

**RESOLUTION 03-10-2008**

**DIGEST**

Evidentiary Privileges: Communications Made as Part of a 12-Step Program

Adds Evidence Code section 1034.5, which makes communications in any 12-step program subject to the same privilege as the penitent-clergy privilege.

**RESOLUTIONS COMMITTEE RECOMMENDATION**

**DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution adds Evidence Code section 1034.5, which makes communications in any 12-step program subject to the same privilege as the penitent-clergy privilege. This resolution should be disapproved because it fails to sufficiently define the proposed privilege.

The resolution seeks to create an entirely new brand of privileged communications without properly defining the parameters or identifying the privilege holders. The author states that the resolution is fashioned after the penitent-clergy privilege. However, unlike the penitent-clergy privilege, the resolution fails to define the proposed privilege. Evidence Code section 1030 defines who the “member[s] of the clergy” are to whom the penitent-clergy privilege applies. Evidence Code section 1031 defines who the “penitent” person is in the penitent-clergy privilege context. Evidence Code section 1032 explains the term “penitential communication.” Evidence Code section 3033 makes clear that the “penitent” person can exercise the privilege. And Evidence Code section 1034 extends the same privilege to “member[s] of the clergy.”

The proposed resolution is a far cry from the above-referenced sections. The resolution merely states that members of a 12-step program can prevent others from disclosing communications learned as part of the program, and that participants in a 12-step program can refuse to disclose the same communication. While society may recognize a public policy in favor of encouraging free and open communications in 12 step programs, this resolution fails to adequately define what constitutes a qualifying 12-step program, a participant, or a confidential communication.

**TEXT OF RESOLUTION**

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add California Evidence Code section 1034.5 as follows:

- 1 § 1034.5
- 2       (a) Subject to Section 912, a member of a Twelve Step Program, whether or not a
- 3 party, who has made disclosures as a part of the Twelve Step Program has a privilege to
- 4 refuse to disclose, and to prevent another from disclosing, such communications to the
- 5 same extent as a penitent under Evidence Code section 1033, if he or she claims the
- 6 privilege.

7            (b) Subject to Section 912, a member of a Twelve Step Program, whether or not a  
8 party, who is the recipient of a communication made by a participant in a Twelve Step  
9 Program as a part of a Twelve Step Program, may refuse to disclose such communication  
10 if he or she claims the privilege to the same extent as a member of the clergy may claim a  
11 privilege against disclosure pursuant to Evidence Code section 1034.

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

**PROPONENT: CONTRA COSTA COUNTY BAR ASSOCIATION**

**STATEMENT OF REASONS**

Existing Law: Existing Law provides no protection to a person who, in the course of participation in a Twelve Step Program, receives communication from another member of a Twelve Step Program which is intended to constitute required participation in the Twelve Step Program.

This Resolution: Protects and causes such communications to be privileged to the same extent as the Penitent – Clergy privilege.

The Problem: There are currently approximately 58 Twelve Step groups which base their programs on the Twelve Steps of Recovery initially set forth by the program Alcoholics Anonymous. All such groups who have adopted the Twelve Steps of Recovery, recognize in some fashion the following steps (taken from Alcoholics Anonymous):

- 4        Made a searching and fearless moral inventory of ourselves.
- 5        Admitted to God, to ourselves, and to another human being the exact nature of our wrongs.

Presently, the disclosure to “another human being” is not protected by any sort of privilege. Accordingly, a party may subpoena a person who receives the communication under steps 4 and 5 to court to testify as to the substance of the “inventory.” This may result in persons who are participating in a Twelve Step Program being deterred from making the type of full and complete disclosure necessary to participate in the program.

The courts and the legal profession have recognized the value of Twelve Step Programs in addressing problems of alcoholism and addiction. In many cases, courts require that persons arrested for alcohol related offenses attend meetings of Alcoholics Anonymous or other Twelve Step Programs as a condition of their release pending disposition of their case. The social value in protecting these communications outweighs any evidentiary value to be gained in compelling the testimony of a member of a Twelve Step Program.

