MEMORANDUM

To: Members, Advisors, and Observers
Drafting Committee on Anti-SLAPP Act

From: Lane Shetterly, Chair
Robert T. Sherwin, Reporter

Date: February 12, 2018

Re: Overview of project; issues for consideration

The Uniform Law Commission has charged this Committee with drafting legislation on Strategic Lawsuits Against Public Participation, or "SLAPP" suits. The specific charge of the Committee was stated in the resolution approved by the Executive Committee:

> RESOLVED, that * * * a Drafting Committee be formed for an Anti-SLAPP Act to address the breadth of the act; limitations, if any, to be imposed after a motion to strike is made; the standard of review relating to the motion to strike; appeal rights from the grant or denial of a motion to strike; and whether the court should award attorney's fees and costs.

This memorandum highlights the major issues the Committee will need to consider as it begins its deliberations. Part I of the memo briefly discusses the background of SLAPP suits and anti-SLAPP legislation. Part II explores the six major issues the Committee must resolve in drafting a statute that, ideally, will serve the dual purposes of protecting individuals' rights to petition, associate, and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

I. BACKGROUND

A. What is a "SLAPP"?

"Strategic lawsuit against public participation," or SLAPP, is a term used to describe a specific kind of civil action brought by a plaintiff whose real aim is to silence or intimidate a critic, or punish the critic by subjecting that person to costly and lengthy

litigation. The credit for coining the label goes to Professors George Pring and Penelope Canan, who, in 1989, penned companion law review articles.[1] Pring wrote:

> Americans are being sued for speaking out politically. The targets are not typically extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[2]

Pring observed that certain types of activities—things like circulating petitions, calling consumer protection offices, reporting police misconduct, and speaking out at school board meetings—had a disturbing tendency to spark lawsuits against those who were simply trying to participate in local government or otherwise exercise their free-speech rights. Those lawsuits, which typically manifest themselves in the form of defamation, tortious interference, conspiracy, nuisance, and intentional infliction of emotional distress claims, can effectively silence important speech, particularly when they're brought by parties with substantial resources against individuals who lack the resources to mount a healthy defense. That's true even when the cases have no merit; the suits achieve success because defendants can't afford to defend them, and ultimately either retract their statements or agree to censor themselves in the future.

B. The Rise of "Anti-SLAPP" Legislation

In 1989—the same year Pring and Canan published their seminal articles—Washington became the first state to pass what is known as an "anti-SLAPP" law.[3] Since

---

[1] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989); Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENVTL. L. REV. 23, 24 (1989).

[2] Pring, *supra* note 1, at 3.

[3] *See* WASH. REV. CODE §§ 4.24.500-.520 (1989). Interestingly, in 2015, Washington also became the first state to have its anti-SLAPP law struck down by its own high court. *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015) (holding that Washington's amended law—which was expanded in 2010—infringed on the "right of trial by jury under article I, section 21 of the Washington Constitution because it require[d] a trial judge to invade the jury's province of resolving disputed facts and dismiss—and punish—nonfrivolous claims without a trial."). Technically, the New Hampshire Supreme Court was the first state high court to write that an anti-SLAPP law *could* violate the right to a trial by jury. *Opinion of the Justices (SLAPP Suit Procedure)*, 641 A.2d 1012, 1015 (N.H. 1994). But in that instance, the court had been asked by its state senate to opine about the constitutionality of pending anti-SLAPP legislation. *Id.* at 1012. In May 2017, Minnesota's Supreme Court struck down its state's anti-SLAPP law for the same reasons as court in Washington. *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017).

then, 30 other states, as well as the District of Columbia and the territory of Guam, have likewise enacted various forms of legislation to address SLAPP cases.[4] The most recent enactment was by Kansas in 2016.[5]

To be sure, most of the 33 statutory efforts differ from each other in some respect. Some are broad in scope, others are narrow. Some impose high burdens on plaintiffs, while others feature low hurdles. But it's safe to say that purpose of the typical anti-SLAPP law is to root out and end frivolous cases—those brought only to harass or punish one's critics—before the costs of litigation escalate and prevent a defendant from mounting a defense. They typically accomplish this goal by: 1) granting defendants specific avenues for filing motions to dismiss or strike early in the litigation process; 2) requiring the expedited hearing of these motions, coupled with a stay or limitation of discovery until after they're heard; 3) requiring the plaintiff to demonstrate the case has some degree of merit; and 4) imposing cost-shifting sanctions that award attorney's fees and other costs when the plaintiff is unable to carry its burden.

