# DISCOVERY BEST PRACTICES
## General Guidelines for the Discovery Process in Ontario

## A. Introduction

In its Report, the Task Force on the Discovery Process in Ontario recommended the development of a best practices manual to address the proper conduct of discovery. The objective of the manual is to provide a source of practical suggestions and tips to the profession that will help reduce unnecessary cost and delay in the discovery process.

The manual is intended to serve as a guide to the profession and is not proposed to be enforceable as Rules of Civil Procedure or the Rules of Professional Conduct. Mandating a detailed code of conduct through the enactment of rules would only serve to "micro-manage" lawyers, and would impose a "one-size fits all" approach that would not be appropriate given the different types of litigation. Furthermore, rules prescribing a detailed code of conduct would not only bring unnecessary complexity to the Rules, but would inevitably lead to more disputes and related motions.

While "best practices" are not rules, it is hoped that the bench and bar will adopt them as appropriate conventions or norms for the conduct of discovery. It is also expected that they will serve as an educational guide for the profession on how to reach early agreements in the discovery process, so that the potential for undue cost and delay may be limited.

The development of best practices, or "guidelines," is not unique to Ontario. A number of jurisdictions have implemented "discovery guidelines" that have been instructional in the development of the best practices found below. The Task Force also recognized that best practices are more likely to be accepted as norms or conventions if members of the profession propose them. As a result, requests for suggested best practices were sent to and received from major bar organizations in Ontario, the bench, senior litigators, government officials, and professionals in a variety of disciplines.

The draft best practices contained in this report have been divided into two parts. The first part contains guidelines for each step of the discovery process. The second part is devoted solely to electronic discovery. Since electronic discovery is a relatively recent development in litigation, many lawyers are unfamiliar with the many considerations and issues it raises. Therefore, electronic discovery is explored in greater detail in the second half of this manual.

A bibliography to this manual contains a partial list of publications and leading cases as of the fall of 2005. It is the expectation that these will be kept reasonably up-to-date on from-time-to-time basis, with weblinks. Global commerce has made a number of these issues international in scope.

Discovery planning is the first step of discovery management, whereby counsel (and/or the parties, where unrepresented) meet early in the case to map out the discovery process and reach an understanding on such matters as the scope of discoverable issues and information, the manner of production, the persons to be examined, the mode of examination, the need for expert evidence, and the timetable for disclosure, production and examinations. Where the parties are unable to reach a consensus on a discovery plan, or where a case otherwise requires court assistance in managing the discovery process, judicial intervention may be necessary.

Good discovery planning can assist in reducing many of the problems currently associated with the discovery process, including late delivery of affidavits of documents, incomplete and untimely production, excessive requests for information and documents, difficulties and delays in scheduling discoveries, improper refusals, delays in fulfilling undertakings, and disagreements as to the scope of discovery. While many lawyers already make it a practice to plan how and when production and examinations will occur, many others do not have meaningful discussions with opposing counsel prior to oral discovery. This practice is, however, good advocacy and should be considered the first step in the discovery process. Reaching a consensus on discovery matters can promote cooperation, ensure complete, timely, and orderly production of documents, clarify the scope of discovery, and reduce the potential for protracted disputes.

## ISSUE #1: WHAT STEPS SHOULD BE TAKEN IN ANTICIPATION OF THE DISCOVERY PROCESS?

a. Guideline: ***Before an action is commenced, the client should be apprised of the anticipated costs and scope of the discovery process.***[1]

> **Commentary.** Parties should be aware of the scope and consequences of, in particular, documentary production. This should be part of the cost/benefit analysis when a party decides to pursue litigation.
>
> With respect to expense, in some cases legal costs may be dwarfed by the cost of document identification and retrieval. This will depend on the nature of the documents that exist and the party's system of record-keeping. Clients should be apprised of anticipated costs before commencing litigation and prior to each stage of discovery.

b. Guideline: ***Counsel should plan ahead when drafting pleadings to encourage an efficient discovery process.***[2]

> **Commentary.** It is important to plead sufficient particulars to give access to documents and evidence that will be needed. Inattention to pleadings will set parties up for significant discovery disputes later in the litigation.
>
> When drafting pleadings, serious thought should also be devoted to the implications of advancing a particular claim or defence, and these considerations should be discussed with clients. For example, a claim for mental distress may well put the client's psychiatric and psychological history into issue.

