

Key Features: Civil Rules and Court Fees



Proportionality	1
Case Planning	
Conferences	1
Limits on Discovery	2
Experts	3
Trial Management	
Conferences	3
New Fast Track	
Litigation	3
Miscellaneous	4

Proportionality (Rule 1-3)

The new object of the rules is to “secure the just, speedy and inexpensive determination of every proceeding on its merits.” That includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:

- a) the amount involved in the proceeding,
- b) the importance of the issues in dispute, and
- c) the complexity of the proceeding.

This new objective will provide judges with more authority to manage the adversarial process so as to reduce complexity, cost and delay.

Case Planning Conferences (Part 5)

The original concept draft of the new rules focused on upfront planning and agreement by the parties on pre-trial procedures. It required that each case have a case plan order before taking steps in the litigation process. The case plan order was to address dispute resolution options, dates for the exchange of documents, an electronic document protocol, the parameters of oral examinations for discovery and basic information about the planned use of experts. If the parties were unable to agree on a case plan order, the order would have to be made through a case planning conference (CPC) before the parties could take steps in litigation.

Concern was expressed in the consultation that the proposal to require case plan orders before steps could be taken in the litigation might result in the holding of unnecessary CPCs and therefore the creation of unnecessary costs. To address those concerns, the new rules do not automatically require a case plan order and therefore do not include any provisions for consent case plan orders. Instead, the new rules use a party driven model, similar to the notice to mediate process. The party driven model does not require a CPC, but makes it available if one party to the litigation requests that a CPC be held, absent court order to the contrary. At the CPC, the judge or master will set the parameters of the litigation, guided by proportionality principles, and the results of the conference will be set out in a case plan order. The consultation produced additional objections about the requirement that clients be personally present at CPCs. This provision was therefore dropped so that clients who are represented by counsel are not required to attend the CPC.

Limits on Discovery (Part 7)

A. Reduced scope of document production (Rule 7-1)

The Civil Justice Reform Working Group (CJRWG) concluded that excessive document production is responsible for much of the delay and expense in civil litigation. They determined that the 19th century “Peruvian Guano” case that allows for the discovery of indirectly relevant evidence is no longer workable in the context of proliferating electronic information and the increasing complexity of modern litigation. The case is no longer followed in the U.K., where it originated.

The new rules provide that parties only disclose those documents that could be used to prove or disprove a material fact at trial and any other documents that a party intends to refer to at trial. Parties may seek an order to obtain additional documents if warranted.

B. Limits on oral examinations for discovery (Rule 7-2)

Another significant cost factor in today’s litigation is excessive oral examinations for discovery, as the current rules place no limits on the examiner. The Honourable Chief Justice (as he then was) Allan McEachern stated that oral examinations for discovery can be “a procedure of oppression” and that “often transcripts of interminable examinations for discovery are never looked at during the trial.” He said that the expense of oral discovery must be reduced if we are to “survive the dangerous escalation of costs of the trial process.”

The original concept draft of the new rules provided that no party would be subjected to more than three hours of questioning in discovery by all other parties, without consent or court order. Concern was expressed in the consultations that the total of three hours by all parties combined was insufficient. As a result, the new rules set a maximum (absent consent) of seven hours for each party conducting an examination for discovery. This provides for a reasonable amount of oral discovery, without allowing days upon days of questioning.

An informal process that sometime occurs in an examination for discovery is that the deponent does not know the answer to a question, but agrees to look into it and then provide the answer. Rather than appear at a subsequent examination for discovery, however, counsel frequently agree to have the new information sent to the requesting party. The new rules have formalized this process by allowing a letter answering the questions to be deemed to be questions and answers given under oath in the exam for discovery. (Rule 7-2 (23) and (24))

C. Interrogatories (Rule 7-3)

Interrogatories under the new rules are only allowed with consent or leave of court.

D. Witness lists (Rule 7-4)

The rules require the parties to exchange witness lists at least 28 days before trial or as set in a case plan order.

Experts (Part 11)

A. Duty (Rule 11-2)

Another significant issue found by the CJRWG was the increasingly adversarial nature of expert testimony. To address this issue, the new rules provide that an expert's duty is to assist the court and not to advocate for any party.

B. Reports (Rule 11-6)

Anyone wishing to tender an expert's report into evidence at trial must serve the report on the other parties at least 84 days (12 weeks) before trial. Anyone wishing to tender an expert's report in response to another expert's report must do so at least 42 days (6 weeks) before trial. The information that must be in an expert's report has been expanded and is set out in Rule 11-6(1).

C. Joint experts (Rule 11-3)

While the rules do not require the use of joint experts, they facilitate the use of such experts by setting out a protocol for their use in

D. Experts conferring

The CJRWG's original recommendations provided for opposing experts to confer prior to trial in order to clarify the technical issues in dispute. The mandatory nature of this requirement, however, was subject to criticism in the consultation. As a result, the mandatory nature of this requirement has been dropped from the new rules, but a judge or master can order the experts to confer at either a CPC (Rule 5-3(1)(k)(iii)) or at a trial management conference (Rule 12-2(9)(i)).

E. Disclosure of expert's file

Rule 11-6(8) clarifies the rules on producing the contents of an expert's file.

F. Direct exam of expert

Rule 11-7(5) clarifies the common-law rules on when an expert can provide a report and provide testimony on direct examination.

Trial Management Conferences

To ensure that trials proceed smoothly, trial management conferences will be held between two and four weeks before trial.

New fast track litigation (Part 15)

The new fast track rule combines the existing expedited litigation rule (current Rule 68) and the fast track rule (current Rule 66) to provide a single simplified and fast procedure when the amount in controversy is \$100,000 or less or when the trial of the action can be completed in three days or less. If the matter fits the fast track criteria, either party may put the case into the fast track. Either party can apply to have the case removed from the fast track (or the court may do so on its own).

In a fast track action, the parties cannot file contested applications without first attending a case planning conference. Oral discovery in fast track actions are (absent consent) limited to two hours combined by all parties adverse in interest. Costs in fast track actions are limited to \$8,000 for one day trials, \$9,500 for two day trials and \$11,000 for trials lasting three or more days.

Most importantly, if a plaintiff recovers judgment of \$100,000 (or less) or a trial is completed in three days (or less), the limited cost provisions apply. This will provide an incentive to ensure that cases that should be in the fast track are put into the fast track.

Miscellaneous

A. Case initiation and response

- i. New forms will facilitate a clearer statement of the claim and response and appendices to the forms will facilitate better data collection.
- ii. The writ and appearance have been eliminated as unnecessary.
- iii. Third party notices are now required to be filed (absent leave) within 42 days of being served with a claim or counterclaim (3-5(4)).

B. Application process

- i. Simplified from rule 51A.
- ii. Clearer rules on urgent applications (Rule 8-5).
- iii. Summary judgment process refined (Rule 9-6).
- iv. Data collection improved (appendices to form for filing applications).

C. Better organization

- i. The new rules have a reorganized structure to allow for a more logical and chronological flow, along with new terminology to update the rules to modern standards
- ii. Time periods are set in multiples of seven for easy calculation in weeks.