**How to Prepare for and Conduct and Examination for Discovery**

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1. **The purpose of an examination for discovery**

The court has endorsed the following goals of an oral examination for discovery[[1]](#footnote-0):

1. to enable the examining party to know the case they have to meet;
2. to obtain admissions that will dispense with formal proof;
3. to obtain admissions which may “destroy” an opponent’s case;
4. to facilitate settlement, pre-trial procedure, and trials;
5. to eliminate or narrow issues; and
6. to avoid surprise at trial.

The scope of permissible questions used to be “semblance of relevance” – this was generally interpreted to mean that if a question lead to a line of inquiry that would uncover admissible evidence, then the question was proper. The problem is that this implicitly endorses fishing expeditions, in which questions that might lead to relevant evidence are permissible. So, examining lawyer, ask away, and hope that you land on something relevant.

This changed on January 1, 2010. The new standard is “relevance”. Theoretically, this tightens the scope of permissible questioning to actually relevant issues. This writer’s experience is that examining lawyers either don’t know, or don’t care, about this restriction, and I believe that this is mainly due to lack of preparation on their part (more on this discussed below). Relevance is defined by the pleadings (both the Statement of Claim and the Statement of Defence).

A properly conducted examination for discovery should leave little question about the position that the other side is going to take in the file, and with a bit of experience, the legal strategy should also be fairly apparent.

1. **The Rules governing oral examinations for discovery**

Rules 31 and 34 are the playbook for oral examinations for discovery. Familiarize yourself with them long before you begin preparing. They contain the rules about how to ask questions, how to object, and the process generally. I won’t take space here to summarize those rules.

The scope of permissible questioning is intentionally broad. Any matter relevant to a matter in issue is fair game, and the party is compelled to answer even if it hurts their case (subject to privilege). The party is not only required to answer based on their “knowledge”, but also on their “information and belief”. The rationale for this is that it allows the examining party to obtain the necessary information, even if it is based on information told to the deponent by third parties, to avoid the need to examine numerous non-parties or potential witnesses. “What did so-and-so tell you” is a fair question, despite the numerous lawyers I have encountered over the years who have (improperly) objected to it.

The interplay between an examination for discovery and hearsay evidence is too complicated for this overview document, but the fact is that questions about hearsay when they involve the deponent’s knowledge, information, and belief, are fair game. To be safe, the examining lawyer should ask the witness if they believe the hearsay to be true, and if not, then ask about the basis on which the witness disputes that hearsay evidence.

Other than extremely limited circumstances, a party cannot rely on their own discovery transcript at trial. This creates significant leeway for the examining lawyer to ask questions that might result in “unhelpful” answers. That’s okay, because the examining party is “in control” of those answers. For example, imagine a plaintiff who says she cannot sit for more than 20 minutes at a time:

Q: I see from the file that you travelled to Europe in 2018? How did you get there?

A: We flew.

Q: How long was the flight?

A: 7 hours.

Many lawyers subscribe to the “stop here!” approach. It sounds like a great admission. However, this is what happened next:

Q: Well, how did you manage that if you can only sit for 20 minutes at a time?

A: It was excruciating. I was so doped up on pain medicine I was barely awake. I had to lie down across the seats, and when I landed they had to take me off the plane in a wheelchair.

An examination for discovery is not (necessarily) a cross-examination. The rule against asking “one question too many” doesn’t apply here, because the Plaintiff can’t use their own Discovery transcript anyway other than in very limited situations. So, the examining lawyer is “safe” in that they are in control of how to use that line of questioning. The reality is that any experienced plaintiff lawyer will elicit that evidence at trial in their examination in chief anyway, to get in front of what might be damaging evidence. It is extremely likely that this “wheelchair story” is going to come out at trial anyway, and this way, the defendant’s lawyer can at least try to prepare some arguments to lessen the impact of this testimony.

In an action commenced in the ordinary procedure, *each party* gets to question for 7 hours, regardless of the number of parties to be examined. This means that if one lawyer acts for 2 defendants, that lawyer is entitled to a total of 14 hours to divide between the deponents as they see fit. This is a common misconception – many lawyers believe that their party can only be questioned for a total of 7 hours; they are wrong.

