HOW TO PREPARE FOR QUESTIONING

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I. INTRODUCTION

The goal of this paper is to provide the practitioner with practical advice on conducting questionings effectively and efficiently.

Conducting effective questionings is a skill requiring thorough preparation and continuous practice. Questionings are meant to achieve several objectives. Some of these objectives include:

- To prevent surprise at trial;
- To obtain admissions for use at trial;
- To get the witness to agree to a suggested answer, in the same way cross examination does[1]; and
- To size up the person examined.

In Alberta, the rules in relation to questioning are found in Part 5, Subdivision 3 of the Alberta *Rules of Court*[2], specifically rules 5.17 – 5.33. These rules have been extensively interpreted by case law, which may be found relatively easily in classic reference texts.[3]

II. PREPARATION FOR QUESTIONING

> *Rarely will you maximize your effectiveness by taking a deposition without preparation, merely on the hope that you will learn something interesting. To the contrary, the most interesting information gained from an [examination] usually comes as a result of hard work.*[4]

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[1] *Hollands v Winfield Power Co*, 2004 ABQB 929, 366 AR 59.

[2] AR 124/2010 [*Rules*]. Lawyers need to be alerted to the fact that, in Alberta, the rules as they concern questionings were substantially amended in 2010. This has implications as to the applicability of cases interpreting some of these rules which were decided before these amendments. Please note that the terms questioning, examination for discovery, and discovery are used interchangeably in this paper.

[3] Allan A Fradsham, *Alberta Rules of Court Annotated 2009* (Toronto: Thomson Carswell, 2008) [*Fradsham*] and WA Stevenson & JA Cote, *Civil Procedure Guide*, (Edmonton: Juriliber, 2009) [*Stevenson & Cote*]. For current law, please see most recent yearly updates of these texts.

[4] Daniel P Dain, *How to Prepare For, Use, and Take a Deposition* (Costa Mesa: James Publishing, 1990) (looseleaf) at para 410 [*Dain*]. The section on Preparation for Discoveries is based primarily on the recommendations found in *Dain*.

A. General

The importance of being prepared for questioning cannot be overstated. More cases proceed through to questioning than they do to the end of trial, suggesting that effective preparation for questioning is vital.[5] Preparation helps the lawyer achieve two important goals. First, it helps the lawyer to choose who should be examined. Second, it helps the lawyer to determine which subject areas should be explored during examination.

It is imperative that the lawyer who is preparing to conduct a questioning prepare a thorough analysis of the case. The lawyer must therefore do the following:

- Review the file and know the paper;
- Know the legal elements of the case;
- Know what testimony to be expected from your own witnesses; and
- Know the relevant documents which prove or disprove your case.

Building a written chronology of facts, parties, and important documents is recommended. This chronology will aid in analysis and will assist the lawyer with organization. Schedule A provides a sample chronology that may be modified for different cases.

B. Review the file and know the paper

Being thoroughly prepared for questioning can avoid the need to proceed to trial, which is why:

> *...the factual investigation and review with the witness must be as intense and complete as possible. At a minimum, this must include review of the pleadings, the productions and any other available documentation. The witness' narrative should be reviewed for completeness, consistency with the other known facts and inherent probability. Rough spots should be reviewed.*[6]

[5] Bryan Finlay, QC and TA Cromwell, *Witness Preparation Manual* (Aurora: Canada Law Book Inc, 1991) at 65 [*Finlay*].
[6] *Ibid* at 67.

Clearly there are differences between the questioning process and trial that need to be born in mind. Most of the differences flow from the different scope of questioning, different rules of evidence and admissibility (ex. hearsay) and the different tactical purposes for which questioning is conducted.[7]

C. Determine the Law and the Legal Elements of the Claim, including the Burdens of Proof

It is important to review the underlying law relating to your particular matter, including textbooks and leading cases. A thorough review serves to assist the lawyer in creating a checklist of what needs to be accomplished during discoveries. Failing to thoroughly understand the law, and what must be proven or disproven can only lead to disastrous consequences.

One insider tip is to consult with *Benders Forms of Discovery*[8], available at the courthouse. Although this is a U.S. publication, it provides checklists for almost every topic ever litigated and is an excellent guideline for starting with your preparations for questionings. A similar source is *Bullen & Leake & Jacob's Precedents of Pleadings*[9].

Another insider tip is to read transcripts from analogous matters, especially transcripts where a seasoned and well-respected litigator is examining or defending his/her client.

D. The Examination Notebook

A helpful tool, especially for new lawyers, is to create an Examination Notebook that is taken to every questioning taken or defended. If properly prepared and organized, a

[7] *Ibid.*
[8] 1963-date. 33 looseleaf volumes, also available on LexisNexis. (Matthew Bender & Co., New York, NY, 1963).
[9] 15th ed by Lord Brennan QC, William Blair QC with Advisory Editors and Specialist Contributors (London: Sweet & Maxwell, 2004). This is a British publication. While it is more helpful in the context of drafting one's pleadings this publication, it also contains information concerning what elements needs to be proven in a variety of legal claims.

Examination Notebook provides the practitioner with an excellent resource and a ready source of reassurance. Dain suggests including an index to facilitate the notebook's ease of use and to insert tabs for easy access to materials that need to be readily available. Dain also suggests keeping the size of one's notebook down to one inch thick (if it is too thick, it is more likely to be left behind at the office).

Dain suggests that an Examination Notebook should contain the following:

1. Key rules of civil procedure relating to discovery.

Photocopy the key rules and highlight those parts you will need to refer to readily, for example, rules concerning the following:

- questioning an organization;
- the manner of making objections;
- when it is appropriate to instruct your witness not to answer;
- terminating a deposition for the purpose of seeking court intervention; and
- ensuring the preservation of objections.

This section of the Examination Notebook can be tailored to reflect those rules which relate to the forum(s) in which the lawyer is most often engaged.

2. Key cases to show opposing counsel in appropriate circumstances.

It is advisable to keep copies of the leading cases on issues that tend to repeatedly arise in the context of questionings.

In Alberta, rules 5.17 and 5.18 concern who may be questioned. The following cases provide a sense of jurisprudence on this area of the law which frequently arises in the context of questionings.[10]

In *Golden Estate v Neilson*[11] the defendants sought an order compelling the deceased's mother and spouse to attend for questioning under rule 5.17. The deceased had

[10] Many of these cases were cited in a former LESA paper/seminar. Alan S Rudakoff, "Common and Uncommon Issues in Discovery" (Paper prepared for and presented to Legal Education Society of Alberta at the Banff Refresher Course, Civil Litigation, April 24-28, 2004) prepared by: Kyla D. Sandwith.
[11] 2011 ABCA 338, 539 WAC 165.

committed suicide shortly after being released from the hospital, and the defendants sought to question the deceased's mother and spouse as they may have failed to monitor the deceased after his release, thereby breaking the chain of causation. The action had been brought on behalf of the estate, the parents, and the deceased's spouse and child under the *Fatal Accidents Act*.

The Alberta Court of Appeal "adopted a "true parties" approach to the assessment of questioning under the new Rules" and held as follows:

> [19] In our view, the chambers judge erred in concluding that the mother and spouse of the deceased were not adverse in interest to the appellants. They are the persons for whose benefit the claim for relief was brought, and could have brought the claim on their own behalf had the Public Trustee failed to do so. They also have personal knowledge of facts essential to establish the claim and will undoubtedly be witnesses at any trial. We conclude that parties on whose behalf a claim is brought under the *Fatal Accidents Act*, or who claim relief directly under the *Fatal Accidents Act* are parties adverse in interest to the party or parties whose negligence or wrongful acts are alleged to have caused the death of the deceased.
>
> […]
>
> [21] In conclusion, we have adopted a "true parties" approach to the assessment of questioning under the new Rules. In our opinion, the mother and the spouse of the deceased are, indeed, true parties whose evidence would enhance speed, economy, fairness and disclosure, the factors referred to in *Wilbur v Miller*, 2005 ABCA 220 (CanLII) at para 11, 367 AR 191. Not only are the claimants in a position to provide essential evidence, they are also in a position to provide the best evidence on the issues of entitlement, liability and quantum, issues which flow from the *Fatal Accidents Act* and the *Survival of Actions Act*, RSA 2000, c S-27.[12]

Samsports.Com Inc v Canada Revenue Agency[13] is an important case in that the unanimous Court of Appeal (per Fruman J.A.) concluded that [then] rule 200 applied to the Federal Crown (Canada Revenue Agency), which in this case was a defendant in the action. The appeal was allowed and Halvertson, a party to the proceeding, was entitled

[12] *Ibid* at para 19, 21.
[13] 2007 ABCA 151, 73 Alta LR (4th) 5.

as of right to have a certain employee of the Crown be subjected to Examination for Discoveries. This was in addition to his right to have a representative of the Crown examined.

In *Devon Canada Corp v PE-Pittsfield, LLC (cob Pittsfield Generating Co, LP)*[14] Paperny J.A. delivered the unanimous judgment of the Court in an appeal concerning whether certain limited partners could be examined in a case where there had been non-registration of the Limited Partnership under the *Partnership Act*. It was held that the non-registration did not convert an otherwise properly constituted foreign limited partnership into a general partnership when it carried on business in Alberta. Therefore, the limited partners were not proper parties to the action, nor were they subject to examination.

Trimay Wear Plate Ltd v Way[15] is a decision of the Court of Appeal on the issue of who is an officer: for purposes of [then] rule 200(1)(b). The Court determined that the object of the rules is to discover the truth relating to the matters in question in the action, and the examination ought to be of such "officer" of a defendant company as is best informed as to such matters.

Petro-Canada Products Inc v Dresser-Rand Canada, Inc[16] which considered the issue as to whether "near employees" could properly be examined, was reaffirmed in *Harcap Investments Inc v Alberta Permit Pro Inc.*[17] *Petro-Canada* involved allegations of negligent design following the failure of a piece of equipment. The two persons sought to be examined were employees of a sister company of the Defendant. The sister company performed services for the Defendant. The Chambers Judge found that the individuals were "akin to employees who had acquired relevant knowledge by virtue of that relationship".

[14] 2008 ABCA 393, 303 DLR (4th) 460 [*Devon*].
[15] 2008 ABCA 48, 429 AR 39 [*Trimay*].
[16] 2004 ABCA 144, 31 Alta LR (4th) 206 [*Petro-Canada*].
[17] 2007 ABQB 590, 438 AR 202 [*Harcap*].

At paragraph 14 of *Harcap*, the Court recited with approval the following part of the decision in *Petro-Canada* relating to the issue of who may be examined during discoveries:

> ...Several common threads can be gleaned from the authorities [with respect to who can be properly examined as a near employee]. They are as follows:
>
> 1. Whether a person fits through the "narrow gateway" must be determined on a case-by-case basis;
> 2. The burden rests on the party seeking to examine to establish a relationship akin to employment;
> 3. The person must have relevant knowledge acquired by virtue of that relationship;
> 4. The Rule should be given a wide and purposive interpretation as pre-trial disclosure of relevant and material evidence is beneficial to the litigation process, facilitating settlement or narrowing the real issues in dispute;
> 5. The court should consider the nature of the functions performed by the person in question and whether they are broadly equivalent to those performed by traditional officers and employees.
>
> 24 The list is not exhaustive. Other factors to be considered include whether the cause of action arose prior to the individual becoming involved, how the corporation held the individual out to others, the nature of the relationship between the party and the person sought to be examined, the purpose of the relationship, any remuneration for the service, the individual's responsibilities to the party, and the individual's role or responsibility to the job, project, product or work related subject in question.
>
> 25 In other words, the limiting factor to determining the "who" requires two things:
>
> 1. a relationship based on certain indicia akin to employment, and
> 2. relevant knowledge by virtue of that employment.
>
> There is no requirement to establish that the person is "the best informed", a relative and largely meaningless term in this context.

