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# ***Duty Counsel Manual***

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LEGAL AID ONTARIO  
AIDE JURIDIQUE ONTARIO

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For more information, please see [LAO Contact Information](#), page [I](#).

*Ce document est disponible en français.*

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## Chapter 1: Introduction

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### Statutory Mandate

The Ontario government introduced legislation in late 1998 that created an independent agency called Legal Aid Ontario (LAO). The purpose of the corporation is to promote access to justice throughout Ontario for low-income individuals. The [Legal Aid Services Act, 1998](#), (LASA) establishes the following mandate for LAO:

- To promote access to justice throughout Ontario for low-income individuals by providing high quality legal aid services;
- To encourage and facilitate flexibility and innovation in the provision of legal aid services;
- To recognize the diverse legal needs of low-income individuals and disadvantaged communities;
- To operate within a framework of accountability for the expenditure of public funds.

As part of its mandate, LAO is committed to identifying, assessing and recognizing the diverse legal needs of low-income individuals and disadvantaged communities. LAO provides legal aid services by any method it considers appropriate, including certificates, staff offices, duty counsel, community legal clinics, public legal education, summary assistance, alternative dispute resolution and self-help materials.

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### Vision

Legal Aid Ontario will pursue its legislative mandate with the goal of achieving:

- Excellence in accessibility and quality of client service;
- Effective relationships with service providers, and
- Efficient, accountable and innovative use of resources.

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### Values

**Integrity:** We act with integrity and we assume that others do so.

**Respect:** We practice respect in all relationships.

**Responsiveness:** We are responsive to clients, stakeholders and staff. We treat people in an equitable way, recognizing their needs.

**Excellence:** We strive for excellence and continuous quality improvement. We aim to attract and retain the best employees.

**Independence:** We are an independent part of the justice system.

**Accountability:** We are accountable to the government, clients, stakeholders and staff.

**Openness:** We are open and consultative in decision-making.

**Consistency:** We are consistent in our processes and decision-making. We create unity across the organization. We make decisions on the basis of facts and sound principles.

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## History of Duty Counsel

The institution of duty counsel, which originated in Scotland in the 15<sup>th</sup> century, has become one of the most significant components of LAO. Legal aid in Ontario was established in 1967 and still operates on the premise that the legal needs of low-income Ontarians can best be met primarily through the voluntary participation of members of the private bar. The private bar's delivery of duty counsel services is supplemented and anchored by full-time staff lawyers in many geographical areas.

In the year 2001-2002, LAO assisted over one million people through the certificate program, duty counsel, advice lawyers, student legal aid societies, community legal clinics and other service and information programs. Duty counsel alone assisted over 800,000 people.

Duty counsel and advice lawyers are paid by LAO to assist the public (subject to financial eligibility restrictions) by providing legal information, advice and representation at no direct cost to the individual. Services provided by duty counsel protect the rights of the litigant and assist many individuals at all stages of the court process. The presence of duty counsel and advice lawyers also benefits the overall administration of the courts.

In many criminal and family law matters, duty counsel may be the only lawyer contacted by the client, particularly in cases where early resolution can be reached. It is more efficient for LAO to have as many appropriate cases as possible dealt with by duty counsel, thereby retaining the certificate system for more complex matters.

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## Lawyers and Legal Aid Ontario

The certificate and duty counsel programs are a form of public-private partnership in serving low-income individuals throughout Ontario. LASA obliges LAO to recognize the private bar "as the foundation of legal aid services in the areas of criminal and family law" – this maintains the fundamental right of choice of counsel for poor people.

The province, through LAO, provides funding and other support, while private lawyers contribute to legal aid by accepting the legal aid rates and tariff for legal services provided to clients.

The [Legal Aid Services Act](#) (LASA) and regulations set out the different types and functions of duty counsel. The Act specifies that LAO may employ lawyers to act as duty counsel on a full or part-time basis, or may enter into contracts for the regular or occasional services of lawyers as duty counsel.

## About This Manual

### Who is it for?

This manual is intended for both staff and private bar duty counsel lawyers, to outline the policies and procedures for duty counsel services, billing and reporting. The manual assumes that the lawyer is already on a duty counsel panel. If you have not yet registered for panel membership, please contact your local area director at the Legal Aid office.

### What's in it?

This manual is a plain language interpretation of the regulation and schedules. For more detailed information on the regulations and schedules, see the following documents:

- The [Legal Aid Services Act, 1998](#);
- [Ontario Regulation 106/99](#) (Amended August 2002);
- [Ontario Regulation 107/99](#).

### Where to look?

The manual contains detailed information about all criminal and civil duty counsel services. Criminal duty counsel is covered in [Chapter 2: Criminal Duty Counsel](#), while civil is covered in [Chapter 3: Civil Duty Counsel](#). Statutory limitations and standards for duty counsel panels are included in [Chapter 4: Limitations and Standards](#), hourly rates and activity reports are in [Chapter 5: Accounts and Activity Reporting](#) and financial eligibility testing is in [Chapter 6: Financial Eligibility Test](#). Appendices and useful forms are included in [Chapter 7: Appendices and Forms](#).

Many common forms that are used by the courts or by Legal Aid vary from office to office. Check with the supervisory duty counsel, where available, or the Legal Aid office for more information about the forms you might need in court.

### Getting extra copies and updates

Updates and additional copies of the manual will be provided in electronic format, through the LAO Web site at [www.legalaid.on.ca](http://www.legalaid.on.ca). New updates will be publicized through the legal media and Legal Aid area offices.

### E-billing and other electronic forms

LAO is moving into the electronic age, and will soon conduct many routine business transactions with lawyers and clients through web-based technology. Get started now, by checking out the following resources on the LAO Web site:

- [Direct deposit](#): save time and money by ensuring you receive your legal aid payments deposited directly to your bank account;

- For certificate work: electronic versions of the civil and criminal account forms ([forms 50 and 51](#));
- For certificate work: e-billing software – free of charge to allow you to submit your accounts electronically through secure Internet technology.

### *Coming Soon:*

- Electronic versions of Forms 12 and 13.

### **For more information**

For more information about this manual, please contact one of the following provincial duty counsel managers, or see [LAO Contact Information](#) on page [I](#) at the beginning of this manual:

Toronto area: 416-979-2352

Toll-free: 1-800-668-8258, plus the extension

Fax: 416-204-7136

Family Duty Counsel:        Extension 6436

Criminal Duty Counsel:    Extension 4352

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## **Types of Duty Counsel and Functions**

This section provides an overview of the kinds of duty counsel and their general functions.

### **Family and civil duty counsel**

Functions of family and civil duty counsel:

- Attend the Family Court of the Ontario Superior Court of Justice and the Ontario Court of Justice as scheduled.
- In Family Court and the Ontario Court of Justice:
  - o Advise persons about their rights and take any steps necessary to protect those rights;
  - o Advise persons about court procedures;
  - o Prepare or review documents to be filed with the court;
  - o Obtain adjournments;
  - o Represent otherwise unrepresented persons at motions, in interim hearings concerning custody, access, child protection or support and in pre-trial hearings and show cause hearings; and
  - o Assist persons in the negotiation of settlements and consent orders and in mediation.

### **Criminal duty counsel**

Functions of criminal duty counsel:

- Attend the Ontario Court of Justice as scheduled;
- In the Ontario Court of Justice, assist persons who have been taken into custody or summoned and charged with offences, by advising them of their rights and by taking any steps that may be appropriate to protect those rights, including:
  - o Representing a person on an application for remand, adjournment or judicial interim release, on a pre-trial that relates to disposition, or on entering a guilty plea;
  - o Applying for diversion;
  - o Making representations with respect to sentence if a guilty plea is entered.
- Perform duties in connection with criminal appeals as may be appropriate, including:
  - o Helping an inmate in preparing a prison appeal;
  - o Helping an appellant to complete a notice to the court that an application has been made for legal aid services in relation to the appeal;
  - o Helping an appellant who is represented by counsel to complete a notice of withdrawal of a prisoner appeal;
  - o Representing an appellant on an application for judicial interim release.

### **Mental health law duty counsel**

Functions of mental health law duty counsel:

- Attend at psychiatric facilities designated under the [Mental Health Act](#).
- At those facilities:
  - o Advise persons about their rights and take any steps that may be appropriate to protect those rights; and
  - o Take applications for certificates.

### **Special duty counsel**

Functions of special duty counsel:

- Advise and assist persons as the circumstances require;
- Take applications for certificates at the area director's office or elsewhere in the area, as scheduled.

### **Advice lawyers**

Functions of advice lawyers:

- Attend where and as scheduled;
- Advise persons about their rights;
- Prepare or review documents.

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## **Other Duty Counsel Programs**

### **24-hour telephone duty counsel (Brydges Hotline)**

A 24-hour, 365 days a year telephone duty counsel service is available to all accused detained by the police or to answer any questions young offenders may have regarding the Alternative Measures Program.

Sykes Canada Corporation provides this service on behalf of LAO. The corporation employs private counsel who work out of Sykes' offices in Toronto and London. Service is offered in both English and French. A list is available of lawyers that speak another language if required, and an interpreter service may be arranged at police expense.

Persons detained by the police should be told of their right to retain and instruct counsel without delay, their right to contact any lawyer (including the availability of prompt free advice from duty counsel) as well as the existence of legal aid. If the accused wishes to speak with duty counsel, the police officer calls 1-800-265-0451 and provides information including his/her name, detachment, telephone number, the accused's name, charges and time of the arrest.

A duty counsel returns the call no later than 45 minutes after the initial call is received. Impaired driving calls receive the highest priority. The officer answering the return call obtains the name of the duty counsel and allows the accused to speak with the duty counsel in private.

Telephone duty counsel are required to keep written records of their conversations on the Hotline. The reports are kept by Sykes Canada and are available to the accused or counsel for \$25 plus GST. This fee is waived if the accused is on a legal aid certificate.

### **Supervisory duty counsel**

Legal Aid has employed 14 salaried supervisory duty counsel for a number of years in Toronto, Oshawa, Ottawa, Cornwall, L'Orignal, Kenora and Timmins to meet the needs of these specific communities.

LAO has been expanding its full-time duty counsel to anchor the delivery of duty counsel services in each area across the province. In the fall of 2001, supervisory duty counsel were hired on contracts to anchor the delivery of duty counsel services in Sault Ste. Marie, Welland, Brampton, Barrie, Thunder Bay and Lindsay. In the summer of 2002, other

supervisory duty counsel were hired in Brantford, Kingston, Napanee, Sudbury, Bracebridge, Kirkland Lake and Newmarket. Other areas of the province will have supervisory duty counsel phased in over the next few years.

