

## Appendix "A"



The Law Society of Upper Canada | Barreau du Haut-Canada

**The Law Society of Upper Canada**  
Osgoode Hall, 130 Queen Street West,  
Toronto, Ontario, M5H 2N6  
Tel: 416-947-3300  
Toll Free: 1-800-668-7380  
Fax: 416-947-5263  
Web: <http://www.lsuc.on.ca>

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### How to Prepare Motion Materials

*Updated June 2014*

This How-To Brief outlines the steps to take when preparing written materials for a civil motion.

**Note:** The following Brief sets out the steps to be taken by the moving party. While similar steps apply to the responding party, necessary modifications will be required to respond to the motion and bring any cross-motions. Please consult the relevant *Rules of Civil Procedure* and Practice Directions that govern your motion and modify any of the requirements outlined below as necessary. Also note that r. 76.05 of the *Rules of Civil Procedure* governs motions in actions under simplified procedure and r. 77.07 of the Rules governs motions in actions and applications subject to case management.

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#### 1. Gather what you will need

- The client's file, including notes from client interviews pertaining to the motion
- *Rules of Civil Procedure* (See the link to the *Rules of Civil Procedure* in the Statutes and Rules section of this How-To Brief.)

- Applicable Practice Directions (See the link to the Superior Court of Justice Practice Directions and Policies effective July 1, 2014 in the Resources section of this How-To Brief. As of July 1, 2014, the provincial and regional Practice Directions for all proceedings in the court have been consolidated and all previously issued Practice Directions revoked.)
- *Rules of Civil Procedure* Forms:
  - Form 4A, General Heading of Documents – Actions
  - Form 4C, Backsheet
  - Form 4D, Affidavit
  - Form 16B, Affidavit of Service
  - Form 34A, Notice of Examination
  - Form 34B, Summons to Witness (Examination out of Court)
  - Form 37A, Notice of Motion
  - Form 37B, Confirmation of Motion
- (See the link to the *Rules of Civil Procedure* Forms in the Statutes and Rules section of this How-To Brief.)
- *Courts of Justice Act* (See the link to the *Courts of Justice Act* in the Statutes and Rules section of this How-To Brief.)
- Firm precedents, if any, and library resources for precedent material

## 2. Determine the nature of the motion

- Determine the exact relief being sought.
- Identify the relevant rules of the *Rules of Civil Procedure*.
- Determine whether the motion being made is on notice or without notice (r. 37.07).
- Note that if the court concludes that your motion should have been brought on notice but was not, it may (a) dismiss the motion or dismiss it only against the person who was not served, (b) adjourn the motion and direct that it be served, or (c) direct that any order made on the motion be served.
- If you decide to move without notice, note and comply with the duty of full and fair disclosure (r. 39.01(6)).
- If the motion is being made on notice, a motion record will be required and Steps 6 and 7 apply to the service and filing of the motion record, which includes the notice of motion.
- Where required by a local practice direction, book an appointment for the hearing of the motion.
- Rule 37.10 provides for the service and filing of the moving party's motion record at least seven days before the hearing of the motion as well as the service and filing of the responding party's motion record (if any) at least four days before the hearing of the motion.

## 3. Prepare the notice of motion

- Use Forms 4A, 4C and 37A
- Indicate
  - who will hear the motion—judge, master or registrar (see rr. 37.02 and 37.04 as well as the rule that applies to your particular motion to determine who has jurisdiction)
  - the date and time of the motion
  - where the motion will take place (r. 37.03(1))
  - the proposed method of hearing—oral or written
  - the relief being sought
  - the grounds for the motion, including the specific rules relied on
  - the documentary evidence that will be relied upon: affidavits, relevant transcripts, previous court orders and any other documents
- Note that the notice of motion must be served at least seven days prior to the hearing of the motion (r. 37.07(6)).

#### **4. Prepare the supporting affidavit(s)**

- Use Forms 4A, 4C and 4D.
- Identify the purpose of the affidavit based on the applicable rule(s) governing the motion.
- Read relevant case law to develop a complete understanding of how the applicable rules have been interpreted by the courts. Retain research materials for use in the factum (where required or applicable) and at oral argument.
- Interview the deponent to obtain an accurate version of the story and to identify any key documents.
- Prepare a draft version of the affidavit that clearly sets out the deponent's evidence. See r. 4.06 for the general requirements of affidavits.
- Follow r. 39.01(4) regarding statements as to the deponent's information and belief.
- Attach any relevant documents as exhibits (r. 4.06(3)).
- Consider using defined terms, headings, subheadings and a table of contents to organize any long and complex affidavits.
- Have the deponent review the affidavit to ensure that there are no errors or omissions. Make any necessary corrections and have another lawyer, a student-at-law, a law clerk, or your assistant proofread the affidavit and all of the motion materials.
- Commission the deponent's signature on the affidavit and all exhibits.

