

Settlement Conference Rules and Procedure

- [1] The Settlement Conference is the next to last step before a trial. It is a final opportunity for a judicial review and discussion about the disputed issues in the case, and to try to resolve them, in whole or in part to avoid or shorten a trial. It is a confidential process. The judge holding the conference will **not** be the trial judge, everything that is said by anyone participating in the conference is confidential, cannot be repeated in court or later presented at trial, and the settlement conference documents (briefs) which each party must file before the conference are returned or destroyed afterwards. In order for the judge to make meaningful settlement recommendations, the parties must prepare a number of important documents before the conference and file them with the court.
- [2] The *Family Law Rules* (“the *Rules*”) govern what is required and what happens at a settlement conference. There are consequences if these rules are not followed. What follows is a procedural guide (and some tips) to the settlement conference process. When reading this guide, be mindful that the Superior Court of Justice issued an updated **Notice to the Profession** for the Central East Region on December 18, 2020, effective January 4, 2021 (“the Notice”):¹ among other things it deals with the filing of documents and restrictions on what can be filed. It can be found on the Superior Court of Justice website (Home>> Notices and Orders-Covid-19>>Regional Notices (Central East-Family)). Part III of that Notice gives instructions how to file documents and restrictions on them. The website also contains additional information about family law rules and practice and can be accessed online by going to “A Guide to Process for Family Cases at the Superior Court of Justice” (Home>> Family Proceedings>> Resources-Family Proceedings) or you can contact the Family Law Information Centre (“FLIC”) at your local court.

Purpose of a Settlement Conference

- [3] The purposes of a settlement conference are set out in rule 17(5) of the *Family Law Rules*,

PURPOSES OF SETTLEMENT CONFERENCE

¹ References in “[]” are to the numbered sections of the Notice. **Bolded** words or phrases are for emphasis purposes only.

- 17(5) The purposes of a settlement conference include,
- (a) exploring the chances of settling the case;
 - (b) settling or narrowing the issues in dispute;
 - (c) ensuring disclosure of the relevant evidence;
 - (c.1) settling or narrowing any issues relating to any expert evidence or reports on which the parties intend to rely at trial;
 - (d) noting admissions that may simplify the case;
 - (e) if possible, obtaining a view of how the court might decide the case;
 - (f) considering any other matter that may help in a quick and just conclusion of the case;
 - (g) if the case is not settled, identifying the witnesses and other evidence to be presented at trial, estimating the time needed for trial and scheduling the case for trial; and
 - (h) organizing a trial management conference or holding one if appropriate.

It is important to note what the settlement conference is not – it is NOT a repetition, or duplication, of the case conference, and it is not the place to reargue what may have happened, or been ordered, at earlier steps in the court proceeding like a case conference or a motion.

Required Documents

- [4] These are the documents that **must** be prepared, served and filed with the court before a settlement conference can proceed:
- (a) a **Net Family Property statement**, if the parties are married and there are property issues involved;
 - (b) a **Comparison of Net Family Property** statements (if (a) applies);
 - (c) a **Certificate of Financial Disclosure**;
 - (d) an **updated financial statement, or an affidavit** saying that the information in a previous financial statement sworn more than 30 days before the conference has not changed and is still true;
 - (e) an **expert report**;

- (f) a **settlement conference brief**;
- (g) an **Offer to Settle**, either in the settlement conference brief (where noted) or separately attached.

[5] Appendix A sets out when these documents must be served on the other party and filed with the court, along with the governing Rule. Some of these documents, such as (a) to (e) above, are filed in the court record (this is called the “Continuing Record”). A settlement conference brief and any Offer to Settle **do not** form part of the Continuing Record and are returned or destroyed after the conference (see **Confidentiality** below).

[6] Failure to comply with the *Rules* wastes the time of the parties and the court. Non-compliance will usually result in costs being awarded against the offending party (see **Cost Consequences** below).

Orders at a Settlement Conference

[7] Rule 17(8) sets out the kind of orders that the judge can make at a settlement conference.

