EXAMINATION FOR DISCOVERY READINESS KIT

Marc E. Smith

Introduction

The thought of being examined by a lawyer can be frightening. The thought of being examined by a not-so-nice lawyer can even be more daunting. It is not a pleasant experience to be on the receiving end of an attack, especially when the goal is to criticize your conduct, make you look incompetent, and eventually attempt to discredit you entirely.

If you are one of the many adjusters who must attend at Examinations for Discovery, or if you are ever cross-examined on an Affidavit or at trial, you will likely find it to be an intimidating experience, or worse, a negative one. This is not to say the experience has to be any of those things, however, since this Readiness Kit will increase your confidence and equip you with necessary tools to face off at your examination.

What is an Examination for Discovery?

An Examination for Discovery is one of the procedures established in litigation, and outlined in Rule 31 of the *Rules of Civil Procedure*, to ensure that each party has full disclosure about the opposing party's case. One party asks an adverse party a series of questions about any matter relevant to the issues being disputed in the litigation.

Generally speaking, the Court has stipulated that the purpose of an Examination for Discovery is to accomplish the following:

- Enable the examining party to know the case to be met;
- Elicit admissions from the other party;
- Facilitate settlement and eliminate or narrow issues; and
- Avoid any surprises at trial, better known as avoiding a "trial by ambush".

When it comes to examining adjusters, the purpose tends to take on a different flavour, which has been observed by this author to include the following goals of the party doing the examining:

- Assess the adjuster's performance as a witness at trial;
- Attempt to show an inability to properly adjuster the file;
- Attempt to show incompetence and a lack of skill;
- To corner or manipulate the responses to expose weaknesses; and
- To expose biases of an adjuster towards a claimant and his/her claim.

The evidence given at an Examination for Discovery is binding upon your insurer employer, and may be used to impeach testimony at trial (Rule 31.11(2)), making it arguably one of the most important steps within the litigation process. Often, the examination that occurs at this stage, is a "make or break" for the case.

What happens at an Examination for Discovery?

Usually, the Examination for Discovery will take place at one of the local reporting services offices, although sometimes it will take place at the offices of one of the lawyers.

Shortly after your arrival, you will be sworn in or affirmed by your lawyer or the court reporter, which means that you will tell "the whole truth and nothing but the truth".

Then, you will proceed to the meeting room where the examination will take place. As seen below, a stenographer will be sitting at the end of the table while the lawyer asking questions will sit across from you. You will be examined under oath as to your knowledge and information concerning the matters in issue. At the beginning of the examination, you will be asked to confirm that your answers are "binding on the insurance company".

When you are examined by an opposing lawyer, you should be represented by counsel who will protect you and your rights. Usually, the other party will not be present during your examination, only their lawyer. That said, the party does have a right to attend as long as he/she is not disruptive during the questioning.

Your lawyer's role during the discovery is to ensure that all questions asked of you are proper, and to object if any of the questions posed are believed to be improper. Apart from this, you are unable to communicate with your lawyer directly, and are somewhat on your own.

The questions and answers are recorded by the stenographer and later reproduced as a written transcript.

It is very important to remember that your discovery is conducted not for your benefit but for the benefit of the other party. As set out above, the lawyer for the opposing party will do his/her best to elicit answers from you that will help his/her case and, of course, hurt your case.

What to do before the discovery?

Prepare, prepare, and prepare.

It has been found that the performance of a witness at a discovery is proportionally related to the witness' preparation for it. Also, the more familiar you are with the facts of the case, the less likely it is that you will be nervous. Knowledge is power. The more that you are familiar with the facts of your case, the more persuasive you will be at a discovery.

There is no doubt that preparing for a discovery is time-consuming, but it is one of the most important steps in the litigation process and this is often forgotten by defence counsel and the adjuster. If you fare well at the discovery, this may very well dissuade counsel for the opposing party to continue with a meritless claim. Otherwise, evidence given by an adjuster that appears untruthful, disorganized, or unhelpful to the defence may give the opposing party the confidence they need to continue in pursuing the claim, no matter its merit.

It is a good idea to meet with your lawyer in the week(s) leading up to the discovery. He/she should review with you in great detail the questions that will likely come up at the discovery, so that you are comfortable with the areas likely to be canvassed. Ideally, your lawyer should have an intimate knowledge of the file before meeting with you, and will be able to draw your attention towards potential areas of weakness in the file, since they are likely to be spotted by the opposing party, as well.

If you have not previously given evidence, it may be useful for your lawyer to take you through a "mock discovery" so that you can experience being in the proverbial hot-seat.

