

RESOLUTION 04-07-2016 (As Amended)

DIGEST

Civil Immunities: Eliminate Absolute Privilege for Falsely Reporting Criminal Activity

Amends Civil Code section 47 to provide that malicious or false reports of criminal activity are non-privileged communications.

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:

§47

1 A privileged publication or broadcast is one made:

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

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

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

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

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

23 (4) This subdivision does not make privileged any communication between a person and
24 a law enforcement agency in which a person intentionally falsely reports that another person has
25 committed or is in the act of committing a criminal act or is engaged in an activity requiring law
26 enforcement intervention.

27 ~~(4)~~ (5) A recorded lis pendens is not a privileged publication unless it identifies an action
28 previously filed with a court of competent jurisdiction which affects the title or right of
29 possession of real property, as authorized or required by law.

30 (c) In a communication, without malice, to a person interested therein, (1) by one who is
31 also interested, or (2) by one who stands in such a relation to the person interested as to afford a
32 reasonable ground for supposing the motive for the communication to be innocent, or (3) who is

33 requested by the person interested to give the information. This subdivision applies to and
34 includes a communication concerning the job performance or qualifications of an applicant for
35 employment, based upon credible evidence, made without malice, by a current or former
36 employer of the applicant to, and upon request of, one whom the employer reasonably believes is
37 a prospective employer of the applicant. This subdivision authorizes a current or former
38 employer, or the employer's agent, to answer whether or not the employer would rehire a current
39 or former employee. This subdivision shall not apply to a communication concerning the speech
40 or activities of an applicant for employment if the speech or activities are constitutionally
41 protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other
42 provision of law.

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

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

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

50 (B) Breaches a court order.

51 (C) Violates any requirement of confidentiality imposed by law.

52 (e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was
53 lawfully convened for a lawful purpose and open to the public, or (2) the publication of the
54 matter complained of was for the public benefit.

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

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Existing law provides absolute immunity from liability for anyone who reports criminal activity to the police, even falsely and with malice. Calling 911 can be dangerous to innocent people's health. Over the past year, several innocent people (mostly young, Black males) have been killed by the police after a citizen called 911 to report that the individuals involved were engaged in criminal activity, even though the deceased individuals were engaged in non-criminal, innocent activity. Assuming the caller did so maliciously or recklessly, in California the deceased person's family will not have a civil cause of action against the caller. According to the California Supreme Court's interpretation of Civil Code section 47(b), "when a citizen contacts law enforcement personnel to report suspected criminal activity on the part of another person" that person has absolute immunity from liability, even if the report to the police was false and done maliciously or recklessly. *Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 355.

The Solution: *Hagberg* was a four to three decision, and the dissent pointed out that California is in the minority in its interpretation of section 47(b) or its equivalent in other states. The majority rested its decision primarily on prior decisions of the Courts of Appeal based on an asserted

policy of encouraging communications between citizens and police but failed to explain why that policy should extend to protecting malicious or reckless false reports.

The dissenting opinion makes the better case for not making such reports subject to an absolute privilege in civil actions. The dissenting opinion ended as follows:

“The ramifications of an intentionally false report of suspected criminal activity to police are enormous. Citizens arrested pursuant to such a report will be stigmatized, and forever thereafter have to note the arrest on job, credit, and housing applications. Assertions that the charges were dropped, and of one’s actual innocence, will likely fall on deaf ears. Under the majority’s conclusion today, such falsely accused individuals will have no opportunity to clear their name, seek compensation for economic loss in defending the charges or loss of their reputation. In the absence of clear support from either the language or the history of section 47(b), this court should not approve absolute civil protection for such destructive and criminal communications conduct.”

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

Not known.

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RESOLUTIONS COMMITTEE RECOMMENDATION

The CCBA’s Resolutions Committee recommended Disapproval of this resolution. The full Conference rejected that recommendation and approved the resolution.

COUNTERARGUMENTS

The **BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY** also recommended Disapproval of the resolution. The full Conference rejected that recommendation and approved the resolution.

The **SAN DIEGO COUNTY BAR ASSOCIATION** also recommended Disapproval of the resolution. The full Conference rejected that recommendation and approved the resolution.