ORDERS AT CONFERENCE

17(8) At a ... settlement 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;
- (a.0.1) make an order about expert evidence, including hiring an expert for one or more parties, the use of an expert opinion and how and when experts’ reports are to be served, filed and the opinion admitted into evidence;
- (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 ... settlement conference conducted by a non-judge who is a current or retired lawyer or a retired judicial officer of the Ontario Superior Court approved for that purpose by the regional senior judge;
 - (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.

[8] While the Rule is worded to include case and trial management conferences, each of those has a different purpose than the settlement conference, although there will be some overlap. Some of the Rule’s provisions, like sub-paragraphs (a), (a.0.1), (b) and (b.1) above, should have already been ordered at the case conference, or even motion – **a settlement conference is not the place to raise for the first time, for example, issues about disclosure or questioning.** If you have a complaint about failure by the other party to comply with an Order made at the case conference for disclosure or if you think that the disclosure provided is inadequate, then consider bringing a motion well before the settlement conference.

Settlement Conference Briefs

[9] There is a group of Rules that governs what documents must be served and filed by each party before a settlement conference can be held, and when those must be served and filed (see **Required Documents** above). These Rules include expert opinion evidence (see **Expert Evidence** below). There is a prescribed Form 17C for a settlement conference brief not involving protection of children. Part III of the Notice [35] states that the briefs “shall

not exceed eight pages in total comprised of the form, any additional narrative and attachments.” Not included in this page limitation are Separation Agreements (if applicable), Reports from the Office of the Children’s Lawyer, Child Support and Spousal Support Advisory Guideline calculations, Offers to Settle, Reports produced pursuant to s. 30 of the *Children’s Law Reform Act*, the Net Family Property Statements in [3] (a) and (b) above (without back-up documents) and relevant court orders including bail/release terms.

- [10] Note that Expert Reports are not exempted from these page limitations because they are required to be filed in the Continuing Record **before** the conference (see *Family Law Rules* 20.2(2) and (14)). A summary of the expert(s) opinion(s) can be included in the brief so long as the page limitations are obeyed: if a party believes it necessary to exceed the page limit, the Notice [37] requires that leave of the court by 14B motion in advance of the conference be obtained before the brief is filed.
- [11] Rules 17(13), (13.1), (14.1) and (14.2) set out the requirements for settlement conference briefs and their contents.

PARTIES TO SERVE BRIEFS

17(13) ...[E]ach party shall serve and file a ... settlement conference brief (Form 17C)

TIME FOR SERVICE OF BRIEFS

17(13.1) **The party requesting the conference** (or, if the conference is not requested by a party, the applicant or party making the motion) **shall serve and file a brief not later than six days before the date scheduled for the conference and the other party shall do so not later than four days before that date.**

NO LATE BRIEFS

17(14.1) No brief or other document for use at the conference that is required to be served or filed may be served or filed after 2 p.m. two days before the date scheduled for the conference.

REQUIREMENT TO BRING DOCUMENTS TO SETTLEMENT CONFERENCE

17(14.2) The following documents shall be brought to a settlement conference:

1. Any document that supports a party’s position in respect of a dispute regarding the value of property or regarding the amount of a debt, in the case of a property claim under Part I of the *Family Law Act*.

2. Any document required to be served under rule 13 (financial disclosure), if there is a dispute as to whether it was served.

[12] An Offer to Settle must be included in, or accompany, the brief (see **Offers to Settle** below). It is prudent to consider having the Offer accompany the Brief (rather than being included in it) because that may have later cost implications. The Offer should comply with *Family Law Rule* 18.

Expert Evidence

[13] Rule 20.2 deals with expert opinion evidence. A party can hire their own expert or the court can make an order that an expert be hired by or for one or more of the parties. There are several kinds of experts described in Rule 20.2(1). Regardless whether the expert is hired by a party or an order has been made, the expert report must be served and filed with the court **at least 6 days before the settlement conference**. There are minimum requirements that must be met if you want to call an expert as a witness at trial (a “litigation” or “joint litigation” expert) or if you only want to file an expert’s written opinion (a “participation expert”). These requirements include listing the documents or other sources of information relied on by the expert and serving copies of the documents on the other party or parties unless they have already been served.