## ISSUE #2: HOW SHOULD DISCOVERY PLANNING BE INITIATED?

a. Guideline: ***As soon as practical but at least by the close of pleadings, all parties should hold a discovery conference in person or at least by telephone to discuss the most expeditious and cost effective means to complete the discovery process, with regard to:***

*i.* ***the nature and complexity of the proceedings;***

*ii.* ***the number of documents and potential witnesses involved;***

*iii.* ***the ease and expense of retrieving discoverable information;***[3] ***and***

*iv.* ***whether given the volume of documents and the time/cost of production, some form of proportional discovery may be considered and agreed to.***

**Commentary.** In particular, no discovery (documentary, oral or written) should occur until counsel for all parties have had an opportunity to discuss the following issues:

- ❑ Dates for exchanging sworn affidavits of documents and productions;
- ❑ An agreed format for producing affidavits of documents and productions (e.g. electronic format, scanning copies of non-electronic documents on CD);
- ❑ Use of staged production of documents, in cases where there are voluminous productions, to ensure that the most relevant documents are produced promptly and that full production follows but does not delay timing of oral discoveries;
- ❑ Use of a joint book of productions (or a single searchable database);
- ❑ In jurisdictions where mandatory mediation exists, the selection of a mediator and proposed dates for the mediation;
- ❑ Use of agreed statements of fact, requests to admit, or demands for particulars to better clarify issues or identify non-contentious issues prior to oral discoveries;
- ❑ Use of written interrogatories prior to oral discoveries, after oral discoveries to follow-up on answers to undertakings, or instead of oral discoveries where their use will reduce the time and cost of the discovery process;
- ❑ Dates, location and expected duration of examinations for discovery, or dates for exchange of written questions and answers;
- ❑ Estimated dates for setting the matter down for a trial;
- ❑ Potential need for individual judicial management in complex cases; and
- ❑ For large document and e-material cases, protocols that consider limiting search of records such e-mail by time, topic or personal names should be considered.

b. Guideline: ***After lawyers have completed a discussion of discovery issues, counsel should prepare a letter listing any agreements that were reached during the discussion and deliver it to all parties.***

> **Commentary.** Preparing a letter confirms the agreement, and prepares the client for the discovery process. A client will be better able to participate in the discovery process if kept informed. In addition, clients can learn how agreements can save time and money.
>
> Counsel can also consider obtaining a consent timetable order, to make the agreed upon timetable enforceable.

## B. Documentary Discovery

Documentary discovery encompasses both disclosure of the existence of documents and production of documents. Rule 30 sets out timeframes that apply in documentary discovery.

When handled poorly, documentary discovery can be the most problematic step in the discovery process. The prevalence of incomplete, untimely, disorderly and excessive disclosure and production often leads to increased costs, delays and disputes in the discovery process. In addition, incomplete and untimely disclosure and production of relevant documents often result in a time-consuming, costly and inefficient "two-stage" discovery process whereby further relevant documents are identified at the examination for discovery, necessitating a second round of examinations on those documents subsequently produced.

On the other hand, where document production is fulsome and reliable, oral discovery tends to be shortened. The guidelines contained in this section will assist in ensuring that documentary discovery proceeds in the most efficient and least costly manner.