It is not easy to reconcile the reasoning in *Petro-Canada* as reaffirmed more recently by *Harcap*, with the reasoning in *Trimay*. *Trimay* states examination ought to be of the best informed "officer" as to the matter in issue.

Harcap refines somewhat the law in relation to examining persons who are "near employees" favoring a functional analytical approach over a technical approach. In *Harcap*, an application was made to have the wives of two parties in the action examined on the basis that the wives were akin to employees. The Court in *Harcap* noted, after examining the current state of the case law on this issue, that:

> 16 Those cases and other cases considering whether or not someone is an "employee" within the meaning of Rule 200 use a functional approach rather than a technical approach. Persons who are technically not employees (i.e. not receiving wages, having no formal connection with the corporate body, etc.) who nonetheless perform services for the entity in some capacity (such as a volunteer or contractor, or for a related entity) may still be considered to be employees if they have gained relevant and material knowledge as a result of their relationship with the entity.

Cana Construction Co v Calgary Centre for Performing Arts[18] considered whether an unpaid volunteer who performed key and relevant executive responsibilities for the corporate defendant could be examined under [then] rule 200 and found that the volunteer could be examined.

In *Mikisew Cree First Nations* v *Canada*[19] the court was asked to consider whether a consultant to the Band could be examined under [then] rule 200. In its decision, the court held that the test is not whether a person *is* an officer or employee, but whether that person is *akin* to an officer or employee.

With respect to selecting a representative for the corporation, the matter was dealt with in *Leeds v Alberta (Minister of the Environment)*[20] where it was found that the

[18] 30 DLR (4th) 455, [1986] 6 WWR 74 (Alta CA).
[19] 2000 ABQB 485, 267 AR 338.
[20] 61 DLR (4th) 672, [1989] 6 WWR 559 (Alta CA).

corporation's discretion to choose the person who speaks for it should not be lightly interfered with unless the selection is not made honestly and *bona fide* or where he officer cannot provide the required information. This principle was reiterated in *Olds (Town) v McDonald.*[21]

In *Western Canadian Place v Con-Force Products*[22] it was determined that there existed the ability of a corporation to change its officer before examinations are concluded, assuming there is a good and honest reason to do so. In *Western*, there was a request by Western Canadian to change its officer as the result of assignment. *Western* cites *McDougall & Secord, Limited v Merchants Bank of Canada*[23] for the proposition that the corporation's selection should not be interfered with if made honestly and reasonably.

Harcap[24] is also a useful case because it provides counsel with some guidance as to how to properly apply for and set aside proposed appointments under [then] rule 200:

> 20 I am not aware as to whether formal appointments have been taken out for the examinations of Mrs. Kerscher and Mrs. Pearce [wives of one of the parties who the court concluded could not be examined as employees]. The application before me is for an order requiring Mrs. Kerscher and Mrs. Pearce to attend for examinations for discovery. Alberta Permit Pro Inc. resists the application, although in a strict sense it should be Alberta Permit Pro Inc. applying under Rule 200(2)[1] to set aside the appointments as being unnecessary, improper or vexatious. Once an appointment is taken out, it is up to the person on whom the appointment is served, or the corporate party, to move to set aside the appointment. It is not generally up to the party serving the appointment to first establish that the person sought to be examined is indeed an employee, past employee or someone else who is subject to being examined for discovery. If a person sought to be examined challenges the appointment, as noted in *Petro-Canada,* the burden rests on the party seeking to examine to establish that the appointment has been properly taken out.[25]

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[21] 2003 ABQB 682, 17 Alta LR (4th) 195.
[22] 1998 ABQB 486, 224 AR 1 [*Western*].
[23] 46 DLR 672, [1919] 1 WWR 830 (Alta SC).
[24] *Supra* note 17.
[25] *Ibid* at para 20.

It is important to be aware that, contrary to the situation in the United States, "mere witnesses" have never been subject to questioning.[26]

3. Lists to review periodically as a quick refresher

It is useful if the Examination Notebook contains a section of lists to be reviewed regularly. Some suggested lists include the following:

- List of Guidelines for preparing a witness;
- List of common objectives of questioning; and
- List of the types of privilege.

Dain contains several lists that can be adopted to one's individual practice.

III. CREATING A CHECKLIST AND GETTING ORGANIZED

A. General

Once the lawyer has reviewed the pleadings, reviewed the applicable law, reviewed any prior discovery (formal and informal) and been in discussions with his or her client and cooperative witnesses, the lawyer is ready to prepare an inquiry. This next stage of preparation involves creating notes and developing checklists.

By this stage, the lawyer should be aware of the facts he or she needs to know and/or needs to have admitted. "The sooner that counsel has a full appreciation of his case, the sooner he may recognize the desirability of a settlement and be able to effect a good settlement to the advantage of his client." [27]

[26] *Wilbur v Miller*, 2005 ABCA 220, 256 DLR (4th) 171.
[27] Cudmore, *Choate on Discovery*, 2nd ed, looseleaf (Toronto: Thomson Carswell, 2008 Release 5) at para. 2-1 [*Choate*].

Notes are crucial to the beginning examiner if not for all examiners[28] and they are meant to serve two primary purposes: to help organize one's thoughts and to provide a checklist for questions.

Organization is important for two primary reasons. First, organization will aid in the creation of a clear questioning in the event the transcript needs to be used in a trial. Second, organization will ensure that everything needing to be covered is in fact, covered.

The important thing to remember about organization is that it is an aid only. During the questioning, the lawyer's method or order of organization may need to be refined and reorganized as the examination proceeds.

How should the lawyer organize vast quantities of information and material? Dain suggests several methods.

Potential Organization Methods:

- By chronology (order of events or occurrences);
- By subject matter;
- By the allegation (order of allegations of the complaint) – may be particularly useful for defendant's counsel; or
- By the document or document type (themselves organized chronologically, by the plaintiff, defendant or witness file or by subject matter).

Choate recommends that examining counsel give considered thought to the uses that may be made of questioning in each separate case and also recommends that considered thought be given to the best course to pursue in order to make the questioning serve the desired purpose.[29]

[28] *Dain, supra* note 4 at para 471.
[29] *Choate, supra* note 27 at para. 2-1.

B. Building a Checklist

When building a checklist, the lawyer may want to start with writing down every question, and later, reduce the checklist to include key questions only.

Particular attention should be paid to the essential facts and the documents that need to be proven. The lawyer must determine which facts and documents can be covered by admissions during questioning.[30]

Dain recommends that a checklist follow these guidelines, and that it be used by the lawyer in the following manner:

- Unless the wording of the answer or the question is critical for some reason, do not write out the question.
- Do not become tied to your notes (you risk failing to hear what your witness says, and you risk asking appropriate follow-up questions to a response).
- Use notes as a form of additional security, allowing you to be free to take detours as new possibilities arise during your examination. Knowing you have this security allows you focus your attention on the witness and take advantage of unexpected testimony. Return to your notes as a backup to ensure you have covered what you need to cover, only once you have exhausted an avenue of questioning...

Careful preparation will indicate which headings or points need to be dealt with during questioning. A memorandum containing these heading or points should be prepared.[31]

C. Preparing Your Client and Defending a Questioning

It is equally important for a lawyer to be prepared to defend his or her client that is being questioned for the reason that the transcript may be admissible as evidence at trial, and may ultimately affect the witness' credibility. Therefore "...conducting a thorough interview before testimony is not only proper but essential to fulfilling the duty of presenting the case in the most persuasive fashion."[32] In preparation for one's witness being examined the following "phases" are recommended:[33]

[30] *Ibid* at 2-2.
[31] *Ibid* at 2-1.
[32] *Ibid* at 2-2.
[33] *Ibid* at 2-2, 2-3.

1. Obtain the facts of the client's case, even cross-examine him or her, explaining that the purpose of this mode of inquiry is to develop the case as much as possible.

2. Advise the client of the nature of the case and the potential pitfalls. Stress to the client the importance of the following words of advice:

- maintaining an attitude of conviction and fairness;
- telling the truth at all times;
- avoiding arguments with examining counsel;
- avoiding long answers;
- volunteering information not asked about in the question;
- being prepared to be incited/intentionally angered by opposing counsel in the hope of obtaining a thoughtless answer in anger;
- avoiding answering every question with certainty where there is no certainty and the matter is not within the client's own knowledge;
- avoiding negative comments directed at the adverse party even where it is obvious that the adverse party is lying – let the evidence speak for itself; and
- leaving all objections to counsel.

3. Your client should also be instructed on the following matters:

- how to conduct herself in the event of cross examination;
- the importance of informing himself of the facts of the case, as required, and that such information may need to be found through his agents or servants[34];
- ensure her memory is refreshed with respect to important documents and have those documents available; and
- that a rehearsal may be advisable if it will serve to put the client at ease.

(This checklist might be useful to include in the Examination Notebook.)

[34] On the obligation to inform oneself see *Turkawski v 738675 Alberta Ltd*, 2005 ABQB 423 at para 22, 49 Alta LR (4th) 22, citing *Wright v Schultz* [1992] AJ No 1206 (CA); *Canadian Western Bank v Alberta* [2003] AJ No 360 (Master); *Aujla v Przywrzej* [2003] AJ No. 438 (Master); *Stevenson & Cote, supra* note 3.

It is notable that in *Bains v Bains*, 2007 ABQB 668, the family bar was criticized for "largely abandoning discovery of records in favour of a Notice to Disclose and going to trial with little discovery.[35]

An important point is raised by *Stevenson & Cote* concerning one's professional obligations during questioning. When a witness is not a party, a question arises as to who is the lawyer for the non-party. The authors note that if the lawyer is not acting for the witness, than the lawyer has no right to instruct or advise the witness, nor may non-lawyers intrude into the answers of such a witness.[36]

To reiterate an important principle: organizational tools are an aid for preparation –notes and checklists should not be an inflexible road map to be adhered to strictly. Preparation will ensure that legal counsel will conduct herself in the manner described by Chrumka J. in *Haslam v Summers*[37]:

> 30 On an examination for discovery, the questions may be direct or leading but they must never become abusive or misleading. Unnecessary repetition is expected to be avoided but it cannot completely be eliminated. There are instances where a relevant area is being revisited and a certain amount of repetition is necessary. This is particularly the situation in areas where the subject, though explored to an extent, has not been fully explored. The repetition focuses the witness on the area being further discovered.

IV. CONDUCT AND DECORUM

> *Beware the "friendly" examiner. Perhaps the most dangerous examiner is the one who makes his witness relax and become conversational. The witness must be told that the enemy sits across the table and that he or she must answer only the question. Nothing is to be volunteered. The silence at the end of the answer is golden and not to be filled with further words*.[38]

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[35] *Stevenson & Cote, supra* note 3, discussing [then] Rule 187.
[36] *Stevenson & Cote, supra* note 3 at 255, making reference to *Austec Electronic Systems Ltd v Mark IV Industries Limited*, 2002 ABQB 349, 325 AR 1.
[37] 2005 ABQB 306.
[38] *Finlay, supra* note 5 at 70.

