

League of California Cities
City Attorneys' Department July 18, 2013 Webinar

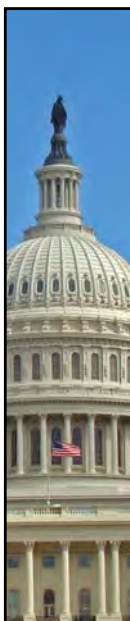
**Striking Out the Plaintiff Using
the Anti-SLAPP Statute,
Code of Civil Procedure Section 425.16:
Who, What, When, Where, Why and How**



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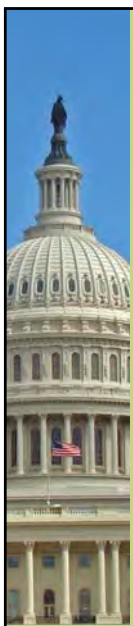
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The Wheels of Justice

- You get a baseless suit, extortionate settlement demands.
- You dread the defense costs - the endless demurrers with leaves to amend, the intrusive discovery, the nonresponsive answers, the protective orders, the motions for summary judgment, a trial. Argh....
- "Surely, there's a better way," you say.
- Enter the Anti-SLAPP statute, CCP § 425.16 to the rescue!

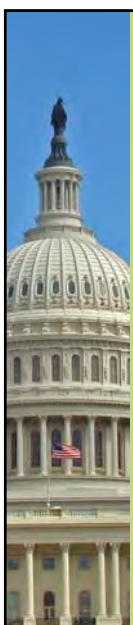
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Webinar: Deconstructs Complex Statute

- What does the statute provide?
- Who does it apply to?
- When must the special motion to strike be filed?
- Where may such motions be filed?
- Why file such motions?
- How should the motion be framed?

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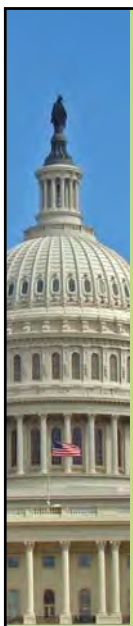


Key Provision Is § 425.16 (b) : Special Motion To Strike

[1] 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 under the United States Constitution or the California Constitution in connection with a public issue *shall be subject to a special motion to strike, unless* the court determines that the plaintiff has established that [2] *there is a probability that the plaintiff will prevail on the claim.*

(Emphasis and numbers added.)

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The Test Has Two Prongs; Affidavits

1. Whether the cause of action “arises from” protected activity.
2. Whether the plaintiff failed to establish a probability of success.
 - If the answer is “yes” to 1 & 2, the special motion to strike must be granted.
 - In making its determination, the court shall consider the pleadings, **and supporting and opposing affidavits** stating the facts upon which the liability or defense is based. (§425.16 (b)(2).)

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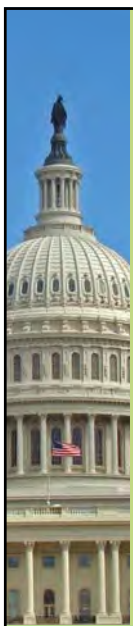


Protected Activity Defined - § 425.16 (e)

- Non-exclusive list

1. any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law,
2. any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law,
3. any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest,
4. any other 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.

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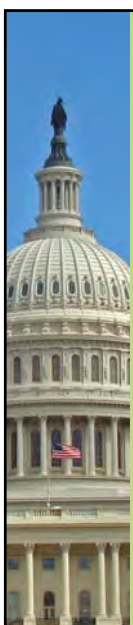


The First “Arises From” Prong

- “The moving defendant’s burden is to demonstrate that the act or acts **of which the plaintiff complains** were taken ‘in furtherance of the [defendant’s] right of petition or free speech under the United States or California Constitution in connection with a public issue,’ *as defined in the statute.*” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)
- “The anti-SLAPP statute’s definitional focus is **not the form of the plaintiff’s cause of action** but, rather, the defendant’s activity that gives rise to his or her asserted liability – and whether that activity constituted protected speech or petitioning.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.)
- “**“Mixed” causes of action are subject** to an anti-SLAPP motion so long as “at least **one of the underlying acts is protected conduct.**”” (*Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1551.)

