

**MEETING AGENDA**

***UTAH SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF EVIDENCE***

**Matheson Courthouse  
450 South State Street  
Council Room (N301)**

**Tuesday – November 29, 2016  
5:15 p.m. to 6:45 p.m.**

**Mr. John Lund, Presiding**

*Light dinner will be served*

- 
1. Welcome & Approval of Minutes (October 11, 2016) (*Attached*).....*Mr. John Lund*
  2. Victim Selection Rule (*Attached*).....*Mr. Paul Boyden*
  3. Report Back on Meeting with the Court (*Attached*).....*Mr. Rick Schwermer*
  4. Rule 902 Committee Note (*Attached*).....*Mr. Rick Schwermer*
  5. Particular Circumstances Subcommittee (*Attached*).....*Linda Jones, et al.*
  6. ABA Proposal for Attorney Client Privilege (*Attached*).....*Mr. John Lund*
  7. Other Business.....*Mr. John Lund*

AGENDA

ITEM

1

**UTAH SUPREME COURT ADVISORY COMMITTEE  
ON THE RULES OF EVIDENCE**

**MEETING MINUTES**

**Tuesday – October 11, 2016  
5:15 p.m.  
Council Room**

*Mr. John Lund, Presiding*

**MEMBERS PRESENT**

Mr. John Lund  
Hon. Matthew D. Bates  
Mr. Christopher R. Hogle  
Ms. Linda M. Jones  
Hon. Keith A. Kelly  
Ms. Lacey Singleton  
Mr. Adam Alba  
Hon. David Mortensen  
Mr. Matthew Hansen  
Ms. Deborah Bulkeley  
Hon. Vernice Trease

**GUESTS PRESENT**

**STAFF PRESENT**

Ms. Nancy Merrill  
Mr. Richard Schwermer

**MEMBERS EXCUSED**

Ms. Teresa Welch  
Ms. Jacey Skinner  
Mr. Terry Rooney  
Ms. Tenielle Brown  
Mr. Ed Havas  
Ms. Michalyn Steele

---

**1. WELCOME AND APPROVAL OF MINUTES: (Mr. John Lund)**

Mr. Lund welcomed everyone to the meeting.

***Motion: Mr. Chris Hogle moved to approve the minutes from the Evidence Advisory meeting on August 23, 2016. Judge Vernice Trease seconded the motion. The motion carried unanimously.***

**2. Proposed Federal Amendments 803 (16) and 902(13) and (14): *Mr. Chris Hogle, Judge Keith Kelly, and Mr. Adam Alba***

Rule 803(16) – The basis for the proposed rule change is that given the exponential development and growth of electronic information since around 1998, the hearsay exception for ancient documents has potentially become an open door for vast amounts of unreliable electronically stored data, especially since no showing of reliability needs to be made to qualify under the exception. The Federal Advisory Committee found that this potential exists now, and therefore proposes the amendment, which would limit this presumption of reliability to documents created before 1998.

The Utah subcommittee is not persuaded that the problem is imminent, and recommends that Utah not adopt the change to the ancient documents standard until it is clear that there is a problem. The full committee discussed the issue at length, and agreed to recommend reconsidering the proposed change until after there is more experience with the issue at the State level.

Rule 902(13) and (14) - The Federal Rules of Evidence Advisory Committee proposes adding two subsections, (13) and (14), to Rule 902, Certified Records Generated by an Electronic Process or System and Certified Data Copied from an Electronic Device, Storage Medium, or File. The aim is to reduce the necessity of routinely producing a witness to authenticate certain generally reliable electronic data. The Federal proposal also incorporates by reference a notice provision found elsewhere in Rule 902.

The Utah subcommittee agrees with the recommendation, but structurally, proposes that instead of referencing the existing notice provisions, they should be restated in each subsection, for clarity. The full committee discussed the changes, acknowledged that the Utah rule would differ slightly from the Federal, but agreed with the subcommittee recommendation.

***Motion:*** *Ms. Linda Jones made a motion to adopt the subcommittee's report. Judge Matt Bates seconded the motion. The motion passed unanimously.*

**3. Eyewitness ID Joint Subcommittee Update: *Judge Matt Bates, Ms. Linda Jones. Ms. Teresa Welch and Ms. Teneille Brown***

Ms. Jones reported on the subcommittees work. She noted the report that the subcommittee is presenting in the meeting is an initial report. The Supreme Court appears concerned about poor eyewitness identification issues and asked the Committee to review two issues; the propriety and policy implications of jury instructions advising jurors on how to view particular circumstance evidence; and to possibly draft a rule or jury instructions to consider.

The subcommittee requested comment from the Evidence Advisory Committee on two issues concerning their report. After looking at how Utah views particular circumstance evidence the subcommittee suggested that one rule is not capable of covering all the different categories of evidence, i.e. law enforcement procedures, investigations, lineups and identifications, and best practices would have to be adopted. Their research suggests that in Utah jury instructions may be preferable.

