COSAC Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

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TO: NYSBA Committee on Standards of Attorney Conduct ("COSAC")

FROM: David P. Miranda
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RE: Comment in Opposition to Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

Dated: October 4, 2021

This is submitted in opposition to the COSAC proposal seeking a new regulatory scheme to permit nonlawyer legal services providers to engage in conduct related to the provision of legal services, otherwise precluded by the New York Rules of Professional Conduct and New York's Judiciary Law §495. The COSAC proposal is contrary to long-standing policy of NYSBA and has the potential to cause substantial harm to New York lawyers, the public and the core values of the legal profession. The COSAC proposal should be rejected in its entirety.

Executive Summary of Opposition

The New York State Bar Association's (NYSBA) Committee on Standards of Attorney Conduct (COSAC) seeks to permit what is referred to as "Legal Intermediary Referral and Information Services" or "lawyer-client matching services" (hereinafter "nonlawyer legal services providers" or "NLSPs") to engage in conduct related to the provision of legal services that is currently prohibited. The proposal, recognizing the proliferation of nonlawyer legal services providers, seeks to create a new regulatory scheme that is contrary to existing NYSBA policy and the core values of the legal profession.[1]

The COSAC proposal seeks to permit NLSPs to engage in conduct that licensed attorneys are prohibited from engaging in. Specifically, the proposal permits NLSPs to receive fees from lawyers for client referrals, in a manner that lawyers would otherwise be prohibited from sharing pursuant to Rule 7.2.[2] Under the proposal such referral fees to NLSPs are not limited in amount or "percentage of legal fees earned" and may also include "a membership or participation fee" regardless of any referral.[3]

Permitting NLSPs to control the flow of clients, and fees, to lawyers is a step towards nonlawyer ownership of lawyers and law firms, and is contrary to existing NYSBA policy.[4] The

[1] Preserving the Core Values of the American Legal Profession, (MacCrate Report) NYSBA April 2000; Report of Task Force on Nonlawyer Ownership, NYSBA November 2012; Report and Recommendation of the Working Group on Regulatory Innovation, Commission to Imagine the Future of New York Courts, December 2020.

[2] Rule 7.2 of the New York Rules of Professional Conduct

[3] Proposal p. 5, Section C

[4] In 2000, NYSBA's MacCrate Report concluded:

> Thus, we have considered and rejected the suggestion that rules against nonlawyer participation in the practice of law should be relaxed. We do so mindful of the fact that denying nonlawyers the ability to have a financial interest or otherwise to participate in law firm governance deprives lawyers of significant opportunities for financial gain. Nevertheless, we believe that it is in the public interest that lawyers forgo this opportunity.

The MacCrate Report noted, it is reasonable "to assume that financial dominance confers control, either through outright ownership, or through the functional equivalent of outright ownership."

COSAC proposal permits mostly unfettered control by NLSPs over a participating lawyer, including establishing rules regarding the charging of legal fees, potentially implicating anti-competitive and antitrust issues.[5] In addition, the proposal permits NLSPs to create policies and procedures for attorneys, procedures for client communications, and procedures for admitting, suspending or removing attorneys from an NLSP service, all of which provides the NLSP with substantial control over a participating attorney's law practice. Furthermore, by providing a regulatory mechanism for commercial NLSPs to control the flow of business to attorneys, the proposal devalues bar association lawyer referral services already permitted by the Rules.[6]

The COSAC Proposal is harmful to the legal profession

The proposal recognizes that our profession, and the public we serve, is threatened by NLSPs, businesses that not only demean the profession, but also diminish the complexity and nuances of providing competent and effective legal services and the attorney-client relationship. NLSPs claim to be innovative, but they are not bound by, and often subvert, the fundamental principles of our profession.

Each year hundreds of millions of dollars of venture capital fund NLSPs; well over 1,000 legal tech start-up companies are selling legal services to the public, and their numbers are growing.[7] NLSPs attract venture capital, not because they want to help close the justice gap for the poor, but because they want to profit from consumers with money for legal services. NLSPs target lower and middle income consumers, with resources to pay for legal services. Operating mostly unfettered, they have blossomed into marketing machines for legal services and legal advice.

Although the COSAC proposal will impact the entire legal profession, it is especially harmful to attorneys who are newly admitted, practice as solos, or in small firms, who report difficulty finding new ways to connect with clients. COSAC's proposal encourages the legal profession to become co-opted by the influx of venture capitalists and internet entrepreneurs who "market" legal services without being encumbered by rules of professional responsibility and other rules that apply to our profession.

If the COSAC proposal is implemented, solos and small firms will be further impaired in their ability to attract clients. Rather than compete on a difficult, but even, playing field for clients, attorneys will be forced to either pay a substantial portion of their legal fees to NLSPs or compete against the well-funded advertising and marketing of the NLSPs.

