

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2016

RESOLUTION

RESOLVED, That the American Bar Association urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (“LRS clients”) for confidential communications between an LRS client and a lawyer referral service, when an LRS client consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer.

REPORT

I. Introduction

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation to establish an evidentiary privilege for lawyer referral services and their clients (“LRS clients”) for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It generally facilitates and implements the goal of existing ABA policy (93A 10D), when the ABA adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”

Shielding communications between legal referral services and those seeking legal assistance from discovery remains important, but, despite the existing ABA policy, the protection of those communications remains uncertain, in part because the communications often do not involve a lawyer. This Resolution therefore urges a complementary approach: establishing a new lawyer referral service-LRS client privilege similar to the privilege that currently exists for confidential communications between attorneys and their clients. Such new privilege should provide that a person or entity who consults a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice may refuse to disclose the substance of that consultation and may prevent the lawyer referral service from disclosing that information as well. The lawyer referral service-LRS client privilege would belong to the LRS client, and the LRS client would have the authority to waive the lawyer referral service-LRS client privilege. In addition, each jurisdiction may wish to apply to this new privilege certain of the recognized exceptions to the attorney-client privilege, including, for example: a) the crime/fraud exception (*see, e.g.*, Cal. Evid. Code § 956 (crime/fraud exception to the attorney-client privilege; Cal. Evid. Code § 968(a) (crime/fraud exception to the lawyer referral service-client privilege)); b) the fiduciary exception (*see, e.g.*, Restatement (Second) of Trusts § 173, cmt. b; *Garner v. Wolfinbarger*, 430, F.2d 1093 (5th Cir. 1970), but note that a number of states do not recognize this exception); and/or c) any overriding public policy exceptions.

II. Background on Lawyer Referral Services

Lawyer referral services help connect LRS clients (people, businesses, and other entities) seeking legal advice or representation with attorneys or organizations who are qualified to assist the LRS clients with their specific legal needs. In addition to providing an important service to the public, lawyer referral services provide an important service for attorneys by helping them to get new clients and grow their practices.

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Lawyer referral services are usually non-profit organizations affiliated with a local, state or territorial bar association. There are hundreds of these organizations, and they assist hundreds of thousands of LRS clients every year connect with a lawyer. Some state governments and/or bar associations regulate and certify local lawyer referral services, such as in California. In addition, the ABA offers its own accreditation to lawyer referral services. While some lawyer referral services are directed by attorneys, most of the staff who do “intake” (answering phone calls from LRS clients, speaking with people who walk-in, or responding to electronically transmitted requests) are not attorneys and do not typically act under the direct supervision of attorneys. Lawyer referral services all invariably have adopted confidentiality rules requiring the intake staff to keep confidential the information provided consumers.

The lawyer referral process begins when the LRS client contacts the lawyer referral service, usually by phone or increasingly by email or over the Internet, to explain a problem, and ends when the lawyer referral service either provides the LRS client with contact information for one or more attorneys whose expertise is appropriate to the problem or directs the LRS client to a legal services program, government agency, or other potential solution. In the course of this interaction, confidential information regularly is provided by the LRS client to the lawyer referral service. Indeed, to be directed to the appropriate lawyer or government or non-profit office, LRS clients need to disclose the same or similar information to the lawyer referral service that they would typically provide in an initial meeting with a law firm or legal aid organization’s office personnel or a lawyer – the who, what, where, when, why and how of their legal situations.