The next issue the subcommittee looked at is if there is a rule instead of jury instructions what would that rule look like? They found that the types of particular circumstance evidence that the rule would cover is too broad for one rule. The Committee had further discussion about the assignment and the broad topic of eyewitness identification. They noted that the jury instruction committees are not tied directly to the Court. The subcommittee agreed to draft a rule addressing what procedures might need to be followed when determining when eyewitness testimony should be admitted. The subcommittee agreed to study further what other states have done, perform more research on the topic, and create a draft. The committee suggests that the rule should empower trial court judges to adjust instructions for admissibility to evolving social science.

**4. Final Consideration of Rules 412 and 504: *Mr. Rick Schwermer***

Mr. Schwermer reported that there were no comments to proposed rules 412 and 504.

***Motion: Mr. Chris Hogle made a motion to recommend rules 412 and 504 as presented to the Supreme Court. Judge David Mortensen seconded the motion. The motion passed unanimously.***

**5. ABA Proposal for Attorney Client Privilege Amendment: *Mr. John Lund***

Mr. Lund presented proposed material that would be included in the privilege rules. The proposed material would amend Rule 504; it would protect information discussed in the context of a lawyer referral service even when that discussion occurs prior to the attorney client privilege relationship being established. Mr. Lund agreed to investigate the different kinds of lawyer referral services and look at options for the Committee to consider.

**6. Other Business (Mr. John Lund)**

Mr. Lund requested that Mr. Boyden be included on the next agenda to discuss proposed Rule 417.

**Next meeting:**

The Committee scheduled the next Evidence Advisory Committee meeting on Tuesday, November 29<sup>th</sup> at 5:15 p.m.

AGENDA

ITEM

2

1 **JOINT RULES RESOLUTION ON VICTIM SELECTION EVIDENCE**

2 2017 GENERAL SESSION

3 STATE OF UTAH

4 

---

---

  
5 **LONG TITLE**

6 **General Description:**

7 This joint resolution amends the Utah Rules of Evidence by enacting a rule that  
8 prohibits the admissibility of evidence regarding the defendant's selection of the victim,  
9 except as specified.

10 **Highlighted Provisions:**

11 This resolution:

- 12 ▶ provides that a criminal defendant's expressions or associations are not admissible
- 13 as evidence of the defendant's selection of the victim when addressing a victim
- 14 selection penalty enhancement, except when the evidence:
  - 15 • specifically relates to the crime charged; or
  - 16 • is introduced for impeachment.

17 **Money Appropriated in this Bill:**

18 None

19 **Other Special Clauses:**

20 This resolution provides an immediate effective date.

21 **Utah Code of Evidence Affected:**

22 ENACTS:

23 **Rule 417**, Utah Code of Evidence

24 

---

---

  
25 *Be it resolved by the Legislature of the state of Utah, two-thirds of all members elected to each*  
26 *of the two houses voting in favor thereof:*

27 As provided in Utah Constitution Article VIII, Section 4, the Legislature may amend  
28 rules of procedure and evidence adopted by the Utah Supreme Court upon a two-thirds vote of  
29 all members of both houses of the Legislature:

30 Section 1. **Rule 417**, Utah Code of Evidence is enacted to read:

31 **Rule 417. Admissibility of Evidence of the Actor's Expression or Association in**  
32 **Victim Selection Criminal Penalty Enhancements.**

33           Evidence of a criminal defendant's expressions or associations is not admissible to  
34 establish a penalty enhancement for the defendant's selection of the victim unless the evidence  
35 is otherwise admissible under these rules, and:

36           (1) specifically relates to the crime charged; or

37           (2) is introduced for impeachment.

38           Section 2. **Effective date.**

39           This resolution takes effect upon approval by a constitutional two-thirds vote of all  
40 members elected to each house.

---

---

**Legislative Review Note**  
**Office of Legislative Research and General Counsel**



**VICTIM SELECTION PENALTY ENHANCEMENTS**

2017 GENERAL SESSION

STATE OF UTAH

---

---

**LONG TITLE**

**General Description:**

This bill modifies the Utah Criminal Code regarding sentencing for offenses committed against persons selected because of certain personal attributes and modifies the Public Safety Code regarding reporting crimes that exhibit evidence of prejudice.

**Highlighted Provisions:**

This bill:

- ▶ provides that the penalty for a criminal offense is subject to enhancement by one degree if the offender acted against an individual because of the offender's perception of the individual's ancestry, disability, ethnicity, gender, gender identity, national origin, race, religion, or sexual orientation;
- ▶ provides the same enhancement provisions if the criminal offense damages property and the offender acted against the property because of the offender's perception of the individual's ancestry, disability, ethnicity, gender, gender identity, national origin, race, religion, or sexual orientation;
- ▶ states that the provisions do not affect an individual's constitutional right of free speech or any other constitutional rights; and
- ▶ amends the Bureau of Criminal Identification's duties regarding recording crimes that exhibit evidence of prejudice based on specified categories.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**53-10-202**, as last amended by Laws of Utah 2016, Chapter 144

ENACTS:

**76-3-203.12**, Utah Code Annotated 1953

33 REPEALS:

34 **76-3-203.3**, as last amended by Laws of Utah 2007, Chapter 229

35 **76-3-203.4**, as enacted by Laws of Utah 2006, Chapter 184

36

---

---

37 *Be it enacted by the Legislature of the state of Utah:*

38 Section 1. Section **53-10-202** is amended to read:

39 **53-10-202. Criminal identification -- Duties of bureau.**

40 The bureau shall:

41 (1) procure and file information relating to identification and activities of persons who:

