September 7, 2022

VIA EMAIL: crc.secretary@ontario.ca

Kathryn Manning, Chair
Rule 34 Subcommittee of the Civil Rules Committee
DMG Advocates LLP
155 University Avenue, Suite 1230
Toronto, Ontario M5H 3B7

Dear Ms. Manning:

RE: Civil Rules Committee Consultation on Rule 34 of the *Rules of Civil Procedure*

Thank you for inviting The Advocates' Society to participate in the Civil Rules Committee's consultation on proposed amendments to Rule 34 of the *Rules of Civil Procedure*, regarding the procedure on oral examinations.

Established in 1963, The Advocates' Society is a not-for-profit organization representing approximately 5,500 diverse lawyers and students across the country, including approximately 4,500 in Ontario —unified in their calling as advocates. As the leading national association of litigation counsel in Canada, The Advocates' Society and its members are dedicated to promoting a fair and accessible system of justice, excellence in advocacy, and a strong, independent, and courageous bar. A core part of our mission is to provide policymakers with the views of legal advocates on matters that affect access to justice, the administration of justice, the independence of the bar and the judiciary, the practice of law by advocates, and equity, diversity, and inclusion in the justice system and legal profession.

The Advocates' Society's comments below are organized in accordance with the questions raised in the Rule 34 Subcommittee's Consultation Paper dated June 24, 2022.

Rule 34.01.1

Other Feedback

The *Rules of Civil Procedure* provide for norms of behaviour governing litigants in Ontario's Superior Court of Justice and Court of Appeal. Absent agreement amongst the parties, the Rules set out the minimum expectations of parties and the consequences of failing to meet those expectations. The Advocates' Society has considered the proposed amendments to Rule 34 in the context of the type of party behaviour that should be encouraged in litigation, as well as the ability to enforce the Rules against parties who are not behaving reasonably or with a view to proportionality.

In the experience of members of The Advocates' Society, the parties to a proceeding do generally agree on the time, place, and method of attendance for out-of-court examinations. However, the Rules must

continue to provide for the small minority of cases where the parties cannot reach an agreement, or an examinee fails to abide by the parties' agreement.

For example, The Advocates' Society is concerned that if the parties agree to dispense with the notice of examination, as per proposed rule 34.01.1(b), it may be difficult to obtain a certificate of non-attendance from the court reporter should the examinee fail to attend at the agreed time or place or by the agreed method of attendance. Generally, in order to obtain a certificate of non-attendance, the Notice of Examination and proof of service are required. A solution may be to provide in the Rules that a certificate of non-attendance can be issued on the basis of a document (including an email) clearly demonstrating the examinee's consent to attend at the time and place, and by the method of attendance, agreed amongst the parties.

The Advocates' Society has no comments on the proposed amendments to rules 34.02 or 34.03. Our feedback on the proposed changes to rule 34.04 will be addressed below in conjunction with our comments on rule 34.07.

Rule 34.05

Targeted Question 1

The Advocates' Society agrees that the minimum notice period for an examination should be greater than the two days currently provided for in rule 34.05. The Advocates' Society recommends that the minimum notice period be the same for the person to be examined (rule 34.05(1)) and for the other parties (rule 34.05(2)), as the practice is generally to serve the notice on all parties at once. The Advocates' Society is of the view that a fourteen-day notice period for all parties would be a sensible amount of notice in advance of an examination.

Rule 34.06

Targeted Question 1

The Advocates' Society agrees that the procedure to resolve disputes respecting out-of-court examinations should aim to be as efficient as possible. However, in our members' experience, the most timely and cost-effective procedure varies by region. In some regions, case conferences may be readily available such that disputes about out-of-court examinations can quickly be determined in that manner, without incurring the expense of filing a motion. However, in other regions, the first available dates for case conferences may be months away; placing the matter on the list for a standing motions day may in fact be the fastest and most efficient way to have the dispute resolved by a judge. As such, we recommend making both options available in the rules: retaining the motion procedure originally found in rule 34.02(2) and adding the case conference procedure proposed in rule 34.06. Practice directions in each region may provide guidance to litigants and their counsel on the preferred procedure for resolving disputes respecting out-of-court examinations in that region.

Retaining the option for parties to proceed by way of motion has the added benefit of ensuring there is a way of compelling the attendance of an examinee at the proceeding to resolve a dispute regarding an out-of-court examination. It is not clear to The Advocates' Society that there is a way of compelling attendance at a case conference.

Other Feedback

The Advocates' Society recommends that instead of incorporating the factors listed in rule 1.08(6) into rule 34.06(4) by reference, the applicable factors be expressly listed in rule 34.06(4). Not all of the factors from rule 1.08(6) apply to determining the appropriate time, place, and method of attendance for an out-of-court examination. Listing the relevant factors directly in rule 34.06 will preclude spurious arguments based on inapplicable factors, or the need for the court to fashion a common law test by adapting rule 1.08(6) to the circumstances of an out-of-court examination.

Rules 34.07

Together, the proposed amendments to rule 34.04 and rule 34.07 create three distinct "tracks" based on the geographic location of the examinee: (1) where the person to be examined resides in Ontario; (2) where the person to be examined resides outside Ontario, but within Canada; and (3) where the person to be examined resides outside Canada.

The Advocates' Society will first answer Targeted Question 6, regarding the overall structure and content of the rule, and then address the other targeted questions about the proposed changes to rule 34.07.