[14] **It is usually a good idea to serve and file a copy of the expert report well in advance of the conference.**

Financial Disclosure

[15] Financial disclosure already made must be updated for the settlement conference. Rules 13(12), (12.1) and (12.2) 1. and 2. provide as follows:

UPDATING FINANCIAL STATEMENT

13(12) **Before any ... settlement conference ... each party shall update the information in any financial statement that is more than 30 days old by serving and filing,**

(a) a new financial statement; or

(b) an affidavit saying that the information in the last statement has not changed and is still true.

MINOR CHANGES

13(12.1) If there have been minor changes but no major changes to the information in a party's past statement, the party may serve and file, instead of a new financial statement, an affidavit with details of the changes.

TIME FOR UPDATING

13(12.2) The material described in subrules (12) and (12.1) shall be served and filed as follows:

1. For a ... settlement conference requested by a party, the requesting party shall serve and file at least **seven days** before the conference date and the other party shall serve and file at least **four days** before that date.
2. For a ... settlement conference that is not requested by a party, the applicant shall serve and file at least **seven days** before the conference date and the respondent shall serve and file at least **four days** before that date.

[16] If there is any document earlier served as required by the *Rules* which has been corrected, updated or is a new version, an updated Certificate of Financial Disclosure must be served and filed in the Continuing Record. Rule 13(13.1) governs this,

UPDATING CERTIFICATE OF FINANCIAL DISCLOSURE

13(13.1) Before any settlement conference ... a party who has served a corrected, updated or new version of a document referred to in subrule (3.1), (3.3), (3.4) or (5.0.1) in accordance with subrule (15), or additional documents in accordance with subrule (16), shall serve and file an updated certificate of financial disclosure (Form 13A), no later than,

- (a) seven days before the conference, in the case of the party requesting the conference or, if the conference is not requested by a party, the applicant or the party making the motion, as the case may be; and
- (b) four days before the conference, in the case of the other party.

[17] Rule 13(17) provides,

DUTY TO ADDRESS OMISSIONS IN FINANCIAL DISCLOSURE

13(16) As soon as a party discovers that he or she failed to serve a document required to be served under subrule (3.1), (3.3), (3.4) or (5.0.1), the party shall serve the document on the other party.

Property Claims

[18] Where the case involves property claims between married (not common-law) spouses, two important documents must be prepared. The first is a **Net Family Property statement** (Form

13B): this must be prepared and filed not less than 30 days before the settlement conference. The other document is a **Comparison of Net Family Property Statements** (Form 13C) which must be prepared and filed with the settlement conference brief.

[19] Rule 13(14)(a) requires,

NET FAMILY PROPERTY STATEMENT

13(14) Each party to a property claim under Part I of the *Family Law Act* shall serve and file a net family property statement (Form 13B) or, if the party has already served a net family property statement, an affidavit saying that the information in that statement has not changed and is still true,

(a) not less than 30 days before a settlement conference

[20] In addition to a Net Family Property Statement, the parties must prepare a document comparing their net family properties. Rules 13(14.2) and (14.3) deal with Form 13C where parties either can, or cannot, agree on a joint comparison of net family property statements.

COMPARISON OF NET FAMILY PROPERTIES, JOINT

13(14.2) Parties who have served and filed net family property statements in accordance with subrule (14) shall file a joint comparison of net family property statements (Form 13C) **no later than seven days before a settlement conference**, subject to subrule (14.3).

COMPARISON OF NET FAMILY PROPERTIES, SEPARATE

13(14.3) If the parties fail to agree on a joint comparison of net family properties, each party shall serve and file his or her own comparison of net family property statements (Form 13C) no later than,

(a) seven days before a settlement conference, in the case of the party requesting the conference or, if the settlement conference is not requested by a party, the applicant or the party making the motion, as the case may be; and

(b) four days before the settlement conference, in the case of the other party.