42 (a) are fugitives from justice;

43 (b) are wanted or missing;

44 (c) have been arrested for or convicted of a crime under the laws of any state or nation;

45 and

46 (d) are believed to be involved in racketeering, organized crime, or a dangerous

47 offense;

48 (2) establish a statewide uniform crime reporting system that shall include:

49 (a) statistics concerning general categories of criminal activities;

50 (b) statistics concerning crimes that exhibit evidence of prejudice based on [~~race,~~

51 ~~religion, ancestry, national origin, ethnicity, or~~ ancestry, disability, ethnicity, gender, gender

52 identity, national origin, race, religion, sexual orientation, and any other categories that the

53 division finds appropriate; and

54 (c) other statistics as required by the Federal Bureau of Investigation;

55 (3) make a complete and systematic record and index of the information obtained

56 under this part;

57 (4) subject to the restrictions in this part, establish policy concerning the use and

58 dissemination of data obtained under this part;

59 (5) publish an annual report concerning the extent, fluctuation, distribution, and nature

60 of crime in Utah;

61 (6) establish a statewide central register for the identification and location of missing

62 persons, which may include:

63 (a) identifying data including fingerprints of each missing person;

- 64 (b) identifying data of any missing person who is reported as missing to a law  
65 enforcement agency having jurisdiction;
- 66 (c) dates and circumstances of any persons requesting or receiving information from  
67 the register; and
- 68 (d) any other information, including blood types and photographs found necessary in  
69 furthering the purposes of this part;
- 70 (7) publish a quarterly directory of missing persons for distribution to persons or  
71 entities likely to be instrumental in the identification and location of missing persons;
- 72 (8) list the name of every missing person with the appropriate nationally maintained  
73 missing persons lists;
- 74 (9) establish and operate a 24-hour communication network for reports of missing  
75 persons and reports of sightings of missing persons;
- 76 (10) coordinate with the National Center for Missing and Exploited Children and other  
77 agencies to facilitate the identification and location of missing persons and the identification of  
78 unidentified persons and bodies;
- 79 (11) receive information regarding missing persons, as provided in Sections 26-2-27  
80 and 53A-11-502, and stolen vehicles, vessels, and outboard motors, as provided in Section  
81 41-1a-1401;
- 82 (12) adopt systems of identification, including the fingerprint system, to be used by the  
83 division to facilitate law enforcement;
- 84 (13) assign a distinguishing number or mark of identification to any pistol or revolver,  
85 as provided in Section 76-10-520;
- 86 (14) check certain criminal records databases for information regarding motor vehicle  
87 salesperson applicants, maintain a separate file of fingerprints for motor vehicle salespersons,  
88 and inform the Motor Vehicle Enforcement Division when new entries are made for certain  
89 criminal offenses for motor vehicle salespersons in accordance with the requirements of  
90 Section 41-3-205.5;
- 91 (15) check certain criminal records databases for information regarding driving  
92 privilege card applicants or cardholders and maintain a separate file of fingerprints for driving  
93 privilege applicants and cardholders and inform the federal Immigration and Customs  
94 Enforcement Agency of the United States Department of Homeland Security when new entries

95 are made in accordance with the requirements of Section 53-3-205.5.

96 (16) review and approve or disapprove applications for license renewal that meet the  
97 requirements for renewal;

98 (17) forward to the board those applications for renewal under Subsection (16) that do  
99 not meet the requirements for renewal; and

100 (18) within funds appropriated by the Legislature for the purpose, implement and  
101 manage the operation of a firearm safety program, in conjunction with the state suicide  
102 prevention coordinator, as described in this section and Section 62A-15-1101, including:

103 (a) coordinating with the Department of Health, local mental health and substance  
104 abuse authorities, the public education suicide prevention coordinator, and a representative  
105 from a Utah-based nonprofit organization with expertise in the field of firearm use and safety  
106 that represents firearm owners, to:

107 (i) produce a firearm safety brochure with information about the safe handling and use  
108 of firearms that includes:

109 (A) rules for safe handling, storage, and use of firearms in a home environment;

110 (B) information about at-risk individuals and individuals who are legally prohibited  
111 from possessing firearms;

112 (C) information about suicide prevention and awareness; and

113 (D) information about the availability of firearm safety packets;

114 (ii) procure cable-style gun locks for distribution pursuant to this section; and

115 (iii) produce a firearm safety packet that includes both the firearm safety brochure  
116 described in Subsection (18)(a)(i) and the cable-style gun lock described in Subsection  
117 (18)(a)(ii);

118 (b) distributing, free of charge, the firearm safety packet to the following persons, who  
119 shall make the firearm safety packet available free of charge:

120 (i) health care providers, including emergency rooms;

121 (ii) mental health practitioners;

122 (iii) other public health suicide prevention organizations;

123 (iv) entities that teach firearm safety courses; and

124 (v) school districts for use in the seminar, described in Section 53A-15-1302, for  
125 parents of students in the school district;

