discovery stay applies to the entire case, if the motion to dismiss applies only to certain causes of action.

(Very) limited discovery may be allowed on issues relevant to the motion to dismiss, based on a motion by the court or a party.⁵⁸ Since the motion must be heard within 30 days of the service of the motion, and the new statute does not address whether the deadlines in the Rules of Civil Procedure may be modified, discovery is likely limited to depositions, possibly with production of some record production, unless the opponent refuses to waive the response times contemplated in TEX. R. CIV. P. 196.2 and 199.2(5). The statute is silent on any modification of hearing deadlines due to the need to conduct some discovery, but since the statute does not provide for discovery as an exception to the 30-day hearing rule, courts may very likely deny any discovery that could affect the hearing date.⁵⁹ There is no provision for when a motion for discovery may be brought, whether a movant is entitled to hearing, or how the court may respond to such a motion. There does not appear to be any authority for a trial court to extend hearing deadlines in order to permit discovery for reasons unique to



the parties, such as illness, incarceration, or any other reason that would normally constitute “good cause.” The effective result of a discovery stay is to prevent virtually all discovery except at hearing, in response to subpoena, much like a contested temporary injunction hearing. This denial of discovery, especially coupled with the expedited minimum notice dispositive motion, may very well violate the open courts provision of the Texas Constitution, as discussed below.

D. Standards and Burdens of Proof/ Actions by Court.

1. What evidence may be considered?

“In determining whether a legal action should be dismissed under [the TCPA], the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based.”⁶⁰ The TCPA does not clearly indicate whether the hearing is evidentiary, or whether the trial court should consider live testimony or take up the motion by submission. Although the Act specifically refers to affidavits and pleadings to be considered, the Legislature does not prohibit live testimony. Yet the language of the statute may leave open an argument to a movant that a respondent is limited to affidavit testimony, although a plaintiff resisting the motion to dismiss may very well desire to bring live testimony at the hearing, because of the discovery limitations. There is no time limit for the hearing. Nor does the statute provide for any continuance of the hearing once it commences.

2. Burden of Proof on the Movant.

The standard for the defendant bringing the motion to dismiss is “preponderance of the evidence.” The movant need only show by a preponderance of the evidence “that the legal action is based on, relates to, or is in response to the party’s exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association.”⁶¹ In order to require a dismissal of

the underlying legal action, there is no requirement that the movant obtain any finding that the action against him was frivolous or groundless and brought in bad faith or for purposes of harassment, despite the avowed intent of the statute, or otherwise was brought for the purpose of harassing or maliciously inhibiting the free exercise of First Amendment rights. Importantly, the Legislature did not condition the application of the TCPA on a finding of improper motive by the plaintiff. There is no *mens rea* requirement that the intent of the lawsuit be to chill free speech, petition or association. Nor is there a requirement under the statute that the trial court take into consideration any disparity in the resources available to the parties.

3. Burden of Proof on the Respondent.

Once the movant files a verified motion that merely states the statutory allegations, the burden of proof shifts to the plaintiff/respondent. There are crucial questions about what the burden of proof on the respondent is and how it is met. The court “may not dismiss a legal action under this section if the party bringing the legal action establishes by *clear and specific* evidence a prima facie case for each essential element of the claim in question.”⁶² What does that mean? What must a respondent do to defeat a motion to dismiss?

i. “Clear and specific evidence” is undefined and, if it is meant to be a higher standard of proof than “preponderance of the evidence,” may very well violate the Open Courts provision of the Texas Constitution.

It is not clear what the Legislature meant by “clear and specific evidence,” as there is no such recognized standard under Texas law for any cause of action. We anticipate immediate confusion with “clear and convincing evidence,” which is a high standard to meet with a long history of interpretation.⁶³ The standard should not mean anything

other than some evidence of each element; otherwise, the Act would impermissibly impose a higher burden of proof that would ultimately be required of a plaintiff at the trial of the legal action. Yet this is exactly what the drafter intended.

“Clear and specific evidence” is evidently derived from the reporter’s privilege codified in 2009 in the “Journalists’ Qualified Testimonial Privilege in Civil Proceedings” in TEX. CIV. PRAC. & REM. CODE CHAPTER 22, SUBCHAPTER C, in which a party seeking to compel information from a reporter must make a “clear and specific showing” about the need to obtain the information. TEX. CIV. PRAC. & REM. CODE 22.024. The “clear and specific showing” does not apply to any cause of action, or a burden of proof for any right of action for damages.

Ms. Prather, writing for the Texas Daily Newspaper Association, gave her detailed explanation of the TCPA, including her view of what constitutes “clear and specific evidence.” She wrote: “*What is the “clear and specific” standard?* As many of you may recall, it is the standard already used by the courts in reporter’s privilege cases and is a more significant burden than establishing something by a preponderance of the evidence but not as heavy a burden as requiring proof by clear and convincing evidence.”⁶⁴ A “clear and specific showing” to obtain a reporter’s source information is very different from meeting a burden of proof on a recognized tort common law cause of action.

At least one media party, relying only upon pieced together definitions of “clear” and “specific,” argues that “clear and specific” is an intermediate burden of proof that is greater than the preponderance of the evidence.⁶⁵ Other briefing struggles to find a workable definition of the term.

If indeed “clear and specific evidence” is supposed to represent a



“more significant burden” than a “preponderance of the evidence,” the statute may very well run afoul of the open courts provisions of Article I, Section 13 of the Texas Constitution.⁶⁶ There is at least one case pending on appeal in which the constitutionality of the imposition of a higher burden of proof in response to a motion to dismiss has been challenged.⁶⁷ The statute in question clearly applies to many established common law causes of action, and if Ms. Prather’s view as non-legislative author of the statute is correct, a party must meet a higher burden of proof to defeat a motion to dismiss filed at the outset of a case without discovery than the preponderance standard required to prove the case at trial. Preponderance of the evidence is the long-standing burden of proof in most common-law and many statutory causes of action.

Likewise, imposing a higher standard of proof in response to a motion to dismiss would seem to impose a higher burden than is required to defeat a no-evidence motion for summary judgment, which requires the respondent only to produce more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements.⁶⁸ A non-movant produces more than a scintilla when the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.”⁶⁹ There is a very large body of law that describes for courts and practitioners what level of proof is necessary to sustain or defeat a no-evidence motion for summary judgment, none of which is deemed frivolous. The case law refers to a burden on the non-movant to “produce” such evidence. The TCPA requires the non-movant to “establish” the evidence.

Considering the introduction of other standards in the statute, a movant could argue that “establish” also means more than “produce,” perhaps rising to the level of evidence required to sustain

a directed verdict. This also makes no sense and overwhelms any notion of fairness and harmony with existing law. Existing rules for summary judgment and against frivolous suits, when applied by even-handed jurists, provide a more than adequate framework for sorting out meritless suits involving some sort of speech.

ii What is a “prima facie case?”

“The term ‘prima facie evidence’ is ambiguous at best; it sometimes entitles the producing party to an instructed verdict, absent contrary evidence, and sometimes means that a party has produced sufficient evidence to go to the trier of fact on the issue.” *Hinojosa v. Columbia/St. David’s Healthcare System, L.P.*, 106 S.W.3d 380, (Tex. App. Austin 2003, no pet.), citing *Coward v. Gateway Nat’l Bank*, 525 S.W.2d 857, 859 (Tex. 1975). In this context, “prima facie” appears to refer to some evidence on the elements of the cause of action. The statute does not clarify what it means by “a prima facie case for each essential element of the claim in question.”

Ms. Prather likewise described to readers of her articles the origin of the prima facie case language: “*Where did the prima facie establishment of the elements of the claim come from?* This is the test Texas courts currently use in determining whether someone has a valid claim to access information about an anonymous speaker. It only makes sense to apply the same test to all forms of speech ----- anonymous and non-anonymous, and Texas courts are used to applying this test in speech-related cases.”⁷⁰

Ms. Prather’s comment does not address a cause of action, or the elements of a cause of action, and does not explain what proof of need for access to information has in common with proof of a cause of action consistent with due process.

iii. What about noncommunication claims joined in the same lawsuit?

Another unanswered question is whether the motion to dismiss applies only to causes of action in a legal action based on a communication, or applies as well to non-communication causes of action. In business litigation, for example, conduct that gives rise to a breach of contract may precede emotionally based communications that form the basis of defamation or other torts. Since, under joinder rules,⁷¹ and in the interest of judicial economy, an aggrieved party usually sues for all applicable causes of action against the offending party, the entire “legal action” could be the subject of the motion, regardless of whether each cause of action is based on speech rights.

It would certainly be more sensible for a motion to dismiss to target only the portions of a lawsuit related to the protected speech. “Legal action” does refer to “cause of action” in addition to “lawsuit . . . , petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief”⁷² but the statute does not limit its applicability to causes of action.

The issue is made more difficult to resolve in light of the statute’s provisions suspending “all discovery in the legal action,”⁷³ requiring dismissal of “a legal action,”⁷⁴ and permitting limited rights of appeal and writ of “a trial court order on a motion to dismiss a legal action” could certainly be interpreted by a trial court to halt discovery and require dismissal of even non-communication claims.

A real trap for the practitioner lies in the ambiguity of the scope of dismissal contemplated by the statute. Most good practitioners make alternative allegations in their lawsuits, most of which are supported by known evidence, and some of which are believed will be supported by the evidence



adduced during discovery. If the defendant moves to dismiss the entire suit, which includes all theories alleged and remedies sought, including extraordinary remedies, a movant may very well persuade the trial court to dismiss the entire lawsuit even if only one element of one of the causes of action is not clearly supported by evidence. As in Example 2, the remaining doctors seeking to preserve the protected health information of their patients may very well see their injunctive relief dissolved and the suit dismissed, and fees and sanctions awarded against them, even though the injunctive relief was clearly the proper remedy.

In light of the passage of the TCPA, and in the appropriate case, the prudent practitioner who represents the plaintiff, or defendant on a counterclaim, may consider whether to avoid joining related claims in the same suit. By the same token, such parties should consider whether to seek to sever⁷⁵ certain claims after the filing of a Chapter 27 motion to dismiss to preserve them and continue with discovery. The same practitioners should refresh their knowledge of the rules on compulsory and permissive counterclaims⁷⁶ and whether “actions involving a common question of law or fact” should be consolidated⁷⁷ or proceed in separate trials.⁷⁸

A trial court sitting in review of a Chapter 27 motion to dismiss would do well to review the rules and require clarity of scope of the motion to dismiss and any ruling on it.

4. Ruling by the Court—Dismissal Mandatory.

If the movant/defendant meets her modest burden, the court has no discretion, but “shall dismiss” the legal action brought against the movant/defendant. This is an important provision, as it seems to make the trial court’s decision nondiscretionary, so long as the nonmovant does not “establish” “clear and specific evidence” on *some*

element of *any* cause of action.

