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The Texas Docket

March 2020
Volume 17, Issue 4

SEE YOU IN SAN MARCOS!

**TALP ANNUAL
MEETING AND
EDUCATION
CONFERENCE**

April 24-25, 2020
San Marcos, Texas



Editor

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The Texas Docket

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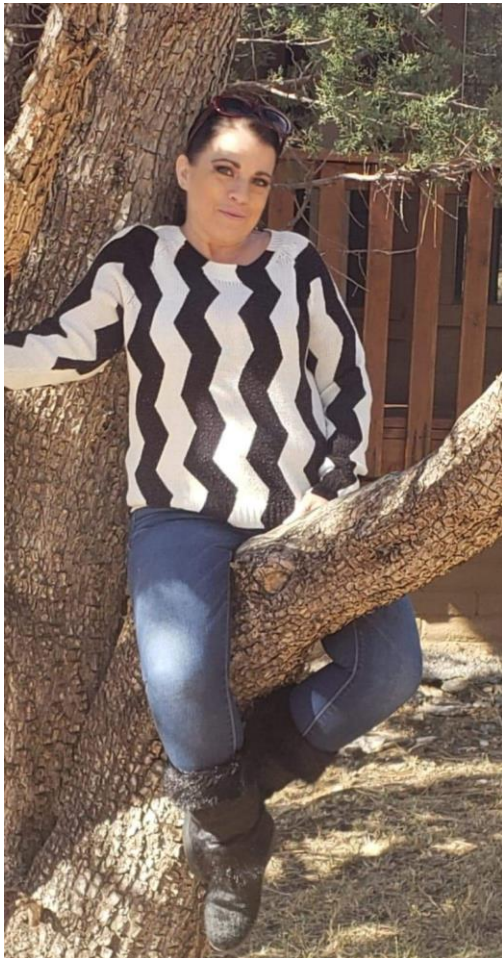
Anti SLAPP Clapback

PRESIDENT'S MESSAGE

As I sit here writing my last President's Message, it fills me with mixed emotions. This year has gone by in the blink of an eye. As I look past my journey since I became a member of the Executive Committee, each of you have been there through so many important events in my life. I am grateful for each person in this association.

I realize how much we each enjoy spending our time away from work with family and/or friends and that we would often rather do that than those things that take us away from them. However, please remember that a lot of work goes into planning the educational webinars and conferences. I am not saying this towards anyone specifically as I understand that life happens and sometimes things happen unexpectedly that keep us from attending these events.

Life is all about change...personal and professional. I have watched this association change since I became involved. I have enjoyed seeing the dedication and the passion that members continue to put into the association, which is what it takes to keep us going. A new term is about to begin and I wonder what changes will happen over it and the following years.



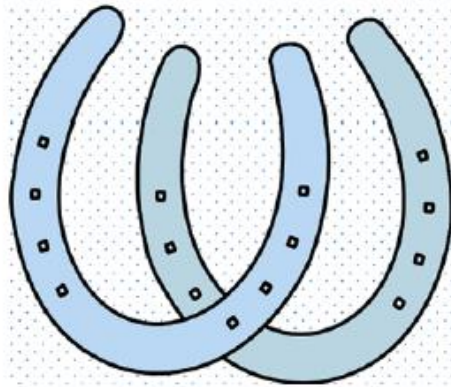
While my life is now taking me in a different direction than I had thought it would even a couple months ago, no matter where I am physically located, I will always continue to be a part of Texas ALP.

I know that Tina is ready to take her next step in the leadership of our association, and I wish her and all future leaders the best of luck and give them my support.

I want to thank San Antonio and Houston members for their combined support of putting together the 2020 Annual Meeting and Education Conference. I am looking forward to seeing all of you and your smiling faces. Do not forget about the challenge presented in Austin about bringing a first timer or someone who has not been to a conference in over five years.

Andrea D. Griffin, PP, PLS
2019-2020 Texas ALP President





Uniquely United



CHANGE OF ADDRESS, EMAIL, PHONE

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HAPPY ANNIVERSARY

San Antonio LSA received its Charter
on June 7, 1957.
Wichita County LPA received its Charter
on July 7, 1958.



"Lying' is such a harsh word, your honor. We prefer to call it 'testimony without borders.'"

TALP HUGS

I would like to share with you the following written by Paula Finn entitled “You’re a Woman on the Journey of a Lifetime.”

“A journey no one else will travel and no one else can judge ~ a path of happiness and hurt, where the challenges are great and the rewards even greater.

You’re on a journey where each experience will teach you something valuable and you can’t get lost, for you already know the way by heart.

You’re on a journey that is universal yet uniquely personal, and profound yet astonishingly simple ~ where sometimes you will stumble and other times you will soar. You’ll learn that even at your darkest point, you can find a light ~ if you look for it. At the most difficult crossroads, you’ll have an answer ~ if you listen for it. Friends and family will accompany you part of the way, and you’ll walk the rest by yourself...but you will never be alone.

Travel at your own pace. There’ll be time enough to learn all you need to know and go as far as you’re meant to go. Travel light. Letting go of extra baggage will keep your arms open and your heart free to fully embrace the gifts of the moment.

You may not always know exactly where you’re headed, but if you follow the desires of your heart, the integrity of your conscience, and the wisdom of your soul... then each step you take will lead you to discover more of who you really are, and it will be a step in the right direction on the journey of a lifetime.”

So, as each of us travels on our journey, let’s reach out and accompany those who might feel they are walking alone and who need our encouragement and support.

If you know of someone who needs a hug, please let me know by sending an email to hugs@talp.org. Let’s be fellow travelers and share a hug. It will make us all feel good.

Mary D. Teague, PP, PLS
Chair, TALP HUGS



Mildred M. Holeman

October 13, 1926–February 12, 2020



Mildred Maxine Holeman, age 93, surrounded by family and friends, burst through heaven's gates on February 12, 2020, at 10:20 p.m. She was a force, a brilliant, creative, loving, and complex mother, grandmother, aunt, and friend. Mildred was born in Smart's Bottom, between Logansport, Louisiana, and Carthage, Texas. She had difficulty getting her passport because the address was in Louisiana, yet she was actually born in Texas to newly widowed Gracie Neal. Mildred attended Carthage schools and was mentored by loving teachers who realized her poverty and her genius. Her story is a true overcomer's story.

Mildred came to Houston as soon as she could. She worked several jobs, but the one that really paid off was as a waitress at Simpson's Dining Car, where she met her husband, Billie Jack Holeman. Together they raised four children with the help of her mother. Mildred was a working mother with an insatiable desire to succeed and live a life that counts. She worked as a legal secretary for attorney L. A. Kucera for 35 years, where she was not only trained in law, but also became involved with the SPJST Lodge. Because of everything he taught her, she developed real estate and insurance businesses and served on many governing boards. She spent many years continuing to help his clients and their families, all who became her extended family. Love God, love people, know your gifts, serve your community was her MO. She could never say "No." She was the fund-raising queen for her beloved church, Our Savior Lutheran. Her civic service included Shepherd Park Civic Club, Houston and Texas Association of Legal Secretaries (President), SPJST LODGE 88 in Houston (Board Chairman and others) and Czech Heritage Museum in Temple, Texas (Board Member). One of her greatest joys was being selected as the 2015 Carthage ISD Distinguished Alumni Hall of Fame.

From Mildred: "Reflecting back on my life I must profess the goodness of God in my life. I know that God had his hand on my head since my birth. He knew me in my mother's womb as I was being knitted together. He knew me and what I would do with my life. He has been gracious to me at all times, whether I was accepting second-hand clothes in Carthage or washing the school cafeteria's towels at home and waiting for them to dry on the wood heater overnight to take back to school in return for a free lunch (I generated my own free lunch program). When I was young, I was ashamed of it. Today I am grateful. I am grateful that God has allowed me to live, to teach Bible classes, to be an encourager, to pray for and help the sick and needy, and to do all these things I could not have done without the wonderful people God has put in my path. No matter how many bad things befall us, we know that God is in charge, and through his son Jesus Christ we are all healed. I know that even greater things await all of us when we are reunited in Heaven. How great will that be?"

Mildred was preceded in death by her loving husband Billie Jack and son James. She is survived by her daughter Billie Brinkley and husband David; sons Greg and wife Renee; Henry and wife Laura; grandchildren Travis, Bryan, Wendy, and Adam, and great-grandchildren Kenley, Bannan, and Jaxon. She will be missed by a host of beloved friends. Thanks to Ana and Sandra Latigo, two cherished employees and those who helped during her long illness.

A Simple Thank You Goes a Long Way

For most of us, our workday will go by fairly quickly because of the amount of work and responsibilities we have each day. When we get a bit rushed our courtesies might also be a bit rushed or completely forgotten. I'm sure most of us remember our mothers and grandmothers teaching us to Mind our Manners and say Please and Thank You all the time. Of course, living here in Texas, I hear a lot of "Yes Sir" and "Yes Ma'am" (Oooh, I really don't like being called ma'am because even though I'm no Spring Chicken, I don't think I'm over a hundred – yet).

These courtesies also go a long way in our day-to-day life help us do well in our careers. There is no harm in showing a little kindness to someone with whom you work, whether it is your boss, a coworker, or the office runner/copy person. They all deserve a simple kindness. You cannot tell me when you request a copy job from your office services department (mailroom in my office), should your request arrive at the same time as a snarky-type person's request, that your request would not get done first or at least without complaint. I do say please and thank you to people all the time without thinking about it (thank you, mom and mémère, for that—or should I say instead S'il vous plaît and Merci, being French-Canadian) but when I am really stressed about getting something done quickly and correctly, sometimes I do have to remind myself to say those same words.

There are also other ways to show your appreciation to those around your office each day. There is always someone who will bring in donuts or some other goodies to share with everyone. That is one way of showing everyone how much you appreciate all their hard work and effort they put in each day. I love to bake, so if I have the time on the weekend, I will bake some cookies or cheesecakes or something and bring it into the office for everyone. I work with a lot of hard working and nice people and they make the day go easier for me. They love it also when I stop by the local Mexican Bakery not too far from my house and bring in some wonderful Pan Dulce for everyone to share.

A small token or gift to someone to show them that they are appreciated is always a nice thing to do also. It does not have to be a Coach purse, but something small that you think they would enjoy is great. Anne Hoover is a wonderful example of a person who sees something and it reminds her of them and she buys it and gives it to them. I have yet to see someone who isn't thrilled that she thought of them and gave them a little something. At Christmas, Anne gave me some white chocolate and peppermint candies that I absolutely love and I told her how wonderful they were and how much I loved them. Next time I saw her she had gone to the store and wiped them out of those candies and gave them to me. They are in my drawer at work and I limit myself to two a day to make them last a while. That is only one item of many that Anne has given me over the years of our friendship and each one is very dear to me.

Of course, praising someone is another way to boost someone's spirits. We put a lot into our work each day whether it is for our career or by volunteering in an organization. To

know that our work is appreciated is a great incentive. If you criticize someone's efforts, they are not going to be too willing to help in the future.

Take one of your coworkers out to lunch for their birthday, a special occasion, or just because you wanted to spend some time with them. Let them pick the place and enjoy your time with them and just visit.

Some incentives for offices to provide to their employees to make them feel appreciated would be providing opportunity for advancement by offering them more training and cross-training, letting them offer their special skills at office events, such as civic or charitable events, letting them attend professional meetings or events, and/or giving them financial incentives such as raises and/or bonuses.

These are just a few ideas to show your appreciation to those around you. Hopefully you will take these thoughts with you and pass them on to others in your life. Spread a little appreciation around and watch it grow.



The first part of this article appeared in the December 2019/January 2020 edition.

However, the editor messed up and missed the second page (starting at No. 4).

**Professional Development
Cheryl A. Wenzel, PP, PLS, Chair**

Getting Comfortable In Public Speaking Situations

This is not a favorite topic of most people but it will help you now and in the future if you are placed in a situation where you need to make a presentation at a meeting or at work. I can probably tell you every situation—horrifying situation—I had in school when I had to make a presentation in front of class. I was not comfortable with myself at all and lacked a great deal of self-confidence. Not that I am totally different now than I was back then but hopefully I am a little better at it now. My local association and Texas ALP have helped me tremendously with pushing me and getting me to present myself better. These groups have done so much for me and my self-confidence over the years, it is truly amazing. Self-doubts from childhood and lots of taunts from boys have left many scars over the years that don't go away but they do tend to fade with the new layers of confidence that I have found with the wonderful group called Texas ALP.

Here are some tips for getting ready to speak or make a presentation to a group.

1. Know your audience. Know the group to whom you are going to make your presentation. Make sure that your presentation will be informative to that group. You don't want to present a topic on basic math to a group of scientists; you will lose them right away.
2. Rehearse. Make sure you go over your notes or pages numerous times, getting more and more comfortable with the information you are going to present. You don't want to stumble over words or use too many "umms" or "ahhs" throughout the speech. You want to make it perfectly natural for the audience but, most important, you want it to be perfectly natural for you.
3. Practice with distractions. Well, in my house there are numerous cats running around or getting into fights that need to be broken up occasionally, but they can definitely be a distraction. Even this little face can be a distraction.



4. Know your environment. Know where you will be speaking and how many people will be there. You want to make sure everyone in the room can hear you at all times, so test your equipment and view the room. Familiarizing yourself with these things will be helpful to you.

5. Practice in front of a mirror. Well, this is one that I have never been comfortable with, and maybe I would get better if I did what is recommended on this particular item. But again, it all goes back to being comfortable with yourself and being able to stare at yourself in the mirror so that you can critique yourself better and see if you are doing something that might not look so great in front of a crowd.

6. Try to relax and breathe. Oh yeah, right! This is not an easy thing to do but you have to keep your breathing even so you can do well with your presentation. You don't want to hyperventilate in the middle of a presentation and hit the floor! Imagine the impression you would make. No, I have not hit the floor – yet; but I don't want to find out, either.

7. Podium. Podiums are great to have because in your mind you are hiding behind it, at least in my mind. Sometimes one will help you but if you are holding onto the podium so hard that you could possibly break it apart, then you are not relaxed at all and everyone in the audience knows it knows it. I try to rest my hands on the podium in front of me if possible. Also, if you have note cards in front of you, you can get to them easily to flip them over as you go. Try not to read word-for-word from your notes or cards. Try to make it as smooth as possible.

I am not going to tell you that I am fantastic at all of these suggestions. I don't know that I ever will be, but I do try. I won't tell you that when someone asks me to speak in front of a group, even a group as wonderful as Texas ALP, that my throat does not close up. Oh, it does close up—for a moment. I then breathe and think about what they are asking me to do, what my topic is going to be, and what I need to do to prepare.

Every person is different and some of these tips will work for you and some may not. Just know that you are not alone and that most of us have had to learn to speak in front of a group for our own benefit as well as others. Public speaking is a part of Professional Development and any help you can give to yourself or to others to help them through a presentation will be a benefit for everyone, especially yourself.