A. General

Review your objectives before you defend your client's questioning. There may be several objectives you need to achieve; certainly one is to minimize any damaging testimony your client gives. To achieve this end, preparation of your client is essential, so long as it is within the bounds of ethics. Tips on preparing your client for questioning are provided later on this section.

Additional objectives may include the following:

- Ensuring your witness is comfortable with the process and therefore better able to give truthful and accurate answers;
- Minimizing the risk that the witness may inadvertently give misleading or incorrect testimony;
- Preventing improper conduct of the examining solicitor, especially where such conduct may adversely affect the truthfulness and accuracy of the testimony;
- Preventing the witness from answering improper or prejudicial questions that have no basis;
- Preventing your witness from testifying as to privileged information; and
- Ascertaining the examining solicitor's knowledge and theories of the case.[39]

It is also important to review any plans you may have to cross-examine the witness, or to make sure various points are covered and placed on the record. You can use the opportunity to educate your opponent about your evidence in the hope of fostering favorable settlement. It is also in your interest to preserve relevant testimony in the case the witness cannot attend at trial.[40]

Several key points relating to the proper conduct of counsel during discoveries were provided to this author by The Honourable Justice Martin (Alberta Court of Appeal) when the author was articling at the Court. These three points relate primarily to demeanour:

[39] *Dain, supra* note 4 at para 811.
[40] *Ibid*.

1. Keep the proceedings formal – don't chum around with opposing counsel even if they are your friends.

2. Keep your cool and take the high road when there are disputes.

3. Don't argue on the record; make your point and move on.

Dain also stresses the importance of demeanour, both the lawyer's and the examinee's. The lawyer's demeanour should be nothing less than what is expected at trial in terms of projecting confidence, attentiveness, alertness, and professionalism. This energy will transfer to the witness and will aid in making him or her feel more comfortable. It is particularly important to protect your client from any harassing or embarrassing examination. Pay particular attention to avoiding disclosing any of your weaknesses, through facial expression or body language. Be cognizant of the non-verbal messaging your face and body may be communicating.[41]

Remember to pay attention to the signals your client may be giving. If your client is fatigued, it will affect the quality of the testimony. Displays of anger or confusion may ultimately result in your client making unintended statements – accordingly, "nip it in the bud" earlier rather than later and request a recess.

B. Style of Questioning

Whether to ask open ended questions versus cross examination style questions depends on your purpose. If you want to know the information ask open ended questions. Only use cross examine style to nail down an admission.

C. A Clear Record

It is important to be reminded that it is not counsel who is being discovered:

[41] *Dain, supra* note 4 at para 832.1.

> It is highly improper for counsel for the witness to interrupt examination questions with comments, cues, his or her own answers or anything but a legally proper objection to the question.... It is unethical.[42]

Dain emphasizes the overwhelming importance of maintaining a clear record.[43] The following chart is an adaptation of the advice in *Dain* as to how to achieve a clear record.

Avoid These Pitfalls	**Establish These Good Habits**
Saying "...this document"	X is indicating he is referring to "Exhibit_____"
Ignoring body language (head nods "yes" or "no") ("this big")	Translate nonverbal communication into a verbal equivalent "Witness nod indicating yes" "Witness indicating dimensions of__" or have witness verbalize the dimensions herself.
Ignoring what is going on off the record i.e. Witness consulting with lawyer or document before answering question	Translate what is happening off the record with a visual description that is recorded on the record "Let the record reflect that prior to answering the last question the witness had a confidential conference with his lawyer lasting approximately one minute"
Allowing multiple persons to talk at the same time	Take turns speaking – it is essential to a clean record Allow examiner to finish posing the question before objecting to it. Allow the examiner to finish posing the question before answering it.

[42] *Stevenson & Cote, supra* note 3 at 266, citing *Allison v Traff*, 2003 ABQB 17 (Master).
[43] *Dain, supra* note 4 at paras 548, 549, 835.5.

	Make your objection before the answer starts to be given
Creating confusion when a witness is instructed by their lawyer not to answer a question.	As the lawyer defending the witness: state clearly "I instruct/request the witness not to answer the question on the ground that...(state ground)". As the lawyer examining the witness ask: "Do you refuse to answer the question?" If objections are frequent, elicit from the witness that every time he or she is instructed or requested not to answer that he or she in fact will not answer.

Two cases relating to the conduct of counsel at questioning are provided here as a reminder that one's conduct should at all times remain professional and courteous.

In *Pfeifer v Westfair Foods Ltd*,[44] Pfeifer sought costs at Column 4, alleging misconduct of the defendant (lawyer) during questionings regarding the production of certain videotape and photographs. The court was not satisfied that Westfair's failure to disclose was malicious. Pfeifer was therefore awarded costs on Column 3 instead. If the misconduct had been determined to be malicious, the court indicated that the consequences would have been far more severe.

In *Roque v Bane*[45] the main claim was dismissed. The defendant, Bane, sought payment of costs against the solicitor for the plaintiff on the basis that he had caused undue delay as a result of his questionable conduct during questioning. The evidence in the discovery transcripts revealed the existence of considerable acrimony as between the solicitors on the two sides. Wilkins J. found that there was no evidence of bad faith. However:

[44] 2003 ABQB 829, 347 AR 236.
[45] 2003 ABQB 1005.

> 44 The conclusion I have reached should in no way be considered to be an approval of the conduct of Mr. Moodie as recorded in examinations for discovery. The transcripts make it very clear Mr. Moodie was irritated with counsel for Mr. Bane. I am satisfied that Mr. Moodie acted with less control and professionalism than this Court would expect from a person of his experience. It is clear from his recorded statements that a personal animosity existed between him and counsel for Bane. That animosity was reflected in his conduct of the examination. However, objectively assessing the actions of Mr. Moodie as reflected in those transcripts and the correspondence between counsel, I cannot reach the conclusion that the allegation he acted in bad faith has been made out. Moodie was entitled to pursue his client's interest with determination to complete the discovery of all relevant documents and evidence.

While the acrimony between counsel increased the costs to the parties, it did not merit an award of costs against the solicitor personally.

V. COMMON OBJECTIONS DURING QUESTIONING

Rule 5.25 sets out what questions may be asked and objected to. It reads as follows:

> Rule 5.25 (1) During questioning, a person is required to answer only:
>
> (a) Relevant and material questions, and
>
> (b) Questions in respect of which an objection is not upheld under subrule (2).
>
> (2) A party or a witness being questioned may object to an oral or written question during questioning but only for one or more of the following reasons:
>
> (a) Privilege;
> (b) The question is not relevant and material;
> (c) The question is unreasonable or unnecessary;
> (d) Any other ground recognized at law.
>
> (3) A corporate representative may object to an oral or written question during questioning on the basis that it would be unduly onerous for the corporate representative to inform himself or herself in the circumstances.
>
> (4) If an objection to a question cannot be resolved the Court must decide its validity.
>
> (5) After the questioning party has finished questioning a person, that person may be questioned by the party for whom the person is or may be

a witness to explain, elaborate or provide context for an answer initially given.

(6) Following answers to the explanatory, elaborative or contextual questions, the person may be questioned again about the person's answers.

A. To Object or Not to Object, that is the Question

According to Dain, the decision as to whether to object must be based on a specific strategy.[46] At trial, one is unlikely to object to technicalities but will definitely object when the objection will accomplish a purpose. In a questioning, whether you object or not should be based on what is best for you and your case, and whether the objection will accomplish your goal.

Some factors Dain suggests are worth considering when making a decision as to whether to object (or not) include the following:

- Objecting might serve to keep you alert and attentive in a boring circumstance;
- Objecting will show the examinee that you support her;
- Making an objection in questioning is easier than during the heat of trial;
- Objecting might serve to interrupt the examiner's flow – provided that you have an otherwise good and ethical primary reason to object;
- A proper objection can serve to keep the record clean and clear;
- An objection may be necessary to keep out harmful evidence;
- Consider the examinee's reaction to objections – whether they cause disruptions or provide the examinee with a break;
- Ask yourself what the objection would accomplish.

In addition to these tactical reasons for objecting (or not), there exist substantive and more classical reasons for objecting (or not).

1. When not to object:

[46] *Dain, supra* note 4 at para 831.1.

- It is not a valid objection, that to answer the question would be too expensive or too much trouble.[47] [however, note the exception under rule 5.25(3) with respect to corporate representatives]

- Do not object to hearsay. The rule against hearsay does not apply to questioning.[48]

- It is no objection to state that the witness likely does not know the answer, or that the examiner already knows the answer.

- Questions may be asked to learn names of people with knowledge who might be examined, though this is not so if one is trying to identify Crown informers.[49]

2. When to object:[50]

Counsel can object to questions being put to her client, so long as the objections relate to the normal rules of exclusionary evidence. The following is one list of acceptable reasons to voice objections to questions:

a. Evidence that is privileged;
b. Opinion Evidence;[51]
c. Answering Hypothetical Questions;[52]
d. Questions going only to credibility or credit;
e. Questions of law;
f. Questions of Proof (one may only ask questions of fact);[53]
g. Questions concerning the facts a party relies upon for part of his pleading;
h. Unfair questions (for example a question which misstates a previous answer);
i. Whether one can ask about previous similar incidents and precautions taken later see *Canada Southern Petroleum Ltd v Amoco Canada Petroleum Co*[54].

[47] *Dene Tha' FN v AEUB*, 2003 ABCA 250, 330 AR 387.
[48] *Lastiwka v TD Waterhouse Investor Services (Canada) Inc*, 2005 ABQB 44 (CanLII).
[49] *Leipert v R*, [1977] 1 SCR 281, aff'g (1996) 74 BCAC 271.
[50] This section is taken primarily from *Stevenson & Cote, supra* note 3.
[51] *Inland Cement v Stantec Consulting*, 2002 ABQB 7, 308 AR 180 (Master); *Allison v Traff,* 2003 ABQB 17 (Master); *SDM v R*, 2002 ABQB 1132, 329 AR 93.
[52] *Stone Sapphire Ltd v Transglobal Communications Group Inc*, 2007 ABQB 238, 416 AR 306.
[53] *Millot Estate v Reinhard* (2000), 265 AR 350, 84 Alta LR (3d) 387 (QB).
[54] [1995] 5 WWR 270, 168 AR 132 (QB).

Schedule B contains a similar list to the above.

The decision of the unanimous Court of Appeal in *Briggs Bros Student Transportation Ltd v Collacutt*[55] highlights the importance of determining whether a party is in actual fact adverse in interest to the party which seeks to compel answers in questioning. In *Briggs*, the defendant sought contribution from the mother for injuries sustained to her child in a bus accident when that child was nine years old. The defendant bus company third-partied the mother and was asking the Court to compel the mother to answer certain questions that were objected to during questioning. The bus company claimed the mother had failed to properly instruct her child as to how to safely cross the road.

