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FOLA's RESPONSE TO LSO's PROPOSED AMENDMENTS to the CONFLICT of INTEREST RULES: LEGAL AID ONTARIO

Submitted to: Jacqueline Horvat, Chair Professional Regulation
Committee

Call for Comment – Short Term Pro Bono Legal Services Rules
Law Society of Ontario
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Toronto, ON M5H 2N6

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INTRODUCTION

The Federation of Ontario Law Associations (FOLA) is an organization representing the associations and members of forty-six local 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 pro-bono services and as Legal Aid Counsel both as staff lawyers and as *per diem* duty counsel.

FOLA appreciates the opportunity to provide written submissions to you, with respect to proposed amendments to Rule 3.4-16.2 of the *Rules of Professional Conduct* and addition to the commentary to the Short-Term Pro-Bono Legal Services rules.

PROPOSED REFORMS

It is understood that the Professional Regulation Committee of the Law Society of Ontario (LSO) is seeking input about an addition to the definition of "pro-bono lawyer" as found in Rule 3.4-16.2 and as applicable in Rules 3.4-16.3 and 3.4-16.6, to include a sub-category (iii) to read:

A lawyer providing short-term pro-bono services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic.

In addition, an amendment to the commentary section to include the following reference:

[9] A pro-bono lawyer who provides short term services to clients while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic, and who also provides legal services to other clients through the lawyer's law firm, must continue to take steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer's law firm.

THE PURPOSE

We understand that Legal Aid Ontario (LAO) has asked the LSO to consider exemptions from the Conflict of Interest Rules for LAO to permit service providers through LAO to provide short-term pro-bono help to the public. In particular, the amendments are sought to permit duty counsel to provide a greater array of services to a broader number of public members who are self-represented or unable to access legal representation through a private retainer or the legal aid certificate program.

The historical context considered by the LSO with respect to the LAO request, details how the then Pro Bono Legal Services (PBLO) had provided insight about the challenges encountered by lawyers within the PBLO in providing access to justice within the conflict rules. Amendments were approved in 2010, with minor changes in September of 2016, which included Convocation's amendment of the name to Pro Bono Ontario (PBO).

The Rules were crafted to permit a pro bono lawyer to provide pro bono services on a short-term basis without the need to address any conflict of interest that may stem from duties owed to past or present clients of the pro bono lawyer's firm or as may exist to the pro bono service provider. However, if the lawyer was aware, or became aware of a conflict, then that lawyer was obligated to stop services and a waiver was not to be sought with respect to the conflict.

Although LAO lawyers do provide pro bono services to the public, free of charge to the user, the current LSO Rules of Professional Conduct do not umbrella the LAO lawyer, as the definition of a pro-bono lawyer means being a volunteer or working within PBO. As a paid legal service provider, the LAO lawyer, at present, must carefully and strictly adhere to the Conflict Rules as governing all lawyers in practice.

The LSO, through the Committee, is considering cooperating with the LAO request for amendments and has drafted the proposed amendments, as above, in response and is now seeking consultation with the stakeholders within the practicing Bar and the public at large through this Call for Comment initiative. It is appreciated that this is the last step of engagement before the Committee's desire for full "implementation" of the amendments by the LSO.

It is clearly understood that the Committee is of the view that LAO lawyers should be treated the same as the other pro bono lawyers within PBO, or as found providing services free of charge to the public.

Below, we address the two questions presented in the Professional Regulation Committee's Consultation Paper dated April 25, 2019.

Should the Short-term Pro Bono Legal Services Rules be Amended to include lawyers providing short-term legal services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic?

As aforementioned, FOLA represents lawyers with varied professional roles and capacities. The end result is that there is no simple answer of yes or no. Rather, there is an analysis to be undertaken with the voices of many to be included.

FOLA is mindful of the underlying purpose of the Conflict of Interest Rules in the Rules of Professional Conduct. Loyalty and independent judgement are essential elements in a lawyer's

relationship with the clients: where a conflict of interest exists, the lawyer's loyalty and independent judgement are compromised. There is always a risk in a conflict situation of harm to the public. This need not be intentional on the part of the legal service provider. The lawyer may, by human error, create a situation of prejudice to the service recipient. In other circumstances, the mere appearance of a conflict in the public eye may damage the integrity and reputation of the justice system. The convenience of the implementation of the inclusion of LAO within the conflict exception may come at a cost to the security of the public.

However, the present language of the Rule in question clearly halts ongoing service where a conflict becomes known by the pro bono lawyer. Therefore, the lawyer acting pursuant to the Rule should be in compliance and the public well protected.

Those FOLA members, in the current employ of LAO, one would anticipate, would wish to see outright support for the requested amendments and inclusion therein for the benefit of the LAO system. This would remedy concerns over conflict situations, like the benefit had for PBO and others who fall within the current definition and exceptions.

One would easily label this as a clear access to justice solution and a benefit to the public at large, as more people could be serviced by LAO counsel. More significantly, it should enhance the timeliness of access by the public to legal advice and, in turn, reduce delays. Ultimately, the Courts, - as well as other litigants and users of the justice system, - benefit from cases being able to move forward in a more expedited manner.

At the same time, on the other hand, private bar FOLA members may have another perspective.

One distinguishing point, from the above perspective, is noted as one considers Rule 3.4-16.6 commentary [5] and the delineation that confidential information in the possession of the pro bono lawyer is not imputed to other lawyers etc. at the lawyer's firm. This permits the firm lawyers to act for other clients adverse in interest to the pro bono service recipient. This makes sense, as the lawyer stepping out to do pro bono work of the nature anticipated, within the Rules², would not bring that work back to the lawyer law firm proper. The legal services are quick in duration. In this circumstance, there is little risk of the sharing of confidential information as the lawyer upholds duties of confidentiality and privacy.

