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## FOLA Submissions

### to Legal Aid Ontario on Minimum Requirements to be Authorized to Provide Legal Services by Area of Law

Submitted to: Marcus Pratt, Legal Aid Ontario  
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Submitted on: January 24<sup>th</sup>, 2022

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## **INTRODUCTION**

The Federation of Ontario Law Associations [hereinafter referenced as FOLA] is an organization representing the associations and members of forty-six law associations across Ontario. Together with the Toronto Lawyer’s Association, our members represent approximately 12,000 lawyers across the province. The vast majority of these lawyers provide front-line services to the Ontario public and many of our members assist in providing Private Practice Legal Aid Certificate services, pro-bono services and as Legal Aid Counsel both as staff lawyers and as *per diem* duty counsel. However, for the purposes of this consultation, it is appreciated that Legal Aid Ontario [hereinafter referenced as LAO] is addressing only roster members who are providing duty counsel services and/or legal aid certificate services.

FOLA appreciates the opportunity to provide written submissions to LAO, with respect to minimum standards for qualifications based on area of law.

## **THE PURPOSE**

It is understood that the maintenance of base minimum standards for lawyers who are in representation of legally aided members of society is an important area of management for LAO. It is essential to monitor and govern a standard of education and skill for roster member empanelment. FOLA thanks LAO for this opportunity of consultation.

We appreciate that LAO is looking to maintain competent and qualified services for LAO clientele. FOLA supports this purpose.

FOLA also readily appreciates, on review of the LAO standards material, that LAO has secured thoughtful input from others (in-house) on drafting the presented standards. However, there is a concern that the minimum standards as drafted may have some undesired results.

To sort through this topic, in a hopefully meaningful and direct way, we will respond NOT be parsing out the various criteria standards enumerated by area of law and topic of law therein but rather by sharing on general subjects of consideration that run through all the areas of law listed by LAO and may require some additional reflection, plus modification, by LAO before moving forward with implementation of the standards as currently drafted.

## **AREAS for PAUSE with respect to the PROPOSED REQUIREMENTS:**

### **(a) Maintenance of Senior Counsel empanelment**

LAO allows for an exemption with respect to the Law Society of Ontario [hereinafter referenced as LSO] specialist certification applicants. This is to be commended as it encourages recognition of that LSO designation program. However, for those who do not seek such a recognition of certification, we did not note any “grandfather exception” built in to the LAO document to permit LAO a discretion to secure empanelment of seasoned senior counsel. It is to be appreciated that, at the stage of being senior counsel, the private practice lawyer maybe practicing at a reduced level or limiting the practice to certain types of large cases or may have developed a method of practice which simply results in a failure to maintain the base LAO “minimum experience” criteria but with an articulable and credible explanation worthy of LAO examination and exemption for empanelment purposes.

LAO discretion is important, when looking at maintaining senior counsel on roster panels. LAO should have a



method of assessment allowing for an examination and corresponding appreciation that many such current senior roster members limit their practices to a specialized area of law, which serves to enhance skill in the practice of a particular area of law. This inures benefit to the LAO client and ensures that competency standards are met.

The belief that LAO wishes to maintain seasoned members of the Private Bar on the Roster is held by the practicing Bar and, to effectively do so, it is respectfully submitted that LAO should build-in a mechanism of discretion for empanelment when circumstances arise that require same, on individual case assessments where the identified minimum experience is not achieved but other safe guards are in the balance for consideration by LAO.

### **(b) Attraction of New Lawyers to Empanelment**

There is a concern by FOLA that the standards, as drafted, are a potential road block for admission with respect to those who are young in the practice of law. FOLA raises a concern that many of the lawyers, who are sole practitioners, may not achieve the base minimums required by LAO. It should be noted that many new calls to the Bar become sole practitioners and we believe that these numbers are disproportionately the racially or otherwise marginalized lawyer, inclusive of Indigenous / Metis lawyers. This barrier to admission may be a block for these Junieur lawyers.

### **SUMMATIONS ON THE OVERALL IMPACT**

Access to Justice is key for the LAO client. LAO has developed a client-based focus and FOLA appreciates that this requires safe guards with respect to quality management of panel roster lawyers delivering the legal services that LAO offers to the client(s): there is no question that this is required.

However, FOLA is concerned that the minimum standards as drafted may not be as achievable as LAO believes. It is thought that many current roster members would not satisfy these requirements when placed under the microscope for an honest review and assessment.

The base minimum standards as drafted do not take into consideration the collective benefit to the justice system provided by lawyers who do not fit this particular LAO mould of legal practice. Not all law practices achieve these base minimum standards, but competency is not compromised. Likely the result would be the same if LAO applied these competency standards to staff lawyers. Many would not meet muster but are likewise in no way compromised in practice ability.

