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TAB 8

Family Law Refresher 2020

Case Conference and Motions

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Case Conference Checklist

The goal of the family law Case Conference is to facilitate settlement and narrow issues that need to be adjudicated. The Family Law Rules[1] ("the FLR") list exploring the chances of settling the case" as the first purpose for conferences.[2]

Case Conferences are less formal proceedings than a motion or trial, and may take place in Court, a conference room, or chambers. However, the informality of a Case Conference does not mean that it should be treated as an inconsequential attendance. The Case Conference can often be a useful attendance where partial or full settlement is achieved, or alternatively, a concrete timetable for moving the case ahead is established.

The checklist below is intended to assist counsel in maximizing the procedural and substantive outcomes of the Case Conference through effective preparation, drafting of materials, and settlement focused advocacy. A crucial component at each step is to manage the client's expectations for the Case Conference, as this attendance is most often the client's first time being in Court or in a formal judicial setting with the other party. Effective client management can increase the likelihood of successful settlement or narrowing of issues through negotiation.

Amendments to the FLR in 2018 changed a few of the procedural aspects relating to case conferences ("the 2018 Amendments"). Counsel should be aware of the changes highlighted below in order to ensure adherence to the current service and filing deadlines, the current confirmation form to be used, and the change to the rules on costs at a Case Conference.

[1] *Family Law Rules*, O Reg 114/99 ["*Family Law Rules*"].
[2] *Ibid*, at r 17(4).

Step 1: Prior to Requesting the Initial Case Conference

Case Conferences are an important opportunity for identifying and resolving procedural, and sometimes substantive, issues in a case. However, the time allotted to each Case Conference is most often limited, ranging from 30 to 60 minutes depending on the jurisdiction. On days with busy Case Conference lists, Judges may decide to narrow the issues to be addressed, speak only with counsel, or limit the time allotted for counsel's submissions. These time constraints necessitate that counsel for both parties take certain preliminary steps prior to requesting and scheduling the initial Case Conference in order to maximize the usefulness of the Case Conference attendance.

A. <u>Review the disclosure that has been made by the parties</u>

- Ideally, a Case Conference should be scheduled after sufficient disclosure is made so the parties can have meaningful settlement discussions. To maximize efficiency, the parties should exchange financial disclosure before attending the Case Conference, with a timeline already in place for the delivery of any outstanding disclosure.

- If disclosure is outstanding from the opposing side, counsel should begin to prepare a detailed list of the disclosure still required. This list will form an important addition to the Case Conference brief as it can be used as a guide for both the Judge and for discussions between counsel.

- If disclosure is outstanding from your client, it is useful to review the requested disclosure and provide the opposing lawyer with your response as to whether or not the documents will be provided, and a proposed timeline for their delivery. While further timelines will likely be set at the Case Conference, creating an initial timeline will assist to reduce the time that is spent on this issue at the attendance.

B. Discuss Settlement with the Opposing Lawyer

- Although perhaps obvious, a preliminary phone conversation or meeting with the opposing lawyer at an early stage is always worth proposing in the hopes that it may provide a chance to develop an agenda for the Case Conference and narrow the substantive and procedural issues which need to be addressed. At the very least, an initial discussion can provide a sense of which issues are a priority for the other party and what you can expect to be the focus of their Case Conference materials.
- The focus on discussion with opposing counsel prior to a case conference is highlighted in the 2018 Amendments to Rule 17(14):

> *17(14) Each party shall,*
>
> *(a) confer or attempt to confer orally or in writing with every other party about the issues that are in dispute, subject to a party being prohibited from such communication by court order;*

C. Consider the Need for Motions

- Rule 14(4) of the *FLR* sets out that a notice of motion or supporting evidence may not be served and a motion may not be heard before a conference dealing with the substantive issues in the case has been completed.[3] It is important to note that if the parties attend at a Case Conference, and deal only with a timeline for disclosure or a procedural issue, the restriction in Rule 14(4) for a substantive conference has not been met. Therefore, one instance in which counsel may wish to proceed with an initial Case Conference prior to the party exchanging sufficient disclosure is if there is a need for a Motion that may not be categorized as an Urgent Motion. If some substantive issues are ready to be addressed at an initial Case Conference, the conference may be held so the Motion can be brought.

[3] *Family Law Rules*, r 14(4).

- Rule 14(4.2) permits Motions to be brought without having a Case Conference where there is situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.[4] This situation is addressed further below.

D. Request a Case Conference by serving and filing a case conference notice (Rule 17(4.1))

- The last step is to formally ask for and book the Case Conference. Rule 17(4.1) states that "A party who asks for a case conference shall serve and file a case conference notice (Form 17)."[5] The best practice is to canvass available dates for the Case Conference with opposing counsel prior to serving the Case Conference Notice in order to ensure that the parties will be able to attend on the selected date.

Step 2A: Preparation for the Case Conference

An effective Case Conference requires counsel to properly review their file and speak with their client prior to drafting their materials. It is important to review the purposes of a Case Conference and the Orders a Judge may make at a Case Conference prior to discussing goals for the Conference with your client.

A. Review the purposes of the Case Conference

- Rule 17(4) sets out the purposes of the Case Conference, which include:

> *(a) exploring the chances of settling the case;*
>
> *(b) identifying the issues that are in dispute and those that are not in dispute;*
>
> *(c) exploring ways to resolve the issues that are in dispute;*
>
> *(d) ensuring disclosure of the relevant evidence;*
>
> *(d.1) identifying any issues relating to any expert evidence or reports on which the parties intend to rely at trial;*

[4] *Ibid*, r 14(4.2).
[5] *Family Law Rules*, r 17(4.1).

(e) noting admissions that may simplify the case;

(f) setting the date for the next step in the case;

(g) setting a specific timetable for the steps to be taken in the case before it comes to trial;

(h) organizing a settlement conference, or holding one if appropriate; and

(i) giving directions with respect to any intended motion, including the preparation of a specific timetable for the exchange of material for the motion and ordering the filing of summaries of argument, if appropriate.[6]

Reviewing these purposes prior to speaking to the client and drafting the Case Conference brief provides a useful reminder of which objectives can reasonably be expected to be addressed at the Case Conference and also provides direction for your Brief. While it may not be possible to address all of these purposes at the initial Case Conference, a review of Rule 17(4) may assist in prioritizing the procedural and substantive issues to be addressed.

