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Civil Duty Counsel

The types of civil duty counsel and their functions are set out in Section 24 of the [Legal Aid Services Act](#) Regulation 106/99. Civil duty counsel includes family duty counsel, mental health law duty counsel, clinic law duty counsel, special duty counsel, and advice lawyers. Special duty counsel includes correctional duty counsel and family violence duty counsel. Advice lawyers include advice lawyers who provide general summary advice, and those who focus on providing family law advice in Family Law Information Centres.

As a general rule, lawyers may not bill as per diem duty counsel for advice given in their own offices to clients except in exceptional circumstances and when authorized in advance by, or at the request of, the area director.

Clinic Law Duty Counsel

At the present time, the only duty counsel functioning in a clinic setting are tenant duty counsel.

The Tenant Duty Counsel Program is a project of the Advocacy Centre for Tenants Ontario (ACTO) and is funded by LAO. Tenant duty counsel are available at most Ontario Rental Housing Tribunal (ORHT) locations across the province.

Tenant duty counsel provide services to unrepresented tenants appearing before the ORHT. Services include summary legal advice, public legal education, referrals, document preparation assistance, assistance with mediation and negotiation and representation in certain matters.

In Toronto and Mississauga, tenant duty counsel services are offered by full-time tenant duty counsel employed by ACTO. Elsewhere in the province, tenant duty counsel services are provided by local clinics, with program management and oversight provided by ACTO. In providing services, local clinics use a mix of clinic staff, private per diem counsel and dedicated tenant duty counsel.

For more information on tenant duty counsel, contact:

Tenant Duty Counsel Program
425 Adelaide Street West, 5th Floor
Toronto ON M5V 3C1
Telephone: 416-597-5830
Fax: 416-597-5821

A Tenant Duty Counsel Manual is also available.

Correctional duty counsel

Duty counsel attend provincial reformatories and federal penitentiaries to take legal aid applications, provide summary advice and investigate potential problems, as well as attend at federal disciplinary court on serious charges.

In addition to the [Criminal Code](#) and the [Young Offenders Act](#) (to be replaced by the [Youth Criminal Justice Act](#)), prison duty counsel must have knowledge of the federal [Corrections and Conditional Release Act](#) and the provincial [Ministry of Correctional Services Act](#). Access to Information and Privacy acts ([provincial](#) and [federal](#)) and policy guidelines and directives are also useful.

Areas of concern for the inmate may be classification, disciplinary offences, segregation, transfers, various conditional releases and suspension/ revocation issues, as well as civil issues which include immigration, personal injury claims, family law problems and mental health matters.

In order for a lawyer to act as correctional duty counsel, the area director may require expertise in the field or may require attendance at special training sessions provided by LAO.

Family violence duty counsel

The issue of family violence has become increasingly important as its frequency becomes more evident. Duty counsel are encouraged to take steps to ensure that victims of family violence receive assistance.

The needs of women who are victims of violence are complex and may involve a range of legal, social and related issues. Requesting help or information is often a major step for an assaulted woman and an appropriate response is crucial if she is to obtain needed assistance.

An abused spouse frequently shows a pattern of leaving and then returning to an abusive partner. Sometimes this pattern repeats itself a number of times. Duty counsel should provide assistance to those who seek it wherever help is sought.

Shelters

Local shelters for abused spouses, community clinics, Victim/Witness Assistance Programs and Ontario Welcome Houses maintain a supply of Special Duty Counsel Statements of Account Form 13-FV for use by duty counsel who advise women who have been abused.

The form is presented by the client to the advising lawyer, who provides the client with up to two hours of advice at duty counsel rates. The account is meant to provide for "one-time" services only, and is sent by the lawyer directly to the provincial office for payment.

Although the general rule is that duty counsel cannot become counsel for a person he/she has assisted as duty counsel, lawyers providing advice through this program are allowed to continue to act for the client either privately or on a legal aid certificate.

General summary advice lawyers

Most LAO area offices provide a summary legal advice program through which people can obtain legal advice on various issues. These programs are distinct from community legal clinics which are also funded by legal aid, whose focus is generally on “poverty law” (housing, income maintenance programs, etc.) issues.

The general summary advice lawyer is often located in community centres, and may be open during evening hours to provide as much accessibility as possible to members of the public. In addition to providing summary legal advice, advice lawyers can also refer people to other appropriate resources in the community, such as a community legal clinic, Student Legal Aid Services Society (SLASS), or other organization.

A list of the advice lawyer locations across the province and their hours of operation is available from the Legal Aid area office.

Special duty counsel

This term refers to lawyers acting as duty counsel in unusual, emergency or non-recurring situations. Special duty counsel are authorized by an area director to give a specified number of hours of service. The Special Duty Counsel Authorization Form is available from the area director and must be submitted with special duty counsel accounts.

Special duty counsel may be asked to advise a witness on the consequences of perjury and to avoid future criminal or civil liability. They may also be called upon to take legal aid applications from individuals confined to their home or a hospital bed because of illness or disability, and can be requested by an area director to provide advice to a potential legal aid applicant whose legal problem is unclear.

Family Duty Counsel / Family Advice Lawyer

Family duty counsel as a category represents the largest portion of civil duty counsel. Family court duty counsel have historically been per diem lawyers. LAO is moving to a mix of full-time duty counsel and per diem duty counsel. In addition, LAO provides advice lawyers whose function is to provide out-of-court family law advice and information on court process in Family Law Information Centres (FLICs).

