

Tips to Prepare for the New Rule Changes

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On January 1, 2021, significant changes to the *Rules of Civil Procedure* come into force. While you should review the [amendments](#) carefully, this article includes some key practical tips and an overview of the major changes.

Key Practice Tips

- You can now serve documents by email. Confirm that your email address is up to date with the LSO as the courts and parties will look it up on the LSO members database. Rule 4.12(1)(b) allows the Court to send documents to the e-mail address for lawyers as published on the LSO's website when there is no other e-mail address in the Court file.
- Remember to add your email address to the backsheet of and update your [Court forms](#). Familiarize yourself with the new [document naming protocols for electronic filing and CaseLines](#).
- [Sign up](#) and familiarize yourself with CaseLines, the new cloud-based document sharing and storage e-hearing platform for remote and in-person court proceedings. Remember that Caselines is not used to initiate proceedings or deliver documents - you use the newly expanded Justice Services Online (JSO) platform. (See below for further Caselines tips.)
- Ensure professional teleconference or videoconference capacities for your lawyers and in/out-of-court witnesses/deponents (for more about providing legal services by videoconference, see our related article [here](#) and our checklist [here](#))
- Consider licensing Adobe Acrobat to help you comply with electronic formatting requirements.
- Check your e-mail filters and establish a routine for consulting junk folders
- Educate your staff about the new changes, develop your collective comfort with the new requirements, and update your firm processes to meet them; and
- Inform your clients of the remote options available for hearings and other steps in the litigation process (1.08). Your client witness preparation will also need to be adapted to help your clients understand and be prepared for proceeding in this new manner.

New Rule Changes: No Turning Back

The COVID-19 pandemic has compelled lawyers and the judiciary to make better use of remote alternatives to litigation processes and tasks that would otherwise have been facilitated in person. These adaptations were temporary solutions born of necessity but [recent amendments to the Rules of Civil Procedure](#) make them permanent features of the Ontario Court system. On January 1, 2021 the changes to the *Rules* will be in force. They bring practice efficiencies and, as with anything new, risks for unwary lawyers.

Virtual Hearings and the Removal of the In-Person Assumption

When restrictions on the Court's facilities were introduced in March 2020 in response to the pandemic, online methods of administering justice proved essential. More than [50,000 virtual hearings were conducted in the six months that followed](#). When the pandemic ends, remote hearings may supplant in person attendances as a significant proportion of overall Court activity and the *Rules* will soon reflect this potential reality. Virtual hearings have been codified and the *Rules* have been amended to remove the in-person assumption.

The amended Rule 1.08 requires a party seeking a hearing or other step in a proceeding to specify the method of attendance: in person; by telephone conference; or by video conference. This election is to be made in the forms or documents ordinarily filed in advance of these events. Importantly, this rule does not apply to proceedings at the Ontario Court of Appeal (1.08(2)) or case conferences (the latter are to be held by teleconference – 1.08(3)) but does apply to mandatory mediations and oral examinations (1.08(8)).

If a party objects to the proposed method of attendance, it must deliver a notice of objection in the prescribed form before the earlier of 10 days after service of the document specifying the election or seven days before the hearing or other step (1.08(4)). The objection will then be resolved by case conference at which the Court will consider various factors (1.08(6)), including:

- the availability of telephone conference or video conference facilities;
- the general principle that evidence and argument should be presented in open court;
- the effect a telephone or video conference will have on the Court's ability to evaluate the credibility and demeanor of witnesses; and
- the balance of convenience among the parties.

In keeping with the increase of online alternatives for litigants, the amendments to the *Rules* also remove codified assumptions that hearings will be heard in the county where the proceeding was commenced (Rules 37.15(1), 38.11(2)(b), 60.17(b), and 62.01(6)) and that parties will participate in person (Rules 37.03, 38.03(1.1), 50.05(1), 50.13(2), 54.05(2), and 76.05(2)). A virtual renaissance is underway, but there are practice risks.