The COSAC proposal permits NLSPs to advertise in a way that attorneys are prohibited

The well-funded marketing campaigns of NLSPs raise many ethical concerns as they employ a tone that is both bold and deliberately vague. They offer legal services. They are simply facilitators so attorneys and clients can find each other. They furnish legal help. They do not furnish legal help. They give legal advice. They do not give legal advice. They create one impression to an unknowing public. They include disclaimers for the regulators.

[5] Proposal Sec. 3 (A)(2)
[6] Rule 7.2(b)(3)
[7] American Bar Association Commission on the Future of Legal Services 2016, pg. 2.

For example, LegalZoom, provides a small-print disclaimer on its site, "We are not a law firm or a substitute for an attorney or law firm. We cannot provide any kind of advice, explanation, opinion, or recommendation about possible legal rights, remedies, defenses, options, selection of forms or strategies," but its marketing campaign aims to create a very different impression: "Whatever your legal need, we have an answer. Let us help you protect all that matters easily and affordably." Some of this advertising, if used by a lawyer, or to market a law firm, might put the lawyer on the wrong side of the Rules of Professional Conduct. [8]

The proposal suggests a new regulatory scheme is necessary since the Rules of Professional Conduct do not apply to NLSPs because they are nonlawyer corporations, not law firms. However, New York's Judiciary Law §495 already prohibits a nonlawyer corporation from providing or promoting legal services.

Many attorneys are innovative in their methods of seeking clients, and have adapted to the use of new technologies. However, attorneys are limited by the Rules of Professional Conduct with respect to how they can advertise, seek clients, and conduct their law practice. If attorney rules and regulations are outdated, or too restrictive, then it is incumbent upon our bar association to discuss and advocate for changes to the rules impacting a lawyer's ability to advertise and practice law. The COSAC proposal offers no changes to the Rules for lawyers, but rather proposes that nonlawyers be permitted to advertise legal services and collect legal fees in ways that lawyers are prohibited.

The COSAC Proposal undermines the Rules prohibiting fee splitting with nonlawyers

Clients seeking services via an NLSP are steered toward a list of attorneys in certain geographic and practice areas, which according to the proposal may, or may not, be based on the attorney's experience or admission to practice.[9] The COSAC proposal permits NLSPs to set rules limiting the fees attorneys may charge, but there is no limitation on the amount of fees NLSPs may charge attorneys.

Under the current Rules, paying a business for advertising is of course permissible, however, fee-splitting violates Rule 5.4, "Professional Independence of a Lawyer," which states: "A lawyer or law firm shall not share legal fees with a nonlawyer."[10]

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[8] For example, Rule 7.1(a) "Advertising" states: "(a) A lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule." Rule 8.4(a), "Misconduct," states: "A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

[9] Proposal Section 3(A)(3)

[10] NYSBA Ethics Opinion, No. 1081, discussed the topic:

> Rule 5.4 contains a number of provisions intended to ensure the professional independence of a lawyer. . . . Rule 5.4(a) provides that a lawyer "shall not share legal fees with a nonlawyer". . . . If the Company's clients are paying the Company for legal services rendered by the inquirers, then the inquirers would be violating Rule 5.4(a).

Rule 7.2(a) states:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client . . . . [11]

The COSAC proposal removes the prohibition against fee splitting with "registered" NLSPs, but otherwise keeps the prohibition in place between lawyers and others. If Rules against fee splitting are outdated or overly restrictive, we as a profession should consider amending them in a way that benefits the profession and the public we serve, not encourage lawyer advertising to be co-opted by nonlawyer commercial entities seeking to profit from legal fees.

The COSAC proposal permits NLSPs to engage in the unauthorized practice of law prohibited by Judiciary Law § 495

There is some debate about whether NLSPs are engaging in the unauthorized practice of law. By their own account, NLSPs purport to connect clients with licensed attorneys that perform legal work. NLSPs imply in their advertising that they are offering legal services, that is the only service they advertise and promote.

If NLSPs are not already on the wrong side of ethics rules, they may be in violation of the N.Y. Judiciary Law, Section 495(1) which provides:

> No corporation or voluntary association shall . . . (c) . . . render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, . . . nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel.

Our bar association must stand against the unauthorized practice of law, not create ways to enable such conduct. The COSAC proposal gives NLSPs a free pass to violate the Judiciary Law.

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[11] Significantly, Comment [1] to Rule 7.2 adds:

> Paying Others to Recommend a Lawyer
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> [1] [L]awyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. . . . [A] lawyer may pay others for generating clients leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyers, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of Professional Employment).

