

Civil Rules Committee

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

Consultation Paper

June 24, 2022

The Civil Rules Committee is considering making significant amendments to Rule 34 of the Rules of Civil Procedure, subject to approval of the Attorney General.

A Rule 34 Subcommittee has been struck to lead a consultation. As part of this process, your organization is invited to provide feedback on the proposed approach.

To stimulate reflection on the approaches that could be taken, sample wording for each new rule is provided in this Consultation Paper. The sample wording has not been reviewed by the Civil Rules Committee and should not be regarded as an indication of final drafting. After this consultation process concludes, further development of the proposal, including further drafting, is anticipated.

Questions about the consultation may be directed to crc.secretary@ontario.ca.

A response is requested by September 2, 2022. Please submit the response to crc.secretary@ontario.ca.

Thank you in advance for your contributions.

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Outline

This Consultation Paper begins with a high-level overview of the project's aims. It then sets out the overall structure of the revised Rule 34, as currently envisioned.

The bulk of the Consultation Paper sets out in detail the current thinking on each rule. Each is accompanied by:

- a summary of what is being contemplated,
- sample wording to stimulate reflection,
- targeted questions to draw out feedback on key areas of interest to the Subcommittee, and
- an open text box for other feedback.

The Consultation Paper concludes with an open text box for general comments not provided elsewhere.

While readers are asked to focus on concepts rather than on the sample wording, feedback on particularly problematic aspects of the wording (ambiguous terms, provisions that seem unnecessary, etc.) is welcome.

For ease of reading in Word, please display the Navigation pane:

- PC: Ctrl+F → Headings
- Mac: View → Sidebar in the application menu → check Navigation Pane

Reworking Rule 34: Core aims

The Civil Rules Committee and its Secretariat have identified a number of areas of Rule 34 requiring improvement.

The Rule:

- does not give adequate prominence to the consent-based procedure to arrange for out-of-court examinations;
- requires the time and expense of a motion to resolve disputes respecting out-of-court examinations;
- presents a potential inconsistency with the procedure to resolve objections to the method of attendance (rule 1.08); and
- presents numerous difficulties in the context of examinees residing outside Ontario, including:
 - confusing organization of the procedures related to examining persons residing outside Ontario;
 - by default requiring a formal motion to resolve any disagreements in times when judicial resources are scarce;
 - outdated language focused on where the examination takes place, which fails to capture “cross-border” examinations in which the non-resident examinee is examined by telephone or video conference – a practice that already existed prior to the pandemic and will likely become increasingly common; and
 - failure to distinguish clearly between examinees who reside outside Ontario but in Canada (who are subject to the *Interprovincial Summonses Act*) and examinees who reside outside Canada (who are not).

The changes envisioned in this Consultation Paper aim to address each of the issues above.

Fundamentally, the Subcommittee’s goal through this consultation is to ascertain the Bar’s comfort with the changes being contemplated and to gain insight into whether the changes can be expected to address the problems they are intended to address and whether they inadvertently introduce new problems. The Subcommittee is also interested in other aspects of Rule 34 not addressed in the proposed changes that would also benefit from improvements.

Structure of Rule 34, with envisioned changes

Rule	Purpose	Changes proposed?
34.01	Application of the Rule 34	X
34.01.1	Consent to examination arrangements	X
34.02	Basic parameters of examinations	X
34.03-34.06	Arranging examinations of Ontario residents	X
34.03	<i>Limitation on location of examination</i>	X
34.04	<i>Providing notice of the examination</i>	X
34.05	<i>Notice period</i>	X
34.06	<i>Objections to the arrangements</i>	X
34.07	Arranging examinations of non-Ontario residents	X
34.08-34.12	Conducting the examination	X
34.08	<i>Swearing in the examinee</i>	X
34.09	<i>Interpretation</i>	
34.10	<i>Production of documents</i>	X
34.11	<i>Re-examination</i>	
34.12	<i>Objections to questions</i>	
34.14-34.15	Limitations on conduct of the examination	X
34.14	<i>Improper conduct of the examination</i>	
34.15	<i>Sanctions</i>	X
34.16-34.19	Record of the examination	
34.16	<i>Examination recorded</i>	
34.17	<i>Transcript prepared</i>	
34.18	<i>Transcript filed</i>	
34.19	<i>Video recording</i>	

Rule 34.01

Summary:

This opening rule continues to set out the application of R34. The only identified change is an added reference to the new rule 34.01.1.

Sample wording:

APPLICATION OF THE RULE

34.01 Rules ~~34.02~~ **34.01.1** to 34.19 apply to,

- (a) an oral examination for discovery under Rule 31;
- (b) the taking of evidence before trial under rule 36.01, subject to rule 36.02;
- (c) a cross-examination on an affidavit for use on a motion or application under rule 39.02;
- (d) the examination out of court of a witness before the hearing of a pending motion or application under rule 39.03; and
- (e) an examination in aid of execution under rule 60.18.

Targeted questions: Sample wording:

34.01.1 Despite anything to the contrary in this Rule, a person to be examined and all the parties may agree to the time, place and method of attendance for the examination and,

- (a) to the minimum notice period and the form of notice for the examination; or**
- (b) to dispense with notice of the examination.**

None

Other feedback:

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Rule 34.01.1 [NEW]

Summary:

The aim of this new rule is to give greater prominence to the consent mechanism already set out in rule 34.06.

Targeted questions:

None.