126 (c) creating and administering a redeemable coupon program described in this section  
127 and Section 76-10-526, that may include:

128 (i) producing a redeemable coupon that offers between \$10 and \$200 off the purchase  
129 of a gun safe from a participating federally licensed firearms dealer, as defined in Section  
130 76-10-501, by a Utah resident who has filed an application for a concealed firearm permit;

131 (ii) advertising the redeemable coupon program to all federally licensed firearms  
132 dealers and maintaining a list of dealers who wish to participate in the program;

133 (iii) printing or writing the name of a Utah resident who has filed an application for a  
134 concealed firearm permit on the redeemable coupon;

135 (iv) mailing the redeemable coupon and the firearm safety brochure to Utah residents  
136 who have filed an application for a concealed firearm permit; and

137 (v) collecting from the participating dealers receipts described in Section 76-10-526  
138 and reimbursing the dealers;

139 (d) in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act,  
140 making rules that establish procedures for:

141 (i) producing and distributing the firearm safety brochures and packets;

142 (ii) procuring the cable-style gun locks for distribution; and

143 (iii) administering the redeemable coupon program; and

144 (e) reporting to the Law Enforcement and Criminal Justice Interim Committee  
145 regarding implementation and success of the firearm safety program:

146 (i) during the 2016 interim, before November 1; and

147 (ii) during the 2018 interim, before June 1.

148 Section 2. Section **76-3-203.12** is enacted to read:

149 **76-3-203.12. Victim selection penalty enhancement -- Definitions -- Penalties.**

150 (1) An actor is subject to enhanced penalties under Subsection (2) if the actor  
151 intentionally selects:

152 (a) the individual against whom the offense is committed in whole or in part because of  
153 the actor's belief or perception regarding an individual's ancestry, disability, ethnicity, gender,  
154 gender identity, national origin, race, religion, or sexual orientation, or the association of that  
155 individual with another individual or group of individuals who have one or more of these  
156 characteristics, whether or not the actor's belief or perception was correct; or

157 (b) the property damaged or otherwise affected by the offense in whole or in part  
158 because of the actor's belief or perception regarding the ancestry, disability, ethnicity, gender,  
159 gender identity, national origin, race, religion, or sexual orientation of the property's owner,  
160 possessor, or occupant, or the association or relationship of the property's owner, possessor, or  
161 occupant with another individual or group of individuals having one or more of these  
162 characteristics, whether or not the actor's belief or perception was correct.

163 (2) (a) If the trier of fact finds beyond a reasonable doubt that an actor has committed a  
164 crime and selected the individual or property in the manner described in Subsection (1), the  
165 actor is subject to an enhanced penalty for the offense under Subsection (2)(b).

166 (b) The enhanced penalties are:

167 (i) a class C misdemeanor is a class B misdemeanor;

168 (ii) a class B misdemeanor is a class A misdemeanor;

169 (iii) a class A misdemeanor is a third degree felony;

170 (iv) a third degree felony is a second degree felony; and

171 (v) a second degree felony is a first degree felony.

172 (3) If the trier of fact finds beyond a reasonable doubt that the actor has committed a  
173 first degree felony and selected the individual or property in the manner described in  
174 Subsection (1), the sentencing judge or the Board of Pardons and Parole shall consider:

175 (a) the actor's selection of the individual or property as an aggravating factor; and

176 (b) whether the penalty for the first degree felony is increased under another provision  
177 of state law.

178 (4) This section does not apply to the actor's selection of a victim because of the  
179 victim's gender in the commission of a sexual offense under Title 76, Chapter 5, Part 4, Sexual  
180 Offenses.

181 (5) This section does not prevent the court from imposing alternative sanctions as the  
182 court finds appropriate.

183 (6) This section does not affect or limit any individual's constitutional right to the  
184 lawful expression of free speech or other recognized rights secured by the Utah Constitution or  
185 the laws of the state, or by the United States Constitution or the laws of the United States.

186 (7) Subsection (1)(a) does not create a special or protected class for any purpose other  
187 than a criminal penalty enhancement under this section.

- 188           Section 3. **Repealer.**
- 189           This bill repeals:
- 190           Section **76-3-203.3, Penalty for hate crimes -- Civil rights violation.**
- 191           Section **76-3-203.4, Hate crimes -- Aggravating factors.**

AGENDA

ITEM

3



1 **Rule 504. Lawyer - Client.**

8/16 draft

2 **(a) Definitions.**

3 (1) "Client" means a person, public officer, corporation, association, or other organization or  
4 entity, either public or private, who is rendered professional legal services by a lawyer or who  
5 consults a lawyer with a view to obtaining ~~professional~~ legal services.

6 (2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to  
7 practice law in any state or nation.

8 (3) "Representative of the lawyer" means a person or entity employed to assist the lawyer in a  
9 rendition of ~~professional~~ legal services.

10 (4) "Representative of the client" means a person or entity:

11 (A) having authority to obtain ~~professional~~ legal services;

12 (B) having authority to act on advice rendered pursuant to legal services ~~on behalf of the client;~~  
13 or

14 (C) specifically authorized to communicate with the lawyer concerning a legal matter.

