DISCOVERY IN ONTARIO:

A QUICK REFERENCE GUIDE (2021)

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Adjuster Notes:

Production of the adjuster's notes was ordered (in a first party context), where the notes were created to determine and adjust the loss. *Ferris v. Shell Canada Ltd.*, [2000] O.J. No. 3058 (Ont. Sup. Ct.). However, the adjuster's notes were deemed subject to litigation privilege in a third party (tort) action. *Panetta v. Retrocom et al.*, [2013] O.J. No. 2386 (Ont. Sup. Ct) at paras. 28-66.

Affidavits – Providing Additional after Examination:

Rule 39.02(2). Where a party seeks to serve an additional affidavit subsequent to cross-examination (on a motion), they must satisfy the court that the evidence is relevant, responds to a matter raised on the cross-examination, would not result in prejudice that could not be addressed by costs, terms or an adjournment, and provide a reasonable explanation for why the evidence was not included at the outset. *Sure Track v. Kaisersingh*, 2011 ONSC 7388 (CanLII), par. 28.

Criminal History and Pleas:

In a civil suit, a defendant may be questioned as to whether they were convicted for the acts which gave rise to the civil action. Pursuant to *s.* 22.1 of the *Ontario Evidence Act*, such matters are relevant, as they are addressed to proof of facts in dispute (rather than credibility). Significantly, this

remains true for Provincial Offences, such as violations of the *Highway Traffic Act*. *Andreadis v. Pinto*, 98 O.R. (3d) 701 (Ont. Sup. Ct.) at paras. 14-15. *See also* *Caci v. Macarthur*, [2007] O.J. No. 156 (Ont. Sup. Ct.) and *Toronto (City) v. C.U.P.E., local 79*, [2003] S.C.R. 77.

Otherwise, questions regarding criminal convictions may properly be asked where punitive damages are at issue, but are otherwise improper, as going solely to credibility. *Hornby v. Advanced Nutrients Ltd.*, [2008] BCSC 962 (B.C. Sup. Ct) at paras. 52-53. *See also* *Rule* 31.06(1)(b).

However, at trial, a witness may be asked whether he has been convicted of any crime. *Evidence Act*, R.S.O. 1990 c. E. 23, s. 22 (1)., *Andreadis v. Pinto*, [2009] O.J. 3910 (Ont. Sup. Ct.) at paras. 42-43.

Coaching Witnesses:

Prima Facie improper. It is legitimate to ask (on the resumption of discovery) the witness under oath if he was coached in any way as to what answers to give. *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at para. 43.

Correcting Answers:

A party may correct their answers, pursuant to Rule 31.09(1). Both answers are later admissible.

Cost of Copies:

43.5 cents (96 cents in 2020 dollars using the BOC inflation calculator) per page for voluminous records. *Toronto Bd. of Educ. Staff Credit Union Ltd. v. Skinner*, [1985] O.J. No. 444 (Ont. H.C.J.). *Rule*

30.04(7). $1.00 per page through the Court, *O. Reg.* 293/92: Superior Court of Justice and Court of Appeal – Fees (#7).

Cost of Medical Records:

Maximum rates (well below market) are set pursuant to the *Personal Health Information Protection Act*, 2004, and include a nominal processing fee and 25 cents per page. *Health Information and Privacy*, File Numbers HA13-108, Order HO-14.

Costs Thrown Away:

Where a party adjourns a scheduled discovery after the other side has dedicated significant resources preparing for same, resulting in work that cannot be utilized (or must be duplicated), costs thrown away are generally assessed on a full indemnity basis, although judicial discretion remains to make an Order that will allow the action to proceed (i.e. partial payments in installments from parties of modest means). *Trudel et al. v. HMQRO et al*, 2020 ONSC 1842 (CanLII).

Counsel Answering for Witness:

Counsel may not answer for a witness unless there is no objection, even if the answer of the witness is wrong. *Rule* 31.08. *Kay v. Posluns*, [1989] O.J. No. 1914 (ON H.C.J.). *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 28. The examining party is entitled to the evidence of the witness and not that of counsel. *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at para 43. Any correction of answers

should be left for re-examination. *Kudlak v. Sutherland*, [2005] O.J. No. 339 (Ont. Sup. Ct.) at para. 24.

Counsel – Improper Interference:

It is improper for counsel to try to run interference, or protect his client from clear, but difficult questions. Counsel for a witness may not unduly interfere with the cross-examination. Principle 21 of The Principles of Civility for Advocates published by The Advocates' Society makes the point clearly: "Advocates, during examination for discovery, should at all times conduct themselves as if a judge were present." The same principle applies to out-of-court cross-examinations on affidavits. *Smith Estate v. Rotstein*, [2010] O.J. No. 1527 (Ont. Sup. Ct.) at paras. 82-83, *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at para. 20.

Credibility:

A party may refuse to answer a question that goes solely to credibility. *Rule* 31.06(1)(b). Refusals may properly extend to what a party told others about the incident (provided the party at discovery was not otherwise uncertain or exhibiting memory problems). *Baker v. Taylor*, 2016 ONSC 7918 (CanLII) at paras. 6, 9, 12 & 13.

Credibility of Party's Position:

Questions going to the credibility of a party's position (rather than the party itself) are proper, i.e. why the plaintiff changed its position as to who was at fault. *Air Canada v. McDonnell Douglas Corp.*,

[1995] O.J. No. 195, (Master) at para. 29, affd [1995] O.J. No. 4881.

Discovery – Concluding Statement:

I will adjourn this discovery and reserve the right to continue at a later date, **or** subject to any further questions arising from the undertakings, refusals, question taken under advisement, questions on documents subsequently produced, those are my questions.

