The Voice of the Legal Profession

Proposed Amendments to Rule 34.12 and 30.03 of the *Rules of Civil Procedure*

Submitted to: Civil Rules Committee

Submitted by: Ontario Bar Association

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ONTARIO
BAR ASSOCIATION
A Branch of the
Canadian Bar Association

L'ASSOCIATION DU
BARREAU DE L'ONTARIO
Une division de l'Association
du Barreau canadien

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Introduction

The Ontario Bar Association ("**OBA**") welcomes the opportunity to provide a submission to the Civil Rules Committee on proposed amendments to Rule 34.12 and 30.03 of the *Rules of Civil Procedure*.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region 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 and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Civil, Insurance, and Class Actions law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. Members of the Insurance Law section include representatives on both the plaintiff and defense side of personal injury claims.

Comments & Recommendations

As requested by the consultation letter, we have responded to the questions in the order posed.

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

The OBA agrees with this proposal but recommends some minor clarifications. There should be allowance for leave where parties have not met mandatory requirements for

good reason (e.g. third-party records, WAGG motions, etc.). We are also of the view that the proposed amendment language "met the mandatory document production requirements" (unlike the language "fully complied with their undertakings") could be the subject of some debate or disagreement. As such, we suggest that the latter be a factor considered by the judge hearing the motion under subrule (3).

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

The OBA agrees with the proposal to add explicit cost consequences that are subject to the overriding discretion of the court. We further agree with the per question basis proposal for costs, as this is something the commercial list has already been doing to a certain extent with positive outcomes. For clarity, making inappropriate refusals can be just as detrimental to the progress of a proceeding as bringing inappropriate refusals motions. The heightened cost consequences under the proposed Amendments should explicitly apply to both moving and responding parties.

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

The mandatory disclosures proposed may work well if they are limited to motor vehicle accident cases, but as drafted, they would not apply well to other personal injury cases, like medical malpractice, for example. Furthermore, consideration must be given to how these requirements would apply in a class action, where there can be thousands of records that would be captured for the class members. The mandatory disclosures in a medical malpractice case would need to be worded differently.

Question 4: Do you have any concerns with the proposed mandatory disclosures under new rules (2.1) and (2.2)?

We have some concerns and comments about the proposed mandatory disclosure provisions in (2.1) and (2.2).

- The provisions in (2.1) and (2.2) should mirror each other so the required disclosures are the same for plaintiffs and defendants, where applicable. For

example, the (2.2) (b) requirement to disclose statements of any party and/or a will-say statement of any witness should be mirrored in (2.1). Care should be taken to strike the right balance between the obligations of both parties to ensure that the process is not overly onerous on any single party.

- The presence of the mandatory language "shall" is problematic as it creates a requirement to produce the listed documents regardless of relevance, proportionality, or if it applies to the case at hand. The language should be amended to provide for this eventuality to avoid additional disputes. These categories of documents should be provided if they are in the party's power, possession, or control.

- It is impractical to require witness statements or will-say statements at this early stage in the proceeding, unless they have already been obtained. Often, statements from parties are obtained later in the process, typically after the discovery process. Furthermore, statements from police may require a WAGG motion and would not be part of the police report. In our view, a better approach would be to list these under the discovery section as presumptively relevant documents that are produceable in the course of proceedings, but not necessarily at the early stages of the litigation before examinations have occurred. This should also be limited to non-discovered witnesses rather than the statement of *any* party. Another approach could be limiting this to witness statements made by third parties contemporaneously with the incident. Any rules should ensure that litigation privilege is respected.

- The insurance policy and declaration page requirement in (2.2) (a) would render these documents mandatory to disclose even when they are irrelevant for the purpose of the claim. These documents would only be relevant if the policy is in dispute, which is not always the case. If this requirement is maintained, we recommend allowing premium information to be redacted. Similarly, the cell phone

records requirement in (2.2) (g) would only be relevant for a motor vehicle accident case, not for slip-and-falls or other personal injury cases. In summary, the application of the draft section is currently overbroad, and would require non-relevant productions in all cases. This proposed rule is potentially duplicative of 30.02(3). It also conflicts with that rule, which contemplates that such policies must be disclosed but are not evidence. It would not be appropriate to require its inclusion in an affidavit of documents. The contents of a policy are not relevant and do not make liability more or less likely to be established in most cases.