### ISSUE #3: WHAT PREPARATION SHOULD OCCUR BEFORE DOCUMENTARY DISCOVERY BEGINS?

a. Guideline: ***Counsel should have a thorough understanding of the case, to assist in determining what documents are relevant to the action, and hence what documents counsel are obligated to produce.***

b. Guideline: ***Before commencing or defending a proceeding, lawyers should explain to their clients in detail the necessity of making full disclosure of all relevant documents, and that the obligation to disclose is a continuing obligation.*** [4]

> **Commentary.** Consider carefully what disclosure the action will involve. This should form part of advice given to the client when obtaining instructions. Clients are often shocked to find that the action as framed allows the opposite party access to personal details through the discovery process.

c. Guideline: ***Before preparing an affidavit of documents, each of the client's documents should be organized.***

**Commentary.** Consider placing a unique serial number on each document before copying it, particularly in cases with voluminous documents. This allows tracking of documents throughout the litigation process and permits the documents to be returned to the client without destroying the integrity and order of the client's files. Separate relevant, irrelevant and privileged documents. Originals should remain unmarked and should be retained in a safe place for possible use as exhibits at trial.

**d. Guideline:** ***Where possible, counsel should agree to a plan for documentary discovery.***

**Commentary.** The organization and production of the documents for the purpose of the litigation should ideally utilize a jointly accepted plan of:

a) organization;
b) authentication;
c) identification; and
d) retrieval.

In particular, counsel should discuss early in the process how to disclose documents to:

- enable swift and sure retrieval at trial or discovery;
- enable counsel examining the documents of another party to relate each document to its reference on Schedule A and to satisfy her/himself that all documents listed have been provided;
- enable counsel at trial to ascertain swiftly that a document which is tendered as an exhibit is in fact a document produced in Schedule A; and
- be compatible with computer retrieval systems.

A system should be established before copies of documents are made, so parties have copies that ***bear identifiers***.

e. Guideline: ***In particular, before producing documents, counsel should consult with opposing parties regarding the most efficient and least costly manner of production.***

**Commentary**. Lawyers should consider the benefits of:

- a joint book of productions;
- use of consistent software applications to list documents;
- potential cost savings of scanning documents and making them available electronically, as opposed to hard copies.

In addition, lawyers who prepare affidavits of documents through electronic software programs should make them available electronically to all opposing parties, where requested. In a case with voluminous documentation, lawyers should consult with opposing lawyers before preparing affidavits to agree on a consistent electronic software program that can be used by all parties. See Part II of this manual for guidelines on electronic discovery.

## ISSUE #4: HOW SHOULD DOCUMENTARY INFORMATION BE EXCHANGED?

a. Guideline: ***Disclose and produce key documents and standard documents early in litigation.***

**Commentary.** In certain case types (including personal injury, medical malpractice, commercial, wrongful dismissal, and construction cases, among others), there are standard documents and information that can and should be routinely produced early in the litigation process. Disclosing and producing these standard documents, as well as any key documents, early will assist in early resolution of a case.

b. Guideline: ***Ensure that documents are disclosed and produced in an organized fashion.***

**Commentary.** Schedules to the affidavit of documents should always be organized chronologically, by issue (e.g. financial statements, medical reports, human resource documents, etc), or both issue and date, depending on the circumstances.

As documents are being reviewed for disclosure, it is essential to start the process of cataloguing documents into categories so that they can be easily retrieved and have value. Preparing a chronology can be invaluable in this process. Chronology is a useful tool for:

- briefing the client;
- finding information during discovery preparation, at examinations, during trial preparation and at trial; and
- capturing knowledge, enabling counsel to return to the case efficiently after a hiatus.

While reviewing the documents, it is also useful to begin preparing a brief of key documents, sorted by category or chronologically, which will form the foundation of discovery, mediation, and ultimately evidence at trial.

c. Guideline: ***Documents listed in schedules to affidavits of documents should be individually itemized with sufficient description to identify each document, subject to the need to protect privileged documents.***

**Commentary.** Schedules should never use boilerplate language to describe a group or class of documents. Unless parties agree or the court orders, parties should not "bundle" documents together in the schedules.

## ISSUE #5: HOW SHOULD PRIVILEGE BE ADDRESSED IN DOCUMENTARY DISCOVERY?

a. Guideline: ***Never assert privilege over documents simply to avoid producing relevant documents. If only part of a document is privileged, the part that is not privileged should be produced.***[5]

**Commentary.** Wherever possible, identify privilege and confidentiality concerns prior to finalizing a client's affidavit of documents. To the extent that the confidential information may need to be produced, take steps to protect that information in advance of producing documents. Co-operate with opposing counsel with respect to reasonable protections for confidential information.

