



**Law Society**  
of Ontario

**Barreau**  
de l'Ontario

Tab 7.4

## **Professional Regulation Committee**

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### **Amendments to the Conflict of Interest Rules: Legal Aid Ontario**

April 25, 2019

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## Introduction

The Law Society is seeking input on the following proposed amendments to Rule 3.4-16.2 of the *Rules of Professional Conduct* and to the Commentary to the Short-term Pro Bono Legal Services rules:

**3.4-16.2** In this rule and rules 3.4-16.3 to 3.4-16.6,

“*pro bono* lawyer” means (i) a volunteer lawyer who provides short-term *pro bono* services to clients under the auspices of *pro bono* provider; (ii) a lawyer providing services under the auspices of a Pro Bono Ontario program; or (iii) a lawyer providing short-term *pro bono* services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic.

### Commentary

[9] A *pro bono* lawyer who provides short-term *pro bono* services to clients while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic, and who also provides legal services to other clients through the lawyer’s law firm, must continue to take steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer’s law firm.

## Executive Summary

At its last meeting, the Professional Regulation Committee (the Committee) considered a request from Legal Aid Ontario (LAO) for exemptions from the conflict of interest rules with respect to LAO lawyers who provide short-term legal services, such as duty counsel services.

In response, the Committee recommended the following steps:

- i. Draft proposed amendments to the Short-term *Pro Bono* Legal Services Rules (the “*pro bono* rules”) so that they apply to those LAO lawyers who provide short-term legal services;
- ii. Draft proposed amendments to the Commentary to the *pro bono* rules in order to highlight the obligation of LAO’s *per diem* lawyers to ensure that they continue to conduct conflict screening with respect to their private, non-LAO clients; and
- iii. Launch a Call for Comment to solicit feedback about these proposed changes.

Therefore, the Committee has proposed that the following amendments to the *Rules of Professional Conduct* be the subject of a short Call for Comment before returning to the Committee to review any feedback received and proceed with implementation:

- i. Rule 3.4-16.2 be amended as follows:

“*pro bono* lawyer” means (i) a volunteer lawyer who provides short-term *pro bono* services to clients under the auspices of *pro bono* provider; (ii) a lawyer providing services under the auspices of a Pro Bono Ontario program; or (iii) a lawyer providing short-term *pro bono* services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic.

- ii. the Commentary to the Short-term Pro Bono Legal Services rules be amended to include the following:

[9] A *pro bono* lawyer who provides short-term *pro bono* services to clients while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic, and who also provides legal services to other clients through the lawyer’s law firm, must continue to take steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer’s law firm.

## Background

### A. Context

At its meeting on February 14, 2019, the Committee considered a request from LAO with respect to the application of the conflict of interest rules to lawyers who provide short-term legal services on behalf of LAO. The Committee decided that it was prepared to proceed with amendments to the *pro bono* rules in Rules 3.4-16.2 – 3.4-16.6 of the *Rules of Professional Conduct*. Therefore, the Committee decided that the following steps should be taken with respect to the amendments:

- i. Draft amendments to the *pro bono* rules to extend the modified conflict standard to lawyers providing short-term legal services on behalf of LAO or through a LAO program or clinic;
- ii. Draft amendments to the Commentary to the *pro bono* rules to specifically highlight and remind LAO lawyers who provide services to clients other than those of LAO that they are still required to perform a full conflicts screening with respect to their private clients; and
- iii. launch a Call for Comment with respect to the amendments to solicit feedback from the professions and the public before implementation.

## Analysis

### A. Short-Term *Pro Bono* Legal Services Rules

The conflict rules addressing short-term *pro bono* legal services were enacted in January, 2010, after discussions with what was then Pro Bono Law Ontario (“PBLO”) about the challenges faced by lawyers providing brief services through PBLO’s court-based programs. In 2016, the Committee drafted minor changes to the *pro bono* rules, which

were approved by Convocation in September of that year. Those changes included amendments to recognize that PBLO had changed its name to Pro Bono Ontario (“PBO”).

Rules 3.4-16.3 – 3.4-16.6 modify the conflict rules for a “*pro bono* lawyer”, which is defined in Rule 3.4-16.2 as:

1. A volunteer lawyer providing short-term *pro bono* services under the auspices of a *pro bono* provider; or
2. A lawyer providing short-term *pro bono* legal services under the auspices of a Pro Bono Ontario program.

Rule 3.4-16.2 defines a pro bono provider as meaning “a pro bono or not-for-profit legal services provider that makes pro bono lawyers available to provide advice or representation to clients.”<sup>1</sup>

Under Rule 3.4-16-3, a pro bono lawyer may provide short-term *pro bono* services legal services without taking steps to determine whether there is a conflict of interest arising from duties owed to clients or former clients of the lawyer’s firm or of the *pro bono* provider. However, if a lawyer knows or becomes aware of a conflict of interest, Rules 3.4-16.5 and 3.4-16.6 require that the lawyer cease providing services and may not at that time seek the client’s waiver of the conflict.

