

HOW DO I DISCLOSE MY DOCUMENTS?

Prepared by Law Help Ontario, a project of Pro Bono Law Ontario

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INTRODUCTION

A basic purpose of the rules governing discovery within the *Rules of Civil Procedure (Rules)* is to ensure a more open and complete discovery process by all parties, prior to trial, in order to facilitate settlement and to make the trial process more efficient and fair.

There are different forms of discovery. One very important part of the discovery process is the *discovery of documents*. Rule 30 sets out the requirements for the discovery and inspection of documents. Rule 30 allows you to get access to the documents of the other party that are relevant to your case and requires you to allow the other parties to see your relevant documents (with the exception of those documents over which privilege has been claimed).

The discovery of documents process has **two** major steps:

- it requires you to *disclose* to the other parties in the proceeding every document relating to any matter that is being disputed in the action that is (or has been) in your possession, control or power; and
- it permits you to *inspect* the other party's documents that have been produced for inspection.

WHAT IS AN AFFIDAVIT OF DOCUMENTS?

An *affidavit of documents* is the means by which you disclose your documents to the other parties. It is a list of all documents relevant to the proceeding that are or have been in a party's possession, control or power. The listing is contained in an affidavit made under oath or solemnly affirmed (See Forms 30A or 30 B under the *Rules*).

For information on how to access the forms, refer to the end of this Tip Sheet under the heading "Where Can I Get More Information"). These documents may also be inspected by the other parties (with the exception of those documents listed in Schedule B, that you object to producing due to privilege).

WHAT IS CONSIDERED TO BE A “DOCUMENT”?

Document is broadly defined in the *Rules* [see Rule 30.01(1)(a)] and includes:

- a sound recording,
- a videotape,
- a film,
- a photograph,
- a chart,
- a graph,
- a map,
- a plan,
- a survey,
- a book of account, and
- electronic information.

“Electronic information” includes all information stored on a computer, including email. If a paper and electronic copy of the document exist, both must be disclosed (if they are not privileged) and produced.

TIP: *When gathering your documents for inclusion in your affidavit of documents, it may be helpful to think of a document as anything that: 1) teaches you something; 2) you can learn from; or 3) gives you information.*

WHAT DOCUMENTS MUST BE INCLUDED IN AN AFFIDAVIT OF DOCUMENTS?

In order to decide what to include in your affidavit of documents you will need to get organized. Getting yourself organized means that you need to identify:

- the nature of documents that are in your possession, control, or power which relate to the proceedings;
- the nature of documents that have been, but are no longer in your possession, control, or power which relate to the proceedings; and
- those documents protected from disclosure by *solicitor and client privilege*, *litigation privilege* or *without prejudice privilege* and determine which type of privilege applies to each document.

Once you have organized your documents into these categories, the document must be disclosed (i.e. listed in the affidavit of documents) if it:

- ***relates to a “matter in issue” in the case:*** A “matter in issue” is a matter raised by a party in the pleadings (such as the Statement of Claim or the Statement of Defence); and
- ***is or has been in the party’s possession, control or power:*** The obligation to disclose a document is not limited to documents that you

have with you. It includes documents that you used to have and don't have any longer. It also includes documents that you are entitled to obtain but the other party is not, such as documents that are with your bank, your accountant, or your doctor [see Rule 30.01(1)(b)].

HOW DO I DECIDE WHAT DOCUMENTS ARE SUBJECT TO PRIVILEGE?

Some of the documents you find may be privileged. That means that although you still need to list the documents in your affidavit of documents (within Schedule B), the other party is not entitled to see them. You will need to set out your reasons for claiming privilege for each document. There are three (3) types of privilege that may be claimed:

- solicitor and client privilege;
- litigation privilege; and
- without prejudice privilege

TIP: *You may want to talk with a lawyer about the law relating to privileged documents, as it might be difficult for you to determine which documents are privileged. You may harm your case if you disclose privileged documents or you could be sanctioned by the court if you do not disclose a document that you thought was privileged when it was not.*

WHAT IS “SOLICITOR AND CLIENT PRIVILEGE”?

Solicitor and client privilege is restricted to communications that are intended to be confidential between a lawyer and a client for the purpose of giving or receiving legal advice, whether oral or in writing. For example, if you consulted with a lawyer about your case and received a letter from the lawyer that gave you some legal advice about the case, the letter would be a privileged document and you would not be required to give a copy of it to the other party.

WHAT IS “LITIGATION PRIVILEGE”?

Litigation privilege is not restricted to communications between lawyer and client and contemplates communications between a lawyer (or unrepresented litigant) and third parties. Its purpose is to create a “zone of privacy” in relation to pending litigation which ends upon the termination of the proceedings.

