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# Absolute Privilege and California Civil Code Section 47 (2): A Need for Consistency

Defamatory<sup>1</sup> statements frequently occur within the context of judicial proceedings, a frequency enhanced by the adversarial nature of our legal system. If these statements are allowed to become the bases of actions for damages against the speakers, litigation becomes the source of litigation, and individuals are deterred from participating in the judicial system. To encourage free access to the courts and to ensure the effectiveness of judicial proceedings through free communication, the California Legislature enacted Civil Code section 47(2).<sup>2</sup> Section 47(2) grants a privileged status to publications or broadcasts made in judicial proceedings.<sup>3</sup> The privilege is absolute<sup>4</sup> and, therefore, provides an im-

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1. Injurious to reputation; libelous; slanderous. BLACK'S LAW DICTIONARY 376 (5th ed. 1979).

2. See notes 15-16 and accompanying text *infra* (original enactment). Civil Code section 47 defines privileged publications. Some of the privileges are absolute, others are qualified. The code section reads:

A privileged publication or broadcast is one made—

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

4. By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued.

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

CAL. CIV. CODE §47.

3. The term "judicial proceedings," as used herein, includes quasi-judicial proceedings.

4. *Albertson v. Raboff*, 46 Cal. 2d 375, 379, 295 P.2d 405, 408 (1956); *Donnell v. Linforth*, 11 Cal. App. 2d 25, 28, 52 P.2d 937, 938-39 (1935).

munity from liability for defamatory statements made in judicial proceedings.

In theory, the statute provides certain and undeviating protection to judicial participants for publications made in the course of a proceeding. In practice, however, protection afforded by the statute is *not* certain and undeviating. Instead, the immunity varies with time and between appellate districts.<sup>5</sup> The courts use various considerations in determining the scope and application of the privilege, including policy, the status of the participant in relation to the proceeding, the nature of the publication,<sup>6</sup> the character of the defendant's conduct, and the relevance of the publication to the matter being adjudicated.<sup>7</sup> Problems of uncertainty and inconsistency arise when each court, without guidance from definitive language in either the statute or in California Supreme Court decisions, determines which considerations and standards are applicable. The greatest inconsistency among the courts occurs with the consideration of relevance. Some courts hold that the privilege is without limitation;<sup>8</sup> other courts append a minimal relevance limitation;<sup>9</sup> and still other courts impose rigid relevance limitations.<sup>10</sup> This inconsistency has an inhibitory effect on the free flow of communication necessary to the success of judicial proceedings. The need for consistency is important to all judicial participants, but is especially important to attorneys, since they have increased exposure to suits by virtue of the volume and nature of the communications required in their roles as advocates.

The purpose of this comment is to determine the scope of the privilege granted by section 47(2) to publications made in judicial proceedings, to point out the inconsistent views of the courts that have led to unequal application of the privilege, and to make suggestions designed to bring about more uniform protection. The historical development of section 47(2) will provide the background for a discussion of the methods used by courts to define and limit the privilege. The considerations of policy, participant status, nature of the publication, and character of

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5. See, for example, the inconsistent application of relevance to limit the privilege. See notes 147-221 and accompanying text *infra*.

6. In the law of libel, publication means "the act of making the defamatory matter known publicly, of disseminating it, or communicating it to one or more persons." BLACK'S LAW DICTIONARY 1105 (5th ed. 1979).

7. See notes 43-48, 70-79, 96-100, 138-142, 117-136, and accompanying text, *infra* for the courts' use of these considerations.

8. *E.g.*, 11 Cal. App. 2d at 29, 52 P.2d at 939; *Moore v. United States Fidelity & Guar. Co.*, 122 Cal. App. 205, 210-11, 9 P.2d 562, 564 (1932).

9. *E.g.*, *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706, 713-14 (1966) (some relation to the judicial proceeding); *Jordan v. Lemaire*, 222 Cal. App. 2d 622, 625, 35 Cal. Rptr. 337, 339 (1963) (some reference to the judicial function).

10. See *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 824-25, 106 Cal. Rptr. 718, 721-22 (1973).

the defendant's conduct will be explored to illustrate how the courts determine the scope and application of the privilege and to support proposals aimed at bringing about uniformity in appellate court decisions. Finally, the judicially-appended limitation of relevance will be discussed, and a recommendation will be made to the legislature to incorporate the limitation into the statute by amendment. Before exploring the considerations used by the courts to determine scope and application of the privilege, the historical development of absolute privilege in California will be examined.

#### ABSOLUTE PRIVILEGE: BACKGROUND

Privilege is one of the primary defenses to an action in defamation<sup>11</sup> and may be either qualified or absolute. The former is lost through excessive publication or publication with malice.<sup>12</sup> The latter, an immunity from liability,<sup>13</sup> is granted on occasions in which the interest of society in unfettered communication outweighs the concern for an individual's reputation.<sup>14</sup> A judicial proceeding is an occasion of that kind.

In California, absolute privilege for defamatory statements made in judicial proceedings is codified in Civil Code section 47(2). Application of the privilege by California courts is best understood with some knowledge of the history of this code section.

Section 47 originated with the adoption of the Civil Code in 1872.<sup>15</sup>

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11. Defamation in California is defined in Civil Code sections 44, 45, and 46:

Defamation: Defamation is effected by either of the following: (a) Libel. (b) Slander.

*Id.* §44.

Libel. Libel is a false and *unprivileged* publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

*Id.* §45 (emphasis added).

Slander. Slander is a false and *unprivileged* publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with a crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;

4. Imputes to him impotence or want of chastity; or

5. Which, by natural consequence, causes actual damage.

*Id.* §46 (emphasis added). See generally PROSSER, HANDBOOK OF THE LAW OF TORTS §§111-113 (4th ed. 1971) [hereinafter cited as PROSSER].

12. I. A. HANSON, *LIBEL Case and Comment* ¶¶ 124, 143 (1969) [hereinafter cited as HANSON].

13. R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 268 (1980) [hereinafter cited as SACK].

14. HANSON, *supra* note 12, at 85.

15. Enacted March 21, 1872. For historical background see generally Kleps, *The Revision*

As initially enacted, subsection 2 granted a privilege limited in scope.<sup>16</sup> Protection was confined to the publications of a single participant class, that of witnesses; and unless the statements were made in reply to a question allowed by the tribunal, they were required to be *pertinent and material* to the matter at hand.<sup>17</sup>

Shortly after 1872 a new code committee suggested revisions to the Civil Code.<sup>18</sup> One of the revisions was an amendment which resulted in significant changes to Civil Code section 47(2).<sup>19</sup> The requirements of pertinency and materiality were deleted, and the wording was broadened to encompass publications by participants in a variety of proceedings. A privileged publication became one made "in any legislative or judicial proceeding, or in any other official proceeding."<sup>20</sup> The inconsistencies in judicial construction and application of the privilege began with this amendment.<sup>21</sup>

Over a half-century later, a further amendment to section 47(2)<sup>22</sup> gave the courts new material to aid in construing the intent of the Legislature regarding the scope of the privilege. This amendment changed the absolute privilege to a conditional privilege in a single subclass of judicial proceedings—divorce proceedings. The divorce provision placed express limitations on the publication before the privilege would attach.<sup>23</sup> These express limitations were used by some courts to con-

and *Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766, 772 (1954) [hereinafter cited as Kleps]; Parma & Armstrong, *The Codes and Statutes of California: A Bibliography*, 22 LAW. LIBR. J. 41, 43 (1929); Comment, *The First Half-Century of the California Civil Code*, 10 CALIF. L. REV. 185, 187 (1922).

16. "A privileged publication is one made . . . (2) in testifying as a witness in any proceeding authorized by law to a matter *pertinent and material*, or in reply to a question allowed by a tribunal" (emphasis added). WEST'S ANNOTATED CIVIL CODE, Section 47 Historical Note at 188.

17. Pertinency and materiality comprise the common law requirement of relevance under the American rule of absolute privilege in judicial proceedings. PROSSER, *supra* note 11, §114, at 778.

18. See Kleps, *supra* note 15, at 777.

19. AMENDMENTS TO CODES 1873-74, c. 612, §11, at 184.

20. *Id.*

21. The Legislature attempted to clarify the scope of the privilege in 1901 when a third code commission proposed substantial amendments to the Civil Code, the Code of Civil Procedure, and the Penal Code. The changes were introduced and passed by the Legislature in three bills. The revision to the Code of Civil Procedure was declared unconstitutional in *Lewis v. Dunne*, 134 Cal. 291, 293, 66 P. 478, 479 (1901). Kleps, *supra* note 15, at 782-83. The effect of the decision was to invalidate the revisions to all three codes. Among the invalidated revisions to the Civil Code was an amendment to section 47(2) limiting the privilege: "But *irrelevant or immaterial* matter voluntarily and *maliciously* published in the course of a *judicial proceeding* is not privileged." AMENDMENTS TO THE CODES 1900, c. 157, §10, at 334 (emphasis added).

22. In 1927 the internal numbering was inserted and the proviso on divorce proceedings was added:

provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce . . . shall *not* be a *privileged* publication . . . *unless* such pleading be verified or sworn to, and be made *without malice*, by one having reasonable and probable cause for believing the truth of such allegation or averment *and unless . . . material and relevant* to the issues in such action.

CAL. STATS. 1927, c. 866, §1 at 1881 (emphasis added).

