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Advocacy

Questioning (for Discovery)

Questioning For Discovery

- Potentially more important than the trial itself
- Hear the other side of the story
- Narrow down the issues in dispute
- Certain issues will show themselves as being more or less significant
- Those shown to be less significant can likely be discarded
- Get to go fishing to isolate the true issues in dispute

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- You will be able to see firsthand what type of witness your client and the other side are “under fire”
- How do the main antagonists react under pressure?
- The transcript can only be used at trial by the side questioning
- Since they can’t be used by the other side, you can:
  - Ask the question “Why?”
  - Ask open questions
  - Ask questions you don’t know the answer to
  - Ask questions where the answer may hurt your case if the same question were asked at trial
- Questioning is where you get to flesh out and refine your factor analysis
- Prelude to settlement
  - If enough bad answers are given
  - If your client won’t be persuasive or credible
  - If it’s clear your case is a loser

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Use at trial

- Impeach a witness
  - Prior inconsistent statement
- To be a “read-in” for the Plaintiff
  - Admissions against interest

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Mechanics

- Who:
  - Usually the litigant, unless a corporation, then corporate representative
  - Can also be a litigation representative in certain cases
  - Court reporter
    - Transcribes the questioning
    - Licensed to administer oaths
    - Not a judge – won't deal with objections
    - Order the transcripts directly from the Court Reporting agency
- Where:
  - At a lawyer's office, in a boardroom
- When:
  - As agreed on by the parties, or as scheduled in a Notice of Appointment (Form 29)

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Preparing for Questioning

- Rules 5.2-5.33: Read them

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) To significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

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1) Review the Pleadings

- Make sure the pleadings are reflective of the issues as you have identified them through your investigative work and briefing of the law
  - Scope of questioning is based on the facts set out in the pleadings
  - Amend your pleadings if necessary in order to ensure that you can ask the "relevant" questions
- Know who you will be questioning
  - Corporate representative
    - Must confirm that they are being produced as the corporate representative and that their answers bind the corporate Defendant
      - Otherwise they are just an employee and their answers are their own

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2) Review your brief of the law

- Ensure that you pick out the necessary elements to be proven based on what the Court as required as evidence for favorable findings in similar cases
- Get/do research on any new issues that you discover as you get into the case

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3) Review all documents produced by both sides

- Affidavit of Records
- Ask yourself:
  - Who wrote it
  - What is its significance
  - Is there anything I need to know further
  - Does it reference other documents
    - Were they disclosed?
  - What else is missing?

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4) Review your Factor List

- Update the factor list
  - This is the first time you will have reviewed everything all at once
- Allows you to focus in on the issues and prepare accordingly
- Do the same for both sides

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Prepare your Client for Questioning

- Explain the overall process
  - Where it will take place
  - Who will be there
  - Under oath - sworn or affirm?
  - The use of the transcript
- Most people will try to “fix” their story to fit their understanding of the issues
  - You must be certain they are satisfied with the “correctness” of their story
  - Hard to change tunes later
  - Critical for credibility assessment

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Preparing the Client

- Explain the role of the Court reporter
  - Only private reporters for civil litigation
- Clean transcript
  - Wait for the entire question before answering and vice-versa
  - Spell names
  - Clearly enunciate amounts or figures
  - Clear “Yes” or “No”
  - mhmm is ambiguous
  - Court reporter can’t record gestures
- Questioning lawyer can put the gesture on the record: “For the record the witness is nodding his head “yes””
- Interpreters must answer in the first person and must be sworn in
- Only go off the record if both sides agree (rule is more honoured in its breach)
- Be very considerate to the Court reporter

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Preparing the Client

- Explain your theory of the case and therefore, what each side will be trying to achieve through the QFD process - namely - trying to pin down the other side to a certain story, or, trying to get admissions so that the facts fit their theory

- Get your clients thoughts on your theory of the case
  - If you are on the wrong track, then refine your theory
  - Or, get your client to understand why their focus is actually on an irrelevant tangent

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Preparing the Client

- Review the pleadings with your client so they understand the allegations and defence
- If there are calculations of damages, the client has to know how they came to be as they will be asked about them
- If information is learned from documents, you must walk the client through the documents so that they know where the information has come from
  - Most clients say they will read the documents, but don't. It's your job to be familiar with every piece of paper so you can point out the important ones

