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May 18, 2021

Legal Aid Ontario

2021rulespublicfeedback@lao.on.ca

RE: Legal Aid Ontario Draft *LASA, 2020* Rules and the Tariff

The County of Carleton Law Association has reviewed the Legal Aid Ontario Draft *LASA, 2020* Rules and the Tariff from the perspective of three senior criminal lawyers (Karen Ann Reid, Sean May and myself), and from the perspective of our Family Law Advisory Committee (FLAC). We are pleased to make two submissions on behalf of our over 1700 members.

Thank you for reviewing our submissions.

Yours sincerely,

Rosalind Conway
President, County of Carleton Law Association

CC: Federation of Ontario Law Associations



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Legal Aid Ontario Draft LASA, 2020 Rules and the Tariff – Criminal Submission

The County of Carleton Law Association is an association of over 1700 lawyers, paralegals, law students, paralegal students and members of the judiciary. We are the second largest of Ontario's local law associations, and are pleased and honoured to make submissions to Legal Aid Ontario concerning the Draft LASA Rules from the perspective of criminal law practitioners. The CCLA has a separate submission from our FLAC (Family Law Advisory Committee), which follows this submission.

The LASA Draft Rules may not simplify matters for criminal lawyers: the draft rules require lawyers to know the Tariff, the rates and LAO Rules/practices intimately.

It is time for Legal Aid Ontario to recognize that legal aid rates, which are unchanged since April 1, 2015, do not represent anything remotely close to what modest-means clients would pay. The CCLA, whose collective experience is reflected in two sets of submissions, learned: (1) Two of the subcommittee members' Family Law firms will not take Legal Aid cases, as they cannot afford to carry the net losses which habitually result in those cases, and (2) Two of the subcommittee members who practise Criminal Law are able to sustain a Legal Aid practice due to longevity and experience, but also because their spouses effectively subsidize their health expenditures by means of the spouses' separate government benefits.

Rule 1: Roster Management

Rule 18 provides essentially for disciplining panel members: there may be concerns about whether lawyers will be dealt with fairly, as decisions that will affect their practices are stated to be final, and not reviewable, and oral submissions may not be made. Geographical restrictions will be placed on lawyers. LAO does not wish to pay for travel within a 50 kilometre radius of the lawyer's office, but we are often appearing virtually now, and furthermore, a lawyer may want to assist an old client who is charged some distance away, and may have special knowledge that would assist in that client's representation. There is a Schedule with a section called "Administrative Burden": it would be helpful if LAO could clarify that calling their staff with questions on how to bill a file does not offend this rule, as the Tariff is long and complex.

Rule 2: Payment to Roster Members

This rule sets out the fee schedule, and has no reference here to paralegals, but only to law clerks. The language should be updated to recognize that paralegals are licensees. Paralegals supervised by lawyers should be included, at a rate of pay commensurate with that set out for articling students, \$64.74 per hour. Otherwise, a paralegal's work would be remunerated at \$32.37 an hour. Big Case



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Management only seems to refer to matters in which preliminary hearings are set, but arguably ought to refer to trials in provincial court, now that the Criminal Code has been amended and there are fewer preliminary hearings. A lawyer's fee for a different service performed as duty counsel should not be clawed back if another lawyer at their firm later gets a certificate. The number of hours/fees allocated for bail hearings (2 hours), bail reviews (5 hours), and Charter arguments (2 hours) continues to undercompensate defence counsel.

Rule 3: Certificate Management

We are concerned that there is no protocol for assigning work directly to lawyers, whether they be staff or private.

Rules 4: Eligibility for Legal Aid Services

The criteria continue to be strict and the cut-off for a single person is \$18,795, and \$45,289 for a family of four.

The vulnerable working poor are foreclosed from getting a LAO certificate. An individual charged with a violent or sexual offence may be looking at a trial with multiple issues or witnesses, lasting a week. A working poor individual cannot afford to spend \$5,000 -10,000 plus HST for a multi-day private or certificate account.

