



**Presumptive Mode of Proceedings: OBA  
Submission in response to the Ontario Superior  
Court of Justice's Guidelines to Determine the  
Mode of Proceeding**

**Submitted to:** Ontario Superior Court of Justice

**Submitted by:** Ontario Bar Association

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## Introduction

The Ontario Bar Association (“**OBA**”) appreciates the opportunity to provide input into the Ontario Superior Court of Justice’s Guidelines to Determine the Mode of Proceeding in Civil, Family, Criminal and Small Claims Court (“**Presumptive Guidelines**” or “**Guidelines**”). This submission contains suggested revisions to the Civil and Family Presumptive Guidelines, and comments related to consistency, clarity, and ongoing collaboration applicable to all the Guidelines.

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to individuals and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public.

The OBA canvassed and received input from the membership practice sections most impacted by the Presumptive Guidelines: Civil Litigation, Family, Criminal, Insurance, Employment, and Class Actions. We also brought this matter to the most recent Provincial Council meeting, held on March 31, 2023. As a result, we received a range of perspectives across multiple practice areas.

The OBA offers both specific suggestions with respect to the presumptive modes within the Presumptive Guidelines, as well as feedback on the impact the Presumptive Guidelines have had on the entrenchment of virtual proceedings within our sector and what that means for the effective provision of legal services to the public. This is a pivotal time for all participants in the justice sector, as we adapt to the changes the rapid onboarding of technology and virtual appearances brings to the way we work with other legal practitioners, clients, and, most significantly, the courts.



We are pleased to submit the following comments and recommendations on the Presumptive Guidelines for your consideration.

## **Executive Summary**

The OBA supports the continued integration of virtual proceedings as found in the Presumptive Guidelines, and it is in that context that we offer four specific recommendations for changes to those Guidelines, alongside suggestions for increased clarity, communication and ongoing collaboration.

### ***1. Recommendations for changes to the Presumptive Guidelines***

- **Mediations (Civil):** the presumptive mode of appearance should be virtual.
- **Discoveries (Civil):** the presumptive mode of appearance should be virtual.
- **Case conferences (Family):** the presumptive mode of appearance for family case conferences should be virtual.
- **Central West Region (ROTA Weekly Circuit):** the current regional practice direction requires in-person appearances. Revising the presumptive mode to better align with the increased use of virtual proceedings would be welcomed to the practitioners in this region and be consistent with the practices in most other regions.

### ***2. Clarity and Consistency***

- It would improve the effectiveness of the Presumptive Guidelines to have presumptive modes that are more consistent across the province (while continuing to recognize the practical need for flexibility in the regions, such as in Northern and remote communities).
  - Where there are differences in the presumptive mode, that information should be readily available and clearly communicated.



- It would also improve the effectiveness of the Presumptive Guidelines to ensure clear, consistent, and efficient procedures for requesting a change to the presumptive mode are available and clearly communicated. It is important to keep flexibility in the Presumptive Guidelines, and to reinforce the key contextual factors that might be considered in a decision on whether a certain mode of proceedings is ultimately appropriate for a particular attendance.
  - In the context of the Civil Guidelines, it would be helpful to have an articulation of the Court's ability to consider a change of mode to in-person or hybrid proceedings in matters that are scheduled to proceed over more than 3 consecutive days. This is not to suggest a change to the presumptive mode of proceedings for these events, but rather to reinforce the possibility of flexibility to consider in-person or hybrid mode in the right circumstances, including due to length of proceedings where there is consent of counsel.
- Any changes that may be made to the presumptive modes because of the current consultation should not disrupt proceedings that started under the “previous” presumptive mode.

### ***3. Ongoing Collaboration***

Difficulties encountered with virtual appearances can and should be proactively addressed without retreating from the important progress that has been made in leveraging emerging technologies that can reduce barriers to justice, such as cost, geography and length of proceedings. The OBA supports the continued use of virtual proceedings present in the Presumptive Guidelines and is optimistic about the benefits that this evolution brings to the justice system. Continuing collaboration through joint working groups, renewing resources and educational materials on best practices for virtual hearings and continuing the efforts to support all justice sector participants in accessing the required technological tools are the key areas of focus to ensure the ongoing success of the Presumptive Guidelines.