Discovery of Minors:

Discovery of minors (rather than their litigation guardians) is (sometimes) permissible in Ontario (if competent), pursuant to *Rule 31.03*. However, discovery of minors is not an absolute right. *Bennett v. Hartemink,* [1983] O.J. No. 1308 (Ont. Sup. Ct.) at paras. 7-8. A framework for when same is appropriate is set forth in *Abrahamson v. Buckland*, [1990] 5 W.W.R. 193 (Sask. C.A.). It is however unlikely you can shield your minor client from discovery but later elicit testimony from same at trial. *McCallum v. Thames Valley School District School Board*, [2012] O.J. No. 160 at para. 26. Special procedures for the taking of testimony, such as screens and the presence of a support person may be employed. *Ontario Evidence Act*, R.S.O. 1990, c. E. 23.

Discovery – Default Not In-Person:

Discoveries may be in person where there is agreement, but can otherwise be via video, at the

option of the deponent pursuant to *Rule* 1.08. *Worsoff v. MTCC* 1168, 2021 ONSC 6493 (CanLII) at paras. 34-36.

Discovery – Order of Examinations:

Rules 31.04(1), 31.04(2) and 31.04(3). The party that first requests discovery, even informally, has the right to examine first. *Rule* 31.04(3), *Risi Stone Ltd. v. Burloak Concrete Products Ltd*, [1987] O.J. No. 2462 (H.C.J.). However, absent agreement, the party's Affidavit of Documents must be served prior to serving the notice of examination, *Ferguson v Peel Mutual Insurance Company*, 2017 ONSC 2318 (CanLII), par. 5 citing *Rule* 31.04(3), with service meaning a sworn Affidavit of Documents. *Zdenko v. Sutherland*, 2019 ONSC 4858 (CanLII), par. 19. Pragmatically, a sworn AOD must be served first to ensure priority.

The Affidavit of Documents must contain relevant documents in the party's knowledge, information and belief at the time served (and where referenced in the pleadings). *Lambert v. Maracle*, 2019 ONSC 7003 at paras. 38-39. Further, the party that examines first has the right to complete their examination before being examined themselves, which includes undertakings being fulfilled and any follow up questions answered. *Rule* 31.04(3) and Trial Lawyers Discovery Notebook. Daley, Helen A. Law Society of Upper Canada Department of Continuing Education, Chapter 2, page 3, (1998).

Discovery of Non-Parties

Rule 31.10.

Discovery Plan: Required by *Rule* 29.1 within 60 days of the close of pleadings, but widely ignored in Personal Injury cases. If one is proposed, analyze it carefully (and suggest revisions/modifications) to ensure it doesn't limit your ability to prove causation or damages, or expands the definition of relevance for prior medical records and conditions. Failure to timely object may be deemed implied agreement. *Sultana v. Veley*, 2012 ONSC 395 at para. 19. Note that pursuant to *Rule* 29.1.05, the Court may refuse to grant relief (i.e. refusals/undertakings motions) where the parties have failed to agree upon a discovery plan (i.e. this may be a defense to such a motion). Additionally, the Court has the ability to impose a discovery plan. *TELUS Communications Co. v. Sharp (c.o.b. Residential Pros)*, 2010 ONSC 2878 (CanLII), (On. Sup. Ct.) (Master) at para. 17.

Discussions with Witnesses: During cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding. As such, counsel should not discuss evidence with the witness during a break. Rule 4.04 (now 5.4-2) of the Rules of Professional Conduct. *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at para. 43. Where a witness consults privately with counsel during cross-examination, the witness must provide evidence on the substance of this conversation. *Polish Alliance of Canada v. Polish Association of Toronto Ltd.*, 2011 ONSC 1851 (Ont. Sup. Ct., Div.

Ct.), at para. 43. These rules are somewhat relaxed where discovery continues over multiple days, as it may be necessary to prepare a client for discovery. *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC), par. 43. Alternately, issues can be addressed via re-examination by the witnesses' own counsel at the end of cross-examination, or by later correcting the answers in writing.

Documents – Authenticity of: "Do you agree that all documents listed in our Affidavit of Documents are **authentic**? If not, for which specific documents do you dispute? Why? Do you accept the authenticity of all other documents other than those specifically objected to?" Discovery Best Practices: Practical and Effective Tools to Guide You Through the Discovery Process. J. Campbell, Colin L., Law Society of Upper Canada Department of Education, Chapter 6, page 2, (2004).

Do you agree all our documents are **admissible**? For each of our documents, do you agree to the truth of the contents thereof?

The Advocates' Society, Best Practices for Civil Trials, June 2015, 7.1.

Per the law of evidence, most documents are hearsay (you want them admitted into evidence because of what they say or indicate), which requires both authentication (it is what you say it is) along with it otherwise being admissible,

generally as an exception to the hearsay rule or otherwise not hearsay.

Documents – Discovery of:

Rules 30.02 & 30.03. Disclosure shall be made of all documents (broadly defined) relevant to any matter at issue. Absent agreement, such production is to be made prior to examinations for discovery. *Romcan Limited o/a Kingsville Retirement Centre v. AXA Pacific Insurance Company*, 2009 CanLII 87111 (ON SC), paras. 19-20.

Note that the letter and spirit of the Rules require the opportunity for a party and his counsel to see a document before it may be put to them on discovery, so as to prevent ambush at trial (note limited exception for litigation privilege, i.e. contents of surveillance reports, but not the fact there was surveillance – ***but see*** **Surveillance below**). *Jhaj v. York University*, [2002] O.J. No. 128 (Ont. Sup. Ct.) at paras. 7-13.

A document is relevant for the purpose of a party's discovery obligations if it is logically connected to and tending to prove or disprove a matter in issue as defined by the pleadings. *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714 (CanLII) at para. 25.

Mandatory pursuant to *Rule* 30.03(1), such that a party may move pursuant to *Rule* 48.08 to require another party to produce same even after setting an action down for trial. *BNL Entertainment Inc. v. Ricketts*, 2015 ONSC 1737 (CanLII).