We suggest having a variety of repayment agreements. See below.

Rule 5: Recovery of Costs

While the 10% management fee that already exists may be reasonable in some cases, in many others, as we note above, it is a barrier to accessing Legal Aid services, and it would be more appropriate for Legal Aid to charge such clients a modest contribution fee, rather than the total of the lawyer's fees, disbursements and HST, plus 10%.

Rule 6: Entity Service Providers

Bidding for batches of work has been a concern for defence counsel for years; and it is not clear that the rule would preclude this, potentially affecting both the right to counsel of choice, and the viability of the certificate system.

Rule 7: Delivery of Documents

Counsel should not have to check the portal daily, and the rule should incorporate a tickler system, in which LAO sends an email to counsel to tell them to check the portal, as is presently the case.



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Rule 8: Definitions

"Law Clerk" is defined elsewhere. As previously noted, there is no reference to paralegals in the draft rules, and it would be reasonable to put them on the same footing as articling students, for remuneration for work done under a supervising lawyer.

Rule 9: Transitional Matters

The Draft Rule was recently released. We have no comments at this time.

Responses to Specific Questions:

1. What aspect of billing takes up the most amount of time?

In criminal matters, many clients only qualify when they have multiple sets of charges, and if these do not resolve together, billing becomes complex and time consuming. Requesting discretion is so time-consuming that it is often not worthwhile.

2. What is the biggest impediment to finding information regarding billing or billing rules?

The Tariff is too long, and does not clearly reference or index all criminal charges.

3. How can LAO simplify billing for you?

If the portal displayed allowable hours, billing would be easier.

4. What additional features would you like to see in an online portal?

The portal should have hyperlinks to relevant parts of the Tariff.

5. What are your top three billing grievances unrelated to the tariff?

(1) When a criminal client has multiple files it would be simpler to bill all matters hourly on the same certificate, with a minimum of one judicial pre-trial for each resolution or trial. It is extremely time-consuming to separate all services into multiple invoices to Legal Aid for the same client, especially when we are often working on multiple sets of charges for the client at the same time.

(2) Lawyers often carry a file for over a year before seeing any payment, which is a disincentive for taking on some matters.

(3) Certificates are often issued for the wrong charges, which becomes apparent when we begin the billing process.

6. Where do you feel that the tariff is most inadequate?

Sexual assault matters are very likely to go to trial. Potential consequences include lengthy jail terms, long or lifetime SOIRA orders with restrictions on association, residence, liberty, travel, and familial and social stigma, yet sexual assault is classified as Type I Indictable Offence, rather than Type II. The Tariff is inadequate whether the client decides to plead guilty or go to trial. There may be multiple counsel pre-trials, yet none are recompensed. There is usually more than one judicial pre-trial, even where a matter does not go to trial, but only one of these is generally recompensed. Many are historical allegations. The lawyer then tries to cobble together the client's narrative for their defence. Many such clients are mentally ill, and the Mental Health enhancement should be available.

General Comment: Two hours for CPTs/meetings with the Crown should be restored to the Tariff.

Criminal Harassment: Clients with these charges are similarly disposed to mental health issues such as fixed delusions, phobias and depression. Disclosure will easily be triple or quadruple the volume for other offences, consisting of hundreds or thousands of text messages, emails, telephone and Facebook records, from our client to the complainant. Where there has been bilateral communication, one can double the volume of disclosure. This is time-consuming to review with the client who will spend hours explaining why each and every message was called for. If the lawyer forges a palatable resolution, thus averting a multi-week trial, the fee is not adequate. That is false economy to LAO, as it discourages resolution.

Special Needs Enhancements: It is hard to understand why the Tariff does not permit a mental health enhancement on certificates that are billed hourly.

As noted above, there is a need for the Mental Enhancement for sexual assault files. Other non-block fee matters such as Breach of Conditional Sentence are also Mental Health Enhancement-exempt. The Breach of Conditional Sentence tariff allows for only 8.5 hours up to the end of the first day of hearing, and 2.5 hours for each subsequent continuation day including preparation time. This is inadequate, and a client who has breached their sentence is extremely likely to have Mental Health issues.

