

RESOLUTION 03-07-2008

DIGEST

Evidentiary Privileges: Proceedings and Records of Attorney Peer Review Committees
Adds Evidence Code section 1161 to establish a privilege for law firm peer review committees.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution adds Evidence Code section 1161 to establish a privilege for law firm peer review committees. This resolution should be disapproved because the resolution is too broad and vague as to the scope and exact nature of the privilege.

Many law firms have established voluntary, internal peer review systems in which a panel composed of a number of employees and a small number of management representatives convenes and reviews internal firm operations. However, law firm peer review committees typically lack the specific guidelines and procedures that govern medical peer review committees. This resolution does not define what a peer review committee is, or the scope of the privilege to be established; and would apparently cover the discussion of numerous matters as to which no privilege should be provided.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Evidence Code Section 1161, to read as follows:

- 1 §1161
- 2 (a) Neither the proceedings nor the records of an organized peer review committee
- 3 of a law firm, having the sole responsibility of evaluating and improving the quality of
- 4 legal services rendered by the law firm, shall be subject to discovery. As used in this
- 5 Section, "law firm" means any general partnership, limited liability partnership, law
- 6 corporation or limited liability company entitled to practice law in the State of California.
- 7 (b) No person in attendance at a meeting of any such peer review committee shall
- 8 be required to testify as to what transpired at a committee meeting.
- 9 (c) The prohibition relating to discovery or testimony does not apply if any person
- 10 serves upon the peer review committee when his or her own conduct or practice is being
- 11 reviewed.
- 12 (d) Evidence otherwise admissible or subject to discovery outside of a peer review
- 13 committee shall not be or become inadmissible or protected from disclosure solely by
- 14 reason of its presentation to or consideration by a peer review committee.

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

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS:

Existing Law: The internal proceedings and records of law firm committees designated variously as “loss prevention,” malpractice prevention,” “counsel committee,” and “professional conduct” committees are not protected from discovery absent the firm’s representation by independent counsel. Court decisions have rejected the assertion of an attorney-client privilege for internal investigations that relate to a firm’s representation of a client.

This Resolution: The proposed statute establishes a privilege for the internal proceedings and records of law firm peer review committees established solely for the purpose of evaluating and improving the quality of legal services, provided that no committee member’s conduct or practice is being reviewed by the committee.

The Problem: Peer review is an essential element of quality control and improvement in professional organizations. Recognizing the beneficial effects of candid, thorough, and objective peer review, an extensive statutory framework already protects peer review committees established by health care providers to evaluate and improve the quality of care. (Evidence Code §1156 *et seq.*) No such privilege, however, exists for peer review committees established by attorneys to evaluate and improve the quality of legal services provided to clients.

The American Bar Association notes that the legal profession “has made a number of ‘false starts’ in its effort to develop some form of a model peer review system” and that members of “the Bar now recognize the need for some form of self-assessment and this form of risk management is also being promoted within the insurance industry.” One major reason that firms are reluctant to implement effective peer review is their concern that records of the peer review committee will be used as evidence against the firms in legal malpractice claims. The proposed evidentiary privilege for law firm peer review committees ameliorates this concern by affording to lawyers the same protections afforded to health care providers, while preserving a client’s right to obtain through discovery relevant documents generated independently of the peer review process.

IMPACT STATEMENT:

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

AUTHOR AND/OR PERMANENT CONTACT: Randall Kiser, DecisionSet, 550 Hamilton Avenue, Palo Alto, CA 94301, 650-838-0148, rkiser@decisionset.com.

RESPONSIBLE FLOOR DELEGATE: Randall Kiser