

Family

Five ways Legal Aid Ontario's not serving family lawyers, nor their clients | Marie G. Michaels

By Marie G. Michaels



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(September 22, 2022, 11:36 AM EDT) -- I read, with interest, but no surprise, the Sept. 12, 2022, *Toronto Star* article by Daniel Brown (with contributor John Hale) titled "Starving Legal Aid is threatening Ontario's justice system" lamenting how the criminal defence bar was and was not coping under Legal Aid Ontario (LAO).

The criminal defence bar is not the only one that is suffering under Legal Aid Ontario. As a family lawyer in Whitby-Ajax, I can tell you that the situation with Legal Aid Ontario and the family law bar is abysmal.

Many Ontario lawyers agree that LAO is broken. What is missing is the appetite to fix it and a process that won't involve committees spanning decades. My goal in writing this article is that someone in the Attorney General's Office of Ontario, Doug Downey, will read this — and act on it.

First, the public is likely not aware that receiving a Legal Aid certificate does not simply mean that their lawyer will be paid by Legal Aid, so clients have nothing to worry about. Nothing could be further from the truth. Legal Aid determines that a normal family law file, with normal people on both sides (your client and the opposing party) should take only so many hours. But, the minute it takes longer, your ability to convince Legal Aid to pay you for your time spent is in serious jeopardy.

Second, Legal Aid restricts both the number of hours a lawyer can work on a file (regardless of the behaviour of the separating spouses or partners) and the hourly rate a lawyer gets paid. I recently completed a file where I took a huge financial loss because Legal Aid restricts the number of hours that they will pay a lawyer for work done on a family law file, regardless of whether the hours spent are the lawyer's fault, their client's fault, or the fault of the behaviour and/or antics of the opposing party.

Further, Legal Aid pays approximately one-quarter of a lawyer's normal hourly rate. The huge financial loss that I incurred was calculated based on the rate paid by Legal Aid. If I were to calculate the loss based on my actual hourly rate, it would be significantly higher.

Third, Legal Aid does not provide for exceptions of any kind, including capacity issues. I recently had to attend court with respect to a motion by the opposing lawyer asking the court to find his client did not have sufficient capacity to give the lawyer instructions due to a brain injury his client suffered years ago, and to appoint a litigation guardian on his client's behalf. This shouldn't have taken much time, so what's the issue causing Legal Aid to want me to attend for free?

Fourth, Legal Aid has neither process nor penalties for when lawyers disrespect the due process. The opposing lawyer had wasted hours of my client's certificate time by initially refusing to address my concern of how he could obtain instructions from a man whom a different court said was incapable of making his own decisions regarding finances or personal care. Essentially, the three previous court events were wasted time and not factored in by the Legal Aid 'time budgeting' department.

As for the huge loss I suffered, it was because the opposing party refused to get a lawyer, refused to co-operate with the court process or follow court orders and, although there are mechanisms to

address that (such as obtaining an order to strike their pleadings), those mechanisms may not be available when it comes to decision-making (formerly referred to as custody) or parenting time (formerly referred to as access) of children.

In that particular case, the judge extended the opposing party so much "courtesy" that we were forced to attend our motion seeking to find the opposing party in contempt (for failing to obey previous court orders granting parenting time) on five separate occasions before we received an order that the opposing party was, in fact, in contempt.

Then, in the hope of encouraging the opposing party to participate in the court proceedings, a new case management judge compelled our attendance at court repeatedly in the simple hope that the party would show up and choose to participate.

So, in extending the opposing party so many extra opportunities to comply, I fought with Legal Aid to cover my costs (because, had I chosen not to show up at court like the opposing party chose, the court would have penalized me and my client) and lost the fight, ergo tens of thousands of dollars in billed fees that they refuse to pay.

Fifth, another issue that is never discussed is the client who first qualifies for a family law Legal Aid certificate and then cannot find a lawyer to accept their case on a certificate.

My staff are frequently yelled at by prospective clients who do not understand why we refuse to accept their case once we hear they have a Legal Aid certificate. I recently heard my clerk speaking to one such individual and telling them that the hourly rate I receive from Legal Aid is one-quarter of my regular hourly rate and that it does not even cover the cost of our firm overhead.

When the person continued to argue with my clerk, I then heard her explain that the firm had to pay the phone bill, so people like the caller could phone us; to pay rent, so there was a place for people to meet with their lawyer; to pay salaries, so the lawyer could employ a clerk and others; and so on.

The person then told my clerk, "That's your problem, you shouldn't punish me for your problems," indicating a total lack of understanding of how Legal Aid works. Clients are unaware that a Legal Aid certificate does not give them "carte blanche" to deal with all of their issues.

There are ways to obtain extra hours from Legal Aid to do certain parts of a file, but in a difficult case those hours still are not enough. It then puts the lawyers into the difficult position of either: working for free; or, working the bare minimum for the client, which might result in the lawyer appearing to be negligent. Not a good choice to have to make!

As a result, I have decided as both business owner and a family lawyer, that my firm will no longer accept Legal Aid certificates. No business owner can afford to subsidize clients who believe they have carte blanche in a broken legal system, all the while dealing with lawyers who do not respect the legal process itself.

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