

MEMORANDUM

July 15, 2021

TO: Members of the Bar and Public - For Public Comment
FROM: NYSBA Committee on Standards of Attorney Conduct (“COSAC”)
SUBJECT: Proposed Statute or Court Rule to Regulate Legal Intermediary Referral and Information Services

The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is comprehensively reviewing the New York Rules of Professional Conduct. This memorandum seeks public comment on a proposed statute or court rule to regulate Legal Intermediary Referral and Information Services (sometimes called “lawyer-client matching services”).

The existing New York Rules of Professional Conduct regulate some aspects of the conduct of lawyers who form, cooperate with, or participate in Legal Intermediary Referral and Information Services, but the Rules of Professional Conduct do not and cannot govern the conduct of nonlawyers who own or operate such services. Nevertheless, the need for regulation of such services is apparent. COSAC has therefore developed a new regulatory structure that could be enacted as a statute or adopted as a Court of Appeals rule.

COSAC requests public comments on this proposal no later than **Monday, September 13, 2021 at 5:00 PM.** Please send comments directly to the Chair of COSAC, Roy D. Simon, at roy.d.simon@gmail.com.

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

Section One. Applicability of Chapter and Definitions.

(A) A “*legal intermediary referral and information Service*” (a “Service”) shall, except as set forth in Paragraph B hereof, include any individual or entity providing or offering any one or more of the following services to attorneys or users or potential users of the service in New York, whether on-line, in person, by email, in writing, or by any other means of communication, and whether organized in corporate or other form and operated on a for profit or not for profit basis:

- (1) a lawyer network;
- (2) a matching or matchmaking service for connecting potential clients to attorneys;
- (3) a legal bidding site in which lawyers bid to provide specified legal services to a specific client or category of clients in need of those legal services;
- (4) a legal question and answer site in which a lawyer answers questions for a fee; or
- (5) any similar marketplace or service of any kind, including an on-line service, that connects customers, members, subscribers, users, or the like to participating lawyers for a fee paid either by the attorney, the user or both.

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(B) A “*participating attorney*” means an attorney licensed or authorized to practice law in New York who uses or seeks to use a legal intermediary referral and information service to offer or render legal services.

(C) A “*legal intermediary referral and information service*” shall not include:

- (1) individual referrals from lawyer-to-lawyer, lawyer-to-client, client-to-client, or client-to-lawyer;
- (2) reciprocal referrals from lawyer-to-lawyer, lawyer-to-nonlawyer-professional, or nonlawyer-professional-to-lawyer;
- (3) a service operated by a legal services organization or by a bar association that connects potential clients to attorneys;
- (4) a tribunal appointing or assigning lawyers to represent parties to a proceeding before the tribunal; or
- (5) a prepaid or group legal services plan that meets the criteria of Rule 7.2(b)(4) of the New York Rules of Professional Conduct.

(D) The “*Authority*” means an agency or authority established or authorized to promulgate regulations, forms, procedures, and guidelines to implement this Chapter.

Section Two. Referral Fees to Legal Intermediary Referral and Information Services.

An attorney authorized to practice in this State may pay a fee to a legal intermediary referral and information service in exchange for referral of a client, or may share legal fees with a Service, only if:

- (A) the Service is registered in accordance with the provisions of this Chapter and
- (B) the Service and the attorney each comply with the provisions hereinafter set forth.
- (C) A Service that is registered in accordance with the terms of this Chapter and complies with its provisions shall be exempt from Section 491 of the Judiciary Law.

Section Three. Registration and Other Requirements for Legal Intermediary Referral and Information Services.

- (A) To qualify for registration under this Chapter, a Service serving or seeking to serve clients in New York shall comply with all of the following:
 - (1) The Service shall operate for the purpose of referring prospective clients to lawyers (whether the lawyers are in private practice or other settings) who can provide needed assistance to a prospective client in light of the prospective client’s financial ability, language capabilities, geographical convenience, legal needs, and other circumstances;
 - (2) The Service shall establish rules that prohibit attorneys from agreeing to, charging, or collecting excessive fees within the meaning of Rule 1.5(a) of the New York Rules of Professional Conduct;
 - (3) The Service shall establish procedures to govern the following:

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- a. procedures to evaluate whether attorneys participating in the Service comply with the Service's policies and procedures;
 - b. procedures for clients to communicate with the Service regarding their satisfaction or dissatisfaction with the Service or its agents or employees;
 - c. procedures for clients to communicate with the Service regarding their satisfaction or dissatisfaction with any participating attorney or attorneys;
 - d. procedures to investigate and take appropriate action with respect to client complaints or expressions of dissatisfaction regarding attorneys participating in the Service or regarding the Service and its agents or employees; and
 - e. procedures for admitting, suspending, or removing attorneys from the Service.
- (4) The Service shall prohibit a fee-generating referral to any attorney who has an ownership interest in the service, or who operates, controls, or is employed by the Service, or who is associated with a law firm that has an ownership interest in, or that operates or is employed by, the Service.
- (5) The Service shall establish procedures and objective, neutral criteria for referring prospective clients to lawyers. To implement these neutral criteria, the Service may establish panels of attorneys based on specific factors (or a combination of factors), such as:
- a. Subject matter panels organized around fields of law, eligibility for which may be based on a lawyer's experience, current involvement with the subject matter, degree of concentration in the subject matter, and similar objective criteria relating to the subject matter;
 - b. Geographic panels, eligibility for which may be based on the jurisdictions in which a lawyer is admitted to practice, the location of a lawyer's bona fide offices, and similar objective geographic criteria; and
 - c. Panels organized around other factors relevant to the selection of counsel.
- (B) To remain qualified for registration under this Chapter, a Service must not limit an attorney's independent judgment regarding provision of legal services to clients or limit an attorney's right to select co-counsel, whether or not co-counsel participates in the Service.
- (C) (1) **Registration and Annual Report.**
- a. A legal intermediary referral and information service that is already operating in New York on the effective date of this Chapter shall register with the Authority within ninety days of the effective date of this Chapter.
 - b. A Service that begins operating in New York after the effective date of this Chapter shall register with the Authority ninety days before the Service begins operations in New York.
 - c. To register, a Service shall: (i) complete and file a registration form prescribed by the Authority and (ii) pay a fee set by the Authority.

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- d. On or before the [first day of March] of each succeeding year, the Service shall file an annual report with the Authority, in a form prescribed by the Authority, containing information about (i) the activity of the Service for the preceding year and (ii) any changes to its immediately preceding registration form.
- e. The Service shall pay required assessments based on fees that the Service charges to participating attorneys. These assessments shall be calculated in accordance with schedules prescribed by the Authority. The Authority may levy assessments not to exceed [one] per cent of fees collected in the relevant period by the Service from participating attorneys to fund the Authority's operations.

(2) **Criteria for Denial or Revocation of Registration.**

- a. The Authority may deny or revoke registration if the Authority determines that: (i) the Service or any of its attorneys do not meet the criteria established by this Chapter; (ii) the Service has not provided all information requested by the Authority; or (iii) the Service has provided materially false or misleading information to the Authority.
- b. The Authority may deny or revoke registration if the Authority determines that any individual who owns or controls the service, directly or indirectly, in whole or in part: (i) has been publicly disciplined or convicted of a felony or crime involving moral turpitude in New York or another U.S. or non-U.S. jurisdiction; or (ii) has owned, controlled, or had a substantial affiliation with one or more other legal referral and information services that have been publicly disciplined or have had a registration denied or revoked, either in this State or another jurisdiction whose criteria for registration are substantially equivalent to those of this Chapter.
- c. The Authority shall explain in writing the basis for any denial or revocation of registration.
- d. Upon receiving notice that the Authority has denied or revoked registration, the Service may submit an amended registration form [or seek court review]. The Authority may charge an additional fee to a Service for submitting an amended registration form.

(3) **Effect of Denial or Revocation of Registration.**

- a. Denial or revocation of a Service's registration shall not be a bar to discipline of attorneys participating in the Service, but the facts on which the denial or revocation was based shall not be given collateral estoppel effect unless the parties to the disciplinary proceeding so stipulate.
- b. The Authority shall (i) promptly notify participating attorneys and the Attorney Grievance Committee of any revocation or denial and (ii) make the record of the revocation or denial process available to an Attorney Grievance Committee or law enforcement authority upon request.
- c. No fee may be charged by a Service or shared between a Service and a participating attorney for legal services rendered by a participating attorney after the date on which the Service's registration was revoked.

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- (4) **Registration Is Not an Endorsement.** A registered Service may state that it is registered with the Authority as a legal intermediary referral and information service in the State of New York but may not otherwise assert or imply that registration is or can be construed as an endorsement or rating of the Service by the Authority, by the Courts, or by the State of New York.