If there are documents upon which confidentiality restrictions have been placed, identify those documents, and the basis for refusing to produce them, and provide that information to the opposite party in Schedule "B" to the affidavit of documents.

If confidential information is identified, and is irrelevant, redact that information from the documents, communicate the redaction and the reasons for the redaction to the opposite party, and provide the opposite party an opportunity to inspect the complete document to be satisfied the information is irrelevant.

## ISSUE #6: WHAT STEPS SHOULD BE TAKEN ONCE AFFIDAVITS OF DOCUMENTS HAVE BEEN EXCHANGED, PRIOR TO THE NEXT STAGE OF DISCOVERY?

a. Guideline: ***Once an opposing party's affidavit of documents is received, counsel should immediately provide a copy to his or her client to determine whether any relevant documents appear to be missing.***[6]

b. Guideline: ***Before examinations begin, counsel should ensure that they have received and disclosed all relevant documents.***

**Commentary.** By securing all required relevant documents before examinations proceed, counsel can ensure that examinations proceed expeditiously. It is in the best interests of the litigation process to reduce the need for re-attendance.

## ISSUE #7: IF, FOR ANY REASON, AFFIDAVITS OF DOCUMENTS ARE BY AGREEMENT NOT BEING COMPLETED, A RECORD OF THE AGREEMENT AND THE REASONS FOR IT SHOULD BE EXCHANGED BETWEEN THE PARTIES

**Commentary.** As will be seen from a review of e-Discovery Guidelines and some large document cases, it may not be feasible to complete a full and detailed affidavit as contemplated by the rules at the time called for at all, given time/cost considerations. Counsel and the parties should formalize any deviation should it become an issue later in the action.

## C. Examinations

Examinations for discovery can occur by way of oral examination or written questions and answers. A number of significant problems are often associated with oral discovery, including scheduling difficulties, delays in completing examinations, inadequate preparation for oral discovery, prolonged examinations, and improper refusals based on relevance. Written discovery, on the other hand, is a seldom-used tool that is not seen as an appropriate means of obtaining admissions.

These guidelines are designed to encourage parties to consider written discovery in appropriate circumstances, and to outline measures that will make oral discovery more efficient and cost-effective.

### ISSUE #8: IN WHAT FORMAT SHOULD EXAMINATIONS OCCUR?

a. Guideline: ***Consider using written questions and answers, as opposed to oral discovery, for some or all examinations.***

**Commentary.** While written discovery may not be as effective as oral discovery in obtaining admissions or judging the credibility of a witness, it does have several potential benefits over oral discovery including:

- clearer, more succinct, and more informative answers than those given at oral discovery;
- additional time to consider and ask further questions;
- avoidance of scheduling delays and lengthy examinations associated with oral discovery;
- reduction of the number of undertakings on oral discovery and the need to follow up on responses to undertakings;
- avoidance of possible harassment and intimidation of an examined party; and
- a more cost effective and efficient discovery process.

Written discovery may be useful in the following situations:

- Cases which rely heavily on documentary evidence or where there are only a few, non-controversial questions
- As a "follow-up" to answers to undertakings
- Where the questions deal with technical or statistical matters that need to be compiled from various sources
- Where a corporate officer adopts the evidence of other employees who have been examined
- Where a corporate representative needs to obtain information from a number of employees
- Where it is inconvenient to have the witness attend
- To preserve evidence before trial
- Prior to oral discovery, to obtain basic information about a party's position, or to obtain information from key witnesses or key documents. This may help to focus the oral examination.

## ISSUE #9: HOW SHOULD ORAL DISCOVERY BE SCHEDULED?

a. Guideline: ***Before delivering a notice of examination or scheduling an examination, motion, or other pre-trial event, counsel for all parties should consult and work together to develop a schedule for oral discovery that is as accommodating as possible for all concerned.***

**Commentary.** It is important to accommodate the needs and reasonable requests of all witnesses and participating lawyers. Lawyers should strive to agree upon a mutually convenient time and place, seeking to minimize travel expense and allow adequate time for preparation.

