

RESOLUTION LATE FILED 01-2019

DIGEST

Civil Code: Litigation Privilege

Amends Civil Code section 47 to clarify that the litigation privilege is not an evidentiary privilege.

RESOLUTIONS COMMITTEE RECOMMENDATION DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code section 47 to clarify that the litigation privilege is not an evidentiary privilege. This resolution should be disapproved because striking a protected allegation from a complaint does not affect the evidentiary value of that same statement when the case reaches the trial stage for purposes of a Civil Code section 47 defense.

Code of Civil Procedure section 47 creates the so-called “litigation privilege” as a defense and stands for the general proposition that statements made in the course of litigation are protected from subsequent litigation for defamation or other causes of action. On the other hand, Code of Civil Procedure section 425.16 (the so-called “anti-SLAPP statute”) provides a procedure for filing at the outset of the case, a motion to strike a complaint that chills free speech rights. (Code Civ. Proc., § 425.16, subd. (a).) Included among the types speech covered by the anti-SLAPP statute are statements made in judicial proceedings (Code Civ. Proc., § 425.16, subd. (e)(1)), which are also included under Code of Civil Procedure section 47.

Code of Civil Procedure section 425.16 has been the subject of a significant body of case law ever since it was enacted. *Baral v. Schnitt* (2016) 1 Cal.5th 376, and *Laker v Board of Trustees of the California State University* (2019) 32 Cal.App.5th 745, are the latest in a long string of cases that struggle with the anti-SLAPP statute.

Existing law on anti-SLAPP is clear that both the cause of action and any factual allegations regarding the protected speech are to be stricken. “Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing.” (*Laker, supra*, 32 Cal.App.5th at 768, citing *Baral, supra*, 1 Cal.5th at 396.) But neither *Baral* nor *Laker* hold, as the resolution suggests, that that also means that those protected statements must also be excluded from evidence. Instead, the underlying protected statements are stricken from the complaint at an early stage of litigation, as they should be when they trigger protected activity. That is the purpose of the anti-SLAPP statute. The probative value of an evidentiary statement that supports a distinct claim unrelated to protected activity, and survives an anti-SLAPP challenge, is admissible under both *Baral* and *Laker*, and their evidentiary value should still survive.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Civil Code section 47 to read as follows:

1 §47

2 A privileged publication or broadcast is one made:

3 (a) In the proper discharge of an official duty.

4 (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official
5 proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized
6 by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3
7 of the Code of Civil Procedure, except as follows:

8 (1) An allegation or averment contained in any pleading or affidavit filed in an action for
9 marital dissolution or legal separation made of or concerning a person by or against whom no
10 affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the
11 person making the allegation or averment within the meaning of this section unless the pleading is
12 verified or affidavit sworn to, and is made without malice, by one having reasonable and probable
13 cause for believing the truth of the allegation or averment and unless the allegation or averment is
14 material and relevant to the issues in the action.

15 (2) This subdivision does not make privileged any communication made in furtherance of
16 an act of intentional destruction or alteration of physical evidence undertaken for the purpose of
17 depriving a party to litigation of the use of that evidence, whether or not the content of the
18 communication is the subject of a subsequent publication or broadcast which is privileged
19 pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified
20 in Section 250 of the Evidence Code or evidence that is property of any type specified in Chapter
21 14 (commencing with Section 2031.010) of Title 4 of Part 4 of the Code of Civil Procedure.

22 (3) This subdivision does not make privileged any communication made in a judicial
23 proceeding knowingly concealing the existence of an insurance policy or policies.

24 (4) A recorded lis pendens is not a privileged publication unless it identifies an action
25 previously filed with a court of competent jurisdiction which affects the title or right of possession
26 of real property, as authorized or required by law.

