



## **Is Attacking Bad Faith Peer Review a "SLAPP" Suite?**

By Greg Abrams, Legal Counsel, California Medical Association

Applying the Anti-SLAPP statute - enacted for an entirely different problem - to physician challenges of bad faith peer review would be another major obstacle to potential redress.

Hospital attorneys recently have begun using a new tactic against physicians who sue the hospital for alleged bad-faith peer review. They tell the judge that the physician's lawsuit was solely intended to shut medical staff members up and to intimidate them from taking care of quality matters in the hospital, particularly matters that might otherwise require imposing discipline. If they're successful, the judge dismisses the suit.

The law at issue here is California's "anti-SLAPP" law. This law, found at Civil Code section 425.16, prohibits what are known as "strategic lawsuits against public participation" - suits intended *primarily to chill the willingness of persons to speak out on matters of public importance*. A SLAPP suit, or a "SLAPP," is not a suit a plaintiff really intends to win, because a true SLAPP has no legal basis to be filed - it is not winnable. The "SLAPPer's" real goal is just to intimidate, to scare people, to stifle dissent or criticism, and that is never, never good.

The classic SLAPP suit is one where the large oil company sues a citizen for publicly decrying the oil company's bad environmental record. The comments may be given before a county board of supervisors or other government body. This kind of open forum is critical in our democratic style of government to assure public involvement and input on important issues. Public participation in these kinds of open forums actually helps direct government to do the right thing in serving the public. If the oil company sues the person or group that criticizes it in such a forum, say for defamation, everyone will immediately think "SLAPP." Everyone will also be worried that speaking out against the oil company might end up being a very dangerous and expensive thing to do.

California's Legislature caught on to this kind of tactic. In 1992, the anti-SLAPP statute was passed with the Legislature making clear that:

there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.

(Code Of Civil Procedure §416.16(a).) So how does this dastardly kind of suit relate to the physician who sues the hospital for bad faith peer review? In CMA's view, it doesn't. CMA definitely supports the appropriate application of the SLAPP statute to protect the rights of physicians, for example, to speak out publicly in efforts to assure quality care and patient safety. In the context of confidential peer review matters, however, the analysis is a bit different. CMA recently explained why that is in our amicus brief to the California Supreme Court in *Kibler, M.D. v. Northern Inyo County Local Hospital District*. In that case, Dr. Kibler sued the hospital for seven different things, including defamation, wrongfully interfering with his ability to practice medicine, an conspiracy to wrongfully harm his economic interests. The medical staff had summarily suspended him,

allegedly due to threats of violence and abusive behavior. Dr. Kibler asserts in his lawsuit against the hospital that he was suspended because he complained about quality issues and warned of the hospital's prospective insolvency. What we can only say for sure, however, is that the Supreme Court is going to answer whether the anti-SLAPP statute applies in the context of a physician's suit against a hospital based on bad faith peer review actions. If it does, then this will be a new tool for hospitals to obtain dismissal of such suits, or at least try and make a physician expend further (usually very limited) resources in attempting to obtain justice against bad peer review.

The law is not quite that simple, of course. Both the defendant and plaintiff in a potential SLAPP suit have a burden to prove their respective points to the court, usually very early on in the litigation. The defendant wants the case dismissed ASAP, and therefore has to show that the plaintiff's suit attacks some constitutionally protected activity of the defendant. The plaintiff, on the other hand, wants the suit to survive, and must show the quintessential characteristic of a suit that is *not* a SLAPP - *that the plaintiff is likely to win*. After all, wrongful conduct under the guise of constitutionally protected activity is not protected. For example, making defamatory statements may look like free speech, but the First Amendment doesn't protect the telling of lies. You can be sued for that.

If the defendant carries his burden, and the plaintiff doesn't subsequently show the probability of winning, then the case is dismissed. And the law requires the plaintiff to pay the defendant's attorneys fees spent in making the anti-SLAPP motion. This can add up to many thousands of dollars, especially if there are many defendants. If the plaintiff shows a probability of winning, however, despite the defendant's showing that there may be a protected activity at the heart of the lawsuit, then the case stays alive. Either way, no one knows if a suit is a SLAPP until this "SLAPP dance" is concluded before a judge and the judge makes a ruling. Even that ruling is subject to being appealed, however. In Dr. Kibler's case, the trial court's anti-SLAPP ruling against him is now before the state Supreme Court.

But, wouldn't it be a good thing for the anti-SLAPP statute to apply in suits by aggrieved physicians against bad faith peer review? No. The reason is that there are already huge hurdles that a physician must overcome to obtain justice against bad faith peer review. Adding the anti-SLAPP hurdle, with its attendant threat of attorneys fees, closes the door even tighter to possible redress for the victim of bad faith peer review, and may even further embolden those who would engage in sham peer review.