Under the Simplified Rules, the same general principle applies, but the time is limited to 3 hours per party, regardless of the number of parties to be examined.

Think about a Simplified Rules matter in which there is 1 plaintiff and 7 defendants – that Plaintiff lawyer would be wise to be well-prepared, in the absence of an agreement between the parties to allow additional time.

1. **Read the File**

This sounds self-evident, but it never ceases to amaze me how often lawyers, whether for plaintiffs or defendants, arrive at the examination for discovery with, at best, a tenuous grasp on even their own file. Leave no stone unturned!

When I was an articling student, a mentor of mine said to me that a lawyer should know everything they can about the file, including what they don’t know or what is missing from the productions, at the time of the examination for discovery. That advice has stuck with me all these years later, and my own practice is to read every single page of the file before examining a witness.

Know what you know, and know what you don’t know. Sometimes, gaps are apparent in the records. For example, a decoded OHIP summary might list repeated attendances with a physician whose records have not been produced. Make a note and ask for those by way of undertaking. Or, there might be references to email exchanges in the lead-up to the breach of a contract by a party, but those emails haven’t been produced. If you are able to get in front of those outstanding issues, ask for them in advance. But, if the other side is being non-responsive, or you only noticed this at the last minute, don’t despair, because you can still ask for production by way of a post-discovery undertaking (with the proviso that you may request further discovery upon receipt and review of this new evidence).

1. **Figure out the relevant legal test(s) before you commence the examination for discovery, and obtain the facts to apply to the law in your favour**

Our job as lawyers is generally to apply the facts to the law, and to make compelling arguments that the facts, and the law (as we interpret it) leads to a victory for our client and a loss for the other side.

Lawyers are very rarely called upon to make new law. Whether in the realm of personal injury, business and contract law, employment law, etc., the law is almost always settled. By knowing the legal test(s) in advance, you can make sure to ask the right questions to elicit the relevant admissions to help your case. If you don’t know the law, you’ll just be floundering and hoping that the evidence is relevant. This latter approach can lead to long-winded, largely irrelevant, and tedious examinations for discovery as the questioning lawyer asks every question under the sun, yet somehow manages to keep the questions in the realm of relevance.

There are rumors that the following was the entirety of the examination for discovery of a defendant in a rear-end motor vehicle accident case:

Q: What is your name [and other basic identifying questions]

A: [identifying answers]

Q: Were you the operator of [described vehicle] on [date]?

A: Yes.

Q: Did the front of your car collide with the rear of my client’s car?

A: Yes.

Q: Will you agree with me that my client was stopped at the time of the collision?

A: Yes.

Q: No further questions.

This may be uncomfortably brief for most lawyers. Understandable. However, the point is that the law on a rear-end collision is clear. Absent suggestions of contributory negligence, a person cannot be 101% at fault. This approach demonstrates getting the relevant admission to apply to the law, and then getting out.

This type of brevity does not typically work for a discovery of a party when there are facts in dispute, such as a liability split or almost any question of the valuation of damages. On that point, there are two schools of thought, which appear largely based on a generational approach.

It seems that lawyers with 20+ years of practice subscribe to an approach of “get in, get out, and sort it all out at trial”. I think this comes largely with what used to be a greater prevalence of cases proceeding to trial, whereas today virtually every case settles.

This writer subscribes to the detailed approach. I believe that details matter, particularly in the personal injury realm. For example, some Plaintiffs will have been prepared by their lawyer to simply say “I can’t do my housework” and leave it at that. I would strongly caution against the examining lawyer simply accepting that at face value and moving on. Dig deep. Go through the various tasks, and even break down the tasks themselves. For example, I once had a plaintiff in a *very* questionable injury claim tell me that he could not “do the laundry”. So we went through each task (taking his clothes off, putting them in the basket, taking the basket to the machine, transferring the wash from the washer to the dryer, etc.). By the time we were done, he told me that he could not even lift a sock out of the washing machine. Let that marinate for a second, and think about how well the court is going to respond to that testimony.