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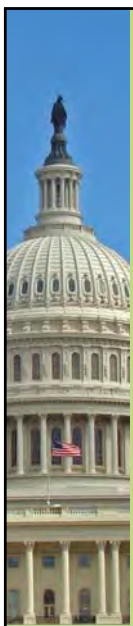


The Second “Probability of Prevailing” Prong

- Plaintiff has the burden to establish a reasonable probability of success. (*DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 568.)
- The courts apply a “summary-judgment-like” test (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.)
- The evidence put forward at this stage must be admissible; even allegations in a verified complaint are insufficient. (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1212.)
- “In addition to considering the substantive merits of the plaintiff’s claims,” the court “must also consider all available defenses to the claims . . .” (*No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1026.)

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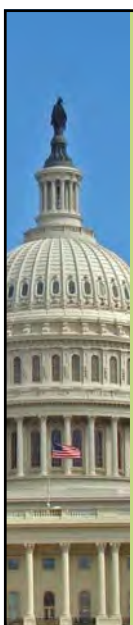
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2d Prong: Admissible Evidence Required

- Plaintiff must produce “sufficient admissible evidence to establish the probability of prevailing on the merits of every cause of action asserted.” (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721.)
- For purposes of the Anti-SLAPP statute, “admissible evidence’ . . . is evidence which, by its nature, is capable of being admitted at trial, i.e., evidence which is competent, relevant, and not barred by a substantive [evidentiary] rule.” (*Fashion 21 et al v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1147.)
- Evidence that is barred by the hearsay rule, or because it is speculative, not based on personal knowledge or consists of impermissible opinion testimony, “cannot be used by the plaintiff to establish a probability of success on the merits because it could never be introduced at trial.” (*Id.*)

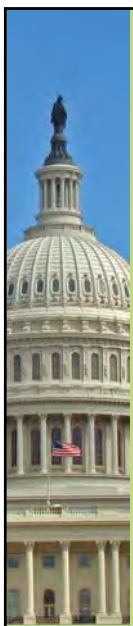
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“Complaint” Defined; No Leave to Amend

- A special motion to strike may be granted against an entire complaint or against one or more causes of action. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1004.)
- Motion can be filed against cross complaint (§ 425.16.9 (h).) Practice tip: Do not cross complain based on act of filing or litigating complaint (It is protected by (e)(1) & (e)(2).)
- If a cause of action is properly subject to a motion to strike, the court may not grant leave to amend. (*Simmons v. Allstate Insurance Co.* (2001) 92 Cal.App.4th 1068, 1073.)

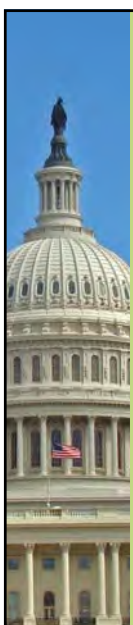
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Who is Protected?

- [G]overnmental entities are entitled to invoke the protections of section 425.16 when such entities are sued on the basis of statements or activities engaged in by the **public entity or its public officials** in their official capacity.” (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 17.)
- Subdivisions (e)(1) and (e)(2) protections apply, “without regard to whether the statements are made by private individuals or by governmental entities or officials.” (*Id.* at p.18.)
- Public entities were equally entitled to attorney’s fees under the anti-SLAPP statute, notwithstanding the plaintiff’s claim that such an award would violate constitutional rights to petition the government for redress of grievances. (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, rev. denied, cert denied.)

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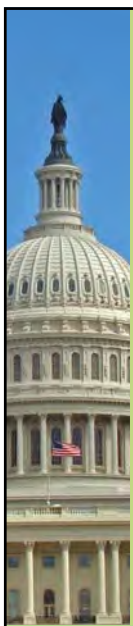


§ 425.15 (e)(1) and (e)(2)

No showing has to be made that:

- the issue is a public issue. (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1116-17)
- the defendant’s activity challenged in the SLAPP suit was protected by the First Amendment. (*Navellier, supra*, 29 Cal.4th at pp. 94-95)
- plaintiff intended to chill the exercise of constitutional rights. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 66-67.)

