

MCLE Self Study

Litigating in the Press

By Paul S. Chan

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Many clients believe that litigating in the press is indispensable to the vigorous prosecution or defense of a case. Even the U.S. Supreme Court has recognized that "in some circumstances, press comment is necessary to protect the rights of the client and prevent abuse of the courts." *Gentile v State Bar of Nevada* (1991) 501 US 1030, 1058. But California lawyers are subject to ethics obligations that restrict what they can say publicly about a case without inviting disciplinary action. Statements that fall outside the scope of California's litigation privilege are also fair game for tort claims including defamation, fraud, and infliction of emotional distress.

So what can a lawyer say to the press? With some exceptions, "fair and true" communications to the press about a "judicial proceeding" are absolutely protected against defamation and other tort claims. CC §47(d). But many types of statements commonly associated with the practice of litigating in the press are not protected. For example, a lawyer's public statements about an anticipated -- but not yet filed -- lawsuit are not privileged. *Rothman v Jackson* (1996) 49 CA4th 1134. Nor are statements that a lawyer knows, or reasonably should know, will materially prejudice the proceedings. Cal Rules of Prof Cond 5-120(a); CC §47(d) (2). Even statements that would not get a lawyer disciplined may, nevertheless, be actionable in tort, unless protected by a separate privilege or statute. *Rothman*, 49 CA4th 1134.

The Litigation Privilege

California generally makes privileged all that is said and done in judicial proceedings. CC §47(b). For this purpose, *judicial proceedings* include prelitigation communications that, in themselves, constitute functional steps in judicial proceedings, such as demand letters and other communications directed toward settlement; communications with potential claimants seeking support for claims; and investigatory interviews preparatory to litigation. *Rothman*, 49 CA4th at 1148-1149. There are a few highly specific statutory exceptions to this privilege, such as gratuitous libel of a nonparty in a marital dissolution action; acts in furtherance of destruction of evidence; concealment of the existence of an insurance policy; and an improper *lis pendens*. CC §47(b)(1)-(4).

The purpose of the litigation privilege is to give litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. *Silberg v Anderson* (1990) 50 C3d 205, 213. The courts have extended the privilege to attorneys as well as parties, "not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with libel or slander actions while acting for his client." *Thornton v Rhoden* (1966) 245 CA2d 80, 99. The litigation privilege, when applicable, thus serves as an absolute bar against all tort claims based on the challenged communication -- except malicious prosecution actions. See *Silberg*, 50 C3d at 215-16 (list of barred actions). The privilege also applies in federal cases applying California law. See for example *Crane v The Arizona Republic* (9th Cir 1992) 972 F2d 1511, 1517-1518.

Civil Code section 47(d) sets forth a separate privilege for a "fair and true report in, or a communication to, a public journal, of a judicial ... proceeding ... or of anything said in the course thereof." That section extends the litigation privilege to accounts of judicial proceedings published in the press, as well as to certain communications to the press. Unlike the section 47(b) privilege, which protects litigation participants from tort liability, the "fair report" privilege serves the broader purpose of getting information to the public. *McClatchy Newspapers, Inc. v Superior Court* (1987) 189 CA3d 961, 975.

Section 47(d)(2) lists some exceptions. It does not protect a report or communication that (1) violates rule 5-120 ("materially prejudice"); (2) breaches a court order (such as a gag order), or (3) violates any requirement of confidentiality imposed by law (such as the lawyer's duty of confidentiality under Business and Professions Code section 6068(e)).

So what constitutes a privileged communication to the press under section 47(d)? For lawyers, the one clear example is the distribution of court pleadings. The 1996 amendment of section 47(d), adding the phrase "communication to [the press]," specifically abrogated the case of *Shahvar v Superior Court* (1994) 25 CA4th 653, which had held that a lawyer's faxing of a copy of a civil complaint to a newspaper was not a privileged communication. The distribution of copies of filed pleadings to the press is now protected by the fair report privilege of section 47(d), unless the conduct violates a court order or other confidentiality requirement, or rule 5-120.

