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REPORT BY THE NEW YORK CITY BAR ASSOCIATION

A.9029

S.5845

M. of A. Dinowitz

Sen. Bonacic

AN ACT to amend the judiciary law, in relation to establishing a lawyer referral service-client privilege

THIS BILL IS APPROVED

The New York City Bar Association supports amending § 498 of the Judiciary Law to provide that communications between a consumer of legal services and a lawyer referral service be deemed to be privileged on the same basis as those provided by law for communications between attorney and client. This privilege could be waived only by the consumer of legal services.

BACKGROUND

Consumers of legal services contact a legal referral service, lawyer referral service, or lawyer referral and information service (collectively, “LRS”) seeking legal assistance – they want to find a lawyer who will help them. In order to be directed to the appropriate lawyer, consumers need to disclose the same information to LRS referral counselors that they would in an initial meeting with law office personnel or a lawyer – the who, what, where, when, why and how of their legal situations. Typically, a consumer calls on the telephone or submits a referral request online to an LRS. LRS’s often discourage in-person referral requests. In New York, as well as nationally, both lawyers and non-lawyers serve as referral counselors.

When speaking on the phone to LRS personnel, consumers of legal services are often anxious, angry, and upset about their legal issues; wish to explain their situation in great detail without prompting to do so; and express concerns about deadlines and a desire for immediate legal assistance. Moreover, consumers do ask whether the information they provide will remain confidential. In addition, the online behavior of those seeking referrals reveals resistance to restricting the information provided by limiting it with specific questions; consumers 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.” Forms with a series of 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.

A simple text box with a general instruction, like a phone conversation with a consumer about his/her legal situation, offers the consumer the opportunity to provide a narrative in his/her own words. The consumer's narrative must contain sufficient details about the problem to allow the referral counselors to triage the legal issues involved and match consumers to an appropriate lawyer, agency, government entity, non-profit program or organization, or other resource. In addition, the narratives often will prompt the referral counselors to provide consumers with important additional information, such as fast-approaching deadlines. However, a consumer's narrative frequently includes confidential information that could cause damage to a consumer's criminal or civil case if revealed to adverse parties.

If an LRS refers a consumer to a lawyer, typically the consumer then contacts the lawyer directly and schedules an initial consultation. Initial consultations are low cost (\$35 for up to 30 minutes is typical) or free, depending on the type of case.¹ If the consumer and the lawyer decide that the legal situation requires further attention, and both want to continue to work together, they will then agree upon any additional fees themselves and sign an engagement agreement.

New York has 19 LRS's – 18 county, metropolitan or other bar association-sponsored LRS's and one LRS sponsored by the New York State Bar Association. The 18 LRS's service limited geographical areas within the state and the New York State Bar Association's LRS offers statewide assistance, including for rural areas not serviced by the other LRS's.

New York's LRS's have been an important part of the legal landscape for many years, and hundreds of thousands of New Yorkers have relied upon LRS's for triage information and to help them find an appropriate lawyer or other resource to assist them with their legal problems. The New York City Bar Legal Referral Service, for example, was established in 1946 and is the oldest lawyer referral service in New York, and the first one in New York City approved by the American Bar Association. The New York City Bar Legal Referral Service, alone, has 75,000-100,000 points of contact – phone calls and online – with New Yorkers annually. Like other LRS's across the state, approximately 74% of inquiries do not result in referrals to private lawyers, but instead result in references to appropriate agency, government entity, non-profit program or organization, or other resource.

California has taken the lead in establishing an LRS-client privilege. In 2013, California amended its Evidence Code, adding sections 965-968 and amending section 912, in response to the San Francisco District Attorney's issuance of a subpoena to the Bar Association of San Francisco's Lawyer Referral and Information Service (BASF). The subpoena sought what a criminal defendant may have said to BASF staff in the course of seeking a referral. The matter was resolved without disclosure and without any reported decision, but left open the question of whether information disclosed by a consumer of legal services to LRS staff was privileged and would remain confidential. The new sections and amendment to the California Evidence Code resolved that question in favor of privilege/confidentiality and assured consumers of legal

¹ Free consultations are often provided for personal injury and medical malpractice matters; workers' compensation claims; Social Security Disability (SSD) and Supplemental Security Income (SSI) claims.

services in California that seeking legal help through the assistance of an LRS would not prejudice or cause potential harm to their civil or criminal matters.

Seeing the issue as a national one, on August 8, 2016, the American Bar Association House of Delegates passed a resolution calling for confidentiality in communications between lawyer referral services and their clients:²

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.

The resolution had significant support and was cosponsored by a number of metropolitan and state bar associations.³ It had no opposition.