B. Review the Orders a Judge may make at a Case Conference

- Before speaking with your client about the goals they hope to achieve at the Case Conference, it is useful to be reminded of the Orders a Judge is permitted to make. This refresher will allow counsel to determine whether the client's goals are realistic and obtainable. Rule 17(8) sets out the Orders a Judge may make at a Case Conference. The Rule is reproduced below for ease of reference:

  "Rule 17(8) At a case conference, settlement conference or trial management conference the judge may, if it is appropriate to do so,

  (a) make an order for document disclosure (rule 19), questioning (rule 20) or filing of summaries of argument on a motion, set the times for events in the case or give directions for the next step or steps in the case;

[6] *Family Law Rules*, r 17(4).

(a.0.1) make an order respecting the use of expert witness evidence at trial or the service and filing of experts' reports;

(a.1) make an order requiring the parties to file a trial management endorsement or trial scheduling endorsement in a form determined by the court;

(b) make an order requiring one or more parties to attend,

(i) a mandatory information program,

(ii) a case conference or settlement conference conducted by a person named under subrule (9),

(iii) an intake meeting with a court-affiliated mediation service, or

(iv) a program offered through any other available community service or resource;

(b.1) if notice has been served, make a final order or any temporary order, including any of the following temporary orders to facilitate the preservation of the rights of the parties until a further agreement or order is made:

(i) an order relating to the designation of beneficiaries under a policy of life insurance, registered retirement savings plan, trust, pension, annuity or a similar financial instrument,

(ii) an order preserving assets generally or particularly,

(iii) an order prohibiting the concealment or destruction of documents or property,

(iv) an order requiring an accounting of funds under the control of one of the parties,

(v) an order preserving the health and medical insurance coverage for one of the parties and the children of the relationship, and

(vi) an order continuing the payment of periodic amounts required to preserve an asset or a benefit to one of the parties and the children;

(c) make an unopposed order or an order on consent; and

(d) on consent, refer any issue for alternative dispute resolution."[7]

[7] *Family Law Rules*, r 17(8).

The Court has considered whether the above Rule allows for Judges to make only procedural Orders, or if substantive Orders may be made at a Case Conference. If seeking a substantive Order at the Case Conference, counsel should consider the record that the Court has available, the evidence the Order would be based on, and the standard of appellate review that could be used on an appeal from that Order.[8] If there is a possibility that a substantive Order is being made, other than on consent, it is best practice that the Case Conference move into an open Court and request a Court reporter.[9]

C. Consider the Procedural and Substantive Goals for the Case Conference with Your Client.

- It is first important to discuss the purposes and limitations of Rule 17 as set out above. When speaking with the client about the strategy for the Case Conference, remind them that their goals should be realistic given the allotted time of 30-60 minutes depending on jurisdiction. If the client's goals are realistic, these will provide a useful foundation for the drafting of your materials. If the client has unrealistic expectations, this is the opportunity to address and manage their expectations.

- Ideally, one purposes of the Case Conference is to avoid the necessity of Motions where practicable. However, it is important to remind clients of the limitations of Rule 17 and the Court's ability and willingness to make substantive Orders at a Case Conference. Ensuring that your client understands that the Judge may not provide outright evaluations on all of the merits of the case at an initial Case Conference may prevent your client from feeling as though the time was wasted.

D. Manage You Client's Expectations about the Attendance at the Case Conference

- The Case Conference will often be your client's first time attending Court. They may have friends or family members asking them about their attendance, providing them with incorrect expectations, amplifying their concerns or creating new anxieties. After

[8] George Karahotzitis and Jessica Luscombe (2017) "Motions and Conferences" Family Law Practice Basics at 6-11.
[9] *Ibid*.

determining together your goals and objectives, it is extremely important to explain to the client the process for the day. The tips below may assist in structuring your conversation and can be adjusted or expanded on depending on the sophistication and experience of the client.

1. Physical Route and Location: It can be quite helpful to advise the client of the location of the Courthouse, the best route to get there, where to find parking, etc. Then describe the route the client will take once in the building, including passing through security (and what they will need to do as part of passing security), the floor their matter will likely be heard on, what the waiting room looks like, and what the Courtroom will look like. Describe how the attendance will unlikely be like any courtroom setting they might have seen in the media, which may assist in avoiding feelings of disappointment from not having their "day in Court". For some clients, a discussion about what to wear and what to bring with them is useful and reassuring.

2. Moral Support: Advise the client that they may bring family or friends as moral support to the Courthouse, but these individuals will not be permitted to sit in the Conference. Remind the client that the other party is also allowed to bring his/her family or friends as support, but that the restrictions apply equally to both parties, and the other side's supports will also be required to remain outside of the Courtroom. If applicable, reassure clients that rely on moral supports as language interpreters in other circumstances that interpreters can be provided by the Court if necessary.

3. Timing of the Day: Prepare the client for the amount of time that is allotted for the Case Conference, and that depending on the jurisdiction, the parties may spend more time waiting to be called than in front of the judge. Advise the client that there will be several matters on the Court list for the day, and that many matters may be scheduled for the same time. Explaining the congestion of the Courts and normalizing the possibility that their matter may not be reached or that the Judge may only meet with

counsel can assist to ease the client's frustration should setbacks take place on the day of the attendance.

Step 2B: Drafting the Case Conference Brief

The Case Conference Brief is the main document that the Judge will refer to during your Case Conference. With the purpose of the Case Conference and the client's objectives in mind, a well-drafted Case Conference Brief can be integral to ensuring that the Judge understands the key issues in the case and that you are prepared to succinctly address each issue with the Court and negotiate on the day of the attendance.

A. Revisit the Family Law Rules on Materials

- Rule 17(13) provides that parties are required to a file a case conference brief (Form 17A or Form 17B).[10] Along with the brief, parties are required to serve and file an updated financial statement or affidavit of financial statement if the financial statement is more than 30 days old.

