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## The New Rule to Deter SLAPPs

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# The New Rule to Deter SLAPPs

ROBERT A. KUDLICKI III\*

*A Strategic Lawsuit Against Public Participation (SLAPP) serves to intimidate and chill the speech of defendants who are engaged in First Amendment protected forms of speech and press. A SLAPP is not filed with the intention of presenting a legitimate claim against a defendant; rather, it serves only to silence. Defendants face significant litigation costs during a SLAPP; thus, they become fearful of speaking out and criticizing the plaintiff again in the future. While some jurisdictions have protections against SLAPP suits, others have no protection or only limited forms of protection from SLAPP suits. This article proposes creating a new professional conduct rule for adoption by the American Bar Association that specifically prohibits SLAPP suits. By implementing a new rule, attorney discipline and attorney self-regulation can be utilized to deter SLAPP suits.*

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## INTRODUCTION

Imagine yourself as an attorney who filed a lawsuit that had no chance of winning. Your client had you file this suit merely to silence the opposing party because the opposing party said something distasteful about your client. You knew your case wouldn't win because the opposing party had in fact said or wrote something truthful about your client. Yet, you still file the case to push this opposing party into submission and prevent the opposing party from saying anything further about your client. This hypothetical may seem like a made-up story of adult bullying by using the legal system. In reality, it is a practice that still occurs today in multiple judicial venues in the United States.

This article will argue for the implementation of a new professional conduct rule to be utilized to combat against strategic lawsuits against public participation, also known as SLAPP<sup>1</sup> suits or SLAPPs. Several states do not have anti-SLAPP legislation or the state's anti-SLAPP law is limited in effectiveness.<sup>2</sup> Counsel for plaintiffs may pursue SLAPPs in these states without facing anti-SLAPP motions.<sup>3</sup> Ethical rules prohibit attorneys from filing a suit solely to harass or intimidate an opposing party.<sup>4</sup> The Model Rules of Professional Conduct prohibits lawyers from bringing lawsuits without merit;<sup>5</sup> however, the current rules do not specifically mention and prohibit SLAPP suits. A more specific ethical rule describing and prohibiting SLAPP suits will work to prevent future usage of SLAPP suits. A new professional conduct rule should be developed by the ABA and implemented for use in each state, whether they have anti-SLAPP statutes or not. In states that do not have anti-SLAPP laws, this new ethical rule will help to prevent future SLAPP filings based on attorney discipline and the self-regulation of the practice of law.<sup>6</sup> By implementing a new professional rule, attorneys who represent potential SLAPP filers will question the legitimacy of their client's claim. Parties on the defense may utilize the threat of ethical discipline as a way to discourage future SLAPP suits as well.

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1. George W. Pring & Penelope Canan, *"Strategic Lawsuits Against Public Participation" ("SLAPPS"): An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 939 (1992); GEORGE W. PRING & PENELOPE CANAN, *SLAPPS GETTING SUED FOR SPEAKING OUT 3* (Temple Univ. Press 1996).

2. See Austin Vining & Sarah Matthews, *Overview of Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS (Nov. 8, 2021), <https://www.rcfp.org/introduction-anti-slapp-guide/> [<https://perma.cc/AM2Y-JMLF>].

3. See *id.*

4. MODEL RULES OF PRO. CONDUCT pmbl. cl. 5 (AM. BAR ASS'N 2020).

5. *Id.* r. 3.1.

6. See *Anti-SLAPP Legal Guide*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 14, 2021), <https://www.rcfp.org/anti-slapp-legal-guide/> [<https://perma.cc/4EH3-QTBV>].

Part I of this article will give an overview of SLAPP suits and examples of how SLAPPs affect multiple types of parties. Part II will discuss statutory schemes currently employed to combat SLAPP suits, known as anti-SLAPP statutes, but it will also illustrate the limited effectiveness of these statutory schemes. Part II will also discuss the use of judicial sanctions to deter SLAPP suits. Part III will discuss anti-SLAPP legislation at a national level. Part IV will discuss ethical rules that are particularly relevant to SLAPP suits and propose a new ethical rule based in part on the professional rules of different states.

### PART I: WHAT IS A SLAPP?

“Strategic Lawsuits Against Public Participation” or “SLAPPS” are lawsuits intended to suppress freedom of speech.<sup>7</sup> George Pring and Penelope Canan are the original authors who studied and coined the phrase of SLAPP.<sup>8</sup> SLAPP suits can take on several forms and are used in a variety of instances.<sup>9</sup> The most common type of SLAPP suit is a civil suit alleging defamation and other torts in order to suppress the defendant’s previous speech or writing about a plaintiff.<sup>10</sup> Plaintiffs are more often companies or people with “substantial amounts of capital.”<sup>11</sup> SLAPP suits are often brought as cost effective means to suppress unfavorable opinions of other parties.<sup>12</sup> For the plaintiff initiating a SLAPP suit, the benefit of suppressing future speech is outweighed by the potential sanctions that may be imposed on the plaintiff or plaintiff’s counsel.<sup>13</sup> A plaintiff with “substantial amounts of capital” would rather spend thousands of dollars in legal fees to suppress speech and stop potential criticism than let critical speech hurt their name or brand.<sup>14</sup> SLAPP suits achieve substantial goals for the plaintiff, including “(1) to recover for financial losses due to successful opposition regarding an issue of public interest; (2) to prevent future losses on similar subsequent public policy issues; (3) to intimidate and deter others from joining the opposition; and (4) to silence current and future opposition to the political issue.”<sup>15</sup> SLAPP

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7. Pring & Canan, *supra* note 1, at 939 & 962 n.2.

8. George W. Pring, *SLAPPS: Strategic Lawsuits Against Public Participation*, 7 PACE ENV’T L. REV. 3, 4 (1989).

9. See Pring & Canan, *supra* note 1, at 947.

10. See *id.*

11. Shine Sean Tu & Nicholas F. Stump, *Free Speech in the Balance: Judicial Sanctions and Frivolous SLAPP Suits*, 54 LOY. L.A. L. REV. 623, 628 (2021).

12. See *id.* at 625.

13. *Id.*

14. *Id.* at 628.

15. *Id.* at 627; see Penelope Canan, *The SLAPP from a Sociological Perspective*, 7 PACE ENV’T L. REV. 23, 30 (1989).

suits are a potentially significant problem because they chill free speech and suppress criticism—which are both fundamental to a free society.<sup>16</sup>

#### WHY EVERYONE SHOULD BE CONCERNED

SLAPP suits affect people on both sides of the political aisle and SLAPP filers may stem from both conservative and liberal organizations. Individual politicians may also utilize SLAPP suits to silence criticism of their voting history.<sup>17</sup> SLAPP suits may also have nothing to do with politics and are purely used as a business tactic to stifle criticism.<sup>18</sup> So long as a SLAPP filer has the necessary capital to face potential fines and penalties for filing SLAPP suits, they will continue to be utilized in political opposition and business operations.<sup>19</sup> A SLAPP filer may already have substantial capital from regular business operations, though funding can also come from third-party sources that want to utilize a particular party's position to file a SLAPP suit.<sup>20</sup> Suits may even stem from non-profit organizations.<sup>21</sup> SLAPPS can also occur when government or public entities utilize litigation to strike against public criticism.<sup>22</sup> SLAPP suits may “intimidate those who support a respect for God, moral principles, strong character, traditional marriage, values in the school curriculum, and other behaviors that make for a stronger nation.”<sup>23</sup> SLAPP suits may also be used to attack those who have opposite opinions in regards to the aforementioned quotation. Due to SLAPP suits being used for illegitimate claims, it is relevant for everyone to be concerned about the frivolous nature of SLAPP suits. Bipartisan support exists for anti-SLAPP legislation at state and federal levels, further showcasing the interest in eliminating these types of lawsuits.<sup>24</sup>

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16. Tu & Stump, *supra* note 11, at 628.

17. E.g., Jonathan Shorman, *Judge Throws Out Kansas Lawmaker's Defamation Suit Against The Star*, *Citing 2016 Law*, WICHITA EAGLE (July 3, 2019, 9:38 AM), <https://www.kansas.com/news/politics-government/article232208082.html> (on file with author).

18. E.g., Complaint at 1-6, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (W. Va. Cir. Ct. June 21, 2017).

19. See Tu & Stump, *supra* note 11, at 625.

20. See Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 769 (2017); Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 565 (2021).

