

ONTARIO E-DISCOVERY IMPLEMENTATION COMMITTEE

MODEL DOCUMENT #12:

MODEL AFFIDAVIT OF DOCUMENTS (CORPORATION OR PARTNERSHIP)

Purpose of the Model Affidavit of Documents

This model affidavit of documents is offered as an alternative to Form 30B, currently the prescribed form of affidavit of documents for a corporation or partnership under Rule 30.03 of the *Rules of Civil Procedure*. This model affidavit addresses challenges in using the current prescribed form for enterprise affiants which assumes that a single individual oversees collection of electronically stored information for discovery purposes.

Following a period of public comment on this model document, it is contemplated that a proposal will be made to the Civil Rules Committee to amend Rule 30.03 and Form 30B in order to reflect the alternative approach to the affidavit of documents reflected here.

Form 30B is outdated, and does not reflect the way in which discovery of electronic documents is carried out, particularly in light of the 2010 reforms to the *Rules of Civil Procedure*, which emphasize the principle of proportionality.

New Rules 29.1 (Discovery Plan) and 29.2 (Proportionality in Discovery) provide that a party may not always be required to disclose all non-privileged, relevant documents. In some circumstances, the parties may agree to limit the scope of documentary discovery based on factors such as:

- cost (clauses 29.1.03(3)(a) and 29.2.03(1)(b)),
- the importance and complexity of the issues and the action (clauses 29.1.03(3)(a) and (e)),
- the time required to produce documents (clause 29.2.03(1)(a)),
- any undue prejudice that would be caused to a party or other person (clause 29.2.03(1)(c)),
- any undue interference with the orderly progress of the action (clause 29.2.03(1)(d)),
- the ready availability of a document from another source (clause 29.2.03(1)(e)), and
- the overall volume of documents to be produced by a party or other person (clause 29.2.03(2)).

Essentially, the principle of proportionality allows for various practical considerations to limit the scope of document discovery. It should not, however, shield a party from its obligation to produce relevant, non-privileged documents of which it has knowledge, including those that may be harmful to the party's case.

In this context, Form 30B and the current wording of Rule 30.03 to which Form 30B relates are problematic because the affiant is required to confirm that all relevant documents **have been disclosed**. In the world of electronic documents governed by new rules, such a statement may be impossible to verify, especially at the early stages of the litigation process. If the parties have agreed to limit the scope of discovery, or if the court has ruled that limited discovery is acceptable, then the affidavit of documents needs to address that possibility. It also needs to address those situations where some sources of potentially relevant information were not identified, preserved, or searched for technical reasons.

An alternative form of affidavit of documents is therefore appropriate, to reflect this reality.

The model affidavit of documents is designed to modernize the outdated aspects of the current Form 30B and to promote the goals of the 2010 reforms. As explained below, the model affidavit is designed to give greater effect to several key features of those reforms, notably: the discovery plan and its emphasis on cooperation; the principle of proportionality; the limitation on the availability of discovery relief when proportionality is not demonstrated, and the seven-hour rule for examinations for discovery.

To these ends, the model affidavit of documents requires a party to disclose some information about the scope of the party's efforts to locate relevant documents, and information about the proportionality-based decisions the party has made when deciding what documents to disclose. Specifically, a party is required to identify:

- the individuals of whom inquiries were made in order to identify sources of relevant information,
- the individuals who were asked for their relevant documents and those who provided them, and
- any limitations placed on the scope of search (for example date range, document type, devices/ storage media searched, search methodology, type of software tools used, or other limitations).

In this regard, the level of specificity contemplated by, and the suggestions incorporated into, the model affidavit of documents are designed to encourage each party to consider the range of individuals who should properly be engaged in the search for relevant records and the range of devices or media on which electronically stored information may be available, among other things. For example, it is important for parties to consider whether, in addition to making inquiries of employees that created particular records, it is necessary and appropriate to make inquiries of information technology staff, contract staff, records custodians, or third-party service providers and others to assist in the identification, preservation, and production of records.

The enhanced disclosure contemplated in the model affidavit of documents is motivated by the following goals:

1. Encouraging **early** and **practical** discovery planning:

The discovery plan rule (Rule 29.1) encourages parties to cooperate in defining the scope of documentary discovery, by agreeing to define (and limit) the scope of discovery through a discovery plan, taking into account the proportionality factors listed above. The information that an affiant would be compelled to disclose in the model affidavit of documents is precisely the

information that parties would need to share in order to permit proportionate discovery. In practice, this information is rarely shared by parties, often for perceived strategic or tactical reasons. By mandating transparency, the model affidavit of documents will lead to better discovery planning and thus a more cost-effective process. The existence of this model affidavit of documents as the default affidavit of documents in the absence of a discovery plan means that, unless they cooperate, the parties will be required to disclose information relating to these topics in any event.

