



**Family
Lawyers
Association**

Submission to Legal Aid Ontario on Draft Rules under LASA, 2020 from the Family Lawyers Association

May 20, 2021

Introduction

The Family Lawyers Association welcomes this opportunity to share our feedback on the Draft Rules which are a key feature of the *Legal Aid Services Act (LASA), 2020*. The Rules are intended to form the operational foundation for how legal aid is managed and administered. They are therefore of critical importance for the legal aid system in the province. We hope to be able to engage in further consultation with Legal Aid Ontario before the Rules are finalized.

Our submissions focus on five key areas of concern with the draft Rules:

- Solicitor-client privilege
- Solicitor-client relationship
- Quality assessment, including the audit provisions
- Payment to roster members
- Recovery of costs of providing legal aid services

About the Family Lawyers Association

The Family Lawyers Association was founded 26 years ago in response to the legal aid funding crisis of the mid-1990s. The Family Lawyers Association is governed by a nine member volunteer Board. Our membership consists of lawyers working primarily for low-income clients. Most of our members accept legal aid certificates in both custody and access and child protection matters. Some of our members are per-diem Legal Aid Duty Counsel who work in the Family

Court system and at Family Law Information Centres in our court houses representing and assisting the self-represented and unrepresented. Accordingly, the focus of the Family Lawyers Association has always been to work towards improving Legal Aid Ontario (LAO) and protecting the rights of our most vulnerable low-income citizens.

Solicitor client privilege

The proposed Rules under LASA 2020 do not consider the importance of solicitor-client privilege in our legal system and pursuant to the Rules of Professional Conduct as mandated on its members by the Law Society of Ontario.

In the area of family law (domestic and child protection), the relationship between the lawyer and client is a personal relationship. In domestic proceedings, Legal Aid funds cases where there is domestic violence and or high conflict family law cases. Gone are the days where Legal Aid had the financial resources to fund what we used to consider the run of the mill family law files. The proposed Rules provide that a lawyer shall not resign (or remove oneself from a proceeding either by a Form 4: Notice of Change of Representation executed by the client or bring a motion to the Court to be removed as the lawyer for the client in a proceeding.) While such a Rule attempts to address Legal Aid Ontario's financial pressures, it does not recognize the circumstances where there has been a breakdown in the solicitor-client relationship as defined by our regulatory body, the Law Society of Ontario, nor does such a Rule benefit the vulnerable client Legal Aid Ontario is mandated to serve.

Legal Aid Ontario is the funder of our most vulnerable litigants in our family court system. The client, whether legally aided or not, has the right to terminate the solicitor-client relationship. If there has been a deterioration of the relationship between the lawyer and client, wherein the lawyer is unable to obtain instructions from the client, the client has deceived their lawyer, the client refuses to accept and act upon the lawyers advice on a significant point of the litigation, the client is persistently unreasonable or uncooperative in a material aspect of their case and there has been a material breakdown in communications, the lawyer will have no option but to end the retainer either by Form 4 or by a Motion to be Removed. Ultimately, it is the Court not

Legal Aid Ontario to be the decision maker of this important issue. It is the position of the Family Lawyers Association that this Rule be removed from the draft Rules.

Quality and service standards, including audit provisions

Legal Aid Ontario's focus as the funder of legal service for their clients should be to get value for money spent. The Family Lawyers Association's position has always been and continues to be that Legal Aid Ontario is underfunded. What is concerning about these provisions is that it appears Legal Aid Ontario assumes the lawyers providing services to the most vulnerable in family and child protection proceedings are not providing proper advice to their clients, are not treating our clients with dignity and respect, including accommodations for clients with disabilities (as required by Human Rights legislation), are not in tune with the needs of their clients, and are not acting in a professional manner.

It is also concerning that, under draft Rule 1: Roster Management, Legal Aid Ontario is proposing to assess roster lawyers' quality of service based in part on client satisfaction surveys and results. It is not clear whether roster lawyers are to be given the opportunity to address survey results. This provision seems especially problematic for family law, where clients are often disgruntled, and "success" is difficult to measure.

In terms of the provision for removal from the roster, Legal Aid proposes to notify both the lawyer and the client of the suspension. The client will also be told the reasons for the lawyer's suspension. There is a financial contract between the roster lawyer and Legal Aid, not the client. The client does not know and thus would be incapable of understanding the intricacies of the lawyer's contract with Legal Aid Ontario. The Family Lawyers Association is concerned that clients would think suspension means disbarment by the Law Society of Ontario.

It is the position of the Family Lawyers Association that these Rules are not within the jurisdiction of Legal Aid Ontario as the funder of legal aid cases. Rather the proper jurisdiction for these issues is the Rules of Professional Conduct of our regulatory the Law Society of Ontario and applicable Human Rights legislation.

