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The (nearly) absolute power of California’s litigation privilege

Contrary to popular belief among lawyers, application of the litigation privilege is not limited to civil lawsuits.



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California's litigation privilege is an incredibly powerful tool that effectively immunizes conduct if it is reasonably related to litigation. The litigation privilege protects conduct even if it is "alleged to be fraudulent, perjurious, unethical, or even illegal." *Kashian v. Harriman*, 98 Cal. App. 4th 892, 920 (2002). The California Supreme Court has acknowledged that application of the privilege to allegedly unlawful conduct "necessarily results in some real injuries that go uncompensated" but acknowledged "that is the 'price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say.'" *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990) (quoting Prosser, Law of Torts (3d ed. 1964, p. 797)); *see id.* at 213 ("The principal purpose of section [47(b)] is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.")(internal citations omitted). "To effectuate its vital purposes, the litigation privilege is held to be absolute in nature." *Id.* at 215.

Contrary to popular belief among lawyers, application of the litigation privilege is not limited to civil lawsuits. The California Court of Appeal recently held that the litigation privilege even applied in a criminal trial involving charges of extortion. *People v. Toledano*, 36 Cal. App. 5th 715, 728 (June 24, 2019) ("Thus, the litigation privilege may apply to criminal prosecutions of extortion."); *id.* at 730 ("The trial court, however, had a sua sponte duty to give a correctly phrased instruction on Toledano's affirmative defense that his actions were protected under the litigation privilege.")

The above gives rise to two key questions. First, when does conduct fall within the protections of the litigation privilege? Second, are there any recognized exceptions to the litigation privilege?

As to the first question, the litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg*, 50 Cal. 3d at 212. While, for example, pleadings are an obvious example of privileged communications, application of the litigation privilege "is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards." *Action Apartment Ass'n, Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1241 (2007) (internal quotations omitted); *see Rusheen v. Cohen*, 37 Cal. 4th 1048, 1058 (2006). For example, in *Rubin v. Green*, 4 Cal. 4th 1187, 1191 (1993), a resident of a mobilehome park, Green, and a law firm she hired mailed a "notice of intention to commence action" to the park's owner, Rubin, alleging various defects with operation of the park. Green and her lawyers were also alleged to have wrongfully solicited park residents to join in a potential lawsuit in violation the California Business and Professions Code Sections 6152 and 6153. Rubin responded by suing Green and her lawyers for unfair competition under California Business and Professions Code Section 17200 et. seq. The California Supreme Court ultimately upheld the trial court's dismissal of the entire action on demurrer on the basis of the litigation privilege. The court did so even while acknowledging that the "gravamen of plaintiff's complaint ... is that the methods employed by the law firm ... amounted to conduct the Legislature has made criminal." *Id.* at 1196.

Additionally, there are very few recognized exceptions to the litigation privilege, other than for malicious prosecution actions. *See Silberg*, 50 Cal. 3d at 216. Courts have reasoned that additional exceptions to the litigation privilege must not be created unless two conditions are met: (1) The statute at issue must be "more specific than the litigation privilege," and (2) application of the privilege would render the statute "significantly or wholly inoperable." *See People v. Persolve*, 218 Cal. App. 4th 1267, 1274 (2013) (holding that the litigation privilege does not apply to alleged violations of certain state and federal unfair debt collection statutes); *see Action Apartment*, 41 Cal. 4th at 1246 (the litigation privilege does not apply to criminal prosecution of perjury, false reporting, and attorney deceit because the statutes at issue are "more specific than the litigation privilege and would be significantly or wholly inoperable if its enforcement were barred when in conflict with the privilege.").

But aside from these narrow, sometimes fact-specific holdings, the litigation privilege continues to function as a powerful, nearly absolute defense in criminal and civil proceedings alike. *See Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal. App. 4th 17, 23 (2002) ("[a]ny doubt as to whether the privilege applies is resolved in favor of applying it.") (citation omitted). For these reasons, defense and plaintiff attorneys alike would benefit from a clearer understanding of California's litigation privilege and the scope of its application in a variety of settings. □

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