

D R A F T
FOR DISCUSSION ONLY

PUBLIC PARTICIPATION PROTECTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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PUBLIC PARTICIPATION PROTECTION ACT

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in preparing this Act consists of the following:

LANE SHETTERLY, 189 SW Academy St., P.O. Box 105, Dallas, OR 97338, *Chair*
JERRY L. BASSETT, Alabama Legislative Reference Service, 11 S. Union St., Suite 613,
Montgomery, AL 36130
JAMES BOPP, The National Bldg., 1 S. Sixth St., Terre Haute, IN 47807
EFFIE V. COZART, 5409 Maryland Way, Suite 212, Brentwood, TN 37027
ELENA J. DUARTE, California Court of Appeal, Third Appellate District, 914 Capitol Mall, 4th
Floor, Sacramento, CA 95814
LEON M. McCORKLE, 5484 Fawnbrook Ln., Dublin, OH 43017-8366
WILLIAM J. QUINLAN, 233 S. Wacker Dr., Suite 2210, Chicago, IL 60606
V. LOWRY SNOW, 912 W. 1600 S., Suite B-200, St. George, UT 84770
D. JOE WILLIS, 360 SW Bond St., Suite 500, Bend, OR 97702
ROBERT T. SHERWIN, Texas Tech University School of Law, 3311 18th St., Lubbock, TX
79409, *Reporter*

EX OFFICIO

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall, Box
353020, Seattle, WA 98195-3020, *President*
CANDACE ZIERDT, Stetson University College of Law, 1401 61st St. S., Gulfport, FL 33707,
Division Chair

AMERICAN BAR ASSOCIATION ADVISORS

LAURA LEE PRATHER, 600 Congress Ave., Suite 1300, Austin, TX 78701, *ABA Advisor*
JAY ADKISSON, 6671 S. Las Vegas Blvd., Suite 210, Las Vegas, NV 89119, *ABA Section
Advisor*

EXECUTIVE DIRECTOR

TIM SCHNABEL, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
312/450-6600
www.uniformlaws.org

PUBLIC PARTICIPATION PROTECTION ACT

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1 **PUBLIC PARTICIPATION PROTECTION ACT**

2 **Prefatory Note**

3 “Strategic lawsuit against public participation,” or SLAPP, is a term used to describe a
4 specific kind of civil action brought by a plaintiff whose real aim is to silence or intimidate the
5 defendant, or punish the defendant by subjecting it to costly and lengthy litigation. SLAPPs defy
6 simple definition. They can be brought by and against individuals, corporate entities, or
7 government officials across all points of the political or social spectrum. They can address a
8 wide variety of issues from zoning to the environment to politics to education. They are often
9 cloaked as otherwise standard claims of defamation, civil conspiracy, tortious interference,
10 nuisance, and invasion of privacy, just to name a few. But for all the ways in which SLAPPs
11 may clothe themselves, their unifying features make them a dangerous force: They are brought
12 not to remedy civil wrongs, but rather to ensnare their targets in costly litigation that will deter
13 them and others from engaging in constitutionally protected activity such as free speech and
14 petition.

15
16 To limit the detrimental effects these lawsuits can have, 31 states, as well as the District
17 of Columbia and the Territory of Guam, have enacted laws that establish special and expedited
18 procedures to aid defendants in seeking early dismissal of SLAPPs. Though grouped under the
19 “anti-SLAPP” moniker, these statutes vary widely in scope, form, and procedure. For example,
20 some anti-SLAPP laws are triggered by any claim that implicates free speech on a public issue,
21 while others apply only to speech in specific settings or concerning specific subjects. Some
22 statutes provide for special motions to dismiss, while others employ traditional summary
23 judgment procedures. Some stay the discovery process and provide for attorney’s fees and
24 sanctions, while others do not. Two state supreme courts have struck down their states’ laws
25 over concerns that they infringe upon the right to a civil jury trial.

26
27 This degree of variance from state to state—and an absence of protection in at least 19
28 states—leads to confusion and disorder among plaintiffs, defendants, and courts. It also
29 contributes to what can be labeled as “litigation tourism;” that is, a type of forum shopping by
30 which a plaintiff who has choices among the states in which to bring a lawsuit will do so in a
31 state that lacks strong and clear anti-SLAPP protections.

32
33 The Public Participation Protection Act seeks to harmonize these varying approaches by
34 enunciating a clear process through which SLAPPs can be challenged and their merits fairly
35 evaluated in an expedited manner. In doing so, the Act serves the dual purposes of protecting
36 individuals’ rights to petition and speak freely on issues of public interest while, at the same
37 time, protecting the rights of people and entities to file meritorious lawsuits for real injuries.