The audit provisions of the proposed Rules are also too far reaching and encroach on the solicitor-client relationship. The wording of the Rules is vague and will have a chilling effect attracting new or senior counsel to remain on the Legal Aid Roster. It is the Family Lawyers Association's position that Legal Aid Ontario will not be able to attract and retain the quality-of-service providers (lawyers) that the clients who require legal aid to advance their important cases in domestic and child protection matters expect and frankly deserve.

The proposed Rule potentially requires lawyers to breach solicitor-client privilege in that Legal Aid Ontario may require its service providers (lawyers) to produce to Legal Aid Ontario any notes and records and any independent records or court documents. In addition, the proposed Rule will require proof (although not specified) and justification (again, not specified) of items (including dockets) of the detailed account.

Legal Aid Ontario is the funder and not the client of the lawyer. Only the client can waive solicitor-client privilege and it is the position of the Family Lawyers Association that this proposed Rule should not be enacted as it is a direct violation of the Rules of Professional Conduct as mandated by our governing body, the Law Society of Ontario.

Solicitor-client relationship

The draft Rules provide for the assignment of lawyers by Legal Aid Ontario. No evidence has been provided to indicate that family law clients are having difficulties finding a panel lawyer to take on cases. The Family Lawyers Association would ask that Legal Aid Ontario provide data on the number of unacknowledged certificates for family law matters. If the data supports that clients are having difficulty finding panel lawyers to take on cases, we propose that the preferred way to resolve this issue is to attract more lawyers to the panel, and to ensure that the tariff is appropriate to the nature and complexity of the case, including client complexity factors where applicable.

Once a lawyer is assigned to a client under this mechanism, the Rules prohibit the lawyer from resigning from a case without Legal Aid's permission, including in circumstances where there has been a breakdown of the solicitor-client relationship. This is extremely concerning, and may cause lawyers to leave the panel, or not join it in the first place, thus exacerbating the issue of

difficulty matching clients to legal aid panel lawyers. The client has the right to their counsel of choice who accepts legal aid certificates. Especially in family law, Legal Aid must understand and recognize the personal relationship between the client and lawyer.

Payment to roster members

The stated aim of the draft Rule 2: Payment to Roster members is to “simplify LAO’s complex billing requirement and reduce red tape.” We are concerned that this draft Rule in fact creates additional administrative burdens for lawyers, as well as being vague and potentially objectionable in terms of solicitor-client privilege.

The rule creates an onus for lawyers to provide, at the request of the Corporation “proof of and justification for the legal services provided and disbursements incurred, *including any notes and records of the roster member.*”¹ It is not clear when such “proof of and justification” would be required. Would this be in the context of an audit? Or in the regular course of preparing or submitting accounts?

Lawyers have always included invoices for disbursements when submitting accounts. This is a reasonable requirement. However, the requirement to provide “any notes and records” as well as independent records or documents from a court, third party provider, or tribunal is concerning, excessively burdensome, as well as potentially objectionable in terms of solicitor-client privilege/confidentiality in some cases.

Lawyers all have ways of doing our notes; some of us may write chicken scratch and that is enough to bring back to memory volumes when we refer to them. If we are to be ready to give over our notes at any time, this potentially represents a significant onus to put upon lawyers.

Lawyers will have to ensure their notes are thorough enough so Legal Aid Ontario will understand the facts and decisions we made. In terms of confidentiality, under the Law Society rules, when a new lawyer takes over a file, they are to be given everything by the previous lawyer but not the notes - they are privileged and confidential.

¹ P2(3)

Under the draft Rule 2: Payment to roster members, panel lawyers are required to maintain a record of the “*outcome or results of the proceedings.*”² It is not clear what this information is to be used for? Does this pave the way for results-based determination of certificate funding? If so, it is often difficult or impossible to quantify success in family law and child protection proceedings.

The Family Lawyers Association can appreciate that Legal Aid Ontario wants and needs more explanation of what has been done on a Court file when it pays a lawyer’s accounts. It is reasonable for lawyers to provide, for example, an Endorsement or Order and disbursement invoices. We do not agree though with lawyers being penalized with non-payment of our bills because they were unable to get a particular result, which may not have been attainable in the client’s circumstances.