II. THE SIX MAJOR ISSUES AT PLAY

Those four most typical components of anti-SLAPP legislation, and the manner and means by which they can operate, should broadly frame the Committee's work. Within that frame, specifically, the Committee must determine:

- *The scope of the statute*—to what kinds of "speech" and "public participation" should the law extend? Otherwise put, when can defendants invoke the protections of the statute?

- *Standards for review*—what level of proof must the plaintiff adduce to survive a motion to dismiss under the statute, and what form must that proof take?

- *Discovery*—to what extent may the case progress after a motion to strike has been filed?

- *Attorney's fees*—should a prevailing defendant be entitled to recover its attorney's fees after the court rules on the motion? Should a prevailing plaintiff be entitled

[4] *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, http://www.anti-slapp.org/your-states-free-speech-protection/ (last visited February 11, 2018) (identifying the scope of anti-SLAPP laws in Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Guam, 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).
[5] KAN. STAT. ANN. § 60-5320 (2016).

to its fees if the defendant's motion was brought in bad faith or solely to delay the proceedings?

- *Timing*—should there be a time by which the defendant must file the motion to strike? A time by which the judge must hear the motion? A time by which the judge must rule on the motion?

- *Immediate Appealability*—should the denial of an anti-SLAPP motion to dismiss be subject to an immediate, interlocutory appeal? Relatedly, if only *some* of a plaintiff's claims are dismissed (leaving other claims to survive), should either party be able to immediately appeal the trial court's decision?

A. Scope

The first issue the Committee should address is the breadth of its legislation. Many states have enacted protections that only extend to suits related to limited activities or specific individuals. Conversely, other states—and this appears to be the trend—have adopted statutes that essentially encompass any action that arises out of a person's exercise of free speech rights on issues of public import.

A 2007 student law review note did an admirable job of categorizing the nation's (at that time 24) anti-SLAPP statutes into three categories—narrow, moderate, and broad.[6] The author defined "narrow" statutes as those worded "so as to allow anti-SLAPP protection only in certain statutorily defined circumstances," "moderate" as those "that apply only to participation in the processes of government or to communication specifically intended to procure government action," and "broad" as those "that extend the definition of protected activity to cover the exercise of a party's right to petition or free speech on any matter of public concern."[7]

1. Narrow statutes

In the "narrow" category, the author pegged 12 states—Delaware, Florida, Hawaii, Missouri, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, Tennessee, Utah, and Washington—as having laws that at that time only applied in limited instances.[8]

---

[6] Shannon Hartzler, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235 (2007).
[7] *Id.* at 1248.
[8] *Id.* at 1248 n.64.

One way in which the "narrow" statutes limit application is by restrictively defining SLAPP plaintiffs. For example, Nebraska defines an "[a]ction involving public petition and participation" as a claim "that is brought by a public applicant or permittee and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge, or oppose the application or permission."[9] So, by constraining the type of *plaintiff* that could conceivably file a SLAPP action (and, conversely, be the subject of an anti-SLAPP motion), a statute could convey a narrow scope by only applying to cases involving permits, leasing, licensing, zoning, and other entitlements.

More commonly, statutes will restrict their breadth by limiting the forum in which a *defendant*'s speech (that speech ostensibly being targeted by the SLAPP plaintiff) will be protected. Specifically, many states only safeguard speech that is made to or before a governmental body in connection with some proceeding, hearing, or meeting. For instance, Washington's initial statute (prior to its expansion in 2010), noted that its "purpose ... is to protect individuals who make good-faith reports to appropriate governmental bodies."[10] New Mexico's law only covers suits filed in response to "conduct or speech undertaken or made in connection with a public hearing or public meeting in a quasi-judicial proceeding before a tribunal or decision-making body of any political subdivision of the state."[11]

One other way in which anti-SLAPP statutes can narrow their own application is by prescribing the topic to which a defendant's speech must relate. For example, Pennsylvania's law is only available to defendants who have made oral or written communication "relating to enforcement or implementation of an environmental law or regulation."[12]

2. Moderate statutes

The 2007 law review article slotted seven jurisdictions in the "moderate" category: Georgia, Guam, Massachusetts, Maine, Minnesota, Nevada, and Rhode Island.[13] This category includes statutes that:

> [D]o not limit activity protected ... to particular classes of individuals or types of proceedings. Rather, the statutes in these states expand the definition of protected activity to include not only oral or written statements made to government bodies or as part of government proceedings, but

[9] NEB. REV. STAT. § 25-21,242(1) (1994).
[10] WASH. REV. CODE § 4.24.500.
[11] N.M. STAT. § 38-2-9.1.
[12] 27 PA. CONS. STAT. § 8302(a).
[13] Hartzler, *supra* note 6, at 1253 n.80.

