

TAB 4

Strategic Use of the Family Law Rules

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STRATEGIC USE OF FAMILY LAW RULES

Disclosure, Compulsion and Practice

By: Edwin A. Flak

“Military action is important to the nation – it is the ground of death and life, the path of survival and destruction, so it is imperative to examine it.”

The Art of War, Sun Tzu, translated by Thomas Cleary, Shambhala, Boston and London, 2003, P. 40.

The English Compact Oxford Dictionary’s principal definition of “strategy” is “The art of commander in chief, the art of projecting and directing the larger military movements and operations of a campaign.” The meaning of “strategy” or “strategic” is specifically distinguished from the meaning of “tactic” or “tactical.” “Tactics” deals with events during specific engagements with an opponent, while “strategy” deals with the design of a plan for battle. As counsel in a family law matter you should be able to design battle plans for clients using the Family Law Rules (“Rules”). The Rules are your troops and your arms to deploy strategically.

The scope of this paper allows for consideration of only a few elements of strategy. Although strategy involves both attack and defence, I have mainly focused on the Rules as instruments for attacking an uncooperative adversary’s case. This is the most difficult art. Defensive strategies, which include following the Rules, are easily derived from the same principles as are the basis of successful attack of an obdurate opponent.

This paper will focus on three main topics:

1. Rules requiring disclosure;

2. Rules assisting in compelling required disclosure; and
3. Practitioner's suggestions for managing disclosure and relevant information in a coherent way.

Disclosure

The foundation of every successful family law case must include a clear understanding of relevant facts. Our common and statutory law has evolved to the point that any relevant fact or document which is not privileged must be disclosed either voluntarily or on demand. Obtaining disclosure is the strategic core of any claim. It's essential to valuing the claim, designing a settlement, questioning, or trial. This paper will mainly focus on the application of the Rules to disclosure issues from an opposing litigant.

Family Law Rules Disclosure Provisions

"As you gain freedom in the martial arts, you should be able to fathom your opponent's mind well, and thus have many ways of victory."

The Book of Five Rings, Miyamoto Musashi, Translated by William Scott Wilson, Kodansha International, Tokyo, New York, London, 2002 p.104

The Family Law Rules are replete with provisions designed to assist disclosure. This paper will highlight most of the applicable rules.

Financial Statement

The Rules have extensive provisions, principally found at Rule 13, designed to promote early and complete financial disclosure. It is important to note, however, that the Rules are not a complete code, but complement other statutory provisions. *The Family Law Act, 1986*, for instance, at section 8, requires each party to deliver a statement of property

in connection with claims under section 7. Section 41 requires a financial statement to be delivered in connection with support claims. The *Child Support Guidelines* at section 21 has extensive provisions for financial disclosure. The provisions of the *Family Law Act* and *Child Support Guidelines* of course, together with the *Divorce Act* explain the purposes behind the statutes' own disclosure provisions and those of the Rules.

The basic question, "why" should be asked internally before any disclosure request is made. As simple as that proposition is, it is sometimes overlooked, so that unjustified and unjustifiable "fishing expeditions" are undertaken without focus nor benefit. The following sample spreadsheet dealing with undertakings and refusals with a couple of examples illustrates the kind of relationship which should be set up to support any enquiry about financial or other disclosure investigations.

Refusals

Question	Why Relevant?
Q. # 236 Produce consulting contracts which were being worked on by the witness on the valuation date.	<ol style="list-style-type: none"> 1. Work in Progress is an asset which may be valued as part of the witness' net family property. 2. Work In Progress will likely generate income relevant to produce support.
Q.# 501 Produce General and Trust records of total amounts paid in legal fees between the witness' first and second financial statements.	<ol style="list-style-type: none"> 1. It is impossible to reconcile the changes of the witness' capital position. 2. The legal fees are a budget item- all budget items must be completed per Rule 13 (6) (c) for the relevant period.

