




Preparing Yourself for Discovery

CBA IP 2012 Spring Advocacy Program

Andrew M. Shaughnessy

Thursday, May 17, 2012



Conducting an effective discovery requires ***rigorous preparation*** and ***practice***, and is an ***essential skill*** for all litigators.

John Cotter, Chair

Allarco Broadcasting Limited v. Duke
(1981), 34 B.C.L.R. 7 (B.C.S.C.)

- Unfortunately, it has become the practice ... for counsel to indulge themselves in interminable examinations before they decide what the case is about. It has become, in many cases, a learning experience for counsel about the case in which he is engaged ... Often transcripts of interminable examinations for discovery are never looked at during the trial.

- ***McEachern C.J.S.C.***

- ... This case does ... afford me an opportunity to express the concern ... about the increasing length of examinations for discovery, and the apparent failure of some counsel to recognize that in many cases — particularly cases where the documents tell the story — that much of what is done on discovery is unnecessary, and will not be useful upon the trial.

- ***McEachern C.J.S.C.***

- “A variety of factors contribute to unduly long examinations for discovery, including lack of preparation or experience on the part of counsel, irrelevant or repetitious questions or, in some cases, lawyers' billing targets.”
 - *Civil Justice Reform Project, Honourable Coulter A. Osborne, Q.C., 2007*

- “Many with whom I met expressed similar concerns about oral discoveries being fishing expeditions, unfocused or conducted by poorly prepared counsel who are unduly concerned about overlooking potential facts and issues.”
 - *Civil Justice Reform Project, Honourable Coulter A. Osborne, Q.C., 2007*

- The 2003 Discovery Task Force identified the issues:
 - > narrow the scope of discovery;
 - > duration of oral examinations should be limited;
 - > should refusals based on relevance be permitted; and
 - > should discovery planning be a requirement under the rules to promote more efficient discovery management.
- ***Civil Justice Reform Project, Honourable Coulter A. Osborne, Q.C., 2007***

- Before starting on your examination for discovery, consider the use to which you will put the discovery transcript at trial.
- Focus on:
 - > tight, crisp admissions;
 - > keeping the transcript in a usable form;
 - > having the transcript available for impeachment and keeping a party on the straight and narrow; and
 - > keeping the volume of paper to a minimum.

Planning is the key

TORYS
LLP



1. **Learning:** to “discover” your opponent’s case; to obtain production of additional material.
2. **Pin them down:** to commit a party to a fact or position.
3. **Tactical:** to obtain admissions for trial (or SJ).
4. **Foster settlement:** to narrow and clarify the issues.

- Know your case theory.
- Know the facts that you need to prove at trial.
- Know the facts that the other side will need to prove at trial.
- Know the pleadings: is an amendment required?
- Know the documents that you and the other side will need.
- Consider admissibility (or inadmissibility) of documents as the case may be.

- Consider retaining an expert witness to assist you in ensuring all technical issues are canvassed.
- Prepare event chronology to assist you in keeping it straight.
- Have a plan in place to prepare your discovery witness:
 - > review purpose;
 - > review issues;
 - > review areas of likely examination; and
 - > has the witness become fully informed?
- Consider who should be discovered first.

- Prioritize your issues.
- Determine your goal:
 - > “get in; get out”?
 - > scorched earth?
- Anticipate objections on both sides:
 - relevance;
 - privilege; and
 - practice what you will say on the record.

- When reviewing topics, prepare for “exhausting” all information on a topic.
 - who, what when, where, why.
 - get the good and the bad out.
- Practice using open-ended questions.
- Think early about developing a useable record:
 - short, clean questions;
 - avoid debates on the record; and
 - one fact per question.

- Have a system that permits you to listen to the witness, jot notes and loop back.
- Get ready for aggression:
 - don't take the hook.
- Book the examination.
- Prepare and serve a Direction to Attend (Notice of Examination)?

- Make sure the client is aware of the anticipated cost and scope of discovery.
- Think of discovery at the pleadings stage.
- Hold a discovery conference with your opponent to discuss most expeditious and cost effective means to complete the discovery process.
- Consider carefully your approach to refusals.

TORYS
LLP

www.torys.com

Toronto
New York
Calgary

416.865.0040
212.880.6000
403.776.3700