Other documents that might be subject to litigation privilege are those created for the main purpose of helping you prepare to take your case to court. For example, if you met with a mechanical engineer to get some advice about an aspect of your case and took notes of your meeting, you could claim that the notes were privileged.

WHAT IS “WITHOUT PREJUDICE PRIVILEGE”?

In general, negotiations to settle a dispute are conducted on a “without prejudice” basis. “Without prejudice” refers to information contained in a document (or communications

between the parties) that cannot be used against that party in court if the parties are unable to settle the matter.

These documents are privileged because their purpose was to try and settle the dispute. For example, if you or your lawyer wrote a letter on a without prejudice basis to the other party offering to settle the dispute on some terms and conditions and no settlement was ever reached, the other party could not use that document later at trial.

HOW DO I PREPARE AN AFFIDAVIT OF DOCUMENTS?

Step One: Search Your Records

You must make a serious effort to search your own records and also make any appropriate inquiries of others to make sure that you have all relevant documents. Your affidavit of documents must fully disclose your knowledge, information and belief about all documents relating to any matter in issue in the action that are or have been in your possession, control or power.

Step Two: List and Describe Your Documents

Your affidavit of documents will be in Form 30A (for individuals) or Form 30B (for corporations or partnerships). Both Form 30A and Form 30B require you to list and describe your documents in three schedules (see Rule 30.03(2) for more detail):

- **Schedule A:** In this schedule, you list and describe all the documents that are in your possession, control or power that you do not object to producing (e.g. “contract of employment, dated June 1, 2008”).
- **Schedule B:** In this schedule, you list and describe all the documents that are or were in your possession, control or power that you object to producing because the documents are privileged. You must still describe the nature of the document (e.g. “a letter from a lawyer, John Brown, dated July 3, 2008”), as well as your grounds for claiming privilege.
- **Schedule C:** In this schedule, you list and describe all the documents that were formerly in your possession, control or power, but are no longer in your possession, control or power (e.g. documents you have lost), whether or not you are claiming privilege over them. You must state when and how you lost possession or control of or power over them and their current location.

TIP: Note that in simplified procedure actions brought under Rule 76, a Schedule D must be included in the Affidavit of Documents. Schedule D includes the names and addresses of persons who might reasonably be expected to have knowledge of the transactions or occurrences in issue (see Rule 76.03). See also the guidebook called *Simplified Procedure at the Superior Court – Rule 76*, available on the Law Help Ontario website at www.lawhelpontario.org.

For each schedule, create a table, numbering each document consecutively. Set out a description of the nature of each document and its date, including other particulars sufficient to identify it.

You will also need to state in your affidavit that you have never had in your possession, control or power any document relating to any matter in issue in the action other than those listed in your affidavit (the exact language to use is provided in Form 30A and Form 30B). In the rare circumstance you do not have any documents that relate to the matters in issue, you must still swear an affidavit of documents stating this.

Step Three: Review and, if necessary, Revise the Affidavit of Documents

You should review your affidavit of documents and, if no changes need to be made, you can swear or affirm the affidavit of documents. If changes are required, make the necessary revisions and then swear or affirm the affidavit of documents.

Step Four: Serve Your Affidavit of Documents

You must serve an affidavit of documents on every other party in the action within ten days after the close of the pleadings [see Rule 30.03(1)]. For the purpose of serving the affidavit of documents, the pleadings are closed when the plaintiff has delivered a reply to every defence in the action or the time for delivery of a reply has expired (Rule 25.05).

WHAT IF, AFTER SERVICE, I COME INTO POSSESSION OF MORE DOCUMENTS?

The obligation to disclose documents does not end once you serve the other party with your affidavit of documents. All parties to a proceeding have a continuing discovery obligation to disclose relevant documents that subsequently come into their possession, control or power [see Rule 30.07(a)].

You may find documents in places or with people you did not think about when you completed and served your affidavit of documents, right up to and even during the trial. These “new” documents must also be disclosed. If you have already served your affidavit of documents, you will need to provide the other parties with a *supplementary affidavit of documents* specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

WHAT IF, AFTER SERVICE, I FIND OUT THAT MY AFFIDAVIT DOCUMENT IS INACCURATE OR INCOMPLETE?

You also have an obligation to correct any inaccuracies by serving a supplementary affidavit of documents [see Rule 30.07(b)]. If you do *not* disclose a document in an affidavit of documents (or a supplementary affidavit) then you may not be able to use it at the trial [see Rule 30.08(1)].

If the undisclosed document is helpful to your case, you cannot use it unless the court grants leave (permission) to do so. If the undisclosed document is *not* helpful to you case, the court may make any order that it considers just.

WHAT IS THE PROCEDURE FOR THE INSPECTION OF DOCUMENTS?

