

**REFUGEE LAWYERS' ASSOCIATION SUBMISSION
REGARDING LAO'S PROPOSED PANEL STANDARDS**

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I –Preliminary Comments and General Observations

The following is the commentary of the RLA's Access to Justice Committee and its Executive Committee on the proposed panel standards for membership on the LAO Refugee Law Panel. We have sought and received commentary from RLA membership, however it has become clear in our internal consultations and at the consultation meetings held by LAO that a majority did not understand all of the standards that will be relevant under the proposal, because of the convoluted presentation on the LAO website, which segmented policies into several documents that must be cross-referenced. This has led to the consultation being carried out, to date, with many lawyers not understanding the entire set of standards. The ambiguity inherent in having multiple documents, without a clear explanation of which standards are mandatory and how they will be applied may also make a decision to apply the standards difficult to defend in litigation.

As an overall observation, we are concerned that the standards as drafted may result in competent lawyers being harassed, delayed or refused admission to the panel while lawyers who should not be permitted to represent refugees are empanelled. We are concerned with the lack of planning for a committee of experts in place to carry out the initial exercise of deciding empanelment in a timely manner, and lack of any mechanism to promptly review decisions lawyers want to appeal. We are also concerned that as with LAO's use of its bar on funding for Federal Court opinion letters as a mechanism to cut funding and create a barrier to access to justice, which has been ongoing for over a year, the exercise of creating and maintaining a panel could be abused to effectively ensure that whether or not certificates are issued, there are insufficient lawyers permitted to represent refugees who require Legal Aid certificates.

The substantive standards set out for RPD representation are carefully detailed, but include some requirements that would not be applicable in all cases. At a more basic level, compliance with them would often result in lawyers exceeding the tariff limit. This raises questions about LAO's readiness to recognize the panel standards as justification for discretionary increase and disbursement authorization requests. At present LAO does not recognize many of the values expressed in the proposed standards when it assesses discretionary increase requests. It also raises question about how consistently LAO will enforce the standards. If the standards exceed what LAO is willing to pay for, enforcement may be capricious, with lawyers who want to comply unsure what is

expected and lawyers who disregard basic standard able to point in litigation to lack of coherence in how standards are enforced.

We are also concerned that while the substantive standards for representation at the RPD have been detailed in the appendixes to the main documents, it is unclear how the standards apply to other types of immigration and refugee law representation.

The new panel standards address a concern with the existing standards. The current standards lack enforceability because the language is suggestive and not mandatory. However, the RLA is concerned that the new panel standards could mean that competent lawyers would not be permitted to take LAO cases and the standards may not ensure quality if they are not enforceable in a reasonable and predictable way.

We recommend that the entire set of documents be rewritten as one document, with a more systemic approach to how the various elements are resolved. We also recommend that the new document be distributed for commentary, particularly as the documents posted were not understood by many. The RLA is ready to volunteer to assist LAO in redrafting the panel standards, and agrees with the suggestion made at LAO's January 21 2014 consultation meeting that LAO staff and RLA members rework the proposed standards.

The RLA has identified a number of concerns:

- The primary standards document reads as equating quantity of cases with quality of service. A large volume of completed cases does not in and of itself indicate a high standard of practice. We need to ensure that lawyers who do a good quality of work are empanelled even if they have a low volume of cases. Being a member of the panel should be linked to substantive quality of representation, based on reasonable standards.
- For lawyers who are recently called, the requirement of mentoring has to be matched with realistic financial support for private bar lawyers to act as mentors.
- LAO must ensure that before the requirement that lawyers belong to the panels is implemented, it has enough lawyers on the panel to guarantee that immigrants and refugees can get representation, and that the management of the panel is never permitted to under-serve existing or projected need. The panel standards must not perversely result in a reduction of accessibility to service for clients. This is a crucial requirement.
- As the panel standards were presented in a complicated format, with key documents dispersed on the LAO web site, many lawyers affected by these changes have not understood the entire set of standards. Consultation on a revised document which is more plainly integrated is necessary.
- The expectations in the standards must be recognized in the review of discretionary increase and disbursement authorization requests.

- The standards should clearly differentiate between practices required in all cases – which would mandate removal from the panel if they are not followed; and practices which involve a level of subjective judgment. Where assessment of representation is more complex, as it requires assessing the judgment ordinarily exercised in representation, peer review may be more critical than where it is self-evident a practice is so basic that no lawyer should ever disregard it. Standards should also only apply to the work a lawyer is able to take charge of or correct once he or she is retained.
- We do not believe the requirement of two references is practical. Competent lawyers may not know two lawyers familiar enough with their work to act as references, and it is not evident who should be listed as a reference at the inception of the panel.
- A lawyer whose recent experience has been with private clients may not be able to present their files to LAO due to their confidentiality.

