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Criminal Duty Counsel

Availability of Duty Counsel

Reasonable efforts should be made by the court to inform all those appearing without representation of the availability, role and function of duty counsel. Duty counsel should announce their presence prior to the commencement of court, both in the corridor and in the body of the court itself. The announcement should make it clear that duty counsel are:

- Lawyers;
- Available for advice and assistance in court;
- Free of charge; and
- Located in and around court.

Proper signage in the duty counsel office and in the corridor is helpful both in attracting clients and explaining limitations on duty counsel services. A sample sign is included in Chapter 7: Appendices and Forms – Appendix 1 – Sample Promotional Sign, page 7-2.

The starting time is set by the area director or supervisor. Duty counsel should attend between half an hour and an hour before court so they can interview people as they arrive at court. Cell interviews should also commence at least an hour before court, depending upon inmate arrival time.

Unfortunately, many accused attend just before or after court commences. Unless the court automatically adjourns in recognition of the problem, duty counsel should request that a client's matter be stood down to give duty counsel an opportunity to meet with the client.

Once court commences, the judge should either make a general announcement as to the availability of duty counsel, or enquire whether each unrepresented individual would like to consult with duty counsel.

Duty counsel should never force their services on an accused, as every person has the right to act for himself/herself. In advising an unrepresented accused, duty counsel should review all the options including the possible benefits associated with an early resolution.

Advice

Duty counsel should be prepared to answer questions about courtroom procedure, legal aid, bail, offences, possible penalties and defences. Advice can be provided at any stage of the proceedings.

Duty counsel should be able to advise an accused where to apply for legal aid and how to appeal an area director's refusal to issue a certificate.

LAO only issues a certificate to a financially eligible accused if there is a probability of incarceration or if the accused's mental status or other disability would affect the fairness of the proceedings. Most accused facing a charge that does not involve a probability of incarceration upon conviction should be advised that they are unlikely to succeed in obtaining a legal aid certificate, even when loss of employment is certain.

However, duty counsel should note aggravating circumstances such as theft from an employer which increase the probability of incarceration, and the local area director should be notified of the circumstances as to why a certificate should be issued.

Duty counsel should be well acquainted with the [Criminal Code](#) and related statutes such as the [Young Offenders Act](#) and the [Controlled Drugs and Substances Act](#). Duty counsel should also be able to answer questions involving related [Provincial Offences Act](#) proceedings such as prosecutions under the [Highway Traffic Act](#).

Duty counsel must alert the accused as to the effect a [Criminal Code](#) conviction has on other statutes. For instance, a conviction for impaired driving or driving while prohibited will trigger an automatic suspension under the [Highway Traffic Act](#). Also, a conviction may result in incarceration under another statute such as the [Corrections and Conditional Release Act](#) or deportation under the [Immigration Act](#).

Duty counsel should advise clients that a "discharge" still creates a criminal record. A conditional or absolute discharge may still result in a prohibition of entry into the United States.

Advice given by duty counsel should clearly be resolution oriented and include a clear explanation of the role of duty counsel in arranging diversions and entering guilty pleas.

Adjournments

Adjournments to obtain counsel

Most courts allow two to four weeks following first appearance for a client to obtain a lawyer either privately or through Legal Aid. If the accused does not have a lawyer on the return date, the judge will enquire as to the reason. Duty counsel should be able to inform the court as to the reason for the delay. At this point the court may grant a further adjournment to set a date for trial or preliminary hearing.

If an accused does not have counsel on a trial date, it is very difficult to obtain an adjournment, as witnesses are inconvenienced and trial time wasted.

Assisting private counsel

Often counsel for an accused request duty counsel to act as agent to request adjournments or set trial dates. LAO encourages this procedure, particularly when the accused is legally aided. It is acceptable for duty counsel to appear as agent for counsel and provide a reasonable list of suggested trial dates. Duty counsel are not entitled to any additional

compensation from LAO or from private counsel for acting as an agent while appearing as duty counsel.

Duty counsel should not appear as agent if the accused is not present.

Duty counsel should not appear as agent with respect to a motion to change a trial date if the motion is contested, nor should duty counsel act as agent for counsel to conduct a trial or speak to sentence.

An example of a "Request by Counsel" form that may be used by lawyers requesting duty counsel to appear as agent is included in Chapter 7: Appendices and Forms – Appendix 2 – Request by Counsel, page 7-4.

Reasons for "holding matters down"

The following is a list of acceptable reasons for duty counsel to request that a matter be stood down on behalf of a client:

- For counsel to attend;
- To attend at trial co-ordinator's office to obtain a trial date;
- To have a resolution meeting with the Crown;
- To have the accused meet with diversion worker;
- To have the youth complete an alternative measures application form.

Reasons for adjournment

The following is a list of acceptable reasons for duty counsel to request that a matter be adjourned on behalf of a client:

- To retain counsel privately (ascertain time needed to complete retainer);
- To complete legal aid application (direct the client to courthouse location or area office);
- To obtain a trial date;
- For pre-trial with Crown;
- For judicial pre-trial;
- Disclosure not available (ask when it will be ready);
- Crown brief not in court (Askov clock running);
- To have officer in charge determine if complainant would accept a peace bond or if restitution has been made;
- For an accused who is ill, in custody elsewhere or otherwise cannot attend court, request "bench warrant with discretion" or a bench summons.

An adjournment request can be made by an accused's counsel or an accused who has contacted the duty counsel office with information that is reliable or verifiable. It is important that the accused understand that duty counsel is relaying a request and not appearing as agent without the client. The accused must also understand that he or she (or his/her lawyer) is responsible for finding out the result, including the return date. The justice may deny the adjournment request and issue a bench warrant for an accused who is not in attendance.

Video remands

Video remands for "administrative adjournments" will soon be available in all court areas in Ontario, particularly with the advent of "superjails" which are often located far away from the populated areas they serve. The cost of transporting inmates is enormous, as is the inconvenience of an inmate being brought to court for a simple adjournment.

The process allows an inmate to remain in the institution and appear on television screens in the courtroom. The inmate, in turn, can view the entire court by way of a split screen monitor in a room occupied only by the inmate. The audio/visual transmission is simultaneous.

In addition, duty counsel can speak privately with the inmate by way of a telephone in a privacy booth in the courtroom. As soon as duty counsel picks up the receiver the entire system shuts down and the screen becomes blank. When the conversation ends the system is reactivated. Duty counsel should be satisfied the booth is soundproof.

There is a set time frame during which the appearances must take place, as the institution must also contact other courts using the facility.

Although video remands are used mainly for adjournments and setting trial dates, they are also used for consent bail releases and regional "WASH" (weekends and statutory holiday) courts in some areas to centralise the use of judicial and court resources. In the future, bail hearings may be the subject of video proceedings to facilitate the testimony of distant witnesses. Contested bail hearings by video require the consent of the accused.

Although many accused are represented and duty counsel acts as agent for the accused's lawyer, unrepresented accused may need additional time to discuss the case with duty counsel other than the open court discussion or the short "booth" conversation. Audio conferencing initiatives, currently being implemented in "superjails" and in Toronto regional jails include a telephone line that permit duty counsel and other counsel to speak to an accused prior to court convening.

Avoiding needless adjournments

Duty counsel should always ask the question "how can I make the accused's next appearance more productive?" If the matter is adjourned to obtain legal aid, the accused should be directed to the Legal Aid office and told to bring the required information. This information includes some form of identification, bankbooks, proof of income, proof of monthly expenses and bills, etc. By doing so, even though the adjournment was not a

disposition, it was handled in a dispositive manner, as a decision regarding legal aid should be made by the next court appearance.

Bail Hearings

Conducting bail hearings and arranging the early release of accused persons is one of the most important functions of duty counsel as it is often significant in subsequent decisions about how to proceed with the charges. If an accused is detained, he or she could spend several months in custody while awaiting a bail review or a trial.

Duty counsel must be aware that a detention order or a surety release that cannot be met might result in a period of incarceration longer than the actual sentence. Such “dead time” is not always fully considered at the sentencing stage. Further, remanded inmates are allowed fewer privileges than inmates serving a sentence.

Time to prepare for a bail hearing is often very brief. As part of that preparation, duty counsel must interview the accused, contact and prepare potential sureties, review the synopsis and criminal record of the accused and when necessary, contact community resources. Duty counsel must then conduct the bail hearing or attempt to negotiate a release with the Crown.

Duty counsel in bail court also need to advise an accused on a possible guilty plea and request a position on disposition from the Crown. Duty counsel should be alert to matters that are suitable for an early plea. Also, duty counsel should be aware that the Crown often agrees to withdraw minor charges resulting from the same transaction or series of transactions.

Application for release: burden of proof; reverse onus provisions

When a person has been arrested and has not been released by either the arresting police officer or the officer in charge, s.503 of the [Criminal Code](#) requires that the person be taken before a justice of the peace within 24 hours of the arrest (where a justice is available), or as soon as possible.

When the accused appears before the justice, he or she is entitled to apply for judicial interim release pending trial, unless the accused intends to plead guilty. Following the judicial interim release hearing (also described as a show cause hearing or bail hearing), the accused is either released (with or without sureties, conditions, etc.), or else he or she is ordered detained in custody until the time of the trial.

Subject to specified exceptions contained in s. 515(6), the onus at the bail hearing is on the Crown to show why the accused should *not* be released from custody pending the trial. The accused may either be released on his own recognizance without conditions (s. 515(1)), or on a recognisance with conditions, sureties or cash deposits (s. 515(2)).

Section 515 has been described as a “ladder” which the Crown must climb from the lowest rung (accused to be released without conditions) to the highest (accused to be detained in

custody). The primary duty of the justice, if the Crown cannot show that detention is justified or that some other order under s.515 should be made, is to release the accused without conditions, on his or her own undertaking to appear as required.

The next “rungs” on the ladder are found in s. 515(2). In order, they consist of the accused being released:

- On an undertaking with such conditions as the justice directs;
- On a recognizance without sureties, in such amount and with such conditions, if any, as the justice directs, but with no cash deposit;
- On a recognizance with sureties in such amount and with such conditions, if any, as the justice directs, but with no cash deposit;
- With the prosecutor’s consent, on a recognizance without sureties and with or without conditions, with a cash deposit;
- Where the accused is not ordinarily resident in the province or does not reside within 200 kilometres of the place where he is in custody, on a recognizance with or without sureties and with or without conditions, with a cash deposit.

Again, the burden is on the prosecution to show the necessity for any of these orders. Section 515 (3) states that the justice shall not make any of the above orders unless the prosecution shows why an order under the immediately preceding paragraph should not be made.

Finally, one comes to the highest rung on the ladder. If the Crown meets the onus upon it to show that detention pending the trial is required, the accused is detained in custody pursuant to s. 515 (10).

