

24 May 2021

Mr. Charles Harnick
Chair, Board of Directors

Mr. David Field
President and CEO

Legal Aid Ontario
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Dear Mr. Harnick and Mr. Field:

Re: Proposed draft rules to support the implementation of the *Legal Aid Services Act, 2020*

The Refugee Lawyers' Association thanks you for the opportunity to comment on the draft Rules Legal Aid Ontario has prepared to coincide with the new Legal Aid Services Act, and for extending LAO's deadline for commentary until today.

Introduction:

We appreciate that attempting to prepare a comprehensive set of rules is a complex task, and hope that you will accept there is the spirit they are offered, as constructive recommendations based on a shared concern with promoting LAO's ideal of ensuring vulnerable clients are provided with a high quality of representation; that lawyers ready to represent the vulnerable can maintain their professional and ethical obligations while committing to Legal Aid work; and that the Legal Aid program remains sustainable.

Legal Aid Ontario's authority to prepare Rules, subject to the approval of the Attorney General, presents an opportunity for LAO to balance the policy goals of accountability, protecting the best interests of legally aided clients and promoting participation and engagement of service providers. The draft LASA 2020 Rules presently fall short in meeting these policy goals and should be substantially revised.

With respect to the goal of promoting the best interests of clients, the Rules retain outdated provisions that allow LAO to refuse to fund necessary work. The Rules contemplate entity service providers that need only to employ one lawyer or one paralegal and need not meet the same standards as roster lawyers providing certificate services. The potential impact of new entities on all services and specifically clinic services are serious concerns.

The Rules are also overly broad in defining the responsibilities and liabilities of lawyers who provide Legal Aid representation, setting expectations that are likely to discourage lawyer participation. The Rules contain no corresponding service expectations of LAO and do not ensure fair resolution of contested decisions. The rules should protect lawyers by including reasonable limits on work demanded which reflect what LAO is willing to pay for.

The Rules, as drafted, also allow for lawyers to be left in predicaments which could conflict with their obligations under the Law Society of Ontario's Rules of Professional Conduct. This should not be a possibility, even in theory, as lawyers have to be certain agreeing to work with LAO could not put them in such conflict.

Institutions that assert that overly broad rules or contractual provisions are necessary to protect a valid policy interest often have failed to reflect on what language is actually necessary to achieve the policy goal. Taking the position that the institution should simply be trusted not to apply the overly broad rules in a manner that is unreasonable begs the question of why the authority would not adopt reasonable language in the first place.

LAO has established relationships with lawyer associations that have historically been ready and willing to commit to extensive consultations. The public comment period LAO has allowed, the minimum 30-day period mandated under LASA 2020, is insufficient for the public and the legal profession to be meaningfully consulted on such extensive rules.

The segmented format of the draft Rules following no coherent numbering sequence, the fact that much of their application may be left to administrative policy, and the lack of guiding policy explanation also makes them difficult for the public to understand or be in a position to make informed commentary on.

The Rules reincorporate old policies, even where those policies have had adverse impacts on clients and service providers. It is insufficient to simply reincorporate old policies without re-examining whether they should be included in the new Rules.

LAO has, throughout its history, supported litigation and advocacy challenging overly broad legislation in respect of other institutions. LAO should therefore appreciate the importance of preparing rules which are tailored to achieve valid policy goals without adverse corollary consequences, or potential consequences that would be contrary to its most important public policy goals.

As many provisions of the Rules and policies which may be implemented under the Rules will have impacts specific to areas of practice, the Rules should ensure that associations representing service providers are included in meaningful consultations.

We ask LAO's Executive and its Board of Directors to delay the submission of the Rules, to take the time for meaningful engagement with lawyer associations and the public and to allow itself the time to reflect on how the Rules could be revised to achieve reasonable balance. Alternately, we ask that the Rules be substantially revised before approval.

Commentary:

The following are comments on specific rules.

Part 1: Definitions

1 “person responsible”, in relation to an individual, means

- (a) a person who is legally responsible for financially supporting the individual;
- (b) a person who, in the opinion of the Corporation,
 - (i) usually contributes to the individual’s financial support,
 - (ii) it is reasonable to expect would contribute to the individual’s financial support, or
 - (iii) has made or is likely to make financial resources available to the individual;

It is very difficult to strike the right balance between capturing situations where a person has relatives or people taking responsibility for them who would pay if they did not get Legal Aid, versus leaving people unrepresented when they are in need because they have been wrongly presumed or suspected to have that support. This provision validly seeks to protect the interests of LAO’s administration in refusing funding to people able to access funding for representation on their own, however the Rules should also include countervailing administrative standards to avoid or at least mitigate the risk of adverse impacts on people who are truly in need.

Once a certificate is granted to a person who could pay a lawyer, it also becomes difficult or impossible for the lawyer to negotiate a private retainer. Clients may refuse to pay a lawyer once they have LAO funding, and can simply choose a lawyer willing to accept the certificate. It is not practical to rely on an expectation that lawyers inform LAO of speculative belief that a client has funding available, as that may poison the solicitor-client relationship.

The definition of Person Responsible uses the disjunctive “or”, meaning any of these criteria can make someone the Person Responsible. This is a broad definition which will allow LAO to require unrelated people who could be viewed as willing to pay, or reasonably expected to pay, to take financial responsibility. Refusal of a certificate or the granting of a certificate conditional upon a contribution agreement can result.

Although this Rule tries to capture the idea that a person could have sources of funding, it is worded so broadly that it is not possible to tell what its limits are. LAO should give a more precise definition.

This may lead to delays in certificate issuance, as the client can be required to get financial records and consents from an unrelated person, or someone who is not in Canada. Relatives or undefined others may not be cooperative, and clients can miss deadlines because they are unable to satisfy LAO.

We also recommend that the Rules provide for follow-up by LAO to identify instances where the client has gone unrepresented as a result of a refusal. Lawyers are often left unaware of this, as the client simply does not call back, knowing they can neither get Legal Aid nor pay a lawyer. The applications of these clients should automatically be reconsidered. LAO will also benefit from knowing whether its assessments that applicants had available funds proved to be realistic to help inform future decisions.

LAO should have a defined time frame to follow up with clients and communicate a decision. The definition of the time frame should incorporate sensitivity to the litigation context, as some litigation funding decisions must be taken within a defined and short time frame.

Part 1, Rule 1 Definition of “proceeding”

“proceeding” includes any action, application, motion or other process, whether in writing or otherwise, before a court or tribunal, or an officer of either, in which any part of a matter before the court or tribunal is decided;

This definition does not capture all the work funded by LAO. For example Immigration, Refugees and Citizenship Canada and Canada Border Services Agency officers can be decision-makers (and may be characterized as a “tribunal” in some sense) but are not truly a tribunal or court).

Part 3: Roster management

Although the Schedule to Part 3 includes quality and service standards for lawyers acting on Legal Aid certificates, there is no equally strict requirement for services provided through entities. The public should not receive inferior representation or have its interests protected less based on which mode of funding or service provision LAO follows. The same roster requirements should apply to any service, regardless of how the service is funded or provided.

Part 3 Rule 3(2), provides:

- (i) appear for court or tribunal dates when expected or required to do so on the client's matter, and if unable to attend,*
- (i) ensure that an agent attends in the roster member's place,*
- (ii) ensure that the agent is a roster member who is qualified, prepared, and authorized to provide the legal aid services required, and*

However the entities provisions allow for the possibility of representation by people who do not belong to a roster, and for case management by people who do not belong to a roster.

- 4(2) In assessing a roster member's quality of service, the Corporation may take into account any information, and consider any factor, that it considers relevant, including:*
- (a) the roster member's record of compliance with the Corporation's rules, procedures, billing and account submission rules or administrative requirements;*
 - (b) information about the roster member's conduct towards clients, including as evidenced by the results of any client satisfaction surveys and reviews;*
 - (c) any decision or documents from a court or tribunal;*
 - (d) information received from other lawyers, (whether or not they are roster members), clients and judges.*

This rule does not provide for a fair process. It includes no requirement to disclose sources or even the information being relied on, and does not allow for the lawyer to be in a position to respond to allegations.