Duty counsel and advice lawyers must have a thorough knowledge of the [Divorce Act](#), the [Family Law Act](#), the [Child and Family Services Act](#), the [Children’s Law Reform Act](#), the [Family Responsibility and Support Arrears Enforcement Act](#), the [Child Support Guidelines](#), and other related legislation.

In addition, duty counsel and advice lawyers should be familiar with the Rules of Civil Procedure and the Family Law Rules, depending upon whether one is practising in the Superior Court of Justice (Family Court) or the Ontario Court of Justice.

Providing advice is a key function of all duty counsel, so family court duty counsel and advice lawyers must be able to provide accurate “process-related” advice on topics such as

court procedure and the case management system, the law, the need for counsel and the existence of various support agencies (counselling services, mediation, financial assistance, etc.).

In addition, family court duty counsel and advice lawyers can often assist in obtaining a speedy resolution when the parties are close to settlement and intervention by retained counsel may not be necessary.

Duty counsel do more than request adjournments and set dates. The summary advice they provide and their assistance in the resolution of relatively simple matters are essential to ensure that resources can be concentrated on more complex matters.

The following sections are intended as a guideline for advice lawyers and duty counsel in performing their duties in family court. Duty counsel or advice lawyers should not feel compelled to act if they do not feel competent due to time pressure or inexperience.

If duty counsel and advice lawyers feel external support is required, they should contact the local area director or the LAO provincial office to access the resources that are available to assist them to properly perform their role.

The precise duties of court duty counsel may vary somewhat according to local court practices and depending on whether a jurisdiction is within the Superior Court of Justice (Family Court) or the Ontario Court of Justice. The type of court also affects the role of the advice lawyer in each jurisdiction.

Role of advice lawyer / duty counsel in family court

Duty counsel are encouraged to be proactive in assisting clients to reach a resolution in appropriate cases. If a legal aid certificate is an option, based on the type of matter in dispute, the duty counsel or advice lawyer should advise the client about Legal Aid's financial criteria and the application process, and how and where to apply for legal aid.

Duty counsel should explain to clients that legal aid does not always provide a lawyer, legal aid is not always free, and that the client might be required to sign a payment agreement.

Duty counsel and the advice lawyer should explain that they cannot recommend a particular lawyer. Clients should be referred to the Law Society's *Lawyer Referral Service* or the Yellow Pages of the local telephone book if they do not know a lawyer, or they can get a recommendation from a person they trust.

Duty counsel or advice lawyers should not later act for a person they have assisted as duty counsel or advice lawyer because of the perceived impropriety of using the high visibility of the position of duty counsel to obtain clients. It should only occur in unusual circumstances and prior approval must be obtained from the area director, regardless of whether the retainer is private or by way of a legal aid certificate.

The limited role of duty counsel and the advice lawyer should be stressed when duty counsel or the advice lawyer first meets with a client and should be revisited at key points in the interview. In complex or hotly disputed matters, it should be clear in the client's mind that duty counsel or the advice lawyer cannot replace the client's own counsel.

General functions of family court duty counsel

Court duty counsel deal with persons who are on the list and present in court on that specific day. Family court duty counsel appear in the Superior Court of Justice (Family Court) and the Ontario Court of Justice. In many locations, duty counsel also appear in the non-integrated Superior Court of Justice to assist in variations of child support and access. Duty counsel are usually gowned in the Superior Court of Justice.

Court duty counsel may be full-time employees of LAO who are present at court each day or per diem duty counsel - lawyers in private practice who are paid an hourly rate to take turns in the duty counsel rotation. Generally, in regions having full-time duty counsel, per diem duty counsel are scheduled, supervised and administered by the full-time duty counsel under the direction of the legal aid area director. In other jurisdictions, the duty counsel program is administered through the Legal Aid area office.

The functions of court duty counsel include:

- Advising unrepresented parties about their legal rights and obligations;
- Assisting unrepresented parties in negotiating and settling issues on a final or temporary basis, and preparing or reviewing consents and minutes of settlement;
- Reviewing court documents and assisting in preparing court documents such as motions, affidavits and financial statements in limited circumstances;
- Referring unrepresented parties to other sources of assistance, such as on-site or off-site mediation, Legal Aid or a privately retained counsel;
- Attending court with unrepresented parties to request adjournments, obtain consent orders, argue motions, child protection hearings, default and garnishment hearings, support “show cause” hearings, and to assist in summary and uncontested hearings regarding custody, access and support where the issues are not complex;
- Conducting motions to change child support or access for financially eligible clients in non-complex cases.

Enhanced functions of full-time duty counsel

Because of the increased presence of full-time duty counsel, duty counsel functions have expanded to include:

- A greater role in drafting and preparing documents for financially qualified unrepresented parties in areas where facilities and equipment are provided;
- Maintaining continuity of client representation whenever possible from court appearance to court appearance;
- Opening and updating files for unrepresented parties to maintain file continuity for clients if continuity of client representation is not possible;
- Preparing and submitting data evaluation forms for statistical collation.

Limits on functions performed by duty counsel

Because of the summary nature of duty counsel assistance, it is recommended that duty counsel do not provide services beyond the limits suggested by LAO. Court duty counsel should not:

- Deal with significant property disputes/equalization of net family properties and divorce hearings;
- Attend at a contested trial or any hearing where the issues are lengthy and/or complex;
- Attend trial management conferences or give advice regarding witnesses or evidence to be called at trial (see [Case Management](#), page 21, for more information);
- Assist persons who are not on the court list unless they need an emergency motion and there is no advice lawyer available to assist them;
- Assist persons who have privately-retained (non-legal aid) counsel of record.

