

# ***Part 9 - Pleading, Affidavit, and Brief***

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## **Rule 38 - Pleading**

### **Scope of Rule 38 and definition**

**38.01 (1)** A party may prepare a pleading, claim a declaratory judgment, amend a pleading, or obtain particulars of a claim, defence or ground, in accordance with this Rule.

**(2)** In this Rule,

“statement of claim” includes a statement of counterclaim, crossclaim, and claim against third party;

“statement of defence” includes a statement of defence to counterclaim, crossclaim, third party claim, or subsequent claim.

### **General principles of pleading**

**38.02 (1)** A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.

**(2)** The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

- (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.
- (4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

### **Pleading a claim or defence in an action**

- 38.03 (1)** A claim or defence in an action, and a claim or defence in a counterclaim, crossclaim, or third party claim, must be made by a statement of claim that conforms with Rules 4.02(4) and 4.03(4) of Rule 4 - Action, or a statement of defence that conforms with Rule 4.05(4) of Rule 4.
- (2) The following additional rules of pleading apply to all pleadings in an action:
- (a) a description of a person in pleadings must not contain more personal information than is necessary to identify the person and show the person's relationship to a claim or defence;
  - (b) claims or defences may be pleaded in the alternative, but the facts supporting an alternative claim or defence must be pleaded distinctly;
  - (c) if the effect of a contract, communication, notice, or other document is material, the pleadings must concisely identify the document and state the effect of it without quoting exact words, unless the exact words are material in and of themselves;
  - (d) if the giving of notice is material, the pleadings must state when and to whom notice was given without stating exactly how notice was given, unless the form of notice is itself material.

### **Further rules for pleading a claim in an action**

- 38.04 (1)** A statement of claim must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.
- (2) The performance or occurrence of a condition necessary to a claim is implied from the pleading of the claim and need not be included in a statement of claim, and the party who alleges non-performance or non-occurrence of the condition must specifically plead it in the statement of defence.

### **Further rules for pleading a defence**

- 38.05** The following further rules of pleading apply to a statement of defence:

- (a) it must, if it is denied, expressly and specifically deny the right of a party to claim in an alleged representative capacity, the constitution of an alleged partnership, the incorporation of an alleged corporation, the legality of a contract, or the binding effect of an alleged contract;
- (b) it must, if it is alleged, specifically plead non-performance or non-occurrence of a condition to a right or obligation;
- (c) it must specifically plead any material fact or points of law on which the party intends to rely at trial and that, if not specifically pleaded, would take the other party by surprise or raise an issue not clearly raised by the statement of claim and the party's denials and version of the material facts;
- (d) it must provide full particulars of fraud, fraudulent misrepresentation, or other unconscionable conduct alleged in defence to a claim.

#### **Pleading grounds in an application**

- 38.06 (1)** Statements of grounds in an application or notice of contest must conform with Rules 5.02, 5.03, 5.04, 5.07, or 5.08 of Rule 5 - Application.
- (2) The grounds must be stated in such a way that the relevance of each statement in an affidavit filed, or to be filed, by the party is apparent.
  - (3) If another party requests particulars, they must be provided in an answer or by written reference to evidence in an affidavit.
  - (4) A description of a person must not contain more personal information than is necessary to identify the person and show the person's relationship to a claim or ground of contest.

#### **Claiming a remedy in an action or application, including declaratory judgment**

- 38.07 (1)** A statement of claim, an *ex parte* application, and a notice of application must state the remedy the party seeks from the court, except that a claim for costs is presumed.
- (2) A statement of defence, or contest, need not claim a dismissal of the action, counterclaim, crossclaim, third party claim, or application, and a claim for costs is presumed.
  - (3) The statement of claim must state each of the following:
    - (a) the amount claimed for damages if the claim is for a debt, another liquidated demand, or an ascertained amount;

- (b) the particulars of a claim for damages other than damages referred to in Rule 38.07(3)(a), but not the amount the party considers the claim to be worth;
  - (c) all remedies other than damages claimed by the party.
- (4) The *ex parte* application or notice of application must state the remedy sought by describing the order the applicant seeks.
  - (5) A party making a claim in an action or an application may plead, or apply for, a declaration of the legal status or right of a person.

