LEGAL DEFENSE TRUST TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (951) 653-0130 Fax (951) 656-0854

September 2011

IS A LAW ENFORCEMENT LEGAL DEFENSE FUND VULNERABLE TO A "DISCRIMINATION" LAWSUIT BROUGHT BY ONE OF ITS PANEL ATTORNEYS?

by
Michael P. Stone
and
Muna Busailah

Almost all enforcement labor associations and unions have legal defense plans that are paid for by a portion of each member's dues. Generally, they function as pre-paid group legal plans, and provide legal representation in job-related administrative, civil and criminal litigation and other legal services, in addition to the traditional labor representation benefits that all together form the backbone of the organization's representation structure. They are the reasons that men and women in the profession join such organizations.

Typically, these defense funds, trusts and plans maintain their own select group of "panel attorneys" who are assigned particular cases to handle, funded by the organization. Thus, the key features of these transactions are *selection of well-qualified attorneys* and *making good decisions* regarding *whether* and to *what extent to fund the cases.*

A third important factor is that the directors, trustees and officers of these plans have *fiduciary duties* that attach to their continuing ability to fund present and future cases; that is, a duty to make *responsible* attorney selection and funding decisions both for the benefit of the members being represented already, and in the management of funds and solvency of the organization for the benefit of all the members.

The case we discuss here, *Tuszynska v. Cunningham*, 4th Civ. No. E050858, __ C.A.4th__(September 16, 2011) resulted from a clash between one such "panel attorney," Danuta Tuszynska, and one such organization, our own Riverside Sheriffs' Association Legal Defense Trust (RSA-LDT), over whether Tuszynska could *force* RSA-LDT to give her legal cases "because she is a woman" and was entitled to her "fair share of the work" as the "male panel attorneys" allegedly received. Besides "biting the hand that feeds," there are many reasons why this lawsuit was wrong-headed from the start.

Trying to impose racial or gender quotas upon the fiduciary duties of attorney selection and funding of cases would constitute an unbearable impediment to the directors', officers' and trustees' exercise of their independent judgment to pick the best lawyers in the best interests of the membership.

We must recognize that superimposing racial, gender and other legal "quotas" over these decisions would *invite* judicial scrutiny and oversight anytime a panel attorney claimed he or she didn't get a "fair share" of work for discriminatory reasons. It would place the decisionmakers in the position of *defending* their decisions to show their choices were made for non-discriminatory, wholesome reasons. This situation would inevitably result in a threat to individual members' rights of privacy and invasion of the attorney-client privilege, and greatly complicate the process of attorney selection and funding, as decisionmakers would strive to maintain ethnic and gender balances between the panel lawyers in doling out legal work.

Fortunately, California and many other states have enacted statutory schemes to deflate lawsuits at the outset that are designed primarily to "chill" the exercise of constitutional free speech and petitioning activities under the First Amendment. These statutes permit defendants to move to strike complaints if they can show that the plaintiff's claims *arise out of "protected activities of free speech or petitioning the government for redress of grievances."*[1]

The *Tuszynska* case was one of first impression in the courts, in the sense that it represents the first time a published decision considered a situation where a "panel attorney" sued a defense fund and the fund brought an anti-SLAPP motion, arguing that the lawsuit was designed to "chill" constitutional rights. The case turned on whether RSA-LDT's attorney selection and funding decisions are in *furtherance of free speech and petitioning activities* and are therefore "protected." A second question was

---

[1] *Code of Civil Procedure* § 425.16, subdivision (b)(1) states: "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 there is a probability that the plaintiff will prevail on the claim." *Code of Civil Procedure* § 425.16, subdivision (e) provides that, as used in the statute, the phrase, "'act in furtherance of a person's right of petition or free speech . . . .'" "includes" four categories of protected speech and petitioning activities, namely: "(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, or (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."

whether RSA-LDT could seek protection for these activities *on behalf of its members,* as opposed to protection for exercising *its own rights*.

In its Opinion certified for publication on September 16, 2011, the Court of Appeals, Fourth Appellate District, held that in selecting, appointing and funding attorneys and cases for its members, RSA-LDT engages in activities in furtherance of the First Amendment protected activities of its members. Therefore, Tuszynska's lawsuit may be a "Strategic Lawsuit Against Public Participation" or a "SLAPP," and subject to the "anti-SLAPP Special Motion to Strike." When an anti-SLAPP motion is filed at the *outset* of litigation, the forward movement of the case stops dead. The burden is first on the defendant to show that the lawsuit is a SLAPP. The burden then shifts to the plaintiffs, in this case Tuszynska, to prove that her claims bear a likelihood of prevailing notwithstanding they may constitute a "SLAPP suit." If the plaintiff loses on the second issue, the action is dismissed as a SLAPP.

This is where the *Tuszynska* litigation breaks down. Prohibitions on racial, ethnic and gender discrimination are common in state and federal laws. We are accustomed to the idea that such discrimination is *unlawful* in education, employment, real estate transactions, public accommodations and so on. Tuszynska's claims were brought under one of California's civil rights acts (the "Unruh Act"), the Fair Employment and Housing Act, and the California Constitution, although the overarching theme in all three claims was "gender discrimination."