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Preparing the Client

- Ideally, your client will give short, clear, to the point answers that only answer the question that is asked
  - Never happens
- Survival Methodology for witnesses:
  - Did I hear the whole question?
  - Do I understand the question?
  - Can I answer the question?
  - What am I going to say?
- Don’t volunteer anything
- Obligation is only to answer the question asked, not to fill in the blanks - if counsel can’t ask the correct questions, you have no duty to set them straight
- Confusion will only work in your favor

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Preparing the Client

- Tell your client to keep their cool
- Tell your client about the other lawyer
  - What are they like
  - Aggressive? ODD? Sloppy?
  - Good opportunity to assess opposing counsel
- I don't remember
  - Perfectly legitimate answer
  - Suspicious if people know things cold
- No good can come from guessing or assuming

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Preparing the Client
Undertakings

- Undertakings: an obligation to produce further information or documents not yet produced or answered
  - Can be very effective at getting further documents that may have been overlooked by the parties
  - Can ask for answers from other witness's that are in the care and control of the witness who is testifying
    - Employee, e.g.
  - Can be a burden
  - If request is for a **third party to produce records**, like updated medical records from a physician, then take it **under advisement**
  - Under advisement means that you may have an objection to producing the record, but you can't think of it at the moment.

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Preparing the Client

- Interruptions
  - Advise the client that you will only interrupt if a question is improper or if you have to consider it
  - You will put up your hand which is a signal to the client to STOP TALKING
  - The lawyers will then hash it out until you give your client instructions to continue

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- NB: Once your client is being questioned (or cross-examined) you are not allowed to have any discussion about their evidence
- - If you determine that your client does not understand a question, then you can intervene (especially if they are asked more than one question), but be careful as you may only be helping the other lawyer get a clean transcript

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Techniques: What lawyers do to get their answers

- 1) Intimidation: go straight to the key issues and hammer them on them
- 2) appear incompetent or unprepared in order to disarm the other side
- 3) be honest and charismatic and try to win the other side over with congenial conversation

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- Demeanor
  - Often best to establish rapport with witnesses early on
  - “I’m going to ask you some questions, if you don’t understand a question, please let me know and I’ll explain it, if you don’t hear me, please ask me to repeat myself - if you don’t interrupt, I’ll assume you have heard me and understand the question, ok?”

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Theatrics rarely pay

- If the other counsel is rude, object
  - Get it on the record
  - If it continues take a coffee break - time heals all wounds
- Don’t be a %$#@

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- Ask short, clear questions - break your questions into small components
  - Leads to clearer response

- Don’t repeat the witnesses answer as part of your next question unless it is the only way to get the question out
  - It confuses the witness
  - Adds needlessly to the length and expense of the transcript
  - Potentially takes away from the previous response
  - Gives the witness an opportunity to change their evidence

- Allowed both open and closed, leading questions
  - But, keep in mind that credibility is NOT a permitted area of questioning at Questioning

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Logical Sequence vs. Skipping

- Normally, it's best to ask questions in a logical, chronological sequence

But…

- Sometimes its very effective to use the skipping technique, especially to surprise the witness
  - People expect a logical sequence of questions
  - Especially effective with a rehearsed witness
  - Break through the protection of preparation

- Careful with the skipping technique as you can lose your place
- Either way, you have to be thorough!

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Go with the flow

- Don’t hesitate to “go with the flow” and change direction depending on where the witness takes you
  - Must listen carefully to the answers given
  - Follow up on hunches
  - Get detail
  - Pin the other side down

- No bad question as the transcript is only yours
  - …unless the Witness dies…
  - Ask away, even if you don’t know the answer
- It’s better to learn bad facts at discovery then learn them at trial!

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Exhibits

- Mark documents referred to by witnesses
  - Makes use at trial much easier
  - Stay organized
  - Folder or binder
    - Can create a “Questioning Book” just like a trial book
      - Pleadings
      - Key Documents
      - Factor analysis
    - Remember though, trying to get information, not whittle it down

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Ending the Questioning

- Don’t let the other lawyer try to “adjourn” the questioning
  - Silly trick to suggest that they can then reconvene
  - Ensure that they end their questioning subject to any objections and anything arising from answers to undertakings

- Questioning on Undertakings
- Scope is limited to the answers and documents given in Undertakings

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Objections

- Relevance
- Privilege
- Confusion
- Repetition
- Inadequate foundation
- Compound question
  - Though I think this can be worse for the party conducting the questioning than the witness

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Pointers and Tips and Such

- When starting the questioning, confirm the witness's role in the lawsuit:
  - "Ms. Smith, please confirm that you are the Defendant in Action 1403 93321?"
- If you get a good admission move on to something else!
  - This is true for trial as well
- Be clear, ask simple questions and avoid $50 words