### **Requiring particulars in an action**

- 38.08** (1) A party to an action may deliver to another party a demand for a further and better statement of a claim or defence.
- (2) The party may only demand a statement that the other party could have included in the original pleading, and the party must not demand evidence or a description of evidence.
  - (3) The demand must contain the standard heading, be entitled “Demand for Particulars”, be dated and signed, and state each demand in separately numbered sentences.
  - (4) The demand for particulars may be in Form 38.08.
  - (5) The demand may not be filed with the court.
  - (6) A judge may order a party to provide a further or better statement of a claim or defence.

### **Providing particulars in an action**

- 38.09** (1) The party to whom a demand for particulars is delivered must file an answer no more than ten days after the day the demand is delivered.
- (2) The answer must include everything required in the demand except it must be entitled “Answer to Demand for Particulars” and, after each demand, provide one of the following statements:
    - (a) a response to the demand that becomes part of the pleading to which it relates;
    - (b) a refusal to respond and the reason for the refusal.

- (3) The answer to demand for particulars may be in Form 38.09.

#### **Obtaining particulars in an application, judicial review, or appeal**

- 38.10** (1) A party to an application, application for judicial review, or appeal may request particulars of a ground, and the party to whom the request is delivered must provide the requested particulars in an answer or reserve the request for direction of a judge.
- (2) A party to an application who is requested to provide particulars may give an answer by referring to evidence in an affidavit.

#### **Amending pleadings in an action**

- 38.11** (1) A party to an action may amend the party's pleadings once no more than ten days after the day pleadings close, by filing an amended pleading with the court.
- (2) At any time, the parties may agree in writing, or a judge may allow, a party to amend pleadings.
  - (3) Pleadings of a party who receives an amended pleading may be amended to respond to the amended pleadings not more than ten days after the party receives the amended pleading, or such other time as the parties agree or a judge permits.
  - (4) Amended pleadings must contain the standard heading, be dated the day of the amendment, and be signed.
  - (5) Amended pleadings must be prepared in a way that shows all changes to the pleadings, such as by underlining new words and noting where words have been removed or by appending a marked version of the pleadings to a corrected version.
  - (6) An amended statement of claim or defence becomes part of the notice to which it relates, although it is not attached.
  - (7) The party who amends pleadings must, unless a judge directs otherwise, deliver a copy of the amended pleadings in accordance with Rule 31 - Notice to a party who is entitled to notice and, if it affects the claim against a party who has become disentitled to notice, to that party.

#### **Amending pleadings in an application, judicial review, or appeal**

- 38.12** A party to an application, appeal, or application for judicial review may amend the party's grounds if the parties affected by the amendment agree in writing, or a judge allows.

### **Close of pleadings**

**38.13** Pleadings close in an action on the day when each party claimed against has filed a notice of defence, has filed a demand of notice, or has become disentitled to further notice, unless the parties agree or a judge orders otherwise.

## **Rule 39 - Affidavit**

### **Scope of Rule 39**

**39.01** A party may make and use an affidavit, and a judge may strike an affidavit, in accordance with this Rule.

### **Affidavit is to provide evidence**

**39.02 (1)** A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.

**(2)** An affidavit that includes hearsay permitted under Rule 5.13 of Rule 5 - Application, Rule 22.15 of Rule 22 - General Provisions for Motions, another Rule, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witnesses' belief in the truth of the information.

### **Editing exhibit**

**39.03 (1)** A party must edit out personal information not required to prove or disprove a fact in issue from an exhibit attached to, or referred to in, an affidavit to be filed by the party.

**(2)** A party who edits information from an exhibit must do so in such a way that the reader of the exhibit sees where text has been edited out, such as by obliterating text on part of a page, leaving a shaded blank in the text of electronic information, or inserting a note that indicates a number of pages or a quantity of text has been removed.

