Anatomy of an examination for discovery

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I have reached that stage in my career where I am no longer junior counsel (but am certainly not senior). The first tell-tale sign was that other lawyers occasionally ask me for advice. Many of these questions are about examinations for discovery.

Discoveries are a building block of any case and of any aspiring civil litigator's professional development. They are the essential pre-trial determinant of the evidence and can make or break a case.

This article is not intended to be either a comprehensive how-to guide on examinations for discovery or a detailed examination of any one aspect of a discovery. Rather, it is a collection of my observations gleaned from doing discoveries and watching others do them. It is what I would tell those lawyers who ask me questions about doing a discovery.

The basics: Purpose and use of the discovery transcript

Most people will tell you the purpose of the discovery is to

- understand the other side's case; and
- obtain admissions to help your own case.

Essential to understanding these purposes is understanding how an examination for discovery transcript can be used at trial (or on a motion). The transcript of an adverse party can be used

- as part of a motion (for example, a summary judgment motion);
- at trial, as part of a cross-examination of an adverse party; or
- at trial, "read in" as part of a party's case.

Unlike a cross-examination transcript, an examination for discovery transcript cannot be used by the party being examined (see Rule 31.11 on trial and Rule 39.04(1) on motions).

What this means is that a party examining on an examination for discovery has the freedom to ask whatever questions it wants without fear that unhelpful answers will subsequently be used by the party being examined.[1]

The old cross-examination adage to "never ask a question you don't know the answer to" very much does *not* apply to discoveries. This procedure is, as its name suggests, a process of discovery where you should be finding out the answers so that, when it does come time for cross-examination, you know what the answers will be.

Preparation: Mastery of the documents

When doing my first discoveries, I was told that the most important thing was a mastery of the documents and an understanding of the case. Especially in a document-heavy case, understanding the documents and having them at your fingertips will allow you to stay one step ahead of the witness, confront a witness with inconsistencies and control the examination.

Mastery of the file will also allow you to ask questions without being wedded to a script. It allows you to complete the discovery quickly and efficiently and without time wasted reviewing or looking for documents.

Preparation for discovery should also involve taking a step back and looking at your theory of the case. What are the themes you want to establish? What is the evidence you need to support these themes and the narrative you want to establish?

It's never too early to look at case law dealing with similar situations. Doing so will often give you ideas about the evidence that can be used to support your theory of the case.

Have a script and don't stick to it

It is helpful to have an outline of the questions you want to ask. This outline can be more or less detailed according to the type of case and your comfort level. But no matter how detailed the script, don't follow it slavishly. An examination for discovery is just as much about listening as it is about talking. Listen carefully to the witness's answers and ask questions that explore and probe the evidence being provided. Don't hesitate to ask questions in a different order than you had planned.