R3 (1) An individual who is a member in good standing with the Law Society of Ontario may apply to the Corporation to be enrolled on the roster, at the times and in the manner determined by the Corporation.

Restricting applications to "at the times" LAO appoints has, when LAO has adopted this practice, blocked new lawyers and those changing practice areas from joining a panel. This has an arbitrarily unfair impact on new lawyers in particular and is not in the public interest.

Applications should be taken throughout the year, rather than leaving this to administrative convenience.

R3 (2) (b) (ii) (B) any court, professional insurer or other third party that has information or documents relevant to the application;

It is overbroad for LAO to require consent to disclosure of information from any “third party” LAO chooses to contact.

R3 (4) If an applicant does not meet a requirement relating to the experience required to be a roster member, the Corporation may enrol the applicant on the roster on the condition that the applicant meet the experience requirement and complete the specified training or professional development or other program to the satisfaction of the Corporation, within the period specified by the Corporation.

In practice this expectation has been implemented in Criminal law, Immigration and Refugee Law and in respect of Consent and Capacity Board practice, with the cooperation of the respective bars. However, consultations respecting roster standards in other areas of law have not been carried out. The Rules should require consultation with associations representing service providers and the Law Society of Ontario to determine appropriate standards agreed to for roster membership and removal, and agreement that standards are appropriate and reasonable.

LAO, lawyer associations and the LSO may also be able to work collaboratively to develop and provide appropriate professional development programmes (which can be recorded or prepared such that they are available on demand). LAO should also develop a professional development course on the Rules, given their complexity, the extent to which they depend in practice on policies, and its ongoing authority to change the Rules.

R3 (7) The Corporation may refuse to approve an application for any reason.

This provision is overbroad.

R4(2) The Corporation may, at any time, impose any conditions or requirements on the roster member’s authorization that the Corporation considers necessary,

LAO's authority to impose any condition or requirements at any time on the roster member creates an unreasonably broad discretion, which would permit imposition of unreasonable conditions on the member.

R4(2)(b) limiting the type of legal aid services or volume of legal aid services that the roster member may provide;

The grounds on which the type of legal aid services could be limited should be stated. In addition, reference to volume in this rule appears to be aimed at limiting lawyers from accepting such a high volume of certificates that they are unlikely to be able to provide quality service to individual clients and should be worded to clearly reflect this policy goal. The rule should also contemplate how this would apply where a lawyer employs or contracts other lawyers who acknowledge certificates. This principle should be apply equally regardless of the mode of service funding or provision.

R4 (1) If an application to be enrolled on the roster is approved, the Corporation shall determine, and inform the roster member in writing of, the roster member's authorization to provide specified legal aid services in one or more areas of law for one or more specified districts or for one or more specified parts of a district or districts.

The rules should include a time limit or reasonable definition of a timely processing standard. Lawyers have often been left unable to move forward because applications were not attended to. We recommend 10 days or less for a completed application.

R5 (1) A roster member shall keep informed of the Act and these Rules.

LAO should inform roster members of relevant changes in the Act and Rules, and (as noted above) offer professional development courses on this.

R7 (3) If requested to provide information or documents to the Corporation under subsection (1) or under any other section, the roster member shall not refuse, on the basis of privilege or confidentiality or otherwise, to provide the information or documents to the Corporation.

This Rule is overbroad as it does not recognize any circumstances where it may be reasonable or mandatory for a lawyer to respect confidentiality or privilege.

Notice to Corporation:

R8 (1) A roster member shall notify the Corporation in writing immediately if any of the following circumstances occurs:

(f) the roster member decides to cease providing legal aid services on a temporary basis for a period of more than 45 days;
(g) any other circumstance specified by the Corporation.

This rule is overbroad. 45 days is a very short time frame. LAO may simply lose lawyers because they don't adhere to this, or give notice once and then decide not to pick up doing LAO work again. The term "any other circumstance" is also overbroad.

R9 (4) If a roster member fails to file the self-report on or before the date referred to in subsection (1) or fails to provide the information and documents required under subsection (3) within the specified period, the Corporation shall suspend the roster member from the roster.

This should be amended to "may" to avoid inadvertent error leading to suspension. LAO could then be free to notify the lawyer –particularly given that the lawyer may be a roster member LAO wants to retain.

(e) impose any other measure the Corporation considers appropriate in the circumstances;
(f) require the roster member to give notice of a measure imposed under this section to one or more individuals or organizations specified by the Corporation.

"Any other measure" is overbroad. The rule should be amended to incorporate the reasonable purposes of such measures and any limitations.

Obligations of roster members, the Corporation may impose any one or more of the following measures:

R10 (1) If a roster member fails to comply with subsection R5(2)

(a) require the roster member to participate in one or more programs of legal education or professional development or other programs approved by the Corporation;

It is recommended that this provision incorporate consultation with associations representing service-providers and the LSO.

(2) The Corporation shall promptly deliver to the roster member a written notice of the decision under subsection (1) that includes the reasons for the decision and the effective date of any measure imposed under subsection (1).

The term "promptly" should be amended to "immediately", as promptly is not a defined time limit.

R12(1) The Corporation may suspend a roster member from the roster
(a) if the Corporation has made a decision to remove the roster member under subsection R15(2) [Removal from roster];
(b) if the roster member is the subject of a criminal proceeding in any jurisdiction, or the subject of a conduct, capacity or competence proceeding by any law society;

Although this provision does allow for discretion (“may”) it does not define any minimum criteria. Criminal charges can be totally unrelated to concerns with a lawyer’s legal practice. LSO proceedings can also be unrelated to the lawyer’s area of practice, or to concerns that could reasonably impact the lawyer’s Legal Aid work.

There is also no requirement that the objective basis of the proceeding, and whether it raises sufficient reasonable concern to warrant removal, be assessed. Lawyers can be subject to unresolved criminal or LSO proceedings for an extensive time.

R13 If a roster member is suspended from the roster under section R9 [Requirement to file annual self-report], R10[Failure to comply], R11[Administrative suspensions] or R12[Other suspensions], the Corporation may prohibit the roster member, while suspended, from carrying out any of the following activities, except as specifically permitted in writing by the Corporation:
(a) providing legal aid services under any certificate that the roster member has acknowledged;
(b) acknowledging new certificates;
(c) providing duty counsel services or advice lawyer shifts;
(d) acting as an agent on a legal aid matter;
(e) providing legal aid services in one or more specified districts or in one or more specified parts of a district or districts or in a specific area of law;
(f) submitting any accounts.

This restriction should be expressed as only being exceptional and limited to circumstances where there is a basis to believe that the suspension is related to service fraud. Broad provision to prevent billing would make it impossible for a lawyer to sustain their practice if they are relying on Legal Aid funds. R13(f) also conflicts with the requirement to submit annual accounts, which places lawyers in an impossible predicament.

R14 (1) The Corporation may remove a roster member from the roster without notice in any of the following circumstances:
(a) the roster member has surrendered the roster member’s licence to practise law to the Law Society of Ontario;

- (b) the roster member's licence to practise law has been revoked by the Law Society of Ontario;*
- (c) the roster member becomes an employee of the Corporation;*
- (d) the roster member has been inactive for a period of two years.*

LAO and the public may benefit from retaining experienced lawyers willing to accept Legal Aid certificates, but who have not acted on a Legal Aid case recently.

LAO should reconsider whether it really is in the public interest to remove lawyers automatically on this basis, and should at minimum give notice to the lawyer to allow for lawyers willing to do some Legal Aid work to continue.

R15 (4) A decision under subsection (3) is reviewable in accordance with section R19 [Review process].

The review process should have timelines and deadlines for responses by LAO so as not to keep the lawyer in limbo.

R17 (1) A roster member may make a request in writing to the Corporation to resign as a roster member.

(2) Promptly after receiving the roster member's request, the Corporation may

(a) approve the request, subject to subsection (3); or

(b) refuse the request.

(3) The Corporation shall, after making a decision under subsection (2), promptly deliver a notice of the decision to the roster member that includes a statement as to whether the roster member is required under subsection (4) to continue providing legal aid services under certificates that the roster member has acknowledged.