[21] These documents must be filed in the Continuing Record.

Service and Filing of Briefs

[22] Part III of the Notice (paragraphs [25] to [31]) explains how to file conference documents. Be mindful that there are different rules for the applicant and respondent for serving their Briefs: the applicant must **serve and file** their Brief on the respondent at least **six days** before

the conference date, and the respondent **must serve and file** their brief **four days** before the conference date.

<i>Filing of Brief with Court (by 2:00 p.m.) by applicant (deadline for respondent is in brackets)</i>	<i>For Conference date for the following week</i>
Monday (Wednesday)	Tuesday
Tuesday (Thursday)	Thursday
Wednesday (Friday)	Friday
Thursday (Monday)	Monday the second week afterwards
Conferences are not held on Wednesdays in Newmarket.	

[23] Where the deadline for filing falls on a statutory holiday, add a day. For example, if Monday would ordinarily be the deadline for filing Briefs in time for a Tuesday Settlement Conference the next week, and the Monday is a statutory holiday, then the Briefs must be filed with the court by no later than 2:00 p.m. on the preceding Friday. **Always remember to serve and file your Brief as soon after service on the other side as possible to ensure that you comply with this rule.**

[24] See Appendix A for service and filing deadlines.

Offers to Settle

[25] An Offer to Settle must be made as part of the settlement conference process. Its terms are confidential and **cannot** be mentioned in any document filed in the Continuing Record or until after a judge has made a decision dealing with the subject matter of the Offer (i.e. after a trial or other hearing). **Rule 18** of the *Family Law Rules* deals with offers to settle, who must sign them, the consequences of withdrawing an offer, and accepting or failing to accept an offer.

[26] The settlement conference Form requires (at paragraph 19) that a party include the terms of their offer to settle. Please remember that while the Form requires each party to set out the terms on which they are prepared to settle the issues in the case, the settlement conference process and all documents associated with it are considered confidential. In other words, the offer referenced in the settlement conference Brief will **not** qualify as a Rule 18 Offer which

a party will be allowed to mention after a trial when dealing with the issue of costs. The best practice is to refer to the terms of an offer in the Brief or separately attach it. **In every case an Offer to Settle must be served and accompanied by an affidavit proving its service on the other party.** These documents are **never** filed with the court until after a trial has finished and then only as directed by the judge.

Confirmation

[27] Even though the court, or either or both of the parties, have scheduled a settlement conference date, **each** party must still confirm with the other side and file with the court a confirmation that the conference will proceed. Rule 17(14) states:

PARTIES TO CONFIRM ATTENDANCE

(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;

(b) before giving the clerk confirmation of the conference in Form 17F under clause (c), **give a copy of the confirmation of conference to every other party using mail, fax, email or any other method**, except in a child protection case; and

(c) not later than 2 p.m. **three days before the conference date**, give the clerk the confirmation of conference (Form 17F) by,

(i) delivering it to the court office, or

(ii) if available in the court office, sending it by fax or by email. O. Reg. 298/18, s. 12 (3)

[28] See also “Service and Filing of Briefs” above (paragraphs [21] and [22]).

[29] The Form 17F confirmation is a filing requirement **in addition to** the deadline for filing Briefs. **In other words, the filing of the Brief does not relieve a party from serving and filing their confirmation.**

[30] Form 17F requires the parties to discuss with each other beforehand what are the important issues for the conference and how much time each party expects will be needed to tell the judge what is needed for their case. **It is required that each party list what they think are the important issues for that conference.** This list is like an **Agenda** and will enable the

judge, who will have read the Briefs beforehand, to focus on the issues and consider how to handle them.