No other types of statements have been identified that qualify as privileged communications to the press. The enumerated exceptions in section 47(d) make clear that the scope of the privilege is narrower for lawyers than it is for the media. "A media defendant does not have to justify every word of the alleged defamatory material it publishes.... [A] degree of flexibility is tolerated in deciding what is a 'fair report.'" *McClatchy Newspapers*, 189 CA3d at 975-976. Thus, the same remarks that would be absolutely privileged if published by a member of the press may not be privileged at all if communicated by a lawyer.

The Pending Case Requirement

Unlike the section 47(b) litigation privilege, which protects certain prelitigation actions, the section 47(d) fair report privilege only applies to communications about an existing judicial proceeding. CC §47(d)(1)(A). It does not apply to out-of-court statements about anticipated or future lawsuits or claims that have yet to be asserted.

That distinction was explained in *Rothman v Jackson*, 49 CA4th 1042, in which an attorney, Barry K. Rothman, was retained by a father and son to negotiate with celebrity Michael Jackson concerning alleged torts against the minor. No complaint was filed, which protected the family's privacy. However, a mandated psychological evaluation of the minor that was filed with the Los Angeles County Department of Children's Services was somehow leaked to the press. Michael Jackson's attorneys called a press conference to publicly deny that child molestation had occurred and charged that Rothman and his clients had intentionally made false accusations against Jackson in order to extort money from him. Rothman withdrew from representation, and the tort claim was subsequently rumored to have settled for millions.

Rothman then sued Jackson and his attorneys for defamation, tortious interference with business relationships, and intentional infliction of emotion distress, but his action was dismissed on the ground that the press conference statements were completely protected by the litigation privilege. The court of appeal reversed, based in part on its finding that the press conference statements were not privileged communications because there was no pending judicial proceeding at the time they were made. As explained by the court, "[T]he statements at issue in this case simply make assertions which [Jackson's lawyers] claim they intended in good faith to make again later, in anticipated litigation. Obviously, the statements are not reports or communications of judicial proceedings." 49 CA4th at 1145 n3. "The [litigation] privilege ... affords its extraordinary protection to the uninhibited airing, discussion and resolution of disputes *in and only in judicial or quasi-judicial arenas*. Public mudslinging ... is ... one of the kinds of unregulated and harmful feuding that courts ... exist to prevent." 49 CA4th at 1146 (italics in original).

The Nonconfidential Requirement

The fair report privilege of section 47(d) expressly excludes communications to the press that breach a court order or violate a confidentiality requirement imposed by law. CC §47(d)(2)(B), (C). Those exceptions ensure that the fair report privilege is not used as a vehicle to end run a preexisting gag order or other confidentiality restrictions.

A recent illustration of these limitations was provided in the widely publicized San Francisco dog-mauling case, *Knoller v California*, 2001 Cal. App. Unpub. LEXIS 2299. While the case was pending, the district attorney and the defense attorney separately made statements to the media that questioned the truthfulness of their opponent's key witness. In a ruling issued after the jury had returned verdicts against the defendants, the court found that both attorneys had violated the court's gag order by making their out of court statements to the press. The attorneys were only fined, but they could have been held in contempt of court and jailed, or potentially sued for defamation or other torts based on the statements.

Rules of Professional Conduct

The biggest -- and least defined -- exception to the fair report privilege is for statements that violate Rule 5-120 of the Calif. Rules of Professional Conduct. CC §47(d)(2)(A). That ethics rule states that a lawyer "who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communications if the member knows or reasonably should know that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Cal Rules of Prof Cond 5-120(A).

The rule lists a handful of out-of-court statements that can properly be made by a lawyer without subjecting that lawyer to discipline. In civil cases, a lawyer may publicly state: (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of persons involved; (2) information contained in a public record; (3) that an investigation is in progress; (4) the scheduling or result of any step in the litigation; (5) a request for assistance in obtaining necessary evidence or information; and (6) a warning of danger concerning the behavior of a person involved if there is a likelihood of substantial harm to an individual or the public interest. Cal Rules of Prof Cond 5-120(B)(1)-(6).

In criminal cases a lawyer may disclose those items as well as the identity, residence, occupation, and family status of the accused; information necessary to aid in apprehension of the accused; the fact, time, and place of arrest; the identity of investigating and arresting officers, and the length of the investigation. Cal Rules of Prof Cond 5-120(B)(7).