> also communications made in connection with any issue under consideration or review by a government body.[14]

In other words, they aren't restrictive with respect *to whom* they apply, nor are they necessarily restrictive as to *where* the targeted speech took place. They could protect, for example, a newspaper or television station's reporting. But that reporting *would* have to concern a matter being considered by a governmental entity.

For example, Massachusetts's law only applies to a suit that is based on the defendant's "exercise of its right of petition."[15] That, in turn, means "any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government."[16]

Similarly, Minnesota's statute protects "public participation" and defines that term to mean:

> [S]peech or lawful conduct that is ***genuinely aimed in whole or in part at procuring favorable government action***, including ***but not limited to***: (1) seeking assistance from, or reporting suspected unlawful conduct to, law enforcement; (2) speaking before a zoning board regarding a real estate development project; (3) communicating with an elected official concerning a change in law; (4) demonstrating peacefully for or against a government action; and (5) filing a complaint with a government entity regarding safety, sexual harassment, civil rights, or equal employment rights.[17]

3. Broad statutes

The last category the 2007 law review article detailed was for those statues that have a broad scope. "The states in this category have broadened the protective reach ...

---

[14] *Id.* at 1253.
[15] MASS. GEN. LAWS ch. 231, § 59H.
[16] *Id.*
[17] MINN. STAT. §§ 554.01 (emphasis added).

to include any conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue or an issue of public interest."[18]

California's statute is an example of a broad-scope law. It applies to suits that relate to an "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," and defines that term to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or [] any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."[19]

Texas's statute is also broad. It applies to legal actions "based on, relat[ing] to, or [] in response to [a] party's exercise of the right of free speech, right to petition, or right of association."[20] "Exercise of the right of free speech" is defined to mean "a communication made in connection with a matter of public concern," which, in turn is defined to mean "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."[21]

To be sure, the general trend of state legislatures has been toward the enactment of broad anti-SLAPP statutes. Since the publication of the 2007 law review article discussed above, nine jurisdictions (Arizona, Connecticut,[22] District of Columbia, Illinois, Kansas, Maryland, Texas, Vermont, and Virginia) have passed new anti-SLAPP laws, and only two (Arizona's and Virginia's) wouldn't fit into the "broad" category.[23] Moreover, many states that had been in the "narrow" or "moderate" categories—Florida, Georgia, Nevada, Oklahoma, Rhode Island, and Washington, specifically—amended their laws after 2007 to broaden their scope.

---

[18] Hartzler, *supra* note 6, at 1260-61.
[19] CAL. CIV. PROC. CODE § 425.16(b)(2).
[20] TEX. CIV. PRAC. & REM. CODE ANN. § 27.003(a).
[21] *Id.* at § 27.001.
[22] Connecticut's law, which went into effect January 1, 2018, is interesting in that it follows the lead of many states by purporting to cover actions "based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association…" CONN. GEN. STAT. ANN. P.A. 17-71, § 1(b). But the statute defines "right of free speech" as "communicating, or conduct furthering communication, *in a public forum* on a matter of public concern." *Id.* at § 1(a)(2) (emphasis added). Although it defines "matter of public concern," it neglects to define "public forum." Is it using "public forum" in the Constitutional sense? *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983)? Maybe it only means governmental forums? Maybe something else? Other legislatures that have used similar language—the District of Columbia, Georgia, Louisiana, Nevada, Oregon, and Vermont—have all used the term "*in a place open to the public* or a public forum," which is arguably more expansive and certainly more clear.
[23] Again, depending on how "public forum" is interpreted in Connecticut's statute, its scope may not be as broad as some may think. *See supra* note 22.

B. Standards for review

Once the Committee determines the scope of the statute, it must then turn to what likely will be the second biggest topic, which focuses on the way in which the law will operate to dismiss SLAPP suits. In particular, the Committee should be prepared to discuss two issues: What level of proof should the plaintiff be charged with meeting to overcome a motion to dismiss, and what must its "evidence" look like?