Documents – Further & Better Affidavit of

Rule 30.06. Where the court is satisfied by any evidence that a relevant document has been omitted from a party's Affidavit of Documents, the court may, *inter alia*, order the document produced or for the party to deliver a further and better affidavit of documents. Such motion can be brought before examinations for discovery, although it is insufficient to allege that a document 'ought to exist,' *Bow Helicopters v. Textron Can. Ltd.* (1981), 23 C.P.C. 212 (Ont. Master). The moving party must produce evidence in support of its assertions, keeping in mind that the responding party has access to the document(s) and the moving party does not. *Titanium Logistics Inc. v. B.S.D. Linehaul Inc. et al.*, 2019 ONSC 4955 (CanLII) at par. 11.

Documents Supporting Claims / Defences:

A witness may properly be asked what productions they rely upon in support of an allegation. *Rule-Bilt Ltd. v. Shenkman Corp. Ltd.*, [1977] 18 O.R. (2d) 276 (Ont. H.C.J.) (Master).

Drivers License and SIN's:

Plaintiff not required to answer regarding her SIN and/or drivers' license number, as same go only to credibility. *Muraca v. Cengarle*, [1998] O.J. No. 5223 (Master) at para. 15, citing *Rule* 31.06(b).

Duty to Correct Answers:

Rule 31.09(1). A party has a continuing duty to correct answers where the party subsequently discovers the answer was incorrect when made, or is no longer complete and correct.

Duty to Inform Self:

Generally, a party is bound to disclose anything relevant to the issue of which he has knowledge. He may be compelled, if he does not have knowledge, to ascertain same from documents or persons, including his agents. *Burns v. Henderson*, [1918] 1 W.W.R. 885 (Alta) at para. 5. An individual is bound to inform himself in the same manner as an officer of a corporation. *Van Horn v. Verrall*, [1911] O.J. No. 497 (On. H.C.J.) at para. 14.

Expert Reports/ Opinions:

Rule 31.06(3)

A party may obtain disclosure at discovery of the expert's:

i) foundational information
ii) findings and opinions; and
iii) conclusions

along with the expert's name and address, unless the party that retained the expert undertakes to not call him at trial.

Foundational information includes the information sent to the expert, documents read by the expert and the facts disclosed to the expert, along with notes, raw data and records of the expert, along with books and journals researched by the expert. *BIE Health Products v. Attorney General (Canada)*, 2018 ONSC 2142 (CanLII) at para. 19.

Findings include field notes, raw data and records made and used by the expert in preparing his report. *Award Developments (Ontario) Ltd. v. Novoco Enterprises Ltd.*, [1992] O.J. No. 1288 (Gen. Div.) at para. 12. Where one party pleads a theory, the other side is entitled to the facts relied upon in support of said theory. *Kennedy v. Toronto Hydro-Electric System Ltd.*, [2012] O.J. 1923 at paras. 43-47.

A party may further be asked:

1) What information she has about the factual evidence known to her expert;

2) To undertake to ask her expert about factual evidence if the expert is bound by the party not to speak to the opposing party, and

3) About the opinions and findings of her expert as a potential trial witness and if the expert's findings include any articles he has written, the party may pose appropriate questions to him.

Andersen v. St. Jude Medical, Inc., [2007] O.J. No. 5383 (Ont. Sup. Ct.) at para. 31.

"**We will comply with the rules**" does not absolve a party from compliance with the above where the party does not undertake to not call the witness. *Kennedy v. Toronto Hydro-Electric System Ltd.*, [2012] O.J. 1923 at paras. 37-41.

Retention letters are typically not discoverable at the discovery stage unless the expert relied on them or the specific questions asked of the expert are not disclosed in the expert's report. *Calvaruso v. Nantais*, [1992] OJ No 345 (Ct. (Gen. Div.)). *Suchan v. Casella*, [2006] O.J. No. 2467, (Ont. Sup. Ct.) at paras. 37-44.

Expert Reports/ Opinions (Draft):

Preliminary draft reports are subject to litigation privilege and are generally non-discoverable. *Moore v. Getahun*, 2015 ONCA 55 (CanLII) at paras. 67-78, impliedly overruling *Leo Alarie and Sons Ltd. v. SNC-Lavalin Power Ontario Inc.*, [2010] O.J. No. 5205 (Ont. Sup. Ct.) at paras. 29-40.

Facebook & Social Media:

Court refused to compel production of 1100 photos as it amounted to a fishing expedition. *Garacci v. Ross*, [2013] O.J. No. 4024 (Ont. Sup. Ct.) Master, paras. 8-9. Account access denied as an invasion of privacy and on relevance grounds. *Stewart v. Kempster*, [2012] O.J. No. 6145 (On. Sup. Ct.) at paras. 18-25. However, where a party alleges they cannot do certain activities, their social media accounts may

need to be disclosed in their AOD's. *Isacov v Schwartzberg*, 2018 ONSC 5933 (CanLII), par. 36.

Failure to Answer:

Rule 31.07. A party fails to answer if:

i) They refuse to answer;
ii) They take it under advisement, but no answer is provided within 60 days of the request;
iii) The party undertakes to provide an answer, but 60 days passes without response;

Hypothetical Questions:

Are proper when relevant to some issue in the case, where the witness has some expertise to provide an opinion. *Motaharian (Litigation Guardian of) v. Reid*, [1989] O.J. No. 1947 (On. H.C.J.). This includes questions relevant to the standard of care (i.e. "what do you believe you were required to do in the circumstances, on what do you base that?"), including the witness' understanding of the standard of care, acts or omissions that are probative of that, along with what could have caused certain outcomes. *The Estate of Maryam Asharzadeh v.* Amin, 2019 ONSC 1024 (CanLII) at para. 22. However, a witness need not defend the actions of others or answer for their failures. As such, the Court will not require defendant doctors to provide opinions on the actions of other defendant doctors, nurses etc. Likewise, questions going to the ultimate issue or asking the defendants to opine on the standard of care, are outside of the

defendants expertise, hence improper. *Stryland (Litigation Guardian of) v. Yazadanfar*, [2011] O.J. No. 2785 (ON. Sup. Ct.) at paras 26-28.