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HISTORY OF LAW SERIES
PART II
“EARLY DEVELOPMENT OF THE U.S. COURT SYSTEM”

DIANE M. STANLEY, HOUSTON ALP



Now let's take a look at how the US court system evolved. Hope you enjoy!

Article Three of the US Constitution stated that "the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The first action of the newly created Congress was to pass the Judiciary Act of 1789 that made provisions for the Supreme Court. It stated that it would consist of a Chief Justice and five Associate Justices and they would meet in the nation's capital.

The first Chief Justice appointed by George Washington was John Jay, who served from September 26, 1789 to June 29, 1795. The five Associate Justices were John Rutledge, William Cushing, James Wilson, John Blair, and James Iredell.

The Judiciary Act of 1789 additionally stated that the jurisdiction of the Supreme Court would include appellate jurisdiction in larger civil cases and cases in which state courts ruled on federal statutes. Further, the Supreme Court justices were required to serve on the U.S. circuit courts. Part of the reason for this was to make sure that judges from the highest court would be involved in the principal trial courts and to learn about the procedures of the state courts. However, this was often seen as a hardship. Further, in the early years of the Supreme Court, the justices had little control over which cases they heard. It was not until 1891 that they were able to review cases through certiorari and did away with the right of automatic appeal.

While the Supreme Court is the highest court in the land, it has limited administrative authority over the federal courts. It was not until 1934 that Congress gave it the responsibility for drafting rules of federal procedure. The Judiciary Act also marked the United States into circuits and districts.

Three circuit courts were created. One included the Eastern States, the second included the Middle States, and the third was created for the Southern States. Two justices of the Supreme Court were assigned to each of the circuits and their duty was to periodically go to a city in each state in the circuit and hold a circuit court in combination with the district judge of that state. The point of the circuit courts was to decide cases for most federal criminal cases along with suits between citizens of different states and civil cases brought by the US government. They also served as appellate courts. The number of Supreme Court justices involved in each circuit court was reduced to one in 1793. As the United States grew, the number of circuit courts and the number of Supreme Court justices grew to ensure that there was one justice for each circuit court. The circuit courts lost the ability to judge on appeals with the creation of the US Circuit Court of Appeals in 1891 and was abolished completely in 1911.

Congress created thirteen district courts, one for each state. The district courts were to sit for cases involving admiralty and maritime cases along with some minor civil and criminal cases.

The cases had to arise within the individual district to be seen there. Also, the judges were required to live in their district. They were also involved in the circuit courts and often spent more time on their circuit court duties than their district court duties. The president was to create a "district attorney" in each district. As new states arose, new district courts were created in them and in some cases additional district courts were added in larger states.

2019-2020 Membership Campaign

Theme: Uniquely United

Goal: Get as many horseshoes as you can to win the grand prize

Rules: Each association starts out with 1 horseshoe to fill up, for every **Point** you get you get a “peg” on the horseshoe. The chapter or member with the most complete horseshoes by **April 15, 2020** wins. Each horseshoe will have 5 pegs to fill.

Points: To get **Points** you must do one of the following things:

1 Point: Send the name and contact information for your membership chair to Carrie Nevarez at Carrie@affiliatedtaxsolutions.com

1 Point: Send Carrie the names/birthdays/contact information for your chapter

1 Point: For every new member the chapter or member brings into the association

1 Point: For bringing back a past member to the association

1 Point: Sharing a TALP social media post using your association page (Carrie is excluded); for example. LLPA shares a TALP post to its page

1 Point: For every member who obtains certification (new certifications only)

1 Point: For every member who re-certifies and sends Carrie proof of the recertification.

1 Point: For each member the local membership or welfare chair sends a birthday, sympathy, or get-well card to, and lets Carrie know about it

1 Point: For each member who gets a NALS specialty certificate

2 Points: For holding a charity event or volunteering with a charitable organization where 5 or more members attend

2 Points: Holding a CLE event with a minimum of 4 hours of CLE

2 Points: Sending something in for *The Docket* and cc'ing Carrie (*The Docket* Chair will be excluded)

2 Points: For giving a presentation to the local high school/college/paralegal organizations about TALP (and sending Carrie proof, i.e., pictures, post, something)

2 Points: Sending something to Rachel Scott for Marketing in postable form, so a picture format, or ability to post on the Facebook page (Rachel and Carrie are excluded from this)

5 Points (that's a whole Horseshoe): Hold a membership drive



WANTED

Networking News

(aka “It Ain’t Braggin’ If It’s True!”)

**Share your local association news!
Just send your stories and brags to
lgentry@hkwwlaw.com**

**REWARD: Points in the
Membership Campaign**

SHEETS

Lubbock Legal Professionals Association Congratulates

Boss of the Year

Daniele Mitchell has been a supervisor for over a year and already has her co-workers bragging about what a good boss she is. Daniele is very dedicated to the legal profession. "She is a cheerleader for LLPA." Daniele has been instrumental in the growth of LLPA, has been a past member, past President, and past Legal Professional of the Year for both LLPA and TALP!



Legal Professional of the Year

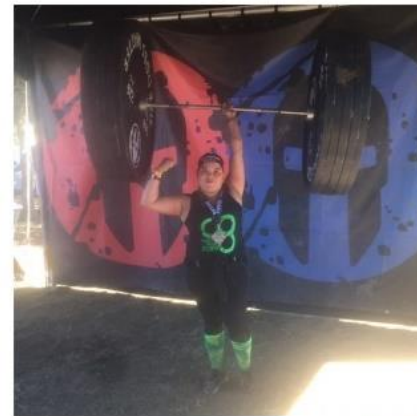
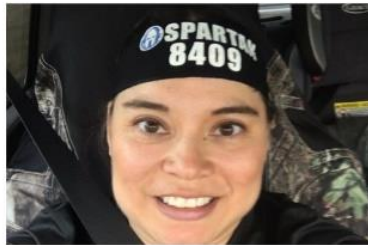
Angela Gschwend joined LLPA only a couple years ago and jumped in with both feet, helping organize events, attending meetings and, by the second year of membership, serving as an officer. Angela currently serves as our local Treasurer. "She is a proud Aggie Mom."



WACO LPA

Waco LPA would like to congratulate Laura DeLeon on completing her Spartan 2019 Trifecta. Spartan Trifecta is completed when a participant completes a Sprint, Super, and Beast race all in the same year. She completed the Super race, which was a 10K with 25 obstacles in March. Then she completed the 5K Stadium Sprint with 20 obstacles, at AT&T Stadium in June. The Super race, a Half Marathon with 30 obstacles, was completed in October. Laura completed these races with her husband Delton and several of her Camp Gladiator members. Although she never thought she would ever be the person to race or complete any kind of race, much less a Spartan Race, Laura is extremely excited that she finished it. "It is an overwhelming accomplishment to have finished these races and obtained my Trifecta. As an extra benefit since I completed it with my husband, it was like couple's therapy and bonding." Laura completed these races even after sustaining a sprained ankle in the Super, competing with stitches in her foot for the Sprint, and then losing her big toenail because of injuries sustained in the Beast. Her perseverance and determination demonstrate just the type of person that Laura is.

Again, Waco LPA is extending some huge congratulations to Laura and Delton DeLeon for completing their Trifecta!



Funny Words in the English Language—And How to Use Them

The English language is pretty wild and includes some wacky words that seem too weird to be real. Here are just a few examples:

Bumfuzzle

We all find ourselves confused and flustered from time to time, perhaps even perplexed. When those words fail to capture your bewildered state of mind, then use the term [bumfuzzle](#).

Example: "That movie was bumfuzzling and left me, well, bumfuzzled."

Hullabaloo

A perfect example of a word that sounds like its meaning. [Hullabaloo](#) refers to a ruckus or a loud bruhaha or uproar that usually leans to the unpleasant side and is generally unappreciated.

Example: "The hullabaloo was totally wild."

Gobbledygook

While slang is one thing, people who indulge in [gobbledygook](#) are a lot like turkeys who also gobble, gobble, gobble, or use language that is basically incomprehensible.

Example: "He sure likes to go on and on with the gobbledygook."

Eeksie-peeksie

When you like everything in your world to be perfectly balanced and appreciate even numbers and identical amounts, then you like things to be [eeksie-peeksie](#), which is a term for equal.

Example: "I think it should be eeksie-peeksie for each of us."

Why the ampersand? Here's the story...

Traveling back in history to the first century AD, the Ancient Romans introduced what we now know as the ampersand. Originally it was a combination of the letters E and T to represent **et**, the Latin word for **and**. Over time, the combined letters came to signify the word “and” in English as well.

In the early 1800s, the ampersand symbol (&) was considered the 27th letter of the English alphabet. Since it was both awkward and confusing to say “X, Y, Z, And, school children added it after z by saying “X, Y, Z, and, per se, **And**. *Per se* means “by itself,” so the students were essentially saying, “X, Y, Z, and, by itself, **And**.”

Over time, “and per se and” was slurred together into the word we use today: **ampersand**. For those wishing to add a new definition to your vocabulary, when a word comes about from a mistaken pronunciation, like **ampersand**, it's called a **mondegreen**.

The ampersand is also used in an unusual configuration where it appears as “&c” and means etc. The ampersand does double work as the e and t. Y'all have fun with this mondegreen of a one-time letter of the alphabet!!

Affect and Effect are easy to mix up.

Affect is usually a verb, meaning to **impact** or **change**.

Effect is usually a noun, an **effect** is the **result of a change**.

So, if **A affects B**, **B** experiences the **effect** of **A**'s action.

Let's say Ruby (A) pushes Raphael (B) into the pond.

Ruby **affects** where Raphael is standing.

The wetness Raphael experiences is the **effect** of Ruby's pushing him into the pond.

Because Ruby performed an **action**, that signals the use of a **verb: affect**.

The result, or **effect**, of that **verb** is “wetness,” a **noun** that has Raphael most definitely uncomfortable.

Here are a couple of tips:

1. **A** is for **action**. **Verbs** are about **action**. **Affect** starts with an **A**, so it's a **verb**. **Effect** is a **noun**, meaning the **result of a change**. So, when an event **affects** your life, you feel the event's **effect**.
2. Think of the common phrase *cause and effect*. **Cause ends with an E, and effect begins with an E**. So, while cause leads to an effect, the E in cause also leads to the E in effect, giving you a handy noun bridge to step across and remember which spelling to use.

Encouraging Quotes to Inspire You

When you're having a bad day, feeling uninspired, maybe even a little lost – here are some quotes of encouragement to keep you going. Y'all have a great rest of the week!!!

1. "It doesn't matter who you are or where you come from. The ability to triumph begins with you. Always."—*Oprah Winfrey*

2. "I love the light, for it shows me the way, yet I endure the darkness, because it shows me the stars."—*Og Mandino*

3. "In the middle of difficulty lies opportunity."—*Albert Einstein*

4. "He who has a why to live can bear almost any how."—*Friedrich Nietzsche*

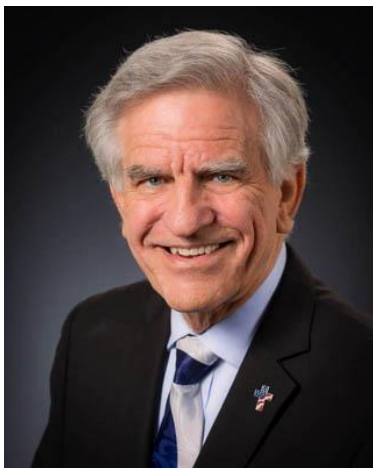
5. "Believe you can and you're halfway there."—*Theodore Roosevelt*

6. "The only person you are destined to become is the person you decide to be."—*Ralph Waldo Emerson*

7. "Anything's possible if you've got enough nerve."—*J.K. Rowling*

8. "A bird doesn't sing because it has an answer, it sings because it has a song."—*Maya Angelou*

9. "Embrace uncertainty. Some of the most beautiful chapters in our lives won't have a title until much later."—*Bob Goff*



This material is provided by Hiatt Ives, speaker, consultant, and author of **That Ain't Not Right—The Use and Abuse of the English Language**. Reach him at Hiatt@HiattIves.com or 832-372-6900.

Thanks, Kip Hall, for forwarding, being in contact with Mr. Ives, and getting permission for the use of his work!

TEXAS ALP 65th ANNUAL EDUCATION CONFERENCE
San Marcos, Texas ☆ April 24-25, 2020
REGISTRATION DEADLINE—APRIL 2, 2020

REGISTRATION FORM

Name _____
 Street Address _____
 City/ST/ZIP _____
 Daytime/Mobile Phone _____
 E-mail _____

Certifications (circle if a choice)

ALP PLS/CLP PP SC _____
 CLA/CP ACP RP TSC _____
 Other _____

Local Chapter _____

Current Texas ALP Position Held _____

Current Local Position Held _____

Current NALS Position Held _____

NALS Life Member
 Texas ALP Past President (Year: _____)
 This is my first Texas ALP meeting
 I want to be a Texas ALP PAL
 Special dietary request (contact Registration Chair)

FULL REGISTRATION FEES (includes all events)

Texas ALP Member* \$135
 Texas ALP Chair \$ 85
 Nonmember \$165
 Student \$ 85

INDIVIDUAL EVENT REGISTRATION FEES

Education Only—Nonmember (no meals) \$ 75
 Education Only—Student (no meals) \$ 50
 Professional Development Luncheon (nonmember/student)..... \$ 25
 Recognition Luncheon (nonmember/student)..... \$ 25
 Presidents' Banquet (Saturday)..... \$ 50

MEMBER'S GUEST REGISTRATION

Professional Development Luncheon (Friday)..... \$ 25
 Recognition Luncheon (Saturday) \$ 25
 Presidents' Banquet (Saturday)..... \$ 50

Late Fee (postmarked after April 2, 2020)..... \$ 25

Guest Name(s) _____

***Per Standing Rule No. 22, members are required to pay the full registration fee.**

SCHEDULE OF EVENTS (please mark each event you will attend)

Friday, April 24, 2020

8:45 am – 9:30 am Chance to Win \$25
 9:45 am – 10:45 am CLE—Elder Law
 10:45 am – 11:45 am CLE—Multidistrict Litigation
 12:00 pm – 1:30 pm Professional Development Luncheon
 1:45 pm – 2:45 pm CLE—Family Law
 3:00 pm – 4:00 pm CLE—Appellate Law
 4:00 pm – 4:15 pm Credentials Check-In
 4:15 pm – 6:00 pm Texas ALP Annual Meeting

Saturday, April 25, 2020

9:00 am –10:00 am CLE—Fire Safety Law
 10:15 am –11:15 am CLE—Personal Injury Litigation
 11:30 am – 1:00 pm Recognition Luncheon
 1:15 pm –2:15 pm CLE—Ethics
 2:30 pm – 3:30 pm CLE—Large Real Estate Portfolio Deals
 3:30 pm – 4:00 pm TALP FUNdraising Raffle
 7:00 pm – 7:30 pm Incoming President's Reception
 7:30 pm – Presidents' Banquet

PAYMENT INFORMATION (due with registration form)

Total Amount Due: \$ _____

Please make check payable to:
 Houston ALP Special Meeting Account
 (Federal Tax ID No. 75-6061378)

Notices:
(1) A \$30 fee will be assessed for returned checks.
(2) Refunds requested and confirmed in writing (less a \$25 processing fee) will be made until April 2, 2020.