B. Note the Amended Timelines for Service and Filing

- The time for service and filing was changed in the 2018 Amendments. The brief of the party requesting the conference (or the Applicant) is required to be served and filed no later than six days before the conference and the brief of the party not requesting the conference (or the Respondent) is required to be served and filed no later than four days before the conference.[11]

- Rule 17(14.1) has been amended, so that the rules no longer allow for both parties to consent to late filing of briefs up to 2pm two days before the Case Conference. [12] Although some Courts may still accept late briefs with consents to late file attached, there is variability between Courts and it is therefore best practice to abide by the

[10] *Family Law Rules*, r 17(13).
[11] *Ibid*, r 17(13.1).
[12] *Ibid*, r 17(14.1).

timelines set out in the amended *FLR*. Parties consenting to late file should agree to file no later than 3 days before the Case Conference in accordance with the new timeline for filing the Form 17F confirmation.

C. Include Relevant Documents as Schedules

- All relevant documents should be attached as schedules to your brief. The Judge may not have access to the entire continuing record, so any documents referred to in your Case Conference brief should be attached and tabbed.

- At the same time, it is important to be aware of varying practice directions between different jurisdictions that may include page limits for the brief. Review any relevant practice directions and ensure that your materials are in compliance or you may run the risk of your Brief being rejected, the Judge not reading the materials in advance or being the recipient of a stern lecture from the Judge at the start of the Case Conference.

D. Include an Offer to Settle

- The first listed purpose of the Case Conference is to explore settling the case. It is imperative that you include your proposal for settling some or all of the matter in your Case Conference brief. Attaching an Offer to Settle demonstrates conciliatory efforts and knowledge of your case, as stated by Justice Spence in *Husein v Chatoor*, 2005 CarswellOnt 7809 (OCJ) when citing Justice Quinn in *Scott v Scott* (2002) 113 ACWS (3d) 849 (Ont SCJ):

> [30] I agree with the comments of Justice Joseph W. Quinn who, in the case of Scott v. Scott (2002), 113 A.C.W.S. (3d) 849, [2002] O.J. No. 1418, 2002 CarswellOnt 1078 (Ont. Fam. Ct.), had this to say at paragraph [53]:
>
> > A matrimonial litigant who does not serve an offer to settle either does not know the case or is engaged in hardball

> tactics; the former is inexcusable and the latter is expensive, where the tactics fail.[13]

> Although Justice Quinn's comments were made in the context of offers to settle prior to trial, in my view, parties have an obligation to begin to assess their respective cases at the outset of the litigation — even before the litigation commences — and to make all reasonable efforts to settle. Legal fees can create enormous financial burdens for litigants and it behooves neither party simply to sit back and to roll the dice while those fees continue to mount. The need for reasonableness is even more pronounced when there are children involved because, as costs continue to increase, it is the children who will have to shoulder as least part of the financial burden.[14]

- It should be noted that an offer included only in the Case Conference brief, but not formally served and sent under separate cover, will not constitute an offer for consideration under Rule 18 of the FLR. If the intention is for the offer to attract cost consequences pursuant to Rule 18, it is best practice to serve the offer separately and in the proper form, and then to include a copy in the Case Conference brief.

E. Review the Documents with Your Client

- Reviewing both your Case Conference brief and the other party's Brief once received with your client is an important aspect of client management. Endeavour to provide the client with a draft brief well in advance of your signing meeting and deadline for service and filing. This allows the client to review the brief carefully and provide feedback. The process also allows the client to become better acquainted with the substantive issues of their case and the settlement position that you will put forward at the attendance.

- Allocate time prior to the Conference to discuss with your client any comments they have about the other party's Brief and clarify for them that they do not have an opportunity to provide a written response to the content of the other side's Brief.

[13] *Scott v Scott* (2002) 113 ACWS (3d) 849 (Ont SCJ) at para 53.
[14] *Husein v Chatoor*, 2005 CarswellOnt 7809 (OCJ) at para 30.

Often, having your client's written notes in response to the other side's Brief can be a useful tool in preparing submissions and issues to be addressed with the Judge.

F. Confidentiality of Case Conference Briefs

- Finally, when preparing your brief, remember that the brief will not form part of the Continuing Record. Briefs are either returned to the parties at the end of the Conference or destroyed by the Court. While there is no specific rule that speaks to the confidentiality of the Case Conference, judicial interpretation is that the same limitations should apply as set out in 17(23) of the FLR for Settlement Conferences. In *Savoie v Richard* [2004] OJ No 5140 (SCJ), Justice Perkins extended the application of subrule 17(23) regarding statements at a Settlement Conference to a Case Conference:

> "It is also improper to report another judge's opinion on the merits of the case expressed in the course of a case conference or settlement conference. See subrule 17(23) respecting statements at a settlement conference."

The confidentiality of case conference briefs allows for the inclusion of multiple settlement offer structures.

G. File a Comprehensive Confirmation after Speaking to Opposing Counsel.

- The 2018 Amendments changed the timeline for serving and filing confirmations, and the form to be used. Adherence to the new amendments is crucial, as a conference shall not be held if the confirmation is not given to the clerk in accordance with the *FLR*, unless the court orders otherwise. [15]

- Pursuant to Rule 17(14), as amended, the Confirmation of Conference form is now found at Form 17F.[16] As noted above, you must confer with the other party regarding the issues in this case. Form 17F contains the following note as a reminder:

[15] *Family Law Rules*, Rule 14.1.

[16] Prior to the 2018 Amendments, the confirmation was found at Form 14C, and was to be filed by no later than 2:00 p.m. two days before the Case Conference.

NOTE: The *Family Law Rules* require the parties or their counsel to confer, or attempt to confer, orally or in writing with each other on the issues in dispute for a conference prior to filing Confirmations. The only exception is where a party is prohibited from such communication by court order. **Failure to comply with the *Family Law Rules* may result in a cost order**.

- You must give a copy of your Form 17F to every other party via mail, fax, email or any other method before giving it to the clerk, except in a child protection case. Once you have delivered your Form 17F, it must be delivered to the court office, often by fax, not later than 2 p.m. three days before the conference date.

