**How to Draft a Motion**

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Participants in a lawsuit often require the court to issue Orders to facilitate the conduct of the litigation. The range of Orders available is quite large. Often, but not always, these requests for Orders from the court are based on a written motion record. During trial it is common to bring oral motions to the judge, without a written motion record.

This article provides a quick overview of bringing motions before trial.

**Documents Required**

1. Motion Record (not always required)
2. Notice of Motion
3. Affidavit
4. Factum (not always required)
5. Order

**Motion Record**

The Motion Record is simply the book binding the motion together. It contains a title page and back page, an index of the contents of the motion, and the various motion materials (other than the factum and book of authorities). Rule 37 governs the colour of the motion record and issues as pagination and what specific documents need to be included.

**Notice of Motion – Form 37A**

The Notice of Motion is the document that sets out when a motion is to be heard, how it is to be heard, the relief requested in the motion, the grounds for that relief, and the evidence to be relied on for the motion. A Notice of Motion typically follows the form of Form 37A as required by Rule 37.06.

It is important to consider who the motion should be brought in front of. Simple requests to the court can be made by Requisition to the Registrar. Many procedural issues can be made to an Associate Judge in those jurisdictions (Toronto, Windsor, and Ottawa) that have Associate Judges (formerly referred to as “Masters”), and any motion that cannot be heard by an Associate Judge or Registrar can be heard by a Judge. However, Judges may refuse to hear a simple motion that should have been heard by an Associate Judge or Registrar.

It is important to consider whether a motion will proceed on consent, opposed, or unopposed. An opposed motion means that both parties will contest the outcome of the motion and oral arguments will be necessary. A consent motion means that the parties agree on the outcome of the motion, which means that the motion can likely be heard in writing, without oral arguments. An unopposed motion typically means that the motion may still have oral arguments (simple motions can still be brought in writing), but unless the court has grave concerns the motion will likely be granted.

**Affidavits – Form 4D**

Motions in writing require affidavits. Rules 39 and 4.06 provide the requirements for affidavits for use on a motion. An affidavit is the sworn evidence of the individual swearing the affidavit. Affidavits can be made by a party, non-party, lawyer, law clerk, or anyone else with knowledge of the contents of the affidavit. The affidavit must be divided into consecutively numbered paragraphs, with each paragraph containing an individual fact. Affidavits should not contain argument as that is properly the realm of the factums and oral argument. Affidavits are sworn or affirmed by a Commissioner of Oaths or Notary Public.

Affidavits may contain statements of information and belief, but must state the source of said information and belief (Rule 39.01(5)).

**Factum**

Factums are legal briefs containing a summary of the facts relied upon, the issues in question, the legal arguments made, and the order requested. Factums are not technically required for all motions before a judge (Rule 37.10(7)), and are often foregone on simple or consent motion. Judges are familiar with fundamental issues and do not need a factum for a standard undertakings motion.

However, on any complicated motion, the factum is the heart of the motion. A well written factum is the key to success, while oral argument is always important, a good factum is the key to success.

**Order**

Typically the court will hear the motion and make its decision, either by oral or written reasons. Often the moving party or successful party will be required to turn those reasons into a Court Order. While written decisions can be 100+ pages long, the Order is not concerned with the nitty gritty of the reasons, it is typically only 1-3 pages long and contains a set number of paragraphs articulating the exact outcome decided by the judge.

The wording of the Order is typically agreed upon between the parties, although if one party is being obstinate for tactical reasons a hearing can be set with the court to determine the wording of the Order.

**Confirmation of Motion – Form 37B**

For any motion that is heard with oral arguments, a date for the motion needs to be set. Because so many motions settle before the oral hearing, the courts have implemented a system where the parties must write to the court and confirm whether the motion has been cancelled or is proceeding using a ‘Confirmation of Motion’.

**Costs – Form 57B**

Ontario has a ‘loser pays’ system, where the unsuccessful litigant can be required to pay some portion of the legal costs of the winner. Typically, partial indemnity costs are granted, which are always at the discretion of the court. “Partial indemnity” is typically 60% of the actual costs incurred by the winner.