## Details of Submission

### 1. Recommendations for Changes to the Presumptive Guidelines

The specific suggested revisions to the Presumptive Guidelines are as follows, as well as included in an Appendix at the end of this submission.

#### *a. Mediations & Discoveries (Civil)*

The OBA recommends that the presumptive mode be changed from *in-person* to *virtual* for both mediation and discoveries. Most mediations and discoveries in the civil litigation context are currently proceeding virtually despite the default in-person presumption for both these events. The advantages of conducting these proceedings virtually include:

- Easy reference to electronic materials with screen sharing;
- Ability to use “waiting time” in a mediation for other purposes, reducing cost; and
- Reduced travel time, including for witnesses.

One of the most significant effects of naming a default mode in the context of mediation is that it gives each party the power to withhold its consent to deviate from the default. Consent is a particularly important factor in the mediation context as, unlike a court, the neutral party risks undermining the party-driven nature of successful mediation if forced to favour one party or the other on the issue of method of proceeding. Selecting the proper default mode is vital to avoid potentially dangerous, and solution-resistant, power imbalances and safety concerns that can arise when the more dominant party refuses to proceed virtually.

Setting the default as virtual mediation creates fewer and less significant opportunities for one party to take advantage of power imbalances. An in-person default will more often disadvantage poorer parties, victims of abuse and other vulnerable participants. The moral



hazards that arise from an in-person default are also harder to overcome or adjust for (for instance, technological inability versus the effects of physical proximity on abuse victims), though we note that we need to continue to explore options for safe spaces for technology access.

***b. Case Conferences (Family)***

We recommend that case conferences in the Presumptive Guidelines for Family be presumptively virtual. This aligns with the presumption of virtual appearances already in place for early and urgent case conferences in the Family context, as well as the Presumptive Guidelines for case conferences in the Civil context. A virtual appearance will also generally expedite access to the earliest possible court date.

A case conference is often the first substantive appearance before a Judge or Dispute Resolution Officer (“DRO”). The focus of the first case conference is often on assisting parties to organize their issues and disclosure of documents so that issues can be identified, settled where possible, or ready for the next steps in the litigation.

The first case conference is an ideal time for the judge or DRO to discuss with the parties and counsel, if any, what the next step should be in the proceeding, and if it should be held virtually, in-person, or as a hybrid hearing. The default mode could still be the default, but early consideration of the issue would help the parties resolve their matters efficiently while considering case-specific needs and preferences.

***c. Central West Region (ROTA Weekly Circuit)***

We recommend that the presumptive in-person mode of appearance in this region be adjusted to better align with the increased use of virtual proceedings available to the public in other regions. The significant difference in the presumptive mode in this region raises concerns from those in that region about whether parties are able to access the benefits virtual proceedings can bring in terms of lowering potential cost of proceedings and access



to counsel (benefits available to individuals in other regions), among other potential challenges. In addition, having availability of hybrid appearances (such as one party or counsel appearing virtually and the other, by choice, appearing in person) allows for increased access to justice for those parties who need that flexibility, given the distances to the various courthouses that have the ROTA court.

## 2. Clarity and Consistency

The OBA appreciates and supports the clarity the Presumptive Guidelines are intended to bring to the issue of the modes of appearances.

We have identified two areas where increased clarity and consistency would be helpful:

- i. To the extent appropriate, it would improve the effectiveness of the Presumptive Guidelines to have presumptive modes that are more consistent across the province, while continuing to recognize the practical need for flexibility in the regions, such as in Northern or remote communities. For those regions where there are differences in the presumptive mode, information on the variations should be readily available and clearly communicated. A recognition that practitioners are increasingly working in multiple regions may assist us all in preparing online resources and notices that allow quick, clear access to the necessary information. Centralizing the information on the different regional practices could be helpful, as well as ongoing communication about further refinements, with online resources incorporating and addressing areas of difficulty as they arise. The OBA has developed a comprehensive tool that outlines the regional variations for its members, and we would be happy to discuss future collaboration and expansion of this tool.