Step 3: Attending the Case Conference

Remember that your client may be nervous on the day of the Case Conference. If they are coming with support people, you may advise them to meet you in a specific area of the Court. If they are coming alone and anxious about the attendance, you may wish to meet them nearby and walk into the Court together.

A. Address the Procedural Issues

- For procedural issues, come prepared with a list of all disclosure that is outstanding. A detailed Order should be made including a timeline for completion.

- Consider preparing and circulating a draft Order addressing the outstanding disclosure in advance of the Case Conference. The draft can be provided to the other party's counsel prior to the date of the Conference or at the beginning of the Conference to give them an opportunity to review the terms you are seeking be incorporated into an Order.

- Ensure that your client has access to his/her calendar and availability for the upcoming months so that next appearances and timetables can be scheduled accordingly.

- Setting out a schedule is important when a Motion is contemplated, as it will avoid the circumstances in which the Responding party is forced to respond to a Motion on short notice and allows the moving party to file any Reply materials in an organized manner.

B. Address the Substantive Issues

- For substantive issues, it is similarly useful to consider preparing a draft Order in advance to aid in the facilitation of any settlement discussions. Waiting for one party to draft Minutes of Settlement from scratch may slow the negotiation process. It is often more efficient to use a pre-existing draft Order as the basis for Minutes of Settlement.

C. Endeavour to Avoid the "Never Ending Case Conference"

- An important aspect of the Case Conference is to satisfy the requirement in Rule in 14(4) that states that a Motion may not be brought prior to a conference which addresses substantive issues.[17] As mentioned above, a Case Conference which focuses exclusively on procedural issues to the exclusion of the substantive issues can create a circumstance in which a Case Conference has been attended, but the requirement in Rule 14(4) has not been met and a Motion cannot be brought. If this occurs, the parties either need to attend at a second Case Conference, or the Motion must be brought under Rule 14(4.1). To avoid this, endeavour to complete a comprehensive Case Conference at the initial appearance or, at a minimum, address one substantive issue when faced with time constraints.

D. Ensure Any Agreement Reached is Signed and Witnessed

- Rule 17(19) provides "No agreement reached at a case conference is effective until it is signed by the parties, witnessed and, in a case involving a special party, approved by the court."[18] If the parties are able to reach an agreement at the Case Conference, the

[17] *Supra*, note 3.
[18] *Family Law Rules*, r 17(19).

agreed upon terms should be reduced to writing and presented to the Judge, who may endorse that record that an Order is to go in the form of the agreement filed.

- In the event that either party is a 'special party', it is necessary to ensure that the Court approves the agreement. Out of an abundance of caution, you may want to request that the Judge in the endorsement, specifically states that the agreement is approved pursuant to Rule 17(19).

E. Consider Costs

- Rule 24(10) of the *FLR* states that a judge or other person that dealt with a particular step in a case shall determine the issue of costs promptly after the step.[19] In *Islam v Rahman* [2007] OJ No 3416 CA, the Court held that a trial judge could not determine any claim for costs related to prior steps if they had not been raised during that step.[20] However, in *Gammon v Gammon* [2008] OJ No 4525 (SCJ), the Court noted that the while the decision in *Islam v Rahman* provides a reminder to counsel to deal with issue of costs at the end of each step in a proceeding… it is less common for costs to be sought at the end of conferences, even though conferences, some of which are mandatory, can form a significant expenditure of time in family law cases.[21] The principle of asking for costs promptly after each step may not translate well at an initial case conference, as stated by the Honourable Madam Justice Backhouse in *Mori v Mori*:

> I do not agree that in every case, unless costs are awarded at a case conference or settlement conference, they cannot be included as costs of the action. It is not the practice to award costs at conferences-it is rarely done and usually only where a party has failed to attend or has failed to do something that has resulted in the conference being a waste of time. There is insufficient time to consider costs and it is often too early in the proceeding to be able to determine whether costs are appropriate. However, in this case, I do not consider it appropriate to award costs for the conferences. The first case conference resulted in a consent order.

[19] *Family Law Rules*, r 24(10).
[20] *Islam v Rahman* [2007] OJ No 3416 CA (Ont CA).
[21] *Gammon v Gammon* [2008] OJ No 4525 (SCJ) at paras 12-13.

> The wife was awarded costs for the trial management conference (for which she does not claim costs in her bill of costs.)[22]

- This seeming conflict between the case law and Rule 24(10) was clarified in the 2018 Amendments to the *FLR*. Rule 17(18) now confirms that costs shall not be awarded at a conference, subject to a few exceptions:

> Costs
> (18) Costs shall not be awarded at a conference unless a party to the conference was not prepared, did not serve the required documents, did not make any required disclosure, otherwise contributed to the conference being unproductive or otherwise did not follow these rules, in which case the judge shall, despite subrule 24 (10),
>
> (a) order the party to pay the costs of the conference immediately;
> (b) decide the amount of the costs; and
> (c) give any directions that are needed

- If the events of the case conference fall under one of the above exceptions, the best practice is to ask for costs at the conclusion of a Case Conference. If your submissions under Rule 17(18) are not successful, or the exceptions in Rule 17(18) were not present, costs may be awarded later if not awarded at the case conference:

> (18.1) Subrule (18) does not prevent the court from awarding costs in relation to the conference at a later stage in the case, if costs are not awarded at the conference.[23]

- It is important to note that the Court may consider the actions or inactions of counsel when determining whether or not a conference was productive in a Rule 17(18) analysis. In *Kaur v. Virk*, the Court considered the Applicant's counsel's failure to attend the case conference at the scheduled time and invited submissions on costs to be addressed at a special appointment. After considering the submissions, the Court held that the conference was less productive than it otherwise would have been in light of the Applicant's counsel's failure to attend. After considering the factors in Rule 24(11) of the *Family Law Rules* (now Rule 24(12)), the Court held the Applicant should be

[22] *Mori v Mori* [2008] OJ No 1999 (SCJ) at para 12.
[23] *Family Law Rules*, r 17(18.1).

responsible for the Respondent's costs on a substantial indemnity basis. The Court directed the Applicant's counsel to provide the Applicant with a copy of the Endorsement to inform their discussion of what quantum of these costs, if any, should be paid by the Applicant herself (rather than the Applicant's counsel personally). The Court ordered the Applicant's counsel to file evidence with the Court that she provided the Endorsement to the Applicant.[24] *Kaur v. Virk* is a good example of the application of Rule 17(18)(a)(b) and (c), and a reminder to counsel of the importance of attending scheduled Court matters on time.