Depending upon your personality, a discovery may be quite easy or otherwise can be extremely difficult. If the discovery turns into what feels to be a scrutiny of your professional ethics and/or your competency, the experience could turn into a stressful one. Again, the best way to protect yourself from feeling too much pressure is to prepare, know the file, and remain calm and composed throughout the discovery.

As part of the discovery process, your lawyer will prepare an Affidavit of Documents (Rule 30) which will be sworn by you. In most cases involving insurance claims, the adjuster's notes, subject to redaction for privileged information, are producible. These notes will be scrutinized and you will be thoroughly questioned on them. One thing to remember for future cases is that the better the file is properly documented, the easier it will be to defend the position being taken by the insurance company.

In preparing for your discovery, we recommend that the following steps be taken:

1. Review the **Statement of Claim** – what are the allegations against the adjuster and the insurance company and/or the insured? Although the claim is likely generic, this should nonetheless provide somewhat of a road map on what to expect from the opposing party at the discovery.

2. Review the **Statement of Defence** – what is the theory of your case? Are you in agreement with the defences that have been advanced? Are you able to convey them to the other side, should the occasion arise?

3. Review the **Adjuster's notes** – there should be no surprises at the discovery and you should not be caught off guard. This means that you ought to be familiar with all of the facts of the case and be prepared to answer difficult questions about decisions that have been made throughout the file-handling. Consider these points when reviewing your file:

    a. Is the position taken by the adjuster consistent throughout? It is possible that you are not the only adjuster that has been involved in the file-handling of this case. Are you able to answer the questions regarding actions taken by the other adjusters?

    b. If there was another adjuster involved in the file, would you have handled it differently? How will you respond to that question?

    c. What are the problems with the file? Are you able to identify the strengths and weaknesses of your case?

    d. Are there any inconsistencies in the notes? Are there any entries that are not explainable?

4. Review the **Affidavit of Documents** – this may be voluminous but it is essential that you become familiar with its contents. Your counsel will likely walk you through the relevant documents and point out some issues that may arise at the discovery.

    a. Review the expert reports relied upon to justify the decision(s) taken by the adjuster;

    b. Review the opposing party's expert report – are there any conflicting opinions? Did you consider them when making a particular decision on the file?

    c. In the context of an Accident Benefits claim, review the surveillance. Was it considered in rendering a decision on the file? Has your counsel decided to disclose it as part of the production or has he/she categorized it as a privileged document?

5. Review the **company policies and procedures** – The opposing party will often ask a series of questions regarding these, and attempt to get you to commit to "company process". He/she will then attempt to elicit evidence that is inconsistent with the company's policies and procedures.

6. Review your **obligations of good faith** – Although there is some debate about the appropriateness of asking questions regarding "good faith" (legal and not factual), the opposing party will almost always endeavour to ask these types of questions. Some examples include:

    a. What is the role of the insurer towards the insured?
    b. Is your company reasonable in the handling of its claims?
    c. What courses have you taken when it comes to the duty of acting in good faith?
    d. What have your supervisors told you about how you should act with an insured?
    e. Do you agree that if your duty of good faith is not observed, the insurance company should pay aggravated damages?
    f. Do you agree that Accident Benefits are provided for the protection of the insured?
    g. Do you agree that your duty of good faith should include a reasonable investigation before making a decision?
    h. Do you agree that you should not treat the insured as an adversary?
    i. Are insureds difficult to deal with?
    j. Do you agree that there are minimum ethical standards that an insurer must meet when dealing with an insured?
    k. Do you agree that you should be honest when dealing with the insured?

7. Prepare, prepare, and prepare.

The Rules of Engagement at a Discovery

Depending upon the opposing lawyer's personality, demeanor, and/or tactics, the discovery could be viewed as a "battle zone". In those circumstances, you ought to be on guard for the duration of the discovery and pay close attention to the questions being asked. In any event, this advice works equally well with personable lawyers as well.

In fact, lawyers are generally quite civil and friendly at discoveries, since they know that they can "catch more flies with honey". So, while there is no need to expect things to be adversarial and argumentative, it nevertheless can happen. This is why it is important to prepare yourself for the worst, which will ensure that you will be at your best.

Things to consider	Explanation
Listening Skills	
Listen carefully to the question	Is the lawyer trying to set you up? Sometimes they will make statements and/or assumptions that they will want you to adopt as true. Be careful about responding – analyze the question.
Listen to your counsel	If your lawyer tells you not to answer the question, stop talking immediately.
Let the lawyer ask the question	Do not interrupt the opposing lawyer and do not try to anticipate the question to be asked, or figure out where the lawyer is going with a line of questioning. Instead, listen to the question carefully, and answer only what is being asked.
Cannot understand the question	Tell counsel that you do not understand a question and ask for clarification. Never guess. Never speculate, unless your lawyer says it is ok to proceed. If the question is confusing, incomprehensible, and/or inappropriate, do not answer. Likely, your counsel will have already objected.
Question cannot be answered	Tell the lawyer that you cannot answer it. If an answer is still sought, the lawyers will discuss an "undertaking", which is one lawyer's promise to attempt to obtain that answer at a later time. Let your lawyer deal with undertakings, as he or she may or may not agree to it.