Conference Chair:
 Cheryl A. Wenzel, PP, PLS
 San Antonio LSA
 cherylalp@gmail.com

Mail registration form and payment to:
 Helene L. Wood, PP, PLS, TSC-RE
 Registration Chair
 c/o Norton Rose Fulbright US LLP
 1301 McKinney, Suite 5100
 Houston, Texas 77010-3095

For questions about registration, contact:
 Helene L. Wood, PP, PLS, TSC-RE
 713.651.3713 • helene.wood@nortonrosefulbright.com

HOTEL INFORMATION

Reservations should be made with the Embassy Suites San Marcos Hotel, Spa & Conference Center (1001 E. McCarty Lane, San Marcos, Texas 78666, US). The discounted room rate is \$139 standard two-queen-bed suite (plus 15% tax). For the discounted room rate, book your reservation **no later than March 28, 2020**, through online reservations at <http://embassysuites.hilton.com/en/es/groups/personalized/S/SNMESES-ALP-20200423/index.html>. If making your reservation by phone, please call 512.392.6450 or 512.805.5345 and identify yourself with the Texas ALP conference by the code **ALP** to receive the discounted room rate, which is available until **March 28, 2020**.

Contributions or gifts to Texas ALP are not deductible as charitable contributions for income tax purposes.

TEXAS ALP 65TH ANNUAL EDUCATION CONFERENCE
San Marcos, Texas ☆ April 24-25, 2020

SCHEDULE OF EVENTS

(All CLE Topics/Speakers Are Subject to Change as Deemed Necessary)

Friday, April 24, 2020

8:00 a.m.	—	10:45 a.m.	Registration
8:00 a.m.	—	5:00 p.m.	Vendors
8:45 a.m.	—	9:30 a.m.	Chance to Win \$25
9:45 a.m.	—	10:45 p.m.	Elder Law Carol Bertsch, Esq. (Law Offices of Carol Bertsch) (CLE—1.0 hr.)
10:45 a.m.	—	11:45 a.m.	Multidistrict Litigation Jane Bockus, Esq. (Dykema Gossett PLLC) (CLE—1.0 hr.)
12:00 p.m.	—	1:30 p.m.	Professional Development Luncheon Vincent Michael, Executive Director of The Conservation Society of San Antonio
1:45 p.m.	—	2:45 p.m.	Family Law Matthew J. Hill, Esq. (Matthew J. Hill Law Office) (CLE—1.0 hr.)
2:25 p.m.	—	3:00 p.m.	Break
3:00 p.m.	—	4:00 p.m.	Appellate Law Renee Yanta, Esq. (Law Office of Renee Yanta) (CLE—1.0 hr.)
4:00 p.m.	—	4:15 p.m.	Credentials Check-in
4:15 p.m.	—	6:00 p.m.	Texas ALP Annual Meeting

Saturday, April 25, 2020

8:00 a.m.	—	10:45 a.m.	Registration
8:00 a.m.	—	5:00 p.m.	Vendors
9:00 a.m.	—	10:00 a.m.	Fire Safety Laws Kelly Kistner, Fire Marshall (San Marcos Fire Department) (CLE—1.0 hr.)
10:15 a.m.	—	11:15 a.m.	Personal Injury Litigation Dannick Villasenor-Hernandez, Esq. (Plunkett & Gibson, Inc.) (CLE—1.0 hr.)
11:30 p.m.	—	1:00 p.m.	Recognition Luncheon
1:15 p.m.	—	2:15 p.m.	Ethics Andrew Borrego, Esq. (Moreno & Borrego) (CLE—1.0 hr.)
2:15 p.m.	—	2:30 p.m.	Break
2:30 p.m.	—	3:30 p.m.	Large Real Estate Portfolio Deals Amanda Shaw-Castro, Esq. (Jackson Walker) (CLE—1.0 hr.)
3:30 p.m.	—	4:00 p.m.	TALP FUNdraising Raffle
7:00 p.m.	—	7:30 p.m.	Incoming President's Reception
7:30 p.m.	—	Presidents' Banquet





**TEXAS ALP
65TH ANNUAL EDUCATION CONFERENCE**

Presidents Banquet

Location—

**Embassy Suites San Marcos Hotel,
Spa & Conference Enter
San Marcos, Texas**

When—

April 25, 2020

Incoming President's Reception—

7 to 7:30 p.m.

Presidents Banquet—

7:30 to 10 p.m.

Theme—

“Lighting the Way”

Dress Code—

Cocktail

Texas ALP 2020 65th Annual Education Conference FUNdraising Raffle

“Light the Way with Texas ALP”

Support Texas ALP by donating any themed item for the raffle



Tickets may be purchased at the conference for \$1.00 each or 6 tickets for \$5.00.w
All proceeds return to Texas ALP to support future conferences/educational opportunities.
Nothing is possible without YOUR participation!

What Does San Marcos Have To Offer? Here Goes.....



The Meadows Center Glass Bottom Boat Tours

The Meadows Center Glass Bottom Boat Tours, formerly Aquarena Center, offers interpretive and self-guided tours, historic glass bottom boat rides, wetlands boardwalk, Texas River exhibits, nature-friendly Gift Shop and much more.

Purgatory Creek Natural Area

The 570-acre Purgatory Creek Natural Area is within the Edwards Aquifer recharge zone. Portions of the natural area are generally referred to as Prospect Park, lower and upper Purgatory.



San Marcos Outlets

Go Big! San Marcos has the largest outlet shopping center in the United States. Featuring 240 designer and name brands stores spread out over 1.2 million square feet of shopping heaven. The amazing discounts at San Marcos Premium Outlets and Tanger Outlets are hard to resist.

Wimberley Glassworks

Wimberley Glassworks is known worldwide for its beautiful hand-blown glass art and lighting pieces. A visit to the gallery is unique, visitors can observe the beautiful craftsmanship of glassblowing and then shop the gallery.

Wonder World Park

Visitors have enjoyed touring the Balcones Fault Line cave for more than 105 years at Wonder World Park, the first Texas commercial show cave. Today, the park has many other attractions for family fun and educational entertainment.



Three Dudes Winery

Three Dudes Winery overlooks the crystal-clear waters of the San Marcos River and offers a great place to experience the finest of Texas wines in a relaxed, peaceful atmosphere. Our tasting room and gift shop are open 7 days a week. They also have ongoing events open to the public.

Hops & Grain

Downtown | Hops & Grain San Marcos is a craft brewery which produces clean lagers and hop-forward beers. The brewery and taproom is located in downtown San Marcos, just two blocks from the downtown square.

CabanaSMTX

CabanaSMTX provides year-round paddling instruction and equipment rentals to enjoy the San Marcos River. Experienced instructors and guides are here to outfit visitors for kayaking, fishing, stand-up paddleboarding, snorkeling, swings, slides, slack lines or just a hammock.

TEXAS ALP 2019-2020 ROSTER OF OFFICERS AND CHAIRS

Chartered July 27, 1956

Elected Officers

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PROFESSIONAL DEVELOPMENT

See **Annual Conference**

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(2020-02-04)

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Note from the Editor:

Have you read an article you think other members might be interested in reading?
If so, you can share it for others to read in *The Texas Docket*.

Feel free to e-mail the article to me at lgentry@hkwwlaw.com

**Local Associations,
please send your brags!**



**THE ANTI-SLAPP CLAPBACK: HOW THE TCPA
COMPLICATES ESTATES, TRUSTS, AND GUARDIANSHIPS**

W. CAMERON McCULLOCH, *Houston*
MacIntyre McCulloch & Stanfield, LLP

Co-author:

LAUREL M. SMITH, *Houston*
MacIntyre McCulloch & Stanfield, LLP

State Bar of Texas
14TH ANNUAL
FIDUCIARY LITIGATION
December 5-6, 2019
San Antonio

CHAPTER 2

W. CAMERON MCCULLOCH, JR.

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AREAS OF PRACTICE

Probate litigation
Probate administration
Estate planning
General civil litigation

PRACTICE DESCRIPTION

Representation and counseling of guardians, trustees, administrators, beneficiaries, and executors of estates in administrative matters as well as in litigation which concerns guardianships, trusts, wills, gifts, and estates including the preparation of wills, trust agreements, powers of attorney, and other necessary documents; assistance in both the independent and dependent administration of estates and guardianships; the preparation of and/or review of fiduciary accountings for both trustees and trust beneficiaries; and the institution of and/or the defense of estate, trust, and/or fiduciary litigation

RECENT REPRESENTATIONS

Successful representation of individuals in the contest of wills and the construction of trusts involving assets of more than \$200 million

Successful representation of individuals and corporate fiduciaries in trust and fiduciary litigation matters on multiple occasions

Represented numerous individual trust beneficiaries as well as corporate fiduciaries in their respective roles as guardians, trustees, administrators, and/or executors of trusts and estates

Counseled and represented a number of individuals on matters involving their lifetime planning and planning for the disposition of their assets at death

ACTIVITIES AND AFFILIATIONS

Admitted to the State Bar of Texas, 1994

Member, State Bar of Texas; Probate, Trust, and Estate Section and Litigation Section

Council Member, Real Estate, Probate & Trust Law Section of the State Bar of Texas, 2013-2017

Chair, Fiduciary Litigation Committee, Real Estate, Probate & Trust Law Section of the State Bar of Texas, 2013 – 2014;

Member, Houston Bar Association; Probate, Trusts, and Estate Section; Council Member, 2003-2007

Chair, Houston Bar Association; Probate, Trusts and Estates Section, 2012-2013

Member, State Bar of Texas Pattern Jury Charge Committee, Family & Probate, 2013-2014

Fellow, Texas Bar Foundation

Fellow, American College of Trust and Estate Council

Member, College of the State Bar of Texas

Member, Regional Council – Texas Christian University

Texas Christian University Alumni Association

Board Member, South Campus Sport's Association, 2004-2007

Board Member, West University Little League, 2004-2005

St. Luke's Methodist Church

Phi Delta Theta Alumni Association

Selected for inclusion in listing of Texas Top Financial Advisors, *Texas Monthly*, 2009
Selected for inclusion in listing of Texas Super Lawyers, *Texas Monthly*, 2008-2013
Selected for inclusion in listing of Best Lawyers in Houston, *H Texas Magazine*, 2004
Selected for inclusion in listing of Texas Rising Stars, *Texas Monthly*, 2004-2007

PUBLICATIONS AND PRESENTATIONS

“Fiduciary Duties in Limited Partnerships,” *Advanced Estate Planning and Probate* 2018
“Privilege Issues for Estate Planners and Probate Practitioners,” *Estate Planning and Probate Drafting* 2017
“Drafting & Enforcing Arbitration Clauses in Wills, Trusts, & Settlement Agreements,” *Advanced Estate Planning and Probate* 2016
“Practical Considerations for Drafting Arbitration Clauses,” *Estate Planning and Probate Drafting* 2015
“Drafting to Head Off Disputes,” *Estate Planning and Probate Drafting* 2014, State
“Privilege & Expert Witness Issues in Probate,” *Advanced Estate Planning and Probate* 2014
“It’s Too Late to Say You’re Sorry,” *Advanced Estate Planning Strategies* 2014
“Common Privilege and Expert Witness Issues,” 38th Annual *Advanced Estate Planning & Probate Course*, State Bar of Texas, 2014
“Give ‘Em Hell: Causes of Action, Remedies, and Considerations to Take Into Account When Dealing With Wayward Fiduciaries, Beneficiaries or Heirs,” 20th Annual *Advanced Estate Planning Strategies Course*, State Bar of Texas, 2014
“Everything You Need to Know About Probating Estates in Texas (With an Added Emphasis on Joint Tenancies With Rights of Survivorship & Oil and Gas Transfers Involving Estates),” National Institute for National Association of Division Order Annalist (NADOA), 2011
Course Director, 21st Annual *Estate Planning and Probate Drafting Course*, State Bar of Texas, 2010
“Joint Tenancy with Right of Survivorship Issues,” 33rd Annual *Advanced Estate Planning & Probate Course*, State Bar of Texas, 2009
“Landmines for Lawyers,” Houston Bar Association’s *Wills and Probate Institute*, 2009
“The Roles of an Attorney Ad Litem, a Guardian Ad Litem and a Mediator in a Contested Guardianship Mediation,” *Advanced Guardianship Course*, State Bar of Texas, 2009
“Joint Tenancy with Right of Survivorship Issues,” Texas Bankers’ Association *Estate Administration Seminar*, 2008
“Landmines for Lawyers,” 32nd Annual *Advanced Estate Planning & Probate Course*, State Bar of Texas, 2008
“The Contested Guardianship,” Houston Bar Association *Continuing Legal Education Seminar*, 2008
“Landmines for Lawyers,” *Wills & Probate Institute*, South Texas College of Law, 2007
“Practical Aspects of Guardianship Law,” Texas College of Probate Judges 2007 Annual Meeting
“Preserving Error on Trial,” 31st Annual *Advanced Estate Planning and Probate Course*, State Bar of Texas, 2007
“Techniques to Avoid Will Contests,” *Wills and Probate Institute*, South Texas College of Law, 2005
“Preserving Error on Trial,” 29th Annual *Advanced Estate Planning and Probate Course*, State Bar of Texas, 2005
“Techniques to Avoid Will Contests,” *Wills and Probate Institute*, University of Houston, 2004
“Guardianships from Start to Finish,” *Wills and Probate Institute*, University of Houston, 2004
“Joint Tenancy With Right of Survivorship Issues,” 27th Annual *Advanced Estate Planning and Probate Course*, State Bar of Texas, 2003
“JTWROS Accounts,” *Wills and Probate Institute*, South Texas College of Law, 2003
“Recent Legislative Developments for Probate, Trust & Estate Matters,” Speaker for Legislative Update in Family/Probate Court, Houston Bar Association, 2003

"Techniques to Avoid Will Contests," Wills and Probate Institute, University of Houston, 2003
"Guardianships and Guardianship Alternatives," Family Law Practice Seminar, University of Houston, 2003
"Marital Property Issues for the Incapacitated Spouse," Houston Bar Association's Guardianship Certification Course, 2003
"Guardianships and Guardianship Alternatives," Wills and Probate Institute, University of Houston, 2002
"Guardianships From A to Z," Wills and Probate Institute, South Texas College of Law, 2002
"Challenging Relationships - Common Law Marriages, Putative Marriages and Adoption by Estoppel," 26th Annual Advanced Estate Planning and Probate Course, State Bar of Texas, 2002
"How to Initiate and Administer Guardianships," Wills and Probate Institute Attorney and Guardian Ad Litem Certification Course, South Texas College of Law, 2001
"Ten Unanswered Questions in Probate," 25th Annual Advanced Estate Planning and Probate Course, State Bar of Texas, 2001
"Ten Unanswered Questions in Probate," 24th Annual Advanced Estate Planning and Probate Course, State Bar of Texas, 2000
"Statutory Probate Court Jurisdiction," 1994
"The ADA and its Application to the Incapacitated Individual" and "Advanced Directives," The New Guardianship Laws in Texas: A Course of Instruction, 1994
"Appeals, Mandamus & Recusal," Annual Wills & Probate Institute, 1992
"Advanced Directives," Elder Law Institute, 1992

