# Missouri Enacts First "Peer Review" Privilege for Design Professionals

*By G. William Quatman, Esq., FAIA*

To encourage open and candid discussions, U.S. law prevents some communications from being revealed in court. Common examples are those between a lawyer and client; a priest, rabbi or member of the clergy and a member of his or her synagogue or church; a physician, surgeon, therapist or psychologist and patient; and an accountant and client. These protections are called a legal "privilege" and date to the early 1800s. Some of the first privileges covered communications between doctors and their patients. In later years, courts questioned whether one doctor's "peer review" of another doctor's work would be protected by the same privilege.

A Missouri lawsuit in 1984 answered this question in the negative, finding that there was no privilege for statements or documents by medical personnel participating in peer reviews. A year later, the doctors lobbied for a new statute, which passed in 1985. Missouri statute 537.035 now states that, with limited exceptions, "the interviews, memoranda, proceedings, findings, deliberations, reports, and minutes of peer review committees" are not admissible in court. Further, in order to encourage doctors and others to serve on peer review committees without fear of getting sued, the law states that the peer reviewers "*shall be immune from civil liability*" if their acts are performed "in good faith." Missouri is not unique in this regard, and today nearly all 50 states have adopted laws granting a "peer review privilege" to health care providers.

Peer review is the name given to the evaluation, critique and commentary by one professional of a peer's work. In the medical field, most hospitals have committees that perform reviews of their doctors to improve quality of patient care. A federal law, the Health Care Quality Improvement Act of 1986 (HCQIA), was enacted after Congress determined there was a nationwide problem of medical malpractice that could be remedied "through effective professional peer review," but that "the threat of private money damage liability... unreasonably discourages physicians from participating in effective professional peer review." (42 U.S.C.A. §§ 11101, et seq.)

Under the HCQIA, those participating in the peer review process are not liable for damages under any federal or state law for their role in the peer review process. (42 U.S.C.A. § 11111.) Persons providing information to the peer review body are likewise immune from liability, with the exception of false testimony. Some states, like Colorado, adopted their own peer review laws modeled on the federal act. See the Colorado Professional Review Act (CPRA), C.R.S.A. §§ 12-36.5-101, et seq., which states, "All proceedings, recommendations, records, and reports involving professional review committees or governing boards ***shall be confidential***." Without statutory protection, doctors would be unwilling to participate in a peer review, and health care would not improve, at risk to the public.

Engineers are also licensed to protect public safety, health and welfare. Like physicians, the profession would benefit from peer reviews, but the same fears about liability and admissibility hold many back from engaging in such reviews. To remedy this dilemma, the engineering community should seek the same protections as health care providers enjoy, and for the same reason.

While some design firms hire outside "peer reviewers" to look at their documents as part of their quality control process, the practice is not widespread. Firms are even reluctant to teach "lessons learned" classes to co-workers due to fear of aggressive lawyers seeking those course materials. Like physicians, design professionals fear that some attorney will use the report in court, pointing out all of the mistakes found by a reviewer. This discourages firms from conducting peer reviews, teaching lessons learned, and catching errors and omissions that might otherwise be picked up by a second set of eyes. Consulting engineers are reluctant to perform peer reviews for a relatively small fee, at risk of being named in a lawsuit if a problem is later found in the design.

Taking a cue from the medical profession, in 2011 the Missouri legislature introduced and passed a "peer review privilege" law for architects, engineers and land surveyors. Missouri's S.B. 220 passed in the House 111-31, and passed overwhelmingly in the Senate 33-1. However, the bill was subsequently vetoed by the Governor due to his objection that the law

was too broad. The design community worked with the Governor's office to introduce a revised bill in 2012, H.B. 1280, which passed in the last week of the 2012 session by votes of 33-1 in the Senate and 95-57 in the House. The Governor signed the bill on July 10, 2012, and it will become law effective August 28, 2012. As amended, the 2012 law provides immunity to outside peer reviewers who are engaged to provide only that service, but are otherwise not involved in the project. It also protects from discovery internal "lessons learned" that are taught post-completion in-house to the design firm's employees and partners. The bill expires in January 2023, giving the design community a decade to produce results to the "Show-Me State" legislature, which can then renew the law's provisions or allow them to lapse.

Missouri may be the first state to enact such a law, but other states have been closely watching. The time has come to give all design professions the same protections that doctors have had for decades. By encouraging aggressive critiquing of our work and learning from mistakes – both our own and those of others – we can provide safer buildings and structures for the public. Passing "peer review" privilege legislation for design professionals in all 50 states will encourage this.▪

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