It appears that LAO envisions, at times, conditional empanelment. FOLA is not sure of this but, if so, FOLA supports this. FOLA strongly believes there is a need for LAO discretion, on a case-by-case basis, to maintain full empanelment of competent service providers.

As stated, the FOLA concerns raised herein focus on two essential groups of private practicing lawyers: the Senior counsel and the Junieur lawyer for empanelment.

However, FOLA also stresses the broader and most serious issue of diversity and inclusivity barriers of entry to Roster membership.

The nature of the practices of these two aforementioned essential groups are such that the LAO minimum standards may not be met. In the case of the Junieur lawyer it may be a complete barrier to empanelment. A conditional empanelment solution may bring that nature of Junieur Lawyer to empanelment and in due course compliance. On the other hand, the Senior Lawyer may not achieve compliance, depending on the nature of the individual practice, as the stage of practice may not permit the necessary case work to bring the very seasoned



and capable lawyer into compliance. That lawyer simply may not be interested in a practice that has the case practice to achieve the compliance LAO wants. But the lawyer has a wealth of experience that may be worthy of “grandfathering”, with treatment similar to that of the LSO Specialist Certification designate. LAO should have the ability/discretion to assess a lawyer to make a determination of merit for an exception. This is not Conditional Empanelment but full empanelment.

FOLA is concerned that, without the conditional empanelment of the Junieur Lawyer and the “Grandfathering” (for lack of a better word) of the Senior Lawyer, that over time there will be a dwindling of the roster numbers and in the result, this will harm LAO client access to justice.

In addition, the anticipated impact of further marginalization of already identifiable marginalized lawyers is noteworthy and should cause immediate pause for LAO policy management. The solution, FOLA believes is the addition of built-in safe guards permitting LAO to review individual lawyer requests for empanelment.

FOLA wishes to also point out that there is a fear - that this design of minimum standards, as currently drafted, without additional LAO monitored and granted exemptions – will cause private practicing lawyers to abandon the LAO Certificate program which will result in an increase need for LAO staff lawyer services. In the result, as seen in the last decade, more LAO staff lawyers will be required and hired. The end is a significant step to the demise of the Private Practice LAO Certificate program. This has been a deeply troubling and long-standing concern of private bar roster members and this may be viewed as another step away from the maintenance of the current system due to the onerous nature of the minimum standards on certain groups within the practice.

In the meanwhile, if the number of Certificate lawyers decreases and the staff lawyers cannot manage the increase work load LAO has a risk of contribution to the problem of the self-represented individuals and the unrepresented litigant, which has been identified as a current and systemic problem of significant impact on the daily functionality of our Court system. It has been identified in the past and this continues to be an issue that spans all levels of the courts. FOLA submits that the risk of contribution to this problem should be avoided by designing minimum experience standards that allow for conditional empanelment and exceptions based on a lawyer’s past experience record.

FOLA encourages LAO to consider the need to address this discretionary consideration and to maintain such powers of review and inclusion and exemptions to create a system of empanelment with diversity representation and both Senior plus Junieur counsel options for client selection of representation through the LAO Certificate program. It is hoped that LAO agrees with the existence of such diversity of client choice within the panel roster lists.

Furthermore, FOLA believes that there needs to be another prong of the required analysis:

In particular, appreciating that FOLA is a participating member of the Alliance for the Sustainability of Legal Aid [hereinafter referenced as ASLA]. FOLA has had the benefit of reviewing the ASLA submission which we support and adopt.

Through the ASLA process of consultations FOLA has observed that the ASLA stakeholders, on the topic of LAO minimum requirements for empanelment within the LAO Certificate program, are of an alike mind in our concerns raised. Often stakeholder points of view vary, and sometimes greatly, but on this topic we achieve a comfortable majority of harmony. That agreement should demonstrate to LAO the significant need to pause and to consider additions to your policy.



FOLA stresses, as ASLA did, the funding piece of the equation. Although not strictly a part of the issues of this consultation, the financial component is essential to the sustainability of LAO. Appreciating that LAO cannot self-lobby, we are all here supporting the budget needs of LAO.

LAO needs to hear that we are your allies! With this said and appreciated, FOLA has one more closing submission:

Please, also hear that LAO needs to look at changing the approach of using a test of "what would the reasonable person of modest means do...". It is submitted, that is not the question. Hand in glove with LAO minimum requirements for service, by area of law, should be the post service examination and FOLA asks that you consider that the test should be: "What would the competent lawyer, in the circumstances of a particular legal case, have done." LAO appreciates the competency piece for empanelment and should likewise apply a competency analysis on conclusion of services.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Terry L. Brandon  
FOLA Legal Aid Chair