Lawyer referral services are able to make appropriate referrals because they obtain detailed information needed to evaluate which is the appropriate resource for a given LRS client. Without detailed LRS client information, lawyer referral services cannot function properly. Inaccurate referrals are frustrating to LRS clients as they delay their ability to connect with a lawyer who is qualified to handle their matter if the LRS client so desired. What makes lawyer referral services valuable is their ability to triage LRS clients' issues against the backdrop of knowledge of the government and nonprofit resources available, in addition to private lawyers in every area of law. Lawyer referral services are regularly questioned by LRS clients about the issue of confidentiality of the information being provided, and most, while they can assure the consumer that it is the lawyer referral service's policy to keep the information provided confidential, are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. More importantly, however, the lack of privilege may chill prospective LRS clients from seeking the assistance of a lawyer referral service and consequently deprive them of the ability to obtain competent and affordable counsel to assist with their legal problem. Moreover, in recent years in a number of instances, litigants have sought discovery of such communications. In particular, the Bar Association of San Francisco was subpoenaed by a District Attorney concerning LRS client communications. The issue was resolved without having to turn over any LRS client communications. In 2015, the Akron Bar Association Lawyer Referral Service was forced to comply with a subpoena of its lawyer referral records concerning a referral to a panel attorney. This resolution seeks to protect lawyer referral services and LRS clients from these types of subpoenas.

Until it is made clear that the communications are protected, LRS clients may be forced to endure the frustrating experience of making multiple cold calls to different legal aid organizations or private lawyers, asking each time if his/her issue matches the organization's limited mission or the lawyer's particular area of practice, and repeatedly being told no. Indeed, even uncertainty as to whether the communications are protected can and does have this affect. Ineffective referrals do and will result in LRS clients not connecting with the appropriate agency, legal aid society, or lawyer and decrease the use and utility of lawyer referral services. This is particularly unfortunate because two-thirds to three-quarters of referrals are not to private lawyers. Lawyer referral services provide a significant public service – not only to the LRS clients they serve, but to the multitude of government agencies and nonprofits that benefit from accurate referrals to them.

When speaking on the phone to lawyer referral service personnel, LRS clients are often anxious, angry, and upset about their legal issues; wish to explain their situation in great detail without being prompted to do so; and express concerns about deadlines and [a] desire for immediate legal assistance. In fact, referral counselors have no control over LRS clients' outbursts and as a result, LRS clients often will provide potentially damaging or sensitive information immediately or soon after the referral counselor's greeting. Similarly, LRS clients' seeking legal assistance on lawyer referral services' websites often ignore or resist the lawyer referral services' attempts to restrict the information LRS clients provide. For example, while lawyer referral services' websites typically ask specific questions and then limit the number of characters an LRS client can type in response, LRS clients often express a clear preference for providing a detailed, open narrative in a text box in response to a general instruction, such as: "Briefly explain your legal issue and what result you would like to see."

Although LRS clients' open narratives frequently include information that could harm the LRS client's criminal or civil case if revealed to adverse parties, lawyer referral services' cautions about not providing too much information are unlikely to be effective. LRS clients either ignore the caution altogether, and provide potentially damaging information without prompting, or they take the caution very seriously and provide little to no information, thereby frustrating any ability to make an accurate referral to a lawyer, government agency, or nonprofit organization. On the other hand, based on an informal survey of LRIS administrators throughout the country, the most common alternative utilized by many other lawyer referral services—forms with a series of specific questions—have a high abandonment rate with fewer completed submissions than a simple form with a general instruction that permits a more open-ended answer.

III. Background on the Attorney-Client Privilege

The concept of attorney-client privilege concerns information that the lawyer must keep private and facilitates the client's ability to confide freely in his or her lawyer.¹ The attorney-

¹ The principle of confidentiality is a related but distinct concept set out in the legal ethics rules adopted by each state and other jurisdictions and in ABA Model Rule of Professional Conduct 1.6. These rules generally prohibit lawyers from revealing information relating to the representation of a client in the absence of the client's informed

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client privilege protects any information communicated in a confidential conversation between a client and an attorney for the purpose of seeking or obtaining legal representation or advice, and it usually extends to communications between a *prospective client* and an attorney (even if the attorney is not ultimately retained). Originally established through the common law and now codified in many state rules of evidence, the attorney-client privilege allows the client and attorney to refuse to reveal such communications in a legal proceeding. The underlying purpose of the attorney-client privilege is to encourage clients to seek legal advice freely and to communicate fully and candidly with lawyers, which, in turn, enables the clients to receive the most competent legal advice from fully-informed counsel. The attorney-client privilege contributes to the trust that is the hallmark of the confidential attorney-client relationship. The privilege belongs to the client, not to the lawyer, and so the client is always free to waive the privilege.