Other feedback:

From a statutory interpretation point of view, a comma belongs between “place” and “and”.

OBA is concerned with instances when you cannot achieve an agreement. Consider whether language should be added addressing how the agreement is memorialized, e.g., in writing.

Rule 34.02

Summary:

The changes envisioned for rule 34.02 narrow its focus to setting out an expectation of how the particulars of the examination (time, place, method of attendance, assignment of examiner) are to be determined. The objection procedure is then 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 as is currently the case. The rationale for this change is that regardless of where the examination takes place (or where the examinee resides), the notice of examination or summons to witness serves the same purpose of setting out the examination details, unless there is an objection or the parties and person to be examined agree to different details.

Sample wording:

~~BEFORE WHOM TO BE HELD~~ ORAL EXAMINATIONS

34.02 ~~(1) Except as otherwise provided in this Rule, a~~An oral examination ~~to be held in Ontario~~ shall be held,

- ~~(a)~~ (a) at a time and place and by the method of attendance set out in the notice of examination or summons to a witness; and
- ~~(b)~~ (b) before a person assigned by,
 - ~~(a) an official examiner,~~
 - ~~(b) (i)~~ (i) a reporting service agreed on by the parties, or
 - ~~(c) (ii)~~ (ii) a reporting service named by the examining party.

~~(2) A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination.~~

~~(3) If a motion under subrule (2) is dismissed, the court shall fix the responding party's costs on a substantial indemnity basis and order the moving party to pay them forthwith, unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.~~

Targeted questions:

1. The revised rule establishes a default expectation that the time, place, and method of an examination will be as set out in the notice of examination or summons to witness, subject to other provisions in Rule 34. Do you have concerns about this approach applying to examinations of persons residing outside Ontario where

- a. the examination is held virtually across borders,
- b. the examination is conducted entirely outside Ontario and elsewhere in Canada, or
- c. the examination is conducted entirely outside Canada?

2. Do you have concerns with the proposed removal of the reference to official examiners?

OBA has concerns about the proposed removal of the reference to official examiners. We do not see the rationale for taking out official examiners as an option and only leaving in “reporting service”.

As the number of Examinations for Discovery being conducted virtually is increasing, parties should not be encouraged to shop extra-jurisdictionally for court reporting service providers because this may cause incongruencies in provisions of transcripts and discovery procedure. Leaving in the language of the “official examiner” in the Rule signals to parties that, notwithstanding the virtual method of attendance, the booking practices for discoveries generally remain the same.

While we know that an official examiner is an officer of the court as per the *Courts of Justice Act* s.91, it is unclear if that section will be amended to make a “reporting service” an officer of the court.

Perhaps the proposed change will require additional changes to be made to other rules referring to “official examiners”. For instance, rule 58.05(1) refers to “official examiner”. Will the removal of same in rule 34.01 necessitate a change to rule 58.05(1)? Or will we have to add the term “reporting service” to rule 58.05(1)?

These proposed changes raise additional questions such as:

1. How are “official examiner” appointments made?
2. Can anyone hold themselves out as a “reporting service” but not an “official examiner”? In other words, are “reporting services” necessarily officers of the court?
3. How do we know if the “reporting service” has the authority to administer oaths?
4. Will the “reporting service” have the authority to provide Certificates of Non-Attendance?

3. Do you have concerns with separating the objection procedure from the provision setting out the contents of the notice?

Rule 34.02(2) & (3)

The current rule 34.02(2): “A person who objects to being examined at the time or place set out in the notice of examination or before a person assigned under subrule (1) may make a motion to show that the time, place or person is unsuitable for the proper conduct of the examination.”

Cost consequences are then set out in rule 34.02(3): “If a motion under subrule (2) is dismissed, the court shall fix the responding party’s costs on a substantial indemnity basis and order the moving party to pay them forthwith, unless the court is satisfied that the making of motion, although unsuccessful, was nevertheless reasonable.”

Rule 34.06(1) & (2)

The new rule 34.06 applies if the person to be examined resides in Ontario and (a) the person to be examined objects or (b) the person to be examined and the parties otherwise fail to agree to the time, place or method of attendance of the examination, or the person before who it is to be conducted.

Rule 34.06(2) states “[o]ne of the parties shall request a case conference under rule 50.13 for an order for direction respecting the time, place, method of attendance, or person, as the case may be.”

OBA’s preference is for the objection procedure to remain in rule 34.02. However, If the objection procedure is taken out of rule 34.02, OBA recommends that rule 34.06 reiterate the former rule 34.02 in that it should require the objecting party to bring the motion or request a case conference and keep in the cost consequences.

A significant consideration for OBA’s recommendation above is the objective of encouraging counsel to be collaborative and reasonable. Considering this objective, we think that the cost consequences from the objection procedure in subrule 34.02(3) (substantial indemnity costs) should be carried over into the objection procedure in subrule 34.06 (and the objection procedure for exams of persons outside Ontario under rule 34.07) and are imposed on the party who loses the motion or case conferences.

By requiring “one of the parties” to bring a motion or request a case conference, our concern is that it will in practice often require the party who wants to proceed virtually and be progressive to bring the motion or request a case conference. Cost consequences would follow if the motion or case conference is dismissed. Rule 34.02 addresses the practical concern that if a party served a notice to proceed virtually, it would then be incumbent on the person objecting to virtual exams to bring a motion or request a case conference. Cost consequences will follow if the motion is dismissed.

