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FOLA Submission: LAO LASA Draft Rules

Submitted to: Charles Harnick, Board Chair, LAO
David Field, President and CEO, LAO
2021rulespublicfeedback@lao.on.ca

Submitted on: May 20, 2021

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Introduction:

The Federation of Ontario Law Associations [FOLA] is thankful for the opportunity to provide Legal Aid Ontario [LAO] with feedback on the draft rules, prepared in response to the Legal Aid Services Act, 2020 [LASA].

FOLA is an organization that represents the 46 local law associations across Ontario. Together with our associate member, the Toronto Lawyer’s Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province.

FOLA is a stakeholder member within the Alliance for the Sustainability of Legal Aid [ASLA], and we support the group submission. Also, many of FOLA’s member associations have tendered individual submissions which we hope are also seen as insightful.

FOLA appreciates that LAO has worked hard to draft the current LASA 2020 Rules and we applaud that effort.

FOLA greatly appreciates the various attendances by LAO Representatives at ASLA teleconferences, throughout 2021, to address the LASA 2020 rules. We are thankful for the receipt of an early confidential release of the draft rules to ASLA and we wish to thank all of the board members who were able to attend and participate on April 29, 2021 at the ASLA feedback session.

Significant time has also been invested and effort expanded by numerous stakeholders, in an attempt to assist the LAO Board to understand that there are some concerns with respect to the draft LASA 2020 rules, as they currently stand.



General overview:

FOLA supports that LAO is crucial to the justice system overall. It is essential that sustainability be carefully monitored and managed. The provincial government has introduced new legislation and in response LAO draft rules are being reviewed. These rules are important to LAO sustainability.

Issues for Consideration:

FOLA wishes to focus on two main issues. The one relates to client needs and the other to service providers. There is concern that the current rules, as drafted, are overly broad, at times, and there is a power imbalance created, as between the client/service providers and LAO. FOLA hopes that these respectful submissions will illuminate the issue(s) and offer thought on how to finesse the draft.

Submissions:

FOLA respectfully submits that the two broad scope issues raised herein are essential to the interests of LAO.

LAO states a client focused legal service system is at the root of the rules and we submit that to meet those client needs competent and capable legal counsel are required.

Much of the feedback FOLA has received, from legal counsel, centers around inadequate tariff, insufficient billing rates and prohibitive client eligibility issues.

These are valid points raised, from the perspective of FOLA, and we support the need for LAO and the Ministry of the Attorney General [MAG] to give serious consideration to all of these various concerns. We see these as stumbling blocks that will eventually cause the LAO system to fall.

In many regards, a separate trajectory to look into all of those concerns apart from the current draft LASA 2020 rules consultation is much needed. Those efforts of tariff review, at least, FOLA acknowledges commenced in December 2020 and are anticipated to reengage soon. We thank LAO for that commitment and encourage LAO to continue to engage in this worthwhile pursuit of change.



FOLA respectfully commends for your current rules review consideration, the below list of specific rules and concerns raised:

1

Roster Management:

(a)

R3(7)

The reference: “The corporation may refuse to approve an application for any reason.” - is concerning.

FOLA points out the overly broad sweeping power of LAO, found herein, as pitted against the public person of modest means, who is left here with even less means.

However, perhaps this rule is the current state of affairs. This is where it would be useful to know the current versus the draft rules.

In any event, just because one has always done something one way, does not mean it is necessarily correct or cannot be improved upon.

FOLA suggests that if the rule is to remain, add the balance of “approve or” deny. Plus, adding a reference to the Rowbotham next step consideration, as a client option, is we submit a client focused approach.

(b)

Resignation:

Section R17 deals with this issue and it is concerning that a roster member can be required by LAO to continue to provide legal aid services when the roster member wishes to resign from the roster, in total.

Again, we do not know if this is a codification of the current state of being or a new power being added to LAO.



In any event, it is in the exclusive jurisdiction of a judge to determine the status of counsel of record and on a roster member application to LAO being declined the rule should allow for an Order of a Court of competent jurisdiction to be engaged.

FOLA suggests that leaving the rule, as drafted, without addition may necessitate Court review of the Rule and future unnecessary & costly litigation for LAO.

(c)

Schedule one: ineligibility for enrolment on the roster:

FOLA raises as a concern section (d) (ii) any lawyer with costs ordered against them individually in the course of representing a client would not be eligible for enrolment on a legal aid roster.