Unlike the provisions in Rule 13 and Chapters 9 and 10 of the Civil Practice and Remedies Code, there is no statutory requirement of any written finding in support of the trial court’s ruling. If the movant makes no request for any findings under Section 27.007, the trial court does not have to issue any. At the request of the movant, but not the respondent, the court “shall issue” findings about whether the legal action was brought for improper purposes, and must issue the findings not later than 30 days following the request.⁷⁹

The Legislature does not provide a time limitation or end date on the request, and does not indicate whether the request should be made before or after a ruling, or if the request can be made months or years later. The Legislature does not explain why the party bringing the legal action is not entitled to ask for such specific findings in the event that the trial court rules that the legal action should be dismissed. More importantly, the Legislature did not address what relevance, if any, such findings would have to the trial court or to an appellate court. If it is not an element of the motion that there be a finding that the lawsuit was brought for an improper purpose, then why is the movant permitted to request such findings? The motion can and must be granted so long as the other elements are met. If the Legislature intended such findings to assist in the determination of sanctions by the trial court, and the review of such award by the appellate court, such intent is less than clear from the text of the statute.

Another issue of concern is whether the trial court must rule on the motion if the plaintiff non-suits the case. Normally counterclaims and certain requests for sanctions survive a non-suit, but the motion to dismiss is not a counterclaim for damages, nor is it a motion for sanctions. The non-suit is effective as soon as the plaintiff files a motion for non-suit. *Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011). At the same time, a non-suit does not affect any pending claim for affirma-

tive relief or motion for attorney’s fees or sanctions. *Id.*; TEX. R CIV. P. 162. A non-suit fenders the merits of the case moot. *UTMB v. Estate of Blackman*, 195 S.W.3d 98, 101 (Tex. 2006). Since the TCPA motion to dismiss is predicated on a review of the merits of the lawsuit, does the motion constitute a claim for affirmative relief or sanctions? Arguably the non-suit fenders the motion to dismiss moot.

E. Mandatory, Not Discretionary, Award of Fees and Sanctions for Movant Upon Dismissal of Legal Action.

If the court dismisses a legal action, again the court has no discretion, but “shall award to the moving party: (1) court costs, reasonable attorney’s fees, and other expenses incurred in defending against the legal action as justice and equity may require; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter.”⁸⁰ There is no explanation in the legislative history or the statute why the trial court has been stripped of the discretion to award fees and assess sanctions, which discretion has long been given to courts. Even a suit with significant merit can result in fees and sanctions assessed if the court does not think that there is “clear and specific evidence.”

The Legislature did not follow the lead of some other states and allow for the recovery of exemplary or punitive damages. An award of sanctions is reviewed for an abuse of discretion, while Texas law provides a strict, high standard of proof to recover exemplary damages.⁸¹ The legislative history and bill analyses do not discuss why the Legislature chose sanctions over punitive damages.

F. Award of Fees Not Sanctions for Respondent/Plaintiff—Predicated on Frivolous Motion.

In contrast to the broad recovery favoring the subject of the legal action, the only



recovery that a plaintiff in the action may obtain in responding to a motion to dismiss would be for court costs and reasonable attorney's fees, but only if the court finds that the motion to dismiss is "frivolous or solely intended to delay."⁸² Unlike the movant, the respondent cannot recover sanctions under the statute, and would have to resort to existing Texas law to recover any sanctions for frivolous pleadings. The Legislature did not disclose why the plaintiff in the civil action must prove that the motion to dismiss is frivolous, while the object of the suit, the purported defamer, need only prove the action "relates to" his claimed exercise of speech, association, and petition rights.

G. Appellate Review.

1. Interlocutory Appeal Limited to Denial of Motion to Dismiss by Operation of Law.

What type of appeal is available to litigants of a Chapter 27 motion to dismiss is a hot topic of discussion and motions in the cases making their way through the appellate system. It appears that although the Legislature devoted a separate section of the statute to "Appeal,"⁸³ the scope of interlocutory appeal is limited. The Fort Worth Court of Appeals recently decided that interlocutory appeals lie only for motions to dismiss overruled by operation of law, and not where a timely written order overruling the Chapter 27 motion to dismiss exists,⁸⁴ finding that "the interlocutory appeal statutorily authorized by subsection (a) is limited to situations in which a trial court has failed to timely rule on a timely-filed motion to dismiss, and the motion to dismiss is therefore considered to have been denied by operation of law."⁸⁵

Appellate courts generally have jurisdiction over final judgments.⁸⁶ Jurisdiction of a court of appeals is controlled by the constitution and by statutory provisions; an interlocutory order is not appealable unless a statute explicitly provides for appellate jurisdiction.⁸⁷ The Fort Worth

Court of appeals correctly noted that "[s]tatutes authorizing interlocutory appeals are strictly construed because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable."⁸⁸ A TCPA order of dismissal is not among the types of actions for which an interlocutory appeal is available under TEX. CIV. PRAC. & REM. CODE 51.014. Section 27.008's specific grant of right to appeal refers only to denial of the motion to dismiss by operation of law only, and permits appeal only by the moving party.⁸⁹

Although Section 27.008(b) refers to expediting an appeal "from a trial court order on a motion to dismiss a legal action," the statute does not explicitly state that the granting of a motion permits an interlocutory appeal. The Fort Worth Court of Appeals correctly noted that the Legislature did not use any language creating a right of interlocutory appeal in the event that an order was signed.⁹⁰ Section 27.008(b) does not use the type of language found in other statutes creating interlocutory appeals, and it does not state that a party may appeal or is entitled to appeal.⁹¹

During the interlocutory appeal from the trial court's failure to rule on the motion to dismiss, the trial is not stayed and court proceedings are not suspended.⁹² Ironically, in cases in which media defendants are involved, their interlocutory appeal of a Chapter 27 denial by operation of law does not result in a stay of the case, whereas a signed order denying a motion for summary judgment would result in a stay of the trial, though possibly not other proceedings.⁹³

2. Written Denial of Motion to Dismiss—Mandamus Available.

Given that the statute does not create a right to interlocutory appeal if the trial judge follows the law and timely denies the motion to dismiss, the movant is not without recourse to the appellate courts. If the trial court timely signs an order denying the motion to dismiss, the movant may be able to proceed with a petition for

writ of mandamus, alleging that the trial court abused its discretion when required to dismiss the action.⁹⁴ Upon review, the appellate court will determine whether the trial court clearly abused its discretion,⁹⁵ and a trial court's application of legal principles is reviewed for an abuse of discretion separately from its resolution of factual disputes.⁹⁶

The proceedings in the trial court are not suspended or stayed while the mandamus proceeds.

3. Motion to Dismiss Timely Granted—Appealable Noninterlocutory Order.⁹⁷

The respondent to a Chapter 27 motion to dismiss must prepare for an expedited appeal in the event the motion is granted. The *Wallbuilder* case suggests that an order granting a motion to dismiss under Section 27.005 may be appealable as a final judgment, or severable and appealable as a final, non-interlocutory order disposing of all issues and all parties.⁹⁸ This may be true if the trial court dismisses the entire case, but may not be true if the order of dismissal targets only certain causes of action. Whether the dismissed causes and parties are severable for appeal will be decided on a case-by-case basis. We anticipate that an appeal of a final order will be reviewed for legal sufficiency.⁹⁹

4. Deadlines for Chapter 27 Appeal or Writ.

Either party has 60 days after the court's order is signed to actually file the appeal or writ, not just a notice of appeal, if the appeal or other writ is brought "under this section."¹⁰⁰ The deadline for any other appeal or writ should be governed by applicable law.¹⁰¹ A failure to timely rule is treated as a denial by operation of law to trigger the appellate deadline.¹⁰²

The statute is unclear as to what appeals or writs would be brought "under this section." Clearly an interlocutory appeal from a failure to rule on the motion is brought under Section 27.008(a). If a party files a petition for writ of mandamus, is it considered "under this section" for pur-



poses of the filing deadline? Chapter 27 does not expand the jurisdiction of any appellate court. Since a mandamus action is an original proceeding, a strong argument can be made that the practitioner should look to and follow the existing deadlines under the Texas Rules of Appellate Procedure.¹⁰³

What is the deadline to appeal if the motion to dismiss is granted, and an order disposing of all parties and claims is entered? Is that considered a final judgment, for which a notice of appeal must be filed within 30 days of the order,¹⁰⁴ Or does the 60-day filing of the appeal itself, regardless of notice, apply under TEX. CIV. PRAC. & REM. CODE 27.008? These questions are not addressed, let alone answered, in the statute, but a prudent practitioner should look first to the standard shorter notice of appeal deadlines. The question would be whether an appeal of an order of dismissal would be considered brought “under this section” for purposes of filing the appeal. Since any appeal is expedited, it is conceivable that the 60-day filing deadline may apply to actually filing the appeal of an order granting the motion. Presumably the reference in Section 27.008 (c) to “the trial court’s order” is the order on the motion to dismiss, not another order, such as one on a motion to sever. The statute does not reconcile the expedited 60-day deadline with any other orders to render the trial court’s order non-interlocutory and appealable.

5. Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited.

Section 27.008(b) indicates that any appeal or writ is to be expedited. The Fort Worth Court of Appeals concluded that “the plain language and meaning of subsection (b) is to require expedited consideration by an appellate court of any appeals or other writs from a trial court’s ruling on a motion to dismiss filed under chapter 27, whether interlocutory or not.”¹⁰⁵ In other words, Section 27.008(b) “imposes a duty on the appellate courts to expedite disposition of any types of appeals or writs” from

Chapter 27 motions to dismiss.