The exception to the general rule that the burden of proof is on the prosecution is found in section 515 (6). Section 515(6)(a) places an onus on the accused to show cause why, “on the balance of probabilities” detention is not justified where he or she has been charged with an indictable offence (other than a s.469 offence) alleged to have been committed while the accused was out on bail with respect to another indictable offence, or where the accused has been charged with a s. 467.1 offence (participation in criminal organization).

The same onus is on the accused, pursuant to s. 515 (6)(b), where the offence is a non-section 469 indictable offence and the accused is not ordinarily resident in Canada. According to section 515 (6)(c), the onus is also on an accused charged with offences under section 145 (2) to (5) of the Code (failing to appear or failing to comply).

Under section 515(6)(d) the onus arises where the accused has been charged with committing an offence punishable by imprisonment for life under subsection 5(3), 6(3) or 7(2) of the [Controlled Drugs and Substances Act](#), or with conspiracy to commit such an offence.

Grounds for detention

Section 515(10) provides:

For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and
- (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

Ensuring court attendance (formerly known as the primary ground)

The first ground for detention is that detaining the accused is necessary in order to ensure his or her attendance in court. This includes the consideration of such factors as: residence; fixed place of abode; employment or occupation; marital or family status; previous criminal record; proximity of close friends and relatives; character witnesses; facts relating to the allegations of the offence; personal history.

The weight to be accorded to these factors varies, according to the circumstances of each case. However, one factor that often appears to be determinative in the accused's being denied bail is the fact that he or she is not ordinarily resident in Canada. Still, there are cases in which non-residents have been granted interim release.

Public safety (formerly known as the secondary ground)

The concept of public safety is not restricted to the public's physical safety, and includes the need for protection from property offences such as theft. However, neither the gravity of the offence nor the fact that violence was involved should be, by themselves, conclusive against release. Public safety often can be assured by crafting a release order that would prevent contact with any of the complainants or co-accused.

Having regard to all the circumstances: Substantial likelihood

Section 515(10)(b) directs the court, in determining whether detention is required in the interest of public safety, to have regard "to all the circumstances", including any "substantial likelihood" of the accused committing criminal offences or interfering with the administration of justice while he or she is on bail.

Any other just cause; detention necessary in order to maintain confidence in the administration of justice

The third justification for detention in custody is found in s. 515 (10)(c) and creates a much broader basis for detention than is found in either of the preceding subsections; it refers to detention on the grounds of “any other just cause being shown”. Specifically, but “without limiting the generality” of the “any other just cause” criterion, the subsection refers to detention that is “necessary in order to maintain confidence in the administration of justice” (known as the “tertiary ground”).

Section 516 adjournments

Section 516 of the [Criminal Code](#) permits a justice, before or at any time during the course of section 515 proceedings, and on an application by either the prosecutor or the accused, to adjourn the proceedings and remand the accused in custody. The section specifies, however, that no adjournment is to exceed three clear days without the consent of the accused.

In *The Law of Bail In Canada*, 2d ed. (Toronto: Carswell, 1999), Gary Trotter writes that, since time is of paramount concern when it comes to bail, it is essential that the hearing be conducted as soon as possible. This goal would be undercut if the court were permitted to delay matters by granting adjournments on its own initiative or at the request of the prosecution.

However, he goes on to indicate that there may be times when it is not in the interest of the accused or the prosecution to proceed with the hearing on the first appearance. For instance, the Crown may wish to make further inquiries regarding the offence or the accused, and the accused may need more time in order to retain counsel or make arrangements for sureties.

Adjournments may also be required if the hearing cannot be concluded on the same day on which it commences. The Crown does not, however, have an automatic right to a three-day adjournment. Valid reasons must be provided to the court.

Duty counsel should obtain and make a note of a client’s instructions when they are seeking an adjournment of a bail hearing.

Publication bans

The power to delay the publication or broadcast of what goes on at a bail hearing is contained in s.517 (1) of the Code. The court has a discretionary power to impose a ban on its own initiative or at the request of the prosecution. However, where the application for a ban comes from the accused, the section states that imposing the ban is mandatory rather than discretionary. The ban may be imposed at any time before, or during, the course of the bail hearing. If the accused is committed to stand trial, the ban may last until the trial is over.

Evidence at the bail hearing

Evidentiary matters at bail hearings are governed by section 518 of the [Criminal Code](#). Subsection (1) provides as follows:

In any proceedings under section 515,

- (a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;
- (b) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;
- (c) the prosecutor may, in addition to any other relevant evidence, lead evidence
 - (i) to prove that the accused has previously been convicted of a criminal offence,
 - (ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,
 - (iii) to prove that the accused has previously committed an offence under section 145, or
 - (iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of the conviction of the accused;
 - (v) to prove that the accused has previously committed an offence under section 145, or
 - (vi) to show the circumstances of the alleged offence, particularly as they relate to the probability of the conviction of the accused;
- (d) the justice may take into consideration any relevant matters agreed upon by the prosecutor and the accused or his counsel;
 - (d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence;
 - (d.2) the justice shall take into consideration any evidence submitted regarding the need to ensure the safety or security of any victim of or witness to an offence; and
- (e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

Note that section 518 (1)(d.2) is a recent amendment effective as of December 1, 1999. In his text, *The Law of Bail in Canada*, 2nd ed. (Toronto: Carswell, 1999), Gary Trotter writes that, due to the necessity of determining the issue of bail expeditiously, bail hearings reflect a certain level of procedural informality.

This informality translates into the relaxation of certain formal rules regarding the presentation of evidence. Trotter states that the most important measure for assessing

admissibility of evidence at bail hearings is provided by the phrase “credible or trustworthy” in s. 518 (1)(e).

This approach to the problem envisages a number of ways in which evidence may be challenged. It may be confronted directly, through cross-examination, or it may be attacked collaterally by an accused who leads independent evidence that contradicts the evidence led by the prosecutor.

In addition to the “credible or trustworthy” standard, s. 518 (1) also sets out a “relevancy” standard. The prosecutor may, according to s. 518 (1)(c), lead certain enumerated types of evidence “in addition to any other relevant evidence”. Also, the justice may take into consideration “any relevant matters agreed on by the prosecutor and the accused or his counsel”.

It goes without saying that evidence must be relevant in order to be admissible (at a bail hearing or any other proceeding). While the Crown is not permitted to question the accused about the offence he is alleged to have committed, *other* witnesses may be asked to testify about the circumstances of the offence (including the accused’s proposed surety). In the event the accused does testify respecting the offence, he may then be cross-examined on that subject.

The purpose of the bail hearing is not to determine the guilt or innocence of the accused, but rather to determine whether there is any reason the accused should not be released pending trial. It is in this context that the circumstances of the offence are relevant. Duty counsel conducting bail hearings should exercise caution that they do not inadvertently open up the issue by inquiring of the alleged facts of the offence from an accused.

While the accused is not to be questioned by the Crown or the judge about the offence itself (although the accused may be cross-examined once the issue is raised), the accused is free to introduce evidence about the offence through his own counsel.

Section 518 (c) entitles the court to consider evidence concerning the circumstances of the alleged offence, as they relate to the probability of conviction.

There appears to be considerable variation in local processes for approving sureties. Some courts require the prospective surety to testify in cases where a release on consent is proposed. This process is unduly time consuming and cumbersome. The court should be urged to accept affidavits for potential sureties as a best practice. (See Chapter 7: Appendices and Forms – Appendix 3 – Sample Affidavit of Justification by a Surety, page 7-6.

Alternative to physical presence of accused

An accused may be permitted to make an appearance, for purposes of judicial interim release, by means of “any suitable telecommunication device” rather than in person. Pursuant to s. 515:

(2.2) Where, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the appearance shall be by actual physical attendance of the accused but the justice may, subject to subsection (2.3), allow the accused to appear by means of any suitable

telecommunication device, including telephone, that is satisfactory to the justice.

(2.3) The consent of the prosecutor and the accused is required for the purposes of an appearance if the evidence of a witness is to be taken at the appearance and the accused cannot appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication.

Weekend and statutory holiday (WASH) courts have been created in some areas and are functioning as a regular bail court. However, the WASH courts which rely on video remands do not conduct contested bail hearings and are often not in a position to offer a consent release. As a result many of these courts have become remand courts only. An area director will generally not schedule a duty counsel to such a court as it would not be an efficient use of resources.

Preparation time

Due to the short time frame that duty counsel have to work within (usually 1-2 hours before court begins each morning), and the volume of accused to represent each day, preparation time can be limited. Preparation therefore, must be efficient, precise and accurate.

The interview with the accused may be the only source of information for conducting the bail hearing. It is therefore essential that duty counsel conduct a detailed and complete interview which addresses and records all essential matters for use by another duty counsel or retained counsel. Essential questions include, but are not limited to, those dealing with the three grounds under s.515 of the [Criminal Code](#), surety contact information, criminal records (including convictions for “failing to appear” or “failing to comply” (FTA & FTC), evidence of stability and the existence of mental or physical health issues.

In some courthouses duty counsel are allowed access to Crown briefs that usually contain a wealth of background information, the record of the accused and prior release history, as well as a copy of the synopsis of the offence charged.

At the interview, duty counsel should first inform the accused who they are, what they are there to do for the accused, and that what is said will be confidential. Information about the time of arrest, and whether the accused has private counsel, should then be garnered. If the accused indicates that his lawyer is coming to conduct a bail hearing the assistance of duty counsel may not be necessary. If the accused indicates that he or she would prefer to use duty counsel, duty counsel can then assist and continue the interview.

Duty counsel must obtain all relevant information in a short amount of time, in a clear detailed and legible fashion. This information may be recorded on the standard duty counsel worksheet. An example of a worksheet is included in Chapter 7: Appendices and Forms – Appendix 4 – Duty Counsel Worksheet, page 7-8. Each duty counsel office has a procedure for how and where information is to be stored. Uniformity and clarity are very important and prevent duplication and errors.

Duty counsel *must* indicate on the back of the worksheet all the steps taken, and the steps that need to be done next. Proper notation ensures that when someone else picks up the sheet, they know what was done and what needs to be done next. For example, when a surety is contacted, the date, and time of the call, as well as the result (left message, surety

on the way) should be noted, along with duty counsel's initials. Printing instead of writing provides for easier reading by subsequent duty counsel.

In the interview, duty counsel should ask the accused whether or not he/she is in need of medical assistance, if there is a history or current difficulties with alcohol or drug abuse, and whether there are psychiatric issues. Sometimes accused persons cannot or will not tell duty counsel the truth. Personal observations of the duty counsel should be recorded on the interview sheet as well.

If an interpreter is needed, this should be clearly marked and an interpreter ordered. Finally the accused must be informed of the general process of a bail hearing, so he/she is prepared and unexpected outbursts are minimized.

Included in Chapter 7: Appendices and Forms are two information notices – Appendix 5 – Sample Bail Information Form on page 7-9, and Appendix 6 – Are You Going to be a Surety? on page 7-12, which may be provided to members of the public about the bail process and sureties.