EDUCATION

Juris Doctor degree from South Texas College of Law, 1993
Bachelor of Arts degree from Texas Christian University, 1990

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EMPLOYMENT

MacIntyre, McCulloch & Stanfield, Houston, Texas

Associate Attorney, March 2019 – present

Law Clerk, May 2017 – July 2017

Crain, Caton & James, Houston, Texas

Law Clerk, January 2016 – December 2018

Contract Paralegal, July 2015 – January 2016

File Clerk, June 2010 – July 2015 (part time)

Arnold & Itkin, Houston, Texas

Law Clerk, May 2018 – August 2018

PUBLICATIONS

Guardianships – What Do You Do When Your Client Is Not All There? Co-Author, presented at the State Bar of Texas 44th Annual Advanced Family Law Course, August 13 – 16, 2018

Tortious Interference with Inheritance: Dead or In a Temporary Coma? Co-Author, presented at the State Bar of Texas 12th Annual Fiduciary Litigation Course, November 30 – December 1, 2017

EDUCATION

South Texas College of Law Houston, Houston, Texas

Doctor of Jurisprudence, December 2018

Journals

- South Texas Law Review, *Note and Comment Editor*, April 2017 – April 2018; *Member*, January 2017 – August 2018

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THE ANTI-SLAPP CLAPBACK: HOW THE TCPA COMPLICATES ESTATES, TRUSTS, AND GUARDIANSHIPS

I. INTRODUCTION

Without further qualification, constitutional rights are the cornerstone of the freedoms enjoyed by the citizens of the United States of America. However, the current climate has fueled an almost unfettered right for a defendant to avoid legal action if he or she can demonstrate that the claims against him have even a vague connection to such freedoms—proof which normally requires a showing of public participation or government action. Indeed, the purpose of the Texas Citizen’s Participation Act (“TCPA”) is to encourage and protect the constitutional rights of persons to petition, speak freely, and otherwise participate in government to the maximum extent permitted by law.¹ However, the legislature intended these rights to be counterbalanced with the rights of a person to file a meritorious lawsuit for demonstrable injury.²

This Article is not opposed to an avenue which provides defendants protections of their freedoms from infringement. Rather, this Article posits the idea that the remedy has outweighed its own need, resulting in a tilt of the scale in favor of defendants, which exceeds the bounds of the original intent of the legislators who created the remedy. Yet curiously, despite the increasing number of exemptions from the statute, Courts have continued to broadly—arguably, overbroadly—interpret the statute to apply to cases which involve private disputes between private parties. Specifically, the application of the TCPA to disputes related to estates, trusts, and guardianships, especially those which involve elder abuse, is wholly inappropriate and causes more damage than it does good.

This Article will discuss the history of the TCPA, both in the legislature and the courtroom, along with the proper procedure for utilizing the protections of the TCPA. Additionally, this Article will examine the recent amendments to the TCPA, as well as inconsistencies between the Texas legislature and the application of the TCPA to parties’ claims. Finally, this Article will discuss the use of the TCPA in litigation involving

estates, trusts, and guardianships, and suggest that these areas of the law should be exempted from the TCPA.

II. HISTORY AND PROVISIONS OF THE TCPA

The Texas Citizen’s Participation Act is governed by Sections 27.001 through 27.011 of the Texas Civil Practice and Remedies Code. Originally enacted in 2011, the TCPA is a relatively new statute to Texas. However, with the passing of this Act, Texas joined a majority of states which already had similar laws.³ In fact, the Public Participation Project currently identifies thirty-two states with anti-SLAPP statutes, including Texas.⁴ Additionally, Washington D.C. has an anti-SLAPP statute and West Virginia has anti-SLAPP protections in case law.⁵ Although there are ongoing efforts to pass federal anti-SLAPP laws since the introduction of the SPEAK FREE Act of 2015, no federal anti-SLAPP laws have yet been enacted.

A. A New Version of Tort Reform

The TCPA is not the first instance of Texas providing remedies that favor defendants. Although Texas enjoyed a plaintiff-friendly court for many years, that trend came to a screeching halt with the arrival of what is now commonly referred to as “tort reform.” Specifically, a movement began in Texas in the 1980’s and 1990’s as a result of widespread concern across the state regarding, among other issues:

. . . the impact of liability cost increases on access to healthcare . . . misuse of class actions, an inability of parties to reach reasonable settlements in a timely and cost-effective manner, forum shopping, liability exposure of manufacturers and providers of products, and interest rates on judgments and appeal bonds.⁶

Tort reform began in 1975 with a report by the Keeton Commission, a group of interested parties appointed by the Governor, Lieutenant Governor, and Speaker of the House, which recommended a cap of \$500,000 on non-economic damages in injury cases and other changes to medical malpractice law.⁷ In 1987, the Texas legislature made amendments to the permissible punitive damages

¹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019).

² See *id.*

³ See generally, PUBLIC PARTICIPATION PROJECT, FIGHTING FOR FREE SPEECH, <https://anti-slapp.org> (last visited October 30, 2019) (a non-profit organization that focuses on assisting individuals to get anti-SLAPP laws in states and also in Congress).

⁴ See PUBLIC PARTICIPATION PROJECT, STATE ANTI-SLAPP LAWS, <https://anti-slapp.org/your-states-free-speech-protection/> (last visited October 30, 2019) (identifying Arizona, Arkansas, California, Colorado, Connecticut,

Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and Washington as having anti-SLAPP statutes).

⁵ *Id.*

⁶ Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part One*, 36 TEX. TECH. L. REV. 1, 3 (2005).

⁷ *Id.* at 4.

in order to further limit recover, and later, in 1995, passed laws to require that medical malpractice claims be subject to a pre-suit review.⁸ After numerous additional amendments and modifications in the 1990's, the Texas legislature passed its most comprehensive laws intended to stem the flow of frivolous lawsuits: The Medical Malpractice and Tort Reform Act of 2003. Among the numerous changes and restrictions placed on plaintiffs' remedies, several of the more striking examples include limitations on the recovery of noneconomic damages in medical malpractice cases,⁹ new statutes to curtail the recovery of attorneys' fees,¹⁰ and amendments to limit the proportionate responsibility of defendants.¹¹

Similarly, the Texas Citizen's Participation Act continues this trend by creating a remedy for a defendant to escape liability—through a dismissal of a plaintiff's claims. The primary difference, however, is that while tort reform limited the procedures and remedies available for a plaintiff during and at the end of the case, the TCPA goes even further by nipping a plaintiff's case in the bud before it has hardly begun.

B. Anti-SLAPP Procedure, Texas Style

Texas's version of the anti-SLAPP statute was first enacted in 2011 by adding Chapter 27 to the Texas Civil Practice and Remedies Code. The purpose of this chapter is “to encourage and safeguard the constitutional rights of persons to petition, speak 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.”¹² Section 27.003(a) currently reads, in part:

(a) If a legal action is based on or is in response to a party's exercise of the right of free speech, right to petition, or right of association or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b), that party may file a motion to dismiss the legal action.¹³

The statute further clarifies that a “party,” as defined under this section, does not include a government entity, agency, or an official or employee acting in an official capacity.¹⁴ A legal action is defined generally as a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim, or any other judicial pleading or filing that requests legal, declaratory, or equitable relief.¹⁵ Therefore, if a plaintiff files a cause of action that implicates any of the above-named rights, a defendant may file a motion to dismiss under the TCPA.

A defendant may file a TCPA motion to dismiss no later than the sixtieth day after the date of service of the legal action.¹⁶ The sixty days post-service is a hard and fast deadline absent either a court order to the contrary upon a showing of good cause, or by agreement of the parties.¹⁷ Importantly however, unlike motions to dismiss under Rule 91a of the Texas Rules of Civil Procedure, the TCPA does not provide a mechanism for the filing deadline of the motion to be reset by amendment of the plaintiff's pleading.¹⁸

Once a TCPA motion to dismiss is filed, all discovery is suspended until the court has ruled on the motion.¹⁹ The movant is required to set a hearing and give the non-movant a minimum of twenty-one days' notice of the hearing.²⁰ The court must generally hear the motion not later than the sixtieth day after service of the motion, but the deadline may be extended to the nintieth day after service if the court's docket requires a later hearing, good cause is shown for the delay, or the parties agree otherwise.²¹ Limited discovery on the substance of the motion may be permitted by the court, and in such cases where limited discovery is ordered, the hearing may be heard not later than one hundred twenty days after service of the motion.²² Once the hearing is set, the non-movant must file a response no later than seven days prior to the date of the hearing, absent agreement by the parties otherwise or an order of the court.²³ The statute does not, however, provide a deadline for the movant's reply.

In determining whether a legal action is subject to or should be dismissed under this chapter, the court shall consider the pleadings, the evidence a court could consider under Rule 166a of the Texas Rules of Civil

⁸ See, e.g., Act of May 5, 1995, 74th Leg., R.S., ch. 140, 1995 Tex. Gen. Laws 985, 985–89, amended by The Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., Ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 864–82.

⁹ See, e.g. TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2003) (putting caps of \$250,000 of non-economic damages on many healthcare liability claims).

¹⁰ CIV. PRAC. & REM. § 26.003.

¹¹ See generally, CIV. PRAC. & REM. Ch. 33 (various sections enacted pursuant to The Medical Malpractice and Tort Reform Act of 2003).

¹² TEX. CIV. PRAC. & REM. CODE ANN. § 27.002 (West 2019).

¹³ CIV. PRAC. & REM. § 27.003(a).

¹⁴ *Id.*

¹⁵ CIV. PRAC. & REM. § 27.001(6).

¹⁶ CIV. PRAC. & REM. § 27.003(b).

¹⁷ *Id.*; note, however, that the provision that the parties may agree to extend the time was only recently added during the 2019 legislative session.

¹⁸ *Id.*; cf. TEX. R. CIV. P. 91a.5.

¹⁹ CIV. PRAC. & REM. § 27.003(c).

²⁰ CIV. PRAC. & REM. § 27.003(d).

²¹ CIV. PRAC. & REM. § 27.004(a).

²² CIV. PRAC. & REM. § 27.004(c).

²³ CIV. PRAC. & REM. § 27.003(e).

Procedure, and supporting and opposing affidavits stating the facts on which the liability or defense is based.²⁴ Circumstantial evidence is proper for a court to consider on review of a motion filed under the TCPA.²⁵ However, conclusory statements are not probative evidence and will not suffice to establish a prima facie case under the TCPA.²⁶ Ultimately, if the plaintiff is unable to establish facts and evidence to support his prima facie case, the court must dismiss the claims.²⁷

The first determination to be made by the court is whether or not the TCPA applies to the plaintiff's claims. If the TCPA does apply, the TCPA provides for an extraordinary, almost automatic remedy for the defendant moving to dismiss the claims against him. Specifically, the TCPA states that a court *shall* dismiss a legal action against the moving party if the moving party demonstrates that the legal action is based on or is in response to that party's exercise of his rights of free speech, association, or petition, or the act of a party as described in Section 27.010(b).²⁸ Section 27.010(b) further specifies that the TCPA also applies to additional legal actions related to the dissemination of certain communications to the public or related to consumer opinions and ratings of businesses, notwithstanding certain exemptions.²⁹ The movant may also have the claims dismissed against him if he establishes an affirmative defense or other grounds under which he would be entitled to judgment as a matter of law.³⁰

Step two of the analysis of a TCPA motion involves a burden-shifting mechanism to the non-movant. However, a plaintiff can avoid the burden-shifting requirements of the TCPA by showing that one of the Act's several exemptions applies.³¹ Generally, the burden of proving a statutory exemption rests on the party seeking the benefit of the exemption.³² If an exemption does not apply, however, the non-movant plaintiff has the burden to establish by "clear and specific evidence" a prima facie case for each essential

element of the claim in question.³³ "Prima facie case" is defined as the evidence legally sufficient to establish that a claim is factually true if it is not countered, or otherwise described as the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."³⁴

Because a definition of the burden of "clear and specific evidence" is notably absent from the statute, courts have struggled with this new burden at length in order to determine the exact level of proof required for a party to survive a motion to dismiss. "Specific" has been defined as "explicit or relating to a particular named thing," and "clear" has been defined as "ambiguous, sure, or free from doubt."³⁵ One federal court, applying Texas law, noted that a party's proof of "clear and specific evidence" of each element of his prima facie case relates more to a pleading standard than a summary judgment standard.³⁶ Another federal court determined that mere notice pleading—that is, general allegations that merely recite the elements of a cause of action—will not be sufficient to survive a TCPA motion to dismiss, and that the plaintiff (i.e., the non-movant) must cite evidence to support each element of his claims.³⁷

In recent years, the Texas Supreme Court has clarified the parties' respective evidentiary burdens with respect to a TCPA motion. The Court confirmed that mere notice pleading by the plaintiff (i.e., general allegations that merely recite the elements of a cause of action) will not be sufficient to defeat a defendant's motion to dismiss under the TCPA. Rather, a plaintiff must provide enough detail to show the factual basis for his claim.³⁸ However, in disapproving a host of prior cases, the Texas Supreme Court held that the TCPA does not require a plaintiff to put on direct evidence of each essential claim to avoid dismissal.³⁹ Moreover, the TCPA does not impose an elevated evidentiary standard or categorically reject circumstantial evidence, nor does

²⁴ CIV. PRAC. & REM. § 27.006(a).

²⁵ *Beving v. Beadles*, 563 S.W.3d 399, 407 (Tex. App.—Fort Worth 2018, pet. denied).

²⁶ *O'Hern v. Mughrabi*, No. 579 S.W.3d 594, 604 (Tex. App.—Houston [14th Dist.] 2019, no pet. filed).

²⁷ CIV. PRAC. & REM. § 27.005(b).

²⁸ CIV. PRAC. & REM. § 27.005(b).

²⁹ CIV. PRAC. & REM. § 27.010(b).

³⁰ CIV. PRAC. & REM. § 27.005(d).

³¹ *See Toth v. Sears Home Improvement Prods.*, 557 S.W.3d 142, 150 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (discussing the commercial speech exception); *see also* CIV. PRAC. & REM. § 27.010 (various exemptions).

³² *Toth*, 557 S.W.3d at 152.

³³ CIV. PRAC. & REM. § 27.005(c).

³⁴ *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015).

³⁵ *Id.*; *Comm'n for Lawyer Discipline v. Rosales*, 577 S.W.3d 305, 315 (Tex. App.—Austin 2019, pet. filed).

³⁶ *Southwest Airlines Co. v. Roundpipe, LLC*, 375 F.Supp.3d 687, 696 (N.D. Tex. 2019).

³⁷ *Haynes v. Crenshaw*, 166 F.Supp.3d 764, 771 (E.D. Tex. 2016).

