

Providing Remote Services & recent case law

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DISCLAIMER

Nothing we say in this presentation should be construed as legal advice. This is simply for information purposes only. Please consult with a lawyer if you need legal advice.

NOT LEGAL ADVICE



Working from home- General Protocols

- 1. confidentiality
 - Do you have your own computer? Not always possible.
 - Do you have your own login on the computer at home? Just log off when you are done and do not share your password with anyone.
- 2. Make sure that your access to work remote login is password protected. All tech support do this.
- 3. Are you taking physical files home? If so, keep them in a locked bag and a locked cabinet. I will elaborate on what the law society requires in future slides.
- 4. All persons sharing the residence must be advised that work files are confidential and are off limits except to the advocate.

- 5. All consents and permissions obtained verbally, will be noted as such in the file. You may send follow up emails to clients saying something like “I write to confirm your verbal consent for ... If this is not correct, please advise”
 - Assuming it is safe to email.
- 6. All bring forward protocols will remain in place and will be followed while working remotely.
- 7. Monthly file reviews will continue as scheduled and will be conducted via telephone with the legal supervisor. The legal supervisors will remain available to the advocates via telephone and email as needed.
- 8. Basic records for home use of printer and cell phone use should be kept so that future reimbursement may be considered.
 - Speak with your manager about this

Code of Professional Conduct (LSBC)

3.2 Quality of Service

- You still have a duty to provide courteous, thorough and prompt service to clients.
- **Manage expectations**
 - You cannot print things for people
 - Cannot give them access to printers
 - Provincial court is not allowing people to commence new applications unless urgent. So, you cannot bring one on. That being said, you can problem solve and help prepare pleadings going forward.
- **Communicate effectively**
 - This will be different based on the needs and sophistication of the client
- **Tend to matters in a reasonable time frame**
 - Yes, we are not at the office but be sure to let clients know that you are not going to be able to submit things on time. If you made any commitments, you either follow through or communicate.
 - Do not prejudice the client
- **Meet Deadlines & do not prejudice the client's interests**

Examples of expected practices

The following list provides some examples of expected practice (this is not exhaustive)

- keeping a client reasonably informed;
- answering reasonable requests from a client for information;
- responding to a client's telephone calls;
- keeping Virtual appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;
- taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
 - Important in these times
- answering, within a reasonable time, any communication that requires a reply;
- ensuring that work is done in a timely manner so that its value to the client is maintained;
- providing quality work and giving reasonable attention to the review of documentation to avoid delay;
- informing a client of a proposal of settlement, and explaining the proposal properly;
- providing a client with complete and accurate relevant information about a matter;
- making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

Discussing Settlement during Covid

- You may discuss with clients to pros and cons of settlement of a dispute when it is possible to do so and on a reasonable and practical basis.
- can suggest virtual mediation
 - I sent out an email a few days ago so refer to that or Andrea and I can recommend mediators

Confidentiality

- You must, at all times, must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
 - (a) expressly or impliedly authorized by the client;
 - (b) required by law or a court to do so;

Confidentiality Continued

- One should avoid indiscreet conversations and other communications, even with one's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified.
- In some situations, the authority of the client to disclose may be inferred. For example, for lawyers this is revealing information in court. For you, this may be talking to me or your supervising lawyer. So, generally, you may have a written consent from clients to do this, but you may not this time.

Tech Security Concerns

- Zoom
 - Are you meeting with your clients on Zoom?
 - **2 concerns**
 - i. Can zoom be hacked? – It's encrypted, so less likely an issue
 - ii. Is the client's telephone / computer secure?
 - Did you send the client the link and password via email?
 - If so, does their partner have access to their email and can log in?
 - Zoom can be set up to prompt you when anyone joins in.
 - It can also be set up to seek permission from the host before one joins in.

Tech Continued

- Do not record client meetings
- Ensure that the area behind you, which will be seen by the connecting party, does not reveal anything that may infringe upon the privacy of others (e.g. photos, items on bulletin boards, binders labelled with client names, etc.)
- Have you downloaded Zoom?
 - Can log in on your phone with meeting ID

Potential Risks to delivering Legal Services via Video-Conferencing

- Risk of compromising confidentiality of documents and legal advice during transmission via video conferencing or email.
- Exposure of information when cloud sharing is enabled on personal devices.
- Unauthorized monitoring and recording of the video conference.