Examinations, motions and other pre-trial events should be scheduled early enough during the pre-trial phase to avoid the difficult scheduling problems that often result from last-minute requests.

Where a lawyer needs to reschedule discovery or other pre-trial event, s/he should promptly explain the reason for the request. A lawyer who receives a reasonable rescheduling request should strive to accommodate it.

b. Guideline: ***If discoveries are expected to be lengthy, lawyers should consider alternating roles as examining lawyer.***

**Commentary.** This may permit discoveries to be dealt with on an issue-by-issue basis, which may promote settlement of some issues and prevent resentments that build up over lengthy discoveries.

## ISSUE #10: WHAT STEPS SHOULD BE TAKEN TO PREPARE FOR ORAL DISCOVERY?

a. Guideline: ***Always prepare in advance of the examination and be familiar with the facts and issues of a case, to avoid unnecessarily prolonging discoveries.***

**Commentary.** Prior to examination, counsel conducting the examination should read all pleadings, any existing transcripts, and look at all documents produced. Counsel should be familiar with the legal issues; discovery cannot be conducted properly unless counsel understands what the case is about and where the issues arise.

b. Guideline: ***Counsel should ensure that their clients have reviewed all of the documents produced prior to oral discovery.***

**Commentary.** Time can be saved if clients do not need to read through documents to answer questions. Counsel should explain the purpose of discovery to the client and go through all the documents and known evidence in a logical sequence, spending extra attention to areas of difficulty. Counsel should make note of any questions that arise or further documents to be located and produced.

c. Guideline: ***Clients should be advised prior to oral discovery that they must answer every question unless there is an objection, and that they should not seek to confer with counsel during the examination.***

**Commentary.** Clients should be advised that it is counsel's job to see that no improper questions are asked. Clients should be advised to answer the questions that are asked honestly, and if they do not know the answer or do not understand a question, that they should say so.

## ISSUE #11: WHAT IS PROPER QUESTIONING AND CONDUCT DURING EXAMINATIONS?

a. Guideline: ***Limit questions to those necessary to develop the claims or defences in the case, or to obtain relevant testimony.***[7]

**Commentary.** By clarifying the issues and isolating the facts relevant to those issues, counsel can reduce the length and cost of oral discovery. Counsel should be prepared to explain the relevance of a request following a refusal.

b. Guideline: ***Be prepared to ask questions that will elicit the required information as efficiently as possible.***

**Commentary.** Questions should be phrased to be free of ambiguities. Asking specific questions saves time and can lead to responses that provide simple and clear answers.

c. Guideline: ***Avoid "boilerplate" questions and answers during examinations.***

**Commentary.** "Boilerplate" questions and answers are common in written examinations, and limit the usefulness of written questions and answers as a cost effective compliment to oral discovery.

Questions should be carefully tailored to elicit information that is relevant to the issues in the case, or that is necessary to discover or understand those issues.

Answers should properly respond to the questions asked, unless otherwise objectionable. Lawyers should not interpret questions in a strained or unduly restrictive way in an effort to avoid responding to them or to conceal relevant, non-privileged information.

d. Guideline: ***Both the examining and defending lawyers have a duty to keep themselves and the discovery procedure under control.***

**Commentary.** A lawyer should never conduct oral discovery for an improper purpose, for example, to harass, intimidate or unduly burden the opposite party with unreasonable demands for information or document production. Lawyers should conduct themselves with decorum and should never verbally abuse or harass a witness or unnecessarily prolong an examination.

Counsel must keep in mind that their purpose is not to protect their client from "bad facts" that are relevant and within the scope of an examination, regardless of whether those facts hinder the client's position. A useful guide for all counsel in conducting himself or herself at discovery is this: do nothing, which one would not do at trial, with a judge in attendance.