1. Degree of proof

Typically, most anti-SLAPP statutes either explicitly or implicitly establish a "two-step approach" courts must follow in deciding a motion to dismiss or strike. The first step is to determine whether the statute applies—whether the plaintiff's action is indeed a SLAPP suit as that particular law defines it. But once the court finds the statute applies, it then must turn to the second step—deciding whether the action should be dismissed. Many statutes provide a specific standard for the court to utilize. For example, California's law represents one of the more common approaches. It dictates that a SLAPP claim will be stricken "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."[24] This "probability" standard has been adopted by at least a plurality of the states.[25]

One potential problem with a "probability" approach is that it has arguably contributed to two state supreme courts—first Washington, in 2015, and most recently Minnesota, in 2017—striking down their state statutes on grounds that the language required judges to make factual findings that invade the province of the jury.[26] The Washington statute required the "responding party to establish by clear and convincing evidence a probability of prevailing on the claim."[27] That state's Supreme Court held that the language "creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact."[28]

Minnesota's statute was slightly different; it did not include the "probability" language, instead reading "the court shall grant the motion and dismiss the judicial

---

[24] CAL. CIV. PROC. CODE § 425.16(b)(1).

[25] Connecticut's brand new statute dictates that the court shall deny a motion to dismiss if "the party that brought the complaint ... demonstrates to the court that there is *probable cause*, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim." CONN. GEN. STAT. ANN. P.A. 17-71, § 1(e)(3) (emphasis added).

[26] *Davis v. Cox*, 351 P.3d 862, 875 (Wash. 2015); *Leiendecker v. Asian Women United of Minnesota*, 895 N.W.2d 623, 635-37 (Minn. 2017).

[27] WASH. REV. CODE § 4.24.525(4)(b).

[28] *Davis*, 351 P.3d at 874.

claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability."[29] Nevertheless, it relied on the Washington Supreme Court's opinion to hold that the Minnesota law similarly invaded the province of the jury.[30]

Interestingly, California has avoided the same result through judicial interpretation of its statute. In the 1994 case of *Wilcox v. Superior Court*, the Seventh Division of California's Second District Court of Appeal likened California's then-new law to other statutes that provided early dismissal mechanisms, like a motion for nonsuit or directed verdict.[31] It noted that the caselaw interpreting those statutes, which also used the language "probability of success," only required that "the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited."[32] Specifically, the court examined pre-enacted drafts of the statute to support the conclusion that the Legislature wanted to avoid "the implication the trial court was to weigh the evidence which ... would raise a serious constitutional problem."[33] The *Wilcox* court's analysis has been accepted statewide, and so despite the "probability of prevailing" language, California plaintiffs only need to establish a prima facie claim.[34] It's also worth noting that California's statute does not feature the "clear and convincing evidence" language present in both Washington's and Minnesota's laws—a point not lost on the Washington Supreme Court, which noted that its statute "expressly ratchets up the plaintiffs [sic] evidentiary burden."[35]

The Texas statute avoided the Washington/Minnesota fate by expressly adopting the "prima facie"—and not "probability"—standard: "The court may not dismiss a legal action under this section if the party bringing the legal action establishes by clear and specific evidence a prima facie case for each essential element of the claim in question."[36] Notably, the Texas Supreme Court has determined that the "clear and specific" language does not equate to "clear and convincing" evidence: "Clear and specific evidence is not a recognized evidentiary standard. Although it sounds similar to clear and convincing evidence, the phrases are not legally synonymous."[37] Although not defined by the Legislature, the Texas Supreme Court held the language merely meant that "a

---

[29] Minn. Stat. § 554.02(subd. 2(3)).
[30] *Leiendecker*, 895 N.W.2d at 636.
[31] 33 Cal. Rptr. 2d 446, 454-55 (Cal. Ct. App. 1994), disapproved on another point in *Equilon Enters. v. Consumer Cause, Inc.*, 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).
[32] *Id.* at 454.
[33] *Id.* at 455.
[34] *See Church of Scientology v. Wollersheim*, 49 Cal. Rptr. 2d 620, 637 (Cal. Ct. App. 1996), disapproved on another point in *Equilon Enters. v. Consumer Cause, Inc.*, 124 Cal. Rptr. 2d 507, 519 n.5 (Cal. Ct. App. 2002).
[35] *Davis*, 351 P.3d 862, 869.
[36] TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(c).
[37] *In re Lipsky*, 460 S.W.3d 579, 589 (2015).

