MEMORANDUM

UNIFORM PUBLIC EXPRESSION PROTECTION ACT

To: National Conference of Commissioners on Uniform State Laws

From: Lane Shetterly, Chair
Robert T. Sherwin, Reporter
Uniform Public Expression Protection Act (formerly Anti-SLAPP Act and Uniform Public Participation Protection Act) Drafting Committee

Date: June 30, 2020

Re: Issues addressed by Committee since Anchorage and informal readings

The Uniform Law Commission has charged this Committee with drafting legislation on what are typically known as "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.

The purpose and content of the Act, as well as the major issues the Committee considered and addressed prior to its original reading in 2019, are discussed at length in the Committee's June 3, 2019 memorandum. Additionally, the Act's Prefatory Note consists of a primer on Strategic Lawsuits Against Public Participation, the history of anti-SLAPP legislation, and the contours of the Act. Rather than repeat that information, this memorandum will discuss the deliberations of the Committee and changes to the Act *since* the July 2019 reading and June 2020 informal reading.

I. CHANGES PROMPTED BY JULY 2019 ANCHORAGE READING

A. Title

The Act's original title used the familiar "SLAPP" nomenclature. But because the term SLAPP is merely an acronym, and because the term appeared nowhere in the Act itself, a new name was needed. Originally, the Committee settled on the "Public Participation Protection Act," which was approved prior to the Anchorage reading. But the Committee received significant feedback in Anchorage that the name failed to capture the entirety of what the Act protected and did not adequately signal to courts the Act's substantive nature.

In considering a new name, the Committee worked with the Style Committee to incorporate recent Executive Committee guidelines on the naming of acts. Central to those guidelines were that the title should begin with the subject matter of the act rather than a verb or gerund, so as to make the Act easy to find by a researcher. Ultimately, the Drafting Committee agreed that at its heart, the Act was protecting "Public Expression," and so that became the core of the new title. "Uniform Public Expression Protection Act" was approved by the Executive Committee in June 2020, prior to the informal reading.

B. Definitions

There was some concern about the Act's definition of "person," particularly in its exclusion of governmental entities. That exclusion created some inconsistencies in other areas of the Act, which have now been resolved. In short, the Act now clearly provides that a governmental unit is a "person." While it may not use the Act as a defendant, a governmental unit is subject to the Act when it is a plaintiff, unless it is suing to enforce a law to protect against an imminent threat to public health or safety.

C. Substantive Nature of Act

The 2019 version contained a section (Section 3) that purported to declare the Act is substantive, rather than procedural, in nature. This was important to the Committee, as there is currently a federal circuit split regarding whether state anti-SLAPP laws apply in federal-court diversity actions under the *Erie* doctrine. But nearly all of the commentary received during the Anchorage reading advised against including such a provision. So, it was ultimately replaced by significant commentary as well as a broad "Construction" provision (Section 11). Similar construction language is present in many states' statutes and has been pivotal to courts' upholding the broad, substantive rights anti-SLAPP laws protect.

Relatedly, some commissioners opined that the Act might work better as a set of procedural rules. The Committee carefully considered that suggestion, but ultimately decided against it for two primary reasons: First, none of the 34 statutory enactions have come in the form of civil procedure rules. Although many appear in state civil procedure codes (and the Committee fully expects the Act to fit within such codes), those are still *legislative statutory* enactions that govern courts—not rules that govern parties to civil cases. And second, adopting anti-SLAPP protections in "rule" form would almost certainly preclude their application in federal-court diversity actions, thereby creating an incentive to file cases in federal court and avoid the ramifications of a state anti-SLAPP law.

D. Applicability

The lion's share of comments in Anchorage focused on the applicability of the Act, specifically, the meaning of "matter of public concern." Interestingly, comments ranged from "the act is too narrow"—because expression doesn't necessarily need to be on a matter of public concern to be protected by the Constitution, or because we had not specifically mentioned the press—to "the act is too broad"—because we had not defined "matter of public concern."

Ultimately, the Committee concluded it had struck a proper balance with its applicability language. It has struck the word "conduct," so now the Act only applies to "communication" (commentary makes clear that communication does include *expressive* conduct). And the "exemptions" dictating when the Act does *not* apply have been expanded and made more clear.

But the Committee decided not to change the "matter of public concern" language in the Act itself. A few reasons support that decision. First, states that have attempted to define "matter of public concern"—Texas in particular—have grown to regret it. Texas (and other states) has done so by providing a non-exhaustive "list" of topics that would constitute a public concern: things like health and safety, a good or product in the marketplace, or "community well-being." The problem courts have encountered is that virtually anything can be shoehorned into those types of broad categories. In one Texas case, a routine slander suit between a husband/wife and their son-in-law fell subject to the Act because they had told their friends the son-in-law was "mentally ill." The court held those statements pertained to "health and safety." Similarly, routine trade-secret cases were coming under the Act because the act of disclosing a trade secret was "communication" regarding a good or product in the marketplace. In most of those instances, nobody would consider the communications to have been "matters of public concern" absent the list-type definition.

Second, states that have *not* defined "matter of public concern"—like California, which uses the term "public issue"—have been able to use federal and state caselaw to adequately interpret it. Every case is context specific. And recognizing that truth means it is often better left to individual courts to decide whether something is a matter of public concern given the particular facts of the case at hand.

So, in short, the Committee concluded it had struck the proper balance with its "matter of public concern" language in an undefined context. It has provided significant comment language that courts and litigants will be able to use as guidance in interpreting that term.

E. Other Changes

The Committee has clarified the procedure of how a court goes about ruling on a motion under the Act. Specifically, the Act now clearly lays out a "three-step" procedure dealing with (1) applicability; (2) factual viability; and (3) procedural viability. This should help explain the burdens on the litigants and responsibilities of the courts.

II. CHANGES PROMPTED BY JUNE 2020 INFORMAL "ZOOM" READING

Most of the changes prompted by the June informal reading are minor in nature. The definition of "governmental unit" now includes Indian tribes; the "bodily injury" exemption no longer mentions "survival" actions, and the timeline of the right of appeal is now tied to the state's interlocutory appeal statute or rule. One substantive change pertains to the "Stay" of Section 4. Now, the stay at the trial court will only apply to the movant and non-movant—and not all parties in the case. This will give parties who are not part of the motion far more freedom to proceed while the motion is pending.

Aside from those changes, the new Act contains a significant amount of additional commentary to answer many, if not most, of the questions and concerns raised during the informal reading.

III. CONCLUSION

The Committee welcomes any specific questions about its deliberations and the specifics of the Act's final draft. It looks forward to the July final reading and thanks the Commissioners for their careful consideration.