- ii. Clear, consistent, and efficient procedures are needed for instances where a party wishes to challenge the presumptive mode, as are easy and efficient ways to understand and access that procedure in the appropriate circumstances.

There will be times when a change to that presumptive mode – or a move to a hybrid appearance<sup>1</sup> - will better serve the parties and the courts. As such, it is important to keep flexibility in the Presumptive Guidelines, and to reinforce the key contextual factors (such as the overarching principles) that might be considered in a decision on whether a certain mode of proceedings is ultimately appropriate for a particular attendance. In the Civil context, this could even be expanded to include contemplation of a change in mode of proceeding to in-person or hybrid when an event is scheduled to proceed over more than 3 consecutive days. This is not to suggest a change the presumptive mode of proceedings for these events, but rather to reinforce the ability of the Court to consider in-person or hybrid mode in the right circumstances, such as due to length of proceedings.<sup>2</sup>

In summary, we recommend strengthening the clarity, consistency, and communication of the procedure for requesting a change to the presumption. We would be happy to discuss future collaboration and expansion of our Quick Link Guide tool that currently includes details on existing procedures for our members. This tool consolidates information on the Presumptive Guidelines in each region.

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<sup>1</sup> The OBA supports consideration being given to “hybrid” appearances, where the judge and court staff could be in-person with one or more parties or lawyers, while other parties and lawyers could appear virtually at the same appearance.

<sup>2</sup> Concerns about “zoom burn out” are most acute in the context of a single proceeding that requires consistent presence in front of a screen. It is noted that well-resourced parties may have setups that reduce this impact, while less-resourced counsel and parties will often attend on a single laptop screen. This could be implemented as an expected and accepted challenge to the presumptive mode of proceedings, or a frequent matter for consent in appropriate circumstances.



In addition, we also note that, if any changes are made to the Presumptive Guidelines as part of the Court's current consultation, the presumptive modes of matters with next court dates already set be maintained as any new changes take effect. This is in keeping with our understanding of how important the assumed mode of appearance can be in the management of a particular matter, given the impact on cost expectations, venue, and choice of counsel.

### **3. Continuing Collaboration**

One of the most significant characteristics of the Presumptive Guidelines is its confirmation of the benefits of appropriate use of virtual appearances in many instances. As outlined below, we see an overall net benefit to this, for reasons related to the increased ability to offer efficient and effective service to clients, and to improve access to justice.

The use of virtual appearances has allowed many practitioners to serve more clients more efficiently and cost effectively through:

- Reduction in travel time and cost for clients;
- Increased ability for practitioners to work on other matters while waiting for an appearance, which can be more cost effective for clients;
- The benefits of conducting appearances in an office with familiar technology, multiple screens and all possible resources at hand; and
- Scheduling flexibility that can result when physical travel is greatly reduced, leading to greater efficiency in the advancement of proceedings.

Feedback from our members indicates that the presumption of virtual hearings has had a positive impact on access to justice. Examples provided include:



- Where family violence or other abuse is at play in a matter, virtual proceedings can allow clients and counsel to feel safer, more confident and comfortable in an environment of their choosing;
- Virtual proceedings that are entirely in French or bilingual can be easier and quicker to schedule than in-person French or bilingual proceedings;
- Virtual appearances can result in a lower cost to clients (through reduced waiting and travel time);
- Virtual appearances can require less disruption of clients' daily lives (with reduced need to take as much time off work, or arrange alternate childcare) and allow greater flexibility in the choice of counsel; and
- In the Class Action context, virtual proceedings can allow for greater participation and familiarity with the proceedings for class members, wherever they may be located.
- In an example from the Northwest, to provide equal access to the Superior Court of Justice, the Northwest Region moved to an **online regional calendar** in 2020. Because so much of the court's work was being conducted virtually there was no longer a need to hold separate speak to dates, assignment courts and motions dates for each of the court's Northwest's centres. Commencing in September 2020, the court moved these events to be heard on a regional basis rather than by court location. This change provided more access to the court for counsel and parties in Fort Frances and Kenora. In lieu of setting court dates on a limited basis in both Kenora and Fort Frances, counsel and parties may obtain the earliest available date for their event.<sup>3</sup>