> 11 Since the defendants and the third parties have a dispute over the right to contribution and indemnity, questions on those topics are obviously "relevant". With respect to the validity and quantum of the plaintiff's claim there is no issue between them. The third parties have chosen not to directly challenge the plaintiff's claim against the defendants. They are prepared to abide by and suffer any judgment that the plaintiff may obtain against the defendants. Whether one assumes that they have admitted the validity of the plaintiff's claim against the defendants, or they are merely content to rely on the defendants to defend the claim, **the third parties have failed by their pleadings to demonstrate any adversity between themselves and the defendants. It follows that the third-party mother, in her capacity as a third party, was entitled to refuse to answer the questions put to her.**
>
> **...**
>
> 13 The primary purpose of examinations is to avoid surprise and to obtain admissions that can be read in at trial. It is significant that any examination of the third parties on the damages suffered by the plaintiff could not be read in a trial as against the plaintiff. It is true that those transcripts could be used to impeach the third party should she testify at the trial. But that is something that could be done with a transcript of the evidence of any witness, and as has been mentioned mere witnesses are not examinable for discovery. In this case, the happenstance that the third party is the mother of the plaintiff should not be allowed to extend the scope of discovery beyond what is "relevant and material" in terms of the pleadings.

[55] 2009 ABCA 17, 100 Alta LR (4th) 17 [*Briggs*].

Accordingly, the mother was determined as being **not adverse in interest** to the defendant, therefore questions of the mother relating to the child plaintiff's injuries and damages were not permitted.

Common Wealth Credit Union Ltd v Waylan Mechanical Ltd[56] is a lengthy case considering *inter alia* whether one of the parties in questioing could be compelled to answer certain questions which it had objected to answering. Chrumka J. held that the question at issue did not need to be answered as the answer required the examinee to **interpret a document, answer a question of mixed fact and law, or to give a legal interpretation.**

Common Wealth remarks on the law with respect to **objecting to questions calling for conclusive answers** (at paras 24-25), finding consistency with two earlier decisions of *Alberta (Provincial Treasurer) v National Bank of Canada et al*[57] and *Can-Air Services Ltd v British Aviation Insurance Co Ltd*[58].

Paragraphs 24-61 of *Alberta* provide concrete examples where objections to certain specific questions were held by the court to have been proper objections, on the basis that the question being asked of the examinee **amounted to interpreting documents or to answering questions of law**. In *Alberta*, Master Funduk individually recites 10 questions to which objections to answer were given and he provides clear reasons as to why the objections were proper in the circumstances (at paras 24-48).

The decision of Cote J.A. in *Can-Air* is recalled in paragraphs 49-61 of *Common Wealth* in which emphasis is placed on Cote's analysis as to the difference between asking questions to elicit facts (allowed), asking questions to elicit opinions (not allowed), and asking questions as to what facts the examinee relies on (not allowed.) A lawyer having

[56] 2008 ABQB 96 [*Common Wealth*].
[57] 172 AR 282, [1995] AJ No 702 (Master) [*Alberta* citing to AJ].
[58] (1988), 91 AR 258 (CA) [*Can-Air*].

a working knowledge of the principles set forth in *Common Wealth* will be well equipped to manage objections.

Stevenson and Cote, in their discussion regarding [then] rule 189[59], provide a checklist for possible types of privilege. Their checklist is conveniently divided into categories (for example criminal, contracts, legal, counsel etc.) This list is also a good list to include in one's Examination Notebook.

The next section will consider in somewhat greater detail the matter of hospital privilege.

3. Statutory Privilege of Hospital Records[60]

Section 9 of the *Alberta Evidence Act*[61] creates an absolute prohibition against the disclosure of records of the Quality Assurance Committee of a hospital. For convenience, that section of the *Evidence Act* is set out in Schedule C.

A Quality Assurance Committee is a committee that has as its primary purpose the carrying out of quality assurance activities. Quality assurance activities are defined as planned or systematic activities the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of the quality of health care or health services.

Records specifically included in the privilege are records relating to the investigation and review of hospital incidents. According to case law interpreting section 9, the investigation and review of hospital incidents falls within the mandate of quality assurance committees. Thus the protection and privilege afforded by section 9 extends to all records resulting from investigations or reviews which may follow in the wake of an incident.

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[59] Now rule 5.20, which necessitates that a party is not entitled to conduct examinations for discovery until that party has filed and served an affidavit of records (unless otherwise agreed or allowed by court order).

[60] This section is adapted from the paper *Discovery of the Health Region*, prepared by Craig Gillespie and Bottom Line Research Inc., availbale online: www.bottomlineresearch.ca.

[61] RSA 2000, c A-18 [*Evidence Act*], s 9.

In *Goad (Guardian ad litem of) v Cavanaugh*[62] the plaintiffs sought production of the minutes of the Medical Advisory Committee to which the defendant doctor had provided a summary of events. Trussler J. refused disclosure, concluding that section 9(1)(b) of the *Evidence Act* provides for an outright prohibition against the production of such documents:

> "...[s.9] may be restrictive in an age of fuller disclosure, but the section does exist and it is up to the legislature to make any amendments to it. The object of the **section** is obviously to promote full discussion by the groups mentioned therein with the purpose of creating an atmosphere in which matters can be investigated and improvements can be made.
>
> ...Section 9(1)(*b*) creates a prohibition against the production of those documents. It is, therefore, not a question of whether or not there is a privilege with respect to these documents, it is a question of an outright prohibition.
>
> As a result the hospital and the doctors are prohibited by legislation from producing the documents in question." (at paras 7-9)

In *Sinclair v March*[63] the B.C. Court of Appeal considered the extent of protection afforded by section 51 of the B.C. *Evidence Act* which relates to the disclosure of evidence produced by hospital committees. It found that the purpose of the protection is "to protect efforts made by hospitals to ensure that high standards of patient care and professional competency and ethics are maintained, by ensuring confidentiality for documents and proceedings of committees entrusted with this task"[64]. Furthermore, "[r]ather than striking a balance of interest, the Legislature made a clear choice in favour of one interest, hospital confidentiality"[65]. The appellate court concluded, therefore, that the clear prohibition against disclosure provided by the legislation extended to an investigation of the practice and procedure of a particular doctor as the investigation ultimately related to a quality of care issue protected by the legislation.

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[62] 3 Alta LR (3d) 18, [1992] AJ No 1268 (QL) (QB) (citing to AJ).
[63] 2000 BCCA 459, 78 BCLR (3d) 218 [*Sinclair*].
[64] *Ibid* at para 23.
[65] *Ibid* at para 26.

Lancaster v Minnaar[66] considered a similar provision in the Saskatchewan *Evidence Act*. And in *Steep (Litigation Guardian of) v Scott*[67], Master Egan noted that while Ontario was the only jurisdiction in which quality assurance records did not enjoy legislative protection, common law privilege applied to records, on the basis that such records satisfied the four Wigmore criteria.

Quality Assurance Committee Regulation[68] designates the Physicians Performance Committee established by the College of Physicians and Surgeons of Alberta as a quality assurance committee for the purpose of section 9 of the *Evidence Act*. Thus, the statutory privilege that is made available to a hospital's Quality Assurance Committee applies equally to the records of the Physicians Performance Committee of the College.

Some hospital committee records are excluded from the section 9 privilege. A quality assurance committee **does not include** a committee "whose purpose, under legislation governing the profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation." Thus it appears that whether the investigations of the College are covered by the prohibition against disclosure depends on which College committee undertook the investigation.

Discussions in medical rounds or with colleagues do not fall under this quality assurance exemption either; this statutory exemption is very specific to the function and operation of the quality assurance committee.

Notwithstanding the explicit exemption of quality assurance records from disclosure under section 9 of the *Evidence Act*, Courts have found that remedial measures taken by a hospital after the fact [of an investigation] **are** relevant on questioning. Thus in *Algoma Central Railway v Herb Fraser& Assoc*[69], the court held that the defendant must

[66] 2006 SKQB 380, 288 Sask R 31.
[67] 62 OR (3d) 173, 2002 CarswellOnt 4061 (Master).
[68] AR 94/2003.
[69] 66 OR (2d) 330, 1988 CarswellOnt 535 (Div Ct).

answer questions about fire safety practices and procedures adopted and enforced after the incident leading to the action. And in *Lucko v Unruh*[70], the same conclusion was reached in a medical malpractice case.

4. Manner of Objection

The manner of objecting is by way of motion over a specific dispute. The court will rarely make advance blanket rulings about questions not yet asked.

The court should not order that irrelevant questions be answered simply because they are brief and will do little harm (*Cominco v Worthington Compressor*, [1997] AR Uned 305).

> It is preferable for objecting counsel to object during the examination stating clearly on the record all grounds of objection at that time, being that it may be possible to avoid the objections by rephrasing the question.[71]

VI. RELEVANCE AND MATERIALITY

Rule 5.2(1) of the *Rules* sets out when something is relevant and material. In *Weatherill (Estate) v Weatherill*[72] it was observed that:

> 16 In determining whether a document [or a discovery question] is relevant and material, the starting point is the pleadings. The pleadings define the issues, and relevance must be determined with respect to the issues. The pleadings are also relevant with respect to the issue of materiality. However, with respect to materiality one must also have regard to the issue in question. ...
>
> 17 That relevance is determined by the pleadings, while materiality is more a matter of proof can be seen by the wording of the Rule. The Rule talks about records that can "help determine" an issue, or that can "ascertain evidence" that will determine an issue. These are words of proof, and materiality must be determined with that in mind.

[70] 104 Man R (2d) 1, 1995 CarswellMan 535 (QB).
[71] *Stevenson & Cote*, *supra* note 3, discussing [then] rule 213.
[72] 2003 ABQB 69, 11 Alta LR (4th) 183.

In *Stone Sapphire Ltd v Transglobal Communications Group Inc*[73], Lee J. was asked to consider whether it was appropriate to compel the party to provide answers to various undertakings and to compel answers to certain questions to which various objections were given. Lee J. canvassed the general legal principles that were applicable.

Both *Fradsham* and *Stevenson & Cote* canvass the issue of relevance and materiality thoroughly in their discussions relating to the rules around relevance and materiality. The question of relevance is dealt with in greater detail below in the context of determining what sort of records are producible during questioning.

VII. DOCUMENT REQUESTS[74]

It is important for counsel to know how to deal with common requests for records during questioning. This section provides an overview of what types of records need to be produced and what types do not, with a particular focus on personal injury claims.

A. General Principles

Rule 5.25 limits the scope of questioning to what is relevant and material. *Pinnacle Arabians v Warren Bentley*[75] and *NAC Constructors v Cap. Region Wastewater Comm*[76] are cases reviewing jurisprudence in this area.

The matter in *NAC* arose out of a tendering process for which the plaintiff was seeking damages. In discoveries, counsel for NAC questioned the Commission's representative concerning three matters related to communications between a consultant and the Commission. Each question was objected to and taken under advisement. The Commission later declined to disclose the information requested.

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[73] 2007 ABQB 238, 416 AR 306 [*Stone Sapphire*].
[74] The majority of this section is an adaptation of a previous paper prepared by Craig Gillespie and Bottom Line Research and Communications, available online: www.bottomlineresearch.ca .
[75] 2004 ABQB 90, 351 AR 363 (Master) [*Pinnacle*].
[76] 2006 ABCA 246, 63 Alta LR (4th) 19 [*NAC*].

The Chambers judge ordered the Commission to disclose the disputed evidence. The order was reversed on appeal.