Family court duty counsel may act at the request of retained lawyers (either private or on a legal aid certificate) to appear as agent for the purpose of obtaining an adjournment, holding a matter down or setting a hearing date, subject to the following conditions:

- For privately retained counsel, the adjournment or setting of a date must be on consent of all parties. If the adjournment or setting of a date is contested but the client has a legal aid certificate, duty counsel has the discretion to refuse to appear as agent if it appears the argument may be complex or lengthy.
- Duty counsel will not appear as agent if the client is not in attendance, unless retained counsel confirms it is impossible for the client to attend court (e.g.: due to illness).
- Duty counsel is not responsible for reporting back to retained counsel as to the outcome of an adjournment or setting of a date unless it is impossible for the client to attend. In most cases, the client must be advised to notify his/her lawyer.

As a general rule, duty counsel should not act in their own cases or matters to the detriment of their duties as duty counsel, nor should any duty counsel attempt to act beyond the limits of his/her own professional judgment.

Functions of the family advice lawyer

The family advice lawyer deals with persons seeking legal advice who are usually not scheduled for court on the day of their attendance. The advice lawyer has an interview room in the FLIC in courts which have a FLIC.

Elsewhere, advice lawyers may be available at certain hours within a courthouse or area office. Advice lawyers do not gown and usually do not go into court. The advice lawyer is usually a per diem lawyer and is required to be present for the hours set by the Legal Aid office. Advice lawyers are administered and supervised by the local Legal Aid office.

The functions of the advice lawyer include:

- Providing advice about the role of counsel, how to choose a lawyer and how to make the most of the assistance of a legal service provider, i.e., what to bring to a first interview;
- Referring and advising persons about other sources of assistance, such as on-site or off-site mediation, counselling services, Legal Aid or other community resources;
- Providing up to 20 minutes (depending on time constraints) of court process information and related general advice on family law matters, i.e., how child custody, access and support obligations are determined, the case management process, disclosure requirements, documents to be filed and costs consequences.
- Providing specific and detailed advice on matters for persons who have qualified by financial eligibility testing, including:
 - Reviewing pleadings drafted by the client;
 - Drafting and preparing initiating documents, i.e., guideline support applications and answers, etc., when parties seeking assistance are constrained by a mental or physical handicap or illiteracy from preparing their own documents;
 - Assisting in the drafting and preparation of documents for motions to change child support or access for financially eligible clients in non-complex cases;
 - Reviewing and discussing consents and agreements presented by opposing counsel, court-annexed mediation services, Ontario Works Family Support Workers, etc.;
 - Assisting persons referred by court duty counsel; and
 - Consulting about the division of simple household assets and chattels.

Limits on functions performed by the advice lawyer

As with court duty counsel, an advice lawyer should not act beyond the limits of his/her own professional judgment. In particular, advice lawyers should not:

- Provide information or advice by telephone, other than to give directions on how to contact the local Legal Aid office or where to find the court house. In remote areas where distance frequently precludes clients from being able to attend in person to obtain advice, this rule is relaxed;
- Provide more than general information about the equalization of property or other complex matters not covered by Legal Aid;
- Provide “independent legal advice” about potentially complex issues such as spousal support or hardship calculations;
- Assist in the preparation or signing of uncontested divorce pleadings unless satisfied that all corollary issues have been previously dealt with by a court order or formal agreement;
- Provide independent legal advice to an unrepresented party to a separation agreement;

- Provide independent legal advice on a consent to an adoption pursuant to the [Child and Family Services Act](#).

Financial eligibility testing

Advice lawyers and court duty counsel are required to conduct a financial eligibility test if the client is seeking assistance in relation to specific legal services, and if in providing summary advice, information is received indicating the client would not qualify for legal aid. Please see Chapter 6: Financial Eligibility Test for more information on financial eligibility testing.

Duty counsel and two spouses/parties

By their very nature, family court matters involve a minimum of two parties, being spouses or ex-spouses of one other, or parents of a child. Sometimes there are more parties, such as step-parents or grandparents. Only one party may contact duty counsel in family court. The other party may be absent, represented by counsel, assisted by an employee of an agency (e.g.: a Family Support Worker from Ontario Works), or may not want duty counsel assistance.

At least two duty counsel are usually scheduled in family courts, so that if both spouses/parents contact duty counsel, they can each speak to a different lawyer. If a separate duty counsel is not available to speak to a party, one or more of the parties should be advised to seek independent counsel or to ask for an adjournment.

The advice lawyer and conflict of interest

The issue of what happens if both (or more) parties in a family dispute show up to speak to the same advice lawyer is a cause for concern. In most cases, the situation is more a perceived rather than an actual conflict. The following guidelines to deal with this issue may be of assistance.

Each FLIC should keep a daily sign-up list at the front counter naming everyone who wishes to speak to the advice lawyer. If the person seeking advice is entitled to “case specific” advice because he/she meets the financial eligibility test, the advice lawyer will be made aware of the names of the other potential litigants in the case and should recognize a conflict exists if one of the other litigants later come in for assistance.

There may be an issue if the person only qualifies for generic procedural advice, because if the advice lawyer doesn’t get into the specifics of the case, he/she may not even be made aware of the names of the other potential parties. This is more of a perceived conflict of interest, since the advice given is very general and non-case specific.

It is very rare that both sides of a potential case show up when the same advice lawyer is on duty. The reason for this is that the parties do not usually speak to the advice lawyer on the day of court. The more common scenario is that the party who wants (perhaps) to start court proceedings comes in and speaks to the advice lawyer.

Assuming the person decides to start proceedings, qualifies financially, and does not qualify or chooses not to get a certificate, the advice lawyer helps that person. Duty counsel may help the client with his/her documentation up to the point of getting the court file opened, a date scheduled, and providing advice about how to serve and file documents.