Arguably, two tiny sub-rules of Rule 13 are more important than any other in demanding full financial disclosure. Rule 13 (6) (c) and (d) simply state:

- (c) follow the instructions set out in the form; and
- (d) fully complete all portions of the statement.

Those sub-rules import all of the instructions of the form into a litigant's obligations. The instructions are rarely followed fully. Part of the problem relates to the evolutionary nature of financial statements – after all, Rule 13 (12) requires that they must be updated before every case conference, motion, settlement conference or trial where the financial statement is more than 30 days old. Properly executed, there are virtually no aspects of a person's relevant financial circumstances that may not be derived from a completely executed financial statement. Sequential financial statements are even more informative. I will highlight some information which is often not properly disclosed, although it is required. I will examine only the income benefit expense and budget aspects of the form.

The instructions for the financial statement's "income" section are typically executed by recording the last year's line 150 income. That execution is rarely adequate. The form actually demands: "From the 12 months from (date) to (date). Include all income and other money that you get from all sources, whether taxable or not. Show the gross amount here and show your deductions in part three."

In order to understand a person's income for the purposes of the form, it is necessary to consider items which are not necessarily relevant for taxation purposes such as gifts,

loans, receipts, last year's tax refund and dispositions of capital assets. These items may have profound implications for a litigant.

The "benefits" section of the financial statement is usually read down to refer only to taxable benefits such as the use of a car or expenses paid by an employer or business. The form actually requires: "Show your non-cash benefits – such as the use of a company car, a club membership or room and board that your employer or someone else provides for you or benefits that are charged through or written off by your business."

Some benefits that are often excluded, from disclosure but which should be recorded, include budget items that are paid for by a person or business. It is certainly mandatory for these types of benefits to be disclosed if the corresponding expense is recorded in the budget portion of the form. Whenever there is an apparent discrepancy between lifestyle and apparent income and benefits, these sections must be closely scrutinized. Benefactors' contributions, personal expenses paid through businesses and even barter often provide answers about an affiant's true means.

,Practice Suggestion: When a financial statement does not make apparent sense, do not delay in asking questions. Too often the first questions that are asked appear in a case conference memorandum or even orally at a hearing. Do not delay writing a letter asking for information or, if you suspect what the missing information is, postulate the answer in a request to admit facts. At a minimum, a pointed enquiry will set up a request for information under Rule 13(11) which states as follows:

Additional Financial Information – If a party believes that another party's financial statement does not contain enough information for a full understanding of the other party's financial circumstances,

- (a) the party shall ask the other party to give the necessary additional information; and
- (b) if the other party does not give it within seven days, the court may, on motion, order the other party to give the information or to serve and file a new financial statement.

The budget section of the financial statement has little or no meaning if the relevant time period is not disclosed. This mandatory requirement of the form should ideally match the period for income disclosure.

Ideally, the budget, income and benefit sections of the financial statement should balance. If a person is borrowing or selling assets to pay for what would otherwise be a budget deficit, the proceeds should be recorded as a budget item.

Any mismatch in timing between income and expenses may be made up in explanatory notes at the end of the budget section or at the end of the form where the affiant is questioned as to whether he or she expects material changes in the information given.

The form has two boxes one of which must be filled in:

- ☐ I do not expect changes in my financial situation.
- ☐ I do expect changes in my financial situation as follows:

The case of Marinangeli v. Marinangeli [2003] O.J. No. 2819, Ont. C.A. p.6, para 2. makes it clear that failure to fill in the right box may have serious ramifications. In that

case the husband filled in the box signifying that he did not anticipate any material changes in the information given as to his income or property. That representation was material in light of the stock option gains the husband got shortly after the financial statement and later Minutes of Settlement were signed.