(4) If the Corporation approves the request made under subsection (1), the Corporation may require the roster member to continue providing legal aid services under certificates that the roster member has acknowledged.

LAO should not have authority to refuse a request to resign. It is unclear how this would even be enforceable, or how forcing a lawyer to continue work would be in the best interests of clients. Competent legal representation requires goodwill, insight and concerted intellectual effort. This rule does not balance the Corporation's interest in cost-reduction against the client's best interests.

A legitimate underlying concern LAO may be trying to deal with is a situation where LAO is in the midst of investigating incompetence and billing fraud and the lawyer resigns. If that is the policy concern LAO has, it could cover this with a rule, similar to what tribunals such as the IRB have, saying that if an investigation has commenced LAO may continue and decide it even if the lawyer resigns.

It would also be contrary to the public interest in being able to rely on “roster” membership as an indicator of standards to order that a lawyer who acquiesces in a major LAO investigation must remain on the roster, if the only policy purpose were that LAO be able to continue the investigation.

*R18 (3) With respect to the disclosure of information or documents,
(a) the notice and any materials that are included with the notice constitute the written record of the decision; and
(b) the Corporation is not required to disclose any information or documents to the individual that were previously provided to the individual or that are not relevant to the review.*

This limit on what LAO should disclose may be rooted in the outdated administrative demands of locating and providing paper documents. To be fair to the lawyer, and to allow any lawyer representing her to respond to the case, LAO should provide all the materials that are being taken into consideration.

*R19 1) A request for the review of a decision under this Division must be submitted to the Corporation in the form and manner determined by the Corporation no later than 15 days after the date on which the notice of the decision is delivered.
(2) The request must include all of the following:
(a) the name and contact information of the individual requesting the review; (b) a copy of the reasons for the decision;
(c) written submissions to the Corporation that set out the basis for disputing the decision.*

15 days is an unrealistically short time frame for lawyers with busy practices, often sole practitioners with minimal or even no support staff on call to organize such material. LAO demands can be for many files at once, and for work spanning many years.

R15 (1) The Corporation may remove a roster member from the roster if the Corporation determines that the roster member R15(1)(j) was found guilty of civil or criminal contempt of court, was found by a court or tribunal to have committed an abuse of process or to be a vexatious litigant, or had costs awarded by a court against the roster member personally in the course of representing a client.

Abuse of process is a vague concept, open to abuse by decision-makers. Lawyers have been found to have engaged in abuse of process for making a submission a decision maker disagreed with, simply because the decision-maker was being unreasonable and did not accept a reasonable submission. Judges and tribunal members have engaged in gratuitous and unreasonable interpretations of the LSO standards, without reporting purported allegations to the LSO, in circumstances where no reasonable LSO discipline tribunal would make a finding against the lawyer. Hostility to the lawyer may even be specifically because the lawyer was competently and ethically representing a client's best interests. The award of costs against a lawyer can also reflect unreasonable hostility to a legitimate litigation step brought in the client's best interests.

The potential arbitrariness of tribunal members and judges should not define what LAO does. This Rule should be better defined to require relevance to the quality of a lawyer's Legal Aid work, a reasonable assessment standard and fair process.

R19(7) The Corporation may draw an adverse inference if the individual does not provide the information or documents referred to in subsection (5) within the time specified under subsection (6) or extended under subsection (3).

This rule is over broad. Demands may be impossible to comply with. Documents may no longer exist or be costly to obtain (such as transcripts). LAO should reasonably specify in this provision what documents can generally be expected to be readily available without disproportionate cost.

(9) The review shall be conducted on the basis of written materials only and there shall be no oral hearing.

A time-limited and reasonably managed oral hearing would provide a basis to have a dialogue on the issues at stake, and potentially enable resolution. Modern technology allows for virtual hearings. Lawyers subject to a removal proceeding may be capable lawyers it would be in the public interest to retain on a “roster”.

Part 3, Schedule, Administrative Burden:

1(2) Administrative burden occurs when a roster member creates unreasonable, unnecessary or excessive administrative impact on the Corporation, and includes, without limitation, the following conduct:

(a) repeated failures to comply with billing rules and procedures, including failures to seek required authorizations for disbursements or repeated requests for extensions of time to submit accounts;

This provision is overly broad. The term “without limitation” is unreasonably broad. The provision gives no assurance of predictability or reasonable standards for lawyers interacting with LAO.

As a practical example, LAO currently has an unpublished policy of treating 3 extension of time requests for billing (where a lawyer has missed one of the annual certificate billing deadlines on any individual certificate) in a lawyer’s entire lifetime as its limit. This is impractical for lawyers who regularly work with Legal Aid certificates. Leaving the broad term “repeated” in the Rules exposes lawyers to being unreasonably barred from doing Legal Aid work, or unreasonably refused extension requests because the general principle is so extreme.

Respect and civility

2 (1) Roster members and any individuals directly supervised by or acting under the direction of a roster member

(a) shall be respectful and civil in their communications with and their conduct towards those individuals and entities referred to in clauses 1(1) (a) to (c); and

(b) shall not with respect to the individuals and entities referred to in clauses 1 (1) (a) to (c), (i) communicate, or engage in conduct, that is abusive or offensive or is otherwise

unprofessional or inconsistent with a professional relationship,
(ii) communicate orally or in writing in a tone that is inconsistent with professional communication; or
(iii) conduct themselves in a manner that is unprofessional or inconsistent with a professional relationship.

Civility to clients, lawyers and institutions is a reasonable expectation, but it is governed by the LSO Rules, which have been subject to judicial interpretation. It is unclear why these provisions are required in LAO Rules.

Because the definitions of respect and civility are so broad, there is no protection for a lawyer who has to be blunt with a client who is being unreasonable, engaging in unreasonable communications or demands, disregarding the funding limits of a Legal Aid certificate, or who simply does not understand subtle explanations.

It is notable that Legal Aid could not finance provision of unlimited response to client demands. Legal Aid does not allow for discretionary increases on the mere basis that a client makes frequent or unreasonable demands, absent what it accepts as “exceptional” circumstances.

This section should either be removed from the Rules or redrafted to ensure it permits a balancing of the lawyer’s need to give candid advice and to work within the limits of Legal Aid funding.

The Rules include extensive provision with respect to protecting Legal Aid employees from lack of respect or incivility by lawyers. The definitions of respect and civility are very broad, and there is also broad provision for having to inform on and report lawyers who could be perceived as having made uncivil comment. The wording is so broad that reasonable communication disagreeing with a decision may be treated as “*inconsistent with a professional relationship*”. It is unclear why LAO requires this in the Rules.

Obligations to report breaches

3 A roster member who becomes aware of a breach of these Standards by another roster member ... shall promptly report the breach to the Corporation in the form and manner specified by the Corporation.

It is unclear why LAO should require lawyers to report to it when a lawyer has been uncivil to LAO employees. LAO would be aware of its perception of a communication from a lawyer. It is unclear how, in practice and particularly in an era of “listservs” (which often include LAO staff) lawyers who are members of a roster would be expected to comply with this broad provision.

Schedule - Professional standards

2(1) (ii). “Communicate orally or in writing in a tone that is inconsistent with professional communication”.

This provision is overbroad. It is not clear what the term “in a tone” means. Tone is also a culturally loaded concept, with racialized people more likely to be labelled as adopting an inappropriate “tone” when they are simply speaking plainly.

Part 3, Division 3 Payment to roster members

P2 (1) When preparing or submitting accounts, a roster member, whether in the capacity of an acknowledging roster member or an agent, shall:

(d) ensure that the fees and disbursements billed for the legal aid services provided are actual, reasonable and necessary to the standard of what a reasonable privately paying client of modest means who has been properly informed by the client’s lawyer would pay for those services under similar circumstances.

The term “modest means” should be removed as it is inconsistent with the contemporary ideal LAO has of recognizing the importance of assuring capable representation, particularly for vulnerable clients. No person of modest means can afford to pay legal fees for a complex matter. It seems this term has simply been repeated from earlier rules and policies.

