

SLAPP Happy: How Anti-Slapp Impacts Attorneys

In the Summer 2010 edition of *The Gavel* we examined the basics of anti-SLAPP motions and some exceptions to anti-SLAPP (Strategic Lawsuit Against Public Participation) motions in the context of recent case law. This is the second installment of that article, and it is designed to examine recent cases dealing with the application of anti-SLAPP law to attorney conduct.

The anti-SLAPP motion was derived from Code of Civil Procedure section 425.16 and was originally designed to protect free speech from the threat of expensive litigation. (Code Civ. Proc. § 425.16, subd. (a).) (All further statutory references will be to the Code of Civil Procedure unless otherwise indicated.) The use of anti-SLAPP motions, however, has grown in recent years and now impacts our conduct as attorneys.

Are an Attorney's Communications During Litigation Covered by Anti-SLAPP?

The key to this analysis is to determine whether the communication is privileged under Civil Code section 47. In *GeneThera, Inc. v. Troy & Gould Prof. Corp.* (2009) 171

IN-DEPTH ANALYSIS



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offer by defendant to a co-litigant in the underlying action constituted negligence and intentional interference with contractual relations. In the trial court, the defendant attorney filed a special motion to strike under section 425.16, contending the settlement offer at issue arose from a protected activity under Civil Code section 47. The trial court agreed and granted defendant's motion, expressly finding that the complaint arose from protected activity. The appellate court affirmed the trial court's ruling, finding an attorney's commu-

because an action was filed after protected activity took place "does not mean the action arose from that activity for purposes of the anti-SLAPP action statute."

(*GeneThera, Inc., supra*, at p. 907.) The appellate court cited the California Supreme Court and noted "the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity." (*Navellier, supra*, at p. 89.) The court looked at both causes of action and determined an attorney's communication with opposing counsel on behalf of a client regarding pending litigation directly implicates the right to petition and thus is subject to a special motion to strike.

(*GeneThera, Inc., supra*, at p. 908.)

In *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, the trial court found that a lawyer's solicitation of another firm's clients and advice regarding settlement of pending litigation fell within the litigation privilege and within the purview of SLAPP. In *Taheri*, the court found defendant's communications with plaintiff's client were made in connection with pending litigation and therefore were subject to anti-SLAPP protection. (*Id.* at p. 489.) The Court of

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Cal.App.4th 901, the plaintiff, a litigant in an underlying action, sued opposing counsel and their clients, alleging that a settlement

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nication of a settlement offer to opposing counsel was protected by the absolute litigation privilege (Civil Code section 47.) Further, because communicating the settlement offer was protected, plaintiffs had not shown a reasonable probability of success on the merits. (*GeneThera, Inc., supra*, at p. 907.) Citing *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 and *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-78, the plaintiff in *GeneThera, Inc.* argued that just

Appeal affirmed the ruling and observed that defendant's acts "did not consist of any act in furtherance of anyone's right of petition or free speech" (*Ibid.*) The court also noted that the communication between the soliciting lawyer and plaintiff's client fell within the litigation privilege. (*Ibid.*) Interestingly, in *Taheri Law Group*, the court specifically ruled that the commercial speech exception to the anti-SLAPP statute, as defined in section 425.17,

subdivision (c), did not apply. The court noted:

"a cause of action arising from a lawyer's conduct, when the conduct includes advice to a prospective client on pending litigation, does not fall within the statutory exemption to the anti-SLAPP statute. Any other conclusion would be inconsistent with the intent of the Legislature when it passed section 425.17,

and would conflict with the client's fundamental right of access to the courts, which necessarily includes the right to be represented by the attorney of his or her choice." (*Taheri Law Group, supra* at p. 490.)

Not all communications, however, are protected. In *Cohen v. Brown* (2009) 173 Cal.App.4th 302, plaintiff, an attorney, sued a fellow attorney alleging, among other

things, that defendant engaged in extortion when he assisted a client in filing a complaint against plaintiff with the California State Bar. The court determined that defendant's anti-SLAPP motion should be denied where the complaint amounted to extortion. The court noted that subdivision (a) of section 425.16 specifically states that anti-SLAPP motions are applicable to suits that "chill the *valid* exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Italics added.) Citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, the court concluded that when a defendant's speech or petition activity is "shown to be illegal as a matter of law, such speech or petition activity will not support the special motion to strike." (*Cohen, supra*, at p. 317, citing *Flatley, supra*, at p. 320.) Because extortion is not constitutionally protected speech, the court found that it did not constitute a "valid" exercise of speech and petition and therefore was not subject to anti-SLAPP protection. (*Ibid.*)

Is a Client's Complaint Against an Attorney Subject to Anti-SLAPP?

