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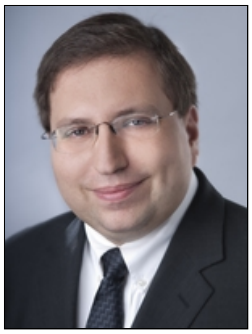
Revitalizing Calif.'s Often Overlooked Legislative Privilege


Felix Shafir


Jeremy B. Rosen

Law360, New York (August 9, 2016, 3:54 PM EDT) -- California Civil Code Section 47(b) codifies several subdivisions establishing an "absolute privilege" that affords "an 'immunity' from suit" for certain statements. (Moore v. Conliffe (1994) 7 Cal.4th 634, 638, fn. 1, 652.) Section 47(b) is perhaps best known for subdivision 47(b)(2)'s "litigation privilege," which applies to communications with some connection to judicial proceedings. (Chang v. Lederman (2009) 172 Cal.App.4th 67, 87.)

But Section 47(b) shields other statements too. Notably, subdivision 47(b)(1) protects statements made in connection with the "proceedings of all legislative bodies, whether state or municipal." (Scott v. McDonnell Douglas Corp. (1974) 37 Cal.App.3d 277, 285-286 & fn. 7.) Courts refer to this as the "legislative privilege." (People ex rel. Harris v. Rizzo (2013) 214 Cal.App.4th 921, 936, 944.)

Whereas a plethora of cases address the litigation privilege's reach, only a handful of California appellate opinions examine the legislative privilege's scope. And, until recently, these few appellate decisions discussed whether the legislative privilege applied in the context of traditional forms of communication.

In Angel v. Winograd (May 9, 2016, B261707) [nonpub. opn.], review denied (July 20, 2016, S235079), the California Court of Appeal recently revisited the often overlooked legislative privilege and examined its application to more modern modes of communication, holding that this privilege protected statements made via the internet and a television news interview where the statements solicited support for a petition campaign that urged a city to take legislative action.

Winograd serves as a reminder that the little-known legislative privilege has a vital role to play in today's society: protecting citizens as they seek to press for legislative change by using contemporary means of communication to influence legislatures through the pressure of public opinion.

The Legislative Privilege Before Winograd

California's legislative privilege has repeatedly been applied to settings directly tied to legislative proceedings, such as to a witness' allegedly defamatory testimony before a legislative committee and to the purportedly misleading title and text of an ordinance. (Rizzo, supra, 214 Cal.App.4th at p. 944; Spitler v. Children's Institute International (1992) 11 Cal.App.4th 432, 436-437, 440.)

But California courts have not hesitated to extend the legislative privilege beyond such narrow circumstances. The legislative privilege "is 'broad and comprehensive'" (Rizzo, supra, 214 Cal.App.4th at p. 944), and must "be construed broadly" (Spitler, supra, 11 Cal.App.4th at p. 440). Consequently, this privilege "extends to the activities and conduct" that are "separated" in "time and space from the city forums" as long as those activities are connected to a legislature's work. (Pettitt v. Levy (1972) 28 Cal.App.3d 484, 489-491.) In particular, California Courts of Appeal have

applied the legislative privilege to statements to the public or press made to marshal support for legislative action.

For example, the legislative privilege has been applied to protect allegedly defamatory statements made about a city manager in letters that had purportedly been prepared by a private company's agents and later distributed to the audience during a city council meeting — an audience consisting of the public and press — as part of a supposed scheme to cause the city council to remove the manager. (See Scott, supra, 37 Cal.App.3d at pp. 281-286.)

Similarly, the legislative privilege has been applied to allegedly defamatory verbal remarks made by a husband and wife about their neighbors to members of the public in the neighborhood since those statements were made to "marshal support" for the couple's petition to the local city council. (See Cayley v. Nunn (1987) 190 Cal.App.3d 300, 302-306.)

Likewise, the legislative privilege has been applied to bar a claim alleging that an optometrist induced a breach of contract by arranging for himself and the plaintiff's former in-house attorney to meet with members of the public during a convention of optometrists to provide them with information about potential legislative action against the plaintiff (a business engaged in discount sales of replacement contact lenses) to enable them to pursue legislative initiatives. (See 1-800 Contacts Inc. v. Steinberg (2003) 107 Cal.App.4th 568, 572-575, 586-588.)

