BARRISTERS TIPS

by Diana Sanders

The age of social media and digital news as well as ever-increasing interest in celebrity legal battles has fostered an environment in which the public now expects, and often demands, their favorite brands or celebrities provide (personally or through legal representatives) public statements and address legal controversies in real time.

The counsel of such companies, celebrities, influencers, or other public figures may find themselves in the position of being tasked with issuing a public statement, often because they are the most credible sources and most capable of handling the press in a manner that does not compromise the client's legal position.

When attorneys issue detailed statements on behalf of their clients in high-profile disputes, these statements are customarily significantly thought out as well as reviewed and revised prior to release. Even press conferences themselves are often scripted, and questions are answered carefully and deliberately to stay within the bounds of the law and the four corners of the filed pleadings at issue.

While attorneys have leeway in what they say in court while advocating on behalf of their clients or disputing their adversaries, the world outside the courtroom is not so forgiving. New California attorneys dealing with the media or clients in the public space should familiarize themselves with California's laws and applicable privileges that can protect them in this respect and, most importantly, limitations that could potentially subject them to liability. Two of the main privileges concern litigation and reporting.

Litigation Privilege

Codified by Civil Code Section 47(b), the litigation privilege protects communications 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 a connection or logical relation to the action.[1] Communications furthering the "objects of the litigation" are those that function as a necessary or useful step in the litigation process and serve its purposes.[2] These include court pleadings and oral argument, and extend to settlement demand letters and other out-of-court statements to interested parties of a similar nature. It is because of the litigation privilege that attorneys can freely advocate for their clients in court or with their adversaries without fear of personal liability such as claims for defamation or false light.

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The litigation privilege typically does not extend, however, to communications to non-interested parties such as the press or various other media. Statements to the press/media, even if they concern the litigation or a client's position, can be actionable unless privileged or protected on some other basis. Simply put, press statements do not serve a necessary or useful step in the litigation process but rather are meant to share with noninterested third parties a litigant's view of the dispute.[3] So, while it may be important for a specific type of client (i.e. celebrity or popular brand) to have a public statement made on the client's behalf, the desire to be vindicated in the eyes of the world has no such special treatment under the law.

Reporting Privilege

Codified by Civil Code Section 47(d)(1), the true and accurate reporting privilege protects a fair and true report in, or a communication to, a public journal of a judicial proceeding or anything said in the course thereof. The privilege is typically invoked by media defendants when reporting on pending litigation. It can also protect other parties, such as attorneys, for transmitting a copy of a pleading, or communicating the lawsuit's allegations, to the press.[4] To qualify for protection under the privilege, the party must 1) make a report on a pending proceeding and 2) the report must be true and accurate.

Therefore, It is presumed in the first prong that there is actually a proceeding on which the party is reporting. Accordingly, then, while the litigation privilege may cover certain prelitigation non-media related communications, the fair reporting privilege is not intended to apply at all unless the party is discussing with the press an existing, filed proceeding.

With respect to the second prong, a "fair and true report" is determined by considering the natural and probable effect the statements would have on the average reader.[5] Significantly, California courts hold that to

Diana Sanders is an attorney at Russ August & Kabat LLP, where she represents musicians, actors and other entertainers and their companies in various transactions and disputes. She served as president of LACBA's Barristers/Young Attorneys Section during the 2019-20 term.

have protection of the privilege, a party reporting the proceedings to the press must attribute the report to the actual allegations of the complaint or proceeding at issue (i.e. the source) and not report these allegations as fact.[6] There is "a critical difference between communicating to the media what is alleged in a complaint and communicating the alleged facts without reference to the complaint.... The issue is whether the average viewer or listener of the media reports would understand the...statements as communications about the complaint (which would be privileged) or as facts (which would not)."[7]

The Takeaway

Being mindful of the limitations of privileges to attorneys, it is often best not to provide a statement to the press at all. Frankly, the less said, the less trouble that can be caused. This is especially true when there is not a pending litigation and since in that circumstance there is no protection of any privilege. If there is a pleading in place, it can speak for itself.

There are particular instances, however, when business or strategic decisions or the nature of the situation or the client's celebrity will necessitate a statement. In those limited circumstances, it is well to ensure that the statement is carefully crafted to reflect an opinion or point of view or is presented as a summary of a filed allegation rather than a statement of fact.

An example of such a statement can be framed in the following manner: "We have alleged in the complaint that _____" or "As alleged in the Complaint, my client believes _____." Therefore, the complaint is stated accurately and truthfully within the bounds of the protected pleadings that have been filed in court.

Zealous advocacy is important. In cases like this, however, attorneys have to be careful about how far to go so as not to inadvertently create liability for themselves. After all, attorneys are meant to be the advocates, not defendants. ■

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[1] Silberg v. Anderson, 50 Cal. 3d 205, 212 (1990).
[2] Rothman v. Jackson, 49 Cal. App. 4th 1134, 1144, 1146 (1996).
[3] Argentieri v. Zuckerberg, 8 Cal. App. 5th 768, 786-87 (2017).
[4] Healthsmart Pacific, Inc. v. Kabateck, 7 Cal. App. 5th 416, 431-32 (2016) (attorney's report to media conveying client's allegations upon complaint's filing was privileged).
[5] *Id.* at 434.
[6] Sipple v. Found. for Nat'l Progress, 71 Cal. App. 4th 226, 244-247 (1999).
[7] Healthsmart, 7 Cal. App. 5th at 435 (defendant attorneys' statements referenced the client's allegations in the complaint and the entirety of the news report specifically referred to the complaint and the allegations therein).