

October 17, 2016

32-2016

NOTICE TO THE PROFESSION

Avoiding Conflicts of Interest

Synopsis

Access to justice, and ensuring the efficiency and effectiveness of the justice system, are properly at the forefront of all stakeholders minds. The failure to discover and avoid a conflict of interest generally results in the appointment of new counsel, substantially increased costs to Legal Aid Manitoba (LAM), and inappropriate delay in the administration of justice.

Legal Aid Manitoba (LAM) assessed just under 35,000 Applications for Legal Aid coverage in FY 2015/16 and issued over 27,000 certificates. The Intake department takes reasonable steps to avoid conflicts when assigning certificates for the sole purpose of fulfilling its administrative functions in an efficient and effective manner. Intake staff at LAM have never been in a position to fulfill the professional obligations of counsel respecting conflicts of interest, and LAM has never undertaken to do so.

All Judicial officers, court personnel, Crown Attorneys, Legal Aid staff, and private bar lawyers accepting certificates, should be aware that LAM does not have the ability to carry out a full conflict check on the certificates it assigns to counsel. Counsel accepting a certificate are both practically, and professionally, required to take appropriate steps to discover and avoid conflicts of interest prior to accepting a legal aid certificate, and to continue to do so throughout the conduct of the case

Inherent Limitation of LAM Conflict Checks

There are numerous circumstances where counsel's prior representation of accused persons, complainants, and witnesses, are not known to LAM (such as when counsel represented persons in private practice, or when LAM administrative files have been archived or destroyed, as they must be to comply with the LAM's obligations pursuant to *The Freedom of Information and Protection of Privacy Act*, and *The Archives and Recordkeeping Act*).

There are also many instances where the name of the complainant, and/or material witnesses, are not apparent in the initial disclosure received with an Application. Where a name is provided, accurate identification of persons with common names often requires a DOB, or other background information which is not disclosed. In addition the timing of certificate "offer and acceptance" in a law office, late disclosure of witnesses,

and multiple other factors, complicate the discovery of case conflicts by Intake, and at the Administrative office level, throughout the conduct of a case.

Intake Conflict Checks

LAM intake workers perform a cursory check for conflicts when feasible. They do this to ensure that certificate acceptance is not unnecessarily delayed by a certificate being offered to counsel who are in a clear conflict. This cursory conflict check, however, is based on the limited information readily available at the intake stage, and is done for Administrative purposes only (to ensure counsel are retained as efficiently as possible).

Intake workers at LAM are not lawyers and are not able to fully assess when a conflict will be material. Furthermore conflict checks at the Administrative level take substantial time and only infrequently uncover potential conflicts. When there is a significant backlog in application assessments, the Administrative office conflict check may be suspended to allow Intake staff to focus on clearing the backlog.

Legislation and Policy

The fact that LAM relies upon counsel performing their professional obligation in this regard should be readily apparent. It is a condition precedent to *Legal Aid Manitoba Regulation 225/91 Regulation 44(e)*, which permits the Executive Director to disallow payment of a lawyer's account where counsel withdraw from a case due to a conflict that was reasonably foreseeable by counsel when the certificate was accepted. This provision has been, and will continue to be, applied in appropriate cases as the *Regulation* intends.

Section 5 of the Case Conduct Manual for Legal Aid staff counsel also succinctly indicates:

“... Generally each community Law Office should deal with the issue of conflicts in the manner that the Law Society requires for a separate private firm.”

Stakeholders will note that LAM's Administrative office performs an administrative function and is deemed not to be practicing law when fulfilling its purposes (Cf. *The Legal Aid Manitoba Act C.C.S.M. c L105 as am. s. 24.1*).

Conclusion

While LAM takes reasonable steps to avoid conflicts when assigning certificates to fulfill its administrative obligations, counsel accepting a certificate are both practically, and professionally obliged to check for, and avoid, conflicts of interest prior to accepting a certificate, and to continue to do so throughout the conduct of each case.