After the interview

Potential sureties must be contacted, interviewed and properly prepared to testify. When contacted prior to their attendance in court, advise the surety to bring with them documents proving their financial worth, such as bankbooks, deeds or RRSPs. A Surety Information Form should also be completed (see Chapter 7: Appendices and Forms – Appendix 7 - Surety Information Form, page 7-14.).

Where possible, obtain the names of several potential sureties from the accused in order to have alternatives. If a surety is deemed inappropriate, the duty counsel should *clearly indicate* it on the interview sheet. Sureties can be rejected for various reasons, including age (too young), status in Canada, financial situation or criminal record. The reasons for refusal of a surety vary sometimes from one courthouse to another. Duty counsel must be familiar with the acceptability criteria of their respective courthouses.

Duty counsel must explain briefly the concept of a bail hearing to the surety and a surety's role as supervisor of the accused. As well, the surety should be made aware of the allegations, the criminal record and any prior releases of the accused. Failure to do so usually results in difficult and undesirable responses from the surety in court. To assist with the preparation of the sureties, a general information sheet should be provided to them.

If it appears that the only potential surety is questionable, duty counsel may wish to have that surety named to avoid problems with another Justice of the Peace (JP) by taking away the JP's discretion to not accept that person.

It is a significantly effective best practice for Crown counsel, having reviewed the briefs, to meet with duty counsel one half hour before court commences. In this meeting, counsel can discuss which matters are ready to proceed, which are remands, which await counsel, which are consent releases, as well as other information central to each case.

All of these discussions can occur before court commences, minimizing downtime and promoting efficiency.

Bail hearing procedure

Given the fast-paced atmosphere of some bail courts, it is important that duty counsel understand the bail hearing procedure.

Duty counsel may act for any accused who does not have counsel, even if the accused appears in court without a duty counsel interview completed. Normally, duty counsel relies on the worksheet for information. It is appropriate to ask for the matter to be held down for duty counsel to interview the accused.

When the accused first appears in court, duty counsel records on the worksheet whether the matter is a Crown onus or reverse onus. Duty counsel should then endeavour to negotiate a release and its applicable conditions. At the bail hearing, the court decides whether or not to release the accused by considering the three grounds set out in section 515 of the [Criminal Code](#).

Duty counsel must learn to anticipate the concerns of the court and address them with a strong plan of release. Conditions for release may include requiring that the accused:

- Abstain from alcohol;
- Respect curfews;
- Have no contact with a complainant or co-accused;
- Stay some distance from a certain address;
- Reside at a specific address;
- Attend counselling or treatment;
- Surrender a passport; and
- Report to the police station.

Conditions of bail should be recorded on the worksheet.

It is essential that duty counsel play close attention to these conditions. Often the accused is so eager to be released that he or she accepts conditions of release, which are too onerous, unrealistic and likely to be breached. For example, an accused could lose employment because of a strict curfew, or the present release conditions may conflict with prior release conditions. Note that the terms of release should also not be tantamount to a detention order. (e.g.: unrealistic amount for surety).

If the accused's own counsel requests an adjournment and the Crown approaches duty counsel offering a consent release, efforts must be made to contact counsel. If counsel is unavailable, duty counsel should canvass the proposal with the accused to make sure the suggested conditions of release are acceptable. Duty counsel should then proceed as it is in the best interest of the accused to be released.

Duty counsel should also be aware of section 524, which enables the Crown to conduct a revocation hearing if a subsequent charge is laid (in addition to the bail hearing re the new charge). However notice must be provided to the accused of the Crown's intent to conduct a revocation hearing.

It is very important that duty counsel work as a team. Often several duty counsel work on one file. Clear notes on the interview sheets and good communication are essential in providing the best client service.

Community resources

Many resources and agencies can provide assistance to the accused. In some courthouses, these agencies are present in the building. These agencies include:

- Salvation Army;
- John Howard Society;
- St. Vincent de Paul Society;
- Elizabeth Fry Society;
- Aboriginal Court Services;
- Mental Health Services.

These agencies can provide a wide array of assistance such as contacting a surety or help line (416-397-INFO for Toronto and area), locating a shelter or arranging counselling. Arranging help for an accused's problem as part of a release plan is part of a proactive duty counsel role.

Area directors and supervising duty counsel should make books of community resources available to duty counsel where they exist and where none have been prepared, develop a skeleton referral and resource sheet to be used by all duty counsel. For example, in each office in Toronto there is a "Blue Book", which is a directory of community services. This book contains hundreds of services available in the city, as there are many resources and agencies that can provide assistance to the accused.

Bail programs

Duty counsel should be aware of bail programs where they exist. Bail programs are funded by the Ministry of the Attorney General and are located in the Toronto area, Brampton, Hamilton, Barrie, Kitchener and Niagara.

These programs provide professional community supervision for accused who are unable to obtain a surety. The bail program can assist with verification of information provided by the accused. Verification involves confirmation of the accused's community ties including residence, employment or education status, family and involvement with social agencies. The verification is done mainly by phone.

The bail program is only accessible to accused persons who have no prospect of sureties and who meet certain criteria as far as their criminal record is concerned. For example, at 1000 Finch Avenue West courthouse, the bail program does not accept an accused with more than two convictions of Fail to Comply and Unlawfully at Large in the last 4 years. Duty counsel must familiarise themselves with the requirements of the bail program in their courthouse.

Supervision of the accused is offered as a condition of release on a recognisance. Supervisory conditions include the accused maintaining a regular reporting schedule to a bail supervisor. The bail supervisor may monitor court imposed conditions such as remaining in the jurisdiction, obtaining suitable accommodation, abiding by a curfew, notifying authorities of any change of address, abstaining from alcohol or non-prescription drugs, obtaining treatment and seeking or maintaining employment or education. Bail supervisors also contact community resources to assist with specific needs. For example, the Salvation Army may provide a residence, counselling or in custody drug treatment referrals.

Failure to comply with conditions of the bail program usually result in a further charge of Fail to Comply with Recognisance and termination of supervision by the bail program.

Referral to the bail program is usually made in writing. Duty counsel must verify the criminal record of the accused and obtain confirmation from the accused that no surety is available before a referral is made to the bail program. Potential sureties should be called to confirm they will not or cannot help.

Since the accused must be interviewed by the bail program and verification must be made prior to approval, it is essential that referral to bail program be made as early as possible on the day of court. Failing to do so may mean the accused stays in jail another day. Supervision is designed for those who would potentially be released with a surety but do not have one.

While the bail program addresses the primary ground, the stability achieved affects the secondary ground as well. The bail program, however, does not address the secondary grounds as well as a potential surety would.

Resources

Further information with respect to bail hearings can be found in the texts listed below:

The Law of Bail in Canada (2nd edition), Gary Trotter (Carswell, 1999)

Bail Hearings, D. Garth Burrow Q.C. (Carswell, 1996)

The Art of Bail: Strategy & Practice, Joel I. Katz (Butterworths, 1999)

These texts are available in many duty counsel offices. It is duty counsel's responsibility to keep themselves informed and knowledgeable about bail law and procedure. Legal Aid also provides a number of legal memoranda which address bail hearings. These memos are available free of charge on the [LAO Web site](http://www.research.legalaid.on.ca) at (www.research.legalaid.on.ca).

Role of Duty Counsel in Diversion Programs

General

Both the [Criminal Code](#) and the [Young Offenders Act](#) refer to alternative measures as a method of resolving charges without resorting to judicial intervention. A wide variety of programs exist which stress restorative justice, mediation, accountability and increased community involvement.

Diversion is available both at the pre-charge and post-charge stages. Some programs apply to a charge that has been laid, but avoid a court appearance upon completion of the alternative measures.

Unless contacted for advice, duty counsel mainly deal with post-charge programs. Often the Crown will already have decided to offer diversion and the role of duty counsel is to explain the process to the accused, including the contract and available options. Duty counsel should be watchful for cases that are overlooked and could benefit from diversion.

Since successful completion results in the charges being withdrawn or stayed, the process does not result in a criminal record. Participation should be encouraged unless the accused denies responsibility for the offence or there is insufficient evidence to secure a conviction. However, the accused must be made aware of the options and potential consequences and must make the final decision. Some programs require the accused to admit responsibility, (although not criminal responsibility), while others (e.g.: mental health diversion), do not.

Although diversion is totally dependent on Crown discretion, duty counsel play a vital, proactive role in identifying candidates. Even if the charge screening form rejects diversion, duty counsel may succeed in persuading the Crown to offer diversion. For instance, a dated conviction for impaired driving should not prevent entry into a “shoplifting” diversion program.

Although serious offences such as break and enter are not normally diverted, duty counsel may stress that the criminal activity was minor, e.g.: that a young person charged with theft was alleged to have taken a bicycle from a garage.

Often an adjournment is required to consider factors such as the consent of the victim or restitution.

It is important that duty counsel maintain close contact with court workers in diversion programs, such as probation officers, mental health caseworkers, aboriginal court workers and representatives of various agencies, whether or not they have an office at court. Service providers often must be put in contact with the Crown to facilitate the process.

Diversion benefits the accused by making him/her take greater responsibility for his/her actions while avoiding a criminal record. The increased use of diversion also results in cost savings to the court system as well as LAO.

Diversion programs

The following is a list of some of the diversion/alternative measure programs available. Some programs result in an automatic withdrawal or staying of the charge upon entry. Others require proof of compliance, with or without a further court appearance. The development of new diversion initiatives with the approval of all stakeholders may be a useful activity for supervisory duty counsel.

→ NOTE

The list is by no means exhaustive. Procedures vary from area to area. Not all programs are available in all areas.

Adult diversion

Diversion is usually offered to adult first offenders charged with minor offences such as shoplifting (theft under \$5,000), possession under, fraud under, fraud accommodation, and transportation fraud, causing a disturbance or mischief. However, aggravating factors such as the degree of planning and sophistication, gang involvement etc., may preclude entry.

The accused must sign an agreement acknowledging responsibility and identifying the course of action to be followed. The participant may be required to perform a set number of hours of community service work (e.g.: at a food bank), make restitution (e.g.: replace a vandalized car door mirror), make a monetary donation to a charity, prepare a letter of apology or attend counselling.

Alternative measures program for young offenders

Accused young persons and their parents are encouraged to contact duty counsel at the time of the charge by telephoning the 24-hour duty counsel "hotline" or by consulting duty counsel prior to the first court appearance. Duty counsel should assist the young person in completing an application to the Alternative Measures Program (AMP) and submitting it to the Crown as early as possible, often before the first appearance date.

Duty counsel can provide legal advice and representation throughout the AMP process. Even if the Crown has not offered alternative measures, duty counsel may be able to convince the Crown to reconsider.