23. See note 22 *supra* for express provision.

strue an absence of restrictions on the balance of section 47(2).<sup>24</sup> Other courts have used the wording of the entire code section,<sup>25</sup> the wording of the amendments to subsection 2,<sup>26</sup> and the common-law rule of absolute privilege<sup>27</sup> to determine whether the legislature intended to restrict the immunity.<sup>28</sup> Case law reveals that, in adjudging the limits of the privilege, the courts have given inconsistent weight to the considerations of policy,<sup>29</sup> the relationship of the participant to the proceeding,<sup>30</sup> the nature of the publication and theory of recovery,<sup>31</sup> the availability of alternative sanctions,<sup>32</sup> and the character of the defendant's conduct.<sup>33</sup> When courts enlist different considerations and standards to apply the privilege, the result is uncertainty in the law, an uncertainty that hinders achieving the objectives of the privilege.

#### CONSIDERATIONS IN DETERMINING THE SCOPE OF THE PRIVILEGE<sup>34</sup>

"An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>35</sup> If the purpose of the privilege is to be served, the judicial participant must feel with some degree of certainty that his statements will not result in tort liability. One way for the courts to reduce inconsistency and to provide this degree of certainty for judicial participants is to focus on the policy behind the rule.

##### *A. Policy: The Rationale Behind the Rule*

The objective or purpose of any law is found in the policy behind the rule. Policy is at once the moving force that justifies the existence of the law and the unifying factor that results in homogeneous application of the law.<sup>36</sup> A basic policy statement, derived from past decisions and

24. See notes 182-185 and accompanying text *infra*.

25. See notes 2, 16 *supra*.

26. See notes 19-22 and accompanying text *supra*.

27. Stated in *Wyatt v. Buell*, 47 Cal. 624, 624-25 (1874), a case decided before the 1873-74 amendment effectively extended the privilege to include all judicial participants.

28. But see California Civil Code section 4 for legislatively mandated construction of the Civil Code.

29. See notes 42-55 and accompanying text *infra*.

30. See notes 70-84 and accompanying text *infra*.

31. See notes 94-110 and accompanying text *infra*.

32. See notes 137-146 and accompanying text *infra*.

33. See notes 117-136 and accompanying text *infra*.

34. For a better understanding of the discussion on considerations and limitations, the reader should keep in mind that the focus of absolute privilege is the proceeding in which the publication occurs. The proceeding, and society's interest in protecting the occasion cloaks the publication with immunity and allows the defendant to escape liability. See generally PROSSER, *supra* note 11, §114, at 777-81.

35. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (an evidentiary privilege rather than a privilege that limits liability).

36. See HANSON, *supra* note 12, ¶ 111, 142; Veeder, *Absolute Immunity in Defamation: Judi-*

adopted by the California Supreme Court, would provide this necessary focalization. As background for the policy discussion and proposal, the various reasons advanced for granting an absolute privilege to judicial publications will be reviewed.

*1. Policy Considerations Historically*

By granting freedom from personal liability for defamatory statements made incident to the proceeding,<sup>37</sup> absolute privilege promotes effectiveness of judicial proceedings and prevents the operation of the legal process itself from becoming the basis of further litigation.<sup>38</sup> Since the immunity limits the potential for expenditure of time and money in defense of litigation, a free flow of information by and between participants is encouraged.<sup>39</sup> In essence, the rule of absolute privilege encourages use of the courts to settle disputes and facilitates the search for truth.<sup>40</sup> Similar policy objectives may be extracted from decisions of California courts to formulate a basic policy statement for section 47(2).

*2. A Policy Statement for Section 47(2)*

Development and adoption of a basic policy statement will provide focalization for applying the privilege and thus promote consistency in decisions between appellate districts. Since the focus of section 47(2) is the proceeding in which the publication occurs,<sup>41</sup> the statement should reflect dual objectives—effectiveness of, and access to, judicial proceedings.

The second part of this dual objective is set out in *Albertson v. Raboff*,<sup>42</sup> an opinion authored by Justice Traynor. The case involved an action for disparagement of title based on the filing of a *lis pendens*. In holding the filing privileged, Justice Traynor asserted that the purpose of section 47(2) was to provide parties maximum freedom of access to the courts to uphold and defend their rights without apprehension of becoming defendants in subsequent actions for defamation.<sup>43</sup>

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*cial Proceedings*, 9 COLUM. L. REV. 465-68 (1909) [hereinafter cited as Veeder]; see generally PROSSER, *supra* note 11, §114, at 777-78.

37. Veeder, *supra* note 36, at 463.

38. Green, *Relational Interests*, 30 ILL. L. REV. 314, 321 (1935).

39. See *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 917-18 (1956) (litigation of facts is required with a qualified privilege).

40. See HANSON, *supra* note 12, ¶ 108.

41. See notes 52-67 and accompanying text *infra*.

42. 46 Cal. 2d 375, 380, 295 P.2d 405, 409 (1956).

43. *Id.* See also Veeder, *supra* note 36, at 469.

Several years later in *Bradley v. Hartford Accident & Indemnity Co.*,<sup>44</sup> an appellate court expanded Justice Traynor's policy statement by asserting that the purpose of section 47 was also to promote the unhampered administration of justice.<sup>45</sup> If the court meant that an additional objective of the privilege was to promote the effectiveness of the proceedings, then the expanded statement would have been an improvement. Unfortunately, such an intention is not clear from the opinion. Instead, to the consternation of later courts,<sup>46</sup> the *Bradley* court used the additional phrase as a limitation on the privilege.<sup>47</sup> The court said, in essence, that only when the defamatory publication promotes the interests of justice is the statute to be liberally applied.<sup>48</sup> The wording of the expanded statement consequently confuses rather than clarifies policy, and thus does not promote uniform application of the privilege.

A policy statement incorporating the dual objectives of the privilege and approved in a California Supreme Court opinion will promote homogeneous application of the statute by providing a unifying theme. A suggested statement is as follows: The purpose of section 47(2) is to promote the peaceful and timely disposition of legal matters or disputes by affording freedom of access to the courts and other quasi-judicial agencies without fear of legal actions based on defamatory statements made in the course of a proceeding.

This statement is broad enough to encompass publications of all judicial participants, including judges, witnesses, jurors, parties, and attorneys, as well as publications of persons in comparable roles with quasi-judicial agencies and commissions. The "course of a proceeding" includes publications made in contemplation of, initiation of, or conduction of a proceeding, as well as publications made to effectuate the result of the proceeding. Furthermore, the statement does not inhibit other considerations and limitations on the privilege, nor does it

44. 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973).

45. *Id.* at 823, 106 Cal. Rptr. at 721. The phrase used by the *Bradley* court also appears in *Abbot v. Tacoma Bank of Commerce*, 175 U.S. 409, 411 (1899), and in *Veeder*, *supra* note 36, at 478.

46. One court's comment:

We must confess that we are uncertain as to what the *Bradley* court meant when it said that the defamatory publication must 'promote the interest of justice' to be accorded the absolute privilege. . . .

It seems reasonably certain that the Legislature did not immunize a defamer from liability for his defamation because it thought that a defamatory publication in a judicial proceeding promoted 'the interest of justice.'

*O'Neill v. Cunningham*, 118 Cal. App. 3d 466, 475, 173 Cal. Rptr. 422, 427 (1981).

47. 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973). Statements were held not privileged because they were extrajudicial, "[b]ut most of all, [because] they were not made . . . to promote the unfettered administration of justice." *Id.* at 828, 106 Cal. Rptr. at 724.

48. *Id.* at 826, 106 Cal. Rptr. at 721, 723. It is difficult to conceive of any defamatory publication which would promote the interests of justice.



prevent the use of policy statements specifically adapted to a single class of judicial participants, such as attorneys.

Attorneys are frequently the defendants in tort actions based on defamatory statements made in the course of a proceeding, and appellate court decisions applying the privilege to attorney publications are often the most disparate.<sup>49</sup> For counsel, the privilege promotes zealous client representation by granting full freedom of speech in representing and advocating the client's cause<sup>50</sup>—an attorney's primary functions.<sup>51</sup> Since the attorney is a principal means of access to the courts and other agencies, protecting attorney publications advances the basic policy objectives suggested for section 47(2)—unencumbered access to the courts and timely, peaceful settlement of disputes. The basic policy objectives that justify protecting attorney publications also justify protecting the publications of other communicants in a judicial proceeding. To successfully assert the privilege, however, a communicant must have participant status, and the publication must have occurred "in" a judicial proceeding.

### B. Judicial Proceeding and Participant Status

The focus of the absolute privilege in section 47(2) is the proceeding in which the communication occurs.<sup>52</sup> The privilege is not confined to the traditional courtroom setting, but extends to quasi-judicial proceedings, such as administrative hearings of hospital boards<sup>53</sup> and hearings before agencies charged with overseeing professional conduct.<sup>54</sup> Thus, the traditional participant labels of attorney, party, witness, judge, and juror do not comprise an exhaustive list of those with potential stand-

49. See, e.g., 118 Cal. App. 3d 466, 173 Cal. Rptr. 422 (breach of ethics does not abrogate the privilege); *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977) (breach of ethics is inconsistent with a privileged status).

50. See *Hollis v. Meux*, 69 Cal. 625, 628, 11 P. 248, 250 (1886) (attorney publication, made in opposition to an insolvency action, accusing an insolvent debtor of intent to defraud his creditors, held privileged). *Veeder*, *supra* note 36, at 482, states: "[T]o subject [counsel] to actions for defamation would fetter and restrain him in the fearless discharge of the duty which he owes to his client, and which the successful administration of justice demands." See also the dissent in the vacated first California Supreme Court decision of *Albertson v. Raboff*, 287 P.2d 145, 148 (1955), *reh'g granted*, 46 Cal. 2d 375, 295 P.2d 405 (1956) (new decision).