## D. Undertakings and Refusals

Unreasonable delays or lack of diligence in answering undertakings and improper refusals on the basis of relevance, along with the associated motions, have been identified as principal causes of unnecessary cost and delay in the discovery process. Moreover, undertakings and refusals motions can be very time-consuming, often resulting in days of hearings. However, if undertakings and refusals are streamlined, given careful consideration, and framed appropriately, they can be dealt with in a much more efficient manner.

### ISSUE #12: WHAT PROCEDURE SHOULD BE FOLLOWED TO CONFIRM THE UNDERTAKINGS GIVEN AND REFUSALS MADE DURING EXAMINATIONS?

a. Guideline: ***Parties should complete a list of undertakings and refusals.***

**Commentary.** At an oral examination, this list should be compiled as the undertakings and refusals are being provided. The use of a dictaphone to simultaneously record undertakings and refusals as they are provided may be helpful. The list should be reduced to writing and delivered to the party providing the undertakings/refusals within five business days after the examination.[1]

***Counsel should review refusals in writing once oral examinations have been completed, and revisit their positions.***

### ISSUE #13: IN WHAT CIRCUMSTANCES SHOULD REFUSALS BE MADE?

a. Guideline: ***Refusals should be made in good faith, adequately explained and limited. Lawyers should not assert privilege as an objection solely to withhold or suppress non-privileged information or to limit or delay their response.***[8]

**Commentary.** If only part of a request is objectionable, then counsel should object only to the part that is objectionable.

When the opposite party objects to answering a question, require a reason for the refusal, however, discussion of the refusal should occur later and should not delay the examination.

## ISSUE #14.: IN WHAT CIRCUMSTANCES SHOULD UNDERTAKINGS BE GIVEN?

a. Guideline: ***Avoid giving undertakings if alternatives are available.***

**Commentary.** Undertakings can be unduly time-consuming and lead to follow-up examinations. Consider more efficient means of allowing the examining lawyer to obtain information. For example, consider agreeing to have a second representative of the client with direct knowledge of the matters in issue be examined.

b. Guideline: ***Lawyers should not provide undertakings unless they know they will be able to fulfill them in a timely manner.***[9]

**Commentary.** When providing undertakings, lawyers should be cognizant of their professional responsibility to fulfill undertakings. Before agreeing to an undertaking, be clear on the feasibility of fulfilling it, and set out agreed timelines for fulfilling the undertaking. Phrase undertakings carefully to correctly reflect what information will be provided.

***If discovery is ongoing over a period of time, try to fulfill undertakings in between discovery dates to avoid further unnecessary re-attendances.***

## ISSUE #15: WHAT TIMEFRAMES SHOULD APPLY TO THE FULFILMENT OF AN UNDERTAKING?

a. Guideline: ***All undertakings should be answered within the prescribed timeframe, or such other time as agreed to by the parties.***[10]

**Commentary.** The Rules of Professional Conduct impose an obligation on lawyers to “strictly and scrupulously” carry out undertakings. Lawyers should not wait until transcripts have been produced before carrying out undertakings.

b. Guideline: ***Unless there are compelling reasons to deny a request for additional time to respond to an undertaking, such requests should be granted without necessitating court intervention.***

**Commentary.** Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.

## E. Motions

Discovery-related disputes are resolved through general motions procedures and, in case managed proceedings, through the additional mechanism of case conferences. Motions add significantly to the expense and length of the discovery process. By following these guidelines, counsel can minimize motions and their impact on the litigation process.

### ISSUE #16: HOW CAN MOTIONS BE AVOIDED?

a. Guideline: ***Anticipate potential problems.***

**Commentary.** Many discovery problems can be anticipated and avoided through early attention.

b. Guideline: ***Establish a collaborative and cooperative working relationship with opposing counsel from the outset.***

**Commentary.** Many discovery and production issues can be resolved in advance by collaborative procedural decision-making. One of the first things to discuss with opposing counsel is the timing of various events.

