

PRACTICE TIPS FOR DRAFTING MOTIONS

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Notices of Motion

- Jurisdiction – cite the statutory provision or Rule relied upon
- Ensure you have claimed the relief you are seeking in your motion in your pleading
- Legal research before drafting starts
- Use of Schedules to Notices of Motion
- Regular motion or long motion

Affidavits

- What is the legal test that must be met in order to succeed on the motion?
- What evidence is necessary to obtain the relief you or seeking or alternatively, to deny the relief the other side is seeking?
- Overview and Conclusion
- Organization of evidence – Logical Flow; Headings and subheadings for issues
- Defined terms
- Avoid inflammatory language
- Do not clutter Affidavit with Endorsements or Orders which can be found in the Endorsement Record or Financial Statements found in the Continuing Record
- Do not attach every piece of correspondence between counsel
- Number the pages of lengthy Exhibits
- Do not include legal argument or opinion
- Not attaching Divorcemate calculations as Exhibits

- Attaching full email or text chain as Exhibit but highlighting specific portion in body of Affidavit

Reply Affidavits

- Responding to any new matters raised by the responding party
- Should not raise new issues otherwise splitting your case

Evidentiary Issues

a) Hearsay

- Rule 14(18) provides that for any motion, hearsay should be avoided “as much as possible”. However, hearsay is admissible provided that the requirements of Rule 14(19) are met. Identify the source of information and that the affiant believes the information to be true
- If you are proffering an out of court statement for credibility purposes and not the truth of the statement, the evidence does not have to comply with Rule 14(19): See *Plese v. Herjavec*, 2015 CarswellOnt 18609 at paras. 84-86 and *Katz v. Katz*, 2014 ONCA 606 at para. 22
- If the hearsay is a material fact and likely to be disputed consider an Affidavit from the actual source of the information otherwise adverse inference may be drawn or little to no weight given
- Children’s hearsay, circumstances surrounding the statement, and state of mind exception
- Hearsay evidence is inadmissible on a contempt motion
 - Pursuant to Rule 14(19), an Affidavit may contain information that was learned from someone else, however, if the motion is a contempt motion under Rule 31, that information must not likely be disputed
- Although hearsay evidence is admissible on a motion for summary judgment under Rule 14(19), the Court hearing a summary judgment motion is permitted to draw an adverse inference against the party who relies on hearsay evidence under Rule 16(5).
- Rule 16(5) provides that: “If a party’s evidence is not from a person who has personal knowledge of the facts in dispute, the court may draw conclusions unfavourable to the party.”
- Some courts have held that Rule 16(5) provides discretion as to whether or not to admit the hearsay evidence and if admitted to attach whatever weight, if any, is appropriate (See *Cheng v. Yu*, 2017 CarswellOnt 12552)

- There is some controversy as to whether the evidence on a summary judgment motion ought to be “trial worthy” or, in other words, evidence that would be admissible at trial. This would mean that the test for admission of hearsay on a summary judgment motion is the criteria of necessity and reliability (See *Catholic Children’s Aid Society of Toronto v. T.T.L.*, 2018 CarswellOnt 9569)

b) *Opinion Evidence*

- Expert reports to be attached to Affidavit sworn by expert otherwise inadmissible hearsay
- If necessary, on a motion for disclosure, may want expert to swear an Affidavit explaining why the disclosure requested is relevant
- Medical reports to be attached to Affidavit sworn by author
- Rule 14(17) provides that evidence on a motion may be given by any one or more of the following methods:
 1. An affidavit or other admissible evidence in writing.
 2. A transcript of the questions and answers on a questioning under rule 20.
 3. With the court’s permission, oral evidence.
- “Other admissible evidence in writing” includes evidence filed under Sections 35 and 52 of the *Evidence Act*: See *Chilman v. Dimitrijevic*, [1996] O.J. No. 1533 (Ont. C.A.) at para. 27
- Therefore, Sections 35 and 52 of the *Evidence Act* provide a mechanism for clinical notes and records and medical reports to be admissible on a motion
- To tender expert medical testimony on a motion, the expert must be made a witness and may be subject to cross examination. Alternatively, a medical report can be served in compliance with Section 52 of the *Evidence Act*, in which case the opposing party will have an opportunity to cross-examine the expert prior to the hearing of the motion: See *Dupont Heating & Air Conditioning Ltd. v. Bank of Montreal*, 2009 CarswellOnt 451 at paras. 51 & 52

c) *Privileged communications*

- Do not include any reference to settlement discussions or without prejudice discussions at Conferences (For a thorough decision on expunging references to settlement discussions in the Continuing Record see *Rouillard v. Rouillard*, 2015 CarswellOnt 9452)
- Ensure that you vet Exhibits to exclude without prejudice communications otherwise will be struck (*Leka v. Leka*, 2017 CarswellOnt 14515 at para. 38)

- Do not inadvertently waive solicitor-client privilege in Affidavit

d) *Affidavits of Law Clerk or Lawyers*

- An Affidavit of a law clerk touching on contentious facts in lieu of an Affidavit in the name of a party should not be used as a tool to insulate a party from cross-examination
- On contentious matters, the best evidence rule will govern i.e. an Affidavit sworn by the person with the most direct knowledge will be the strongest and most persuasive evidence
- As stated by Justice Pazaratz in *Catholic Children's Aid Society of Hamilton v. R.(P.)*, 2010 CarswellOnt 8497 at para. 9:

“There has been an increasing (and distressing) trend in family law motions to have information — and indeed evidence — presented by way of affidavits sworn by legal secretaries and law clerks. This practice may be innocuous to the extent that such affidavits merely present non-contentious background information. However - as in this case - affidavits of legal support staff should not be used to convey or summarize information about facts or issues which are in dispute. Quite simply: clients should sign their own affidavits - and be subject to cross-examination thereon.”

- In *Mapletoft v. Service*, 2008 CarswellOnt 897, the following guidelines were set out for the use of affidavits of lawyers and clerks:
 - a) A partner or associate lawyer or a member of the clerical staff may swear an affidavit identifying productions, answers to undertakings or answers given on discovery. These are simple matters of record, part of the discovery and admissible on a motion. Strictly speaking an affidavit may not be necessary but it may be convenient for the purpose of organizing and identifying the key portions of the evidence. Used in this way, the affidavit would be non contentious.
 - b) If it is necessary to rely on the information or belief of counsel with carriage of the file, it is preferable for counsel to swear the affidavit and have other counsel argue the motion. This approach will not be appropriate for highly contentious issues that may form part of the evidence at trial. If the evidence of counsel becomes necessary for trial on a contentious issue, it may be necessary for the client to retain another law firm.
 - c) Unless the evidence of a lawyer is being tendered as expert testimony on the motion, it is not appropriate for an affidavit to contain legal opinions or argument. Those should be reserved for the factum.

Facta

- Consult the applicable Practice Direction to determine if a factum is required and if so, the formatting requirements
- Organization
- Prepare a concise overview
- Summarize the important facts
- Present your submissions clearly and concisely, outlining the relevant law on each issue followed by an analysis based on the facts of the case
- Consider Schedules to Factum, such as chronology, charts, calculations, Divorcemate calculations

Motions in writing

- Limited to procedural, uncomplicated or unopposed matters - recently the Court condoned bringing a 14B Motion for a Voice of the Child Report (*Canepa v. Canepa*, 2018 CarswellOnt 14657)
- Use 14B Form instead of Notice of Motion and Affidavit
- Response is due within 4 days after being served
- No reply is permitted: Rule 14(11.6)