Bail, Bail Reviews and Charter Arguments

Notably, the two hours typically allowed pre-COVID for **bail hearings**, five hours for **bail reviews** and the two hours for **Charter arguments** are not adequate to cover the preparatory work and courtroom time involved. However, if the lawyer has worked on a bail hearing or review, and the client's plan fails to materialize, the lawyer is not paid anything for their preparatory services. Paradoxically, if counsel



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proceeds with a hopeless bail hearing, wasting court time, their services would be covered, at least in part. Incomplete services should be covered where a lawyer works on a bail plan for a client.

7. How would you improve discretion?

The criteria are too narrow. The Form for Discretion in the Forms Library is too restrictive, with its heavy emphasis on groundbreaking precedent versus recognizing the value of work to our client. Sometimes our best work is done by convincing the client that going to trial is actually not in their best interest and that a trial would in fact be disastrous for them. We may have to competently spend dozens of hours reviewing disclosure with them. The lawyer should be adequately compensated for competently and ethically avoiding a lengthy expensive trial and forging a good result for a client.

Thank you for reviewing our comments about the LASA Draft Rules and the Legal Aid Ontario Tariff, from the perspective of three practising criminal lawyers.

Respectfully submitted,

Rosalind Conway, C.S., President, County of Carleton Law Association

Sean May, C.S., Vice President, County of Carleton Law Association

Karen Ann Reid, Barrister, Past President, County of Carleton Law Association



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Legal Aid Ontario Draft LASA, 2020 Rules and the Tariff – Family Submission

This submission is made on behalf of the County of Carleton Law Association (the CCLA). The CCLA was formed in Ottawa in 1888 by a group of 60 lawyers and is now the second largest law association in Ontario, representing over 1700 lawyers in the Ottawa and East Region legal community. These submissions are being provided by the CCLA and specifically the Family Law Advisory Committee, which is comprised of 9 members of the bar who practice exclusively in family law.

In reviewing the following questions, the Committee considered the following questions:

Submissions

There can be no doubt that family law is an area of law that is increasingly complex, requiring detailed and expansive knowledge of a large number of statutes, case law, and intersecting areas of practice such as immigration, criminal law, business law, tax law, contract law, real estate law, child protection law, and employment law. Family law also requires an understanding of emotional and interpersonal dynamics, including racial, gender, class, and cultural awareness, sensitivity to violence and abuse issues, and the significance and relevance of mental health issues.

In fact, LAWPRO repeatedly identifies family law as one of the most complex and challenging areas in which to practice.

This is the case for all family law cases – including those cases that require a legal aid certificate. As family lawyers, we often hear the myth of “this shouldn’t be complicated” or “if there are less assets, this ought to be simple.” Family professionals and family lawyers will confirm that when it comes to families separating, it is indeed complex. For example, there is often the thought that if the client is eligible for a legal aid certificate, there is no property involved. Some cases do not include property, but some do (one particular example is when a woman must flee the family home for protection in cases where domestic violence is alleged).

It can be very difficult for families to comprehend the complexities of the division of their assets or support scenarios or arrangements for their children and this is the case even when our clients have a number of socio-economic resources and benefits available to them. However, clients who are eligible for legal aid certificates often do not have similar socio-economic resources and benefits available to them. Not having these resources available to the client makes our jobs as the lawyer more difficult, as we must meet the client where they are (i.e: only having phone calls/meetings with clients who have

difficulty with emails, meeting clients with an interpreter, social worker, or support worker, taking longer to explain certain concepts, reading out court documents to clients with literacy challenges, meeting clients at irregular hours, etc). Much of the work that legal aid lawyers are expected to perform, often for free, creates an unfortunate dichotomy where:

- the client gets reduced standard of services because the lawyer refuses or cannot afford to do the work; or
- the lawyer is left doing unpaid work and subsidizing it in other ways.