That is not to say that virtual appearances do not, at times, pose significant challenges. These challenges can take many forms, including those that stem from inequitable access to

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<sup>3</sup> Notice to the Profession – Northwest Region (August 20, 2020), <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-nw-august20-20/>



technology. Harnessing the opportunity presented by virtual proceedings for the furtherance of the benefits they can bring to the public and sector requires us to also diligently identify and work through these challenges.

Building on the successful experience with joint working groups with members of the bar and the courts during the pandemic, we would welcome and be happy to assist with the continuation of the working groups now and on an ongoing basis. The forum that these groups provide for ongoing dialogue and problem solving will continue to be useful as we take on the lessons learned during the pandemic about how to run more virtual practices and proceedings, and work to chart a sustainable and thoughtful path forward.

Some of the topics we have identified that could benefit from continued dialogue and collaboration related to the ongoing use of Presumptive Guidelines include:

- Ongoing public **communications**, and adaptation of these communications, related to the rules and procedures connected to the Guidelines.
- Identifying and addressing **accessibility** challenges when there are different modes of proceedings.
- Ongoing consideration of how to ensure appropriate **transparency** and openness of virtual proceedings, ensuring that they remain open and accessible to the public.
- How to address concerns that **self-represented litigants** have difficulty navigating both the virtual and in-person systems.
- How to facilitate access to the essential **technology** at the centre of all justice sector participants' on-the-ground experience with the modes of appearance designated by the Guidelines. Reliable internet, well-designed document portals, appropriate physical technology, and continuous opportunities for education on the use of technology are essential to smooth and effective proceedings whether that mode is in-person or virtual. Those without these tools can be at a significant disadvantage. We know that access to these tools is unequal across the sector, and these comments



are a reminder to us of the support and improvements needed to facilitate the entrenchment of technology and adaptation to the evolving “electronic first” practice. Specifically related to technology, the following areas of future collaborative work between the OBA and the courts could include:

- How to support the further integration of **hybrid proceedings** into the determination of modes of proceedings, in addition to its inclusion in the overarching Principles in the introduction to the current Presumptive Guidelines.
- Ongoing study and communication of updated best practices related to virtual proceeding, including how to manage the now well-accepted challenge of “zoom burn out” in longer proceedings;
- Considerations surrounding the tools required to facilitate an increased use of hybrid proceedings;
- Exploration of opportunities for existing physical infrastructure to be adapted to provide predictable and affordable access to the necessary technology and related tools, including safe spaces for access to that technology; and
- Exploration of the benefits of province-wide rosters, including for mandatory mediations, improving choice and scheduling options for parties,

## Thank You

Thank you for the opportunity to provide feedback to the Court in this matter. As always, we welcome further discussion on the Presumptive Guidelines as you move forward.



## APPENDIX: Chart of Suggested Revisions to Guidelines

Using the summary charts included in the Court’s letter of February 7, 2023, as the starting point, please find below the specific suggested changes, highlighted in **yellow**.