Identification of Persons with Knowledge

A party may obtain disclosure of names and addresses of persons who might be expected to have knowledge. *Rule* 31.06(2).

Sample Questions:

Q Will you please advise me of the names and addresses of all persons known to you who may reasonably be expected to have knowledge of any of the transactions or occurrences at issue in this action?

Q If you obtain a statement from any of those individuals and if you are intending to call any of them as witnesses in these proceedings I would ask to be provided with a summary of each person's evidence and a copy of their statements?

Andersen v. St. Jude Medical Inc., [2007] O.J. No. 5383 (ON Sup. Ct.) at para. 11.

Add: Further, I will request an undertaking as to the substance of the expected testimony and/or evidence of each of your witnesses before trial.

Note that a summary of the evidence of those persons with knowledge must be provided if requested. *Dionisopoulos v. Provias*, [1990] O.J. No. 30 (ON

H.C.J.) at para. 6. Pursuant to *Rule* 31.09(1), such information must be corrected or supplemented if it later becomes incorrect or was incomplete when given. Depending upon the Judge, this may not apply to parties (as opposed to witnesses), but you can obtain the same information by questioning on any facts and evidence in support/against each item from the pleadings, including what productions they rely upon for each such assertion.

For institutional parties: Also request the contact information, including phone number of any witnesses no longer employed by the defence at the time of trial who the defence will not undertake to call as a witness.

Improper Conduct at Discovery:

Rule 34.14. An examination may be adjourned where there is abuse, i.e. excessive improper interruptions, evasive answers, improper questions, or where the questioning is done in a manner to annoy, badger, embarrass or oppress the person being examined. Proper motion is a motion for directions and/or sanctions.

1. If objection is made, a discussion (**argument**) **should not ensue on the record**. Counsel should simply briefly state the reasons for the refusal in a non-suggestive manner. *Kay v. Posluns*, [1989] O.J. No. 1914 (ON H.C.J.), *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at paras. 16(2), 28. *See also* *Rule* 34.12(1).

2. Counsel **may not answer** for a witness unless there is no objection, even if the answer of the witness is wrong. *Kay v. Posluns*, [1989] O.J. No. 1914 (ON H.C.J.), *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 16(4).

3. It is **improper** for counsel to **try to run interference**, or protect his client from clear, but difficult questions. *Smith Estate v. Rotstein*, [2010] O.J. No. 1527 (Ont. Sup. Ct.) at paras. 82-83, *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at para. 20.

4. During cross-examination by an opposing legal practitioner, **the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence** or any issue in the proceeding. Discussions may occur at the end of the day or just before re-examination at the conclusion of the cross. Counsel should not discuss evidence with the witness during a break. *Rule* 4.04 (now 5.4-2) of the *Rules of Professional Conduct* and *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2006] O.J. 4222 (Ont. Sup. Ct.) at paras. 30, 43, *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 16(7).

5. It is **improper** to **interrupt** an examination other than to seek clarification or to state an objection. *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 28.

6. It is **improper** to **give instructions** ("wood-shedding") to the witness or coach the witness after the start of the examination. *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 28; *Polish Alliance of*

Canada v. Polish Association of Toronto Ltd., 2011 ONSC 1851 (Ont. Sup. Ct., Div. Ct.) at para. 27.

7. It is **improper** to **place a document** before a witness unless invited to do so. *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para. 28.

8. It is **improper** to insist that the questioning lawyer refer to documents for information requested (rather than obtain answers from the witness). *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para. 20.

9. It is **improper** for a lawyer to lead or cue his own witness, or to suggest directly or indirectly how a question should be answered. *Madonis v. Dezotti*, [2010] O.J. No. 1509 (Ont. Sup. Ct.) at para 16.

Improper Discovery Conduct – Sanctions

Rule 34.15. Where a party fails to attend at examination, to answer proper questions, answers evasively, improperly refuses to produce relevant documents or the examination is interfered with by an excess of improper interruptions, the court has wide discretion to require re-attendance, to dismiss the action, strike the evidence or make such order as is just, although dismissing the action is a draconian remedy reserved for the most extreme cases. *Gomommy Software.com Inc. v. Blackmont Capital Inc.*, 2014 ONSC 2478 (CanLII) at para. 62.

Where the court finds that a person's improper conduct necessitated a motion, the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination. The court may fix the costs and make such other order as is just. *Wawanesa v 2096264 Ontario*, 2017 CanLII 11727 (ON SC), par. 34.

Incident Reports: Must generally be produced and are often not subject to litigation privilege. *Fiege v. Cornwall General Hospital et al.*, 30 O.R. (2d) 691 (ON. H.C.J. 1980), *Smith v. Air Canada*, 2014 BCSC 1648 at paras. 24-31.

Incriminating Answers: Questions eliciting incriminating answers may be asked on examination without violating the deponents common law, statutory, or constitutional privilege against self incrimination. *Charles v. Royal Bank of Canada*, [1987] 60 O.R. (2d) 537 (ON. H.C.J.). Such questions must be answered. *Royal Bank of Canada v. Wilford,* [1985] O.J. No. 1642 (H.C.J.) (Master) at paras. 1-16.

Inferences Drawn: A party must disclose the evidence, but is not required to state the inferences drawn by him or his solicitor in researching the case. *Rule* 31.06. *Leerentveld v. McCulloch*, [1985] O.J. No. 1695 (ON. H.C.J) at paras. 23-24.