51. *Smith v. Hatch*, 271 Cal. App. 2d 39, 50, 76 Cal. Rptr. 350, 357 (1969) (letter from an attorney to his client asserting misappropriation of association funds by the opposing party); *Friedman v. Knecht*, 248 Cal. App. 2d 455, 462, 56 Cal. Rptr. 540, 545 (1967) (defamatory statements of prosecuting attorney to defense counsel during request for continuance); RESTATEMENT (SECOND) OF TORTS §586 comment c (1976) [hereinafter cited as RESTATEMENT].

52. See *Veeder*, *supra* note 36, at 468.

53. *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 864, 100 Cal. Rptr. 656, 658-59 (1972). But see *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 481-82, 551 P.2d 410, 420, 131 Cal. Rptr. 90, 100 (1976), in which the California Supreme Court makes it clear that section 47(2) is applicable only to *statements* made in a board proceeding and not to *actions* of the board.

54. See *King v. Borges*, 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414, 416 (1972) (letter from an attorney, on behalf of his purchaser-client, to the Real Estate Commissioner regarding unethical actions of a real estate broker).

ing to assert the privilege.<sup>55</sup> To come within the privilege, the publication must occur "in" a judicial proceeding by one with participant status.

### 1. *The Scope of a Judicial Proceeding*

The "proceeding" issue is not raised by a publication made in a traditional criminal or civil courtroom setting. Instead, the issue arises when the privilege is asserted to limit liability for a publication made in a public hearing to settle a matter in dispute,<sup>56</sup> or in a hearing before a tribunal which performs judicial functions.<sup>57</sup> The issue may also be raised when the privilege is asserted for a publication made incident to the functioning of an agency, commission, or officer empowered to apply law to facts,<sup>58</sup> to control unethical or illegal activity,<sup>59</sup> or to investigate and discipline.<sup>60</sup> When the communication occurs in one of these nontraditional settings, the court must determine whether the proceeding is within the privilege—whether it qualifies as a quasi-judicial proceeding.

Tests for determining whether an administrative body qualifies as quasi-judicial were delineated in *Ascherman v. Natanson*.<sup>61</sup> The *Ascherman* court used the following inquiries to make its determination:

- (1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts,
- (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly (3) whether its power affects the personal or property rights of private persons.<sup>62</sup>

A judicial proceeding within the protection of section 47(2), thus, may be any proceeding that entails a determination based on investigation and evaluation of evidentiary facts, and that affects personal or prop-

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55. See HANSON, *supra* note 12, ¶112 (recognizing the traditional labels, but including members of an administrative body and excluding "outsiders" to the proceeding).

56. Green, *Relational Interests*, 30 ILL. L. REV. 314, 324 (1935). See also *Pettitt v. Levy*, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972) (planning commission/city council hearing on zoning variance).

57. PROSSER, *supra* note 11, §114, at 779; see *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 864-66, 100 Cal. Rptr. 656, 658-60 (1972) (hospital review board hearing). See generally SACK, *supra* note 13, at 284-87.

58. PROSSER, *supra* note 11, §114, at 779-80; see also *Veeder*, *supra* note 36, at 483-86.

59. *Long v. Pinto*, 126 Cal. App. 3d 946, 949, 179 Cal. Rptr. 182, 184 (1981).

60. 28 Cal. App. 3d at 33, 104 Cal. Rptr. at 416 (complaint to Real Estate Commissioner). A more liberal application occurred in North Dakota, a state with a statute similar to California's. The North Dakota Supreme Court held that the privilege protected an employer for a notice of employee separation filed with the Workmen's Compensation Bureau. Bureau determination of whether compensation was payable, qualified as a "proceeding authorized by law." *Stafney v. Standard Oil Co.*, 299 N.W. 582, 589 (N.D. 1941).

61. 23 Cal. App. 3d 861, 100 Cal. Rptr. 656 (1972).

62. *Id.* at 866, 100 Cal. Rptr. at 659.

erty rights of individuals. To be protected, however, the communication must meet a further requirement; it must have occurred "in" the judicial proceeding.

Section 47(2) defines a privileged publication as one made "in" a proceeding.<sup>63</sup> The term, albeit seemingly clear, has not been construed to mean that the publication must occur literally within the formal confines of a court or agency. The communication may still be privileged, even though it is made outside of the courtroom and does not invoke any function of the court or its officers.<sup>64</sup> The privilege thus extends to publications made not only in a courtroom, but also to publications made in anticipation of a proceeding,<sup>65</sup> in preparation for a pending action,<sup>66</sup> or in the initiation of investigatory or formal proceedings.<sup>67</sup>

Though the communication need not be made in the courtroom to be privileged, the privilege may be vitiated if the communication is made to an outsider or stranger to the proceeding.<sup>68</sup> Moreover, the privilege may be abrogated if the speaker, at the time of publication, lacked the necessary relationship to the proceeding.<sup>69</sup>

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63. See text of the section in note 2 *supra*.

64. *Albertson v. Raboff*, 46 Cal. 2d 375, 381, 295 P.2d 405, 409 (1956) (filing *lis pendens*).

65. Such publications include attorney-client correspondence, settlement offers, pretrial depositions, and demand letters. See *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 923-24 (1956); see also *O'Neil v. Cunningham*, 118 Cal. App. 3d 466, 173 Cal. Rptr. 422 (1981) (letter from attorney to client/insurance company advising settlement); *Lerette v. Dean Witter Organization*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976) (letter from brokerage house attorney to bank requesting compromise payment to avoid lawsuit). But see *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977) (demand letter not privileged if words therein may subject the attorney-author to disciplinary action by the State Bar).

66. Preparatory communications include interviews of witnesses by counsel and conferences of parties or interested persons to organize evidence for presentation at the proceeding. See *Veeder supra* note 36, at 487 n.75; see also 23 Cal. App. 3d at 865-66, 100 Cal. Rptr. at 659. *Ascherman* involved an interview of a witness by a hospital board's attorney preparatory to a hearing before the hospital review board. The court held the communication privileged even though a medical secretary was present at the interview. The presence of the unnecessary person did not destroy the privilege because she had first-hand knowledge of the matters discussed and would have also qualified as a witness. *Id.* at 867, 100 Cal. Rptr. at 660. See also *Brody v. Montalbano*, 87 Cal. App. 3d 725, 733-34, 151 Cal. Rptr. 206, 212 (1978) (preliminary conversations by parents bringing a formal complaint against a school vice principal); *Pettitt v. Levy*, 28 Cal. App. 3d 484, 490-91, 104 Cal. Rptr. 650, 654 (1972) (preparation of a forged evidentiary document). But see *HANSON supra* note 12, ¶ 111, at 87 (unnecessary persons present during preparatory conversations could vitiate the privilege).

67. See *Long v. Pinto*, 126 Cal. App. 3d 946, 948-50, 179 Cal. Rptr. 182, 184-85 (1981) (letter intended to initiate investigation of doctor's conduct); *King v. Borges*, 28 Cal. App. 3d 27, 33, 104 Cal. Rptr. 414, 416 (1972) (complaint to Real Estate Commissioner). But see *Katz v. Rosen*, 48 Cal. App. 3d 1032, 1037, 121 Cal. Rptr. 853, 856 (1975), holding that the recipient of the complaint must be vested with investigatory or disciplinary powers for the privilege to attach.

68. See *HANSON, supra* note 12, ¶ 111, at 87-88.

69. See *Washer v. Bank of America*, 21 Cal. 2d 822, 822, 136 P.2d 297, 303 (1943). In *Washer*, the California Supreme Court held that statements to reporters by a disgruntled losing party in a labor board action were not absolutely privileged. *Id.* at 825, 832-33, 136 P.2d at 299, 303.

## 2. Participant: A Standing Requirement

It is the relationship of the participant to the proceeding that entitles him to speak and write with impunity;<sup>70</sup> *a fortiori*, absent the necessary relationship the privilege is inapplicable.<sup>71</sup> Nevertheless, courts are not consistent in applying the privilege when it is asserted by participants of comparable status.

In *Bradley*,<sup>72</sup> plaintiff-attorneys alleged that defendants had made statements to non-participants accusing the attorneys of suborning perjury.<sup>73</sup> In addition, the attorneys alleged that defendants had filed documents at the trial and state supreme court levels solely for the purpose of getting the perjury accusations into the news.<sup>74</sup> In holding the publications unprivileged, the court noted that one of the defendants was neither a witness nor a party in the previous action, and that the attorney-defendant was not an attorney of record in the prior action.<sup>75</sup>

In contrast, the court in *Pettitt v. Levy*<sup>76</sup> allowed the privilege to be asserted by one who was not a party to the proceeding, but who was an interested member of the public.<sup>77</sup> Similarly, in *Lerette v. Dean Witter Organization*,<sup>78</sup> the court found a publication, made in anticipation of litigation, privileged. The privilege was allowed although the attorney-publisher did not become the attorney of record when the action was filed.<sup>79</sup>

Both *Bradley* and *Lerette* involved assertion of the privilege by attorney-defendants. Attorneys, judges, parties, witnesses, and jurors are traditionally the positions to which the privilege applies.<sup>80</sup> When a customary role is involved, the court may determine standing to assert the privilege by asking only whether the subject communication was made in the scope of the participant's relationship to the proceeding. When a nontraditional role or a quasi-judicial proceeding is involved, however, further inquiry may be necessary to determine standing.