6. Standard of Review of Interlocutory Appeal.

The statute does not discuss the standard of review of the trial court’s ruling on the motion to dismiss and for fees and sanctions. The statute does not make any express provision for an “abuse of discretion” standard of review of the filings. Of course any statutory construction is a question of law, which is reviewed de novo.¹⁰⁶ And although a trial court’s resolution of questions fuming on the application of legal standards is a de novo review, it is unclear whether the court’s determination of whether the respondent met its burden of proof will be reviewed for an abuse of discretion¹⁰⁷ or legal and factual sufficiency.¹⁰⁸ Whether the appellant met his initial very modest initial burden of proof or the respondent met the shifted burden of proof requires some analysis of the evidence, which may support a legal sufficiency of evidence review.¹⁰⁹

H. Does the TCPA Apply in Federal Court?

Although it is unsettled whether a defendant in federal court in Texas may file a TCPA motion to dismiss, recent authority suggests that the Texas anti-SLAPP dismissal motion may be unavailable in federal court sitting under either diversity or federal question jurisdiction. In a very thorough and well-reasoned opinion, a U.S. District Court sitting in the District of Columbia recently held that a very similar anti-SLAPP statute of the District of Columbia¹¹⁰ attempts to answer the same questions that Federal Rules¹²¹¹¹ and 56¹¹² cover, and therefore cannot be applied in a federal court sitting in diversity.¹¹³ In so finding, Judge Robert Wilkins stated that the “history and practice culminating in the 1946 Amendments clearly demonstrates that the framers intended that Rules 12 and 56 provide the exclusive means for challenging the merits of a plaintiff’s claim based on a defense either on the face of

the pleadings or on matters outside the pleadings.”¹¹⁴ He stated, “[m]oreover, like the rest of the Federal Rules of Civil Procedure, Rules 12 and 56 automatically apply in “all civil actions and proceedings in the United States district courts.”¹¹⁵

The analysis was whether the federal rule, fairly construed, answers or covers the question in dispute.¹¹⁶ If the federal rule answers the question, the state law does not apply.¹¹⁷ In that case, the court determined that Federal Rules 12 and 56 answered the question in dispute, which was “whether this Court may dismiss 3M’s claims with prejudice on a preliminary basis based on the pleadings or on matters outside the pleadings merely because 3M has not ‘demonstrated that the claim is likely to succeed on the merits.’”¹¹⁸ Judge Wilkins observed that the D.C. “special motion to dismiss under the Anti-SLAPP Act operates greatly to a defendant’s benefit by altering the procedure otherwise set forth in Rules 12 and 56 for determining a challenge to the merits of a plaintiff’s claim and by setting a higher standard upon the plaintiff to avoid dismissal.”¹¹⁹ The *Boulter* opinion rejected opinions from the First¹²⁰ and Ninth¹²¹ Circuit Courts of Appeals, finding them distinguishable or failing to apply the proper analysis.

In the event that a party files or faces a TCPA motion to dismiss, the party should pay careful attention to this developing case law in supporting or opposing the motion.

I. Does the Act Conflict with the Supreme Court’s Rule-Making Authority?

Since the new statute creates new motion procedures that conflict with existing dispositive motions by rule, we should question whether it may violate the separation of powers between the Legislature and the rulemaking authority of the Texas Supreme Court. The Supreme Court derives its rule-making authority initially from the Texas Constitution, which specifically and separately empowers



the Supreme Court to promulgate rules of civil procedure.¹²² The Constitution authorized the Legislature to delegate to the Supreme Court other rulemaking power.¹²³ The Supreme Court's statutorily conveyed power is plenary, because the Rules of Practice Act provides: "[s]o that the supreme court has full rulemaking power in civil actions, a rule adopted by the Supreme Court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed"¹²⁴ If, under the *Boulter* analysis, the Texas anti-SLAPP statute is procedural, it would seem to be subject to the Texas Rules of Civil Procedure.¹²⁵

The Texas Rules of Civil Procedure share a history of adoption similar to the Federal Rules. TEX. R. CIV. P. 2, adapted from FED. R. CIV. P. 1 in 1940, provides in pertinent part that "[t]hese rules shall govern the procedure in the justice, county, and district courts of the State of Texas in all actions of a civil nature, with such exceptions as may be hereinafter stated." TEX. R. CIV. P. 1 provides:

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

The Texas Rules of Civil Procedure have not been amended to provide any exceptions for the TCPA dismissal motion. Rule 2 makes no provision for such a statutory procedure to apply in lieu of the Rules of Procedure.

The Texas Supreme Court originally looked to the Federal Rules of Civil Procedure in the adoption of the Texas

summary judgment rule, TEX. R. CIV. P. 166a. The rule was adopted by order of October 12, 1949, effective March 1, 1950, and designated as the new Rule 166-a.¹²⁶

The Texas Bar Journal published the Texas Supreme Court's order adopting and amending several rules, which cited its source as "Federal Rule 56, as originally promulgated, except . . . [with minor wording differences]."¹²⁷

It is beyond the scope of this paper to thoroughly explore the issue of whether the anti-SLAPP motion to dismiss is consistent with the Court's rule-making authority under the Texas Constitution, but this is a serious question to consider. It would certainly seem that at the very least, the Texas Supreme Court could, by order, repeal the motion procedure in Section 27.001 *et seq.*

J. Does the Statute Conflict With Texas' Constitutional Protection of Rights to Sue for Reputational Torts?

Since the Chapter 27 motion to dismiss is directed squarely at claims based on communications, at least many of which would be brought as reputational torts, there is a significant question whether the statute fatally conflicts with longstanding Texas law protecting the right to sue for reputational damages as guaranteed in the Texas Free Expression Clause. "Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that 'broader protection, if any, cannot come at the expense of a defamation claimant's right to redress.'" *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116-117 (Tex. 2000), (quoting *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989)). "Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts." *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, 66 8, 13; *Casso*, 776 S.W.2d at 556; *Ex parte Tucci*, 859 S.W.2d

1, 19-23 (Tex. 1993) (Phillips, C.J., concurring)). The Texas Supreme Court declared that "[t]he Texas Constitution's free speech provision guarantees everyone the right to 'speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege.*" *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. I, 6 8 (emphasis added)). In the *Turner* case, Chief Justice Phillips also relied upon the open courts provision: "the Texas Constitution's open courts provision guarantees that 'all courts shall be open, and every person for an injury done him, in his lands, goods, person *or reputation*, shall have remedy by due course of law.'" *Turner*, 38 S.W.3d at 117 (citing TEX. CONST. art. 1, 6 13 (emphasis added)).

We previously discussed the perils of the adoption of an undefined, and possibly higher, burden of proof than the general civil standard of preponderance of the evidence on the basis that a heightened standard of proof violates the Texas constitution's open courts provisions.¹²⁸ Beyond the issue of standards of proof, from a more basic statutory construction framework, the well-established case law supporting Texans' constitutional rights to seek redress for reputational damages provides ample reason for litigants to carefully review the use of a Chapter 27 motion to dismiss.

IV. UNINTENDED CONSEQUENCES.

A. Overbroad Application and Chilling Effect on Meritorious Business Tort Actions.

Whether the lawsuit is actually frivolous is irrelevant to a motion to dismiss under the TCPA. While the Act was not enacted to legalize illegal activity, or to provide a safe harbor for violations of Texas law, it may have this unintended consequence.¹²⁹

Abuse of anti-SLAPP statutes has been reported in other states, such as Maine and California.¹³⁰ A Maine commentator reports that, "[n]ot surprisingly, entities are beginning to find ways to use anti-



SLAPP statutes for less legitimate purposes. One example is the trend of corporate defendants' use of special motions to dismiss under anti-SLAPP statutes as a delaying tactic in the face of legitimate consumer protection or product liability lawsuits.¹³¹ "Absent a fee-shifting disincentive, defendants are filing largely futile special motions to dismiss and the engaging in interlocutory appeals of the inevitable denials of those motions."¹³² Similarly, a California commentator reports that "legal seminars are continually encouraging corporations to employ the anti-SLAPP Statute motion as a new litigation weapon by filing it in otherwise ordinary personal injury and products liability cases."¹³³ The authors understand that some counsel are urging entities involved in any suits involving communications to file the motion to dismiss in each case.

Texas' exemptions fall short of narrowing the application of the TCPA to true SLAPP cases, particularly since there is no requirement that there be a finding that the lawsuit was frivolous, and that there is a gross disparity in resources among the litigants in which the alleged defamer is at a disadvantage.

Moreover, certain causes of action can always be categorized as "relating to" or "based on" speech, particularly common law torts of defamation, disparagement, tortious interference, fraud, negligent misrepresentation, and even statutory claims concerning communications and misrepresentations.

For example, the Texas Election Code provides that candidates and officeholders who are the objects of illegal campaign contributions have the right to seek damages against the person or persons who knowingly violate the Code.¹³⁴ The Code also provides that "[a] person who is being harmed or is in danger of being harmed by a violation or threatened violation of this code is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring."¹³⁵ Thus, a candidate or officeholder who is harmed by illegal contributions can sue

for damages and injunctive relief. But campaign contributions necessarily "relate to" or are "based on" the "exercise of free speech."¹³⁶ As a result of the enactment of the TCPA, any political candidates suing for damages and to enjoin violations the Code must be ready to survive an anti-SLAPP motion.

A critical problem with determining the applicability of the statute is the use of the terms "related to" and "based on." What does "related to" mean? Does it mean more than "is engaged in?" Or more than "arising from?" As drafted, the statute conceivably applies to almost any type of dispute between parties, and is not limited to traditional press communications, or communications with governmental entities. The very low threshold for success in a motion to dismiss means that anytime a blogger, or other person, decides that he is going to make a business' life miserable, he can do so with virtual impunity so long as he claims he is exercising his First Amendment rights. If a person repeatedly writes or emails vitriolic views about a business, in a way that is damaging to the business, is it not proper to sue to stop the damage? If a person's website, or Facebook, or Twitter comments otherwise violate state defamation law, why shouldn't a party sue for such conduct? We can easily see that theft of confidential information, trade secrets, statutory actions, other misappropriation actions, can be the subject of anti-SLAPP motions to dismiss. It is a very simple matter to predict that creative lawyers will invoke the TCPA's provisions in virtually every applicable case.

Suits for business disparagement, tortious interference, defamation, and related torts are a staple of tactics to restrain unethical practices, and to restrain persons with defective moral compasses from engaging in deleterious behavior. The tort system generally works well to temper the bad conduct of businesses, customers, and the public. The vast majority of business tort suits would likely not be characterized as frivolous SLAPP suits. As a practical matter, most people do not want to spend

the money to prosecute a meritless case. The medicine is probably worse than the illness sought to be cured.

B. Justice Delayed is Justice Denied.

Doubtless many litigants in business tort suits will try out the new TCPA. For a defendant, such as the disparaging blogger, or illegal advertiser, to promptly file a motion to dismiss, with an affidavit claiming that the activity was protected, is not a difficult matter. That defendant/movant would know that he is not likely subject to sanctions under the statute, and that filing the motion causes the case to grind to a halt, the discovery stops, and the plaintiff/respondent has to defend without the benefit of even basic discovery. In many cases a plaintiff does not have the specific proof on every element of her cause of action, and will be able to prove the case with some evidence from the target defendant. That opportunity is denied in the process of the expedited motion to dismiss.

By the time that an expedited appeal is decided, precious time is lost and the expense of meritorious litigation mounts. We will leave it up to the reader to determine the probability of a plaintiff securing fees and expenses from the defendant/movant in such litigation in response to the motion to dismiss.

We will also leave it up to the reader to determine whether the statute in fact operates to deter frivolous SLAPP suits, or has cast the net so far as to ensnare a much greater class of cases in which the parties need access to the courts to resolve their disputes.