2. Encouraging efficient and effective examinations for discovery:

Under the seven-hour rule for examinations for discovery (Rule 31.05.1), parties should be encouraged to make the most efficient use of the available discovery time. Parties should not be forced to spend valuable examination time discovering and assessing the adequacy of the other side's efforts to locate relevant documents. By mandating early disclosure of information about the choices made by each party in preserving, collecting, disclosing, and producing their documents, the model affidavit of documents helps to ensure that documentary discovery disputes are identified and resolved early, thus streamlining the discovery process and permitting parties in discovery to focus on substantive matters.

3. Helping the court avoid, manage and resolve discovery disputes:

The disclosure required in the model affidavit of documents is, in effect, a summary of the party's position as to what information is available, and also what constitutes a proportionate scope of documentary discovery for that party in the action. The model affidavit of documents is an articulation of each party's position on proportionate documentary discovery where agreement cannot be reached. This information will assist the court when discovery disputes arise. When parties fail to agree on a discovery plan, Rule 29.1.05 provides that the court may refuse to grant discovery relief or may refuse to award costs on a discovery-related motion. When discovery relief is sought on a motion, Rule 29.2.03 requires the court to take into account a variety of proportionality factors in making a determination as to whether to grant the relief sought. Under both Rules, the court must assess whether a party's position on the appropriate scope of documentary discovery is reasonable and proportionate. This model affidavit of documents is designed to help the court make that assessment.

Public comment sought

The EIC is seeking public comment on the model affidavit of documents, with a view to, ultimately, advocating a change to Rule 30.03 of the *Rules of Civil Procedure* and to Form 30B.

The EIC invites all comments regarding the suggested approach to documentary discovery as well as the underlying policy rationale as described in this note. In considering the model affidavit of documents, commentators are invited to provide their thoughts on, among other things, the following questions:

- (a) Will it help the documentary discovery process if parties are required to disclose the additional information contemplated by the model affidavit of documents? Is the additional information useful?
- (b) Will the model affidavit of documents promote the policy goals of the 2010 reforms to the *Rules of Civil Procedure*?

- (c) Is greater encouragement of these policy goals needed, or do the current rules adequately achieve them?

Among other things, the EIC recognizes that the application of the principle of proportionality in any given case may require difficult judgment calls by counsel and clients. At the same time, the principle and the model affidavit of documents are not intended to permit a party to “game the system”, either through expansive requests or motions or via the deliberate selection of criteria to avoid identifying certain records.

Accordingly, the EIC is interested in your comments on whether this model affidavit of documents has achieved an appropriate balance between, on the one hand, requiring a party to be adequately transparent in their efforts to identify relevant records so that the other party(ies) may consider if those efforts were proportionate and, on the other hand, not undermining the traditional obligation on each party to disclose relevant records even where those records are detrimental to the party’s case.

Note regarding use of this document

This document and all of the EIC’s model documents and other publications are available on the Ontario Bar Association's website at:

<http://www.oba.org/Advocacy/E-Discovery/Model-Precedents>

This model document has been prepared and made available to the public by the EIC for informational purposes. It is not provided as legal or technical advice and should not be relied upon as such.

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Feedback on EIC materials

The EIC welcomes comments on all of its model documents and other publications. Any comments or suggestions can be provided to Michele A. Wright at mwright4@toronto.ca.

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

■

Plaintiff

- and -

■

Defendant

AFFIDAVIT OF DOCUMENTS OF
(NAME OF PARTY)

I, (*full name of deponent*), of the (*City, Town, etc.*) of ■, in the (*Province, State, etc.*) of ■, MAKE OATH AND SAY (*or AFFIRM*):

1. I am the (*state the position held by the deponent in the corporation or partnership*) of (*name of party*), which is a corporation (*or partnership*).

2. I know that the corporation (*or partnership*) has the obligation to disclose documents relevant to the action that are or have been in its possession, power or control. I have made enquiries of the following individuals to inform myself in order to fulfil this obligation:

(List individuals of whom enquiries were made, including their position within the organization.)