Other feedback:

Virtual oral examinations have been conducted for two and a half years. Since the language, content, and construct of Rule 34 is being reconsidered, this may be an opportune time for the inclusion of ground rules governing the conduct of virtual oral examinations.

We may want to codify rules of engagement and appropriate conduct at virtual oral examinations. Guidance may be taken from case law pre-pandemic as well as decisions involving virtual oral examinations throughout the past two and a half years.

Rule 34.03

Summary:

The existing requirement in rule 34.03 that an examination take place in the examinee's county in Ontario reflects a time when examinations would always be conducted in person. Since remote examinations are now available, a revision is proposed to limit this rule's application to in-person examinations.

Sample wording:

PLACE OF EXAMINATION

34.03 Where **the examination is to be conducted in person and** the person to be examined resides in Ontario, the examination shall take place in the county in which the person resides, unless the court orders or the person to be examined and all the parties agree otherwise.

Targeted questions:

None

Other feedback:

OBA supports this revision.

Rule 34.04

Summary:

Changes to rule 34.04 are envisioned to limit its ambit to examinees **who reside in Ontario**, therefore all references to examinees outside Ontario are removed. The revised rule 34.07 (below) then sets out all aspects of the procedure for examinees outside Ontario.

Sample wording:

~~HOW ATTENDANCE REQUIRED~~ **PROVIDING FOR ATTENDANCE**

Application

34.04 **(0.1) This rule applies where the person to be examined resides in Ontario.**

Party

(1) Where the person to be examined is a party to the proceeding, a notice of examination (Form 34A) shall be served,

- (a) on the party's lawyer of record; or
- (b) where the party acts in person, on the party, personally or by an alternative to personal service.

Person Examined on Behalf or in Place of Party

(2) Where a person is to be examined for discovery or in aid of execution on behalf or in place of a party, a notice of examination shall be served,

- (a) on the party's lawyer of record; or
- (b) on the person to be examined, personally and not by an alternative to personal service.

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

- (a) on the lawyer for the party who filed the affidavit; or
- (b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service.

Others

(4) Where the person to be examined, ~~(a)~~ is neither a party nor a person referred to in subrule (2) or (3); ~~and (b) resides in Ontario~~, the person shall be served with a summons to witness (Form 34B), personally and not by an alternative to personal service.

Attendance Money

(5) When a summons to witness is served on a witness, attendance money calculated in accordance with Tariff A shall be paid or tendered to the witness at the same time.

Summons may be Issued in Blank

(6) On the request of a party or a lawyer and on payment of the prescribed fee, a registrar shall sign, seal and issue a blank summons to witness and the party or lawyer may complete the summons and insert the names of any number of witnesses.

~~*Person Outside Ontario*~~

~~(7) Rule 53.05 (summons to a witness outside Ontario) applies to the securing of the attendance for examination of a person outside Ontario, and the attendance money paid or tendered to the person shall be calculated in accordance with the *Interprovincial Summonses Act*.~~

Person in Custody

(8) Rule 53.06 (compelling attendance of witness in custody) applies to the securing of the attendance for examination of a person in custody.

Targeted questions:

None

Other feedback:

We recommend considering whether the title of the rule can remain unchanged.
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Rule 34.05

Summary:

The principal proposed change to rule 34.05 is to extend the notice period from two days to seven days. For clarity, reference to the consent option is also envisioned.

Sample wording:

TIMING OF NOTICE OF TIME AND PLACE

Person Ontario Resident to be Examined

34.05 (1) Where the person to be examined resides in Ontario, ~~he or she~~ **the person** shall be given not less than ~~two~~ **fourteen** days notice of the time and place of the examination **and the method of attendance**, unless **notice is dispensed with under rule 34.01.1** or the court orders otherwise.

Every Other Party

(2) Every party to the proceeding other than the examining party shall be given not less than ~~two~~ **seven fourteen** days notice of the time and place of the examination **and the method of attendance, unless notice is dispensed with under rule 34.01.1**.

Targeted questions:

1. Do you agree with the expanded notice period? If not, what is your proposed notice period and why?

OBA does not agree with the expanded notice period. Additional time for notice is not required. If there are parties that are making examinations difficult enough such that this rule is resorted to, then providing the parties with additional time only indulges the behaviour we are seeking to discourage. Maintaining the notice period at two days encourages parties to agree on discovery particulars such as date, time, and place.

Other feedback:

The very little case law found in the rules interpreting this rule (e.g., *Firestone v. Firestone* (1975), 6 O.R. (2d) 714, Watson McGowan's Ontario Civil Practice 2022) suggests that this rule is functioning well.

Rule 34.06

Summary:

As noted above, the existing content of rule 34.06 is proposed to be moved to a new rule 34.01.1. In its place, the objection procedure for examinations of Ontario residents would be pulled out of rule 34.02, and moved to this rule in expanded form.

The new objection procedure is envisioned as incorporating objections to **method** of attendance. As such, Rule 34 examinations are proposed to be carved out of rule 1.08(8) (see below under Related Amendments). However, the factors set out in rule 1.08(6) would be applied as relevant.

Note that 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.