(C) **Permissible Conduct by Legal Intermediary Referral and Information Services.** A legal intermediary referral and information service operating in New York may do one or more of the following:

- (1) Charge participating attorneys a fee, whether calculated as a percentage of legal fees earned or otherwise, for matters referred to the attorney by the Service. The Authority may require the Service to designate a portion[, not to exceed five percent,] of the fees charged to participating attorneys to fund public service activities engaged in by the Service or affiliated entities, or otherwise to fund support for delivery of pro bono or other legal services for the indigent;
- (2) Charge a membership or participation fee to participating attorneys and/or to actual or potential clients; and
- (3) Establish and require attorneys to participate in low-fee, moderate-fee, and no-fee panels and other special panels established by the Service to increase access to justice for those who cannot afford market rates or to respond to other referral needs of the public.

Section Four. Conditions for Participation by Individual Attorneys in Legal Intermediary Referral and Information Services.

(A) An individual attorney may participate in and share fees with a legal intermediary referral and information service registered under this Chapter provided that:

- (1) the Service does not direct, regulate, or interfere with the attorney's professional judgment in rendering legal services to any client;
- (2) the amount that the Service charges to the participating attorney for a referral may depend on the amount of the fee the attorney charges to the client in accordance with Section Three (C)(1);
- (3) the participating attorney discloses the referral fee arrangement to the client in writing at the inception of the attorney-client relationship or within a reasonable time thereafter, the attorney's fee is reasonable, and the attorney does not charge the referral fee to the client as an expense;
- (3) any rating system or referral determination by the Service is not affected by payments or anything else of value given by the attorney, directly or indirectly, to the Service, including payments or anything else of value to the Service in exchange for (i) advertising by the participating attorney on the Service's website or otherwise or (ii) plaques, certificates, or other evidence of the participating attorney's membership in the Service;

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- (4) the attorney takes reasonable steps to ensure that the Service's advertisements or other communications concerning the participating attorney or the attorney's practice or legal services (i) are not false and misleading and (ii) otherwise comply with the New York Rules of Professional Conduct; and
- (5) the right of the participating attorney to practice law apart from the Service, during or after the attorney's participation in the Service, is not directly or indirectly restricted by the Service.

(B) Each legal intermediary referral and information service shall include the following provisions in the documents governing an attorney's participation in the service:

- (1) The attorney shall be suspended or removed from further participation in the Service if:
 - a. the attorney is disbarred or suspended from the practice of law in New York;
 - b. the attorney resigns from the New York Bar or takes inactive status;
 - c. the attorney is convicted of a crime that warrants or results in automatic disbarment; or
 - d. the attorney is convicted of a crime that involves moral turpitude or dishonesty.
- (2) An attorney participating in a Service shall promptly notify the Service, in writing, if the attorney:
 - a. is not in full compliance with the terms of the Service's agreement with the attorney;
 - b. is suspended or disbarred in New York;
 - c. has been convicted of a crime that results in automatic disbarment or involves moral turpitude or dishonesty;
 - d. resigns from the New York Bar or takes inactive status; or
 - e. comes to know that any material information in the attorney's application to participate in the service is false, deceptive, or misleading in any respect.

(C) The requirements set forth in this Chapter represent minimum standards applicable to each Service. A Service may impose more restrictive provisions on attorney participants.

Section Five. Treatment of Certain Communications with Intermediary Legal Referral and Reporting Services.

(A) Communications between a client or potential client and a registered legal intermediary lawyer referral and information service for the purposes of (1) seeking or obtaining an introduction to a lawyer participating in the Service for the rendition of legal services, or (2) for the Service to facilitate the rendition of legal services by a lawyer participating in the Service:

- (1) constitute "confidential information" within the meaning of Rule 1.6(a) of the New York Rules of Professional Conduct; and
- (2) constitute privileged communications within the meaning of New York CPLR § 4503 and New York Judiciary Law § 498(2).

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(B) An attorney participating in a Service that has referred a client to the attorney shall give written notice to the client informing the client that the attorney may be required to provide the Service with information regarding the client's matter, including but not limited to the status of the matter and the amount of the attorney's fee for handling the matter. The Authority may prescribe procedures for requesting and reviewing client information and may prescribe or recommend a form for notice to and acknowledgement by the client.

(C) Disclosure of information pursuant to this Section Five shall not, by itself, be deemed (i) a waiver of attorney-client privilege, work product protection, or any other applicable protection, or (ii) a breach of the attorney's duty of confidentiality under the New York Rules of Professional Conduct.

Section Six. Authority Rule Making Consistent with This Chapter.

The Authority may promulgate rules, regulations, forms, procedures, and guidelines to implement the provisions of this Chapter.