15 (5) "Communication" includes:

16 (A) advice given by the lawyer in the course of representing the client; and

17 (B) disclosures of the client and the client's representatives to the lawyer or the lawyer's  
18 representatives incidental to the professional relationship.

19 (6) "Confidential communication" means a communication not intended to be disclosed to third  
20 persons other than those to whom disclosure is in furtherance of rendition of ~~professional~~ legal  
21 services to the client or those reasonably necessary for the transmission of the communication.

22 **(b) Statement of the Privilege.** A client has a privilege to refuse to disclose, and to prevent any  
23 other person from disclosing, confidential communications if:

24 (1) the communications were made for the purpose of facilitating the rendition of ~~professional~~  
25 legal services to the client; and

26 (2) the communications were ~~between~~ among:

27 (A) the client and the client's representatives, lawyers, lawyer's representatives, and lawyers  
28 representing others in matters of common interest; or

29 (B) ~~among~~ the client's representatives, lawyers, lawyer's representatives, and lawyers  
30 representing others in matters of common interest.

31 **(c) Who May Claim the Privilege.** The privilege may be claimed by:

- 32 (1) the client;
- 33 (2) the client's guardian or conservator;
- 34 (3) the personal representative of a client who is deceased;
- 35 (4) the successor, trustee, or similar representative of a client that was a corporation, association,
- 36 or other organization, whether or not in existence; and
- 37 (5) the lawyer on behalf of the client.

38 **(d) Exceptions to the Privilege.** Privilege does not apply in the following circumstances:

- 39 (1) Furtherance of the Crime or Fraud. If the services of the lawyer were sought or obtained to
- 40 enable or aid anyone to commit or plan to commit what the client knew or reasonably should
- 41 have known to be a crime or fraud;
- 42 (2) Claimants through Same Deceased Client. As to a communication relevant to an issue
- 43 between parties who claim through the same deceased client, regardless of whether the claims
- 44 are by testate or intestate succession or by *inter vivos* transaction;
- 45 (3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of
- 46 duty by the lawyer to the client;
- 47 (4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a
- 48 document to which the lawyer was an attesting witness; or
- 49 (5) Joint Clients. As to the communication relevant to a matter of common interest between two
- 50 or more clients if the communication was made by any of them to a lawyer retained or consulted
- 51 in common, when offered in an action between any of the clients.

52

53 **2016 Advisory Committee Note** The definition of "Representative of the client" has been

54 revised to be more grammatically correct, and to clarify the application of the term "specifically

55 authorized" in subparagraph (a)(4). The 2011 Advisory Committee Note made clear that a

56 "representative of the client" includes "employees who are specifically authorized to

57 communicate to the lawyer on a legal matter." An individual client might in a similar vein

58 specifically authorize a person, such as a spouse, to communicate with the lawyer on a specific

59 matter, with the same assurance of confidentiality under the privilege. The authorization need not

60 be written, but may be inferred from the circumstances.

61 The 2011 Advisory Committee Note recognizes that a representative of the client may be an  
62 independent contractor (such as a consultant or an advisor). So too might a spouse or other  
63 individual be specifically authorized to communicate with the lawyer, as described above.  
64 Minor typographical errors were also corrected.

AGENDA

ITEM

4

## Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

....

**(13) Certified records generated by an electronic process or system.** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that must be signed in a manner that, if falsely made, would subject the signer to criminal penalty under the laws where the certification was signed. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to challenge them.

**(14) Certified data copied from an electronic device, storage medium, or file.** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that must be signed in a manner that, if falsely made, would subject the signer to criminal penalty under the laws where the certification was signed. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the data—and must make the data and the certification available for inspection—so that the party has a fair opportunity to challenge them.

AGENDA

ITEM

5

**Massachusetts Rule of Evid. (ALM G. Evid) 1112:**

**(a) Eyewitness Identification Generally.** The admissibility of eyewitness identification evidence is governed both by Article 12 of the Massachusetts Declaration of Rights and common-law principles of fairness.

**(b) Out-of-Court Identification.**

**(1) Photographic Array.**

**(A) Suppression of Identification.** Identification based on a pretrial photographic procedure is not subject to suppression unless the procedures employed in showing the photographic array were unnecessarily suggestive and conducive to mistaken identification. In making this ruling, the trial judge should consider

**(i)** whether the police properly informed the party making the identification that (1) the wrongdoer may or may not be in the depicted photographs, (2) it is just as important to clear a person from suspicion as to identify a person as the wrongdoer, (3) the depicted individuals may not appear exactly as they did on the date of the incident because features such as weight and head and facial hair may change, and (4) the investigation will continue regardless of whether an identification is made;

**(ii)** whether the party making the identification was asked to state how certain he or she is of any identification;

**(iii)** whether the array was composed of persons who possess reasonably similar features and characteristics; and

**(iv)** whether the array contained at least five fillers for every photograph of the suspect.

**(B) Suggestive Identification.** If the trial judge finds that the procedures employed in the showing of the photographic array were so unnecessarily suggestive and conducive to mistaken identity as to deny the defendant due process of law, the Commonwealth may offer evidence of the identification only if it establishes by clear and convincing evidence that the proffered identification has a source independent of the suggestive photographic array.