C. When The Texas Attorney General Must Be Invited to the Party.

The passage of the TCPA also reflects a lack of consideration about the interaction of the statute with other statutory notice requirements. Since the communications made the basis of the motion to dismiss are likely claimed to be constitutionally protected, if the suit is based at least in



part on statutory grounds that the movant challenges on constitutional grounds, the state Attorney General must be timely notified and given an opportunity to participate. Similarly, if a respondent challenges a motion to dismiss on constitutional grounds, notice must be timely provided to the Texas Attorney General.

Pursuant to Section 402.010 of the Texas Government Code (new 2011 statute), the Texas Attorney General must be notified before any ruling by the trial court is made under Chapter 27. Such statute provides that the Texas Attorney General *must* be notified of any challenge to the constitutionality of a Texas statute, whether such challenge be by “petition, motion or other pleading,” and 45-days’ notice required.¹³⁷ Also, pursuant to Section 37.006 of the Texas Civil Practice and Remedies Code, in a declaratory judgment action, when the constitutionality of a Texas statute is drawn into question, the Texas Attorney General “*must* be served with a copy of the proceeding and is entitled to be heard.”¹³⁸

The difficulty lies in the expedited nature of the hearing on the motion to dismiss. How can there be a hearing within 30 days of the filing of the motion to dismiss, and at the same time serve notice on the Attorney General and allow the Attorney General’s participation? The trial court that finds a statute unconstitutional, whether as applied or facially, runs the risk of having the ruling overturned as void if the Attorney General has insufficient notice. Once a challenge to the constitutionality of the TCPA and the Chapter 27 motion to dismiss are made, how does an appellate court review the trial court’s denial of the motion by order or operation of law?

V. CONCLUSION.

While the objective of protecting First Amendment rights in the age of the internet is laudable, and conscientious lawyers are mindful of the need to pursue meritorious litigation, the TCPA has a

COMPARISON OF ANTI-SLAPP MOTION AND NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT
Comparison of Anti-SLAPP Motion and No-Evidence Motion for Summary Judgment ¹³⁹

	NO-EVIDENCE M/S/J	ANTI-SLAPP MOTION
Deadline to File?	No, unless provided for by scheduling order or local rule. Otherwise, after “adequate time for discovery”	Yes, within 60 days of being served. Court may extend deadline upon “showing of good cause”
Discovery allowed before hearing?	Yes	No, except that for “good cause, the court may allow specified and limited discovery relevant to the motion”
Oral testimony allowed at hearing?	No	Perhaps-statute neither expressly permits nor expressly forbids oral testimony
Specific Time Within Which Hearing Must be Held?	No	Yes-30 days after motion filed “unless the docket conditions of the court require a later hearing”
Continuance available for non-movant?	Yes	No
Specific time within which court must rule?	No	Yes -within 30 days after hearing; if Court fails to do so, motion is considered denied by operation of law
Movant’s initial burden?	None	To show by “a preponderance of the evidence that the legal action is based on, relates to, or is in response to the party’s exercise of: (1) the right of free speech; (2) the right to petition; or (3) the right of association”
Non-movant’s burden to defeat motion?	To produce “summary judgment evidence raising a genuine issue of material fact”	To establish “by clear and specific evidence a prima facie case for each essential element of the claim”
Attorney’s fees available for successful movant?	No (unless provided for by substantive law)	Yes-mandatory, “as justice and equity may require”
Attorney’s fees available for successful non-movant?	No	Perhaps-discretionary upon finding that motion was “frivolous or solely intended to delay”
Immediate appeal from denial of motion?	No, unless provided for by CPRC § 51.014 or other law	Yes, if denied by operation of law; No, if denied by written order signed within 30 days, although such denial by written order may be reviewable by mandamus. See, <i>Jennings v. Wallbuilder</i> , No. 02-12-00047-CV, 2012 WL 3500715 (Tex. App. Fort Worth, August 16, 2012, no pet. h.)

number of flaws that may likely restrain legitimate suits, rather than restrict frivolous cases. The TCPA includes many flaws and inconsistencies that can serve as trial and appeal traps for the unwary lawyer. Since the TCPA clearly encompasses far more than SLAPP cases, practitioners should thoroughly examine this new law’s applications and defenses in a wide variety of cases. Business tort lawyers should carefully review the statute and prepare for litigating it before making claims relating to communications made about. . . , well, just about anything at all.

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1. “Strategic Lawsuits Against Public Participation.”

2. See TEX. CIV. PRAC. & REM. CODE 27.001, *et seq.* (2011). The 28 other states, in addition to the District of Columbia, are Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, and Washington.

3. In *Cook v. Tom Brown Ministries, et. al.*, the Mayor of El Paso filed suit to enjoin violations of the Texas Elections Code by several corporations and a group of individuals. The defendants filed a motion to dismiss under the lawsuit under the new anti-SLAPP statute, arguing that the corporate contributions at issue in the case were a form of “protected speech.” In denying the motion to dismiss, Judge Javier Alvarez stated that the new procedure for dismissal of a lawsuit without discovery and with the burden on the plaintiff was too draconian. The authors of this paper were counsel for the plaintiff in that case. See *Cook v. TBM et al.*, S.W.3d, 2012 Tex. App. LEXIS 1318 (Tex. App. El Paso Feb. 17, 2012, pet. filed) (related interlocutory appeal of temporary injunction).

4. TEX. CIV. PRAC. & REM. CODE § 27.003 & 27.005.

5. Mark J. Sobczak, Symposium: *The Modern American Jury: Comment: Slapped in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act*, 28 N. Ill. U. L. Rev. 559, 560-61 (2008), quoting Edmond Costantini & Mary Paul Nash, *SLAPP/SLAPPback: The Misuse of Libel Law for Political Purposes and Countersuit Response*, 7 J.L. & POL 417, 423 (1991).

6. HAW. REV. STAT. § 634-F-1 (2011).

7. Sobczak, *supra*, at 561.

8. *Id.*, quoting Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969-70 (1999).

9. *Id.*, citing George W. Pring, *SLAPPs' Strategic Lawsuits Against Public Participation*, 7 PACE ENV'L L. REV. 3, 5-6 (1998).

10. Richard J. Yurko and Shannon C. Choy, *Legal Analysis: Reconciling the anti-SLAPP Statute With Abuse of Process and Other Litigation-Based Torts*, 51 B.B.J. 15, 15 (2007).

11. See John G. Osborn and Jeffrey A. Thaler, *Feature: Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 MAINE BAR J. 32 (2008). A powerful developer files a frivolous defamation lawsuit against a group of outspoken homeowners that oppose the developer's plans to build an industrial facility in their backyard. The developer's complaint "is sufficiently drafted to survive . . . [a] motion to dismiss, and the developer then embarks upon a course of oppressive discovery and motion practice, forcing the defendants to engage in extensive document production and a seemingly endless string of depositions." "After years of litigation, the defendants prevail at summary judgment or trial—but the victory is, in fact, the developer's. The cost, stress and time involved in defending against the suit has fractured the community group, sapped the energy and financial resources of the group's members, diverted their efforts from actually opposing the industrial plant and chilled the likelihood of future opposition to similar projects because of the toll the lawsuit took on the group and its members." *Id.*

12. The Chapter is entitled: "ACTIONS INVOLVING THE

13. House Comm. on Judiciary and Civil Jurisprudence, *Bill Analysis*, Tex. HB 2973, 82nd Leg., Rs. (2011).

14. See TEX. R. CIV. P. 13, which provides, among other things, for sanctions to be imposed only upon "good cause, the particulars of which must be stated in the sanction order," for a pleading that is "groundless and brought in bad faith or groundless and brought for the purpose of harassment" (the common definition of a frivolous pleading). Every pleading is required to be signed, which signature is a certification that the pleading is not frivolous. A party who brings a suit knowing that it is frivolous "shall be held guilty of a contempt" "'Groundless' for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." Knowing that sanctions are available, "Courts shall presume that pleadings, motions, and other papers are filed in good faith." Accordingly, the party resisting the suit has the burden to prove that the suit is frivolous. "Bad faith is not simply bad judgment or negligence; rather, it is the conscious doing of a wrong for dishonest, discriminatory, or malicious purposes. Improper motive is an essential element of bad faith. Harassment means that the pleading was intended to annoy, alarm, and abuse another person."

Parker v. Walton, 233 S.W.3d 535, 539-540 (Tex.App.---Houston [14th Dist.] 2007, no pet.). Rule 13 permits the trial court to order the offending party to pay fees, expenses, and discouragement sanctions. See also TEX. CIV. PRAC. & REM. CODE § 9.001, *et seq.*, 10.001 *et seq.*

15. Chapter 9 applies to "Frivolous Pleadings & Claims." TEX. CIV. PRAC. & REM. CODE § 9.001, *et seq.* (enacted 1987). In enacting Chapter 10, the Legislature in 1995 went even further than Rule 13, and enumerated frivolous pleadings that could be subject to sanctions, TEX. CIV. PRAC. & REM. CODE § 10.001, and spelled out the sanctions available, including fees and expenses, and sanctions to deter future conduct, TEX. CIV. PRAC. & REM. CODE § 10.004. Chapter 10 provides a mechanism for a party to file a motion for sanctions or, on its own initiative, a court may issue a show cause order and direct the alleged violator to show cause why the conduct has not violated the statute. TEX. CIV. PRAC. & REM. CODE § 10.002(a,b). The Legislature even prohibits the Texas Supreme Court from amending or adopting rules in conflict with the statute. *Id.* § 10.006.

16. TEX. CIV. PRAC. & REM. CODE § 9.002(a)(2).

17. House Comm. on Judiciary and Civil Jurisprudence, *Bill Analysis*, Tex. HB 2973, 82nd Leg., R.S. (2011).

18. *Id.*

19. *Id.*

20. See <http://www.fo.org/>.

21. Ms. Prather was with Sedgwick, and recently joined the Austin office of Haynes & Boone as a partner.

22. See http://www.fo.org/?page_id=796 for a listing of "sponsors."

23. See http://www.fo.org/?page_id=1923 for FIFI's discussion of the passage of the Act.

24. See Ms. Prather's news release at <http://www.sdama.com/laura/prathers-efforts-lead-to-passage-of-texas-anti-slapp-law-06-12-2011/>. The news release was taken down after Ms. Prather joined Haynes & Boone in early June, 2012, but the Sedgwick release was virtually identical to the current Haynes & Boone biography description.

25. See Ms. Prather's bio at [ht://haynesandboone.com/Laura-Prather/](http://haynesandboone.com/Laura-Prather/).

26. *Id.*

27. House Research Org., Texas House of Representatives, *Bill Analysis* H B. 2973 (May 2, 2011).

28. *Id.*

29. Chair, Jim Jackson (R) Dist. 115; Vice Chair, Tryon Lewis (R) Dist. 81; Rep. Dwayne Bohac (R) Dist. 138; Rep. Joaquin Castro (D) Dist. 125; Rep. Sarah Davis (R) Dist. 134; Rep. Will HarWell (R) Dist. 114; Rep. Jerry Madden (R) Dist. 67; Rep. Richard Raymond (D) Dist. 42; Rep. Connie Scott (R) Dist. 34; Rep. Senfronia Thompson (D) Dist 141; Rep. Beverly Wooley (R) Dist. 136.