The term “modest means” comes from a pre-Charter era, when disclosure was limited, expert evidence was unlikely to be involved or required, and there were minimal expectations of what

preparation could be required. “Modest means” is not a realistic test in assessing the required level of professional service for a client.

The “modest means” test also conflicts with LAO’s quality standard expectations. Retaining “modest means” in the Rules, would be inconsistent with both the client’s interest and the public interest in competent representation.

A practical impact of limiting counsel representing poor, racialized and poor clients, or clients with multiple vulnerabilities to the “modest means” test when they are pitted against state prosecutors, investigators or officers with disproportionate means is that this compounds the likelihood of injustice.

In each area of law LAO funds, there are examples of the state, tribunals or courts effectively obliging work that exceeds a “modest means” test for counsel to be able to competently represent the client.

In practice, in Immigration and Refugee law, lawyers have been left with LAO refusing to pay for ongoing preparation based on finding that a person of “modest means” would not be able to afford it. This leaves the lawyer in an impossible predicament, and points to the risks in including terms in the Rules that contradict the ideals LAO is seeking to achieve.

The rule should be amended to *“take all reasonable steps to ensure full and proper representation to the standard of a competent practitioner”*.

P2(2) The roster member is responsible for paying agents and third-party providers who are retained by the roster member, in a timely manner.

This can be unfair, particularly as LAO does not have a corresponding rule assuring payment of disbursements to counsel. Lawyers may be left unable to manage overhead.

This also does not protect lawyers from being expected to pay for invoices or accounts which are non-compliant with LAO standards.

It would be reasonable to require prompt payment of a disbursement or agency account LAO has paid to the lawyer.

LAO could also consider establishing a system of direct payment for some established third party professionals, such as medical experts, court reporters or transcription services –which would obviate the need for lawyers to carry the administrative responsibility and overhead cost.

P2(3) The onus is on the roster member to provide, when required by the Corporation, proof of and 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 a court, tribunal, agent or third-party provider.

The term “proof and justification” is overbroad, and imposes an impossible onus on the lawyer. It creates a risk that the lawyer could be required to engage in audits that simply cannot be satisfied, required to repay payments on a standard that is overbroad, and classified as having been dishonest with LAO when the issue may simply be that LAO requires proof that is not possible. LAO partially recognized this since consultations, having removed the term from what is required in submission of accounts, however it has retained the term in what is expected on demand.

The Rules provide no explanation of this vague term. How is a lawyer expected to “prove” the time spent in preparation? The Rules also provide no definition of the term “justify”, limiting it to a reasonable standard of competent representation as that would be understood by a lawyer with expertise in the field. This is particularly problematic as “justify” could be combined with the “modest means” test.

The requirement that the lawyer provide “notes” is also overbroad, expects lawyers to keep records that are not required for file retention; presumes all lawyers keep notes as proof of preparatory work; and is an incursion into solicitor-client privilege which goes well beyond requesting that documents filed with a court or tribunal be provided to LAO.

Where LAO ultimately finds the account was reasonable, LAO should compensate the lawyer for time and disbursements required to respond to Legal Aid's request for details or records beyond the dockets and invoices that were provided with the account.

P1

“articling student” means a person who has entered into service under articles of clerkship or the law practice program under the bylaws made under the Law Society Act, [...]

“law clerk” means an individual, other than an articling student, who is retained or employed by the acknowledging roster member to provide services, other than services of an administrative nature; (“auxiliaire juridique”)

LAO should amend the term “articling student” to “law student”, to include students at an accredited law school. This would be consistent with current policy and the current LAO Online accounts form), and encourage training opportunities for law students –which would ultimately be in the public interest and LAO’s administrative interest.

Under *P2(1)(c)(A)* Lawyers should not require an account from a law student/articling student if their hours are docketed in the lawyer’s detailed account. Lawyers should be encouraged to create opportunities for law students. It is difficult for students to find appropriate training opportunities and these increasingly include short-term placements with individual lawyers.

P4 (2) A person shall not be paid for providing more than 10 hours of legal aid services in a day but each hour in court spent at trial or in a preliminary inquiry or administrative hearing is considered a half-hour for the purpose of this subsection.

We recommend that LAO allow for discretion to pay for hours in excess of 10 in a day where this was necessary to competently represent LAO clients.

P2(4)(b) directly supervise the person in the preparation and submission of the account.

This is overly broad, as it is unclear what “directly supervise” means.

P4 (3) A roster member shall not be paid in a fiscal year for more than the dollar value equivalent of 2,350 hours of services provided by the roster member multiplied by the member's tier rate specified in the Schedule.

[...] (4) The Corporation may authorize payment for more hours of services than subsection (3) would otherwise allow

It would be consistent for this discretion to also apply to the 10 hour a day maximum. For example, a complex case may require more than 10 hours of work in day, or a lawyer may become required to deal with deadlines in several matters.

P7 (1) A roster member shall keep and maintain the following records with respect to the legal aid services provided under each certificate that the roster member acknowledges or provides as an agent:

(ii) the start and end times for each court or tribunal proceeding,

(iii) the start and end time for services of one half hour or more, [...]

(vi) any other information required by the Corporation to be included in the detailed account; [...]

(d) proof and justification of the items included in the roster member's detailed account.

As set out above, the “*proof and justification*” requirement is overbroad.

The “*start and end times for each court or tribunal proceeding*” should include the time when the lawyer was required to be in attendance by the court or tribunal. LAO’s current practice of requiring this to be billed as preparation time for IRL hearings unreasonably penalizes lawyers for time spent that is required by the court or tribunal. The lawyer should not be required to underuse available preparation time as a buffer to allow for this problem. A lawyer must attend at the time required, and may be required by the court or tribunal to remain after the specific time the decision-maker notes as the end time for the proceeding.

P8(4) 18-month certificate anniversary billing deadline, followed by annual billing deadline.

It is submitted that this rule should be amended. The requirement for submission of bills once after 18 months, then once a year on the anniversary of that date, for each certificate is a major administrative frustration for lawyers. It leads to lawyers not being paid at all for some accounts. It also obliges lawyers to submit interim bills on minor accounts (for example billing for a minor disbursement or minimal billable time because it was the only billable item in a year) requiring lawyer and LAO staff to do far more than work on processing of the account than the amount warrants.

This policy is also a deterrent to lawyers accepting certain types of cases, particularly where it is predictable that there will likely be some hours of work required over the course of several years. A practical example is humanitarian applications, where after the bulk of work preparing submissions has been done, there is routinely follow up work required which can extend for several years. A lawyer with a certificate will be refused payment for work that is not billed within each subsequent anniversary year, and may also be refused payment once tariff hours have been used up on the grounds that required work does not fit any of the narrow criteria to be considered "exceptional".

This rule also fails to recognize that lawyers may need to balance prioritizing the work they must do to meet client needs over billing management. In practice this policy has also had a greater impact on parents trying to balance practice management and family responsibilities, which can discourage retention of lawyers in the certificate model.

We ask that LAO remove this requirement of annual billing, or consider how to reasonably achieve any practical administrative concern it has with receiving annual accounts on each certificate without such impracticality and cost. We also request that LAO explain its administrative policy concern so that we can propose amendment that reasonably addresses this.

P8 (9) The roster member shall provide the roster member's client with a copy of both the online account and the detailed account within 14 days after submitting the account.

LAO ended the practice of sending detailed accounts to clients, replacing this with provision of

the online account, as it had found that sending the detailed account was unhelpful. LAO is now reintroducing the requirement that the client be sent the detailed account, but adding this to printing and sending the online account which had been substituted for this by LAO.

There should be no obligation to print and send both the online and detailed account, as that is redundant and more likely to be confusing for the client.

If LAO's preference is to have clients receive the detailed account, this Rule should be amended to only require provision of the detailed account to the client, not both.

P10 (2) A roster member shall not provide or arrange for the provision of one or more legal aid services to a legally aided client in such a manner that would result, directly or indirectly, in a financial benefit to the roster member unless the manner in which the services were provided may reasonably be considered to have been undertaken or arranged primarily in the best interest of the legally aided client rather than for the financial benefit to the roster member. [...]

(3) The onus is on the roster member to prove and justify that the arrangement for the provision of one or more legal aid services was performed in the best interest of the legally aided client.