One appellate court expressly conditioned successful assertion of the

70. Veeder, *supra* note 36, at 468. "Proceeding" as used herein includes anticipated as well as pending or actual proceedings, and quasi-judicial as well as judicial proceedings.

71. Veeder, *supra* note 36, at 468.

72. 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973).

73. *Id.* at 822, 106 Cal. Rptr. at 720.

74. *Id.*

75. *Id.* at 826, 106 Cal. Rptr. at 723.

76. 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972).

77. *Id.* at 488-89, 105 Cal. Rptr. at 652-53 (allegedly forged building permit submitted in opposition to a zoning variance).

78. 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976).

79. *Id.* at 578-79, 131 Cal. Rptr. at 595. A demand letter from the house counsel of Dean Witter to a potential adversary sought an out-of-court cash settlement in lieu of court action. In the subsequent suit the authoring attorney did not participate as counsel.

80. PROSSER, *supra* note 11, §114, at 778. See also SACK, *supra* note 13, at 268-69; 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §297 (8th ed. 1974).

privilege on the status of the publisher. In *Bradley*, the court limited the privilege to litigants or other participants authorized by law, but failed to clarify the term "authorized by law."<sup>81</sup> Thus, it is unclear whether the *Bradley* limitation would prevent a participant, such as an interested member of the public submitting documentation in opposition to a zoning variance<sup>82</sup> or an investigative staff member on the judicial review committee of one hospital sending a letter to the board of directors of another hospital regarding a doctor's questionable professional practices,<sup>83</sup> from asserting the privilege. This lack of clarity does not promote impartial and uniform application of the rule.<sup>84</sup>

To determine whether the publisher has the required status to assert the privilege, the following set of questions is suggested: (1) Is the relationship of the publisher to the proceeding<sup>85</sup> such that liability-free communication will enhance the effectiveness of the tribunal and promote free access thereto? (2) If the policy objectives support immunity for the status held by the publisher, was the subject publication made within the scope of the publisher's relationship to the proceeding?<sup>86</sup> The proposed test for the determination of standing to assert the privilege, like the proposed policy statement, reflects the objectives of the privilege. Free access and enhanced effectiveness of the proceeding may be achieved, however, without protecting every utterance made in a judicial proceeding. The privilege can be confined within manageable boundaries if the courts limit application of the privilege to statements that are defamatory in nature and limit consideration of the theory of recovery to malicious prosecution actions.

### C. *The Nature of the Statement, the Theory of Recovery, and an Exception to the Privilege*

To keep the privilege within manageable bounds and to promote equal application of section 47(2), courts must decide whether the statement is of the type intended to be covered by the privilege, in other words, whether the statement is defamatory and thus immune from lia-

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81. *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718, 722 (1973).

82. E.g., 28 Cal. App. 3d at 487-88, 104 Cal. Rptr. at 651-52 (allegedly forged building permit submitted in opposition to a zoning variance was held privileged).

83. E.g., *Long v. Pinto*, 126 Cal. App. 3d 946, 948, 179 Cal. Rptr. 182, 184 (1981) (copy of letter sent to the Board of Medical Quality Assurance, calling attention to the doctor's unusually high frequency of operations on elderly rest home patients).

84. Nor does it advance the policy objective of free and unencumbered access to the courts and other agencies. See *Albertson v. Raboff*, 46 Cal. 2d 375, 380, 295 P.2d 405, 409 (1956); Veeder, *supra* note 36, at 469.

85. The proceeding may be anticipated, pending, or in progress.

86. See SACK, *supra* note 13, at 268; Veeder, *supra* note 36, at 490.

bility.<sup>87</sup> When an action is based on a statement made by a participant in a judicial proceeding, the privilege may be asserted as a defense—a direct challenge to liability.<sup>88</sup> If the publication is found to be privileged, then the cause of action fails, and should fail, regardless of the theory of recovery advanced by the plaintiff.<sup>89</sup>

### 1. *The Nature of the Statement and Theory of Recovery*

Civil Code section 47 defines a privileged publication<sup>90</sup> as one which occurs in particular proceedings or under particular circumstances. The privilege has firm foundations in the law of defamation, as indicated by the definition of “publication” and the placement of the section in the Civil Code. “Publication” means communication of *defamatory* material to a third person.<sup>91</sup> In the Civil Code, section 47 immediately follows the sections on libel and slander<sup>92</sup> as a further definition of defamation and a limitation on liability.<sup>93</sup>

Accordingly, courts have generally recognized that the privilege protects judicial participants from actions in libel or slander<sup>94</sup> for *defamatory* statements<sup>95</sup> made in judicial proceedings. In *Portman v. George McDonald Law Corp.*,<sup>96</sup> however, the court granted the privilege to the *nondefamatory* statement of attorneys.<sup>97</sup> In *Portman*, the defendant insurance company lost at trial and a money judgment was entered against it. To avoid posting financial security pending appeal of the decision, lawyers for the defendant asserted that the company was financially sound. In actuality, the company was not financially sound and plaintiffs lost the benefit of their judgment.<sup>98</sup> In holding that the privilege protected the defendant’s lawyers from liability for negligent misrepresentation, the court said that the privilege had been “ex-

87. SACK, *supra* note 13, at 267.

88. *Block v. Sacramento Clinical Labs*, 131 Cal. App. 3d 386, 389, 182 Cal. Rptr. 438, 439 (1982).

89. See note 109 *infra*.

90. See note 2 *supra*. The code section also defines privileged broadcasts. Assuming “broadcast” means dissemination by radio or television, the current use of television in the courtroom may soon lead to appearance of the term in litigation involving assertion of the privilege in section 47(2) as a defense.

91. BLACK’S LAW DICTIONARY 1105 (5th ed. 1979).

92. California Civil Code sections 44-48.5 deal with defamation, libel, slander, and publications. See also note 11, *supra*.

93. 131 Cal. App. 3d at 389, 182 Cal. Rptr. at 439.

94. See *Albertson v. Raboff*, 46 Cal. 2d 375, 380, 295 P.2d 405, 409 (1956); *Lerette v. Dean Witter Org.*, 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592, 595-96 (1976).

95. See generally *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656, 659 (1972); PROSSER, *supra* note 11, §114, at 777-81; Veeder, *supra* note 36 (even the title of Veeder’s article indicates the type of statement protected by the absolute privilege: “Absolute Immunity in Defamation: Judicial Proceedings”).

96. 99 Cal. App. 3d 988, 160 Cal. Rptr. 505 (1979).

97. *Id.* at 991, 160 Cal. Rptr. at 507.

98. *Id.* at 989, 160 Cal. Rptr. at 506.

tended” to other causes of action; and it could, therefore, no longer be assumed that the privilege must be confined to slanderous or libelous statements.<sup>99</sup>

The *Portman* court misinterpreted the decisions granting the privilege in actions other than defamation; and in so doing, it set a precedent for further broadening of the privilege rather than confining it within manageable bounds. In each of the cases cited by the court, the basis of the action was a *defamatory* statement made in a proceeding.<sup>100</sup> For example, in *Pettit*<sup>101</sup> the statement, made in opposition to a zoning variance, was allegedly false or forged and injurious to plaintiff’s continued business operations.<sup>102</sup> Since the publication was otherwise privileged as an injurious falsehood, all the theories of recovery advanced by plaintiff failed, including fraud, negligent misrepresentation, negligence, and intentional infliction of emotional distress.<sup>103</sup> Similarly, in *Brody v. Montalbano*,<sup>104</sup> the statements were allegedly defamatory allegations made by parents to other parents and to the school board concerning the conduct of a vice principal.<sup>105</sup> The defamatory publications were within the privilege since they were made in preparation for a protected proceeding, and designed to prompt official action.<sup>106</sup> Thus, all the plaintiff’s theories of recovery failed, including not only defamation, but also malicious prosecution, conspiracy to interfere with prospective advantage, and intentional infliction of emotional distress.<sup>107</sup> Therefore, the privilege has not been “extended” to protect nondefamatory statements. Rather, the courts, in the previous cases, focused on the facts of the case instead of the theory of recovery, and did not permit a cause of action based on the defamatory nature of a communication which was itself privileged under the defamation laws.<sup>108</sup>

To promote uniform application of the privilege and to allow the courts to draw lines beyond which the privilege will not extend, the

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99. *Id.* at 991, 160 Cal. Rptr. at 507.

100. See also note 110 *infra*.

101. *Pettit v. Levy*, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972).

102. *Id.* at 487, 104 Cal. Rptr. at 652.

103. *Id.*

104. 87 Cal. App. 3d 725, 151 Cal. Rptr. 206 (1978).

105. *Id.* at 729-31, 151 Cal. Rptr. at 209-10.

106. *Id.* at 733-34, 151 Cal. Rptr. at 212.

107. *Id.* at 728, 151 Cal. Rptr. at 209.