The COSAC proposal hurts bar association lawyer referral services

The COSAC proposal devalues the Rule that permits bar association lawyer referral services, by permitting commercial NLSPs to engage in such services.[12] NYSBA and many local bar associations have lawyer referral services that help support its members and connect the public with qualified lawyers. These bar association lawyer referral services, although not always lucrative for the association, perform an important function for lawyers and the public. This year NYSBA was awarded the ABA's prestigious Harrison Tweed award, for its efforts to extend pro bono services to the underserved during the coronavirus pandemic, including an extensive COVID-19 Pro Bono Network across the state, an Unemployment Insurance Initiative, and connecting volunteer attorneys with families of New Yorkers who died from COVID.

Along with other bar associations, NYSBA should enhance properly authorized lawyer referral services to provide greater support to newly admitted attorneys, as well as solo and small firms. Many bar association lawyer referral services could be improved with additional funding and marketing. NYSBA should take the lead in proposing a statewide, comprehensive, coordinated, marketing program that enhances and benefits the many bar association lawyer referral programs throughout the state. The COSAC proposal harms bar association lawyer referral programs, forcing them to compete with well-funded, profit seeking, commercial enterprises.

Impact on the public and the profession

The Rules of Professional Conduct are in place not to protect lawyers, but the public from unscrupulous lawyers that fail to meet the highest standards that we expect from officers of the court and defenders of justice. The Judiciary Law is in place to prevent unregulated nonlawyers from preying on an unknowing public.

NLSPs are not required to adhere to rules of professional conduct or the core principles of our profession. They are not bound by ethics rules. They do not check for conflicts of interest. They do not have a duty of vigorous advocacy. As attorneys we are sworn in as officers of the court, part of a legal system that our society relies on for justice and fairness. Our system of examination to test knowledge and competency, determination of character and fitness, and adherence to a prescribed set of rules of professional conduct throughout an attorney's career, not only serves to protect the public from untrained and unscrupulous would-be practitioners, but also far surpasses what is required of a business.

Our Rules of Professional Conduct reflect the core values of our profession, and are designed to protect the public we are licensed and privileged to serve. If the Rules are outdated or too restrictive, our Association should be studying, debating and making proposals to change how they apply to lawyers and their clients, rather than make it easier for nonlawyers to engage in activity related to the provision of legal services.

[12] Rule 7.2(b) lists approved lawyer referral programs:

> (1) a legal aid office or public defender office; (2) a military legal assistance office; (3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries …

Notably, for-profit corporate entities are not included among authorized law referral providers.

Rather than create a new regulatory agency to permit NLSPs to engage in activities related to the provision of legal services, our bar association should do the following:

1. Perform a comprehensive analysis of the Rules of Professional Conduct, determine if they are outdated or overly restrictive, and propose relevant changes to the manner in which attorneys are permitted to advertise, practice law, and share fees.

2. Propose a statewide, comprehensive, coordinated, marketing program that enhances and benefits the many bar association lawyer referral programs throughout the state.

3. Assist regulatory and enforcement entities in protecting against the unauthorized practice of law.

Change to our profession should not benefit profit-seeking entrepreneurs unencumbered by rules of ethical conduct. The COSAC proposal is not beneficial to the profession, the public we serve, or the provision of access to justice. It should be rejected in its entirety.

October 14, 2021

By Email

New York State Bar Association
Committee on Standards of Attorney Conduct (COSAC)
Attn: Professor Roy Simon, roy.d.simon@gmail.com

Re: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

To the members of COSAC:

The undersigned bar associations all operate lawyer referral and information services ("LRISs") on a not-for-profit basis. The vast majority of the work of these LRISs is to provide assistance to members of the public who cannot afford to retain private counsel, have limited means to do so or do not actually need to engage private counsel.[1] The public is never charged for our services; rather, fees are paid by lawyers to whom referrals are made. Often, LRISs represent the largest pro bono activity of a bar association. We and many bar associations operate our LRISs in accordance with the American Bar Association ("ABA") model rules and minimum standards for lawyer referral and information services that assure that LRISs are operated for the public benefit and that LRISs employ consumer protection measures, such as having panels of lawyers for different kinds of matters that are carefully vetted to assure that the panel members are qualified and survey those who do retain panel counsel. As you know, the ABA is in the process of updating its Model Rules for Lawyer Referral and Information Services" ("Revised Model Rules") and appears to be near the end of that process.