30. Speaking for the bill: Laura Prather (Better Business Bureau, Freedom of Information Foundation of Texas, Texas Daily Newspaper Association, Texas Association of Broadcasters); Carla Main (journalist); Robin Lent (Coalition for Homeowners Association Reform); Brenda Johnson (HOA); Shane Fitzgerald (FOIFT); Joe Ellis (Texas Association of Broadcasters); and Janet Ahmad (Home Owners for Better Building). The Texas Citizens Participation Act; Hearings on Tex. H B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82nd Leg., R.S. 10-17 (March 28, 2011). Sixteen others registered but did not testify.

31. The Texas Citizens Participation Act; Hearings on Tex. H B. 2973 Before the House Comm. on Judiciary & Civ. Jurisprudence, 82nd Leg., R.S. 10-17 (March 28, 2011)(Rep. Todd Hunter).

32. Robert Duncan (R) Lubbock, Chair.

33. Hearing on Tex. CSHB 2973 Before the Senate Committee on State Affairs, 82nd Leg., R.S. (May 12, 2011).

34. See TEX. CIV. PRAC. & REM. CODE § 73.00 I *et seq.*

35. TEX. CIV. PRAC. & REM. CODE § 51.014(6) grants an appeal from an interlocutory order that: "denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of the Civil Practice and Remedies Code]."

36. *Id.*

37. TEX. CIV. PRAC. & REM. CODE § 27.003(a) (emphasis added).

38. TEX. CIV. PRAC. & REM. CODE § 27.001 (6).

39. TEX. CIV. PRAC. & REM. CODE § 27.00 I (4) (A)(ii).

40. TEX. CIV. PRAC. & REM. CODE § 27.00 I (3).

41. TEX. CIV. PRAC. & REM. CODE § 27.00 I (I).

42. A number of categories of speech receive little or no First Amendment protection. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-73 (1942). Obscenity enjoys no First Amendment protection and may be banned simply because a legislature concludes that banning it protects "the social interest in order and morality." *Roth v. United States*, 354 U.S. 476, 485 (1957). Child pornography is not protected by the First Amendment. *Osborne v. Ohio*, 495 U.S. 103 (1990). Advocacy directed to inciting or producing imminent lawless action and is likely to incite or produce such action is also not protected by the First Amendment. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Other categories of speech receive limited protection under the First Amendment. "Commercial speech" receives less First Amendment protection, and *false* commercial speech receives none. *Pet-G v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001). Importantly, commercial speech may relate to a matter of "public concern," but it nonetheless receives limited First Amendment protection as commercial speech if the motivation of the speaker is primarily economic. *Id.* at 556. Misleading commercial speech receives no First Amendment protection. *Goodman v. Ill. Dep't of Fin. & Prof'l Reg.*, 430 F.3d 432, 438 (7th Cir. 2005). Content-neutral restrictions, such as time, place, or manner restrictions, as well as incidental restrictions on speech, also enjoy less First Amendment protection. *Vincen v. Bloomberg*, 476 F.3d 74, 84 (2nd Cir. 2007). Defamation is clearly an exception to the First Amendment, in which greater protection is afforded to public officials and figures.

43. TEX. CIV. PRAC. & REM. CODE § 27.001 (4).

44. *Id.* § 27.001(2).

45. And possibly administrative proceedings.

46. Importantly, neither the TCPA nor other anti-SLAPP statutes contain a requirement that the defendant be economically disadvantaged as compared to the plaintiff, and most states do not require that the plaintiff have the improper motive of interfering with the constitutional rights of the defendant. In fact, it



is highly questionable whether any state of mind is necessary to dismiss a lawsuit under the TCPA and similar statutes. See, *infra*, Discussion Part II.

47. *Id.* 27.01 O(a).
48. *Id.* 27.010(c).
49. *Id.* 27.010(b).
50. *Id.* 6 27.003(a).
51. *Id.* 27.003(a).
52. *Id.* 27.004.
53. TEX. R CIV. P. 21.
54. See TEX. R CIV. P. 166a(c).
55. See, e.g., FED. R CIV. P. 12(b); Local Rule CV-7(d), United States District Court, Western District of Texas (establishing 11-day time for response); FED. R CIV. P. 6(b) provides for extension of time for good cause, with few exceptions.
56. TEX. CIV. PRAC. & REM. CODE 27.005(a).
57. *Id.* 27.003(c).
58. *Id.* 27.006(b).
59. See *id.* 27.004.
60. *Id.* 27.006(a).
61. *Id.* 27.005(b).
62. *Id.* 27.005(c) (emphasis added).
63. See, e.g. *i.d.* 41.001(2): "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.
64. <http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/>.
65. Brief of Univision, *Virgilio Avil and Univision Television Group, Inc. v. Larrea*, No. 05-II-01637, Court of Appeals of Dallas, Texas.
66. The "open courts provision" of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, 13; *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 262 (Tex. 1994). "It includes at least three separate constitutional guarantees: 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers, and 3) meaningful remedies must be afforded, "so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Trinity River Auth.*, 889 S.W.2d at 262. Pursuant to the open courts provision, "[a] statute or ordinance that unreasonably abridges a justiciable right to obtain redress for injuries caused by the wrongful acts of another amounts to a denial of due process under article I, section 13, and is, therefore, void." *Sax v. Votteler*, 648 S.W.2d 661, 665 (Tex. 1983). Thus, the open courts provision is violated when a well-established cause of action is restricted, and the restriction is unreasonable and arbitrary when balanced against the purpose of the statute. *Smith v. Smith*, 126 S.W.3d 660, 664 (Tex. App.----Houston [14th Dist.] 2004, no pet.), citing *Sax*, 648 S.W.2d at 666. Clearly, causes of action for defamation, business disparagement, tortious interference, fraud, malicious prosecution, violations of consumer statutes, and other common-law and statutory actions are well-established. The TCPA may unreasonably and arbitrarily restrict well-established causes of action, by imposing a higher standard of proof than would ordinarily be required for the plaintiff to prevail at trial. Moreover, the TCPA's limitation on discovery may also violate the open courts provision. See *In re Hinterlong*, 109 S.W.3d 611 (Tex.App.----Fort Worth 2003, no pet.) (crime-stoppers statutory privilege violated the open courts provision of the Texas Constitution, because it unreasonably and arbitrarily

restricted plaintiff's ability to prosecute his malicious prosecution, defamation, and negligence claims, by precluding discovery of the identity and other information about his accuser).

67. See *Jennings v. Wallbuilder Presentations, Inc.*, 2012 Tex. App. LEXIS 6834 (Tex. App.----Fort Worth, August 16, 2012) (appeal of order denying motion dismissed for lack of jurisdiction).
68. TEX. R CIV. P. 166a(i); *Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003).
69. *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 601 (Tex. 2004).
70. <http://www.sdma.com/texas-newsrooms-will-benefit-from-anti-slapp-law-07-15-2011/>.
71. TEX. R CIV. P. 51.
72. TEX. CIV. PRAC. & REM. CODE 27.001 (6).
73. TEX. CIV. PRAC. & REM. CODE 27.003(c).
74. TEX. CIV. PRAC. & REM. CODE 27.005(b,c).
75. TEX. R CIV. P. 41.
76. TEX. R. CIV. P. 97.
77. TEX. R CIV. P. 174(a).
78. TEX. R CIV. P. 174(b).
79. TEX. CIV. PRAC. & REM. CODE 27.007(a,b).
80. TEX. CIV. PRAC. & REM. CODE 27.009(a).
81. *Id.* 41.003.
82. *Id.* 27.009(b).
83. TEX. CIV. PRAC. & REM. CODE 27.008.
84. *Jennings v. Wallbuilder Presentations, Inc.*, 2012 Tex. App. LEXIS 6834 (Tex. App. Ft. Worth August 16, 2012, no pet. h.) (dismissing appeal for lack of jurisdiction); see also *Lipsky v. Range Production Co., et al.*, 2012 Tex. App. LEXIS 7059 (Tex. App.----Fort Worth Aug. 23, 2012, no pet. h.) (dismissing appeal for want of jurisdiction for want of jurisdiction for same reason, but granting motion to consider the proceeding as a petition for writ of mandamus).
85. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *8.
86. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *3, citing TEX. CONST. art. V, 6.
87. *Stary v. DeBord*, 967 S.W.2d 352, 352-353 (Tex.1998); *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *4.
88. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *4, quoting *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).
89. TEX. CIV. PRAC. & REM. CODE 27.008(a).
90. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *12.
91. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *12.
92. TEX. CIV. PRAC. & REM. CODE 51.014(b).
93. TEX. CIV. PRAC. & REM. CODE 51.014(a) (6),(b).
94. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *9.
95. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1991).
96. *Id.* at 839-840.
97. An untimely order granting the motion to dismiss would be construed to overrule the motion as a matter of law.
98. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *9, citing *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex.1994) (recognizing that trial court may "make the judgment final for purposes of appeal by severing the causes and parties").
99. See *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).
100. *Id.* 27.008(c).
101. See TEX. R. APP. P. 25.1, 26.1.
102. *Id.* 27.008(a).
103. See TEX. R APP. P. 52; TEX. GOV'T CODE 22.002, 22.221.
104. TEX. R APP. P. 26.1.
105. *Wallbuilder*, 2012 Tex. App. LEXIS 6834 *10.
106. *Entergy GuStates, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009); *Texas Mun. Power Agency v.*