**(3)** The party must, on demand, produce the unedited document or electronic information for inspection by another party.

### **Striking part or all of affidavit**

**39.04 (1)** A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.

**(2)** A judge must strike a part of an affidavit containing either of the following:

**(a)** a statement that is not admissible, such as an irrelevant statement or a submission or plea;

- (b) a statement that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
- (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
- (4) A judge who directs that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
- (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

#### **Scandalous affidavit**

**39.05** A party who files a scandalous, irrelevant, or otherwise oppressive affidavit is subject to the provisions of Rule 88 - Abuse of Process.

#### **Use of affidavit in same proceeding**

- 39.06** (1) An affidavit may be filed for use on a motion or application.
- (2) An affidavit filed on a motion in a proceeding may be used on another motion in the proceeding if the party who wishes to use the affidavit files a notice to that effect before the deadline for that party to file an affidavit on the motion.
  - (3) The affidavit may be used for other purposes in the proceeding, if a judge permits.

#### **Use of affidavit in other proceeding**

**39.07** An affidavit filed with the court may be used in another proceeding for either of the following purposes:

- (a) to impeach the witness who swore or affirmed the affidavit;
- (b) to prove a fact, if the affidavit is not hearsay or it meets the reliability and necessity principles for admitting hearsay.

#### **Form of affidavit**

**39.08** (1) An affidavit must be entitled "Affidavit" and the title may include other words to distinguish it from other affidavits, such as including the name of the witness who swears or affirms the affidavit, the date it is sworn or affirmed, or the word "supplemental".

- (2) An affidavit must contain the standard heading, and include all of the following:
  - (a) the opening, identifying the witness and showing that the witness is giving sworn or affirmed evidence;
  - (b) the witnesses' statement, by which the relationship of the witness to the proceeding is stated, and the witness swears or affirms that the affidavit contains only information based on personal knowledge, or hearsay with a statement of the source and the witnesses' belief of the information;
  - (c) the body, providing the main evidence, with each sentence set out in separately numbered paragraphs and references to exhibits by letter, number, or other identifier;
  - (d) a jurat showing that an oath or affirmation was administered, and the date and place when and where the witness personally appeared before the authority administering it;
  - (e) the printed name and official capacity of the authority administering the oath or affirmation.
- (3) An exhibit that can be attached conveniently to the affidavit must be attached when it is sworn or affirmed, and an exhibit that cannot be attached conveniently must be filed with the affidavit.
- (4) The pages of a long exhibit must be numbered, and ten or more exhibits attached to the same affidavit must be separated by a numbered or lettered tab.
- (5) An affidavit with ten or more exhibits must include, before the exhibits, a table of contents identifying each exhibit and its tab number or letter.
- (6) An affidavit may be in Form 39.08.

#### **Proof of exhibit**

- 39.09 (1)** A party who files an affidavit that includes an exhibit must ensure that the authority who administers the oath or affirmation marks the exhibit so it is clear that it is the exhibit referred to in the affidavit.
- (2) An exhibit is adequately marked if the following are placed on, or attached to, the exhibit and the exhibit is signed by the authority administering the oath or affirmation:
    - (a) the number assigned by the prothonotary to the proceeding;

- (b) the number, letter, or other identifier by which the exhibit is referred to in the affidavit;
  - (c) the name of the witness;
  - (d) a reference to the witness' oath or affirmation;
  - (e) the date the affidavit is sworn or affirmed.
- (3) The writing that marks an exhibit may be in Form 39.09.