Targeted Question 6

The Advocates' Society respectfully suggests that the Rule 34 Subcommittee consider clearly delineating three tracks based first on whether the person to be examined is a party to the proceeding or has sworn an affidavit in the proceeding, and then on where the witness resides. As such, the tracks would be as follows:

(1) Party Witnesses or Affiants
(2) Non-Party Witnesses or Non-Affiants:
    (a) Residing in Ontario
    (b) Residing outside of Ontario, either within Canada or outside Canada

If the person to be examined is a party to the proceeding or has sworn an affidavit in the proceeding, a notice of examination (or agreement amongst the parties) should suffice to compel their attendance at an out-of-court examination held by any method of attendance, regardless of where they reside – in Ontario, elsewhere in Canada, or outside Canada. There are consequences pursuant to rule 34.15 if a party or affiant fails to participate in examinations, which will function to ensure attendance at the time, place, and by the method specified in the notice or agreement.

If the person to be examined is not a party to the proceeding or an affiant, and resides in Ontario, then a summons should suffice to compel their attendance.

If the person to be examined is not a party to the proceeding or an affiant, and resides outside of Ontario (whether within or outside of Canada), the examining party would have to comply with the laws of the jurisdiction where the examinee resides, whether that be a different province or different country.

Targeted Question 1

The Advocates' Society believes that a form should be prescribed to notify a non-party or non-affiant examinee outside of Ontario (within or outside Canada) of the particulars of the examination and their obligations under the Rules.

Targeted Question 2

The Advocates' Society agrees with a fourteen-day notice period for non-party or non-affiant examinees outside of Ontario (within or outside Canada) proposed in rule 34.07(2).

Targeted Questions 3 and 8

The Advocates' Society's comments in relation to rule 34.06 are equally applicable to Targeted Question 3. We recommend retaining the option to proceed by way of motion to resolve disagreements about the arrangements for an out-of-court examination, and adding the further option to proceed by way of case conference. This would also address concerns regarding the Ontario court's jurisdiction (Targeted Question 8).

Targeted Question 4

The Advocates' Society's view is that the person to be examined ought to have the right to object to the arrangements for the examination (i.e. the time, place, or method of attendance) and have the right to bring the matter to the court for determination by way of motion or case conference. In addition, any party who is adverse in interest and would have a right to re-examine the examinee ought to be able to object to the date for the examination, but not the place or method of attendance. This limited right to object would ensure that any party with a right of re-examination would be able to attend the examination.

A party who is not adverse in interest, or has no right to examine, cross-examine, or re-examine the examinee, ought not to have any rights to dispute the arrangements for an examination.

Targeted Question 5

Targeted Question 5a. The Advocates' Society agrees it would be desirable to prescribe a specific form of summons to compel the attendance of a non-party or non-affiant examinee residing outside of Ontario.

Targeted Question 5b. As noted above in relation to Targeted Question 6, The Advocates' Society believes that a notice of examination ought to be sufficient to compel the attendance of a party witness or an affiant at an examination, regardless of where they reside and the specified method of attendance.

Targeted Question 7

The Advocates' Society is of the view that the current rules suffice to address this issue.

Rule 34.08

Other Feedback

The reference to "official examiner" in rule 34.08(2) ought to be removed if it is removed from rule 34.02 as proposed.

Rule 34.09

Targeted Question 1

The Advocates' Society recommends that the Rule 34 Subcommittee consider whether "deaf or mute" remains the appropriate term to refer to individuals with different hearing or communication abilities that impact their participation in an out-of-court examination.

Rule 34.10

Targeted Question 1

Given the proposed extension of the advance notice of the date of the examination (to either seven or fourteen days), the Rule 34 Subcommittee may wish to consider whether the person to be examined should be required to produce relevant documents in advance of the examination. In The Advocates' Society's view, this requirement to produce documents in advance would diminish the inefficiency created by the examinee producing the documents on the day of their examination, or afterwards.

The Advocates' Society has no comments on Rule 34.11.

Rules 34.12 & 34.15

Targeted Question 1

The Advocates' Society believes that the revision of Rule 34 is an opportunity to diminish the delay and costs created by lengthy refusals motions.

Rule 34.12(2) sets out a procedure whereby 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." The Rule 34 Subcommittee may wish to consider providing in the Rules that the Court can order questions to be answered pursuant to Rule 34.12, except for questions refused on the basis of privilege, as part of its directions regarding an examination. This procedure is frequently used in the Ontario Superior Court of Justice Commercial List, as well as in the Federal Court.[1] In addition,

[1] See rule 95(2) of the *Federal Courts Rules*, SOR/98-106: "A person may answer a question that was objected to in an oral examination subject to the right to have the propriety of the question determined, on motion, before the answer is used at trial."

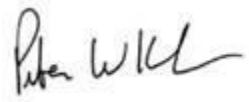
See also rule 18.17(1) of the *Nova Scotia Civil Procedure Rules*: "Making no objection to a question, or making an objection but giving an answer, at a discovery is not an admission that the subject of the question, or the answer, is admissible." In Nova Scotia, courts have made clear that counsel are expected to act reasonably and streamline the

The Advocates' Society recommends amending Rule 34.15 to provide for a presumptive award of substantial indemnity costs if the Court determines that a party unreasonably refused to answer a question pursuant to Rule 34.12 or a party abused the compelled use of Rule 34.12 by asking irrelevant questions.

The Advocates' Society has no comments on Rules 34.13, 34.14, 34.16, 34.17, 34.18, or 34.19.

Thank you for the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,



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discovery process as much as possible; as such, where a discovery question is objected to on the basis of relevance, it is accepted that the best practice is to object but allow the witness to answer.