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## SLAPP Fight Over YouTube Video: Judge OKs Drug Maker's Suit Against Firm

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The Recorder

January 26, 2010

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SAN FRANCISCO — A San Francisco Superior Court judge on Friday ruled that a [Ropers, Majeski, Kohn & Bentley](#) partner who uploaded a [YouTube](#) video reaching out to potential class action members can't use California's anti-SLAPP law to ward off a defamation suit.

In denying anti-SLAPP motions by partner Thomas Clarke Jr. and Ropers, Majeski, Judge Harold Kahn reasoned that Clarke's allegedly defamatory YouTube comments against the maker of a dietary supplement amounted to an advertisement and thus fall short of being protected.

"If Clarke's goal is to communicate with potential class members, there are far more narrowly tailored ways for him to have done so," Kahn wrote in [an 18-page opinion \(pdf\)](#) in *Brain Research Labs v. Clarke*, 491932. "Instead, by invoking the 'new media' of the Internet and its capacity to display videos, Clarke chose, in a 21st century way, to 'litigate in the press.'"

Kahn noted that no currently citable published decision speaks to whether the part of the anti-SLAPP law that excludes commercial speech from its protection applies to a lawyer's ad soliciting clients for a potential lawsuit. One case is before the California Supreme Court, he added.

So the judge said he took some guidance from *Taheri Law Group v. Evans*, 160 Cal.App.4th 482, a 2008 Second District Court of Appeal case that said the commercial speech exception didn't apply to an attorney's advice to a prospective client. At the same time, though, that opinion suggested that when a lawyer engages in a massive ad campaign "divorced from individualized legal advice," the commercial speech exception "conceivably might apply." Clarke filed the class action against Brain Research Labs, maker of a supplement called Procera, last spring in Marin County Superior Court. The company then sued Clarke and Ropers, Majeski, as well as the plaintiff named in the complaint, saying their defamatory comments have hurt its business.

In its complaint, Brain Research Labs, represented by Los Angeles firm Younesi & Yoss, quoted at length from Clarke's nine-minute YouTube video. Kahn also cited portions of the video, for example: "Greetings, I'm Tom Clarke. You probably know me as the attorney who's very concerned about your health. ... These scam artists do not care if you live or die. They only want you to live long enough to give them your money."

The ruling raises big questions for how lawyers go about doing their work, said Kerr & Wagstaffe partner Jacqueline Scott Corley, who represents both Ropers, Majeski and Clarke.

"It could really hamper an attorney's ability to communicate with potential class members if you can't do so on the Internet," Corley said.

Corley pointed to *Rubin v. Green*, 4 Cal.4th 1187, a 1993 Supreme Court decision that held that the solicitation of clients is protected by litigation privilege.

"We don't believe that the development of this communication mode should change the result," Corley said. "Especially here, where the YouTube video was narrowly directed toward consumers with an interest in Procera."

But Kahn made the distinction that the attorneys in that case had directly reached out to potential clients with a known connection to the potential litigation. "In contrast, the YouTube video is potentially available to every English-speaking individual in the world with an internet connection."

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Brain Research Labs had also sued Joseph Rotenberg, the name plaintiff in the underlying class action. Kahn granted Rotenberg's anti-SLAPP motion, saying the company had not showed it was likely to prevail because it didn't have any admissible evidence that Rotenberg had indeed said what a reporter attributed to him on a TV news story about the Procera suit. Rotenberg was represented by Zachary Rothenberg of Santa Monica's Grodsky & Olecki.

Still, a Brain Research Labs attorney called Friday's ruling a "resounding" victory.

"It sends a very broad message to the legal profession that a lawyer can't say anything he or she wants with impunity," John Younesi said.

Corley said she will appeal.

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