**(C) Admissibility of Photographs.** Police photographs used in an out-of-court identification may be admitted if (i) the Commonwealth demonstrates some need for their introduction, (ii) the photographs are offered in a form that does not imply a prior criminal record, and (iii) the manner of their introduction does not call attention to their source.

**(2) Lineup.** The considerations present with photographic arrays also apply to identifications resulting from lineups.

**(3) Showup.** Showup identifications are generally disfavored. However, for good cause shown, the trial judge may admit evidence of such an identification if the showup was not unnecessarily or impermissibly suggestive. This determination involves an inquiry of whether the Commonwealth has shown that police had good cause to use a one-on-one identification procedure and whether police avoided any special elements of unfairness.

**(c) In-Court Identification.**

**(1) Where There Has Been an Out-of-Court Identification.**

**(A)** Generally, an in-court identification of the defendant by an eyewitness who was present during commission of the crime is admissible if the eyewitness (i) participated

before trial in an identification procedure and (ii) has made an unequivocal, positive identification of the defendant.

**(B)** If the out-of-court identification is determined to have been unnecessarily suggestive, an in-court identification is not admissible unless the Commonwealth establishes, by clear and convincing evidence, that it has a source independent of and unrelated to the unnecessarily suggestive out-of-court identification.

**(2) Where There Has Been No Out-of-Court Identification.**

**(A)** If an eyewitness who was present during the commission of a crime did not participate before trial in an identification procedure or has made something less than an unequivocal, positive identification, an in-court identification is not admissible unless there is good reason for its admission.

**(B)** In cases subject to Subsection (c)(2)(A), the Commonwealth must move in limine to admit the in-court identification. The Commonwealth has the burden of production on whether there is good reason for admitting the in-court identification. The defendant has the burden of persuasion to establish that an in-court identification would be unnecessarily suggestive and that there is not good reason for it.

**(d) Testimony of Third-Party Observer.** If the eyewitness testifies at trial and is subject to cross-examination, a third party who observed the eyewitness's out-of-court identification may testify about that identification (1) where the eyewitness cannot identify a defendant at trial but acknowledges having made an out-of-court identification of the defendant, or (2) where the eyewitness denies or fails to remember having made an identification. The third party's testimony about the out-of-court identification is admissible as substantive evidence.

**(e) Expert Testimony.** Expert testimony on the issue of eyewitness identification is admissible at the discretion of the trial judge.

**(f) Jury Instruction.**

**(1) Positive Eyewitness Identification.** Where an eyewitness has made a positive identification and its reliability is an important issue at trial, the judge should instruct the jury regarding their evaluation of the eyewitness identification testimony based on the provisional model jury instruction.

**(2) Eyewitness Identification Testimony, But No Positive Identification.** Where an eyewitness has not made a positive identification but has provided a physical description of the perpetrator or his or her clothing, and the defendant has requested an instruction, the judge should instruct the jury regarding their evaluation of the eyewitness identification testimony based on a modified version of the provisional model jury instruction.

**(3) Eyewitness Has Failed to Identify the Defendant.** Where an eyewitness has failed to identify the defendant, the judge should exercise discretion in determining whether to instruct the jury regarding that failure.



## Utah Jury Instruction

### CR404 Eyewitnesses Identification [Long instruction].

An important question in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt that the crime was committed AND that the defendant was the person who committed the crime. If you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The testimony you have heard concerning identification represents the witness's expression of (his) (her) belief or impression. You don't have to believe that the identification witness was lying or not sincere to find the defendant not guilty. It is enough that you conclude that the witness was mistaken in (his) (her) belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

(1) Did the witness have an adequate opportunity to observe the person who committed the crime? In answering this question, you should consider:

- (a) the length of time the witness observed that person;
- (b) the distance between the witness and that person;
- (c) the extent to which that person's features were visible and undisguised;
- (d) the lighting conditions at the time of observation;
- (e) whether there were any distractions occurring during the observation;
- (f) any other circumstance that affected the witness's opportunity to observe the person committing the crime.

(2) Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider whether the capacity of the witness was impaired by:

- (a) stress or fright at the time of observation;
- (b) personal motivations, biases or prejudices;
- (c) uncorrected visual defects;
- (d) fatigue or injury;
- (e) drugs or alcohol.

[You should also consider whether the witness is of a different race than the person identified. Identification by a person of a different race may be less reliable than identification by a person of the same race.]

(3) Even if the witness had adequate opportunity and capacity to observe the person who committed the crime, the witness may not have focused on that person unless the witness was aware that a crime was being committed. In that instance you should consider whether the witness was sufficiently attentive to that person at the time the crime occurred. In answering this question you should consider whether the witness knew that a crime was taking place during the time (he) (she) observed the person's actions.