³⁸ *Lipski*, 460 S.W.3d at 591.

³⁹ *Id.*, disapproving *Shipp v. Malouf*, 439 S.W.3d 432 (Tex. App.—Dallas 2014, pet. denied); *Young v. Krantz*, 434 S.W.3d 335 (Tex. App.—Dallas 2014, no pet.); *KBMT Operating Co. v. Toledo*, 434 S.W.3d 276 (Tex. App.—Beaumont 2014) *rev'd*, 492 S.W.3d 710 (Tex. 2016); *Farias v. Garza*, 426 S.W.3d 808 (Tex. App.—San Antonio, pet. denied); *Rio Grande H2O Guardian v. Robert Muller Family P'ship Ltd.*, No. 04-13-00441-CV, 2014 WL 309776 (Tex. App.—San Antonio Jan. 29, 2014, no pet.); *Sierra Club v. Andrews Cnty., Tex.*, 418 S.W.3d 711 (Tex. App.—El Paso 2013), *rev'd*, 463 S.W.3d 867 (Tex. 2015); *Alphonso v. Deshotel*, 417 S.W.3d 194 (Tex. App.—El Paso, no pet.); and other cases.

it impose a higher burden of proof than that required by the plaintiff at trial.⁴⁰ Importantly, even if the plaintiff demonstrates a sufficient factual basis for his claims, the court must still grant the TCPA motion if the defendant establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.⁴¹

The court is required to rule on the motion to dismiss not later than thirty days after the date of the hearing.⁴² If a court does not rule on a motion to dismiss within this time, the motion is considered to be denied by operation of law and the moving party may appeal.⁴³ The TCPA provides for an accelerated appeal, whether interlocutory or not, from either a trial court order on a motion to dismiss under the TCPA or from the trial court's failure to rule on such a motion.⁴⁴ Section 51.014 of the Texas Civil Practice and Remedies Code now provides specifically for an interlocutory appeal if a court denies a motion to dismiss filed under Section 27.003.⁴⁵ This Section further provides that an interlocutory appeal of the denial of an anti-SLAPP motion to dismiss "stays all proceedings in the trial court pending the resolution of that appeal."⁴⁶

By contrast, although a plaintiff against whom a TCPA motion to dismiss is granted may appeal the order, the plaintiff is not given the opportunity to file an interlocutory appeal.⁴⁷ Interlocutory appeals are, by definition, appeals of orders that are entered during the course of the litigation and are not final judgments.⁴⁸ Unless a statute expressly authorizes an interlocutory appeal, appellate courts generally only have jurisdiction over final judgments.⁴⁹ Statutes authorizing interlocutory appeals are strictly construed because they are a "narrow exception to the general rule that interlocutory orders are not immediately appealable."⁵⁰

Although a defendant's ability to appeal a denial of a TCPA motion to dismiss is relatively clear, the TCPA does not specify the effect of an order granting a motion to dismiss under the TCPA. There is no question that the TCPA expressly permits a plaintiff to file an expedited

appeal of an order granting a TCPA motion.⁵¹ However, since there is no statutory interlocutory appeal for these types of orders, it would follow logically that the orders may be considered a final, appealable judgment. One case in the Fort Worth Court of Appeals proposed that an order under the TCPA dismissing an action "may be appealable, or severable and appealable, as a final, noninterlocutory order disposing of all issues and all parties."⁵² If the entire case is dismissed, this procedure is relatively straightforward: the plaintiff appeals, and the dismissal is either affirmed or the claims are remanded back to the trial court.

Questions have arisen, however, as to 1) how the absence of a stay in the proceedings in the trial court affects the lawsuit and the procedure of the appeal, and 2) the effect of an order dismissing some of the plaintiff's claims, but not all of them. Unlike a defendant's appeal related to the denial of a TCPA motion, proceedings are not stayed in the trial court during the pendency of a plaintiff's appeal. Further, if some of a plaintiff's claims are dismissed, but not all of them, what is the proper procedure for the appeal of the dismissed claims? Although the Texas Supreme Court has not weighed in on these issues, various Courts of Appeals have determined collectively that an order dismissing plaintiff's claims while issues and/or claims remain in the trial court is an interlocutory order that may not be appealed until all issues have been disposed.⁵³

The Houston First Court of Appeals addressed one case in which a trial court dismissed claims for misappropriation, conversion, breach of fiduciary duty, and claims under the Texas Theft Liability Act, but denied the TCPA motion with respect to a claim for breach of contract.⁵⁴ The Court engaged in a lengthy discussion on its jurisdiction related to a partially granted, partially denied TCPA Motion.⁵⁵ Ultimately, the Court held that the TCPA only granted jurisdiction for an interlocutory appeal to the portion of the order denying the TCPA motion, but did not confer

⁴⁰ *Id.* at 590–91.

⁴¹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(d) (West 2019).

⁴² CIV. PRAC. & REM. § 27.005(a).

⁴³ CIV. PRAC. & REM. § 27.008(a).

⁴⁴ CIV. PRAC. & REM. § 27.008(b).

⁴⁵ CIV. PRAC. & REM. § 51.014(a)(12).

⁴⁶ CIV. PRAC. & REM. § 51.014(b).

⁴⁷ *See* CIV. PRAC. & REM. § 51.014; *see also* CIV. PRAC. & REM. § 27.008.

⁴⁸ *See, e.g., Hernandez v. Ebron*, 289 S.W.3d 316 (Tex. 2009) ("Generally, appeals may only be taken from final judgments However, . . . the Texas Civil Practice and Remedies Code provides that a person 'may' appeal from an interlocutory order [in certain circumstances].").

⁴⁹ *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see also Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

⁵⁰ *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011).

⁵¹ CIV. PRAC. & REM. § 27.008(b).

⁵² *Jennings v. Wallbuilder Presentations, Inc. ex rel. Barton*, 378 S.W.3d 519, 524 (Tex. App.—Fort Worth 2013, pet. denied); *see also* TEX. R. CIV. P. 41.

⁵³ *See, e.g., Trane US, Inc. v. Sublett*, 501 S.W.3d 783, 787–88 (Tex. App.—Amarillo 2016, no pet.) (finding that an order granting defendants' motion to dismiss and dismissing various tort and contract claims is interlocutory when issues concerning attorneys' fees and sanctions remained pending in the trial court).

⁵⁴ *Schlumberger Limited v. Rutherford*, 472 S.W.3d 881, 886 (Tex. App.—Houston [1st Dist.] 2015, no pet).

⁵⁵ *Id.* at 886–91.

jurisdiction for an interlocutory appeal on any claim which was dismissed pursuant to the portion of the order granting TCPA motion.⁵⁶ Therefore, the court only discussed the merits of the TCPA motion with regards to the breach of contract claim, and affirmed the denial of the TCPA motion with regards to that claim, but did not address not the other claims that were dismissed by the trial court.⁵⁷

Schlumberger presents a perfect example of the ambiguities and difficulties with a plaintiff's appeal of a TCPA order. Specifically, the result of the *Schlumberger* appeal was that the plaintiff was permitted to pursue his breach of contract claim in the trial court after the Court of Appeals affirmed the denial of the TCPA motion on that claim, but the remaining claims could not be appealed until the rest of the lawsuit was disposed.⁵⁸ This holding raises questions about judicial efficiency and the procedure of a plaintiff's appeal. If the plaintiff prevails at the appellate level on one appealed claim and that claim is permitted to proceed in the trial court, hypothetically, the plaintiff would be required to litigate that one claim to conclusion in order to appeal the dismissal of the other claims. Then, if the plaintiff prevails on the appeal of his previously dismissed claims, the parties then have to completely re-litigate the case based on those claims. It strains credulity to think that the legislature, which seems to consistently be in favor of expeditious litigation (e.g., the TCPA itself, which is intended to quickly dispose of frivolous lawsuits), would have intended the statute to have this result on a plaintiff's case.

The most effective solution for this problem would be for plaintiffs to also be given the opportunity to file an interlocutory appeal upon the partial grant and partial denial of a TCPA motion. This solution would also address some of the fairness concerns raised by this Article. Specifically, as the statute stands, a defendant gets the benefit of a one-two punch with a strongly favored motion to dismiss, and then an expedited interlocutory appeal if it is denied—while the plaintiff is forced to meet a significant evidentiary burden before the majority (or any) discovery has been conducted, and then be barred from the benefit of an interlocutory appeal of the dismissal of some of his claims. While the Texas legislature has clarified many of the courts' and parties' questions regarding certain interpretations of the TCPA, this issue has yet to be determined.

III. LEGISLATURE VERSUS COURTS: THE ONGOING BATTLE AND NEW PROVISIONS OF THE TCPA

In the eight years since the TCPA was first enacted, there have been significant disputes related to the legislature's intent and the interpretation of the TCPA in the courtroom. The first case heard on the appellate level that involved a detailed analysis of the TCPA presented precisely the types of disputes that are appropriate for the application of the TCPA. Specifically, two businesses, WallBuilder Presentations, Inc. and WallBuilders, L.L.C., and the President of both of those companies, David Barton, sued two former Texas State Board of Education candidates for libel, defamation, and business disparagement based on a 2010 campaign video that the defendants had paid their political consultant to produce.⁵⁹ The defendants timely filed a TCPA motion to dismiss which, after hearing arguments of counsel, was subsequently denied.⁶⁰ The primary issue on appeal was whether an interlocutory appeal was permissible upon the denial of the TCPA motion.⁶¹ The Fort Worth Court of Appeals held that the statutory construction of the TCPA and the Court's interpretation of the legislative intent of Section 27.008 of the Texas Civil Practice and Remedies Code indicated that there was no permissible interlocutory appeal of a TCPA Motion. Although this ruling was later superseded by statute,⁶² the case lent itself as a premier example of the types of disputes which were appropriate for the TCPA.

Since the inception of the TCPA, Texas courts have often disagreed as to not only the application of this chapter, but also as to the breadth of the application. While the legislature has added limitations to the provisions of the statute, courts have repeatedly interpreted the TCPA in a broad fashion and found that the TCPA should be applied to an extensive range of cases. For example, many courts, when granting motions to dismiss under the TCPA, cite to Section 27.005 related to the ruling on such a motion. Section 27.005 states that a motion of a party to dismiss a legal action should be granted if the moving party demonstrates that the legal action relates to the rights of free speech, petition, or association.⁶³ The Texas Supreme Court has stated that it must apply a plain-meaning construction of the TCPA's language, and that the relationship of the legal action to the defendant's rights need only be a "tangential relationship" that requires nothing more than a "tenuous or remote" connection between the two.⁶⁴ However, as described in

⁵⁶ *Id.* at 891.

⁵⁷ *Id.* at 891, 895.

⁵⁸ *Id.*

⁵⁹ *Jennings v. WallBuilder Presentations, Inc. ex rel. Barton*, 378 S.W.3d 519, 522 (Tex. App.—Fort Worth 2012, pet. denied).

⁶⁰ *Id.*

⁶¹ *Id.* at 523–29.

⁶² TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(12) (West 2019); see also *In re Lipsky*, 460 S.W.3d 579, 597 at n. 2 (Tex. 2015).

⁶³ CIV. PRAC. & REM. § 27.005(b).

⁶⁴ *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 900–01 (Tex. 2017).

this Section *infra*, the legislature has narrowed the scope of portions of the statute, presumably to encourage Texas courts to do the same. An analysis of the rights and remedies provided by the TCPA, along with the respective changes, if any, made by the Texas legislature in the 2019 legislative session, is described below.

A. Definition of a “Legal Action”

The Texas legislature recently re-defined what is considered a “legal action” under the TCPA. The original definition of a legal action was simply “a lawsuit, cause of action, petition, complaint, cross-claim, or counterclaim or any other judicial pleading or filing that requests legal or equitable relief.”⁶⁵ Notably, this definition did not include actions for declaratory judgment. Historically, courts have found that declaratory judgment actions fall into a category separate and apart from the type of legal action described by the TCPA. For example, declaratory relief under the Uniform Declaratory Judgments Act has been defined by the Texas Supreme Court as “neither legal nor equitable, but *sui generis*.”⁶⁶ In 2018, citing this definition, the Austin Court of Appeals held that declaratory judgment actions were intended to be exempted from the TCPA.⁶⁷ The Court further found that a TCPA motion attacking a declaratory judgment action suffers from a “justiciability problem” implicating subject-matter jurisdiction; because declaratory judgment claims do not represent “any independent ‘legal action,’” they are not subject to the TCPA.⁶⁸

The First Court of Appeals in Houston, in ruling on the obligations of parties to produce documents under the Business Organizations Code, also found that declaratory judgment actions should be broadly protected from dismissal under the TCPA. Specifically, the Court held that not only should the Uniform Declaratory Judgment Act (“UDJA”) be interpreted separately from the TCPA, but also that the UDJA should not even be subject to the TCPA. The Court stated:

The relief sought by [plaintiff] did not seek to prohibit any conduct or speech by [defendant] [Plaintiff’s] suit for declaratory judgment

falls outside the scope of the TCPA [Plaintiff’s] pleadings demonstrate that its claim under the Uniform Declaratory Judgment Act (“UDJA”) is the sort of lawsuit meant to be protected from dismissal under the TCPA and addresses a genuine controversy that can legitimately be resolved by the suit The UDJA generally permits a person whose rights, status, or other legal relations are affected by a statute or contract to obtain a declaration of the rights, status, or other legal relations thereunder [Defendant] does not—and cannot—point to any provision of the TCPA creating a right for a TCPA movant to bypass the protections accorded by the UDJA to anyone whose own rights are affected by a statute We conclude that the TCPA does not apply here and affirm the trial court’s denial of [defendant’s] motion.⁶⁹

Similarly, the Dallas Court of Appeals reversed the trial court’s order granting a TCPA motion attacking a declaratory judgment action involving document requests and production obligations under the Texas Public Information Act.⁷⁰

While the various Courts of Appeals made interesting (and arguably proper) arguments related to the interpretation of the TCPA and declaratory judgment claims, those arguments are now moot. In 2019, the Texas legislature clarified its position on declaratory judgment actions with respect to the TCPA. In fact, the definition has been amended to state “. . . pleading or filing that requests legal, *declaratory*, or equitable relief.”⁷¹ On the other hand, while the general definition was expanded to include declaratory judgment actions, there were three exemptions added to the definition of a “legal action.” The statute now states that the term “legal action” does not include:

- (A) a procedural action taken or a motion made in an action that does not amend or add a claim for legal, equitable, or declaratory relief;
- (B) alternative dispute resolution proceedings; or
- (C) post-judgment enforcement actions.⁷²

⁶⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (West 2011).

⁶⁶ *Cobb v. Harrington*, 190 S.W.2d 709, 713 (1945).

⁶⁷ *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 298 (Tex. App.—Austin 2018, pet. denied) (holding that as a matter of first impression, declaratory judgment claims were not “legal actions” under the TCPA); *see also Dolcefino v. Cypress Creek EMS*, 540 S.W.3d 194, 201 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (“[Plaintiff’s] pleadings demonstrate that its claim under the [UDJA] is the sort of

lawsuit meant to be protected from dismissal under the TCPA”).