Finally, the rule provides attorneys with a limited right of reply to public statements, made by others, that have unduly prejudiced the attorney's client. "[A] member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client, ... limited to such information as is necessary to mitigate the recent adverse publicity." Cal Rules of Prof Cond 5-120(C).

Whether an out-of-court statement will materially prejudice the proceedings under rule 5-120(A) will necessarily be determined on a case-by-case basis. There are no published California cases discussing which statements do or do not violate rule 5-120 for purposes of this privilege. In a 1996 capital case the California Supreme Court, applying an American Bar Association ethics rule that was an indirect predecessor of rule 5-120, found that extrajudicial statements accurately describing the evidence did not give rise to an ethics violation. In that case, a prosecutor had spoken to a journalist after a guilty verdict but before the death-penalty phase. The prosecutor accurately detailed the difference in evidence between a first mistrial and the second trial on guilt, which was a matter of public record. The journalist, however, inaccurately attributed an opinion to the prosecutor that the new evidence had led to the guilty verdict. The prosecutor obtained a retraction, and the trial court admonished the jury to disregard the newspaper articles. The court held that the prosecutor had not acted unethically because he was "not required, on pain of a misconduct citation, to anticipate the reporter's inaccuracy," and the factual information he had

given "was not of a sort reasonably likely to affect imposition of sentence." *People v Marshall*, 13 C4th 799, 863-864.

The notes to rule 5-120 do set out factors relevant to deciding whether an extrajudicial statement would violate the rule, including (1) whether the statement contains information based on clearly inadmissible evidence; (2) whether the lawyer knows the statement is false, deceptive, or in violation of Business and Professions Code section 6068(d), which describes the lawyer's "duty to employ only such means as are consistent with the truth and never to seek to mislead the judge or any judicial officer by an artifice or false statement"; (3) whether the statement violates a lawful gag order, protective order, statute, rule of court, or other requirement of confidentiality (such as in domestic, mental disability, and some criminal and juvenile proceedings); and (4) the timing of the statement.

The list of permissible statements set forth in subsection (B) is itself imprecise. It is unclear, for example, whether the permitted disclosure concerning the "claim, offense, or defense involved" means a lawyer can publicize any argument or allegation referenced in the pleadings or is confined to simply identifying the causes of action or affirmative defenses pleaded. A lawyer who wants to say more than the bare minimum must exercise judgment to decide whether the additional comments are likely to be prejudicial.

Compliance with rule 5-120 is necessary, but not sufficient, to shield a lawyer from tort liability for extrajudicial statements. Although statements that violate rule 5-120 are not privileged, the opposite is not necessarily true: Statements that comply with rule 5-120 may still fall outside the scope of the fair report privilege. Thus, it did not matter in tort whether the press conference statements by Michael Jackson's attorney were necessary to defend Jackson from undue prejudice and therefore ethically permitted under rule 5-120(c). Because the statements were defamatory, they were actionable in tort. "[T]he rule does not provide, or even imply, that defamatory statements made by attorneys in extrajudicial statements in defense of their clients should be privileged." *Rothman*, 49 CA4th at 1149 n5.

Finally, the rule 5-120 exception for materially prejudicial statements applies only to lawyers. Press communications and extrajudicial statements by nonlawyers are subject to a greater degree of latitude in determining whether they constitute fair and true accounts of judicial proceedings. For example, a newspaper that published a highly inflammatory demand letter in a pending suit would almost certainly be protected by the section 47(d) fair report privilege. However, a lawyer's conduct in giving such a letter to the press, if considered prejudicial, would violate rule 5-120 and therefore not be privileged under section 47(d), even though sending it to the opposing party would be privileged under section 47(b). This alone may be good reason for a lawyer to cede publicity duties to nonlawyers acting on the client's behalf.

Thus, much of what lawyers say out of court when attempting to litigate in the press is beyond the scope of the litigation privilege, including: (1) statements about an anticipated lawsuit; (2) statements that violate a court order or other confidentiality agreement; and (3) statements that the lawyer knows, or reasonably should know, will materially prejudice the proceedings.

Paul S. Chan is a partner at Bird Marella Boxer & Wolpert, a business litigation and white collar criminal defense firm in Los Angeles.

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