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Debrief your Client

- Report to them after the questioning
  - What did you accomplish
  - What did they do well
  - What risks are there for each side as a result of the testimony
  - Review possible settlement opportunities
- This is also your opportunity to build out your Factor list

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Read ins

- Evidence of the Defendant to be used against the Defendant
  - Incredibly powerful
  - Equally dangerous
    - Whatever is read in becomes part of your case
  - If you read in a denial, then you accept that denial as the truth and part of your case
- Admission is only admissible against the party who made it (rather than against all parties)
  - If against a corporation, can only use the corporate representative's evidence against the corporation
    - Can't use an employee's admission, e.g.
  - As against the other defendants, the read in is hearsay
  - There is authority in Alberta: If you need the evidence of one defendant in order to prove your claim against another defendant, you must get admissions from each of them, as you cannot use read-ins of one against the other.
- Exceptions
  - If the admitting defendant otherwise has authority to bind the other defendant
    - Agency, conspiracy (if otherwise proven first), possibly employment

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Case Law

- “However, at least one of the discovery answers read in is to the same effect as the same witness’ trial evidence. And it is well settled that reading in a discovery answer makes it part of the evidence at trial of the truth of its contents. Read-ins cannot be used as a method of making the trial judge disbelieve the witness whose answer is read in, and indeed have much the opposite net effect.”

- *Tschritter v. Otto*, 2007 **ABCA** 415

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- [15] It has long been the law of Alberta that when a party reads in extracts from an examination for discovery of an opponent, that becomes evidence which he adopts but he must take both the benefit and the burden, if any, of that evidence. (See Hayhurst v. Innisfail Motors (1935) 1935 CanLII 237 (AB CA), 1 W.W.R. 385; Carter v. Ferguson (1943) 2 W.W.R. 38; Stevenson & Coté on Civil Procedure 1992, p. 645). **However, where, as here, the parties also give evidence at trial, the trial judge is free, as he was here, to exercise his normal function of assessing credibility, finding facts, and reaching conclusions from all the evidence, and is not bound to accept those discovery extracts read in** (Ure v. Fagnan (1957) 1957 CanLII 440 (AB CA), 22 W.W.R. 289 at 308-9; 1958 CanLII 47 (SCC), [1958] S.C.R. 377).
- *Mackow v. Sood*, 1993 **ABCA** 152

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[82] It is well known that care must be taken in reading in the evidence of a party adverse in interest. The read-ins become evidence of the party entering them, making it difficult for that party to challenge or contradict them. Reading in an answer that is contrary to a necessary component of the case can be fatal. Nevertheless, there is a clear distinction between “evidence” and “admissions”. Admissions can be made in pleadings, or in agreed statements of fact. They can also be made during questioning, but the answers given at questioning are presumed to be evidence only, and not “admissions”, unless they are clearly stated to be such on the record. As a general rule, read-ins are simply evidence, and must be weighed by the trial judge along with all the other evidence.

[83] This principle is confirmed by the text of R. 5.31, which refers to the read-ins as “evidence” at the trial. The law was summarized in 58l257Alberta Ltd vAujla, 2011 ABQB 39 at para. 12, 507 AR 315,49 Alta LR (5th) 398:

> Examination for discovery evidence adopted by a party at trial is like any other evidence. It may be contradicted or qualified by other evidence led by either of the parties and the court may assess its value in the context of all of the evidence presented on the issue. **It does not become conclusive evidence when it is read in and the court is not bound to accept and follow it any more than it would in terms of other evidence.**

This summary of the law was based on binding authority: Michel v Lafrentz, 1999 ABCA 21 at para. 14, 232 AR 62; Mackow v Sood (1993), 141 AR 233 at para. 15 (CA). It follows that the entry of the read-ins did not preclude the trial judge from weighing all of the evidence on the record before making his findings of fact.*Mackow v. Sood*, 1993 **ABCA** 152

Abt Estate v Cold Lake Industrial Park GP Ltd, 2019 ABCA 16

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Objections to read ins

- If a read in includes only part of a witness's evidence on a specific point, you can tender the continuation of that portion of questioning or other portions that touch on that specific line of questioning.

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Implied Undertaking

Rules of Court

Confidentiality and use of information

5.33(1) The information and records described in subrule (2) must be treated as confidential and may only be used by the recipient of the information or record for the purpose of carrying on the action in which the information or record was provided or disclosed unless

(a) the Court otherwise orders,

(b) the parties otherwise agree, or

(c) otherwise required or permitted by law.