This process may take a few days or even longer for the party to complete. By the time the respondent is served, it is usually at least a week or later, and another advice lawyer will likely be in place if that person seeks advice.

On those rare occasions when both sides to a potential case appear wanting to speak to the same advice lawyer, the “first come, first served” rule applies. The second party would be advised the present advice lawyer cannot speak to him/her, and if there is no urgency, that party would be advised to come back another day when a different advice lawyer is scheduled.

If there is some urgency and it is apparent that the second person through the door needs immediate assistance, the advice lawyer can arrange for a court duty counsel to speak to the person, if one is available.

If the potential conflict arises on a day when there is no other duty counsel available to assist the second party, the first option would be to ask the person to return to see another advice lawyer another day. The second option would be to contact the local area office or whoever schedules the advice lawyer rotation to see if an advice lawyer can come in on short notice to assist the person.

Custody, access and support applications

The nature of duty counsel assistance in an application including a claim for child support varies depending on whether or not the client is a recipient of public assistance and if he/she is defending or initiating the application. Each of these aspects are discussed in more detail below. However, generally, both the advice lawyer and court duty counsel can assist a party in an application for custody, access or child support, depending on the party's financial eligibility, by:

- Advising the party on his/her legal rights and obligations and about the court process;
- Reviewing and discussing the court documents with the party;
- Reviewing and discussing pleadings drafted by the party;
- Assisting the party to prepare court documents when the party is unable to do so on his or her own, by reason of mental or physical disability or other handicap;
- Reviewing and discussing consents or agreements with the party;
- Referring the party to other legal and community resources such as the FLIC, court duty counsel, LAO or private counsel.

Assisting the applicant

The services provided by court duty counsel in this situation are much the same as in any family law application. Court duty counsel should provide the following services:

- A review of the client's court documents, ensuring that the client has received and understands the importance of full financial disclosure from the support payor;
- Summary advice on the nature of the proceeding on that day, on the expected process and the remaining court process, including a discussion of the client's options with respect to the next step in the proceeding such as discoveries, case conferences, the trial management conference and the trial;

Duty counsel should inform the client on the possibility of mediation, particularly the availability of mediation services (if at the Superior Court of Justice (Family Court)) or a Legal Aid settlement/variation conference;

- Summary advice should also include a discussion of the applicable provisions of the Child Support Guidelines and their application to the situation at hand;
- If appropriate, discuss the role of the Family Responsibility Office (FRO) and its operation, and what the client may expect from the FRO including the registration process and the collection of and frequency of support payments.

If the client meets LAO's financial eligibility requirements, or if the total services required are likely to take less than 20 minutes to complete, court duty counsel are expected to deliver the following services if appropriate:

- Representation and advocacy in negotiations to determine if a consent resolution is possible;
- Preparation and/or review of minutes of settlement with the client, along with the presentation of the minutes to the court;
- Representation on a motion, a case conference or settlement conference (see Chapter 6: Financial Eligibility Test for more information).

If the applicant in a child support case is on public assistance, a family support worker (FSW) from the local Ontario Works delivery agent is usually already assisting and representing the applicant claiming child support before the court. If the applicant requests assistance from duty counsel, duty counsel should focus on the consequences of any possible court order on the applicant and should refrain from advising the FSW on the appropriateness of a support order.

Duty counsel should work co-operatively with the FSW if the client's interest coincides with those of the public agency. There is no obligation on duty counsel to disclose information received from a client to the FSW, nor is an FSW entitled to "sit in" on discussions with the client unless the client wishes it.

Above all, the publicly assisted client should be made aware of his/her role in the determination of the appropriate amount of support. Although the support order may not

affect her immediate well-being, an appropriate or poor settlement has a direct impact on the client's lifestyle as soon as that client is no longer in receipt of Ontario Works benefits and she must be made aware of that fact. A client who consents to an order outside the Child Support Guidelines without FSW approval risks a deduction in his/her Ontario Works allowance.

If the applicant is not in receipt of public assistance, and duty counsel is asked to make representations at a motion (provided that the client is financially eligible), duty counsel should carefully review the available evidence, bearing in mind the importance of full financial disclosure.

The client should be advised if there is inadequate disclosure, and the resulting options the client may have, such as an order for further disclosure, discoveries or a Legal Aid settlement/mediation conference. The possibility of the client retaining private counsel should be canvassed if the client is not eligible for legal aid.

Assisting the respondent

Generally, the services offered by court duty counsel to a respondent in a family court application are the same as those offered to an applicant. In addition, however, court duty counsel are expected to provide the following assistance to the unrepresented respondent in a support application (if the client meets LAO's financial eligibility requirements or if the total services required are estimated to take less than 20 minutes to complete):

- Assist the party to prepare, to swear to and to file a financial statement and Answer;
- Review the provisions of the [Child Support Guidelines](#) with the respondent that may be particularly applicable to his/her specific case (see s.10 of the Guidelines);
- If paternity is in issue, discuss the applicable court procedure, the legislative presumptions and the technical process and related costs for determining parentage;
- Discuss the role and operation of the FRO in the enforcement of support payments, and in particular, the administration fees charged to the client in the event of default on support payments.

If the client requests representation on a contested motion (and provided that the client is financially eligible), assess carefully the available evidence. If retaining counsel is an option, court duty counsel should recommend an adjournment to the client to allow for adequate preparation. If the time for filing an Answer has expired, duty counsel should advise the client to seek approval for the late filing of an Answer.

Duty counsel should not act for the client if the case appears to be lengthy and complicated and the client insists on proceeding.