LAO already governs the issuance of certificates, which are for the provision of service to clients. It is inherently likely that additional work done for a client should be in the client's best interests, so it is unclear why there should be a reverse onus to justify this. Stating a reverse onus on lawyers to justify that this was in the client's best interests impedes the ability of lawyers to rely on and do work on a certificate, and exposes the lawyer to an unlimited risk of liability for work done and billed in good faith. If LAO has substantive concern with the ethical standards of a lawyer this should be dealt with through substantive review of the quality and ethics of the lawyers work and billing practices (which should incorporate peer review), rather than rules which create an impediment or potential liability for all lawyers.

It is also submitted that this rule should be amended to reflect that the client's best interests must be balanced with advocacy that is ethically permissible. Limiting advocacy to what is in the "best interests of the client" does not recognize that clients may give instructions which are in their self-interest but conflict with what a lawyer can ethically advocate as an officer of the

Court. In Immigration and Refugee Law this extends, particularly as the lawyer is often positively advocating for what the client asserts, to the requirement not to knowingly engage in misrepresentation and the principles of cooperative fact determination that flow from the *Refugee Convention*, as set out in the *UNHCR Handbook*.

P11 (iii) other preparation time by the roster member was unreasonable in its nature or scope or in the time spent

In practice, certificates allow for hours of work which are often barely sufficient or insufficient. The hourly rates paid also tend to be substantially lower than market rates. However the tariff hours on a certificate provide a sense of assurance that they can be relied on in good faith. This provision is overbroad as it gives no practical definition of what is unreasonable. It is also submitted that that the rules for dispute of an assessment should provide that if an assessment is disputed reasonableness of work will be assessed by a person with expertise in the field of practice covered by the certificate.

P12 (1) In this section, “private retainer” means an agreement or arrangement to represent a legally aided client, whether or not the agreement or arrangement

(a) is in writing;

(b) is unsigned;

(c) provides the representation on a pro bono basis;

It is unclear why disclosure of pro bono work for the same client is necessary. Adding this requirement is likely to discourage lawyers from agreeing to assist needy clients.

(4) If a roster member bills a client on a private retainer for legal services performed before the date of issuance of a certificate in relation to the same proceeding or a related or ancillary proceeding under the certificate, the roster member’s online account must include a copy of the private retainer or, if the retainer was not in writing, a summary that sets out the following information:

(a) the services provided;

(b) the dates and times those services were provided;

LAO should clarify what is considered a “related or ancillary” proceeding and when an amount paid for the same, a related or an ancillary proceeding is to be offset against an account.

(6) A roster member shall not seek reimbursement, either directly or through a third party, from a legally aided client for amounts recovered from the roster member under these Rules or for amounts not paid by the Corporation for a service or disbursement, whether or not
(a) the Corporation had authorized the service or disbursement; or
(b) the roster member had submitted an account for the services or disbursement.

While this is meant to protect clients from abuse, it also means clients will not get certain disbursements provided. For example, if an expert report is needed but LAO refuses to fund it (or refuses to pay the expert's rate), a client may be able to pay for it despite inability to pay the full fees of the lawyer and the disbursement. Clients should be warned of this limitation by LAO when they are being issued a certificate, as they may not understand this.

P14(4)

(4) The Corporation may approve a request under subsection (1) or (2) if
(a) the roster member establishes to the satisfaction of the Corporation that there were exceptional circumstances that justify authorizing the increase; and
(b) the Corporation is of the opinion that a reasonable privately paying client of modest means who had been properly informed by the client's lawyer would pay for the legal aid services under similar circumstances.

Retaining "exceptional" as the criteria for discretion is inherently problematic. Most requirements for discretion are not due to the type of need being exceptional *per se*, but instead require assessment, based on an understanding of the litigation, of whether the work was required to competently represent the client. As noted above, retention of the "modest means" test is also inherently problematic. These provisions contradict the ideal of promoting quality in representation.

It is also submitted that the Rules should include a maximum time for settlement of accounts and discretion requests. Setting a maximum would allow LAO to choose a time frame that is generally realistic for it, while giving lawyers a predictable time frame. LAO would remain able to settle an account more quickly, but the lawyer submitting it would at least have a predictable maximum time frame, which would be helpful in planning and managing their practice.

P15 (1) The Corporation may, with respect to an account that has been submitted or paid, examine the account in detail or may audit or investigate the account at the following times:
(a) in the case of an account submitted by a roster member who has acknowledged a certificate, at any time before the 6th anniversary of the end of the year in which the final account in relation to the services provided under the certificate was submitted;
(b) in the case of an account submitted by a roster member who has provided duty counsel services, at any time before the 6th anniversary of the end of the year in which the account was submitted.

We recommend a three year maximum, which should be adequate time for LAO to identify substantive concerns. While LAO should be able to ensure accountability for work done and billed for, lawyers who agree to work with LAO should not have to take on a potential auditing liability that extends beyond a reasonable time in which LAO should be able to identify concerns.

(3) The Corporation may deliver a notice to a roster member requiring the roster member provide, by a date specified in the notice, any information or documents specified by the Corporation for the purpose of the examination, audit or investigation, including
(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.

Requiring proof from a tribunal and independent records from third parties is onerous and may make compliance impossible in some circumstances.

The use of the term “and” is also excessive, as there should be no need to both “justify” work and get records from third parties, tribunals or courts.

(5) The Corporation may draw an adverse inference in either of the following circumstances:
(a) if the roster member does not provide the information or documents required under subsection (4) within the time specified;
(b) if the information or documents provided are incomplete or not legible.

It is excessive for LAO to have a rule allowing for presumptively drawing an adverse inference from the lawyer’s inability to provide the information or documents demanded. The Rules also provide no timelines for decision once a lawyer has provided their response.

(7) If an account is audited or investigated or has been audited or investigated, the roster member is not entitled to request any discretionary increases or authorizations relating to the legal aid services billed under the account.

This is overbroad and arbitrary as any lawyer may have an account audited or investigated while having ongoing obligations to continue Legal Aid work. Further accounts submitted by the lawyer would be subject to the possibility of audit in any event, so it is unclear why an automatic bar based solely on being subject to any audit of any account is necessary or productive.

Lawyers who regularly accept LAO certificates can effectively be placed in the impossible predicament of being unable to continue their practice merely based on the decision to audit one account –which could happen to any lawyer, however competent and ethical.

LAO formerly had a practice of conducting random audits of lawyers based on whether they regularly did LAO work, similarly to the LSO's practice of conducting random audits. This rule would block a lawyer from continuing work, and even from complying with billing deadlines, even where an audit is unlikely to lead to any substantive information of concern.

P17 (10) The person conducting the review may confirm, vary or revoke the original decision.

Under P17 LAO has removed access to an assessment officer for the review of LAO accounts such that LAO has the final say on all accounts. Even if it was rarely used, the assessment remedy created an incentive for reasonableness and compromise. A mediation/arbitration process incorporating expert peer review would be a better alternative so that the final arbiter remains independent of LAO.

P17 (9) The review shall be conducted on the basis of written materials only and there shall be no oral hearing.

An oral hearing would allow for discussion and potential resolution of a conflict.

Table 8, maximum hours allowed in civil matters:

For Immigration and Refugee law:

93 (a) attendance time is billable from the time the member arrives in the hearing room and goes on record to commence the hearing or to discuss pre-hearing matters. Attendance time concludes when the member goes off record at the end of the hearing;

This is highly unfair to IRL certificate lawyers, impedes the ability to plan for use of preparation time, and unnecessary to achieve the legitimate concern of being able to audit accounts. As with all areas of practice, requiring reservation of preparation time for hearing attendance time makes planning preparation hours impossible. With videoconferencing it is particularly unfair as time is added for videoconferencing check-in.

This rule should be amended to define hearing attendance as actual attendance from the time the hearing is scheduled to start (if it is in-person) or the time videoconference check-in is scheduled to start, until the end of the hearing, provided this is the actual time the lawyer attended.