#### **5. Prepare the motion record (where applicable)**

- If the motion must be made on notice, a motion record is required, and the following must be included in consecutively numbered pages and arranged in the following order (r. 37.10(2)):
  1. a table of contents of all documents by name, nature and date and of all exhibits by name, date and exhibit number or letter
  2. a copy of the notice of motion
  3. a copy of all affidavits and other material served by any party for use on the motion
  4. a list of transcripts that will be referred to in chronological order
  5. a copy of any other material in the court file that is necessary for the hearing of the motion

#### **6. Conduct examinations of third parties or cross-examinations on affidavits**

- Any person may be examined as a witness before the hearing of a pending motion for the purpose of having a transcript of that person's evidence available for use at the hearing (r. 39.03). Consider whether any persons who have not sworn affidavits should be examined under this rule. If so, issue and serve a summons to witness (Form 34B) on the necessary parties pursuant to r. 34.04(4).
- Upon receipt of the other party or parties' affidavits on the motion, consider whether cross-examinations should be conducted. (See r. 39.02.)
- Note that a party may not serve any further affidavits or conduct any further examinations under r. 39.03 after that party has conducted cross-examinations on the motion unless the opposing party consents or the court grants leave (r. 39.02).
- Note that a party who cross-examines on an affidavit is liable for the partial indemnity costs of every adverse party on the motion in respect of that cross examination, regardless of the outcome of the proceeding, unless the court orders otherwise (r. 39.02(4)(b)).
- If you order a copy of the transcript from the cross-examination, you are required to purchase and serve a copy of the transcript on every adverse party on the motion, free of charge (r. 39.02(4)(a)).

## **7. Prepare a factum (where required or applicable)**

- Any party may serve and file a factum on a motion; however, facta are mandatory on some motions. Consult the rules governing the motion to determine if a factum is required.
- Determine what the key issues are based on the relevant case law.
- Prepare a concise introduction to the case.
- Summarize the important facts, ensuring that your characterization of the facts is well supported by the affidavit and transcript evidence on the motion.
- Identify the issues that will decide the case.
- Present your submissions clearly and concisely, outlining the relevant law on each issue followed by an analysis based on the facts of the case.
- Come to a forceful conclusion, summarizing your key arguments.
- Defined terms, headings, subheadings and a table of contents may be useful in organizing long and complex facta.
- Prepare a corresponding case book containing the authorities cited in your argument. You may wish to highlight particularly relevant portions of your cases for the assistance of the court.
- Note that facta and case books are bound separately (r. 4.07(5)).

## **8. Serve the motion materials**

- The motion materials must be served on any party or person who will be affected by the order sought (r. 37.07). In addition to preparing the requisite number of copies, ensure you retain a copy for your use during the hearing and a copy for the client's file.
- Service of the notice of motion must be made at least seven days before the date of the hearing (r. 37.07(6)). Under r. 37.10(1), the moving party's motion record must be served and filed with the court at least seven days prior to the motion. Service of the moving party's factum (where required or applicable) must be made at least seven days before the date of the hearing (r. 37.10(7)). Service of the responding party's factum (where required or applicable) must be made at least four days before the hearing (r. 37.10(8)).
- Since motion materials are not originating processes, service by any method listed under r. 16.05 is acceptable.
- Obtain proof of service in the form of an affidavit of service in Form 16B (r. 16.09(1)).

## **9. File the motion materials**

- The notice of motion, motion record and (where required or applicable) factum must be filed with the court office in which the hearing will take place. See rr. 37.08 and 37.10 for the applicable filing dates.
- Proof of service must be filed with the notice of motion, motion record and (where required or applicable) factum.
- File transcripts of evidence, where applicable. See r. 34.18(2) for the applicable filing date.
- Pay the applicable filing fee.

## **10. Confirm that the motion will take place**

- Confer, or attempt to confer, with the opposing party(ies) in accordance with r. 37.10.1(1).
- Fax, email or deliver confirmation of the motion in Form 37B to the Registrar not later than 2 p.m. three days before the hearing.
- Send a copy of the confirmation of the motion to the other parties by fax or e-mail.

## Resources

- [Superior Court of Justice Practice Directions and Policies](#)
- *Mastering the Art of Complex Civil Motions* (Toronto: Continuing Legal Education, Law Society of Upper Canada, 2011). Review this publication at your local law library (see [AdvoCAT Great Library Catalogue](#)) or order it through the [AccessCLE](#) website. The website includes a search function to find other relevant articles from The Law Society of Upper Canada's Continuing Professional Development programs.
- *Pre-Trial Motions for Counsel New to Civil Litigation* (Toronto: Continuing Legal Education, Law Society of Upper Canada, 2010). Order this publication through the [AccessCLE](#) website or review it at your local law library (see [AdvoCAT Great Library Catalogue](#)).
- *Annotated Documents for an Injunction* (Toronto: Continuing Legal Education, Law Society of Upper Canada, 2003). Order this publication through the [AccessCLE](#) website or review it at your local law library (see [AdvoCAT Great Library Catalogue](#)).
- John I. Laskin, J.A., "Forget the Wind Up and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" (1999) 18:2 *Advocates' Soc. J.* 3
- Christopher Wirth. *Interlocutory Proceedings* (Aurora, ON: Canada Law Book, 2004)
- *Keep on Moving: A Guide to Civil Motions* (Toronto: Ontario Bar Association, Continuing Legal Education, 2002)
- *Avoiding Motion Sickness: Essential Advice for the Civil and Family Litigator* (Toronto: Canadian Bar Association, Continuing Legal Education, 1999)

## Statutes and Rules

- [Courts of Justice Act, R.S.O. 1990, c. C.43](#)
- [Rules of Civil Procedure, R.R.O. 1990, Reg. 194, made under the Courts of Justice Act](#)
- [Rules of Civil Procedure Forms](#)