1 **PUBLIC PARTICIPATION PROTECTION ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Public Participation
3 Protection Act.

4	Should have the word "constitutional" in it. (15:24-16:7)
5	Suggestion: "Act to Protect Constitutional Rights to Public Participation"? (Note 1)
6	Should this be a model act or a uniform act? Would a model act be better due to
7	diversity in proceedings? (16:8-11)
8	Should these be rules instead? Or a combination of rules and statute? The legislature
9	shouldn't be telling judges how to do their jobs. (29:15-30:19; 68:9-69:2; 79:11-80:1;
10	80:5-20; 107:1-18; 110:5-111:12; 117:5-8)

11
12 **SECTION 2. DEFINITIONS.** In this [act]:

13 (1) "Moving party" means a person that files a motion under Section 5.

14 (2) "Person" means an individual, estate, business or nonprofit entity, or other legal
15 entity. The term does not include a public corporation or government or governmental
16 subdivision, agency, or instrumentality.

17 (3) "Responding party" means a person against which a motion is filed under Section 5.

18	Conflict/confusion in defining "person" to exclude government, but then by implication
19	suggesting that governmental actions that aren't enforcement actions could be subject
20	to the statute. (16:22-17:22)
21	Government should be exempted from the statute. (45:5-46:4; 49:12-18)
22	Does an individual legislator constitute a person? Is he an individual or the government?
23	(39:23-40:13)
24	Definitions of "moving party" and "responding party" should require them to be actual
25	parties to the case. Otherwise, anyone could file a motion or a response. (Note 2)
26	Is a political action committee a "person"? They're not legal entities. (22:20-23:8)
27	Do we need a definition of state in brackets? We use the term in Section 4(b)(2)(C),
28	Section 10, and Section 12(a). (Note 6)

29
30 **SECTION 3. SUBSTANTIVE NATURE OF [ACT].** The rights protected and
31 remedies provided by this [act] are substantive in nature.

32	This shouldn't be in the statute; should be a comment. Creates confusion; won't work.
33	Trying to change federal law. Find another way to do it. Maybe try to say that there is a

1 right to speak in public proceedings or judicial actions. If intent is provide immunity, say
2 so. Rather than say that it is substantive, say why it's substantive. One way may be to
3 have the court "determine" rather than a party "establish." Also, be more clear about
4 what the statute applies to. (23:19-24:6; 25:10-26:4; 27:10-28:2; 31:2-12; 107:27-
5 108:15; 113:12-22; Note 7)

6
7 **SECTION 4. APPLICABILITY.**

8 (a) In this section:

9 (1) "Goods or services" does not include the creation, dissemination, or
10 exhibition, or advertisement or other similar promotion, of a dramatic, literary, musical, political,
11 or artistic work, including a motion picture, television program, or matter published on a website
12 or other electronic medium or in a newspaper or magazine of general circulation.

13 Cut "general circulation." (Note 10)

14 Does goods and services include intellectual property? What about real estate
15 brokerage? Real property? (44:12-45:2; 48:9-16; Note 8)

16
17 (2) "Official proceeding" means a legislative, executive, judicial, administrative,
18 or other governmental proceeding.

19 (b) This [act] applies to a civil cause of action:

20 (1) filed on or after [the effective date of this [act]]; and

21 (2) brought against a person based on the person's conduct or communication:

22 (A) in an official proceeding;

23 (B) on an issue under consideration or review in an official proceeding; or

24 (C) exercising the right of free speech, free association, or petition,

25 guaranteed by the United States Constitution or the [state] Constitution, on a matter of public
26 concern.

27 The term "cause of action" is used in different ways—to the claim as a whole, and as a
28 pleading. (77:16-79:1)

29 Add specific protection for free press. (49:23-50:6)

1	Statute is too broad (different examples). (51:3-25)
2	Need a section of exemptions for cases like family law, evictions, disciplinary
3	proceedings, etc. (40:19-42:2)
4	Need a comment about scope of “matter of public concern.” (33:13-35:15; 36:13-20;
5	39:8-12)
6	Maybe delete “public concern” altogether? Doesn’t its inclusion limit the scope of the
7	act? (Note 1)

8
9 (c) This [act] does not apply to a cause of action brought:

10 (1) by a governmental entity to enforce a law or regulation to protect against an
11 imminent threat to public health or safety; or

12 (2) by a person primarily engaged in the business of selling or leasing goods or
13 services against a person primarily engaged in the business of selling or leasing goods or
14 services, if the conduct or communication on which the cause of action is based arises out of the
15 sale or lease of goods or services.