- The existing rules and caselaw on disclosing surveillance evidence works well and should be maintained, including guidance on disclosing particulars for impeachment use versus disclosing the whole report for substantive purposes.

- The references to produce certain documents for three years prior to the incident (tax returns, notices of assessment, clinical notes, etc.) is a good starting point, but could mislead parties to believe that this is all that is required of them. In many cases three years will not be sufficient, especially factoring in the pandemic which resulted in fewer people going to the doctor over the past few years. There should be increased clarity that three years is the starting point, but that in some cases, more may be required.

- As mentioned above, consideration should be given to how/if these rules would apply in a class action, where there can be thousands of class members.

Question 5: Do you have any concerns with the timing of disclosures?

In our view, it is not optimal to link the disclosure timelines to the issuance of the statement of claim. Rule 14.08 permits a party to serve a statement of claim up to 6 months after issuance. If a party waits until the end of this timeline to serve the statement of claim, they will also be in breach of this proposed rule. It is preferable to link the timeline to the

close of pleadings, with an overarching provision that permits parties to consent to timelines outside of these requirements.

Additionally, the 6-month timeline paired with the list of mandatory disclosures would be difficult for plaintiffs to comply with. Many documents listed will require third-party production requests (to doctors, OHIP, etc.) which often take considerable time to receive. The current language may invite an opposing party to refute the ability to bring a motion by claiming an incomplete AOD was provided, despite the party being forthcoming in producing these documents throughout the process. The Rules should ensure that a party is not restricted from bringing a motion when additional documents are provided after the initial AOD as a case proceeds and parties become more familiar with the case (or when third parties produce relevant documents).

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

Social media would only be relevant to the plaintiff, and it seems unfair to require this. This issue is largely dealt with at discovery and through ongoing disclosure obligations. In our view, making this mandatory would be unnecessary and a step too far. It should not be deleted and should be produced if relevant.

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

As suggested in our answers above, we think these requirements should only apply if relevant, applicable, and proportional. In many cases, the required disclosures would cover irrelevant information that will only serve to complicate matters or increase disputes about disclosure. Additionally, the language as drafted could be misinterpreted as being exhaustive. For example, a plaintiff could provide clinical notes and records that cover the time period of three years prior to the incident that gave rise to the claim, despite

additional years being necessary in specific cases. The plaintiff may assume that they are not required to produce additional information, leading to more litigation, not less.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

We don't think this requires codification in the rules, as the case law is clear and courts have been managing this largely without issue to-date. In the context of reducing the burden on the Court, this seems counterproductive.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

We think that the full transcript is sometimes required and should be included to avoid confusion and delays. In other cases, the parties can agree to excerpts. We also don't think that this requires codification in the Rules, as it is a matter of counsel discretion and there are adequate practice directions that provide guidance to litigants, which are sufficient.

Question 10: Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

Rule 53.03 sufficiently sets out the timelines for expert reports, and in our view, adding additional steps or timelines will not improve efficiency. A plaintiff's lawyer would be foolish to proceed without a threshold report, and if they do so, they would face a negative outcome and costs awarded against them. We note that this does not apply to personal injury claims to which the *Insurance Act* threshold does not apply.

Question 11: In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

Consistent with question 10, we do not think that adding additional timelines for threshold reports is necessary or advisable.

Concluding Remarks

Overall, we take the view that less is more in terms of mandatory disclosure requirements. There are many skilled personal injury firms that do not have any issues with producing necessary and relevant information, and the rules should avoid adding unnecessary additional steps that could negatively impact this process.

Consideration should also be given to amending Rule 34.12(2) such that a failure to use this rule would be taken into account when considering costs. A trial judge can consider whether the evidence can be used at a hearing, circumventing the necessity of a motion. This could potentially be split between questions that require documentation, versus questions that simply require a verbal answer. This should still be governed by proportionality, and any change must ensure that litigation privilege is protected.

The Rules must balance the interests of justice in providing answers to objected questions that are inadmissible at a trial years later. This could negatively impact settlement negotiations if a party is misled into thinking that they scored a major piece of evidence in their favor when that evidence is ultimately inadmissible.

The OBA would welcome the opportunity to provide additional input into the draft language of the amendments, and to answer any questions you may have.