### **Toronto and Oshawa criminal duty counsel program**

In 1979 Legal Aid established a staff criminal duty counsel system in Toronto, which was later expanded to Oshawa. Staff duty counsel are hired on a three-year contract. The program was established to provide better service and in particular to deal with the volume in the several Toronto courts.

Full-time duty counsel assist LAO to maintain high legal standards, a more even quality of service and more efficient use of LAO's resources. The development of specialized courts warrants the continuation of full-time duty counsel. For instance, in Toronto there is a bail court restricted to drug offences, a drug first appearance court, a drug treatment court, a child abuse court, a domestic violence court, a domestic violence early plea resolution court, a mental health court and an aboriginal court.

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## **Objective of the Duty Counsel Program**

The objective of the duty counsel program may be summarized as follows:

To provide consistently high-quality legal aid services province-wide in a cost-efficient manner to low-income individuals by providing legal advice, court representation and other legal assistance through a mixed per diem/full-time duty counsel program, in accordance with the policies and priorities established by Legal Aid Ontario.

### **Providing consistently high-quality legal aid services**

Duty counsel tasks must be performed in a professionally acceptable manner, taking into account pressures created by volume and needs of clients requiring service as well as the limited time in which those services can be performed.

### **Providing services in a cost-efficient manner**

Area directors or their designates must ensure that duty counsel are assigned where and when required. Each duty counsel is expected to contribute their full professional skill and judgment to the services for which he/she is being paid, and to submit accounts that are accurate and correctly completed.

### **Providing services to low-income individuals**

Duty counsel are expected to supply summary legal services (adjournments, etc.) to all people having business at the court; however, the primary target for duty counsel services is people who financially qualify for legal aid services and are therefore within the LAO mandate for service delivery.

Duty counsel must ensure that this mandate is properly carried out by applying financial eligibility testing consistently and correctly. The policies of LAO allow for limited discretion in providing limited types of assistance to persons who do not financially qualify for legal aid services.

### **Providing legal advice, court representation and legal assistance**

All services provided by duty counsel must fall within LAO's priorities for the types of cases and types of proceedings for which it will provide legal aid services as specified in Section 12 of the Act.

All duty counsel providers must be able to recognize which services do/do not fall within duty counsel's mandate and to provide services in accordance with those priorities. Duty counsel must also be aware of other types of LAO service delivery and in a general way be able to refer proper cases to the proper service delivery method e.g. community clinics, student legal aid and the certificate program.

Duty counsel are accountable to the Corporation (LAO), and must fulfil reporting requirements on the duty counsel activities they provide, including correct billing procedures, data or information collection, and other administrative tasks in accordance with the policies and directions of the Corporation. This information is essential for the local and provincial management of LAO's resources. Accurate reporting provides a measure of the needs of the communities that LAO serves and the manner in which this is being provided.

### **Other objectives**

To meet the overall objective set out above, the duty counsel program has the following subsidiary objectives:

- To provide professional guidance to clients requesting assistance to move through the judicial system as quickly and effectively as possible, by:
  - reaching an appropriate resolution of as many issues as possible for each client;
  - where a final resolution is not feasible, referring the client to the most appropriate resource (mediation, certificate lawyer or private bar) at the earliest possible intervention point; and
  - Planning the client's options and next steps with the client to fully utilise available community resources.
- To reduce each client's time wastage and frustration, thereby contributing to the over-all administration and functioning of the court process, by:
  - ensuring that the optimum number of duty counsel are scheduled each day;
  - encouraging individual duty counsel to be organized and as efficient as possible in dealing with their daily client workload; and



- o Communicating and exchanging information with court administration and the judiciary, and with the local legal aid area office.

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## Duty Counsel Panels

The [Legal Aid Services Act](#) (or LASA) states that an area director:

- May establish a panel of lawyers who agree to provide professional services as duty counsel on a fee for service basis;
- Must maintain a complete record of the names on each panel for the area;
- Must furnish the names and addresses of the lawyers who are on a panel for the area, at any person's request.

### Joining a duty counsel panel

Regulation 106 sets out the procedure for applying to become a panel member. A lawyer may apply to the area director to have his or her name entered on a panel, by submitting a completed Solicitor Panel Form to the area director in the area where the lawyer maintains an office or has an established practice. Lawyers may be members of more than one panel in different areas of the province. Forms are available from any Legal Aid area office.

In the application, the lawyer must provide information concerning his or her practice, qualifications and experience and the status of his or her Law Society of Upper Canada membership that the area director requires.

The “applicable standards” required of duty counsel are evolving, but an area director should take into consideration factors such as previous courtroom experience and training or educational programs completed. The area director may make any other enquiries he/she deems necessary.

An area director may manage a panel or subdivision of a panel by applying additional standards, such as experience in a particular field, e.g.: refusing to put a lawyer on a specialized Youth Court Panel even though the lawyer is on the larger Criminal Panel.

Information about quality standards for duty counsel panel membership is included in [Chapter 4: Limitations and Standards](#).

Each area director manages the scheduling of panel members for particular courts. Exercise of this discretionary authority should be in accordance with management principles and the values of LAO. Mere entry to a panel does not guarantee a specific court assignment or any assignment whatsoever.

### Probationary period – “shadowing”

The area director should ensure that duty counsel successfully complete a probationary period during which time the applicant is scheduled and paid at normal duty counsel rates while “shadowing” an experienced duty counsel.

During the period of shadowing the new duty counsel is expected to be introduced to the unique local aspects of service delivery. Following the shadowing, the area director should discuss the duty counsel's performance with those with whom shadowing was performed before deciding to include that lawyer in the normal rotation of duty counsel.

### Refusal of entry to panels

The following steps set out the procedure to refuse a lawyer entry to a panel.

1. If the area director believes that the lawyer is unable to meet the "applicable standards" (including standards of conduct) for entry, the area director should meet with the lawyer and provide him/her with written notice.

The notice must contain the reasons for the refusal as well as the right to a review of the refusal by serving the President of LAO and the area director with a notice requesting a review within seven days of the delivery of the original notice. If the lawyer fails to serve notice requesting a review, no review is held.

If the President of LAO has "reasonable cause" to prohibit the entry of a lawyer's name on a panel, the lawyer is notified of the proposed prohibition as well as his/her right to have a hearing.

2. The lawyer must serve notice on the Corporation and the area director within seven days of delivery of the original notice of refusal.
3. If the lawyer fails to serve notice requesting a hearing, no hearing is held and the decision stands.
4. The President of LAO or his/her designate may conduct the hearing and notify the area director and the lawyer of the decision.
5. Both the area director and the lawyer are notified of the decision.

### Panel retention and removal from a panel

As in the application process, LAO may impose standards for retention on a panel. These standards are being developed in accordance with LAO's Quality Support Program. More information about quality standards for duty counsel panel membership is included in [Chapter 4: Limitations and Standards](#).

Lawyers may be removed from the panels:

- If the President has reasonable cause;
- If the lawyer has been found guilty of either professional misconduct or a criminal offence related to LAO.

The lawyer's name can also be removed temporarily after proceedings under the [Criminal Code](#) or Rules of Professional Conduct have been commenced.

### *Provision for removal by an area director*

1. If the lawyer fails to meet “applicable standards”, the area director may commence the removal process by sending the lawyer a notice of the proposal with notice of the opportunity for a hearing.
2. The lawyer may request a hearing by serving a request on the area director within seven days of delivery of the notice.
3. If no hearing is requested within seven days, the area director may remove the lawyer’s name from the panel.
4. The President, or his/her designate, who conducts the hearing, can confirm the proposal to remove the lawyer’s name from the panel if he or she has “reasonable cause for doing so”.
5. If the proposal is confirmed, the area director may remove the name from the panel. The lawyer must be notified of the decision if a hearing is held.

A lawyer whose name has been removed by either procedure may make an application to the area director to have his or her name restored to the panel.

1. The area director refers it to the president with a recommendation.
2. The President or his/her designate may conduct such an enquiry, as he or she considers necessary and promptly decide whether to approve the application. There is no requirement for a hearing.
3. The area director is notified of the decision as soon as possible.

Please note that a hearing is formal and both LAO and the lawyer may be represented by counsel.

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## **Liability Insurance**

LAO’s policy on payment of LawPro (formerly known as LPIC) insurance deductibles, and potential premium increases in the event of an indemnity payment being paid by LPIC for services rendered by per diem duty counsel and advice lawyers is set out below:

Duty counsel are covered by their professional liability insurance through LPIC for their work as duty counsel and advice counsel. Per diem duty counsel and advice counsel must pay the premiums due to LPIC from their overall professional income.

In 1995, Legal Aid agreed that in the event an action is commenced against a lawyer arising out of his or her work as duty counsel, and as a consequence of that action the lawyer’s deductible is called upon, LAO will advance the necessary funds to LPIC to pay the deductible up to the amount of \$10,000.

Legal Aid assumes the responsibility for the payment of the deductible whether or not the lawyer is ultimately found to be liable. The policy applies to duty counsel and to advice lawyers when working as scheduled by Legal Aid.

LAO may pay an increase in LPIC premiums due by a per diem duty counsel, should an indemnity payment be made by LPIC in relation to a claim arising out of duty counsel services. LAO considers each case on an individual basis. Factors that would be significant are whether or not the duty counsel had attended duty counsel training sessions, whether or not the services were provided within and in accordance with Legal Aid policies and whether or not the behaviour was appropriate for a lawyer.

It is important to note that never in LAO's history has a duty counsel been successfully sued for negligence or impropriety in the performance of court duty counsel services.

Supervisory duty counsel and staff duty counsel who are employees of LAO are entitled to the same coverage, and in addition, LAO pays their LPIC premiums as well as their fees to the Law Society of Upper Canada.

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## Other Legal Aid Policies

### Freedom of Information and Protection of Privacy Act

LAO is covered by the [Freedom of Information and Protection of Privacy Act](#) (FIPPA).

#### *Solicitor-client privilege and confidentiality*

Almost all the records made and kept by LAO are subject to an extended solicitor-client privilege provided by s.89 of the [Legal Aid Services Act](#) or to the confidentiality provision in s.90. Those provisions prevail over FIPPA.

All LAO records that are subject to solicitor-client privilege or to the confidentiality provision in FIPPA are not subject to access under FIPPA. These records may be disclosed only with the consent of the client, i.e.: when necessary in the performance of legal aid duties, with the consent of the client or by authorization by the Corporation.

### French language services

The [Legal Aid Services Act](#) requires the Corporation to ensure that its services are provided in compliance with the [French Language Services Act](#). As such, LAO is required to provide services in French in all designated areas of the province. Private bar lawyers receive service from LAO and are therefore entitled to all services in the French language.

Lawyers have the right to communicate and correspond with LAO in either English or French, and can expect to receive written and/or verbal responses in that language.