The following offences (Class 1) are ordinarily admitted into the program:

- Theft where the value of the property is under \$1,000 (s.334(b));
- Take motor vehicle without consent (s.335 (1));
- Possession where the value of the property is under \$1,000 (s.354);
- False pretences where the value of the property is under \$1,000 (s. 362(2));
- False statement where the value of the property is under \$1,000 (s.362);
- Food fraud (s. 364);

- Accommodation fraud (s.364);
- Fraud where the value of the property is under \$1,000 (s. 380(1)(b));
- Mischief where the value of the property is under \$1,000 (s. 430(4));
- Cause a disturbance (s.175).

Although the [Criminal Code](#) has been amended to increase the maximum amount for theft under and related charges to \$5,000, if the value of the goods involved exceeds \$1,000, the offence is considered to be in Class II for the AMP. Class II offences are all [Criminal Code](#) offences not listed in either Class I or Class III.

If the facts of a Class II offence suggest that it is an offence which resembles a Class I offence or is “minor criminal activity,” admission to the AMP may be appropriate. The more a Class II offence resembles a Class I offence in terms of gravity, the more likely is it that admission to the program will be approved.

The [Youth Criminal Justice Act](#) (YCJA) gives increased impetus to the use of extra judicial resolution of offences involving youths including community justice committees for pre-charge diversion.

The following offences (Class III) are never considered for alternative measures:

- Any form of culpable homicide;
- Any [Criminal Code](#) vehicle, vessel or aircraft offences resulting in death or bodily harm;
- Aggravated assault;
- Assault with a weapon;
- Any sexual assault;
- Sexual interference;
- Sexual exploitation;
- Incest;
- Criminal harassment;
- Domestic assaults;
- An assault occurring within the context of a dating relationship;
- Child abuse;
- Alcohol-related driving offences.

A prior young offender record does not preclude the Crown from considering a young person for the AMP, but the presumption in favour of alternative measures for first offenders charged with Class I offences do not apply. A prior AMP entered into more than

one year before the present matter does not preclude eligibility for admission into the program again.

Crown attorneys have been instructed that it is expected that most Class I offences will be diverted, that the accused will be invited to enter the AMP, and that a stay of proceedings will be directed at the first court appearance.

For young offenders charged with Class II offences, the Crown should be canvassed to see if the views of the victim in relation to the AMP are contained in the Crown brief, or whether the police are recommending the program.

Duty counsel should provide the Crown with information about the young person and the offence that may assist in determining the appropriateness of alternative measures. In some instances, an adjournment may be necessary to obtain information or make restitution. Character or reference letters may help.

Duty counsel should file in the duty counsel office detailed information about the youth and his/her eligibility for admission to the program to assist duty counsel appearing on the date to which the matters were adjourned.

The Crown must review and consider all requests for alternative measures even in cases where a negative determination has initially been made. New information or persuasion may result in an offer of admission to the AMP.

Although admission to the AMP often depends upon the exercise of Crown discretion, it is duty counsel's role to be proactive in recruiting candidates for admission to the program. Most candidates for admission to the program are better off taking part in alternative measures than they would be going through the normal court process.

In advising potential applicants to the AMP, the following areas should be canvassed:

- Details of the offence including the right to full disclosure;
- Any prior record including prior AMP involvement and outstanding charges;
- The requirement of admission of responsibility;
- Right to retain counsel and availability of legal aid;
- Right to have a trial, including potential consequences;
- Types of alternative measure that may be imposed, such as a verbal or written apology, community service, restitution, charitable donation, counselling, etc.

Pilot "Youth Justice (YJ) Committees" have been established in Barrie, Cornwall, Kitchener, Ottawa, Port Colborne and Scarborough. The process in these areas differs from the usual referral to Probation Services in that, if the matter is referred to the YJ Committee, the young person and his or her parent are required to meet with community volunteers and the victim at which time the appropriate penalty is determined. An apology is required in every case. Police refer cases to the committee pre-charge, Crowns post-charge.

These committees are testing the community-based approach and effect on victim/community satisfaction and recidivism.

Aboriginal Diversion Program

The role of duty counsel in the Aboriginal Diversion Program is to identify potential cases and refer them to the native court worker. If the accused is accepted into the program, duty counsel advise the accused, attend when the accused sign the diversion agreement, and appear in court when charges against the accused are withdrawn.

In the Aboriginal Diversion Program, the aboriginal person is sentenced by a Community Council, not the court. It is the Council which places the conditions of the diversion agreement on the accused. It may not impose a fine or incarceration. Also, there is no limitation on the type of offence or the criminal record of the accused.

The aboriginal accused is required to sign an agreement acknowledging her/his responsibility for the offence committed.

Diversion of mentally disordered accused

When an accused is facing a minor charge resulting from a mental disorder, he or she may be referred to a person, service or hospital to obtain treatment. A stay of proceedings is entered. This process bypasses the "fitness" or "not criminally responsible" provisions of the code for minor charges. The accused is not required to accept responsibility but must agree to the referral.

If a mental health caseworker is not available, duty counsel should contact the appropriate facility to obtain their consent.

Often the court uses the [Mental Health Act](#) to obtain admission or involuntary civil commitment to a psychiatric facility at which time the charge is often stayed.

Section 22 of the [Mental Health Act](#) provides as follows:

22. (1) Where a judge has reason to believe that a person in custody who appears before him or her charged with an offence suffers from a mental disorder, the judge may, by order, remand that person for admission as a patient to a psychiatric facility for a period of not more than two months.

(2) Before the expiration of the time mentioned in such order, the senior physician shall report in writing to the judge as to the mental condition of the person. R.S.O. 1980, c. 262, s. 16.
23. A judge shall not make an order under section 21 or 22 until he or she ascertains from the senior physician of a psychiatric facility that the services of the psychiatric facility are available to the person named in the order. R.S.O. 1980, c. 262, s. 17.
24. Despite this or any other Act or any regulation made under any other Act, the senior physician may report all or any part of the information compiled by the psychiatric facility to any person where, in the opinion of the senior physician, it is in the best interest of the person who is the subject of an order made under section 21 or 22. R.S.O. 1980, c. 262, s. 18.

“John School” diversion

Customers of prostitutes charged with “communicating” or as being a “found-in” are routinely given the option of attending a one-day course at the completion of which the charge is withdrawn. Persons charged with prostitution-related offences who have no previous criminal record may be eligible to attend.

The “John School” course is designed to familiarize individuals with the impact prostitution has on them and on other groups within their community. The program highlights the negative aspects of prostitution including disease, brutality and the exploitation of women.

“Jane School” diversion (“Choices”)

Prostitutes are offered a 4-week life skills course (free of charge) after completion of which the charge is withdrawn. If the accused has a record, successful completion results in a non-custodial sentence.

The program offers a curriculum of life skills and career development.

Cannabis diversion

First offenders facing simple possession of cannabis products (marijuana or hashish) are able to enter a program similar to adult diversion. Charges are withdrawn after the completion of community service work, etc.

Note that diversion is not offered if the accused is using a cannabis product while driving a motor vehicle, or if the possession occurred in a schoolyard during school hours.

Drug Treatment Court (Toronto)

Phase 1

A drug-dependent first offender charged with simple possession of cocaine or heroin may apply for entry into the Drug Treatment Court (Phase 1). Upon successful completion, the charge is withdrawn.

This innovative pilot program involves judicially supervised treatment which can last from 8 months to 2 years. The accused is required to attend court frequently, attend counselling at the Centre for Addiction and Mental Health, provide regular and random urine samples and abide by the rules of the program. It is a harm reduction program offering methadone maintenance for heroin addicts.

Phase 2

The program also allows entry for repeat offenders and non-commercial, habit-supporting traffickers. However they are required to enter a guilty plea and face custodial sanctions including a lengthy sentence if expelled. Upon successful completion, they are assured of a non-custodial sentence.

This phase includes the additional sanction of bail revocations up to five days.

Often the accused does not apply for legal aid and all court appearances are handled by duty counsel. In certificate cases, duty counsel often act as agent in many of the numerous appearances.

For further information about the Toronto Drug Treatment Court, please contact duty counsel at Old City Hall, Toronto, Telephone: 416-598-0200, ext. 351.

Mediation

Agencies such as Conflict Mediation Services of Downsview may offer mediation services for those charged with certain offences, usually resulting from neighbourhood disputes or private prosecutions. Some courts are designed to offer mediation to both parties prior to proceeding with the charge. Successful completion results in a withdrawal of the charge. Many schools use peer mediation even after a charge is laid, provided the Crown consents. If the court has a school board worker present, he or she may be of assistance.

Mediation may be very intensive and involve numerous professions. For instance Participation, Acknowledgement, Commitment and Transformation (P.A.C.T.) is a program which includes therapists and psychologists.

In some cases mediation may not be entirely successful, but may result in a “peace bond” resolution.

Guilty Pleas

One of the main responsibilities of duty counsel is to advise and represent those who wish to enter a guilty plea. Duty counsel are often able to negotiate a very fair disposition on an early guilty plea.

Duty counsel may assist young offenders and anyone in custody with a guilty plea without consideration of financial testing. Out of custody adults may be subject to financial eligibility testing for this service. See Chapter 6: Financial Eligibility Test for more information.

In addition, LAO has embarked on a program to train duty counsel and provide resources to enable them to take a proactive approach with regard to dispositions. The possibility of a plea should be canvassed with most unrepresented accused.

Prior to providing assistance with a guilty plea, duty counsel must be satisfied of the following:

- The accused committed the act which constitutes the offence;
- The accused possessed the requisite mens rea;
- The Crown is in a position to prove the above (e.g.: no possible defence at trial);
- There are no defects in the information;
- There are no Charter arguments prior to trial (delay etc.);

- There are no special pleas (autrefois acquit, autrefois convict) or defence of res judicata or multiple convictions.

If the accused is guilty of the offence but disputes aggravating factors, the Crown should be informed to determine whether an “issue” trial is necessary to resolve the facts in dispute. If relevant facts are disputed, the judge either strikes the plea and sets a trial date or conducts a trial of the issue in dispute.

The timing of the plea can be important. The accused may wish to take steps beneficial to sentencing. For instance, the accused may wish to make restitution without a court order or may wish to obtain employment, enrol in school or register in an alcohol rehabilitation program.

It is important to consider that the sentence currently under discussion may not be available at a later date. Duty counsel should be aware of the sentencing patterns of each judge in the area. However, any request for an adjournment must have a reasonable basis.

Duty counsel should check to see if a “charge screening” form has been completed. This statement of the Crown’s position may not be definitive and should not be treated as inflexible. Duty counsel can provide additional information to the Crown which may result in a more favourable position.

- Often diversion may not be available but a peace bond may be acceptable, so that a criminal record is still avoided.
- The Crown may accept a plea to a lesser and included offence or agree to withdraw other charges in return for a guilty plea.
- The Crown may agree not to oppose a discharge or probation or may agree to a range of sentence or a specific sentence. However, the accused should always be informed that the judge is not bound by a joint submission.

Many jurisdictions feature mandatory resolution meetings by way of pre-trial with or without judicial involvement. Duty counsel are expected to be fully prepared to negotiate a plea at that stage by advocating for the client and providing additional information. Often as a result of the pre-trial, a plea can be entered the same day.

