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## Chapter 6: Financial Eligibility Test

Section 1(3) of Ontario Regulation 107/99 to the [Legal Aid Services Act, 1998](#) provides as follows:

1. (3).The financial eligibility requirements for applicants for legal aid services to be provided by duty counsel are as set out in the document entitled "Duty Counsel: Financial Eligibility Test", being chapter 6, as revised December 13, 1999, of the Duty Counsel Manual dated January, 1996 and produced by Legal Aid Ontario.

Chapter 6, which immediately succeeds this preface, is therefore in a form mandated by regulation and cannot be changed without amending the regulation.

Financial Eligibility Forms for duty counsel services and for Advice Lawyer services are included as in Chapter 7: Appendices and Forms - [Appendix 16: - Financial Eligibility Test Form for Duty Counsel](#), page [7-27](#).

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### Policy

The financial eligibility test **must** be conducted if the client is seeking duty counsel assistance in relation to specific listed legal services and, if in providing summary advice, there is information indicating the client is able to retain counsel privately.

The financial eligibility test for legal aid duty counsel services is based on an income and asset test. If the individual tested has income above the cut-off levels and/or assets, which exceed the exemption level, duty counsel services are not provided and the person is advised to retain counsel privately or to represent himself/herself.

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### Reasons for a Financial Eligibility Test

- Legal Aid Ontario wishes to focus duty counsel services more closely on Legal Aid's core clients and to eliminate service for those people who can afford private counsel.
- Publicly funded services should be directed to those people who are most in need. By restricting duty counsel service, Legal Aid Ontario is focussing on offering better service to its clients and using limited funding in an efficient manner.
- Establishing a formal financial eligibility test for duty counsel services ensures the consistent treatment of clients across the province.

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### Statutory Authority

- Section 2 of the [Legal Aid Services Act](#) states that an "applicant" means a person who applies for or receives legal aid services. Legal aid is defined to mean professional services provided under the Act and the regulations. This includes duty counsel services.

- Section 97(2)(c) of the [Legal Aid Services Act](#) states the Lieutenant Governor in Council may make regulations prescribing financial eligibility requirements for an individual to receive legal aid services.
- Section 24(3)(3) of Regulation 106/99 states that a person who has been taken into custody or summoned and charged with an offence may obtain the assistance of duty counsel.
- Section 24(2) of Regulation 106/99 states duty counsel shall assist persons in the Family Court and Ontario Court of Justice with advice, review of documents, representation at interim hearings, pre-trial and show cause hearings and negotiation of settlements, consent orders and mediation.
- Section 16 (1) of the [Legal Aid Services Act](#) states an individual is eligible to receive legal aid services if he or she meets the prescribed financial eligibility guidelines.
- Section 17(3) of the [Legal Aid Services Act](#) states an applicant shall provide financial information necessary for the Corporation to assess whether the applicant meets the eligibility requirements.

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### When is the Financial Eligibility Test Required?

Financial testing is not required for all individuals seeking duty counsel assistance.

- The test is only conducted if duty counsel has reason to believe the client does not qualify for assistance. Reasons must be based on objective information provided by the client or obtained through a review of information. Subjective reasons alone are insufficient to warrant conducting the financial eligibility test.
- It is conducted for specific services provided by duty counsel at court and for all services provided by the Legal Aid Advice Lawyer. No financial testing is required for services provided in jails, detention centres, hospitals, or other similar locations.

Duty counsel services at court are available only to individuals who are appearing in court on the day services are requested. Those who are not appearing in court that day are directed to return on the court date set or to obtain assistance from the Legal Aid Advice Lawyer or Family Law Information Centres (FLIC). Exceptions to this policy are those who are seeking assistance for alternative measures or diversion prior to the court date and those who need assistance to be put on the court list (i.e. bench warrant).

At some point, services which do not require financial testing might become a service for which financial testing is possible. At that point, where there is evidence of financial ineligibility, the Financial Eligibility test may be conducted before proceeding.

*Examples:*

1. After reviewing the synopsis and determining that a person should enter a guilty plea, and after obtaining information for the purpose of sentencing that the client owns a home, operates a business and has substantial assets, the financial eligibility test is conducted prior to continuing.
2. After advising a client regarding support obligations and reviewing the financial statements provided for court, and noting the client has significant income and assets, the financial eligibility test is conducted prior to preparing for and appearing on a motion.

## Criminal Court

Individuals charged under the [Young Offenders Act](#) are exempt from financial testing. Incarcerated clients are also exempt.

