

California's Constitutional Right to Privacy is Limited by Statutory Litigation Privilege

By [Rory Eastburg](#)
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On April 5, 2007, a unanimous state Supreme Court ruled that California's litigation privilege extends to claims based on the state's constitutional right to privacy. While conceding that the statutory privilege would have to yield to the constitutional privacy right if the two conflicted, the Court concluded that "the statutory and constitutional provisions are not in conflict; they can and do coexist."

The case, *Jacob B. v. County of Shasta*, S142496, dealt with a letter that a county official wrote in connection with a family law proceeding involving visitation rights. The letter claimed that the plaintiff had molested his five-year-old nephew. At trial, the county relied on the litigation privilege of Civil Code section 47(b), which bars tort liability for publications made in connection with a judicial proceeding. The trial court ruled that constitutional privacy interests overrode the litigation privilege, but the Court of Appeal reversed.

Justice Ming W. Chin, writing for the Supreme Court, described the confusion surrounding the interplay between section 47 and the constitutional right to privacy. The decision noted that "[t]wo Court of Appeal decisions have concluded that the litigation privilege must yield to the constitutional right of privacy" because the litigation privilege is "merely a statutory creation." However, it added, other appellate courts have concluded that the litigation privilege bars even constitutional privacy claims.

The Supreme Court took the latter approach. It conceded that "if section 47(b) conflicted with [the] California Constitution ... the statute would have to yield to the Constitution." But it saw no evidence that the 1972 initiative that added the constitutional right to privacy intended to limit the scope of the preexisting litigation privilege. The Court thus concluded that, "[w]hen the voters adopted California Constitution, article I, section 1, they did so mindful of the preexisting litigation privilege." It reasoned that the policy behind the privilege, of affording free access to the courts, "exists even if a privacy cause of action invokes the Constitution, and not on a case-by-case basis but in all cases."

Following this reasoning, the Court found that the section 47(b) litigation privilege bars *all* constitutional privacy claims based on communications connected to litigation, just as it bars all statutory and common-law claims with the exception of malicious prosecution. It found no balancing of interests to be necessary. "In adopting the litigation privilege," the Court said, "the Legislature has already done the balancing."

For more information, please contact:



[Rory Eastburg](#)
Los Angeles, California
(213) 633-6800
roryeastburg@dwt.com



[Rochelle Wilcox](#)
Los Angeles, California
(213) 633-6800
rochellewilcox@dwt.com

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