Explanation of Proposed Supreme Court Rule 220

Individuals who seek a lawyer through an intermediary connecting service would likely want the information they provide to the service for purposes of seeking a participating lawyer's legal services to be treated the same as if they were providing that information directly to a lawyer. The ARDC's proposal would protect that information two ways: (1) by extending the attorney-client privilege to communications between potential clients and intermediary connecting services lawyer-client connecting services, and (2) by extending Rule of Professional Conduct 1.6's confidentiality protections to information contained in those communications, as well as extending Rule 1.6's duty to safeguard client confidences to the intermediary connecting services.

Proposed Rule 220 uses the term "lawyer-client connecting services." The scope of that term would be broader than that of proposed Rule 730. It would encompass intermediary connecting services, whether or not they are registered under, as well as lawyer-client connecting services operated by a bar association or legal aid organization.

Extending the Attorney-Client Privilege

Currently, the Court's Rules, including its evidence rules, do not provide any privilege or protection to information that a potential client provides to a lawyer-client connecting service. California, New York, and Utah, though, have extended the attorney-client privilege to protect such information given to lawyer referral services. *See* Cal. Evid. Code §§ 912, 965-968; NY CLS Jud § 498; and Utah R. Evid. 504.

Many lawyer-client connecting services require information from potential clients that could negatively impact their interests. For instance, the lawyer directory Martindale-Hubbell requires potential clients to include their name, email address, phone number, and specific information about their matter. As one example, an individual who has been charged with driving under the influence is required to indicate whether he or she had a prior offense, what type of test was performed, what the blood alcohol content was, the location of the incident, and a description of the incident in the individual's own words. The individual also has to include his or her full name and a phone number and email address. Martindale-Hubbell then sends participating lawyers an email informing them that they have a new lead, and the service includes all the disclosed information. Without protecting that information from compelled disclosure, users may fear providing full and open information to a connecting service, and that information may affect their interests in any potential future litigation.

Accordingly, Supreme Court Rule 220 would classify as confidential communications—subject to the attorney-client privilege—those communications between a lawyer-client connecting service and a potential client for the purposes of (1) seeking or obtaining a connection with a participating lawyer for the rendition of legal services, or (2) the lawyer-client connecting service to facilitate the rendition of legal services by a participating lawyer. By establishing that those communications are confidential communications and subject to the attorney-client privilege, the information would be protected by the privilege, provided that the one asserting the privilege satisfies the remaining elements of the attorney-client privilege.

The extended privilege would cover those communications from a potential client and from a lawyer's current client. By extending the attorney-client privilege to a client's or potential client's communications with a lawyer-client connecting service, both potential and actual clients would be able to consult with a participating lawyer "freely without fear of compelled disclosure." *Claxton v. Thackston*, 201 Ill. App. 3d 232 (1st Dist. 1990) (internal quotations and citations omitted).

The Court can extend the attorney-client privilege to communications between a lawyer-client connecting service and its users, because the users would be seeking to obtain a lawyer through the service, and because the service would assist the lawyer in rendering legal services or it would transmit facts to the lawyer to assist the lawyer. *See People v. Knuckles*, 165 Ill. 2d 125 (1995) (a privileged communication can be communicated to an agent of the attorney, such as ministerial agents, because the assistance of those agents is indispensable to the lawyer's work or for the transmission of confidential facts); *see also Schlicksup v. Caterpillar, Inc.*, No. 09-CV-1208, 2011U.S. Dist. LEXIS 92827, at *6 (C.D. Ill, Aug. 19, 2011 ("Confidential communications by non-lawyers for the purpose of assisting the lawyers to provide legal advice are also protected by the attorney-client privilege.") Because of the protections proposed Rule 220 would provide to information that connecting services receive, those services, whether for-profit or bar-association-operated, could market those protections to support their market presence.

The proposed rule focuses on the communication's purpose and not the agency role of the lawyer-client connecting service. However, a service could still be considered an agent of either the client or the lawyer, because the service would be transmitting information for the purposes of legal representation. Accordingly, a lawyer-client connecting service and potential clients using the service may be subject to the consequences of dual-agency: when an individual making a statement to an agent who is also, at the same time, an agent for a potential adversary, the privilege may be vitiated. *Monier v. Chamberlain*, 35 Ill. 2d 351 (1966). For instance, potential adversaries in a matter (such as in a landlord-tenant dispute) could seek a lawyer's services though the same lawyer-client connecting service. The information they provide to the service to be connected with a lawyer might not be protected by the privilege, because the service could be considered an agent in both communications. Therefore, to avoid this, proposed Rule 220 would provide that the mere fact that potential adversaries communicate with the same connecting service does not vitiate the privilege.

Extending Rule 1.6 Confidentiality Protections

Proposed Rule 220 would also extend Rule 1.6 protections to the communications between the lawyer-client connecting services and potential clients using the service, by expanding upon what information is considered "information relating to the representation of a client." Pursuant to the proposed rule, information that a user provides to a lawyer-client connecting service for the purposes of seeking or obtaining a connection with a participating lawyer for the rendition of legal services, or for the lawyer-client connecting service to facilitate the rendition of legal services by a participating lawyer would be considered "information relating to the representation of a client."

Rule 1.6 is broader than the attorney-client privilege. By its own order, the Court has recently extended Rule 1.6 protection to information a lawyer receives from a non-client for purposes of the Pilot Intermediary Program. That program utilizes lawyers to attempt to reach and engage attorney-respondents who fail to comply with requests for information or subpoenas in ARDC investigative matters and who default in formal matters before the ARDC Hearing Board. Intermediary lawyer communications with attorney-respondents are considered information relating to the representation of a client and subject to Rule 1.6 protections.

Without protecting information potential clients provide to a lawyer-client connecting service for the purpose of seeking a lawyer or receiving legal assistance, potential clients and lawyers may believe that disclosing information on an online form or website is not confidential and could be readily attainable by the public. Potential clients may be hesitant to seek representation more freely, and lawyers also may be less willing to agree to handle a matter.

Also, by classifying that information as "information relating to the representation of a client," lawyer-client connecting services would have to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." *See* Rule of Professional Conduct 1.6(e). Admittedly, the proposal would only directly require intermediary connecting services registered under proposed Rule 730 to make those reasonable efforts, because those registered services could not engage in conduct that would violate the Rules if engaged in by a lawyer. Still, not-for-profit referral services are subject to Rule 5.3. Thus, lawyers participating in those services would have to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. This would likely encourage not-for-profit referral services to make those reasonable efforts under Rule 1.6(e).