Ontario Superior Court Guidelines to Determine the Mode of Proceeding in Civil		
Over-arching principles:		
<p><i>[Principles removed from this chart to conserve space in this submission, but should remain in the text of the Presumptive Guidelines]</i></p> <p><b>Note: Central West Region: ROTA Weekly Circuit in Guelph, Orangeville, Walkerton, and Owen Sound:</b> All types of events scheduled during a "ROTA day" will be heard in person notwithstanding the presumptive mode of hearing in the Guidelines. [OBA recommendation: presumptive mode for all types of events during ROTA days in this weekly circuit be more aligned with the increased use of the virtual presumptive mode of appearance in other regions, where appropriate]</p>		
Presumptively VIRTUAL	Presumptively IN PERSON	Presumptively IN WRITING
<ul style="list-style-type: none"> <li>• <b>Examinations for discovery</b> (unless both parties consent)</li> <li>• <b>Mandatory mediations</b></li> <li>• <b>case conferences:</b> <b>Regional variation:</b> (Northeast sites Sudbury, Sault St. Marie &amp; North Bay: presumptively in person)</li> <li>• <b>Pre-trial conferences involving trial management and scheduling issues only:</b> <b>Regional variation:</b> (Northeast sites Sudbury, Sault St. Marie &amp; North Bay: presumptively in person)</li> <li>• <b>Pre-trial scheduling conferences: settlement and trial management conferences (involving settlement issues)</b> *unless the Court directs that an in-person pre-trial conference is required).</li> </ul>	<ul style="list-style-type: none"> <li>• <del>Examinations for discovery</del> (unless both parties consent)</li> <li>• <del>Mandatory mediations</del></li> <li>• <b>Judge-alone trials</b> (or hybrid) (unless both parties consent and the Court approves)</li> <li>• <b>Jury trials</b></li> <li>• <b>Appeals to the Divisional Court and applications for Judicial Review</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Consent motions, without notice motions and unopposed motions</b></li> <li>• <b>Costs motions</b></li> <li>• <b>Motions for leave to appeal to the Divisional Court</b></li> </ul>



<p><b>Regional variation:</b> (<u>Northeast</u> sites Sudbury, Sault St. Marie &amp; North Bay: presumptively in person)</p> <ul style="list-style-type: none"> <li>• <b>Trial and motion scheduling court</b></li> <li>• <b>Contested motions and applications</b> (if party requests in person, the Court may so direct taking into account the positions of the parties; the complexity of the legal or factual issue; whether the outcome of the motion or application is legally or practically dispositive of a material issue in the case (e.g. summary judgement); whether viva voce evidence will be heard; and any other factor bearing on the administration of justice. <b>Regional variation:</b> <u>Central West, East Region &amp; Northeast</u> Presumptively In person</li> </ul> <ul style="list-style-type: none"> <li>• <b>Assessment hearings</b></li> </ul>		
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Ontario Superior Court Guidelines to Determine Mode of Proceeding in Family		
<b>Over-arching principles:</b>		
<i>[Principles removed from this chart to conserve space in this submission, but should remain in the text of the Presumptive Guidelines]</i>		
<p><b>Note: Central West Region: ROTA Weekly Circuit in Guelph, Orangeville, Walkerton, and Owen Sound:</b> All types of events scheduled during a “ROTA day” will be heard in person notwithstanding the presumptive mode of hearing in the Guidelines. <b>[OBA recommendation: presumptive mode for all types of events during ROTA days in this weekly circuit be more aligned with the increased use of the virtual presumptive mode of appearance in other regions, where appropriate]</b></p>		
Presumptively VIRTUAL	Presumptively IN PERSON	Presumptively IN WRITING
<i>Family</i>		



<ul style="list-style-type: none"> <li>• <b>Case conferences</b></li> <li>• <b>First appearances</b> (unless the Court specifies a different method of attendance taking into account the availability of duty counsel and on-site mediation services)</li> <li>• <b>Early or urgent case conferences and triage courts</b></li> <li>• <b>Urgent motions</b></li> <li>• <b>Trial scheduling conferences, other trial management conferences</b> (with focus on trial preparation) and assignment court attendances</li> <li>• <b>Substantive regular/short motions</b> (outside of UFC Locations, Toronto and Windsor)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Case-conferences, settlement conferences and trial management conferences</b> (with a settlement focus)</li> <li>• <b>Motions for Contempt</b></li> <li>• <b>Long motions</b></li> <li>• <b>Trials</b> (unless all parties consent to a virtual trial and the Court approves. Hybrid proceeding may be considered)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Motions for procedural relief and motions on consent BUT more complex procedural motions will be conducted virtually, unless the Court specifies that an in-person attendance is required."</b></li> </ul>
<i>Child Protection</i>		
<ul style="list-style-type: none"> <li>• <b>First hearing where child has been brought to a place of safety (5-day hearings)</b> (unless the Court decides that an in-person hearing is required, taking into account any concerns regarding: (i) parental participation in virtual hearings or (ii) Legal Aid support for these events)</li> <li>• <b>Child protection lists or TBST appearances</b> (unless the Court decides that an in-person hearing is required, taking into account any concerns regarding: (i) parental participation in virtual hearings or (ii) Legal Aid support for these events)</li> <li>• <b>Trial scheduling conferences, other trial</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>Settlement conferences and trial management conferences</b> (with a settlement focus)</li> <li>• <b>Long motions</b></li> <li>• <b>Trials</b> (unless all parties consent to a virtual trial and the Court approves. Hybrid proceeding may be considered)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Motions on consent and motions for procedural relief only (including 148 motions) BUT more complex procedural motions will be conducted virtually, unless the Court specifies that an in-person attendance is required.</b></li> </ul>