(4) Was the witness's identification of the defendant completely the product of the witness's own memory? In answering this question, you should consider:

- (a) the length of time that passed between the witness's original observation and the time the witness identified the defendant;
- (b) the witness's mental capacity and state of mind at the time of the identification;
- (c) the exposure of the witness to opinions, to photographs, or to any other information or

influence that may have affected the independence of the identification of the defendant by the witness;

[(d) any instances when the witness either identified or failed to identify the defendant;]

[(e) any instances when the witness gave a description of the person that was either consistent or inconsistent with the defendant's appearance;]

(f) the circumstances under which the defendant was presented to the witness for identification.

[You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.]

[You may also take into account that identifications made from seeing the person are generally more reliable than identifications made from a photograph.]

[A witness's level of confidence in (his) (her) identification of the perpetrator is one of many factors that you may consider in evaluating whether the witness correctly identified the perpetrator. However, a witness who is confident that (he) (she) correctly identified the perpetrator may be mistaken.]

Again, I emphasize that it is the prosecution's burden to prove beyond a reasonable doubt that the defendant is the person who committed the crime.

## ***State v. Ramirez*, 817 P.2d 774 (Utah 1991)**

The admissibility of eyewitness identification evidence is governed by the due process clause of the Utah Constitution. *Id.* at 780.

“The analytical model to be followed under article I, section 7 of the Utah Constitution is structured around the criteria discussed in [*State v.*] *Long*. The ultimate question to be determined is whether, under the totality of the circumstances, the identification was reliable. In *Long*, we gave the following list of pertinent factors by which reliability must be determined”:

- (1) [T]he opportunity of the witness to view the actor during the event;
- (2) the witness's degree of attention to the actor at the time of the event;
- (3) the witness's capacity to observe the event, including his or her physical and mental acuity;
- (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and
- (5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.

*Id.* at 781 (citing *State v. Long*, 721 P.2d 483, 493 (Utah 1986)).<sup>1</sup>

The court further explained the essential components of each factor.

**First, the opportunity of the witness to view the actor during the event.** The court stated: “Here, pertinent circumstances include the length of time the witness viewed the actor; the distance between the witness and the actor; whether the witness could view the actor's face; the lighting or lack of it; whether there were distracting noises or activity during the observation; and any other circumstances affecting the witness's opportunity to observe the actor.” *Id.* at 782.

**Second, the witness's degree of attention to the actor at the time of the event.** In *Ramirez* there were two suspects and the witness gave conflicting information about his degree of attention to the second suspect, identified as Ramirez. Specifically, although the eyewitness was “fully aware” that a crime was taking place and one suspect was threatening him with a pipe, he testified he stared at the second suspect to get a good description. But the witness gave a more detailed description of the first suspect at the time of the crime. *Id.* at 783.

**Third, the witness's capacity to observe the event, including his or her physical and mental acuity.** The court stated, “Here, relevant circumstances include whether the witness's capacity to observe was impaired by stress or fright at the time of the

---

<sup>1</sup> The United States Supreme Court previously listed the following five factors as relevant to the analysis: “the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Ramirez*, 771 P.2d 779 (citing *Neil v. Biggers*, 409 U.S. 188, 199 (1972)). The *Long* factors differ from the *Briggs* factors because, according to the court, “several of the criteria listed by the [United States Supreme] Court are based on assumptions that are flatly contradicted by well-respected and essentially unchallenged empirical studies.” *Ramirez*, 771 P.2d at 780. Indeed, the Utah Supreme Court has criticized some of the factors in *Biggers*. *Id.* at 781. Moreover, the court considered the *Long* factors to “precisely define the focus of the relevant inquiry.” *Id.* at 781.

observation, by personal motivations, biases, or prejudices, by uncorrected visual defects, or by fatigue, injury, drugs, or alcohol.” *Id.* at 783.

**Fourth, whether the witness’s identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion.** In addressing spontaneity and consistency, the court identified the relevant circumstances as “including” the following: “the length of time that passed between the witness’s observation at the time of the event and the identification of defendant; the witness’s mental capacity and state of mind at the time of the identification; the witness’s exposure to opinions, descriptions, identifications, or other information from other sources; instances when the witness or other eyewitnesses to the event failed to identify defendant; instances when the witness or other eyewitnesses gave a description of the actor that is inconsistent with defendant; and the circumstances under which defendant was presented to the witness for identification.” *Id.* at 783.

In addition, the court considered suggestibility to be a critical factor. It noted that the identification took place in the middle of the night, the defendant had a dark complexion and he was the only person “at the showup,” during which his hands were cuffed behind his back with headlights trained on him. Also, officers told the witness “that they had apprehended someone who fit the description of one of the robbers” and the witness made the identification from the back of the police cruiser. *Id.* at 784.

**Fifth, the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it correctly.** This factor includes considering “whether the event was an ordinary one in the mind of the observer during the time it was observed, and whether the race of the actor was the same as the observers.” *Id.* at 781.

The court will consider the factors under the totality of the circumstances. *Id.* “If, after performing this analysis, the identification is found to be unreliable, it is not to be admitted.” *Id.*

Re an instruction: If eyewitness identification is a “central issue in a case,” a cautionary instruction about the weaknesses of such evidence must be given. “Although research has convincingly demonstrated the weaknesses inherent in eyewitness identification, jurors are, for the most part, unaware of these problems. People simply do not accurately understand the deleterious effects that certain variables can have on the accuracy of the memory processes of an honest eyewitness. Moreover, the common knowledge that people do possess often runs contrary to documented research findings.” *Id.* at 779-80.