Courtesy of V. Law

Duty of Technical Competence

- Federation of Law Societies of Canada amended [Model Code of Professional Conduct](#) to add the following commentary to the competence rule (r. 3.1-2):

Courtesy of V Law

- [4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3 (covered above)

Courtesy of V Law

Model Code of Professional Conduct

[4B] The required level of technological competence will depend on whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

- (a) The lawyer's or law firm's practice areas;
- (b) The geographic locations of the lawyer's or firm's practice; and
- (c) The requirements of clients.

Courtesy of V Law

Additional tasks

- a few of you have said that work is slower. If so,
 - Reach out to existing clients (if safe to do so) and work the files
 - Ask if they need anything else. Ask how COVID is affecting their parenting schedules;
 - Work on future applications
 - Work on a precedent bank for yourself
 - Affidavits take hours so you can draft those
 - Brief cases for the team
 - Ontario has COVID caselaw. I will send the email later. Please brief those and send them to me and I can review/ revise and send them out to the team.
 - If you are confident in your ability to brief cases, then send them out to everyone. Just let people know that no one has reviewed it.
 - Take courses online on the Courthouse Library website.
 - Feel free to summarize for the team
 - Develop Presentations for the community to explain what you do and, when the borders open (in a manner of speaking), you can present

Case Law

1. *Skuce v. Skuce*, 2020 ONSC 1881 (March 26, 2020) <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc1881/2020onsc1881.html>: Mother refused to return child and said videoconferencing with father only. Parties had JUST entered into Minutes of Settlement giving father parenting time.

- Mother essentially using COVID as an excuse to not follow the Minutes.
- Father living in a community home with greater risk of exposure, but planning to return to live with his parents.

Skuce v .Skuce continued

Decision- Judge ordered a father to have virtual visits with his children until he moved out of a communal recovery home. And then all parties must follow strict handwashing and physical distancing guidelines when face-to-face visits begin after a period of isolation.

- His Honour said that family courts should also be careful about issuing blanket orders that would put the lives of children on hold and deprived them entirely of the love of one parent a time when they most need support.

Skuce v .Skuce continued

Definition of urgency (as per previous case law)

- [47] As stated in *Rosen v. Rosen*, [2005 CanLII 480 \(ON SC\)](#), [2005] O.J. No. 62, which refers to *Hood v. Hood*, [2001 CanLII 28129 \(ON SC\)](#), [2001] O.J. No. 2918 (S.C. – Family Court), in which this definition was considered.
- [48] These cases are decided as to when a court should hear a motion before a case conference. He commented, “It is my decision that an urgent motion within a court proceeding contemplates issues such as abduction, threats of harm, dire financial circumstances and these can be addressed prior to a case conference.”

BC Case- brief is courtesy of Negin

- **2. *Johansson v. Janssen*: *Johansson v. Janssen* 2020 BCSC 469**
- The Chief Justice of BCSC in the “March 18 Direction” announced a suspension of all regular court operations due to the COVID-19 emergency, with only essential and urgent matters to be heard.
- According to this announcement, following matters would be considered as an essential and urgent family matters:
 - 1- orders relating to the safety of a child or parent due to a risk of violence or immediate harm;
 - 2- orders relating to the risk of removal of a child from the jurisdiction;
 - 3- orders relating to the well-being of a child.
- Here, the Court explained the factors that need to be taken into consideration in determining whether a family matter is an urgent one during the current state of emergency.
- It also provided some additional guidance on how the court hears Request for Urgent Hearing (RUH) process under the new Court’s protocol for hearing urgent matters.

Johansson v. Janssen

Facts

- Parties lived together in a marriage-like relationship for approx. 6 years.
- They separated in 2017.
- They have 2 children at the ages of 8 and 5.
- The children were born in Canada and are Canadian citizens, while their parents are neither citizens nor permanent residents of Canada. The claimant is a citizen of Sweden and the respondent is a citizen of Germany.
- In late January, 2020, the mother, the respondent, took the children from BC to Germany. The claimant sought an order that the children be returned to BC after the COVID-19 international travel restrictions are lifted.