Please note that most documents currently produced by computers at LAO (e.g.: description of settled accounts, direct deposit information, etc.) are produced in English only.

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## Chapter 2: Criminal Duty Counsel

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### 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.

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### 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.

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## 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.

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### 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*, 2<sup>nd</sup> 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 (2<sup>nd</sup> 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](http://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(l)(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.

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## 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 2-24. 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

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## 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.

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## 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 2-17).

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.

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## **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.

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### 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.

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## **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](mailto:eligibility@lao.on.ca).

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## 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.

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## 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 [2-17](#).

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## Chapter 3: Civil Duty Counsel

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

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

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### Clinic Law Duty Counsel

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

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

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

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

For more information on tenant duty counsel, contact:

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

A Tenant Duty Counsel Manual is also available.

### Correctional duty counsel

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

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

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

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

### Family violence duty counsel

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

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

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

### Shelters

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

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

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

### General summary advice lawyers

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

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

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

### Special duty counsel

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

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

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## Family Duty Counsel / Family Advice Lawyer

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

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

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

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

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

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

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

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

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

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

### **Role of advice lawyer / duty counsel in family court**

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

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

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

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

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

### **General functions of family court duty counsel**

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

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

The functions of court duty counsel include:

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

### **Enhanced functions of full-time duty counsel**

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

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



### Limits on functions performed by duty counsel

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

- Deal with significant property disputes/equalization of net family properties and divorce hearings;
- Attend at a contested trial or any hearing where the issues are lengthy and/or complex;
- Attend trial management conferences or give advice regarding witnesses or evidence to be called at trial (see [Case Management](#), page 3-21, for more information);
- Assist persons who are not on the court list unless they need an emergency motion and there is no advice lawyer available to assist them;
- Assist persons who have privately-retained (non-legal aid) counsel of record.

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

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

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

### Functions of the family advice lawyer

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

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

The functions of the advice lawyer include:

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

### **Limits on functions performed by the advice lawyer**

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

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

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

### Financial eligibility testing

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

### Duty counsel and two spouses/parties

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

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

### The advice lawyer and conflict of interest

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

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

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

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

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

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

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

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

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

### **Custody, access and support applications**

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

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

### *Assisting the applicant*

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

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

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

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

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

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

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

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

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

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

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

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

### *Assisting the respondent*

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

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

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

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

### **Motions to Change**

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

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

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

Duty counsel takes primary responsibility in support variations where:

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

Duty counsel takes primary responsibility in access variations where:

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

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

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

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

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

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

**Emergency Motions and Motions Without Notice*****Bringing the motion***

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

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

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

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

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

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

***Drafting the motion materials***

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



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

### *Who assists the client?*

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

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

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

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

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

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

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

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

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

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

### *Taking out the order*

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

### **CFSA proceedings**

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

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

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

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

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

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

### *Commencement of proceedings*

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

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

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

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

### *Care & custody hearing (the temporary order)*

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

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

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

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

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

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

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

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

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

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

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

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

### *Changing the temporary order*

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

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

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

### *Temporary order during status review*

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

### *Findings and disposition (the final order)*

#### *Finding in need of protection*

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

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

#### *Disposition*

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

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

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

#### *Common misunderstandings by clients*

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

### *Access*

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

### *The documents*

#### *The Application*

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

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

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

#### *The Answer*

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

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

#### *Plans of care*

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

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

### *The Agreed Statement of Fact*

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

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

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

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

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

### *Advising a child*

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

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

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

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

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

### *Retaining counsel*

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

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

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

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## Property Issues

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

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

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## Case Management

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

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



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

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

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

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

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

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

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

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

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

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## Chapter 4: Limitations and Standards

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### Solicitor-Client Privilege

The customary solicitor– client relationship applies to duty counsel and their clients. Pursuant to the [Legal Aid Services Act, 1998](#):

89. (1) All legal communications between the Corporation, an officer or employee of the Corporation, an area director or member of an area committee and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(2) All legal communications between a lawyer, student or service-provider at a clinic, student legal aid services society or other entity funded by the Corporation, or any other member, officer or employee of a clinic, student legal aid services society or other entity funded by the Corporation and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.

(3) Disclosure of privileged information to the Corporation that is required under this Act does not negate or constitute a waiver of privilege.

The Act also includes a prohibition on the disclosure of information:

90. (1) A member of the board of directors, an officer or employee of the Corporation, an area director, a member of an area committee, a lawyer, a service-provider or a member, officer, director or employee of a clinic, student legal aid services society or other entity funded by the Corporation shall not disclose or permit to be disclosed any information or material furnished to or received by him or her in the course of his or her duties or in the provision of legal aid services.

Exception

(2) A person referred to in subsection (1) may disclose information or allow it to be disclosed in the performance of his or her duties or in the provision of legal aid services or with the consent of the applicant or if authorized by the Corporation.

93. The relationship between a lawyer who provides legal aid services and the individual who is receiving those services is the customary solicitor-client relationship, whether the legal aid services are provided pursuant to a certificate, in a legal aid services staff office, clinic, student legal aid services society or other entity funded by the Corporation or by any other method under this Act.

Duty counsel are often faced with a request from a judge as to the status of a legal aid application. Information that an application has been made and the point the application has reached in the administrative process usually assists the applicant in obtaining an adjournment, so the client's consent to disclose is usually readily forthcoming.

However, in some situations the information may be prejudicial. For instance, the client may have obtained a three week adjournment to obtain legal aid and waited until the

twentieth day to apply. The client's consent to disclose should be obtained prior to passing the information to the court.

Duty counsel should also be aware of section 72(1) of the [Child and Family Services Act](#) which imposes a duty on counsel to report child abuse, even if the information is disclosed outside a family law context.

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### Referrals to Other Lawyers

Duty counsel cannot suggest or recommend either directly or indirectly another lawyer to a client, nor should duty counsel attempt to dissuade a client from choosing a specific lawyer.

Under section 85 of the [Legal Aid Services Act](#):

85. (1) Subject to subsections (2) and (3), no lawyer or service-provider or officer or employee of the Corporation. shall, in connection with or arising out of his or her duties under this Act, suggest or recommend to an applicant any lawyer or service-provider as being suitable to act for the person pursuant to a certificate.

Exception

(2) If it appears to an officer or employee of the Corporation that, because of physical or mental disability or other legal incapacity, or for any similar reason, an applicant is unable to make a choice of lawyer or service-provider and that there is no other person who might reasonably be expected to make that choice for the applicant, then the officer or employee may suggest or recommend to the applicant one or more lawyer or service-provider who might act for the applicant pursuant to a certificate.

(3) An officer or employee of the Corporation may advise the applicant of the names of those lawyers or service-providers within the area who can take instructions in a language in which the applicant can converse.

If the client does not have the name of a particular lawyer, duty counsel may suggest the Lawyer Referral Service provided by the LSUC, or present the client with the entire panel (or sub-panel) list.

If duty counsel is of the opinion that the accused is incapable of choosing counsel and no family member is present to assist, duty counsel should contact the area office or duty counsel supervisor for a referral. If the client requests a lawyer that speaks a language other than English, duty counsel can provide him or her a list from which to choose, or advise the client to contact the area office.

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### Acting in the Same Matter

Any lawyer who advises or represents a person as duty counsel shall not represent that person "in the same matter". Duty counsel can represent the individual in subsequent matters provided there was no touting while acting as duty counsel.

Duty counsel should not hand out their cards to clients. If requested, a duty counsel should inform the client that he/she cannot represent the client either privately or by way of a

certificate. Associates of duty counsel are also prohibited from subsequent representation of the client.

There are three exceptions to this restriction:

- Where duty counsel has obtained prior approval from the area director. Duty counsel must send a written request to the area director stating the reasons for the request;
- Where duty counsel certifies in writing to the area director that a prior solicitor-client relationship existed between the individual and duty counsel or anyone else associated with the duty counsel in the practice of law. See Chapter 7: Appendices and Forms – [Appendix 12 – Certificate of Duty Counsel](#), page 7-20.
- Where duty counsel has provided two hours of advice to an assaulted spouse who was referred by a shelter or other agency.

Area directors should issue “blanket” exceptions only in the rarest of circumstances. The test is that on a balance of probabilities it would be in the client’s best interests to permit the continuation of services by the same counsel. The area director must be satisfied that there is a benefit to the client from the continuation of service provided by duty counsel.

Factors to be considered include:

- The disability of the client. For example, if a client has been able to communicate his/her circumstances to duty counsel once and to do so again would be onerous or risk missing significant elements;
- The duty counsel has performed substantial services for the client, and it would be counterproductive to repeat the established groundwork;
- The inability of the person to access counsel other than duty counsel, by reasons of mobility limitations and geographical distance;
- The skills of duty counsel to deal with special needs demonstrated by the client;
- The language of the applicant is difficult to match or to fulfil the intention of the [French Language Services Act](#).

The services provided by duty counsel should represent a complete a range of services that duty counsel could have discharged in the circumstances. A summary adjournment is not the type of service that would warrant an exemption on the basis of continuity.

An exemption should not create public suspicions of touting or the use of duty counsel assignments to solicit clients. Previous requests by the lawyer seeking the exemption will also be taken into consideration. Finally, the application for exemption must be made in a timely manner.

## **Acting for a Private Client While Retained as Duty Counsel**

Duty counsel/advice lawyers should not act in their own cases while serving as duty counsel.

In larger metropolitan areas where there are frequent criminal and family court sittings, lawyers should schedule their own private files to avoid court appearances when they are scheduled to be duty counsel or the advice lawyer. Where criminal or family court only sits one or two days a week or the duty counsel panels are small, enforcement of this policy may be relaxed in appropriate circumstances.

Each duty counsel is required to be available for the hours scheduled for him/her as duty counsel/advice lawyer. Attempting to deal with one's own files while acting as duty counsel/advice lawyer results in diminished accessibility, efficiency and effectiveness as duty counsel/advice lawyer.

An area director has the authority to remove a lawyer from the duty counsel panel for consistently scheduling his/her own files on days when scheduled as duty counsel/advice lawyer and the lawyer's ability to carry out his or her duty counsel function is adversely affected as a result.

Where a lawyer has no realistic option other than to schedule his or her own private matters for a date when he/she is duty counsel, the lawyer should advise the local area office in advance of the potentially diminished service.

Duty counsel may not include any time spent with private clients, including clients on legal aid certificates, in accounts submitted for duty counsel services. The time spent on one's own matters is not to be recorded in any way on the duty counsel account form.

For example:

- Lawyer "A" attends court from 9:00 a.m. to 1:00 p.m. as duty counsel.
- Lawyer "A" spends 1.5 hours of that time dealing with two of his/her own cases.
- Lawyer "A" must subtract those 1.5 hours from his/her duty counsel hours prior to the duty counsel hours being entered on his/her duty counsel account. The duty counsel account will show the hours being billed as "9:00 a.m. to 11:30 a.m."

