**Civil Litigation**

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***The Lost Art of the Discovery and How an Effective Examination Can Assist at Trial***

**Preamble**

Every litigator has their own method and style to prepare for and conduct Examinations for Discovery. In one sense, the way a litigator has been trained and / or the skills they have developed over time can be unique. Even the most experienced litigator can become complacent conducting a Discovery covering issues that they’ve seen hundreds of times over the span of their career. Cases that are “not worth much” or lack complicated issues tend to be overlooked in favour of cases that require more attention to detail and preparation.

This paper is meant to highlight effective techniques to use at a Discovery in anticipation of eventual use as Trial evidence. Rather than list all applicable *Rules*, this paper offers an overview of Discovery preparation and execution with an ultimate view to set the groundwork to present the best possible case or defence at Trial.

**Preparing for an Examination for Discovery**

Before conducting a Discovery, counsel must prepare for it. While it is obviously important for counsel to know the nature of the case, it is never too early to anticipate the use of all evidence gathered, either pre or post-discovery, at an eventual Trial. Even if the odds remain low that your claim will reach Trial, subtle changes or additions to the way by which you approach and conduct discoveries will ensure that when you do get to Trial, the majority of the evidence you need and want will be ready for presentation in a logistical manner before your trier of fact.

One of the more important but overlooked tips in preparing for a Discovery is to review the pleadings. If nothing else, this provides an excellent opportunity for counsel to “get back to basics” of the case itself. At the end of the day (or a Trial), it is the pleadings that will govern. The pleadings, especially the Statement of Claim, dictate:

* The precise relief a party is seeking through their prayer for relief;
* The specific allegations (or defences) a party is making as against an opposing party;
* Pertinent facts corroborating the circumstances and nature of the claim;
* A party’s clear cause of action or theory of defence;
* Coverage issues (if applicable);
* The relevancy parameters of future evidence.

*Evidence and Affidavits of Documents*

If you don’t already, make it a practice to request and receive all parties’ Affidavits of Documents’ productions as early as possible in advance of Discovery. Ensure that you have a proper system of document management. While this may seem obvious, ensure that you are aware of what all other parties’ evidence is and where you can locate it. Take the necessary time to review the listed documents and ensure that, before you proceed to Discovery, you have the evidence that will allow you to conduct a fulsome and productive Discovery. If you don’t have it, ask for it.

Pay particular attention to what any opposing party has listed in their clients’ Schedule “B” to their Affidavit of Documents. Ask questions about those documents. If there are Statements, request summaries. (Witness evidence is discussed below in greater detail). Ask what kind of privilege is being claimed over each document. A trial Judge will not hesitate to make a ruling about whether Schedule “B” evidence is in fact privileged. If you’re educated about those documents you will be able to better advocate for disclosure. In many instances, hastily prepared Affidavits of Documents will incorrectly attach privilege to evidence that you otherwise would be entitled to.

While this may also appear obvious, when preparing for Discovery, ask yourself what is the purpose for having included a document in a party’s Affidavit of Documents? Try and determine why you think it is relevant. Think about it from different perspectives. If you do not have the opportunity to request or receive documents and evidence that you want before Discovery, and you believe that it is important, consider adjourning the Discovery until you receive it. Alternatively, during your Discovery, make requests for the documents that you do not have but need. Be sure to reserve your right to ask further questions that may arise from the documents you do not have at the time.

One example for illustration purposes is to request a Plaintiff’s employment disciplinary file. This follows the panel’s discussion. At first instance, counsel for the party whose employment disciplinary file is being requested may wonder why such documentation is relevant. There is an element of confidentiality to it. From the requesting counsel’s perspective, those documents, if they exist, would be crucial in assessing a loss of income claim. If that employee left his or her position for reasons unrelated to what is being alleged (possibly injury), you are entitled to know that.

*Miscellaneous*

Broadly speaking, cover as many issues as you can at a Discovery. Parties’ theories of their cause of action and / or defence evolve and change as litigation develops. Circumstances change over time. The case you are dealing with at Discovery may look different by the time it reaches Trial. In anticipation of an ultimate Trial, ask opposing counsel if they’ve secured written or verbal expert reports. Ask them if they know of and / or intend to rely on any witnesses. If so, request the witness’ contact information as well as Will-Say Statements about the evidence they anticipate relying on at Trial. Remember, there is no property in a witness. There is no *Rule* requiring a party to provide co-parties with the anticipated evidence of their witness, save for an expert.

Finally, be clear on the record during Discovery. The questions that you *think* you asked, and the answers you *think* you heard, do not always translate clearly on a transcript. You do not want to find yourself reviewing transcripts in preparation for Trial only to realize that the clear evidence you thought you secured isn’t as solid as you thought. You have to assume that a trier of fact is going to hear and / or read your question and answer exchange with a witness. It’s important to be clear and fair when asking a question so that it’s introduction as evidence at Trial is as seamless as possible.