II - Specific Recommendations:

1) 10 Refugee Claims (BOCs and hearings)/5 Federal Court Judicial Reviews or Appeals at RAD in Previous 2 Years/Percentage requirements

As set out above, lawyers could meet the quantitative threshold yet fail to meet the substantive expectations of the Quality Service Expectations and Best Practices Guide (Appendices A and B). There should be one integrated document. It should give explicit explanation of the standards that are mandatory in all cases, and how they will be judged; along with the standards which are more complex and how those will be judged. It should make it clear how the qualitative standards will be monitored and enforced, as this is the most critical part of the proposal.

Similarly, the use of percentages as a qualifier is not necessarily correlated to competent work. It is also unclear how calculating the percentage of practice devoted to immigration and refugee law would be assessed by LAO. As with the minimum number of cases expectation, greater emphasis should be on substantive quality of representation.

Two-Step Review of Work for Empanelment:

We recommend that LAO treat its numerical standards as merely presumptive – establishing simply that a lawyer is presumed to be qualified or unqualified, without dictating whether the lawyer is permitted to be on the panel. Assessment of the substantive work of the lawyer, and agreement that the lawyer will adhere to the panel standards, would be required in either case. If a lawyer cannot meet the minimum number of cases he or she would simply undergo a more complete review of those cases

the lawyer acted on, by submitting the work done on those cases for the expert committee to assess.

There are varied reasons why a competent lawyer might not meet the numerical requirements. Without being exhaustive, factors could include: that the lawyer primarily represents claimants from one country; that there has been a drop in the number of claimants; that the lawyer primarily represents clients in PRRA or humanitarian applications, but maintains expertise in refugee hearings; that the lawyer is differently-abled, is on parental leave, practices part-time, etc. but maintains expertise in refugee law. Rather than making the standards more convoluted by trying to anticipate every exception, focus on assessment of substantive work could resolve this.

We recommend that the number of Federal Court cases completed include stays and judicial reviews that were settled on consent. A stay requires the same work as a judicial review hearing, and it would be particularly illogical to treat advocacy that is so effective it results in a successful settlement as not qualifying.

2) Conditional Empanelment and Mentoring

In principle, we support the conditional empanelment of new lawyers or lawyers intending to switch their areas of practice.

The membership expressed concerns that the mentoring concept for conditional empanelment is not realistic in light of the cost to the private bar associated with mentoring new calls. Although some counsel employ new refugee lawyers, this tends to be limited to law offices with sufficient private clients to subsidize the cost. It is not realistic, factoring in the hourly rate and the tariff hours limits, for a lawyer who does extensive Legal Aid work to devote adequate time to mentoring another lawyer within the certificate system.

We propose that LAO compensate experienced mentors, and are ready to work together with LAO to develop the parameters of such a program. For example, mentors could be issued a “certificate” for mentoring a particular lawyer; or, additional “mentoring hours” could be added to certificates and billed by either the mentor or the mentored lawyer (on behalf of the mentor) at the regular hourly rate.

We further propose that LAO use mentoring as a tool when lawyers fail to meet the panel standards yet the concern at hand does not warrant suspension or removal from the panel. Such methods are used by the LSUC and might make sense in LAO certain situations.

We believe the cost of training new, dedicated lawyers to do quality Legal Aid work must be borne in part by LAO, for LAO to have a viable pool of new lawyers replenishing the panel. This has been a chronic problem with the “graying of the bar”, aggravated by the lack of funding for mentoring on Legal Aid cases, the relatively low fees paid by Legal Aid, and the rising debt load of law school graduates as tuition fees continually increase.

With respect to the continuing legal education component of the panel standards, while there have been relatively low-cost or free educational events offered by LAO, CARL and the RLA, the LSUC and Advocates Society have tended to price seminars higher, and OBA or CBA events require annual membership fees which are high for many lawyers who primarily do Legal Aid work. We propose that LAO negotiate with the LSUC, CBA/OBA and Advocates Society for a lower rate for lawyers who are empanelled or, perhaps more critically, conditionally empanelled by LAO.

3) Quality Service Expectations and Best Practices Guide, RPD matters

The standards should reflect that the LAO tariff is limited. LAO cannot enforce standards that would require exceeding the tariff hours and disbursements. Since the reality is that LAO's treatment of discretionary increase applications is arbitrary, the standards should include assurance that they can be relied on in a discretionary increase application, and that a lawyer cannot be removed from the panel for refusing to do work LAO refuses to pay for.

A necessary corollary of the Quality Service Expectations and Best Practices Guide (Appendices A and B) is that LAO fund services that are additional to the tariff, when such requests are reasonable and necessary to comply with the standards. LAO needs to ensure it is ready to make quick and reasonable decisions when lawyers request approval for additional hours or disbursements during the course of litigation, and when discretion is requested on completion of a case. The current practice of having a very narrow range of criteria recognized in discretion requests, and the arbitrary application of the "client of modest means" argument when necessary work has been done make it untenable to expect LAO will really be able to enforce the standards proposed.