The most controversial expense which may be considered in the form is for legal fees. Although this expense is material to the understanding of a person's budget, it is often not revealed. Practitioners are naturally loathe to reveal anything about communications between solicitor and client – even about the amount of bills. To the extent that costs are invariably claimed by the affiant of a financial statement and the opposing party must know the case that he or she must meet, the accounts paid for legal fees must be disclosed. The form's requirement for full disclosure of budget expenses, and later, debt must make that disclosure mandatory.

Practitioner's Suggestion: The single step which is most revealing when we assess the accuracy and completeness of a person's financial disclosure involves the comparison of multiple financial statements sworn by the same person. It is an old, but effective, step to compare a budget surplus or deficit for the period between financial statements to alleged changes in a person's capital position. Usually, the discrepancies are explained by misstated income or benefits, incorrectly filled out expenses or inaccurate capital valuations. It is very important to ask the questions to assess where the problems lie.

One of the anomalies in the Rules relates to the timing of providing updates to financial statements for motions. Although a motion may be brought on four days' notice, Rule 13(12.2) (3) requires that any financial statement update must be provided seven days prior to the motion.

When a financial statement is inadequate, Rule 13(13) permits questioning. The subrule states:

Questioning on Financial Statement- A party may be questioned under rule 20 on a financial statement provided under this rule, but only after a request for information has been made under clause (11) (a).

There has been some controversy as to whether an order for questioning or argument under rule 20 is a necessary condition precedent. My experience is that most Courts and counsel accept that no order or agreement for questioning is required. There are few reported cases dealing with this rule. Justice Perkins' decision in Lanthier v. Lanthier [2000] O.J. No 2949, Ontario Superior Court of Justice, is one case that I have found which addresses the issue. Justice Perkins wrote at p. 7, paragraph 26 of the decision:

Under rule 13(13) of the Family Law Rules, the parties have the right to question each other on their financial statements, but only after requesting that the necessary information be provided informally.

Certainly, Justice Perkins in particular, and the Newmarket Courts in general (where Justice Perkins sits), follow the principle that questioning on a financial statement is available as of right, once a request for information has been made.

Other Provisions of the Rules Requiring Disclosure

The following list is a non-exhaustive summary of the Rules dealing with disclosure:

1. Rule 4 (7) is not, on its face, a disclosure rule. It states:

Lawyer for Child – In a case that involves a child who is not a party, the court may authorize a lawyer to represent the child, and then the child has the rights of a party, unless the court orders otherwise.

The Rule has, however, been interpreted in the case of R. (c.) et al v Children's Aid Society of Hamilton et al. (2004), 70 O.R. (3d) 618 at 640 (Superior Court) Czutrin J., to import obligations of disclosure to the Children's Lawyer. Justice Czutrin conducted a review of the law and concluded in that case: " I have come to the conclusion that the Children's Lawyer has an obligation to comply the Band's request to admit facts, pursuant to rule 22, to produce an affidavit of documents pursuant to rule 19, and to comply with all rules that speak about responsibilities of parties."

Rule 21 deals with Reports of the Children's Lawyer under section 112 of the *Courts of Justice Act*. That rule provides specifically at 21 (c):

The Children's Lawyer has the same rights as a party to document disclosure (rule 19) and questioning witnesses (rule 20) about any matter involving the child's custody, access, support, health or education.

If the reasoning in R.(C) v. C.A.S. of Hamilton, above is followed , it seems inevitable that the Children's Lawyer's responsibilities must correspond with the entitlement of the Children's Lawyer.

Rule 13 deals with more than financial statements. Rule 13 (14) requires a net family property statement be delivered in a case dealing with claims under Part I of the *Family Law Act* not later than seven days before a settlement conference or trial.

Rule 15(7) deals with the mandatory disclosure provisions of an affidavit for use on a motion to change an order or agreement. It sets out the minimum disclosure requirements for these motions. Any deficiency may be the basis of complaint.

Rule 15(12) allows the same information to be conveyed by means of Form 15 and adds requirements for specific provisions of the *Child Support Guidelines*.

