Legal Aid Services Act 2020

LASA, 2020 Rules feedback summary

September 2021

LEGAL AID ONTARIO
AIDE JURIDIQUE ONTARIO

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Introduction

In Following the process set out in the *Legal Aid Services Act, 2020*, Legal Aid Ontario (LAO) invited and gathered feedback on the draft rules that will govern the delivery of its services once the new legislation is proclaimed. Feedback was gathered via a feedback form on the www.LASA2020rules.ca website, through virtual town halls, and in written submissions accepted between April 21 and May 20, 2021. For Rule 9 (Transitional Matters), feedback was accepted up to June 9, 2021.

By the end of the feedback period, 101 written submissions had been received, totalling 1,075 pages. LAO hosted six live public town halls online, which were attended by 81 individuals in total. LAO also hosted separate feedback sessions with the Alliance for Sustainable Legal Aid (ASLA), Friends of the Community Legal Clinics, Aboriginal Legal Services, and the nine advisory committees of the Legal Aid Ontario Board of Directors. LAO also received 31 submissions through the online feedback form.

Eighty per cent of the written submissions were from service providers who deliver LAO-funded services through clinics or the private bar. Clinic representatives and private bar lawyers also comprised the vast majority of participants who submitted feedback during the town halls and through the online feedback form. Of the 101 written submissions received, 69 were from community legal aid clinics. Thirteen written submissions were from private bar lawyers who provide certificate services, and the remaining 19 submissions were from organizations that work with legally aided clients, from academics, and other groups and individuals.

Rule 1 (Roster Management)

Feedback on the Roster Management rule clustered around the following issues and themes:

- The Administrative Burden schedule
- The Professionalism Standards schedule
- Quality Assurance and Service standards, and the enforcement of roster standards
- A perceived imbalance between the respective powers and obligations of Legal Aid Ontario and lawyers on the roster or applying for the roster
- Concerns regarding language in the draft rule being too prescriptive, too vague and provisions and procedures appearing unfair or not transparent
- The rule possibly conflicting with lawyers' professional obligations or the Law Society's Rules of Professional Conduct
- Concerns regarding the handling of client information that is confidential or solicitor-client privileged
- Protection for access to French language services
- No reference in the rule to diversity or inclusion

Some feedback was received regarding the Administrative Burden schedule under this rule. Participants were concerned that these provisions were broad and vague. This provision could result in new lawyers imposing an "administrative burden" on LAO solely through seeking help from LAO because of their inexperience or unfamiliarity with LAO policies and procedures. It was also stated that this possibility would discourage lawyers from joining the legal aid roster. There were several suggestions that this schedule be removed from the rule.

The roster management rule's Professionalism Standards schedule requires roster members to report breaches of the professionalism standards committed by other roster members (or their agents) to LAO. This was described as problematic for the following examples and reasons:

- A lawyer can easily be in breach in exercising their own assessment or comprehension of what qualifies as a breach.
- Roster lawyers are professionals governed by the Law Society rules, and officers of the court.
- One lawyers' group referred to this requirement as "highly controversial" and believed

their members would have differing views on it.

This rule also provides that a roster member shall not act for an individual under a certificate if the roster member has a conflict of interest. It was noted that the Law Society rules provide for circumstances in which a lawyer may represent a client where there is a conflict of interest. It was suggested that:

- LAO's rule align with the Law Society's rules on when a lawyer may act.
- This rule should accommodate situations where the Crown or court has agreed there is no conflict, or taken steps to insulate counsel and the proceeding from conflict.
- There was general support for the Quality and Service Standards schedule that forms part of this rule, although an organization that represents lawyers in one area of law did take the position that LAO has no jurisdiction over quality and service standards for its roster lawyers. Among those in support of these standards, there were concerns expressed about the specifics. Several participants maintained that LAO should ensure that its service standards are harmonized with the Law Society of Ontario's regulatory framework to avoid duplication or conflict between the two regimes. It was noted that protocols should be put in place to ensure the Law Society is advised when LAO discovers a breach that may require disciplinary action.

There were questions around standards for providing services in particular areas of law, for example, appeals from mental health tribunals, whether new roster members need a mentor, whether they need to apply for the criminal panel to do Ontario Review Board (ORB) hearings, or whether they're able to qualify through being mentored for ORB hearings. It was noted that the roster rule does not include enhanced roster standards, which LAO committed to developing in the 2016 Mental Health Strategy for Legal Aid Ontario. One participant submitted that there is no mentoring, training or retraining available to lawyers serving legal aid clients, leaving them to their own devices. It was stated that lawyers have received contradictory information from LAO regarding area of law standards, and that the requirements need to be clarified.

The provision that a lawyer cannot stop acting for a client without notifying LAO was described as "highly problematic", as an ethical or conflict issue may require the lawyer to get off the record irrespective of whether LAO agrees. It was proposed that a lawyer may be in the midst of a trial when an ethical issue arises and has a professional obligation to get off the record immediately, while being barred from explaining the reasons in detail. Another example given was that there may be circumstances where there has been a breakdown in the solicitor-client relationship as defined by the Law Society. Recommendations included: further consultation with the profession, changing the reporting imperative from "shall" to "should," and removing this requirement entirely.

Other suggestions included:

- Up-to-date standards and service expectations for each area of law.
- Consulting with the Law Society of Ontario, and other stakeholders and experts regarding standards and training.
- Peer review and/or mentoring for roster members, possibly compensated.
- Involving people with subject matter expertise in quality assessment, to ensure realistic assessments.
- Including client relations in quality assessment.

Participants expressed the view that this rule imposes many obligations on lawyers providing legal aid services, but does not set out corresponding responsibilities for Legal Aid Ontario. Examples of this perceived imbalance included various specific deadlines (subject to penalty if not met) for lawyers, with no deadlines for LAO to provide responses.

There were also comments that this rule seems to create onerous administrative requirements and confer broad powers on LAO to remove roster members. While it was acknowledged that lawyers who abuse legal aid should be removed from the roster, participants stated that there should be a better balance, to encourage and enable private bar lawyers to join the roster. It was stated that some provisions in the rule risk penalizing effective practitioners and clinics in an attempt to weed out the small minority that may be problematic. The net effect would be to discourage a diverse array of qualified lawyers from entering or remaining as lawyers who accept legal aid certificates. Suggestions included:

- Further discussions between LAO and the bar.
- Peer review and mentoring to help lawyers adhere to LAO rules and policies and avoid punitive measures.
- LAO establishing and offering courses on how lawyers can work with its rules and procedures.

