

JOURNAL ARTICLE NO. 2
EXAMINATIONS FOR DISCOVERY -
A PRACTICAL APPROACH

During our class seminar on credibility and reliability, Ron Slaght stated that many cases are won or lost on the examinations for discovery. I concur with this statement and with the level of importance which Mr. Slaght placed upon examinations for discovery. In this journal I will focus upon steps which counsel may take to adequately prepare for an examination for discovery and to prepare the witness who is to be produced on the examination.

THE PURPOSES OF DISCOVERY:

Prior to commencing preparation for examination for discovery, it is useful for counsel to focus upon the general purposes of discovery and to apply those purposes to the case at hand.

The overriding and obvious purpose of an examination for discovery is to learn about the opponent's case. In his text, *The Art of Discovery*¹, Robert White outlines and discusses the additional purposes of discovery.² These purposes include the following:

1. Counsel should use the discovery to obtain a preview of the documentary evidence available to the other side;
2. Counsel should obtain admissions which can be used as substitutions for other proof at trial;
3. Examinations for discovery may be used to commit a party or a witness to his testimony;
4. Discovery may be used to gain an understanding of the issues which the parties can agree upon and those upon which there are serious disputes; and
5. The examination for discovery may be used to obtain insight into the quality of witnesses who shall be appearing at trial.

Although it shall not be possible to accomplish all of these objectives on every examination for discovery, these objectives should be kept in mind when planning and conducting an examination for discovery. A careful review of these objectives prior to the examination for discovery may shorten the examination and should produce an examination transcript which will be useful at trial.

¹ R.B. White, *The Art of Discovery*, Canada Law Book, Aurora, Ontario, 1990.

² *Ibid.*, at p.12.

THE DOCUMENTARY EVIDENCE:

Rule 30.03(1) of The Rules of Civil Procedure requires that each party serve an affidavit of documents within ten days after the close of pleadings. Although in practice this time deadline is frequently not complied with, affidavits of documents should be exchanged as early as possible in the litigation process and well in advance of the examinations for discovery.

Prior to conducting an examination for discovery I carefully review the affidavits of documents. This review is helpful when preparing the examination for discovery to be conducted of the adverse party as it assists in shortening the examination for discovery. Documents often contain statements of admissions which would have otherwise been sought on the examination for discovery. It is necessary to consider the applicable rules of evidence to ensure that they are complied with to allow the document to be tendered as evidence at trial.

PREPARATION OF THE CLIENT:

In my view a critical and frequently overlooked factor in the discovery process is the preparation of the client for the examination for discovery. With the exception of institutional clients, most clients are unfamiliar with the discovery process. Few lay people know anything about litigation beyond what they have seen in movies, television or in the newspapers.³

As examinations for discovery occur early in the litigation process, it is imperative that the discovery is as positive an experience as possible. Failure to properly prepare a client prior to attending on the examination may have an adverse impact on the client's performance on the examination and leave the client with a negative impression of the process.

When preparing a client for an examination for discovery, I discuss with the client the purpose of the examination for discovery and what the client may expect on the examination for discovery. I try to have this discussion with the client as early as possible after the pleadings have been exchanged.

I explain to the client what is meant by discovery of documents and oral examinations for discovery. In conducting the discussion with respect to discovery of documents, I explain to the client the documents which must be included in an affidavit of documents and outline the Rules which require the production of these documents. I also discuss with clients the concept of privilege and any documents to which privilege may apply.

Prior to attending on examinations for discovery, virtually all counsel conduct some sort of meeting with their client to prepare for the oral examination. These meetings may vary from a

³ Ibid., at p.61.

brief session immediately prior to the examination for discovery to a thorough briefing which attempts to anticipate any and all questions which may be asked on the examination. In all instances, the purpose of this briefing remains to make sure that the witness is familiar with what is taking place at discovery and that they will give a good account of themselves.⁴

Although the circumstances of each case shall vary, I attempt to meet with the witness well in advance of the examination for discovery to ensure they are adequately prepared. Important issues to consider in planning a meeting to prepare a client for an examination for discovery include the following: the timing of the meeting, who should conduct the meeting and what material should be covered at the meeting.⁵

The timing of the meeting will vary according to the witness involved and the amount of material to be reviewed. In cases involving a small number of documents, such a briefing may be conducted a short period of time prior to the date scheduled for the examination for discovery.

In cases where there are numerous documents to be reviewed, or in instances where a witness is appearing on behalf of a party such as a corporation, it shall be necessary to conduct the briefing meeting well in advance of the examination for discovery. This shall afford the witness sufficient time to review the documents and also to make any necessary inquiries with respect to other potential witnesses at the corporation prior to attending on the examination for discovery. It shall then also be possible to have a follow-up briefing with the witness shortly before the date scheduled for the examination for discovery.

Whenever possible, the lawyer who shall conduct the examination for discovery should attempt to brief the witness. When conducting a briefing of a witness for an examination for discovery, I attempt to ensure that the witness understands the discovery process and is familiar with the documents which are contained in the affidavits of documents. Frequently, after meeting with a client for a few minutes, I will adjourn to my office and allow the client to take the necessary time to review and familiarize themselves with the documents contained in the affidavits of documents.

In his text on the discovery process, Robert White outlines the purposes of a discovery briefing to include the following:

1. To equip the client with such knowledge and skills as are necessary for him to participate intelligently in the discovery process;
2. To give him practice and confidence in applying skills; and

⁴ Ibid., at p.68.

⁵ Ibid., at pp.70-72.

3. To reconfirm to counsel what the witness is going to say on matters of particular complexity or consequence.⁶

It is important to focus upon these objectives when attempting to prepare a witness for an oral examination. In most cases it is not possible or practical to attempt to anticipate or ask the witness all possible questions which may be asked on the examination for discovery.

When preparing a witness for discovery, I remind the client to follow three important principles:

1. Listen to the question carefully and be responsive to the question asked;
2. Answer the question honestly; and
3. Do not guess.

It is important to remind the client to answer the question which has been asked. Frequently, clients may regard the discovery as an opportunity to tell their story and seek to do so even when this is not responsive to the question asked. It is necessary to reinforce with the client the purpose for the examination for discovery and that they need only respond to the question asked.

Although it may sound trite, counsel should review with the client the importance of being truthful on the examination for discovery. If the client demonstrates a reluctance to do so, one should consider attempting to settle the case or withdrawing from the case in accordance with the obligations set out in The Rules of Professional Conduct.

There will be occasions on an examination for discovery when a client may not remember the answer to a question posed. It is critical that the client not guess but instead respond candidly that they do not recall the answer.

When preparing a client for an examination for discovery, counsel should also discuss with the client the possibility of objections and advise the client what to do in these circumstances. I instruct my clients that when I start speaking during their examination, they must stop speaking as I am interjecting to object to a question or to the manner in which the question is being asked.

When preparing a client for an examination for discovery, I advise them there may be verbal exchanges between counsel and these exchanges may become heated. I do this in order that a client will be prepared for such exchanges and will not be disturbed or upset in the event these exchanges occur.

⁶ Ibid., at p.71.

CONCLUSION:

As in all aspects of litigation, careful preparation is of paramount importance to counsel and clients in the discovery process. When counsel is conducting this preparation, it shall be of assistance to focus upon the objectives of the examination for discovery and what may be reasonably achieved on the examination. When preparing your own client for discovery, it is important to take all necessary steps to ensure that the client understands the discovery process and is familiar with the material and documents which shall be covered on the examination. This should ensure that examinations for discovery constitute a positive experience for the client and allow counsel to achieve the stated objectives.