**Trial**

One basic but important point to remember is that Trial witnesses provide the oral evidence for the trier of fact and not counsel. Throughout the life of the litigation, it is crucial to assess and re-assess how your witnesses will present at Trial. Additionally, most witnesses are asked to provide evidence about documents and events from years prior. Be sure that your witness is well versed in the evidence at all times.

Preparing a witness for Discovery and ultimately Trial can require a delicate balance. Obviously, refrain from coaching a witness about what to say. A coached witness will almost always be apparent to the trier of fact. The weight given to what appears to be genuine and honest testimony is always greater than that which appears to have been manufactured.

Before allowing your witness to be examined at Discovery, or put on the stand at Trial, provide them with copies of prior Statements or Discovery Transcripts. Be sure to include copies of documentation upon which they will be questioned. Before a Discovery, take time to walk your witness through productions that they will ultimately be asked about. Make sure they are familiar with these documents. If you have multiple witnesses, be sure to prepare them separately and in isolation. As counsel, you should ensure that witnesses are comfortable with the process. Be sure to answer any questions that they may have and, for more critical witnesses, simulate your examination in-chief as well as a potential cross-examination.

*Rule 31.11 – Use of Examination for Discovery at Trial*

This *Rule* forms the most important link between Discovery and Trial. A party may read in as part of its’ own case any portions of the Discovery evidence of an adverse party if that evidence would otherwise be admissible, whether the party or other person has already given evidence or not. *Rule 31.11* addresses the use of Discovery evidence at Trial.

While an examining party can illicit the information and belief of an examinee at Discovery, when at Trial, the examiner is restricted to reading into the record parts of the Discovery that would be otherwise admissible under the rules of evidence. Counsel should carefully demark the portion of the transcripts to indicate which questions and answers are to be read-in. A list of this should be prepared and shared with opposing counsel and the Trial Judge. This should be shared in advance and counsel should avoid any attempts to misrepresent the evidence. This is another reason why securing clear questions and answers on the record at Discovery is crucial.

It is important to know that where counsel seek to use Discovery evidence to impeach the testimony of the deponent while as a witness at Trial, counsel is required to bring the Discovery evidence to the witness’ attention before putting it into evidence.

*Order to Examine a Witness before Trial*

One “trick” that is often overlooked is that available through *Rule 36*. It provides that, with leave of the Court or on consent, a party who intends to introduce the evidence of a person at Trial may examine that person before Trial in order to tender that testimony at Trial. The purpose of the *Rule* is to preserve evidence so that it will be available if necessary at the time of trial. Even if the Order to take the evidence before Trial is granted, the Trial Judge retains discretion to admit or refuse to admit evidence taken in advance of Trial, particularly if the witness is available to testify *viva voce*.

What makes this option useful is that the witness may be examined, cross-examined and re-examined in the same matter as a witness at Trial. It should be video-taped. It is unlikely to secure an Order to examine a party who has already been examined for Discovery. Once this evidence is obtained, it is subject to the same undertakings regarding use outside of the action in the same way that Discovery evidence is.

*Cross-Examination and Impeachment*

Counsel who wish to cross-examine a witness at Trial must give serious thought to what they want to accomplish. Without cross-examination, opposing counsel will argue to the trier of fact that the evidence should be accepted. Obviously, the rule in *Brown v. Dunn* requires that contradictory evidence be put to a witness. Counsel should put contradictory evidence to a witness and ask if, independent of that evidence, if they adhere to the testimony. Other tricks during cross-examination, especially without contradictory evidence, is to attack a witness’ memory, powers of observation, potential interest and possible contradictions in the witness’ own testimony. These are all allowable at Discovery if relevant and with proper foundation. Where possible, devote a section of your Discovery to this so that it appears at the same part and in the same context on a Transcript.

*Rule 31.11(2)* allows for Discovery evidence to be used for the purpose of impeaching the testimony of the deponent as a witness in the same manner as any previous inconsistent statement by that witness.

If counsel has a Statement or prior Discovery evidence of a witness, it’s critical that they know it well. It is also important that they take detailed notes during Trial, in the absence of Trial transcripts, which can be costly. One useful tactic to consider with a Trial witness is to put to that witness the exact same question asked of them at Discovery but without reference to the Discovery. If that witness gave consistent evidence during their examination in chief and a clear contradiction arises from the Discovery evidence, the witness would essentially be cornered without any reasonable way to explain the differences.

While counsel should continuously assess the credibility of their clients and witnesses, it is important to keep in mind that you can ask cross-examining questions during Discovery, unless the question is directed solely to the witness’ credibility. This is dealt with under *Rule 31.06(1)*. This certainly does not preclude counsel from making their own observations about the credibility of a witness throughout a Discovery. Reading body language is one way to assess credibility without saying a word.