Collaboration involves notions of civility and professionalism. Courtesy, collaboration, and common sense should characterize the relationship. This is not only the professional responsibility of every lawyer; it is also a good strategy to keep the costs of litigation down.

c. Guideline: ***A lawyer who has no valid objection to an opponent's proposed motion should immediately make that position known to opposing counsel.***

**Commentary** Such candour will permit the opposing party to file an unopposed or consent motion that will also save scarce court resources.

d. Guideline: ***When a discovery dispute arises, opposing lawyers should attempt to resolve it by working cooperatively. Lawyers should refrain from filing motions to compel or for sanctions unless they have genuinely tried but failed to resolve the dispute through all reasonable avenues of compromise and resolution.***[11]

**Commentary.** Before bringing a motion counsel should ask why they are taking the step and what they hope to achieve. No party should commence a discovery-related motion until all lawyers have met and conferred in a good faith effort to resolve discovery disputes.

Counsel are expected to grant requests for reasonable extensions of time to comply with discovery obligations and other pre-trial matters, unless such extensions are clearly inconsistent with the legitimate interests of one's client.

ISSUE #17: WHERE A MOTION IS UNAVOIDABLE, WHAT MEASURES CAN BE TAKEN TO FACILITATE EFFICIENT PROCESSING OF THE MOTION?

a. Guideline: ***Where a discovery-related motion on refusals is brought, counsel should consider filing material outlining the refusals.***

**Commentary.** A lawyer should complete a detailed refusals chart grouping the refusals by issue, and provide sufficient opportunity for the opposing lawyer to complete details with respect to the reason for the refusal. The chart should be filed in advance of the motion.

## F. Experts

Discovery of expert evidence is largely restricted in Ontario to the exchange of expert reports. The untimely production of expert reports and the proliferations of expert reports are both factors that increase cost and delay in the discovery process. These guidelines are designed to ensure that expert evidence is helpful to the litigation process and encourage a cooperative approach to the discovery of expert evidence.

ISSUE #18: HOW SHOULD EXPERT EVIDENCE BE ADDRESSED IN THE DISCOVERY PROCESS?

a. Guideline: ***Counsel should turn their mind to obtaining required expert reports and opinions as soon as possible in the litigation process.***

**Commentary.** From an advocacy point of view, an expert should be retained early on in the proceedings, probably even before pleadings are filed. While a formal report can wait until all the necessary facts have been collected, it is good advocacy to have the guidance of an expert before pleadings are prepared and the discovery process has commenced.

Likewise, lawyers should request expert reports as early as possible. Many lawyers assume experts can easily complete reports within the time prescribed by the rules (90 days before trial), and so do not request reports until late in the process, often in the few months preceding trial. It is important to be aware that as busy professionals, experts may have to prepare reports outside of regular working hours and are often not able to provide reports within short time periods. Experts should be provided with ample time to prepare a report.

Waiting until the eve of trial to obtain expert reports also often results in postponing the trial date, delay in the resolution of the case, and scheduling difficulties for the court. A lawyer should never purposefully delay designating an expert witness or delivering an expert's report in an effort to postpone trial.

b. Guideline: ***In retaining an expert witness, counsel should respect the integrity of the expert's professional practices and procedures. Counsel should provide the expert with information that is believed to be relevant and material to the subject matter of the expert's written report. Experts are often not able to provide expert reports within short time periods and should be provided with sufficient time to prepare the requested report.***[12]

**Commentary.** Various bar groups and organizations such as the Medico-Legal Society of Toronto, have developed standard formats for expert reports in appropriate cases.

c. Guideline: ***An expert report should give adequate notice of the substance of the expert's opinion and its foundation.***

**Commentary.** Expert reports should set out at a minimum:

- the expert's name, address and current curriculum vitae;
- a detailed description of the expert's area of expertise;
- the nature of the opinion being sought and the specific issues to which the opinion relates;
- a description of research conducted by the expert in reaching her/his opinion;
- a description of the factual assumptions on which the opinion is based;
- a list of any documents upon which the expert relied in formulating the opinion; and
- the opinion and the basis for the opinion.

d. Guideline: ***To reduce costs and avoid the possibility of competing expert evidence, lawyers should discuss the possibility of retaining a single independent expert.***[13]