3. In order to locate documents relevant to this action, the corporation (*or partnership*) has caused a diligent search of documents in the possession, control or power of the corporation (*or partnership*) to be conducted by employees and other individuals believed to be custodians of

relevant documents. A custodian includes not only a person who created or received a document, but also any other person with possession, control or power over a document. Searches have also been made of official sources of records, through record custodians or owners of non-custodial data repositories. Except as described below, comprehensive searches have been conducted of all devices, document repositories, storage media and any other sources, whether on premises or not, where documents relevant to this action could possibly be located. These searches were conducted between approximately _____ and _____.
(Parties should provide approximate date or date range to indicate the time period within which the searches described below were conducted.)

- (a) Employee custodians: The following employees of the corporation (or partnership) were asked to provide all documents in their possession, control or power that are relevant to the action:

(List the employees, including the affiant if applicable, and include their position within the organization. Custodians may include the corporation's (or partnership's) IT department or other central custodians.)

- (b) Other custodians: Subject to any privilege with respect to the identity of an individual that may apply, the following other individuals or organizations were asked to provide all documents in their possession, control or power that are relevant to the action:

(List the individuals over whose identity no privilege is claimed, including their position within the organization. Where the individual is an employee or representative of another organization, specify the organization. Where inquiries

were made of external vendors or companies that provide IT management or other relevant services, these organizations should be identified.)

4. Of the custodians listed in paragraph 3 above, the following persons advised that, after conducting a diligent search for relevant documents, they did not locate in their possession, control or power any documents relevant to the action:

(List the custodians that apply.)

5. The scope of the search for documents that was conducted was as follows *(complete if applicable)*:

(a) Sources: Custodians were asked to provide/exclude electronic documents stored on the following electronically stored media or devices:

(Specify sources, such as cloud storage, personal computers, laptop computers, servers, personal digital assistants, cameras, etc.)

(b) Date range: Custodians were asked to provide/exclude documents within the following date range:

(Specify date range.)

(c) Document types: Custodians were asked to provide/exclude documents of the following document types:

(Specify document types, such as email, electronic spreadsheets, word processed documents, paper documents, photographs, etc.)

(d) Software tools and methodology: In order to assist in locating relevant electronic documents, the following software programs were employed, in the following manner:

(Specify the software program(s), version, configuration and describe in reasonable detail the search methodology used.)

6. I confirm that the corporation (*or* partnership) has a continuing obligation to disclose documents relevant to the action regardless of the scope of search set out in paragraph 5 above, and that it will continue to meet this obligation. If, in the course of the action, it becomes apparent that further steps beyond those listed in paragraph 5 are required in order to locate documents relevant to the action, such further steps will be taken, subject to the limitations set out in paragraph 8 below and an evaluation of the factors to be considered pursuant to Rules 29.1 and/or 29.2.

7. Unless expressly specified in paragraph 8 below, this affidavit discloses, to the full extent of my knowledge, information and belief, all documents relevant to any matter in issue in this action that are or have been in the possession, control or power of the corporation (*or* partnership).

8. *(Complete if applicable.)* The following limitations apply to the statements referenced in paragraphs 5, 6 and 7 above:

- (a) Factors referenced in a Discovery Plan agreed upon by the parties in accordance with Rule 29.1; and
- (b) Other factors, including factors referenced in Rule 29.2 (Proportionality in Discovery).

(List all limitations that apply, such as an agreement between the parties (other than a discovery plan) limiting the scope of search; an incomplete list of documents as part of a rolling production; sources that are not reasonably accessible that were not searched but that could possibly contain documents

relevant to the action; inherent limitations of the search tools and search methodologies used, etc.)

9. I have disclosed in Schedule A the documents that are in the possession, control or power of the corporation (*or* partnership) that it does not object to producing for inspection.

10. I have disclosed in Schedule B those documents that are or were in the possession, power or control of the corporation (*or* partnership) that it objects to producing for inspection because it claims that they are privileged, and I have stated in Schedule B the grounds for each such claim.

11. I have disclosed in Schedule C those documents or categories of documents that were formerly in the possession, control or power of the corporation (*or* partnership), but that were deleted or destroyed or are otherwise no longer in its possession, control or power, and I have stated in Schedule C when and how it lost possession or control of or power over them and their present location, if applicable.

SWORN BEFORE ME at the)
(City/Town, etc.) of ■, in the)
(Province/State, etc.) of ■,)
this day of , 20)
)
)
A Commissioner for Taking Affidavits, etc.)

(full name of deponent)