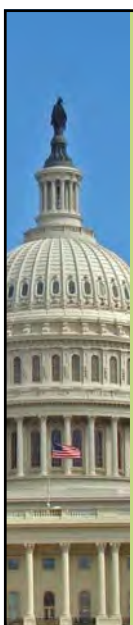
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Circumstances Triggering (e)(1) & (e)(2)

- These sections “protect all direct petitioning of governmental bodies” and “petition-related statements and writings.” (*Briggs v. Eden Council for Hope and Opportunity*, *supra*, 219 Cal.4th at p. 1121.)
- The Legislature “intended to protect speech concerning matters of public interest in a governmental forum.” (*Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1507.)
- All discretionary governmental proceedings, as opposed to ministerial ones, are “official proceedings” within the meaning of section 425.16 (e)(1) and (e)(2). (*City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 215-217.)

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Examples applying (e)(1) & (e)(2)

- Physician peer review proceedings
- Sheriff's case allocation decision
- Police officer statements to DA
- Employer investigations
- Sexual harassment investigations
- Zoning enforcement
- Suit against EIR consultant
- Letter to AG.
- (See paper pp. 8-9.)

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§ 425.16. (e)(3)

- Protects any “written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest.”
- Comments by public officials to the media on an issue of public concern are protected. (*Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113–16.)

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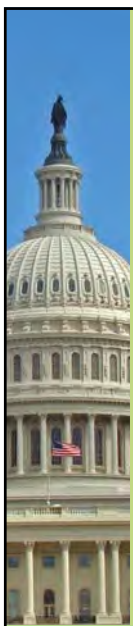


Protections Under § 425.16 (e)(4)

- Protects “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.”
- “The First Amendment’s guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern.” (*Board of County Comm’rs v. Umbehr* (1996) 518 U.S. 668, 116 S. Ct 2342.)

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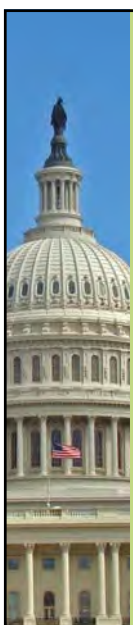
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Exemptions

- Enforcement action in the name of the people by AG, DA or city attorney, acting as a public prosecutor (§ 425.16 (d).)
- Exemptions in § 425.17. (Exemption in (a) includes public interest litigation, akin to standards for § 1021.5 attorney's fees awards).
- Writ of mandate provided for by law to review the decision in an official proceeding. (*Young v. Tri-City Healthcare District* (2012) 210 Cal.App.4th 35)

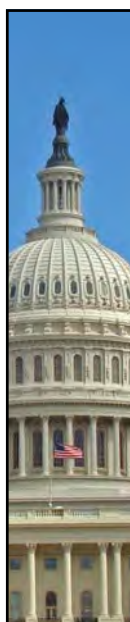
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Where - Motion May Be Filed In Both State & Federal Court

- The motion can be filed in state court.
- Also the motion can be filed to challenge causes of action brought under state law in federal court. (*United States v. Lockheed Missiles & Space Co., Inc.* (9th Cir.1999) 190 F.3d 963, 970-73. ["there is no direct conflict between (section 425.16(b) and (c)) and the Federal Rules].)
- "Because the discovery-limiting aspects of §425.16(f) and (g) collide with the discovery-allowing aspects of Rule 56, these aspects of sub-sections (f) and (g) cannot apply in federal court." (*Metabolife International, Inc. v. Wornick* (9th Cir. 2001) 264 F.3d 832, 846.)

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When May Motion be Filed?

- The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. (§ 425.16 (f).)
- The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing. (*Id.*)
- Practice tip: File within 60 days to be sure, since later filing is discretionary with court.