21. See JIM DEMINT & J. DAVID WOODARD, *WHY WE WHISPER: RESTORING OUR RIGHT TO SAY IT'S WRONG* 66-67 (Rowman & Littlefield Publishers, Inc. 2008).

22. See PRING & CANAN, *supra* note 1, at 46-82 (discussing the most harmful types of SLAPPS originating from government entities with several case examples).

23. DEMINT & WOODARD, *supra* note 21, at 67.

24. E.g., SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015).

A SLAPP AGAINST COMEDY: *LAST WEEK TONIGHT WITH JOHN OLIVER*

A recent popular culture example of a SLAPP suit involved the CEO of Murray Energy,<sup>25</sup> Robert Murray, and the host of the HBO show *Last Week Tonight*, John Oliver.<sup>26</sup> John Oliver's show presents a majority of liberal political viewpoints in a comedic setting.<sup>27</sup> Late night comedy shows generally target conservative politicians as well as other prominent stories concerning differing political views.<sup>28</sup> John Oliver had a scathing television episode<sup>29</sup> about Murray Energy's business practices and a mine collapse that occurred in Utah for which "Murray publicly claim[ed] an earthquake was to blame, though a government investigation concluded that the collapse was caused by unauthorized mining practices and there was no evidence of a natural seismic event."<sup>30</sup> Shortly after the episode, Robert Murray brought a libel suit against John Oliver's show, with Murray alleging character reputation loss to himself and his companies.<sup>31</sup> It is conceivable Murray chose West Virginia as the judicial venue because West Virginia does not have any anti-SLAPP protections available.<sup>32</sup> Also, the suit "exhibit[ed] the classic anatomy of a SLAPP suit: a powerful entity sued a target for claims such as defamation and false light in clear retaliation for critical speech in an attempt to silence that party . . . ."<sup>33</sup> The initial circuit court in West Virginia dismissed the

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25. AM. CONSOL. NAT. RES., INC., <http://www.acnrinc.com> [<https://perma.cc/66C7-SYAX>] (last visited Nov. 26, 2021) (American Consolidated Natural Resources, Inc. was formally known as Murray Energy).

26. Kevin Lui, *Coal Boss Robert Murray Is Suing John Oliver After Being Mocked on Last Week Tonight*, TIME (June 23, 2017, 9:28 AM), <http://time.com/4829720/john-oliver-lawsuit-robert-murray-coal/> [<https://perma.cc/4F4L-7XJ6>]; Tu & Stump, *supra* note 11, at 631-38.

27. See Zac Davis, *Please Stop Watching Jon Oliver*, AM. THE JESUIT REV. (Feb. 10, 2017), <https://www.americamagazine.org/arts-culture/2017/02/10/please-stop-watching-john-oliver> [<https://perma.cc/9CDB-XCST>].

28. See Caitlin Flanagan, *How Late-Night Comedy Fueled the Rise of Trump*, THE ATLANTIC (May 2017), <https://www.theatlantic.com/magazine/archive/2017/05/how-late-night-comedy-alienated-conservatives-made-liberals-smug-and-fueled-the-rise-of-trump/521472/> [<https://perma.cc/V3FF-VVNH>].

29. Last Week Tonight, *Last Week Tonight with John Oliver*, YOUTUBE at 12:41-24:20 (June 19, 2017), <https://www.youtube.com/watch?v=aw6RsUhw1Q8> (HBO television broadcast June 18, 2017).

30. Lui, *supra* note 26.

31. Complaint at 1-6, Marshall Cnty. Coal Co. v. Oliver, No. 17-C-124 (W. Va. Cir. Ct. June 21, 2017); Betsy Swan, *Republic Coal King Sues HBO Over John Oliver's Show*, DAILY BEAST (June 22, 2017, 5:18 PM), <https://www.thedailybeast.com/coal-king-sues-hbo-over-john-olivers-show> [<https://perma.cc/Z482-Q9TN>]; Marissa Martinelli, *A Coal Baron is Suing John Oliver for "Character Assassination" Over Last Week Tonight's Talking Squirrel Segment*, SLATE (June 22, 2017, 2:16 PM), <https://slate.com/culture/2017/06/coal-baron-robert-murray-is-suing-john-oliver-over-his-segment-featuring-a-talking-squirrel.html> [<https://perma.cc/X7JX-KU9W>].

32. *Anti-SLAPP Legal Guide*, *supra* note 6.

33. Tu & Stump, *supra* note 11, at 634.

case.<sup>34</sup> Murray appealed the case in West Virginia, but eventually Murray's legal team decided to drop the lawsuit.<sup>35</sup> While the dismissal at the appellate level seemed like relief, it was not without damage. Oliver reportedly noted the legal defense of the case racked up "a whopping \$200,000 in legal fees despite HBO winning in the end."<sup>36</sup> The suit also cost a considerable amount of time and resulted in insurance claims which would eventually raise the premiums for future insurance coverage.<sup>37</sup> Clearly, the suit was intended to chill speech, and represents a clear form of a SLAPP suit.<sup>38</sup>

## PART II: ANTI-SLAPP EFFORTS

### STATUTORY DEFENSE: ANTI-SLAPP LAWS

There are several ways to defend against SLAPP suits. One major area of defense against SLAPP suits is the use of anti-SLAPP laws.<sup>39</sup> Thirty-one states currently have some form of anti-SLAPP statutes, but the effectiveness and scope of each statute varies by state.<sup>40</sup> Other states do not have anti-SLAPP laws on their books.<sup>41</sup> It is also unclear how state anti-SLAPP laws should apply in federal cases sitting in diversity jurisdiction.<sup>42</sup> There is currently a split on how SLAPP laws should apply in diversity jurisdiction.<sup>43</sup> The goal of an anti-SLAPP law is to protect defendants from costly litigation and having their speech silenced.<sup>44</sup> Anti-SLAPP laws usually provide a

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34. Matthew Dessem, *Court Finds John Oliver Has the Right to Hire a Giant Squirrel Named "Mr. Nutterbutter" to Insult Coal Barons*, SLATE (Feb. 24, 2018, 9:08 PM), <https://slate.com/culture/2018/02/court-finds-john-oliver-has-the-right-to-hire-giant-squirrels-to-insult-coal-barons.html> [<https://perma.cc/3DKZ-88T9>].

35. Marissa Martinelli, *John Oliver Taunts Coal Baron Enraged by Giant Talking Squirrel with Giant Singing Squirrels*, SLATE (Nov. 11, 2019, 9:43 AM), <https://slate.com/culture/2019/11/john-oliver-coal-baron-squirrel-slapp-lawsuit-bob-murray.html> [<https://perma.cc/CE9J-VK89>]; *Last Week Tonight with John Oliver*, at 5:15-7:00, (HBO television broadcast June 18, 2017).

36. Martinelli, *supra* note 35.

37. *Id.*

38. Tu & Stump, *supra* note 11, at 635.

39. See Vining & Matthews, *supra* note 2, para. 1.

40. See Vining & Matthews, *supra* note 2, para. 2.

41. *Anti-SLAPP Legal Guide*, *supra* note 6.

42. See Katelyn E. Saner, *Getting SLAPP-ED in Federal Court: Apply State Anti-SLAPP Special Motions to Dismiss in Federal Court After Shady Grove*, 63 DUKE L.J. 781, 781 (2013); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010).

43. Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week- July 2020*, BLOOMBERG L. (July 31, 2020, 11:17 AM), <https://news.bloomberglaw.com/us-law-week/circuit-splits-reported-in-u-s-law-week-july-2020> [<https://perma.cc/G4AP-CB4S>]; Porter Wells, *Joy Reid Must Defend Against Defamation Claims, Second Cir. Says*, BLOOMBERG L. (July 15, 2020, 10:58 AM), <https://news.bloomberglaw.com/us-law-week/joy-reid-must-defend-against-defamation-claims-second-cir-says> [<https://perma.cc/JT2P-GS9A>].