Winograd's Application of the Legislative Privilege to the Modern Era

While Scott, Cayley and 1-800 Contacts addressed the interplay between the legislative privilege and traditional communications (written letters and verbal statements), Winograd examined the legislative privilege's application to modern modes of communication.

The Winograd case arose out of a petition campaign, consisting of a broad range of activities, that sought to persuade the Santa Monica City Council to take legislative action to end the pony rides and petting zoo at the Main Street Farmers' Market. (See Winograd, supra, at pp. *1-*4.) Marcy Winograd is a "long-time community activist who believe[s] 'animals are sentient beings, capable of suffering, and deserve to be treated with dignity and compassion.'" (Id. at p. *1.) Winograd "considered the pony ride[s] and petting zoo to constitute animal cruelty and abuse." (Ibid.) "[T]o protect the animals," Winograd began a months-long petition campaign in March 2014 "'call[ing] on the city of Santa Monica, known for its visionary and progressive policies, to shut down pony rides and petting zoos'" at the Farmers' Market because, in her view, these were "'cruel and inhumane' animal exhibits." (Id. at p. *2.)

"At a Sept. 9, 2014, meeting, the Santa Monica City Council considered alternative activities for the entrance to the [F]armers' [M]arket after the city's contract" with the operators of the pony rides and petting zoo expired. (Winograd, supra, at p. *4.) The council "voted to direct its staff to put out a request for proposal for nonanimal activities or to create a pilot educational program." (Ibid.)

Thereafter, the operators of the pony rides and petting zoo sued Winograd, claiming she had falsely accused them of "animal cruelty." (Winograd, supra, at p. *1.) The statements challenged by their lawsuit included: (1) commentary Winograd had posted on the websites of publications like the Santa Monica Patch and LA Progressive as well as on Facebook; and (2) Winograd's interview with a reporter from a local television news station on the eve of the city council's vote. (Id. at pp. *2-*4, *6.)

Winograd moved to strike plaintiffs' lawsuit under California's anti-SLAPP statute. The trial court granted the motion as to certain claims, but denied it as to the claims for libel and intentional interference with a prospective economic advantage.

Winograd appealed, maintaining that plaintiffs' claims were barred by the legislative privilege. The trial court had rejected this argument by relying on case law that declined to apply the *litigation* privilege to statements made to the general public and the press. But the Court of Appeal agreed with Winograd and reversed, holding that Winograd's statements "fell within the broad construction of the *legislative* privilege" because they "solicited public support" for the "petition to cause the city of Santa Monica to take action to end the pony ride and petting zoo." (Winograd, supra, at pp.

*1, *5-*7, emphasis added.)

The Court of Appeal's application of the legislative privilege to the modern modes of communication in Winograd makes sense under the standard governing the statutory privileges codified in Civil Code section 47(b).

Section 47(b)'s privileges apply only to statements with some connection to the particular type of proceeding protected by each respective privilege. Whether a statement bears this connection to one of the proceedings protected by Section 47(b) turns on whether the statement serves a useful function in that type of proceeding. (See, e.g., Rothman v. Jackson (1996) 49 Cal.App.4th 1134, 1146.) A statement has this "*functional* connection" if the statement "function[s] as a necessary or useful step" that "serve[s]" the "purposes" of the proceeding at issue. (Ibid.) In short, context matters because "context ... must control whether a communication has 'some connection or logical relation'" to a proceeding protected by Section 47(b). (Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal.App.4th 1082, 1089-1090.)

Thus, subdivision 47(b)(2)'s litigation privilege "'protects from tort liability any publication made in connection with a judicial proceeding.'" (Holland v. Jones (2012) 210 Cal.App.4th 378, 381.) In other words, the communication "must function as a necessary or useful step in the litigation process and must serve its purposes." (Rothman, supra, 49 Cal.App.4th at p. 1146.) In contrast, subdivision (b)(1)'s legislative privilege protects communications made in connection with the "'proceedings of all legislative bodies, whether state or municipal.'" (Rizzo, supra, 214 Cal.App.4th at p. 944.) The legislative privilege therefore applies to a statement that "bears some connection to the work of the legislative body." (Scott, supra, 37 Cal.App.3d at p. 285.) Since the application of Section 47(b)'s functional connection test is context-specific, a communication that serves a useful step in the context of the work done by legislative bodies might not serve as a useful step in the distinct context of the litigation process.

