

Legal Aid Ontario

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# Discretion Guidelines



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# Discretion Guidelines

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## LAO contact information

### Legal Aid Ontario mailing address:

Legal Aid Ontario  
40 Dundas Street West, Suite 200  
Toronto, ON M5G 2H1

### Telephone

1-800-668-8258 (or 416-979-2352)

### Website:

[www.legalaid.on.ca](http://www.legalaid.on.ca)

### Lawyer Service Centre

1-866-979-9934 (or (416) 979-9934)

- To check on the status of an account
- Questions about direct deposit /banking information
- Help with online billing using *Legal Aid Online*
- Change of contact information
- General tariff information
- Experience level increases
- Information about review of an account

# Discretion Guidelines

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## 1. Approved discretion guidelines

The discretion guidelines describe and clarify in accordance with the *Legal Aid Services Act* and the Regulations 'exceptional circumstances' for which you may be eligible for an increased payment.

These guidelines reflect the feedback LAO received from the bar during province-wide consultations. LAO released its new guidelines to clarify the discretion request process on Aug. 16, 2012, after holding 29 consultation sessions on discretion.

The new discretion guidelines will apply to accounts submitted to LAO **on or after November 26, 2012**.

## 2. Definition of exceptional circumstances

As defined in the Legal Aid Services Act, Note C, the legal aid tariff reflects the fees customarily paid by a client of modest means and except in exceptional circumstances, the legal aid tariff normally applies. The regulations state that the fees may be increased if an increase is justified having regard to all the circumstances, including:

- Result obtained
- Complexity of the matter
- Contributions of the client or other contributors
- Amount of time realistically set aside in anticipation of a lengthy trial which time was not otherwise filled by the lawyer
- Any other relevant factor which would warrant an increased fee.

## 3. 3-Month Bridging Strategy

Where the exceptional circumstances guidelines effective November 26, 2012 have a substantial adverse impact on the outcome of a discretionary payment request, the pre-November 26, 2012 discretion reasons will apply for three months until February 26, 2013.

## **4. Principles for discretionary increases**

Legal Aid Ontario recognizes that lawyers doing legal aid work meet their professional obligations and represent clients to the best of their abilities, and make every effort to do so within the tariff available. However, meeting these standards in and of itself does not support a discretionary increase.

The onus is on the lawyer to provide sufficient details and explanation as to how the matter meets the exceptional circumstances test. Simply indicating one of the guidelines has been met is not sufficient. LAO cannot infer from the outcome that a discretionary increase is appropriate.

The details supporting a discretionary increase need to indicate how the time spent was necessary to advance the proceedings and achieve resolution and exceeding the tariff was necessary due to the exceptional circumstances of the case.

The exercise of discretion is not without checks and controls. LAO is subject to regular independent audits and quality assurance reviews.

When exercising discretion, LAO has to justify and explain the exceptional circumstances relied upon if paying more than the normal tariff maximum.

Once the exceptional circumstances test is met, LAO will determine the amount of discretion to be paid taking into consideration:

- What is usually billed for cases of similar type based on the experience of Lawyer Services & Payments staff in processing discretionary accounts and the practice of law
- The nature of the exceptional circumstances
- What a client of modest means would pay
- The work done by a lawyer based on the information provided in the lawyer's discretion request and detailed accounts

## **5. Legislative Framework & Clarified Discretion Guidelines**

The regulations state that LAO may increase fees beyond the tariff maximums if an increase is justified having regard to all the circumstances, including:

- Results obtained
- Complexity of the matter
- Contributions of the applicant

- Amount of time realistically set aside in anticipation of lengthy trial which time was not otherwise filled by the lawyer
- Any other relevant factor
- *Legal Aid Services Act, 1998, Schedule 1 & 2 O.REG. 107/99*

In order to provide clarification to these circumstances contained in the Regulations, a summary sheet of the guidelines by area of law are available, in [PDF](#) and on the [LAO website](#).

## **6. Discretion payments**

Before LAO can consider a discretion request, counsel must seek and obtain all available authorizations on a certificate before billing.

If the legal aid tariff on the certificate with all available authorizations is insufficient for the services required, but is not eligible for mid-case or big case management, Counsel must promptly notify the District Area Director (DAD) of the details of the case and an estimate of the time and services required, prior to incurring any costs.

Where an account exceeds the amount of time authorized under the certificate, but a discretionary increase is not requested or the request does not contain sufficient information on which to make a discretion decision, the account will be settled in accordance with the tariff maximum for the certificate.

Discretionary increase requests are dealt with by the Lawyer Services and Payments Department, and, in some cases, in consultation with the District Area Director.

Please note that failure to notify the DAD prior to incurring the costs will be a factor in the settlement of the account.

## **7. How to make a request for discretion**

All discretionary increase requests should be attached to the specific account for which an increase is being sought; a request should not be sent separately.

A separate request is required for each account which addresses the work completed during the service period of that account. Discretionary increase requests must be made in writing using LAO's Request for Discretion form.

The discretionary increase request must include detailed reasons for each Discretion Guideline factors selected. The request must outline the exceptional circumstances of the case which

justify a discretionary increase and should address the period of service of the specific account. Copies of earlier opinion letters rendered in the matter can also be attached to the account.

## **8. Exception requests**

The District Area Director has authority to determine whether a discretion request based on factors not contained in the clarified Discretion Guidelines meets the exceptional circumstances test and is eligible for discretion consideration.

Counsel's request for a DAD exception should be utilized in few and limited circumstances. The DAD exception request is made using the discretion forms.

LSP will examine the request and make a recommendation to the DAD.

- If eligibility for discretion is established: the account will be assessed for a discretionary payment.
- If eligibility for discretion is not established: the account will be paid to the tariff maximum.

## **9. Request for review of discretion**

A Review can be requested when counsel is dissatisfied with a discretion decision and the settlement of an account.

A Review should not be initiated if discretion has not been requested.

To make a request for review of discretion:

- Use the Request for Review Form
- Submit your Request for Review through LAO Online using the electronic document submission process

Reviews are not conducted based on telephone calls or voice messages.

LAO will be enforcing Legal Aid Services Act OR 106/99 - s 46 that governs reviews.

- 60 Day Time Limit: Reviews must be submitted within 60 days of receipt of payment
- Articulation of Grounds: Reviews must articulate clear grounds for objecting to the discretion decision

Once a review is made, the decision is final and cannot be submitted again for the same account. Counsel can however seek a court assessment of a Review decision

## **10. Electronic Fund Transfer Payment Messages**

LAO communicates decisions regarding account payments through messages on the Electronic Fund Transfer (EFT) notice.

Standard messages are used to explain how an account is settled, including why discretion requested is not paid in whole or in part. Often messages indicate billing errors or lack of detailed dockets as reasons why an account or discretion request cannot be paid as billed.

Messages may advise that the time spent is disproportionate to the complexity of the matter. This does not mean that the time is not necessary, but that the amount is outside what is appropriate for LAO to pay as a public-funded agency governed by the principle of a client of modest means.

A full list of the message codes that may be shown on the electronic fund transfer can be found on the [Legal Aid Ontario website](#).

## **Appendix**

### **A: Online resources**

- [Discretion](#)
- [Discretion guidelines](#)
- [Frequently asked questions](#)
- [Results Obtained Summary Sheet](#) – [PDF]
- [Tariff & Billing Handbook](#) – [PDF]

### **B: Forms – discretion request forms by area of law**

- [Criminal law](#) – [PDF]
- [Family law: CFSA](#) – [PDF]
- [Family law: SAC](#) – [PDF]
- [Refugee law](#) – [PDF]
- [General use](#) – [PDF]