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## **Accepting Payments from Clients**

Duty counsel may not:

- Accept payment or gratuity from a client;
- Hold monies or chattels in trust (e.g.: bail).



## Quality Standards



### **Duty counsel panel eligibility where panel member convicted of criminal offence**

In keeping with LAO's authority to define minimum standards for panel membership, duty counsel must meet the following requirements:

- Duty counsel must be in good standing with the Law Society.
- Duty counsel must be able and willing to carry out their professional obligations to their clients, the courts and LAO.
- Duty counsel must act in compliance with the Law Society's Rules of Professional Conduct.

Where a member of the LAO panel is found guilty of a criminal offence, LAO may remove or suspend the member from the panel where LAO has reasonable cause to believe that:

- The misconduct impairs or will impair the lawyer's effective representation of the client; or
- The misconduct occurred in the context of the lawyer's professional duties or in the context of duties performed while acting as duty counsel; or
- The misconduct compromises either LAO's reputation or the reputation of the lawyer for acting with honesty, integrity and in accordance with professional standards.

LAO will act in accordance with the process established in sections 27-37 of Regulation 106/99 when removing or suspending duty counsel from a panel.

Duty counsel removed or suspended from a panel has the right to apply to have his or her name restored to the panel pursuant to the process established in sections 34 of Regulation 106/99.

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## Chapter 5: Accounts and Activity Reporting

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### Introduction

Pursuant to section 95(1) of the [Legal Aid Services Act, 1998](#):

“Except in accordance with this Act, no person shall take or receive any payment or other benefit in respect of any legal services provided by the person under this Act.”

Duty counsel cannot accept any fee, gratuity or other compensation of any kind over and above the fees and disbursements provided in the Act or Regulations. Duty counsel cannot hold money or chattels in trust for a client or any other person.

Reg 106/99 to LASA governs the submission of duty counsel accounts:

41. (1) A lawyer who acts as duty counsel shall, promptly after performing his or her duties, submit to the president,

- an account, in the form specified by the legal accounts officer, showing the times during which and the places at which he or she was engaged as duty counsel; and
- any claim for expenses.

The account shall be submitted within six months after the services to which it relates were completed.

(1) If an account does not comply with subsection 40(1) or 41(2), as the case may be,

- the Corporation is not required to pay the account; and
- the account shall be returned to the lawyer with an appropriate reference to this section.

(2) Despite subsection (1), the president has discretion, on the lawyer's application, to extend the time during which the account may be submitted; in exercising the discretion, the president shall take into account whether or not the Corporation (or the applicant, if subsection 40 (1) applies) has been prejudiced by the delay.

The application for an extension shall be made to the president and shall explain why the extension is necessary.

The factors resulting in a time extension must generally be beyond the control of duty counsel.

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### Hourly Rates

The hourly rate for duty counsel work performed after August 1, 2002 is \$70.35. There is no experience increase. If more than five hours are required, some area directors require duty counsel to obtain his/her authorization. Often authorization is granted retroactively unless the services were unnecessary. Work must be performed at court or in assigned interview areas unless otherwise authorized by the area director.

### → NOTE

A lawyers may only bill for a maximum of ten hours per day of combined duty counsel and certificate work.

### Special northern rates

Lawyers who provide services in one of five designated areas (Cochrane, Kenora, Rainy River, Temiskaming and communities served by Nishnawbe-Aski Legal Services Corporation (NALSC)) will receive the following incentives on all duty counsel work performed after August 1, 2002:

- Duty counsel rates will be paid at the new hourly rate of \$77.39 (no tier level increase). Duty counsel appearance fee remains at \$40.00.
- Travel time in these areas is paid at \$47.30 (10 per cent above the normal travel rates).
- For fly-in courts and to destinations 200 km or more one way from the lawyer's offices, the tariff provides a minimum guaranteed daily rate (GDR) of \$800.00 on both certificate and duty counsel assignments. Prior authorization from the area director is required.
- The GDR does not apply if the destination is to the location of an area office, e.g.: Sioux Lookout to Kenora.

Lawyers authorized to provide duty counsel services in fly-in courts in Northern Ontario submit their accounts on their letterhead (attaching the back of a Form 12 to record the services provided and the names of clients served) and submit them to the area director for approval. The solicitor number must be included.

Full details on how the GDR is being implemented are being worked out. Check the [LAO Web site](#) for more details on how to bill for these special northern rates.

### Family violence services (Form 13-FV)

Duty counsel acting on a special 2-hour duty counsel assignment (Form FV-13) in family violence situations may bill up to a maximum of two hours. The lawyer's name and number must be included, along with client name, date service was rendered and the time the interview commenced and terminated.

The form 13-FV cannot be used to circumvent the certificate application process or as a means of supplementing hours allowed on a family law certificate.

### Travel time

Travel time may be claimed only if the distance from office (not home) to court is 50 kilometres or more one way, and the travel time has been previously authorized by the area director. Duty counsel may claim travel time at \$43.00 per hour (\$47.30 for one of the five designated area of the north – see [Special northern rates](#) above).

Duty counsel cannot claim travel time in the following circumstances:

- When travelling to or from a location less than 50 km one way;



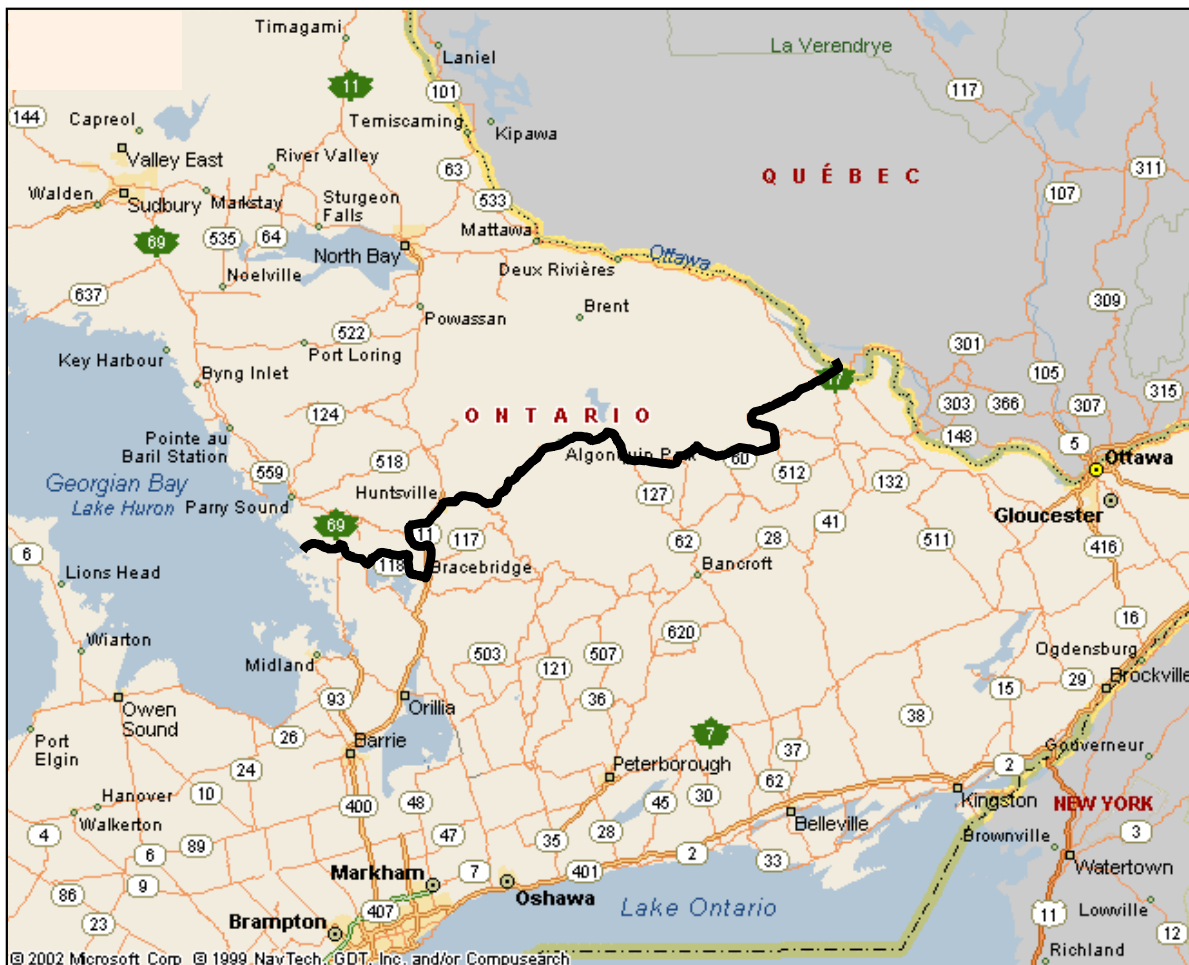
- When travelling within the Greater Toronto Area (GTA), including the Regional Municipalities of Durham, York, Peel and Halton.

### Disbursements

The most common disbursement is mileage which is paid at the rate of \$0.30 per kilometre (\$0.305 in northern Ontario). Reasonable parking expenses may also be claimed with mileage. These disbursements are not payable unless there is an allowance for travelling time (e.g.: 50 km plus authorization) and are therefore not payable in the GTA. Other disbursements must be incurred at court or the assigned interview area unless otherwise authorized by the area director.

The dividing line between northern Ontario and southern Ontario for mileage rates is as follows:

Healy Lake (Municipal) Road from Healy Lake easterly to its junction with Highway 612; Highway 612 to Highway 103; Highway 103 easterly to its junction with Highway 69; Highway 69 easterly to its junction with Highway 118; Highway 118 through Bracebridge to its junction with Highway 11; Highway 11 northerly to its junction with Highway 60 at Huntsville; Highway 60 easterly to its junction with Highway 62 at Killaloe Station; Highway 62 to Pembroke; the above-named highways to be included in southern Ontario.



- Any travel that takes place on or below the line shown in the map above is paid at southern Ontario rates.
- If travel encompasses travel in both the northern and the southern area, the travel rate is determined by where the majority of the distance is traveled.

### Appearance fees

Duty counsel are also entitled to the following appearance fees:

Service	Fee
Appearance in family court, criminal court or young offenders court	\$40 per day per court
Attendance at a jail, a mental hospital or a legal advice location	\$40 per day per location
Providing family violence advice up to a maximum of one authorization per account	\$40 per authorization
Acting as a special duty counsel up to a maximum of one authorization per day	\$40 per authorization

Appearance fees are not claimed on the Duty Counsel Account Form 12 or Form 13. They are calculated automatically when the account information is processed at provincial office.