Motions to Change

Duty counsel offer clients immediate assistance for faster resolution of simple variation applications in family law cases. Duty counsel considers the circumstances of a family law litigant's variation application before a certificate is issued. Where abuse is, or has been an

issue, clients should be encouraged to apply immediately for a certificate because of the potential imbalance in bargaining positions.

LAO does not issue a certificate in a variation application if duty counsel believes that the case can appropriately be addressed through duty counsel. In all other circumstances, the litigant is referred to the area office to apply for a certificate or to another appropriate service provider (such as a mediation service).

Duty counsel takes primary responsibility in support variations where:

- The payor's income has changed and the Child Support Guidelines suggest a change in the amount of support;
- Custody has changed;
- The payee is no longer entitled to child support;
- The payor is receiving Ontario Works or Ontario Disability Support benefits.

Duty counsel takes primary responsibility in access variations where:

- Changes in employment or residency require a variation in access terms;
- Access is being varied in circumstances where:
 - o existing restrictions, not related to allegations of abuse are being modified e.g. from day to overnight terms;
 - o terms are being minimally varied (i.e., changing access duration and/or pick up and drop off times, redefining holiday times).

Even if contested, duty counsel can assist a client to argue a variation of support or access if the following conditions are met:

1. All necessary documentation for the client's case is before the court; *and*
2. The variation is to be conducted as a motion argued on the materials filed without live witnesses to be examined or cross-examined.

If duty counsel or the advice lawyer determines that the client should be referred to Legal Aid for a certificate, a written referral to the local area office must be completed by the duty counsel or advice lawyer.

The suggested decision-making process to be followed by duty counsel, entitled *When to Refer a Client in a Variation Proceeding?* is included in Chapter 7: Appendices and Forms - Appendix 10 - When to Refer a Client in a Variation Proceeding, page 7-18.

If duty counsel or the advice lawyer determines that the client should be referred to Legal Aid for a certificate, a written referral to the local area office should be completed by the duty counsel or advice lawyer and given to the client to take to the area office. The referral form, is included in Chapter 7: Appendices and Forms - Appendix 11 - Advice Lawyer/Duty Counsel Referral Form, page 7-19..

Emergency Motions and Motions Without Notice

Bringing the motion

When approached by a person wishing to make an emergency motion without notice, duty counsel or the advice lawyer should review with the client the grounds for bringing the motion and explain the Rules of Court respecting such motions. Duty counsel must be satisfied that an actual emergency exists before advising the client to proceed with the motion. Accordingly, pursuant to the Rules of Court, duty counsel/the advice lawyer should ascertain whether:

- There is an immediate danger to the health or safety of a child or the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences;
- There is an immediate danger of the child's removal from Ontario and the delay involved in serving a notice of motion would probably have serious consequences;
- Service of a notice of motion would probably have serious consequences.

If duty counsel/the advice lawyer deems it advisable to proceed with the motion, the client must be informed of the need to make full disclosure and of the potentially serious consequences of failing to do so. Also, any delay by the client in bringing the motion may be a strong factor weighing against the court granting relief.

Duty counsel/advice lawyers are likely to be familiar with the propensity of the local bench to entertain requests for relief on an emergency motion without notice on any particular set of facts. Duty counsel should consider asking for an expedited hearing as alternative relief in the motion.

Financial testing is not required before assisting on an emergency motion. If the client has the financial means to retain private counsel, duty counsel should advise the client of the advantages of retaining counsel at the commencement of proceedings. This ensures an opportunity for a more complete review of the facts and for devising the best strategy for the overall conduct of the litigation. The area office may be able to expedite the issuance of a certificate, but the urgency of the situation may preclude this course of action.

If not already aware, the client should be advised of the various support services available in the community. Duty counsel/the advice lawyer should also be alert to any indication of child abuse, and the obligation placed upon every professional to make disclosure to the Children's Aid Society (CAS) in a proper case.

Drafting the motion materials

Duty counsel or the advice lawyer, in the course of interviewing the client, should try to determine the client's level of education and literacy. Where it appears that the client lacks the literacy required to draft his/her pleadings, duty counsel or the advice lawyer should assist in the preparation of the pleadings. Even where such assistance is not deemed necessary, the client should be asked to permit duty counsel to review the completed

pleadings before they are filed with the court. This allows for the detection of deficiencies in the pleadings which might otherwise result in the dismissal of the motion.

Who assists the client?

Areas where there is a Family Law Information Centre (FLIC)

Where there is a FLIC, the advice lawyer is available to assist persons who are not on a court docket or scheduled to be in court on the day they attend. A person who requests an order without notice in a situation of alleged "urgency or hardship or for some other reason in the interest of justice" is not a person scheduled for court and therefore the first point of contact for this person should be the advice lawyer.

The advice lawyer must determine if bringing an emergency motion appears to be warranted, or if the person should be referred to counsel or to Legal Aid for a certificate. If an emergency motion appears to be warranted, the advice lawyer should speak to court duty counsel to determine what the court duty counsel's workload is like.

It is up to the court duty counsel to confirm that an emergency motion is appropriate, and then to decide if he/she has the time to assist the person in preparing the motion documentation. In areas with supervisory duty counsel, emergency motions are generally referred to the supervisor who will determine the process and allocate the necessary assistance.

If court duty counsel does not have sufficient time to assist in preparing the documentation, the advice lawyer should do so. If the advice lawyer also does not have sufficient time resources, the advice lawyer should contact the local area office to request the assignment of a special duty counsel to assist the person, or the emergency processing of a legal aid application.