Lawyers will need to carefully examine preferred methods of hearing and avoid objections to remote elections absent a compelling reason(s). The amended Rule 57.01(1) will allow the Court to consider whether a party unreasonably objected to proceeding by telephone or video conference under Rule 1.08 when determining costs. Discomfort with remote processes will not be enough to excuse lawyers or their clients from participating virtually and a failure to warn a client (preferably in writing) of the potential for an adverse cost award could result in a claim.

CaseLines

[CaseLines](#) is a cloud-based document sharing and storage e-hearing platform for use by participants in remote and in person court proceedings. This technology will support virtual hearings by permitting online sharing and storage of documents. The Superior Court of Justice produced a [video](#) that helps familiarize prospective users with the platform, published a [FAQ](#) and has encouraged lawyers to [sign up](#) given that its use can be required (4.05.3(3)). But lawyers beware! [CaseLines is not an alternative means of filing or serving documents](#) under the *Rules* (4.05.3(11)).

The new Rule 4.05.3 stipulates when CaseLines is to be used, the deadlines for submission of documents and the formatting requirements. Document names must indicate the document type, the type of party submitting the document and the date on which it was created or signed (4.05.3(6)). Lawyers will also want to familiarize themselves with the new Rule 4.01, which specifies [document standards](#) for filing in both paper and electronic formats.

Parties who submit a document through CaseLines must retain the original for 30 days after the expiry of the appeal period (4.05.3(9)). Parties must also provide the original document for inspection within five days of a related request from the Court or other litigant (4.05.3(9)). If there are inconsistencies between documents in the court file and those submitted through CaseLines, they will be resolved in favour of the information in the court file (4.05.3(10)).

Rule 4.05.3(6) requires that documents submitted to CaseLines be in PDF format and include bookmarks and section headings. Authorities must be hyperlinked to websites that allow free access (e.g. CanLII, e-Laws, etc.) and if the authority is not publicly available, the relevant excerpt must be included in the document. There are no size limit for Caselines uploads.

Do not forget to file and serve documents under the *Rules*. Submitting documentation through CaseLines at the behest of the Court does not satisfy these requirements 4.05.3(11).

E-mail is the New Standard

The amended *Rules* allow for the service of documents (other than originating processes) by email. Relatedly, references to the service of documents by fax have been removed from Rules 16, 37, and 38. So lawyers – check your e-mail regularly!

E-mail service will not require the consent of the other parties or a court order (see amended Rule 16.01(4)(b)(iv) and Rule 16.05(1)(f)). There is also no longer a need for a certificate of service (former Rule 16.09(6) is revoked). Court staff will also be permitted to communicate and send certified court documents (4.03 (2)) to parties by email (4.12).

Now that e-mail is the new standard for communication in the litigation process, lawyers should be especially wary of delegating regularly checking their inboxes. Routinely consulting junk folders for misidentified communications from the Court or other parties involved in your litigation files is also an easy way to mitigate the risk of losing important correspondence. And, up to date anti-virus software will protect you from cyber risks.

Virtual Commissioning of Affidavits, Electronic Signatures and Issuance

In the summer, 2020, the government enacted a regulation permitting and setting out the requirements for remote commissioning of affidavits, and the Law Society of Ontario [published related guidance, including practice risks](#). Like virtual hearings, virtual commissioning of affidavits is now a permanent feature of the *Rules* (Rule 4.06(1)(e) is amended to permit virtual commissioning).

In addition, the new Rule 4.01.1 provides that documents that may or must be signed by the Court, a registrar, a judge, or an officer under the *Rules* may be signed with an electronic signature. Consistent with this change, the new Rule 4.05 (1.1) permits any document to be issued electronically. The date of electronic issuance is the date indicated on the document by the registrar or authorized software.

Conclusion

On January 1, 2021 the amended *Rules* will be in force. Many in the profession have welcomed these changes as overdue modernizations to Ontario's Court system and they will certainly impart many efficiencies. At the same time, lawyers will need to remain vigilant to avoid missteps and generally commit themselves to embracing electronic technologies.

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