- If you appear as duty counsel in criminal, youth and family court on the same day, you are entitled to three appearance fees, as you would be submitting three separate accounts for the three courts.

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## Payment of Accounts

Duty counsel accounts must be submitted on original forms obtained from the area office (Form 12 --Criminal Duty Counsel Statement of Account or Form 13 – Civil Duty Counsel Statement of Account).

- Accounts must be completed by the lawyer who performed the services.
- If the account includes disbursements, receipts must be included.
- If travel time and travel disbursements are included, send the account to the area director or supervisory duty counsel if applicable, for authorization.

### Billing deadlines

Accounts must be submitted within six months of the completion of the service. Billing deadlines are strictly enforced, and accounts that are not received by the billing deadlines are not eligible for payment.

You can apply to the President of LAO for an extension of the final date for submission when you submit the account. Your application must be in writing and with reasons. If

LAO has been prejudiced by the delay in submission of the account, an extension is not granted.

If you are submitting an account more than six months after the date of duty counsel service, you should include a letter explaining the delay. Accounts with letters that provide evidence of illness or incapacity are generally accepted; accounts with letters that explain inadvertence or office administrative difficulties are generally not accepted.

Send completed forms to:

Legal Aid Ontario  
Data Processing Department  
375 University Avenue, Suite 304  
Toronto ON M5G 2G1

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## Forms 12 and 13 – Criminal and Civil Duty Counsel Accounts

### Rules applicable to both forms 12 and 13

- Duty counsel must fully complete a Form 12 -- Criminal Duty Counsel Statement of Account or Form 13 -- Civil Duty Counsel Statement of Account.
- The lawyer's name and solicitor number must be entered on every account. It is important that the solicitor number be accurate to avoid a colleague being paid in error.
- Sections 1, 2, 5, 6, 7, and 8 of the form must be completed in full.
- Sections 3 and 4 need only be completed if applicable.
- All dates must be in year/month/day format. For example June 1, 2002 would be shown as 02/06/01.

### Section 1

- Only one type of criminal court can be entered per Form 12 criminal account --Youth or Adult. Even if one youth court matter were dealt with on an otherwise adult criminal day, a separate form is required.
- On the Form 13 civil account, the appropriate court or service must be circled (e.g.: Family Court, Advice Lawyer, Mental Health, FLIC or Other). CAS matters are included as family court. Each type of service must be on a separate form. For example, a lawyer acting as family court duty counsel in the morning would complete one Form 13 for those services, and a second Form 13 if he/she then acted as the advice lawyer in a FLIC in the afternoon. Similarly, acting as the advice lawyer in the FLIC must be billed separately from acting as a general advice lawyer.
- Duty counsel must identify the times of services provided and ensure that time entries do not overlap if more than one account is being submitted per day.

### *Section 2*

- Enter the times of day when services began and ended.
- If duty counsel services are not completed until mid to late afternoon, it is expected that duty counsel take a lunch break and record the morning and afternoon sessions separately.
- Duty counsel are not paid for lunch breaks or meals. If duty counsel do not break for lunch and continue to assist clients over the lunch hour, there may only be one time entry for that day, starting in the morning and ending in the afternoon.
- The total time billed for duty counsel services must be recorded in tenths of hours (e.g.: 4 hours, 30 minutes is shown as “4.5 hours”).
- As a general rule, duty counsel are expected to be at their assigned location a half-hour before court is scheduled to start (for court-related services) and are paid for that time. This rule may be varied by an area director and duty counsel should confirm the local policy with the local area director.

### *Section 5*

- The first time a lawyer submits an account to LAO showing his/her GST Registration Number, the GST number goes on file and does not have to be entered on any subsequent accounts.
- On each account, the amount of GST being billed must be calculated.

### *Section 6*

- Each account must be signed and dated by the duty counsel.

### *Section 7*

- Duty counsel are required to report all services provided to each person assisted. This information is used by LAO to manage the duty counsel program.
- All persons assisted must be named.

### *Section 8*

- Enter the total number of each type of service at the bottom of each column.
- The total number of clients assisted must also be totalled at the bottom of the form. As more than one service may be provided to a client, the total services and the total number of clients are not likely to coincide.

### Service definitions on Form 12 - Criminal Account Form

The general rule is that every service provided by duty counsel to a client must be checked off. See below for more information on specific services. An example of a fully completed Form 12 – Criminal Duty Counsel Account is included in Chapter 7: Appendices and Forms -- [Appendix 13 – Sample Form 12 – Criminal Duty Counsel Account](#), page 7-21.

#### *Statute*

Record “F”, for federal legislation and “P” for provincial offences. Most people assisted by duty counsel have been charged under federal legislation. If a client has been charged with both a federal and a provincial offence, the more serious offence (“F”) is indicated. The number of federal and provincial cases must also be totalled at the bottom of the “F” and “P” columns.

#### *Summary Advice*

Since all substantive services provided by duty counsel contain an advice component, the category of “Summary Advice” should only be checked as a service if no other services are rendered other than “Financial Eligibility Test” or “Referral”.

#### *Adjournment*

A “Contested Bail Hearing” or “Consent Release/Variation” always involves an adjournment, so “Adjournment” should not be checked if a bail hearing or consent release/variation is done for that same client. “Contested Bail Hearing” is recorded as a service once a hearing is commenced, even if the Crown later consents to a release.

#### *Sureties, lawyers and others contacted*

Only requires a check mark rather than a number.

### Service definitions on Form 13 - Civil Account Form

Included in Chapter 7: Appendices and Forms – [Appendix 14 – Service Definitions – Form 13 Civil Account](#), page 7-23, is a full list of the civil service definitions. An example of a fully completed Form 13 – Civil Duty Counsel Account is included in [Appendix 15 – Sample Form 13 – Civil Duty Counsel Account](#), page 7-25.

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## Special Duty Counsel

Special duty counsel submit a Form 12 in criminal matters and a Form 13 in civil matters. However a Special Duty Counsel Authorization form signed by the area director must be attached to the completed account form. The area director’s authorization includes an upper limit on the number of hours or service to be provided.

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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.

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**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.

## 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.

## 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.

## Chapter 7: Appendices and Forms

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## **Appendix 1 - Sample Promotional Sign**

The following sign can be posted in the corridors of the court to attract clients and explain duty counsel services.



## Criminal Duty Counsel

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Duty counsel is a **lawyer**.

Duty counsel is free of **charge**.

Duty counsel will give **advice**.

Duty counsel will help you to get an **adjournment**.

Duty counsel will help you get **bail**.

Duty counsel will help you with **diversion** or **alternative measures**.

Duty counsel will act for you with regard to a **guilty plea**.

If you do not have your own lawyer with you, please see duty counsel before court or as soon as possible.



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## Appendix 2 – Request by Counsel

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- ☐ in custody  
☐ out of custody

Client: \_\_\_\_\_ Date: \_\_\_\_\_

Counsel: \_\_\_\_\_ Phone: \_\_\_\_\_

Court: \_\_\_\_\_ Time of Call: \_\_\_\_\_ Called in By: \_\_\_\_\_

Hold Down: \_\_\_\_\_ ETA: \_\_\_\_\_ Adjourn: \_\_\_\_\_ Date: \_\_\_\_\_

Other: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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### Action Taken by Counsel

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Message relayed to counsel: \_\_\_\_\_

Date: \_\_\_\_\_ Time: \_\_\_\_\_ Duty Counsel: \_\_\_\_\_

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### **Appendix 3 – Sample Affidavit of Justification by a Surety**

The following affidavit is suggested for use for potential sureties. It may not be accepted by all courts.

**Canada**  
**Province of Ontario**

**AFFIDAVIT OF JUSTIFICATION BY A SURETY**

**Her Majesty the Queen**

**Vs.**

**Accused Person**

**I** \_\_\_\_\_  
Full name of surety applicant Date of birth

reside at \_\_\_\_\_  
Address and street name

\_\_\_\_\_  
(City/town, province) (Telephone number)

**Make Oath and Say or Affirm and Say...**

**That I freely and voluntarily offer myself as a proposed surety for the above named accused person who is in custody charged with the following offence(s):**

\_\_\_\_\_

☐ I have lived at the above address for \_\_\_\_ years.

☐ If less than three years, please list previous addresses:

\_\_\_\_\_

**My employment status:**

☐ I am employed by: \_\_\_\_\_ and have been so employed for \_\_\_\_ years.

Income from employment: \$ \_\_\_\_\_ Income from all sources: \$ \_\_\_\_\_.

☐ I am not currently employed.

☐ I am currently receiving benefits or pensions from: \_\_\_\_\_.

Total Income from benefits, pensions, etc. \$ \_\_\_\_\_.

That I have the following assets:

Value

\_\_\_\_\_

\$ \_\_\_\_\_

\_\_\_\_\_

\$ \_\_\_\_\_

\_\_\_\_\_

\$ \_\_\_\_\_

That I have a criminal record: Yes: ☐ No: ☐

If YES, please list the offence(s) and year(s) of conviction(s):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

That I am presently on release on bail, or charged and awaiting trial on a criminal offence in Canada.

Yes: ☐ No: ☐

That I am not acting as a surety at this time for any other person.

Yes: ☐ No: ☐

That I am associated with the said accused person in committing or attempting to commit the offence with which he/she is charged.

Yes: ☐ No: ☐

That I have not, nor has any person on my behalf directly or indirectly, obtained, received, accepted or agreed to receive or accept or been paid or promised any money, gift, loan, remuneration or reward or any indemnity, compensation, or guarantee or any other consideration whatsoever for providing this bail or for my becoming or agreeing to become a surety for bail in this matter.

That I know that if the said accused does not appear in accordance with the condition(s) of the recognizance that I am willing, if approved, to enter into on his/her behalf, I may be called upon to pay the amount of bail set out on the recognizance that I am becoming surety for, and failing being able to pay that amount, my goods, chattels and real property will be sold and if the amount of bail cannot be realized out of such sale that I may be imprisoned.

That this affidavit has been read over by/to me and explained and I fully understand the contents and my obligations if approved as a surety. I also understand my right to seek independent legal counsel prior to my signing this affidavit.

Sworn before me at: \_\_\_\_\_

This \_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_\_.