Courts have also recently considered a case alleging attorney malpractice. In *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, Hylton filed a complaint against his former attorney, seeking damages and rescission of a contingency fee contract based on the attorney's alleged misfeasance in connection with his representation of plaintiff. The attorney brought a special motion to strike under the anti-SLAPP statute but the trial court denied the motion and an appeal followed. (*Id.* at p. 1267.) The Court of Appeal found:

"Although petitioning activity is part of the evidentiary landscape within which [plaintiffs] claims arose, the gravamen of [plaintiff's] claims is that [defendant] engaged in nonpetitioning activity inconsistent with his fiduciary obligations owed to [plaintiff]." (*Id.* at p. 1272.)

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The court reviewed several other cases involving claims against attorneys for malpractice in the anti-SLAPP context: *Freeman v. Schack*, (2007) 154 Cal.App.4th 719; *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532; *Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624; and *Benasra v. Mitchell Silberberg & Knupp LLP*, (2004) 123 Cal.App.4th 1179. The court of appeal found that the trial court correctly ruled against defendant because he did not meet his threshold showing that plaintiff's claims arose from petitioning activity within the purview of the anti-SLAPP statute because the gravamen of the claim was based on alleged violation of fiduciary obligations. (*Hylton v. Frank E. Rogozienski, Inc.*, *supra*, 177 Cal.App.4th at p. 1274.) The court reasoned:

"the anti-SLAPP statute does not apply to a client's claim against his or her former attorney for breach of fiduciary duty (as in *Benasra*) or for malpractice (as in *Jespersen*) merely because the client's claim against the former attorney followed or was associated with petitioning activity by the attorney on the client's behalf." (*Ibid.*, citing *Freeman v. Schack*, *supra*, 154 Cal.App.4th 719.) The court explained:

"[i]t is 'the principal thrust or gravamen of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies ... and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute.'" (*Hylton v. Frank E. Rogozienski, Inc.*, *supra*, 177 Cal.App.4th at p. 1274, citations omitted.)

The court of appeal reached a similar result in a recent case, *PrediWave Corporation v. Simpson Thatcher & Bartlett LLP* (2009) 179 Cal.App.4th 1204. In *PrediWave Corporation*, the plaintiff filed a complaint for damages stating four causes of action: (1) breach of fiduciary duty, (2) constructive fraud, (3) legal malpractice, and (4) violation of Business and Professions Code section 17200 et seq.

The trial court granted defendant's anti-SLAPP motion finding that the claims against the defendants were based "in significant part upon protected petitioning activities" and there was "no reasonable probability" that plaintiff would have prevailed because the claims were time barred under the applicable statute of limitations. (*Id.* at p. 1217.) The court of appeal reversed and applied an analysis of the same cases reviewed in *Hylton v. Frank E. Rogozienski, Inc.*, *supra*, 177 Cal.App.4th

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1264 and determined that the broad scope of the anti-SLAPP statute did not apply to the "causes of action against the client's own attorney arising from litigation-related activities undertaken for that client." (*PrediWave Corporation v. Simpson Thatcher & Bartlett LLP, supra*, at p. 1228.)

The court determined that allowing anti-SLAPP to expand to "include such client lawsuits unreasonably expands the language beyond the clear legislative purpose and leads to absurd results." (*Id.* at p. 1228.) The court thus concluded the defendants did not satisfy their threshold burden of demonstrating that the principal thrust of any of the complaint's causes of action was activity protected by the anti-SLAPP statute. The court found that the trial court erred when it ruled this was a SLAPP suit subject to a special motion to dismiss pursuant to section 425.16. (*Ibid.*) The court also noted that since the defendants did not make the requisite threshold showing that the action arose from protected activity, it was not necessary for the court to examine whether there was a probability that plaintiff would prevail on the merits of its claims. Therefore, the court did not reach that issue. (*Ibid.*)

Can You Amend a Complaint to Get Around an Anti-SLAPP Motion?

One procedural question that seems to be unanswered is whether a plaintiff can amend a complaint to plead around an anti-SLAPP motion. The courts appear to be split on this issue. In *Nguyen-Lam v. Cao*

(2009) 1717 Cal.App.4th 858, the court held that a plaintiff was properly permitted to amend the complaint to defeat an anti-SLAPP motion. Yet in *Hansen v. Dept. of Corrections & Rehabilitation* (2009) 171 Cal.App.4th 1537, the court determined that plaintiff cannot amend a complaint to plead around anti-SLAPP. Once a party voluntarily dismisses a lawsuit, this deprives the trial court of jurisdiction to rule on a

pending anti-SLAPP motion. (*Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869.)

Conclusion

The trend appears to be against attorneys who try to claim that their communications constitute protected speech. One should not assume that a communication will not be the basis for litigation at a future time. ☞



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