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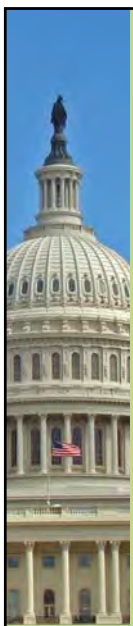


Why File The Motion?

- It is a "speaking" motion; affidavits reqd. (§425.16(b)(2).)
- Decides merits at the outset - may file w/i 60 days of filing of complaint (§425.16 (f).)
- Is entitled to priority setting in 30 days. (*Id.*)
- Can be combined with other motions. (See Kapler Opening brief and Opinion, attachments A & B to paper.)
- Discovery stayed, unless court authorizes upon motion showing good cause. (§ 425.16 (g).)
- No leave to amend if motion is granted. (*Simmons, supra*, 92 Cal.App.4th at p.1073.)
- Attorney's fees awarded if motion is granted. (§425.16 (c)(1).)
- Immediately appealable order, case stayed on appeal. (§§ 425.16.(i), 904.1(a)(13).)
- Denial of motion cannot be used in later litigation as to merits of case (§ 425.16 (b) (3).)

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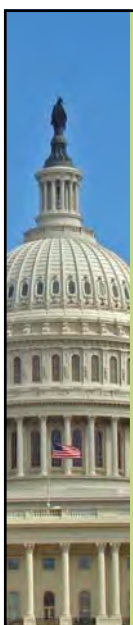
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How To Frame & File Anti-SLAPP Motion

- May be coupled with demurrer or filed after answer. (See Kapler brief and opinion on beneficial effect on special motion to strike of jointly filed sustained demurrer and amended answer deleting causes of action)
- Must be supported by affidavits which should address both prongs of test for special motion to strike, **including plaintiff's lack of merit.**
- Challenge admissibility of plaintiff's proof by making detailed objections. (See Gallant opinion.)

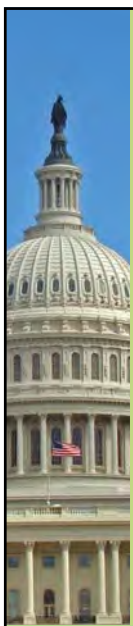
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Appeal

- Order granting or denying motion is appealable (§§425.16 (i), 904.1 (a)(13).)
- "If a judgment or order is appealable, an aggrieved party **must file a timely appeal or forever lose the opportunity to obtain appellate review.**" [Citations omitted.]" (*Maughan v. Google Technology, Inc.* (2006) 143 Cal.App.4th 1242, 1247.)
- Since grant or denial of a special motion to strike is appealable, it must be appealed within 60 days of the order since no appeal will lie from later entry of a final judgment. (*Id.*)

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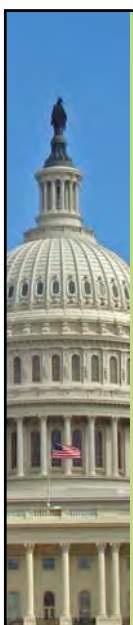


Attorney's Fees 425.16 (c)(1)

- Moving party is entitled to attorney's fees and costs if motion is **granted, unless** action brought under Government Code sections 6259 (Public Records Act) 11130, 11130.3, (the Bagley-Keene Open Meeting Act.) 54960, or 54960.1 (the Brown Act). (§§425.16.(c)(1).)
- "[A]n award of fees may include not only the fees incurred with respect to the underlying claim, but also the fees incurred in enforcing the right to mandatory fees under Code of Civil Procedure section 425.16." (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.)
- Attorney's fees and costs are **not recoverable** by the opposing party when the motion is **denied** unless the court finds that the motion is "**frivolous or is solely intended to cause unnecessary delay**" pursuant to § 128.5. (§425.16.(c)(1).)

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Conclusion

- The anti-SLAPP statute is a powerful tool.
- It can result in a speedy final decision on the merits after appellate review.
- It can result in recovery of the city's attorney's fees.
- Kapler was decided by the Court of Appeal in sixteen months, dismissing virtually the entire nine count complaint. The annual interest on the attorney's fees award alone exceeds the annual recovery on the remaining claim.

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