Sample wording:

~~EXAMINATIONS ON CONSENT~~ **OBJECTION OR FAILURE TO AGREE**

Application

~~34.06 (1) A person to be examined and all the parties may consent to the time and place of the examination and,~~

- ~~(a) to the minimum notice period and the form of notice; or~~
- ~~(b) to dispense with notice.~~

This rule applies if the person to be examined resides in Ontario and,

- (a) the person to be examined **objects** to being examined at the time, or place, or by the method of attendance, specified in the notice of examination or summons to a witness, or before the assigned person; or**
- (b) the person to be examined and the parties otherwise **fail to agree** to the time, place, or method of attendance of the examination, or the person before whom it is to be conducted.**

Case Conference

(2) **One of the parties shall request a case conference under rule 50.13 for an order for directions respecting the time, place, method of attendance, or person, as the case may be.**

Notice

(3) The party who requests the **case conference shall give notice of the request to the person to be examined and to every other party.**

Factors

(4) The court, in making the order, shall consider any applicable factors listed in subrule 1.08 (6), with necessary modifications.

Targeted questions:

1. Do you agree that a case conference instead of a motion should be used to address disagreement about the arrangements for a Rule 34 examination?

In many regions and specialty practice areas (e.g., commercial list and class actions), case conferences are already being employed to effectively make these procedural determinations faster and less costly. However, there are concerns in the larger regions including Toronto that the change to make case conferences the exclusive method to make these determinations will not accomplish the goals of efficiency and effectiveness because:

- 1) There is not currently a reliable procedure to get materials in front of a case management judge. Parties have had trouble in getting their materials in front of a judge which slows down the process or makes the conference less effective.
- 2) In actions where there are numerous parties or instances where there are companion actions, not all parties receive notice of the case conference and are therefore absent from decisions being made. This is less likely to occur when motions are brought, and proper notice is required.
- 3) Given the current delay in getting case conferences in some regions, there are questions about whether there are sufficient resources to ensure that the rule change does not simply transfer motion delays to case conference delays.
- 4) On civil lists that have not traditionally employed case conferences to make these determinations, it will be necessary to clearly signal this shift so that all understand that these determinations are to be made at the case conference.

In jurisdictions where case conferences are effectively used to determine rule 34 disputes, they will continue to be used. It is hoped that case conferences can be used more effectively across the province. However, before this mechanism is made mandatory across the province, there needs to be certainty that the above four issues can be addressed. We would be happy to continue to discuss solutions with the Committee.

In addition, even if the above issues are addressed, there would still be one clearly foreseeable disadvantage to making case conferences a mandatory mechanism to address all rule 34 disputes. There may be cases where, for various reasons, a motion is ultimately necessary. In such cases, if the matter is required to proceed by case conference first and only then proceed to a motion, delay will be exacerbated. Direct access to a motion would, in these circumstances, be the more efficient procedure. There needs to be a safety valve that allows for counsel to bring a motion where a threshold test

is met. If the above issues are addressed such that it becomes appropriate to make the suggested rule change, the change should include a threshold for determining when a motion is necessary, based on how fundamental the rule 34 dispute is to the ultimate outcome of the case, the issues in dispute and the nature of the evidence required to make the necessary determinations. A case in which that threshold is met should have direct access to a motion, with appropriate cost consequences for abuse.

Other issues to consider:

The Subcommittee should consider whether there is a problematic loss of precedent if matters are decided in case conferences rather than open court motions and whether there would be a way to address that for those cases that might have precedential value.

2. Do you agree that a single case conference procedure should apply to all arrangements for a Rule 34 examination, including the method of attendance?

A single procedure would be preferential to deal with all arrangements for Rule 34 examinations such as date, time, place, method of attendance, person to be produced etc.

Other feedback:

The OBA has identified a gap in the proposed rule which exists in the current Rule 34.02 which is what to do when the examining party is objecting to the person who is being examined as an unsuitable person to be examined for the proper conduct of the examination. For instance, Examinations for Discovery involving a corporate defendant and the representative selected is not appropriate.

From a statutory interpretation standpoint, the drafting of 34.06(1)(a) and (b) should be revised to include commas as reflected above.

Rule 34.07

Summary:

Currently, the requirements for examinations of persons residing outside Ontario are divided between Rule 34.04(7) and Rule 34.07. Nominally, the former addresses examinees who are summoned to attend in Ontario and the latter addresses examinees who are examined in their home jurisdiction. However, the court's determination of whether the examination will be conducted in or outside Ontario is made under rule 34.07(1). Furthermore, 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.

Apart from these issues, the current Rules do not distinguish between examinations outside Ontario but in another Canadian jurisdiction and examinations outside Canada. They also refer to the *Interprovincial Summonses Act* for the purpose of attendance money, but do not reflect the Act's limitation to examination in other Canadian jurisdictions or its requirement that an interprovincial summons be ordered by a judge.

The changes envisioned for this rule would make it the single point of reference for arranging examinations of persons residing outside Ontario.

Sample wording:

WHERE PERSON TO BE EXAMINED RESIDES OUTSIDE ONTARIO

Contents of Order for Examination

Application

34.07 (1) This rule applies where the person to be examined resides outside Ontario.

Notice Period

(2) The person to be examined shall be given not less than fourteen days notice of the time and place of the examination and the method of attendance, unless notice is dispensed with under rule 34.01.1 or the court orders otherwise.

Failure to Agree

(3) If the person to be examined and the parties fail to agree to the time, place or method of attendance of the examination or the person before whom it is to be conducted, one of the parties shall request a case conference under rule 50.13.

Notice of case conference

(4) Despite rule 50.13, where an Act, regulation, or other law requires that an issue to be determined, or an order to be made, at the case conference is reserved to the

jurisdiction of a judge, the party requesting the case conference shall identify this requirement in the request.