- In the instance where a motion is considered as a procedural next step, it is likely still prudent to request that costs be reserved to the Motion Judge, as costs for attendance at a case conference were awarded at a subsequent motion by Justice McGee in *Hill v Hill*.[25]

Step 4: After the Case Conference

There are two steps that should be completed as soon as possible following the Case Conference. Following through with these steps immediately after the Case Conference will ensure that the momentum from the Conference is not lost and may result in further settlement negotiations.

A. Set out and prepare for the agreed upon procedural timelines

- It is important to remember to follow through on the procedural timelines set out at the Case Conference. Timelines for disclosure, questioning, delivering materials, obtaining reports, and motions should be noted and diarized.
- All dates should be sent to the client as part of your reporting summary, addressed below.

[24] *Kaur v. Virk*, 2019 ONSC 2113.
[25] *Hill v Hill* [2009] OJ No 5911 (SCJ).

B. Send a summary to your client

- It is a good practice in client management to summarize the events of the Case Conference for your client via email or letter immediately following the Conference. As mentioned above, the Case Conference may have been your client's first time in Court. If the Court was busy with many matters, they may be disappointed with the amount of time the Judge allotted to their case. If the Judge provided an evaluation on the merits of their case, they may feel frustrated or defeated, or alternatively, unrealistically empowered. Finally, they may have friends or family members asking them about their attendance and advising them about what they should do next or providing their own interpretations of what was said by the Judge. A comprehensive summary will provide your client with a document to refer to should they be unclear about any aspect of the Conference. It also provides a reminder to some clients that it may be best to shift to more realistic objectives or positions as the case proceeds.

- Summaries should include any Endorsements or a copy of the signed Minutes of Settlement. Clients should also be reminded of all relevant procedural timelines, any agreed upon Court dates, and next steps for providing further disclosure, if applicable.

Motion Checklist

The following checklist provides a general foundation for preparing for Rule 14 and Rule 15 Motions in a Family Law proceeding. In preparing to argue a Motion, it is important to have a good understanding of the relevant rules and required timelines.

Amendments to the FLR in 2018 and in 2019 ("the 2019 Amendments") include new aspects for counsel to consider when preparing for a motion. Counsel should be aware of the changes highlighted below in order to ensure adherence to the new service and filing deadlines.

Step 1: Prior to the Motion – the *Family Law Rules* you need to know

Rules 14 and 15 of the *FLR* set out the procedure to follow when bringing a Motion. The first step is to determine whether you are seeking a temporary or interim order, or if it is a motion to change a final order or agreement. The procedure for seeking to obtain a temporary or interim Order is set out in Rule 14, while the procedure for a motion to change a final order or agreement is set out in Rule 15. Familiarity with these Rules is crucial for ensuring the proper timelines and procedure are followed.

A. Motions for Temporary or Interim Orders

- Rules 14(2) and 14(3) confirm who has status to bring a Motion and which parties are deemed to be parties to a Motion. A Motion may be brought by a party to the case or by a person with an interest in the case.[26] A person who is affected by a motion is also a party for the purposes of the motion only, with the exception of a child affected by a motion relating to custody, access, child protection, adoption or child support.[27]

- Recall, as addressed above, that Rule 14(4) of the *FLR* sets out that a notice of motion or supporting evidence may not be served and a motion may not be heard before a

[26] *Family Law Rules*, r 14(2).
[27] *Ibid*, r 14(3).

conference dealing with the substantive issues in the case has been completed.[28] It is important to note that if the parties attend at a Case Conference, and deal only with a timeline for disclosure or a procedural issue, the restriction in Rule 14(4) for a substantive conference has not been met.

- Rule 14(4.2) permits Motions to be brought without having a Case Conference where there is situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.[29] In *Hood v Hood* [2001] OJ No 2918 SCJ, the Court states that urgency under the FLR would be properly based on events such as abduction, threats of harm, or dire financial or other circumstances.[30] However, neither the FLR not the Court has provided an definitive list of what events would constitute "dire circumstances." In *Howatt v Howatt* [2002] OJ No 3818 SCJ, Justice Steinberg noted that it would be "important to have, from an appellate court, an indication of how the judicial discretion should be exercised under subrule 14(4.2)."[31] The Superior Court of Justice provides a helpful guide to establishing urgency in *Rosen v Rosen* [2005] OJ No 62 (SCJ)[32], which can be used as a tool should the Motion be required before a substantial Case Conference can be heard.

- In cases of urgency, it is important to find out from the Court, if possible, when the next date for a Case Conference is available, and to make efforts to resolve the issue that gives rise to the urgency so that an Urgent Motion can be avoided. If unavoidable, your materials for the motion should identify your attempts to obtain an early Case Conference date and to otherwise resolve the issue, where appropriate.

[28] *Ibid*, r 14(4).
[29] *Ibid*, r 14(4.2).
[30] *Hood v Hood* [2001] OJ No 2918 SCJ
[31] *Howatt v Howatt* [2002] OJ No 3818 SCJ
[32] *Rosen v Rosen* [2005] OJ No 62 (SCJ)

- Finally, Rule 14(6) sets out the types of cases/circumstances under which Rule 14(4) does not apply and a case conference is not necessary. The categories are reproduced below for ease of reference.

