

Modernizing Oral Examinations: Changes Are Coming to Rule 34

August 11, 2022

By Jeff Cowan

The Ontario Civil Rules Committee has issued a [consultation paper](#) and is seeking input on potential changes to [Rule 34](#) of the [Rules of Civil Procedure, RRO 1990, Reg 194](#), governing oral examinations.

This consultation reflects concerns that Rule 34 currently does not give adequate prominence to the consent-based procedure; requires a motion to resolve disputes respecting out-of-court examinations; and generates difficulties for examinees residing outside Ontario. The latter include confusing procedures requiring a formal motion to resolve any disagreements; language focused on where the examination takes place, which fails to capture “cross-border” telephone or video conference, failure to distinguish clearly between examinees who reside outside Ontario but in Canada (who are subject to the [Interprovincial Summonses Act, RSO 1990, c 1.12](#)) and those who reside outside Canada (who are not).

In brief, the changes contemplated include:

1. A new rule 34.01.1, to give greater prominence to the consent mechanism already set out in rule 34.06, the content of which would be moved to the new rule 34.01.1.
2. Changes to rule 34.02 to narrow its focus to setting out an expectation of how the particulars of the examination are to be determined. The objection procedure would then be moved to a later provision. While the rule would be narrower in focus, it is envisioned as broader in ambit – extending to all oral examinations, instead of only those to be held in Ontario.
3. Changes to rule 34.04 to limit its ambit to examinees who reside in Ontario. A revised rule 34.07 would then set out the procedure for examinees outside Ontario.
4. Changes to rule 34.05 would extend the notice period from two days to seven or fourteen days for Ontario residents being examined, and either seven or fourteen days for other parties not being examined, with reference to the consent option.
5. Given that rule 34.06 is proposed to be moved to a new rule 34.01.1, the objection procedure for examinations of Ontario residents would be pulled out of rule 34.02, and moved to rule 34.06 in expanded form. In place of the existing motion procedure for objections under rule 34.02, objections are proposed to be dealt with by way of case conference. While rule 34 examinations are proposed to be carved out of rule 1.08(8), the factors set out in rule 1.08(6) would be applied as relevant.
6. Changes to rule 34.07 would make it the single point of reference for arranging examinations of persons residing outside Ontario. Current requirements are divided between rule 34.04(7) and rule 34.07, and this binary distinction does not easily lend itself to virtual examinations, in which the person conducting the examination (and likely one or more parties) is in Ontario while the examinee is elsewhere. The current rules also do not distinguish between examinations outside Ontario but in another Canadian jurisdiction and examinations outside Canada.
7. Changes to rule 34.08 would specify that the deciding factor in determining how the examinee is to be sworn is the location of the examiner, to provide certainty in the case of remote examinations across borders.
8. Changes to rule 34.10 would address production of documents for examinations conducted by remote methods.
9. Minor changes to rule 34.15 are proposed to incorporate reference to the method of attendance and to recognize that the

arrangements for the examination may be ordered by the court, not only set out in a notice or summons.

10. Changes to Tariff A would entitle a witness/examinee to the attendance allowance regardless of how they “attend”, but the travel allowance would be available *only* to those who attend in person.
11. Finally, various related amendments have been identified for rules 1.08, 50,13 and 53.05.

As practitioners are aware, the devil is in the details and lawyers, paralegals and staff need to be able to adjust their practices to reflect continuing efforts to simplify, if not better organize, out of court procedures. Providing feedback to the Rule 34 Subcommittee of the Civil Rules Committee is encouraged to gain insight into whether the changes can be expected to address the problems they are intended to address, whether they introduce unintended consequences, and other aspects of Rule 34 that would also benefit from improvements. Feedback is sought by September 2, 2022 and is easily done by filling in answers to questions set out in the [consultation paper](#), and e-mailing them to crc.secretary@ontario.ca.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:



Jeff Cowan

Toronto
416.947.5007

Email:
jcowan@weirfoulds.com

Jeff Cowan is recognized as one of Canada's leading public law litigators.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035