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## ANTI-SLAPP

## CALIFORNIA LAW

By Jennifer A. Becker

**Kolar v. Donahue, McIntosh & Hammerton** (2006) 145 Cal.App.4th 1532

*The Fourth District sets forth a blanket rule that the anti-SLAPP statute does not cover legal malpractice actions.*

The Kolar family retained Donahue, McIntosh & Hammerton (Donahue) to represent them in a neighbor dispute. After a large monetary judgment was entered against them, the Kolars sued Donahue for “garden variety” legal malpractice. Donahue filed a special motion to strike under the anti-Strategic Lawsuit Against Public Participation statute, C.C.P. § 425.16, which the trial court denied.

The Court of Appeal noted that to prevail on an anti-SLAPP motion, the defendant must show that the challenged cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue. Once this is established, the plaintiff must demonstrate a probability of prevailing on the claim.

The court disagreed that the Kolars’ malpractice action arose from petitioning activity protected by the act. Although a party’s litigation-related activities constitute acts in furtherance of a person’s right of petition or free speech, not all claims associated with those activities are subject to the anti-SLAPP

statute. The defendant must show that the claim arises from an act that forms the basis for the plaintiff’s cause of action. Because a cause of action is associated with a protected act, it does not follow that the cause of action arises from that act.

For example, a board’s discussions and vote on an increased contribution to an employee retirement fund is protected activity. However, a lawsuit about the increase is not premised on the protected activity but on the board’s collective action in increasing the contribution. Acts of governance mandated by law, without more, are not exercises of free speech or petition. An attorney’s pursuit of arbitration on behalf of a client is protected activity, but a prior client’s claim for breach of loyalty based on the attorney’s representation of the client’s adversary in the arbitration proceeding is based on the prior client’s abandonment.

The Kolar court disagreed with prior case law that implied that some conduct alleged in a legal malpractice case may be protected activity covered by the statute. Instead the Court articulated a

basic principle that attorney malpractice is not a protected right. The express purpose of the statute is to protect the valid exercise of constitutional rights. A malpractice claim focusing on attorney competence does not have the chilling effect on advocacy found in malicious prosecution, libel, and other claims typically covered by the anti-SLAPP statute. The client does not sue because of the petition activity taken on his behalf, but because the attorney did not act competently. The threat of malpractice does not chill advocacy but encourages attorneys to petition competently and zealously.

The anti-SLAPP statute did not apply on the separate ground that the underlying action was a matter of public concern. There was no support in the record that the issue in the underlying suit, the interpretation of Conditions, Covenants & Restrictions, was a public controversy. Even if the legislature was considering legislation about the issue, Donohue's argument was akin to an assertion that a simple auto accident case involves a matter of public interest because Congress is considering legislation dealing with auto safety. In any event, the dispute between neighbors presented in the underlying case did not involve a person in the public eye, conduct that could directly affect a large number of people beyond the direct participants, or a topic of widespread public interest.

The court also rejected the assertion that the litigation privilege barred the Kolar's claims.

The litigation privilege protects attorneys, judges, jurors, witnesses, and other court personnel from tort liability for any publication or broadcast made in

any judicial proceeding. Although the scope of the litigation privilege is extremely broad, the privilege does not apply in all situations. A key purpose of the litigation privilege is to promote freedom of access to the courts and to encourage witnesses to testify truthfully without the fear of retaliatory lawsuits. If the litigation privilege protected an attorney from any suit by a former client, no malpractice suit could be brought.

*Comment:* Attorneys should not look to the anti-SLAPP statute to protect them in suits brought by their own clients.

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