Rule 19 is an extremely powerful and demanding provision for requiring documentary disclosure. Rule 19 (1) requires an affidavit of documents “within 10 days after another party’s request.” This provision makes it prudent to use a document management system from the beginning of the case. More will be said about this subject later in this paper.

Rule 20 deals with questioning witnesses and disclosure. The rule is far more brief than the comparable provisions of the Rule of Civil Procedure. Except for child protection cases (Rule 20(3)) and concerning financial statements, an order or consent must be obtained prior to questioning a witness or party (Rule 20(5)).

Practitioner’s Suggestion: Because of the brevity of the Rule and lack of relevant caselaw, it is usually desirable to agree to or seek an order for a term that the Rules of Civil Procedure for examination for discovery apply to questioning. Modifications may be negotiated as necessary.

Rule 22 deals with admissions of facts and documents. This paper will deal with the use of this rule in conjunction with a chronology and affidavit of documents. No litigant can afford to ignore a request to admit. Rule 22(4) effectively means that a party is taken to admit to the facts in a request to admit which is not responded to within 20 days. It is notable, and I think odd, that the costs consequences of the similar Rule of Civil Procedure (Rule 51.04) are not present.

Rule 27 permits a support recipient to demand a financial statement from a defaulting payor (Rule 27 (1)). It provides for disclosure from, and examination of, an income source. These disclosure provisions will be examined further in the section of this paper dealing with compelling disclosure.

Rule 29 deals with garnishment. Rule 29 (26) creates a positive obligation on a payor to give notice that a payor “has started to work for or receive money from the new income source”.

Compelling Disclosure

It is much safer to be feared than to be loved when one of the two must be lacking. For one can generally say this about men: that they are ungrateful, fickle, simulators and deceiver, avoiders of danger, greedy for gain and while you work for their good they are completely yours, offering you their blood, their property, their lives, and their sons, as I said earlier, when danger is far away; but when it comes nearer to you they turn away.”

The Prince, Niccolo Machiavelli, Translated by Peter Bondanella and Frank Musa, Oxford University Press, 1979, at p. 56)

The Rules contain a baleful warning for those who defy them. Rule 1(8) applies to breaches of the Rules or Orders, including orders for disclosure. Rule 1 (8) states as follows:

Failure to Follow Rules or Obey Order- The court may deal with a failure to follow these rules, or a failure to obey and order in the case or a related case, by making any order that it considers necessary for a just determination of the matter, on any conditions that the court considers appropriate, including,

- (a) an order for costs;
- (b) an order dismissing a claim made by a party who has wilfully failed to follow the rules or obey the order.

No motion to compel performances of disclosure which is required by the Rules should fail to refer to Rule 1(8). It is the catch – all provisions which is infinitely adaptable to any breach of disclosure provisions of the Rules.

Rule 14 (23) has direct application to orders for disclosure which are not followed. It states as follows:

Failure to Obey Order Made on Motion – A party who does not obey an order that was made on motion is not entitled to any further order from the court unless the court orders that this subrule does not apply, and the court may on motion, in addition to any other remedy allowed under these rules,

- (a) dismiss the party's case or strike out the party's answer or any other document filed by the party;
- (b) postpone the trial;
- (c) make any other order that is appropriate, including an order for costs.

Rule 19 (10) makes it clear that a person who fails to provide document disclosure does so at extreme peril. This rule provides the longest list of potential sanctions of any in the Rules. The list of potential punishments is daunting:

Failure to Follow Rule or Obey Order – If a party does not follow this rule or obey an order made under this rule, the court may, on motion, do one or more of the following:

1. Order the party to give another party an affidavit, let the other party examine a document or supply the other party with a copy free of charge.
2. Order that a document favourable to the party's case may not be used except with the court's permission.
3. Order that the party is not entitled to obtain disclosure under these rules until the party follows the rule or obeys the order.
4. Dismiss the party's case or strike out the party's answer.
5. Order the party to pay the other party's costs for the steps taken under this rule, and decide the amount of the costs.
6. Make a contempt order against the party.
7. Make any other order that is appropriate.