⁶⁸ *Id.* at 301–03 & n.63.

⁶⁹ *Dolcefino*, 540 S.W.3d at 200–02 [emphasis added].

⁷⁰ *See State Fair v. Riggs & Ray, P.C.*, No. 05-15-00973-CV, 2016 WL 4131824, at *4–5 (Tex. App.—Dallas 2016, no pet.) (mem. op.).

⁷¹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(6) (West 2019) (emphasis added).

⁷² *Id.*

The exemptions in Subsections (B) and (C) appear fairly narrow and do not lend themselves to a complicated interpretation. The legislature seems to have intended a “legal action” to be related to truly contested litigation matters, as opposed to matters wherein the parties are either attempting to work out their differences or where a judgment has already been obtained and need only be enforced.

Alternatively, Subsection (A) presents the quintessential problem between the law and practice: what may appear straightforward on paper may be harder to implement in the courtroom. As defendants continue to bring motions to dismiss under the TCPA, the interpretation of a “legal action” related to Subsection (A) will likely become a hotly contested matter in the filing of these motions, in plaintiffs’ responses, and in the court’s interpretation of the exemption. Subsection (A) appears to protect procedural mechanisms in litigation, including various motions that occur throughout the case (for example, a motion for summary judgment) that do not add additional claims to the plaintiff’s original lawsuit.

The disputes regarding this exemption, however, will likely arise from the interpretation of the legislature’s meaning of “amend or add a claim,” and the effect of such amendment or addition. Specifically, when taking the inapposite interpretation of Subsection (A), if a plaintiff does in fact add a claim to his original lawsuit, or amend an existing claim, the exemption would then presumably not apply and a “legal action,” as defined by the TCPA, would arise. This result then begs three questions: 1) what does the term “amend or add a claim” truly mean, 2) does the term “legal action” solely apply to the amendment or additional claim, or is the “legal action” now the entire original lawsuit, and 3) if the sixty-day deadline has passed, does the amendment or added claim that is considered a “legal action” reset the deadline for filing a motion to dismiss under the TCPA? Although the 2019 amendments to the TCPA are still so new that these issues have largely not yet been specifically addressed, the answers to these questions may still be found in case law.

1. The Meaning of “Add” or “Amend”

Despite the TCPA’s silence regarding the effect of an amendment on the filing deadline, courts have still examined meaning of an amended or additional claim within the context of a defendant’s right to file a TCPA motion beyond the original sixty-day deadline. For

example, two decisions from the First and Fourteenth Courts of Appeals, respectively, state that amended and supplemental pleadings do not toll the sixty-day deadline where those pleadings rely on “the same essential factual allegations” as the claims in the original pleading. The First Court of Appeals held that “despite any additional details included in the third amended petition . . . [it] relied on the same essential factual allegations as the claim stated in [plaintiff’s] original petition,” and therefore the amended petition did not reset the sixty-day deadline to file a TCPA motion.⁷³ Similarly, the Fourteenth Court of Appeals held that “because the claims asserted in the supplemental petition are a subset of those asserted in the original petition,” the 60-day deadline was not “tolled or reset by the filing of the supplemental petition.”⁷⁴ The Fourteenth Court went on to reiterate that the purpose of the TCPA is “to allow a defendant *early in the lawsuit* to dismiss claims that seek to inhibit a defendant’s constitutional rights to petition, speak freely, associate freely, and participate in government as permitted by law.”⁷⁵

The Corpus Christi Court of Appeals has also held that both 1) a claim added after the effective date of the TCPA and 2) the merger of a defendant into a new corporation after the TCPA went into effect did not render any of the plaintiff’s claims subject to the TCPA.⁷⁶ Plaintiff’s original petition, which was filed before the effective date of the TCPA, alleged claims for breach of fiduciary duty and tortious interference with prospective business relations against defendants San Jacinto Title Services of Corpus Christi, LLC (“SJCC”) and its officer, Mark Scott.⁷⁷ After the TCPA went into effect on June 17, 2011, the plaintiff added a claim for business disparagement and joined defendant San Jacinto Title Services of Texas, LLC (“SJT”), which had merged with SJCC.⁷⁸ The trial court denied defendants’ TCPA motion to dismiss.⁷⁹ Appellant Defendants argued that the TCPA should apply to Appellee Plaintiff’s claims because 1) the business disparagement claim was added after the effective date of the TCPA, so the suit became a “legal action” and 2) the TCPA should apply to all claims asserted against SJT because it was not added as a defendant (as a result of a merger with SJCC) until the filing of Plaintiff’s First Amended Petition after the effective date.⁸⁰ However, the Court concluded that the new business disparagement claim was based on the same factual allegations as the prior claims, which were filed before the TCPA’s effective

⁷³ *Paulsen v. Yarrell*, 455 S.W.3d 192, 197–98 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

⁷⁴ *Jordan v. Hall*, 510 S.W.3d 197, 198 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

⁷⁵ *Id.* at 198 (citation omitted) (emphasis in the original).

⁷⁶ *San Jacinto Title Servs. of Corpus Christi, LLC v. Kingsley Properties, LP*, 452 S.W.3d 343, 350–51 (Tex. App.—Corpus Christi 2013, pet. denied).

⁷⁷ *Id.* at 350.

⁷⁸ *Id.*

⁷⁹ *Id.* at 346.

⁸⁰ *Id.* at 350.

date, so the TCPA did not apply to any of the claims.⁸¹ The Court further found that because of the merger, SJT did not exist as an entity separate and apart from SJCC; therefore, although SJT was joined as a defendant after the effective date of the TCPA, the plaintiff's claims against SJCC, which were filed prior to the effective date applied to SJT.⁸²

Courts appear to interpret an amendment or supplement that only includes additional facts of existing claims, or even ancillary claims that are merely a "subset" of the original claims, as not being an "amendment" per se under the TCPA. Although these opinions were released before the 2019 legislative session, which added Subsection (A) as an exemption to the definition of a "legal action," the principles expressed in these holdings may still be applied to forthcoming suits. Also, despite some of the opinions' focus on the tolling of the sixty-day deadline, the amendment or supplementation of a claim also relates to the definition of a "legal action," and therefore, the very application of the TCPA to a particular claim or lawsuit.

On the other hand, however, with the addition of Subsection (A) to Section 27.001(6), it is also possible that courts will now interpret the statute literally, construing *any* amended or added claim for legal, equitable, or declaratory relief as a "legal action" and applying the TCPA, regardless of substance or content. If any such amendment or addition is found to be a "legal action," questions then arise as to how the term "legal action" should be applied to the claim and/or the lawsuit, and further, how that finding affects the deadline to file a TCPA motion. Such issues are discussed in the following sections.

2. The Application of "Legal Action" After the Added or Amended Claim

The second question that arises from the new exemption found in Subsection (A) of Section 27.001(6) is the effect of the added or amended claim on the existing lawsuit. Specifically, if the added or amended claim gives rise to a "legal action" as defined under the TCPA, does the TCPA then apply to the amended or new claim alone, or does it apply to the entire existing lawsuit? Some courts appear to segregate the new or amended claims from the pre-existing claims. In *Better Business Bureau of Metropolitan Dallas v. Ward*, the Dallas Court of Appeals stated that the TCPA is "broad and evidences a legislative intent to treat any claim by any party on an individual and separate basis."⁸³

Citing *Ward*, the Houston First Court of Appeals discussed the application of the TCPA on claims that were filed after the effective date of the TCPA. In *James v. Calkins*, Appellant Carolyn Calkins James appealed the denial of her TCPA motion to dismiss filed against Appellees Richard Stephen Calkin and Michael Easton, based on the timing of new and amended claims.⁸⁴ Appellees had filed their original petition in April of 2011, prior to the effective date of the TCPA (June 17, 2011), and argued that the TCPA did not apply to their claims because their lawsuit was filed before the TCPA went into effect.⁸⁵ However, after June 17, 2011, Appellees repeatedly amended their claims and also joined Mary Elizabeth Urquhart and G. Wesley Urquhart, P.C. as defendants.⁸⁶ The Court held that the TCPA applied to all claims against the new defendants because they were joined after the effective date of the TCPA.⁸⁷ The Court further found that Appellees' claims of fraud, barratry, and fraudulent lien, which were asserted after the TCPA went into effect, were subject to the TCPA.⁸⁸

The Texas Rules of Civil Procedure also support the idea that a "legal action" would only refer to the newly added or amended claims. Specifically, Rule 41, in discussing the severability of claims and parties, states in relevant part:

Parties may be dropped or added, or suits filed separately may be consolidated, or actions which have been improperly joined may be severed and each ground of recovery improperly joined may be docketed as a separate suit between the same parties, by order of the court on motion of any party or on its own initiative at any stage of the action Any claim against a party may be severed and proceeded with separately.⁸⁹

Accordingly, although neither the legislature or the Courts have yet addressed the specific application "legal action" pursuant to Subsection (A), absent an amended statute or court ruling to the contrary, it is likely the "legal action" would only apply to the amended or new claim, and not to the entire lawsuit. This conclusion is supported by the discussion regarding the TCPA filing deadline as laid out below.

⁸¹ *Id.* at 350–51.

⁸² *Id.* at 351.

⁸³ *Better Bus. Bureau of Metro. Dallas Inc. v. Ward*, 401 S.W.3d 440, 443 (Tex. App.—Dallas 2013, pet. denied).

⁸⁴ *James v. Calkins*, 446 S.W.3d 135, 144 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 145.

⁸⁸ *Id.*

⁸⁹ TEX. R. CIV. P. 41.

3. The Effect of the Added or Amended Claim on the Filing Deadline

The TCPA is noticeably silent as to the effect of an amended petition filed by the plaintiff on the defendant's filing deadline for a TCPA motion.⁹⁰ The absence of this provision is significant because, by contrast, the Texas legislature has provided a mechanism for resetting the deadline for filing similar motions to dismiss under Rule 91a of the Texas Rules of Civil Procedure.⁹¹ However, the legislature's reasoning for failing to include a similar provision for TCPA motions becomes apparent upon further examination of the purpose of the TCPA itself. As the El Paso Court of Appeals has stated, "We see nothing in the [TCPA] or its history and purpose to indicate that the Legislature intended to create a perpetual opportunity to file a motion to dismiss" ⁹² Resetting the deadline based on an amended petition that brings the same or similar causes of action and relies on the same previously pleaded facts would "defeat the [TCPA's] purpose of dismissing unmeritorious suits based on or related to the exercise of free speech *early in the litigation or in an expeditious manner*."⁹³

The legislature made significant amendments to the TCPA just this year, and still refrained from including an express provision for resetting the filing deadline based on an amended pleading. At first glance, it would appear that their intent is parallel to the foregoing reasoning by the courts—to permit dismissal under the TCPA early in the litigation, but not beyond the sixty days. However, the legislature's addition of Subsection (A) muddies the waters of this interpretation because it suggests that an amended or added claim would be considered a "legal action." The only possible purpose for classifying an amended or new claim as a "legal action" would be to effectively reset the filing deadline of a TCPA motion for, at minimum, those added or amended claims.

The legislature's addition of Subsection (A) necessitates a balancing of interests between the plaintiff and defendant with regards to the filing deadline of a TCPA motion. The balance is described in the statute itself: the TCPA must be applied to give weight to the protection of a defendant's right to freely exercise his rights of freedom of speech, petition, and association, while also supporting a plaintiff's right to file a meritorious lawsuit for demonstrable injury.⁹⁴ On one hand, a defendant is given the right to file his TCPA motion within sixty days to protect his constitutional rights; if he fails to do so, the plaintiff has the right to proceed with his lawsuit unhindered. However, in

theory under Subsection (A), a plaintiff could have a lawsuit on file for months, or even a year or more, far beyond the beginning of the lawsuit or the sixty-day filing deadline, and then amend or add one claim, for which the defendant would be able to file a TCPA motion to dismiss. Subsection (A), then, appears to contravene the very purpose of the TCPA as previously described by both the legislature and the courts.

As discussed previously, it appears that the legislature intended Subsection (A) to apply to only the new and/or amended claims, and not the plaintiff's entire lawsuit. In weighing the fairness of the application of this Subsection to each party, a plaintiff who has filed a meritorious lawsuit is essentially punished under Subsection (A) when he files a new or amended claim because he grants the defendant an additional and previously impermissible opportunity to dismiss that claim. By contrast, the defendant should not be penalized by a bright-line sixty-day deadline when a plaintiff adds a totally brand new and/or unrelated claim to his lawsuit a year after it was initially filed; logic seems to indicate that the defendant should have a right to file a TCPA motion on the new claim. Both parties' concerns should be considered, and because they are fact specific, the applicability of the TCPA to a new or amended claim should be determined on a case-by-case basis. A suggested revision to the statute, which gives an equitable result for both parties, may be this: a claim that existed in a plaintiff's original petition would be subject to the hard and fast rule of a sixty-day deadline, because the defendant had the opportunity to file a TCPA motion on that claim when he was initially served with it. Therefore, any subsequent amendments would not be considered a "legal action" because the amendment, even if it added some facts, would not change the legal basis for the claim. By contrast, a new claim added in an amended petition would be considered a "legal action" and would reset the sixty-day deadline, but only with respect to that new claim. This mechanism would provide a defendant the full benefit of the sixty days provided by the TCPA for each respective claim, while granting the plaintiff the ability to proceed with his lawsuit without fear that amending his existing claims will prompt another TCPA fight months, or even years, into the litigation.

Although the amendments to the TCPA evidence the legislature's attempts to clarify and narrow the scope of the statute, clarifications with respect to some of the changes are still needed. The discussion of the TCPA amendments—and those portions of the statute that remained the same—continues below, including an

⁹⁰ See TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(b) (West 2019).

⁹¹ See TEX. R. CIV. P. 91a.5.

⁹² *Miller v. Weisbrod, L.L.P. v. Llamas-Soforo*, 511 S.W.3d 181, 193 (Tex. App.—El Paso 2014, no pet.).

⁹³ *In re Estate of Check*, 438 S.W.3d 829, 837 (Tex. App.—San Antonio 2014, no pet.) [emphasis added].

⁹⁴ CIV. PRAC. & REM. § 27.002.

analysis of the provisions concerning a defendant's constitutional rights of free speech, association, and petition.