If the advice lawyer is required to assist the person in the preparation of the documentation for an emergency motion, the materials are to be provided to the court duty counsel by the advice lawyer when completed, and the court duty counsel attends on the motion in court. It is not the function of the advice lawyer to attend court.

Areas where there is no FLIC or the advice lawyer is not available

If the court duty counsel or supervisory duty counsel, where available, is the first point of contact for a person requesting an emergency motion, the court duty counsel assesses the appropriateness of bringing the emergency motion. If the court duty counsel decides that such a motion is appropriate, he/she must determine if she has the time to assist in the document preparation, and if so, to follow the procedure set out earlier in the section "Drafting the motion materials".

Court duty counsel may not wish to attend on a motion that he/she believes is not an emergency. If the client insists on proceeding, whether or not to attend to argue the motion is in the discretion of the duty counsel who may feel his/her reputation with the court may suffer by attending on motions which lack merit. This should not arise as an issue in those

jurisdictions in which all emergency motions without notice are dealt with as basket motions.

Taking out the order

In the event an emergency motion is successful, the order must be taken out. In some jurisdictions the court staff prepares the order for issuing and entering without a fee to the applicant. In other jurisdictions duty counsel need to know where to send the applicant to have the order prepared. In those jurisdictions with a FLIC, the advice lawyer may have the resources to prepare the order. This information also applies to the service of the motion materials initially, and to the service of any resulting order.

CFSA proceedings

The role of the CAS is unique, as they function both as a helping organization and a policing agency. This presents challenges to duty counsel who assist parents in these proceedings. When court proceedings begin and the CAS worker makes allegations against the parents, there is often a keen sense of betrayal and anger on the part of the client.

Duty counsel must advise and assist the client in obtaining the best possible result. At times, this calls for strenuous litigation. At other times, duty counsel must assist in finding compromises and improving co-operation between the client and the CAS.

Particularly at the outset of proceedings, duty counsel should avoid being drawn into the client's focus on the "truth" or what is "right" (from the client's perspective). Consider making efforts to change the client's focus to plans and goals that require immediate attention.

Duty counsel often encounter a client who is hostile and aggressive to the CAS. He/she may refuse to co-operate with the CAS in any way. It is often true that the more one resists the CAS, the longer and more invasive their intervention. The client should be cautioned against making statements to the CAS that might provide ammunition to them.

Aggressive behaviour or failure to co-operate (or even talk) with the CAS also works against the client, and the client should be encouraged to remain as civil as possible when dealing with the CAS, while acknowledging the client may have legitimate complaints.

The following is a brief summary of some of the legal and procedural issues that may affect duty counsel.

Commencement of proceedings

Child protection proceedings under the [Child and Family Services Act](#) (hereinafter the "Act") are commenced in one of three ways:

- **Application after apprehension.** If the CAS believe the child(ren) must be taken into care to protect the child(ren), the Society apprehends the child(ren) with or without a warrant. The matter must come before court within five days. There is often short service of the court documents and no time to retain counsel. Frequently, parents come to court in shock and very angry and want the child(ren) returned immediately. The

care and custody hearing (for a determination of temporary custody) is discussed below.

- **Application without apprehension.** The CAS may also start by commencing an application without an apprehension. This is usually the route taken if:
 - The CAS is only seeking a supervision order;
 - The child is safe in someone else's de facto care; or
 - The child is already in care under a voluntary care agreement.
- **Status review.** When the initial order runs out, the case must be brought back to court for review. The CAS may seek a further order or terminate the case.

Care & custody hearing (the temporary order)

The test and criteria: section 51(3) of the Act provides that during adjournments, the child shall remain or be returned to the person who had charge of the child "... unless the court is satisfied that there are reasonable grounds to believe that there is a risk that the child is likely to suffer harm ...".

This new amendment removes the word "substantial" in reference to "risk". Based on existing case law, "likely" describes the degree of risk. One of the few cases addressing the criteria clarifies the test: [there must be] "... reasonable grounds to believe there is a real possibility that if the child is returned to his parents, it is more probable than not that he suffer harm." (*Children's Aid Society of Ottawa-Carleton v. T.*, [2000] O. J. No. 2273 (S.C.)). Review LAO LAW's (Research Facility) memorandum CH5-8 for a more detailed discussion.

The evidence: section 51(3) allows the court to rely on evidence that it "... considers credible and trustworthy under the circumstances."

The only material before the court at a first appearance is likely the CAS's affidavit(s). Some judges allow last minute affidavits by the respondent(s), if this is not too prejudicial to the CAS' right to respond. In most jurisdictions viva voce evidence is not allowed at the hearing. The evidence may be rather one sided in favour of the CAS.

Prejudice: if a care and custody hearing results in a child being put in care, the client is significantly prejudiced. The temporary order may last many months pending a trial and may be in place as long as, or longer than, the order initially requested by the CAS.

Benefits of adjournment: a delay may provide the client with the opportunity to:

- Retain legal representation;
- Prepare extensive and persuasive materials;
- Gather evidence from other sources;
- Remedy the problems that led the CAS to apprehend the child; and
- Explore alternatives to the child being in CAS care (such as a family placement).

Temporary supervision order on adjournment: if the care and custody hearing is adjourned, the CAS will likely insist that a temporary order be made placing the child in their care. This order should be made “*without prejudice to the evidentiary and onus rights of the parties (at the Care and Custody Hearing).*” In addition, the CAS usually seeks a provision that access be at their discretion. See the discussion below regarding the issue of access.

The chances of successfully opposing a motion for a temporary supervision order are poor. The Section 51(3) criteria do not apply to this type of order, as the child is remaining with, or being returned to, the person in charge. The test is closer to *best interest of the child*, with some consideration of what is necessary to protect the child. Most judges are likely to err on the side of caution.

