MEETING AGENDA

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

Matheson Courthouse
450 South State Street
Education Room (N302)

Tuesday – October 11, 2016
5:15 p.m. to 6:45 p.m.

Mr. John Lund, Presiding

Light dinner will be served

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1. Welcome & Approval of Minutes (August 23, 2016) ***(Attached)***.....*Mr. John Lund*

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

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

4. Final Consideration of Rules 412 and 504 ***(Attached)***.....*Mr. Rick Schwermer*

5. ABA Proposal for Attorney Client Privilege Amendment ***(Attached)***……*Mr. John Lund*

6. Other Business……..*Mr. John Lund*

AGENDA ITEM 1

UTAH SUPREME COURT ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

MEETING MINUTES

Tuesday – August 23, 2016
5:15 p.m.
Council Room

Mr. John Lund, Presiding

MEMBERS PRESENT
Ms. Michalyn Steele
Hon. Matthew D. Bates
Mr. Christopher R. Hogle
Mr. Adam Alba
Hon. Keith A. Kelly
Mr. John R. Lund
Mr. Terry Rooney
Judge David Mortensen
Ms. Jacey Skinner
Ms. Teresa Welch
Mr. Ed Havas
Hon. Vernice Trease
Mr. Matthew Hansen
Ms. Deborah Bulkeley
Ms. Lacey Singleton

GUESTS PRESENT
Mr. Paul Boyden

STAFF PRESENT
Ms. Nancy Merrill
Mr. Richard Schwermer
Mr. James Ishita

MEMBERS EXCUSED
Teneille Brown
Ms. Linda M. Jones

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

Mr. Lund welcomed everyone to the meeting.

The following correction was made to the Evidence Advisory Committee minutes on May 17, 2016: Item 3 should read; Terry "Rooney".

Motion: ***Mr. Ed Havas moved to approve the amended minutes from the Evidence Advisory Committee meeting on May 17, 2016. Mr. Terry Rooney seconded the motion. The motion passed unanimously.***

2. Welcome and Introduction of New Members (Mr. John Lund)

Mr. Lund welcomed the five newest members to the Evidence Advisory Committee.

3. Proposed New Rule 417*(attached)* (Mr. Paul Boyden)

Mr. Schwermer began the discussion by informing the Committee about the background of the Hate Crimes Bill and reviewing the last rule of evidence proposed during the 2016 legislative session. He noted that a draft of that proposed rule was brought to the Evidence Advisory Committee last year.

Mr. Boyden passed out a protected draft of Rule 417 to the Evidence Advisory Committee members. He discussed a potential bill that would amend the criminal code to enhance the penalty of the crime based on victim selection. The Committee had further discussion about the implications of the potential penalty enhancement amendment and discussed language suggestions with Mr. Boyden for the rule. After further discussion Mr. Lund suggested that Mr. Boyden consider the input from today's discussions and redraft the proposed rule for the Evidence Advisory Committee to review at a future meeting.

4. Federal Rule Amendments 803(16) and 902(*attached*) (Mr. John Lund)

Mr. Lund suggested putting together a work group to address the proposed changes in the federal rules. Mr. Chris Hogle, Judge Keith Kelly, and Mr. Adam Alba agreed to work on the subcommittee.

5. Progress Report on Eyewitness ID Joint Subcommittee (Hon. Matthew Bates)

Judge Bates reviewed the background on this issue. The Supreme Court asked the Evidence Advisory Committee and the Rules of Criminal Procedures Committee jointly to research the following issues:

(A) The propriety and policy implications of a court issuing jury instructions aimed at advising a jury how to assess the reliability and credibility of certain kinds of witnesses or categories of evidence particularly in cases in which the defendant may not be able to afford an expert witness.

(B) The possibility of addressing the matters dealing with jury instructions through a rule of evidence or procedure.

Judge Bates reported that the joint subcommittee members have taken specific assignments to research specific topics. Judge Bates will update the Evidence Advisory Committee on the progress of the Eyewitness ID Joint Subcommittee as needed.

6. Other Business (Mr. John Lund)

Next Meeting: October 11, 2016
5:15 p.m.
AOC

AGENDA ITEM 2

MEMORANDUM

To: Utah Supreme Court Advisory Committee on the Rules of Evidence

From: Judge Keith Kelly, Chris Hogle, and Adam Alba

Date: October 6, 2016

Re: Proposed Federal Amendments 803(16) and 902(13) and (14)

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Evidence recently proposed amendments to Rules 803(16) and 902(13) and (14), with a recommendation that they be approved. At its meeting on August, 23, 2016, the Utah Supreme Court Advisory Committee on the Rules of Evidence ("Advisory Committee") formed a subcommittee to analyze whether the proposed amendments to Rules 803(16) and 902 should be considered for adoption in the Utah Rules of Evidence. The subcommittee consists of Judge Keith Kelly, Chris Hogle, and Adam Alba. This memorandum contains our recommendations. In short, the subcommittee recommends that no immediate action be taken with regard to Rule 803(16). The subcommittee further recommends that a rule similar to the proposed 902(13) and (14) be considered for adoption for the Utah Rules of Evidence.