27 (c) In a communication, without malice, to a person interested therein, (1) by one who is
28 also interested, or (2) by one who stands in such a relation to the person interested as to afford a
29 reasonable ground for supposing the motive for the communication to be innocent, or (3) who is
30 requested by the person interested to give the information. This subdivision applies to and
31 includes a communication concerning the job performance or qualifications of an applicant for
32 employment, based upon credible evidence, made without malice, by a current or former
33 employer of the applicant to, and upon request of, one whom the employer reasonably believes is
34 a prospective employer of the applicant. This subdivision applies to and includes a complaint of
35 sexual harassment by an employee, without malice, to an employer based upon credible evidence
36 and communications between the employer and interested persons, without malice, regarding a
37 complaint of sexual harassment. This subdivision authorizes a current or former employer, or the
38 employer's agent, to answer, without malice, whether or not the employer would rehire a current
39 or former employee and whether the decision to not rehire is based upon the employer's
40 determination that the former employee engaged in sexual harassment. This subdivision shall not
41 apply to a communication concerning the speech or activities of an applicant for employment if
42 the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of
43 the Code of Civil Procedure or any other provision of law.

44 (d) (1) By a fair and true report in, or a communication to, a public journal, of (A) a
45 judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the
46 course thereof, or (E) of a verified charge or complaint made by any person to a public official,
47 upon which complaint a warrant has been issued.

48 (2) Nothing in paragraph (1) shall make privileged any communication to a public journal
49 that does any of the following:

50 (A) Violates Rule 5-120 of the State Bar Rules of Professional Conduct.

51 (B) Breaches a court order.
52 (C) Violates any requirement of confidentiality imposed by law.
53 (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was
54 lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter
55 complained of was for the public benefit.
56 (f) The privilege created by this section shall not bar admission into evidence of the
57 privileged publication or broadcast.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: CCP 425.16(b) provides that "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.**" (Emphasis added.)

Per the code, a SLAPP motion can strike a claim and a cause of action. However, *Baral v Schnitt* (2016) 1 Cal.5th 376, extends CCP 425.16(b) to provide that if the non-moving party loses the SLAPP motion, "the claim **and its corresponding allegations** must be stricken." *Baral* (Emphasis added).

Baral's holding appears to confuse the absolute privilege from liability for statements made in proceedings in Civil Code section 47, subdivision (b)(3) with an evidentiary privilege that excludes facts from evidence. CCP425.16 authorizes a court to strike the claim / cause of action under where the liability is premised on privileged speech. But *Baral's* further step to strike the factual allegations is a step too far.

Baral lends itself to citation to support the exclusion of allegations from evidence if the allegations arise from statements made in a proceeding. On February 28, 2019, the Court of Appeal filed *Laker v Board of Trustees of the California State University* (H044836). *Laker* builds on this confusion. The *Laker* Court stated: "Turning to the merits of this aspect of Laker's retaliation claim, we conclude that the statements supporting this allegation are **inadmissible under the absolute litigation privilege. We therefore strike the defamation allegation** from Laker's retaliation cause of action." (Emphasis added.) Thus, rather than simply immunize the defendant from liability, the litigation privilege is incorrectly used to strike statements from evidence.

I have dealt with this confusion from opposing counsel whose client made admissions on the record. I cited those admissions to show liability. Opposing counsel brought a motion to strike the admissions, claiming that those statements were absolutely privileged because of the statements were made in a proceeding. This is a clearly wrong application of the law, but the jurisprudence is building that might support the misuse of the litigation privilege.

When Perry Mason got the witness to admit guilt on the stand, the admission was NOT stricken from the record because of an absolute privilege for statements made in litigation. Nor should they be. This confusion calls for clarification.

The Solution: The proposed amendment to Civil Code section 47 would clarify that the litigation privilege which immunizes the speaker from liability does not bar the statement's admission into evidence. Where the statement is competent, relevant, and not barred by a substantive rule, the statement should be admissible into evidence. This amendment achieves that goal.

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Alicia M. Gamez, 220 Montgomery Street, Suite 1200, San Francisco, CA 94104, 415-341-8143, alicia@gamezlaw.com

RESPONSIBLE FLOOR DELEGATE: Alicia M. Gámez