108. *Id.* at 738-39, 151 Cal. Rptr. at 215. It should be noted that in *Portman*, the injured parties were not the subject of the publication and suffered no injury to reputation, as is the usual case when a defamatory statement is protected by the privilege. Instead, they suffered financial detriment as a result of reliance on the representation that the insurance company was financially sound. In addition, the publication was made, not in a truth-finding phase of the proceeding, but in a nonadvocacy, procedural function. The decision appears to be an aberration. See 99 Cal. App. 3d 988, 990-92, 160 Cal. Rptr. 505, 506-507.

immunity should be limited to statements which are defamatory in nature. This does not mean, however, that a plaintiff can circumvent the protection of section 47(2) by bringing the action under a theory of recovery other than defamation.<sup>109</sup> If the publication comes within the privilege, it cannot be used to establish an essential element in any tort action to which absolute privilege is a defense.<sup>110</sup> Nonetheless, there is one cause of action that is not defeated by the privilege even though the statement leading to the cause of action is defamatory in nature.

## 2. *Malicious Prosecution: Outside the Immunity of Section 47(2)*

A malicious prosecution action may be brought against the publisher of a defamatory statement when the otherwise privileged publication is used to initiate or support an *unsuccessful* legal or administrative action against the plaintiff.<sup>111</sup> In addition, the unsuccessful action must have been initiated without probable cause and for an improper motive.<sup>112</sup> The policy objectives of the privilege are outweighed by the policy of affording restitution for individual wrongs when these additional elements of an action in malicious prosecution are present.<sup>113</sup> In California, the tort will lie not only for criminal prosecutions, but also for civil actions, including ancillary civil proceedings.<sup>114</sup> Moreover, the action will lie for a maliciously initiated administrative proceeding.<sup>115</sup> Although a defendant cannot be held to answer in damages for an other-

109. See *Brody v. Montalbano*, 87 Cal. App. 3d 725, 738-39, 151 Cal. Rptr. 206, 215 (1978); *Lerette v. Dean Witter Org.*, 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592, 595-96 (1976); *Agostini v. Strycula*, 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314, 317 (1965).

110. See Kimball, *Defamation: The Montana Law*, 20 MONTANA LAW REVIEW 1, 29 (1958). See generally SACK, *supra* note 13, at 385-479 (tort actions related to defamation). Theories of recovery that fail when based on an otherwise privileged publication are generally those to which privilege is a defense. These theories include intentional infliction of emotional distress, *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (1972); *but see Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977); interference with the practice of a profession, *Goodley v. Sullivant*, 32 Cal. App. 3d 619, 108 Cal. Rptr. 451 (1973); interference with prospective advantage, *Brody v. Montalbano*, 87 Cal. App. 3d 725, 151 Cal. Rptr. 206 (1978); abuse of process, *Twyford v. Twyford*, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976); *but see Younger v. Solomon*, 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974); fraud, *Pettitt v. Levy*, 28 Cal. App. 3d 484, 104 Cal. Rptr. 650 (1972); negligent misrepresentation, *id.*; negligence, *id.*; and disparagement of title, *Albertson v. Raboff*, 46 Cal. 2d 375, 295 P.2d 405 (1956), see also SACK, *supra* note 13, at 462. Other actions to which substantially similar privileges apply are invasion of privacy, SACK, *supra* note 13, at 398; public disclosure of private facts, SACK, *supra* note 13, at 433-34; deceit, *Janklow v. Keller*, 90 S.D. 324, 241 N.W.2d 364 (1976); and insulting language, Wade, *Tort Liability for Abusive & Insulting Language*, 4 VAND. L. REV. 63, 92 (1950).

111. *Albertson v. Raboff*, 46 Cal. 2d 375, 382, 295 P.2d 405, 410-12 (1956); RESTATEMENT, *supra* note 51 at §653; *Developments in the Law of Defamation*, 69 HARV. L. REV. 875, 924 n.323 (1956). See *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 99-100, 53 Cal. Rptr. 706, 716-18 (1966), for reasons why an abuse of process action cannot be based on an otherwise privileged publication.

112. 46 Cal. 2d at 382-83, 295 P.2d at 410-11.

113. *Id.* at 382, 295 P.2d at 410.

114. *Twyford v. Twyford*, 63 Cal. App. 3d 916, 921-22, 134 Cal. Rptr. 145, 147 (1976).

115. *Hardy v. Vial*, 48 Cal. 2d 577, 580, 311 P.2d 494, 496 (1957); *Imig v. Ferrar*, 70 Cal. App. 3d 48, 57, 60, 138 Cal. Rptr. 540, 544, 546 (1977). See *Westlake Community Hosp. v. Superior*



wise privileged communication unless it has been used to support an unsuccessful legal or administrative action against the plaintiff, the defendant may be made to answer for the wrong through alternative remedies<sup>116</sup> that focus on the character of the defendant's conduct.

#### D. Evaluating the Defendant's Conduct

Courts, unhappy with the inequity that results from granting the privilege, seek to curtail the privilege.<sup>117</sup> Considering the character of the defendant's conduct is a method the courts sometimes use. Unless section 47(2) is changed by the Legislature from an absolute privilege to a qualified privilege, however, the character of the defendant's conduct is an inappropriate consideration in determining whether the privilege exists. Rather, the defendant's conduct is an appropriate consideration only when determining alternative, nonmonetary sanctions.

##### 1. Malice as a Limitation on the Privilege

An absolute privilege grants an indefeasible immunity.<sup>118</sup> Thus, a publication that is otherwise within the privilege is not made actionable by a showing that it was made with malice.<sup>119</sup> In determining whether section 47(2) applies, the publisher's purpose in uttering the defamatory matter, his belief in its truth, or his knowledge of its falsity are not proper matters of inquiry.<sup>120</sup>

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Court, 17 Cal. 3d 465, 483-84, 551 P.2d 410, 421-22, 131 Cal. Rptr. 90, 100-101 (1976), for similar view regarding quasi-judicial proceedings of hospital boards.

If a publication is a complaint that results only in an investigation of the plaintiff, an action for malicious prosecution will not lie. *Brody v. Montalbano*, 87 Cal. App. 3d 725, 736, 151 Cal. Rptr. 206, 214 (1978). But if the communication results in punitive action against the plaintiff, and the plaintiff initiates and succeeds in a formal proceeding to annul the punitive action taken against him, an action for malicious prosecution may lie even though the punitive action was taken without a formal hearing. 70 Cal. App. 3d at 60, 138 Cal. Rptr. at 546. For example, if a parent's complaint to a school board leads to the dismissal of a teacher after an investigation, and the instructor succeeds in a reinstatement proceeding, an action for malicious prosecution may lie against the parent. In addition, successful review by writ of mandate overturning a quasi-judicial decision will also serve as the basis for an action. 17 Cal. 3d at 483-84, 551 P.2d at 421-22, 131 Cal. Rptr. at 100-101.

116. See generally *Veeder*, *supra* note 36, at 470-71.

117. See *Bradley v. Hartford Acc. & Indem. Co.*, 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718, 723 (1973).

118. Casenote, 10 S. CAL. L. REV. 105, 107 (1936).

119. 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* §294 (8th ed. 1974).

120. Instead, these considerations are only proper in determining applicability of alternative sanctions. See RESTATEMENT, *supra* note 51, §586, comment a; SACK, *supra* note 13, at 268. Evil intent, motive, ill will, lack of just cause, or bad faith are proper considerations only when the court is applying a *qualified* privilege. See *id.*

Malice in libel and slander is defined as: ". . . an evil intent or motive arising from spite or ill will; personal hatred . . . ; . . . intentionally publishing, without justifiable cause . . . acting in bad faith and with knowledge of falsity of statement." BLACK'S LAW DICTIONARY 862 (5th ed. 1979).

The California Supreme Court acknowledged in *Gosewisch v. Doran*<sup>121</sup> that the statute grants an absolute privilege unaffected by malice.<sup>122</sup> The court reasoned that had the Legislature intended lack of malice to qualify the privilege, the qualification would be expressly stated, as it is in other divisions of section 47.<sup>123</sup> Nevertheless, opinions of appellate courts applying the privilege indicate that the courts give weight to the defendant's motive or intent.

The most blatant example is the *Kinnamon v. Staitman & Snyder*<sup>124</sup> decision. There the court considered defendant's motive in determining that a demand letter was written to gain an advantage in a civil suit by threatening criminal prosecution. The court expressly based its decision on a finding that the defendant's misconduct was inconsistent with a privileged status.<sup>125</sup>

Other courts, although resting their decisions on different grounds, also have given weight to the defendant's motive or intent in disallowing the privilege. In *Bradley*, the court said the privilege should not protect defendants who make filings in a judicial proceeding for the sole purpose of defaming.<sup>126</sup> Similarly, in *Younger v. Solomon*,<sup>127</sup> the court first discussed the defendant's purpose in making the defamatory publication in an interrogatory before deciding that the privilege was inapplicable.<sup>128</sup> These conduct evaluations by the courts ignore the substance of the rule — that if the publication is privileged, no cause of action is stated. Since the absolute privilege is not defeated by the communicant's frame of mind or ulterior motives, when it is asserted as a defense, the inquiry should be limited to whether the communication is privileged.<sup>129</sup>

121. 161 Cal. 511, 119 P. 656 (1911).

122. *Id.* at 514-15, 119 P. 657-58.

123. *Id.* This view is supported by the wording of the 1927 divorce proviso, expressly requiring that an allegation or averment in a divorce proceeding be absent malice before the privilege attaches. See note 22 *supra*.

124. 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977).

125. 66 Cal. App. 3d at 897, 136 Cal. Rptr. at 324.