***State v. Hoffhine*, 2001 UT 4, 20 P.3d 265**: The court relies on the five *Ramirez* factors for a showup identification. *Id.* ¶18. “The purpose of analyzing the facts under the *Ramirez* test is for the trial court to determine, as a threshold matter, whether the identification is constitutionally reliable and thus, whether it can properly be admitted into evidence.” *Id.* ¶16.

***State v. Butterfield*, 2001 UT 59, ¶42, 27 P.3d 1133**: “Because of the inherent deficiencies in eyewitness identification recognized in *Long*, trial courts are required to give a cautionary jury instruction when eyewitness identification ‘is a central issue in a case and such an instruction is requested by the defense.’”

***State v. Hubbard*, 2002 UT 45, ¶26, 48 P.3d 953**: “Even if law enforcement procedures are appropriate and do not violate due process, eyewitness identification testimony must still pass the gatekeeping function of the trial court and be subject to a preliminary determination—whether the identification is sufficiently reliable to be presented to the jury.”

***State v. Guzman*, 2006 UT 12, ¶17, 133 P.3d 363**: The trial court must determine under the totality of the circumstances whether eyewitness identification evidence is reliable.

## State v. Gallegos, 2016 UT App 172, 380 P.3d 44:

The court considered the admissibility of a photo array under the Utah Constitution. To aid in the analysis, the court assessed a two-step test for admissibility of eyewitness identification under the federal due process clause and articulated in *Perry v. New Hampshire*. The *Perry* Court identified the two steps as follows: “At step one, the court determines whether the identification was the product of ‘unnecessarily suggestive’ law enforcement procedures.” *Id.* ¶33 (citing *Perry v. New Hampshire*, 132 S.Ct. 716 (2012)). “At step two, the court determines ‘whether under the ‘totality of the circumstances’ the identification was reliable even though the confrontation procedure was suggestive.” *Id.* (citing *Biggers*, 409 U.S. at 199).

**Step one:** the court determines whether the identification was the product of “unnecessarily suggestive” law enforcement procedures. “If ‘unnecessarily suggestive’ identification procedures were not used, the due process inquiry ends. But if ‘unnecessarily suggestive’ procedures were used, the court proceeds to step two.” *Id.* ¶33 (internal citations omitted).

**Step two:** the court determines whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive. This step implicates “a variety of factors, includ[ing] the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.” *Id.*

Under the Utah analysis, police misconduct—i.e., suggestibility—is not a threshold question. *Id.* ¶40. Rather, “the single focus of a Utah trial court’s constitutional admissibility analysis ‘is whether, under the totality of the circumstances, the identification was reliable.’” *Id.* ¶34.

The court relies on the standard set forth in *Ramirez*. Under that standard, the prosecution bears the burden of demonstrating admissibility and must lay a foundation to enable the court to make preliminary factual findings about the admissibility of the evidence. *Id.* ¶34. In addition, the court asserts that the *Ramirez* factors “offer guidance concerning which considerations may bear on the reliability of an eyewitness identification. But they offer no guidance on how reliable an identification must be to pass constitutional scrutiny. The holding of *Ramirez* suggests the bar is not high.” *Id.* ¶42.

The court listed and analyzed the evidence under the five factors, and it upheld admissibility of the evidence. The analysis for factor four, however, is worth noting. With respect to factor four, the court pointed out that the process “was not recorded.” *Id.* ¶53. Also, “the photo array violated best practices in several ways: the size difference in the photos, the different URLs, the lack of a double blind procedure, the lack of a recording, and the delay between the events in question and the identification.” *Id.* ¶55.

**State v. Lujan, 2015 UT App 199, 357 P.3d 20:**

The court of appeals held that the eyewitness identification in a showup was not sufficiently reliable to support admissibility under the *Ramirez* standard.

It listed “indications of unreliability. For instance, the man failed to identify Defendant at the lineup, which is an important consideration under the fourth *Ramirez* factor. Moreover, the man's original description of the robber omitted any mention of facial hair and included a definite recollection of long, straight hair. In contrast, Defendant had a goatee and a shaved head, both of which are features that seem hard to miss at a distance of ten inches, and the man did not miss the shaved head because it was covered with a beanie—he ‘definitely’ remembered hair protruding well below the beanie.” *Id.* ¶14.

In a footnote, the court of appeals urged the Utah Supreme Court to reconsider *Ramirez*. The Utah Supreme Court subsequently granted a petition for a writ of certiorari in the case. The case is scheduled to be argued in the supreme court in December 2016.

AGENDA

ITEM

6



**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. Wolfenbarger*, 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.

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.<sup>1</sup> The attorney-

---

<sup>1</sup> 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

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

---

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.

prompted to do so, these LRS clients are likely to be seriously harmed in the event of an 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.”<sup>2</sup>

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.”<sup>3</sup>

<sup>2</sup> See Resolution (93A 10D),

<sup>3</sup> 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

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.”<sup>4</sup>

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)

<sup>4</sup> 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



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.