Insurance: *Rule* 31.06(4). A party may obtain disclosure of the existence and contents of any policy of insurance along with the amount of money available under the policy. This includes notice of

any positions taken that may affect insurance coverage. *Seaway Trust Co. v. Markle*, [1992] O.J. No. 1602 (S.C.J.). You should also ask if there is any undertaking or agreement as to loss-sharing, contribution or *Mary Carter/Perringer* type agreements, and for a continuing undertaking in this regard.

Litigation Privilege:

If a party asserts litigation privilege, ask questions regarding the reasons such (privileged) actions were taken, the date and reasons litigation was first contemplated or threatened and all evidence in support of same, whether the document was prepared as a routine part of business or investigation of the claim, why, what the routine practice is when such events happen, whether the document was made at the request of a lawyer, to obtain legal advice, or to assist counsel in defending the action. *See Kennedy v. McKenzie*, [2005] O.J. No. 2060 (ON Sup. Ct.) at paras. 14-51, *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 at paras. 60-64. Note that the test to determine litigation privilege is the dominant purpose test. *Id.* and *Ferris v. Shell Canada Ltd.*, [2000] O.J. No. 3058 (Ont. Sup. Ct.) at para. 10.

Medical Evaluations – Additional Defense:

Defense not automatically entitled to additional matching medical examinations, i.e to have 4 additional "tit for tat" expert reports. *Suchan v. Casella*, [2006] O.J. No. 2467 (Ont. Sup. Ct.) (Master) at paras. 1-16.

Medical Evaluations – Recording: Possible in limited circumstances where the moving party demonstrates a bona fide concern over the reliability of the doctor's of the plaintiff's account. *Moroz v. Jenkins*, 2010 ONSC 4789 at paras. 5-8.

Medical Records (Prior): Generally limited by custom to 3 years prior to injury. Limited to about 2.5 years in *Furlano et al. v. Calarco*, [1987] OJ No 744 (ON H.C.J.). FSCO previously limited to 1 year pre-accident, Practice Note 4, Exchange of Documents. *But see* *Smith v. Stewart*, [1991] O.J. No. 3491 (O.C.J.), medical records ordered produced 13 years prior, where there was a prior accident, 10 years where prior surgery, *Saleh v. Ambalaavanar and Sambasivam*, 2018 ONSC 3358 at para. 8, or 7 years in *Bombardieri v. Baldini*, [2003] O.J. No. 4531 (Ont. Sup. Ct.) at para. 17, where there was pre-existing back pain. Arguably, older records are no longer as relevant, given that 'semblance of relevancy' was replaced with 'relevant to the matter in issue' in the Rules. Potentially, the proportionality principle could also be called into play.

Medical Records – Redacting: The Court permitted the plaintiff to redact clinical notes and records to remove irrelevant, embarrassing and potentially prejudicial information. *Dupont v. Bailey et al.*, [2013] O.J. No. 932 (ON Sup. Ct.) at paras. 14-25. However, the information redacted must be irrelevant and there must be a

good reason for redaction. *Jones v. I.F. Propco*, 2018 ONSC 23 (CanLII) at par. 52.

Mixed Questions Fact, Law and Opinion:

In most circumstances, mixed questions of law and fact are proper. *Six Nations of the Grand River Indian Band v. Canada (Attorney General)*, [2000] O.J. No. 1431 (ON Sup. Ct. Div. Ct) at paras. 11-16. Likewise, a witness may also be asked mixed questions of law and opinion. *Armak Chemicals Ltd. v. Canadian National Railway Co.; Oakville Storage & Forwarders Ltd. et al. (Third Parties)*, [1982], 37 O.R. (2d) 713 (ON. H.C.J.).

Objections Proper:

I don't understand the question, please clarify

ambiguous -	question unclear in meaning
answered -	already answered
argumentative-	question contains a legal argument, i.e. was he driving negligently?
badgering -	counsel is antagonizing or mocking the witness
beyond the scope of the examination -	not relevant to a material issue
calls for a conclusion -	calls for a legal conclusion rather than facts
compound -	a single question asking more than one thing
confusing -	question unclear in meaning
disproportionate-	providing an answer would offend the proportionality principle, set forth below
harassment -	i.e. abusive, yelling, standing, waving fingers, questions designed to discomfort a witness but having little probative value.

See Aghaei v. Ghods, 2011 ONSC 4308 (CanLii) (ON. Sup. Ct.) at para. 144.

immaterial -	synonymous with irrelelvant, directed to a fact not at issue
Improper question -	"have you stopped beating your goldfish"
inconsistent -	not consistent with another fact
irrelevant -	not tending to prove or disprove a matter at issue
incoherent -	unclear, confusion or incomprehensible
misleading -	calculated to be misunderstood
misstates evidence -	improper characterization of the evidence
oppressive -	question is unduly burdensome
overly broad -	not sufficiently restricted to a specific subject or purpose
privileged -	legal, common interest, without prejudice, self-incrimination, lawyer client, litigation, settlement
unanswerable -	fully defined in Refusals - Proper Grounds
unclear -	uncertain, unclear or indefinite
vague -	uncertain, unclear or indefinite
speculative -	question calls for witness to guess the answer

Objectionable Questions:

Rule 34.12(2) permits a party to answer an objectionable question, while requiring a Court ruling before such answer may be used at Hearing. Alternately, a party may refuse to answer an objectionable question, or "**take the matter under advisement**" which pursuant to *Rule* 31.07, becomes a refusal after 60 days.