New York Judiciary Law section 498, enacted in 1988, establishes immunity from civil action for an LRS that provides a referral without charge and as a public service, without malice, and in the reasonable belief that such referral was warranted; however, the statute does not contain a confidentiality provision. By explicitly ensuring that such services do not carry the risk of a lawsuit, Section 498 was enacted in recognition of – and in order to encourage – the important service provided by LRS’s. As stated by then-Senator John Dunne in his support letter to the Governor:

“For many New Yorkers the thought of searching for an experienced, affordable attorney properly suited to his or her needs is unnerving. Oftentimes, individuals who have never required legal assistance before resort to choosing their attorney at random from a phone book page or a thirty second television commercial.

Fortunately, free legal referral services operated by state and local bar associations provide a much needed alternative. Since professional societies have at hand the names of those attorneys who possess the special expertise a client may require, it is natural that the public turn to them for information.”

² Resolution 106, available at https://www.americanbar.org/news/reporter_resources/annual-meeting-2016/house-of-delegates-resolutions/106.html.

³ In addition to the New York City Bar Association, the resolution was cosponsored by the New York State Bar Association, Standing Committee on Lawyer Referral and Information Service, Austin Bar Association, Brooklyn Bar Association, Cincinnati Bar Association, Law Practice Division, Oregon State Bar, Section of Civil Rights and Social Justice, Standing Committee on Disaster Response and Preparedness, Standing Committee on Group and Prepaid Legal Services, and the Bar Association of San Francisco.

For the same reasons that the Legislature saw fit to enact section 498, we now support an amendment to create a confidential information privilege.⁴

RATIONALE

Annually, hundreds of thousands of New Yorkers – as well as consumers of legal services from other states and countries – rely upon our local LRS’s for triage information and to help find an appropriate lawyer or be directed to an appropriate agency, government entity, non-profit program or organization, or other resource. Sophisticated and unsophisticated consumers alike provide detailed narratives that include confidential information that could cause damage to their criminal or civil case if disclosed to adverse parties. For decades, consumers have relied upon LRS’s for help and assumed that the detailed information they provide LRS’s was both necessary in order to receive appropriate referrals and safe in the hands of the LRS’s helping them.

Amending Judiciary Law section 498 will resolve any potential question about the confidentiality of communications between the 19 LRS’s in New York and the hundreds of thousands of people who rely on them for help. Enactment of this amendment will assure consumers of legal services in New York that seeking legal help through the assistance of an LRS will not prejudice them – and will put in place a protection that consumers always thought was there. The New York City Bar Association sees no downside risk to amending Judiciary Law section 498.

Amending Judiciary Law section 498 to include confidentiality protections will also further the original intent behind that section, which was to recognize bona fide LRS’s and shield them from lawsuits. This legislation permits LRS’s to carry out their important work without having to divert resources away from their fundamental mission – to assist as many people as possible. The civil immunity that LRS’s currently enjoy will be further realized by protecting LRS’s and their staff from disruptive subpoenas and discovery requests. The proposed amendment harmonizes the purpose of the original immunity protection with the high volume, day-to-day operational realities faced by LRS’s, *i.e.*, allowing an important public service to be conducted without distraction or threat of court procedures.

On the other hand, to leave open the question of whether information disclosed by a consumer of legal services to an LRS is confidential will have severe adverse effects. The most direct consequence is that a consumer’s criminal or civil case could be significantly prejudiced if adverse parties through discovery could obtain the detailed narratives consumers typically provide to LRS’s. At this moment, there is no assurance that a subpoena – like the one issued in San Francisco – would not force one of New York LRS’s to disclose confidential communications that would prejudice a consumer’s civil or criminal matter.

⁴ The privilege is modeled after the one contained in Jud. Law 499, which protects communications between lawyers and bar associations’ “Lawyers Assistance Programs.” Lawyers rely on these programs when they are struggling with alcohol or drug abuse, depression, anxiety, stress, and other mental health issues.

The lack of a clear privilege also threatens the open communication necessary for LRS's to triage effectively the legal issues involved and match consumers with appropriate lawyers, agencies, government entities, non-profit programs or organizations, or other resources. Consumers' trust and confidence in LRS's might well evaporate following publicized accounts of successful discovery requests to LRS's. Stopping or limiting the communications between LRS's and legal consumers will materially harm the ability of LRS's to help hundreds of thousands of New Yorkers in need of legal assistance. Without open communication – information that might alert a referral counselor to provide the consumer with important information, such as fast-approaching deadlines – consumers may remain unaware of looming deadlines and otherwise prejudice their legal rights.

CONCLUSION

The New York City Bar Association supports the enactment of A.9029/S.5845 to ensure that communications between a consumer of legal services and an LRS are deemed to be privileged just like the communications between attorney and client. New York should take a leading role nationally by addressing this important issue *before* any of its LRS's or consumers relying on its LRS's are forced to face this issue without any protections.

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