

# **DOCUMENT PRODUCTION**

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For:

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## INITIAL PRODUCTION – AFFIDAVIT OF RECORDS

### What to Produce:

While the specific records that should be produced as part of a client's affidavit of records is dependent on the nature of the claim and the facts of the specific case, the Rules set out the basis of what is producible.

Under the *Rules of Court*, a record is producible if it "relevant and material". The test for relevance and materiality sets out that a record is relevant and material if it could reasonably be expected to:

- a) significantly help determine one or more of the issues raised in the pleadings; or
- b) ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings [Rule 5.2].

It is the responsibility of the lawyer handling the file to determine what records should be obtained and of the records obtained, which are producible. When handling files of a similar nature, it is suggested that a firm or a lawyer put together a checklist of the records that would generally be producible as a starting point for gathering complete production and limiting the number of undertaking requests you will be faced with.

As an example, we have attached to this handout as Appendix "A" is a suggested master checklist that our office utilizes in the personal injury claims we handle, specifically those that arise from a motor vehicle accident.

The expectation should not be that this or any similar checklist can be relied upon blindly as a method of obtaining all of the relevant records in every case, as this will obviously be case-specific. However, it is a good starting off point. One must take the time to review the file, consider what records may be material and relevant, including those on the checklist and those that are not, and request the records they expect will be producible. In our office, we find the checklists simply provide assistants and junior lawyers with guidance as to what will typically be expected to be included in the producible documents.

Once the records are obtained, the next step is for a review of the records to be undertaken in order to determine which of those records are, in fact, producible. On a very general level, all records are producible with the exception of those that lack relevance/materiality and those that fall under the cloak of privilege.

While it is extremely important that the responsible lawyer on the file review all of the records that come in, there are some specific types of records that typically warrant more extensive review or consideration prior to being produced to the other side, including:

- WCB files;
- Disability files;
- EI files; and
- Counselling records.

Further discussion on the considerations to be made prior to producing the above files is included in the paper I completed on the topic of “Preparation for Questioning”, which is included in the seminar materials.

In addition, the WCB has created a guideline list of specific documents that should and should not be included in production of WCB files, which we attach to this handout as Appendix “B”.

### **When to Produce:**

The rules regarding disclosure and when to disclose are set out under part 5 of the *Alberta Rules of Court*. With respect to the Affidavit of Records, the rules are very clear on timing:

- The Plaintiff must serve an affidavit of records on all other parties within 3 months after the date the Plaintiff is served with a statement of defence [Rule 5.5(2)];
- The Defendant must serve an affidavit of records on all other parties within 2 months after the date the Defendant is served with the Plaintiff’s affidavit of records [Rule 5.5(3)]; and
- A Third Party defendant must serve an affidavit of records within 3 months of filing their statement of defence [Rule 5.5(4)].

### **ONGOING PRODUCTION**

Under the Rules, there exists an ongoing duty of disclosure on the parties, summarized as follows:

- Following service of an affidavit of records, each party has an ongoing obligation to disclose any and all further records that they create or obtain by:
  - Immediately giving notice of the further record(s) to the other parties;
  - On written request and on payment of reasonable copying expenses, supplying each of the other parties with a copy of the record(s); and

- Prior to scheduling a date for trial, serving a supplementary affidavit of records on each of the other parties. [Rule 5.10]

Given the continual obligation on parties to produce all relevant and material records, the next logical question is how best to go about fulfilling that obligation and when.

Often times, an affidavit of records is served well in advance of when Questioning is set and additional producible records are obtained in the interim. In that case, one should advise the other side of the additional records obtained as soon as they are reviewed and confirmed to be producible, provide copies of same upon request and ensure that a supplemental affidavit of records containing those further records is served on the other parties far enough in advance of Questioning to allow the other side time to review.