OHIP Summaries:	Have been held to be of 'very limited value,' *Gelinas v. Ah Now*, [2007] O.J. No. 3881 (On. Sup. Ct.) at para. 19, but nonetheless should be produced for several years before an accident to the present. Limited to **2** years prior in *Derynck v. Chevalier Estate*, [2002] O.J. No. 641 (On. Sup. Ct.).
Opinion Testimony – Lay Witness:	Generally, lay witnesses may not testify as to their opinions. However, where the line between fact and opinion is not clear, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. *Stryland (Litigation Guardian of) v. Yazadanfar*, [2011] O.J. No. 2785 (ON. Sup. Ct) at para. 35. Likewise, mechanics (not qualified as experts) have been permitted to testify as to the condition of a tractor they repaired. *M & P Logging Ltd. v. Carrier Lumber Ltd.*, 2001 BCCA 125 (B.C. C.A.) at paras 43-51.
Order – Approve Form	Settling an Order is an administrative act that counsel is required to conduct in good faith (i.e. to approve where the form of the proposed Order accurately reflects the ruling, regardless of whether you agree with the ruling itself). The Order is to be drafted simply, recording the

operative terms of the tribunal's Endorsement. It is a matter that counsel is to perform regardless of the position or instructions of the client, and one that counsel remains obligated to do even after ceasing to act. *Mayer v. Rubin*, 2018 ONSC 1826 (CanLII), par. 3, citing *Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.* (Master), 1991 CanLII 7311 (ON SC).

Order – Request Reconsideration

Between the time an Order is issued and entered, the Judge retains jurisdiction, and may permit the matter to be reopened and amend the Order. Where counsel moves for reconsideration (as opposed to appealing), counsel needs to show that the integrity of the litigation process is at risk, or that there is some principle of justice at stake that would override the value of finality in litigation, or that some miscarriage of justice would occur if such reconsideration does not take place. *Schmuck v. Reynolds-Schmuck*, 2000 CanLII 22323 (ON SC), par. 25.

Prior Settlements:

Amounts of prior settlements not relevant in a new action. *Anderson v. Cara Operations Ltd. (c.o.b. Montana's Cookhouse)*, [2009] O.J. No. 4463 (On. Sup. Ct.) at paras. 10-23.

Prior Statements Consulted (memory refreshed):

"Before coming here today, did you review any statements that you may have made to assist you

in refreshing your memory?" *Heyduk v. Love*, [1993] O.J. No. 4337 (O.C.J.). at paras. 1-6.

Purposes of Discovery:

1) To enable the examining party to know the case he has to meet;
2) To procure admissions that enable one to dispense with formal proof;
3) To procure admissions which may destroy an opponents case;
4) To facilitate settlement; pre-trial procedure and trial;
5) To eliminate or narrow issues;
6) To avoid surprise at trial.
Motaharian (Litigation Guardian of) v. Reid, [1989] O.J. No. 1947 (On. H.C.J.).

7) To commit the other side to positions;
8) To obtain some insight into the qualities of a key witness of the other side;
White, R., The Art of Discovery (Toronto, Canada Law Book, 1990).

9) To obtain the opponent's position as to which documents are relevant to each issue in the preceding. Trial Lawyers Discovery Notebook. Daley, Helen A. Law Society of Upper Canada Department of Continuing Education, Chapter 1, page 3, (1998).

Questions on Law:

The witness on an examination for discovery may be questioned about the party's position on questions of law. *Ontario v. Rothmans Inc.*, [2011] O.J. No 1896 (Ont. Sup. Ct.) at para. 129.

Questions Taken "Under Advisement":

Where counsel "takes questions under advisement", (as permitted by *Rule* 31.07), they have 60 days to provide a response, after which it becomes a failure to answer. It is likely worthwhile to inform counsel that:

"Counsel, I'm sure you are aware that should I not receive a response within 60 days, that becomes a failure to answer under the Rules. Conversely, were I to receive a response, it would likely necessitate this discovery be continued, to get that question, and any follow up questions, answered on the record. As you are aware, I'm entitled to have answers from the witness, rather than from counsel." (i.e. **you don't have to accept a letter in satisfaction of undertakings**). *See* S.E. Lyons and Son Ltd. v. Nawoc Holdings Ltd. et al., [1978] 23 OR (2d) 727 (ON H.C.J.). Instead, you may insist upon having undertakings answered by the party attending at a follow up examination. *Marotta v. Ganz*, 2014 ONSC 2988 (CanLII) at para. 48.

Re-Examination: (Rehabilitate the witness):

A party may be re-examined by his own lawyer. *Rule* 34.11.

Refusals –
Proper Grounds:

(1) **unanswerable** - the question is not capable of being answered, which is to say that the question is vague, unclear, inconsistent, unintelligible, redundant, superfluous, repetitious, overreaching, beyond the scope of the examination, speculative, unfair, oppressive, or a matter of rhetoric or argument;

(2) **immaterial** - the question is not material, which is to say that the question falls outside the parameters of the action and does not address a fact in issue;

(3) **irrelevant** - the question is not relevant, which is to say that the question does not have probative value; it does not adequately contribute to determining the truth or falsity of a material fact;

(4) untimely - the question is not relevant to the **class** period because it concerns events or matters outside of the class period, or more generally, it concerns events temporally unconnected to a cause of action or defence;

(5) idiosyncratic or uncommon - the question is not relevant to the common issues because it concerns an individual inquiry that was not **certified** for the (**class**) common issues trial;

(6) **answered** – the question or the documents relevant to the question have already been provided by the party being examined;

(7) **disproportionate** - the question is disproportionate, which is to say that the question may be relevant but providing an answer offends the proportionality principle; and

(8) **privileged** – the answer to the question is subject to a privilege, including lawyer and client privilege, litigation privilege, or the privilege for communications in furtherance of settlement.

Canadian Imperial Bank of Commerce v. Deloitte and Touche, 2013 ONSC 917 (CanLII) at para. 81.

Routine: Questions may be asked about the habit of a person or routine practice of an organization, i.e. state of maintenance of a fleet of motor vehicles before and after an accident. *Torami v. Horton*, 1988 CanLII 4790.

Scope of Discovery: *Rule* 31.06.1. A party shall answer, to the best of his knowledge, information and belief, any proper question **"relevant to any matter at issue",** unless the question is directed solely to the credibility of a witness.

"The following principles apply governing the scope of questioning:

The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings.