(5) The party who requests the case conference shall give notice of the request to the person to be examined and to every other party.

Summons

(6) A party seeking to compel the attendance of a person outside Ontario but within Canada for examination either in person in Ontario or by telephone conference or video conference from Ontario shall have a summons issued in Form 53C and present the summons at the case conference.

Case Conference

(4) (7) At the case conference, the presiding judicial official ~~Where the person to be examined resides outside Ontario, the court may~~ **make an order ~~determine~~**ing**,**

- (a) whether the examination is to take place in or outside Ontario;
- (b) the time, ~~and~~ place **or method of attendance** of the examination;
- (c) the minimum notice period;
- (d) the person before whom the examination is to be conducted;
- (e) the amount of attendance money to be paid to the person to be examined; and
- (f) any other matter respecting the holding of the examination.

Factors

(8) The court, in making the order, shall consider any applicable factors listed in subrule 1.08 (6) and, if relevant, the *Interprovincial Summonses Act*, with necessary modifications.

Certificate

(9) Where the order under subrule (7) requires a person outside Ontario but within Canada to be examined either in person in Ontario or by telephone conference or video conference from Ontario, a certificate shall be signed in accordance with the *Interprovincial Summonses Act*,

(10) Subrules 34.04 (1), (2) and (3) apply, with necessary modifications, with respect to a summons issued under this rule or a certificate signed in accordance with the *Interprovincial Summonses Act*, and, for the purpose, a reference in those subrules to a notice of examination shall be read as a reference to the summons and, if required, certificate.

Commission and Letter of Request

~~(2)~~ **(11)** Where ~~the~~ person outside Canada is to be examined ~~outside Ontario~~ in accordance with an order under subrule (7), the order ~~under subrule (1)~~ shall be in Form 34E and shall, if ~~the moving a~~ party requests it, provide for the issuing of,

- (a) a commission (Form 34C) authorizing the taking of evidence before a named commissioner if the examination is to take place outside Ontario; and
- (b) a letter of request (Form 34D) directed to the judicial authorities of the jurisdiction in which the person is to be found, requesting the issuing of such process as is necessary to compel the person to attend and be examined before the commissioner or by telephone conference or video conference from Ontario.

~~(3)~~ **(12)** The commission and letter of request shall be prepared and issued by the registrar.

Attendance Money

~~(4)~~ **(13)** ~~Where the person to be examined resides outside Ontario and is not a party or a person to be examined on behalf or in place of a party, the examining party shall pay or tender to the person to be examined the amount of attendance money fixed by the order under subrule (1).~~ Unless the court orders otherwise under subrule (7), the attendance money paid or tendered to a person to be examined under this rule who is neither a party nor a person to be examined on behalf of or in place of a party shall be calculated in accordance with,

- (a) the *Interprovincial Summonses Act*, if the person resides in another Canadian jurisdiction and attends the examination in person in Ontario; or
- (b) *Tariff A*, in any other case.

Duties of Commissioner

~~(5)~~ **(14)** A commissioner shall, to the extent that it is possible to do so, conduct the examination in the form of oral questions and answers in accordance with these rules, the law of evidence of Ontario and the terms of the commission, unless some other form of examination is required by the order or the law of the place where the examination is conducted.

~~(6)~~ **(15)** As soon as the transcript of the examination is prepared, the commissioner shall,

- (a) return the commission, together with the original transcript and exhibits, to the registrar who issued it;
- (b) keep a copy of the transcript and, where practicable, the exhibits; and
- (c) notify the parties who appeared at the examination that the transcript is complete and has been returned to the registrar who issued the commission.

Examining Party to Serve Transcript

~~(7)~~ **(16)** The registrar shall send the transcript to the lawyer for the examining party and the lawyer shall forthwith serve every other party with the transcript free of charge.

Targeted questions:

1. Should a form of “notice” or “summons” be prescribed as an initial method of formally notifying an examinee outside Ontario (both in Canada and outside Canada), as a precursor to agreement or disagreement, case conference, and order of the Ontario court?

Yes, this is satisfactory.

2. Do you agree with the proposed 14-day notice period for examinees outside Ontario? If not, what is your proposed notice period and why?

The present rule does not contemplate the exact timing of the notice period for serving an examinee outside of Ontario. However, OBA submits that fourteen days is excessive. Typically, a party, even if outside of Ontario, would be represented by counsel. Notices would be served upon the counsel’s office. The counsel would be responsible for having their non-Ontario client attend in any event.

If a timeframe must be chosen, seven days is probably reasonable for a non-Ontario examinee. It strikes the appropriate balance between the ability of a party to properly make themselves available to be examined, gather their affairs, account for rescheduling, and the reality that deposition-like attendances of any kind are simply easier now for the public considering virtual attendances. If a party fails to attend, a new notice can easily be served as opposed to waiting fourteen days.

3. As with examinations of Ontario residents (rule 34.06), do you agree that a case conference instead of a motion should be used to address disagreement about the arrangements?

OBA’s recommendations regarding case conferences as opposed to motions are set out above.

4. Do you have any concerns with requiring a party to request the case conference if a non-party examinee does not agree to the arrangements?

Please refers to the OBA’s above comments.

