



Fleury, Comery LLP
Barristers & Solicitors

YOUR AFFIDAVIT OF DOCUMENTS

In all civil legal proceedings there is a requirement to exchange relevant documents. In most courts, this involves delivering sworn Affidavits of Documents. The purpose of this memo is to emphasize the crucial importance of doing this properly.

Form of Affidavit of Documents

[Form 30A](#) used in the Ontario Superior Court of Justice is the most common format for the Affidavit of Documents. It is divided into three parts, or "Schedules":

- A: documents you have and will produce
- B: documents you have, but object to produce
- C: documents you no longer have

Under the Simplified Procedure (see [memo#3](#)) there is a further Schedule D, being a list of persons with knowledge of the matters raised in the proceeding. In the Affidavit, you certify that you have never had any other relevant documents in your possession, control, or power - a sworn statement that could haunt you at trial if incorrect. In Small Claims Court, where an Affidavit is not required, nevertheless all trial documents are required to be produced to the other side at least 14 days before trial.

When is it to be delivered?

The Rules of Civil Procedure technically require an Affidavit of Documents to be delivered "within ten days after the close of pleadings", i.e. ten days after the last Claim or Defence has been served. Counsel generally allow an indulgence for a reasonable time thereafter. You cannot, however, require the attendance of the opposite party on examination for discovery if you have not served your Affidavit of Documents. If new documents are produced before trial, e.g. an up-to-date medical opinion letter, you must either amend your Affidavit or deliver a supplementary one.

Inspection and Production of Documents

You must allow the opposite party the right to inspect the documents in Schedule A, and it is the usual practice to serve a book containing copies of these documents when serving the Affidavit.

Privileged Documents

Schedule B requires you to list any privileged documents, such as your lawyer's investigation file, and letters between us. If such documents are not described adequately, the other side can ask for a court order requiring more specificity - and the costs of such a proceeding are going to be payable by you.

What are "documents"?

Basically, anything which could be used at trial to support either side's case, that is not oral testimony, is a document. Photos, maps, accounts, and computer data are documents.

Electronic Data

Data, being a "document" must be listed. This rather new kind of production must be taken very seriously. If you have relevant accounting data, E-mails, or word processed documents on your computer, you must conserve that evidence and allow inspection of it. It is becoming common to look at the "metadata", being the hidden information relating to a computer document, such as its creator and date of creation. E-mails, for example, have a header of information, not usually seen. We should discuss how to conserve electronic evidence immediately upon our retainer.

Penalties for failure to disclose

If you want to use documents at trial, you had better include them in your Affidavit. The trial judge is not likely to allow you to use them, or, if he does, he will probably assess a costs penalty. If you fail to produce documents that are known to be available, the trial judge will presume the content was against your case. Under the Simplified Procedure, you cannot call a witness you have not listed in Schedule D - including yourself!

Help us - and reduce your legal costs

We ask our clients to give us THE ORIGINAL COPY of any relevant documents as soon as we are retained. Please put them in good order (chronological is usually sensible), to reduce our time spent and, accordingly, your legal bill. Try to mount bits of paper, like receipts or photos, on a clean 8.5 x 11 inch sheet of paper for ease of photocopying. A descriptive list and numbered tabs are also helpful. For E-mails, we suggest you save each e-mail to a separate printable file, then edit and print each message on a separate piece of paper, deleting the extraneous "original message" text from replies; but do preserve the data in its original format on the computer. Above all, please consider the issues and deliver to us ALL possibly relevant documents.

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