The consequences of making practice mistakes can be irreparable and severe, from issues impacting the well-being of children, to the viability and health of families, and other significant human, social, and financial costs. Getting it wrong can easily result in significant overall detrimental impact. Failure to know or apply the law is twice as likely to occur in family law than in other areas of practice and errors of law account for 22% of common malpractice errors in family law.¹ Accordingly, it is simply not open for family lawyers to rush a process or proceed without the satisfaction that the client understands their rights and obligations.

For clarity, the family lawyers who offer their services with legal aid certificates have no delusion that they will be compensated (or even that they ought to be compensated) at the same level as a private retainer.

Rates:

The Law Society of Ontario, on their website confirm that the fee Schedule for a junior lawyer with less than one year of call is \$165.00 per hour. The highest tier of pay with LAO is \$136.43 per hour. On its face, family law lawyers who accept legal aid certificates are already accepting to do the work at a reduced rate – no matter what their year of call.

There are family law lawyers who have a regular rate of \$300.00 and more who are on the panel and charge the significantly reduced rate of \$136.43 when they accept a legal aid certificate. In other words, that lawyer would have received remuneration of \$3000.00 from the client for 10 hours of work and they fully understand (and agree) that they will only be compensated \$1364.30 for the same work when they are on a legal aid certificate. That is more than a 50% reduction off their regular rate.

The biggest issue is that in addition to the already significantly reduced rate they charge, LAO has imposed several administrative and substantive limitations that in turn:

¹ Published by Law Pro in April 2019 - [Here](#)

- increase the number of non-billable hours on the file (administrative burdens); and significantly limit the number of hours on a file, limiting the lawyer's ability to properly
- serve the client, or requiring them to work for free.

Current Situation:

Certificates for family law are limited in hours. The typical number of hours allocated for a file is between 12 and 24 hours. If the lawyer is successful in justifying to LAO that more hours are needed, one might get an extra 24 hours until trial begins.

The Family Law Advisory Committee has considered the following seven (7) questions to better inform the Committee of some of the issues arising in legal aid files:

1. What aspect of billing takes up the most amount of time?

1. Writing to LAO to seek additional hours;
2. Searching the portal/handbook for what disbursements are allowed;
3. Minor disbursements that LAO ought to pay, that are not being paid by LAO (we are hearing examples of \$10 disbursements that even clients who are entitled to a fee waiver are required to pay), leaving lawyers who acknowledge the certificate to pay such disbursements out of pocket.
4. Tracking the number of hours remaining on all of your certificates.

2. What is the biggest impediment to finding information regarding billing or billing rules?

Seeking discretion. The requirements for seeking discretion are complicated, unclear and often involved regional and provincial requests. We believe that an approach similar to that used by the Office of the Children's lawyer would be more manageable.

The largest impediment is having to find information about billing or billing rules with the lack of centralization. The rules must be found while scrolling through a number of lengthy handbooks such as the Tariff and Billing handbook, the Disbursements handbook, or scrolling through the LAO website to find the information. More often than not, LAO lawyers will simply consult a colleague or call the LAO Lawyer Service Centre for assistance if they cannot find the answer. Another issue is where the various handbooks or manuals do not match the online billing system (for example if the handbook permits a disbursement that is not listed in the online billing portal).

3. How can LAO simplify billing for you?

1. By authorizing reasonable hours to do the work needed.
2. By paying lawyers for administrative tasks borne from LAO issues, or preferably, to stop making them responsible for this administrative work:
 - An example of the above is that often there are issues with the certificate issued and the lawyer (who often is not even on record yet) is expected to fix these issues (all unbillable time). An example is as follows:
 - Woman receives 7.5 hours certificate in a case where domestic violence is present. There are no children. This woman has a claim for spousal support and property. The certificate issued is the wrong one. The prospective lawyer advises the woman to call LAO to get this fixed and LAO advises her to “get her lawyer to write to them to fix the issue.” The lawyer isn’t even on record yet and they are expected to:
 - a) fix LAO’s problem of issuing the wrong certificate;
 - b) run the risk of LAO not allocating enough hours and now they are on record to deal with complex property and support issues with 7.5 hours. The lawyer knows that their best-case scenario is that they will get 30 hours (but only after investing considerably to write to LAO to obtain these 30 hours). In the meantime, the client is going through a difficult process and she has questions for her lawyer that she needs answered in order to understand her rights and obligations. The process has not even started, and half the certificate is used up.

