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YOU MUST HAVE in Your Back Pocket for EVERY Single Motion

Comprehensive knowledge and understanding of the *Rules of Civil Procedure* is integral to the success of a motion. This article provides a practical guideline to the *Rules* that will assist with the success of motions. While the *Rules* detail motion jurisdiction and procedure, the Practice Directions published for various jurisdictions

should also be consulted prior to a motion.

Nature of the Motion and the Jurisdiction: Rule 37

Rule 37 provides a comprehensive outline of the jurisdiction and required materials for motions.

The first step when bringing a motion is to determine the exact relief being

sought, and to identify the relevant rules of the *Rules of Civil Procedure* applicable to the relief sought.

The nature of the motion and the relief sought will determine the proper jurisdiction for the motion, and whether the motion should be heard by a judge, master or registrar (Rule 37.02). Rule 37.04 indicates that a motion shall be made to the court if it is within the

jurisdiction of a master or registrar and otherwise shall be made to a judge.

Each jurisdiction will have a different process in which motion dates may be selected. In some jurisdictions, such as Toronto, an oral hearing date must be selected prior to filing a Notice of Motion. Upon obtaining a motion date in Toronto, the Notice of Motion must be filed within 10 days. In other jurisdictions, such as Brampton, the date is selected by filing the Notice of Motion. It is important to consult the practice direction of the jurisdiction in which the motion will be heard to determine how motions are scheduled.

A further consideration when scheduling a motion is whether the motion will be a short or long motion. The anticipated length of the hearing of a motion will dictate the procedure for motion scheduling. The definition of long and short motions varies depending upon jurisdiction.

If a motion is on consent, unopposed, or without notice, it may be heard in writing (Rule 37.12.1(1)). An opposed motion can also be made in writing if the issues of fact and law are not complex (Rule 37.12.1(4)).

When Leave is Required to Bring a Motion: Rule 48.04

A party who has set an action down for trial, or consented to an action being placed on a trial list, requires leave of the court to initiate or continue those particular motions (Rule 48.04(1)), save for exceptions listed in Rule 48.04(2). These exceptions include, but are not limited to, a motion to compel answers to undertakings given on an examination for discovery, or a motion to compel a party to disclose information subsequently obtained.

The Notice of Motion: Rule 37.01

In accordance with Rule 37.01, a motion shall be made by a Notice of Motion (Form 37A), unless the nature of the motion or the circumstances make a Notice of Motion unnecessary.

The content of the Notice of Motion is prescribed by Rule 37.06. Every Notice of Motion shall:

- (a) State the precise relief sought;
- (b) State the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
- (c) List the documentary evidence to be used at the hearing of the motion.

If a motion is made on notice, the Notice of Motion and proof of service must be filed at least seven business days prior to the hearing date in the court office where the motion is to be heard (Rule 37.08).

When is Notice Required: Rule 37.07

The court takes a practical approach and does not require every motion to be made on notice. Rather, in accordance with Rule 37.07(2), the *Rules* recognize situations where notice is not necessary; these are called Ex-Parte Motions. For example, a motion brought for a substituted service or dispensing with service upon a defendant, does not require the notice to be served on that defendant, as the nature of the motion would render the service of the notice of motion impractical.

Rule 37.07 outlines the requirements for service of the Notice of Motion. The Notice of Motion must be served at least seven business days prior to the hearing of the motion (Rule 37.07(6)), unless the

Rules indicate otherwise. If the Notice of Motion ought to have been served, but has not been, the motion may be adjourned or dismissed by the court.

A motion that does not require notice on parties may be filed at or before the hearing in accordance with Rule 37.08(2). In Toronto, motions made without notice or consent motions may be walked into Masters' Ex-Parte Motions Court any day that a master is sitting. The Practice Direction should be consulted for each jurisdiction's practice of Ex-Parte Motions.

Urgent Motions

In accordance with Rule 37.05(3), an urgent motion may be set down for hearing any day on which a judge or master is scheduled to hear motions, even if it is likely to be more than two hours long. The Court may exercise its discretion in determining whether the motion is urgent.

The Motion Record: Rule 37.10

Unless indicated otherwise, when a motion is made on notice, the moving party must serve and file a Motion Record. The required contents of the Motion Record are enumerated in Rule 37.10(2).

Service: Rule 16

An unnecessary barrier to a motion's success is failure to serve either the Notice of Motion or Motion Record in accordance with the *Rules*. The general rules for manner of service are outlined in Rule 16.01. It is important to note that the manner of service dictates the date in which service is effective. For example, service on the lawyer of record by courier is effective the second day following the day the courier was given

the document (Rule 16.05(2.1)), and service by mail is effective on the fifth day after the document is mailed (Rule 16.06(2)).

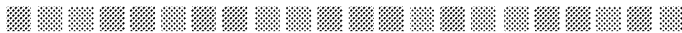
Certain manners of service require prior consent. For example, a motion record may not be served by fax unless the receiving party has given prior consent (Rule 16.05(3.2)). Specific motions have particular rules of service.

sought in the Notice of Motion. The format of an Affidavit is prescribed by Rule 4.06(1) and Form 4D.

The purpose of the Affidavit is to support the relief sought, not to argue the motion. It may contain statements of the deponent's information and belief, if the source of that information and belief is specified.

business days prior to the hearing date, by a Confirmation of Motion Form (Form 37B). If no confirmation is given in accordance with the timelines prescribed, the motion shall not be heard, except by order of the Court.

As a matter of courtesy, if there are any updates to the Confirmation of Motion form, it should be corrected and sent to the Court immediately.



The PURPOSE of the Affidavit of Service is to provide support for the relief sought, not to argue the motion.

Upon completion of service, an Affidavit of Service must be sworn (Form 16B). Once a Motion Record has been served, it must be filed with the Court office seven business days in advance of the motion being heard.

As short service and improper service can be a common source of failure, it is important to give consideration to the method of service in advance of preparing the Motion Record. It is good practice to diarize the earliest date by which the motion must be served to ensure proper service.

The Affidavit: Rules 4.06 and 39.01

The Affidavit includes information that is being relied on in support of the relief

Additional Documents: Rule 37.10

In addition to the Motion Record, certain documents may be required to be filed for certain motions.

If the moving party is relying on case law, a factum must be served (Rule 37.10(6)). If a transcript of evidence will be referred to, it must be filed (Rule 37.10(5)). On an undertakings and refusal motion, a refusal and undertaking chart (Form 37C) must be filed (Rule 37.10(10)).

Confirmation of Motion: Rule 37.10.1(1)

In accordance with Rule 37.10.1(1), all motions must be confirmed with the registrar no later than 2 p.m., three

Draft Order: Form 59A

Bring three copies of a Draft Order (Form 59A), which reflects the relief being sought in the Notice of Motion. If the motion is on consent or unopposed, ensure you have a copy of the responding party's position in addition to the Draft Order.

Costs: Rule 57

If you are successful on a contested motion, costs can be awarded (Rule 57.03(1)). While it is not mandatory, a costs outline (Form 57B) should be brought and shared at the motion. It is standard practice to share the costs outline in advance of the motion in order that the opposing party has a chance to review.

Summary

A powerful tool to ensure the success of a motion is understanding the *Rules of Civil Procedure*. Knowledge of the *Rules* will promote time and resource management, and will help to build one's reputation as a lawyer.



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