Public Util. Comm'n, 253 S.W.3d 184, 192 (Tex.1997).
107. See *In re Doe*, 19 S.W.3d 249 (Tex. 2000).
108. See, e.g., *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003).
109. See *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005).
110. D.C CODE 16-5501-5505, enacted in 2010, effective in the District of Columbia on March 31, 2011.
111. FED. R CIV. P. 12.
112. FED. R CIV. P. 56.
113. *3M Co. v. Boulter*, 2012 U.S. Dist. LEXIS 12860 *44 (D.C. 2012). In this case, 3M sued U.K. defendants in federal court for blackmail, tortious interference, business disparagement, and related claims. The defendants filed motions to dismiss under the new D.C. anti-SLAPP statute.
114. *Id.* at *47.
115. *Id.*, citing *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1437 (2010), and FED. R CIV. P. 1.
116. *Boulter*, 2012 U.S. Dist. LEXIS 12860 *25; *Shady Grove*, 130 S.Ct. at 1437.
117. See *Shady Grove*, 130 S.Ct. at 1437.
118. *Boulter*, 2012 U.S. Dist. LEXIS 12860 *6.
119. *Boulter*, 2012 U.S. Dist. LEXIS 12860 *44.
120. *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010).
121. *United States v. Lockheed Missiles & Space C.o.*,190 F.3d 963, 972 (9th Cir. 1999).
122. TEX. CONST. art. V, 31 (b): "The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."
123. TEX. CONST. art. V, 6 31 (c).
124. TEX. GOV'T CODE 22.004(c). See also, Nathan L. Hecht & E Lee Parsley, *Procedural Reform: Whence and Whither* (Sept. 1997).
125. Unlike TEX. CIV. PRAC. & REM. CODE 9.003, the anti-SLAPP law contains no savings provision that it does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.
126. 12 TEX. B. J. 531 (1949); TEX. R CIV. P. 166-a
127. *Id.*
128. *Supra*, Section III.D.2.ii.
129. The Act became effective on June 17, 2011 and there is no case law interpreting it or applying it. Under the Code Construction Act, it is proper to consider legislative history and the object sought to be obtained by the Legislature when construing and applying any statute. See TEX. GOV'T CODE 311.023.
130. John G. Osborn & Jeffrey A. Thaler, *Feature: Maine's Anti-SLAPP Law: Special Protection Against Improper Lawsuits Targeting Free Speech and Petitioning*, 23 MAINE BAR J. 32 (2008).
131. *Id.*
132. *Id.*
133. Joshua L. Baker, *Review of Selected 2003 California Legislation: Civil: Chapter 338: Another New Law, Another SLAPP in the Face of California Business*, 35 MCGEORGE L. REV. 409 (2004).
134. TEX. ELEC. CODE 253.131 (a) (2010).
135. *Id.* 273.081.
136. Whether campaign contributions are actually considered constitutionally protected free speech is a question beyond the scope of this paper. However, it is fair to say that campaign contributions are always necessarily related to the exercise of free speech.
137. TEX. GOV'T CODE 6 402.010 (new 2011 statute) (2012).
138. TEX. CIV. PRAC. & REM. Code 6 37.006.
139. With special thanks to Thomas Williams, of the Haynes & Boone office in Fort Worth, for his thoughts and effort in preparing the chart.

Fixed vs. Variable Annuities

Craig Hackler, Financial Advisor, Raymond James Financial Services, Inc., Member FINRA/SIPC

Annuity products have grown more sophisticated over the years to meet the demands of today's more sophisticated investors. Just as mutual funds grew in popularity as an alternative to certificates of deposit, the variable annuity was developed as an alternative to the fixed annuity. Variable annuities offer potentially higher returns than fixed annuities. Of course, there is a risk of loss as well. So, deciding which annuity product to invest in often comes down to deciding how much risk you are willing to take.

Fixed annuities provide certain guarantees

When you purchase a fixed annuity, the issuer guarantees that you will earn a minimum interest rate during the accumulation phase and that your premium payments will be returned to you. If you annuitize the contract (i.e., take a lifetime or other distribution payout option), the issuer guarantees the periodic benefit amount you will receive during the distribution phase. (Guarantees are subject to the claims-paying ability of the issuing insurance company.) The interest rates earned during the accumulation phase will reflect current fixed income rates, changing periodically. During the distribution phase, the payment is based on the prevailing interest rates at the start of the distribution phase, and then remains constant. This fixed payment may lose purchasing power over time due to inflation. Consequently, many investors are hesitant to lock in a fixed annuity payout rate.

Variable annuities provide growth opportunities instead of guarantees

When you purchase a variable annuity, the annuity issuer offers you a choice of investment options in what are known as



subaccounts. The issuer may offer many different types of asset classes such as stock, bond, and money market funds. The issuer of a variable annuity does not guarantee or project any rate of return on the underlying investment portfolio. Instead, the return on your annuity investment depends entirely on the performance of the investments that you select. Your return may be greater than or less than that of a fixed annuity. However, if you die before you begin receiving annuity distributions, your heirs will receive at least as much as the total of your premium payments, regardless of the annuity value.

If you elect to annuitize and receive periodic distributions from your variable annuity, you can choose to receive either a fixed payout (like with a fixed annuity as previously discussed), a variable payout, or a combination of the two. If you select a variable payout, then the amount of each payment will depend on the performance of your investment portfolio. If the portfolio increases in value, then your payments will increase as well. Most annuity issuers offer a third option that allows

you to lock in a minimum fixed payment every month, with the possibility of an additional variable payment based on the performance of your investment portfolio. By allowing your principal to remain in investment accounts during the distribution phase, you have the continued opportunity to benefit from rates of return that are higher than what would have been received with a fixed annuity. But remember, you also run the risk that your payout could be lower if your investment choices do not perform well.

Which is better?

First, make sure that an annuity is appropriate for you. Annuities are long-term savings vehicles used primarily for retirement. There are many advantages to annuities, but there are drawbacks, too. These include a 10 percent tax penalty on earnings distributed before age 59½, and the fact that all earnings are taxed at ordinary rather than capital gains rates. If an annuity is right for you, then the choice between fixed and variable annuities will depend on your situation and preferences.

Usually, choosing between the two comes down to your risk tolerance and the amount of control you want over investment decisions. With a fixed annuity, there is little risk. You know what you're going to get out of the annuity. However, the growth potential of a fixed annuity is limited. A variable annuity, on the other hand, has a much greater potential for growth (although with this growth potential, there is a greater potential for loss). You also have the opportunity to make the investment decisions that will impact the growth of your annuity. How much risk you can comfortably accept, and your ability to manage your investment, will help you choose between a fixed and a variable annuity.

Note: Annuity withdrawals and distributions prior to age 59½ may be subject to a 10% federal tax penalty unless an exception applies.

Note: Variable annuities are long-term investments suitable for retirement

funding and are subject to market fluctuations and investment risk, including the possibility of loss of principal. Variable annuities contain fees and charges including, but not limited to, mortality and expense risk charges, sales and surrender (early withdrawal) charges, administrative fees, and charges for optional benefits and riders.

Note: Variable annuities are sold by prospectus. You should consider the investment objectives, risk, charges, and expenses carefully before investing. The prospectus, which contains this and other information about the variable annuity, can be obtained from

the insurance company issuing the variable annuity, or from your financial professional. You should read the prospectus carefully before you invest.

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Health Insurance Portability and Accountability Act and Privacy Standards in the Twenty-First Century

By Christine R. Cook, PHP

The Texas Legislature enacted HB300, which became effective September 1, 2012, and provides for changes and additions to the Health and Safety Code, Business and Commerce Code, Government Code, and Insurance Code. These additions and modifications enhance the responsibilities of healthcare providers in maintaining and processing protected health information. Additionally, these changes create a task force on health information technology and set forth the duties and responsibilities for the administration of the new requirements.

This article focuses on changes to the Health and Safety Code. For the full text of HB300 or other legislation, visit Texas Legislature Online at <http://www.capitol.state.tx.us/>.

Employee Training for Covered Entities
The new legislation will require each covered entity to provide a training program to its employees regarding the state and federal law concerning protected health information as it relates to the covered entity's particular course of business and



each employee's scope of employment. The employees must complete the training within 60 days of employment with the covered entity and must receive this training at least once every two years. The employee's completing the training program will be required to sign (electronically, or in writing) a verification of attendance at the training program. The covered entity will be required to maintain the signed statement.

Consumer Access to Electronic Health Records

If a health care provider is using an electronic health records system that is capable of fulfilling a request for protected information, the health care provider must provide the requested records to the person in electronic form, unless the person agrees to accept the record in another form, not later than the 15th business day after the date the health care provider receives a written request for a patient's electronic health record. However, a health care provider is not required to provide access to a patient's protected health information that is excepted from access, or to which access may be denied under 45 C.F.R. Section 164.524.

With regard to the formatting of the electronic health record, the executive commissioner, in consultation with the Department of State Health Services, the Texas Medical Board, and the Texas Department of Insurance, by rule may recommend a standard electronic format for the release of requested health records, which must be consistent, if feasible, with federal law regarding the release of electronic health records.

Consumer Information Website

The new legislation also requires the attorney general, not later than May 1, 2013, to maintain an Internet website that provides information concerning a consumer's privacy rights regarding protected health information under state and federal law; a list of the state agencies, including the Department of State Health Services,

the Texas Medical Board, and the Texas Department of Insurance, that regulate covered entities in Texas and the types of entities each agency regulates; detailed information regarding each agency's complaint enforcement process; and contact information for each of these agencies for reporting a violation.

Consumer Complaint Report by Attorney General

The attorney general must submit a report to the legislature, annually, beginning December 1, 2012, describing the number and types of complaints received by the attorney general and by the state agencies receiving consumer complaints along with the enforcement action taken in response to each complaint reported.

Sale of Protected Health Information

A covered entity may not disclose an individual's protected health information to any other person in exchange for direct or indirect remuneration, except that a covered entity may disclose an individual's protected health information to another covered entity for the purpose of treatment, payment, health care operations, or performing insurance or health maintenance organization function described by Section 602.053 of the Insurance Code, or as otherwise authorized or required by state or federal law.

Additionally, the remuneration a covered entity receives for making a disclosure of protected health information may not exceed the covered entity's reasonable costs of preparing or transmitting the protected health information.

Notice and Authorization Required for Electronic Disclosure of Protected Health Information

Beginning January 1, 2013, a covered entity must provide notice to an individual for whom the covered entity creates or receives protected health information if the individual's protected health information is subject to electronic disclosure. The notice may be made by posting a written notice in the covered entity's place of business, posting a notice on the covered entity's Internet website, or posting a notice in any other place where individuals whose

The new legislation requires the creation of a task force on health information technology, composed of 11 members appointed by the attorney general, not later than December 1, 2012, with the advice of the chairs of the standing committees of the senate and house of representatives having primary jurisdiction over health information technology issues.

protected health information is subject to electronic disclosure are likely to see the notice. A covered entity may not electronically disclose an individual's protected health information to any person without a separate authorization from the individual or the individual's legally authorized representative for each disclosure. An authorization for disclosure may be made in written or electronic form or in oral form if it is documented in writing by the covered entity. However, the authorization for electronic disclosure of protected health information is not required if the disclosure is made, 1) to another covered entity for the purpose of treatment, payment, health care operations, or performing an insurance or health maintenance organization function, or otherwise authorized or required by state or federal law.

By January 1, 2013, the attorney general must adopt a standard authorization form which complies with the Health Insurance Portability and Accountability Act and Privacy Standards.