The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or *speculative discovery* is known colloquially as a 'fishing expedition' and it is not permitted.

(HEARSAY)

The deponent on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue.

A party offering hearsay evidence during an examination for discovery may properly be asked if they have additional evidence or evidence that contradicts the hearsay evidence, but a party is not obliged to admit hearsay evidence to be true. However, if a party adopts the truth of the hearsay evidence, same may be admissible against them at trial.

However, a party's duty to inform himself or herself does not go so far as to require the party to inform himself about the information from third parties, strangers, or outside sources who might be witnesses in the proceeding.

What facts are in issue, which is to say, what facts are contested or disputed, is explained by the idea of materiality. Evidence that does not address any issue arising from the pleadings or the indictment (a fact in issue) or the credibility of a witness (perception, memory, narration, or sincerity) is immaterial, and it is inadmissible: For example, a person's mental state may be an issue in a given case. If it is an issue, then evidence that would be relevant to proving that the person was inebriated or angry or depressed would be material. If the person's mental state was not an issue in the case, then the evidence about inebriation, anger, or depression would be immaterial because it would not matter to the outcome of the case.

(RELEVANCE)

To be relevant, evidence must increase or decrease the probability of the truth of the facts in issue: **Relevance is about the tendency of the evidence to support inferences.**

To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. **The evidence must simply tend to "increase or diminish the probability of the existence of the fact in issue."** As a consequence, **there is no minimum probative value required for evidence to be relevant.**

Evidence is relevant if, as a matter of common sense and human experience, it makes the existence of a fact in issue more or less likely. **Relevance is assessed by reference to the material issues in a particular case and in the context of the entirety of the evidence and the positions of the parties."**

Canadian Imperial Bank of Commerce v. Deloitte and Touche, 2013 ONSC 917 (CanLII) at paras. 65-80.

A document is relevant for the purpose of a party's discovery obligations if it is logically connected to and tending to prove or disprove a matter in issue as defined by the pleadings.

Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co., 2015 ONSC 4714 (CanLII) at para. 25.

(Proportionality Principle): The **proportionality principle** set out in *Rule* 29.2.03 applies to limit the scope of examinations for discovery. 29.2.03, states:

(1) In making a determination as to whether a party or other person must answer a question or produce a document, the court shall consider whether,

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
(b) the expense associated with answering the question or producing the document would be unjustified;

(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
(e) the information or the document is readily available to the party requesting it from another source.

Canadian Imperial Bank of Commerce v. Deloitte and Touche, 2013 ONSC 917 (CanLII) at para. 72.

Scope of Discovery

Pre-2010 cases: Wide latitude is allowed on examinations for discovery. Questions are permitted and should be answered so long as they have a "semblance of relevancy." *Brand Name Marketing Inc. v. Rogers Communications Inc*., [2010] OJ No. 978 (Ont. S.C.J.) at para. 55. Where discoveries had commenced prior to January 1, 2010, the "semblance of relevancy test" continued to apply. *Id*. at para. 85. *But see Midland Resources Holding Limited v. Shtaif*, 2010 ONSC 3772 (CanLII) at para. 6, though some discoveries took place prior to the rule change, this motion was heard after, so the new rules applied.

Scope of Examination on Affidavit:

"The scope of a cross-examination of a deponent for an application or motion is narrower than an examination for discovery.

A cross-examination is not a substitute for examinations for discovery or for the production of documents available under the Rules of Civil Procedure.
The examining party may not ask questions on issues that go beyond the scope of the cross-examination for the application or motion.

The questions must be relevant to: (a) the issues on the particular application or motion; (b) the matters raised in the affidavit by the deponent, even if those issues are irrelevant to the application or motion; or (c) the credibility and reliability of the deponent's evidence.

If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposing party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.

The proper scope of the cross-examination of a deponent for an application or motion will vary depending upon the nature of the application or motion.

A question asked on a cross-examination for an application or motion must be a fair question.

The test for relevancy is whether the question has a semblance of relevancy.

The scope of cross-examination in respect to credibility does not extend to a cross-examination to impeach the character of the deponent.

The deponent for an application or motion may be asked relevant questions that involve an undertaking to obtain information, and the court will compel the question to be answered if the information is readily available or it is not unduly onerous to obtain the information.
The deponent for a motion or application who deposes on information and belief may be compelled to inform himself or herself about the matters deposed." *Ontario v. Rothmans Inc.*, 2011 ONSC 2504 (CanLII) at para. 143.

However, the scope of cross examination on a motion for **summary judgment**, which may end the litigation and potentially grant a final judgment, has to be wider than motions of a narrower focus. *Aghaei v. Ghods*, 2011 ONSC 4308 at paras. 22-26.

Similar Facts/ Events/ Occurrences:

Evidence of similar claims or problems are relevant, and should be answered. *George Day Contracting v. Coneco Equipment, a Division of Rivtow Equipment Ltd.*, [1991] A.J. No. 783 (Alta. Master), *Torami v. Horton*, [1988] O.J. No. 2056 (Ont. Div. Ct.), *Roycroft v. Kyte*, [1999] O.J. No. 296 (Ont.Gen.Div.), *Sandhu v. Ontario*, [1990] O.J. No. 1753 (H.C.J.), *Durrani v. Augier*, [2000] O.J. No. 2960 (Ont. Sup. Ct) at para. 19, *Hales v. Kerr*, [1908] 2 KB 601. However, such evidence may be refused where deemed a 'fishing expedition.' *SecurityInChina International Corp. v. Bank of Montreal*, 2019 ONSC 7183 (CanLII) at paras. 17-22.