It could be that the law has gotten more complicated over the years. In MVA claims, the “threshold” is relatively new, and functionality is a key issue. Medical evidence has become more complicated. The leeway that might have existed in the past to deal with omitted issues no longer is guaranteed. You get one chance, and need to make it worthwhile. Trials are no longer prepared weeks out with last-minute reports and evidence; trials are prepared months out, and there are strict timelines in place regarding preparation. Given the time, cost, and investment required to proceed to trial, taking the time to conduct a thorough discovery of a party and lock them into their testimony seems both prudent and a good tactic.

The cost of trials may also play a factor – clients (and lawyers) should be looking for opportunities to settle files. Obtaining admissions (like the sock example above) or narrowing the issues (such an admission that in fact there is no provable income loss) just seems prudent.

1. **Listen to the answer**

Following a script is not recommended. Witnesses and answers often twist and turn, sometimes going down unexpected rabbit holes, and when a lawyer is simply following a question-and-answer template this can severely limit the ability to react to unexpected testimony. However, with that caution in mind, having a template of the topics of discussion and questions to be asked is advisable to ensure that nothing was missed. All senior lawyers will have a template to provide to junior lawyers embarking on their first Discovery.

Improper questions should be objected to. The following are acceptable objections and properly refused questions:

* The question is not relevant.
* The question is ambiguous, unclear, or confusing.
* The question is over-broad or speculative.
* The question is hypothetical.
* The question calls for an opinion.
* The question has been answered.
* The question is directed “solely to the credibility of the witness.”
* The examination is being conducted in an unreasonable manner so as to annoy, embarrass or oppress the person being examined.
* The answer would offend the proportionality principle.
* The answer is subject to privilege.

It should go without saying that objecting to a question simply because the testimony is damaging the case of the deponent is entirely improper, and should be called out when it occurs. There is no question that some lawyers engage in deliberate interference, sometimes to buy time for the witness to answer, or even worse, to object in a manner and using language that nudges the witness towards a particular answer. For example, courts have held that even reminding one’s own client to “only answer if you can remember” is a form of impermissible coaching.

Examinations for discovery can be stressful for lawyers and witnesses, and it is easy for them to get heated. However, the Rules of Professional Conduct require lawyers to remain civil and professional at all times – sometimes this means taking a break for a few minutes! Disagreements are expected, but do not need to become nasty. Keep it clean and clear, because if a judge eventually reads the transcript, you want to look professional and civil at all times.

Opposing counsel is, after all, there to assess the party as a witness and not to hear arguments from their counterpart. There are times when it will be proper to refuse a question. The most common refusal would be a lack of relevance. The test for relevance, however, is very broad and counsel should be mindful to not being overly restrictive in their refusals.

1. **Undertakings, Refusals, and Under Advisements**

In almost every discovery, questions will be asked for which the answer is not readily available. The deponent may not know a witnesses’ phone number or address; documents may become known for the first time during questioning; the witness may be asked to go do something, learn something, or get something. These are called “undertakings”. Essentially, the party promises to provide further information and/or documentation at a later date and on certain conditions.

If the lawyer for the deponent objects to a question and refuses to allow the deponent to answer, that is called a “refusal”. There is not to be any argument on the record at the time of the refusal (which can be a difficult rule to follow). The objector is to briefly state the reason for the objection, and the questioning lawyer is expected to move on. If the questioning lawyer thinks that the refusal is improper, the correct procedure is to finish the examination for discovery, order the transcript, and bring a motion asking the court to order the question to be answered.

A third option is called taking a question “under advisement”. This allows the deponent 60 days to consider their position. It is not a refusal until after 60 days has passed and this is a useful tool to buy some time to consider the question and position.

1. *Ontario Bean Producers’ Marketing Board* v. *W.G. Thompson & Sons* (1981), 32 O.R. (2d) 69 [↑](#footnote-ref-0)