> **Commentary.** On matters that are not likely to be contentious, such as purely scientific calculations or tests, it may be possible to obtain a joint expert to reduce time and costs. In certain situations, such as the calculation of present value figures on an agreed set of numbers, there is likely to be little disagreement.

e. Guideline: ***Where there are experts with contradictory reports, consider a possible meeting of the experts to ascertain the areas on which agreement can be reached, or to clarify the reasons why the reports differ.***[14]

## G. Other Techniques

### ISSUE #19: HOW SHOULD NON-CONTENTIOUS ISSUES BE ADDRESSED?

a. Guideline: ***Lawyers should use requests to admit and agreed statements of fact on non-contentious issues.***[15]

> **Commentary.** Such steps help reduce the amount of time spent at oral examinations on non-contentious issues, allowing parties to focus on the real matters at issue in a case.

### ISSUE #20: HOW SHOULD INFORMATION FROM NON-PARTIES BE OBTAINED?

a. Guideline: ***Consider whether information or documents from non-parties are required as soon as possible in the litigation process.***

> **Commentary.** This issue should be considered immediately after the close of pleadings, and again following a review of the opposing party's documents. Waiting until the discovery of an opposing party to determine whether such information is required may result in imprecise questions and/or unnecessary undertakings that increase the cost and time incurred in the discovery process.
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> Counsel should consult with each other well in advance of discovery as to whether information from non-parties is required. Only information relevant to a material issue in the action should be sought. In addition, an agreement as to the truth of the contents of documents may avoid the necessity of seeking non-party information.
>
> Where a motion to permit discovery of a non-party is opposed, counsel for parties and the non-party should consult to accommodate the schedules of participating counsel. If an order permitting discovery of a non-party is made, the examination should be restricted to questions relating to the witness' knowledge of the information in respect of which the order was made. Advance preparation can avoid unnecessarily prolonging the discovery.

## ISSUE #21: HOW SHOULD AUTHENTICITY BE ADDRESSED DURING DISCOVERY?

a. Guideline: ***The issue of authenticity should be approached as efficiently as possible.***

**Commentary.** Be prepared to admit authenticity as much as possible when requested to do so. Even when there is a genuine dispute about the authenticity of some documents, admit with respect to all other documents.

If one needs to proceed to oral discovery to be satisfied as to authenticity, the issue should be approached in an efficient manner, with general questions where possible, rather than questioning with respect to each individual document.

If an admission is not forthcoming at oral examinations for discovery, promptly serve a request to admit after those examinations for discovery have concluded. In any event, plan to serve a request to admit no later than in connection with preparation for pretrial.

Parties should never refuse to admit the authenticity of documents on the grounds that they are not admissible. The admission of authenticity is an admission that a document is what it is purported to be. It has no bearing on the admissibility of documents at trial.

## Endnotes

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[1] Consultation with Sudbury & Algoma Bar Associations.

[2] ABA CDRC, AS Principles of Civility, para 5.

[3] Modified from US (Fed) discovery plan rule, and UK & Aus. proportionality tests. Other factors could include those under "complex case" definition in Ont. r. 77.09.1.

[4] Law Society of British Columbia, "Practice Checklists Manual: Personal Injury Plaintiff's Interview or Examination for Discovery",

http://www.lawsociety.bc.ca/library/checklist/body_checklist_table.html#Litigation [hereinafter, BC Practice Checklist];

Ont. Rules of Professional Conduct, r. 4.01(4).

[5] ACTL Code (s. 5(c) 2).

[6] *BC Practice Checklist.*

[7] ACTL Code (s. 5(e)1); AS Principles of Civility, para 25.

[8] ACTL Code (s. 5(a) 4, 6); AS Principles of Civility, para 21.

[9] Ont, Rules of Professional Conduct, r. 4.01(7).

[10] Consultations.

[11] ACTL Code (s. 5(a)5, 6(a)); *Principles of Civility*, para 5.

[12] Medico-legal consultation; ACTL Code (s. 11(b)(d)).

[13] Consultations; UK Pre-action protocols.

[14] Quebec Code of Civil Procedure.

[15] Suggestions from case management masters.