- [31] If no Confirmation is filed, the conference will be struck from the list and not heard unless the court orders otherwise. Rule 17(14.1) states:

EFFECT OF FAILURE TO CONFIRM

(14.1) Unless the court orders otherwise, a conference shall not be held if confirmation of the conference is not given to the clerk in accordance with clause (14) (c). O. Reg. 298/18, s. 12 (3).

- [32] If the conference is not confirmed, the Registrar will endorse the Record that no further steps in the case may be taken without the parties obtaining from the court an order pursuant to Form 14B supported by an affidavit satisfactorily explaining the reason why the conference was not confirmed.

- [33] In the event that there should be any change to the confirmation sent (such as certain issues being settled, or inadvertently omitted) the parties should let the court know right away.

PARTIES TO UPDATE CONFIRMATION

(14.1.1) If a party who has given a confirmation of conference determines at any time before the conference is held that the confirmation is no longer correct, the party shall, if possible, immediately,

(a) give a copy of the corrected confirmation of conference in Form 17F to every other party using a method listed in clause (14) (b) and subsequently give the clerk the corrected confirmation of conference by a method listed in clause (14) (c); or

(b) in a child protection case, give the clerk a corrected confirmation of conference in Form 17F by a method listed in clause (14) (c). O. Reg. 298/18, s. 12 (3).

Participation/Attendance

- [34] Rule 17(15) deals with the mandatory participation/attendance of parties and their lawyers at the settlement conference,

(15) The following shall come to each conference:

1. The parties, unless the court orders otherwise.

2. For each represented party, the lawyer with full knowledge of and authority in the case.

[35] The lawyer, or lawyer's agent, who appears for a party must not only be familiar with the issues in the case but also have the authority to give recommendations to, and receive settlement instructions from, the client.

[36] Sometimes either or both the party and their lawyer cannot participate/attend the conference. Reasons may include a party being out of the jurisdiction, a compelling medical condition which prevents personal participation/attendance or a lawyer having a conflicting court attendance (this is not an exhaustive list). Rules 17(16) and (17) deal with this:

(16) With permission obtained in advance from the judge who is to conduct a conference, a party or lawyer may participate in the conference by telephone or video conference.

(17) A party or lawyer who has permission to participate by telephone or video conference shall,

(a) make the necessary arrangements;

(b) serve a notice of the arrangements on all other parties and file it; and

(c) participate in the conference as the notice specifies.

[37] It is the responsibility of a party's lawyer, or the party if they are representing themselves, to request from the court at the earliest available opportunity its permission so that the party and/or lawyer may participate by telephone or video conference (**Note:** all conferences during Covid-19 are by ZOOM videoconference or teleconference unless otherwise ordered: court administration will send out the conference contact information two days before its scheduled date). This should be done by a Form 14B motion on notice to the other party at least three weeks before the date scheduled for the conference. The request must be accompanied by an affidavit that provides a good reason (or reasons) why the party and/or lawyer is unable to participate.

[38] **Note:** Section 136 of the *Courts of Justice Act* prohibits any person from copying, recording, publishing, broadcasting or disseminating a court hearing or a portion of it, **including a hearing conducted over videoconference or teleconference**, without the court's permission. **This prohibition includes screenshots.**

Confidentiality

[39] The settlement conference is confidential. These are the rules that were mentioned at the beginning of this summary,

CONTINUING RECORD, SETTLEMENT CONFERENCE BRIEFS

17(22.2) Settlement conference briefs do not form part of the continuing record and shall be returned at the end of the conference to the parties who filed them or be destroyed by the court staff immediately after the conference.

CONFIDENTIALITY OF SETTLEMENT CONFERENCE

17(23) No brief or evidence prepared for a settlement conference and no statement made at a settlement conference shall be disclosed to any other judge, except in,

- (a) an agreement reached at a settlement conference; or
- (b) an order.

SETTLEMENT CONFERENCE JUDGE CANNOT HEAR ISSUE

17(24) A judge who conducts a settlement conference about an issue shall not hear the issue, except as subrule (25) provides.²

The Conference

[40] The Conference will proceed on the date and at the time scheduled. During this time of Covid, the Trial Coordinator will forward a ZOOM link to the parties and their lawyers in advance.