The attorney-client privilege is sometimes subject to exceptions, such as when disclosure may be necessary to prevent death, substantial bodily harm, or substantial injury to the financial interests or property of someone, or when the communication with the lawyer was for the purpose of committing a crime or defrauding others (the so-called “crime-fraud” exception). These exceptions vary somewhat from state to state.

IV. The Problem and the Solution

If an LRS client reveals confidential information to a lawyer referral service in an effort to obtain legal advice or counsel, it is unclear under existing case law whether any statutory or common law privilege would protect that communication (except in California, which passed a statute creating such a privilege in 2013). As noted above, most lawyer referral service staff are not attorneys, nor are most of these staff directly supervised by attorneys. Moreover, the LRS client typically seeks to obtain a referral to an attorney, not legal advice or representation from the lawyer referral service itself. Thus, some courts may conclude that the attorney-client privilege does not apply to communications between LRS clients and lawyer referral services (though it should be noted that we have found no published case where a court made a finding on this issue).

This is a problem for at least two reasons. First, it hampers communications between some LRS clients and lawyer referral services, making it difficult for the lawyer referral service to gather the information necessary to make a referral to the appropriate lawyer, government agency, not-for-profit program or other source of help. LRS clients sometimes ask lawyer referral services whether their communications are privileged, and in most states, the current answer is “we don’t know, but the communications may not be protected.” It is crucial that LRS clients feel comfortable sharing as much information as possible with a lawyer referral service in order to facilitate a referral to the best possible attorney (or agency) for their particular legal issue. Second, with respect to the multitude of LRS clients who are overly comfortable sharing damaging or sensitive information with lawyer referral service personnel without being prompted to do so, these LRS clients are likely to be seriously harmed in the event of an

consent, implied authorization, or under specific, limited exceptions permitted by the rule. Violations of the rules may lead to disciplinary sanctions. This Resolution does not suggest any changes or additions to such rules.

opposing party's successful discovery request. In a number of instances, as cited above, litigants have sought discovery from a lawyer referral service with respect to confidential communications with an LRS client, and it is likely this will continue to occur.

The lack of a clear privilege threatens the open communication necessary for lawyer referral services to effectively triage the legal issues involved and match LRS clients with appropriate lawyers, government agencies, non-profit programs or organizations, or other resources. LRS clients' trust and confidence in lawyer referral services might well quickly evaporate following publicized accounts of successful discovery requests to lawyer referral services. Discouraging or impeding the free and candid communications between lawyer referral services and LRS clients will materially harm the ability of lawyer referral services to help hundreds of thousands of people in need of legal assistance. Without open communication – including the exchange of information that might prompt lawyer referral service personnel to advise or warn an LRS client about fast-approaching deadlines and other crucial aspects of the case – LRS clients may prejudice their legal rights or suffer other serious harm.

This resolution urges federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service in order to eliminate any uncertainty as to the privileged status of such communications from an LRS client seeking legal counsel. It would enable lawyer referral services to reassure LRS clients and thereby maintain the kind of honest and open communication required to make a good referral. It would also eliminate the possibility that an opposing lawyer might attempt to subpoena documents and/or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

The ABA previously expressed support for the goal of this proposal in August 1993 when it adopted the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Rule XIV of the Model Supreme Court Rules and Section 6 of the Model Act both state that:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.”²

In addition, the Commentary to Rule XIV and Section 6 both state that “since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege.”³

