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Special Issue
The Five Hot Buttons

Anti-SLAPP Statutes and Peer Review

California Supreme Court Renders Historic Decision

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Hospitals trying to assemble a peer review committee to review another practitioner's record and perhaps impose sanctions for substandard performance have their jobs cut out for them because physicians are often reluctant to pass judgment on a colleague. In addition to this natural reticence, those who sit on or testify at a peer review proceeding have another reason to want to avoid it: the threat of lawsuits brought by the medical practitioner facing discipline. The scope of the problem is obvious: without willing and honest participants, the peer-review system that helps keep patients safe is compromised.

In recent years, a small number of people sued by disgruntled medical practitioners for statements made before hospital peer review and state licensing boards have attempted to scuttle those suits by using state-law anti-SLAPP (Strategic Lawsuit Against Public Participation) statutes. SLAPP suits are, by definition, meritless suits brought not to win, but to use the litigation to deter, intimidate or punish citizens who either will or have reported violations of law, written to government officials or testified before governmental bodies. *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156 (1998). Anti-SLAPP legislation has been passed in several states, including California, Delaware, Georgia, New York, Minnesota, Tennessee and others. Can this legislation help participants in peer review and other medical competence proceedings when the person who was the subject of the proceeding cries "Defamation!" or "Interference with contractual relations?" The law is developing, and some recent decisions show that the answer to that question is still open to interpretation.

Massachusetts Says 'No'

In 2005, the Massachusetts Supreme Judicial Court held that the state's anti-SLAPP statute *did not* immunize a physician from liability for statements he made in an affidavit submitted to the State's Board of Registration in Medicine (the Board). *Kobrin v. Gastfriend*, 443 Mass. 327 (2005). In *Kobrin*, the Board asked defendant David R. Gastfriend, a licensed psychiatrist who had served as a director of addiction services at Massachusetts General Hospital, to investigate and report to it concerning allegations of faulty prescription drug prescribing practices by the plaintiff psychiatrist, Kennard C. Kobrin. Gastfriend submitted an affidavit to the Board that asserted Kobrin deviated from the proper standard of care and was "engaged pervasively in illegitimate prescribing and … widespread misconduct," and concluded that the plaintiff's "continued practice of medicine … represents a serious and immediate threat to his patients and to the public health, safety and welfare." In reliance on this and other evidence, the Board summarily suspended the plaintiff's license. Subsequently, the Board exonerated Kobrin on all charges.

Kobrin sued the defendant for the statements made in his affidavit on theories of expert witness malpractice/negligence, defamation, malicious prosecution, and interference with contractual relations. The defendant moved to dismiss pursuant to the anti-SLAPP statute and the trail judge dismissed the case. The plaintiff appealed to the Appeals Court, and Supreme Judicial Court transferred the case to itself on its own motion.

The Supreme Judicial Court, in finding that the anti-SLAPP statute did not apply in this case, noted that Massachusetts' anti-SLAPP statute (G.L. c. 231, § 59H, inserted by St.1994, c. 283, § 1) was enacted to provide a quick remedy for citizens targeted by frivolous lawsuits based on their government petitioning activities. *See* preamble to 1994 House Doc. No. 1520. It was, said the court, designed to protect overtures to the government by parties petitioning in their status as citizens; Gastfriend's activities were not covered because he was not exercising *his* right to petition or to seek any redress from the Board, but rather was acting solely on behalf of Board as an expert investigator and witness. Thus, the fact that Gastfriend was not personally seeking redress from a State entity precluded the application of the anti-SLAPP protections to him.

California Says 'Yes'

The California Supreme Court, on the other hand, recently issued an

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important opinion, *Kibler v. Northern Inyo County Local Hospital District* (2006) 39 Cal.4th 192, that confers on participants in a hospital's peer review process the procedural protections afforded by California's anti-SLAPP statute (Cal. Code Civ. Proc., § 425.16). The case resolved a split of authority among the lower courts by holding that a hospital's peer review process qualifies as an "'official proceeding authorized by law"' protected by the anti-SLAPP statute.

California's anti-SLAPP statute provides that a cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue" is subject to a special motion to strike, unless the plaintiff establishes a probability of prevailing on the claim. (Code Civ. Proc., § 425.16, subd. (b)(1).) Like the Massachusetts statute, § 425.16 sets out a procedure for the trial court to evaluate the merits of the lawsuit, using a summary-judgment-like procedure at an early stage of the litigation.

The facts of *Kibler* are these. Dr. George Kibler had staff privileges at Northern Inyo Hospital. In 2001, the hospital sought an anti-workplace violence injunction against Dr. Kibler after he had a series of hostile encounters with other staff members. The hospital's peer-review committee summarily suspended Dr. Kibler from its medical staff based upon his "continuing and recently escalating unprofessional conduct of extremely hostile and threatening verbal assaults, threats of physical violence, including assault with a gun, and related erratic actions of a hostile nature toward nursing and administrative personnel." Although, the hospital and Dr. Kibler reached an agreement that reinstated his staff privileges, Dr. Kibler sued the hospital and various hospital personnel for defamation, abuse of process, and interference with his medical practice. The hospital filed a motion to strike the entire complaint under the anti-SLAPP statute. The trial court and intermediate Court of Appeal agreed that Dr. Kibler's lawsuit should be dismissed pursuant to the anti-SLAPP statute.

In upholding the lower court's decisions, the California Supreme Court described the process of peer review in some detail to demonstrate that peer review proceedings constitute an "official proceeding" under California's anti-SLAPP statute. The Supreme Court explained that peer review involves "a committee comprised of licensed medical personnel at a hospital [who] 'evaluate[] physicians applying for staff privileges, establish[] standards and procedures for patient care, assess[] the performance of physicians currently on staff,' and review[] other matters critical to the hospitals functioning." Moreover, the court found the peer review process "plays a significant role in protecting the public against incompetent, impaired or negligent physicians … [T]he [California] Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians."

CONCLUSION

As yet, the courts of most states that have anti-SLAPP statutes on the books have not addressed the application of such laws to peer review proceedings. The arguments and reasoning used in California's *Kibler* decision will afford doctors there important procedural protections: Only time will tell if similar arguments can be successfully advanced in other jurisdictions. With *Kibler*'s favorable outcome for peer review participants, there may be hope for more states to follow suit in protecting the vital peer review process from the self-censorship that many participants feel they must employ today.

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