If an accused contacts duty counsel on the trial date indicating a change of plea, duty counsel should also make sure the Crown witnesses are present prior to assisting with a guilty plea.

Guilty plea instructions when defence indicated

An accused may disclose a defence to a charge in discussions or a defence may be evident on the face of disclosure. Notwithstanding the advice of duty counsel, the accused may insist on pleading guilty “to get it over with”. Duty counsel cannot assist the accused with the plea. Quite often, the accused disagrees with the facts and the judge strikes the plea in any event. If the plea and sentencing occur separately, duty counsel may speak to sentence but should advise the court that duty counsel did not take part in the plea.

Guilty plea for represented accused

Duty counsel should discourage an accused with counsel from pleading guilty in the absence of his/her counsel. Every reasonable effort must be made to contact the retained lawyer to see if he or she can attend later that day. If counsel cannot appear, duty counsel should inform the court of the situation and obtain the accused's consent on the record.

Guilty plea to a serious charge

Occasionally, an accused insists on entering a guilty plea to an offence that will attract a lengthy penitentiary term. Duty counsel should carefully explain the probable penalty to the accused. Where extensive preparation is required, duty counsel should recommend an adjournment to allow for a private lawyer to be retained. If the accused insists on proceeding, duty counsel should obtain written instructions, and the court should be informed of the situation. See [Example - Acknowledgement and Direction](#), page 24. The judge will probably adjourn sentencing in any event.

Duty counsel may still feel that he or she cannot adequately represent the accused and may exercise discretion not to act. The area director should then be contacted to obtain senior counsel to act for the accused as special duty counsel for the plea, either on that date or on the date the matter is adjourned to.

Example - Acknowledgement and Direction

I _____, charged with the offence of _____, acknowledge that I have been advised by duty counsel of my right to request an adjournment which would enable me to apply for legal aid to retain a lawyer of my choice.

I further acknowledge that duty counsel has informed me that the offence is a serious one and that entering a guilty plea will likely result in a lengthy period of incarceration.

I hereby acknowledge that duty counsel has advised me not to enter a plea of guilty at this time, but notwithstanding said advice, I have decided to enter a guilty plea.

I further direct duty counsel to make representations as to sentence although a lawyer of my choice would have more time for research and preparation.

I hereby acknowledge that I have read this direction and fully understand same.

Date

Signature of Accused

Speaking to Sentence

Duty counsel must consider all types of sentencing options such as: discharge (absolute or conditional), fine, suspended sentence with probation, conditional sentence or incarceration. Community service orders, orders for restitution, intermittent sentences and recommendations for temporary absence should also be canvassed.

Duty counsel should inform the court of any difficulties that might flow from the imposition of a particular sentence. For example, a loss of license may result in a loss of employment. A sentence may affect the total time to be served by an accused on parole or subject to mandatory supervision or may result in the deportation of a permanent resident. Similarly, a probation order with a curfew could affect a youth's employability. Duty counsel must bring this information to the attention of the accused and the court.

In speaking to minimum sentences, duty counsel must know the notice requirements, when a conviction is properly treated as a second or subsequent offence, and how prior convictions may be proved.

Often a pre-sentence report has been prepared by a probation officer. The accused must read the report prior to sentencing. If the accused disputes the report, duty counsel can insist upon the attendance of the probation officer who prepared the report.

Criminal Code provisions

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Duty counsel must be aware of the principles of sentencing including totality, mitigating and aggravating factors. Mitigating factors might include an early guilty plea, pre-trial

incarceration (two- or three-to-one credit), lack of a criminal record, co-operation with police, restitution, youthfulness of the offender, employment, conduct of the victim, provocation, stress and the influence of alcohol.

Aggravating factors might include a substantial criminal record, violence, the use of a weapon, breach of trust, racial motivations and prevalence of the offence in the community. For instance there may have been recent publicity over similar incidents such as assaults on taxi drivers.

Rehabilitation must be considered together with general and specific deterrence.

One of the key factors in successfully speaking to sentence is the formation of a “plan” with the accused. For instance, enrolment in a school, drug treatment program, or anger management program or obtaining a residence or employment may give the judge a reason to impose a lenient penalty.

A list of community outreach resources should be available in the duty counsel office.

Order authorizing the taking of bodily substances for forensic DNA analysis

Duty counsel are often faced with a request to obtain an order to obtain a blood sample immediately after conviction. The section of the [Criminal Code](#) that designates the types of offences for which this order can be made is s. 487.04:

“primary designated offence” means

- (a) an offence under any of the following provisions, namely,
 - (i) section 151 (sexual interference),
 - (ii) section 152 (invitation to sexual touching),
 - (iii) section 153 (sexual exploitation),
 - (iv) section 155 (incest),
 - (v) subsection 212(4) (offence in relation to juvenile prostitution),
 - (vi) section 233 (infanticide),
 - (vii) section 235 (murder),
 - (viii) section 236 (manslaughter),
 - (ix) section 244 (causing bodily harm with intent),
 - (x) section 267 (assault with a weapon or causing bodily harm),
 - (xi) section 268 (aggravated assault),
 - (xii) section 269 (unlawfully causing bodily harm),
 - (xiii) section 271 (sexual assault),

(xiv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),

(xv) section 273 (aggravated sexual assault), and

(xvi) section 279 (kidnapping),

(b) an offence under any of the following provisions of the [Criminal Code](#), chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,

(i) section 144 (rape),

(ii) section 146 (sexual intercourse with female under fourteen and between fourteen and sixteen), and

(iii) section 148 (sexual intercourse with feeble-minded, etc.),

(c) an offence under paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.) of the [Criminal Code](#), chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988, and

(d) an attempt to commit or, other than for the purposes of subsection 487.05(1), a conspiracy to commit an offence referred to in any of paragraphs (a) to (c);

“secondary designated offence” means

(a) an offence under any of the following provisions, namely,

(i) section 75 (piratical acts),

(ii) section 76 (hijacking),

(iii) section 77 (endangering safety of aircraft or airport),

(iv) section 78.1 (seizing control of ship or fixed platform),

(v) paragraph 81(1)(a) or (b) (using explosives),

(vi) subsection 160(3) (bestiality in the presence of or by child),

(vii) section 163.1 (child pornography),

(viii) section 170 (parent or guardian procuring sexual activity),

(ix) section 173 (indecent acts),

(x) section 220 (causing death by criminal negligence), (xi) section 221 (causing bodily harm by criminal negligence),

(xii) subsection 249(3) (dangerous operation causing bodily harm),

(xiii) subsection 249(4) (dangerous operation causing death),

(xiv) section 252 (failure to stop at scene of accident),

(xv) subsection 255(2) (impaired driving causing bodily harm),

(xvi) subsection 255(3) (impaired driving causing death),

- (xvii) section 266 (assault),
- (xviii) section 269.1 (torture),
- (xix) paragraph 270(1)(a) (assaulting a peace officer),
- (xx) section 279.1 (hostage taking),
- (xxi) section 344 (robbery),
- (xxii) subsection 348(1) (breaking and entering with intent, committing offence or breaking out),

Duty counsel must determine whether the offence is a “primary” or “secondary” designated offence, as the latter places the burden on the Crown to justify the order. The procedure and considerations involved in making the order are set out in section 487.051 of the [Criminal Code](#):

- (1) Subject to section 487.053, if a person is convicted, discharged under section 730 or, in the case of a young person, found guilty under the [Young Offenders Act](#), of a designated offence, the court
 - (a) shall, subject to subsection (2), in the case of a primary designated offence, make an order in Form 5.03 authorizing the taking, from that person, for the purpose of forensic DNA analysis, of any number of samples of one or more bodily substances that is reasonably required for that purpose, by means of the investigative procedures described in subsection 487.06(1); or
 - (b) may, in the case of a secondary designated offence, make an order in Form 5.04 authorizing the taking of such samples if the court is satisfied that it is in the best interests of the administration of justice to do so.

Exception

- (2) The court is not required to make an order under paragraph (1)(a) if it is satisfied that the person or young person has established that, were the order made, the impact on the person's or young person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.
- (3) In deciding whether to make an order under paragraph (1)(b), the court shall consider the criminal record of the person or young person, the nature of the offence and the circumstances surrounding its commission and the impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

The general body of case law suggests that courts more often than not impose DNA data bank orders on offenders to whom such orders are applicable, especially if they are adults. In many cases, one finds that the orders are imposed with the consent of or without any apparent objection from defence counsel. Furthermore, the DNA data bank legislation has not been successfully challenged under the *Charter of Rights and Freedoms*.

In fact, courts have upheld the constitutionality of parts of the legislation. While the Ontario Court of Appeal did not directly address the constitutionality of the DNA data bank

legislation, its judgments suggest that the legislation generally meets the constitutional requirements of the *Charter of Rights and Freedoms*.

Arguing against the imposition of a DNA data bank order in a particular case does not necessarily involve an onerous level of preparation. Duty counsel should, for example, gather information on his or her client's background and circumstances because this information is useful to the court when it applies the relevant statutory criteria. Duty counsel will likely have to obtain this kind of information in any event for the purposes of the sentencing hearing.

The DNA data bank legislation provides for four types of orders:

- Prospective/primary (person convicted or discharged of a primary designated offence like sexual assault or murder);
- Prospective/secondary (person convicted or discharged of a secondary designated offence like robbery or breaking and entering);
- Retrospective (person convicted or discharged of any designated offence committed prior to the establishment of the DNA data bank);
- Retroactive (person who, prior to the establishment of the national DNA data bank, was declared dangerous offender, convicted of more than one sexual offence for which he or she is serving a sentence of imprisonment of at least two years for one or more of those offences, or convicted of more than one murder committed at different times).

Prospective orders involving a primary designated offence are mandatory. The court is required to make such an order, unless the offender satisfies the court that the impact on the person or the person's privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

Prospective orders involving a secondary designated offence, retrospective orders involving any designated offence, and retroactive orders are discretionary. Except for retroactive orders, the court must be satisfied that it is in the best interests of the administration of justice to make the order.

The particular statutory factors which a court must consider in deciding whether to grant an order are the same for prospective applications involving secondary designated offences, retrospective applications and retroactive applications:

- The criminal record of the person or young person;
- The nature of the offence and the circumstances surrounding its commission; and
- The impact such an order would have on the person's or young person's privacy and security of the person and shall give reasons for its decision.

Victim surcharge

Pursuant to Section 737 of the [Criminal Code](#), the court can levy a victim surcharge upon convicted or discharged accused persons in certain circumstances:

(1) Subject to subsection (5), an offender who is convicted or discharged under section 730 of an offence under this Act or the [Controlled Drugs and Substances Act](#) shall pay a victim surcharge, in addition to any other punishment imposed on the offender.