Most of the practical standards set out in Appendices A and B are reasonable, given the above caveat. Some are not practical:

- "Respect for the client's instructions" allows for unreasonable client instructions, and instructions that would obviously exceed the tariff limits. This should be amended to "reasonable client instructions, which are practicable and in the client's best interests"
- "As soon as possible after the first meeting, a panel member should seek relevant disclosure from the IRB, CIC, and/or CBSA" – should be amended to specific "when necessary and appropriate", since it is often unnecessary to make such requests.

A more focused review of the standards, particularly with a mind to differentiating basic and more complex standards, is recommended. By way of example, it may be obvious and relatively easy to judge that a BOC narrative has been written by a non-lawyer or written incompetently because of its syntax or because it presents an incoherent case that does not address basic refugee determination requirements. LAO already collects BOCs,

so there is no reason why LAO could not screen this and make a straightforward decision that certain lawyers would not meet the requirement that a lawyer interview a client and review a BOC before it is submitted. Assessing whether a lawyer normally presents a coherent theory of a case supported by adequate knowledge of the law in hearings is both more work-intensive for LAO and requires more complex judgment.

Because the practice standards are so focused on RPD hearings, it is unclear how they would be applied to lawyers doing other work.

For Federal Court work it is fairly straightforward that the Area Committee has existing expertise in assessing whether lawyers present competent opinion letters or memoranda. To be clear, this is not a mechanical exercise (as Area Committee may believe an opinion is thorough, but disagree on the likelihood of success). Members of the Area Committee should be relied on to determine if lawyers are meeting the requirement of substantively competent work, both by being permitted to recommend removal from the panel and by a requirement that appeal on a decision to remove a lawyer be heard by a panel which includes members of the Area Committee who did not take part in the initial recommendation. The number of lawyers who submit inadequate opinion letters is very low, but LAO permits them to remain on the panel, which means (whether or not LAO funds opinion letters) that they can disadvantage many refugees. Funding of certificates for opinion letters should be restored with the implementation of the new panel and refugees as well as community agencies should be very clearly and accessibly be told which lawyers can submit opinion letters.

4) Transparency

It is critical that the LAO staff deciding whether or not lawyers are admitted to the panels have substantive expertise in refugee law, and that an appeal panel incorporate peer review. There should be an appeal panel that can promptly hear appeals, composed of lawyers who are expert in the field- including private bar lawyers. LAO could draw on refugee lawyers on the existing Area Committee.

Legal Aid's discretion must be clarified. It is unclear, for example, what is meant by discretionary empanelment for those who have been "recognized for substantial recent experience in refugee law".

5) Immigration Appeal Division (IAD):

Membership on the general refugee law panel should permit lawyers to represent clients at the RPD, the IAD, the Immigration Division, in humanitarian, PRRA and any other types of immigration law matters covered by Legal Aid which are not explicitly limited to the appellate panel. Although the IAD is an appeal tribunal, it functions as a hybrid, with much of the presentation of a case at the IAD truly being first-instance representation (for instance the presentation of humanitarian arguments which were not

considered at an Immigration Division hearing). IAD hearings are not more legally complex than an RPD hearing, and are more akin to first-instance advocacy than RAD and Federal Court litigation.

6) Enforcement

The RLA has repeatedly voiced concerns to LAO about inadequate enforcement of the existing panel standards. We understood that one of the major incentives for revisiting the panel standards was to put in place viable enforcement mechanisms.

Without clarity about enforcement measures, we have reservations about the panel standards proposal. We would like to know how LAO intends to proceed when LAO, other counsel or a client is concerned that a lawyer's work fails to meet the panel standards, particularly regarding poor quality of service.

We are also concerned that the breadth of the standards could invite harassment of lawyers on the panel. Clarity about what triggers a review of a case or a lawyer's work generally is required. LAO's past practices of random audits coupled with its refusal to act on serious complaints, and our experience of accounts being questioned by staff without expertise in refugee law while no one with expertise is in a position to overturn the decision, make us very wary of standards which are not coupled with clear enforcement criteria. Just as with the enforcement of any law, standards are not merely for those subjected to an institution's judgments.

7) Universality:

The standards must apply to all types of immigration and refugee law representation funded by LAO.

8) Public information:

Clients and community agencies should be given the standards that lawyers have been required to adhere to. This can be summarized in communications explaining the standards, but should not be reduced to a simplified text that leaves the standards unclear. Each client should be given the entire text of the actual standards.

Clients should not be given randomized short lists of lawyers, as this distorts the clients ability to choose a lawyer –giving the impression he or she is being directed to only certain lawyers. LAO should also not provide lists by language spoken, other than informing clients if a lawyer represents clients at hearings in English or French. Clients who are determined to find a lawyer who speaks their own language are able to do so if they are given a complete list, and it is misleading to encourage refugees to think this should be their primary concern.

III - Conclusion:

As stated above, the RLA has been advocating for many years for enforcement of reasonable panel standards to ensure immigrants and refugees are competently represented. We are ready to work on the proposed standards with LAO. We are concerned that the guiding principles in development and implementation of these standards should be an honest concern with ensuring immigrants and refugees get competent representation, and fair treatment of lawyers who are dedicated to this work.