> 17 The disputed evidence may comprise opinions and advice that relates to compliance of the Maple and NAC bids, the fundamental and determinative issues raised by the pleadings, and that evidence may be relevant to those issues in a broad sense. But it is not material to them within the *Rules* fixing the scope of examination for discovery. Resolution of the issues of compliance of the tenders does not depend in any way on the opinions and advice communicated by Earth Tech to the Commission. The disputed evidence cannot reasonably be expected to significantly assist in proving or disproving the issues of compliance.[77]

The Court of Appeal in *NAC* based its decision having regard to the effect of the amendments to the Rules:

> 12 Oral examination for discovery is now confined to eliciting facts of primary relevance, that is, facts that are directly in issue, or of secondary relevance, that is, facts from which the existence of the primary facts may be directly inferred. Both primary and secondary relevance are determined by reference to the issues raised by the pleadings. Questions seeking information that could reasonably be expected to lead to facts or records of secondary relevance (that is, questions asking for information that is only of tertiary relevance) need no longer be answered.
>
> 13 In addition to being relevant within the meaning of Rule 186.1, information sought on discovery must be material, that is, be reasonably expected to "*significantly*" help determine one or more of the issues raised in the pleadings. The materiality of evidence refers to its pertinency or weight in relation to the issue it is adduced to prove: *Black's Law Dictionary*, (6th ed. 1990). Facts or documents may be relevant within Rule 186.1, but, either alone or in combination with other evidence, be of no significant help to the examining party in proving or disproving a fact in issue. As Slatter J. observed in ***Weatherill Estate v. Weatherill,*** (2003) 337 A.R. 180 (Q.B.), 2003 ABQB 69 at para. 17, "... relevance is determined by the pleadings while materiality is more a matter of proof ...". See also ***Tolko Industries Ltd. v. Railink Ltd.*** (2003), 14 Alta. L.R. (4th) 388, 2003 ABQB 349 at para. 6.

[77] *NAC Constructors Ltd v Alberta Capital Region Wastewater Commission*, 2005 ABQB 267.

In *Pinnacle*, Master Breitkreuz had occasion to express his frustration with the 1999 Rule amendments when asked to determine whether certain questions objected to during discovery would elicit evidence that was relevant and material.

> 2 It is apparent to me that everyone who has written about the new rule (Rule 186.1), and the amendment of Rule 200 to provide that the questions must be "relevant and material" agrees that the scope of discovery has been narrowed, but there still appears to be a reluctance to narrow the scope of discovery to any significant degree from what it was prior to the new rule.[78]

After reviewing the jurisprudence that has been developing post 1999, and remarking upon the difficulty of distinguishing primary, secondary and tertiary evidence, the Master concluded that "...the application of the new Rule to particular fact situations must be primarily pragmatic."[79] In the result, and Order was issued directing that all 35 questions be answered.

In *Tolko Industries Ltd* v *Raillink Ltd*[80] the relevant and material requirement was raised in the context of the scope of questions that are permissible during questioning:

> [7] Counsel also referred to the decision of Master Funduk in *Franco* v. *Hackett* […] at para. 34:
>
> > 34. But the test is relevant and material. That now cuts out the old fishing expeditions. There is no fishing without first evidence that there are fish in the pond and a reasonable amount of fish. Defendant has not satisfied me of that. Conjecture is not sufficient.
>
> This statement has caused counsel in subsequent cases to embark on all sorts of piscatorial analogies. The metaphor is helpful if one remembers that with respect to the scope of discovery of the parties the question of "whether there are fish" is determined by the pleadings. If one of the parties pleads that there are or are not fish, then that is determinative of the issue as far as discovery goes. As to whether there are "a reasonable amount of fish", that relates to materiality. Rule 186 says that there are a reasonable amount of fish if there are enough to significantly help

[78] *Pinnacle, supra* note 75 at para 2.
[79] *Ibid* at para 9.
[80] 2003 ABQB 349 at para 7, aff'd 2003 ABCA 332 [*Tolko*].

> determine one or more issues, or to ascertain evidence that can significantly help determine an issue. Under the new Rule fishing expeditions are still permitted if they fall within that test. [Reference omitted]

The concepts of relevancy and materiality are distinct. Materiality relates to the degree to which a fact is related to the issues of the lawsuit. Relevancy relates to whether a document assists in proving or disproving that particular fact.[81]

As stated by Sean FJ Curran, "[c]learly, then, it is through **the careful crafting of pleadings** that one 'stocks the pond' with fish, and sets the framework for a broad examination for discovery."[82]

It is worth noting that rule 5.10 provides that there is a continuing duty to disclose documents. This means that once the affidavit of records is prepared, if relevant and material records are discovered, they must also be disclosed.

The next several sections will consider the production of specific classes of records, specifically the production of medical and hospital records, WCB records, Disability records, and Employment Insurance Statutory Files and Employment files.

B. Medical and Hospital Records

As indicated earlier, all documents that are in the party's possession, custody or power must be listed in the affidavit of records.

In *Price v Labossiere*[83] the plaintiff sued the defendant for damages caused by the defendant's negligent operation of a motor vehicle. During the plaintiff's questioning she stated that she had been examined by her doctor on a number of occasions, however

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[81] SFJ. Curran, "Relevance and materiality: Setting the Scope of Discovery" in *Rediscovering Discoveries* (Edmonton: Alberta Civil Trial Association, 2005) Supplementary paper G at 7 [*Rediscovering Discoveries*]; AA Fradsham, *Alberta Rules of Court Annotated 2006*, (Toronto: Carswell, 2005) at 477. See also: *Dow Chemical Canada ULC v Nova Chemicals Corp*, 2014 ABCA 244 [*Dow*].

[82] *Rediscovering Discoveries*, *supra* note 81 at 6.

[83] 22 DLR (4th) 629, 1985 CanLII 1252 (QB citing to CanLII) [*Price*].

she did not provide the defendant with copies of her physician's notes, nor had she asked the physician for them. The defendant requested that the plaintiff file a further and better affidavit that would include those notes.

Sinclair J. concluded that the documents requested were in the "power" of the plaintiff because it was reasonable for her to request the notes and records from the physician:

> In the result, I have come to the conclusion that the notes and records in question are in the "power" of the plaintiff in the sense that it would be reasonable for her to request them from her physician. If the notes and records are not produced following such a request then an application would have to be made by the defendant pursuant to R. 209.[84]

Similar considerations apply to the notes and records in the possession of the physiotherapists.

In light of *Price*, where the medical or mental condition of a party is at issue in the lawsuit, the related medical and hospital records, including clinical notes and records obtainable by a party, ought to be listed in the affidavit of records.[85] One need only list and produce what is relevant to the medical condition at issue or what is related to the matter disputed. If the whole medical and emotional history is at issue, then everything must be produced.[86]

The fact that medical reports are produced does not render clinical notes irrelevant-they also need to be produced when relevant to the dispute:

> The plaintiff has put in issue his entire medical and emotional health and it seems to me that there can be no doubt that all medical records must be subject to production. I am in agreement with the submission that once clinical notes and records are relevant, they remain relevant, whether or not there has been a medical report. The obligation of the plaintiff to make

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[84] *Ibid* at para 22.

[85] See TL Archibald & JC.Morton, *Discovery: Principles in Practice* (Toronto: CCH, 2004) at 17, 41-42; Master Quinn, in *Murphy v. Boully* (1987), 77 AR 276, held that the principles in *Price* only applied where there has been an independent medical examination for the defendant.

[86] *Gibbs v Sabourin* (2001), 304 AR 125 (Master).

> reasonable efforts to obtain these documents is not affected by the production of a medical report.[87]

If only a part of the medical records are relevant, the entirety of the records need not be produced. In *Micheli v Sheppard*[88] the plaintiff sustained a serious injury to his eye and claimed general and special damages. The defendant sought production of several sets of clinical notes and records of professionals who appeared to have seen the plaintiff since the accident.

The Court held that the request was beyond the limits of relevance and that the records in question did not need to be produced. The fact that the pleadings were broad did not make all the clinical notes and records relevant, considering that the claim was narrowed down to the eye injury.

Similarly, in *Feraco v. Rasul*[89] in the context of a motor vehicle accident there was no claim relating to the obstetrical or gynecological condition of the plaintiff. Justice Read held that the gynecologist and obstetrician's charts, as well as the treatment received at a fertility clinic that post dated the accident, were irrelevant and immaterial.

In the same case, the plaintiff's counsel also provided a substantial quantity of edited doctor's notes. The defendant requested the charts without editing. Justice Read reviewed the unedited record and concluded that none of the portions of records that were not produced were relevant. This appears to be an acceptable practice in cases where some irrelevant records are mixed with relevant ones - the court may review the records in order to assess their relevancy to ensure that no relevant material has been left out in the discovery process.

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[87] *Lonergan* v *Morrissette* (1993), 109 DLR (4th) 758 (Ont Gen Div). Justice Macdonald was guided by *Cook v Ip* (1985), 22 DLR (4th) 1 (Ont CA). See also *Guitierrez* v. *Jeske*, 2005 ABQB 953.

[88] (1994), 30 CPC (3d) 297 (Ont Gen Div). See also *Vu v Garcia*, 2005 ABQB 308, where Master Wacowich refused to order that records concerning treatment to the plaintiff's personal area be produced, because they were unrelated to the personal injury action 17 2003 ABQB 951.

[89] 2003 ABQB 951.

The same principles of relevance apply to pre-existing medical conditions. If there is an issue regarding pre-existing conditions, records and documents that pre-date the injury must be disclosed if relevant. Where no pre-existing conditions are in issue, such records are likely to be considered irrelevant and need not be listed in the affidavit of records.[90]

In *Aujla v Przywrzej*[91], the plaintiff refused to provide an undertaking to disclose her hospital records for 14 years prior to the accident. Master Funduk denied the defendant's request for production of these documents, finding that the request constituted a fishing expedition.

In general, courts have refused to compel psychiatrists to give evidence. *G (DM) v G (SD)*[92] arose in a family law context in which the production of psychiatric records was judged to be harmful for the health of the party and therefore no production was ordered.

In *Guitierrez v Jeske*[93], the psychological health of the plaintiff was also at stake. Despite the fact that pre-existing conditions may have been present, Moen J. denied production of counseling records from the Institute of Psychology and Law. The counseling records involved not only the plaintiff, but also her children. The plaintiff had requested the records from the Institute, but it refused to provide them because of the childrens' interests.

Given the reality of a partial privilege in the case of psychiatric records, it appears that in certain situations there will be times where disclosure is appropriate and there will be disclosure of a limited number of records, disclosure of edited records or the imposition of conditions to the disclosure.[94] For instance, in an action where damages are claimed,

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[90] *Johnston v Bryant*, 2003 ABCA 169, 17 Alta LR (4th) 24 [*Johnston*]. See also *Karkanas v Thomas* (1986), 19 CPC (2d) 303 (Ont Dist Ct); *Furlano v Calarco* (1987), 20 CPC (2d) 279 (Ont HCJ).
[91] 2003 ABQB 310. See also *Turkawski v 738675 Alberta Ltd*, 2005 ABQB 423, 49 Alta LR (4th) 22.
[92] 72 OR (2d) 774, 1990 CanLII 7003 (Master).
[93] 2005 ABQB 953, 385 AR 62.
[94] In the context where a child welfare file was ordered to be disclosed under some conditions see *Swamy v Schell* (2003), 333 AR 366 (QB).

not ordering certain records would be unfair in that it would prevent the defendant from properly evaluating the nature and quantum of the claim for damages. It would also prevent the Court from properly conducting an assessment of damages. The Court may, in these situations, allow disclosure upon certain conditions.[95]

This was the case in *Gibbs v Sabourin*[96], in which all of the plaintiff's state of health (physical and psychological) was placed at issue. It was held that the plaintiff's allegation that the accident caused mental problems made the doctors' records about her depression relevant. The plaintiff submitted that the depression she suffered as the result of the accident was separate than the depression she suffered because of her boyfriend's death. Master Funduk did not attach any conditions to the disclosure, because there was nothing to sustain the necessity of conditions. Moreover, he was not convinced that the "depressions" could be so conceptually distinct.