> (a) to change a temporary order under subrule 25 (19) (fraud, mistake, lack of notice);
>
> (b) for a contempt order under rule 31 or an order striking out a document under subrule (22);
>
> (c) for summary judgment under rule 16;
>
> (d) to require the Director of the Family Responsibility Office to refrain from suspending a license;
>
> (e) to limit or stay a support order, the enforcement of arrears under a support order, or an alternative payment order under the Family Responsibility and Support Arrears Enforcement Act, 1996;
>
> (e.1) in a child protection case;
>
> (e.2) made without notice, made on consent, that is unopposed or that is limited to procedural, uncomplicated or unopposed matters (Form 14B);
>
> (e.3) made in an appeal;
>
> (f) for an oral hearing under subrule 32.1 (10), 37 (8) or 37.1 (8); or
>
> (g) to set aside the registration of an interjurisdictional support order made outside Canada.[33]

B. Motions to Change a Final Order or an Agreement for Support filed under section 35 of the *Family Law Act*

- Rule 15 only applies to a motion to change a final order or an agreement for support filed under section 35 of the Family Law Act.[34] However, the rule does not apply to a motion or application to change an order made under the *Child and Youth Family*

[33] *Family Law Rules*, r 14(6).
[34] *Ibid*, r 15(2)(a)(b).

Services Act, *2017*, unless the final order is made under section 102 of that Act.[35] It is important to note that if starting a Rule 15 Motion, Rule 5 of the *FLR*, which sets out where a case starts, applies to a Rule 15 Motion as if a new case was starting.[36]

- In some jurisdictions, the first step in a variation proceeding of this kind is to attend at an appearance in front of a Dispute Resolution Officer.

- There may be instances where the parties are in agreement about changing the final Order. In this case, the Forms that are required depend on the content of the Order or Agreement. To change a final order or agreement for child support only, with the agreement of both parties, you need to prepare:
    - Form 15 D: Consent Motion to Change Child Support;
    - Form 25: Draft Order (you will need 5 copies);
    - Stamped envelopes addressed to each party;
    - Support Deduction Order Information Form; and a
    - Draft Support Deduction Order;[37]

- To change a final order other than for child support only, with the agreement of both parties, you need to prepare:
    - Form 15A: Change of Information Form;
    - Form 15C: Consent Motion to Change;
    - Form 13: Financial Statement;
    - Form 14B: Motion;
    - From 25: Draft Order (you will need 5 copies);
    - Stamped envelopes addressed to each party;
    - Support Deduction Order Information Form; and a

[35] Ibid, r 15(3).
[36] Ibid, r 15(4).
[37] *Family Law Rules*, r 15(16).

- Draft Support Deduction Order.[38]

Step 2A: Preparation for the Motion

Preparation is an integral step for the success at a Motion. Counsel must be well versed in the facts of the case, their client's position and materials, the opposing party's position and materials, as well as the relevant statutes and case law. In oral argument, counsel must be prepared to answer the Judge's questions with quickly. This requires assessing the weaknesses of your case beforehand and preparing answers to anticipated questions.

A. Consider the Forms and Documents You Need

- If preparing for a Rule 14 Motion, Rule 14(9) outlines that "a motion, whether made with or without notice, (a) requires a notice of motion (Form 14) and an affidavit (Form 14A); and (b) may be supported by additional evidence."[39]

- If preparing for a Rule 15 Motion as the moving party, you must prepare, serve, and file a Form 15: Motion to Change and a Form 15A: Change Information Form, and a Form 13: Financial Statement. The moving party must also serve the responding party with a Form 15B: Response to Motion to Change and a Form 15C: Consent Motion to Change.

- If in the Toronto jurisdiction, a practice direction requires that a Factum be delivered on every Motion.

B. File a Comprehensive Confirmation

- Pursuant to the 2018 amendments to the *Family Law Rules*, you must file a Form 14C: Confirmation not later than 2 p.m. three days before the motion date.[40] This confirms that the motion is ready to be heard and will be proceeding. Unless the Court orders

[38] *Ibid*, r 15(17).
[39] *Family Law Rules*, r 14(9).
[40] *Family Law Rules*, r 14(11)(e).

otherwise, a Motion shall not be heard if confirmation of the motion is not given. Many jurisdictions accept filing of the Form 14C by fax. You must endeavor to contact the opposing lawyer to confirm the content of the confirmation or provide a reason if unable to contact them.

- It is advisable to list on the form with some specificity the issues that you will be addressing on the Motion to avoid the situation where the Judge reads all of the materials and then learns on the morning of the Motion that you are only proceeding to argue some of the issues.

- Take the time to direct the Judge to the pages of the Continuing Record and provide a realistic estimate of the time you will require.

C. Manage Your Client's Expectations

- The final step in preparing for the Motion is to ensure that your client is well-prepared and to manage their expectations. As you did at the Case Conference, explain the procedure of the day from start to finish. In the case of a Rule 14 Motion, it may be the first time your client attends a Motion or a formal argument in a Court. Explain the differences between a Motion and other Court proceedings they may have attended, such as a Case Conference.

Step 2B: Drafting your Motion Materials

Drafting your materials is a crucial step in preparing for the Motion, as, in addition to providing the written evidence that the Court will rely on, it allows you to become more familiar with your position. While it may be the case that in some instances Judges will not have had the opportunity to read your materials in advance of the Motion, Motion materials should be drafted as though the Judge will have the opportunity to review them with a fine-tooth comb.

A. The Rules on Materials for Rule 14 Motions

- As stated above, a Rule 14 motion, whether made with or without notice, (a) requires a notice of motion (Form 14) and an affidavit (Form 14A); and (b) may be supported by additional evidence.[41] However, if a Motion is limited to procedural, uncomplicated or unopposed matters the Moving party may use a motion form (Form 14B) instead of a notice of motion and affidavit."[42] Rule 14(17) outlines the method by which evidence may be given on a Motion:

  "Evidence on a motion may be given by any one or more of the following methods:
  1. An affidavit or other admissible evidence in writing.
  2. A transcript of the questions and answers on a questioning under rule 20.
  3. With the court's permission, oral evidence."[43]

- Rule 14(18) addresses the content of the affidavits. When drafting an affidavit for use on a motion, the affidavit should, to the extent it is possible, contain only personal knowledge of the person signing.[44] Case law establishes that information from other sources cannot be extracted from various publications, like magazines, books or journals for affidavits.[45] More specifically, Rule 14(19) outlines the content of the Affidavit filed in support of a Motion for contempt. If arguing a motion for contempt, you must serve and file a Form 31 Notice of Contempt Motion rather than a Form 14 Notice of Motion.[46]