We are hearing that these types of examples happen so often that lawyers and firms are now refusing LAO certificates altogether.

4. What additional features would you like to see in an online portal?

1. We have heard from all legal aid lawyers that it would be immensely helpful if LAO can display the number of hours allocated, number of hours billed and number of hours remaining on each certificate on the portal. This will significantly reduce the administrative burden of lawyers having to maintain detailed spreadsheets.
2. It would also significantly reduce the administrative burden to have a simple form to fill out for additional authorization requests. Having a simpler process to request additional allotments would reduce the time spent by certificate lawyers on this type of task, and identify specific

information that LAO considers pertinent when deciding whether to grant additional authorizations.

3. It would be helpful if the LAO system automatically emailed counsel their deposit slips once they are posted to the portal.
4. Legal aid lawyers would also request that the portal tell us at the billing stage, when this bill will be paid by LAO. We have to check a separate link and scroll down to the billing date to determine when the bill will be paid.

5. What are your top three billing grievances unrelated to the tariff?

1. LAO does not fund mediation or arbitration; To this end, the CCLA submits that there should be greater support for mediation and collaborative law in most family law cases. Amendments to the *Divorce Act* and the *Family Law Act*, require legal advisors to encourage family dispute resolution processes, defined in the *Acts* as negotiation, mediation and collaborative law. Clearly, both Parliament and the Legislature of Ontario have determined that access to justice will be enhanced utilizing these processes. Consequently, serious consideration should be given to making mediation mandatory in all family law cases before the courts (subject to screening for violence and power imbalances) and financial support so that litigants and non-litigants can have access to trained mediators and collaborative professionals to assist them in resolving the issues arising from the dissolution of their marital relationships. This should include a specialized mediation program through Legal Aid Ontario.
2. The length of time it takes for LAO to process bills. LAO certificate lawyers are pleased that the time to be paid was once again reduced from 28 days to 14 days, but would like to see further reductions. Predictability of pay makes this type of work more challenging and having to wait two weeks between billing and payment creates additional financial pressures for legal aid lawyers.
3. The HST calculation made by the LAO portal never matches the bills we generate. It is almost always different by a few cents. This requires us, after we are paid, to retroactively change the bill we originally rendered or write off those amounts, which creates more administrative burden.

6. Where do you feel that the tariff is most inadequate?

Trial preparation

The number of hours allocated to prepare for trial is completely inadequate.



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There is a total of 15 hours allocated for trial preparation and this simply does not allow lawyers to meet their professional and ethical standards when serving a legal aid client.

Even in child protection matters where the order sought extended care (where a parent loses all parental rights) the hours for trial preparation are by no stretch of the imagination sufficient to even begin trial preparation. The disclosure in most child protection cases can be several thousand pages and just the review of this disclosure often takes more time than the allocated trial preparation hours, not to mention dealing with other technical issues such as expert reports, children's hearsay etc.

Additional Conferences

The more recent change to limit additional conference allotments to only one additional conference is another source of frustration. Many family law files will have at least three conferences: a Case Conference, a Settlement Conference, and a Trial Management Conference. In fact, in most cases, you are likely to have at least a second Settlement Conference shortly before heading to trial. These appearances are necessary for counsel to do all that they can to: (1) resolve the issues and avoid a trial; (2) narrow the issues for trial; and/or (3) ensure that trial is a streamlined process to make the most efficient use of time. There are also cases where the presiding judge will order the parties to attend a subsequent Case Conference, Settlement Conference or a Trial Management Conference, removing the decision entirely from counsel's hands. This creates substantial pressure for lawyers, particularly during the later stages of the proceeding, when you are likely running out of hours and may have to attend the appearance without pay. The allotment for additional conferences, should at the very least, cover two conferences subsequent to the first Case Conference.