\_\_\_\_\_  
Signature of Surety Applicant

\_\_\_\_\_  
Justice of the Peace

## Appendix 4 – Duty Counsel Worksheet

Name:		Private counsel:	
Present Charges:	1.		
	2.		
	3.		
	4.		
	5.		
	6.		
Age:	Marital Status:	Children:	Ages:
Support/Custody:			
Address:		How long:	
Previous address:		How long:	
Ownership/leasehold interest in residence:			
Lives with:		How long living in this area:	
Immigration Status:		Immediate/extended family	
Employer:	Position:	How long:	
Previous employer:	Position:	How long:	
Education:			
Medical/mental concerns:			
Criminal record:	Yes <input type="checkbox"/>	No: <input type="checkbox"/>	
Year:	Offence:	Sentence:	
Year:	Offence:	Sentence:	
Year:	Offence:	Sentence:	
Year:	Offence:	Sentence:	
Year:	Offence:	Sentence:	
Year:	Offence:	Sentence:	
Previous convictions for:	Fail to appear	Yes <input type="checkbox"/> No <input type="checkbox"/>	Number
	Fail to comply	Yes <input type="checkbox"/> No <input type="checkbox"/>	Number <input type="checkbox"/>
Outstanding charges:	1.	Form of release:	
	2.	Form of release:	
	3.	Form of release:	
	4.	Form of release:	
Presently on probation:	Yes <input type="checkbox"/> No <input type="checkbox"/>	Expiry date:	
Possibility of surety:	Yes <input type="checkbox"/> No <input type="checkbox"/>		
Name:	Phone #:	Amount:	
Relation:	Address:		
Employment:	Assets:	Crim. Record:	
Name:	Phone #:	Amount:	
Relation:	Address:		
Employment:	Assets:	Crim. Record:	
Possibility of cash:	Yes <input type="checkbox"/> No <input type="checkbox"/>		
Notes:			

---

## **Appendix 5 - Sample Bail Information Form**

The following information sheet may be printed and distributed for general information to members of the public.

---

## What is a bail hearing?

When the police arrest someone, this person (called the accused) can be released right at the scene, from the police station or through a bail hearing that takes place in a criminal courthouse.

A bail hearing is a bit like a short trial. The Justice of the Peace (JP) is the one who decides if the accused will be released, or will stay in jail until the criminal charges are dealt with. The JP makes his/her decision to release the accused by considering three points:

- If released, will the accused come back to court to face the charges or will he/she take off?
- If released, is the accused going to be dangerous, i.e. will he get into more trouble, threaten the victim or not follow the conditions of release imposed by the court?
- Is there any other “just cause” for detention?

## What does a surety do?

A surety is a friend or a family member of the accused. It is someone who is ready to sign bail for the accused, in order for the accused to be released from jail. A surety is asked to pledge or sign an amount of money. The reason an amount of money is requested is to make sure the surety's job is taken seriously.

Most times, you do not have to deposit that amount of money, *but*, you may have to show the court that the money is available to you by showing a bank book, deed to your house, RRSPs, saving bonds, etc.

You are to supervise the accused and to make sure that he follows the conditions of his bail. If the accused does not follow the conditions of the bail, your job is to pull the bail, by phoning or going in person, to the police or the office of the JP.

The court wants you to be very strict with the accused: if he misbehaves, he goes back to jail. If you are aware that he is not following the conditions of his bail and you do not call the police or the JP, *you could lose the full amount of the bail.*

## What does a bail hearing look like?

1. The duty counsel interviews you. He/she will ask you general background questions (age, address, employment, etc.) as well as asking you questions about being a surety for the accused.
2. After the interview is finished, you can sit down in the courtroom. The bail hearing that you are here for can take place anytime during the day. The Crown attorney decides when the bail hearing takes place. When it is time for ‘your’ bail hearing, the accused is brought into the prisoner's box. You are not allowed to talk to him.
3. The Crown attorney stand ups and read the allegations. The allegations are a description of what the accused supposedly did.

(continued)



- 
4. You should listen carefully.
  5. After the Crown is finished, the duty counsel stand up and will likely call the accused to testify.
  6. The duty counsel asks him questions about his personal background. The Crown also asks questions.
  7. After this is finished, the surety (you) will probably testify: the duty counsel and the Crown ask you questions. The court wants to make sure that the surety will supervise the accused.
  8. After this is over with, the duty counsel and the Crown make submissions (speeches).
  9. The JP then decides if the accused will be released or detained. If bail is granted, a JP will decide if you can be the surety.

### **If the accused is detained (bail is denied)**

If the accused is denied bail, he needs to hire a private lawyer to do a bail review, if he wants to be released. A bail review is much more complicated than a bail hearing because several legal documents need to be prepared. As well, bail reviews take place in Superior Court and can take several days or weeks to be heard.

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## **Appendix 6 - Are You Going to be a Surety?**

The following information may be printed and distributed for general information to members of the public.

# Are You Going to be a Surety?

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## **If you are here to sign someone's bail**

### **Your general duties are to:**

- Make sure the accused comes to court on time, when the court says he/she must attend.
- Make sure the accused obeys all the conditions imposed by the court. These conditions are listed on the release papers.
- Make sure the accused does not commit any offences.
- Call the police if you know the accused did not follow or is about to break any one of the conditions of the release imposed by the court. Examples of conditions that could be imposed: curfew, boundaries, reside at specific address, report to the police station, no contact with the victim, attend treatment, attend school. The conditions imposed can only be changed by a judge or a Justice of the Peace (JP). Nobody can give 'permission' to the accused to vary his/her release. As well, if you do not want to be a surety anymore, advise the JP or/and the police (and the accused).
- Supervise the behaviour of the accused until the case is finished.

### **To qualify as a surety, you may have to:**

- Show the JP proof that you are good for the amount of the bail: bank books, saving bonds, GICs, treasury bills, RRSPs, deed or proof that you own a home (credit cards or car ownership are not acceptable).
- Not to have anything to do with the charge: the victim or the co-accused cannot sign bail for the defendant.
- Not have a criminal record.
- Be at least 21 years of age.
- Be a Canadian citizen or a landed immigrant.
- Be employed (some JPs will approve parents of youths who are on social benefits).
- Not to be an employee of the accused.

Note: these qualifications are not absolute. Exceptions are at the discretion of the JP.

You can also sign bail at the detention centre or jail (call first and make sure that a JP is available).

### **You may lose the amount of bail if you fail to perform your duties.**

It is entirely at the discretion of the JP to accept you or not accept you as a surety.

## Appendix 7: Surety Information Form

<b>Background</b>		
Accused Name:		Date:
Surety Name:	Length of time in Canada/Status:	
Relationship to accused:	Known how long?	
Address:	Phone #:	Age:
House <input type="checkbox"/> or apartment <input type="checkbox"/>	If owns house, value of it:	Mortgage:
Who does surety live with?	Place of employment:	
Position:	How long:	
Income:	Hours of employment:	
Criminal record (surety):	Outstanding charges:	
Accused's place of employment:		
Position:	Accused's hours of employment:	
<b>Relationship with Accused and Complainant</b>		
How often does surety see accused?		Do they have good relationship? Yes <input type="checkbox"/> No <input type="checkbox"/>
Does surety think accused will listen? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Does accused have any mental health problems: <input type="checkbox"/> drug or alcohol addictions: <input type="checkbox"/> anger management: <input type="checkbox"/>		
Is accused getting treatment for problems? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Is surety aware of accused's record and who victims where/circumstances of convictions? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Is surety aware of accused's outstanding charges and bail conditions? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Does surety know the complainant? Yes <input type="checkbox"/> No <input type="checkbox"/>		How many times have they met?
Plan of supervision:		
Can accused live with surety? Yes <input type="checkbox"/> No <input type="checkbox"/>		If not, how will surety supervise accused?
If accused resides with surety, how far is victim's address?		Is there anyone else to assist with supervision?
Do they have criminal records? Yes <input type="checkbox"/> No <input type="checkbox"/>		Ever acted as surety before? Yes <input type="checkbox"/> No <input type="checkbox"/>
For whom?		When?
What were the charges?		How long was accused on bail?
If same accused did accused reside with surety? Yes <input type="checkbox"/> No <input type="checkbox"/>		
What were the conditions?		
Were there any breaches? Yes <input type="checkbox"/> No <input type="checkbox"/>		
If so, what did surety do? (check record to see if FTC with recognizance when on bail with surety)		
Is surety currently acting as a surety for someone else? Yes <input type="checkbox"/> No <input type="checkbox"/>		
<b>Responsibilities</b>		
<ul style="list-style-type: none"> <li>To make sure accused attends court</li> <li>To ensure compliance with bail conditions</li> <li>How much money willing to post</li> </ul>		If FTAs on record, what steps will surety take to ensure attendance? <ul style="list-style-type: none"> <li>To call police/pull bail if breaches</li> </ul> Is that a lot of money to surety?
Does surety understand will lose money if they don't report breaches? Yes <input type="checkbox"/> No <input type="checkbox"/>		
Any conditions requested by surety?		
<b>Other</b>		
Has surety discussed charges with accused or complainant?		Was surety witness to offence?
Yes <input type="checkbox"/> No <input type="checkbox"/>		
Comments:		

---

## Appendix 8 – Self-Identifying Questions for In-Custody Legal Aid Applications

### Instructions to Lawyers

Under the [Legal Aid Services Act](#), part of our mandate to promote access to justice for low-income individuals is to identify, assess and recognize the diverse legal needs of low-income individuals and of disadvantaged communities. In order to meet this objective Legal Aid Ontario needs to identify its client groups by recognizing the number of clients seeking assistance who have self-identified a disability, language barrier, visible minority status or Aboriginal status.

Following the “1996 Census of Canada” questionnaire and the “Employment equity group membership self-identification items” used by HRDC, four self-identifying questions are now included in our application process. Through the collection of this information we hope to:

- Enhance our understanding of who are clients are;
- Determine the impact of these self-identification statuses on the delivery of legal aid services;
- Compare our information with Census Canada data to assess the degree to which legal aid applicants are representative of the population.

As you complete legal aid applications at jails, prisons and youth detention centres we are asking that you now include the Self-Identifying questions in each application. Attached is a form which we ask you to complete and forward with the legal aid application to the local area office. All four questions must be asked and answered.

These questions are voluntary and do not affect a client’s eligibility for legal aid assistance. The client must self-identify answers and no one can presume an answer for a client. Clients who do not wish to answer these questions may decline to do so with no impact on their application. If, by reason of mental incapacity, it is impossible to record any answers, please indicate this on the form and include it with the application. Anyone who is concerned about the information collected through this process may contact the FIPPA Coordinator at the Legal Aid Ontario Provincial Office (1-800-668-8258).

Any questions about this process and the use of this form may be directed to your local area office.

## Appendix 8 – Self-Identifying Questions for In-Custody Legal Aid Applications (cont'd)

### Self-Identifying Questions

#### Collected for statistical purposes only

When completing an application for an incarcerated legal aid client, please ask and record answers to the following questions. Submit this form with the legal aid application form to your local area office.

Answers to these questions are voluntary and the client must self-identify answers. Do not presume an answer for a client.

The purpose of this information is to meet our statutory mandate to identify, assess and recognize the diverse legal needs of low-income individuals and of disadvantaged communities. This information is not used to determine eligibility for legal aid services. It is collected for statistical purposes and is in keeping with Census of Canada and Employment Equity guidelines.