126. 30 Cal. App. 3d at 826, 106 Cal. Rptr. at 723. The *Bradley* court seems intent on rewriting the perimeters of absolute privilege. In *Bradley*, an opinion written by Justice Kane, the court sets out "conditions" to the privilege, restates policy, and infers that motive is a proper consideration to defeat the "absolute" privilege. *Id.* In a later decision, *Frisk v. Merrihew*, 42 Cal. App. 3d 319, 116 Cal. Rptr. 781 (1974) (also written by Justice Kane), the court indicates an acceptance of the majority view that the *absolute* privilege applies to communications in a "proceeding authorized by law," but reverses a directed verdict for the defendant because it could not determine, as a matter of law, *whether the privileged occasion was abused*. *Id.* at 323, 326, 116 Cal. Rptr. at 782-83, 785. This is contrary to the majority view that only a qualified privilege may be lost by abuse. See PROSSER, *supra* note 11, §114, at 776-77; SACK, *supra* note 13, at 268, 297; Comment, *As Times Goes By: Gertz v. Robert Welch, Inc. and its Effect on California Defamation Law*, 6 PAC. L.J. 565, 574 (1975).

127. 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974).

128. *Id.* at 298, 301, 113 Cal. Rptr. at 119, 122.

129. See SACK, *supra* note 13, at 268.

Unless the Legislature acts to expressly qualify the privilege in section 47(2), the courts should consider the privilege absolute and refrain from considering motive or intent.<sup>130</sup> If a communication is absolutely privileged, it should be privileged regardless of whether published in good faith,<sup>131</sup> technically deficient,<sup>132</sup> criminal in nature,<sup>133</sup> an abuse of the privilege,<sup>134</sup> inaccurate and untruthful,<sup>135</sup> or published with malice.<sup>136</sup> The single-minded view that an absolute privilege is granted and that the defendant's mental state in making the statement is not a proper consideration will lead to more uniform application of the privilege. Any evaluation of the defendant's conduct should be confined to determining the appropriateness of alternative measures of redress.

## 2. *Alternative Measures*

To afford the injured party an avenue of redress and to penalize the wrongful publisher, while keeping the immunity intact for policy reasons, nonmonetary measures are available. These alternative sanctions include contempt, disciplinary action, and prosecutions for perjury; although some courts doubt whether these alternatives are sufficient deterrents.<sup>137</sup>

Two courts, however, have accepted the concept of alternative sanctions as the proper deterrent action in light of the policy objectives of section 47(2). In *Smith v. Hatch*,<sup>138</sup> Hatch, an attorney who represented a construction association in an action against a similar organization, wrote a letter to a director of his client-association in which he accused the opponent organization of skimming money by paying out organization funds in the form of traveling expenses and legal fees to an attorney named Smith and his associates. The court found the letter absolutely privileged,<sup>139</sup> and cited *Friedman v. Knecht*<sup>140</sup> in observing

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130. See *Gosewisch v. Doran*, 161 Cal. 511, 514-15, 119 P. 656, 657-58 (1911).

131. *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 93, 53 Cal. Rptr. 706, 716 (1966).

132. *Frank Pisano & Assocs. v. Taggart*, 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414, 430-31 (1972) (technically deficient mechanics lien held privileged).

133. *Pettit v. Levy*, 28 Cal. App. 3d 484, 491-92, 104 Cal. Rptr. 650, 654-55 (1972) (allegations of conspiracy to forge an evidentiary document did not militate against the privilege).

134. See PROSSER, *supra* note 11, §114, at 776-77; see also note 126 *supra*.

135. 28 Cal. App. 3d at 489, 104 Cal. Rptr. at 653.

136. See *Izzi v. Rellas*, 104 Cal. App. 3d 254, 264-65, 163 Cal. Rptr. 689, 695 (1980).

137. See, e.g., *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 896-97, 136 Cal. Rptr. 321, 323-24 (1977) (action for intentional infliction of emotional distress allowed to go forward on a publication which constituted a breach of ethics); *Younger v. Solomon*, 38 Cal. App. 3d 289, 296, 298-99, 113 Cal. Rptr. 113, 117, 119 (1974) (abuse of process action allowed on a publication that amounted to a breach of ethics).

138. 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969).

139. 271 Cal. App. 2d at 47, 76 Cal. Rptr. at 355. In addition, the court granted the immunity to republication at an association meeting, and to a request for continuance which contained the same allegations. *Id.* at 50, 76 Cal. Rptr. at 355, 356-57.

140. 248 Cal. App. 2d 455, 56 Cal. Rptr. 540 (1967).

that except for an "infinitesimal" number of cases, attorneys could be adequately sanctioned by disciplinary action or contempt proceedings.<sup>141</sup> In *Friedman*, the court held that the appropriate sanction for slanderous innuendos in a verbal affray between a prosecuting attorney and a defense counsel was disciplinary action or contempt proceedings.<sup>142</sup>

The decision of *Kinnamon* represents an opposing view. In *Kinnamon*, an attorney, retained to collect a bad check, apprised the plaintiff check writer that his client would not only seek civil remedies but would also pursue a criminal misdemeanor action.<sup>143</sup> The court found the unethical conduct inconsistent with the privileged status afforded by section 47(2)<sup>144</sup> and sufficiently outrageous to support an action for intentional infliction of emotional distress.<sup>145</sup> The case sets a precedent by making an *exception* to the absolute privilege, an exception based on the character of the defendant's conduct. Since the decision has not been overruled, it provides a source for further inconsistency in application of the privilege. Any plenary exception, such as that voiced in *Kinnamon*, should come from the Legislature by way of an express amendment to the statute. Until the Legislature acts to make express exceptions to the privilege,<sup>146</sup> the courts should limit the evaluation of the defendant's conduct to the appropriateness of alternative sanctions.

The defendant's conduct, along with the other considerations discussed above, has been used by the courts in defining and confining the scope of the privilege. Only the consideration of relevance, however, has evolved into a true limitation on the absolute privilege of section 47(2).

#### RELEVANCE: CONDITIONING AN ABSOLUTE PRIVILEGE

The original 1872 wording of section 47(2) required the publication to be *pertinent and material* to the matter being adjudicated.<sup>147</sup> The 1873-74 amendment eliminated this express requirement. The courts have since struggled with whether the Legislature intended to abandon the pertinency criterion; and if not, what the proper test of relevance should be.

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141. 271 Cal. App. 2d 39, 50, 76 Cal. Rptr. 350, 357 (1961).

142. 248 Cal. App. 2d at 462, 56 Cal. Rptr. at 545.

143. 66 Cal. App. 3d at 895, 136 Cal. Rptr. at 322. To threaten criminal prosecution to gain an advantage is a breach of ethics, subject to disciplinary action. *Id.* at 896, 136 Cal. Rptr. at 323; RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 7-104 (1975).

144. 66 Cal. App. 3d at 897, 136 Cal. Rptr. at 324.

145. *Id.* at 896, 136 Cal. Rptr. at 323.

146. For example, communications amounting to a crime such as perjury, or a communication which contravenes statutorily mandated conduct such as a breach of ethics might be excepted.

147. See note 16 and accompanying text *supra*.

Courts have taken inconsistent positions on the issue. Generally, they have either avoided the issue by exercising judicial restraint,<sup>148</sup> emphatically held that there is no relevance requirement,<sup>149</sup> imposed a minimal requirement,<sup>150</sup> or imposed a strict relevance requirement.<sup>151</sup> To promote consistent and equal application of the privilege, a single rule of relevance must be embraced by the Legislature and incorporated into the statute by amendment.

To understand the need for the amendment, the following discussion will follow the chronological development of relevance from its application at common law, through the controversy created by deleting the requirement, through its evolution into a generally accepted limitation, to the current conflict over the degree of relevance necessary for successful assertion of the privilege.

#### A. Pre-1873-74 Amendment: Common Law Relevance

Prior to the 1873-74 amendment, section 47(2) applied only to publications made by *witnesses* in judicial proceedings.<sup>152</sup> Therefore, when the participant asserting the privilege was a nonwitness, the common-law judicial privilege applied.

In *Wyatt v. Buell*,<sup>153</sup> the defendant dismissed the plaintiff as his attorney after sustaining a judgment. Thereafter, he acted in *propria persona*, requesting an extension of time to appeal the unfavorable judgment. He explained that the delay was because of illness and lack of legal representation. The suit was based on his expository comment that the unfavorable judgment had ensued because of a collusive agreement between his attorney and the adverse party.<sup>154</sup> The court held that the statements were *wholly foreign* to the proceeding, and thus were not privileged.<sup>155</sup> In this decision the California Supreme Court spoke decisively and stated the common law succinctly. This decisiveness would not occur after the 1873-74 amendment made the statute applicable to all participants and deleted the pertinency requirement.

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148. See notes 165-169 and accompanying text *infra*.

149. See notes 178-185 and accompanying text *infra*.

150. See notes 189-205 and accompanying text *infra*.

151. See notes 205-214 and accompanying text *infra*.

152. See note 16 and accompanying text *supra*.

153. 47 Cal. 624 (1874). Section 47(2) at the writing of this decision contained a pertinence requirement but the statutory privilege was available only to witnesses. See note 16 and accompanying text *supra*.

154. 47 Cal. at 624-25.

155. 47 Cal. at 625. Had the court used the less stringent relevance requirement employed by many courts today, the result would have been *contra*. See notes 194-199 *infra*. The statement had "some relation" to the request for extension since it illustrated why the applicant was acting in *propria persona* and thus why his own illness prevented timely appeal.