## **B. Proposed Amendments**

### *LAO Lawyers As Pro Bono Lawyers*

As currently drafted, the short-term *pro bono* rules do not apply to LAO lawyers. As a not-for-profit legal service provider, LAO is a “*pro bono* provider” as defined in Rule 3.4-16.2.<sup>2</sup> However, LAO lawyers do not meet the definition of a *pro bono* lawyer under that rule, since they are neither volunteer lawyers nor lawyers providing services under the auspices of a PBO program.

When initially adopted, it appears that the Committee determined that the Rule should have two unique features, which are that:

- i) The rules be applicable only to lawyers working specifically for PBO or lawyers working without remuneration for a non-profit legal services provider; and

<sup>1</sup> See The Rules of Professional Conduct, available at <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>. Note that “short-term pro bono services” is defined as “pro bono legal advice or representation to a client under the auspices of a pro bono provider with the expectation by the pro bono lawyer and the client that the pro bono lawyer will not provide continuing legal advice or representation in the matter”.

<sup>2</sup> See *Legal Aid Services Act* 1998, S.O. 1998, c. 26. Section 3(1) establishes LAO as a corporation without share capital. Section 4(a) provides that one of the objects of LAO is to establish and administer a cost-effective and efficient system for providing high quality legal aid services to low-income individuals in Ontario.

- ii) once a lawyer to whom the modified standard applies is aware of an actual conflict, the lawyer must cease acting and may not seek the clients' consent to continue acting.

There's no apparent reason why the rules that apply to PBO lawyers should not apply to LAO lawyers providing similar services. As noted in the Commentary to the *pro bono* rules, the nature of short-term *pro bono* legal services makes it difficult to screen for conflicts. The limited nature of such services, however, "significantly reduces the risk of conflicts of interest". In addition, LAO's correspondence with respect to this request suggests that there would also be benefits to both LAO clients and the courts. In particular, according to information provided by LAO, extending the modified conflicts standard to their lawyers who provide short-term legal services will:

- i) enable LAO to act more efficiently when providing duty counsel or other short-term assists;
- ii) facilitate access to justice for those who may have otherwise been denied legal assistance on the basis of a conflict that may not be material to the matter at hand and is unknown to the lawyer providing the short-term services; and
- iii) reduce burdens on court staff and judges who would otherwise be left to manage frustrated unrepresented clients who may lack the experience to engage with the court system effectively.

Therefore, it is recommended that the Committee extend the modified conflicts standard in Rules 3.4-16.2 – 3.4-16.6 to LAO and its lawyers.

By including LAO lawyers in the definition of a "*pro bono* lawyer" in Rule 3.4-16.2, LAO lawyers would not be required to take steps to determine whether there is a conflict of interest when providing short-term legal services and could continue to provide such services unless they know or become aware of a conflict.

Therefore, it is recommended that the Rule 3.4-16.2 be amended as underlined below:

"pro bono lawyer" means (i) a volunteer lawyer who provides short-term *pro bono* services to clients under the auspices of *pro bono* provider; (ii) a lawyer providing services under the auspices of a Pro Bono Ontario program; or (iii) a lawyer providing short-term *pro bono* services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic.

LAO has advised that their *per diem* lawyers are expected to maintain a conflict list so as to ensure that there are no conflicts between the LAO short-term client and the *per diem* lawyer's private clients. Given that the *per diem* lawyer's private clients may be long standing clients whose affairs and circumstances could be well known to the lawyer, this seems to be an appropriate way to manage the increased risk of a conflict. However, it may be prudent to include Commentary to ensure that LAO lawyers who may provide legal

services for both *pro bono* clients as well as private clients are reminded of their obligation to ensure that their *pro bono* services do not conflict with their duties and obligations to the interests of their private clients.

Therefore, it is recommended that the Commentary to the Short-term *Pro Bono* Legal Services rules be amended to include the following:

[9] A *pro bono* lawyer who provides short-term *pro bono* services to clients while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic, and who also provides legal services to other clients through the lawyer's law firm, must continue to take steps to determine whether there is a conflict of interest arising from duties owed to current or former clients of the lawyer's law firm.

## Conclusion

### A. Questions

Before proceeding with implementing these amendments, a Call for Comment will be launched to seek input on the following questions by May 31, 2019:

- Should the Short-term *Pro Bono* Legal Services Rules be amended to include lawyers providing short-term legal services while employed by Legal Aid Ontario or through a Legal Aid Ontario program or clinic?
- Should the Short-term *Pro Bono* Legal Services Rules be expanded to include other not-for-profit legal service providers?
  - If so, which providers, why, and under which circumstances?