While ideally most, if not all, relevant and material records will be produced as part of the original production or by way of undertaking responses, it is extremely important to keep in mind that the duty to disclose continues right up until a trial date is set. Again, the most efficient manner in which to deal with production of further records after Questioning is to provide notice and/or copies of the records to the other parties and then providing a supplemental affidavit of records prior to setting a trial date.

## **ANSWERING UNDERTAKINGS**

With respect to timing, under the Rules, any undertaking given at Questioning must be answered within a “reasonable time” [Rule 5.30(1)]. What constitutes a reasonable amount of time will depend upon the undertakings provided and your ability to obtain the records or otherwise answer the undertaking promptly. What seems to be generally accepted by lawyers in this jurisdiction is that undertaking responses should be provided within 3 months of Questioning.

In order to consistently be in a position to effectively respond to all undertakings within the suggested 3 month period, it is extremely important that the lawyer and their assistant have a method or protocol in place by which the undertaking requests are made, organized and responded to.

It is suggested that records from third parties or information or records from your client be requested as soon as practicable after the Questioning takes place (or after the transcripts come in for those who cannot read their lawyer’s notes from Questioning...).

As is often the case when making requests, you may not get those records right away and it may be necessary to make follow up requests via letter, phone or email in order to fulfill the duty of making best efforts to answer the undertaking given. In order to ensure

that the responsible lawyer and assistant are on the same page and both able to quickly reference where the undertaking responses are at on any given day, it is suggested that the assistant keep a clear log of all requests, including when they were made and to whom. It is also strongly recommended that the assistant keep a similar log of what undertaking responses have been sent to the other parties and on what date, which again can be quickly and easily referenced.

For reference, we have attached as Appendix "C" examples of the way in which one can effectively organize undertaking requests and responses.

## **CONCLUSION**

The simple truth of the matter is that from the day you open a file, your production should be geared towards readying yourself for trial.

Having an effective, efficient and consistent protocol for: requesting records; putting together initial production; ensuring production is a-go for questioning; answering undertakings; and fulfilling the ongoing duty of disclosure right up until trial is key to successful handling of a claim. In order to succeed, the lawyer and their assistant must work together to ensure that a reliable system is not only in place, but followed.

# **PRODUCTION CHECKLIST**

## **(Motor Vehicle Accidents Claims)**

*(Note that this is a general guide and should not be considered an exhaustive list of producible records with every claim, nor should it be assumed that all of the records listed should be obtained/produced in every case)*

### **LIABILITY**

- Alberta Collision Report
- Long Form Police Report
- Demographic & Pre-Court Searches
- Conviction Certificate
- Photographs of Vehicles
- Property Damage – Sec. C File
- Witness Statements (obtain but typically not included in production)

### **MEDICAL**

- EMS Report
- Hospital Charts
- Alberta Health Statement of Benefits Paid
- Family Physician Treatment Record (pre and post-collision)
- Records of all treating Physiotherapists, Chiropractors, Massage Therapists, etc.
- Dental Treatment Records (pre and post-collision)
- Specialist's Treatment Files
- Family Physician Treatment Record
- Records of Physicians listed on AH SOBP (pre and post-collision records where relevant to claim)

- Diagnostic Imaging
- Medical-Legal Reports & IMEs (obtain but typically not included in production)

### **EMPLOYMENT**

- Income Tax Returns
- Employment File(s)
- [where self-employed] Company Financial Statements
- Private Disability Insurer File (redacted where appropriate)
- EI File (redacted where appropriate)

### **MISCELLANEOUS**

- Section B File
- WCB File (redacted where appropriate)
- Photographs of Injuries
- Schedule of Special Damages and Supporting Documentation
- Subrogated Claim Records
- Assignments

# PRODUCTION OF DOCUMENTS

As a general guideline, the following documents are to be produced when requested by defendant or plaintiff counsel:

1. Physician's Progress Report;
2. Worker's Report of Accident;
3. Employer's Report of Accident;
4. Notification of Physical Therapy, Physical Therapist Report, Physical Therapy Progress Report and Request for Extension;
5. Any medical report from a treating physician or treating facility such as Western Occupational Rehabilitation Centre or the Millard Rehabilitation Centre. Also any consultation medical report provided at the request of a case manager should be produced if requested;
6. Worker's Progress Report;
7. Vocational Rehabilitation Department - **CASE REFERRAL**
8. WCB Rehabilitation Centre Aid Supply Form (since this will be reflected on the Medical Aid statement);
9. Employer's Confirmation of Income and Benefits;
10. Statements of Medical Aid Costs which exclude disbursements for medical-legal reports;
11. Memos from medical advisors to case managers.

The following documents should not be produced from the claims file:

1. All handwritten notes to file and any typed memos to file authored by case managers;
2. Letters from case managers to workers;
3. Any Statements of Medical Aid Costs which includes disbursements for medical-legal reports;
4. Entitlement Decisions;
5. Any memos from case managers to WCB medical advisors;
6. Any documentation pertaining to WCB compensation benefits provided to a worker;
7. Worker Call-In Notices;
8. Decisions from the CSRC and the Appeals Commission;
9. Any correspondence to the worker from the Office of the Appeals Advisor, from the CSRC or from the Appeals Commission.

## **APPENDIX “C”**

The first page of the attached is an example of a working chart used to track progress with Undertaking requests and responses. This chart needs to be updated as requests are made, records or answers are obtained and answers are sent out to the opposing parties.

The following pages are examples of what we would produce as the answer to the completed undertakings listed in the chart provided. The page applicable to the undertaking request would simply be scanned as the first page under each tab with the document or record obtained attached to it.

**UNDERTAKING RESPONSES GIVEN BY  
JOHN DOE  
AT QUESTIONING ON JULY 1, 2015**

No.	UNDERTAKING	RESPONSE	STATUS
1.	To provide the updated treatment notes from the Plaintiff's family physician.	Done – See Tab 1. (to D Sept. 1/15)	
2.	To review your record and advise of the name of the massage therapist you saw in January 2013, and to make a request and provide the treatment chart of that massage therapist.	The Massage Therapist's name is Jane Doe.	1 request sent July 15, 2015  2 <sup>nd</sup> request sent August 1, 2015
3.	To confirm the amount paid by the Plaintiff for lawn mowing.		Request sent to client July 15, 2015
4.	To provide a schedule of special damages and any supporting documentation	Done – See Tab 4. (to D Sept. 1/15)	
5.	To provide a printout of the Plaintiff's prescriptions from Brentwood London Drugs from three years before the accident to the present.	Done – See Tab 5. (to D Sept. 1/15)	1 request sent July 15, 2015  2 <sup>nd</sup> request sent August 1, 2015  3 <sup>rd</sup> request sent August 15, 2015
6.	To try and locate the photographs of the vehicles taken after the collision.	Done – See Tab 6. (to D Sept. 1/15)	Client confirmed unable to find photos.

## **Undertaking No. 1:**

To request and provide the updated treatment records from the Plaintiff's family physician.

## **Answer:**

**Attached is the updated treatment record from the Plaintiff's Family Physician, Dr. X., received July 27, 2015.**

## **Undertaking No. 4:**

To provide a schedule of special damages and any supporting documentation.

## **Answer:**

**Attached is the Schedule of Special Damages up to August 1, 2015 and all available supporting documentation.**

## **Undertaking No. 5:**

To provide a printout of the Plaintiff's prescriptions from Brentwood London Drugs from three years before the accident to present.

### **Answer:**

**Attached are the written requests made of London Drugs. We have received no response and consider this Undertaking to be satisfied.**

## **Undertaking No. 6:**

To try and locate the photographs of the vehicles taken after the collision.

### **Answer:**

**The Plaintiff has confirmed that he is unable to find the photographs of the vehicles taken after the collision. We consider this Undertaking satisfied.**