II. PROPOSED RULE 803(16)

The amendment to Rule 803(16) would make the following changes to the ancient documents hearsay exception:

Rule 803: Exceptions to the Rule Against Hearsay -Regardless - of Whether the Declarant is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . .

(16) Statements in Ancient Documents. A statement in a document ~~that is at least 20 years old~~ that was prepared before January 1, 1998, and whose authenticity is established.

The Advisory Committee to the Federal Rules of Evidence recommends the adoption of this amendment "due to the risk" that the ancient documents exception will soon "be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI)." Committee Note to Proposed 803(16). The committee further notes that "[g]iven the exponential development and grown of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception." *Id.* In the literature favoring the amendment, there is also an undercurrent of discontent with the ancient documents exception in general.

This subcommittee fully appreciates the advantages of having Utah's evidence rules mirror the federal rules of evidence, and the potential disadvantages of differences. The subcommittee, however, does not share either the discontent with the ancient documents exception or the fears that the proliferation of ESI in litigation has led

to, or will lead to, an abuse of the exception. Utah's version of the ancient documents exception reads:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:
>
> . . .
>
> (16) *Statements in ancient documents*. A statement in a document that is at least 20 years old and whose authenticity is established.

Utah R. Evid. 803(16). Forty-nine states have a similar hearsay exception. Peter Nicolas, *Amending the Ancient Documents Hearsay Exception*, 63 UCLA L. Rev. Disc. 172 n.35 (2015). The ancient documents exception is, itself, ancient. It has existed in common law for centuries. It exists due to the scarcity of relevant, 20-year-old witness recollections. If there is a relevant document that is at least 20 years old, it may be the only relevant evidence. The exception is helpful in cases involving transactions and occurrences occurring in the distant past, such as quiet title and water rights cases.

The proponents of revised 803(16) presented no evidence of any abuse of the ancient documents exception. Though they predicted that ESI storage will preserve virtually all documents for more than 20 years, their prediction conflicts with common experience. Sophisticated companies do not maintain all 20-year-old ESI. ESI storage entails costs not only for storage equipment and maintenance, but also for cybersecurity and the liability associated with data appropriation by hackers. Such costs will not likely be absorbed for 20-year-old data unless the data is important.

Thus, the requirement that the data be at least 20 years old provides some assurance of reliability of the evidence. In addition, courts can exclude unreliable ancient documents with Rule 403. *See State v. Fulton*, 742 P.2d 1208, 1218 (Utah

1987) (holding that Rule 403 can be employed to ensure that the jury will not be exposed to unreliable evidence). Furthermore, one commentator has argued that, "as with all other hearsay exceptions, the ancient documents exception is only applicable if the declarant spoke from personal knowledge," and "the overwhelming majority view is that the exception—like nearly all other hearsay exceptions—does not encompass hearsay within hearsay." Nicolas, 63 UCLA L. Rev. Disc. 172. These limitations on the admissibility for hearsay may act to further guard against the admission of unreliable evidence in ancient documents.

Accordingly, the subcommittee recommends that no change be made to Utah Rule of Evidence 803(16) at this time, and that a proper course of action is to wait to see if any abuse of 803(16) occurs with the growing use of ESI in litigation.

III. PROPOSED RULE 902(13) AND (14)

The Federal Rules of Evidence Advisory Committee proposes adding two subsections, (13) and (14), to Rule 902 so that the rule would read as follows:

> **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 complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(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 complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

The Federal Advisory Committee states that this amendment is necessary to reduce the expense and inconvenience "of producing a witness to authenticate an item of electronic evidence [that] is often unnecessary." Committee Note to Proposed 902(13); *see also* Committee Note to Proposed 902(14). The amendment "provides a procedure under which the parties can determine in advance of trial whether a real challenge to authenticity will be made, and can then plan accordingly." *Id.*

The subcommittee supports the adoption of a similar amendment to the current Rule 902 of the Utah Rules of Evidence, with certain clarifying modifications that are consistent with Utah R. Civ. P. 902(11) and (12). Specifically, the subcommittee proposes:

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.

Rather than referring to the certification and notice requirements, the subcommittee proposes that such requirements be included in 902(13) and (14). Doing so provides clarification and is consistent with Utah's 902(12), which specifies, rather than references, the certification and notice requirements.