Client Name:

1. Are you limited in the *kind* or *amount* of activity that you can do at work or at home because of a long-term physical condition, mental health condition, or other health problem?      Yes ☐      No ☐      Decline to answer ☐
2. Can you speak English or French well enough to conduct a conversation?  
Yes ☐      No ☐      Decline to answer ☐
3. If No, what language(s), **other than English or French**, can you speak well enough to conduct a conversation?  
None ☐      or specify other language(s):
4. Do you consider yourself to be a member of a visible minority group?  
Yes ☐      No ☐      Decline to answer ☐
5. Do you belong to one of the following groups of Aboriginal people?  
Status Indian, Non Status Indian, Inuit, Metis  
Yes ☐      No ☐      Decline to answer ☐

## Appendix 9 – Criminal Appeal Information Form

Name:			
	Last	First	Middle
Appeal of:	<input type="checkbox"/> conviction	<input type="checkbox"/> sentence	<input type="checkbox"/> both
Type of offence:	<input type="checkbox"/> summary	<input type="checkbox"/> indictable	
Charges:			
Trial information:			
Court Name:		Court Location:	
Name of judge:		Plea:	
Date of conviction:		Date of sentence:	
Length of trial:		Sentence imposed:	
Trial lawyer – name and address:			
Trial on legal aid certificate? <input type="checkbox"/> No <input type="checkbox"/> Yes			
If no trial lawyer, why not?			
Notice of Appeal files? <input type="checkbox"/> No <input type="checkbox"/> Yes			
Appeal Bail: <input type="checkbox"/> Pending <input type="checkbox"/> Denied <input type="checkbox"/> Not requested <input type="checkbox"/> Set at \$ cash/surety			
Serving other sentence? <input type="checkbox"/> No <input type="checkbox"/> Yes			
Other criminal record?			
Address if released from custody?			
Have you contacted a lawyer for the appeal? <input type="checkbox"/> No <input type="checkbox"/> Yes			
If yes, name and address:			

## Appendix 10 – When to Refer a Client in a Variation Proceeding

Is this a matter that Legal Aid does not deal with, i.e., a significant property dispute/equalization of net family properties, divorce or a private adoption?	→	Yes	Summary advice only
		No	Go to Step 2
Is the client financially eligible for duty counsel services?	→	Yes	Go to Step 3
		No	Summary advice only
Is this a matter within LAO's covered priorities?	→	Yes	Go to Step 4
		No	Assist in document prep if client requests
Are there domestic violence issues?	→	Yes	Refer for certificate
		No	Go to Step 5
Is this matter one of the following types of variations? A support variation where: <ul style="list-style-type: none"> <li>The payor's income has changed and the child support guidelines would suggest a change in the amount of support</li> <li>Custody has changed</li> <li>A child is no longer dependent or enrolled in a program of education and not subject to child support</li> <li>The payor is now in receipt of Ontario Works or Ontario Disability Support benefits</li> </ul> An access variation where: <ul style="list-style-type: none"> <li>The parties are agreeing to change from supervised to non-supervised access</li> <li>Changes in employment or changes in residency require a variation in access terms</li> <li>Access is being varied from day to overnight, or terms are being minimally varied (i.e., changing access duration and/or pick up and drop off times, redefining holiday times).</li> </ul>	→	Yes	Go to Step 6
		No	Refer for certificate
Does the client's matter appear to be resolvable on consent or within three or fewer court appearances?	→	Yes	Assist client in obtaining settlement
		No	Go to Step 7
If the matter proceeds to a hearing on a contested basis: a) Is the documentation necessary to establish the client's case before the court?	→	Yes	Go to Step 7b)
		No	Request adjournment for client to file necessary materials
b) Will the variation be argued as a motion based on the materials filed?	→	Yes	Assist client in arguing the variation
		No	Go to Step 7c)
c) Will the variation be argued as a hearing with witnesses providing evidence under examination and cross-examination?	→	Yes	Refer to LAO for certificate
		No	Assist client in arguing the variation



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## Appendix 11 – Advice Lawyer/Duty Counsel Referral Form

Client Name: \_\_\_\_\_

Date: \_\_\_\_\_

To area director at: \_\_\_\_\_

Client Issues:

- |  |  |  |
|--|--|--|
| <input type="checkbox"/> Custody         | <input type="checkbox"/> Access            | <input type="checkbox"/> Child Support |
| <input type="checkbox"/> Spousal Support | <input type="checkbox"/> Restraining Order | <input type="checkbox"/> Property      |
| <input type="checkbox"/> FRO Enforcement | <input type="checkbox"/> Other:            |  |

Service Provided by Duty Counsel/Advice Lawyer:

- |  |   |  |
|--|---|--|
| <input type="checkbox"/> Interview client    | <input type="checkbox"/> Financial Eligibility Test | <input type="checkbox"/> Review documents    |
| <input type="checkbox"/> Prepare documents   | <input type="checkbox"/> Negotiation                | <input type="checkbox"/> Consent order       |
| <input type="checkbox"/> Consent adjournment | <input type="checkbox"/> Argue matter/adjournm't    | <input type="checkbox"/> Attend CFSA hearing |
| <input type="checkbox"/> Other:              |   |  |

Reason for Referral to Legal Aid: \_\_\_\_\_

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Duty Counsel/Advice Lawyer Name:

\_\_\_\_\_

(Please Print)

Signature of Duty Counsel: \_\_\_\_\_

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## Appendix 12 – Certificate of Duty Counsel

(Section 25 - Regulation 106 - [Legal Aid Services Act](#))

This is to certify that \_\_\_\_\_ whom I assisted as  
duty counsel on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_, had a previous  
lawyer-client relationship with me, or with \_\_\_\_\_, who is  
associated with me in the practice of law.

Dated at \_\_\_\_\_, Ontario, this \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Duty Counsel Signature

# Appendix 13 – Sample Form 12 – Criminal Duty Counsel Account

**LEGAL AID ONTARIO**  
**Form 12**  
**CRIMINAL DUTY COUNSEL STATEMENT OF ACCOUNT**

Office use only

SOLICITOR NUMBER: 311001123

SOLICITOR NAME: A.B. BROWN  
Initials: A.B. Surname (Please Print): BROWN

1. INDICATE THE CATEGORY OF THE CLIENTS YOU REPRESENTED BY CIRCLING EITHER: ☒ ADULTS OR ☐ YOUTHS

2. AS DUTY COUNSEL I PERFORMED SERVICES UNDER THE LEGAL AID ACT AND REGULATION AS FOLLOWS:  
TIME OF DAY MUST BE COMPLETED. THERE IS A MAXIMUM OF SIX (6) ENTRIES PER ACCOUNT FORM.

LOCATION	DATE			TIME OF DAY		HRS.	MIN.
	YR.	MTH.	DAY	FROM	TO		
PROV. CT. BRAMPTON	012	03	14	8:30	1:00	4	30
PROV. CT. BRAMPTON	012	03	14	2:00	2:30	0	30

5.0  
TOTAL HOURS  
285

TOTAL HOURLY FEES = 57  
TOTAL HOURS = 5  
TOTAL HOURLY FEES = NET HOURLY RATE X TOTAL HOURS = \$

3. TRAVELLING TIME (ONLY AS PROVIDED UNDER SCHEDULE 5)

LOCATION		TIME OF DAY	
FROM	TO	FROM	TO
OFFICE	COURTHOUSE	7:30	8:30
COURTHOUSE	OFFICE	2:30	3:30

HRS MIN  
12 00  
Total Travel Time

43 2  
TOTAL TRAVELLING FEES = NET HOURLY RATE X TOTAL TIME = \$ 86

TOTAL NET FEES = \$ 371

4. DISBURSEMENTS (LETTERS MUST BE SHOWN AT NET RATE OF 0.1 HOURS PER LETTER SENT OR RECEIVED UNDER "OTHER - 4B")

(A) DISTANCE (KM)			(B) OTHER	
FROM	TO	KM	DESCRIPTION	\$
OFFICE	COURTHOUSE	85		
COURTHOUSE	OFFICE	85		

TOTAL OTHER DISB.: \$

TOTAL NUMBER OF KILOMETRES 170 x 30 c/km = TOTAL DISTANCE DISB.: \$ 51.00

TOTAL DISBURSEMENTS \$ 51.00

5. G.S.T. REGISTRATION No. 112345678910 AMOUNT OF G.S.T. BILLED ON FEES: \$ 25.97 DISBURSEMENTS: \$ 3.57 TOTAL G.S.T. BILLED \$ 29.54

6. I CERTIFY THAT THE ABOVE SERVICES WERE RENDERED BY ME:

0120314  
YR. MTH. DAY  
DATE OF ACCOUNT

A. Brown  
SOLICITOR'S SIGNATURE

## Appendix 13 – Sample Form 12 – Criminal Duty Counsel Account (cont'd)

7. AS DUTY COUNSEL I ASSISTED THE FOLLOWING PERSONS IN CRIMINAL MATTERS:

INDICATE APPLICABLE STATUTE FOR EACH PERSON ASSISTED: F = Federal P = Provincial

INDICATE THE TYPE OF SERVICE PROVIDED FOR EACH PERSON. EACH TYPE OF SERVICE MUST BE TOTALLED.

DATE YY / MM / DD	NAMES OF PERSONS ASSISTED	STATUTE		Take Application	Institution Interviews	Summary Advice	Referrals	Adjournment	Pre-Trial	Diversion/Alternative Measures	Withdrawal of all Charges	Other	Financial Eligibility Test	Contested Bail Hearing	Consent Release/Variation	Guilty Plea	Speak to Sentence	Trial	Action Taken at Request of Counsel Sureties, Lawyers & Others Contacted
		F	P																
02/03/14	1 S. SOSA	F										✓							
"	2 G. BECKERT	F		✓				✓											
"	3 A. DAWSON	F				✓													
"	4 E. BANKS	F						✓											✓
"	5 R. SANTO	F											✓			✓	✓		
"	6 B. WILLIAMS	F												✓					✓
"	7 M. GRACE	F								✓									
"	8 J. HICKMAN	F						✓											
"	9 J. CARDENAL	F														✓	✓		
"	10 M. ALOU	P				✓													
"	11 T. HUNDLEY	F													✓				
"	12 J. LIEBER	F											✓			✓	✓		
	13																		
	14																		
	15																		
	16																		
	17																		
	18																		
	19																		
	20																		
	21																		
	22																		
	23																		
	24																		
	25																		
	26																		
	27																		
	28																		
	29																		
	30																		

8. TOTAL NUMBERS ASSISTED:

FEDERAL	1	2	3	1	1	2	1	1	3	3	1	1
PROVINCIAL												

TOTAL OF EACH TYPE OF SERVICE

---

## Appendix 14 – Service Definitions – Form 13 Civil Account

### *Take Application*

Refers to the taking of a written application for a legal aid certificate. This service is rarely performed by court duty counsel.