*B. Section 47(2): Pertinency Deleted*

The 1873-74 amendment<sup>156</sup> eliminated the requirements of pertinence and materiality. In *Hollis v. Meux*,<sup>157</sup> the California Supreme Court declined to determine whether the Legislature intended to change the relevance rule of *Wyatt*.<sup>158</sup> Instead, the court found the accusations of fraud, made in opposition to an insolvency action, were relevant to the proceeding. Thus, it was unnecessary to decide whether the Legislature intended to create a “conditional” or “absolute” privilege,<sup>159</sup> that is, a privilege conditioned or unconditioned by relevance. The court’s misuse of terminology further confused the issue.<sup>160</sup>

Then, in *Carpenter v. Ashley*,<sup>161</sup> the California Supreme Court considered relevance in applying judicial privilege, but ignored the statute altogether and avoided any issue of legislative intent. Instead, the court cited the decisions of other jurisdictions and treatises<sup>162</sup> to support its application of a nonstatutory judicial privilege. Statements by a district attorney accusing defense counsel of perjury and subornation of perjury<sup>163</sup> were held unprivileged since they lacked *pertinency, relevancy, or reference* to the criminal action in which they were made.<sup>164</sup>

By 1911 the amendment had been in effect for almost four decades, but the California Supreme Court was still reluctant to make a decision on the issue of pertinence or to address the issue of legislative intent. In *Gosewisch v. Doran*,<sup>165</sup> the court found the charges of embezzlement relevant to the civil action by stockholders against the director and president of a corporation.<sup>166</sup> Since the statements were relevant and thus privileged in any event, the court refused to rest its decision on a finding that the statute was limited by relevance. Instead, the court languished in the backwaters of judicial restraint and emitted its most indecisive pronouncement to date. The court said that *if* the privilege was not absolute, the only limitation was that the “defamatory matter must be *pertinent* and *material* to the cause or subject of inquiry before the court;”<sup>167</sup> that “[s]ubject to the *possible* limitation of *relevancy* and

156. See notes 19-20 and accompanying text *supra*.

157. 69 Cal. 625, 11 P. 248 (1886).

158. *Id.* at 629-30, 11 P. at 250.

159. *Id.* at 630, 11 P. at 250.

160. See notes 11-14 and accompanying text *supra*.

161. 148 Cal. 422, 83 P. 444 (1906).

162. *Id.* at 424-25, 83 P. at 445.

163. *Id.* at 422-23, 83 P. at 444.

164. *Id.* at 426, 83 P. at 445. See also Casenote, 10 S. CAL. L. REV. 105, 106 (1936). Since the court makes no reference to the statute and does not cite California cases in support, the case lacks precedential value as reasoned construction and application of section 47(2).

165. 161 Cal. 511, 119 P. 656 (1911).

166. *Id.* at 513, 515, 119 P. at 657-58.

167. 161 Cal. at 514, 119 P. at 657 (emphasis added). Note that the court uses the limiting words of the original 1872 enactment. See note 16 *supra*.

materiality, the privilege" was "absolute."<sup>168</sup>

With the California Supreme Court refusing to lead the way, and indeed only weakly pointing the way, the appellate courts were left to their own devices in construing the statute. One of these devices was the wording of the 1927 amendment.<sup>169</sup>

### C. Section 47(2): Evolution of a Relevancy Requirement

The 1927 amendment restricted the privilege for certain publications made in divorce proceedings. One of the limitations was a requirement that the publication be *material* and *relevant* to the issues.

#### 1. 1927 to 1955: Conflicting Decisions

The appellate court in *Reid v. Thomas*<sup>170</sup> boldly declared that with the exception of the divorce proviso the privilege in section 47(2) was without limitation, and therefore provided a complete defense.<sup>171</sup> As long as the language complained of occurred in a judicial proceeding, it was absolutely privileged<sup>172</sup> and could neither be libelous nor actionable under any circumstances.<sup>173</sup> Thus, the *Reid* court did not consider relevance a limitation.

Another court was willing to go along with this construction, but only to a point. In *Irwin v. Newby*,<sup>174</sup> the court conceded that as long as the publication was made in a judicial proceeding, the privilege applied.<sup>175</sup> A publication, however, was not *in fact* made in a proceeding unless it had *some relation or reference* to the cause at hand.<sup>176</sup> The court thus required relevance, but only as a factor in determining whether the publication had occurred "in" a proceeding, and not as a direct limitation on the privilege.

A second court in the same appellate district as *Irwin* took a different position. In *Moore v. United States Fidelity and Guaranty Company*,<sup>177</sup> the court used the wording of the 1927 divorce proviso to construe section 47(2) as an absolutely unconditional privilege.<sup>178</sup> The court reasoned that the requirement of materiality and pertinency<sup>179</sup> in the

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168. *Id.* at 515, 119 P. at 658 (emphasis added).

169. See note 22 *supra*.

170. 99 Cal. App. 719, 279 P. 226 (1929) (statements in a complaint of insanity).

171. *Id.* at 721, 279 P. at 227.

172. *Id.*

173. *Id.*

174. 102 Cal. App. 110, 283 P. 370 (1929) (libelous statements in a cross-complaint).

175. *Id.* at 113, 283 P. at 370.

176. *Id.* at 116, 283 P. at 370.

177. 122 Cal. App. 205, 9 P.2d 562 (1932) (libelous publication in a complaint).

178. *Id.* at 210, 9 P.2d at 564.

179. "Material and relevant" are the actual words of the proviso. See note 22 *supra*.

proviso indicated legislative intent to confine the limitation to a special character of action—divorce proceedings;<sup>180</sup> that to extend the limitation to all cases would render the proviso meaningless.<sup>181</sup> Prior cases finding a relevance requirement were summarily dismissed as decided independent of the statute.<sup>182</sup> As for the *Moore* court, it declined to claim any such independent law-making powers.<sup>183</sup>

Three years later, the same court declared that “[s]ince the language in the section [was] clear, plain and unambiguous, there [was] no need for construction or interpretation and its literal wording must be followed,”<sup>184</sup> the privilege was unconditional. This strict constructionist view was not adopted by any other court.

## 2. 1956-1972: Germination of a Limitation

In *Albertson v. Raboff*,<sup>185</sup> the California Supreme Court cited *Moore* to support its statement that section 47(2) granted an absolute privilege.<sup>186</sup> The court, however, cited non-California cases to support its position that to be protected the publication must have a *reasonable relation* to the action.<sup>187</sup>

In *Lewis v. Linn*,<sup>188</sup> an appellate court noted that the issue of relevance was still undecided but it did not address the issue directly. Lewis, an attorney, sued Linn, a judge, for slanderous statements made from the bench. The court found the statements relevant *if* relevance was required and if the requirement was *not* construed in any strict sense.<sup>189</sup> Thus, it was unnecessary for the court to rest its decision on a finding that the statute was limited by relevance.<sup>190</sup> The court, in dictum, stated that relevance might condition the statutory privilege; but if it did, it was not to be construed as a rigid requirement.<sup>191</sup> Rather, it

180. 122 Cal. App. at 211, 9 P.2d at 564. *But see* Casenote, 27 CALIF. L. REV. 618, 621 n.30 (1939).

181. 122 Cal. App. at 211, 9 P.2d at 564.

182. *Id.*

183. *Id.* The court, however, ensured its decision by finding that the communication was material to issues involved. *Id.* at 211-12, 9 P.2d at 564.

184. *Donnel v. Linforth*, 11 Cal. App. 2d 25, 29, 52 P.2d 937, 938, 939 (1935). *Donnel* dealt solely with the proper construction of section 47(2). The subject statements were made in a motion for new trial and accused the plaintiff of hog theft. Though the statements were unrelated to the personal injury action against a railway company, the court held that the statements were absolutely privileged; that section 47(2) was not limited by a relevance requirement. *Id.* at 27-29, 52 P.2d at 939. *But see* Casenote, 27 CALIF. L. REV. 618, 621 n.29 (1939) (critical comment).

185. 46 Cal. 2d 375, 295 P.2d 405 (1956) (*lis pendens* privileged).

186. *Id.* at 378-79, 295 P.2d at 408. Also cited for support was *Gosewisch*, a misapplication since the court there did not assert that the privilege *was* absolute. Instead it held that *if* it was not absolute, the only limitation was relevance. See notes 165-168 and accompanying text *supra*.

187. 46 Cal. 2d at 381, 295 P.2d at 409 (not even *Carpenter* was cited as support).

188. 209 Cal. App. 2d 394, 26 Cal. Rptr. 6 (1962).

189. *Id.* at 399, 26 Cal. Rptr. at 8.

