

## MEETING NOTES

### Family Law Advisory Committee Meeting of November 10, 2009

#### Advisory Committee Members Present

John D. McCamus, Chair  
Justice Sidney B. Linden  
Carol Barkwell  
Kristen Bucci  
Thomas Dart  
Alex Finlayson  
Crystal George  
John Liston  
Alf Mamo  
Susan McGrath  
Charlotte Murray  
Lise Parent  
Mary Reilly  
Sara Wunch  
Bob Ward (*ex officio*)

#### Legal Aid Ontario Representatives Present

Janet Budgell  
David McKillop  
Rod Strain  
Heather Morgan  
Stephanie Mealing

#### Others Present

Anne Marie Predko, MAG  
Aileen Page, 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 Attorney General has asked for advice on the best use of the new funding which has been made available to LAO. LAO is facilitating this process, and will forward the advice provided to the Minister by December 15 this year. The process has a tight timeline, in order to maximize the possibility of flowing the

money this year. The new money is earmarked for new initiatives and improvements, and is not to be used to address the current financial situation.

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

### **Opening Remarks by Participants and General Comments**

The family bar is concerned about the hourly rate. Although it is understood that the Minister is not looking simply for advice about the “same service delivered in the same way”, the hourly rate and the number of hours for child protection work must be addressed. With the present 19-hour allocation, a lawyer is into discretion before even finishing the initial application on a child protection matter.

Child protection work must be separated from and treated differently than domestic work. Child protection is the “capital punishment” of family law. Child welfare is a public health issue and not just a legal issue.

Improving LAO and improving the justice system overall go hand in hand. A number of the issues on the table here were also discussed at the recent Justice Summit. They are systemic issues.

The committee should try to avoid getting caught up in trying to think of how to do more within the current system. That would be like playing better music on the Titanic. Instead, the ship needs to go in a new direction.

There are major process issues that need to be looked at. The Family Law Rules have had a real impact on the time it takes to complete a case. The Rules front-load the work that has to be done by the lawyer, before a negotiation process can even begin. It now takes three months to do the work that used to be done in a week. There is too much paperwork. The long timelines for completing a case are not good for victims of domestic violence. The ranks of unrepresented litigants include many women who have simply run out of money to fight their litigious partners.

Early judicial intervention does not result in early decision-making. No decisions are ever made at case conferences, unless on consent. The only thing that case conferences do is eat up five hours of the certificate.

The view of CDLPA is that the new money must get to the users of the service. The best way to do that is to increase lawyers’ hourly rate. Lawyers do not take child protection cases because they are not paid adequately.

Mediation is something that should be explored by the committee. It can be used to get many cases out of the court system.

The system is inequitable. The CAS can afford as many expert witnesses as it needs or wants. LAO is limited in every way. One side can paper the other side to death if one of the parties is legally aided and the other is not. The limitation extends to the number of family certificates that LAO issues, in comparison to the number of criminal certificates.

A challenge for the committee, whose members come from different areas of the province, will be to look at province-wide issues and not focus on local issues.

The committee also needs to keep in mind the difference between unrepresented litigants (forced to be unrepresented by economic circumstances) and self-represented litigants (unrepresented by choice).

Over-representation of Aboriginal clients in the child protection system is a problem. Mentoring programs could be helpful in getting new lawyers into this area and representing this clientele. Mentoring and training would also help to retain lawyers in the child protection field.

The financial eligibility thresholds are too low: families with incomes above these thresholds cannot afford a lawyer.

The problems and issues the committee is grappling with go beyond legal aid itself. Who will pay for mediators, and who will pay for interpreters? Interpretation is a huge issue. The question is how far you can push the legal aid function. When is it a legal aid responsibility and when does it become a Ministry responsibility or a community responsibility. Perhaps the committee could make recommendations on the basis that both LAO and the Ministry could contribute funding to make some of the recommendations work.

Concern was expressed that the new money would be used to revamp the justice system, when it should be used to provide services to clients. The committee needs to focus on what LAO should be doing, and not on how to fix the whole system. The Chair agreed that LAO cannot solve all of the problems on its own. Justice Linden added that, clearly, LAO does not operate in a vacuum. Some of the ideas being provided by the committee could apply to the Ministry, or to the judiciary. It is not possible to “fix” one part of the system without affecting other areas too.

## **Discussion of Questions: Emerging Themes**

### ***1. Whether Alternative Payment Programs or Models Would Better Support Lawyers***

#### ***Payment Options***

For domestic matters, it might be an idea to abandon the hourly rate and look at a block fee billing structure for many steps in the process. Private clients want to know in advance what their litigation will cost, and they are starting to ask for a fixed or flat fee. This approach would not work in the area of child protection, because of the risk of dump-trucking. Some members felt that block fees would not work at all, and could result in fewer, and not more, family lawyers taking legal aid cases.

Unbundling services would be a waste of time and would not be efficient. It would mean that, for each step in the process, a lawyer would be starting fresh.

