

MEETING NOTES

Standard Criminal Cases Advisory Committee Meeting of November 23, 2009

Advisory Committee Members Present

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

Legal Aid Ontario Representatives Present

David McKillop
Heather Robertson
Nye Thomas
Heather Morgan
Stephanie Mealing

Others Present

Michelle Sherwood, MAG
Brent McCurdy, MAG
Lou Strezos, CLA

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.

There were no comments on the minutes of the October 27, 2009 meeting. The Chair noted that the minutes of all of the advisory committee meetings will be posted on the LAO website.

The Chair raised the point that some comments had been made suggesting the current advisory committee process is only window dressing. Although the timeline for the committees to provide their advice is quite short, there is no reason to believe that this process is not a genuine one. The Minister has

indicated that he is concerned that the funding earmarked to flow in this fiscal year will disappear if the advisory process is not concluded by the December 15 deadline.

If, after this meeting, the committee feels that further discussion is needed, LAO will do its best to schedule another meeting; however, the process must still be concluded by December 15. LAO remains open to consultations with stakeholders, through its Board advisory committees and other channels, and the end of this process does not and should not mean the end of consultation.

The Chair drew the committee's attention to the background materials that had been circulated to members in response to requests for additional data and information. Turning to the discussion ahead, LAO is thinking seriously about a return to block fees, and would like to hear the committee's advice. The discussion should run along two tracks, one focused on how the system could be improved for service providers and the other focused on improving services to clients and the administration of the legal aid system.

The Chair introduced the committee to David McKillop, LAO's Vice President, Policy and Research, who highlighted some key information in the "Issues for Discussion" slide deck that had been distributed to the committee. It was emphasized that the analysis behind this slide deck was cost neutral, i.e., based on LAO spending the same money on block fee billings as it does now on hourly billings.

Discussion

Improvements for Service Providers

It was stated that the key issue is whether block fees can be structured to provide reasonable compensation, and that the notional block fees referred to in the slide deck are not reasonable. One member suggested that a reasonable block fee structure would include a minimum fee of \$1,500 for a plea and \$3,500 for a summary trial.

The point was made that the CLA boycott is the "elephant in the room". If the new money flows, and there is no perceivable increase for service providers as a result, there will be problems. There was also a statement that the committee would not support a recommendation that block fees are appropriate without knowing if or how block fees will improve compensation.

Lawyers have ethical requirements that they must meet. They need an adequate support system in place or they cannot run a practice properly. The Law Society's report on sole practitioners and small firms highlighted the difficulties facing these lawyers. To make ends meet sole practitioners are having to work

out of their homes, or from shared office space, or out of their cars. LAO found out what it costs to run a criminal practice when it established the CLOs. The CDLPA report showed that the cost of a CLO certificate is 80 per cent higher than the cost of a private bar certificate. LAO does not have to match what the Crown pays, but it has to do better than this if criminal defence lawyers are to run their practices properly and meet their ethical obligations.

A block fee system, if implemented, should include an experience increase or mark-up. If block fees are structured to reward experience, it could help to bring more experienced lawyers back to legal aid. In turn, having more experienced lawyers taking cases will lead to improved quality of service and will effectively encourage resolution of more cases. The old block fee system had three tiers, with mark-ups between 12 per cent and 25 per cent, depending on the lawyer's experience.

Block fees also need to provide adequate compensation to less experienced people, or else no new lawyers will ever start working in criminal law. No new lawyer with \$80,000 in student loans is going to be able to do criminal defence work unless the compensation is adequate.

LAO should keep in mind that there is no longer the same sharp distinction that there once was between summary conviction and indictable matters. There should be consideration of what to do with "super-summary" cases. Some of these come with the same trappings as an indictable case. Also, it was pointed out that an apparently simple type of case can become complex if there are other issues involved, for example if there is a search and seizure issue.

Lawyers have to go through a lot more steps in a case today than they did when the old block fees existed. JOT will build even more steps into the process. LAO needs to think about whether a block fee would be "from beginning to end", or whether there would be separate block fees for steps such as bail, bail review, judicial pre-trial and so on.

Block fees can work for guilty pleas. Withdrawals are different from pleas; a lot of work can go into those and they should have a different block fee.

It was noted that guilty pleas and withdrawals often occur just before the trial, after the lawyer has done all of the preparatory work. Crowns wait until the last minute to withdraw a case. In some jurisdictions it is not possible to enter an early guilty plea because there are no judges in the bail courts.

LAO should think of starting with a block fee pilot focused on summary conviction cases. The super-summary (18-month) cases should be left out of the pilot at this time.

There was no consensus on whether a trial component should be included in a summary block fee. Nye Thomas noted that some jurisdictions that use block fees include the first day of trial in a block fee and then switch to an hourly rate for any subsequent trial days.

Some members felt that summary conviction appeals could potentially be included in a block fee structure.

There was a question about how discretion would be awarded in a block fee system. If lawyers still have to reconstruct their files and count the hours spent on a case, and LAO still has to figure out how to pay discretion on that case, then there will be less administrative savings.

It was suggested that, if LAO is able to eliminate some of its administrative costs by moving to block fees, that could be helpful in freeing up money to improve compensation.

Some members thought that the traditional division of funding (as between criminal, family, clinic and immigration and refugee law) should be maintained when allocating the new LAO funding: why rob Peter to pay Paul? Others were wary of making such a recommendation, particularly without knowing what the other committees are recommending.

Improving Quality

The view was expressed that dump truck lawyers are not a big problem in Ontario; there are very few of them and everyone who works with them knows who they are. LAO should not have to set up complicated and expensive peer assessment or educational programs in order to address what amounts to a small, identifiable problem: it would be a waste of money.

One member said that dealing with “poor quality lawyers” is really the responsibility of the Law Society. However, lawyers who are abusing the legal aid system and not managing certificates responsibly should certainly be removed from the legal aid panel. Another member said that a lawyer does not have to be abusing the system to be providing poor service, and that panel management is an important issue that LAO should be concerned with.

In order to attract newer lawyers to legal aid work, LAO should become more active in training and mentoring, and should encourage experienced local counsel to become involved in mentoring and training newer counsel. If the local bar gets involved, a bridge will be created and the necessary connections established to support an ongoing informal mentoring system. If LAO wants experienced lawyers to get involved in this kind of work, it has to make it interesting to them and has to compensate them to do it.

Providing more realistic opportunities for junior counsel to work on interesting cases would also increase the likelihood of attracting more new lawyers to legal aid work. There are very few opportunities to junior on a murder case. Junior lawyers could also help out and gain useful experience on simpler kinds of cases.

Recommendations from the Committee

The following recommendations were unopposed by all members present.

1. If block fees are to be acceptable, they need to be accompanied by a substantial increase in remuneration for service providers.
2. A block fee system should include an experience increase, to attract experienced lawyers back to legal aid work.
3. LAO should begin by piloting block fees.
4. LAO's block fee pilot should be limited to summary offences. Indictable and "super-summary" offences should not be included in the pilot at this time.
5. LAO should be muscular in removing panel lawyers who are abusing the system.
6. LAO should provide more opportunities for junior counsel and co-counsel to work on cases with more experienced lawyers.