Johansson v. Janssen

The Analyses and Decisions

- The court concluded that the matter is not in fact urgent and, that, in the current uncertain circumstances, it would be inappropriate to decide the substantive issues in dispute. An order requiring return of the children to British Columbia would have “no immediate practical consequences” in this current state of international travel restrictions.
- According to the “March 18 Direction”, a judge will first review the applicant’s unfiled materials to determine if a hearing is required. If the judge determines that a hearing is required, the Court will give directions to both the applicant and the respondent to provide filed materials for the hearing.
- The Court in this decision has reiterated the “March 18 Direction” that applicants seeking to have matters heard must submit an online form to request an urgent hearing. That form and related materials are reviewed by a judge to determine if an urgent hearing is required.
- In *Johansson v. Janssen* a hearing was authorized. The court explains that the authorization of a hearing under the RUH process does not constitute a “final determination” that a matter is urgent. It remains for the judge or master hearing the application to determine two issues; one, whether it is in fact urgent and two, whether it can be appropriately decided during the current state of emergency.
- The Court then explained issues that need to be considered in deterring appropriateness. Issues may include; 1- practical utility of any order; 2- difficulties faced by parties in obtaining necessary evidence, and 3- the possibility of changing circumstances as the emergency situation evolves.

Johansson v. Janssen

- **Implications**

- This case may provide us with some insights into the Court's discretion to hear urgent matters listed in the recent COVID-19 Court announcements. This decision shows that while an application might be considered as an urgent matter by a Judge at the first place, the Court still has the discretion to make a decision that the matter is not urgent enough to be decided during this time of emergency.

3. *Chrisjohn v. Hillier*, March 26, 2020

<https://www.cba.org/CMSPages/GetForumAttachment.aspx?fileguid=086c7cab-054f-4f5a-980c-371d799d489a>

- Mother refused to return child to father and said father was not practising social distancing. Father gave proof he was. Judge ordered child returned to father with police enforcement clause.
- our take way- orders are not police enforceable unless they say so
- Question- can we have a police enforceable clause in a consent order?

4. *Zee v. Quon*, March 27, 2020

<https://www.cba.org/CMSPages/GetForumAttachment.aspx?fileguid=e78d6776-b5bc-47e5-b027-f7cce0176bad>

- Father refused to return child to mother and said mother was a healthcare practitioner and therefore exposing kid to virus, even though mother was on vacation and provided employer letter saying mother was on vacation and nobody in the healthcare facility had been exposed.
- Judge ordered child returned to mother with police enforcement clause.

5. *Douglas v. Douglas*, March 25, 2020

<https://www.cba.org/CMSPages/GetForumAttachment.aspx?fileguid=b14b359e-135a-4b6e-8103-b58831eb3561>

- Mother refused to return children because she was concerned since the father worked at a retail store. Father alleged mother had pattern of denying access and wanted reinstatement of status quo. Judge found the matter not urgent, but did say in obiter that “Surely a complete termination of all contact between the child and his father cannot be in the child’s best interests even in these unprecedented times.”
- Note the distinguishing fact in this case from all the other cases is that there was no court order, only a status quo.

6. *Le v. Norris*, 2020 ONSC 1932 (March 26, 2020)

<https://www.canlii.org/en/on/onsc/doc/2020/2020onsc1932/2020onsc1932.html>

Mother refused to return child because of COVID concerns, mother's fragile mental health, OP stalking her, mother not having opportunity to vary court order.

Judge ordered return of child with police enforcement clause.

Judge said in obiter:

- “Finally, what do I mean by “responsible adherence to the existing Court Order”? I mean being practical and having some basic common sense. Physical distancing measures must be respected. The parties must do whatever they can to ensure that neither of them nor the child, C., contracts COVID-19. Every precautionary measure recommended by governments and health authorities in Ontario and Canada must be taken by both parties and, with their help, by C. Neither party shall do anything that will expose him/herself or C. to an increased risk of contracting the virus.”

7. *Perkins v. Macierzynska*, March 27, 2020

<https://www.cba.org/CMSPages/GetForumAttachment.aspx?fileguid=112755c1-7bcc-45a0-9473-ba668cf9d026>

- Mother had parenting time with child. Child got sick with pneumonia so mother got worried and took kid to maternal grandmother, in a different city, to go to a hospital for treatment. Hospital treated kid and said kid would be fine in a week.
- Mother told father she could not return to the city so father could not have parenting time until mid-April. Mother gave no doctor's note showing that the kid went to a doctor.
- Judge ordered return of kid to father.