There are circumstances where costs are awarded not because of some egregious act but rather circumstances of a power imbalance between a very seasoned senior lawyer and a junior.

Simply put the solution is to avoid an absolute prohibition but to make this a point of note subject to LAO review to overcome with admission where appropriate. Please, enhance the LAO power of review and discretion.

(d)

Assignment of lawyers C4

This is seen as a proactive addition. It is a helpful solution to an often-difficult justice system plight. Thank you.

There is one area of concern, for private bar certificate counsel, as legal aid can also assign a roster member or a staff lawyer and the difficulty is knowing how this section might be used in the future. Will it result in work being funneled to staff lawyers rather than private bar certificate counsel? Historically work was to Certificate counsel first. Will this practice be sustained?



LAO may consider identification as to who should be approached first. For example, roster members be exhausted prior to going to a staff lawyer.

It is also problematic and troubling that the assigned lawyer cannot without LAO permission resign from the proceeding or retain an agent to provide substantive legal aid services in the proceeding.

Certainly, legal aid should be able to trust an assigned lawyer to engage an appropriate agent where needed. For instance, sometimes a lawyer is called, at the last moment, to other court proceedings and needs to engage an agent - at the last minute.

Lastly, in this section, FOLA respectfully submits that the ability of assigned counsel to be removed as solicitor of the record should remain with the judicial system and a judge should determine that issue as to the appropriateness of counsel being removed as opposed to legal aid. Please, note that often there are time sensitive ethical issues at play and the Law Society of Ontario [LSO] Rules of Professional Conduct must triumph. No service provider wants to be at odds as between LSO and LAO.

Perhaps LAO could be the first avenue of consult, where time permits, and in the event, LAO refuses there should be a remedy on the part of the assigned lawyer to look to the court for a determination of the issue. FOLA submits this is fair approach balancing the interests of all concerned and to the overall administration of justice.

(e)

Issuing Retroactive Certificates

C7

FOLA submits that it is problematic that the word “all” is used and a list of four points that must coexist to secure a retroactive issuing of a certificate. This is a change from the present system where even an accused delay in making application for legal aid funding is sufficient for the backdating of a certificate, with authorized services noted from that day forward. The removal of the word “all” should resolve the situation. We submit that as it stands, neither the public nor the service provider are provided fairness in the process. This appears as a



non-intentional consequence, with the inadvertent wording. We suggest LAO enhance the discretionary powers back to what has been enjoyed to date and with a stroke of a pen, this problem creation is averted.

2

Division 3

Payment to roster members

(a)

P2(3)

We all appreciate that Legal Aid lawyers are already working at a significant reduction in payment. The amount of time required administratively to complete and submit a legal aid account is taxing on both counsel and staff time. This overhead is unrecoverable. LAO is encouraged to continue the parallel review of billing and tariff reform. The online billing form needs serious scrutiny, in full consultation with the users, and we appreciate and thank LAO for apparently moving in that direction.

Pursuant to the draft rules, LAO proposes a significant onus on a roster member when called upon to provide “proof of a justification for the legal services provided and disbursements incurred, including any notes and records of the roster member and any independent records or documents from court, tribunal, agent or third-party provider. “

These tasks are all lost time and energy for the lawyer and the staff. Legal aid offers no compensation for these administrative tasks. It is fair for the lawyer to answer about file records, notes and dockets etc. Items in the roster member’s possession ought to be delivered for inspection.

However, a review of a legal aid account submitted is stressful enough without putting an additional onus in the form of an absolute rule that the service provider/roster member must procure documents in possession of a third party. This is a true breakdown in the relationship between service provider and LAO.



The solution is easy, LAO staff are able to requisition documents from a court or tribunal. LAO staff have been successfully doing this, for a number of years, in Criminal Law, at least. Please, maintain this current system and do not return to the old system where lawyers had to seek these documents on a review. Let’s keep moving forward to improve the system. The present system is not broken so let’s make a rule to support the current.

In conclusion, please, amend the obligation to production of materials within the lawyer’s possession and LAO to seek those in the possession of a third-party record holder. This is a matter of fairness too, if the third party fails to respond LAO is aware of the validity of that problem. For a roster member to invest time without success leads to communication time to detail the state of affairs to LAO and LAO may question the validity of the reply. Again, this is stress building and does not foster healthy relationships between LAO and service providers.