44. See Vining & Matthews, *supra* note 2, para. 4.



means for a defendant to avoid costly litigation by filing a motion early on to dismiss the case.<sup>45</sup> Anti-SLAPP statutes may also include other forms of relief, such as “permitting defendants who win their anti-SLAPP motions to recover attorney’s fees and costs, automatically staying discovery once the defendant has filed an anti-SLAPP motion, and allowing defendants to immediately appeal a trial court’s denial of an anti-SLAPP motion.”<sup>46</sup>

#### ANTI-SLAPP LAWS DON’T EXIST EVERYWHERE

While anti-SLAPP laws exist in some states, they vary in effectiveness.<sup>47</sup> States may limit effectiveness of anti-SLAPPs in several ways.<sup>48</sup> States may limit anti-SLAPP protection to certain instances, such as cases involving specific government entities.<sup>49</sup> States also vary on the types of activities that are protected.<sup>50</sup> For example, “states, such as Arkansas, Indiana, and Illinois, do not specifically define the activities that their statutes cover, but instead apply the statute’s protection to any act in furtherance of the person’s rights to free speech or right to petition, with Illinois also including the right of association.”<sup>51</sup> Meanwhile other states have tighter applications of anti-SLAPP statutes, such as Pennsylvania where the statute “applies only to communications made to governmental agencies relating to environmental laws and regulations.”<sup>52</sup> Due to the wide variance of state anti-SLAPP laws and their applicability to certain claims, this opens the door to litigation and exploitation of defendants who may have limited or no SLAPP protections.<sup>53</sup> Plaintiffs will utilize forum shopping in jurisdictions with little or no anti-SLAPP protections. Although there is a variety of anti-SLAPP laws on the books, and attempts to pass anti-SLAPP laws, it will take some time for states and the federal government to pass these laws. Even if these laws are passed and enforced, there still may be a patchwork of uncertainty and forum shopping.

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45. Vining & Matthews, *supra* note 2, para. 4; 123 AM. JURIS. *Proof of Facts* 3d 341, § 15 (2022).

46. Vining & Matthews, *supra* note 2, para. 4.

47. *Anti-SLAPP Legal Guide*, *supra* note 6.; *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection> [<https://perma.cc/E5UT-9TUT>].

48. See Cheryl Mullin & Erica Mahoney, *Strategic Lawsuits Against Public Participation: Avoiding the Sting of an Anti-SLAPP Challenge*, 40 FRANCHISE L.J. 647, 650-52 (2021).

49. *Id.* at 650.

50. *Id.*

51. *Id.* at 652.

52. *Id.*

53. See generally *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/resources/anti-slapp-laws/#antislappstories> [<https://perma.cc/CH88-LA6P>] (discussing various cases pertaining to Anti-SLAPP laws).

## DOUBLE EDGED SWORD

Anti-SLAPP laws may also be used in an unethical manner. The use of anti-SLAPP motions is not always allowed anytime an issue of public speech is at stake. Plaintiffs may have legitimate defamation claims or types of claims that need to be reviewed through further litigation. Anti-SLAPP filers may in fact face discipline and sanctions for filing anti-SLAPP motions that have no basis. In California, an attorney named Reed Hamzeh had sent a letter on behalf of a client to the client's former manager.<sup>54</sup> Reed Hamzeh had threatened to report the manager to the district attorney and the Internal Revenue Service, among others, if he didn't pay a proposed \$75,000 settlement.<sup>55</sup> The manager who was threatened, Miguel Mendoza, filed a tort claim against Hamzeh for the threatening letter.<sup>56</sup> Mendoza's claims included civil extortion, intentional infliction of emotional distress, and unfair business practices.<sup>57</sup> Hamzeh filed an anti-SLAPP motion in response to Mendoza's tort complaints.<sup>58</sup> But, extortion was not a covered action under the anti-SLAPP statute.<sup>59</sup> Even though Hamzeh's threats were vague with the demand letter he sent to the manager, they still constituted extortion.<sup>60</sup> The lower court dismissed Hamzeh's anti-SLAPP motion and asserted a \$3,150 fine for "frivolously asserting the anti-SLAPP shield."<sup>61</sup> The Second District Court of Appeal for California upheld the lower court's decision.<sup>62</sup>

Attorney's fees, sanctions, and a referral to the State Bar of California were also imposed in a real estate dispute that involved a frivolous anti-SLAPP motion.<sup>63</sup> Plaintiff Donna Sue Workman had placed a house for sale on the real estate market and had entered into escrow with the buyers.<sup>64</sup> Paul Colichman and David Millbern lived in a house together that was adjacent to Workman's home.<sup>65</sup> The defendant Paul Colichman informed Workman's real estate agent that he and David Millbern planned to build an addition to their house, thus changing the view of Workman's property and potentially

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54. Martha Neil, *Appeals Court Oks Fine for Lawyer Who Asserted SLAPP Shield Against Tort Case Over Demand Letter*, A.B.A. J. (Apr. 24, 2013, 9:23 PM), [https://www.abajournal.com/news/article/appeals\\_court\\_oks\\_lawyers\\_fine\\_for\\_asserting\\_slapp\\_shield\\_against\\_tort\\_case](https://www.abajournal.com/news/article/appeals_court_oks_lawyers_fine_for_asserting_slapp_shield_against_tort_case) [<https://perma.cc/8ZLS-4KPT>].

55. *Mendoza v. Hamzeh*, 155 Cal. Rptr. 3d 832, 833 (Cal. Ct. App. 2013).

56. *Id.*

57. *Id.*

58. Neil, *supra* note 54.

59. *See Mendoza*, 155 Cal. Rptr. 3d at 836.

60. *Id.*

61. Neil, *supra* note 54.

62. *Id.*; *Mendoza*, 155 Cal. Rptr. 3d at 837.

63. David Carr, *SLAPP Happy: Anti-SLAPP Draws Sanctions and State Bar Referral*, ETHICS L. BLOG (Apr. 4, 2019), <https://www.ethics-lawyer.com/2019/04/04/slapp-happy-anti-slapp-draws-sanctions-and-state-bar-referral> [<https://perma.cc/F2BG-NFET>].

64. *Workman v. Colichman*, 245 Cal. Rptr. 3d 636, 640 (Cal. Ct. App. 2019).

65. *Id.*

affecting the value of Workman's home.<sup>66</sup> Workman sued Colichman for apparently fake plans to construct the addition.<sup>67</sup> Colichman filed an anti-SLAPP motion claiming his email to the real estate agent was a matter of "representations to the public in the advertising materials about the views from Workman's house."<sup>68</sup> The trial court denied Colichman's anti-SLAPP motion as this case dealt with a private dispute rather than a public concern.<sup>69</sup> The appeals court agreed, providing further analysis that the defense's anti-SLAPP motion did not demonstrate the communication "was made in furtherance of [the] defendants' constitutional rights of free speech in connection with a public issue."<sup>70</sup> Workman was also able to successfully file a motion for sanctions against the defendants and their attorney.<sup>71</sup> California's Code of Civil Procedure allows plaintiffs to possibly recover costs and fees associated with frivolous special motions.<sup>72</sup> Finally, the court referred the defense attorney to the State Bar of California.<sup>73</sup>

#### HIDING FROM DISCIPLINE PROCEEDINGS

In some states, attorneys have attempted to utilize anti-SLAPP motions as a defense to disciplinary actions. However, state courts have been reluctant to allow the use of anti-SLAPP motions in discipline proceedings. Actions taken by attorneys in a free speech context are not always protected. Attorney Omar Rosales attempted to utilize an anti-SLAPP motion in Texas regarding a discipline case in which Rosales was sending deceitful emails to medical providers.<sup>74</sup> The emails alleged that the medical providers' websites violated a particular section of the Americans with Disabilities Act.<sup>75</sup> Eventually, the medical providers "filed grievances against Rosales with the Office of the Chief Disciplinary Counsel of the State Bar of Texas."<sup>76</sup> The Commission for Lawyer Discipline alleged in their complaint against Rosales that numerous violations of the Texas Disciplinary Rules of Professional Conduct had

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66. *Id.*

67. *Id.*

68. *Id.*

69. *Workman v. Colichman*, 245 Cal. Rptr. 3d 636, 640 (Cal. Ct. App. 2019).

70. *Id.* at 651.

71. *Id.* at 653.

72. *Id.* at 648; CAL. CIV. PROC. CODE § 425.16(c)(1) (West 2022).

73. *Workman*, 245 Cal. Rptr. 3d at 658; Carr, *supra* note 63.

74. Law.com, *Could This Anti-SLAPP Ruling Help Lawyers Dismiss Attorney Discipline Cases?*, YAHOO! (Apr. 2, 2019), <https://www.yahoo.com/now/could-anti-slapp-ruling-help-021847073.html> [<https://perma.cc/3EXP-DEBG>].

75. *Comm'n for Law. Discipline v. Rosales*, 577 S.W.3d 305, 308 (Tex. App. 2019); 42 U.S.C.S. § 12101 (LexisNexis 2022); 42 U.S.C.S. § 12181 (LexisNexis 2022).