There were several concerns expressed that the language in the draft rule is too prescriptive, too vague or that provisions and procedures appear to be unfair or lacking transparency.

For example, a few concerns were expressed over what LAO requires for a lawyer to join or remain on a roster, including the observation that there is a lot of paperwork to join the roster. It was suggested that LAO review its processes to make it easy to apply for the roster and encourage and support lawyers historically underrepresented in practice. Another suggestion was waiving the application process if a lawyer is already providing

legal aid services.

Other examples given included the ability to refuse or remove a roster member “for any reason”, to impose any conditions or requirements on a roster member’s authorization, and to assess the quality of roster member services based on any factor that LAO considers relevant. A suggestion was made that in the case of denial of a roster application, a court of competent jurisdiction could be engaged.

It was also submitted that the 15-day window to review a decision to remove a lawyer from the roster is too narrow and a hearing solely on written material may be inadequate. Recommendations included:

- The window should be at least 30 days.
- Extensions should be granted on a “reasonable” basis, not at LAO’s sole discretion.
- Oral hearings should be allowed where circumstances warrant.
- The person conducting the review should be a senior LAO staff member or independent outside counsel.

There were also questions about LAO’s ability to remove a roster member for misconduct of a sexual nature with a client: participants asked what the standard for sexual misconduct would be and how LAO would ascertain that such misconduct had occurred.

The provision that appears to permit only another roster member to attend a court or tribunal in place of a roster lawyer was described as too restrictive, as roster lawyers often rely on law students and students-at-law to address routine and administrative criminal matters in court. There was confusion over a provision in the Professionalism Standards schedule that bars roster lawyers from communicating “orally or in writing in a tone that is inconsistent with professional communication.” The concern was that this seems overly broad and might capture communications of a personal and friendly nature.

Issues were raised regarding the requirement that someone who has retired from the roster must continue providing services under acknowledged legal aid certificates. This was seen by some as overly broad, unfair, and possibly interfering with a lawyer’s ability to arrange for orderly succession planning. It was stated that the requirement could also adversely impact clients if the lawyer’s retirement is due to illness. Some participants maintained that a judge has exclusive jurisdiction to determine the status of counsel.

Several participants submitted that administrative suspensions or removals without notice are unfair. For example, a lawyer may not be responding to LAO queries because of circumstances for which they are not at fault, such as health issues. Administrative removal under this rule does not contemplate exemptions for lawyers appealing their

license suspension with the Law Society, or doing other legal work that is time-limited. It was suggested that, at a minimum, there should be notice given before an administrative suspension or removal, which should include when the suspension is effective. There should also be provision for “inactive” status for lawyers taking a contract position, facing personal difficulties, or other circumstances.

There was an objection to a suspended roster member having to pay a reinstatement fee before having the suspension lifted: there should be no fee as the suspended member has likely suffered financial distress while suspended. Alternatively, there should be discretion to deduct this fee from future billings.

Many submissions and participants expressed concern over this rule’s provision that roster members cannot refuse to provide information to LAO on the basis of privilege or confidentiality. It was maintained that such a broad provision could upset sensitive or vulnerable clients, make clients unwilling to disclose information their lawyer needs to represent them, and undermine solicitor-client relationships by creating a conflict between lawyers and their clients.

One submission noted that there is no mention of French language services in the Professionalism Standards schedule. It was suggested that this be amended to provide that roster lawyers not persuade or discourage clients in the use of one language over the other. It was also suggested the same change be made to the Quality and Services Standard schedule.

Several participants and submissions observed that this rule does not explicitly reference equity, diversity and inclusion. Some suggested that this rule include a strong statement about justice for racialized and other equity seeking groups, and set an expectation that LAO and its service providers be proactive in that regard.

Rule 2 (Payment to Roster Members)

Feedback and concerns on the rule pertaining to the payment to roster members focused on the following issues and themes:

- The tariff is too low.
- Funding standards.
- Requirements for accounts and records.
- Provisions regarding examinations, audits, investigations and reviews.
- Client confidentiality and solicitor-client privilege.

Although the new rules do not affect the existing tariff for roster members providing legal aid services, there was considerable feedback that the tariff is too low, with the following examples and recommendations given:

- Many participants stated that the hours paid under a certificate rarely reflect the hours required to properly represent a client on the matter for which the certificate was given.
- LAO generally does not pay roster members for waiting time and adjournments for trials and hearings, despite lawyers being required to be in attendance for such times. It was suggested that LAO simply allow lawyers to bill for waiting time as long as their hours do not exceed the hours authorized in the certificate.
- It was suggested that the fee schedule include lawyer-supervised paralegals paid at the same rate as articling students, and unsupervised paralegals paid at half that rate.
- It was requested that the tariff for Consent and Capacity Board appeals be raised to 35 hours.
- There was a request for more block fees for criminal matters, though at least one submission noted that many clients in racialized communities have concerns about block fees, as they believe they incentivize guilty pleas.
- One submission noted that many certificate clients have disabilities, are racialized, LGBTQ+, Indigenous, predominantly French-speaking, etc. and lawyers representing such clients require more time to properly serve them. It was suggested that more certificate hours be permitted for such clients and additional funding provided for interpretation and translation where necessary.

Some participants stated that LAO billings are cumbersome, time intensive and there are delays and denials of payment. It was suggested that LAO consider direct payments to agents and third-party providers to remove this burden from lawyers.

There was a concern expressed that the LAO payment rules may negatively impact the goals of equity, diversity and inclusion. It was submitted that lack of funding and the low tariff narrow the number of lawyers willing to do legal aid work. This results in fewer female, racialized and Indigenous private lawyers, and impacts clients who will not have the choice of such lawyers available to them.

There were several positive comments. One welcomed the extension of mid-level case management. Another appreciated the inclusion of a fitness hearing counted as an additional day of trial time. There was also a submission that, at first glance, the payment rule seems more accessible and easier to grasp than the existing tariff handbook that includes out-of-date information.

There was significant feedback on the funding 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," which under this rule governs the fees and disbursements billed for the legal aid services. Several participants maintained that no person of modest means could afford to fund any complicated legal matter, and few clients know all that is required to act in their interest. Some maintained that the standard should be what a reasonable and competent lawyer would do to advance their client's interest. Another suggestion was that LAO funding should parallel the Crown's funding, meaning legal aid clients would have the same resources such as experts, co-counsel, junior counsel, etc.