Conclusions: if the CAS case is seriously flawed and duty counsel determines there is a good chance of succeeding at a care and custody hearing with the material that is before the court, duty counsel may recommend proceeding on the first appearance. As a general rule, it is prudent for the client to adjourn the matter and prepare to aggressively argue the matter with full supporting material and retained legal representation. In the end, however, it is the client’s choice whether to proceed or request an adjournment.

If the client insists on proceeding with the care and custody hearing, duty counsel should assess the appropriate degree of involvement in the proceeding by considering the following questions:

- Is duty counsel able to assist the party in court?
- Given the complexity of the matter and its importance, can duty counsel competently argue this matter?
- Does duty counsel have time to prepare properly?
- Should duty counsel simply summarise the client’s position to the court and leave the rest of the argument to the client?

Changing the temporary order

The Act does not specifically set out any criteria for changing a temporary order that placed a child in care. See subsection 51(6). The general test for change motion applies: *Is there a material change in circumstances?*

The subsection 51(3) criteria also apply. There are two ways this can be viewed:

- The client seeking the change must show that there is a material change in circumstances that would result in a failure to meet the criteria set out in Subsection 51(3). The burden is entirely on the client. This is likely the more successful interpretation.
- The client must show that there is a material change in circumstances that would affect the subsection 51(3) criteria (the threshold test). The CAS then must show that the criteria are met. Duty counsel may attempt to argue this interpretation, but will likely not be successful.

Temporary order during status review

Under subsection 64(10), the criteria for the temporary order on a status review are "... whether the child's *best interest requires a change in the child's care and custody.*"

Findings and disposition (the final order)

Finding in need of protection

The issue is whether the child is in need of protection at the time of the application, although there is some case law saying the CAS must show the child continues to be in need of protection at the time of the trial. There is no appeal court decision on this point.

There is a long list of situations in subsection 37(3) that constitute a child being *in need of protection*. Often more than one subsection applies. If the client intends to retain counsel, duty counsel should advise the client to adjourn so that counsel can assess if a finding should be consented to, and if so, under which subsection. If the client is not going to retain counsel, duty counsel should consider negotiating for the least prejudicial or offensive subsection possible. The subsection relied upon for the finding may make no practical difference, but may be of great emotional or symbolic importance to the client.

Disposition

If the court finds a child is in need of protection, the judge must decide whether to:

- Return the child to the person who had charge of him/her, subject to supervision;
- Give the child into someone else's care;
- Place the child in the care of the CAS; or
- Make no order.

Section 37 sets out the possible orders a court may make after finding the *child in need of protection*. Where conditions are being imposed on the client, duty counsel should attempt to ensure the client can reasonably meet each of them and advise the client of the consequences of failing to abide by those conditions.

Common misunderstandings by clients

- A six-month order does not mean the intervention is over in six months. It merely means the parties return to court to review the plan in six months.
- The CAS worker may indicate some step will be taken in the future (e.g.: the return of the child). However, the client cannot rely on this. The CAS may change their position. The court may disagree with the CAS position.

Access

Duty counsel should always try to avoid an “access at the discretion of the CAS” order, although it may be appropriate if the parent poses some risk to the child and/or is inconsistent in visiting. If the CAS does not agree to a schedule, duty counsel should consider recommending a term such as “access as agreed upon by the parties (and the child) with visits anticipated to occur (schedule)”, or at least try for “access as agreed upon by the parties (and the child)”. Another acceptable wording may be “unless new protection concerns arise, the respondent mother/father should have access as follows: (schedule)”.

The documents

The Application

This document should be the starting point for duty counsel. It indicates:

- What subsection number the CAS is proceeding under;
- What allegations are being made; and
- What disposition is being sought.

Duty counsel should make inquiries as to whether the disposition is actually what the CAS wants or whether they are being over-cautious. As well, the situation may have changed since the Application was prepared.

The Answer

Every respondent must file an Answer within 20 days of being served with the Application. If an Answer is not filed, the CAS will proceed on default, sooner or later. The Answer may be very simple: the CAS claims should be denied and a statement that “the CAS allegations are all false and I am a good parent”.

Duty counsel may wish to consider assisting a client file an Answer in these generic terms to ensure one is filed, although more details would be better. The Answer can always be amended at a later date if necessary.

Plans of care

The client is presented with the CAS’ Plan of Care. It must be reviewed with the client, although he/she does not have to agree with all or any of its contents. As the name of the person who reviews the document with the client must be entered at the end of the document, duty counsel should consider whether the CAS worker should review and sign the plan rather than duty counsel. Duty counsel should explain the purpose of the Plan of Care and ask if the client has any questions about it.

A client who disagrees with the CAS’ plan should be advised by duty counsel to prepare and file his/her own Plan of Care for the child. This step is frequently neglected by clients. Duty counsel can assist in the preparation of a Plan of Care if the client is financially eligible for this degree of assistance.

The Agreed Statement of Fact

If the client is consenting to a finding and/or disposition, he/she will be presented with an Agreed Statement of Fact. It contains:

- Certain basic findings of fact (date of birth, religion, parentage, etc.);
- Facts on which the decisions may be based;
- A finding of in need of protection and the relevant subsection (unless it is a Status Review); and,
- The order sought, including custody, access and conditions.

Duty counsel should ensure the wording of the subsection being relied upon for a finding in need of protection is set out. If it is not, duty counsel should look it up and review it with the client.

