

WINNING DISCOVERY

OBA Civil Litigation Section
Sunrise Series
November 14, 2012

Barry Weintraub, Rueter Scargall Bennett LLP
Ryan A. Morris, Blake, Cassels & Graydon LLP



Purpose of Discovery

- Find out what you do not know
- Lock-in admissions on the record
- Commit witness to positions
- Test theories
- Evaluate the witness



Use of Discovery Transcript

- At trial:
 - Admissions to read in at trial
 - Basis for cross-examination at trial (impeachment)
- Drive settlement:
 - Draw out weaknesses in opponent's case
 - Assess strengths and weaknesses of your case
- Basis for full or partial summary judgment



Be Conscious of the Transcript

- Use precise language; avoid pronouns and shorthand references
- Use key words that can be searched later
- Use headlines to denote topic areas (now let's discuss...)
- Keep admissions succinct; repeat if necessary; you want sound bites!
- Ensure that documents can be identified



Demeanour

- Be polite
- Make the witness like (or at least respect) you
- Encourage the witness to talk
- Be aware of the stress in the room
- Minimize arguing between counsel
- “You catch more bees with honey...”
- Control the examination: breaks, pace, going off record



When to Refuse

- Evidence would be inadmissible
 - Solicitor-client, litigation or without prejudice privilege
 - Relevant to credibility only
- Information sought is not relevant to any matter in issue
 - Determined by the pleadings and matters put in issue by evidence
 - “That which tends to make a finding of a disputed fact or issue more or less likely”
 - Must also be proportional



When to Refuse (cont'd)

- Improper form of question
 - No foundation (misstated evidence; false premises)
 - Compound or confusing question
 - Calls for guess or speculation
- Questions outside agreed-upon scope of attendance
- Questions already asked and answered



Common but Improper Refusals

- Hypothetical question (where relevant)
- Questions requiring expertise (where expertise exists)
- Fishing expedition
- Documents speak for themselves
- “Make your own inquiries”
- Facts relied upon in support of allegations



How to Make Refusals

- Promptly and only when necessary
- Politely
- Reasonably
- Succinctly state basis for refusal
- Minimize argument on record



How to Respond to Refusals

- Confirm basis for refusal
- Overcome refusal if possible (re-phrase, contextualize)

OR

- Concisely state basis for requiring answer

BUT

- Minimize argument on the record
- Consider returning to topic area later in the examination



Undertakings

- Undertakings obligate witness to answer
 - Be sure to qualify if necessary (best efforts; if information exists; agree to make inquiry)
- Counsel, not witness, should control undertakings
- Advisement becomes a refusal if not answered in 60 days (r. 31.07)
 - BUT signals to court that even you are not sure a refusal is proper
- When examining, seek timeline for response
- Ongoing duty to correct answers and provide information subsequently obtained (r. 31.09)



Checklist of Recommended Questions

- Legal positions
- Authenticity of documents
- Information of witnesses other than the discovery witness
- Pleadings; facts relied upon in support of pleadings
- Expert findings, opinions, conclusions, drafts & reports
- Insurance policies



Preparing Your Witness for Discovery

- Ensure that witness has reviewed all documents (or, in bigger cases, key documents)
 - Representative witness obliged to inform him/herself
- Explain the discovery process
- Explain the rules for answering questions:
 - Tell the truth; answer only question asked; do not speculate; break down compound questions; ask for clarification
- Review evidence (consider practice examination)



Preparing for Discovery

- Know the theory of your case
- Know the themes of your case
- Know all of the documents
- Prepare a list of attainable admissions
- Prepare outline of topic areas to cover



WINNING DISCOVERY

OBA Civil Litigation Section
Sunrise Series
November 14, 2012

Barry Weintraub, Rueter Scargall Bennett LLP
Ryan A. Morris, Blake, Cassels & Graydon LLP

