

Why CA's Anti-SLAPP Statute Should Apply to Peer Review

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California law protects defendants from lawsuits designed to thwart "a person's right of petition or free speech under the United States or California Constitution in connection with a public issue." The "anti-SLAPP" (Strategic Lawsuit Against Public Participation) statute provides this protection by permitting the defendant to move to strike the plaintiff's complaint at the outset of litigation unless the plaintiff can demonstrate a likelihood of success on the merits of the claim. (Cal. Code Civ. Proc., § 425.16, subd. (e)).

The model SLAPP suit is one "filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1125, citing *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53. Section 425.16, however, has been applied to dismiss complaints in a wide range of other contexts. See, eg, *Briggs, supra*, 19 Cal.4th 1106 (residential rental property owners' suit against nonprofit tenants' rights corporation); *Colt v. Freedom Communications, Inc.* (2003) 109 Cal.App.4th 1551 (public figures' suit against newspaper); *Dove Audio Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 (record publisher's suit against law firm); *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175 (home buyer's suit against

seller). Since enactment of the anti-SLAPP statute, the question has arisen: What are the effects of the anti-SLAPP statute on peer review boards and their members when a disgruntled physician seeks to recover for injuries he feels the board's activities have caused him?

A TEST CASE

The California Supreme Court recently agreed to decide whether physicians who participate in hospital peer review are involved in "official proceedings addressing issues of public importance" that are protected by the anti-SLAPP statute. The lead case before the court is *Kibler v. Northern Inyo County Local Hospital District*, Case No. S131641.

Dr. George Kibler has staff privileges at Northern Inyo Hospital. In late 2001, he had a series of interpersonal conflicts with other staff members. The hospital accused Kibler of acting violently and aggressively toward hospital employees, including making threats with a gun. A hospital peer review committee convened to consider corrective action, and summarily suspended Dr. Kibler's staff privileges for a short period of time. Although Dr. Kibler and Northern Inyo entered into a settlement agreement — which included Dr. Kibler's release of all his claims against Northern Inyo — Dr. Kibler did file suit against Northern Inyo. Kibler's complaint alleged defendants suspended his medical staff privileges as a form of retaliation. In particular, he charged that the hospital's board of directors was antagonistic toward him for raising issues of inadequate medical services and the hospital's prospective insol-

vency. The seven causes of action asserted by Kibler included: intentional interference with the right to practice his profession; abuse of process; defamation; violation of constitutional rights; restraint of trade; extortion; and conspiracy.

Northern Inyo filed an anti-SLAPP motion to strike Dr. Kibler's complaint, asserting that Dr. Kibler's lawsuit constituted an effort to chill defendants' exercise of free speech as related to an official proceeding authorized by law and that Kibler could not prevail on the merits because he had waived the right to sue by signing a release of all claims. In opposition, Kibler argued that section 425.16 did not apply when considered in conjunction with California's Evidence Code section 1157, which provides confidentiality for the proceedings of hospital medical and peer review committees. On the merits of his claim, he further argued that his alleged misconduct did not involve medical treatment of a patient and the release he signed was against public policy. The superior court granted the motion.

The California Court of Appeal affirmed the order granting the anti-SLAPP motion. In doing so, the court concluded that peer review qualifies for protection under the anti-SLAPP statute as an official proceeding authorized by law involving the important public issue of health care. In light of a contrary, conflicting decision by another division of the Court of Appeal (*O'Meara v. Palomar Pomerado Health System*, Case No. S131874), the California Supreme Court granted review (the

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equivalent of certiorari) and will soon decide whether the Court of Appeal was correct.

THE SUPREME COURT SHOULD UPHOLD THE LOWER COURT DECISION

Peer review is part of a larger scheme of public and private oversight of physician competency and performance. While licensing is in the hands of public medical boards, the California Legislature has delegated peer review responsibilities to the private sector, relying on hospital peer review committees to establish and maintain high professional and ethical standards through careful selection and review of staff. The California Legislature has stated that private peer review enables public medical boards to function effectively: “Peer review, fairly conducted, will aid the appropriate state licensing boards in their responsibility to regulate and discipline errant healing arts practitioners.” (Cal. Bus. & Prof. Code, § 809, subd. (a)(5)). The public and private sectors are thus united in a legislative effort to “integrate[] public and private systems of peer review.” (Cal. Bus. & Prof. Code, § 809, subd. (a)(9)(A)). It is this that makes peer review, a public licensing function that the Legislature has delegated to the private sector, an “official” proceeding for purposes of anti-SLAPP protection.

Moreover, in California, peer review is not just authorized, but *required* by the Business and Professions Code, which provides that written peer review procedures affording due process “shall be included in medical staff bylaws.” (Cal. Bus. & Prof. Code, § 809, subd. (a)(8)). The statutory requirement is supplemented by regulations mandating peer review com-

mittees for a wide variety of hospital functions. (Cal. Code Regs., tit. 22, §§ 70701, subds. (a)(1)(E) & (F) and (a)(7), 70703, subds. (a) & (d)). This legislative mandate reinforces the conclusion that hospital peer review is protected by the anti-SLAPP statute because peer review is an official proceeding authorized by California law.

Hospital peer review is protected by the anti-SLAPP statute because it also involves “conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e)(4)). The activity at issue in the *Kibler* case is not just the imposition of discipline, but also the peer review committee’s *written and oral statements* concerning Dr. Kibler’s conduct. These written and oral statements are inextricably intertwined with the disciplinary process. The connection between the two makes the imposition of discipline by a peer review committee free speech “conduct” within the meaning of the anti-SLAPP statute.

The California Legislature has declared that “[t]o protect the health and welfare of the people of California, it is the policy of the State of California to exclude, through the peer review mechanism as provided for by California law, those healing arts practitioners who provide substandard care or who engage in professional misconduct.” (Bus. & Prof. Code, § 809, subd. (a)(6)). There can be no doubt that a public policy of protecting health and welfare by preventing substandard medical care and medical malpractice is a matter of widespread concern. Indeed, other courts have concluded that peer review committees “are affected with a strong element of public interest.” (*Matchett v. Superior Court* (1974) 40 Cal.App.3d 623, 628; accord, *Gill v. Mercy Hospital, supra*, 199 Cal.App.3d at p. 897 (“we are cognizant of the strong public policy in favor of effective medical peer review by hospitals”); *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 220

(“There is a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities.”)). The widespread public interest in the quality of hospital care provides ample grounds for invoking the anti-SLAPP statute.

CONCLUSION

Taking part in hospital peer review proceedings is a thankless task. Service on peer review committees is voluntary, time-consuming, and nearly always unpaid. Most physicians take no pleasure from sitting in judgment of — and occasionally having to discipline — their colleagues, especially if they risk a lawsuit every time they decide to impose discipline.

Peer review committee members “must be able to operate without fear of reprisal.” (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1227, internal quotation marks omitted (applying Evidence Code section 1157’s exclusion of peer review committee records from discovery), disapproved on another point in *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 724, fn. 4.). That is why the California Legislature has afforded various statutory protections for peer review committees, including immunity from liability absent malice (Civ. Code, § 43.7) and exclusion of proceedings and records from discovery (Evid. Code, § 1157). But none of those statutory protections is designed, as is the anti-SLAPP statute, to end a retaliatory lawsuit at the pleading stage, before the lawsuit can do its intended harm. Supreme Court approval of anti-SLAPP protection for hospital peer review will further help to reduce the risk of reprisal, thus safeguarding the peer review process and helping to “preserv[e] the highest standards of medical practice.” (Cal. Bus. & Prof. Code, § 809, subd. (a)(3)).



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