Creation of Task Force

The new legislation requires the creation of a task force on health information technology, composed of 11 members appointed by the attorney general, not later than December 1, 2012, with the advice of the chairs of the standing committees of the senate and house of representatives having primary jurisdiction over health information technology issues. The task

force will include at least two physicians; at least two individuals who represent hospitals; at least one private citizen who represents patient and parental rights; and at least one pharmacist in addition to the executive commissioner of the Health and Human Services Commission or an employee of the commission designated by the executive commissioner; the commissioner of the Department of State Health Services or an employee of the department designated by the executive commissioner; and the presiding officer of the Texas Health Services Authority or an employee of the authority designated by the presiding officer.

The attorney general is also responsible for appointing a chair of the task force among the members. The chair must have expertise in state and federal health information privacy law, patient rights, and electronic signatures and other consent tools.

The task force must develop recommendations regarding the improvement of informed consent protocols for the electronic exchange of protected health information, as that term is defined by the Health Insurance Portability and Accountability Act and Privacy Standards, as defined by Section 181.001, Health and Safety Code, as amended by this Act; the improvement of patient access to and use of electronically maintained and disclosed protected health information for the purpose of personal health and coordination of health care services; and any other critical issues, as determined by the task force, related to the exchange of protected health information.

By January 1, 2014, the task force must submit to the standing committees of the senate and house of representatives having primary jurisdiction over health information technology issues and the Texas Health Services Authority a report including the task force's recommendations. The Texas Health Services Authority must publish the report submitted on the authority's Internet website. The task force requirement expires February 1, 2014.

Christine R. Cook, PHP works for the Law Office of Maisie A. Barringer in Houston.

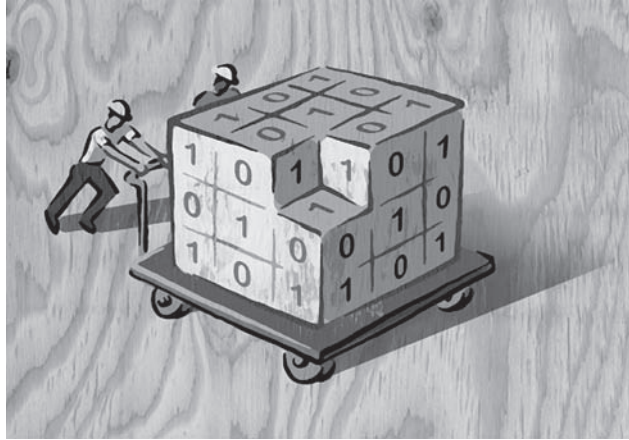
There's An App for That

Michelle Iglesias, TBLS-BCP

Prior to my dedication to family law, I worked in civil litigation on cases that ranged from personal injury to class action lawsuits. These tended to be paper intensive practices, and as the sole paralegal to four attorneys, I found myself drowning quickly. Even ten years ago, my solution was to turn to technology to solve these longstanding issues. There weren't many options, at the time, for personal scanners or .pdf converters, and the existing options were cumbersome and lacked portability.

I made the leap to family law seven years ago after moving to Texas. The paperless fad had not quite caught on here, but I could see the same trends in technology applications. While each firm will come with its own set of concerns, priorities, methods and issues, paralegals across the field face some of the same challenges. Our attorneys are on the go and multitasking more casework from the courthouse or out of the office than ever before, and they like the idea of getting voicemails and faxes delivered to their e-mails, accessing case files remotely with ease, and streamlining more procedures through technology. Whether your firm is already on the technology bandwagon or you find yourself trying to pull your attorneys in on the advances, there are so many suggestions, applications, hardware choices and preferences – the choices become overwhelming.

Reginald Hirsch's article, "Latest Tech Tools for Your Practice", provides precisely the kind of succinct but thorough information most paralegals are looking for when we attempt to point our attorneys in a more tech-heavy direction. Mr. Hirsch has pointed out tried and true assets such as the updated technology section for the State Bar of Texas (www.sbot.org) and the web resource (www.technolawyer.com). For those of you who cannot decide



between the multiple versions of apps that make Word documents accessible, how to make your iPhones something more than a social media hub or whether or not to recommend iPads for your firm's trial use, the blog run by New Orleans' attorney Jeff Richardson (www.iphonejd.com) posts reviews, breakdowns, costs and suggestions for iPhone and iPad applications. Mr. Richardson also attend the annual American Bar Association's Techshow in Chicago (www.techshow.com) and regularly reports back on the latest legal minded developments. Mr. Hirsch notes that this convention is a great source for new methods to meet our constantly increasing desire to be more efficient and more effective.

Our practice is an entirely Mac converted office. The following are the top five apps we have found most useful:

1. Documents to Go (\$9.99): Allows us to edit Word documents from our iPhones and iPads.
2. ScannerPro (\$6.99): Scan documents, receipts, and whiteboards.
3. Print Central Pro (\$5.99): A print from this iPhone/iPad app does not require an AirPrint printer.

4. Texas Child Support Calculator (\$8.99): Perfect for those in-the-hallway calculations, revisions from the courthouse or client meetings.

5. 2012 Texas Family Code (TX Law) (\$5.99): A great way to cover your bases when you've left the heavy book back at the office. This provides full text search, options to e-mail sections and complete offline access.

These advances aren't limited to Apple products. Android based products, like Google and Samsung, have competitive hardware with a vast number of applications crossing over to their platforms.

Scanners are getting smaller and faster; computers and smart phones now come with the capability to interact with each other and any other device in your home or office. There is a constantly evolving list of programs and applications that can speak to any number of needs (even some we don't know of yet!). With each advance, more hardware and options are becoming readily available and more accessible to various price points and firm sizes. Do we need better laptops? Smart phones? Personal tablets? Macs? PCs? Where do we begin?

The answer is to start by addressing your biggest demands and work your way to end solutions that capture the needs of your practice. As our options continue to multiply, the true success is utilizing the technology to its maximum capacity to make the most of the time we give to each of our cases.

Michelle Iglesias is a member of the Professional Development Committee of the Paralegal Division (PD) of the State Bar of Texas. She has been a member of PD since 2009. Michelle currently works as a family law paralegal for the Law Office of R. Shane McFarland, P.C. in Austin, TX. She became Board Certified in Family Law by the Texas Board of Legal Specialization in 2009. She began her career as a paralegal in 2003 and began focusing on family law in 2006.

Scruples

The Ethics of Keeping Your Attorney Updated

Ellen Lockwood, ACP, RP

I was recently asked by a paralegal whether it was unethical to ask an attorney who was representing a defendant in an unrelated action if he would accept service for the defendant in a lawsuit that the paralegal's firm was handling. They had not had any luck serving the defendant directly and the paralegal was understandably relieved when opposing counsel agreed to accept service. Unfortunately, the defendant was not at all happy and complained to the paralegal's firm about his own attorney billing him for accepting service. Of course, it is not unethical to ask opposing counsel to accept service and the defendant's issue was with his own attorney, not the paralegal's firm. However, the paralegal's firm was not pleased with this situation and advised the paralegal never to contact any opposing counsel again. It turned out that the paralegal contacted opposing counsel and arranged for service of the lawsuit without first notifying her supervising attorney.

Most people don't like surprises that leave them unprepared to answer questions and attorneys are no exception. While attorneys are all different, it is best to keep your supervising attorney updated on what you are working on, the information you have gathered, and confirm how to proceed.

Sometimes paralegals use their judgment based on experience to determine when to update their attorneys. Until you are certain about when to update

FYI

your attorney, it is a good idea to keep the attorney updated frequently. Some attorneys prefer to be copied on emails, others prefer weekly or daily briefings. Some attorneys prefer an email providing an update and requesting instructions on how to proceed and others prefer you to just stop by as matters come up to provide updates and get instructions.

Often it is helpful to ask the attorney when and how he or she would like to be updated. The attorney may request different methods and frequency of updates depending upon the situation. This approach is particularly helpful when just beginning to work with an attorney as well as when important ongoing matters arise. As the working relationship matures, it may be appropriate to discuss recurring situations with the attorney and determine the preferred method and frequency for providing updates.

While every area of law is different,

generally the attorney should be advised regarding correspondence (including emails) and phone calls to or from an opposing counsel, as well as witnesses, court personnel, and governmental agency personnel.

Another consideration is whether someone else such as the client or another attorney might question your attorney about the situation and whether your attorney would prefer to have the information when asked rather than checking with you for an update before responding. The best course of action is to keep your attorney updated more than necessary. It is better to have your attorney let you know you don't need to provide updates as frequently than to have your attorney question why he or she was unaware of specific information or a particular situation.



Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past president of the Division. She is a frequent speaker

on paralegal ethics and intellectual property and the lead author of the Division's Paralegal Ethics Handbook published by West Legalworks. You may follow her at www.twitter.com/paralegalethics. She may be contacted at ethics@txpd.org.



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State Bar of Texas
Paralegal Division

SAVE THE DATE – JUNE 21, 2013

Paralegals Evolve Into Success

Annual Meeting - Paralegal Division, State Bar of Texas

11:30 am – 1:30 pm

Belo Mansion - Dallas, TX

Keynote Speaker:

Justice Mary Murphy, Fifth Court of Appeals

Registration details will be distributed to the members of the Paralegal Division in March 2013.

TAPS 2012

A Direct Flight to First Class CLE

The 2012 Texas Advanced Paralegal Seminar (TAPS) was held at the Crowne Plaza Hotel—Addison, Texas on October 3–5, 2012 and was a great SUCCESS. There were 229 registered attendees from all across Texas. Save The Date for TAPS 2013 that will be held in San Antonio on October 2–4, 2013.

Kudos to the TAPS Planning Committee that did a fantastic job! The TAPS Planning Committee members are always the best of the best and willing to do whatever is needed to make this event a success; this year's committee was no exception.

Persons who served on the TAPS 2012 Planning Committee are listed below:

- Susan Wilen, Chair of the TAPS Planning Committee
- Joncilee Davis, Paralegal Division President/Board Advisor and TAPS Volunteer Coordinator
- Rhonda Brashears, On-Line CLE, Paralegal Division
- Jennifer Barnes, Socials
- Misti Janes, Socials
- Kristina Kennedy, Socials
- Penny Grawunder, Speakers
- Nicole Rodriguez, Registration
- Debbie Oaks, Door Prizes
- Patti Giuliano, Vendors
- Rhonda Brashears, Vendors
- Gloria Porter, Marketing
- Frank Hinnant, Innovative Legal Solutions, Public Member
- Carl Seyer, HG Litigation Services, Public Member

The Paralegal Division (PD) offers two educational scholarships to the annual TAPS seminar. This year the recipients of the scholarship, which is based on membership in the Paralegal Division, professionalism, and financial need, were awarded to Sandra Key (Plano) and Terii Lopez (San Antonio).

