

EXAMINATIONS FOR DISCOVERY: WITNESS TIPS

What is the purpose?

Examinations for discovery are intended to ensure that all the parties are familiar with all the available evidence prior to trial. There should be no surprises at trial.

Examinations for discovery give counsel for each party an opportunity to ask a representative of each opposing party a series of oral (or sometimes written questions) about the matter under dispute. Where a party is a corporation, only one person is usually produced for examination. The questions and the answers are recorded in a transcript which is available to all the parties.

Depending on the nature of the case, the examination for discovery of a witness can last anywhere from a few minutes to several days. There is no judge or decision-maker present during the examinations.

What happens?

All parties, their respective counsel and a Reporter meet at an Examiner's Office. The room is generally arranged somewhat like a boardroom with a large table and several chairs. The Reporter sits at the "head" of the table with their recording equipment. Mikes are arranged on the table for the counsel and witnesses.

After greetings are exchanged and the witness is sworn, the witness sits down and is asked a series of questions by counsel for each opposing party. The counsel for each

opposing party, if more than one, will have an opportunity to ask questions, but not to repeat questions already asked by another counsel.

After each opposing counsel has finished their questions, they will generally say something like "Those are all my questions subject to any questions that may arise from answers to undertakings". At that point, your counsel may ask you a few questions in re-examination to clarify answers that you gave during the examination. Often, your counsel will not ask any re-examination questions. If they do, they will usually be very brief.

What is your role?

Your role is to honestly answer questions about facts within your own knowledge. Don't guess. Don't make assumptions.

If you are being produced on behalf of a corporation, you have a duty to ensure that you are reasonably familiar with all the evidence in the possession of the corporation and its employees prior to your examination. This may involve reviewing documents and/or conducting short interviews of fellow employees who may be called as witnesses at trial.

Some pointers:

1. Listen to the questions very carefully. If you don't hear or understand a question, ask opposing counsel to repeat or clarify. Otherwise, it will be assumed that the question was understood and the answer is correct.

Again, don't guess. If you don't know the answer to a question, simply say so. If we discover that an answer is incorrect, we can correct it later in writing. However, this may affect the credibility of the answer and your credibility as a witness overall.

2. Wait until opposing counsel finishes asking a question before you start to answer. It is rude to have two people trying to talk at once. It also makes the Reporter's job difficult and may later make the transcript difficult to understand.

If opposing counsel interrupts when you are answering a question, just stop talking. If you want to complete your answer, you may do so when opposing counsel stops talking. If opposing counsel's question or conduct is objectionable, your counsel will intervene. Do not get angry or argue with opposing counsel. Do NOT ask opposing counsel to answer questions.

If your counsel does not intervene, you should answer the question. If an answer is left incomplete or misleading, your counsel may ask you some questions at the end in the re-examination stage to clarify your answer.

3. Take a "beat" after each question before answering it. This has three benefits:
 - a. you have an opportunity to be sure that you understand the question;
 - b. you have an opportunity to consider your answer; and
 - c. your counsel has an opportunity to object if the question is improper.

4. Provide an audible answer to all questions. Shaking and nodding your head does not record very well for the transcript. "Yes" and "no" are also preferred over "uh huh" which can be ambiguous in a written transcript. Of course, you shouldn't mumble and you should also keep your hands away from your face while speaking so that you can be clearly understood by the Reporter.
5. If counsel start arguing with each other, you should stop talking. Disputes about the propriety of questions do frequently arise between counsel during an examination and, when they do, you should let your counsel do the talking.
6. Do not bring any notes or documents with you to the examination (including this document). Opposing counsel will usually ask to see such documents and demand copies be produced. All relevant documents should already have been identified in your affidavits of documents and produced. Your counsel will bring a copy of all the produced documents to the examination.
7. Do NOT attempt to record the examination on any recording devices.
8. Dress should be professional and comfortable as you may be sitting for several hours.

What is an undertaking?

From time to time, opposing counsel may ask a question to which you do not know the answer and then ask you to seek the answer from someone else. Alternatively, opposing counsel may ask you to locate and produce a

document that was not included in your affidavit of documents. These are requests for undertakings. You should let your counsel answer those questions for you. Your counsel may grant the request or refuse it outright. They may also advise opposing counsel that they will consider the question and provide a response at a later date. This is often referred to as taking the requested undertaking “under advisement”.

What is the role of counsel?

Opposing counsel is in charge of your examination. They determine when the examination starts and stops. If you’d like a break for any reason, you should ask opposing counsel who will usually grant the request and advise the Reporter that they are “going off the record”. The Reporter will stop recording for the duration of any break.

If a question is proper, your counsel cannot interfere. Your counsel can only interfere in your examination to object to improper questions. You cannot ask your counsel questions during the examination.

With certain exceptions, your counsel should not answer questions for you. The exceptions generally pertain to:

- a. requested undertakings;
- b. questions about the pleadings; and
- c. questions about your legal position.

Your counsel can also assist you in locating documents in the productions that may be relevant to a question.

What is the role of the Reporter?

The Reporter records the examination, usually on audiotape, and later prepares the transcript. There are sometimes complex

rules about which party pays the Reporter for their services. Usually, opposing counsel will pay for the Reporter for the cost of your examination and the related transcript.

Generally, the Reporter is a silent observer during examinations. However, they may interrupt from time to time for various reasons, including:

- a. to stop the examination briefly while they flip or replace an audiotape;
- b. to clarify the spelling of a name or technical word;
- c. to ask counsel or a witness to stop mumbling or remove their hands from their face; or
- d. to ask for a “yes” or “no” answer instead of an “uh huh” answer.

Counsel may also ask the Reporter to play back a section of the audio recording at any time.