Many submissions commented about provisions in the rules for accounts and records of roster lawyers. Some participants raised concerns about the time and effort required for lawyers and staff to prepare and submit legal aid accounts, which is not compensated. It was suggested that these factors contribute to the overall administrative burden of dealing with LAO, which is a disincentive to accepting legal aid clients. LAO was encouraged to continue its review of its tariff and billing procedures, and streamline the accounts process to the minimum that is necessary.

Some participants asked for clarification of what is required as "proof and justification" for all items in a lawyer's detailed account. It was stated that the requirement for proof and justification for accounts is over broad, and that it is unclear how a lawyer could provide proof and justification for routinely required tasks such as conducting research, reviewing documents, conducting client interviews and responding to telephone calls. It was also submitted that having to retain records for 6 years or obtain information from up to 6 years prior is not reasonable.

Concerns were also raised regarding translating dockets into LAO's docketing software and the annual billing requirement. It was stated that the requirement that annual bills be submitted is a disincentive to take on matters with a long time span because there will be

years in which a lawyer will only bill for a few hours. The requirement that lawyers record start and end times for services over half an hour was described as time consuming and recommended to be eliminated.

There were objections to LAO's discretion to require lawyers to provide any information or documents requested by LAO in the context of audits and investigations, including documents in possession of a third party, which was described as overly broad and onerous.

It was stated that there is a lack of clarity about what an examination, audit or investigation of accounts will entail. It was recommended that where LAO has the ability to obtain court information and documentation to support lawyers' accounts, LAO itself should have to obtain that information, not the lawyer who cannot bill for the time involved. Another suggestion was to amend this provision to require lawyers to only provide materials that are in their possession while requiring LAO to obtain third-party and court documents. One organization suggested paying lawyers an administrative fee to obtain necessary documents, which could be clawed back if wrongdoing is later established.

There were several objections to this rule ending the practice of allowing a court assessment officer to review accounts.

One organization expressed dissatisfaction over LAO's ability to disallow payment in certain circumstances. This was described as an overreach on a professional's judgment call in any given litigation which can be prolonged based on any number of circumstances outside a roster member's control.

There was an objection to LAO's ability to refuse case management if a majority of services have been rendered at the time of application. It was stated that, in many cases counsel cannot estimate a budget until quite a few hours have been expended; or a lawyer cannot complete legal aid applications on time because of the Crown's actions or other urgencies; or cases can change direction in ways that are not foreseeable.

There was disagreement with LAO's ability to deny payment for conflicts of interest, as conflicts may arise through no fault of the lawyer.

It was noted that several provisions in this rule require legal aid applicants and roster members to provide LAO with information or documents that are or may be confidential or subject to solicitor-client privilege. It was questioned whether a lawyer can provide privileged documents to LAO without the client's permission. It was recommended that the rules should be subject to section 40 of the *Legal Aid Services Act, 2020*, and that LAO set out in the rules a limited list of purposes for, or circumstances under which, LAO will request privileged information.

Rule 3 (Certificate Management)

Feedback on this rule was received on the following themes and issues:

- Certificate management timeline and reporting requirements were perceived as too strict or onerous.
- The new provision allowing LAO to assign a lawyer to a client raised questions about assignment on the basis of a client's unreasonable conduct, an assigned lawyer's need to obtain permission to resign, and assignment of staff lawyers.

Some participants perceived the draft rules to be lacking in transparency, fairness, or with language that is too prescriptive or vague.

The draft rule allows 30 days for a roster member to notify LAO and a client of their decision to acknowledge or decline a legal aid certificate. It was noted that a client may delay meeting with a lawyer, or fail to provide sufficient information within 30 days for lawyer to make decision. It was recommended that this period be extended to 90 days.

It was noted that the draft rule sets out four conditions for LAO issuing a retroactive legal aid certificate, which must all be met before a retroactive certificate will be issued. It was requested that the rule be amended so that only one of the four conditions needs to be satisfied.

There were submissions about the requirement that an application for travel time on a certificate be made to LAO no later than 30 days after acknowledgement of the certificate. It was stated that this timeframe is unduly strict because a lawyer may not know the direction a matter is going. It also does not accommodate circumstances in which a client subsequently moves (voluntarily or is transferred to another correctional facility) or where a matter is moved to another courthouse. There was a recommendation that a travel application also be permitted within 30 days of a change in circumstances necessitating travel expenses.

If a matter has not concluded within two years of a certificate being issued, the lawyer must report to LAO on the status of the proceeding and other matters, and request an extension if necessary. Feedback on this provision noted that some matters take a long time to reach resolution given the reality of the court system. While it is appropriate to require a roster member to request an extension, the significant administrative burden of preparing a detailed report is onerous. It was suggested that a simple request for extension with brief reasons should be sufficient. There was also a suggestion that LAO give notice that the two-year point is approaching.

There was also feedback that it may not be possible to provide LAO all the information

required in the report, for reasons such as changing circumstances, new case law developments, some accused having to wait for results of other trials. It may not be possible to provide conclusions of service dates, predict what services are yet to be rendered (except in broad terms), or estimate what will be billed as these can depend on the Crown's actions.

With respect to the review process, it was submitted that the time allowed to submit a request for review of a certificate cancellation (15 days) is too narrow. It was stated that clients who are under housed, in shelters, with mental health challenges or language barriers may not be able to comply with this time. It was recommended that the rule provide for time extensions to file a request to review a certificate cancellation.

It was noted that LAO can cancel a legal aid certificate for any reason, or on application of a client, even when a court requires a lawyer to remain on the record. Some participants commented that this may put a lawyer in the position of having to choose between representing a client without assurance of payment, or breaching their professional obligations as an officer of the court.

This draft rule includes a provision allowing LAO to assign a lawyer to a client who is unable or unlikely to retain their own, or who is requesting a change in lawyer because of the unreasonableness of the client's own conduct.

There was mixed feedback on this provision. One lawyers' organization called it a helpful solution to an often-difficult plight. Another lawyers' organization submitted that no evidence has been provided to indicate that clients in the area of law in which they practice are having difficulties finding a lawyer.