Membership on an "attorney panel" of an employee association signals only that the lawyer is presumed *qualified* and *eligible* to receive cases. Tuszynska confuses eligibility with "*entitlement.*" No panel lawyer is *entitled* to receive a certain number, proportion or particular type (criminal, civil, etc.) of cases, or indeed any cases at all. All of us who earn a living as lawyers on various organizations' panels would like to receive "more" or a "fair share" of work, but we don't necessarily expect it, except only as a unilateral wish or subjective desire. This is because serving on a panel is a *privilege* which we hope to sustain based on good lawyering. We don't have a *right* or entitlement to the benefits. Absent a right or entitlement protected by law or contract, we can't say, "*Me too!*" A lawyer may have a contractual right to receive cases based on pure contract law, because a contract expressly grants the lawyer this entitlement; but that is not at issue here.

There is another reason why Ms. Tuszynska has a nearly impossible burden to overcome: There is *no employment relationship.* Panel lawyers are "independent contractors." This means they are hired to do a workman-like job on a particular case or project, no different really than a plumber you might hire to replace your rusty pipes with new copper tubing. You hire for the completed job, and the details of getting it done are left up to the plumber. He or she does not become thereby, your *employee* to whom you owe a host of other obligations beyond payment for the job. Some unions actually *employ* legal counsel *as employees.* The relationship usually means the lawyer owes 100% of his/her professional work to the employer, and is not free to work as an independent contractor for others over the objection of the employer.

Imagine that as a member of your association's legal plan, you are permitted to select *which* one of ten panel lawyers you want to handle your case. You tell the plan administrator, "*I want her; this one.*" The administrator looks at a list and says, "Sorry. She's not available. We have to keep gender balances in mind. Our female lawyers are getting too many cases. It's too bad, she'd be excellent for your case; but well, you have to pick a male."

True, if *the member picks* the female lawyer, how could the administrator be accused of discrimination? Truth be told, it *is nobody's business why* you preferred the female lawyer. However, in subsequent litigation brought by a disgruntled male panel lawyer against the administrator, would *you* be pleased to have to articulate *why* you wanted the female, in a deposition or at a trial?

All of these decisions made both by defense fund administrators and member-clients must not be subjected to judicial oversight and scrutiny under the guise of a discrimination lawsuit. What if the decisionmakers (trustees, officers and directors) of the plan believe that a particular panel lawyer is not the best qualified on the panel to handle a particular case, or the decisionmakers have developed a concern over the competency of a panel lawyer, and for *those reasons* make a different selection? Then these fiduciaries in order to defend against claims of discrimination are required to *explain* to the satisfaction of a judge or jury why a plaintiff like Tuszynska wasn't selected. The entire internal deliberative process is opened up to judicial and public scrutiny as the administrators struggle to defend their decisions.

Finally, there is another very good reason why would-be plaintiffs ought to think carefully about launching a SLAPP suit. The statutes provide for a mandatory award of attorney fees and costs to defendants who prevail on a special motion to strike. Once a SLAPP suit is filed, "the meter starts running." Dismissing the lawsuit promptly when an anti-SLAPP motion is filed doesn't help - - it just keeps the fees and costs down. It is not unusual to encounter attorney fees and costs awards of tens of thousands of dollars to prevailing anti-SLAPP defendants.

This is an important case for police unions and associations. The Court of Appeal issued its first Opinion on August 25, 2011, but did not certify it for publication in the official reports, meaning it could not be cited as authority for law it clarified. With the help of our colleagues at the PORAC Legal Defense Fund and Ed Fishman, Esq. and Alison-Berry Wilkinson, Esq., the Los Angeles Police Protective League and Hank Hernandez, Esq., the Association of Los Angeles Deputy Sheriffs and Dick Shinee, Esq., and the Riverside Sheriffs' Association and Dennis J. Hayes, Esq., all of whom by letter enjoined the Court of Appeal to publish the Opinion, it was ultimately published, and is available as persuasive if not binding precedent should another "panel attorney" claim discrimination in the selection of attorneys or in the control of funding.[2]

Anti-SLAPP motions are frequently invoked *against* police plaintiffs in litigation over

---

[2] Dennis J. Hayes, Esq. of Hayes & Cunningham, LLP represented the Riverside Sheriffs' Association in this litigation. Michael P. Stone and Muna Busailah of Stone Busailah, LLP represented the RSA-LDT.

"false and defamatory citizen complaints" brought against officers pursuant to *Penal Code* § 832.5 (the statute which requires agencies to make a citizen complaint procedure available to persons who want to file a complaint against one or more officers). We are all well aware of the harm to officers' careers that frequently accompanies even palpably false complaints made by "citizens."

Many years ago the Legislature enacted *Civil Code* § 47.5 which authorizes a species of defamation claims against persons who maliciously file false complaints against peace officers. An aggrieved officer is *permitted* to sue the "false" complainer for money damages. However, the "citizen complaint" has been held to be "protected activity" under the SLAPP legislation. If an anti-SLAPP motion is filed in response to an officer's lawsuit brought under § 47.5, the officer must convince the court that his or her lawsuit has a probability of success. Otherwise, the complaint will be stricken as a SLAPP, and the officer will end up paying perhaps $20,000 or more in fees and costs to the complainant-defendant.

For this reason, we generally advise officers to forego these lawsuits, because the risk is simply too great. Of course, there are exceptions, but they are rare. If you are considering filing such a lawsuit, make sure your lawyer fully understands anti-SLAPP law and litigation, *before* the suit is filed. Make sure your claims are strong enough to clearly hurdle the anti-SLAPP motion, or you could get stuck owing the other side $25,000 or more in fees and costs.
STAY SAFE!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 30 years, following 13 years as a police officer, supervisor and police attorney.

Muna Busailah has been a partner in the firm since 1995 and also specializes in police law and litigation.