16	Language is too broad—it covers anyone who sells goods and has no connection to the
17	claim. (46:23-48:6)
18	Unclaimed Property Act may be of help; they considered a business-to-business
19	transaction exemption. (Note 9)

20
21 **SECTION 5. SPECIAL MOTION TO [DISMISS] [STRIKE].** Not later than [60]

22 days after being served with a [complaint] [petition], crossclaim, counterclaim, or third-party
23 claim that asserts a cause of action to which this [act] applies, or at a later time on a showing of
24 good cause, the person served may file a special motion to [dismiss] [strike] the cause of action.

25	Isn’t this deadline to file (60 days) too long? Shouldn’t it be the first thing you have to
26	do? What if you’ve already answered? What if discovery has already been propounded?
27	(76:3-77:15)
28	Calling it a special motion may be confusing (special appearance). What about
29	“Protective Motion to Dismiss”? (70:7-14; 92:1-3; 100:24-101:2; Note 3; Note 4, Note 5)
30	Should cross-claims, counterclaims, and interventions be included? (56:18-57:25; 64:3-
31	65:11)
32	Are class-action suits included? (73:7-17)
33	Add 12(c) motions to the bracketed “dismiss/strike” language of Section 5. (Note 5)

1
2 **Legislative Note:** *A state should use the term “complaint”, “petition”, or both, to describe any*
3 *procedural means through which a cause of action may be brought. A state should title its*
4 *motion one to “dismiss” or “strike” given its customs and procedures.*

5
6 **Comments**

7 The terms “complaint” and “petition” are intended to include any amended pleadings that
8 assert a cause of action for the first time in a case.

9
10 Some states may choose to title their Special Motion one to “Dismiss”, while others may
11 title it one to “Strike”. The choice of title is not substantive in nature and should in no way affect
12 uniformity or construction of the statute.

13
14 **SECTION 6. STAY.**

15 (a) Except as otherwise provided in this section, all proceedings in an action, including
16 discovery and pending hearings or motions, are stayed on the filing of a motion under Section 5.
17 The stay remains in effect until entry of an order ruling on the motion and the conclusion of any
18 appeal of the order or expiration of the time to appeal the order.

19

Stay ought to be discretionary (56:1-4); Note 3

20
21 (b) On a showing by a party that specified information necessary to meet or oppose a
22 burden imposed by Section 9 is not reasonably available without discovery, the court may allow
23 limited discovery for the purpose of obtaining the information.

24 (c) The court for good cause may entertain a motion unrelated to a motion under Section
25 5.

26

What would an unrelated motion look like? (58:3-59:22)
--

27
28 (d) A motion for relief under Section 13 or 14 is not subject to the stay under subsection
29 (a).

30 **Comment**

31 This section should not be construed to affect a court’s ability to hear and rule, upon a

1 finding of good cause, on motions for prejudgment remedies.

2

3 **SECTION 7. EXPEDITED HEARING.**

4 (a) The court shall hear a motion under Section 5 not later than [60] days after service of
5 the motion, unless the court orders a later hearing:

6 (1) because of the condition of the court’s docket;

7 (2) by agreement of the parties;

8 (3) to allow limited discovery under Section 6(b); or

9 (4) for other good cause.

10 (b) If the court orders a later hearing under subsection (a)(3), the court shall hear the
11 motion under Section 5 not later than [60] days after the court issues a ruling allowing for the
12 discovery.

13 Does court have to hold a hearing? A note is needed to make intent clear. (69:9-70:2)
14 What if judges don’t hear/rule in accordance with timelines set by act? Should the
15 motion be overruled by operation of law after a period of time? (119:5-120:4; 125:20-25)

16

17 **SECTION 8. [NONSUIT] [DISMISSAL].**

18 (a) A voluntary [nonsuit] [dismissal] without prejudice of a responding party’s cause of
19 action does not affect a moving party’s right to obtain a ruling on a motion filed under Section 5
20 before the [nonsuit] [dismissal].

21 (b) A voluntary [nonsuit] [dismissal] with prejudice of a responding party’s cause of
22 action entitles the moving party to relief under Section 13 on a motion filed under Section 5
23 before the [nonsuit] [dismissal].

24 Does Section 8(a) present case or controversy issues? (72:4-73:4; 73:21-74:2)
25 Fees should be discretionary if a party nonsuits with prejudice. What if it’s a legitimate
26 claim but the plaintiff just doesn’t want to pursue anymore? (74:3-9; 81-1:18)

27

28

Comment

1 Once a motion under Section 5 has been filed, a voluntary [nonsuit] [dismissal] of the
2 responding party’s cause of action does not deprive the court of jurisdiction.