76. *Rosales*, 577 S.W.3d at 309.

occurred.<sup>77</sup> Rosales responded to the pleadings with a motion to dismiss under the Texas Citizens Participation Act<sup>78</sup> (TCPA) and the lower court granted Rosales's motion to dismiss.<sup>79</sup> The Commission for Lawyer Discipline sought appeal.<sup>80</sup> The Commission argued that the TCPA did not apply to government enforcement actions.<sup>81</sup> The court of appeals disagreed, stating that the TCPA specifically did not exclude lawyer discipline cases.<sup>82</sup> The Commission was able to overcome the motion to dismiss as the Commission met its burden of establishing a prima facie case for Rosales's discipline.<sup>83</sup> Rosales's motion ultimately failed, but the Texas appellate court noted attorneys could use anti-SLAPP motions in future disciplinary hearings.<sup>84</sup> However, after this case, the State of Texas amended the TCPA to exclude actions under the Texas Rules of Disciplinary Procedure.<sup>85</sup>

In another case in Rhode Island, the state supreme court noted an attorney could not use an anti-SLAPP statute as a defense to discipline proceedings, as well as noting state discipline proceedings extend to conduct in federal court.<sup>86</sup> Kevin McKenna was referred to the Disciplinary Board of the Rhode Island Supreme Court for multiple violations of the Rhode Island Supreme Court Rules of Professional Conduct.<sup>87</sup> McKenna's conduct involved frivolous motions involving a workers compensation issue, as well as a failure to disclose certain items during bankruptcy proceedings.<sup>88</sup> The Rhode Island Supreme Court noted attorney discipline proceedings did not involve McKenna's First Amendment rights, therefore the anti-SLAPP motion filed was denied.<sup>89</sup> The court also found the Disciplinary Board could review actions stemming from McKenna's conduct as an attorney in several courts, including Federal Bankruptcy and Federal District Courts.<sup>90</sup>

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77. *Id.*

78. TEX. CIV. PRAC. & REM. CODE ANN. § 27.003 (West 2021).

79. *Rosales*, 577 S.W.3d at 310.

80. *Id.*

81. *Id.* at 311-13.

82. *See id.* at 312.

83. *Id.* at 315-17.

84. *Rosales*, 577 S.W.3d at 311.

85. Laura Lee Prather & Robert T. Sherwin, *The Changing Landscape of the Texas Citizens Participation Act*, 52 TEX. TECH. L. REV. 163, 178 (2020); TEX. CIV. PRAC. & REM. CODE ANN. § 27.010 (West 2021).

86. Bloomberg L., *Anti-SLAPP Law Can't Be Invoked To Get Rid of Disciplinary Charges*, LEGAL ETHICS (Mar. 24, 2015, 11:00 PM), <https://www.bloomberglaw.com>.

87. *In re McKenna*, 110 A.3d 1126, 1130 (R.I. 2015).

88. *Id.* at 1134.

89. *Id.* at 1146-47.

90. *Id.* at 1140-43.

ANTI-SLAPP LAWS DON'T APPLY IN DIVERSITY JURISDICTION: *SHADY GROVE* AND MORE

Currently, there is a lack of federal anti-SLAPP law, and it is unclear if state anti-SLAPP laws can apply in federal venues.<sup>91</sup> Federal courts with a diversity case will apply state substantive law and federal rules of procedure.<sup>92</sup> Yet, when there are conflicts between state and federal laws regarding SLAPP suits, the Supreme Court has not resolved how it would solve that problem.<sup>93</sup> *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.* has led to further confusion concerning state law application in federal courts sitting in diversity.<sup>94</sup> This case does not directly address a SLAPP suit, but provides an idea of the analytical articulation the Supreme Court would use to decide on a future SLAPP case involving diversity jurisdiction. This case discussed the conflict between Federal Rule of Civil Procedure (FRCP) 23,<sup>95</sup> which governs the prerequisites for class action, with a “New York law restricting class actions in suits seeking penalties or statutory-minimum damages.”<sup>96</sup> The plaintiffs in *Shady Grove* filed a class action against Allstate for penalty interests when Allstate did not pay out past-due insurance claim payments.<sup>97</sup> Allstate argued that New York’s procedural rule differed from FRCP 23, thus the New York rule would not allow a class action suit to proceed.<sup>98</sup> The majority opinion by Justice Scalia ruled that FCRP 23 answered the dispute and would govern over the New York rule.<sup>99</sup> Justice Stevens wrote in his concurrence that in certain cases, federal courts should defer to applying state procedural rules if a federal procedural rule interferes with the state’s substantive rights.<sup>100</sup> *Shady Grove* does not specifically take on the issue of how SLAPP suits apply in a diversity context. Rather, the case provides a modern articulation of the analytical approach the court might take on applying state SLAPP statutes. The key debate of whether state anti-SLAPP motions apply in federal courts depends on considering the state’s

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91. Saner, *supra* note 42, at 781 (referring to author’s abstract).

92. *Id.* at 784.

93. Saner, *supra* note 42, at 784; *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941); *Gasparini v. Ctr. for Humans, Inc.*, 518 U.S. 415 (1996).

94. See Saner, *supra* note 42, at 785.

95. FED. R. CIV. P. 23.

96. Saner, *supra* note 42, at 796.

97. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 397 (2010).

98. *Id.* at 399.

99. *Id.* at 406. See Saner, *supra* note 42, at 797-99.

100. *Shady Grove Orthopedic Assocs., P.A.*, 559 U.S. at 424-25; Saner, *supra* note 42, at 798-800.

anti-SLAPP law as procedural or substantive.<sup>101</sup> Federal courts that find state anti-SLAPP laws to be substantive in nature may apply them in diversity cases.<sup>102</sup> Federal courts that find state anti-SLAPP laws to be procedural in nature are much less likely to apply them in diversity cases and default to Federal Rules of Civil Procedure.<sup>103</sup> Many people advocate for a strong state interest and, thus, the application of special motions used in state courts should apply to federal courts sitting in diversity.<sup>104</sup>

Based on the *Shady Grove* opinion, circuits differ in their application of the Supreme Court's ruling to state and federal conflicts of law.<sup>105</sup> The First and Ninth Circuits have applied state anti-SLAPP laws in federal court, whereas the Second, Fifth, Eleventh, and District of Columbia Circuits have all declined to apply state anti-SLAPP laws.<sup>106</sup> The Ninth Circuit has asserted that anti-SLAPP statutes serve to address the protection of First Amendment rights because the Federal Rules of Civil Procedure do not necessarily offer protection.<sup>107</sup> The First Circuit follows a similar philosophy.<sup>108</sup> The Second, Fifth, Eleventh, and District of Columbia Circuits do not agree with applying state anti-SLAPP statutes because rules 8, 12, and 56 of the Federal Rules of Civil Procedure are adequate to answer motions in diversity cases.<sup>109</sup>

UNIFORMITY IN THE WORKS: THE UNIFORM PUBLIC EXPRESSION  
PROTECTION ACT (UPEPA)

Due to the diverse range of anti-SLAPP laws, efforts have been made to unify the standards of anti-SLAPP laws.<sup>110</sup> The Uniform Public Expression Protection Act (UPEPA),<sup>111</sup> developed by the American Bar Association

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101. Jay Adkisson, *Federal Anti-SLAPP Legislation Re-Introduced in Congress but Needs Updating*, FORBES (Aug. 29, 2020, 12:40 AM), <https://www.forbes.com/sites/jayadkisson/2020/08/29/federal-anti-slapp-legislation-re-introduced-in-congress-but-needs-updating/?sh=70cc3a011d28> [https://perma.cc/YH5J-YQD5].

102. *Id.*

103. *Id.*

104. Saner, *supra* note 42, at 821-22.

105. *Id.* at 803-07.

106. Caitlin E. Daday, Comment, *(Anti)-SLAPP Happy in Federal Court? The Applicability of State Anti-SLAPP Statutes in Federal Court and the Need for Federal Protection Against SLAPPS*, 70 CATH. U. L. REV. 441, 448 (2021).

107. *Id.* at 449.

108. *Id.*

109. *Id.* at 452-54.

110. Vining & Matthews, *supra* note 2.

111. See *Public Expression Protection Act*, UNIF. L. COMM'N, <https://www.uniform-laws.org/committees/community-home?communitykey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=groupdetails> [https://perma.cc/ZTR2-3KKY] (provides an overview of the Act along with legislative bill tracking across the United States).