#### **Administering oath or affirmation**

- 39.10** (1) Two or more witnesses may swear or affirm a single affidavit with separate jurats for each witness, if they are sworn or affirmed separately, and a single jurat if they are sworn or affirmed together.
- (2) A witness who cannot read may swear or affirm an affidavit certified by the authority who administers the oath or affirmation as having been read to the person, or the person may give evidence orally under oath or affirmation before a court reporter who agrees to provide a certified transcript.
- (3) A witness who reads, but does not read English, may swear or affirm an affidavit in a language the witness does read, or swear an affidavit in English certified by the authority who administers the oath or affirmation to have been interpreted for, and apparently understood by, the witness.
- (4) A witness who cannot see may swear or affirm an affidavit in Braille or swear or affirm an affidavit certified by the authority who administers the oath or affirmation to have been read to the witness.
- (5) An affidavit that has been marked or written on, such as where a witness writes on or draws a line through words in a draft affidavit to correct it, may be sworn or affirmed if the authority administering the oath or affirmation initials a mark or writing to show it was there when the affidavit was sworn.
- (6) An officer or employee of a corporate party may swear or affirm an affidavit required to be sworn or affirmed by a party and any partner may swear or affirm such an affidavit for a partnership.

## **Rule 40 - Brief**

### **Scope of Rule 40**

**40.01** A party may prepare and submit a brief, in accordance with this Rule.

### **Counsel's discretion**

- 40.02 (1)** A brief must concisely summarize the facts, applicable law, and arguments and be signed by the person making the submission.
- (2) Copies of authorities referred to in the brief must be delivered with the brief, unless the judge directs otherwise.
- (3) A judge may require that the brief, and materials filed with it, be printed, electronic, or both.
- (4) Otherwise, the form of a brief is in the discretion of counsel or that of a party acting on their own.

### **Filing brief and delivering duplicate**

- 40.03 (1)** A party who submits a brief, other than a brief for a settlement conference, must file the brief and deliver a duplicate for the judge.
- (2) The duplicate must be delivered to the prothonotary with the copy for the record or to the judge's office, as the judge directs.

### **Suggestions for form and content**

- 40.04 (1)** A brief may be on neutral paper rather than letterhead, or in a neutral electronic format, similar to other court documents.
- (2) The cover page may provide all of the following:
- (a) the standard heading, or just the names of the parties and the court number;
  - (b) the date and place of the motion, settlement conference, application, or trial to which the brief relates;
  - (c) the name of counsel submitting the brief and the party counsel represents, or the name of the party submitting the brief on their own;

- (d) the names of all other counsel, a list of who represents whom, information for contacting each, and the names of and contact information for parties acting on their own.
- (3) In providing the concise summary of the facts, applicable laws, and argument, the brief may be divided into numbered paragraphs, one for each new subject.

**Booklet of documents with trial brief**

**40.05** A brief for a trial that refers to a provision of a document or electronic information to be proved at trial may, if the authenticity of the document or electronic information is uncontested, be accompanied by a booklet, or an electronic copy, of the documents or electronic information made in accordance with the following requirements:

- (a) include a table of contents identifying each document, or item of electronic information, by its identifier;
- (b) provide only copies of crucial documents, or electronic information, admitted to be authentic;
- (c) edit the copies to remove extraneous material, or highlight the relevant provisions;
- (d) separate each copy of a document or item of electronic information;
- (e) number the pages of a long document, that is not numbered in the original and provide identifiers for the paragraphs of electronic information that is lengthy and does not identify paragraphs.

**Booklet of authorities with any brief**

**40.06** A brief for a trial or hearing that refers to authorities may be accompanied by a booklet, or electronic copy, of authorities made in accordance with the following requirements:

- (a) include a table of contents identifying each authority by its neutral citation;
- (b) edit each authority to remove all text the judge does not need to read to understand the point made in the brief;
- (c) if the text to be copied omits paragraph numbers provided in the original publication, insert numbers;
- (d) separate the copies by physical tabs or by identifiers.

**Destruction or return**

- 40.07 (1)** The judge to whom a brief is delivered, or a person authorized by the judge, may destroy or return a booklet of documents, a booklet of authorities, and the judge's copy of the brief after the judge is finished with them.
- (2)** A brief, booklet of documents, and booklet of authorities for a settlement conference must be destroyed or returned when the settlement conference concludes.