(b)

4(b)

LAO, is to be commended, for the evolution from an old billing system of roster member drafting and submission of accounts to the allowance of others to prepare and submit accounts. However, pursuant to the draft rules we see language that the roster member must “directly supervise the person in the preparation and submission of the account.” What is the definition of “directly supervise“. A lawyer could easily fall short.

This is an easy fix with the necessary addition into the definition section.

(c)

Maintaining records

P7

(d) Proof and justification of the items included in the roster members detailed account.



What does that mean? From a practical point of view: what is required?

(d)

(3) These rules indicate that a lawyer must maintain the files for some six years after the end of the year in which the account is submitted to the corporation. However, within item 3 we find the words "unless otherwise directed by the corporation". Does that mean a lawyer may need to maintain files beyond six years or does that mean the corporation could allow for a lesser time frame? It is vague.

We take no issue with the six-year time frame.

(e)

P2(1)(d)

FOLA stated at the outset that these submissions would not focus on tariff/billing issues per se but the LAO perpetuation of the reasonable person of "*modest means*" test does require some commentary. FOLA respectfully submits that the test is archaic (pre-charter) and is ineffective and grossly unfair to the roster member and frankly to the client too. The reference should be deleted. No such person *of modest means* properly informed would be able to fund the litigation, in any event. No person of modest means can fund any of this which is why we have LAO. It is an arbitrary and highly subjective test with no roots in reality and an ability to be manipulated to suit a denial of compensation for meaningful and required legal services provided. Even support of the client to commend outstanding end results and that all was in the best interests of the LAO client fails to persuade LAO to payment for wonderful services provided.

FOLA supports a rule premised on a test of "take all reasonable steps to ensure full and proper representation to the standard of the competent practitioner." This is still a subjective test but offers an objective assessment to form the subjective conclusion.



On another note, for years now, the “exceptional circumstances” are not defined to allow payment even when services fall within the bullet points of the form because the LAO reviewer simply refers to and relies on the “person of modest means test”.

(f)

P2(2)

The Rule mandates that retained agents and third-party providers must be paid in a timely manner but LAO billings are cumbersome and time intensive. Plus, in the past, we have seen delays and denials in payments.

FOLA asks LAO to consider establishing direct third-party payments. This fairly removes the burden of the administration for the roster member and the added overhead.

3.

Examination, audit and investigation

P15(3)

On the corporation notifying a roster member the roster member *must* provide “any information or documents” as specified by the corporation for the purpose of “examination, audit or investigation”. It is noted that these can include:

(a) proof and justification of the services provided, disbursements incurred and time spent on providing the services: *and*

(b) an independent record or document from a court, tribunal, agent or third-party provider.

The use of the word “must” plus the word “and” are problematic. LAO is mandating that a roster member is obligated to produce a document, in the possession of a third party. The roster member has no control. The language is too binding to a task that may not be achievable. Also, why direct that the unpaid service provider must seek these records? LAO staff are best positioned to requisition (please refer to submission 2 (a)). IF LAO disagrees and wishes to engage the roster member to seek document production, then again, FOLA



stresses that it should not be incumbent on the roster member to need to pursue documents from the court without any administrative compensation to the roster member for the services provided. LAO staff are paid, so too the lawyer’s staff costs should be covered. Presumably the lawyer has done nothing wrong (akin to a constitutional presumption of innocence) why should that service provider need to do post service work, on demand, and free of charge.

FOLA sees two solutions: place this task of securing third party documents on LAO staff or allow a recoverable, administrative fee to the roster member. The word recoverable means on discovery of wrong doing the fee is clawed back along with any other billing over payment.

4.

Division 1

Entity Service Providers

FOLA has not made submissions in response, on this topic, as we submit that other stakeholders are better qualified to speak to the practicalities of this area of the rules and we appreciate that you are thoroughly reviewing those submissions tendered. Not having read the final submissions, in advance, we simply take no formal position but do acknowledge that this is a very complex topic and it is important to roster members.

5.

Schedule X

quality services standards

(a)

Removal from Record:

At: 3(3)(e)

We see that a roster member shall not remove themselves from the record without prior notification to the corporation.



This is akin to the assigned roster member commentary, aforementioned at section 1 (d) of our respectful submissions, which also applies hereto.