We deeply respect the work of the New York State Bar Association Committee on Standards of Attorney Conduct ("COSAC") and we understand and appreciate the time it has invested in preparing the memorandum on "Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services" (the "Report"). We further appreciate the willingness of COSAC to engage with us in a meaningful and good faith dialogue about our concerns regarding the operation of the proposed Legal Intermediary Referral and Information Services ("Intermediaries") in New York. We believe that the Report and COSAC's proposal will benefit from such a dialogue with those who currently provide services like those that COSAC contemplates the Intermediaries will offer to the public on a for-profit basis. In particular, as we have informally discussed with you, there are important consumer protection, access to justice, and public service considerations that the COSAC proposal raises and which we believe call for further reflection and conversation. Given this view, we were pleased to learn

[1] By way of illustration, over the past 5 years the New York City Bar's LRIS has had an average of 58,000 contacts from the public per year, but only 40% result in a referral to a lawyer and only approximately 6% of those referrals to a lawyer result in a retained case. These numbers may vary as among LRISs. New York has 19 LRISs—18 county, metropolitan or other bar association-sponsored LRISs and one LRIS sponsored by the New York State Bar Association. The 18 LRISs service limited geographical areas within the state and the New York State Bar Association's LRIS offers statewide assistance, including for rural areas not serviced by the other LRISs.

that the Report is being presented to the House of Delegates on October 30 on an informational basis only.

In order to elucidate and be transparent about our thinking, we propose to discuss with you foundational questions, such as:

- What impact would the existence of Intermediaries have on the free services currently provided to members of the public who cannot afford private lawyers, have limited means to retain counsel or do not need a private attorney?
- Will Intermediaries afford more or less consumer protections, services to the public, and access to justice? How should these issues be addressed?
- What potential problems do Intermediaries solve and what potential problems and unintended consequences do they create?
- Do the benefits of Intermediaries as proposed by COSAC outweigh their possible negative impact?
- Can any such negative impact be ameliorated by regulations, and if so what should those regulations say?
- What other entities should be regulated and/or enabled at the same time; should not-for-profit and for-profit providers be regulated at the same time and in the same way, or in different ways?

Undoubtedly, discussion and assessment of these types of questions would also inform refinement of the proposal and perhaps generate new or additional solutions.

In addition, we believe that in order properly to evaluate the changes that COSAC has proposed, it is necessary to consider the regulatory structure that COSAC proposes be put in place to govern Intermediaries. The Report, however, does not include any proposed regulations beyond an Intermediary registration requirement and general statements about issues that such regulations might address. We suggest that COSAC consider fleshing out its regulatory proposal using the final or perhaps draft ABA Revised Model Rules as an exemplar.

We believe that the fruits of the efforts described above will benefit both COSAC and better inform the deliberations of the delegates. Thank you for your consideration and your willingness to engage in further dialogue.

Sincerely,

Armena Gayle
President, Brooklyn Bar Association

Soma Syed
Chair, New York State Bar Association Committee on Lawyer Referral and Information Service

Joseph Tremiti
Chair, New York City Bar Association Legal Referral Service

P.B. Wu
Chair, Asian American Bar Association of New York Legal Referral and Information Service

From: **Sarah Gold** sg@goldlawny.com
Subject: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral
Date: July 16, 2021 at 10:37 AM
To: roy.d.simon@gmail.com

SG

Roy:

I read the memo, and as someone who has previously participated in groups like those, I took specific interest. Three issues that popped up for me:

1. In Section 1(C), it might be good to further define other groups that may not fall into this definition, like networking groups like BNI or LeTip. That has been an ongoing discussion for years, as some states are very specific that this is considered fee splitting with non-attorneys. I believe that that is not the case in NY, but it might be worth a mention here.
2. I do like the idea of registering these groups, especially in light of the regulatory sandboxes currently in operation in the western US, but I am not as keen on the fact that attorneys here will have to suss out whether or not these businesses are registered in order to participate. The one that springs to mind that always seems to have skirted the rules here in NY is UpCounsel, which has changed its business plan and gone to a high per month charge for attorneys wanting to have the opportunity to bid. Not only do they take money upfront from attorneys, but also charge fees based on the income generated on the back side through direct billing platforms between the attorney and the client. While it seems to fit the definition well of Section 1(A)(3), many attorneys may not necessarily see it as a legal intermediary referral service and as such not seek to see if they are registered before participating. Putting the onus on the lawyers to see

participating. Putting the onus on the lawyers to see if these businesses are registered might not even cross the minds of many. Yes, I understand that ignorance is no excuse, but not seeing what these organizations are might preclude the seeking of the info in the first place.

3. Finally, and this is niggly to say the least, in Section 1(C)(3), there is reference to legal services organizations. I believe this refers to organizations like Legal Aid? If this is a defined term, could a reference be included as to the rule or law in which it is referenced? It's circular, I know, but the drafter in me wants to know what defined terms I'm dealing with and the fact that it's not capitalized makes me nervous that perhaps I've misconstrued the concept.

Thank you and your committee for this really good work.

Sarah Gold --