Duty counsel services in criminal court which may require financial eligibility testing are identified in the following chart:

No Financial Testing	Financial Testing Possible
<ul style="list-style-type: none"> <li>▪ Taking an application for legal aid</li> <li>▪ Advice without a court appearance</li> <li>▪ Referrals</li> <li>▪ Adjournments</li> <li>▪ Contested bail hearing</li> <li>▪ Consent release/variation</li> <li>▪ Pre-trial</li> <li>▪ Diversion/alternative measures</li> <li>▪ Withdrawal of all charges</li> <li>▪ Acting at the request of private counsel</li> <li>▪ Telephoning sureties, counsel, etc</li> <li>▪ Other</li> </ul>	<ul style="list-style-type: none"> <li>▪ Guilty plea</li> <li>▪ Speaking to sentence</li> <li>▪ Trials [in those limited situations approved under other guidelines]</li> </ul>

## Family Court

Duty counsel services in the family court and the family branch, which may require financial eligibility testing, are identified as follows:

No Financial Testing	Financial Testing Possible
<ul style="list-style-type: none"> <li>▪ Taking an application for legal aid</li> <li>▪ Advice</li> <li>▪ Adjournments</li> <li>▪ Obtaining an uncomplicated consent order</li> <li>▪ Show cause hearings child protection</li> <li>▪ Reviewing Family Court documents</li> <li>▪ Prepare Family Court documents</li> <li>▪ Emergency matters</li> <li>▪ Other</li> </ul>	<ul style="list-style-type: none"> <li>▪ Representation at motion</li> <li>▪ Representation at pre-trial</li> <li>▪ Trials [in those limited situations approved under other guidelines]</li> <li>▪ Garnishment hearings</li> <li>▪ Show cause hearings Family Support Plan</li> <li>▪ Negotiations</li> <li>▪ Settlements</li> </ul>

When it becomes apparent that the time required to obtain a consent order or settlement will exceed twenty (20) minutes of duty counsel time (including advice, and writing the agreement, duty counsel may consider conducting a financial eligibility test.

Similarly, duty counsel should assist with a settlement or a motion if services can be provided in less than twenty (20) minutes without considering the need for financial testing. If within the first 20 minutes the matter cannot be resolved and the parties agree that the matter will be adjourned without arguing the terms of adjournment, financial testing is not considered.

Where both parties in a matrimonial matter are assisted by duty counsel and one qualifies for full duty counsel service while the other may not, discretion may be exercised to waive financial testing and provide assistance. Duty counsel should consider whether the issues are likely to be resolved that day and whether it is in the best interest of all parties involved to proceed that day with duty counsel.

## Legal Aid Advice Lawyer

Financial eligibility testing **must** be conducted for any service, including advice, provided by the Advice Lawyer where there is reason to believe the person is able to retain counsel privately.

## Other Duty Counsel Services

No financial eligibility testing is conducted for duty counsel services provided under the [Mental Health Act](#), in jails, and for taking legal aid applications.

## Who is Included in the Test?

All members of the applicant's family unit are included in the financial eligibility test. The family unit includes the applicant, a spouse or same-sex partner, and any dependent children but does not include any other family members. The applicant is required to disclose financial information for all members of the family unit. For the most part, disclosure of financial information is provided verbally by the applicant and not directly from the other family members.

A test may be conducted on the parents of a client who is 18 years of age or older and fully supported by the parents if there is reason to believe the parents are able to retain counsel privately and after considering the seriousness of the legal action. In general, the policy of the justice system is to provide services to young people facing serious charges.

### Spouse or same-sex partner

The definition of a spouse is in keeping with the [Family Law Act](#) and is defined to be:

- A person who is legally married to the applicant and who is either living with the applicant or apart from the applicant for reasons of employment, schooling, incarceration, institutionalization.
- A person of the opposite sex who is living with the applicant and although not legally married to the applicant
  - has cohabited continuously with the applicant for a period of not less than three years; or
  - has cohabited with the applicant in a relationship of some permanence and is together with the applicant, the natural or adoptive parent of a child;
- A person of the opposite sex who is living with the applicant and although not legally married to the applicant, self declares an equivalent to married status.

The definition of a same-sex partner is in keeping with the [Family Law Act](#) and is defined to be:

- A person of the same sex who is living with the applicant and
  - has cohabited continuously with the applicant for a period of not less than three years; or
  - has cohabited with the applicant in a relationship of some permanence and they are the natural or adoptive parents of a child;
- A person of the same sex who is living with the applicant and makes a personal declaration of an equivalent to married status.

## Dependent child

A “dependent child” is a child who is unmarried, under age 18 or enrolled in a full-time program of education, and if age 16 or older has not withdrawn from parental control. A dependent child includes an adopted child.

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## Income Test

In accordance with the standards authorized under section 97(2)(c) of the [Legal Aid Services Act](#), the gross income of the applicant is defined to include all payments of any kind received by or on behalf of the applicant, the spouse or same-sex partner and any dependent children.