(ABA), seeks to standardized anti-SLAPP laws across the United States.<sup>112</sup> The UPEPA seeks to protect a person’s right to “speak freely on issues of public interest . . . .”<sup>113</sup> The formulation of the UPEPA utilized the impute and concerns of trial attorneys which resulted in a new model law that would not exclude the right to jury trials, preserve each party bearing its own attorney’s fees, and certain cases to not be included in an anti-SLAPP statute.<sup>114</sup> The UPEPA seeks to create a standard special motion that a defendant may bring to have a case dismissed.<sup>115</sup> The motion follows a three-part analysis to be successful.<sup>116</sup> First, the defendant must show their conduct is a protected area of speech.<sup>117</sup> Second, the burden shifts to the plaintiff to show their case is in good faith and would potentially survive summary judgement.<sup>118</sup> Third, the defendant must show the plaintiff’s claim would fail as a matter of law.<sup>119</sup> The UPEPA seeks to protect several forms of First Amendment freedoms.<sup>120</sup> The UPEPA also contains carve-out portions that further limit its scope.<sup>121</sup> The implementation of the UPEPA would provide a uniformed front to combatting SLAPP suits, but it is unclear as to when all states would adopt this statutory model. Only the state of Washington has adopted the UPEPA model thus far.<sup>122</sup>

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112. See Laura Prather Plays Leading Role in Adoption of Uniform Public Expression Protection Act, HAYNES & BOONE (July 20, 2020), <https://www.haynesboone.com/press-releases/adoption-of-uniform-public-expression-protection-act> [<https://perma.cc/24DG-UHZ8>].

113. 61A AM. JUR. 2D *Pleading* § 380 (2022).

114. Jay Adkisson, *The Uniform Public Expression Act: Background and Underpinnings*, FORBES (Feb. 26, 2021, 12:25 PM), <https://www.forbes.com/sites/jayadkisson/2021/02/26/the-uniform-public-expression-protection-act-background-and-underpinnings/?sh=37f6946852c5> [<https://perma.cc/2P4W-NAP6>].

115. Jay Adkisson, *The Uniform Public Expression Act: The Three-Phase Analysis*, FORBES (Mar. 15, 2021, 6:09 PM), <https://www.forbes.com/sites/jayadkisson/2021/03/15/the-uniform-public-expression-protection-act-the-three-phase-analysis/?sh=3e663e9f20be> [<https://perma.cc/945L-J37E>].

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Sarah Matthews & Maya Gandhi, *Washington*, REPS. COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/anti-slapp-guide/washington/> [<https://perma.cc/SR7G-G75Z>]; U.S. CONST. amend. I.

121. Jay Adkisson, *The Uniform Public Expression Act: Scope and Applicability*, FORBES (May 11, 2021, 11:48 AM), <https://www.forbes.com/sites/jayadkisson/2021/05/11/the-uniform-public-expression-protection-act-scope-and-applicability/?sh=24f46a207226> [<https://perma.cc/UG9M-5LWR>] (the UPEPA contains three carve out portions in which the motion to dismiss would be unavailable).

122. Brian C. Nadler, *The “SLAPP” Back: Uniform Public Expression Protection Act Revives Washington SLAPP Protections*, SCHLEMLEIN, FICK, & FRANKLIN (Sept. 2, 2021), <https://www.soslaw.com/news-insights/the-slapp-back-uniform-public-expression-protection-act-revives-washington-slapp-protections> [<https://perma.cc/EA6A-UZ3Z>].

## BIPARTISAN SUPPORT WITH NO ACTION: SPEAK FREE ACT OF 2015

There have been attempts at federal anti-SLAPP law, but currently there are no federal anti-SLAPP law(s) in existence that could be utilized by a defendant in federal court.<sup>123</sup> Plaintiff litigants are often able to forum shop in states with no anti-SLAPP laws or states that lack serious anti-SLAPP statutes.<sup>124</sup> Plaintiffs may also attempt to avoid state anti-SLAPP laws by filing federal causes of action.<sup>125</sup> The Speak Free Act of 2015 was a bipartisan bill aimed at addressing the variety of different anti-SLAPP statutes in different states and the effort by plaintiffs' attorneys to forum shop in venues where no anti-SLAPP legislation was on the books.<sup>126</sup> The bill also had support from numerous legal scholars.<sup>127</sup> This proposed law was intended to operate in a similar function to other state anti-SLAPP statutes where defendants could file a special motion to dismiss.<sup>128</sup> Defendants faced with SLAPP suits could file a special motion to put the burden on plaintiffs to prove a prima facie case of a legitimate claim against the defendant.<sup>129</sup> The bill allowed exceptions for enforcement actions and certain aspects of commercial speech.<sup>130</sup> If a defendant was successful in their motion, they could be entitled to recover attorneys' fees and other litigation costs.<sup>131</sup> The bill was reviewed in the House Judiciary Committee on June 22, 2016, but the bill failed to make it past committee review.<sup>132</sup>

## A MORE RECENT ATTEMPT: CITIZENS PARTICIPATION ACT OF 2020

A more recent attempt by Congress to introduce federal anti-SLAPP legislation started in the U.S. House of Representatives.<sup>133</sup> The Citizen Participation Act of 2020 provided a basic framework for anti-SLAPP protection in federal courts.<sup>134</sup> The proposed statute would provide broad protection for

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123. Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEGIS. & PUB. POL'Y (June 15, 2020), <https://nyujlpp.org/quorum/the-need-for-a-federal-anti-slapp-law/> [<https://perma.cc/W3VX-PRAZ>]; Adkisson, *supra* note 101.

124. Horwitz, *supra* note 123.

125. *Id.*

126. *Speak Free Act*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/speak-free-act> [<https://perma.cc/89M4-PNFR>].

127. Eric Goldman, *59 Legal Scholars Sign Letter Supporting SPEAK FREE Act to Create Federal Anti-SLAPP Law*, FORBES (Sep. 16, 2015, 2:33 PM), <https://www.forbes.com/sites/ericgoldman/2015/09/16/59-legal-scholars-sign-letter-supporting-speak-free-act-to-create-federal-anti-slapp-law/?sh=65ddf9804519> [<https://perma.cc/QAB6-WM25>].

128. *Speak Free Act of 2015*, H.R. 2304, 114th Cong. (2015).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Adkisson, *supra* note 101.

134. *Citizen Participation Act of 2020*, H.R. 7771, 116th Cong. (2020).



legitimate, constitutional protected forms of speech.<sup>135</sup> A special motion to dismiss would be the primary resources for defendants to utilize, which is similar to other state anti-SLAPP laws.<sup>136</sup> The initial burden lies on the defendant to demonstrate there is a SLAPP suit occurring and then the burden shifts to the defendant to show there is a legally sufficient claim.<sup>137</sup> The statute also allows the defendant as the moving party to recover reasonable attorneys' fees if the motion is granted.<sup>138</sup> While the bill provides a broad framework and anti-SLAPP protection, the bill failed to even make it into a committee session.<sup>139</sup>

#### PROTECTING THE RIGHT TO CRITICIZE COMPANIES AND THEIR PRODUCTS

In addition to attempts to pass anti-SLAPP statutes at the federal level, there have been other legislative acts used to protect critical speech regarding products and companies. The Consumer Review Fairness Act of 2016 prohibits the business practice of non-disparagement clauses.<sup>140</sup> Non-disparagement clauses attempt to prevent customers from saying anything negative about a company or its product after purchasing said product.<sup>141</sup> Non-disparagement clauses are an attempt for businesses to avoid being SLAPP filers and instead limit free speech by burying non-disparagement clauses deep into purchase agreements.<sup>142</sup> The Act prohibits consumer contracts that prevent consumer reviews.<sup>143</sup> The Federal Trade Commission is granted authority in enforcing the law and providing additional administrative materials.<sup>144</sup> The Act also allows state attorney generals to bring civil actions against businesses on behalf of the citizens of a state.<sup>145</sup> The Consumer Review Fairness Act of 2016 was signed into law on December 14th, 2016.<sup>146</sup> While the Consumer Review Fairness Act of 2016 is a step in the right direction, its protection is limited in scope and does not fully provide a defense against other forms of SLAPP suits.

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135. *Id.*; U.S. CONST. amend. I.

136. Citizen Participation Act of 2020, H.R. 7771, 116th Cong. (2020); *e.g.*, 735 ILL. COMP. STAT. ANN. 110/20 (LexisNexis 2022).

137. Citizen Participation Act of 2020, H.R. 7771, 116th Cong. § 5(b) (2020).

138. *Id.* § 8(a).