5. Currently, the Form 53C summons to a witness outside Ontario is prescribed for summoning a non-resident examinee to attend an examination in Ontario, both when they are a party and when they are a non-party.
- Would it be desirable for a separate summons form to be prescribed under this rule, rather than relying on Form 53C?
 - Is a summons to a witness outside Ontario (either Form 53C or a new form), as opposed to a Form 34A notice of examination, the appropriate mechanism to secure the **virtual** attendance for examination of a **party** located elsewhere in Canada?

6. Do you think the structure and content of the rule as proposed will be satisfactory (both effective and not overly onerous)? If not, what changes are needed? For example, would it be desirable to have distinct “tracks” (provisions) needed for:
- examinees in Canada vs. outside Canada?
 - non-Ontario examinee objects entirely to examination vs. examinee objects to specific arrangements?
 - “simple” cases vs. “complex” cases (however defined)?
 - etc.?

7. Should attendance money be prescribed for examinations held outside Canada? If so, is Tariff A the appropriate default?

8. Do you have any concerns about the Ontario court’s jurisdiction in relation to the procedure set out in this rule?

Other feedback:

Rule 34.08

Summary:

Currently, rule 34.08 distinguishes between examinations in Ontario and examinations outside Ontario for the purpose of determining how the examinee is to be sworn. Changes are envisioned to specify that the deciding factor is the location of the examiner. This approach is intended to create certainty in the case of remote examinations across borders.

Sample wording:

PERSON TO BE EXAMINED TO BE SWORN

34.08 (1) Before being examined, the person to be examined shall take an oath or make an affirmation.

~~(2) If and, where~~ the examination is conducted before a person who is located in Ontario, the oath or affirmation shall be administered by an official examiner or by a person authorized to administer oaths in Ontario.

~~(2) (3) If Where~~ the examination is conducted before a person who is located outside Ontario, the oath or affirmation may be administered by that the person ~~before whom the examination is conducted~~, a person authorized to administer oaths in Ontario, or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction where the examination is conducted.

Targeted questions:

1. This is the only rule in which the location of the person conducting the examination, rather than the location of the examinee, is determinative of procedure. Does this approach present any concerns?

The above proposed changes are satisfactory.

Other feedback:

Rule 34.09

Summary:

Under the current project, no changes are envisioned for rule 34.09.

Sample wording:

[Unchanged]

INTERPRETER

34.09 (1) Where the person to be examined does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the person is examined, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation and the questions to and answers of the person being examined.

(2) Where an interpreter is required by subrule (1) for the examination of,

(a) a party or a person on behalf or in place of a party, the party shall provide the interpreter;

(b) any other person, the examining party shall provide the interpreter,

unless the interpretation is from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General.

Targeted questions:

1. Are there any suggested improvements to these rules?

The existing rule is satisfactory. No changes are required.

Other feedback:

Rule 34.10

Summary:

Changes are envisaged to rule 34.10 to address production of documents for examinations conducted by remote methods.

Sample wording:

PRODUCTION OF DOCUMENTS ON EXAMINATION

Interpretation

34.10 (1) Subrule 30.01 (1) (meaning of “document”, “power”) applies to subrules (2), (3) and (4).

Person to be Examined Must Produce Required Documents and Things

(2) **Subject to subrules (2.1) and (2.2),** the person to be examined shall produce for inspection at the examination,

- (a) on an examination for discovery, all documents in **their** possession, control or power that are not privileged and that subrule 30.04 (4) requires the person to produce; and
- (b) on any examination, including an examination for discovery, all documents and things in **their** possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to produce.

(2.1) If the examination is to be conducted by telephone conference or video conference, the parties and the person to be examined may make alternate arrangements for the inspection of documents.

(2.2) If the parties are unable to agree on arrangements for the inspection, the parties may request a case conference under rule 50.13.

Notice or Summons May Require Documents and Things

(3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to produce for inspection **at the examination,**

- (a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or
- (b) such documents or things described in clause (a) as are specified in the notice or summons.

Duty to Produce Other Documents

(4) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that is relevant to a matter in issue in the proceeding and is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination **and the method of conduct of the examination allows for immediate production**, and if not, within two days thereafter, unless the court orders otherwise.

Targeted questions:

1. Do the proposed changes to this rule adequately address production requirements where an examination is conducted remotely?

Yes, the proposed changes are satisfactory.

Other feedback:

OBA recommends for Rule 34.10(3) to keep in the words “at the examination” to ensure the party being examined brings their documents to the examination, even if the documents are in electronic form. This is in the event the examiner wants the party to share their screen and put up the document for questioning.

Rules 34.11–34.14

Summary:

Under the current project, no changes are envisioned for rules 34.11–34.14.

Sample wording:

[Unchanged]

RE-EXAMINATION

On Examination for Discovery

34.11 (1) A person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party.

On Cross-Examination on Affidavit or Examination in Aid of Execution

(2) A person being cross-examined on an affidavit or examined in aid of execution may be re-examined by his or her own lawyer.

Timing and Form

(3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination.

On Examination for Motion or Application

- (4) Re-examination of a witness examined,
- (a) before the hearing of a motion or application, is governed by subrule 39.03 (2); and
 - (b) at the hearing of a motion or application, is governed by subrule 39.03 (4).

On Examination Before Trial

(5) Re-examination of a witness examined before trial under Rule 36 is governed by subrule 36.02 (2).

OBJECTIONS AND RULINGS

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.