With respect to 902(14), the subcommittee suggests clarification of the written notice requirement for cases in which an expert witness is the "qualified person." New subsection (14) would apply to electronic data that is presented as having been stored in a particular electronic device, storage medium, or file. Currently, data copied from such sources are authenticated by a "hash value," which is a sequence of characters produced by an algorithm based on the digital contents of the source. Some have likened data's "hash value" to its DNA. Typically, the computation of a "hash value," like the profiling of a person's DNA, is done by expert witnesses, the disclosure of whom is governed by Utah R. Civ. P. 26(a)(4). Accordingly, along with its recommendation for the adoption of subsections (13) and (14), the subcommittee suggests that, if 902(14) is adopted for Utah, an advisory committee note accompany the amendment, explaining that nothing in the rule is intended to supplant Rule 26(a)(4) in cases where an expert witness is engaged to provide the requisite certification.

AGENDA ITEM 4

Rule 412. Admissibility of Victim's Sexual Behavior or Predisposition **Draft 08/16**

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:

(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or

(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and

(C) serve the motion on all parties.

(2) Notice to the Victim. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing ~~must be and remain sealed~~ are classified as protected.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

2016 Advisory Committee Note. The 2016 amendment changes the classification of records described in subparagraph (c)(3) from sealed to protected. See CJA Rule 4-202.02.

Rule 504. Lawyer - Client. **8/16 draft**

(a) Definitions.

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

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

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

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

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

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

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

(5) "Communication" includes:

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

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

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

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

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

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

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

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

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

(1) the client;

(2) the client's guardian or conservator;

(3) the personal representative of a client who is deceased;

(4) the successor, trustee, or similar representative of a client that was a corporation, association, or other organization, whether or not in existence; and

(5) the lawyer on behalf of the client.

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

(1) Furtherance of the Crime or Fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by *inter vivos* transaction;

(3) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client;

(4) Document Attested by Lawyer. As to a communication relevant to an issue concerning a document to which the lawyer was an attesting witness; or

(5) Joint Clients. As to the communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

2016 Advisory Committee Note The definition of "Representative of the client" has been revised to be more grammatically correct, and to clarify the application of the term "specifically authorized" in subparagraph (a)(4). The 2011 Advisory Committee Note made clear that a "representative of the client" includes "employees who are specifically authorized to communicate to the lawyer on a legal matter." An individual client might in a similar vein specifically authorize a person, such as a spouse, to communicate with the lawyer on a specific matter, with the same assurance of confidentiality under the privilege. The authorization need not be written, but may be inferred from the circumstances.

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

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One thought on "Rules of Evidence – Comment Period Closed October 3, 2016"

Grace Acosta
September 6, 2016 at 3:28 pm

My only concern is that defense attorneys do not have control over a physician's schedule. There are very few doctors who will agree to perform medical examinations to begin with (because of being attacked either at a deposition or at trial). I am concerned that if we put such tight time constraints on the doctors that even less will be willing to perform the examinations. I would support a rule that states that we must disclose to opposing counsel within 28 days of receipt of the report—but only giving doctors 28 days to write a report is unrealistic. The best IME doctors are the ones who have active practices….scheduling and writing these reports are very time consuming. I rarely get my report back in 30 days (much less 28). If a case is complicated, the doctor could be required to review 1000's of pages of medical records and summarize–this cannot be done in a short period of time. What will occur is that this rule change will force us to use "mill" doctors who only do IME's–further reducing credibility of the doctor, increasing expense and limiting our pool of doctors from which we can choose. I don't think this time limit is reasonable and I think it would harm the litigants considerably.

- -Rules of Evidence
- -Rules of Juvenile Procedure
- -Rules of Professional Conduct
- -Rules of Small Claims Procedure
- CJA01-0201
- CJA01-0204
- CJA01-0205
- CJA01-0304
- CJA01-0305
- CJA02-0103
- CJA02-0104
- CJA02-0106.01
- CJA02-0106.02
- CJA02-0106.03
- CJA02-0106.04
- CJA02-0106.05
- CJA02-0204
- CJA02-0206
- CJA03-0101
- CJA03-0102
- CJA03-0104
- CJA03-0109
- CJA03-0111
- CJA03-0111.01
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- CJA03-0111.05
- CJA03-0111.06
- CJA03-0112
- CJA03-0114
- CJA03-0115
- CJA03-0116
- CJA03-0201
- CJA03-0201.02
- CJA03-0202
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- CJA03-0407
- CJA03-0408
- CJA03-0410

AGENDA ITEM 5

Utah State Courts

Nancy Merrill <nancym@utcourts.gov>

Attorney client privilege

John R. Lund <JLund@parsonsbehle.com> Sun, Aug 28, 2016 at 4:06 PM
To: Rick Schwermer <ricks@utcourts.gov>
Cc: Nancy Merrill <nancym@utcourts.gov>, Robert Rice <rrice@rqn.com>

Rick,

The bar would like to see the attached ABA position implemented in Utah. Let's add this to the agenda for our next meeting. Shouldn't be too tough.

Thanks,

John

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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.

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

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

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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."[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]

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[2] *See* Resolution (93A 10D),

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[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

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

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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.

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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.

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