But in the case of a LAO clinic, or basic LAO duty counsel and per diem counsel, there is no dividing wall, as the work space is typically one of close quarters and shared spaces that can easily see confidential information pass from one lawyer to another. This reality requires care

² This is appreciating that at present a Pro Bono Lawyer, benefitting from the conflict exemption, is currently defined by the Rules, as providing free services and without remuneration.

and a proper conflict check.³

Also, as the role of duty counsel has been quickly expanding both in the areas of family and criminal law, a more traditional law office or even firm type environment has been developing with assigned files and client management. LAO staff lawyers are now doing trials and enhanced services, rather opposite to the past LAO representation, which was more akin to the brief client encounters anticipated within this area of the Rules of Professional Conduct under consideration herein. As this trend continues, the need for enhanced and proper conflict checks becomes even more pressing, not less.

The current Rules reference that the short-term nature of the pro bono service decreases the risk of conflicts of interest. To the contrary LAO clinics and staff lawyer services are often not short-term in nature (especially in the area of family law). This being said, the risk to the public is increased.

Furthermore, there is a concern that these amendments could interfere with individuals obtaining counsel of choice. The relaxing of conflict checks permits enhanced numbers to enter the clinic doors. This could result in public harm, rather than protection.

Furthermore, the public ability to select the lawyer that best suits the personality and individual legal needs of a service recipient is reduced within a duty counsel or LAO clinic office. It should be appreciated that the ability to secure counsel of choice is often essential to a public member's success within the legal system. Individuals looking for legal assistance are often distraught, overwrought with emotion and in distress. The choice of legal confidant and advisor is a major decision, and an empowering one, that should not be a choice removed from the public.

With respect to the person finding benefit within the LAO duty counsel or clinic infrastructure, the protection as provided in a private law office (where the LSO Conflict Rules are in full force and effect) should be equal. To expand and reiterate, wherever there are potential risks of conflict situations, the public should be shielded with the benefit of an equal protection.

As the Law Society considers potentially expanding the exemption from conflict searches, it is worthwhile to emphasize the public protection purpose of the current conflict rules, and only provide an exemption where the benefit outweighs the potential risks. Moreover, with continued advances in technology, it should only become easier and more efficient to complete conflict searches, rendering the need for an exemption less imperative to ensure timely access to legal services.

³ FOLA represents 46 Law Associations spanning across that entire province. Plus, the Toronto Lawyer's Association is a member. LAO duty counsel services and clinics vary greatly in size and infrastructure. There may be locations where the proposed conflict amendment is with out issue but other geographical locations fraught with public protection issues, should conflict checks be loosened in the suggested manner.

Another issue which should be contemplated is the distinction between services provided by LAO staff duty counsel, *per diem* duty counsel and LAO clinic counsel. In short, the services vary. The amendment being sought references including lawyers who provide short legal services while under the employ of LAO; however, the point being stressed herein and the overriding concern is that the LAO lawyer services are expanding and are often not “short” in duration akin to the pro bono services presently shielded within the current Rules.

Should the Short-term Pro Bono Legal Services Rules be expanded to include other not-for-profit legal service providers?

This appears appropriate in theory if the pro bono service provider falls squarely with the current definition, meaning there is no remuneration to the lawyer for services provided other than self-gratification and the altruistic benefit of helping others.

(i) If so, which providers, why, and under what circumstances?

No examples are known at this time.

CONCLUSION

Access to Justice, and the need to problem solve the plight of the self-represented individual and the unrepresented litigant, is a current problem of significant impact on the daily functionality of our Court system. The issue spans all courts.

FOLA appreciates why LAO has sought the amendments herein. The purpose is functionally beneficial to the LAO lawyer. The goal of improvement of services provided by LAO is positive.

FOLA also commends the LSO committee, for the obvious countless hours of hard work, both in thought and in the drafting, of the Professional Regulation Committee Report in question. It is a worthy endeavor to have undertaken.

But the solution should not be a simple one of convenience, that is for LAO lawyers, where there are real risks to the public if inadvertence or other root causes lead to conflicts being poorly managed under the guise of free legal services.

Perhaps, in closing, there needs to be another prong of the analysis herein required:

In particular, an appreciation that FOLA is a participating member of the Alliance for the Sustainability of Legal Aid (ASLA). The stakeholders therein, much like this submission, at times have varied and even opposite positions on issues as some are from the LAO clinic side of

the practice and some are in large LAO Certificate dependent, given the area of legal practice undertaken. But the bottom line is all wish to see LAO thrive and survive. Within ASLA there is a collegiality in the cause. FOLA in no way wishes to offend LAO but sincerely request that LAO and the LSO carefully consider the concerns raised herein, by some of the stakeholders.

In summation, pro bono services must be maintained at a professional level and have a standard of care to protect the public. The distinction between pro bono service providers working without remuneration and those providing free services to the public for compensation exists. The difference is only magnified by the current uncertainty created by the Provincial government budget cuts in the LAO financing. Additionally, the reality that LAO staff lawyers, clinics and duty counsel are increasing becoming more organized like a law firm including staff (secretaries and the like), formal offices and the enhanced services provided rather than short, temporary and cursory legal advice is of concern.

In general, FOLA respectfully submits that it is a slippery slope to relax conflict of interest rules and caution should be exercised.