139. *Id.*

140. *Consumer Review Fairness Act*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/consumer-review-fairness-act> [<https://perma.cc/PN5J-PZZ2>].

141. Mary Squillace, *Should You Sign a Non-Disparagement Clause? Here's What You Need to Know*, THEMUSE (June. 19, 2020), <https://www.themuse.com/advice/non-disparagement-clause-agreement-sample> [<https://perma.cc/5AKW-DR4E>].

142. *Consumer Review Fairness Act*, *supra* note 140.

143. Consumer Review Fairness Act of 2016, 15 U.S.C. § 58 (2016).

144. *Id.*

145. *Id.*

146. *Id.*

## MONETARY SANCTIONS WON'T QUITE WORK

Judicial sanctions are a means for courts to impose discipline on attorneys or parties separate from state disciplinary committees. Judicial sanctions are usually separated from discipline committee actions as discipline committees show some reluctance to act whether or not judicial sanctions are imposed.<sup>147</sup> If judicial sanctions are not imposed, discipline committees usually close discipline complaints. On the other hand, if judicial sanctions are imposed, discipline committees may be reluctant to impose further penalties.<sup>148</sup>

Judicial sanctions can include monetary and non-monetary punishments.<sup>149</sup> Non-monetary punishments may include reprimands and continuing education courses.<sup>150</sup> Monetary sanctions can be used to compensate defendants for frivolous litigation, but monetary sanctions may be limited in their effectiveness in regards to SLAPP filers.<sup>151</sup> Attorneys who file SLAPPs may charge higher fees to clients to account for possible monetary sanctions and thereby put only the client in the target zone.<sup>152</sup> In addition, “filers may rationally determine that the benefits of filing such frivolous suits outweigh the costs - in that removing the debate from a public forum to the legal arena would justify any direct monetary costs associated with filing a lawsuit.”<sup>153</sup> Therefore, the use of a new ethical rule combined with attorney discipline may lead to better results in jurisdictions where ethical action is needed.<sup>154</sup>

## PART III: A NEW RULE TO PREVENT SLAPP SUITS

Anti-SLAPP laws do not currently exist in federal venues. While anti-SLAPP laws exist in some states, there is still a lack of options for defendants who are in state venues with no anti-SLAPP legislation. Also, the wide range of applicability for anti-SLAPP defenses varies across the states with no universally accepted model of an anti-SLAPP statute implemented by each state. Defense attorneys are also less willing to take on SLAPP cases due to political pressures or not being able to generate enough fees from their clients.<sup>155</sup>

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147. David L. Hudson, Jr., *What is a Lawyer's Ethical Duty to Check Out a Client's Claim Before Filing an Action?*, A.B.A. J. (Apr. 1, 2021, 12:50 AM), <https://www.abajournal.com/magazine/article/election-fraud-cases-highlight-ethics-rules-on-baseless-complaints> [<https://perma.cc/8THP-J6UC>].

148. *Id.*

149. Tu & Stump, *supra* note 11, at 647.

150. *Id.*

151. *Id.* at 644.

152. *Id.*

153. *Id.*

154. *See* Tu & Stump, *supra* note 11, at 644.

155. PRING & CANAN, *supra* note 1, at 154-55 (defense attorneys face several challenges to accepting clients who are defendants in a SLAPP suit).

Therefore, there is a need to explore other avenues of deterrence, including ethical rules and attorney discipline. A new ethical rule is the best solution to deter SLAPP suits from being filed. Attorneys are significant actors in society, seeking to advance positive change rather than just offer a unique service.<sup>156</sup> By developing this new rule, it will advance the objective of respect for the legal system.<sup>157</sup>

In states that do not have anti-SLAPP legislation, defendants are left with limited options to defend themselves. A traditional course of litigation may ensue based on the SLAPP filer's seemingly legitimate claims of defamation or other torts. Even with a defendant successfully warding off a SLAPP suit via traditional litigation, the damage is still done with defense fees and insurance premium increases.<sup>158</sup> More importantly, speech is chilled for the defendant and there may be no punishment for the plaintiff's attorney. Speech may also be chilled for other parties, "[m]ore damaging is the effect that such suits can have on those who have not yet been targeted: the desire to avoid being sued translates into a reluctance to participate in public debate."<sup>159</sup> There needs to be an effective way to protect against future SLAPP attacks that may stem from the same plaintiffs and their attorneys. Attorneys already have an obligation not to file frivolous lawsuits, but there needs to be more done to strengthen that obligation.<sup>160</sup> By strengthening this obligation, it will be an effective tool to help deter SLAPPs. A new rule should be added to the Model Rules of Professional conduct to specifically prohibit the filing of lawsuits that are intended to suppress protected speech. By implementing a new professional conduct rule that specifically mentions SLAPP suits, lawyers will play a more central role in being the gatekeepers to prevent litigation that is intended to chill critical speech. The pieces of this rule already exist amongst the states and a combination of these state rule sets could provide a basis for a new anti-SLAPP ethical rule.

#### USING RULES 3.1 AND 3.2 TO DEVELOP THE NEW RULE

The ABA Model Rules of Professional Conduct include rule 3.1 entitled "Meritorious Claims and Contentions."<sup>161</sup> Rule 3.1 states the following, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous,

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156. See Leslie C. Levin & Lynn Mather, *Beyond the Guild: Lawyer Organizations and Law Making*, 18 WASH. U. GLOBAL STUD. L. REV. 589, 606 (2019).

157. MODEL RULES OF PRO. CONDUCT pmb1. (AM. BAR ASS'N 2020).

158. E.g., Martinelli, *supra* note 35.

159. Brandi M. Snow, *SLAPP Suits*, MIDDLE TENN. STATE UNIV., <https://www.mtsu.edu/first-amendment/article/1019/slapp-suits> [<https://perma.cc/7ZGK-R6GY>].

160. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020).

161. *Id.*

which includes a good faith argument for an extension, modification or reversal of existing law.”<sup>162</sup> SLAPP suits relate to rule 3.1 due to their frivolous nature and needless extension of litigation. However, ABA rule 3.1 does not adequately deter SLAPP suits from being filed by attorneys.

Rule 3.1 clearly would apply to a SLAPP suit, so why then would an attorney still file the suit?<sup>163</sup> One answer may be an attorney’s failure to further investigate their client’s alleged claim. SLAPP filing attorneys may not be away of their clients’ improper motives for the suit.<sup>164</sup> Clients may also not care if their attorney is sanctioned or disciplined for bringing such a suit, since the plaintiff’s main motive in a SLAPP suit is for the defendant to suffer for speaking out against the plaintiff.<sup>165</sup> It could also be suggested attorneys will file a SLAPP suit for billing profit. Either the case at hand has the potential for a high amount of fees and/or, by filing a specific SLAPP suit, a client to become a repeat client for the attorney, either for more SLAPPS or actual legitimate legal interests.<sup>166</sup> An attorney could also be in a gray area, filing what appears to be a meritless claim at the time of filing, which could change based on discovery and continued litigation. Whatever the individual reason may be, a specific ethical rule that prohibits SLAPP suits will provide a stronger obligation for attorneys to not file SLAPPS in the first place.

Individual states vary in their descriptions of rule 3.1.<sup>167</sup> A new ethical rule against SLAPPS could be developed utilizing language from rule 3.1 of various state professional rule sets. Some states have more specific prohibitions in rule 3.1 than others, such as prohibiting harassing litigation and other similar matters without merit.<sup>168</sup> These changes from the ABA version of 3.1 may lead to less SLAPP filings in these states. For example, New York’s rule specifically notes a prohibition on litigation that “serves merely to harass or maliciously injure another” in connection with New York’s rule 3.2.<sup>169</sup> Under Wisconsin’s rule 3.1, “a lawyer shall not . . . file a suit . . . when the lawyer

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162. *Id.*

163. Laura J. Ericson-Siegel, *Review of Florida Legislation; Comment: Silencing SLAPPS: An Examination of Proposed Legislative Remedies and a “Solution” for Florida*, 20 FLA. ST. U. L. REV. 487, 497 (1992).

164. *Id.*

165. *Id.*

166. Tu & Stump, *supra* note 11, at 628.

167. Am. Bar Ass’n, *Variations of the ABA Model Rules of Professional Conduct: Rule 3.1: Meritorious Claims and Contentions*, (Apr. 22, 2022), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc-3-1.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-1.pdf) [<https://perma.cc/T6RV-SYAM>] (the ABA changes these comparison charts periodically, copy of pdf is on file with author).