B. Right of Free Speech

The TCPA currently defines the exercise of the right of free speech as “a communication made in connection with a matter of public concern.”⁹⁵ Communication includes the “making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.”⁹⁶ Notably, neither of these definitions were amended by the legislature in 2019. Under the plain language of the TCPA, the application of the TCPA extends to almost any imaginable form of communication, in any medium.⁹⁷ The Texas Supreme Court has broadly interpreted the TCPA to include both public and private communications.⁹⁸

However, the definition of a “matter of public concern” somewhat limits the application of the TCPA to a defendant's right of free speech, and has been narrowed even further by the latest amendment to the TCPA. Until 2019, a “matter of public concern” was defined as 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.⁹⁹

This vague definition resulted in a host of case law wherein courts attempted to identify exactly what qualified as a matter of public concern. For example, the Fourteenth Court of Appeals interpreted the TCPA's language to mean that a claim actionable under the TCPA must be “based on, relates to, or in response to” a party's “right of free speech, right to petition, or right of association” as being informed by its title, legislative history, and stated purpose, noting that the purpose included the phrase, “otherwise participate in government.”¹⁰⁰ The Court therefore held that the legislature intended the TCPA to protect “only communications that are analogous to participating in

government” and “only communications that may be in the public interest.”¹⁰¹

Other courts have held that the TCPA was not intended to apply to suits between private parties with private issues that were unrelated to the government or public participation. For example, in *Cheniere Energy, Inc. v. Lofti*, the First Court of Appeals considered two individual defendants' contention that their private conversations about the plaintiff's job performance invoked a “common interest” and deserved protection.¹⁰² The Court rejected this contention, holding that the terms “citizen” and “participation” in the TCPA's title “contemplate[s] a larger public purpose” and that the TCPA cannot be used to dismiss “private suits implicating only private issues.”¹⁰³ The word “related” in the definition especially gave courts heartburn, as parties repeatedly would argue that the broad construction of the TCPA gave large amounts of leeway in its application to communications between parties. For example, the Eastern District of Texas, in interpreting the TCPA, found that application of the TCPA was not limited to the plaintiff's defamation claims, but also to other civil claims based on defamation, including tortious interference and civil conspiracy.¹⁰⁴ The Texas Supreme Court stifled some of the overbroad interpretations of this portion of the statute in 2017 by holding that the TCPA protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.¹⁰⁵ The statute, however, desperately needed amendment to reflect that opinion.

Fortunately, in 2019, the Texas legislature completely rewrote the definition of “a matter of public concern,” which appears to support the interpretation that the TCPA was indeed intended to apply to public or government-involved matters rather than private issues between private parties. Specifically, a matter of public concern now means a statement or activity regarding:

- (A) a public official, public figure, or other person who has drawn substantial attention due to the person's official acts, fame, notoriety, or celebrity;
- (B) a matter of political, social, or other interest to the community; or

⁹⁵ CIV. PRAC. & REM. § 27.001(3).

⁹⁶ TEX CIV. PRAC. & REM. CODE ANN. § 27.001(1) (West 2011).

⁹⁷ *Gaskamp v. WSP USA, Inc.*, No. 01-18-00079-CV, 2018 WL 6695810, at *10 (Tex. App.—Houston [14th Dist.] Dec. 20, 2018, no pet. filed).

⁹⁸ *Lippencott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

⁹⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West 2011).

¹⁰⁰ *Jardin v. Marklund*, 431 S.W.3d 765, 771 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

¹⁰¹ *Id.* at 772.

¹⁰² *Cheniere Energy, Inc. v. Lofti*, 449 S.W.3d 210, 212 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

¹⁰³ *Id.* at 216–17.

¹⁰⁴ *Haynes v. Crenshaw*, 166 F.Supp.3d 764, 769 (E.D. Tex. 2016).

¹⁰⁵ *In re Lipsky*, 460 S.W.3d 579, 584 (Tex. 2015) (orig. proceeding).

(C) a subject of concern to the public.¹⁰⁶

The inclusion of the words “public” (repeatedly), “community,” and “official acts of fame, notoriety, or celebrity” confirm the legislature’s intent to narrow the scope of the application of the TCPA so that this section only applied to issues concerning the public and/or the government.

C. Right to Petition

Despite the TCPA’s express purpose to protect constitutional rights, the TCPA’s definition of the “right to petition” is far more broad.¹⁰⁷ The TCPA’s definition of the “right to petition” was also not amended in 2019, probably because the legislature believed that the lengthy definition already included language that contains similarities to the new definition of “matters of public concern.” The definition also applies to various types of “communication” related to the government or the public, so the rights of petition and free speech go hand in hand. Without laying out the entire, extensive definition, the “exercise of the right to petition” refers to communications that, for example, pertain to “a judicial proceeding,”¹⁰⁸ “an official proceeding, other than a judicial proceeding, to administer the law,”¹⁰⁹ or communications that are “reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial, or other governmental body or in another governmental or official proceeding.”¹¹⁰ Section 27.001 goes on to provide definitions for “governmental proceeding,” “official proceeding,” and “public servant,” all which demonstrate that private actions and communications are not applicable to the right to petition under the TCPA.¹¹¹ Some examples of communications to which the TCPA was applied under this subsection are: a purported rape victim’s statements to law enforcement officials, even in the absence of a live proceeding;¹¹² and a former school district communications director’s

claim that a local attorney participated in her criminal trial as part of an alleged RICO conspiracy implicated the attorney’s right to petition under the TCPA.¹¹³ On the other hand, other examples where the right to petition was not implicated under the TCPA are: a buyer’s alleged failure to release a lis pendens;¹¹⁴ and discovery responses and deposition questions are not considered to fall under the “right to petition”.¹¹⁵

However, this section of the TCPA is broadly construed, and ambiguities still arise with regards to interpretation of the right to petition. Specifically, every sub-part of the definition of “right to petition” relates somehow to the government or public proceedings. In fact, one court has stated that the TCPA’s definition of the right to petition generally encompasses most, if not all, claims filed in court.¹¹⁶ Importantly, although the definition of the exercise of the right to petition contains similar language to the definition for matters of public concern, there is only one small subsection of the definition for the exercise of the right to petition that actually contains the words “matter of public concern.”¹¹⁷ Therefore, courts have interpreted this definition far more broadly than the exercises of the right to free speech or association, which require that the claim subject to the TCPA motion be related to matters of public concern. In fact, some defendants who file a TCPA motion rely more heavily on the application of the right to petition, as opposed to the rights of free speech or association, because it the TCPA is more broadly applied to the right to petition than the rights of free speech or association.¹¹⁸ Based on the similarities in the definitions for the exercise of the right to petition and matters of public concern, the legislature may have believed that the definitions were sufficient to indicate the requirement of finding that the claim attacked under the TCPA requires government or public participation. However, as evidenced by the case law, further clarification is needed.

¹⁰⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(7) (West 2019).

¹⁰⁷ See U.S. Const. Amend. 1; see also Tex. Civ. Prac. & Rem. Code § 27.002; *Beving v. Beadles*, 563 S.W.3d 399, 405 (Tex. App.—Fort Worth 2018, pet. denied), citing *Jardin v. Marklund*, 431 S.W.3d 765, 772 – 73 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (op. on reh’g) (discussing a movant’s argument that simply filing a pleading in a lawsuit between private parties invokes the TCPA as protecting the right to petition “despite . . . the particular meanings of the constitutional rights at issue.”).

¹⁰⁸ CIV. PRAC. & REM. § 27.001(4)(A)(i).

¹⁰⁹ CIV. PRAC. & REM. § 27.001(4)(A)(ii).

¹¹⁰ CIV. PRAC. & REM. § 27.001(4)(D).

¹¹¹ CIV. PRAC. & REM. § 27.001(5), (8)–(9).

¹¹² *Cuba v. Pylant*, 814 F.3d 701, 711–12 (5th Cir. 2016).

¹¹³ *Haynes v. Crenshaw*, 166 F.Supp.3d 764, 771 (E.D. Tex. 2016).

¹¹⁴ *Shopoff Advisors, LP v. Atrium Circle, GP*, No. 04-18-00438-CV, 2019 WL 2996977 at *7 (Tex. App.—San Antonio July 10, 2019, no pet.) (finding also that the filing of a lis pendens does implicate the right to petition under the TCPA).

¹¹⁵ *Pinghua Lei v. Nat. Polymer Int’l Corp.*, 578 S.W.3d 706, 716–17 (Tex. App.—Dallas 2019, no pet. filed).

¹¹⁶ *Hawxhurst v. Austin’s Boat Tours*, 550 S.W.3d 220, 227 (Tex. App.—Austin 2018, no pet.).

¹¹⁷ TEX. CIV. PRAC. & REM. CODE ANN § 27.001(4)(A)(ix) (West 2019).

¹¹⁸ See, e.g., *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at *4 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied) (finding that unlike with the rights of association and free speech, a finding that the claim relates to a matter of public concern is not required for the TCPA to apply to a claim related to the exercise of the right to petition).

D. Right to Association

In keeping with the trend of adding the “government” component to the definitions, the Texas legislature also amended the definition of the “exercise of the right of association.” The old definition stated that the right of association meant “a communication between individuals who join together to collectively express, promote, pursue, or defend common interests.”¹¹⁹ Courts had some difficulties in figuring out how to apply this definition; the term “common interest” was not defined, and also, courts disagreed as to the breadth of the definition with regards to public versus private communications. The El Paso Court of Appeals, in literally construing the old definition, held that unlike the definition for free speech, the right of association was not expressly conditioned on a public purpose.¹²⁰ By contrast, the Dallas Court of Appeals held that the right of association under the TCPA “must involve public or citizen’s participation.”¹²¹

However, the legislature clarified the definition this year so that it more closely reflects the public and/or government participation requirements, as demonstrated by the definitions for the rights of free speech and petition. The definition now states that the right of association means “to join together to collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern.”¹²² In conjunction with the new version of the statute, courts have been quick to find that the application of the TCPA related to the right of association should be more narrowly construed to only apply in cases related to governmental or public concerns. For example, the Dallas Court of Appeals found that communications between a manager and employees related to hiring for a scrap-metal business were not made in connection with a matter of public concern, so the TCPA’s right of association did not apply.¹²³ The Fort Worth Court of Appeals even had to clarify that the requirement of a common interest as required by the TCPA’s definition of right of association must be shared by the public or at least a group, and does not include the interests of two conspirators who join together to commit a tort.¹²⁴ However, the new definition of the right to association appears to have largely clarified the issues courts previously faced when

construing the TCPA and motions filed under that statute.

E. Other Notable Amendments

The Texas legislature made several other amendments worth mentioning to the TCPA. Section 27.006, which describes the proof required to determine whether the TCPA applies to a claim, was amended to add the phrase “evidence a court could consider under Rule 166a, Texas Rules of Civil Procedure.”¹²⁵ This amendment is interesting because Rule 166a governs the procedure and evidence for a motion for summary judgment, so the statute is essentially saying that a TCPA motion may be supported by the same evidence as a party could bring for a motion for summary judgment.¹²⁶ However, despite being able to use the same evidence for both motions, an order granting a party’s motion for summary judgment is a final, appealable order, whereas an order granting a party’s TCPA motion (if it only disposes of some claims) is considered interlocutory and is not appealable by the non-movant until the litigation has been completely adjudicated.¹²⁷ This new provision may indicate that the legislature is hopefully moving in a direction that would change the rules of appeal for a non-movant related to an order granting a TCPA motion.

The legislature also changed the requirement for the court to issue findings regarding sanctions. Specifically, while the old statute required the court to issue findings at the request of the moving party, the new statute now only requires the court to issue findings if the court awards sanctions under Section 27.009(b).¹²⁸

An entirely new section was added that describes the effect of a ruling under the TCPA with regards to evidence and proceedings later on in the case. Section 27.0075 states, “Neither the court’s ruling on the motion nor the fact that it made such a ruling shall be admissible in evidence at any later stage of the case, and no burden of proof or degree of proof otherwise appealable shall be affected by the ruling.”¹²⁹

The provisions governing a court’s award of attorneys’ fees, costs, and sanctions also changed. Upon the dismissal of a claim under the TCPA, the statute used to require that the court award the moving party attorneys’ fees and costs incurred in defending against the legal action, as well as mandatory sanctions against

¹¹⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(D) (West 2011).

¹²⁰ *MVS Int’l Corp. v. Int’l Advert. Sols., LLC*, 545 S.W.3d 180, 194 (Tex. App.—El Paso 2017, no pet.).

¹²¹ *Dyer v. Medoc Health Servs., LLC*, 573 S.W.3d 418, 426, n.7 (Tex. App.—Dallas 2019, pet. denied.).

¹²² TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(2) (West 2019).

¹²³ *Goldberg v. EMR (USA Holdings) Inc.*, No. 05-18-00261-CV, 2019 WL 3955771 at

¹²⁴ *Kawcak v. Antero Res. Corp.*, 582 S.W.3d 566, 576 (Tex. 2018) (holding that the interests of two co-conspirators do not fall under the primary definition of “common”).

¹²⁵ CIV. PRAC. & REM. § 27.006(a).

¹²⁶ TEX. R. CIV. P. 166a.

¹²⁷ *See id.*; *see also* CIV. PRAC. & REM. §§ 27.008, 57.014.

¹²⁸ CIV. PRAC. & REM. § 27.007.

¹²⁹ CIV. PRAC. & REM. § 27.0075.

the non-moving party who brought the legal action if the court determined that it would be a sufficient deterrent to keep that party from bringing another frivolous action.¹³⁰ However, the amended version backs off of such harsh language regarding sanctions, and provides that while the court still is required to award attorneys' fees and costs to a movant who prevails on a TCPA motion, the award of sanctions is now only discretionary.¹³¹ The legislature also added a completely new subsection to specify an exception to the rule that the award of attorneys' fees and costs are mandatory to a prevailing movant on a TCPA motion. Specifically, Section 27.009(c) states that if the court dismisses a compulsory counterclaim by granting a TCPA motion, the court, at its discretion, may award the moving party reasonable attorneys' fees incurred in defending against the counterclaim, but only if the court finds that the counterclaim is frivolous or solely intended for delay.¹³²

The last significant amendment, which will be discussed more thoroughly in Section IV *infra*, was the addition of a laundry list of exemptions under Section 27.010 of the TCPA.¹³³ The legislature also added two subsections—Subsections (b) and (c)—to provide clarification for certain communications or actions for which the TCPA still applied, despite the foregoing list of exemptions.¹³⁴ In summary, it is clear from the legislature's amendments that the intent was to not only narrow the scope of the TCPA to certain claims but also to soften the blow to a plaintiff of having a TCPA motion granted against him. However, these amendments still fall short of providing fairness to each party, and, as discussed below, there are still exemptions that should be added to the TCPA.

IV. THE ESTATES CODE AND PROPERTY (TRUST) CODE SHOULD BE EXEMPTED FROM THE TCPA

Although this paper presents the idea that the TCPA is often abused, there are many cases where a defendant's use of the TCPA is appropriate. Claims for defamation, for example, present a prime illustration of the TCPA being properly applied because defamation claims also implicate a defendant's constitutional right of free speech. Defamation claims and the TCPA also both largely involve claims based on certain communications made to the public. In fact, the new definition for a "matter of public concern" reflects some

of the requirements for proving a defamation claim by a public servant. The Texas Supreme Court has distinguished the level of proof required of public officials and public figures in order to prove a defamation claim is higher in comparison the burden of proof for to private plaintiffs.¹³⁵ Specifically, while a private individual need only prove negligence, a public figure must prove malice occurred with regards to the communication in question, and that communication must be published.¹³⁶ Similarly, a moving defendant under the TCPA cannot prevail on a TCPA motion with regards to private communications and private individuals, but rather, must show that the communication in question was based on a matter of public concern.¹³⁷ One court, in discussing the TCPA's relation to defamation claims, found that the TCPA does not override such claims, but rather, merely imposes a procedural hurdle to require a threshold showing of the merit of the claim.¹³⁸ Other examples of claims to which the TCPA is properly applied, and which involve communications related to a matter of public concern, are claims for business disparagement, tortious interference with a business relationship, civil conspiracy, and false advertising.