### *Summary Advice*

Should only be checked as a service **if no other services are rendered to the client other than “Financial Eligibility Test” or “Referrals”**. This service should not be checked off if duty counsel or the advice lawyer provides other substantive services, as any of the substantive services provided by duty counsel or the advice lawyer contain an advice component.

### *Referrals*

To be checked off if the client is advised to seek assistance from another resource, such as a clinic, private counsel, for a legal aid certificate, mediation, etc. It may be ticked off in combination with “Summary Advice”.

### *Prepare/Review Court Documents*

Should be checked off if duty counsel or the advice lawyer reviews the pleadings in a client’s case or assists the client in preparation of documents. Do not check it off in combination with “Summary Advice”.

### *Case Conference*

Should be checked off if the duty counsel attends a case conference either with or on the client’s behalf. Under the Family Law Rules, case conferences, and settlement conferences would be recorded in this column. Attending a trial management conference would be recorded as “Pre-Trial” by family court duty counsel. Do not tick this service off in combination with “Summary Advice”.

### *Adjournment*

To be checked off if duty counsel attends before the judge with or on behalf of the client to have the matter put over to another day. Do not tick off this service in combination with “Summary Advice”.

### *Consent Order*

Usually to be checked if terms of a temporary order have been negotiated, or in situations where a number of issues have been resolved on consent, but there is not a final settlement of all issues. It will usually be ticked off in combination with an “Adjournment”.

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## **Appendix 14 – Service Definitions – Form 13 Civil Account (cont'd)**

### *Care and Custody Hearing*

To be ticked off when duty counsel conducts an actual hearing for temporary care and custody under the CFSA.

### *Other*

Only to be used when none of the other categories are applicable, even by analogy. This category should only be marked in rare situations when the service provided is outside the parameters of any other services that are specifically listed.

### *Financial Eligibility Test*

To be checked off if an FET is done by the duty counsel. Each time this service is checked off, the FET form is to be sent to the Provincial Office with the account. It may be ticked off in combination with “Summary Advice”.

### *Settlement*

Should be checked off if an entire proceeding is finally resolved with the assistance of duty counsel.

The other categories are pretty self-explanatory.

The following services are deemed to be “dispositive” services: Consent Order, Motion, Pre-Trial, Trial and Settlement. When these services (along with the others mentioned above) are ticked off in addition to “Summary Advice”, the percentage of dispositive services is artificially diluted.

For example, let’s say a DC assists four people on a given day. The DC obtains a consent order for 1 client, argues a motion for two of the remaining three clients, and negotiates a settlement for the fourth person. 100 per cent of the services rendered that day are therefore “dispositive” services. If the DC had checked off “Summary Advice” for each of those four clients in addition to the four dispositive service, the DC would be down to 50 per cent in the dispositive services performed that day, by doing nothing else except checking off “Summary Advice”.

# Appendix 15 – Sample Form 13 – Civil Duty Counsel Account

**LEGAL AID ONTARIO**  
Form 13  
**CIVIL DUTY COUNSEL STATEMENT OF ACCOUNT**

Office use only

SOLICITOR NUMBER 213411234

SOLICITOR NAME LM LAWYER  
Initials Surname (Please Print)

1. INDICATE ONE OF THE FOLLOWING TYPES OF DUTY COUNSEL SERVICES: (Circle applicable number)  
☒ 1 FAMILY COURT    ☐ 2 ADVICE LAWYER    ☐ 3 MENTAL HEALTH    ☐ 4 FLIC    ☐ 5 OTHER

2. AS DUTY COUNSEL I PERFORMED SERVICES UNDER THE LEGAL AID ACT AND REGULATION AS FOLLOWS:  
 TIME OF DAY MUST BE COMPLETED. THERE IS A MAXIMUM OF SIX (6) ENTRIES FOR ACCOUNT FORM.

LOCATION	DATE			TIME OF DAY		HRS.	MIN.
	YR.	MTH.	DAY	FROM	TO		
123 Main St., London	012	013	014	9:30	12:00	2	30
" " "	012	013	014	1:00	4:00	3	00

5.5  
TOTAL HOURS

TOTAL HOURLY FEES = NET HOURLY RATE X TOTAL HOURS = \$ 313.50

3. TRAVELLING TIME (ONLY AS PROVIDED UNDER SCHEDULE 5)

LOCATION		TIME OF DAY	
FROM	TO	FROM	TO

HRS. MIN.  
Total Travel Time

TOTAL TRAVELLING FEES = NET HOURLY RATE X TOTAL TIME = \$ \_\_\_\_\_

TOTAL NET FEES = \$ \_\_\_\_\_

4. DISBURSEMENTS (LETTERS MUST BE SHOWN AT NET RATE OF 0.1 HOURS PER LETTER SENT OR RECEIVED UNDER "OTHER - 4B")

(A) DISTANCE (KM)			(B) OTHER	
FROM	TO	KM	DESCRIPTION	\$

TOTAL OTHER DISB.: \$ \_\_\_\_\_

TOTAL NUMBER OF KILOMETRES \_\_\_\_\_ X \_\_\_\_\_ c/km = TOTAL DISTANCE DISB.: \$ \_\_\_\_\_

TOTAL DISBURSEMENTS \$ \_\_\_\_\_

5. G.S.T. REGISTRATION NO. 9181716154131110 AMOUNT OF G.S.T. BILLED ON FEES: \$ 21.95 DISBURSEMENTS: \$ \_\_\_\_\_ TOTAL G.S.T. BILLED \$ 21.95

6. I CERTIFY THAT THE ABOVE SERVICES WERE RENDERED BY ME:

012 013 015  
YR. MTH. DAY  
DATE OF ACCOUNT

J. M. Lawyer  
SOLICITOR'S SIGNATURE

FORM 13 00/02



## Appendix 15 – Sample Form 13 – Civil Duty Counsel Account (cont'd)

7. AS DUTY COUNSEL I ASSISTED THE FOLLOWING PERSONS IN CIVIL MATTERS:		INDICATE THE TYPE OF SERVICE PROVIDED FOR EACH PERSON. EACH TYPE OF SERVICE MUST BE TOTALLED.																
DATE  YY / MM / DD	NAMES OF PERSONS ASSISTED	Take Application	Summary Advice	Referrals	Prepare/Review Court Documents	Case Conference	Adjournment	Consent Order	Care & Custody Hearing	Other	Financial Eligibility Test	Motion	Garnishment Hearing	Show Cause – Family Support Plan	Pre-Trial	Trial	Negotiation	Settlement
02/03/04	1 James Adams	✓									✓							
	2 Keith Birch				✓			✓									✓	
	3 Carla Cosens										✓	✓						
	4 Lisa Duncan			✓			✓											
	5 Mark Evans				✓													
	6 Nancy Frame	✓												✓			✓	
	7 Peter Gunn				✓	✓		✓										
	8 Risa Hunoltz	✓																
	9 Tony Ignacio				✓											✓		
	10 Vera Junaca						✓											
	11 William Kirk	✓	✓								✓							
	12 Arthur Lumsden				✓	✓					✓						✓	✓
	13 Bert Macassa				✓							✓						
	14 Debbie Noone	✓	✓								✓							
	15 Frank O'Brien							✓										
	16 Gus Prakash				✓		✓										✓	
	17																	
	18																	
	19																	
	20																	
	21																	
	22																	
	23																	
	24																	
	25																	
	26																	
	27																	
	28																	
	29																	
	30																	
8. TOTAL NUMBERS ASSISTED:		5372321 52 11 32																
116		TOTAL OF EACH TYPE OF SERVICE																



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## **Appendix 16: - Financial Eligibility Test Form for Duty Counsel**

The following two pages contain the Financial Eligibility Forms for duty counsel for both court services and advice lawyer services.



**Legal Aid Ontario**  
**Financial Eligibility Test for Duty Counsel**  
**Court Services**

Date: \_\_\_\_/\_\_\_\_/\_\_\_\_  
yy mm dd

*[Excluding individuals on social assistance, student loans or Old Age Security plus Gains]*

Name: \_\_\_\_\_ Sex: ☐ Male ☐ Female  
PRINT FIRST LAST

Location: \_\_\_\_\_ Area Office: \_\_\_\_\_

**Type of Service:** ☐ Criminal ☐ Family

**Service Requiring Testing:**

<input type="checkbox"/> Guilty plea	<input type="checkbox"/> Speak to Sentence
<input type="checkbox"/> Trial	<input type="checkbox"/> Representation at Motion
<input type="checkbox"/> Pre-Trial (Family)	<input type="checkbox"/> Garnishment Hearing
<input type="checkbox"/> Negotiation	<input type="checkbox"/> Show Cause FRO
<input type="checkbox"/> Settlement	<input type="checkbox"/> Negotiate Consent Order (over 20 min.)

- How many people are in the Family Unit including you, your spouse or same-sex partner and any dependent children? 1 2 3 4 5+
- What is the total gross income of the Family Unit annually [or monthly]?  

<input type="checkbox"/> No Income	<input type="checkbox"/> Under \$18,000 [\$1,500]	<input type="checkbox"/> \$18,000 - \$26,999 [\$1,500 - \$2,249]	<input type="checkbox"/> \$27,000 - \$30,999 [\$2,250 - \$2,582]
	<input type="checkbox"/> \$31,000 - \$36,999 [\$2,582 - \$3,082]	<input type="checkbox"/> \$37,000 - \$43,000 [\$3,083 - \$3,583]	<input type="checkbox"/> Over \$43,000 [\$3,583]
- Does the total amount of liquid assets exceed \$1,500, including all bank accounts, RRSP's, GIC's and similar assets? [excluding vehicles, real property and household effects] ☐ No ☐ Yes
- Do you own real property (land or house)? ☐ No ☐ Yes  
Is the property included in a matrimonial dispute? ☐ No ☐ Yes
- Is the client financially eligible for duty counsel assistance? ☐ No ☐ Yes

**Declaration:**

I, \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_ declare that the foregoing information is true and correct and I make this statement conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

Declared before me at the \_\_\_\_\_ of \_\_\_\_\_ in the province of Ontario this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
Solicitor Number

\_\_\_\_\_  
Duty Counsel Signature

\_\_\_\_\_  
Client Signature

*Personal information in this application is collected under the authority of Section 83 of the [Legal Aid Services Act](#) and will be used to determine eligibility for legal aid services. Questions about this collection should be directed to the FIPPA Coordinator, 404-375 University Ave., Toronto, Ontario M5G 2G1, (416)979-2352 or 1 (800) 668-8258.*