168. *Id.* (showing the states of Alabama, California, Georgia, Montana, New York, Wisconsin, and Wyoming provide a prohibition on intimidating and or harassing litigation).

169. N.Y. RULES OF PRO. CONDUCT r. 3.1; Am. Bar Ass’n, *supra* note 167.

knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.”<sup>170</sup>

Another relevant section to apply to SLAPP suits is ABA rule 3.2.<sup>171</sup> The title of ABA rule 3.2 is “Expediting Litigation.”<sup>172</sup> ABA rule 3.2 states “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”<sup>173</sup> ABA rule 3.2 focuses solely on expediting the litigation for a lawyer’s own client. Numerous states have adopted the same exact wording as ABA’s rule 3.2.<sup>174</sup> Meanwhile, other states have edited the wording of ABA rule 3.2 to prohibit delayed litigation against opposing parties.<sup>175</sup> States that do not have anti-SLAPP laws have all adopted ABA’s rule 3.2.<sup>176</sup> Meanwhile, some states with anti-SLAPP laws advise delays of litigation to be an unethical practice under their rules of professional conduct, such as California, Nebraska, New York, and Texas, as well as the District of Columbia.<sup>177</sup>

For example, California has a different title for rule 3.2, as well as alternative wording from the ABA’s rule 3.2.<sup>178</sup> California’s title for Rule 3.2 is “Delay of Litigation.”<sup>179</sup> California’s rule 3.2 states “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”<sup>180</sup> New York takes a very similar approach to California, both amending the title and wording of rule 3.2. New York’s rule 3.2 is also entitled “Delay of Litigation.”<sup>181</sup> The text of New York’s rule is: “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense.”<sup>182</sup> Texas also amends the title of rule 3.02 to “Minimizing the Burdens and Delays of Litigations” and amends the rule to “[i]n the course of litigation, a lawyer shall not take a position that unreasonably increases the costs or other burdens of the case or that unreasonably delays resolution of the matter.”<sup>183</sup>

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170. WIS. SUP. CT. R. 20:3.1.

171. MODEL RULES OF PRO. CONDUCT r. 3.2 (AM. BAR ASS’N 2020).

172. *Id.*

173. *Id.*

174. Am. Bar Ass’n, *Variations of the ABA Model Rules of Professional Conduct: Rule 3.2: Expediting Litigation*, (Dec. 11, 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_2.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_2.pdf) [<https://perma.cc/VD9U-75UX>] (the ABA changes these comparison charts periodically, copy of pdf is on file with author).

175. *Id.*

176. *Id.*; *Anti-SLAPP Legal Guide*, *supra* note 6.

177. Am. Bar Ass’n, *supra* note 174.

178. Am. Bar Ass’n, *supra* note 174.

179. CAL. SUP. CT. R. 3.2.

180. *Id.*

181. N.Y. RULES OF PRO. CONDUCT r. 3.2.

182. *Id.*

183. TEX. DISCIPLINARY RULES OF PROF. CONDUCT r. 3.02.

The District of Columbia and Nebraska take the wording one step further to specifically include injury to another is prohibited.<sup>184</sup> The District of Columbia's rule 3.2 states, "[i]n representing a client, a lawyer shall not delay a proceeding when the lawyer knows or when it is obvious that such action would serve solely to harass or maliciously injure another."<sup>185</sup> Nebraska notes the same title as ABA rule 3.2, but uses different wording: "[A] lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another."<sup>186</sup>

#### THE NEW IDEAL RULE

Rules 3.1 and 3.2 could apply to SLAPP suits, but with SLAPPs still occurring today in various states, there needs to be a new rule that specifically describes SLAPP suits and prohibits them. The new rule should be added to the current ABA model rules. The new rule can draw from various states' variations of ABA model rules 3.1 and 3.2. Ideally, this new rule would appear under the "Advocate" section of the ABA model rules.<sup>187</sup> A new title should read "Delay of Litigation: SLAPP Suits."<sup>188</sup> The wording should be the following: "a lawyer shall not commence or continue a SLAPP action where the lawyer knows such action is frivolous and is meant to intimidate, silence, and cause needless expense to the opposing party in violation of the opposing party's First Amendment rights." This new rule should also have comments to further describe the rule. Comment one will describe the acronym of SLAPP and cite a short history and description of SLAPP suits. Comment two will contain the following: "lawyers, as officers of the court, have the duty to uphold the Constitutional protections of First Amendment and must allow for robust, truthful criticism of others, even if that criticism may affect their client(s) in a non-legal way."

By specifically mentioning SLAPP suits, this new rule can be implemented and followed by attorneys in the future. Some may argue that rules 3.1 and 3.2 already cover SLAPP suits, but with SLAPP suits still occurring in various states, it is clear a more specific rule needs to be implemented. Criticism may also be noted that a model rule is supposed to be broad to allow for edits by various states. This argument can be countered by the fact that

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184. D.C. RULES OF PROF. CONDUCT r. 3.2; NEB. CT. R. OF PROF. COND. § 3-503.2.

185. D.C. RULES OF PROF. CONDUCT r. 3.2.

186. NEB. CT. R. OF PROF. COND. § 3-503.2.

187. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2020); MODEL RULES OF PRO. CONDUCT r. 3.2 (AM. BAR ASS'N 2020).

188. Am. Bar Ass'n, *supra* note 174.

the ABA model rules contain some specific, niche provisions such as rule 3.8, which covers the specific role of a criminal prosecutor.<sup>189</sup>

#### THE PUBLIC'S CHANCE TO REGULATE ATTORNEYS

Rules of Professional Conduct vary in their effectiveness based on attorney discipline systems in each state.<sup>190</sup> Each state decides when a rule is violated and what the potential punishment is for rule violations.<sup>191</sup> Each of the fifty states and the District of Columbia have their own procedural rules regarding attorney discipline.<sup>192</sup> Federal courts also establish their own procedures regarding attorney discipline.<sup>193</sup> Attorney discipline cases are neither civil nor criminal, but instead exist as unique procedure exclusive to attorneys.<sup>194</sup> The highest court in each state generally delegates authority to a disciplinary counsel to handle all attorney discipline matters, but more severe punishments such as suspension or disbarment may be left under the control of a state's supreme court.<sup>195</sup> Attorney discipline is normally not a matter considered by state legislatures and is left exclusively to the judicial branch of each state.<sup>196</sup>

Each state allows for attorney discipline for violations of each states' professional conduct rules.<sup>197</sup> Under ABA model rule 8.4(a), "[i]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."<sup>198</sup> Nearly all states word their rule 8.4(a) identical to the ABA rule 8.4(a).<sup>199</sup> While all states call for possible discipline regarding violations of the rules of professional conduct, as well as other unethical offenses, disciplinary authorities rarely produce formal charges against attorneys. The wide majority of complaints filed against attorneys are

189. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 2020).

190. See generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209, 209 (2011) (discussing each state's general procedures for attorney discipline).

191. *Id.*

192. ABA/BLOOMBERG LAW LAWYERS' MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDES 101.10 (2021).

193. *Id.*

194. *Id.*

195. *E.g.*, Curtis, *supra* note 190.

196. Jennifer M. Kraus, *Attorney Discipline Systems: Improving Public Perception and Increasing Efficacy*, 84 MARQ. L. REV. 273, 274 (2000).

197. See Curtis, *supra* note 190.

198. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020).

199. Am. Bar Ass'n, *Variations of the ABA Model Rules of Professional Conduct: Rule 8.4: Misconduct* (Aug. 3, 2022), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc-8-4.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-4.pdf) [<https://perma.cc/2LSN-CE6B>] (the ABA changes these comparison charts periodically, copy of pdf is on file with author).

usually dismissed without further action.<sup>200</sup> States vary as to the percentage of formal discipline charges they produce compared to the amount of complaints they receive.<sup>201</sup> A primary reason for the small percentage of formal charges is because nearly all states have some form of lesser or informal discipline.<sup>202</sup> Informal discipline may involve taking continuing education programs or counseling for attorneys.<sup>203</sup> Private letters of caution may also be an alternative to formal discipline.<sup>204</sup> In addition, state disciplinary systems may be underfunded, thus lacking the resources to enforce all violations of attorney discipline.<sup>205</sup> With limited resources, attorney discipline systems may have to focus their attention on the most serious ethical violations.<sup>206</sup> There is also a general criticism of attorney discipline systems being self-regulated by other attorneys, suggesting a disconnect between attorney discipline and citizen complaints.<sup>207</sup>

Public citizens now play a larger role in attorney discipline. Nearly all states have adopted some form of a public system in which a citizen can file a complaint against an attorney.<sup>208</sup> Public complaint systems may help resolve non-disciplinary complaints, as well as start the initial review for formal discipline.<sup>209</sup> Members of the public who are not attorneys may serve as members of attorney discipline commissions and disciplinary proceedings in some states.<sup>210</sup> While citizens may be a part of the attorney discipline system, the effectiveness of citizen complaints is limited.<sup>211</sup> Attorney discipline com-

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200. See ABA/BLOOMBERG LAW LAWYERS' MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDES 101.2101.20.30.20 (2021). See also Am. Bar. Ass'n, *2019 Survey on Lawyer Discipline Systems (S.O.L.D.)* (Nov. 2021), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sold-survey/2019-sold-final.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sold-survey/2019-sold-final.pdf) [https://perma.cc/LN4J-PYMG].