There was a recommendation that an assignment should only occur when a client is unfit to select their own counsel, determined through a strict test. Another recommendation was that LAO should not be able to assign counsel when a client is seeking to change lawyers, based on the client's own conduct. There were also recommendations that the conditions under which a lawyer may be assigned, as well as the term "unreasonableness," be more specific and clearly defined.

It was noted that many clients request a change of solicitor because their experience with intimate partner violence leads to problems working with a lawyer, and that clients with serious mental health issues often have difficulty establishing a solicitor-client relationship, and that relationship should be maintained and supported. It was noted that respecting choice of counsel is especially important for such individuals.

There was apprehension that this provision would be used to assign LAO staff lawyers to clients, instead of lawyers in the private bar, and may signal a greater reliance on staff lawyers going forward. The comment was made that it would not be appropriate to assign

a staff lawyer unless there is a demonstrated need that the private bar cannot fulfill, which would likely be rare. There were recommendations that LAO first exhaust the options in the private bar, or make all reasonable efforts to connect a client with their counsel of choice, before resorting to a staff lawyer.

Another concern was that a lawyer who has been assigned under this provision cannot resign from the proceeding without LAO's written permission, even when the lawyer has been fired or was permitted to withdraw by a court. It was suggested that there may be time-sensitive ethical issues involved and the Law Society rules could require the lawyer to remove themselves before written permission could be obtained from LAO.

It was suggested that it may not be possible to satisfy the requirement to get LAO approval to get off the record in mental health tribunal matters and mental health appeals. Another observation was that LAO permission should not be required on the basis that lawyers who are trusted to be on the roster should have their discretion to get off the record respected.

Rule 4 (Eligibility for Legal Aid Services)

Feedback on the eligibility rule was received on the following issues:

- Eligibility thresholds too low
- Application process
- Eligibility criteria
- Client confidentiality and solicitor-client privilege

Although the rules do not change the existing eligibility criteria to receive legal aid services, some feedback was received on this issue.

Several participants submitted that the criteria to be eligible for legal aid services continue to be strict and the income cut-off very low. It was noted that working low-income individuals cannot get a legal aid certificate, yet cannot afford to spend $5,000-$10,000 to defend themselves on a criminal charge.

One group noted that the eligibility threshold for survivors of domestic violence leaves many women to fend for themselves. It was recommended that LAO further review eligibility for women victims of violence as they are vulnerable, especially during separation, and at risk of further abuse during the legal process.

It was suggested that LAO allow anyone who is eligible for or receiving Ontario Works benefits to automatically qualify for legal aid. A recommendation was also made that LAO should eliminate financial eligibility testing for clients with matters before the Consent and Capacity Board and Ontario Review Board on the basis that most such clients qualify for legal aid and the few who do not will likely not have access to their money, or be legally entitled to access their money. It was also noted that some individuals have higher living costs due to circumstances such as disability, or living in the north.

There were several comments regarding the treatment of assets when assessing eligibility for legal aid services. There was a request for clarity and fairness on the definition of assets, with recommendations that access to credit, essential vehicles and inaccessible foreign assets be excluded.

There were several recommendations that LAO exclude compensation for historical wrongs from its calculation of assets and income, such as land claims settlements, residential schools settlements and other retributive justice settlements that focus on compensation to Indigenous clients for past trauma and suffering, and the Chinese Head Tax and Exclusion Act compensation.

It was also requested that retroactive government payments be excluded. It was noted that this rule has a different definition of “assets” to be considered than previously, as well as a definition of “family member” that could include the income of a sibling in household income. It was pointed out that valuing housing on reserve is complex and problematic given issues of building quality and overcrowding.

It was suggested that refusal of certificates puts an administrative burden on clinics, particularly in housing, income maintenance, and disability matters. The comment was made that clients who have not qualified for certificates often come to a clinic, where a lawyer or caseworker must take the time to interview the client and prepare a letter to LAO to ask that a certificate be reconsidered.

There was a concern that clinics will no longer be able to exercise discretion and serve clients who fall outside LAO’s eligibility criteria. It was requested that clinics be allowed to continue to exercise such discretion as it allows clinics to take on cases where a client’s income or assets slightly exceed the requirements yet the case will have a systemic impact that benefits many clients. It was submitted that this discretion by clinic Boards of Directors is an important part of the clinic being responsive to community needs and that removing such discretion limits clinic autonomy.

Several concerns were raised regarding LAO’s application process. One was LAO’s ability to refuse to consider an application if information provided is incomplete or inaccurate, or if a previous application was inaccurate or incomplete. It was suggested that clients in criminal matters or with mental health issues may be unable to provide all the necessary information, that clients detained in hospital may not have access to their information, and mental health clients may have mistaken beliefs about their financial resources. It was recommended that LAO exercise discretion and flexibility.

With respect to applications on behalf of mentally or physically incapacitated persons, it was submitted that the list of who can apply on a person’s behalf is too restrictive as it does not include patient advocates, rights advisors or counsel. One submission welcomed the provision that a Designated Representative can make applications for legal aid. It was noted however that this leaves out unaccompanied and separated children who are making inland refugee claims.

Several submissions also expressed apprehension that LAO may require clinics to participate in a centralized intake process to determine eligibility for legal aid services, which will require clinics to investigate and verify clients’ financial information and documents. It was stated that this could discourage clients from accessing clinic services and negatively affect clinics’ relationships with clients and their communities. The suggestion was made that it would also add an administrative burden on clinic staff for which they are not trained or resourced, and would takeaway from direct client service

time. It was noted that currently clinics ask clients about their financial circumstances to determine financial eligibility for services but do not require verification.

It was requested that clinics' existing practices for verifying client eligibility not be changed. It was stated that the rules are not clear on eligibility for incorporated groups, whereas services to non-profit corporations is permitted under the current clinic financial eligibility guidelines. It was requested that the rules expressly recognize that clinics can provide services to incorporated groups.

Some concerns were raised regarding client confidentiality and solicitor-client privilege. It was noted that under this rule, legal aid applicants must consent to the release of any information and documents that LAO requires relating to their legal aid services or court proceedings, including solicitor-client privileged information. Several participants and submissions noted that this provision could create potential vulnerabilities for clients and undermine the solicitor-client relationship, such as by creating a conflict between roster members and their clients, or making clients uncomfortable or unwilling to disclose important information to their lawyer. It was suggested that this provision may also lead to client information being shared with other entities without the clients' knowledge. Some submissions regarded this provision as an infringement of solicitor-client privilege, despite the language in the rule that releasing such information to LAO is not a waiver of privilege.