34.13 Revoked: O. Reg. 171/98, s. 10.

IMPROPER CONDUCT OF EXAMINATION

Adjournment to Seek Directions

34.14 (1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
- (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or
- (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

Sanctions for Improper Conduct or Adjournment

(2) Where the court finds that,

- (a) a person's improper conduct necessitated a motion under subrule (1); or
- (b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just.

Targeted questions:

1. Are there any suggested improvements to these rules?

Other feedback:

Rule 34.15

Summary:

Minor changes to rule 34.15 are envisioned 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.

Sample wording:

SANCTIONS FOR DEFAULT OR MISCONDUCT BY PERSON TO BE EXAMINED

34.15 (1) Where a person fails to attend at the time **and by the method set out and place fixed for an examination** in the notice of examination or summons to witness, **ordered by the court**, or **at the time and place** agreed on by **the person and** the parties, or refuses to take an oath or make an affirmation, to answer any proper question, to produce a document or thing that **the person he or she** is required to produce or to comply with an order under rule 34.14, the court may,

- (a) where an objection to a question is held to be improper, order or permit the person being examined to reattend at his or her own expense and answer the question, in which case the person shall also answer any proper questions arising from the answer;
- (b) where the person is a party or, on an examination for discovery, a person examined on behalf or in place of a party, dismiss the party's proceeding or strike out the party's defence;
- (c) strike out all or part of the person's evidence, including any affidavit made by the person; and
- (d) make such other order as is just.

(2) Where a person does not comply with an order under rule 34.14 or subrule (1), a judge may make a contempt order against the person.

Targeted questions:

1. Are there any suggested improvements to this rule?

Other feedback:

Rules 34.16–34.19

Summary:

Under the current project, no changes are envisioned for rules 34.16–34.19.

Sample wording:

[Unchanged]

EXAMINATION TO BE RECORDED

34.16 Every examination shall be recorded in its entirety in question and answer form in a manner that permits the preparation of a typed transcript of the examination, unless the court orders or the parties agree otherwise.

TYPED TRANSCRIPT

34.17 (1) The official examiner or person who recorded an examination shall, on the request of a party, have a typed transcript of the examination prepared and completed within four weeks after receipt of the request.

Certification

(2) The transcript shall be certified as correct by the person who recorded the examination, but need not be read to or signed by the person examined.

Copy to be Provided

(3) As soon as the transcript is prepared, the official examiner or person who recorded the examination shall send a copy of the transcript to the party who requested it.

FILING OF TRANSCRIPT

Party to Have Transcript Available

34.18 (1) It is the responsibility of a party who intends to refer to evidence given on an examination to have a copy of the transcript of the examination available for filing with the court.

Filing for Use on Motion or Application

(2) Where a party intends to refer to a transcript on the hearing of a motion or application, a copy of the transcript for the use of the court shall be filed in the court office where the motion or application is to be heard, at least four days before the hearing.

(3) The party may file a copy of a portion of the transcript if the other parties consent.

Filing for Use at Trial

(4) A copy of a transcript for the use of the court at trial shall not be filed until a party refers to it at trial, and the trial judge may read only the portions to which a party refers.

VIDEOTAPING OR OTHER RECORDING OF EXAMINATION

34.19 (1) On consent of the parties or by order of the court, an examination may be recorded by videotape or other similar means and the tape or other recording may be filed for the use of the court along with the transcript.

(2) Rule 34.18 applies, with necessary modifications, to a tape or other recording made under subrule (1).

Targeted questions:

1. Are there any suggested improvements to these rules?

Other feedback:

Some court reporter offices have adopted a practice whereby they record the virtual oral examination for discovery. Perhaps we can consider the following issues:

- 1) when a video is preserved,
- 2) how a party can request a video, and
- 3) what happens if a party does not consent to the video recording being made.

Related amendments

To support the changes to Rule 34, various related amendments have been identified in other rules.

Rule 1.08

Summary:

At present, objections to the time and place of an oral examination are governed by rule 34.02, while objections to the method of attendance are governed by rule 1.08. As mentioned under rule 34.06 above, it is considered preferable for objections respecting any arrangements of a Rule 34 examination be addressed under a single case conference mechanism.

For this reason, it is envisioned that Rule 34 examinations would be carved out of rule 1.08(8). However, a new provision in that rule would point the reader to Rule 34, to ensure that rule 1.08 continues to function as the central source for information about method of attendance under the rules,

Sample wording:

METHOD OF ATTENDANCE AT HEARINGS, ETC.

Attendance Before the Court

1.08 (1) [...]

[...]

Attendance at Mediations, ~~Oral Examinations~~

(8) In the case of a mediation under Rule 24.1, 75.1 or 75.2 ~~or of any step to which Rule 34 applies~~, the mediation ~~or step~~ shall be held by a method of attendance referred to in subrule (1) determined in accordance with the following rules:

1. If the parties and any other person who is required to attend the mediation ~~or step~~ agree on the method of attendance, the mediation ~~or step~~ shall be held by that method.
2. If the parties and any other person who is required to attend the mediation ~~or step~~ fail to agree on the method of attendance,
 - i. in the case of a mediation to be held under Rule 24.1 ~~or a step to which Rule 34 applies~~, one of the parties shall request a case conference under rule 50.13 for an order directing the method of attendance, or
 - ii. in the case of a mediation to be held under Rule 75.1 or 75.2, the court shall, on the motion for directions under rule 75.1.05 or 75.2.03, as the case may be, make an order directing the method of attendance.
3. In making an order directing the method of attendance, the court shall consider any applicable factors listed in subrule (6).