201. See generally Curtis, *supra* note 190 (describing throughout the article the percentage of formal charges filed against attorneys versus the number of complaints filed against attorneys based on several years of data for each state).

202. ABA/BLOOMBERG LAW LAWYERS' MANUAL ON PROFESSIONAL CONDUCT: PRACTICE GUIDES 101.2101.20.30.20 (2021).

203. *Id.*

204. *Id.*

205. Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1209 (2003).

206. See *id.* at 1208-09.

207. Kraus, *supra* note 196, at 285.

208. See *id.* at 292-95.

209. *Id.* at 291-92 (non-disciplinary complaints may include fee arbitration programs in which an attorney and client resolve matters involving fees for legal services).

210. *E.g.*, Curtis, *supra* note 190, at 241, 244 (explaining the Illinois ARDC board and its make-up of attorneys and non-attorneys).

211. See generally, Curtis, *supra* note 190, at 245 (highlighting that while Illinois utilizes non-attorney citizens on the ARDC board, the percentage of formal charges filed versus



plaints filed by former clients or other parties are first viewed by state disciplinary committees and many are dismissed with no action.<sup>212</sup> Dismissal may be due to a non-meritorious claim or a lack of resources at the disciplinary committee to further investigate the claim.<sup>213</sup> A person who has been intimidated by a SLAAP suit may file a complaint, but that complaint may be dismissed for what appears to be a non-issue. This may be especially true if the SLAPP filer had dropped the case but had already impacted the defense with litigation costs.<sup>214</sup> The SLAPP filer has won their purpose and an attorney discipline board may choose not to pursue anything as the case seems to be closed due to voluntary dismissal.

#### TALKING THE TRUTH ABOUT OTHER PROFESSIONALS

Attorneys may report their fellow professionals in some situations.<sup>215</sup> Lawyers may be required to report other lawyers for serious ethical violations, but it is arguable if this duty includes reporting attorneys for filing frivolous lawsuits.<sup>216</sup> Rule 8.3 of the Model Rules of Professional Conduct requires “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”<sup>217</sup> This rule does not require attorneys to report every single violation as “the failure to report any violation would itself be a professional offense.”<sup>218</sup> “The term ‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.”<sup>219</sup> Therefore, it is the responsibility of an attorney to report possible misconduct so that state discipline systems may discover serious offenses and repetitive misconduct.<sup>220</sup> Utilizing the threat of a discipline complaint, however, is misconduct.<sup>221</sup> The threat of misconduct

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complaints is small, thus non-attorney citizens do not drastically change the percentage of formal charges).

212. *E.g.*, Curtis, *supra* note 190, at 245 (refer to chart and compare the number of complaints versus investigations).

213. *See* Barton, *supra* note 205.

214. *E.g.*, Martinelli, *supra* note 35; *Last Week Tonight with John Oliver* (HBO television broadcast Nov. 11, 2019).

215. Timothy J. Pierce & Aviva Meridian Kaiser, *Ethical Dilemmas: Threats to File a Disciplinary Complaint Against Opposing Counsel*, STATE BAR OF WIS. (Mar. 18, 2015), <https://www.wisbar.org/newspublications/insidetrack/pages/article.aspx?Volume=7&Issue=6&ArticleID=23967> [<https://perma.cc/GN86-V8ED>].

216. *Id.*

217. MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 2020).

218. MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 3 (AM. BAR ASS’N 2020).

219. *Id.*

220. *See* MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS’N 2020).

221. Pierce & Kaiser, *supra* note 215; MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS’N 2020).

to gain advantage against an opposing counsel is a violation of multiple rules of professional conduct.<sup>222</sup>

Attorneys defending clients in a SLAPP suit could utilize multiple professional conduct rules in formulating an attorney complaint against plaintiffs' attorneys who file SLAPP suits.<sup>223</sup> At the initial start of litigation, it would be difficult for defense attorneys to utilize rule 8.3 as they may run into issues utilizing a complaint as a possible threat.<sup>224</sup> However, during the course of SLAPP litigation an attorney could more easily recognize a frivolous suit and at least seek to start the complaint process. While the complaint may not ultimately assist the current defendant in the present course of litigation, it may provide a future benefit of disciplining the plaintiff's attorney from attempting further SLAPP suits against the same defendant or other parties.

Attorneys may be hesitant, however, to file complaints against SLAPP filing attorneys. Due to implications of rule 8.3 and perhaps appearing to use attorney discipline as weapon, defense attorneys may end up being subject to discipline.<sup>225</sup> However, if a new ethical rule is implemented that specifically prohibits SLAPPs, there is more justification for reporting attorneys who have filed SLAPP suits.

#### A SELF-REGULATING PROFESSION

Implementing a new ethical rule will certainly have challenges and it will take time to implement the new rule. Enforcement of the rule against attorneys will vary in effectiveness based on different discipline systems. However, making a new rule with the specific prohibition of SLAPP suits will deter attorneys from filing SLAPP suits because attorneys are a part of a self-regulating profession.<sup>226</sup> All attorneys take an oath to uphold the Constitution and with this oath comes a responsibility to protect First Amendment freedoms.<sup>227</sup> These First Amendment freedoms allow citizens to criticize multiple actors including other people, corporations, and government offi-

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222. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 94-383 (1994).

223. See MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 2020).

224. See Pierce & Kaiser, *supra* note 215.

225. *Id.*

226. *But cf.* Mark A. Cohen, *Law is a Profession and an Industry—It Should be Regulated That Way*, FORBES (Mar. 29, 2018, 6:39 AM), <https://www.forbes.com/sites/markcohen1/2018/03/29/law-is-a-profession-and-an-industry-it-should-be-regulated-that-way/?sh=5b96f84d6598> [<https://perma.cc/S7TA-VRJF>] (discussing a claim to have business professionals regulate the business industry of law while still acknowledging attorneys should regulate the practice of law).

227. *E.g.*, 705 ILL. COMP. STAT. ANN. 205/4 (LexisNexis 2022).

cials. This criticism is vital to promoting debate and achieving a more collaborative society.<sup>228</sup> By implementing this rule, it makes it obvious that SLAPP suits are prohibited and clearly encourages attorneys to consider the merits of a client's alleged claim. This new rule will also enforce attorneys having in-depth conversations with their clients and confirm each client has a legitimate claim that needs to be addressed by the judicial system.

#### CONCLUSION

SLAPPs still exist in multiple jurisdictions across the United States. SLAPPs serve to coerce defendants exercising free speech and press into silence. Since the invention of the term SLAPP, many steps have been taken to prevent or limit SLAPP suits in order to promote First Amendment freedoms. The first line of defense for those experiencing harassment by SLAPP fillers is to utilize anti-SLAPP statutory protections. However, the applicability and effectiveness of anti-SLAPP laws varies across the United States, thus making SLAPP suits a remaining nuisance in today's legal system.

The profession of law has the ability to regulate itself and must utilize the mechanisms of self-regulation to deter the filing of SLAPP suits. Implementing a new professional rule will make SLAPP suits a more easily recognized prohibited conduct. SLAPP suits will begin to dissipate as more attorneys become aware of SLAPP suits, either through their own recognition or through attorney discipline actions. Citizens who experience attorney misconduct from SLAPP suits may also utilize attorney complaints to stop repeat SLAPP filers. The implementation of a new rule will take time and its effectiveness may vary in different jurisdictions; however, implementing a new rule will provide all attorneys notice of this prohibited conduct. By utilizing legal ethics, SLAPP suits will be prevented. All citizens will have freedom of speech and press without a fear of being bullied via the legal system.

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228. See *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) ("Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.").