Rule 24 is one of the Rules most commonly used against non-disclosure. Although the rule is general in application, it is readily adaptable to disclose issues.

Rule 24 (4) deals with the costs consequences of unreasonable behaviour. A successful party who has failed to provide appropriate disclosure could easily be deprived of his or her costs.

Rule 24 (7) provides for costs consequences for a party who is not prepared for a step in the case. Failing to provide financial disclosure is a clear example of not being prepared. Although costs consequences are not common at case conferences, they are available in the right circumstances.

Rule 27 (6) deals with the consequences of a defaulting payor's failure to provide a financial statement within 10 days of an Order. A breach may result in an Order "... that the payor be imprisoned continuously or intermittently for not more than 40 days."

Rule 27 (10) provides for a Court to order an uncooperative "income source" to post a bond if a statement of income is not delivered within 10 days of an Order.

Rule 27 (11) allow a support recipient to serve a defaulting payor with an appointment for financial examination.

Rule 27 (12) permits a support recipient to serve a summons to witness on a defaulting payor's employer or another person who may know about issue relating to a default.

Rules 27 (19) and 27 (20) provide sanctions of posting a bond and imprisonment for defaults in performance of a disclosure order.

Practitioner's Suggestion: Rule 27 applies to interim as well as final orders. The remedies under this rule are broader than others. Disclosure pressure brought under this rule against recalcitrant payors and their employers may work where other remedies fail. A problem with this rule is that the costs consequences against judgment debtors under the Rules of Civil Procedure have not been imported.

Complementary Fields of Information: Chronology, Affidavit of Documents,

Request to Admit Facts and Documents

Chronology

Every family law file, whether brand new or old and badly in need of rehabilitation requires a strategic plan. That plan's elements must be complementary in order for them to work together effectively.

A chronology is an elementary tool which is not contemplated by the Rules, but is an effective springboard for any campaign based on the Rules.

The form of a chronology which I prefer displays its information in a three column format.

Date	Significant Event	Source Document or Witness
Jan 1, 1955	Wife Born	Application, p. 3 Family History

This document can, and I suggest, should be started at or just after, the first interview with a client or on receiving a file.

There is a great deal of software which makes it an easy matter to integrate new facts into the summary. As new documents arrive they should be reviewed for relevance and facts which may be entered into the chronology.

The chronology will soon become the master document in the file. It will tell a story and identify relevant documents and informants. It will provide the factual basis for questioning, motions, case conferences and at trial.

Any gaps in the chronology will highlight information which must be obtained.

Request to Admit and Affidavit of Documents

Once a fact is entered into a chronology, it is a simple matter to convert that fact into a proposition in a request to admit facts. Any source document identified in the chronology is easily attached to a request to admit documents.

The same document can, and should, be entered into an affidavit of documents.

Practice Suggestion: The following protocol will support any chronology, request to admit, affidavit of documents and virtually any file management need:

1. Scan documents as they come into the office. This makes the document readily e-mailable to clients and others. It makes the documents management described below simple.
2. Where “hard” paper documents are necessary, photocopy appropriate and relevant documents four times in addition to mail management purposes –once for a topical sub-file, once for a three ring or other binder format for a chronology, once for a request to admit facts and finally for an affidavit of documents.
3. Once lawyers and staff think about documents in this way, the hard file will be organized, complete and very easy to use.

While the protocol described above may be seen to be overkill, the cost of implementing this approach is minimal relative to legal costs. Files become pleasures to use. You will develop control of the case.

The best feature of this system is that no document will go “missing”. Your file will be fully available to you in an electronic format. As e-filing becomes more important and judges more receptive to electronic data, submissions, law, and source documents may all be e-mailed to the Court and other counsel.

Conclusion

If knowledge is power, then empower yourself now with a thorough working knowledge of the disclosure provisions of the Rules.