

MEETING NOTES

Standard Criminal Cases Legal Aid Advisory Committee October 27, 2009

Advisory Committee Members Present

John D. McCamus, Chair
Justice Sidney B. Linden
John McMunagle (by teleconference)
Katherine Corrick
Tom Bryson
Anthony Moustacalis
Michael Mandelcorn (by teleconference)
Bob Sheppard (by teleconference)
Esther Rosenberg (by teleconference)
Phil Downes
Jonathan Rudin
Ted Kelly
Bob Ward (ex-officio)

Legal Aid Ontario Representatives Present

David McKillop
Heather Robertson
Rod Strain
Heather Morgan
Stephanie Mealing

Others Present

Martha Otton, MAG
Chris Cheung, MAG

Introductions and Opening Remarks

Committee Chair John McCamus opened the meeting and welcomed the participants. There were introductions around the table and on the phone. The Chair thanked the members for their participation and Justice Sidney Linden for his assistance in facilitating the committee process.

The purpose of this Advisory Committee is to provide advice and suggestions to the Attorney General in respect of moving to a block fee billing structure for many standard criminal cases.

Members were invited to make opening remarks before turning to the specific questions in the Committee Terms of Reference.

Opening Remarks and General Comments of Committee Members

The short timeline for completion of the committee process may pose a problem. It was noted that several members are attending as representatives of groups, and will need time to go back and consult with their organizations between meetings.

Some members would like to meet three times rather than two. This is a big change to the legal aid system, and decisions should not be made hastily. The Chair said that the suggestion for an additional meeting would be taken under advisement. He also suggested that members follow up after the meeting with further thoughts through e-mail exchanges, which could then be appended to the meeting notes.

It was observed that the committee mandate is quite narrow, focusing entirely on block fees rather than including other issues.

It is difficult to discuss block fees without having more information. It would be helpful to know how much of the new funding investment will be allocated to criminal law.

Block fees raise issues around ethical and professional conduct, and these issues are of interest to the Law Society.

The old block fee era was not a good time for Aboriginal clients. Youth, disadvantaged women and clients with mental health issues were also the victims of block fees in the past. The problem of dump truck lawyers needs to be avoided this time, in order to ensure access to justice.

Block fees may not require an increase in overall funding and need not equate to an increase in guilty pleas. A block fee represents a "guesstimate"; it may be assumed that some lawyers will make more money and some will lose money.

If block fees are intended to have the effect of increasing the hourly rate for lawyers, LAO should just increase the tariff instead. The Chair noted that LAO is interested in moving to block fees because block fees are expected to reduce LAO's record-keeping and administrative costs. A block fee system may also result in incentives for speedier resolution of cases. However it is not intended that block fees will be used to save money at the expense of service providers.

A new block fee system should recognize that lawyers are doing more work now than they used to. Initiatives like Justice on Target (JOT) lead to more micromanaging of files which consumes lawyers' time. There are also new procedures and rules to think of. A bail application in Gladue court can take 30 hours.

Block fees can lead to public perception problems. In the past there were serious abuses, and the old block fee program was discredited. For example, some lawyers never did any trials at all. The old block fee system encouraged guilty pleas.

Making billing easier by way of block fees could assist in bringing some experienced lawyers back to legal aid work. It would be a good thing for sole practitioners especially. The problem is with the optics.

An experience increase in tandem with a block fee would be essential to bringing back the senior bar.

Lawyers are leaving legal aid, and if this is not reversed LAO will have to resort to a staff system. Staff offices are more expensive than the private bar and providing choice of counsel via the certificate system has a value. Block fees could be a vehicle to bring lawyers back to legal aid, but only if compensation is reasonable.

One member stated that he would not want to hear it being said that the advisory committee supports/endorse block fees unless it is true that block fees will increase remuneration.

Discussion of Questions/Suggestions of Committee Members **Emerging Themes**

1. Categories of Cases That Could Be Effectively Managed Using a Block Fee Structure; Procedural Steps That Could Be Blocked Together

- Many lawyers rely on what is essentially a block fee system for their private clients, but the fee depends on whether the option chosen is a plea or a trial. Pleas and trials have to be treated differently.
- Criteria need to be developed. There is not enough time for the committee to go through every kind of case and decide “yes” or “no” for block fees. Obviously it is “yes” for bail and “no” for first degree murder.
- Start by thinking of appropriate:
 - Offences
 - Procedures
- The cases that are selected for block fees have to be cases that can be assigned a reasonable rate. Most lawyers would likely say they prefer a block fee structure if the fee is fair.

- Keep the process of developing block fees separate from considerations related to JOT. Block fees will not assist JOT.
- LAO's caps on hours are already a kind of block fee.
- Perhaps block fees should be adjusted to address geographic differences (e.g., ten appearances needed in Toronto but only two elsewhere).
- Actual hours should be paid for trial time, whether the offence is summary or indictable. Block fees can work up to the time of trial but not for the trial itself.
- Appeals need to be considered. This is an area where lawyers need certainty in the number of hours.
- There should be a way to build in flexibility for cases involving lengthy Charter preparations (the same as for cases involving a needy client). Some trials are basic and involve no Charter applications. With other trials (such as drug trials) it may take many hours to prepare a motion which ends up determining the outcome of the trial. The pre-authorization process for such cases needs to be simple: perhaps a standard form, where the lawyer can check off "10(b) motion" rather than writing a detailed letter. Perhaps pre-authorization could be granted by a local area director.

2. Program Enhancements to Ensure Quality of Service Delivery: Ensuring Access for Vulnerable Clients and Avoiding Abuses

- The most serious problem with block fees in the past was the problem of providing service to the needy client. There is a risk that lawyers will be pulled away from those clients by block fees.
- LAO could consider a fee enhancement for an Aboriginal client, on the assumption that the lawyer will be doing more work for this client.
- Set up an easy way for the lawyer to notify LAO of a needy client. Develop a list of factors, basically like a discretion list, that would include mental health, addiction etc. It would be best to avoid setting up a blanket category for Aboriginal people or any specific group.
- Regarding the potential for abuse, it was noted that lawyers take an oath and are accountable.
- There could be a limit placed on the number of guilty pleas a lawyer can do in one day. (However, in Barrie and points north, there is only one plea day scheduled per week, so that needs to be kept in mind.)

- LAO sees the accounts billed, and is in the best position to spot a dump truck lawyer. LAO already has a system for vetting accounts, using random checking.
- It may be better to use rules to prevent abuses, rather than relying on a system of judging accounts.
- There needs to be communication about the issue of quality of counsel. LAO will not find out about abuses through client complaints, because most clients are not aware enough to see problems.
- In the past, the dump truck lawyers were not stopped because they “greased the wheels of justice” and kept the mill rolling. Many people were happy with that.
- Quality of service for Aboriginal clients has definitely improved in the past few years. This is partly because LAO now requires panel lawyers to take training, and partly because lawyers have to submit accounts.

Members were invited to e-mail Stephanie Mealing at LAO with any additional ideas.