It was recommended that there be language barring the sharing of client information without clients' knowledge. Another recommendation was that all references to requesting privileged documents should be removed from this and all other rules.

Several provisions in this draft rule were described as lacking transparency or fairness, or having language that is too prescriptive or vague:

- LAO's sole discretion to determine whether a matter falls within LAO areas of service was questioned.
- Reviews under this rule are in writing only. It was stated that this may be challenging for people in hospital or group settings as they may not always have support in accessing records.
- "Eligibility other than financial" should not include the legal merits of the case. It was stated that many refugee claimants who have been denied legal aid for hearing preparation on merit have been accepted at the IRB, and that LAO is prejudicing refugee claimants by leaving them without counsel or to unscrupulous consultants.
- Merit assessments of appeal proceedings. It was recommended that merit opinions be done by the trial counsel, the only exceptions being where they have refused or a conflict has arisen. It was noted with dissatisfaction that there is no reference to Area Committees in the draft rules.

- There should be an exception to the requirement for a contribution agreement when it is clear the client may lack mental capacity to sign a contribution agreement.
- Contribution agreements are too complex.

Rule 5 (Recovery of Costs)

The following feedback was received on the rule regarding recovery of the costs of providing legal aid services:

Concerns were raised about lump sums being subject to cost recovery. It was noted that in income security cases and child support cases, clients often get retroactive benefits in a lump sum, and must ask for an exception so those funds are not subject to LAO recovery. It was suggested that clients not have to ask for an exception. Clients are often unwilling to accept lump sum settlements because they do not wish to pay legal aid for the cost of their services. It was recommended that a client should be entitled to receive a lump sum for past child support underpayment without being subject to recovery by LAO, perhaps to a specified limit, with LAO retaining discretion to recover from funds received beyond that amount.

LAO was asked, when attempting to recover costs, to take note of the fact that refugee claimants do not have access to many benefits that others do, such as the Canada Child Benefit. It was also pointed out that the ability to pay back legal costs will likely be very different for clients with disabilities, or who are Indigenous, or living in the north. It was recommended that the rules and LAO policies respecting the recovery of costs should fairly reflect the increased cost of living for persons in various demographics including Indigenous persons, and all grounds under the *Human Rights Code*. It was also recommended that LAO have clear discretion to not pursue cost recovery in cases where the client may lack mental capacity, and should consider adding mental disability to the provision regarding waiver of collection rights.

It was requested that clinics be exempt from requiring contribution agreements or cost recovery from their clients. It was stated that contribution agreements and cost recovery would be an extreme hardship for most clinic clients, especially those who use clinic services to collect or recoup subsistence-level income such as social assistance and unpaid wages. Clinics do not currently have to enter into contribution agreements with their clients. It was stated that clinics have neither the administrative infrastructure nor the policy framework to do so, nor to engage in cost recovery from clients.

It was submitted that the 10% management fee may be reasonable in some cases, but in others is a barrier to accessing legal aid services. It was suggested that, in some cases, it would be more appropriate to charge clients a modest contribution fee instead of fees, disbursements and HST plus 10%.

It was recommended that LAO not hold the private property of an intimate-partner violence survivor as guaranteed payment, but should instead implement a “no win no fee” policy.

It was recommended that there be more education for clients upfront about the cost of legal

aid services, and the fact that the client may ultimately end up paying these costs, such as by way of a lien against a matrimonial home in a family law matter. It was stated that there should also be consistency of practice for LAO to recover its lien from the sale proceeds. Participants stated there have been instances when LAO did not instruct real estate lawyers to hold back the legal aid lien amount from the sale proceeds.

Several comments were made regarding measures private lawyers are required to pursue to recover costs from clients, and the time and effort involved. It was noted that the time taken to take out an order and recover court costs assigned to LAO is not accounted for in the time allocated under a certificate, and is therefore unpaid.

Under this rule, a lawyer is responsible to take all reasonable steps to collect the recoverable amount and where there is a court order for costs, they shall file a request for writ of seizure and sale and the writ itself. There was confusion about the extent of the steps lawyers will be required to take to recover costs: will they be expected to do a judgment debtor exam? Will they be paid for the time and costs involved? It was recommended that LAO pay lawyers for a reasonable amount of time to take out orders and deal with issues surrounding recovery of costs. An alternative recommendation was that administrative staff at LAO should do the work, as it will be more cost effective, and LAO is in a better position to weigh the costs and benefits of cost recovery efforts.

One participant stated that the obligation to file a writ for every file seems onerous, suggesting that this be assessed on a case-by-case basis with some discretion afforded to the roster lawyer.

This rule provides that when negotiating costs in settlement discussions, lawyers should base the amount of costs on their private retainer rate, not the legal aid rate. The question was raised whether, when actual cost incurred is typically less than half the private retainer rate, would LAO be making a “profit” if the client obtains costs at the lawyer’s private retainer rate? It was suggested that if LAO is seeking to give lawyers standard instructions respecting the recovery of costs, those instructions ought to be to negotiate such amount as is likely to be awarded by the court, which will be both more flexible and more realistic.

Rule 6 (Entity Service Providers)

The submissions and session participants who responded to the draft entity service provider rule expressed many of the same comments, which centered around the following issues and themes:

- The anticipated impacts of the maximum three-year term (with six months notice for renewal) for service agreements between LAO and entity service providers such as clinics, student legal services organizations, and Indigenous legal services organizations
- A perceived imbalance of the respective powers and obligations of LAO and entity service providers
- Language in the draft rule being too prescriptive, too vague and provisions and procedures appearing unfair or not transparent
- Funding of clinics, reviews of LAO's funding and dealing with yearly surpluses
- Support services LAO provides to entity service providers
- The relationship between community legal clinics and their communities, and the services that clinics provide to their communities
- Absence of language regarding anti-racism, racial justice, and equity, diversity and inclusion
- Concerns regarding the handling of client information that is confidential or solicitor-client privileged
- Issues particular to student legal services organizations, French language services, and concerns about Indigenous/Aboriginal issues

All clinic submissions objected to a maximum three-year service agreement term and detailed the negative impacts they anticipated would flow from that which were generally similar across all submissions and feedback. There were concerns expressed that such a term would limit clinic work to basic legal work and short-term cases, when even many routine matters such as WSIB, ODSP or CPP appeals often take more than one year. It was stated that limited terms will also make clinics unable to plan long term, and reluctant to undertake test cases, law reform, systemic work or community outreach and development.