plaintiff must provide enough detail to show the factual basis for its claim," and that "[t]hough the [statute] initially demands more information about the underlying claim, the Act does not impose an elevated evidentiary standard…"[38]

One other potential—some might say "safer"—approach is Arizona's, which requires the trial court to grant a defendant's motion to dismiss "unless the party against whom the motion is made shows that the moving party's exercise of the right of petition did not contain any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual compensable injury to the responding party."[39] Still, one criticism of that language might be that it fails to provide any guidance to trial courts as to the meaning of "reasonable factual support." Texas's "prima facie" language, for instance, is more definable. As the Texas Supreme Court observed:

> "[Prima facie case" has a traditional legal meaning. It refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. It is the "minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true."[40]

2. Type of evidence

Aside from the issue of *how much* evidence a plaintiff needs to bring forth, there remains the related issue of *what kind* of evidence will suffice. More to the point, what does the "evidence" need to look like? Affidavits? Live witness testimony? Facts alleged in the parties' pleadings?

The majority of statutes are silent on this precise question, and so it would obviously fall to those states' courts to answer it. But 15 states *have* statutorily answered the issue, and most do so with the same (or substantially same) language.[41] It often reads:

---

[38] *Id.* at 591.
[39] ARIZ. REV. STAT. ANN. § 12-752(B).
[40] *In re Lipsky*, 460 S.W.3d at 590 (citations omitted).
[41] *Compare* ARIZ. REV. STAT. ANN. § 12-752(B); CAL. CIV. PROC. CODE § 425.16(b)(2); CONN. GEN. STAT. ANN. P.A. 17-71, § 1(e)(2); GA. CODE ANN. § 9-11-11.1 (b)(1)(2); GUAM CODE ANN. tit. 7, § 17106(d); IND. CODE § 34-7-7-9(c); KAN. STAT. ANN. § 60-5320; LA. CODE CIV. PROC. ANN. art. 971(A)(2); ME. REV. STAT. ANN. tit. 14, § 556; MASS. GEN. LAWS ch. 231, § 59H; OKLA. STAT. tit. 12, § 1435(A); OR. REV. STAT. § 31.150(4); TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a); VT. STAT. ANN. tit. 12, § 1041(e)(2); and WASH. REV. CODE § 4.24.525(4)(c).

> In making its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.[42]

In two instances—Texas and Oklahoma—this statutory directive lives in its own numbered section titled "Evidence" (Texas)[43] or "Evidence to consider by court" (Oklahoma).[44] In the remaining 13 statutes, the provision exists as part of a longer string of text that sets out the procedure the court is to follow. But regardless, for all the states that employ this wording, there's hardly any difference from jurisdiction to jurisdiction.

There is, however, a difference in *how that language is construed*, particularly between California and Texas. A lengthy recent law review article by our Reporter[45] delves into the issue in great detail, but suffice it to say that courts in California (which was the first state to employ the language) firmly hold that a plaintiff's pleadings alone—even when verified or sworn to—are insufficient evidence to overcome an anti-SLAPP motion to dismiss.[46] Instead, the plaintiff must submit *competent*, admissible evidence (typically one or more affidavits) to satisfy its burden. Texas courts, on the other hand, have gone the opposite direction, holding that plaintiffs may rely solely on their unsworn pleadings as "evidence" their case has merit.[47]

Of course, one solution to this "problem" would be to follow the lead of those states that make no reference at all to the form of evidence. For example, Missouri's

---

[42] KAN. STAT. ANN. § 60-5320.

[43] TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a).

[44] OKLA. STAT. tit. 12, § 1435(A).

[45] Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States's Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J. L. & ARTS 431 (2017).