For many years California law has provided significant statutory immunities to protect physicians from civil liability in their activities as peer reviewers. Indeed, the CMA has been the major proponent of these protections. These immunities are extremely difficult to overcome by any physician who believes he or she is the victim of inappropriate or abusive peer review. But they can be overcome, with great difficulty, by a physician who can show he or she has been wrongfully targeted for disciplinary action. The Legislature "left open the door" in these immunity statutes to afford aggrieved physicians the opportunity to prove that the peer review to which they were subject was in fact carried out for improper purposes, i.e., for purposes unrelated to assuring quality care or patient safety. The Legislature did this because it understood the potential for abusive or "sham" peer review activities. If the physician is successful in proving the peer review was abusive, then those protective immunities fall by the wayside, and the physician may proceed with the litigation to prove his or her case along with the damages that flowed from that inappropriate peer review. In the case of peer reviewers that have implemented peer review activities in good faith, i.e., exclusively for purposes of assuring quality care and patient safety, however, these protections for peer reviewers become absolute.

In addition, before these immunities are even called into play to protect peer reviewers, another form of protection for peer reviewers must be overcome by the physician. Specifically, before a physician may maintain a money damages lawsuit against peer reviewers, the physician must "exhaust" all other avenues to challenge and overturn the peer review decision. This includes exhausting all appeals internal to the hospital and, if that fails, to obtain a court order overturning the decision. This is known as the

"exhaustion of remedies requirement."

CMA believes there must be a proper balance of rights of the allegedly aggrieved physician against the rights of the physician-peer reviewers. That balance is properly struck by ensuring that no liability is imposed on a peer reviewer unless all the following steps are completed: 1) the physician exhausts the internal peer review process; 2) the physician obtains a final court order concluding that the peer review process and/or decision was improper; and 3) the physician overcomes all the statutory immunities applicable to peer reviewers, i.e., shows that the peer reviewers acted in bad faith.

It is very important to note that just because an adverse peer review decision is overturned by either the hospital's governing body or by a court doesn't mean that the physician necessarily has a "good" case against the peer reviewers for bad faith peer review. Wrong decisions can be obtained by persons acting in good faith as well. Even in those cases, good faith peer reviewers have what amounts to absolute protection under state law.

In light of the reasoning above, application of the anti-SLAPP statute in the context of physician peer review poses significant problems. We have seen a number of physicians summarily suspended from medical staffs where the "imminent danger" standard for such suspensions simply has not been met. Some of these cases are reversed by a Superior Court, but many physicians simply do not have the financial resources to challenge the suspension in court. Instead, they may wish to conserve their limited financial resources to pay for legal defense in the subsequent peer review disciplinary hearing, in the hopes the matter will be resolved satisfactorily at that time.

We have also seen cases where undue delay occurs in providing the peer review hearing. In the meantime, many of these physicians take a huge financial hit to their income arising out of the inappropriate summary suspension and deliberate or contrived "stalling" by the hospital in providing the hearing. The pattern of "suspend and delay" that we have seen has less to do with patient safety, and more to do with assuring the physician has little or no financial resources, due to the long-lasting summary suspension, to challenge the peer review body's actions currently or later on.

In instances where summary suspension is not involved, we have seen abuses as well. Some hospital attorneys advise that their client governing bodies *impose some kind of* discipline even if it is not recommended by the JRC after hearing. The fear is that if discipline is not imposed after a hearing, the physician can immediately sue for abusive peer review and the money damages that flow from that. Imposing discipline puts in place all the hurdles of immunities and exhaustion of remedies that a physician must overcome before obtaining redress for bad peer review. Thus, the governing body is strongly incentivized to be sure that some sort of discipline "sticks" to try to shield itself from a lawsuit for abusive peer review.

As these examples show (and there are others), it is simply unjust to add application of the SLAPP statute as another hurdle for the aggrieved physician to overcome in a subsequent lawsuit based on a claim of abusive peer review. The SLAPP statute carries with it the requirement that the physician pay his or her own attorneys fees to try to defeat the application of the statute, and offers the specter of potential responsibility to pay thousands or hundreds of thousands of dollars in attorneys fees *incurred by the peer reviewers* if the statute is applied. Given the often limited financial resources of individual physicians in these cases, sometimes even the forced deprivation of financial resources by inappropriate summary suspension, along with the existing protections for peer reviewers discussed above, this result would simply skew the peer review system to such an imbalance that there would be virtually no legal check on abusive peer review.

Clearly, most peer review in California is not unfair or unjust. But abusive peer review activities that do occur are not only unfair to the physicians involved; they also undermine the credibility of the profession and the ability of every physician to properly fulfill patient advocacy responsibilities. Quite simply, the peer review setting is unique, and is not one that is comparable to other settings in which the anti-SLAPP statute has been

applied. Given all of the reasons above, application of the anti-SLAPP statute in the context of confidential peer review proceedings within a hospital only adds another huge and inappropriate hurdle for physicians to overcome who have legitimate grievances against a peer review body or hospital that uses the peer review system in bad faith.

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