(2) Subject to subsection (3), the amount of the victim surcharge in respect of an offence is

(a) 15 per cent of any fine that is imposed on the offender for the offence; or

(b) if no fine is imposed on the offender for the offence,

(i) \$50 in the case of an offence punishable by summary conviction, and

(ii) \$100 in the case of an offence punishable by indictment.

Increase in surcharge

(3) The court may order an offender to pay a victim surcharge in an amount exceeding that set out in subsection (2) if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount.

Time for payment

(4) The victim surcharge imposed in respect of an offence is payable at the time at which the fine imposed for the offence is payable and, when no fine is imposed, within the time established by the lieutenant governor in council of the province in which the surcharge is imposed for payment of any such surcharge.

Exception

(5) When the offender establishes to the satisfaction of the court that undue hardship to the offender or the dependants of the offender would result from payment of the victim surcharge, the court may, on application of the offender, make an order exempting the offender from the application of subsection (1).

Reasons

(6) When the court makes an order under subsection (5), the court shall state its reasons in the record of the proceedings.

Amounts applied to aid victims

(7) A victim surcharge imposed under subsection (1) shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time.

Notice

(8) The court shall cause to be given to the offender a written notice setting out

- (a) the amount of the victim surcharge;
- (b) the manner in which the victim surcharge is to be paid;
- (c) the time by which the victim surcharge must be paid; and
- (d) the procedure for applying for a change in any terms referred to in paragraphs (b) and (c) in accordance with section 734.3.

Enforcement

(9) Subsections 734(3) to (7) and sections 734.3, 734.5, 734.7 and 734.8 apply, with any modifications that the circumstances require, in respect of a victim surcharge imposed under subsection (1) and, in particular,

- (a) a reference in any of those provisions to “fine”, other than in subsection 734.8(5), must be read as if it were a reference to “victim surcharge”; and
- (b) the notice provided under subsection (8) is deemed to be an order made under section 734.1.

Section 736 does not apply

(10) For greater certainty, the program referred to in section 736 for the discharge of a fine may not be used in respect of a victim surcharge.

Duty counsel should apply for an exemption from the surcharge, particularly when the accused is indigent.

Pre-trials

A pre-trial may be any one of the following:

- Meeting with Crown;
- Informal meeting with judge and Crown;
- Court appearance with judge and Crown.

Lawyers are frequently requested to waive issues such as admissibility of evidence or Charter arguments at one of the above-mentioned forms of pre-trial. Waivers such as these, or discussions as to witnesses or other evidence to be called at trial are beyond the scope of duty counsel functions, just as appearing on a trial itself is beyond duty counsel’s mandate. Duty counsel should not participate in pre-trials where such issues are canvassed because they are not counsel of record.

Many pre-trials are plea resolution meetings in which only sentence is discussed. Attending at a pre-trial to assist a client for this purpose is an important function of duty counsel, as is negotiating a plea.

Trials and Preliminary Hearings

Appearing at trials or preliminary hearings is beyond the normal function of duty counsel, and neither activity is included in duties of duty counsel enumerated under the [Legal Aid Services Act](#) or Regulations.

Duty counsel do not have time to interview and subpoena witnesses, research case law and marshal evidence. As a result, adequate preparation for most trials is not possible. Duty counsel may provide summary advice regarding the conduct of a trial or preliminary hearing; however, this does not mean duty counsel are on call throughout the trial to give advice.

The following guidelines (called the “Martin Guidelines”) were developed to ensure that duty counsel may on occasion conduct a defence where the accused would face hardship, or to avoid the unnecessary postponement of a trial and the incurring of unnecessary costs.

Duty counsel may conduct a trial if *all* the following conditions are met:

- The accused is financially eligible (see Chapter 6: Financial Eligibility Test);
- The offence is minor (e.g.: summary conviction);
- The trial will not be lengthy;
- The duty counsel is scheduled for that specific court, that day;
- The accused has been informed of his/her right to seek an adjournment and right to retain counsel of choice, through legal aid or otherwise;
- The accused is fully aware of the limited preparation time available to duty counsel;
- The accused expressly requests duty counsel to conduct the trial and provides written instructions (an example of a direction follows);
- The judge is informed of the situation and agrees to duty counsel conducting the trial;
- It would be in the best interests of the accused to proceed that day;
- Authorization is obtained from the area director or duty counsel supervisor.

Example - Instruction to Duty Counsel to Represent Accused at Trial

I _____, charged with the offence of _____, acknowledge that I have been advised by duty counsel that I have the right to request an adjournment to enable me to exercise my right to retain private counsel through legal aid or otherwise to fully prepare for trial. Notwithstanding this advice, I hereby request that duty counsel conduct the trial.

Date

Signature of Accused

Youth Court

Section 3(1) of the [Young Offenders Act](#) states that:

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).

Duty counsel should be aware of the unique sentencing provisions that apply to young offenders. Obtain a pre-disposition report if a period of incarceration including open custody is likely.

Resource lists including all available outreach services should be available in the duty counsel office.

Duty counsel should provide the court with the youth's date of birth, inform the court if a parent is present and whether the child wishes to waive reading of the charges.

Alternative Measures Programs and/or Youth Justice Committees should be thoroughly canvassed (see [Diversion programs](#), page 17).

Often the Children's Aid Society must be reminded of its responsibilities if the child has nowhere to live. Duty counsel might wish to contact the local office and report the information to the court.

Duty counsel should be aware of the Crown directive to proceed summarily in young offender property cases unless there is a procedural necessity or the Crown is seeking secure custody.

If a young person is charged with breach of probation and duty counsel acted at the original sentencing, there must be proof that a copy of the Order of Disposition was given to duty counsel. (*R.v.J.H* January 28, 2002--Court of Appeal- Goudge and Cronk JJ.A-Doherty J.A. dissenting).

Parent/child conflict

[Young Offenders Act](#) section 11:

(8) In any case where it appears to a youth court judge or a justice that the interests of a young person and his parents are in conflict or that it would be in the best interest of the young person to be represented by his own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of his parents.

It may become obvious that the interests of the young person and his or her parents differ substantially. For example, they may indicate that, although their child did not commit the

specific offence alleged or a Charter defence exists, they feel their child should enter a guilty plea for “getting into trouble” or “associating with the wrong crowd”.

A significant portion of the interview should be conducted in the parents’ absence to discuss the offence and ascertain the instructions of the young person. Duty counsel acts for the young person only.

Order for appointment of counsel

[Young Offenders Act](#) section 11:

(4) Where a young person at his trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, where there is a legal aid or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such a program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

(5) Where a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General of the province in which the direction is made shall appoint counsel, or cause counsel to be appointed, to represent the young person.

If the matter cannot be resolved by duty counsel, the young person should be advised to apply for legal aid or retain counsel privately. If the young person applies for legal aid and is refused and the matter cannot be resolved, duty counsel should advise the young person to request a section 11(4) order for the appointment of counsel.

Note that the accused must have applied for legal aid and been refused. If the reason for refusal is failure to provide information, an order will not be considered unless said information is not available to the young person (e.g.: parental income when parents refuse to be assessed).

The judge should enter into an enquiry to determine whether an order should issue. Factors to be considered include whether the parents would assist and whether the child has his or her own source of income. Also, the applicability of sec. 11(8) should be canvassed. (See *R v M(B)* 139 CCC (3) 480).

De novo bail review

Section 8(2) of the [Young Offenders Act](#) states:

Where an order is made under section 515 of the [Criminal Code](#) in respect of a young person by a justice who is not a youth court judge, an application may, at any time after the order is made, be made to a youth court for the release from or detention in custody of the young person, as the case may be, and the youth court shall hear the matter as an original application.

Therefore, if a JP made the initial order it may easily be reviewed by a judge in the same building. Duty counsel can assist the accused with respect to this review.

Review of dispositions

Duty counsel should assist a young person who appears without counsel with respect to an automatic or optional review of disposition pursuant to s.28 or a review of level of custody [s.28 (1)]. However the young person still has the option of applying for legal aid.

Domestic Violence Courts

In domestic violence courts, priority is given to the safety and needs of domestic assault victims and their children. The program involves teams of specialized personnel, including police, Crown attorneys, Victim/Witness Assistance Program staff, probation services, offender counselling staff and cultural interpreters who work together, to better co-ordinate services that are tailored to the needs of victims. Domestic violence courts provide two approaches to domestic violence cases as discussed below.

New domestic violence courts are being phased in throughout the province. Although prosecutions tend to be more efficient and witnesses are less reluctant to testify, duty counsel should not be overwhelmed and assume that a defence will not succeed.

Early intervention and counselling

First-time offenders, who have caused no significant injuries, have not used weapons, and who plead guilty, are held accountable through referral to counselling in the Partner Assault Response (PARS) program, which is a specialized domestic violence intervention program.

The program provides an opportunity for abusers to learn non-abusive ways of resolving conflict. The victim is consulted about this arrangement. Offenders must complete the counselling program to the court's satisfaction and as a condition of bail prior to sentencing.

If the program is successfully completed a conditional discharge is often imposed. If the offender does not complete the program or re-offends during it, new charges are laid.

Co-ordinated prosecution

When the offender is involved in repeat offences or inflicts serious injury, the focus is on prosecution. Specially trained police use enhanced evidence-gathering techniques, including 911 tapes, medical reports and videotaped victim statements. Crown attorneys trained in prosecuting domestic violence cases are assigned and cases move through the courts in a timely manner.

Victims receive support and information throughout the court process from Victim/Witness Assistance Program staff and from the PARS program, while the offender is involved in that program.

Early plea resolution court

PARS deals with assaults between husbands and wives, boyfriends and girlfriends. Cases can involve both same sex and heterosexual partners. Charges are rarely withdrawn in domestic assault cases.

The Early Plea Resolution Court was created to deal with allegations of domestic abuse in a different, more creative way. Not everyone is eligible. The eligibility criteria are as follows:

1. No prior record for a domestic violence related offence;
2. No use of a weapon in the commission of the offence; and,
3. No significant harm caused to the victim.

The accused is required to plead guilty to the charge and to enter into counselling specifically related to domestic violence. The reason for the focus on counselling is that studies have shown that where a partner (usually the woman) is seriously injured or killed, it was after a period of escalating violence following the initial assaults described as "minor".

The counselling sessions consist of one session a week for 16 to 17 weeks - it is a shorter time for women. The accused must attend each session unless there is a valid reason for not doing so. A representative from the Woman's Abuse Council can help arrange the counselling sessions most appropriate to the particular accused. Attempts are made to accommodate work schedules and language barriers. A fee is determined on a sliding scale, but no one is refused for financial reasons.

If the complainant is prepared to have contact with the accused, the bail may be varied accordingly. This is not generally done until the accused has actually started counselling. The complainant will hopefully be present in court or will have been contacted by the police prior to the appearance date.

If the complainant has not yet been contacted duty counsel should adjourn the matter to the next resolution date as the complainant's input with respect to the bail variation is essential.

