

## RESOLUTION 08-12-2012

### DIGEST

#### Privilege for Communications Between Lawyer Referral Services and Client

Adds Evidence Code sections 963 through 968 and amends section 912 to add lawyer referral services to the other authorized recipients of privileged information.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 03-01-2008, which was withdrawn.

#### Reasons:

This resolution adds Evidence Code sections 963 through 968 and amends section 912 to add lawyer referral services to the other authorized recipients of privileged information. This resolution should be approved in principle because the conversation between a client and contact at a lawyer referral service is currently unprotected from discovery by the client's adversary in any legal proceeding.

Lawyer referral services are presently a hole in the chain of privileged information that flows between lawyer and client. Typically, a client of the service will explain why he or she needs an attorney to an employee of the service. The employee will then diagnose the type of matter (domestic, personal injury, etc.) and refer the client to three attorneys who handle the client's type of case.

If litigation results, counsel opposing the client may attempt to discover information related to the claim by subpoenaing documents and/or deposing the referral service employee. There is currently no bar to this type of discovery. This resolution would provide that bar.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add California Evidence Code, Article 3.1, sections 963-968 and amend California Evidence Code section 912 to read as follows:

1 § 963

2 As used in this article, "lawyer referral service" means a lawyer referral service certified  
3 under and operating in compliance with California Business and Professions Code § 6155 and  
4 the minimum standards, rules, and regulations of the State Bar governing lawyer referral  
5 services.

6  
7 § 964

8 As used in this article, "client" means a person who consults a lawyer referral service for  
9 the purpose of retaining a lawyer or securing legal service or advice from a lawyer in his  
10 professional capacity.

11 § 965

12 As used in this article, “confidential communication between client and lawyer referral  
13 service” means information transmitted between a client and lawyer referral service in the course  
14 of that relationship and in confidence by a means which, so far as the client is aware, discloses  
15 the information to no third persons.

16  
17 § 966

18 Subject to Section 912 and except as otherwise provided in this article, the client, whether  
19 or not a party, has a privilege to refuse to disclose, and to prevent the lawyer referral service  
20 from disclosing, a confidential communication between client and lawyer referral service.

21  
22 § 967

23 The lawyer referral service who received or made a communication subject to the  
24 privilege under this article shall claim the privilege if the communication is sought to be  
25 disclosed and the client has not consented to such disclosure.

26  
27 § 968

28 There is no privilege under this article as to a communication relevant to an issue of  
29 breach, by the lawyer referral service or by the client, of a duty arising out of the relationship.

30  
31 § 912

32 (a) Except as otherwise provided in this section, the right of any person to claim a  
33 privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client  
34 privilege), 980 (privilege for confidential marital, communications), 994 (physician-patient  
35 privilege), 1014 (psychotherapist-patient privilege), 1033 (privilege of penitent), 1034 (privilege  
36 of clergyman), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence  
37 counselor-victim privilege) is waived with respect to a communication protected by the privilege  
38 if any holder of the privilege, without coercion, has disclosed a significant part of the  
39 communication or has consented to disclosure made by anyone. Consent to disclosure is  
40 manifested by any statement or other conduct of the holder of the privilege indicating consent to  
41 the disclosure, including failure to claim the privilege in any proceeding in which the holder has  
42 the legal standing and opportunity to claim the privilege.

43 (b) Where two or more persons are joint holders of a privilege provided by Section 954  
44 (lawyer-client privilege), 994 (physician-patient privilege), 1014 (psychotherapist-patient  
45 privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5 (domestic violence  
46 counselor-victim privilege), a waiver of the right of a particular joint holder of the privilege to  
47 claim the privilege does not affect the right of another joint holder to claim the privilege. In the  
48 case of the privilege provided by Section 980 (privilege for confidential marital  
49 communications), a waiver of the right of one spouse to claim the privilege does not affect the  
50 right of the other spouse to claim the privilege.

51 (c) A disclosure that is itself privileged is not a waiver of any privilege.

52 (d) A disclosure in confidence of a communication that is protected by a privilege  
53 provided by Section 954 (lawyer-client privilege), 994 (physician-patient privilege), 1014  
54 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), or 1037.5  
55 (domestic violence counselor-victim privilege), when disclosure is reasonably necessary for the

56 accomplishment of the purpose for which the lawyer, physician, psychotherapist, sexual assault  
57 counselor, or domestic violence counselor was consulted, is not a waiver of the privilege.

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

**PROPONENT:** Contra Costa County Bar Association

### **STATEMENT OF REASONS**

Existing Law: Contains no provision stating that communications between a client and lawyer referral service are privileged. This could allow discovery of such communications by an opposing or third party.

This Resolution: Would add Evidence Code sections 963-968 to specifically provide that communications between a client and lawyer referral service are deemed confidential and subject to privilege.

The Problem: Under current law, communications between a client and a State Bar Certified Lawyer Referral Service for the purpose of obtaining legal services or advice may be subject to discovery by an opposing or third party. While we have not seen instances of this practice as of yet, attorneys have considered it and more importantly, the uncertainty of this issue has hampered communications between clients and lawyer referral services. Making an appropriate referral requires candor and open communication. This resolution would address these issues by clearly stating that communications between a client and lawyer referral service are confidential and privileged.

A similar resolution was proposed at the conference in 2002 and ResCom recommended approval, though the final result at the conference and any subsequent legislative efforts are unknown. This proposed change is also in line with the American Bar Association's Model Rules Governing Lawyer Referral and Information Services, which provide:

#### **Rule XIV**

-- 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.

### **IMPACT STATEMENT**

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

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