Motion for Summary Judgment

The number of hours allocated for a motion for summary judgment is 8. This is grossly inadequate, particularly in child protection cases. Preparing for a summary judgment motion mirrors preparing for a trial as an unfavorable decision at summary judgment has the same consequences of being unsuccessful at trial i.e. complete termination of parental rights. The Children's Aid Society will often serve multiple lengthy Affidavits, which can be replete with hearsay. The time required to review, properly respond, and prepare, is always well in excess of the 8 hour allotment.

Other

A) Matters involving the Society's claim for a Supervision Order - 19 hours – although the order sought is not as intrusive as Interim or Extended Care, the extent of work required to defend an Application seeking a Supervision Order is the same as for other orders;



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B) Property and equalization related issues in family matter - 12 hours – These limited hours are barely adequate to explain and prepare Financial Statements and Net Family Property Statements for clients.

These specific instances are just a few examples to demonstrate that the hours allocated are hopelessly inadequate for any lawyer to be able to meaningfully assist clients in dealing with these complex issues.

7. How would you improve discretion?

The need to write lengthy and detailed letters to LAO when requesting a discretionary payment is time consuming and cumbersome and, for the most part, these payments are often denied.

When LAO exercises its discretion to not pay lawyers for all the hours worked on a file, it is unclear if LAO takes this position on the basis that the number of hours spent was unreasonable or they simply do not trust that the lawyer has, in fact, worked the number of hours claimed – this is particularly true following a trial.

In this context, the discretion process is an area that creates the most disenchantment with taking on legal aid work. Lawyers who are required to seek discretion have typically done a large amount of work for their clients beyond the traditional certificate allotments. Legal aid lawyers will not usually claim small amounts for discretion, as the administrative cost of doing so would exceed the value. During the process, Legal Aid will review your bills and criticize details in dockets to tell you where you exceeded the bounds of what a client of modest means would pay for. The reductions in payment by LAO are justified using some of the following statements:

- That we should stick to the minimum required level of service, and that other tasks will not be compensated;
- That LAO will not pay for phone calls or emails if they are deemed excessive. If client's or opposing party's email us documents or effectively "spam" us, we are meant to read them for free or ignore them.
- That a client of modest means would not have taken particular procedural steps, such as attending a further conference, or bringing a procedural motion.

These expectations are contrary to our professional responsibilities towards our clients and our obligations as Officers of the Court.



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A suggestion is that a built-in feature in the billing portal be added with templated requests for additional hours so lawyers can “tick a box” as to what is needed.

Closing remarks

The work of a family lawyer is difficult at the best of times. Lawyers are expected (rightly so) to provide the same degree of professional service to a client who is assisted by a legal aid certificate as they would to a client who can afford to pay for their lawyer. Anecdotally, we are hearing from lawyers that the only way they can continue to do the work they do is because:

- a) they feel strongly about social justice work; and
- b) they have other sources of income to support their legal aid practice (partners who can support them for example)

The current situation is simply not sustainable, and the result is that fewer lawyers are prepared to take on legal aid certificates and if they do, they chalk it up to “pro-bono work.” We are hearing from lawyers that they simply cannot afford to take on legal aid files because after accounting for unbilled hours, the burden of writing additional hour authorization requests, discretion letters, and other administrative tasks required on a legal aid matter, the effective rate of the lawyer is approximately 40% less than the legal aid tariff. This exacerbates the access to justice gap for low-income clients, as their ability to find counsel taking on legal aid certificates becomes far more challenging. A properly funded, and less administratively burdensome legal aid system will help legal aid lawyers continue this important work and ensure Access to Justice.

Respectfully submitted,

Family Law Advisory Committee, County of Carleton Law Association