In *HZ v Unger*[97], the Plaintiff was a victim of a brutal sexual assault. The Defendants were (then) members of the Crimes Compensation Board. The Plaintiff alleged that the Defendants prevented her from obtaining timely and appropriate care, which hampered recovery and caused damages, primarily of a psychological nature. The psychologist was examined produced his sealed file pursuant to a Court Order. The Defendants sought production of the sealed file.

Counsel for the doctor maintained that his notes were confidential and that production of them would harm the Plaintiff, and that he was under the professional obligation to refuse delivery. The Court held that the doctor's concerns could be addressed with limited disclosure and Court oversight. The Court ordered that the documents would be provided only to the lawyers and experts of the defendants – "a small group of trustworthy professionals."[98]

[95] *LMP v Fielding*, [1994] OJ No 2775 (Gen Div).
[96] 2001 ABQB 1021, 304 AR 125 (Master).
[97] 2015 ABQB 167 (Master).
[98] *Ibid* at para 13, citing *AM v Ryan*, [1997] 1 SCR 157.

C. Records from the WCB

Section 148 of the *Workers' Compensation Act*[99] governs the disclosure of the Workers' Compensation Board documents in a civil lawsuit:

> 148(1) The books, records, documents and files of the Board and all reports, statements and other documents filed with the Board or provided to it are privileged and are not admissible in evidence in any action or proceeding without the consent of the Board. […]

When a party requests a file, upon provision of a duly executed release from the worker and payment of the required fees, the practice of the Worker's Compensation Board is to produce the whole file to the requesting party.[100] In *Lund v Lauzon*[101] Madame Justice Veit stated what sorts of records should be produced from the WCB claim file:

> [4] In reviewing the documents, I have not ordered the production of memos written to file or to another person in which a WCB employee ruminates about Ms. Lund's situation; I consider those documents to be irrelevant.
>
> [5] I have ordered the production of documents in which WCB staff or consultants report on Ms. Lund's physical condition or report to Ms. Lund on WCB decisions about her physical assessment.
>
> [6] I have not ordered the production of documents relating to Ms. Lund's WCB benefits; however, I have ordered documents that relate to programs offered by the WCB to Ms. Lund and her compliance with those offers.
>
> ...
>
> [13] Much of the material on the WCB file relates to the minutiae of Ms. Lund's earlier WCB claims: the specific amount of money claimed, the specific disability allowed, the specific programs offered to her. I could not find any relevance to most of this material. Here again, the file is, naturally enough, concerned with the disposition of Ms. Lund's claim within the WCB structure; that is irrelevant to these proceedings. That material does not need to be disclosed to the defendants.

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[99] RSA 2000, c W-15.

[100] DR Mah, *Workers' Compensation Practice in Alberta*, 2d ed, looseleaf (Toronto: Carswell, 2005) at 5-42 [*Workers' Compensation Practice in Alberta*]. This practice was a response to *Jahnke v Wylie* (1994), 162 AR 131 (CA) where the Court of Appeal held that s. [148] "forbids a Court from ordering access in any case where the Board is not a party. It instead imposes upon the Board a duty to decide whether to permit disclosure, a duty that must be exercised fairly." It also held that where the WCB is a party to an action despite the wording of s. 148, the Court may order production of documents.

[101] [1996] AJ No 980 (QL) (QB) [*Lund*]. See also *Burton v Brice*, 2006 ABQB 523, 47 CPC (6th) 173, which reaffirms the approach taken by Veit J. in *Lund*.

> [14] Nevertheless, where a benefit has been offered to Ms. Lund, and she has not taken advantage of it, or a program offered to her and she has rejected it, or exercises recommended to her and she appears not to have done them, that information is potentially relevant to these proceedings. I have ordered that it be provided.

Following this judgment, the WCB developed, as a guideline, a list of documents that are producible and non-producible in subrogated litigation. The producible category includes physician's progress reports, workers' as well as employers' reports of accidents, notification of physical therapy, physical therapists' reports, physical therapy progress reports and requests for extension, any medical report from a treating physician or treating facility, any consultation medical report provided at the request of a case manager, memos from medical advisors to case managers (but not memos from the latter to the former), and physician practitioner charts.

Some of the non-producible documents include all handwritten notes to file and any typed memos to file authored by case managers, letters from case managers and entitlement decisions.[102]

D. Records of Disability Pension

In *Nagtegaal v Stad*[103], the plaintiff was asked by the defendant to request the file from Canada Life and also to request the file from the department in charge of the Canada Disability Pension. The plaintiff refused both requests.

Justice Veit held that the reasoning in *Price* applied to the situation before her and she concluded that the files requested were not in the plaintiff's power, nor was it reasonable for the party to request its production:

> [6] The reasoning in *Price* applies to situations other than physician's notes and files. For example, a party is required to request copies of their income tax filings if they have made filings but have not retained personal copies of the filings. Similarly, a party is required to request bank statements if

[102] For the complete list see *Workers' Compensation Practice in Alberta, supra* note 100 at 5-43-5-44.
[103] 215 AR 216, [1997] AJ No 1122 (QB).

> they have bank accounts but have not retained personal copies of the statements relating to those accounts.
>
> [7] However, Price is not authority for the proposition advanced by the defendant here. In Price, it was determined by the court that the patient at least had the right to the information on the physician's files even though the files remained the property, and ethical responsibility, of the physician. There is no evidence to that effect in this case.
>
> [8] Moreover, as noted by the plaintiff, the defendant has requested "the file" from each of Canada Life and Canada Disability Pension Plan. There is no reason to believe that it is reasonable for the plaintiff to order those two separate entities, which are not parties to these proceedings, to deliver up their files to him. Their files may well contain material that is privileged or otherwise confidential or to which Mr. Nagtegaal has no colour of right.

A similar reasoning was used in *Brown v Nguyen*[104]:

> [24] The plaintiff's section "B" Disability file is not producible. […] The disability file represents an insurers assessment of their insured's claim. It is not the property of the plaintiff and he has no colour of right to possess it. The defendants acknowledge that their request for the entire disability file was perhaps overreaching but ask me to order the production of more discreet portions of the file.
>
> [25] Mr. Boyle has indicated that an independent medical assessment often forms part of a section "B" disability file and as his client received a copy of that report he has produced it because it is clearly in his client's power. In *Nagtegaal* v. *Stad* 1997 A.J. 1122, Madame Justice Veit refused the production of the files of a disability insurer on the very basis that they were not in the power of plaintiff. In doing so, she pointed out that in case of physician's files, the patient had at least a right to the information. No such right exists with respect to the files of disability insurer.

Thus, it appears that determining who controls or possess the documents and who has a right to the information requested are key elements that are considered by the courts when they decide whether a document should be produced.

[104] 2006 ABQB 783, 405 AR 373 (Master) [*Nguyen*].

E. Employment Insurance Statutory Files and Employment Files

It appears that unless the documents requested are in the power of a party there is no need to list documents regarding employment insurance files, employers' files or social assistance files in the affidavit of records. Contrary to what appears to be the general practice for medical records, in light of the case law, it appears that with respect to these types of files, there is no duty to request production.

This was the case in *Wright v Schultz*[105] where the court held that the requirement to inform oneself was limited to the matters within the knowledge of his employees and agents. When no control exists, no duty arises:

> [29] I express no opinion as to the nature of the relationship of control referred to above. It is sufficient in this case to say that an individual has no control over his employer, someone who has performed medical services for him, or employees at a school that he attends or has attended.

In *Proprietary Industries Inc v Workum*[106], Kent J. was asked to consider the matter of a refusal by a party to undertake to obtain information regarding Ms. Workum's employer and brokerage firm. Justice Kent held that in light of *Wright* the undertakings requested were to be denied since there was no obligation on a party to inform himself from those people over whom he had no control:

> [20] I have been provided with competing authority with respect to a litigant's obligation to request documents from others. In *Price* v. *Labossière* [1985] A.J. No. 1067 (Q.B.), Sinclair, J. found that a person's medical records were within the plaintiff's power so that he ordered her to request the documents. He acknowledged that a Rule 209 application might be required if the doctor did not provide the documents.
>
> [21] In *Wright* v. *Schultz* (1992), 135 A.R. 58 (Alta C.A.), the plaintiff who had no independent memory of an accident was asked to inform himself about what others knew of the accident. The Court of Appeal said there was no obligation on the plaintiff to inform himself from those people over whom he had no control. That would include his employer, someone who performed medical services or employees at a school he

[105] 1992 ABCA 305, 135 AR 58.
[106] 2005 ABQB 610.

> attended. This case was preferred by *Kachowski* v. *Vost* [1997] A.J. No. 249 (Q.B.), where the plaintiff had been asked to request his complete personnel file from his employer.
>
> [22] I am bound by the decision in *Wright* so that the undertakings requested regarding Ms. Workum's employer and brokerage firm are denied. I would say that it is common practice, particularly in personal injury litigation, to have the plaintiff request certain information relevant to his or her medical condition or employment history. This makes sense given the increased expense in requiring the defendant to make a Rule 209 application for documents that are usually relevant. However, for now, the decision in *Wright* is binding on me.

Applying similar logic to UIC and EI statutory files, one should not be required to produce such files, although what is in a party's power needs be produced if it is relevant:

> [26] The UIC and EI statutory files need not be produced. The information was sought by the defendants for the stated purpose of establishing a pattern of income. It is apparent from a review of the transcript that tax returns have been furnished which would show the plaintiff's pattern of income. Even assuming these records would be in some way relevant a review of the statutory regime satisfies me that no individual has a right to compel production of his UIC or EI file. By way of example, section 96 of the *Unemployment Insurance Act* contains a protection from production of the information except to those individuals charged with administering the program. A request for a UIC payment stub might be appropriate, but to request the UIC or EI statutory file is not. It is not the habit of this court to direct a litigant to shout into the wind where there is no hope of a response.[107]

In *Johnston*[108], where it was alleged that a motor accident seriously injured the respondents and caused continued pain and suffering as well as income loss, Hunt J.A. held that the chambers judge had appropriately narrowed the scope of what had to be produced in the social assistance file. Only the records of the Department of Social Services in relation only to income assistance had to be provided.

[107] *Nguyen, supra* note 104 at para 26.
[108] *Supra* note 90.

In summary, a party must list all of the relevant and material documents in the affidavit of records. Whether or not a record is relevant is a matter that is linked to the pleadings. Once again, the importance of the **crafting of the pleadings is essential** as they will have an important bearing on the litigation process at the discovery level.

Determining who controls or possesses the documents, and who has a right to the information requested are key elements that are considered by the courts when they decide whether a document should be produced. Generally, unless the context is one of medical records[109] or when legislation includes a right of the party to the information, there will be no *de facto* duty for a party to disclose or to attempt to obtain information that is within the power of a third party.

