

RESOLUTION 07-01-2023

DIGEST

Evidence: Privilege Exception in Cases of Harassment or Assault Between Attorney and Client
Adds Evidence Code section 963 to provide an exception to attorney-client privilege in actions alleging sexual assault or harassment between attorney and client.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution adds Evidence Code section 963 to provide an exception to attorney-client privilege in actions alleging sexual assault or harassment between attorney and client. The resolution should be disapproved because it would eliminate privilege more broadly than necessary for its purpose.

Under current law, although attorneys can file civil actions and report crimes for prosecution based on having been sexually harassed or assaulted by a client, they can be hamstrung in providing evidence in support of such claims by the requirement that they maintain attorney-client confidences at “every peril” to themselves. (See Civ. Code sec. 51.9 [civil suits]; Bus. & Prof. Code sec. 6068 [“every peril”].) The attorney-client privilege is broad, and there are no exceptions for communications relevant to sexual harassment or assault.

This resolution would add a new exception to attorney-client privilege, in the context of civil actions, criminal proceedings, and certain administrative proceedings alleging sexual harassment or assault by and against parties to an attorney-client relationship. Within that context, the resolution would provide that communications between the attorney and the client are not privileged.

The resolution should be disapproved because, although it would address the stated problem, its language is overbroad and could apply to communications that are irrelevant to the harassment or assault.

The resolution is based on language from *Anten v. Superior Court* (2015) 233 Cal.App.4th 1254. In *Anten*, the court construed Evidence Code section 958, which by its terms provides an exception to the attorney-client privilege for communications “relevant to an issue of breach” of a lawyer-client duty. The *Anten* court made clear that, despite the broad language of the statute, the exception “is limited to communications between the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged with a breach of duty, on the other.” (*Id.* at p. 1259.)

The resolution uses this language from *Anten* to clarify the type of cases and parties to which the proposed exception will apply, but it lacks a limitation on relevance equivalent to the one in

Evidence Code section 958. Whereas the exception in section 958 is limited to communications relevant to breach in an action for breach, the language of the resolution would apparently apply to any attorney-client communications, so long as they are used in an action alleging sexual harassment or assault. As drafted, the resolution could be construed to eliminate privilege for communications that have nothing to do with the alleged harassment or assault. While a court in such an action might limit application of the exception to communications relevant to the assault, it might not do so if the suit combined claims of sexual harassment or assault with other causes of action. This overbreadth is likely unintended, and could be remedied by adding a limitation to communications relevant to the harassment or assault, modeled on the similar limitation in Evidence Code section 958.

There are no similar pending bills, nor any in the last three years.

This resolution should be disapproved.

RESOLUTION 07-01-2023

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Evidence Code section 963, as follows:

1 § 963

2 There is no privilege under this article as to a communication between a lawyer charging
3 or charged with sexual harassment or assault, on the one hand, and the client charged with or
4 charging sexual harassment or assault, on the other, in civil actions, criminal proceedings, and
5 administrative proceedings before the Equal Employment Opportunity Commission or the
6 California Civil Rights Department, where that sexual harassment or assault is actually asserted
7 by the client or the attorney.

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

PROPONENT: Queen’s Bench Bar Association

STATEMENT OF REASONS

The Problem Lawyers who are sexually harassed or assaulted by a client can’t disclose all relevant evidence during proceedings to vindicate their rights or hold the client criminally accountable where the assault or harassment occurred during privileged communications. While Civil Code section 51.9 and the relevant Penal Code sections allow a lawyer to pursue claims against a client who sexually harassed or assaulted the lawyer during their lawyer-client relationship, lawyer-client privilege prevents disclosure of evidence necessary for such claims to be successful. Business and Professions Code section 6068 provides that lawyers must preserve the secrets of their clients at “every peril” to themselves. Evidence Code section 954 describes lawyer-client privilege, which has been interpreted to cover almost any means of communication by the client to their lawyer. *City & County of San Francisco v. Superior Court* (1951) 37 Cal.2d 07-01-2023 Page 2 of 3

227, 235-36. Evidence Code sections 956-962 provide exceptions to the privilege. None of the enumerated exceptions relate to instances of sexual harassment or assault that occur during attorney-client privileged interactions, and the California Supreme Court has held that courts may not find implied exceptions to lawyer-client privilege. *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725.

The Solution: The proposed Evidence Code section 963 creates an exception to lawyer-client privilege in actions or proceedings for sexual assault or harassment brought by or against the lawyer or the client. The proposed language aligns with the language of the breach of duty exception enumerated in Evidence Code section 958 and the cases which have interpreted it to ensure that attorneys can effectively bring claims against clients based on sexual assault or harassment by those clients. See, e.g., *Anten v. Superior Court* (2015) 233 Cal. App. 4th 1254, 1259. (§ 958 is nearly exclusively applied to (1) “communications between the lawyer charging or charged with a breach of duty, on the one hand, and the client charging or charged with a breach of duty, on the other” and (2) in actions where that breach of duty is actually asserted by the client or the attorney. See, e.g., *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1168.) As with other statutory exceptions to lawyer-client privilege, proposed Evidence Code section 963 should be construed narrowly. *In re Rindlisbacher* (1998) 225 B.R. 180. This resolution provides an avenue for lawyers who are sexually harassed or assaulted during a lawyer-client relationship to disclose all relevant evidence to support their allegations against the perpetrator in civil or criminal actions or administrative proceedings to hold the harasser accountable.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION

None known.

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