The Exhibit Hall for TAPS 2012 was sold out. There were a total of 40 legal service companies that exhibited during the Ex-



Paralegals building bikes for Scottish Rite Hospital



Ashley Givens, Charlie Mohrle, and Susan Wilen. Ashley is the Senior Director, Special Events, Texas Scottish Rite Hospital for Children. Charlie is the Rotary Club of Dallas, Bike Rodeo and Child Safety Day Chairman.

hibit Hall Exposition held on Thursday, October 4. In addition to the Exhibit Hall, TAPS featured a Networking Social (Aviator's Lounge) on Wednesday evening, an off-site dinner/community service event (Navigating Your Way into History) at the Cavanaugh Flight Museum in Addison on Thursday, October 4, and an attendee luncheon, Plotting Your Course, on Friday, October 5. Keynote speaker was: Robin Pou IV, Attorney Mediator +Executive

Coach from Dallas, who gave a riveting address "*The Thinking Advantage: The Thoughtful Secret to the Success You Want*" about the power of our unique gifts and the gifts of the people around us. Through these gifts, we may find the motivation to pursue our life's Purpose, especially in business. He offered serious and humorous examples of how thinking about one's purpose can enrich the choices we make at home and at work. For those who wish to

investigate his ideas further, his book, *Performance Intelligence at Work*, was touted as a major resource. He gave us much to think about.

During the Thursday evening networking social held at the Cavanaugh Flight Museum, the attendees toured the museum, assembled 40 bicycles for the Scottish Rite Hospital (Dallas) 2013 Bike Rodeo, listened to music, and enjoyed a delicious dinner. The bicycles were donated to the Texas Scottish Rite Hospital for Children, sponsored by law firms and local paralegal associations from across Texas. Thank you to each of these sponsors that are listed at the end of this article.

A Leadership Summit was held on Friday morning, October 5 prior to the scheduled CLE presentation topics. Over 100 members of the Paralegal Division attended the Summit. Susan Wilen, PD Immediate Past President, Debbie Oaks, PD Past President, Lisa Sprinkle, Past President, and Kristina Kennedy, District 4 Director, lead a panel discussion of what the Paralegal Division has meant to them and what it can mean to YOU, as a member. Discussion was held on how involvement in PD can serve as a networking tool, provide professional support as a paralegal, and potentially open doors for future employment. The group talked about the use of social networking using the Paralegal Division's LinkedIn and Facebook accounts, the blog, and the PD E-Group. This Leadership Summit will be carried forward as TAPS 2013 is planned.

Many, many thanks go to the Grand Prize sponsor: Merrill Corporation (Dallas). The lucky recipients of the three grand prize drawings for 2012 (\$500 each) were Sharon Wornick (Silsbee), Karen Berryman (Austin), and Katrina Lea (Roanoke). Congratulations! To be eligible for the grand prize, an attendee must have completed a vendor card, signed by all the TAPS exhibitors.

And of course, last but not least, there were 60 substantive CLE topics presented over three days. Without the generosity of the speakers, TAPS would definitely not take place. The Paralegal Division is forever grateful to the speakers that took time from their busy schedules to both prepare and present substantive legal topics to the



Winners of TAPS Grand Prize (Melissa Spivey of Merrill Corporation [Sponsor]; Katrina Lea, Karen Berryman, and Sharon Wornick)

attendees. Each three-day attendee earned up to 14 CLE hours. A few of these presentations are summarized below:

- Katherine Killingsworth, Attorney at Law, SettlePou, Dallas – *Texas Condemnation Law*. Ms. Killingsworth explained the various aspects of condemnation from conception of the foundation of the law, what constitutes “property” in the context of taking, the taking process, the award process, process of appealing the award, and the different types of interests that are involved such as leasehold interests and how and if they are compensated. The presentation covered a long standing topic but made it interesting and understandable.
- Daniel P. Tobin, SettlePou, Dallas: *A Roadmap from Judgment to Appeal*. Mr. Tobin provided an overview of the basic ground rules of appellate law and procedure by reviewing the Texas Rules of Civil Procedure pertaining to deadlines, preservation of error, and other procedural motions. He explained the advantages and pitfalls of each approach and offered recommendations for best practices for successful appeals.
- Frank Branson, Attorney at Law, Dallas – *Persuasion Throughout the Trial Process*. Mr. Branson shared some stories about how useful Jury Questionnaires are during the voir dire process, as they can help bring out biases which might not otherwise be found. Additionally, telling and showing the jury demonstrative evidence will help them retain 65% of the information provided during trial. Modern technology is important to use at trial, allowing jurors greater understanding through reenactments and medical illustrations.
- Rebecca Bell, Fee Smith Sharp & Vitullo, LLP, Dallas – *Update on Changes to the Appellate Process*. Ms. Bell explained the differences between mandamus and interlocutory appeals. The new e-filing rules take effect on December 1, 2012. These rules include a limit on the amount of words which can be used in a brief and that the briefs must now be e-filed. TAMES is the system used to e-file in the appellate courts and everything must be text searchable.
- Christopher Blanton, Capshaw & Associates, Dallas – *Tort Me Out to the Ball Game: A Survey of Liability Issues Arising out of Modern Day Sports in Texas*. Mr. Blanton discussed the topics of premises liability at stadiums, litigation against public and private schools regarding sports related injuries, and dram shop issues arising from alcohol sales at public sports venues. As to premises liability at stadiums, the key is “open and obvious,” as it is clear as an attendee could be struck by a ball or puck. A spectator is considered a business invitee. Mr. Blanton further discussed that school districts and public schools have sovereign immunity. The key to the dram shop case is that

the person was “obviously intoxicated” when they were provided additional alcoholic beverages.

- Steven Springer, Fee Smith Sharp & Vitullo, LLP, Dallas - *Who's on First: Creating Home Runs in First Party Contract Litigation*. Mr. Springer discussed UIM claims and how they have changed through the years. One large change involves judgments received in this case, as the insurer has 30 days to pay after judgment before attorney fees, interest and penalties. He very animatedly described the ins and outs of who is who in an insurance contract.



TAPS 2012 Scholarship Recipients: Terii Lopez, Susan Wilen (TAPS Chair), and Sandra Key

Look for TAPS 2012 presentations on the Paralegal Division's CLE Online at www.txpd.org.

As with any event, its success also depends on its supporters. TAPS 2012 was very fortunate to be supported by the following legal service companies. As a special thank you, please find a complete list of those companies that helped make TAPS 2012 a wonderful event for all of the paralegal attendees. The Paralegal Division would appreciate your support of these sponsoring vendors.

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Friday Attendee Luncheon “Plotting Your Course”

- Alamo Area Paralegal Association, San Antonio
- Capital Area Paralegal Association, Austin
- Dallas Area Paralegal Association, Dallas
- Fort Worth Paralegal Association, Fort Worth
- North Texas Paralegal Association, Denton
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PARALEGAL DIVISION

Notice of 2013—District Director Election

The Paralegal Division's DIRECTOR ELECTION for District Directors in odd-numbered districts (Districts 1, 3, 5, 7, 11, 13, and 15) will take place March 29 through April 12, 2013.

All Active members of the Paralegal Division in good standing as of March 29, 2013 are eligible to vote. All voting must be completed on or before 11:59 p.m., April 12, 2013.

All voting will be online and no ballots will be mailed to members.

Please take a few minutes to logon to the PD's website and cast your vote for your District's Director. The process is fast, easy, anonymous, and secure.

- Between March 29th and April 12, 2013 go to www.txpd.org
- In the Member-Only section, click on "Vote"
- Follow the instructions to login and vote

Beginning on February 8, 2013 each Elections Subcommittee Chair shall prepare and forward, upon request, the following materials to potential candidates for director in their respective district at any time during the nominating period:

- a. A copy of the List of Registered

- Voters for their district;
- b. A sample nominating petition; and
- c. A copy of Rule VI of the Standing Rules entitled "Guidelines for Campaigns for Candidates as Director."

Each potential candidate must satisfy the following requirements:

- a. Eligibility Requirements. The candidate must satisfy the eligibility requirements of Article III, Section 3 and Article IX, Section 1 A and Section 4 of the Bylaws and Rule V B, Section 5c of the Standing Rules.
- b. Declaration of Intent. The candidate must make a declaration of intent to run as a candidate for the office of director through an original nominating petition declaring such intent that is filed with the Elections Subcommittee Chair in the candidate's district pursuant to Rule V B, Section 5 of the Standing Rules.
- c. Nominating Petition. The original nominating petition must be signed by the appropriate number of registered voters and must

be submitted to the Elections Subcommittee Chair in such district, on or before February 28, 2013.

If you are interested in running for District Director, or need further information regarding the election process, contact the Elections Committee Sub-Chair in your District, or the Elections Chair, Gloria Porter, at Elections@txpd.org.

2012–2013 District Election Committee Sub-Chairs in Odd-Numbered Districts:

District 1: Paulina Nguyen – pnguyen@jenkinskamin.com

District 3: Claudette Gordon – cgordon@casham.com

District 5: Heidi Helstrom – assistant5@tessmerlawfirm.com

District 7: Shandi Farkas – shandi.farkas@uwlaw.com

District 11: Darla Fisher – dfisher@lcalawfirm.com

District 13: Gloria Porter, Elections Chair – Elections@txpd.org

District 15: Koreen Mefferd – kmefferd@rgv.rr.com

PARALEGAL DIVISION

Notice of Election of Bylaws Amendment

The Paralegal Division's ELECTION for Amendments to By-Laws will take place March 29 through April 12, 2013.

All Active members of the Paralegal Division in good standing as of March 29, 2013 are eligible to vote. All voting must be completed on or before 11:59 p.m., April 12, 2013.

All voting will be online and no ballots will be mailed to members.

Please take a few minutes to logon to the PD's website and cast your vote for your District's Director. The process is fast, easy, anonymous, and secure.

- Between March 29th and April 12, 2013 go to www.txpd.org
- In the Member-Only section, click on "Vote"

- Follow the instructions to login and vote
- The following amendment to By-Laws will be submitted to the Active members election:

Current Bylaw

ARTICLE VI ANNUAL MEETING

Section 1. Date, Place and Notice.

The Division shall meet annually at the same time and in the same county as the Annual Meeting of the State Bar of Texas. Announcement of the Annual Meeting shall be made to the membership at least 30 days in advance.

Amendment approved by the Board of Directors on November 11, 2012 for vote by Active Members:

ARTICLE VI ANNUAL MEETING

Section 1. Date, Place and Notice.

The Division shall meet annually at a time and location to be determined by the current Board of Directors. Announcement of the Annual Meeting shall be made to the membership at least 30 days in advance.

Reason for Bylaws Amendment:

To allow the Paralegal Division Board of Directors to determine location and time of the Annual Meeting based on cost efficiency and convenience.

If you have questions regarding the election process, contact the Elections Committee Sub-Chair in your District or the Elections Committee Chair, Gloria Porter, at Elections@txpd.org.



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