FOLA again stresses that this is a highly problematic rule, as it can pit the roster member in conflict as between the LSO Rules of Professional conduct; for example, when there is an ethical conflict and an immediate need to seek judicial removal from the record and LAO rules of LAO consent prioritized first. No one wants to be in breach of the legal aid rules. Nor in breach of LSO Rules.

In the balance, is the reality that the LAO rule breach may nullify payment for all services up to that point. The LSO breach may see sanctions or loss of licensing privileges.

Furthermore, in this Covid day and age counsel are often removed from the record because of a breakdown in the solicitor client relationship. In other words, the client cannot be located. These are typically addressed by an oral application. There is no time to adjourn and seek LAO approval.

(b)

Administrative burden

The language in the schedule is concerning because it is broad and vague and may result in LAO removal of a roster member.

A young lawyer may be inexperienced and fall afoul of the billing rules.

Any lawyer may have repeated requests for an extension of time to submit accounts especially during these Covid days. Language here allows LAO to remove many lawyers, as all have been affected by the pandemic with staff shortages and time crunches.

FOLA does not believe this is the intention. But it is a risk.

In addition, a lawyer seeking to late tender accounts may very well be under the crisis of a serious health issue and having all energy diverted to serving clients rather than his or her billings.



FOLA, has heard that LAO has no intention to use these remedies but to simply have the ability when needed. Again, this power imbalance is not required for a positive working relationship between LAO and counsel. Plus, the word “shall” is used and not “may”. We submit that substituting the word “may” gives LAO the flexibility it states is the end goal in this section. FOLA trusts that an easy remedy can be had.

Also at subsection 2(e):

We see a reference to “unnecessary or excessive reliance on employees of the corporation on matters relating to the roster members manner of practice.” FOLA asks: what does that mean? Does that mean a young lawyer learning the ropes calls legal aid employees to often for direction? Does that mean someone trying to do the right thing and phoning and asking employees of the corporation, is the wrong thing?

Clarification of the meaning of this subsection would be helpful.

(c)

Professional standards

(i)

2(1)(b) (ii). “Communicate orally or in writing in a tone that is inconsistent with professional communication “. Does that mean no emojis? Honestly this is overly broad and could include discussions or communication that is more of a personal and friendly nature. Again, FOLA raises a concern that the language is overbroad and LSO Rules are already operational and applicable to address the issue.

(ii)

3

We see here an obligation to report breaches and the language is “shall promptly “. This is problematic as a lawyer can easily be in breach in exercising his or her own assessment/comprehension. In the result, a lawyer may lose the roster panel status for failure to abide by the rules.



More permissive language of “should” is acceptable as roster members are professionals, governed by the LSO Rules and Officers of the Court. Trust is important in fostering a healthy relationship.

(iii)

3(l) an application for authorization for travel time must be made no later than 30 days after the roster member acknowledges the certificate.

That is an unduly strict timeframe as the roster member may or may not know the direction that a matter is going. Those are early stages. In a criminal law matter disclosure is most likely not even in hand yet to assess the direction of the case.

FOLA hopes that LAO will reconsider this strict term. But, if it is to be so imposed then we respectfully ask that LAO record a warning on the certificate proper, so the lawyer is aware of the duty. Plus, FOLA asks LAO to maintain a discretion to authorize on a case-by-case basis outside of this limitation.

(iv)

6

The delineation of court attendances as not including waiting time continues to be problematic for service providers.

FOLA notes that some lawyers docket their time very differently in this regard and there does not seem to be consistency.

Given the tariff limits, it has been suggested that LAO just allow the lawyer to bill and when they hit the ceiling, they hit it. For example, one lawyer attending on 10 cases over the course of an hour assigns 0.1 to each. Another lawyer who has to sit the hour and has only one matter heard in the hour- should docket it as one hour. The ceiling is going to control the traffic in this regard.



Conclusion:

FOLA respectfully submits that the LASA 2020 Rules are in need of some minor adjustments which can easily be implemented with a little more time and consideration. FOLA contends that this is in the best interests of LAO, the clients in need of services and the roster member service providers.

Now is a time of great modernization and LAO is front and center in this process.

FOLA once again thanks LAO for inclusivity in the consultation process. FOLA is a strong supporter of the LAO system and we hope that our time invested, to provide feedback, is seen as positive and helpful, as these are our intentions.

FOLA wishes LAO well in the finalizing of the Rules and FOLA remains encouraged by the prospect of progress. As always, FOLA extends an open invitation to LAO to contact us anytime we can be of service.

Submitted with respect,

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