- The Court provided a useful analysis of Rules 14(17), 14(18), and 14(19) in light of the Court's duty to ensure that the procedure is fair to all parties set out in subrule 2(2) of the FLR in *Children's Aid Society of Toronto v M(A)*.[47] The Court sets out the kinds of

[41] *Ibid*.
[42] *Ibid*, r 14(10).
[43] *Ibid*, r 14(17).
[44] *Ibid*, r 14(18).
[45] See *Di Serio v Di Serio* (2002) 27 RFL (5th) 38 (Ont SCJ).
[46] *Family Law Rules*, rr 14(19), 31(2).
[47] *Children's Aid Society of Toronto v M(A)*, 2002 CanLII 45665 (ONCJ).

evidence that ought to be included in and excluded from an affidavit, keeping in mind the primary objective of the Rules to deal with cases justly. The excerpt below provides a useful frame of reference for considering what evidence you should include in your affidavits for Rule 14 Motions:

> [67] Just dealing requires issues of relevance, probative value and admissibility, all alive in the motion, to be tied to the legislative criteria that govern the adjudication itself.
>
> [68] Just dealing places ***at the beginning*** of the affidavit — not buried somewhere within pages of historical information culled from the society's files — the society's account of what prompted the intervention, why less disruptive steps to the child were not taken, what has been learned to date in the investigation. It is not the parent's entire life that is on parade in an interim custody motion.
>
> [69] Just dealing requires a respect for the rules of evidence. At the risk of stating the obvious, what is evaluated in this motion, as in any other motion, is ***evidence***. Supposition, conjecture, speculation, leaps of hyperbole, innuendo, gossip, unqualified opinion where qualified opinion is required — all have no place in an affidavit. If the decision-making in the motion is to be just, counsel must ensure that the affidavits are stripped of this sort of material before they are filed in the motion record.
>
> [70] At this early stage, the evidentiary case can be expected to include information obtained from others that is then advanced through the vehicle of a social worker's affidavit as "credible and trustworthy" evidence. The information must rise to the level of ***evidence***. Exhibits to affidavits cannot be used to place before the court information that is not admissible evidence.
>
> [71] Just dealing requires an attention to proportionality, a care that the affidavits laid before the court do not, through too casual attention to what the facts show, misstate the strength of the case. Flights in hyperbole are to be particularly avoided. They feed mistrust in the society's evaluative skill.
>
> [72] Factual inferences can be drawn from the evidence only if the facts alleged to support the inference are established by the evidence. If the most pivotal inferences sought by the society are not ***reasonable*** on a plain reading of the materials or have no ***factual*** support at all or do not make plain common sense when the fact advanced for the inference is set within the evidence as a whole, then the basis for the society's position remains a mystery.

- If a practice direction requires that a Summary of Argument or Factum be delivered on every Motion, take special care in preparing your factum and reviewing your opponent's factum. Remember to note up the cases in your factum to ensure cases have not been overturned recently, especially if you have prepared the factum well in advance. Finally, be sure to note up and review opposing counsel's factum, being especially attentive to distinguishing factors in the cases.

- Rule 14(20) sets out the restrictions on evidence and the timeline to be followed:

  > "The following restrictions apply to evidence for use on a motion, unless the court orders otherwise: 1. The party making the motion shall serve all the evidence in support of the motion with the notice of motion. 2. The party responding to the motion shall then serve all the evidence in response. 3. The party making the motion may then serve evidence replying to any new matters raised by the evidence served by the party responding to the motion. 4. No other evidence may be used."

- Parties must be careful to include all evidence that may be considered relevant to the issues, since no evidence other than the material served may be used on a motion. Case law confirms that the only exception to this statement arises when fresh evidence is relevant to a child's best interests.[48] If the moving party's response fails to reply to the issues raised in the responding party's affidavit and instead raising new issues not previously dealt with, the court may strike it out the responding affidavit.[49]

- When considering the evidence to be introduced, consider the need for expert evidence. In 2019, the rules for expert evidence were revoked and substituted with a new framework. Generally, the new Rule 20.2 – Expert Opinion Evidence, applies to motions under Rule 14 and motions for summary judgment unless the court orders otherwise. Rule 20.2(15) states:

[48] *Catholic Children's Aid Society of Metropolitan Toronto v M(C)* (1994), 113 DLR (4th) 321, [1994] 2 SCR 165
[49] *Family Law Rules*, rr 14(20)(3), 1(8.2).

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20.2 (15) Unless the court orders otherwise, this rule applies, with the following modifications, to the use of expert opinion evidence on a motion for a temporary order under rule 14 or a motion for summary judgment under rule 16:

1. Expert witness reports and any supplementary reports shall be served and filed as evidence on the motion in accordance with the requirements of subrules 14 (11), (11.3), (13) and (20), as applicable.

2. Any other necessary modifications.

B. Timeline for Service and Filing under Rule 14

- As set out above, the timelines for service and filing were adjusted in the 2018 Amendments. The amended Rule 14(11) sets out the timeline for service and filing a motion with notice. In this case, the party making the motion shall,

a) serve the documents mentioned in subrule (9) or (10) on all other parties, not later than six days before the motion date;

b) file the documents as soon as possible after service, but not later than four days before the motion date;

c) confer or attempt to confer orally or in writing with every other party about the issues that are in dispute in the motion, subject to a party being prohibited from such communication by court order;

d) before giving the clerk confirmation of the motion in Form 14C under clause (e), give a copy of the confirmation of motion to every other party using mail, fax, email or any other method, except in a child protection case; and

e) not later than 2 p.m. three days before the motion date, give the clerk the confirmation of motion (Form 14C) by,

(i) delivering it to the court office, or
(ii) if available in the court office, sending it by fax or by email.[50]

[50] *Ibid*, r 14(11).