California Law recognizes the beneficial affect of protecting certain types of communications between people, by recognizing various privileges, such as the physician-patient, husband-wife, psychotherapist-patient, clergy-penitent, sexual assault counselor/domestic violence counselor-victim, and human trafficking case worker-victim.

**IMPACT STATEMENT:**

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

**AUTHOR AND/OR PERMANENT CONTACT:** Ronald P. Rives, Rives & Littorno, 2211 Railroad Ave., Pittsburg, CA, 94565, Phone: (925) 432-3511, Fax: (925) 432-3516, [riveslaw@sbcglobal.net](mailto:riveslaw@sbcglobal.net)

**RESPONSIBLE FLOOR DELEGATE:**

## **COUNTERARGUMENTS**

### **THE BAR ASSOCIATION OF SAN FRANCISCO**

It is well-established that privileges must be applied "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a *public good transcending the normally predominant principal of utilizing all rational means for ascertaining truth* . . . exceptions to the demand for 'every man's evidence' are *not to be lightly created nor expansively construed for they are in derogation of the search for truth.*" (*People v. Thompson* (1982) 133 Cal.App.3d 419, 427-428, quoting *United States v. Bryan* (1950) 339 U.S. 323, 331 (emphasis added).) Creating a new and absolute privilege to apply to any "Twelve Step Program," no matter how formal or informal the program, and regardless of the number of people in attendance at the meeting, would be a *vast* expansion of privilege law that would effectively wipe out any balance between the need for excluding evidence vs. the search for truth in a legal proceeding.

### **ORANGE COUNTY BAR ASSOCIATION**

This resolution is overly broad.

- What is the definition of a "twelve step program"? It could be a dance.
- Once defined, when does the privilege start or end? After meeting someone in such a program, are all my communications considered confidential from that time forward? Do breaks count? How about conversations held in the parking lot after a formal meeting?
- What constitutes membership? Many are voluntary. If one owes fees, is one still a member?
- What about meetings held in prisons or jails?
- There is no notice requirement. Lawyers, medical personnel, and clergy are all trained in this. There is nothing comparable for the participants.
- Will passage of this imply an actionable right upon violation of confidentiality?
- This standard is broader than the psychotherapist privilege which requires a warning if there is a potential danger.

Such programs are beneficial. The author may consider a more concise resolution granting a privilege only in meetings conducted by a licensed practitioner, with that individual or licensed designee present and only after a statutory warning has been acknowledged by all participants. The California Court of Appeal (Fifth Circuit), in *Farrell L v. Superior Court* (1988) 203 Cal

App.3d 521 already held that such a privilege exists (finding communications made by patient to others participating in a group therapy session to come within the psychotherapist-patient privilege and, based on the facts of the case, no good cause shown to override the privilege/to justify discovery of the sought-after, privileged information). Notwithstanding this holding, such a privilege for those who are in custody or involuntarily institutionalized may not be best for society.

## **WOMEN LAWYERS OF SACRAMENTO**

The benefit this resolution provides to penitent recovering substance abusers is not outweighed by the harmful impact it will have on the victims of crimes committed by the substance abusers. For instance, in 2005, as part of his Twelve Step Program, a Virginia man confessed and apologized to a woman he had raped 20 years earlier. Following his confession, the woman reported her attacker to the police. As a result, the man received an 18 month prison sentence. According to the woman, the apology “[was] not a substitute for punishment.” Moreover, the apology traumatized the woman all over again by making her relive the attack.

The proposed resolution would prevent victims such as the woman described above from obtaining the justice they deserve. In addition, while their perpetrators moved on, the victims would be forced to relive the crime committed against them in silence. In short, victims’ rights should outweigh those of the individuals who commit crimes against them, despite their professed remorse.