190. *Id.*

191. *Id.*



should be given the liberal construction favored by the California courts.<sup>192</sup>

Indeed, liberal construction was the byword in the most well-reasoned decision on the issue of relevance. In *Thornton v. Rhoden*,<sup>193</sup> the issue was whether the defamatory publication must have something "to do with" the proceeding, and if so, what the appropriate label was for the requirement.<sup>194</sup> The court reviewed the case law and the amendments to the code section. *Irwin*,<sup>195</sup> holding that a publication must have some relation to the proceeding to have been *in fact* uttered in a proceeding, was regarded by the *Thornton* court as foreshadowing the eventual reconciliation of the "somewhat conflicting authorities." The court concluded the proper test was that of the Restatement of Torts, section 586: "does the utterance have 'some relation' to the judicial proceeding?"<sup>196</sup> At last, a court not only addressed the issue squarely and concluded that there was a limitation, but it also promulgated a test. The test was not stringently worded, but the court noted that *all* doubts should be resolved in favor of the privilege.<sup>197</sup>

The opinion in *Thornton* was soon followed by several other courts. In *Friedman v. Knecht*,<sup>198</sup> the court found defamatory statements by the prosecuting attorney against defense counsel absolutely privileged under the broadly worded test of *Thornton*.<sup>199</sup> The *Thornton* test was expressly adopted and applied in *Smith v. Hatch*<sup>200</sup> as the "test in California today."<sup>201</sup> In *Rader v. Thrasher*,<sup>202</sup> the court cited *Thornton* as the leading case on the absolute privilege of section 47(2).<sup>203</sup> With this acceptance by other courts, the *Thornton* test seemed to be well established. Some courts, however, still found it difficult to resolve all doubts in favor of the privilege, and, though citing the minimal relevance test of *Thornton*, applied a strict relevance limitation.

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192. *Id.* This view was subsequently followed by the Third District Court of Appeal in *Jordan v. Lemaire*, 222 Cal. App. 2d 622, 625, 35 Cal. Rptr. 337, 339 (1963). In *Jordan*, the court said that for the privilege to be abrogated, the publication would have to be "palpably irrelevant" to the subject matter of the controversy. *Id.*

193. 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966).

194. *Id.* at 86-87, 53 Cal. Rptr. at 711.

195. See notes 174-176 and accompanying text *supra*.

196. 245 Cal. App. 2d at 90, 53 Cal. Rptr. at 714 (emphasis added).

197. *Id.* at 93, 53 Cal. Rptr. at 715-16.

198. 248 Cal. App. 2d 455, 56 Cal. Rptr. 540 (1967).

199. See *id.* at 460-62, 56 Cal. Rptr. at 544-45.

200. 271 Cal. App. 2d 39, 76 Cal. Rptr. 350 (1969).

201. *Id.* at 49, 76 Cal. Rptr. at 356. The court also adopted the *Thornton* view that all doubts should be resolved in favor of the privilege. *Id.*

202. 22 Cal. App. 3d 883, 99 Cal. Rptr. 670 (1972).

203. *Id.* at 888, 99 Cal. Rptr. at 673. The citation was in support of the contention that the privilege should be construed broadly in accord with the Restatement view. *Id.*

### 3. 1973-Present: Current Conflict

The issue is no longer whether there is a limitation; it is settled that the publication must have "some connection" with the proceeding. The issue now is how tenuous the connection may be and still satisfy the requirement.

In *Bradley*, the court used dictum from *Albertson*<sup>204</sup> to further "condition" the privilege. The court decided that not only must the utterance have some connection with the proceeding, but it also must be made to achieve the objects of the litigation.<sup>205</sup> Noting that the filings by defendants were an apparent ruse to get defamatory statements to the news media,<sup>206</sup> the court concluded that the statements were "extra-judicial" and thus nonprivileged,<sup>207</sup> though it conceded the filings had "some relationship" to the action.<sup>208</sup>

A similarly restrictive position was taken by the court in *Younger v. Solomon*.<sup>209</sup> The defendant-attorney sent a set of interrogatories to the plaintiff-attorney. The defendant's client, a victim of plaintiff's alleged ambulance chasing, was suing for intentional infliction of emotional distress. Attached to the interrogatories was a copy of a complaint against plaintiff to the State Bar.<sup>210</sup> The court found the contents of the letter within the privilege and clearly related to a claim for punitive damages.<sup>211</sup> The concomitant disclosure, however, that the letter was a complaint to the State Bar was held not privileged as having *no logical relation* or connection with the action.<sup>212</sup>

If the *Younger* court had applied the *Thornton* test, the result might have been different. Since the interrogatories sought information to pursue punitive damages in a suit by one of the complainants listed in the letter, it was possible for the court to find that the incidental publication had "some relation" to the proceeding. If the court had resolved all doubts in favor of the privilege,<sup>213</sup> it would have found the publica-

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204. See notes 185-187 and accompanying text *supra*.

205. 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718, 722 (1973).

206. *Id.* at 826, 106 Cal. Rptr. at 723.

207. *Id.* at 828, 106 Cal. Rptr. at 724.

208. *Id.* at 826, 106 Cal. Rptr. at 723.

209. 38 Cal. App. 3d 289, 113 Cal. Rptr. 113 (1974).

210. *Id.* at 292-94, 113 Cal. Rptr. at 115-16.

211. *Id.* at 301, 113 Cal. Rptr. at 121.

212. *Id.* One of the "conditions" promulgated by the *Bradley* court was that the publication must have "some connection or logical relation" to the action. 30 Cal. App. 3d at 825, 106 Cal. Rptr. at 722. In allowing the abuse of process action to go forward, the court in *Younger* noted that an ulterior motive may have been to make the complaint to the bar public, a potential breach of a statutory rule. As the rule reads, however, it is directed at the activities of the State Bar and the board of governors, not to one who files a complaint. Note 3 of the opinion discloses that the defendant made a successful motion to compel answers after the plaintiff-attorney refused to answer the interrogatory on the grounds that it was *not relevant* to the subject matter of the lawsuit.

213. See *Thornton v. Rhoden*, 245 Cal. App. 2d 80, 93, 53 Cal. Rptr. 706, 716 (1966).

tion privileged and thus could not have reached the only issue decided—whether the discovery process was used for an unintended purpose.<sup>214</sup>

Some courts ignore the *Bradley* “conditions,”<sup>215</sup> supporting their findings with citations to earlier or more liberal cases. Other courts cite *Bradley* and its expanded test of relevance;<sup>216</sup> but their decisions reflect the minimal *Thornton* test. In *Twyford v. Twyford*,<sup>217</sup> the court found the privilege protected an accusation of forgery, made in a request for admissions.<sup>218</sup> Though the restrictive test was quoted,<sup>219</sup> the result was the same as would have been achieved under the *Thornton* test.

Thus, the matter of relevance is still unsettled. While the relevance requirement is now generally accepted, the courts do not agree on its character or measure. Neither the California Supreme Court nor the Legislature has elected to clarify a matter that is of concern to courts and to participants in the judicial process.

#### D. Recommendation for Relevance

A single, simply stated, easily applied test of relevance would promote consistency in application of the privilege granted by section 47(2). A single test could incorporate both the *Thornton* and *Bradley* views since the latter is primarily directed at the objectives of the proceeding. Since the matter has gone unsettled for well over a century, the Legislature should take the initiative and incorporate the test into the statute as a proviso. Section 47(2) would read: (underlining indicates addition)

A privileged publication . . . is one made—

. . .

2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in initiation or course of any other proceeding authorized by law . . . ; provided, that a publication made in a judicial proceeding shall not be a privileged publication or broadcast unless such publication has some relation or reference to the purpose of the proceeding; . . .

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214. 38 Cal. App. 3d at 296, 113 Cal. Rptr. at 117.

215. See *Lerrette v. Dean Witter Org.*, 60 Cal. App. 3d 573, 576-77, 131 Cal. Rptr. 592, 594-95 (1976).

216. See *Twyford v. Twyford*, 63 Cal. App. 3d 916, 925, 134 Cal. Rptr. 145, 149-50 (1976).

217. 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976).

218. *Id.* at 919-20, 924, 134 Cal. Rptr. at 146-47, 149.

219. *Id.* at 925, 134 Cal. Rptr. at 149-50. A sidelight to *Twyford* is that, other than the vehicle used for publication, it parallels *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977). The accusation of criminal conduct was used to gain an advantage in a civil suit. In *Twyford*, however, the threat of prosecution was only implied. The ruse apparently was successful as the husband, to whom the request for admissions was directed, neither admitted nor denied, but he paid the sums the wife sought, and the request for admissions was not thereafter pursued. 63 Cal. App. 3d at 919-21, 134 Cal. Rptr. at 146-47.

### CONCLUSION

Civil Code section 47(2) was enacted to encourage free access to the courts and to ensure the effectiveness of proceedings through free communication. Unfortunately, the scope of the privilege is ill-defined and the statute inconsistently applied. To achieve the objectives of the statute through uniform application, the Legislature and the California Supreme Court must be willing to set clear guidelines for the privilege by an amendment to the statute and by authoritative decisions.

This comment has focused on the problems of determining the proper scope and application of section 47(2). In discussing the considerations used by the courts in making these determinations, this comment has proposed a policy statement as the focal point of the courts' considerations; a statement that incorporates the dual objectives of enhancing the effectiveness of the proceeding and promoting unencumbered access to the courts and agencies.<sup>220</sup> For use in determining whether the person asserting the privilege has standing, this comment has proposed a two-part test that incorporates the policy objectives and provides an additional measure for keeping the privilege within manageable boundaries.

In addition, a suggestion has been made to limit the privilege to statements that are defamatory in nature. Moreover, it has been argued that evaluation of the defendant's conduct should be limited to the appropriateness of alternative sanctions. The final recommendation was that the judicially-appended limitation of relevance be incorporated into the statute by amendment. The proposals and suggestions are directed at achieving the policy objectives, promoting consistency in application of the privilege, and providing more concrete measures by which to keep the privilege within manageable bounds. Affirmation or adoption of these proposals will not only clarify areas of uncertainty and promote uniform application, but will also engender confidence in those whom the statute was enacted to protect—judicial participants—by providing dependable, equitable protection.

*Sheila M. Smith*

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220. See notes 41-51 and accompanying text *supra*.

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