The feedback was that clinics should not be subject to term-limited funding as hospitals are, because clinics frequently advocate against powerful or wealthy interests such as governments, landlords and large employers. Despite LAO being an independent agency, participants conveyed that time-limited agreements could expose clinics to retaliation for engaging in legal work or advocacy that is unpopular in some quarters.

Clinic submissions also detailed some of the practical business impacts they expected would follow from service agreement terms of three years or less:

- Difficulty in attracting and retaining lawyers, law students and other clinic staff, because working in a clinic may be perceived as precarious employment.
- Being less able to offer raises, benefits and advancement if the clinic could not be sure they would be given another service agreement beyond their current term. They noted that clinics already have difficulty competing for staff with LAO.
- More difficulty insecuring office space at an advantageous rate or at all, pointing out that the typical commercial lease is at least five years, shorter leases are subject to higher rents, and discounts are generally only available over longer lease terms.
- Less ability to pay for leasehold improvements.
- Inability to remain in co-op leasing arrangements with other agencies for a single space (nor be able to commit to such co-op arrangements in the future).
- Less ability of clinics to attract willing directors when service agreements are limited to three years or less. Participants indicated that potential directors may fear bearing personal responsibility for outstanding leasing costs, employee termination costs and other liabilities resulting from a clinic not having its funding renewed.
- Some participants also worried about being able to secure directors' and officers' liability insurance.

Suggested alternatives to the three-year term were: agreements without a finite term, terms of five, eight, or ten years, and rolling terms by which an agreement is automatically extended at year's end for another year, unless a clinic is in breach of its agreement or under corrective action by LAO. There were also suggestions that the six-month notice period be at least one year or 18 months.

Many participants stated that the entity service provider draft rule establishes an imbalance in the respective powers and obligations of LAO and the entity service providers that will have funding agreements with LAO. Submissions described the rule as removing authority from clinic boards and attempting to micromanage clinics from a distance. Several participants wondered why LAO has not used the existing Memorandum of Understanding and other policies as the basis for the rule governing entity service providers. There were concerns expressed that clinics will be "at the mercy" of LAO instead of in a relationship governed by the documents relied on under the *Legal Aid Services Act, 1998*, a memorandum of understanding and funding agreements. This view was accompanied by several participants observing that the draft rule, in their view, gives broad or almost total and unnecessary discretion to LAO.

A specific example given of this perceived imbalance of powers is the review permitted under this rule. The review provisions are seen as narrow and, to the extent that they would be conducted by LAO staff, some submissions suggested that reviews would lack independence. It was also pointed out that a clinic has just 20 days to seek a review of an LAO decision.

The term “entity service provider” prompted some participants to ask whether LAO intends to contract for-profit companies using non-lawyers to provide legal aid services, in lieu of clinics providing these services.

There were numerous suggestions offered to address the perceived imbalance between LAO and entity service providers under this rule:

- Establish a reciprocal process for entity service providers to propose providing new or additional services.
- Include an obligation that LAO consult with clinics, mirroring the former LAO-clinic consultation policy.
- Include in the rule and service agreements a consultation process for clinics and LAO.

There were several suggestions offered to limit LAO’s discretion under this rule:

- Establish reasonable conditions for LAO to enter into a new agreement with an existing entity service provider.
- Set out specific conditions under which LAO must renew a service agreement with a clinic that has a good record of providing services and managing funds.
- Specify the things LAO must consider when deciding to stop funding a clinic.
- Have every LAO authority under this rule be accompanied by the principles to be followed in exercising that authority, and that such decisions should be subject to review.

Regarding reviews, it was suggested that:

- The rules clarify who will be conducting any reviews.
- LAO should provide full disclosure and all records.
- Reviews should be conducted in person unless the parties consent otherwise.
- Written reviews be limited to situations where there is agreement on the facts and the issue is a question of law.
- The requirement for clinics to provide additional information or documents should be

reciprocal, so a clinic under review has the same right to documentation from LAO.

- Clinics be given 60 days to request a review of an LAO decision instead of 20 days.

There were several comments and recommendations seeking to clarify who could apply to deliver entity services, and what services entities can deliver. There was a request to clarify whether a group of qualified roster lawyers could bid to provide the types of services provided by a clinic. A coalition of groups representing the private bar requested that entity service providers not be permitted to provide services which would traditionally be provided through a legal aid certificate, particularly criminal, family, immigration and refugee law, or mental health law. Similarly, there was a request that the rules prevent clinics from providing summary advice on matters that would qualify for legal aid certificates. It was also suggested that the rule limit entity service provider applicants to non-profit corporations.

There were some concerns expressed that this draft rule lacked fairness and transparency, and contained language that is too prescriptive or vague in the areas of board membership, risk factor assessment, performance and quality measurement, corrective action, and some operational details.

A few participants objected to the provision requiring entity service provider Boards of Directors to include individuals with financial, legal and management skills, as this would be difficult to satisfy in rural or remote areas. A clinic would be in breach of the rule if it could not find directors to satisfy all these requirements, or if a vacancy occurred unexpectedly. One submission questioned whether prescribing who will sit on an independent corporation's board is beyond LAO's powers to set out in the rules. In this vein, another submission questioned whether it was possible for a clinic to guarantee the outcome of an election to a board. A few submissions noted that it would be too difficult to find a Francophone board member.

Changes suggested to the draft rule to address these issues included:

- Allowing boards to ask for outside advice that is not available on their boards.
- Clinics be required to only make "best efforts" that its board reflect the diversity of the community it serves.
- Boards be required to include a low-income member, or have its board reflect the income level in the community.
- The reference to "physical disability" be amended to "disability."
- The rule should guarantee resources for clinics to attract, retain and promote board members who self-identify as Black, Indigenous and persons of colour, 2SLGBTQ+ and other historically underrepresented groups.

Regarding risk factor assessment, the following concerns and recommendations were received:

- Risk assessments may be subjective or arbitrary.
- The definition of “low risk” is vague, overly broad, and provides that a risk assessment cannot be reviewed.
- A clinic’s “reputation” is too subjective and open to manipulation.
- It was recommended that all clinics be considered “low risk” unless they are under a corrective action that is clearly set out in the rule.
- It was suggested that a clinic should be able to see on what information LAO based its determination of risk level or decision to enter into a service agreement, so it can respond to any inaccuracies.