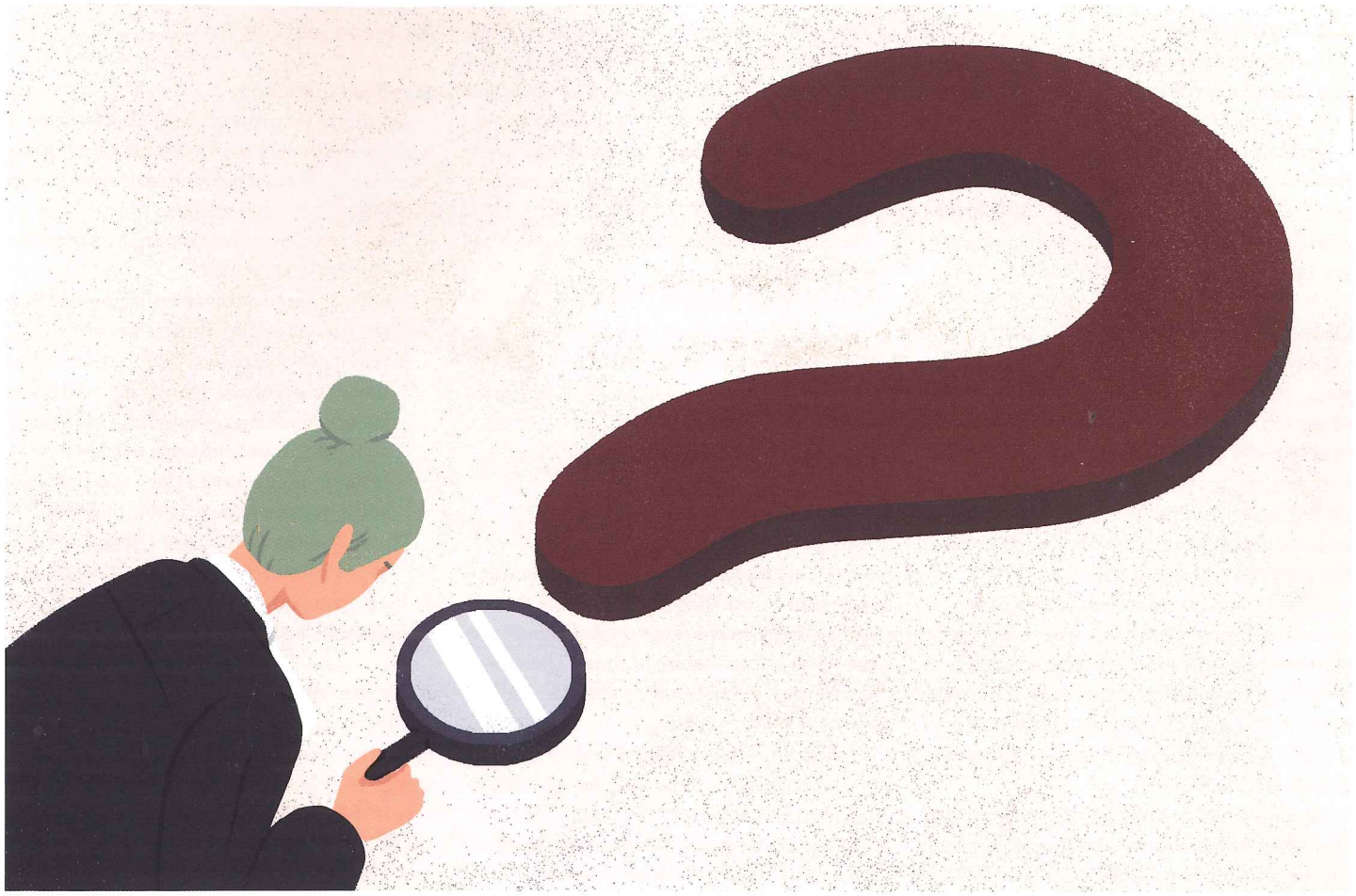
Creativity and curiosity

Creativity and curiosity are important elements of a successful discovery.

On an examination for discovery, the sky is the limit. Ask whatever questions you think will help build your case and look around every corner for helpful information. The other side will tell you that it is a fishing expedition. The good news is that sometimes a fishing expedition results in a large catch.

Creativity is important because it is through an examination for discovery that you are crafting the foundations of your case. Creativity extends to the small details that may seem unimportant but can in fact be quite persuasive when woven into the narrative of the story you want to tell.

Curiosity is also essential. In many, many discoveries, the person you are examining will be an expert in the area they are being examined on. By "expert" I do not just mean an expert in the sense of professional expertise in an area such as medicine or accounting, but also an expert in whatever the person's job or role in the case is – maintenance, politics or whatever the case may be. An attitude of genuine interest and curiosity in what you are asking about will disarm the witness and, hopefully, provide you with a useful education on the area you are examining on.



Demeanour

One of the great things about litigation is that there really is no template for what makes a great litigator. There are a multitude of different styles of examination, all of which can be equally effective. As trite as it sounds, in conducting an examination you really should just "be yourself" and find out what works for you.

A slow, soft-spoken, plodding, methodical examination can be just as effective as an aggressive rapid-fire cross-examination. It all depends on the examiner and what the examination at hand calls for.

This brings me to my next piece of advice: tailoring your examination style to the witness and content. One of the best pieces of advice about handling witnesses (and the practice of law generally) I ever received is to use the metaphor of a toolbox. A lawyer needs to have a complete toolbox of approaches and needs to select the right tool for the right witness. (Thanks to Stanley Tick for this tip.) Sometimes you have to be tough; sometimes you have to be gentle. An aggressive examination with some witnesses will be utterly counter-productive – or, as Tom Curry put it in a recent podcast, not every examination should be an "exercise in hostility."[2]

Cross-examination is okay

Cross-examining at an examination for discovery is allowed and, in my opinion, very important.

I have had numerous counsel object to questioning on the basis that it constituted cross-examination. This is not a proper objection. Rule 31.06 specifically provides that

> 31.06 … no question may be objected to on the ground that, …
>
> (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness;

Don't accept non-answers

If a witness does not answer the question, don't hesitate to repeat or reword the question. Say something like, "no, that wasn't my question," or "perhaps I didn't make my question clear; my question is …" In many cases a non-answer is given because the actual answer is exactly the answer you want. Non-answers are frequently a sign that you are on to something, so keep driving at the answer. Break down, simplify or reword the question, but don't shy away from pushing until you receive a responsive answer or a refusal.