[46] *See, e.g., Finton Constr., Inc. v. Bidna & Keys APLC*, 190 Cal. Rptr. 3d 1, 12 (Cal. Ct. App. 2015) ("[The court] must rely on admissible evidence, not merely allegations in the complaint or conclusory statements by counsel."); *Thayer v. Kabateck Brown Kellner LLP*, 143 Cal. Rptr. 3d 17, 32 (Cal. Ct. App. 2012) ("To begin with, [Plaintiff] cannot rely on her complaint, even if verified, to demonstrate a probability of success on the merits."); *Hailstone v. Martinez*, 87 Cal. Rptr. 3d 347, 351 (Cal. Ct. App. 2008) ("Nevertheless, a plaintiff cannot simply rely on his or her pleadings, even if verified. Rather, the plaintiff must adduce competent, admissible evidence."); *Paulus v. Bob Lynch Ford, Inc.*, 43 Cal. Rptr. 3d 148, 158 (Cal. Ct. App. 2006) ("The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence."); *Roberts v. Los Angeles Cty. Bar Ass'n*, 129 Cal. Rptr. 2d 546, 552 (Cal. Ct. App. 2003) ("In assessing the probability of prevailing, a court looks to the evidence that would be presented at trial, similar to reviewing a motion for summary judgment; a plaintiff cannot simply rely on its pleadings, even if verified, but must adduce competent, admissible evidence.").

[47] *See Cuba v. Pylant*, 814 F.3d 701 (2016); *Fawcett v. Grosu*, 498 S.W.3d 650 (Houston [14th Dist.] 2016, pet. denied); *Watson v. Hardman*, 497 S.W.3d 601, 608, 610 (Tex. App.—Dallas 2016, no pet.). The Texas Supreme Court, Texas's high court for civil cases, has not yet heard the issue.

statute gives courts almost no guidance on what evidence to examine (or, for that matter, what level of proof to demand):

> Any action against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state is subject to a special motion to dismiss, motion for judgment on the pleadings, or motion for summary judgment that shall be considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of litigation.[48]

On the other hand, the Committee could decide that the statute *should* prescribe the type of evidence parties and courts may use. If it does, it must decide whether that evidence can consist of mere allegations in the pleadings (for lack of a better term, the "Texas approach"), or whether a plaintiff must produce actual, competent evidence (the "California approach"). Professor Sherwin has argued the Texas approach fails to fully effectuate the purpose of anti-SLAPP legislation and effectively dilutes the statute into a "Twombly-Iqbal"-esque heightened pleading standard that can be satisfied by artful drafting.[49] He has offered one suggestion as to how make clear that parties must produce sworn evidence (which could include live witness testimony).[50] That said, if the Committee decides the Texas approach is preferable, it could follow the lead of Hawaii's law, which makes clear it's a pleading statute, and actually instructs the court to ignore any extrinsic evidence:

> [U]pon the filing of any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or involves public participation and is a SLAPP lawsuit: (1) The motion shall be treated as a motion for judgment on the pleadings, matters outside the pleadings shall be excluded by the court, and the court shall expedite the hearing of the motion; ... [and] (5) The court shall make its determination based upon the allegations contained in the pleadings.[51]

---

[48] MO. ANN. STAT. § 537.528.
[49] *See* Sherwin, *supra* note 45, at 462-64.
[50] *Id.* at 465-66.
[51] HAW. REV. STAT. § 634F-2(1), (5).

C. *Discovery*

Naturally, one aspect of litigation that makes it costly and burdensome is the process of discovery. That's why most states provide for either a complete or partial discovery "freeze" once an anti-SLAPP motion has been filed. One example of a complete discovery freeze is Hawaii, whose statute provides that "[d]iscovery shall be suspended, pending decision on the motion and appeals."[52] Of course, this makes sense—as the preceding section discusses, Hawaii's law only allows the court to consider the pleadings, so no discovery would aid the plaintiff in overcoming a motion to dismiss. Even though its statute is silent as to evidence, Missouri provides a similar halt: "Upon the filing of any special motion described in this subsection, all discovery shall be suspended pending a decision on the motion by the court and the exhaustion of all appeals regarding the special motion."[53]

More commonly, anti-SLAPP legislation *generally* freezes discovery while allowing the court to permit a limited amount upon motion of a party and a showing of good cause. Some states, like Texas, require any discovery that is allowed be "relevant to the motion."[54] Other states, like California, merely require that the discovery be "specified" by the court.[55]

In all, 22 states either completely or partially freeze discovery (19 partially freeze, while 3 completely freeze), while 10 states don't address the issue of a discovery stay in their statutes. The implications of a statutory discovery stay cut both ways. Failing to include one can undermine the purpose of the law by allowing a vexatious plaintiff to drive up a defendant's litigation costs through responding to and participating in discovery during the pendency of a motion to dismiss. Conversely, imposing a mandatory stay—even one that can be modified the by the judge—can operate to deprive the plaintiff of the very evidence it needs to overcome the motion to dismiss, particularly when the judge denies a plaintiff's reasonable request and that denial is more or less insulated from appellate review under an abuse-of-discretion standard.