Many submissions pointed out that the rule does not set out any standards, performance indicators or quality assurance program and no process for developing such standards and indicators. Several participants and written submissions asked how work such as systemic advocacy, community development and outreach will be measured and assessed, as this is not traditional casework. There were some apprehensions over using existing software to measure performance, based on participants’ views that it has design flaws and different clinics use the same software in different ways. Private bar representatives noted that roster members would be held to more rigorous standards than clinics, and that clinics would not be subject to any quality and service standards until after they already have an agreement with LAO.

Additional suggestions for performance and quality measurement included:

- LAO should work with the Association of Community Legal Clinics of Ontario (ACLCO) and performance measurement experts to create appropriate and meaningful measurement and evaluation of poverty law services delivered by clinics, which should include both qualitative and narrative descriptions.
- Revive LAO’s performance measurement project.
- LAO could fund a self-accreditation process and group for clinics; clinics themselves would draft the accreditation measures.
- Clinics could have a similar certification process as other public service agencies, with clear measures (both qualitative and quantitative) a clinic must meet to be funded, instead of LAO having discretion over funding and determining risk levels.
- Every entity service provider undergo a quality assurance audit at least once every five years or at least once during the term of its agreement.

- Quality assurance measures should include equity.

Some concerns were expressed over the corrective action provisions in this draft rule. It was noted that the section allowing for corrective action does not distinguish between types or degree of default an entity service provider may be in. It was suggested that the draft rule does not adequately contemplate a response proportionate to the default, nor contemplate any discussion before corrective action is imposed. It was also submitted that the correction action provisions do not comply with the spirit and letter of the government's Transfer Payment Accountability Directive, which states that monitoring transfer payment recipients is "enhanced through respectful, open and ongoing communication with the recipient" and "corrective action supports recipients in delivering on desired outputs and/or outcomes, and meeting the terms and conditions established by the agreement."

The following suggestions were received on corrective action:

- Corrective action should be graduated, or similar to progressive discipline, with notice from LAO and open dialogue about how LAO can help resolve the problem that led to the breach.
- There should be a distinction between a "housekeeping issue" and a fundamental breach.
- The rules should permit a review of LAO's decision to apply corrective action to a clinic.
- This provision should be rewritten to set out a multi-step process, beginning with LAO requesting a breach be rectified within a certain period of time; if there is failure to comply within the time period then there would be a "discussion" with LAO. If there was still failure to comply, only then would LAO be required to initiate a "quality assurance audit" unless there had been an audit within the last year.

There were several criticisms of the rule requiring entity service providers to be open seven hours daily, with the ability to close for up to four hours each week for meeting and training. One submission proposed that a clinic may need to close for longer than four hours, to catch up on file work, have all staff work towards an important deadline, or have a full-day training. Another submission suggested it may not be possible for clinics serving a large geographical area to maintain the required opening hours. It was suggested that the opening hours requirement be replaced with language that "the service entity shall respond to all requests in a timely fashion and be funded adequately to do so, seek to be open to the public during normal working hours and where necessary to meet their professional requirements to clients, provide access to services outside of normal working hours."

There were also objections to the requirement for clinics to prepare and maintain accessible a code of conduct beyond the regulatory and statutory schemes already mandated for a clinic and its staff.

Several recommendations were offered regarding the funding of clinics, reviews of LAO's funding, and dealing with excess payments/surpluses. One recommendation was that the rules include an obligation for LAO to transfer adequate funds to provide the services specified in a clinic's service agreement, or limit the provision in ESP8(2)(a) requiring clinics to have everything they require to provide the services in their agreement with the language "as funding resources allow." There was also a request that this rule guarantee funding for clinics to meet pay equity obligations, and for clinics to bring staff salaries and compensation in line with LAO levels.

One submission raised the scenario that a clinic may seek and obtain funding from outside sources for services that do not fall under the meaning of "Legal Services" in order to assist clients "holistically." It was recommended the possibility of such outside funding be addressed in the rule, to ensure that the clinic's LAO funding is not negatively impacted.

Several submissions and participants took issue with the provision that only funding reductions of 7.5% or more in a given year would be reviewable, and that the review would proceed only on the basis of new and relevant information, or factual error. Some submissions asked that the threshold be lowered to reductions of 5%, 3%, or any reduction at all. There were also recommendations to expand the basis and procedure for funding reviews, such as:

- Requiring LAO to provide its reasons and disclosing all "documentation, records, and transcripts of discussion leading to the budget reduction"
- Allowing for client, clinic and community input
- An independent review process
- Allowing for an oral hearing of some information if the decision-maker wishes
- Allowing clinics to meet with LAO decision-makers
- Clinics being able to request reconsideration of any LAO decision that results in a funding cut of 5% or more by the CEO of LAO
- Requiring reviews be heard by the LAO board

Several participants disagreed with this draft rule's provision that LAO may determine the funding has been in excess of the amount required under a provider's service agreement and demand repayment. They noted that LAO's ability to claw back such surpluses creates an incentive for all clinics to spend all their funds before the end of a fiscal year, and makes it more difficult to fill vacancies that occur close to a fiscal year end. Recommendations included: allowing clinics to make a detailed case to LAO for retaining some or all of the funds; allowing clinics to retain some surplus as a contingency; and working with ACLCO to

agree on another use of surpluses.

Many submissions and participants raised the issue of wind-down costs for a clinic, which is related to the issue of fixed term agreements. It was argued that if a clinic were not to enter into a new agreement with LAO at the end of its agreement, there would be substantial costs such as payouts to lawyers and other employees, and for early lease termination. Participants stated that volunteer board members could be exposed to personal liability if funds were not available for these wind-down costs. Recommendations included LAO providing procedures for a wind down, LAO committing to cover all reasonable wind-down costs, such costs to be determined by a third party, and that LAO ensure alternate representation for ongoing cases.