However, the TCPA should not be applied to all claims or all lawsuits. The legislature, recognizing this principle, added a total of eight new exemptions under the TCPA in 2019. These new exemptions include certain actions brought under the Family Code (claims related to marriage, divorce, protective orders and family violence, and suits affecting the parent-child relationship),¹³⁹ the Business and Commerce Code (deceptive trade practices),¹⁴⁰ the Occupations Code and/or the Health and Safety Code (immunity from civil liability for certain medical personnel),¹⁴¹ the Property Code (eviction suits),¹⁴² and the Government Code (reporting violations of the law or certain disciplinary proceedings).¹⁴³ By adding these exemptions, the legislature undoubtedly realized that these suits, especially those brought under the Family and Property Codes, involve private suits with private individuals in which the TCPA has no role. By this same reasoning, the Estates Code (which encompasses proceedings filed

¹³⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a) (West 2011).

¹³¹ TEX. CIV. PRAC. & REM. CODE ANN. § 27.009(a). (West 2019).

¹³² CIV. PRAC. & REM. § 27.009(c).

¹³³ CIV. PRAC. & REM. § 27.0010.

¹³⁴ CIV. PRAC. & REM. § 27.0010(b)–(c).

¹³⁵ *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998).

¹³⁶ *Id.*

¹³⁷ CIV. PRAC. & REM. § 27.007.

¹³⁸ *Schmidt v. Crawford*, 2019 WL 3926468 (Tex. App.—Houston [1st Dist.] 2019).

¹³⁹ CIV. PRAC. & REM. § 27.010(6).

¹⁴⁰ CIV. PRAC. & REM. § 27.010(7).

¹⁴¹ CIV. PRAC. & REM. § 27.010(8).

¹⁴² CIV. PRAC. & REM. § 27.010(9).

¹⁴³ CIV. PRAC. & REM. § 27.010(10).

for both estates and guardianships)¹⁴⁴ and the Titles 9 and 10 of the Property Code (governing trusts and fiduciaries) should also be added as exemptions.

When interpreting the meaning of a statute, the overarching principle of interpretation with the TCPA, or any statute, commands that the court must go no further to understand the Act than the plain meaning of the words the statute uses.¹⁴⁵ However, the Texas Supreme Court has also stated that the first principle used to analyze the meaning of words in a statute is that “[w]ords not statutorily defined bear their common, ordinary meaning unless a more precise definition is apparent from the statutory context or the plain meaning yields an absurd result.”¹⁴⁶ The plain meaning of the TCPA demonstrates an overarching theme that the proper claims for the application of the statute involve matters of public concern and/or government involvement. Nevertheless, the Estates Code and the Trust Code remain absent from the list of exemptions. In short, applying the TCPA to contested claims filed under the Estates Code or the Trust Code would lead to an absurd result—exactly the type of result that the Supreme Court sought to avoid.

The contested claims filed under the Estates Code and Trust Code implicate disputes between private parties who are litigating claims related to a guardianship, a trust, or a deceased person’s estate. Most, if not all, of these cases do not involve communications that fall under the definition of matters of public concern, nor do the claims otherwise relate to a political social, or other interest to the community. Therefore, by the bare definitions contained in Chapter 27 of the Civil Practice and Remedies Code, the TCPA should not be applied to these types of cases.

Nevertheless, defendants continue to try to apply the TCPA to claims brought under the Estates and Trust Codes. For example, the Houston First Court of Appeals affirmed the denial of a TCPA motion brought against the administrator of an estate.¹⁴⁷ Maurice Bresenhan was the court-appointed administrator of the Estate of Mary Calkins.¹⁴⁸ When the Decedent’s son, Richard Calkins, declined to provide information to Ms. Bresenhan that she needed to prepare the Decedent’s individual and estate tax returns, Ms. Bresenhan sought

an order from the court to compel Mr. Calkins to turn over the documentation.¹⁴⁹ In response, Mr. Calkins filed a TCPA motion, alleging that the order compelling him to provide documents implicated his constitutional rights to free speech, association, and petition, because the documents related to previous litigation concerning whether to establish a guardianship for Decedent.¹⁵⁰ The First Court of Appeals ultimately held that Ms. Bresenhan’s motion to compel the production of tax information was not subject to the TCPA because it did not fall under the definition of a “legal action”, nor did it relate to the protections described by the TCPA.¹⁵¹

By contrast, another case, also in the First Court of Appeals, dismissed a party’s action under the TCPA because the Court ruled that the claims attacked the defendant’s right to petition.¹⁵² As discussed previously, a TCPA motion that is based on the exercise of the right to petition does not expressly require a finding that the claim relates to a matter of public concern.¹⁵³ Therefore, the right to petition is construed far more broadly than either the exercise of the rights to free speech or association. In *Collins v. Collins*, Corinna Collins, the former wife of Decedent Bryant Collins, sued Kelly Collins, Bryant’s surviving spouse and the administrator of his estate.¹⁵⁴ Specifically, Corinna brought claims for fraud, conversion, and partition, alleging that Bryant misrepresented his assets during their divorce proceedings in 2007.¹⁵⁵ In response, Kelly filed a TCPA motion to dismiss, asserting that Corinna’s suit implicated Bryant’s right to petition because her claims concerned representations made during a judicial proceeding.¹⁵⁶ The probate court denied the TCPA motion, finding that Kelly did not demonstrate that the claims implicated a matter of public concern.¹⁵⁷ However, the Houston First Court of Appeals reversed, finding that the TCPA applied based on the exercise of the right to petition, which did require a finding that the claim was related to a matter of public concern, and dismissed Corinna’s claims.¹⁵⁸

Finally, the case *In re Estate of Check* demonstrates the use of the TCPA in a will contest. Rachele Marie Powers was appointed as Independent Executor of the Estate of Paul Check, and the Decedent’s brother, Patrick Check, subsequently filed a will contest,

¹⁴⁴ All references to the “Estates Code” refer to both the estates and guardianship provisions as found in the Texas Estates Code.

¹⁴⁵ *Kawcak v. Antero Resources Corp.*, 582 S.W.3d 566, 574 (Tex. App.—Fort Worth 2019, pet. denied).

¹⁴⁶ *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

¹⁴⁷ *In re Estate of Calkins*, 580 S.W.3d 287, 299 (Tex. App.—Houston [1st Dist] 2019, no pet. filed).

¹⁴⁸ *Id.* at 290.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 299.

¹⁵² *Collins v. Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at *4 (Tex. App.—Houston [1st Dist.] Mar. 15, 2018, pet. denied)

¹⁵³ See TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4) (West 2019).

¹⁵⁴ *Collins*, No. 01-17-00817-CV, 2018 WL 1320841, at *1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *2.

¹⁵⁸ *Id.* at *5.

alleging claims of lack of testamentary capacity, undue influence, fraud, conversion, and breach of fiduciary duty.¹⁵⁹ Ms. Powers counterclaimed the will contest based on defamation and bad faith.¹⁶⁰ In response, Mr. Check filed a TCPA motion to dismiss, alleging that Ms. Powers's claims implicated his rights of free speech and petition.¹⁶¹ The Court of Appeals held that the denial of the TCPA motion was proper because the motion was untimely, and because the amended counterclaim filed by Ms. Powers did not fall under the definition for a "legal action."¹⁶² Although the Court did not reach a discussion regarding the merits of the motion because the motion itself was untimely, this case presents yet another example of the use of the TCPA in conjunction with claims brought under the Estates Code.

Although the probate courts have largely been good stewards of the TCPA in cases brought under the Estates Code and Trust Code, the mere permissibility of being able to bring TCPA motions in these cases creates a host of problems that did not previously exist. Specifically, these cases very often involve claims of lack of testamentary capacity, undue influence, and even claims related to elder abuse; an order granting a TCPA motion would dismiss these claims simply because they implicate the will proponent's right to petition the courts to admit the will to probate. Very often, the proponent of a contested will is the very party that was involved in its (often invalid) execution. If the proponent of the will files a TCPA motion against the contestants, and it is granted, the TCPA has now effectively protected a tortfeasor from being liable for his actions, and prevented the beneficiaries of an estate from asserting their rightful claim to an estate. This problem similarly arises with regards to the beneficiaries of trusts, as modern estate plans often include both wills and trusts. Accordingly, any claims brought under the Texas Estates Code should be exempted from the TCPA.¹⁶³

Similarly, guardianships should be exempted from the TCPA. Many families often find themselves in the sad and difficult position of having to apply for guardianship for a family member who suffers from an illness such as Alzheimer's, dementia, a head injury, or other ailments. Moreover, actually being appointed to serve as a person's guardian is even worse than the

procedure for filing for a guardianship—it is a thankless, time-consuming, challenging responsibility, and many guardians struggle both emotionally, mentally, and sometimes even financially. However, as the TCPA is currently drafted, this process can become even more complicated. Upon the filing of an application for guardianship, the court is required to appoint an attorney ad litem to represent interests of the proposed ward.¹⁶⁴ The burden of proof by an applicant to demonstrate that a guardianship is necessary is higher than many civil cases—proof is by clear and convincing evidence—because the very effect of a permanent guardianship removes many, if not all, of the proposed ward's constitutional rights.¹⁶⁵ In the current state of the TCPA, if a family member applies for guardianship, the attorney ad litem, on behalf of the proposed ward, could file a TCPA motion to dismiss the guardianship proceedings. If the proposed ward is indeed incapacitated but the proceedings are dismissed under the TCPA, the proposed ward then left without the care that he needs or a person to make decisions on his behalf. If the applicant appeals, the applicant then has to wait months more for the appeal to be adjudicated, and then hopefully see the action returned to the probate court for further determination on the guardianship. This negative effect is further magnified if the proposed ward is the victim of elder abuse, when guardianship becomes even more emergent. This outcome can be described as nothing more than what the Texas Supreme Court termed an "absurd result,"¹⁶⁶ and as such, proceedings involving guardianships should be exempted from the TCPA.

The procedural effects of the TCPA also lead to negative consequences in claims brought under the Estates and Trust Codes. As of the 2019 legislative session, declaratory judgment actions are now included in the definition of a "legal action" under the TCPA.¹⁶⁷ However, petitions for declaratory judgment are a mainstay of estate and trust-related proceedings because parties often need various issues construed by the court, including: the interpretation of wills, trusts, and other documents; orders to direct fiduciaries to perform or refrain from certain actions; findings to determine questions related to the administration of a trust or

¹⁵⁹ *In re Estate of Check*, 438 S.W.3d 829, 830 (Tex. App.—San Antonio 2014, no pet.).

¹⁶⁰ *Id.* at 831.

¹⁶¹ *Id.* at 831–32.

¹⁶² *Id.* at 836–37.

¹⁶³ Plaintiffs in these cases often not only bring will contests, but also related claims for conversion, fraud, breach of fiduciary duty, and others. Common law fraud claims are already exempted from the TCPA (TEX. CIV. PRAC. & REM. CODE ANN. § 27.101(12) (West 2019)), but the rest are not. Therefore, this Article proposes the idea that when a plaintiff brings his primary claim under the either the Texas Estates

Code (for example, a will contest or guardianship proceedings) or the Trust Code (for example, removal actions or suits to compel accountings) any claims brought ancillary to these primary claims should also be exempted from the TCPA because they are based on the same operative facts which involve estates, trusts, or guardianships.

¹⁶⁴ TEX. EST. CODE ANN. § 1054.001 (West 2014).

¹⁶⁵ See EST. § 1101.101.

¹⁶⁶ *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 838 (Tex. 2018).

¹⁶⁷ CIV. PRAC. & REM. § 27.001(6).

estate; or declarations of the rights of parties under certain instruments.¹⁶⁸ These petitions for declaratory judgment are often filed alone under Section 37.004 of the Texas Civil Practice and Remedies Code, with no additional claims, simply because the parties require the court's assistance with the foregoing issues. Shockingly, the TCPA now enables a party to dismiss an action for declaratory judgment because it qualifies as a "legal action." Dismissal of these claims will undoubtedly cause, at minimum, the administration of trusts and estates to languish and will result in confusion among fiduciaries and beneficiaries alike. Again, this result is "absurd" and does not reflect the expeditious remedies clearly contemplated by both the legislature and the courts. Therefore, Section 37.004 of the Civil Practice and Remedies Code, which relates to trusts and estates, should be exempted under the TCPA.

Moreover, as discussed previously, a TCPA motion stays all discovery pending the outcome of the motion.¹⁶⁹ Many lawsuits filed in proceedings concerning an estate and/or trust involve claims against a party who is misappropriating assets or engaging in self-dealing. In guardianship proceedings, the applicant typically files the application because the proposed ward is in need of a person to manage his or her care and daily needs. In some cases, the applications are filed to stop a person who is abusing or interfering in the ward's life and finances from continuing their bad acts. Temporary restraining orders and injunctions are common in these cases because both of these situations require quick action by the court to stop the defendant from causing further damage. By contrast, the mere filing of a TCPA motion puts a pause on the adjudication of these claims for at minimum thirty days, and up to one hundred twenty days, depending on when the court can hear the motion. The delay in the case is bad enough, but the suspension of discovery further prevents the plaintiff from gleaning information that would enable him to stop the damage from occurring. Then, of course, a dismissal can put the case on hold for several more months. The common phrase that "only law-abiding citizens follow the law" applies here: while a TCPA motion is pending against the plaintiff and discovery is suspended, the defendant may still continue his self-dealing, wasting of assets, abuse of an elderly person, or other such torts, because the plaintiff does not have enough information to pursue another remedy.

V. CONCLUSION

The TCPA has undergone significant changes in previous years which undoubtedly have narrowed the statute and clarified some of the issues that courts have previously faced with interpreting the TCPA. However,

some vague provisions require further examination from the legislature in future years, and remedying many of these ambiguities may also solve the imbalance of rights between plaintiffs and defendants with regards to the application of the statute. Apart from the clarifications needed in the some sections of the TCPA, however, a complete overhaul is needed as the TCPA relates to issues involving estates, trusts, and guardianships. In short, the TCPA has created more problems than solutions related to claims brought in these arenas. Accordingly, the entire Estates Code (including the provisions related to guardianships), Titles Nine and Ten of the Property Code (related to trusts), and Section 37.004 of the Civil Practice and Remedies Code (concerning declaratory judgment actions regarding trusts and estates) should be exempted from the TCPA during the 2021 Texas legislative session.

¹⁶⁸ See CIV. PRAC. & REM. § 37.005.

¹⁶⁹ CIV. PRAC. & REM. § 27.003(c) (" . . . all discovery in the legal action is suspended until the court has ruled on the motion to dismiss.").