All parties have an obligation to produce the documents listed in *Schedule A* for inspection by the other parties. Rule 30.04 governs how you and the other parties can view each other's documents.

This process begins by serving on another party a Request to Inspect Documents (Form 30C). The other party has to provide you with a date (within five days of being served with the Request to Inspect) and time (between 9:30am and 4:30pm) when their documents can be inspected at their lawyer's office or at some other convenient place. If you are served with a Request to Inspect Documents, you will need to do the same.

TIP: *When you go to review the other party's documents, you should take your time and read each document carefully to ensure that you understand its relevance and what it means to your case. You are entitled to make copies of documents at your own expense. You may want to make copies of documents that you think are important to your case [see Rule 30.04(7)].*

WHAT IF I WANT TO INSPECT A DOCUMENT THAT THE OTHER PARTY CLAIMS IS PRIVILEGED?

All documents for which privilege is claimed in *Schedule B* of an affidavit of documents must be listed separately, setting out the nature and date of the document and other particulars sufficient to identify it. It must also set out the grounds for claiming privilege for each document.

The purpose of this degree of description of the privileged documents is to enable the other side to test, if necessary, the claim of privilege. If a party claims privilege over a document and another party wishes to dispute that claim, a motion can be brought to the court to decide whether a claim of privilege may have been improperly made and the court may order any of the following (see Rule 30.06):

- cross-examination on the affidavit of documents;
- service of a further and better affidavit of documents;
- disclosure or production for inspection of the document, if it is not privileged; and
- inspection of the document to determine the document's relevance or the validity of the claim of privilege.

CAN I USE A PRIVILEGED DOCUMENT AT TRIAL?

The purpose of claiming privilege is to prevent the document from being used at trial. However, there are some circumstances where a party may be able to use a document for which privilege has been claimed. There are two such circumstances:

- a party may, by written notice, abandon a claim for privilege by disclosing the document or producing it for inspection within 90 days before the start of the trial; or
- if the claim for privilege is *not* abandoned, the document may be used only to *impeach* (dispute, deny or contradict) the testimony of a witness *or with leave* (permission) of the court.

In a motion for leave of the court to use a privileged document, the court shall grant leave on whatever terms and conditions are appropriate, including an adjournment, unless permitting the document to be used at trial would cause prejudice or unduly delay the trial (see Rule 53.08).

WHAT IF I FAIL TO SERVE AN AFFIDAVIT OF DOCUMENTS OR PRODUCE A DOCUMENT FOR INSPECTION?

The *Rules* provide for severe consequences for parties who fail to comply with their obligations to disclose documents. In such circumstances, the court may do any of the following [see Rule 30.08(2)]:

- revoke or suspend the party's right, if any, to start or continue an examination for discovery;
- dismiss the action or strike out the statement of defence; or
- make any other order as is just.

TIP: *The complete and accurate disclosure of documents ultimately depends on the good faith and integrity of all parties. If a copy of an unfavourable document turns up and it is shown that the document must have been in a party's possession and was not disclosed, then the general overall credibility of that party may be severely impaired. You should therefore consider including in your affidavit of documents all documents that might relate to the proceedings.*

DOES THE COURT GET A COPY OF THE AFFIDAVIT OF DOCUMENTS?

The affidavit of documents must not be filed with court, unless it is relevant to an issue on a pending motion or at trial [see Rule 30.03(5)].

WHERE CAN I GET MORE INFORMATION?

To view a Sample Affidavit of Documents, go to the Law Society of Upper Canada website at:

<http://rc.lsuc.on.ca/jsp/ht/loadHowToPage.do> and then:

Scroll down to “Civil Litigation”,

Click on “How to Prepare An Affidavit of Documents”,

Scroll down to “Resources”, and

Click on “Sample Affidavit of Documents”

The Ministry of the Attorney General has a series of guides that are available at court offices and at the Ministry of the Attorney General website. The site also has general information on civil cases: www.attorneygeneral.jus.gov.on.ca

Legal research: www.canlii.ca

Forms under the *Rules of Civil Procedure*:

<http://www.ontariocourtforms.on.ca/english/forms/civil/index.jsp>

Guide to Ontario Courts: <http://www.ontariocourts.on.ca/english.htm>

The *Rules of Civil Procedure* are available through the e-laws website. Go to www.e-laws.gov.on.ca and follow these steps:

1. Choose your preferred language
2. Click on “Search or Browse Current Consolidated Law”
3. Under “Browse Current Consolidated Law,” click on “C”
4. Scroll down to “Courts of Justice Act”
5. Click on the “plus” sign to the left of “Courts of Justice Act”
6. Click on “Rules of Civil Procedure”