There is no consistency in how the Rules define when LAO allows for “waiting time” to be covered, without having this be offset against preparation time. The LAO rules for indictable offenses allow for waiting time if the matter proceeds, whereas this is not permitted for other types of tribunal or court attendance. In IRL lawyers are generally scheduled for specific hearing attendance, not called to attend all day for several matters which may or may not be called.

The requirement to bill waiting time as preparation even where a hearing is delayed without notice to counsel is also arbitrary and unfair. LAO should include this as a grounds for discretionary increase, as it is neither exceptional nor in the lawyer’s control.

Travel Time 3 (3) An application for authorization for travel time must be made no later than 30 days after the roster member acknowledged the certificate.

This is an impractical expectation as the lawyer may not be able to predict within 30 days of acknowledging the certificate that travel time will be required. The lawyer should not be discouraged from providing necessary service by an unduly strict deadline to request authorisation.

Part 3, Division 2 - Certificate management

C2 (4) 3 year certificate lifespan

acknowledging lawyer shall, no later than 60 days before the termination date of the certificate, in the form and manner specified by the Corporation,

(a) submit a report to the Corporation that includes all of the following information:

(i) the status of the proceeding that is the subject of the certificate, including

(A) the anticipated remaining legal aid services that are to be provided under the certificate and a description of those services,

(B) the anticipated date on which the proceeding will be concluded,

This rule should be removed, as it imposes another deadline and administrative obligation on lawyers, making practice management more difficult without a clearly client-centered purpose. In practical terms it also often impossible to give anticipated dates for unscheduled hearings, and the services remaining for an unscheduled matter are likely to be all manner of remaining preparation and hearing attendance covered by the certificate.

C2 (5) If the Corporation approves the extension request, the Corporation shall deliver a notice to the acknowledging lawyer and to the client that specifies the new termination date.

(6) If the Corporation refuses to approve the extension request, the Corporation shall deliver a notice of its decision to the acknowledging lawyer and to the client, including the reasons for the decision.

LAO should specify a defined timeline to provide a decision, so as to not unduly prejudice the client.

C4 (4) By becoming an acknowledging lawyer under this section, in addition to any other requirements under this Division, a roster member or staff lawyer shall not, without the Corporation's written permission,

- (a) resign from the proceeding; or*
- (b) retain an agent to provide substantive legal aid services in relation to the proceeding.*

While this provision is limited to cases where LAO has assigned a lawyer, it is unclear why a lawyer should not be able to retain another roster member to provide work. This will create practical problems. Lawyers may need to assign work to or retain other lawyers as agents urgently, without being able to delay until LAO approves this. This also adds another administrative burden on lawyers, though all roster members are governed by the same standards and LAO receives the agent's detailed account in any event.

The bar on being able to resign from an assigned proceeding without LAO permission conflicts with the Law Society of Ontario's Rules of Professional Conduct. A lawyer must be able to resign based on an RPC conflict, and should not be required to advise a tribunal or court that delay is required to seek LAO permission. A lawyer should also not be barred from resigning where a court or tribunal has made an order permitting or requiring withdrawal as counsel.

This provision also gives no maximum time for LAO's decision, however an ethical conflict may arise in the midst of litigation.

The rule also does not assure that a lawyer may withdraw or resign where the client's conduct puts the lawyer in conflict with LAO's rules. Compliance with an LAO rule or notice should be expressly deemed "written permission" from LAO.

C4 (1) It is the responsibility of an individual who has been approved to receive certificate services to retain a qualified roster member or staff lawyer who is able and willing to act in accordance with the authorizations and conditions of the certificate.

(2) Despite subsection (1), the Corporation may, in any of the following circumstances, assign a specified roster member or staff lawyer to be the acknowledging lawyer of an individual who has been approved to receive or is receiving certificate services:

The process for the appointment of lawyers for hard to serve clients in Rule C4 contemplates certificates being assigned either to roster lawyers or staff lawyers. This raises concern that

staff and certificate lawyers might be competing for certificates, and staff lawyers might have the inside track. The Rule should be amended to provide that where a certificate was issued LAO should first determine whether the need for representation would be unmet by the certificate bar.

Where it is anticipated that certain types of cases are difficult to address through the certificate model, this may be established in consultation with the RLA. We have consistently advocated for management of the mode of service delivery to be client-centred. The RLA represents a relatively small bar and includes certificate, clinic and staff lawyers.

C5 (1) Subject to section R6, a roster member or staff lawyer who receives a certificate to represent an individual shall

(a) if able and willing to act in accordance with the authorizations and conditions of the certificate, acknowledge the certificate; or

(b) if unable or unwilling to act, decline to acknowledge the certificate.

(2) The roster member or staff lawyer shall, within 30 days after receiving the certificate and in the form and manner approved by the Corporation, notify the individual and the Corporation of the roster member's or staff lawyer's decision under subsection (1).

This rule is overbroad as it requires the lawyer to contact any person who has named her to LAO. Lawyers may have no prior contact with the individual, or may have other valid reason not to contact the individual (such as a client refusing to accept that the lawyer has communicated a decision). While it is reasonable to require that the lawyer notify either the client or LAO within 30 days that a certificate will not be acknowledged, the lawyer should have the option to give notice to one or the other.

C7 The Corporation shall not issue a certificate or amend a certificate with retroactive effect unless the acknowledging lawyer satisfies the Corporation of all of the following:

(a) the legal aid services were provided in an urgent situation, and notice that the services were provided was delivered to the Corporation within a reasonable time after they were provided;

(b) the individual would have qualified for legal aid services at the time the services were provided;

(c) no previous application for the same legal aid services has been refused;

(d) the lawyer has not offered or accepted a private retainer or other payment or benefit for the legal aid services.

As this provision is broad, to the extent that *pro bono* work is included in the definition of a private retainer (referred to above at [P12](#))

C8 (9) The notice must include all of the following information:

(c) a statement whether the acknowledging lawyer is permitted to complete work that has already commenced, and if so, to what extent and to bill for work already provided.

If a lawyer is ordered to continue by a court in a matter that was funded through a certificate, LAO should provide for reactivation of the certificate.

C7 The Corporation shall not issue a certificate or amend a certificate with retroactive effect unless the acknowledging lawyer satisfies the Corporation of all of the following:

(a) the legal aid services were provided in an urgent situation, and notice that the services were provided was delivered to the Corporation within a reasonable time after they were provided;

(b) the individual would have qualified for legal aid services at the time the services were provided;

(c) no previous application for the same legal aid services has been refused;

(d) the lawyer has not offered or accepted a private retainer or other payment or benefit for the legal aid services.

Making these provisions conjunctive will unduly restrict when retroactive funding can be provided, and placing an onus on the lawyer risks discouraging lawyers from providing urgent services to an apparently indigent client. The requirement that no previous application has been refused bars correction of refusals which ultimately proved to be unjust or based on incorrect assumptions. The requirement that the lawyer must not even have “offered” a private retainer is overbroad and likely to become an obstacle to access to justice as clients refused LAO funding cannot even be asked if they could pay any specific private retainer if there is any chance they may need to seek retroactive funding.

C10 (2) When the legal aid services authorized by a certificate are deemed to be complete as provided in subsection (1), the acknowledging roster lawyer shall promptly

- (a) report the fact to the Corporation and provide any related information that the Corporation requires;*
- (b) deliver to the legally aided client, or to another person who has consented to accept delivery,
 - (i) a copy of the information referred to in clause (a), if instructed by the Corporation, and*
 - (ii) in return for a receipt, all documents and other property of the legally aided client that are in the acknowledging roster lawyer's possession.**

C10(2)(a) imposes an additional administrative burden on lawyers, which is likely to become redundant when the lawyer bills the matter. This provision should be removed.

C10(2)(b)(ii) should be amended to make clear that it only refers to the client's original documents. The lawyer should also have discretion not to demand a receipt. Many clients ask for documents to be mailed to them, while some clients have original documents returned to them without having requested this, and the lawyer may reasonably trust that the client will not dispute having the document returned.

(3) The Corporation may direct the roster member not to provide the materials referred to in subclause (3)(b)(ii) if doing so could prejudice or embarrass the client.