The complainant's consent to contact must be in writing and is revocable at any time (again in writing). If the accused does not stop contact when requested, he/she will be charged with breaching the recognizance.

The surety does not need to be present when the bail is varied, as the new bail is one in which the accused is released on his/her own recognisance. Upon entering into the new bail the accused's matter is adjourned 20 weeks. During that time the complainant is contacted for his/her input concerning the progress of the accused. A report is also submitted by the counselling agency.

If there have been no difficulties, the Crown then asks for a conditional discharge and a short period of probation. If the accused does not perform well in the 20-week adjournment period or if the agency's report is a negative one, the Crown withdraws the offer of a conditional discharge and ask for a suspended sentence or a more severe penalty.

Sometimes the accused is additionally charged with Failing to Comply. The accused needs to be aware of this possibility, because once a plea is entered it is difficult to withdraw.

The accused is sometimes eager to join the program in order to have contact with his/her partner. If the accused is not guilty, duty counsel cannot assist with the plea. Duty counsel can, however, negotiate with the Crown for a bail variation but this is extremely difficult in domestic situations.

Although the accused benefits from counselling and obtains a favourable result by way of a discharge, duty counsel must be satisfied that the accused is guilty and the Crown can prove the offence. Often the Crown addresses the entire body of the Court and holds out the "carrot" of altering the bail conditions to allow the accused to return to his family in return for a guilty plea.

Duty counsel should speak to each accused in private and canvass all alternatives. For instance, the assault may have been so minor that a discharge would be warranted even without the program. Bail might be altered by way of a review, particularly if the assault is minor and the spouse is content with the accused returning home.

Mental Health Issues

Where it is questionable whether an accused is fit to stand trial, the possibility of diversion must be fully canvassed. An involuntary committal pursuant to the [Mental Health Act](#) coupled with a withdrawal of the criminal charges is often the best course of action.

The Crown may wish to obtain an assessment order. The judge must complete a Form 48 which specifies the reason for the assessment, whether or not the accused is to remain in custody, and the length of time (30 days maximum). Although the presumption is for out of custody assessments, bail often has not been determined.

Duty counsel should be aware that the primary purpose is observation rather than treatment. Also, a secure hospital setting is custodial and may result in a period of incarceration in excess of the appropriate penalty for the offence itself. Therefore duty counsel should generally not consent to such a remand unless instructed by the accused.

The threshold level of fitness is extremely low and most individuals are found fit even if mentally ill. Duty counsel may be in a position to convince the court that the accused can in fact understand the nature or object of the proceedings, understand the possible consequences, and communicate with counsel at an early stage.

If a full hearing is ordered with potential dispositions involving the Review Board, private counsel should be retained.

If the accused is unable to complete a legal aid application, the area director may choose counsel or the judge may invoke section 678.24 of the [Criminal Code](#) and appoint counsel. The latter would result from a refusal of legal aid for financial reasons and a certificate is not issued.

What does “fit to stand trial” mean?

The [Criminal Code](#) contains the following definition of “unfit to stand trial” in s. 2:

“unfit to stand trial” means unable to on account of mental disorder to conduct a defence at any stage of the proceeding before a verdict is rendered or to instruct counsel to do so, and, in particular, unable to on account of mental disorder to

- a) understand the nature or object of the proceedings,
- b) understand the possible consequences of the proceedings, or
- c) communicate with counsel.

If at any point during the court proceedings the judge or justice has concerns about an accused’s fitness to stand trial, the court can sign a Form 48 and order a psychiatric assessment for the purposes of fitness. Some of the questions the psychiatrist asks the accused are:

- Does the accused know what he or she is charged with?
- Does the accused know what an oath is?
- Does he or she know the penalty for lying under oath?
- Does he or she know the purpose of a trial?
- Does the accused know the people who are in the courtroom and the role of the judge, Crown attorney and defence/duty counsel?
- Does he or she know what pleas are available?
- Does the accused know the consequences of pleas and convictions on charges?

In certain cases, duty counsel may avoid the assessment by initially posing the above questions to the accused in court to illustrate that the accused is fit even though the facts of the case may be bizarre and the accused suffers from mental illness.

After the accused has been assessed for the purpose of fitness, he or she returns to court and appears before the judge. The judge makes the final decision about whether the individual is fit to stand trial.

It is important to keep in mind that an individual’s mental status can fluctuate greatly and can impact on his/her fitness to stand trial. The judge is not bound by the opinion of a psychiatrist. It is not unusual for a psychiatrist to find the individual unfit and the judge to find the individual fit and vice versa.

An accused may be certifiable under the [Mental Health Act](#), present with psychotic symptoms and still be fit to stand trial. The accused only needs a rudimentary understanding of the court process to be found fit to stand trial.

What happens if accused is found fit to stand trial?

If the individual is found fit to stand trial he or she can then proceed with the regular court process.

What if accused is found unfit to stand trial?

If an individual is unfit to stand trial there are a number of options available depending on the individual's circumstances. The goal of duty counsel is to find any possible means of releasing the individual from custody.

Some possible next steps for unfit individuals are as follows:

- In some situations an individual may be given bail and released to the community so the mental health court worker can work with the individual. In these situations the pending charges are often minor and the individual agrees to work with the mental health court worker.

In many situations this has proved to be a successful alternative. The individual does not spend any more time in custody, there is no need to access a forensic bed, and quite often the individual completes mental health diversion successfully at a later date.

- If the individual is clearly unfit, the court may decide to adjourn the matter for a few days or a week. During this time, if the individual's state of unfitness was caused by substance abuse, he or she will have undergone detoxification by the next court date.

If it is known that the individual has a psychiatric diagnosis, medication may be offered at the detention centre in the hope that this will resolve the fitness issue.

- If an individual's fitness is unclear or if the court knows very little about their psychiatric history, a 30 day assessment bed is booked at a secured facility such as the Assessment and Triage Unit (ATU) at the Centre for Addiction and Mental Health in Toronto. During this time the team at the ATU assesses the individual in the hopes of obtaining more information to assist with any treatment decisions.
- A treatment order may be issued if the individual is clearly unfit and there is a psychiatric history showing that he or she has responded to treatment in the past. In the Mental Health Court at Old City Hall Courthouse, treatment orders are issued after all other possibilities have been exhausted.

The criteria for treatment orders are set out in sections 672.59-62 of the [Criminal Code](#) (after found unfit but prior to disposition). The forensic psychiatrist is required to testify and give evidence to the court about why a treatment order is appropriate. The treating facility must consent to accepting a treatment order and cannot keep the individual for longer than sixty days.

- If a full fitness hearing (e.g.: more than a 30 day assessment) is scheduled, duty counsel should not act. Even if the accused does not qualify for legal aid, counsel may be ordered by the Court pursuant to section 672.24.
- Duty counsel should not take part in disposition hearings or Review Board Hearings, as substantial preparation is required.

Court ordered psychiatric assessments under the [Mental Health Act](#)

If an individual is fit to stand trial, but the court remains concerned about the individual's mental status, a psychiatric assessment may be ordered under provincial legislation to obtain a report on the accused's mental condition. The Crown or the defence may request this.

The sections of the [Mental Health Act](#) for court ordered assessments are as follows:

1. Judge's order for examination for an out-of-custody individual:

21. (1) Where a judge has reason to believe that a person who appears before him or her charged with or convicted of an offence suffers from a mental disorder, the judge may order the person to attend a psychiatric facility for examination. (Form 6).

2. Judge's order for admission of an in-custody individual:

22. (1) Where a judge has reason to believe that a person in custody who appears before him or her charged with an offence suffers from mental disorder; the judge may, by order, remand that admission as a patient to a psychiatric facility for a period of not more than two months (Form 8).

In both situations, the psychiatric facility must agree to accept the individual.

Mental Health Court (Toronto)

If a person's fitness to stand trial is questioned, lengthy delays are common. In Toronto, a Mental Health Court was created to rectify the problem. It consists of a judge, Crown, duty counsel, specially trained court officers, two on-site mental health court workers, a case manager, and a forensic psychiatrist on site each afternoon. All those staffing the court are sensitive, compassionate and aware of current mental health issues.

The psychiatrist provides assessment for fitness and treatment orders purposes. If he or she feels it is warranted, the psychiatrist can certify individuals under the [Mental Health Act](#). Some psychiatrists offer short-term follow-up with individuals until they find a community physician.

Duty counsel keep individual files and can use the resources that are in the court re: psychiatric care, housing, etc. Assistance is therefore available not only for fitness issues but also for bail and sentencing matters.

In-Custody Legal Aid Applications

In some areas, duty counsel complete legal aid applications in provincial and federal institutions. A special "In-Custody Application" Form is completed. Below are the instructions for completing an in-custody legal aid application.

The object is to collect all information in the application form to determine eligibility for legal aid assistance. In-custody applications are available in two formats. One is for federal

institutions and one for provincial institutions. Please make sure that you complete the appropriate form. In-custody application forms are available at all legal aid area offices.

Guide to completing legal aid in-custody applications

All communications including the application and all other disclosures, between a client and a representative of Legal Aid are confidential and cannot be disclosed to any other party except the client's lawyer. Therefore, any information you obtain in a legal aid application is privileged between you, the client and LAO.

1. Collect answers from the Self-Identifying Questionnaire and submit the form with the completed legal aid application to your local area office (instructions and questionnaire are included in Chapter 7: Appendices and Forms – Appendix 8 – Self-Identifying Questions for In-Custody Legal Aid Applications, page 7-15..

For clients in federal institutions, identify their Federal Penitentiary Number (FPS) and the institution on the application.

2. **Collect client information.** This includes:
 - o Name (as well as any aliases);
 - o Home address and mailing address;
 - o Social insurance number;
 - o Date of birth;
 - o Marital status and living arrangements (prior to incarceration);
 - o Residency status;
 - o Length of time in Ontario.
3. Clearly define the legal issue and identify the client's choice of lawyer. In the case of an appeal application, you must complete the Criminal Appeal Information form as found in Chapter 7: Appendices and Forms – Appendix 9 – Criminal Appeal Information Form, page 7-17.
4. Identify the particulars of **any other pending legal action** the client may have and include the lawyer's name involved in that action.
5. **Collect financial information.** Not everyone who is incarcerated qualifies for legal aid assistance. Therefore it is imperative that you ask about bank accounts, inmate accounts, property owned, continuing income such as pensions, CPP or WSIB and any other assets such as Guaranteed Investment Certificates (GICs), RRSPs, etc. It is also important to identify if the client has employment to return to upon his/her release.
6. **Complete the consent to inspect assets.** Read or give an accurate synopsis of the Consent to Inspect Assets and explain what it is. Enter the client's name, city/town where the application is being completed and the date. Have the client sign and sign yourself as a witness.

7. **Explain warning to applicant.** Read or give an accurate synopsis of the warning.

Once the application is completed along with any accompanying forms, forward the application to your local area office as soon as possible.

For more information, contact the Financial Assessment Department at 416-979-2352, or by e-mail to eligibility@lao.on.ca.