- Rule 14(11.1), which formerly allowed parties to consent to late filing in writing up until 2 days before the Motion, has been amended. While some courts may accept late materials with consents to late file if served or filed later than 2pm three days before the Motion hearing date, it is best practice to abide by the new rules in order to ensure that your materials are not rejected at the filing counter. Parties may not consent to change the timeline for service and filing of the Form 14C.[51]

- In limited circumstances, a Motion may be made without notice. Rule 14(12) sets out four circumstances in which a motion may be made without notice:

    a) the nature or circumstances of the motion make notice unnecessary or not reasonably possible;
    b) there is an immediate danger of a child's removal from Ontario, and the delay involved in serving a notice of motion would probably have serious consequences;
    c) there is an immediate danger to the health or safety of a child or of the party making the motion, and the delay involved in serving a notice of motion would probably have serious consequences; or
    d) service of a notice of motion would probably have serious consequences.[52]

- Rule 14(13) sets out the timeline for service and filing a motion without notice, "The documents for use on a motion without notice shall be filed on or before the motion date, unless the court orders otherwise."[53]

C. The Rules on Materials for Rule 15 Motions

- As stated above, the moving party may use a Form 15A and responding party may file a Form 15B under a Rule 15 Motion. Pursuant to Rule 15(20), be sure to attach a copy of any existing order or agreement that deals with custody, access of support to every change of information form or consent motion to change child support.[54]

[51] *Ibid*, r 3(6).
[52] *Ibid*, r 14(12).
[53] *Ibid*, r 14(13).
[54] *Ibid*, r 15(20).

- However, Rule 15(22) sets out that a party may use an affidavit, instead of a Change Information Form, to set out the evidence necessary to satisfy the court that it should make the requested order.[55] This is often a more effective and comprehensive way to present your client's evidence.

- Similarly, a responding party may use an affidavit to provide evidence that supports his/her position instead of relying on the relevant portions of Form 15B, and in that case the affidavit is deemed to be part of the Form.[56] Should the party provide such an affidavit in a Rule 15 Motion, subrules 14(18) and 14(19) apply with necessary changes to the affidavits made in accordance with subrules 15(22) and 15(23).[57] Refer to the above discussion regarding drafting affidavits under Rule 14 motions should you choose to file an affidavit in accordance with subrules 15(22) and 15(23).

D. Timeline for Service and Filing under Rule 15

- The timelines for service and filing under Rule 15 were not changed in the 2018 Amendments. Under Rule 15(10) and 15(22), any affidavits in support of the motion must be served no later than 30 days before the Motion is to be heard if the party being served resides in Canada or the United States, and no later than 60 days before the motion is to be heard if the party resides elsewhere.[58] Note that service on the Family Responsibility Office is required if the Motion to Change includes a request to change a child support obligation that, (a) is set out in an order made under the *Divorce Act* (Canada); and (b) was recalculated under section 39.1 of the *Family Law Act* within the 35-day period before the motion is filed.[59]

[55] *Ibid*, r 15(22).
[56] Ibid, r 15(23).
[57] Ibid, r 15(24).
[58] *Ibid*, r 15(10), r 15(22).
[59] *Ibid*, r 15(8.1).

E. A Note on Long Motions

- Motions that are expected to take more than 1 hour (including reply and cross motions) are characterized as “long motions”. For long motions, it is crucial to consult the Practice Direction for the region of your courthouse location and any Practice Advisories. The method for booking a date, filing deadlines, materials required, and format required varies greatly by region.

- For example, Central East region requires the moving party to serve and file all their motion material *and an Offer to Settle* at least 30 days prior to the schedule motion date, otherwise the date will be vacated. The Responding party must serve and file responding material *and Offer to Settle* at least 15 days before the scheduled motion date. 14C confirmations are required to be filed 7 days prior to the scheduled motion date. Failure to confirm 7 days before will result in the motion being removed from the list and the date vacated.

- In the Toronto region, the “Practice Advisory Concerning Family Long Motions in the Toronto Region” supplements the Practice Direction. In order to eliminate parties scheduling “placeholder” motions, it requires the moving party to serve and file a Notice of Motion along with supporting materials and affidavits within 10 days after the motion has been scheduled. The advisory is silent on the timelines for service and filing of the responding party’s materials. The responding party may serve and file their materials within the usual timeframe in Rule 14. However, both parties are required to serve and file their factums at least 7 days before. It is best practice to agree to a timetable with opposing-counsel prior to or immediately after the selection of a long-motion date.

Step 3: Arguing the Motion and Costs

- After you have prepared your Motion materials, arguing your motion turns on your oral advocacy skills. Preparing yourself by becoming well versed with your materials and the materials of your opponent sets the stage for effective oral advocacy.

- Individual style for preparation and presentation vary widely, but regardless of the approach, familiarity with the materials and maintaining an organized and logical structure to your oral arguments are important.

A. Costs

- The potential for a cost award should be consider leading up to the Motion. For example, counsel should caution clients prior to bringing urgent Motions due to the costs consequences which may result if the Motion is dismissed.

- Similarly, an offer to settle should be made at the earliest opportunity prior to the Motion and in accordance with the timelines set out in Rule 18(14).

- While many judges may request written submissions on costs to be delivered shortly after the Motion is heard, counsel should always be prepared to argue costs at the Motion hearing. Recall Rule 24(10) states that promptly after dealing with a step in the case, the court shall, a) make a decision on costs in relation to that step; or b) reserve the decision on costs for determination at a later stage in the case.[60] The factors to be considered in setting the amount of costs were amended in the 2018 Amendments. The factors are now set out in Rule 24(12):

> (a) the reasonableness and proportionality of each of the following factors as it relates to the importance and complexity of the issues:
>
> (i) each party's behaviour,
>
> (ii) the time spent by each party,

[60] *Ibid*, r 24(10).

(iii) any written offers to settle, including offers that do not meet the requirements of rule 18,

(iv) any legal fees, including the number of lawyers and their rates,

(v) any expert witness fees, including the number of experts and their rates,

(vi) any other expenses properly paid or payable; and

(b) any other relevant matter.[61]

- Since the Court is encouraged to consider the matter promptly, it is prudent to bring copies of your Bill of Costs and all Offers to Settle made to the Motion. Rule 24(12.1) states that any claim for costs respecting fees or expenses shall be supported by documentation satisfactory to the Court. Therefore, your Bill of Cost should include a Schedule "A" containing your billed and unbilled dockets relating to the matter and invoices/receipts for disbursements.

[61] *Family Law Rules*, r 24(12).