It is unclear what documents this would relate to. The Law Society permits scanned files to be physically destroyed, if the electronic file is retained for a reasonable time. If the document is an original document LAO should permit the lawyer to return it to LAO for storage and return to the client when LAO believes it should not be returned to the client by the lawyer. Lawyers should not be required to indefinitely hold original documents.

C11 (2) When a decision is made under section C8 [Cancelling certificates], the Corporation shall, in the form and manner approved by the Corporation, promptly deliver a written notice to the individual who is entitled to the review that

- (a) informs the client that the decision may be reviewed and how to request a review;*

*C12 (3) A request for review
[...]*

(6) The Corporation shall deliver notice in writing of the decision made under subsection (5) and the reasons for it to the applicant and to the applicant's lawyer, if any.

(7) A decision made under subsection (5) is final and is not subject to further review unless a

request for reconsideration is made in accordance with subsection C13 (1).

The rules should also include timelines for LAO's decision on a review.

Part 2- Eligibility for legal aid services

EL1 "family member", in relation to an individual, means

(a) if the individual resides with a spouse, the spouse,

(b) a dependent child of the individual or of the individual's spouse,

(c) if the individual resides with the individual's parent and relies on the parent for support, the parent and any other dependent child of the parent,

"income", in relation to a family unit, means the sum of the gross annual income received by all of the family members during a given period from all sources. It includes, but is not limited to, every family member's total earnings from wages and from investment enterprises and any other ventures.

These provisions should include a balancing requirement that it be reasonable in the circumstances to expect that the spouse or parent should be asked to provide funding. Many delays are caused by having to get records of parents or relatives over which the accused has no control, especially an accused in custody (see *R. v. Campbell* 2020 ONCA 573). There may also be a conflict of interest between the client and the relative in relation to the subject matter of the litigation. LAO could define what contextual information may raise reasonable concern that a relative could be asked to provide funds, and what litigation issues are likely to raise an assumption the relative could have a conflict of interests. Simply adding a reasonableness requirement in the Rule would provide a framework for that.

EL2 (2) Despite subsection (1), an individual's eligibility to receive legal aid services is governed by any agreement that is in effect between the Corporation and the provider of legal aid services in a province or territory if

(a) the individual's usual place of residence is in the province or territory; or

(b) the individual's usual place of residence is in Ontario but the matter for which the individual is applying to receive legal aid services is one that is to be determined in a proceeding in that province or territory.

This should not apply to a person residing in Ontario and appearing before a Federal tribunal or court. A Federal tribunal such as the IRB or the Federal Court can (and routinely does) transfer files to decision-makers across Canada with or without notice. For example, in an IRB or Federal Court hearing counsel may learn in the videoconference hearing that the Board Member or Judge happens to be at her house or office anywhere in Canada. Failing to make exemption for Federal tribunals and courts would be also inappropriate while LAO accepts Federal funding for IRL.

EL3(2) The application must be made in the form and manner specified by the Corporation and must include all of the information, documents and authorizations specified by the Corporation.

The application process contemplated in EL3(2) fails to give LAO residuary discretion to find an applicant eligible despite incomplete information, as can occur when a person does not have the capacity to provide all the information and the need is urgent.

EL4 (1) The Corporation shall not accept any application for legal aid services that is in an area of law in which the Corporation does not provide services.

Legal Aid should also have a rule that it make best efforts to provide lists of other organizations that may provide *pro bono* or reduced fee legal services, provided it has verified this is accurate.

This rule should be amended to define the Corporation, for the purpose of this rule, as Legal Aid Ontario rather than any representative of LAO. Call centre staff sometimes incorrectly tell clients they are seeking a service that is not covered by LAO, and this rule provides no recourse.

(4) Any individual is financially eligible to receive summary legal advice and public legal education from an entity service provider.

Summary legal advice should not be provided for matters which would qualify (on a merit and subject-matter basis) for a certificate. LAO should instead be directed to give the caller access to the LAO roster so they can contact a lawyer to negotiate private retainer. Summary advice

for a matter complex enough to ordinarily warrant legal representation can readily lead to misunderstanding or miscarriages of justice.

EL5 (1) The Corporation may refuse to consider an application that is made by or on behalf of an individual if the Corporation is satisfied of any of the following with respect to the individual, a person who is applying on behalf of the individual or any person who is responsible for the individual:

(a) the individual or person has provided the Corporation with inaccurate or incomplete information in the past;

This rule should be amended to provide greater precision as to what type of information would trigger the rule, and to avoid vulnerable persons being refused simply because they were not competent to provide accurate information in the past.

EL5(1)(c) (c) the individual or person has engaged in conduct that, in the opinion of the Corporation, is uncooperative or disruptive with the result that

the individual cannot be provided with effective legal aid services;

This provision is vague and over broad.

EL9 (1) Subject to section EL12, an individual is financially eligible to receive legal aid services or to continue receiving legal aid services if

(a) the income of the individual's family unit, less any support reduction or medical reduction, does not exceed the maximum income set out for those legal aid services in the Schedule for a family unit that matches the individual's family unit in number; and

(b) the value of the assets of the individual's family unit does not exceed the maximum value of assets set out for those legal aid services in the Schedule.

As noted above, the rule should be amended to require that it be reasonable in the circumstances to expect that a family would pay for representation.

EL13 (1) If the Corporation determines that an individual is eligible to receive legal aid services, the Corporation shall specify the type of service provider and the legal aid services that the individual is entitled to receive.

To protect clients this should be modified to require that the client be referred to a member of the appropriate roster.

EL15 (2) The staff member or roster member who acknowledges the certificate shall prepare and deliver the legal opinion no later than 60 days after the acknowledgement.

This should not be required where the lawyer has proceeded with the litigation. Lawyers who do so without certificate coverage proceed at their own financial risk, and should not be penalized if they submit their memorandum as a substantive opinion letter after the fact simply because 60 days passed since the opinion certificate was issued.

LAO should also be required to decide on an opinion within a reasonable time limit.

EL16 (1) A legal opinion under section EL15 in relation to an application for legal aid services for an appellate proceeding must be accompanied by the following supporting documents, as applicable: [...]

(c) the notice of appeal or notice of application, if it has been prepared;

LAO should review with Area Committee members whether all of these are really necessary to make an informed decision. For example, in practice a copy of the notice of appeal or application is not usually necessary in IRL cases. Provision should be added that the items listed are only mandatory if required to make an informed decision.

EL19 (3) A request for review

(a) must be made in writing in the form and manner approved by the Corporation; and (b) is to be considered only if the applicant provides relevant information that was not considered by the original decision-maker.

Limiting appeal to new information is excessively narrow. This does not allow for situations where the information was considered, but the decision was unreasonable or unfair.

*FINANCIAL Gross Annual
ELIGIBILITY Income
Family Unit*

Size for Duty

Counsel

Services

<i>1</i>	<i>\$22,720</i>
<i>2</i>	<i>\$32,131</i>
<i>3</i>	<i>\$39,352</i>
<i>4</i>	<i>\$45,440</i>
<i>5 or more</i>	<i>\$50,803</i>

This should be harmonized with the financial eligibility criteria for a certificate. Having distinct criteria allows for guilty please to be entered by people who are not offered the option of certificate representation.

RC3 (1) 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.

It is unreasonable and imposes an excessive burden on the lawyer to require counsel to recover money from clients for LAO. This provision is also over broad, leaving it unclear what LAO's expectations of counsel are.

RC6 (1) A service provider, unless the service provider receives instruction in writing from the Corporation to dispense with court costs in respect of the proceeding, shall

(a) apply to the court or tribunal in accordance with the governing legislation for an order for court costs; or

(b) attempt to reach a settlement respecting court costs in an amount based on the service provider's private retainer rate.

RC9 (3) (b) any award of court costs is the property of the Corporation by assignment.

RC10 An order for court costs by a court or tribunal against a legally aided client is the responsibility of the client.

RC6(1)(b), combined with RC9(3)(b) present a combination of demands that may conflict with

a lawyer's obligation to act with integrity. While it is possible in law to claim costs at a private rate for a client represented *pro bono*, it is doubtful that it would be ethical for counsel to claim costs at their private rate when the funds are actually to be paid to LAO. It is also contradictory for LAO to demand costs that are higher than what LAO actually pays counsel.