This includes but is not limited to income from:

- Employment income including salaries, wages, commissions and bonuses;
- Social assistance, Canada pension, Old Age pension, other pensions and disability benefits;
- Employment insurance benefits;
- Workers compensation;
- Rental income;
- Support received;
- Investment income or income from annuities and income funds;
- Income from a business.

The total gross income from all sources (annual or monthly) is recorded in the financial eligibility form by selecting the applicable income range. Those with income above the cutoffs, do not qualify for duty counsel assistance.

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## Gross Income Cutoffs

Family Size	Monthly Gross Income	Annual Gross Income
1	\$1,500	\$18,000
2	\$2,250	\$27,000
3	\$2,583	\$31,000
4	\$3,083	\$37,000
5 +	\$3,583	\$43,000

## Asset Test

### Liquid assets

Where the total value of liquid assets exceeds the standard exemption level, the applicant does not qualify for duty counsel assistance. The exemption level for all applicants regardless of family size is **\$1,500**.

Liquid assets are defined as all assets owned by the applicant, the spouse or same-sex partner, or dependent children that can be readily converted to cash. This includes but is not limited to: cash, Canada Savings Bonds, bonds, stocks, debentures, RRSPs (not locked in) Guaranteed Investment Certificates, mutual funds and any interest in assets held in trust.

Liquid assets do not include vehicles, household furnishings, and tools or equipment necessary for employment.

For a person who owns an incorporate business, assets and property owned by the corporation are included.

### Real property

Real property, including land and buildings, is considered an asset that can be used for a private retainer. Duty counsel services are not provided if property is owned by the applicant, the spouse or same-sex partner or the dependent children.

An exception is made for the applicant who has no income if the property is an asset that is in dispute in a family law matter.

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## Client Non-Cooperation

Applicants who refuse to provide financial information or who are unwilling to undergo the financial assessment when asked, do not qualify for duty counsel assistance for the specific services which require financial testing.

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## Exceptional Circumstances

Duty counsel may exercise discretion and provide service if financial ineligibility is uncertain.

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## Verification of Financial Information

Financial information is provided verbally. There is no requirement for an applicant to provide verification other than as may be provided during the duty counsel interview.

Duty counsel may review financial statements prepared for court and any other documents that are available.

In the event information is provided during a court proceeding that indicates a person does not qualify for assistance, duty counsel should continue with the representation in court.

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## Appeal Process

There is no right of appeal from the decision of duty counsel to deny assistance. A person who disputes the decision to deny duty counsel assistance may be referred to the local Legal Aid area office to complete a detailed financial assessment.

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## Freedom of Information

Under the Freedom of Information Policy for Legal Aid Ontario, an applicant is entitled to a copy of the Financial Eligibility Form if requested.

Copies of this Policy Manual may also be made available and can be obtained from the area office or the Provincial Office.

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## Financial Eligibility Form - Reporting Process

When the financial test is required, complete the Financial Eligibility Form and ask the client to sign the declaration.

As part of completing the Financial Eligibility Form, it is important to check off the services requested by the applicant. Check off all substantive services requested. The Financial Eligibility Form is not to be confused with the duty counsel account forms and must be completed in addition to the account form.

The completed Financial Eligibility Form is forwarded to the Provincial Office attached to the Duty Counsel Account Forms. **Forms must be forwarded within a week of completion of the duty counsel service with the account form.**

It is important to ensure the form has been fully completed prior to forwarding it to Provincial Office.

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## When the Judge Orders Duty Counsel to Act

Duty counsel have a professional obligation to refuse to provide assistance if adequate representation cannot be provided because of time limitations due to other obligations or for other reasons. The responsibility and primary obligation of duty counsel is to ensure that those who need assistance most receive representation.

If a client fails the eligibility test, duty counsel are not authorized to represent the individual. Legal Aid Ontario will not pay for services provided to financially ineligible clients nor may duty counsel charge the client privately. If possible, assistance to retain private counsel available in court that day may be provided.

The judge may be advised that Legal Aid Ontario has a legal opinion to the effect that the court has no jurisdiction to order duty counsel to perform a specific service for a specific client and that duty counsel are not to be paid for such services.

Duty counsel are not expected to risk being in contempt of court. The court should be advised that duty counsel are not retained by Legal Aid to act. Any services provided to an ineligible client are provided *pro bono*. Duty counsel may wish an adjournment to seek the assistance of counsel if threatened with a citation for contempt. If duty counsel does act, the order should be noted for the record and a copy of the transcript requested and sent to the area office. The area director or provincial office should be notified of all situations in which duty counsel act as the result of a judge's order.

### CAUTION

Information in this chapter may contradict information in other sections of the Duty Counsel Manual. This chapter takes precedence over any conflicting statements that predate this document.