The facts may be problematic. Even if the client consents to the result being asked for, he/she may disagree with the factual allegations. The wording of the Agreed Statement of Fact may be negotiated. Since only the facts necessary to support the findings and the order are required, compromises should be found.

The agreed statement of fact form indicates at the beginning that “this form ... may be read to the court as evidence, without affecting anyone’s right to test that evidence by cross-examination or to bring in other evidence.” This also applies to any future status review. Duty counsel should ensure the client is aware of this, and if the client has already signed, to determine if the client wishes to withdraw agreement.

Advising a child

Duty counsel are sometimes requested to advise a child who is twelve years or older about an Agreed Statement of Fact that he/she is asked to sign. The Children’s Lawyer may have been appointed for the child in an earlier child protection or custody/access case and, if so, the Children’s Lawyer should be contacted and asked whether the lawyer representing the child will advise him/her. If there is no prior involvement by the Children’s Lawyer, please do *not* request the Children’s Lawyer to become involved.

Duty counsel may assist the child by reviewing the agreed statement of fact with the child to ensure he/she understands the document’s contents and the consequences of signing it:

- If the court requests it;
- If duty counsel is of the opinion that the child is sufficiently mature and sophisticated; and
- If the duty counsel is not in a conflict (e.g.: having already advised a parent or other caretaker).

If the child disagrees with the proposed plan of care, duty counsel should avoid asking what the child wants. This may be taken literally. Instead, duty counsel should ask whether he/she has any other options or plans if he/she disagrees with the Agreed Statement of

Fact. In this situation, asking the court to request the involvement of the Children’s Lawyer is recommended.

Retaining counsel

If the client is in a significant dispute with CAS, he/she should be represented by retained counsel. There is a great imbalance of power and legal sophistication between the CAS and the client. The client may have psychological problems, or simply lack skills or the ability to cope. Clients frequently need advice and encouragement which goes beyond just preparing for and attending at court. Duty counsel should assess each client’s situation in a CAS case to determine if counsel should be retained, and advise the client of the availability of a legal aid certificate if it appears the client is financially eligible.

Some important sections of the [Child and Family Services Act](#)

1	Purposes of the Act	50	Past Conduct to Children
3	Definitions	51	Adjournments, Care in the Interim
26 to 36	Voluntary Agreements	57	Order Where Child in N. of P
37(1)	Definitions (Child Protection)	57(4)	Community Placement
37(2)	“Best Interests of Child”	58	Access
37(3)	“Child in Need of Protection”	60	Financial Support by Parent
39	Parties	64	Status Review
40	Application, Apprehension	64(10)	Adjournment on Status Review
		72	Duty to Report

Property Issues

Property issues rarely arise in the Ontario Court of Justice in family matters, largely because the court lacks jurisdiction to deal with property matters. The expansion of integrated family courts has, however, brought a new dimension to acting as duty counsel, in that property issues are frequently before the court. These may include claims for exclusive possession, equalization of net family properties, the division of chattels, and claims for non-dissipation orders.

As a general rule, duty counsel should not become involved in property disputes. Where there is consent between the parties, or the facts are not in dispute, duty counsel may assist a financially eligible client with respect to an exclusive possession claim as an incident of custody/access, or assist in a straightforward division of chattels, particularly if resolving the chattels issue will simplify the resolution of child-related issues.

Case Management

Both advice lawyers and court duty counsel can assist any person in preparing for any conference under the Family Law Rules by:

- Reviewing with the client the purposes of the type of conference to be held;

- Advising the client of the need to prepare a conference brief and the time limits for serving, filing and confirming the conference.

The above information is process-related and can be provided by duty counsel whether the person financially qualifies for legal aid or not for up to the general 20 minute maximum.

With respect to case conferences and settlement conferences, if the person financially qualifies for further assistance, the advice lawyer can assist the client in preparing the required brief, if necessary, and court duty counsel can attend with the client at the conference. Duty counsel should not become involved in trial management conferences beyond providing general process-related advice.

The reasoning for the distinction between case/settlement conferences and trial management conferences is as follows:

- It is within duty counsel's mandate to assist in the resolution of issues wherever appropriate. Case conferences and settlement conferences are the primary forum for attempting to resolve issues which were not resolved on consent at a first appearance.
- A judge hearing a case conference often turns it into a settlement conference if it appears there are a number of issues easily resolvable on consent and any disputed issues can be easily isolated. Duty counsel frequently attend case conferences that are converted into settlement conferences without any advance notice.
- As a general rule, duty counsel should not become involved in lengthy and/or complex disputes, nor should they assist parties at trial. The related issues of professional liability and duty counsel's inability to adequately prepare for trial make trial attendance inadvisable.

This same rationale applies to becoming involved in a trial management conference. Duty counsel may jeopardize a person's case, and his/her own Errors and Omissions status, by making admissions of fact and/or providing incomplete disclosure relating to other intended evidence and/or witnesses, or by failing to thoroughly understand and demand the necessary disclosure from the other side at a trial management conference.

- Duty counsel should be careful during a settlement conference when the discussion moves into areas relating to trial process, such as making admissions and identifying witnesses or other evidence to be presented at trial.

If duty counsel is involved in a settlement conference in which it appears the matter cannot be settled, duty counsel should advise the judge that matters relating to trial preparation are beyond duty counsel's scope of duties and that duty counsel cannot contribute to any discussion relating to trial preparation.

The bottom line rule of thumb should be: if duty counsel is involved in a conference and the discussion turns to matters relating to trial preparation and specific evidentiary matters, duty counsel should not participate in those issues. Duty counsel should specifically advise both the client and the court about this limitation as quickly as these issues arise, if not at the outset of the conference.