These rules also fail to recognize that in some types of litigation it is preferable, and the normal practice, for LAO funded litigants to seek that costs should not be awarded for or against them –to protect the client's ability to pursue a matter where the risk of costs award could deter seeking access to justice. The rules should at least be amended to recognize that.

We recommend that LAO instead seek legislative change so that Courts cannot order costs against it or lawyers providing LAO services.

Part 4 - Entity service providers

This entire section puts clients otherwise eligible for LAO certificates at risk of being streamed towards corporate service providers without guarantee of representation by a roster member, and creates an incentive for the creation of for-profit companies that may exploit service providers. These provisions may pit service providers against broadly-defined corporations with no clear quality standards.

The term "service provider" is also left undefined.

ESP2 Call for entity service providers

This should not apply to services which could normally be provided through a certificate, particularly criminal, family, immigration and refugee law, or mental health law services.

ESP(2)(3)(c) the entity employs or contracts with at least one individual who is a licensee in good standing of the Law Society of Ontario;

This conflicts with the policy ideal of protecting the public interest in ensuring competent representation. This provision will enable a new type of corporate agency, not necessarily staff lawyers or clinics (though clinics can apply), to compete for work and potentially drive down ethical and competence standards; with the motivation for corporate applicants being that they can both satisfy the bid requirements and make a profit (which would inherently have to be at the expense of lawyers willing to be hired to work for the corporation). The consequences for vulnerable clients may be severe, and this is likely to aggravate disparities within the legal profession (which also tend to follow race and gender disparities).

This section includes no roster membership requirement for the employees providing representation, nor for those managing service provision.

ESP 3(3)

(d) the entity's reputation with the public and, in particular, its reputation with the community it serves and other organizations that serve that community;

(e) any other factors the Corporation considers relevant.

The factors set out in this provision are not directly relevant to ability to provide competent legal representation.

EPS 3(5)

(5) The Corporation may, in its sole discretion, require that terms and conditions be included in a service agreement in addition to the terms and conditions set out in section ESP 4, including any of the following:

(a) terms and conditions that the Corporation considers necessary based on the entity service provider's risk level, including

(i) the term of the service agreement, which must not be longer than three years,

(ii) outcomes or outputs,

(iii) performance measures related to the outcomes or outputs,

(iv) reporting requirements,

(v) monitoring requirements, and

(vi) financial management;

This provision includes no clearly defined quality service standards.

*ESP7 (1) The Corporation may, at any time and for any reason, deliver a notice to entity service provider that requires the entity service provider to provide the Corporation, in the form and manner and on or before the date specified in the notice, with the specified information, documents and authorizations, without limitation, for the following reasons:
[...] (a) quality assurance;*

Within the provisions applied to entities, the only reference to quality is this provision for retroactive verification of “quality assurance”. This is problematic as it would only be after the fact (without any defined standards comparable to the obligations of lawyers under the Rules of Professional Conduct or any LAO Roster standards), after a contract has been awarded and acted on. This potentially puts vulnerable clients at risk.

ESP 8(3)

*(3) An entity service provider shall prepare all of the following in writing and maintain them in a place that is accessible to those to whom they apply:[...]
(a) a code of conduct and ethical responsibilities that applies to all employees, volunteers and contractors and, except in the case of a student legal services organization, to the directors of the entity service provider, that holds those persons to a high standard of conduct and ethics; [...]
(f) procedures and policies for ensuring that the entity service provider has the capacity to provide high quality entity services;*

It is not a substitute for the Rules of Professional Conduct for a private corporation to be asked to create its own ethics and quality standards. It is also impractical to expect that quality service is promoted simply by having a corporation post its own quality standards in a place vulnerable clients may have access to read it.

ESP 4 (J)

(j) the rights and obligations contained in the service agreement bind and enure to the benefit of the heirs, executors, administrators, successors and permitted assigns of the entity service provider.

It is unclear how ethical and quality service standards would be assured by automatic transfer of a Legal Aid contract to the heirs of a corporation.

ESP 10(4)

(4) During the term of a service agreement, the Corporation may reduce the amount of funds provided to an entity service provider under a service agreement if circumstances arise that, in the Corporation's opinion, may have affected or may be reasonably expected to affect the Corporation's ability to meet its obligations under the service agreement, including, without limitation, any of the following circumstances:

- (a) an amendment to the Act or the regulations;*
- (b) a change in the amount of the funding the Corporation receives;*
- (c) a change in the Corporation's priorities established under clause 17 (1) (b) of the Act.*

ESP 23(1) The Corporation may

- (a) determine that it paid funds to an entity service provider in excess of the amount required under the service agreement; and*
- (b) determine the amount of those excess funds.*

These provisions raise concern that the contracts provided to Entity service providers give no assurance of predictable funding even during the term of a contract.

Legal Aid clinics require predictable funding to be able to plan for their hiring and to know what types of cases they can accept.

ESP21 (1) If a service agreement is terminated by the Corporation, the Corporation may, in its sole discretion, determine the estimated costs for the entity to wind down the provision of entity services.

(2) If the estimated costs determined under subsection (1) are less than the funds paid to but remaining in the possession or control of the entity, the Corporation may direct the entity service provider to use those funds, up to the amount determined under subsection (1), to wind down the provision of entity services.

(3) If costs determined under subsection (1) exceed the amount of funds paid to the entity but remaining in its possession and control, the Corporation may, in its sole discretion, provide funds to the entity up to the amount determined under subsection (1) to wind down the provision of entity services.

This leaves the Entity, which may be a Legal Aid clinic, with no recourse if it is impossible to meet its obligations with the funds provided.

Delivery of Documents

D2(f) in the case of a document for a legally aided client, for an individual who has applied to receive legal aid services or for a person responsible for a legally aided client or individual who has applied to receive legal aid services, by posting to the Corporation's online portal for clients;

This provision is problematic as it not geared to the ability and resources of the client, allowing whatever LAO opts for. Wording should be added that it must be by the means the client is able to access.

(g) in the case of a document for a legally aided client, by delivery in accordance with this section to the roster member who is acting for the legally aided client.

This is also impractical as lawyers are not being paid to for time required to do this, may not recognize that the client did not receive the document from LAO, and may not forward every request from LAO to clients.

D3 (3) A document that is delivered by the Corporation by posting to the Corporation's online portal for clients or the online portal for lawyers ' portal is deemed to be delivered the day after notice of the posting is transmitted electronically, in the absence of evidence to the contrary.

This is an excessively short notice period. LAO often sends Portal notices for communications which do not require action by the lawyer (such as copies of communications to clients), and makes some types of notice time-consuming to access (requiring several steps to access the document). Not all lawyers check the portal every day or even every week. There is variation in how much LAO work lawyers do.

Schedule –Quality and Service Standards:

1 The purpose of the Quality and Service Standards is to ensure that the legal aid services provided by roster members

(a) are client-focused, of high quality and efficient;

(b) deliver value for money spent; and

(c) are appropriate to the circumstances of legal aid clients.

The reference to “value for money spent”, is not resolved with client-focused service and is

stated as a conjunctive requirement added to subsections *a* and *c* without, direction or definition of what this means.

The term “roster” is taken from the LASA, however this should not dictate how LAO refers to lawyers. The term “roster” should be replaced with the existing term “panel”, throughout the Rules. This could be accomplished in the “definitions” section of the Rules. The term panel implies some level of qualification and choice, whereas “roster” is a demeaning term implying being on call for assigned tasks –which is not an accurate description and is likely to confuse the public. For example, the Collins dictionary defines roster as: “A roster is a list which gives details of the order in which different people have to do a particular job.”

Read in conjunction with R17(2)(b), which allows LAO to refuse to allow a “roster” member to resign from LAO’s roster, the rules allowing LAO to refuse to allow a lawyer to withdraw as counsel and to expect performance of work on a certificate even if LAO refuses to pay for that work, the characterization of lawyers willing to work with LAO as “roster” members is a concern.

Conclusion:

We hope that Legal Aid finds these recommendations helpful, and thank you for considering our comments.

Yours truly,

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