For example, courts have held that subdivision 47(b)(2)'s litigation privilege ordinarily does not apply to statements made to the public and the press. (See, e.g., Rothman, supra, 49 Cal.App.4th at pp. 1138, 1146-1149; Susan A. v. County of Sonoma (1991) 2 Cal.App.4th 88, 91-96.) This is so because, in the context of litigation, statements made to the public through the press or other nonjudicial forums typically do not serve a useful step in furthering the actual litigation process (see Rothman, at pp. 1146-1149), since efforts to hold a trial by public opinion are "'a procedure forbidden to counsel and subversive of the fair and orderly conduct of judicial proceedings.'" (Susan A., at pp. 95-96).

But, in the different context corresponding to the legislative proceedings protected by subdivision (b)(1), the legislative privilege protects statements made "to potential petition signers" because remarks made to "'influence'" legislative proceedings by seeking to "marshal[ ] support" for a petition campaign bear a "logical connection" to legislative proceedings. (Cayley, supra, 190 Cal.App.3d at pp. 303, 306.) After all, "[p]olitical advocacy seeking support from the citizenry has a long, storied tradition in the United States." (Sekulow & Zimmerman, Weeding Them Out By The Roots: The Unconstitutionality Of Regulating Grassroots Issue Advocacy (2008) 19 Stan. L. & Pol'y Rev. 164, 164.) "[T]he impetus for many legislative programs, civil rights statutes, and other important governmental decisions has come from individuals and groups that successfully rallied their fellow citizens in support of the proposed action at issue." (Ibid.)

It is therefore unsurprising that the Court of Appeal followed cases like Cayley in applying the legislative privilege to protect the communications that sought to solicit support for legislative action in Winograd even though those statements were made in modern settings — the internet and a television interview — that had not previously been addressed by legislative privilege case law. Indeed, it would have been a shock had the Winograd court declined to apply the legislative privilege to this new factual context.

Recent years have seen the development of numerous new "ways in which information is exchanged" through electronic communications, and "'[c]omputers and internet access have become virtually indispensable in the modern world.'" (In re Stevens (2004) 119 Cal.App.4th 1228, 1234.) Such "[t]echnology has revolutionized grassroots lobbying" by allowing "internet organizing, websites, blogs, banners and more." (Susman, Lobbying In The 21st Century — Reciprocity And The Need For Reform (2006) 58 Admin. L.Rev. 737, 742.) This use of the media and the internet to

gather grassroots support and thereby influence legislation is "increasingly integral to modern lobbying." (Briffault, The Anxiety Of Influence: The Evolving Regulation Of Lobbying (2014) 13 Election L.J. 160, 186.) Hence, for the average person today, the best way to marshal public support for legislative action from potentially interested people at the grassroots level — in order to influence the legislative process through the pressure of public opinion — is to communicate using methods that can easily be accessed by anyone with modern technology, such as by way of the internet and television.

If the legislative privilege, in contravention of its broad scope, were construed narrowly to preclude it from applying to contemporary means of communication, then the average American who tries to press for legislative change through the most effective and accessible channels of communication in modern society, may well fall outside the privilege's protection. The average person, bereft of this protection, could potentially face little more than a Hobson's choice: risk liability by trying to influence legislation through modern technological methods, or withdraw completely from participating in the "indirect lobbying [of a legislature] by the pressure of public opinion" that is "the healthy essence of the democratic process." (Rumely v. United States (D.C. Cir. 1952) 197 F.2d 166, 174, affd. sub nom. United States v. Rumely (1953) 345 U.S. 41.) The Winograd court avoided this chilling consequence by applying legislative privilege case law addressing traditional means of communication to the modern age.

Given the importance of the internet and television to the world today, people will continue to employ these technologies when they seek to influence legislative action. Consequently, efforts to marshal support for legislative change will likely remain a contentious subject that could spawn legal disputes in the years ahead. Although the Court of Appeal's unpublished opinion in Winograd cannot be cited as precedent in these future disputes, it nonetheless provides a useful reminder that the often overlooked legislative privilege can serve a vital role in safeguarding such petition campaigns, even in a society where communication methods differ sharply from those employed in the past.

—By Felix Shafir and Jeremy B. Rosen, Horvitz & Levy LLP

Jeremy Rosen and Felix Shafir are partners in Horvitz & Levy's Encino, California, office.