Attendance at Oral Examinations**(8.1) A step to which Rule 34 applies shall be held by a method of attendance referred to in subrule (1) determined in accordance Rule 34.**

[...]

Targeted questions:

1. Do you have concerns with the envisioned approach to the relationship between rule 1.08 and Rule 34?

No, but please refer to the OBA's comments regarding **Case Conferences**.

2. Are there any further suggested improvements to this rule?

Other feedback:

Rule 50.13

Summary:

There is a potential gap in the current rule 50.13, in that it recognizes that a judge may direct a case conference but does not expressly recognize that a case conference may arise in other ways. For avoidance of doubt, an amendment is contemplated to close the gap. This would support the case conference mechanism envisioned under rules 34.06 and 34.07, as well as existing rules that refer to case conferences.

Sample wording:

CASE CONFERENCES FOR ACTIONS AND APPLICATIONS

50.13 (1) **In addition to anything in these rules that requires or permits the holding of a case conference, a** judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or associate judge.

Targeted questions:

1. Are there any further suggested improvements to this rule?

None are contemplated at this time.

Other feedback:

Rule 53.05

Summary:

Rule 53.05 currently provides for a summons to a witness outside Ontario to attend a hearing “under the *Interprovincial Summonses Act*” and prescribes a form for this purpose. Pursuant to current rule 34.04(7), the form is also used for out-of-court examinations and the content of the form reflects this dual purpose. Neither rule 53.05 nor other rules under rule 53 contemplate extra-territorial witnesses who are not subject to the *Interprovincial Summonses Act*. In contrast to existing rule 34.04(7), rule 53.05 also does not address the issue of attendance money.

Changes are envisioned to clarify that the rule applies both inside and outside Canada, to extend its application to remote appearances or examinations from outside Ontario, to address attendance money, and to distinguish between contexts in which the *Interprovincial Summonses Act* does and does not apply.

Sample wording:

INTERPROVINCIAL—SUBPOENA COMPELLING ATTENDANCE OF WITNESS OUTSIDE ONTARIO

Summons

53.05 (1) A summons to a witness outside Ontario **but within Canada** to compel ~~his or her~~ **the witness’** attendance **in person in Ontario or by telephone conference or video conference from outside Ontario** ~~under the *Interprovincial Summonses Act*~~ shall be in Form 53C.

Attendance Money

(2) The attendance money paid or tendered to the witness shall be calculated in accordance with,

(a) the *Interprovincial Summonses Act*, if the witness resides in another Canadian jurisdiction and attends the trial in person in Ontario; or

(b) Tariff A, in any other case.

Targeted questions:

1. Is the procedure in this rule sufficiently particularized for summoning witnesses from other Canadian jurisdictions?

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2. Similarly to the question under rule 34.07, is a Form 53C summons to witness outside Ontario the appropriate mechanism to secure **virtual** attendance of a witness outside Ontario but within Canada?

Other feedback:

Tariff A

Summary:

The provisions under Tariff A respecting attendance money refer to an attendance allowance and a travel allowance. It is proposed that a witness/examinee would be entitled to the attendance allowance regardless of how they “attend” an examination, but that the travel allowance would be available only to witnesses/examinees who attend in person.

Sample wording:

TARIFF A
LAWYERS’ FEES AND DISBURSEMENTS ALLOWABLE UNDER RULES 57.01 AND
58.05

PART II — DISBURSEMENTS

[...]

21. Attendance money actually paid to a witness who is entitled to attendance money, to be calculated as follows:

1. Attendance allowance for each day of necessary attendance **by any method referred to in subrule 1.08 (1)**: \$50.
2. Travel allowance, **where if the witness attends the hearing or examination in person and** the hearing or examination is held,
 - (a) in a city or town in which the witness resides, \$3.00 for each day of necessary attendance;
 - (b) within 300 kilometres of where the witness resides, 24¢ a kilometre each way between his or her residence and the place of hearing or examination;
 - (c) more than 300 kilometres from where the witness resides, the minimum return air fare plus 24¢ a kilometre each way from his or her residence to the airport and from the airport to the place of hearing or examination.
3. Overnight accommodation and meal allowance, **where if** the witness resides elsewhere than the place of hearing or examination, **attends the hearing or examination in person** and is required to remain overnight, for each overnight stay: \$75.

Targeted questions:

1. Do you agree that availability of travel money, but not attendance money, should depend on in-person attendance at the examination or hearing?

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Other feedback:

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Overall feedback

Targeted questions:

1. Do you have comments about the overall structure of Rule 34 as envisaged?

Excellent, comprehensive, and thorough review of Rule 34. OBA appreciates having the rule updated, where necessary, to reflect the current state of modern litigation.

2. Do have any comments on whether it is necessary to have the proposed changes separated into residents of Ontario and non-residents of Ontario?

Other feedback:

Thank you for the Committee's exemplary work preparing this document and contemplating ways in which rule 34 (and inter-related rules) can be improved to better the functioning of our civil justice system.

OBA's Insurance Law, Civil Litigation, Franchise Law, Bankruptcy and Insolvency Law, and Labour and Employment Law Sections are grateful for your efforts and for the opportunity to provide input. If OBA can assist in any further way, please do not hesitate to contact **Jenny Commisso** at jcommisso@oba.org.

Thank you for your contribution to this consultation.