² See Resolution (93A 10D),

³ In 1998, the ABA adopted a general policy against extending the attorney-client privilege to accountants and other non-lawyers: “RESOLVED, That the American Bar Association opposes legislation such as S. 1737 pending before the 105th Congress which would extend the attorney-client privilege to accountants and others not licensed to practice law.” The 1993 policy appears to control as it specifically addresses lawyer referral services, while the 1998

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The ABA also adopted related policy in February 2001 stating that confidential client information held by legal aid and other similar programs should remain privileged and should not be provided to funding sources absent client consent. In particular, Resolution (01M 8A) states in pertinent part that:

“...a funding source should not have access to records which contain information protected by the attorney-client privilege, . . . , or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source.”⁴

Despite the fact that the ABA Model Supreme Court Rules and the ABA Model Act urging that the attorney-client privilege be extended to cover lawyer referral service-LRS client communications were adopted in 1993, whether such protection is afforded remains uncertain. Only one state (California) has taken action on this issue at all, creating a new lawyer referral service-client privilege similar to the one urged in this Resolution, and one other state (New York) has proposed legislation taking a similar approach. Moreover, the communications at issue in this Resolution often do not involve a lawyer, and at the same time, lawyer referral services want to be careful to avoid any suggestion that they are “practicing law” or providing legal representation without a license to do so. Therefore, it is time for the ABA to revise and aggressively implement the goal of its existing policy by adopting the proposed resolution urging courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service.

Respectfully Submitted,

C. Elisia Frazier, Chair
Standing Committee on Lawyer Referral and Information Service
August 2016

policy did not mention them at all. In any case, this Resolution is also consistent with the 1998 policy in seeking to establish a new privilege rather than extend the existing attorney-client privilege. As noted in the 1993 policy and in this Report, lawyer referral services are more like a lawyer’s clerk, receptionist, paralegal, colleague or other agent who may help facilitate legal representation, than they are like accountants or other professionals who provide non-legal services. (5/98BOGEC)

⁴ See Resolution (01M8A), Resolved Clause 3.

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Lawyer Referral and Information Service

Submitted By: C. Elisia Frazier, Chair

1. Summary of Resolution(s). This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for lawyer referral services and their clients (“LRS clients” or “LRS client”) for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. The new lawyer referral service-LRS client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients.
2. Approval by Submitting Entity. Standing Committee on Lawyer Referral Services, by email on April 25, 2016
3. Has this or a similar resolution been submitted to the House or Board previously? Almost identical resolutions were submitted to the House prior to the 2015 Annual Meeting (Resolution 15A111) and the 2016 Mid-Year Meeting (Resolution 16M113), but the resolutions were voluntarily withdrawn to provide the sponsors an opportunity to further discuss the relevant issues with the ABA Standing Committees on Ethics and Professional Responsibility and Professional Discipline and add several minor clarifications and refinements to both the resolution and report. A similar principle was also incorporated into the ABA Model Supreme Court Rules Governing Lawyer Referral Services and the ABA Model Lawyer Referral and Information Quality Assurance Act, previously adopted by the ABA House of Delegates as policy in August 1993 (See Resolution 93A10D). However, while Resolution 93A10D urged state supreme courts and legislatures to apply the attorney-client privilege to confidential communications between LRS clients and lawyer referral services, the proposed resolution would urge federal, state, tribal, and territorial courts and legislative bodies to adopt rules or enact legislation establishing a new privilege for confidential communications between LRS clients and lawyer referral services.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This resolution is generally consistent with the goal of Resolution (93A 10D), which adopts Rule XIV of the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Section 6 of the ABA Model Lawyer Referral and Information Service Quality Assurance Act. Both Rule XIV and Section 6 provide as follows:

“A disclosure of information to a lawyer referral service for the purpose of seeking legal assistance shall be deemed a privileged lawyer-client communication.

Commentary

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Since a client discloses information to a lawyer referral service for the sole purpose of seeking the assistance of a lawyer, the client's communication for that purpose should be protected by lawyer-client privilege."