And, in my view, an objection that the question has been "asked and answered" is not valid unless the witness has actually answered the question you asked.

Close off lines of questioning

Make sure to close off lines of questioning so that the answer will stick later. For example, where there is an allegation that your client was terminated for dishonesty and the answer to what evidence there is to support the allegation is "he took a break without logging it in," confirm that this evidence is all the opposing party has to support the allegation of dishonesty to prevent further allegations being added later.

Questions along these lines are helpful:

Q. What evidence do you have that Mr. Smith solicited your client?

A. The client ended up with his company.

Q. Is there anything else?

A. There may be.

Q. But sitting here today, you can't think of a single other thing?

A. Not right now.

Most counsel will jump in and say, "if there's anything else we will advise prior to trial." But the fact that the witness couldn't recall anything during the discovery speaks for itself.

Objections and refusals

Where opposing counsel refuses one of your questions, listen to and consider the objection. See if you can reword the question to meet the objection.

If you can't, make sure the refusal is clear on the record and move on. There is no point in arguing at length on the record about the propriety of the question.

When your client is being examined, if you are going to object to a question briefly state that the question is being refused and why. You can also take the question under advisement and determine later (within 60 days) whether you will answer the question (see Rule 31.07(1)).

Be restrained in objecting to questions. If the other side is asking about it, it is probably because it is relevant. Unless there is a very good reason not to, simply letting the witness answer will save time and will prevent motions, re-attendances and work back at the office chasing down answers. If you do object and counsel provides a satisfactory explanation for why the question is proper, let the witness answer.

Dealing with difficult counsel

The bane of many junior (and senior) litigators' discovery experiences is the difficult or excessively aggressive counsel. This is someone you'll definitely encounter from time to time.

If counsel repeatedly interjects, object to the counsel answering and ask that the witness answer the question. Counsel are entitled to refuse questions, but they are not entitled to answer a question on behalf of a witness where there is an objection (Rule 31.08).

If opposing counsel raises his or her voice, stay calm. This *will* happen to you at some point, and it is not because of anything you did. "Please stop shouting" or "please don't raise your voice" will usually do the trick and will make opposing counsel's conduct clear on the record.

Most importantly, don't let objections or rudeness change your game plan. If you believe a certain line of questioning is proper or relevant, it probably is. Aggression from the other side should not stop you from pursuing it. There is no way to stop the examiner from asking the questions (although some counsel will certainly try – it never ends well), so put the questions on the record.

Here are a few standard responses that may be helpful:

"I have your position."

"I'm asking the questions right now. You will have a chance to do so."

"I'm not going to argue this issue on the record."

"Please show respect to the witness."

Getting the right documents

The majority of cases include documents that have not been produced which are potentially relevant to the dispute. Think about and explore with the witness what documents exist – and ask for copies of them. These documents may include phone records, emails and social media postings.

Most companies and public institutions have a large number of policies giving direction to employees and others. These are often a good source of information regarding appropriate practices and standards. Getting copies will allow you to determine whether applicable policies were followed (spoiler alert: they often aren't). If a witness doesn't know what policies exist, ask for an index or list.

Standard questions

At the beginning of most discoveries, I will generally ask for a CV and a few questions about the witnesses' educational and professional background.

There are four questions that I ask at the end of most discoveries:

1. Do you have any expert opinions?
2. Do you have any surveillance?
3. May I please have a list of persons who may have knowledge of the matters at issue in this litigation and a summary of the substance of their evidence?[3]. Is there an insurance policy that may cover the matters at issue in this litigation?

The response to the first three is usually: "We will comply with the *Rules*." But at least you have asked the question if it becomes an issue later.

After the discovery

Following most discoveries, I will generally do a rough memo setting out the key pieces of evidence obtained on the discovery. It will include areas to explore on any further examinations, to ask for as part of answers to undertakings, or to simply write and ask opposing counsel for. I don't think I've had a discovery where I did not think of at least a few additional questions to ask on the walk back to the office.

Notes

1. The one caveat I would add is when you achieve the answer that is helpful to your case, do not give the witness the opportunity to change the answer. A "corrected" answer delivered months after the discovery, undoubtedly following consultation with counsel, will always be less persuasive than a contemporaneous correction.
2. *Of Counsel* podcast (host Sean Robichaud); online: <https://robichaudlaw.ca/podcast/tom-curry>.
3. You are entitled to this information: *Dionisopoulos v. Provias*, [1990] OJ No 30 (HCJ).