D. *Attorney's fees and costs*

In an effort to further disincentivize the filing of a SLAPP action, 22 states provide that if the moving party prevails on an anti-SLAPP motion, the court shall award that party its attorney's fees. The other states either do not provide for recovery of

---

[52] *Id.* at § 634F-2(3).
[53] MO. ANN. STAT. § 537.528.
[54] TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(b).
[55] CAL. CIV. PROC. CODE § 425.16(g).

attorney's fees, or make recovery permissive. For example, Maine's law provides that "[i]f the court grants a special motion to dismiss, the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters."[56] Many states *also* impose an attorney's fee award to the *non-moving* party "if the court finds that the motion to strike is frivolous or solely intended to cause delay."[57]

The inclusion of an attorney's fee provision should be one of the less controversial aspects of a uniform law, but it may pose as an adoption stumbling block in those states where an award of attorney's fees is less common or prohibited. Still, even in such states, it's possible that legislatures could adopt the uniform statute while excepting an attorney's fees provision, or make the recovery permissive.

E. Timing

One aspect of anti-SLAPP legislation in general is that it provides defendants an early opportunity to seek dismissal of the action. As a result, many states impose filing deadlines, after which the defendant would no longer have access to the special motion. Many also impose hearing or decision (or both) deadlines on the courts, which can be important depending on whether the statute freezes discovery. If the law does freeze discovery, a plaintiff will certainly want a speedy resolution of the motion so that its claim is not bottled up indefinitely. Conversely, if the law does not freeze discovery, defendants will want a speedy resolution, lest the statute will have no real effect.

California's law requires that "[t]he special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper," and "[t]he motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing."[58] Texas's statute also requires filing within 60 days after service, but gives its courts between 60 and 90 days to hear the motion (120 days if the court allows discovery), and 30 days after the hearing to rule.[59]

Naturally, the problem with imposing specific deadlines in a uniform statute is that each state's court structure and judicial resources differ greatly. What might be a reasonable period of time in one state may be entirely unreasonable in another. One possible approach, should the Committee decide it wants to include in the Act filing,

---

[56] ME. REV. STAT. ANN. tit. 14, § 556.
[57] *See, e.g.,* KAN. STAT. ANN. § 60-5320(g).
[58] CAL. CIV. PROC. CODE § 425.16(f).
[59] TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.003-005.

hearing, and/or decision deadlines, is to insert the specific time frames in brackets, thereby signaling to legislatures that they may insert reasonable figures based on their distinct knowledge of their own jurisdictions.

F. Appealability

The last broad topic the Committee should be prepared to address is the various appellate rights the parties have after a trial court rules on an anti-SLAPP motion. Perhaps the biggest of these issues is the right to immediate appeal if the motion is denied. In 13 states, the law provides for such a right, holding the underlying case in abeyance until the appeal has been determined. The rest of the state statutes are silent on the topic, and therefore the issue would presumably be governed by the specific states' rules regarding interlocutory appeal. Moreover, many of the states that allow for immediate appeals call for those challenges to be expedited. Similarly, some states provide that a plaintiff's appeal of the *granting* of an anti-SLAPP motion be expedited.

Relatedly, the Committee may desire to give some thought to how to handle suits that involve multiple claims, some of which may be subject to the anti-SLAPP statute, and some of which may not. For example, if a plaintiff's SLAPP claims are dismissed but other claims survive, should the plaintiff be able to challenge the dismissal before going to trial on the surviving claims? Or, what if the defendant unsuccessfully moves to dismiss only some of the plaintiff's claims? Should an ability to immediately appeal a denial extend to those kinds of cases, where the plaintiff would have been expected to go forward with the case anyway on account of there being non-SLAPP claims in play?

III. CONCLUSION

To be sure, this memorandum is not intended to be an exhaustive list of the issues this Committee will consider. Of course, we will encounter additional topics, some of which are sub-issues of those discussed above, and some of which are separate and distinct. Nevertheless, until the Committee reaches some consensus on these six broad issues, it will be difficult to begin drafting the uniform statute. Once consensus is reached, however, we may begin what will be the easier task of creating language that clearly and concisely communicates the Committee's objectives.