Moreover, we are concerned by the provision that “the Corporation may disallow the payment of fees in whole or in part, otherwise payable under the Act and these Rules under circumstances: a) if fees/disbursements relate to a i) proceeding that A) is unreasonably taken or prolonged, (B) not likely to advance Applicant’s interests or C) incurred through negligence or ineffective assistance of roster member ii) the preparation of a document by the roster member that was improper, unnecessary or unreasonably lengthy, or iii) other preparation time spent by the roster member was unreasonable in its nature or scope or in the time spent.”³

This draft rule represents an overreach on a professional’s judgment call in any given litigation which can be prolonged based on any number of circumstances including the judge, opposing counsel’s ineffectiveness, or there being a self representing opposing party. We are concerned that this provision authorizes Legal Aid Ontario to financially penalize lawyers for prolonged Court proceedings. The responsibility for prolonged Court proceedings does not solely lie with the lawyer. The decisions and circumstances of the other parties and the Case managing Judges are also involved. Lawyers may also find themselves in an impossible situation where Legal Aid Ontario prohibits them from withdrawing from representation and their client is providing instructions to prepare certain documents or take certain steps that Legal Aid Ontario deems unnecessary or unreasonable and therefore refuses to pay for.

² P7(1)(c)

³ P11(2)(a)

The draft Rule also maintains the provision that, in docketing, lawyers must record the start and end time for services of one-half hour or more.⁴ This recording requirement was discussed in the online consultation sessions in the context of the ongoing modernization of the billing portal. The overwhelming feedback from lawyers in these sessions, which the Family Lawyers Association agrees with, was that this requirement is time consuming for lawyers to comply with, unnecessary and should be scrapped.

Recovery of costs of providing legal aid services

Draft Rule 5 Recovery of Costs provides that it is the “responsibility of a service provider for a legally aided client to take all reasonable steps to collect the recoverable amount in relation to the legally aided client.”⁵ Where there is an order in respect of court costs, the draft Rules state that service providers shall, among other steps, file with the court a request for a writ of seizure and sale and a writ of seizure and sale in respect of the costs, and take unspecified other “steps” to collect the costs.⁶ It is unclear the extent of the steps required for lawyers to take to recover the costs of providing legal aid services. For example, is the expectation the lawyer will need to do a judgment-debtor examination? Will lawyers be paid for these additional services?

It is the Family Lawyers Association’s position that recovery of costs of providing legal aid services would be an appropriate area for Legal Aid Ontario to cover in house. This is a specialist area of service that Legal Aid Ontario is best placed to provide. As the funder of legal aid services, Legal Aid Ontario is also in a better position to conduct the cost-benefit analysis around the recovery of the costs of providing the services.

From the legally aided client’s perspective, it is important that there be more education upfront about the cost of the legal aid services and the fact that the client will ultimately be paying these costs, for example where there is a lien registered by Legal Aid against a matrimonial home. There should be consistency of practice in terms of Legal Aid recovering the amount of its lien from the sale proceeds. The Family Lawyers Association is aware of instances when Legal Aid

⁴ Maintaining records P7(1)(a)(iii))

⁵ RC3(1)

⁶ RC9

has not instructed real estate lawyers to hold back and pay the amount of the legal aid lien from the sale proceeds.

When a legally aided client receives a lump sum settlement for past underpayment of child support, this amount is subject to recovery by Legal Aid. If the support arrears are paid periodically, the funds are not subject to recovery. Clients are often unwilling to accept a lump sum settlement where this would otherwise be available to them because they do not wish to pay the cost of legal aid services. This prolongs litigation and increases the cost of providing the legal aid services. Alternatively, the client may accept periodic payments simply to avoid having to pay for legal aid services. This may be to the detriment of the child.

It is the Family Lawyers Association's position that where a client is financially eligible for legal aid, they should be entitled to retain the lump sum amount for past underpayment of child support. Possibly there could be an upper threshold, such as \$20,000, beyond which Legal Aid would retain the discretion to recover the cost of providing the legal aid services.

The draft Rules provide that, when negotiating the issue of costs in settlement discussions, lawyers should base the amount of costs on their private retainer rate.⁷ This raises an ethical concern, when the actual cost incurred is typically less than half of the private retainer rate. Would Legal Aid then make a profit if the client obtains costs at the lawyer's private retainer rate?

Conclusion

The Family Lawyers Association recognizes that these Rules are fundamentally important to how legal aid is managed and administered. Ontario's legal aid system is fundamental to ensuring access to justice for low-income Ontario residents. The Family Lawyers Association is dedicated to improving the legal aid system to helping support access to justice for the most vulnerable people living in Ontario today. The Family Lawyers Association is concerned that these draft Rules, which represent such a fundamental aspect of our legal aid system and are aimed at meeting the needs of the people of Ontario well into the future, have been afforded such

⁷ RC6(1)(b)

a relatively short consultation period of one month. We welcome the opportunity to provide further feedback.