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DOCUMENTARY DISCLOSURE RULES IN ONTARIO
QUICK REFERENCE GUIDE

WHAT DOCUMENTS MUST BE DISCLOSED?

- You must disclose every document relevant to any matter in issue in an action that is in your "power and control".

  To "disclose" means you are informing the other side in the lawsuit that the document exists. This is not the same as giving the other side a copy of it.

- A "document" can include (among other things): audio, video, photographs, films, maps, plans and charts, whether in paper or electronic form.

  Electronic records such as e-mails, social media posts and text messages are considered "documents" and must be disclosed if they are relevant.

- A document is in your "power and control" if you can obtain it (or a copy of it) and the other side in the lawsuit cannot.

  This includes documents that are being held by third parties. For example, if a psychotherapist has provided treatment to a plaintiff, that psychotherapist's (relevant) clinical notes and records must be disclosed by the plaintiff, even if they are not within her physical possession. Parties are obligated to authorize third parties to produce relevant documents.

- A corporation that is a subsidiary, affiliate, or is directly or indirectly controlled by the party may be compelled to produce relevant documents on court order.

  If you can easily obtain the document from a closely related corporation or affiliate, then it is likely in your "power and control", even if it is not actually in your physical possession.

- Even if a document no longer exists or has been lost, you must disclose it so long as it is relevant and was at one time in your power and control.

- Relevant documents may be redacted, provided you can demonstrate that (a) the redacted portion is clearly irrelevant and (b) there is good reason not to disclose it.

WHEN MUST DOCUMENTS BE DISCLOSED?

- Documents are disclosed at the written "discovery" stage of the lawsuit. This typically happens between the time you have been sued (i.e. served with the lawsuit) and the time of oral discoveries. (i.e. when your witness is questioned under oath)

  Your lawyer will typically ask you to search your records for relevant documents and will then review them and decide which documents must be disclosed.

- The duty to disclose relevant documents continues throughout the lawsuit. If you discover new documents midway through the lawsuit, you are obligated to disclose them even up to trial.

  You, as a party to the lawsuit, are obligated to inform your lawyer of the existence of any relevant documents and your lawyer, in turn, is obligated to disclose those documents to the other side in the lawsuit.

HOW ARE DOCUMENTS DISCLOSED?

- Each side in the lawsuit produces an Affidavit of Documents, sworn by the party or its representative.

  An Affidavit of Documents is sworn under oath, typically by the party named in the lawsuit, or by a suitable representative if the party is a corporation or other organization. Your lawyer or a clerk at her office will typically review the documents you have provided and use them to prepare the Affidavit of Documents.

- Schedule "A" of the Affidavit of Documents discloses the relevant documents that you must turn over to the other side.

- Schedule “B” of the Affidavit of Documents discloses the relevant documents that you do not need to turn over to the other side because they are protected by privilege.

- Schedule “C” of the Affidavit of Documents discloses the relevant documents that you are not turning over to the other side because they are lost, destroyed, or no longer in your power and control.

- Disclosing a document does not mean you are necessarily giving it over to the other side in the lawsuit. You would not normally have to produce documents that are disclosed in Schedule “B” as they are protected by privilege.

    Any relevant document not subject to privilege must be produced to the other side of the lawsuit if they ask you for it.

    Your lawyer will decide which relevant documents belong in Schedule “A”, “B” and “C” and consequently, which documents must be produced.

WHAT DOCUMENTS ARE RELEVANT?

- Relevance is determined by the pleadings in the lawsuit.

- The “pleadings” are the documents filed with the court that set out each side’s position in the lawsuit.

    Your lawyer prepares your pleading and the other side’s lawyer prepares theirs. The pleading of the plaintiff (the one suing) is typically a Statement of Claim. The pleading of the defendant (the one being sued) is typically a Statement of Defence.

- A document is relevant if it could be used to prove or disprove a material fact set out in the pleadings.

    If the Statement of Claim alleges that the plaintiff needed psychotherapy to cope with his injuries, then the psychotherapist’s clinical notes would be relevant and must be produced. On the other hand, if the Statement of Claim merely alleged that the plaintiff suffered a physical injury to his eye, then the psychotherapist’s file may not be relevant to the pleadings.

WHAT ARE THE CONSEQUENCES OF FAILING TO DISCLOSE RELEVANT DOCUMENTS?

- If you do not disclose a relevant document that benefits your case, you may be forbidden from using it at trial.

- If you do not disclose a relevant document that harms your case, the court may penalize you at its discretion.

- If you destroy relevant documents in contemplation of litigation (spoliation), you may be penalized by the court.

    Typically, a court would make an "adverse inference" that the documents you destroyed would have hurt your case.

HOW LONG SHOULD DOCUMENTS BE PRESERVED?

- There is no set rule for how long documents should be preserved. But if litigation is threatened or contemplated, relevant documents should be preserved.

- A proper document retention policy can protect you in litigation.

    If you destroyed documents in accordance with a comprehensive policy or system, it is less likely that a finding of spoliation would be made. If you do not have such a system, it is more likely that you will be accused of willfully destroying documents.

- A good document retention policy should be crafted with litigation in mind.

    The policy should take into account limitation periods such as the two-year limitation period under Ontario's Limitations Act, 2002. The policy should also protect documents where litigation is contemplated or likely.