Having to come back and ask for more discretion on a child protection case is discouraging for lawyers. Perhaps the family law equivalent of BCM cases (i.e., Crown wardship or access cases) could be identified early in the process and moved into a system similar to the BCM system for criminal cases, with a set budget and hours authorized in advance. This would also help to reduce delay.

#### *Mentoring, Training, Articling Students and Juniors*

Mentoring and training support were suggested as areas for improvement. The bar is shrinking and greying. New calls are taking on child protection work because a child protection matter is a guaranteed certificate. However, this is one of the most difficult and critical areas to work in, and these new calls are not prepared. There are not enough mentors to teach them. There should be mandatory education to work in this area. LAO could fund free training programs for lawyers who want to do child protection work.

Most lawyers working in child protection are sole practitioners and could not support an articling student or junior. One idea could be for LAO to provide a junior or an articling student to learn from the more experienced lawyers. The problem with this idea is that the sole practitioner would still have to provide the junior or student with an office and computer, and would have to spend time training that person. The opinion was expressed that juniors and students are not affordable. Another issue is geography: recent graduates want to practice in large urban centres, and not in small or remote communities.

#### *Ideas for Other Supports*

To get away from the traditional certificate for litigation, perhaps LAO could offer a limited certificate to explore litigation or other ways to deal with the case. LAO could provide lawyers with an assessment model or other resources to assist in making the determination.

Providing access to support services could be helpful, so the lawyers don't have to do everything themselves.

Use of a computer system that collects case information or some other method for providing duty counsel with continuity would be helpful, so that duty counsel don't have to start over with a case each time the client is in court.

**2. *What Alternative Service Models Could be Adopted to Support: Improved Information for Clients/Mandatory Information Sessions; Early Assessment/Triage of Cases; Increased Diversion to Mediation where Appropriate***

Information

There is a need for more information, to help people to know their rights and decide what they want to do. People also need assistance to get their forms completed and organized.

Mandatory information sessions are a good idea, because there is so much misinformation out there. Information sessions can save time and reduce frustration. It helps if the client knows in advance what to bring with them to their lawyer's office.

Mandatory information sessions may not be of assistance in a child protection case, because the CAS, and not the parents, sets the direction and decides what happens next.

Assessment and Triage

Triage is needed to get the domestic violence cases onto a different track from the cases that are basically about the amount of child support to be paid.

Triage is important, but who should do the triage, and at what stage? Should it be the lawyer who is responsible for triage, or someone who sees the client earlier, before a certificate is issued?

The triage assessment needs to be done by someone who is capable of making the assessment: someone senior in family law. Ideally assessment – psychological as well as legal - should be added to triage

The courthouse could be a good place for triage (where someone could direct people either to a certificate, a mediator or a private retainer), although the view was also expressed that this could be too late, because by the time someone gets to the courthouse they have already decided where they want to be. If the aim is to reach people before they file an application, LAO should be aware that people are getting the application forms online.

It should be kept in mind that child protection matters involve a very disenfranchised group of clients. They often change addresses and phone

numbers with no notice to their lawyer. The lawyers rely on court appearances as a way to connect and stay in touch with these clients.

Giving people access to legal advice early in the process is important. Parents need access to legal advice as soon as the child welfare worker comes into the picture. Once they are in court, they need a triage process, with someone there who can assist them. It does not have to be a traditional certificate for litigation; it could be a duty counsel. But you do not want an abused woman alone in court with no opportunity to talk to a lawyer.

Making a community resource worker available at every courthouse would save an enormous amount of money. This would be a person who maintains a local resource directory, and handles triage. The FLIC should be resourced by a coordinator who has the ability to access all resources in the community. Clients need to be given an appointment, not just told to go and make an appointment. They need a person to look them in the eye, ask the right questions to find out what their needs are, and tell them where to go. There is a segment of the population that will not access technology.

Triage at the court house will not reach everyone who needs help. Advice counsel can provide help to people in their own comfort zones – by going out to First Nations communities, women’s groups, and the agencies that people in the community use. This is especially the case in smaller communities but is applicable everywhere.

FLICs should be expanded. Also, they are inconsistent: virtually non-existent in Thunder Bay, while a Cadillac model exists in Ottawa.

Agencies can be instrumental in helping clients to use their lawyer’s resources more effectively.

Many criminal certificate cases involve domestic violence or are linked to other family law problems. If these could be dealt with in one forum, with a single judge case-managing, this would be helpful. A pilot has been approved for an integrated (criminal/family) domestic violence court in Toronto.

### Mediation

Mediation is a good idea, to move the cases that do not need to be in court out of the expensive court process. In Superior Court, there is an option to go to ADR instead of an appearance. There are in-house mediators at 311 Jarvis and 47 Sheppard. However, these are resources outside of the LAO budget.

Diversion to mediation can work, but triage/assessment is needed first to ensure that mediation is appropriate. A lot of cases involve violence and emotional abuse.

Mediation has to be made accessible. In the north, the closest mediator may be hours away. It is possible to do mediation in one day, if the mediator travels in.

The Chair encouraged members to share any new ideas and any substantive comments about the meeting notes when they are distributed. The next meeting has been scheduled for Tuesday, December 1.