VIII. UNDERTAKINGS

A. Implied Undertaking Rule

"Rule 5.33 codifies the common law implied undertaking of confidentiality on testimony and records produced under compulsion of discovery in civil litigation."[110] However, rule 5.33 has no significant difference from the common law and the prior case law on the implied undertaking continues to be applicable.[111] The implied undertaking rule applies to parties, their counsel and all persons.[112]

This implied undertaking continues, even where a case is settled and the discovery evidence is not used. "The fact that the settlement has rendered the discovery moot does not mean the appellant's privacy interest is also moot. The undertaking continues to bind. Only when "...an adverse party incorporates the answers or documents obtained

[109] Medical records may have a special status because of the *Health Information Act*, RSA 2000, c H-5, which provides a statutory right to the patients to access their own health information.
[110] *Hall v Willox*, 2011 ABQB 78, 511 AR 139.
[111] *L(P) v Alberta*, 2012 ABQB 309, 529 AR 21.
[112] *Choate*, *supra* note 27 at 2-6.4.

on discovery as part of the court record at trial is the undertaking spent, but not otherwise, except by consent or court order."[113]

The Supreme Court of Canada had occasion to consider the application of this common law rule in detail in *Doucette*. The matter initially arose in British Columbia. A civil action was brought against a childcare worker by the parents of a child who was injured while under that worker's care. A criminal investigation against the same childcare worker relating to charges of child abuse was pending.

The Attorney General of B.C. and the Vancouver Police sought to obtain the discovery transcripts from the civil action, to be used in support of their criminal investigation. Their application in Chambers was not successful. On appeal, the decision was reversed and the court allowed the transcript to be released. The unanimous Supreme Court of Canada reversed the decision of the B.C. Court of Appeal. Per Binnie J.

> 20 The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.

Binnie J. went on to discuss at length the rationale of the rule. The first rationale he considers relates to privacy interests:

> 24 ...pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine..... [thus by] issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential

[113] *Doucette (Litigation Guardian of) v Wee Watch Day care Systems Inc*, 2008 SCC 8 at para. 51, [2008] 1 SCR 157 [*Doucette*].

documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.

25 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. **The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.**

Binnie J. provides a second rationale for the rule – that it exists for the purpose of ensuring a more complete and candid discovery:

26 .... A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude ("litigation by avalanche") as often to preclude careful pre-screening by the individuals or corporations making production....

27 For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature.

Binnie J. cites a plethora of cases considering the application of the rule.[114]

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[114] *Ibid* at para 28: Binnie J. also cites with approval "...other decisions which are helpfully referenced in W. A. Stevenson and J. E. Côté, *Civil Procedure Encyclopedia* (2003), Vol. 2, at pp. 42-36 *et seq.*; and C. Papile, "The Implied Undertaking Revisited" (2006), 32 *Adv. Q.* 190, at pp. 194-96." Also cited with approval is J. B. Laskin, "The Implied Undertaking" (a paper presented to the CBA-Ontario, CLE Conference on *Privilege and Confidential Information in Litigation - Current Developments and Future Trends*, October 19, 1991), at pp. 36-40.

Notwithstanding that the general rule that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order, the Supreme Court in *Doucette* notes that exceptional circumstances can trump the implied undertaking. Binnie J. goes on to provide some guidance as to how the rule can be circumvented:

> 30 The undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, but those values are not, of course, absolute. They may, in turn, be trumped by a more compelling public interest. Thus, where the party being discovered does not consent, a party bound by the undertaking may apply to the court for leave to use the information or documents otherwise than in the action, as described in *Lac d'Amiante*, at para. 77:
>
> > Before using information, however, the party in question will have to apply for leave, specifying the purposes of using the information and the reasons why it is justified, and both sides will have to be heard on the application.
>
> In such an application the judge would have access to the documents or transcripts at issue (S.C.J.).

Binnie J. cautioned that "...delay will defeat the purpose of the application. It is important that [applicants] proceed expeditiously[115]" Furthermore, when making such an application it is incumbent on the applicant "...to demonstrate to the court **on a balance of probabilities** the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation"[116].

Reiterating this test later on in the judgment, Binnie J. emphasized that it was the Court's intention to retain some degree of flexibility in assessing such applications:

> 38 ...the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an undertaking should only be set aside in exceptional circumstances. In what follows **I do not mean to suggest that the categories of superior public**

[115] *Ibid* at para 31.
[116] *Ibid* at para. 32.

> **interest are fixed**. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

Applying the aforesaid principles to the particular case at bar, Binnie J. stressed the importance of balancing the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself - "...in this case that factor was decisive" although in "…other cases the mix of competing values may be different". The key in each case, he said "...is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the [implied] undertaking will not achieve its intended purpose.[117]"

Binnie J. expressly distinguished the Canadian approach from the English approach. The approach taken by the House of Lords as enunciated in *Crest Homes plc v. Marks*[118] found that there was:

> ...no general principle beyond this, that the court will not release or modify the implied undertaking given on discovery save in special circumstances and where the release or modification will not occasion injustice to the person giving discovery (p. 1083).

As to the Canadian approach, Binnie J. speaking for the Supreme Court preferred instead:

> ...to rest the discretion on a careful weighing of the public interest asserted by the applicant (here the prosecution of a serious crime) against the public interest in protecting the right against self-incrimination as well as upholding a litigant's privacy and promoting an efficient civil justice process. What is important is the identification of the competing values, and the weighing of one in the light of the others, rather than setting up an absolute barrier to occasioning any "injustice to the person giving discovery". Prejudice, possibly amounting to injustice, to a particular litigant may exceptionally be held justified by a higher public interest, as in the case of the accused whose solicitor-client confidences were handed over to the police in *Smith v. Jones*, [1999] 1 S.C.R. 455, a case referred to

[117] *Ibid*.
[118] [1987] 2 All ER 1074 as cited in *Doucette, supra* note 113 at para 33.

> in the courts below, and discussed hereafter. Of course any perceived prejudice to the examinee is a factor that will always weigh heavily in the balance. It may be argued that disclosure to the police of the evil secrets of the psychopath at issue in *Smith v. Jones* may have been prejudicial to him but was not an "injustice" in the overall scheme of things, but such a gloss would have given cold comfort to an accused who made his disclosures in the expectation of confidentiality. If public safety trumps solicitor-client privilege despite a measure of injustice to the (unsympathetic) accused in *Smith v. Jones*, it can hardly be disputed in this jurisdiction that the implied undertaking rule would yield to such a higher public interest as well.[119]

Binnie J. next provided guidance as to how courts ought to exercise their discretion when considering an application to release discovery documents. Where "...discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted"[120].

An Alberta case in which the same result was reached is *Schreiber v Canada (Attorney General)*[121]. More recently, in *Engel v Dehid*[122], Moen J. applied Binnie J.'s reasoning to a case in which there was a civil action by the plaintiff against a police officer, and related disciplinary proceedings against the same police officer. The lawyer acting for the police officer in the disciplinary proceedings applied to the Court for an Order directing release of the discovery transcripts and materials arising from the civil action, to be used for a variety of purposes as set out in the application. The plaintiff objected on the basis of his privacy interests being violated. Moen J. held that the disciplinary proceedings involved the same or similar parties and the same or similar issues. Therefore, the prejudice to the examinee was virtually non-existent.

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[119] *Doucette, supra* note 113 at para 33.
[120] *Ibid* at para 35, citing for support *Lac Minerals Ltd v New Cinch Uranium Ltd.* (1985), 50 OR (2d) 260 (HCJ), at 265-66; *Crest Homes*, *supra* note 118 at 1083; *Miller (Ed) Sales & Rentals Ltd v Caterpillar Tractor Co.*(1988), 90 AR 323 (CA); *Harris v Sweet*, 2005 BCSC 998, [2005] BCJ No 1520 (QL); *Scuzzy Creek Hydro & Power Inc v Tercon Contractors Ltd* (1998), 27 CPC (4th) 252 (BCSC).
[121] 2000 ABQB 536, [2001] 1 WWR 739.
[122] 2008 ABQB 608, 459 AR 382. See also *Kent v Martin*, 2011 ABQB 298, wherein the Court allowed the applicant to disclose evidence obtained in the course of examinations for discovery to the Law Society of Alberta, in support of the plaintiff's complaint against his former solicitor.

In reaching this conclusion, Moen J. relied squarely on the reasoning of Binnie J. in *Doucette*. Moen J. took additional steps to protect the privacy interests of the plaintiff by restricting the use to which the discovery evidence could be put, and by requiring that in specific instances, the evidence would need to be given *in camera.* In the event that such evidence could not be given *in camera* such evidence was not to be disclosed.

A similar result was reached in a case where a physician sought to use evidence obtained from a questioning in a civil action (brought against him by the plaintiff), in a separate matter involving the physician's defense against complaints which was brought to the College of Physicians and Surgeons.[123]

> I have no difficulty in concluding that this is one of those situations where an exception should be granted.... I believe that the plaintiff, having instituted the complaints to the College and having instituted this action, both against the same two physicians and both relating to the same issues, cannot now reasonably complain if information in this action is used by the same parties to answer those complaints. ... I do not see that any injustice will be visited on the plaintiff by granting such an order (and none was suggested by her) but, if some injustice could be discerned, it would, in my view, be greatly outweighed by the prejudice to the defendant physicians if an exception was not granted.

Harcap[124], considers at length, the common law rule with respect to the implied undertaking. In *Harcap*, the court was asked to determine whether evidence from a discovery transcript from related proceedings could be used in the *Harcap* action. The application was allowed and the transcripts from discovery could be used in another proceeding to refresh the memory of one of the parties. *Harcap* was decided before *Doucette*[125] though arguably the result would likely have been the same had the *Doucette* decision already been rendered.

Conversely, courts generally will not favour "...attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the

[123] *Browne v. McNeilly***,** 99 OTC 326, 41 CPC (4th) 330 (SCJ), aff'd [2000] OJ No 1805 (QL) (CA).
[124] *Supra* note 17.
[125] *Doucette, supra* note 113.

proceeding in which discovery was obtained in the absence of some compelling public interest."[126]

The focus of the Court in *Doucette* then shifted to consider cases in which the implied undertaking rule at common law (and in those jurisdictions which have enacted rules, more or less codifying the common law) would be subject to various sorts of exceptions such as legislative override[127], or in cases where there is a public safety concern[128] or in cases where it becomes necessary to impeach inconsistent testimony.[129]

The "crimes" exception is discussed at length by Binnie J.[130] Of note is the distinction Binnie J. draws between implied undertakings and privilege, and the distinction between having a right to access records and the right to use them for a particular purpose:

> 56 The appellant's discovery transcript and documents, while protected by an implied undertaking of the parties to the court, are not themselves privileged, and are not exempt from seizure: *R. v. Serendip Physiotherapy Clinic* (2004), 189 C.C.C. (3d) 417 (Ont. C.A.), at para. 35. A search warrant, where available [and which the court suggest is the proper way to access discovery evidence having criminal implications or alternatively through a subpoena *duces tecum*], only gives the police access to the material. It does not authorize its use of the material in any proceedings that may be initiated.

The reasoning of the Supreme Court was in line with earlier ruling of the Alberta courts in *Schreiber*[131]. Schreiber was seeking to use information obtained during discoveries that were related to proceedings to have him extradited to Ontario, in a different set of proceedings.

