



August 31, 2022

Kathryn Manning, Chair, Rule 34 Subcommittee, Civil Rules Committee
Via Email (crc.secretary@ontario.ca)

Dear Ms. Manning and Subcommittee Members:

Re: Consultation on Rule 34 of the *Rules of Civil Procedure*

Thank you for inviting the Federation of Ontario Law Associations (FOLA) to provide feedback on your proposed revisions to rule 34 of the *Rules of Civil Procedure* [**"Rules"**].

1. Comments on Specific Proposed Amendments to the Rules

Below, we have responded to the "other feedback" prompt related to several of the rules in your consultation package:

Rule 34.03

The proposed rule clarifies that it applies where the examination is to take place in person, which is necessary given the availability of virtual examinations.

We generally agree with the purpose of this amendment; however, rule 34 should include a section which clarifies what factor(s) determine(s) "where" the examination is taking place (i.e., is it the location of the witness, the transcriptionist, the examiner, the videoconference host, a presiding officer, etc.?).

This clarification would be helpful for out of court examinations, in particular, because it is possible that all participants may be in the same physical location, but the court reporter is attending remotely. This arises in rural and northern areas, where there are few people who provide this service. Is it still an "in-person" examination if certain participants are attending remotely? This is somewhat unclear.

Rule 34.06

The proposed rule contemplates the use of case conferences to deal with objections or failures to agree on the time, place, or method of attendance for an examination.

Case conferences may not be available in a timely manner in some jurisdictions. In others, it may be easier to get an appearance in a motions court than to book a case conference.

We suggest that the subcommittee consider whether this rule should be broadened in this respect or should allow for attendance in the forum allowed by a local practice direction. There are other references to case conferences in the proposed amendments

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which may also need to be addressed to align with any changes to this proposed wording.

Rule 34.07

We agree with the thrust of the proposed amendments, which are intended to clarify protocols for examinees outside of Ontario.

It would be desirable to have different “tracks” set out throughout rule 34 so that there is a complete code that applies for examinations where the examinee is in Ontario, in Canada, or outside of Canada. Again, this needs to address the distinction between the examinee’s physical location (or residence) and where they are attending the examination from if they are doing so virtually.

We repeat our concerns above, under rule 34.06, about what factors or whose physical presence determines “where” the examination is taking place.

Rule 34.08

The contemplated amendment distinguishes between examinations in Ontario and examinations outside of Ontario for the purpose of determining how the examinee is to be sworn or affirmed.

Subsection (3) of the proposed amendment states that where the examination is conducted before a person who is located outside Ontario, the oath may be administered by (i) that person, (ii) a person authorized to administer oaths in Ontario, or (iii) a person authorized to take affidavits or administers oaths in the jurisdiction where the examination is conducted.

The wording of subsection (3) implies that the examination “is conducted” where the person it is conducted “before” is located. This has the consequence that the examinee can be sworn by the person authorized to do so in the jurisdiction where that official is located, but does not account for swearing in the examinee using a person authorized in the location of the witness.

This would arise where the examinee and the official are located in different locations and are both outside of Ontario. We suggest that this needs to be clarified given the possibility for parties to be in various locations during virtual examinations, particularly for out-of-court examinations.

Rule 34.09

This rule governs the use of an interpreter during examinations. It is proposed that this rule remain unchanged. We suggest that this rule could be improved through an objection procedure, similar to other rules governing examinations.

We also urge that where virtual examinations are used, the interpreter should be required to be in the same physical location as the examinee and their lawyer, if they have one, unless all parties agree otherwise. This is necessary because some of the conferencing technologies cut-off speakers that communicate simultaneously, creating issues for the work of the interpreter, the communications between the examinee and

other participants in the examination, and the person who needs to transcribe the dialogue.

Rule 34.10

This rule governs the production of documents on examination. The proposed amendments are intended to account for situations where the witness is examined remotely and documents must be presented to them.

The proposed amendments could be more specific. The rule should be explicit that exhibits to be relied on in a virtual examination shall be screen-shared by the examiner, presented as a digital brief, or delivered as a print volume to each remote participant. Where a hard copy brief of exhibits is being provided, the rule should specify that it is permissible to provide the material immediately prior to the examination for its use at the examination.

The rule should disallow audio-only or telephone examination unless all parties consent or a court orders otherwise. The witness must be visible in most circumstances and must be able to see materials that are shared digitally on a screen.

The unavailability of video technologies drives up costs and should be discouraged by the *Rules* in this manner. Counsel should be compelled to use it in most cases. Moreover, parties that wish to be obstructive can refuse video if it is not required by the *Rules*.

Rules 34.14 and 34.15

These rules cover the circumstances for re-examination or sanctions for misconduct during an examination.

The proposed rules fail to include appropriate technical provisions for a virtual examination. Specifically, an examining party must have the ability to adjourn an out of court examination where the examinee, their lawyer, or the examinee's interpreter has failed to appear using appropriate, functioning technology or in an appropriately private remote location. The rules should also codify potential cost consequences for a failure to do so.

2. General Comments

In addition to the above, we make the following general comments about the proposed amendments to rule 34:

There is a Need for Minimum Technological Standards

Lawyers in Ontario are expected to meet professional standards of technological competence. The *Rules* should increasingly demand *specific* technological standards be in use in litigation practice that reflect these standards. Oral examinations and document discovery are one such area where this is possible, desirable, cost effective, and promotes access to justice.

In our view, the current rule amendments are unspecific in many respects and could be improved. For example, rule 34 should include a specific section setting out the minimum technological requirements for a virtual/remote examination. We suggest that these minimum requirements should include:

- that the examinee and the examiner be audible to one another in real time and visible to one another on video;
- that the examinee appear virtually from the same physical location as their lawyer and interpreter, if they have these persons assisting them;
- that the examinee's device for the purpose of examination consist of a large-screen computer, laptop, or tablet sufficient to view and read documents and that this device remain stationary throughout the examination;
- that all examination participants make arrangements to attend from a location that is sufficiently quiet, private, and with sufficient internet bandwidth and telephone connectivity to support the chosen method of examination; and
- that parties shall use the conferencing platforms or software required by any local practice direction.

These common standards should apply unless it is agreed otherwise by all parties or otherwise ordered by the court.

Telephone Examination

In our view, all remote examinations should occur over video unless all parties consent or the court orders otherwise. We encourage amendments to this effect and that all references to telephone examination be either removed entirely or qualified through a subrule somewhere in rule 34.

Case Conferences

Finally, it is noted that the rule amendments emphasize the use of case conferences to address disagreements or objections. We repeat that conferences may not be readily available in all jurisdictions to address these issues and encourage the subcommittee to consider whether more flexible language – allowing for alternate types of appearances – can be incorporated into these sections.

Should you have any questions about the comments above, please feel free to contact me at info@douglasjudson.ca or 807-861-3684.

Sincerely,



Douglas W. Judson
Chair, FOLA