(2) For the purposes of subrule (1) the information and records are:

(a) information provided or disclosed by one party to another in an affidavit served under this Division;

(b) information provided or disclosed by one party to another in a recordreferred to in an affidavit served under this Division;

(c) information recorded in a transcript of questioning made or in answers to written questions given under this Division.

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Implied Undertaking of Confidentiality

Wirth Ltd. v. Acadia Pipe & Supply Corp., 1991 CanLII 5837

- It is within the court's inherent jurisdiction to control its own practice: Ed Miller Sales (Q.B.), supra, Wachowich J., at p. 301; Grant v. Monsanto Can. Ltd., supra, at p. 166. It is my view that the law in Alberta does recognize the implied undertaking. Further, in keeping with the broadening right of the discovery process, this implied undertaking confines **all information arising from the discovery process**, whether it is oral or documentary evidence, to the lawsuit at hand. **The undertaking by the solicitor and the parties is to maintain all information confidential in that it is not to be used for any collateral, ulterior or improper purpose**. The purpose of the implied undertaking "is **to ensure full and complete disclosure while maintaining the confidentiality of a private process"**: 755568 Ont. Ltd., supra [p. 654]. The following principles are summarized from the cases, and set out below as being applicable in Alberta:

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- 1. The implied undertaking which is to the court, attaches to all discovery information whether obtained orally or in the form of documents: Lubrizol Corp., supra.

- 2. Additionally, a non-disclosure order may be sought from the court in cases where there are special circumstances, such as patent processes, trade mark rights, sensitive or personal information, or in highly competitive industries: Grant, supra; Big Country Gas Co-op., supra; Ed Miller Sales, supra; Vlchek, supra; Crawford v. G.D. Searle & Co. of Can., supra. In these cases, a specific order could be sought to have the information sealed. The test for this non-disclosure order is that of a "real risk": Can. Commercial Bank, supra, at p. 208; Church of Scientology of California, supra.

- 3. There is also a right to apply to the court to remove the document or other evidence in whole or in part from the implied undertaking or sealing order for use in other proceedings. For example, to test the credibility of a witness where that witness has testified before in a proceeding in respect of the same subject matter and it can be shown that the evidence in this proceeding is or appears to be contrary thereto: see Alberta Evidence Act, R.S.A. 1980, c. A-21, ss. 1(c) and 26. Such application would also cover the possible situation where the discovery discloses fraudulent or criminal conduct. However, notably, "The public interest in investigating possible crimes is not per se a sufficient ground to relieve counsel of his or her implied undertaking to keep such information private": 755568 Ont. Ltd., supra [p. 655]. See also EMI Records Ltd. v. Spillane, [1986] 1 W.L.R. 967, [1986] 2 All E.R. 1016 (Ch. D.).

- 4. Counsel, as officers of the court, have a duty not to disclose or use oral evidence or documents outside the subject proceedings, so as to, at all times, honour the implied undertaking.

- 5. Counsel, as officers of the court who are not directly involved or involved at all in the proceeding have a similar obligation.

- 6. So as to not devalue the implied undertaking and in special circumstances, transcripts and copies of documents may be made available to parties outside the proceedings only with leave of the court. Without leave, no use shall be made of the same by any person who by the discovery or trial process comes into such information or documents.

- 7. The implied undertaking and non-disclosure orders continue after the use of the information in court and thereafter except with leave of the court.

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Exception (sort of)

Use of transcript and answers to written questions

5.31(1) Subject to rule 5.29 [*Acknowledgment of corporate witness's evidence*], a party may use in support of an application or proceeding or at trial as against a party adverse in interest any of the evidence of that other party in a transcript of questioning under rule 5.17 [*People who can be questioned*] or 5.18 [Persons providing services to a corporation] and any of the evidence in the answers of that other party to written questions under rule 5.28 [*Written questions*].

(2) Evidence referred to in subrule (1) is evidence only of the questioning party who uses the transcript evidence or the answers to the written questions, and is evidence only against the party who was questioned.

(3) If only a portion of a transcript or a portion of the answers to the written questions is used, the Court may, on application, direct that all or each other portion of the transcript or answers also be used if all or any other portion is so connected with the portion used that it would or might be misleading not to use all or any other portions of the transcript or other answers.

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Questioning on Affidavit

- True cross-examination
  - Just like trial evidence
  - Allowed leading questions
  - Entire transcript gets filed with the court
  - Both sides can use any or all of the transcript

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