Many submissions and feedback session participants expressed concern that this draft rule refers to support services that LAO may provide to clinics, but does not detail the services nor require LAO to provide them. It was noted that clinics have relied on such supports for decades and their loss would place a large administrative and financial burden on clinics. Because the rule provides that a clinic's funding may vary with the amount of LAO support services used, it was feared that a clinic's funding may be reduced if it uses too many LAO support services. On the other hand, a concern was expressed that clinics do not get credit when they "save LAO money" by using staff or volunteer translators instead of the translation services offered through LAO. It was also noted that the rule does not require LAO to provide directors' and officers' liability insurance for clinic boards, insurance which is costly and increasingly difficult for clinics to obtain by themselves. Recommendations on the issue of support services provided by LAO included:

- LAO should consult with clinics about the supports it provides.
- The rule or service agreements should require LAO to provide support services, detail the services to be provided and require LAO to transfer "appropriate resources" to clinics to obtain any of the listed supports if LAO does not provide them.
- If LAO reduces or withdraws support services this should be considered a reduction or withdrawal of funding and be a reviewable decision.

Many feedback session participants and submissions expressed concern that this rule does not appear to acknowledge the relationship of clinics to their communities, nor the array of services clinics provide to those communities, such as law reform, community development and public legal education. Some pointed out that the clinic system has contributed to law reform through significant cases and precedents. Several objected to the term "entity service provider" as a poor descriptor for community legal clinics, student legal services organizations and Indigenous legal services organizations, with one suggestion that "poverty law service provider" be used instead.

It was recommended that this rule and service agreements recognize all the services

clinics provide, and require all clinics to engage in services such as: referrals, advice, brief services, legal education, community development, law reform and systemic advocacy. The rule and service agreements should state that clinics are accountable to the communities they serve and to LAO for providing community-responsive services.

Although the draft rules are designed to govern the funding and eligibility for legal aid services in Ontario, many submissions and feedback participants nevertheless expressed disappointment that this rule did not also include the duty and commitment of clinics and LAO to further the concepts of anti-racism, racial justice and equity, diversity and inclusion. It was noted that the majority of legal aid clients come from equity seeking groups and that failing to promote equity may lead clinics to take the simplest cases, further harming already disadvantaged clients. There were several recommendations to address this issue:

- Include a statement in the rules or service agreements committing LAO and each clinic to equity, including racial equity, and human rights.
- The rule should require mandatory anti-racism/anti-oppression training in clinics and LAO support for this.
- This rule require clinics to commit to decolonization, require LAO to provide clinics with resources to prepare *Gladue* briefs in relevant cases and require clinics to do outreach to Indigenous communities in their regions.
- This rule identify the Black community and racial justice as priorities.

Many submissions expressed concern about provisions in this rule that require clinics to provide or grant access to client information that may be confidential or solicitor-client privileged in particular circumstances. Participants stated that clinic clients are entitled to and should expect the same confidentiality and solicitor-client privilege as paying clients represented by private lawyers. It was also submitted that such access is contrary to lawyers' obligations under the LSO's Rules of Professional Conduct. Several submissions noted that many client groups do not trust governments, while others are seeking clinic services regarding sensitive health issues or traumatic experiences, and may be reluctant or simply refuse to do so if such information were available to other parties.

One recommendation was that the rule include a transparent and clear rationale for when documents are requested and the confidentiality provisions surrounding the request and who would have access to identified materials or redacted or de-identified records. Other recommendations for amending the rule included incorporating ss. 37(4) and 37(4) from the *Legal Aid Services Act, 1998*, or modifying this rule so there is no perceived breach of the Rules of Professional Conduct. If access to clients' files is required for quality assurance, it was suggested that the former quality assurance program procedures could be used: a sampling of files is reviewed with client consent obtained for that purpose, and an anonymized report from the reviewer sent to LAO.

There was feedback received from deans of Ontario law schools and the student legal aid services societies (SLASSs) that operate in association with the law schools. They stated that the draft rules do not speak specifically to student legal services organizations and their dual purpose of clinical education and providing services. The SLASS directors and deans had similar comments to the ones noted above regarding LAO discretion, the three-year maximum service agreement term and its anticipated effects on stability, the scope of work and financial risks. The deans also expressed the following concerns and recommendations:

- With three-year service agreement terms, universities would be liable for staff and other expenses previously covered by LAO funding at the end of a term if the service agreement is not renewed.
- The ability to review a funding decision is limited. They proposed allowing reviews of any reduction above 3%, on unlimited grounds, with a right to a meeting with the LAO board or CEO.
- Concerns about client confidentiality and solicitor-client privilege.
- Some sections of this rule are broadly drafted for community and other clinics, and therefore put conditions on SLASSs that do not apply, such as section ESP9 regarding insurance.

The SLASS representatives recommended that the rule acknowledge the dual purposes of SLASSs to provide legal services to low-income Ontarians and provide clinical legal education programs for students. They also noted that SLASSs for the most part do not have surpluses attributable to LAO, hence the rule should allow SLASSs to retain unspent funds, otherwise LAO may risk recovering funds that came from other sources.

There was some feedback on French language services and clinics. One submission welcomed the inclusion of a section on French language services in this rule. Another recommended that the rule should ensure the quality of services delivered in French throughout the province, whether or not they are delivered in an area designated under the *French Language Services Act*. Amendments were proposed to section ESP14 of the draft rule (French language services) to ensure that linguistic services providers are made aware of clinic services being available in French, and to ensure the same services are available in English and French. It was also recommended that LAO encourage and support legal clinics in the designation process under the *French Language Services Act*.

Regarding Indigenous and Aboriginal issues, feedback included a request for a better definition of “Indigenous legal services organization” than what is in the rule. It was also stated that the rules continue to create barriers for Indigenous people accessing services, and do not address the failure of the justice system, including legal aid services, for Indigenous clients.

Rule 7 (Delivery of Documents)

Rule 7 updates the means by which documents can be delivered to and from LAO. The following feedback was received:

There was a recommendation that lawyers do not have to check the LAO online portal daily. Instead, it was suggested that this rule should incorporate a tickler system by which LAO sends an email to a lawyer to tell them to check the portal as occurs under the current system.

Rule 8 (Definitions and Interpretation)

Rule 8 sets out the definitions that apply to all the rules. The following feedback was received:

It was noted that there is no reference to paralegals in the rules, and that it would be reasonable to put them on the same footing as articling students for remuneration for work done under a supervising lawyer.

It was submitted that the definitions of “entity service provider” and “entity services” are too vague.

Rule 9 (Transitional Matters)

No feedback was received regarding Rule 9, which concerns transitional issues from the *Legal Aid Services Act, 1998* to the *Legal Aid Services Act, 2020*.

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