In addition, the proposed resolution is generally consistent with ABA Resolution (01M 8A), which urges that confidential client information held by legal aid and other similar programs should remain privileged and confidential and should not be provided to funding sources absent express client consent. Resolution (01M 8A) states in pertinent part that:

"...a funding source should not have access to records which contain information protected by the attorney-client privilege, or by ethical provisions prohibiting the disclosure of confidential information obtained by a client, or by statutory provisions prohibiting disclosure, unless the client has knowingly and voluntarily waived such protections specifically to allow the protected information to be released to the funding source."

Furthermore, because the proposed resolution would call for the establishment of a new lawyer referral service-LRS client privilege that is similar to the attorney-client privilege, the resolution is also generally consistent with Resolution (05A 111), which supports the preservation of the attorney-client privilege as essential to maintaining the confidential relationship between client and lawyer required to encourage clients to discuss their legal matters fully and candidly with their counsel.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A
6. Status of Legislation. (If applicable) The California legislature codified a lawyer referral service-client privilege in 2013. *See Cal. Evid. Code §§965-968.* Similar legislation is pending in New York.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Lawyer referral services and their respective state and local bars around the country would hopefully urge their respective state supreme courts and legislatures to adopt rules or pass laws recognizing this evidentiary privilege. In addition, the ABA sponsoring entities, in coordination with the ABA Governmental Affairs Office and the ABA Center for Professional Responsibility, would urge the federal courts and Congress to approve similar rules and legislation at the federal level.
8. Cost to the Association. (Both direct and indirect costs) None
9. Disclosure of Interest. (If applicable) None

10. Referrals. Business Law, Center for Professional Responsibility, Criminal Justice, Judicial Division, Litigation, National Conference of Bar Presidents, National Association of Bar Executives, Standing Committee on Client Protection, Standing Committee for Ethics and Professional Responsibility, Standing Committee on Professional Discipline, Division for Legal Services, and the CPR/SOC Professional Responsibility Committee.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

C. Elisia Frazier
114 Grand View Drive
Pooler, GA 31322-4042
Cef1938@hargray.com
912-450-3695

12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

C. Elisia Frazier
114 Grand View Drive
Pooler, GA 31322-4042
Cef1938@hargray.com
912-450-3695

EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for lawyer referral services and their clients (“LRS clients” or “LRS client”) for confidential communications between client and a lawyer referral service for the purpose of retaining a lawyer or obtaining an LRS legal advice from a lawyer. The new lawyer referral service-LRS client privilege established by these rules or legislation should be similar to the privilege that currently exists for confidential communications between attorneys and their clients.

2. Summary of the Issue that the Resolution Addresses

Lawyer referral services provide a public service in helping LRS clients to find legal representation (and attorneys find clients). In order to provide this service, lawyer referral services must first obtain information from each LRS client about their case or issue, to ensure that they are referred to the appropriate attorney or attorneys for their specific legal needs. In most states, it is unclear under existing statutory or case law whether any statutory or common law privilege would protect these confidential communications between an LRS client and a lawyer referral service, meaning that they are potentially subject to compelled discovery and disclosure. Lawyer referral services have been regularly questioned by LRS clients about this issue, and most are unable to reassure LRS clients that their communications are clearly privileged. This can hamper the kind of open communication required to make the right referral. Moreover, in recent years in a number of instances, litigants have sought discovery into such communications.

3. Please Explain How the Proposed Policy Position will address the issue

This resolution would urge federal, state, tribal, and territorial courts and legislatures to adopt rules or enact legislation establishing a new evidentiary privilege for confidential communications between an LRS client and a lawyer referral service for the purpose of retaining a lawyer or obtaining legal advice from a lawyer. It would enable lawyer referral services to reassure their clients and thereby maintain the kind of open communications required to make a good referral. It would also eliminate, or at least minimize, the risk that an opposing lawyer might subpoena documents or seek testimony from a lawyer referral service concerning its confidential communications with the other party.

3. Summary of Minority Views

None as of this writing.