Schreiber's argument was that he intended to use evidence obtained during discoveries for certain specific limited purposes. Those purposes included providing the evidence to

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[126] *Ibid* at para 36.
[127] *Ibid* at para 39.
[128] *Ibid* at para. 40.
[129] *Ibid* at para 41.
[130] *Ibid* at paras 42-50.
[131] *Supra* note 121.

Swiss Authorities so they could determine whether the RCMP should be prosecuted, and to use the evidence in support of Schreiber's separate, but inter-related legal challenges. These challenges included a challenge to the constitutional validity of parts of the *Extradition Act*, and a challenge as to the impartiality of Canada's Minister of Justice to assess the extradition request, given what had been disclosed at the discoveries.

The court concluded that Schreiber's interest in using the discovery information outweighed the interests that the implied undertaking was meant to address. These interests related to the privacy interests of the parties and were meant to provide a counterbalance to the intrusiveness of the discovery process. The information Schreiber was seeking to utilize was not related to a privacy interest "in the usual sense". Here, the information concerned the conduct of public officials in the exercise of their public duties, and this did not engage anyone's privilege against self incrimination. Furthermore, Schreiber intended to use the information only in proceedings to which the Department of Justice would be a party.

In *Moore v RFID Systems Corp*[132] several distinct causes of action arose out of a series of inter-related dealings between an assortment of plaintiffs and defendants. An Order was obtained directing that each party be examined once and that the transcript generated would be used as evidence in each separate case.

A breach of the implied undertaking amounts to contempt of court and does not give rise to damages.[133] More recently, the unanimous Supreme Court of Canada indicated (in *obiter*):

> 29 Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See *Lac d'Amiante*, at para. 64, and *Goodman v. Rossi* (1995), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.[134]

[132] 1998 CanLII 3883 (BC SC)
[133] *Casavant v Alberta Co-Op Taxi Line Ltd* (1996), 41 Alta LR (3d) 425, 188 AR 381 (Master).
[134] *Doucette, supra* note 113 at para 29.

B. Undertakings given during Questioning

In *Stone Sapphire*,[135] Lee J. reviewed the current state of the law in Alberta regarding the matter of compelling answers to undertakings and questions objected to at questioning.

As a primary proposition, "[i]t is necessary to look at all of the pleadings when deciding discovery issues: *Hepworth v. Canadian Equestrian Federation* (2000) 277 A.R. 138 (ABCA) at paragraph 7."[136]

The purpose of questioning must also be remembered when determining whether an undertaking must be compelled, which is "...to help parties establish what will be in issue at trial: *Hepworth v. Canadian Equestrian Federation* at paragraph 10.[137]

The primary limiting factor as to the generally broad scope of questioning is relevance or irrelevance: *Hepworth v. Canadian Equestrian Federation* at para 11.[138]

Lee J. continues on, considering the legal meaning of "relevant and material" through paragraphs 66-68. Lee J. then examines each undertaking and objectionable question and concluded that they were "...not relevant to the issues raised in the pleadings and need not be answered."[139]

In *Dow Chemical Canada Inc v Shell Chemicals Canada Ltd*[140] Master Prowse considered the different aspects of undertakings in two different contexts: undertakings given in the context of cross-examination on an affidavit, and undertakings given in the context of questioning. In *Dow*, Shell's application to compel answers to the undertakings requested in a cross-examination was dismissed.

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[135] *Supra* note 73.
[136] *Ibid* at para 63.
[137] *Ibid* at para 64.
[138] *Ibid* at para 65.
[139] *Ibid* at para 94.
[140] 2008 ABQB 671, [2008] AJ No 1195 (Master) [*Dow*].

> 5 After a review of the relevant case law, I have come to the conclusion that the court should be reluctant to direct that undertakings be provided by a party proffering a deponent who is unable to answer all questions put to the deponent during a cross-examination. It should be more difficult to have undertakings directed on a cross-examination than at examinations for discovery**.**

As to whether providing answers to undertakings materially advance an action, see *Ravvin Holdings Ltd. v. Ghitter*.[141]

IX. EVALUATING YOUR PERFORMANCE

"You can learn more from yourself than you can from anyone else"[142].

At the conclusion of each questioning, it is worthwhile to conduct a systematic assessment of the process. Some elements to include in the assessment are as follows:

- review the transcripts and look for bad habits.
- are there areas where you could have probed further?
- did you fully commit the witness on admissions?
- is the record clear?
- get peers or senior lawyers to review.

It is important that you know your own limits:

- if you are not comfortable talk to a more senior member of your firm;
- sit in on as many discoveries as you can ;
- if you are on your own or a small firm, get a litigation partner;
- pay a senior lawyer to assist with discovery or work out an alternate plan; and
- do your client a service and be better prepared for next time.

[141] 2008 ABCA 208, 437 AR 66.
[142] *Finlay, supra* note 5 citing *The Art Spirit*, Philadelphia, J.P. Lipincott Co., (1923), p. 108.

Your final task is to prepare a summary memo including some or all of the following points:

- Evaluate the examinees performance. A year later you will be glad to have this record documenting your evaluation of the examinee's credibility and potential impact.

- Note your critiques of the examinee that can be coached and remedied for in the event of trial, for example if he or she talks too fast, too slow, too much, or fidgets.

- Make a note of further factual investigations that need to be done, based on the examiner's questions and the examinee's answers.

- Make note of any legal or factual theories opposing counsel appeared to be driving at, that you had not yet considered.

- Make a note of points needing to be covered in later questionings, of the same examinee or another one.

- Note your thoughts on your instructions to the examinee not to answer a particular question, especially if you predict opposing counsel will make a motion to compel an answer. Unless you write it down, the reasons you objected may not be so obvious to you three weeks down the road when you are served with the motion.

- When the transcript is received, review it for errors in the testimony. Discuss any errors you may see with the examinee and determine whether he or she should make corrections. [143]

Dain recommends keeping a separate Examination Notebook in which your keep track of what did and did not work in each particular questioning you attend. In theory at least, periodic review of the notes will prevent you from repeating the same mistake or bad habit.[144]

END

[143] *Dain, supra* note 4 at para. 870.
[144] *Ibid* at para 880.

Schedule A

Sample Chronology in Preparation for Examinations for Discovery

SCHEDULE A - Examination for Discovery Chronology				
Date	**Time**	**Event**	**Follow Up or Comment**	**Reference** (Note: all reference to Doc # without Tab refer to main Hospital Chart. Number in parenthesis refer to hospital handwritten #)
01/25/1996	Various	Dr. Y: threaten to quit if John Doe won't follow medical advice – not checking blood viscosity	Family: canvass and prep for ED	Tab 6: Doc 5
12/29/1999 to 01/13/2000		Admitted to Hospital for Valve surgery; was admitted immediately and investigated for infection and endocarditis amongst other things	Dr. X: Was he aware that on previous visit to Hospital in 2000 admitted immediately; Dr. X: Did he review any of old chart prior to March 2, 2005 (Event).	Doc 26 (281)
12/28/1999	23:00	Attended at Hospital for fever and cough. Admitted immediately. Emergency face Sheet. Admitted and IV Started.	Dr. X: Aware prior concern; what was the IV that was started. In that Exam, Osler's and Janeway's checked, no reference to Osler's or Janeway's in Event chart.	Tab 3 Doc 29 (278)
01/06/2000		Surgery to Redo/Replace Bentall Carbomedics Valve Conduit. Performed by Dr. Z	Procedure went well, no significant complications	Tab 3 Doc 50 (257)

Schedule B

LIST OF CLASSIC OBJECTIONS

(Source – Craig Gillespie obtained from a posting by Walter Kubitz to the listserve lists.trialsmith.com)

1. **The question is irrelevant.**
2. **The question is hypothetical.**
3. **The question asks a witness to express an opinion.**
4. **The question asks the witness to draw a conclusion.**
5. **The question asks the witness to interpret a document (and the document speaks for itself).**
6. **The question involves a matter of law.**
7. **The question goes to credibility only.**
8. **The question is argumentative, abusive or rhetorical (rather than intended to elicit facts).**
9. **The question asks the witness to comment on other evidence.**
10. **The question is a pure "fishing expedition".**
11. **The question calls for the witness to disclose evidence rather than facts.**

(These objections are in addition to objections relating to grounds of privilege.)

Schedule C

Examinations for Discovery of Health Regions

STATUTORY PRIVILEGE RESPECTING PRODUCTION OF DOCUMENTS CREATED BY QUALITY ASSURANCE COMMITTEES.

Section 9 of the *Alberta Evidence Act* R.S.A. 2000, c. A-21 explicitly exempts quality assurance records from disclosure.

The section reads as follows:

Quality assurance records

9**(1)** In this section,

(a) "quality assurance activity" means a planned or systematic activity the purpose of which is to study, assess or evaluate the provision of health services with a view to the continual improvement of

(i) the quality of health care or health services, or

(ii) the level of skill, knowledge and competence of health service providers;

(b) "quality assurance committee" means a committee, commission, council or other body that has as its primary purpose the carrying out of quality assurance activities and that is

(i) appointed by

(A) a regional health authority,

(B) the Alberta Cancer Board,

(C) the Alberta Mental Health Board,

(D) the board of an approved hospital under the *Hospitals Act*, or

(E) the operator of a nursing home,

(ii) established by or under another enactment of Alberta, or

(iii) designated by an order of the Minister of Health and Wellness as a quality assurance committee for the purposes of this section,

but does not include a committee whose purpose, under legislation governing a profession or occupation, is to review the practice of or to deal with complaints respecting the conduct of a person practising a profession or occupation;

(c) "quality assurance record" means a record of information in any form that is created or received by or for a quality assurance committee in the course of or for the purpose of its carrying out quality assurance activities, and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.

(2) A witness in an action, whether a party to it or not,

(a) is not liable to be asked, and shall not be permitted to answer, any question as to any proceedings before a quality assurance committee, and

(b) is not liable to be asked to produce and shall not be permitted to produce any quality assurance record in that person's or the committee's possession or under that person's or the committee's control.

(3) Subsection (2) does not apply to original medical and hospital records pertaining to a patient.

(4) Notwithstanding that a witness in an action

(a) is or has been a member of,

(b) has participated in the activities of,

(c) has made a report, statement, memorandum or recommendation to, or

(d) has provided information to,

a quality assurance committee, the witness is not, subject to subsection (2), excused from answering any question or producing any document that the witness is otherwise bound to answer or produce.

(5) Neither

(a) the disclosure of any information or of any document or anything contained in a document, or the submission of any report, statement, memorandum or recommendation, to a quality assurance committee for the purpose of its quality assurance activities,

nor

(b) the disclosure of any information, or of any document or anything contained in a document, that arises out of the quality assurance activities of a quality assurance committee,

creates any liability on the part of the person making the disclosure or submission.

LIST OF ADDITIONAL RESOURCES

Campion (Dec. ’06) 82 *The Barrister* 17 (Alta. Civil Trial Lawyers Assn.) is an article about examination for discovery read-ins, including putting them in during opening statement. The article is recommended by Stevenson & Cote.

L.G. Harris, “Discovery Practice in British Columbia” (looseleaf), Cont. Legal Ed. Socy. of B.C. (Also recommended by Stevenson & Cote in their Alberta Civil Procedure Handbook.)