[41] Once all parties are present for the ZOOM conference, the judge will attend. If the parties have complied with the *Family Law Rules* and have properly identified the important issues, the judge will explore with the parties their settlement options and try to narrow the issues in dispute. Recommendations will be given. Sometimes the judge may direct the parties to breakout rooms to discuss the issues and then have them return to the ZOOM session for further discussions and/or an order. The judge can make an order that is considered appropriate (see **Orders at a Settlement Conference** above) or the judge can make an order

² Subrule (25) deals with child protection cases.

to which the parties have consented in writing: this could include a final order settling one or more of the disputed issues.

[42] If there are experts involved in the case, it is worthwhile that the party planning to use that expert's opinion evidence to have the expert available on a stand-by basis in case the court (or the parties) may have questions touching on the expert's qualifications or opinion.

[43] When the conference has ended, the judge will make an endorsement in the court file that the settlement conference has been held and note whether any orders are being made. A copy of that endorsement will be sent to the parties and their lawyers by the court Registrar or a Judicial Assistant.

Costs Consequences

[44] There are costs consequences where a party fails to obey the settlement conference rules. These can apply before, and at, a settlement conference.

ORDER, IF DOCUMENT NOT PROVIDED

13(17) If a party has not served or filed a document in accordance with the requirements of this rule or an Act or regulation, the court may on motion order the party to serve or file the document and, if the court makes that order, it shall also order the party to pay costs.

[45] If a settlement conference must be adjourned because a party has not complied with the rules, a judge is required to order that party pay costs. Rule 17(18) provides as follows,

COSTS OF ADJOURNED CONFERENCE

COSTS

(18) Costs shall not be awarded at a conference unless a party to the conference was not prepared, did not serve a required brief, 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),³

- (a) order the party to pay the costs of the conference immediately;
- (b) decide the amount of the costs; and

³ Rule 24(10) provides that the court should deal with costs of each step in a case promptly.

(c) give any directions that are needed. O. Reg. 114/99, r. 17 (18); O. Reg. 235/16, s. 3.

COSTS MAY BE AWARDED LATER

(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. O. Reg. 298/18, s. 12 (5).

[46] This rule emphasizes the importance of the settlement conference. Parties who have not followed the preceding rules can be held financially responsible to the other party by an award of costs immediately payable or payable by them at some later time or event as the settlement conference judge thinks appropriate.

Summary

[47] The settlement conference is the best, and likely the last, chance to get a judge's opinion about each party's case before trial. Settlement options are discussed: recommendations will be given. Compliance with the settlement conference rules and preparation of the documents required are essential. As already noted, some or all the disputed issues can be finally settled and made into an order. An expensive trial can be avoided or shortened, along with its costs to the parties, by following these rules.

APPENDIX A

DOCUMENTS THAT HAVE TO BE SERVED AND FILED WITH THE COURT BEFORE A SETTLEMENT CONFERENCE (AND WHICH WILL FORM PART OF THE CONTINUING RECORD, EXCEPTING THE BRIEF)

Name of Document	Form	Deadline (not later than)	Rule
Net Family Property Statement	13B	30 days before the conference	13(14)
Comparison of Net Family Property Statements	13C	7 days before the conference	13(14.2) and 13(14.3)
Updated Financial Statements [or affidavit confirming financial information is the same]	13 or 13.1 [14A]	7 days before the conference (4 days for the other side)	13(12.2)
Updated Certificate of Financial Disclosure	13A	7 days before the conference (4 days for the other side)	13(13.1)
Settlement Conference Brief (with enclosed or attached Offer to Settle)	17C	6 days before the conference (4 days for the other side)	17(13.1)
Expert report	Report must comply with Rule 20.2(2)	6 days before the conference	20.2(2)
Confirmation	17F	3 days before the conference (both parties) by 2:00 p.m.	17(14)(c)