<p><b>management conferences</b> (with a focus on trial preparation) <b>and assignment court attendances</b></p> <ul style="list-style-type: none"> <li>• <b>Substantive regular/short motions</b></li> </ul>		
<i>FRO Lists and Refraining Motions</i>		
<ul style="list-style-type: none"> <li>• <b>Refraining motions (except those are held on regular FRO sittings at Unified Family Court locations.)</b></li> </ul>	<ul style="list-style-type: none"> <li>• <b>All Family Responsibility Office Matters</b></li> </ul>	
<i>Dispute Resolution Conferences</i>		
<ul style="list-style-type: none"> <li>• <b>Dispute Resolution Conferences</b></li> </ul>		

<b>Ontario Superior Court Guidelines to Determine Mode of Proceeding in Criminal</b>	
<p><b>Over-arching principles:</b>  <i>[Principles removed from this chart to conserve space in this submission, but should remain in the text of the Presumptive Guidelines]</i></p>	
Presumptively VIRTUAL	Presumptively IN PERSON
<ul style="list-style-type: none"> <li>• <b>Assignment court</b> (unless the Court specifies a different method of attendance taking into account whether the accused is self-represented (either in custody or out of custody) and any other factor bearing on the administration of justice, including any access to justice issues.</li> <li>• <b>Bail hearings, Bail Reviews &amp; 90-day Detention Reviews:</b> (subject to the discretion of the Court, taking into account: availability of a virtual suite from the custodial institution, whether the accused is self-represented, the position(s) of the parties and any other factor bearing on the administration of justice  <b>Regional variation: <u>Northwest:</u></b> pretrial applications/motions that do not involve calling evidence shall be presumptively virtual.  <b>Regional variation: <u>Northeast:</u></b> In person. <b>Toronto:</b> Bail Hearings &amp; bail/Detention Reviews scheduled through the Trial Office in advance will be presumptively virtual. Bail Hearings and Bail Reviews set on 2 clear days' notice Will be presumptively in person.</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Pre-trial motions</b> (unless both accused and Crown consent and Court approves) (may be hybrid)</li> <li>• <b>Judge-alone trials</b> (unless both accused and Crown consent and Court approves) (may be hybrid)</li> <li>• <b>Jury trials</b> (may be hybrid)</li> <li>• <b>Guilty pleas</b> (unless both accused and Crown consent and Court approves)</li> <li>• <b>Sentencing hearings</b> (unless both accused and Crown consent and Court approves)</li> </ul>



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| <ul style="list-style-type: none"><li>• <b>Judicial pre-trials</b> (unless the Court directs that an in- person judicial pre-trial is required in light of the accused being self-represented, there being multiple accused in a case, the complexity of trial issues, the length of the trial, or any other factor the Court decides warrants an in-person judicial pre—trial)</li><li>• <b>Assignment court appearances related to summary conviction appeals and special motions</b> (except for self-represented litigants)</li><li>• <b>Summary conviction appeals</b> (subject to discretion of Court taking into account: whether the accused is self—represented, the position(s) of the parties, and any other factor bearing on the administration of justice)</li></ul> |  |
|--|--|