3
4 **SECTION 9. DISMISSAL.**

5 If a moving party establishes that this [act] applies to a cause of action, the court shall
6 dismiss the cause of action with prejudice if:

7 (1) the responding party fails to establish a prima facie case as to each essential element
8 of the cause of action; or

9 (2) the moving party establishes that there is no genuine issue as to any material fact and
10 the party is entitled to judgment as a matter of law.

11 The statute doesn’t make clear what the burden of the movant is, or how you “establish”
12 things. Being more clear about what it applies to may make it more substantive. (60:25-
13 62:13; 92:4-93:15; 95:12-18; 104:24-106:23; 107:21-108:15; 113:12-22)

14 How are Sections 9(1) and 9(2) different from FRCP 12(c) and motions for summary
15 judgment? The statute ought to clarify the relationship between this and those other
16 types of remedies. They seem like two different ways to achieve the result, as opposed
17 to a sequence of burden shifting. (84:3-88:22)

18 Should Sections 9 (Dismissal) and 10 (Proof) be switched? (86:18-22; 95:2-11; 96:6-16;
19 113:23-114:2)

20 A lot of what this statute does are things already authorized by the FRCP, and as a
21 result, it’s confusing as to what a court is supposed to do, and we shouldn’t be bossing
22 courts around. (97:5-99:23; 101:11-19; 102:3-103:5; 103:20-104:15; 111:15-113:8;
23 114:3-8)

24
25 **SECTION 10. PROOF.** In ruling on a motion under Section 5, the court shall consider
26 the parties’ pleadings, together with any evidence that would be considered in ruling on a motion
27 for summary judgment under [the state’s statute or rule governing summary judgment].

28 How do we mean to define “pleadings”? Does it include documents other than the
29 Complaint/Petition and Answer? (117:11-23)

30
31 **SECTION 11. RULING.** The court shall decide a motion under Section 5 not later than
32 [60] days after the hearing under Section 7.

1 **SECTION 12. APPEAL.**

2 (a) An order denying, in whole or in part, a motion under Section 5 is immediately
3 appealable [under [the state’s interlocutory-appeal statute]].

4 (b) An appellate court shall expedite an appeal, whether interlocutory or not, from a trial
5 court ruling on a motion under Section 5 or [an original action] [a writ] involving the ruling.

6 **Legislative Note:** *If a state has a statute specifying instances in which an interlocutory appeal is*
7 *permitted, it should cite the statute in this section. This section may require amendment of a*
8 *state’s interlocutory appeal statute.*

10 Concern about piecemeal litigation if a motion is granted as to only one claim (119:5-
11 120:4; 125:20-25); Note 3

12 Concern that Sections 12(a) and (b) don’t go together, because (a) allows for
13 interlocutory appeal, and (b) allows for writs. You can’t have both. (126:15-127:9)

14 **Comment**

17 This section should not be construed to foreclose an interlocutory appeal of an order
18 granting, in whole or in part, a motion under Section 5, if state law would otherwise permit such
19 an appeal.

21 **SECTION 13. RELIEF FOR SUCCESSFUL MOVING PARTY.** If the moving
22 party prevails on a motion under Section 5, the court shall award the moving party court costs,
23 reasonable attorney’s fees, and other reasonable expenses related to the motion.

24 Attorneys fees should be discretionary or bracket “shall” and “may.” (29:24-131:10; Note
25 11)

27 **Comment**

28 The relief provided for by this section includes any court costs, reasonable attorney’s
29 fees, and any other reasonable expenses associated with filing a motion under this section.

31 **SECTION 14. RELIEF FOR SUCCESSFUL RESPONDING PARTY.** If the
32 responding party prevails on a motion under Section 5 and the court finds that the motion was
33 frivolous or filed solely with the intent to delay the proceedings, the court shall award the
34 responding party court costs, reasonable attorney’s fees, and any other reasonable expenses

1 related to the motion.

2 **SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
3 applying and construing this uniform act, consideration must be given to the need to promote
4 uniformity of the law with respect to its subject matter among states that enact it.

5 **[SECTION 16. SEVERABILITY.** If any provision of this [act] or its application to
6 any person or circumstance is held invalid, the invalidity does not affect other provisions or
7 applications of this [act] which can be given effect without the invalid provision or application,
8 and to this end the provisions of this [act] are severable.]

9 ***Legislative Note:** Include this section only if this state lacks a general severability statute or a*
10 *decision by the highest court of this state stating a general rule of severability.*

11 **[SECTION 17. REPEALS; CONFORMING AMENDMENTS.**

- 12 (a)
- 13 (b)
- 14 (c)

15 Would this statute repeal or work with other protections already granted by a state? For
16 example, a state that has already provided some sort of substantive immunity? (50:10-
17 21)

18 **SECTION 18. EFFECTIVE DATE.** This [act] takes effect
19
20
21
22