Answer Concisely	
Answers need to be brief	Simply answer the question being asked, nothing more – do not ramble, it can only get you into trouble. Never volunteer information. Unless specifically asked, there is no need to voluntarily explain why you did "X" or add that you did "Y".
Answer the question	Avoid answering a question with a question – it gives the impression that you are hiding something. Answering a series of questions with "I don't know" or "I don't recall" leaves us thinking that you are avoiding an uncomfortable line of questioning.
Correct an answer	If you realize that you made a mistake or perhaps did not provide a correct answer to the question, the correction needs to take place after the discovery with your lawyer, who will then formally correct the evidence in writing with the opposing lawyer. It is better to correct false information than conceal the error.
Take your time	Think about your answer and how you will formulate a response. Remember that a pause is not shown on the record, so you may sit quietly, no matter how awkward it gets. This also may provide time for your counsel to object to an inappropriate question.
Undertakings	If you are unable to answer the question posed, you may be asked to provide the answer by way of an undertaking (i.e. make inquiries and provide a subsequent written response to the question). Do not agree to any undertakings – let your lawyer respond.
The Opposing Lawyer's Tactics	
Statements made by the opposing party's counsel	If the opposing party's counsel attempts to say that you said something and it is inaccurate, correct him/her. Your lawyer should also be correcting the record.

The opposing party's lawyer takes long pauses	If there is silence, do not feel obliged to provide additional information. Simply answer your question and wait. This is another tactic that is frequently used by lawyers, since people have a tendency to want to "fill the space".
The opposing party's lawyer is friendly	Be on guard. Do not be confused by the opposing lawyer's friendliness. He/she is there to get you to let your guard down so that you converse freely and, they hope, will reveal more information than you intended.
The opposing party's lawyer interrupts	This is another tactic used to intimidate. Treat this in much the same manner as you would in a social situation – note the interruption and ask if the lawyer would like you to finish what you were saying. Remember to stay calm and be courteous, but you are entitled to point out poor behaviour and/or deal with it appropriately.
The opposing party's lawyer appears disorganized	Don't be fooled, as this can be yet another tactic, aimed at breaking your rhythm in the hopes that you will contradict yourself. Remain focused and listen to the questions.
The opposing party's lawyer asks the same questions over and over	Your lawyer should object. If he/she does not, speak up and say "I have already answered this question". Generally, this is a way for the lawyer to try to elicit a different answer where they did not like the first one you offered.
Your Performance	
Keep your cool and do not argue	Avoid taking things personally. Lawyers may be aggressive or may attempt to provoke anger. You may be accused of many things during your discovery, but you should try not to be fazed by this. Do not engage, as this is a tactic. If it gets unpleasant, your lawyer should interject.

Conduct	The opposing lawyer is not your friend. He/she is your adversary at a discovery. Your testimony is recorded and can (will) be used against you at trial. Do not joke, avoid sarcastic comments, do not try to appear helpful or friendly, do not roll your eyes, avoid derogatory remarks.
Words to avoid	When someone starts answering with "honestly" or "to be perfectly honest", it can connote dishonesty.
Need a break	If you need to take a break, ask for one. It may also be strategic to take a break during the discovery, to give yourself a break and/or collect your thoughts.
Placing blame	Assuming that there has been more than one adjuster handling the file, the lawyer may attempt to place blame on previous handlers and exonerate the current adjuster. Be careful. It is still a tactic to impugn the handling of the file, and make out the opposing party's case.
Miscellaneous	
Document Review	If the opposing lawyer asks you to review a document, take your time and review it carefully, as questions will certainly be asked about it. Otherwise, if you need to review a document to answer a question, ask to do so. If the lawyer starts quoting from a document you do not have in front of you, ask to review it.
Questions of law are not proper	Your lawyer should object to this line of questioning.
Conflicting Evidence	It may happen that errors have occurred in the file-handling. Avoid being trapped into defending your actions (or those of a colleague). Simply provide an honest and straightforward answer.

Conclusion

It has been said before, and it is worth saying again: Prepare, prepare, and prepare.

The key to a successful discovery lies in the preparation, since it will ensure that you are confident and calm, enabling you to listen to the question being posed so that you can answer only the question being posed.

In applying some of the tips and tools outlined above, you are sure to have a positive experience at your Examination for Discovery, even if it isn't your idea of a good time. Good luck!