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ADVANTAGE

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Professional Development

Using the Discovery Process to Achieve Your Strategic Litigation Goals

February 25, 2015

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CPD

Strategic Issues in Discovery

Frank Cesario

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Strategic Issues in Discovery

- Discovery as part of your litigation strategy
- Execution of your strategy
 - Litigation Plan?
 - Document Production
 - Examinations for Discovery
 - Motions

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Discovery as part of your litigation strategy

- Strategy vs. tactics
- Theory of the case
- What do you want to achieve?
- How do you get there?
- How can discovery help get you there?

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Execution – Discovery Plan

- Do you push for a formal plan?
- How detailed?
- Examinations
- Document production parameters
- Timing

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Execution – Document Production

- Document searches
- Collaborative document production
- Scope of the issues and relevance
- Electronic document searches
- **Proportionality**

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Execution – examinations for discovery

- Pre or post mediation?
- Examination of the plaintiff
 - use of cross-examination
- Preparation of Discovery Witness
 - provide context and theory of the case

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Execution – Motions

- What types of motions are possible?
 - Production motions
 - Discovery Plan motions
 - Undertakings motions, etc...
- How do motions fit with your strategy?
 - whether you are on the offensive or the defensive

The Discovery Representative

Ian R. Dick

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Don't Shoot the Messenger

- Not usually welcome news
- Understanding the Rules
- Practical preparation tips
- Practical tips for surviving the examination

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What it is/isn't



*The witness had been doing so well
at his deposition when suddenly...*

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General Rules

- Rule 31.03
- Opposing party generally gets to choose who is examined
- Generally only one examination
- Court can order:
 - a different representative be examined
 - another examination take place

Who Qualifies

- Generally have to be "current" officer, director or employee
- Have to be able to bind the corporation with answers
- Have to be knowledgeable

Why Me?

- Knowledge of key facts
- Lack of knowledge of key facts
- Understanding of broader case and company interests
- Because they say so

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Why Not Me?

- Little or no substantive knowledge of issues in dispute
- Medical or other reasons (e.g. panic attacks, subject to pending criminal charges)
- No longer officer, director or employee

One Examination (Usually)

- Not a "current" officer, director or employee
- Vague and indefinite answers, leading to numerous undertakings
- Where representative had not properly prepared themselves
- New and significant info discovered

What Can Counsel Do?

- Negotiate who the representative will be
- Motion to substitute another representative
- Protect against further exam of another representative
- Make the best of a bad situation

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Pre-Exam Preparation

- Be familiar with the case and the issues
- Be familiar with the documents and the document collection process
- Duty to inform yourself
- Familiarize yourself with the process
- Learn how to be an effective representative

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At the Exam

- Listen before answering
- Don't volunteer evidence (damage control)
- Look at documents that are referred to
- "Reverse the pyramid"
- Stay on an even keel
- Listen to your lawyer

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Practical Tips

- Relax...it's not an inquisition
- Familiarity breeds contentment
- The truth will set you free...or at least keep you out of serious trouble
- Watch out for the junk food

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Post-Discovery

Elisha Jamieson-Davies

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Strategic Considerations when Answering Undertakings

- How should you go about gathering information?
- Who should be in charge of gathering information?
- What should you consider when drafting answers to undertakings and refusals?

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Strategic Considerations when Dealing with Refusals

- When should you *fight* refusals?
- When should you *move on* the other side's refusals?
- How long should you wait to move on refusals?

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How to Increase Your Chances at an Undertakings and Refusals Motion

- Consider the paper record that will be before the court
- Consider the test you have to meet and what evidence you need
- Put yourself in the mind of the Master/Judge

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Privilege and Confidentiality in Production

Maureen M. Quinlan

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Privilege and Confidentiality in Production

- During the discovery process, often dealing with sensitive and confidential corporate information
- Want this confidential information to remain confidential:
 - **OUT** of the Court file; and
 - **OUT** of the competitors' hands

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Privilege and Confidentiality in Production

- Limited protection under the Ontario *Rules of Civil Procedure*
 - Deemed undertaking rule (Rule 30.1)
 - Rule not absolute
 - Once information is placed into the public record, it is no longer protected

Privilege and Confidentiality in Production

- Documents and communications can be protected under various grounds of privilege:
 - Litigation privilege
 - Solicitor – client privilege
- **BUT** be aware of the limitations of this type of protection

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Privilege and Confidentiality in Production

- Sealing and/or protective orders are very difficult to obtain:
 - *Sierra Club* test applied
 - Heavy burden of proof
- Confidentiality agreements can be used strategically as a better alternative

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Professional and Ethical Issues in Discovery

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Professionalism and Ethics in Discovery

- The Rules of Professional Conduct
 - disclosure
 - undertakings
- Preparation of Witnesses
 - preparation vs. coaching
- Confidentiality

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Rules of Professional Conduct

- General Discovery Obligations
- Rule 5.1-3.1:
- A lawyer shall explain to their client:
 - the necessity of making full disclosure of all relevant documents
 - the duty to answer relevant questions to the best of their knowledge information and belief

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Rules of Professional Conduct

- A lawyer shall assist the client in fulfilling disclosure obligations
- Shall not make frivolous requests for production of documents or frivolous requests for information at examinations
- Shall disclose errors and omissions and do all that can reasonably be done to rectify

Undertakings

- Rules of Professional Conduct: 5.1-6 and 7.2-11
- A lawyer must "strictly and scrupulously" fulfill any undertakings
- The lawyer's undertaking is a "personal promise and responsibility"

Preparation of Witness

- How do you balance your duty to provide effective representation to your client with your professional obligations to allow the court/tribunal to get the “truth”?

Preparation of Discovery Witness

- **Rule 5.1-2(e):**

When acting as an advocate, a lawyer shall not...knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct

Preparation of Discovery Witness

- **Rule 5.1-3.1(a)(ii):**

Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate...shall explain to the client...the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of the court or the rules of the tribunal

Confidentiality

- Section 3.3 of the Rules of Professional Conduct
- A lawyer shall "*at all times hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information*"
- Subject to a few narrow exceptions (e.g. client authorization, required by law or order or LSUC)