Inmate Appeals

Duty counsel may assist an inmate to complete a “Form A - Prisoner Appeal”, which are available from the institution or area office. The Prisoner Appeal is prepared in writing and delivered to the institution, which is responsible for the typing and filing of the appeal. This process must be completed within thirty days of the sentencing date, whether the inmate is appealing conviction, sentence or both.

If the grounds of appeal are not apparent, general terms such as “the conviction was against the weight of evidence” or “the sentence was unduly harsh having regard to all the circumstances” may be all that is available. A “Criminal Appeal Information Form” should be completed as found in Chapter 7: Appendices and Forms – Appendix 9 – Criminal Appeal Information Form, page 7-17.

If the inmate applies for legal aid, a “Notice of Intention to Appeal” is filed with the Superintendent. This alerts the Court of Appeal to the fact that the inmate has applied for legal aid and, that if granted, the inmate’s counsel will file the appropriate appellate documentation. If legal aid is not granted the prisoner appeal is heard without the involvement of counsel.

In Halton, Brampton, Newmarket, Oshawa and Toronto a streamlined pilot procedure for “Fast Track Appeals” has been developed. If the sentence imposed is not less than 60 days and not more than one year and the appeal is not complex, the inmate may choose this option which uses a special panel of lawyers. The lawyers are familiar with the process and strictly adhere to the time limitations. As a result, the appeal is heard within a reasonable time. The various forms which may be used by duty counsel are available at legal aid area offices in the GTA.

Services for Aboriginal People

General

When working with aboriginal people as clients, duty counsel should have an understanding of the legislation in both family and criminal law that relates specifically to aboriginal people. Further, duty counsel must recognize that the unique languages, cultural and social backgrounds of their aboriginal clients can have great relevance to the outcome and to the clients’ understanding of the court proceeding. Finally, it is important that duty counsel are familiar with the services that are available in the local court and community to assist aboriginal people.

The [Indian Act](#) empowers aboriginal communities to pass by-laws on such issues as possession and consumption of alcohol. Duty counsel should be aware of the relevant legislation that deals with matters such as interim release and sentencing options on Band By-Law offences ([Provincial Offences Act](#)).

Particularly in northern Ontario courts, duty counsel must have knowledge of specialized offenses relating to aboriginal law such as Band By-law breaches and the *Gladue* (see discussion below) and *Corbiere* decisions. Duty counsel must also be familiar with firearms and FAC legislation and hunting, game and fish regulations.

Duty counsel must be sensitive to the fact that many aboriginal people rely on hunting, trapping and fishing for their livelihood or survival. In firearms cases, if rifles are seized or prohibited, the accused loses his whole livelihood and food source. Duty counsel must recognize the severe impact that a firearms prohibition may have on an aboriginal client.

To many aboriginal people, the Canadian justice system is an alien process, operated by strangers in a fashion quite unlike the traditional aboriginal concepts of justice and healing. To a person from a remote fly-in community whose first language is Ojibway or Cree, being in custody can be a frightening and bewildering experience.

Conversely, an aboriginal person from an urban centre may have built up deep resentment toward our justice system, and may feel it has put his or her life in a “revolving door” pattern of being constantly in and out of custody. In either situation, duty counsel must be familiar with the agencies and services that can assist them and their clients in effectively managing their case.

One of the most important services duty counsel should be aware of is the availability of court interpreters. Particularly in the North, many aboriginal persons speak little or no English or French. Duty counsel must be satisfied that the client can communicate with them in private and can understand English or French well enough to follow an often confusing court proceeding, where various strangers will be speaking, often in rapid succession. If in doubt, duty counsel should have the court interpreter available, and should ensure the client comprehends at all steps of the proceeding.

Many communities across Ontario have a branch of the Ontario Federation of Indian Fellowship Centres that provides a wide range of services to aboriginal people in the court system. Depending on the demand, some Fellowship Centres employ aboriginal court workers. They are important liaisons between lawyers and clients, their families and communities. The Centres may also provide addiction and mental health counsellors who attend at jails and where they may, unlike in some correctional facilities, provide counselling for persons on remand. They can also be important resources for accessing counselling and treatment facilities for persons on release.

Most aboriginal communities take an active interest in assisting band members who are going through the court process. Many have developed justice tribunals and have implemented restorative justice techniques to try to divert many criminal charges back to the community level. It is important that duty counsel know which communities offer these programs, and the relevant contacts. Further, many courts in Ontario place heavy emphasis on input from aboriginal communities on such issues as sentencing and interim release.

Duty counsel should, where appropriate, work with Chief and Council or community legal workers to obtain this kind of input.

The Gladue Court

On April 23, 1999, the Supreme Court of Canada released its decision in *R v. Gladue* [1999] 1 S.C.R. 688. The decision provided the Supreme Court's first interpretation of s. 718.2 (e) of the [Criminal Code](#). The section, which was part of a comprehensive series of amendments made in 1996 to the sentencing law in Canada, says:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

The court stated that these amendments represented a change in the way judges should approach the sentencing process (para. 33). The court noted that Canada, compared to other countries, showed an over-reliance on incarceration as a response to criminal activity. This was particularly the case with respect to aboriginal people.

If over-reliance upon incarceration is a problem in the general population, it is of much greater concern in the sentencing of aboriginal people. After canvassing numerous studies, commissions and reports on aboriginal people and the criminal justice system, the court concluded:

These findings cry out for recognition of the magnitude and gravity of the problem, and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. (para 64).

In response to these concerns a group of judges, academics and community agencies met for a year to discuss how to meaningfully develop a response to the *Gladue* decision at the Old City Hall Courts in Toronto. The result was the creation of the *Gladue* (Aboriginal Persons) Court. The objective of the court is:

To establish this criminal trial court's response to *Gladue* and s.718.2 (e) of the [Criminal Code](#) and the consideration of the unique circumstances of aboriginal accused and aboriginal offenders.

The court is available to all aboriginal persons - Indian (status and non-status), Métis and Inuit who wish to identify themselves as such. An aboriginal court worker from Aboriginal Legal Services of Toronto (ALST) may assist the court should questions arise as to an accused's identity.

While the court is open to all accused aboriginal persons, no person is required to have his or her charges heard by the court. Aboriginal individuals are free to have their matters dealt with in any court. However once a matter is heard in the *Gladue* (Aboriginal Persons) Court, it will normally continue in that court until it is resolved. The court sits Tuesday and Friday afternoons, however this schedule may change if volume dictates.

The *Gladue* (Aboriginal Persons) Court performs no different activities than any other court at Old City Hall, although it offers all of them in one court: bail hearings and bail variations (with consent of the Crown attorney), remands, trials and sentencing. What distinguishes the court is that those working in it have a particular understanding and expertise of the range of programs and services available to aboriginal people in Toronto. This range of expertise allows the court to craft decisions in keeping with the directive of the Supreme Court in *Gladue* because the information required to develop such responses is put before the court.

The *Gladue* (Aboriginal Persons) Court redistributes existing resources. The Court has a dedicated Crown attorney, duty counsel, probation and parole officer and court clerk. ALST's aboriginal court worker works closely with the court. The only new position created in response to the development of the court is that of the Aboriginal Caseworker - an employee of ALST who is available to defence counsel to assist in the preparation of sentencing reports to the court. This position has been funded initially by a grant from Miziwe Biik Aboriginal Employment and Training. Initially, four judges rotate through the court.

In order to assist all who are involved with the court, ALST has agreed to co-ordinate training and education sessions on relevant issues. These sessions will also be made available to members of the defence bar who wish to take part in them.

The Supreme Court of Canada decision in *R v. Gladue* stands as an important reminder for duty counsel to constantly be considering the sentencing provisions of the [Criminal Code](#) relating to aboriginal offenders as described at s. 718.2(e). The disproportionate number of aboriginal persons in correctional facilities has forced the courts to consider the broad range of factors that bring many aboriginal people before the courts, and to respond with more creative sentencing options. For more information on the *Gladue* (Aboriginal Persons) Court please contact Jonathan Rudin, Program Director, Aboriginal Legal Services of Toronto - 416-408-3967 ext. 226.

Duty counsel in the far North

Nishnawbe-Aski Legal Services Corporation serves 48 aboriginal communities of Nishnawbe-Aski Nation (NAN). These communities are located in remote northern Ontario and most are accessible only by air. Chartered aircraft transport duty counsel, often with the Crown attorney and (rarely) with the judge. There are frequent cancellations due to weather or community crises.

In the 48 communities of NAN, courts are held on average of 359 times a year, including Criminal Court, JP Court and Advance Days. Some communities have a minimum of three courts per year and some as many as two courts per month. Fly-in courts are held on

average of three to four times a year. Duty counsel are often the first and only lawyer contacts for NAN members.

Advance days permit duty counsel to be present in the community for one full day prior to the court day to meet with clients, review Crown disclosure and confer with the Crown. Duty counsel often stay overnight in the community and see clients in the evening.

Duty counsel depend on community legal workers for translation, communicating with clients and understanding community dynamics. Duty counsel need to explain basic legal rights and procedures because of the low level of understanding of the judicial system in these remote communities compared to urban areas.

Cross-cultural training is provided by NALSC to assist duty counsel to be culturally sensitive (e.g.: impact of residential school, importance of elders, etc.). Duty counsel must be knowledgeable and informed of emerging aboriginal justice systems such as restorative justice and community accountability conferencing.

Panel lawyers attend clinic days and public legal education sessions to educate NAN members on legal issues and to provide the opportunity of one-on-one consultation with clients.

Duty counsel face unique issues relating to the availability of police, peacekeepers, relationships within the community amongst families, band council, chief and regular band members.

The daily rates paid by LAO for work in fly-in courts in the North are as follows:

- Tier I - up to 5 years experience: \$739.00 per day;
- Tier II - up to 10 years experience: \$831.00 per day;
- Tier III - over 10 years experience: \$924.00 per day.

These rates are being reviewed in light of the 2002 tariff increases. Full details on how the northern incentives are being implemented are being worked out. Check the [LAO Web site](#) for more details on how to bill for these special northern rates.

Challenges in northern and remote areas

Very few lawyers take family law cases because of difficulties such as serving documents, enforcing orders and a low tariff rate. New time limits present difficulties for the children and parents involved in child welfare cases.

The demeanour of the aboriginal individual in court is culturally unique in that it is considered rude to look people in the eye. The accused may laugh at inappropriate times because of nervousness. However, this is not considered disrespectful. Often the accused may feel that pleading "not guilty" is a lie. Victims and accused are not assertive.

Clients in remote fly-in communities face challenges in obtaining lawyers, child representation and long delays in proceedings. An adjournment may be as long as three months.

Duty counsel must deal with long dockets and the failure of clients to attend at court because they are out of the community, frequently for medical purposes or traditional hunting days.

For more detailed information regarding aboriginal diversion in criminal matters, please see [Diversion programs](#), page [17](#).