Statements by a Party:

Statements by or information from the plaintiff must be produced to the plaintiff (though not notes containing commentary, remarks or observations). *Panetta v. Retrocom et al.*, [2013] O.J. No. 1984 (Ont. Sup. Ct.) at paras. 49-52. Same are not subject to litigation privilege. *Mancao v. Casino*, 1977, 17 O.R. (2d) 458 (H.C.J). *Rule* 30.02. *Hart v. Canada (Attorney General)*, [2012] O.J. No. 2851 (Ont. Sup. Ct.) at paras. 11-13. Additionally, a party must disclose any information contained in a statement, where the party cannot recall such information at discovery. *Di Salvo v. Gongelli*, [2015] O.J. No. 3356.

Subsequent Remedial Measures:

Post-Accident remedial measures may be relevant as to whether an occupier met the standard of care. *Murphy v. Toronto and Region Conservation Authority*, 2020 ONSC 1189 (CanLII) at par. 8. Questions may be asked, though answers may not be

admissible at trial. *Algoma Central Railway v. Herb Fraser & Associates Ltd.*, 1988 CanLII 4740 (H.C.J.), *Sandu v. Wellington Place Apartments*, 2008 ONCA 215, at paras 58-60, *Sutherland v. SAH and Booth*, 2017 ONSC 736 (CanLII) at para. 29. *Rule* 31.06.

Surveillance

A party must disclose particulars of surveillance, even if only intended for impeachment. *Walker v. Woodstock*, [2001] O.J. No. 157 (Div. Ct.) at para. 12. Under the Rules, Surveillance constitutes a document, which must be disclosed in the Affidavit of Documents, including the times, dates, locations of surveillance and the names and addresses of persons conducting surveillance, contents of reports, video tapes, photographs etc. *Iannarella v. Corbett*, 2015 ONCA 110 at para. 40, *Waxman v. Waxman*, [1990] O.J. No. 871 (H.C.J.) and Mastering Discovery in Personal Injury Cases, Bogoroch, Richard M, Department of Continuing Legal Education, The Law Society of Upper Canada, 1999, Chapter 2, pages 15-16. *Rule* 30.01(1)(a).

Theory of the Case:

A party need not disclose their theory of the case. *Kennedy v. Toronto Hydro-Electric System Ltd.*, 2012 ONSC 2582 (CanLii) at para. 48.

Time Limits for Discovery:

7 hours per side, except in simplified procedure. *Rule* 31.05(1). *But see* *Osprey Capital Partners v. Gennium Pharma Inc.*, [2010] O.J. No.1721 (Ont. Sup. Ct.) (Master), at para. 53 "there would be unfairness if the defendants collectively have 21 hours of examinations for discovery of [the plaintiff] while [the plaintiff] only has seven hours for all three defendants collectively (slightly more than two hours for each defendant). In a case of significant

value to [the plaintiff], with complex issues of fact and law, [the plaintiff] should not be placed in a situation in which it may be examined for discovery for approximately ten times as long as each defendant." *See also* *The Roman Catholic Episcopal Corporation of the City of Ottawa v. Houlahan*, 2014 ONSC 5942, where the plaintiff was allowed 23 hours to conduct discovery on defendants.

Also, the time limit is for actual discovery, and does not include breaks, adjournments or time consumed by unreasonable interference by opposing counsel. *J & P Leveque Bros. Haulage Ltd. v. Ontario*, [2010] O.J. No. 1585 (Ont. Sup. Ct.) at para. 19.

Undertakings:

Lacking a basis in the Rules, undertakings have evolved through custom. Essentially, undertakings consist of a private agreement between counsel that while a question is proper, the witness is presently unable to answer same. *Fortunato v. Toronto Sun*, [2001] O.J. No. 3383 (Ont. Sup. Ct.) (Master) at para. 6. When given, counsel should agree to write 2 request letters, and not oppose the other side in bringing a motion for relevant records. "The requesting side should pay the costs of any records obtained." *Pollard v. Esses*, [1994] O.J. No. 4163 (O.C.J.) at paras. 2-3. Alternately, you may consider providing an authorization, on condition that you are provided with copies of all information received, though same obviously limits your ability to control the disclosure of certain information as allowed by the Rules.

Significantly, you do not need to accept a letter from opposing counsel in satisfaction of undertakings. *S.E. Lyons and Son Ltd. v. Nawoc Holdings Ltd. et al.*, 1978 CanLII 1429 (ON SC). Instead, you may insist upon having undertakings answered by the party attending at a follow up examination. *Marotta v. Ganz*, 2014 ONSC 2988 (CanLII) at para. 48.

Further, the lawyer should give no undertaking that cannot be fulfilled. Additionally, nothing in these rules relieves a party who undertakes to answer a question from the obligation to honor the undertaking. *Rule* 31.07(4).

Unprepared Subject:

Lack of preparation constitutes constructive refusal to participate in the discovery process. *Rule* 31.03, *Metropolitan Toronto Condominium Corp. No 979 v. Ellis-Don Construction Ltd.*, [1997] O.J. No. 353 (O.C.J.) (Master) at para. 6.

Who May Conduct Examinations:

A self represented party may conduct examination pursuant to the *Rules*. However, a lawyer who has sworn an Affidavit in a matter may not conduct examinations in the same matter. *Clay-Jen Holdings Ltd. v. Inner Core Corp.*, [1983] O.J. No. 2154 at para. 11, Rules of Professional Conduct 5.2-1. This accords with the general rule that a lawyer, who is a witness in the proceedings, not appear as counsel. *Marrocco v. Ferndale Vineyards*, 2021 ONSC 4646 (CanLII) at para. 30.

Who May be Examined:

Generally, examinations are limited to other parties to the action, subject to the exceptions set forth in *Rule* 31.03, which permit the Plaintiff to select the corporate representative or employee. If leave is sought to depose more than 1 representative of a corporation pursuant to *R.* 31.03(2)(b), the court will consider a number of factors outlined in *Bovill v. The York Club*, 2019 ONSC 4335 (CanLII) at para. 4. Parties may examine those who are not adverse in interest (i.e. a defendant may examine a fellow defendant event absent a cross-claim), but admissibility will be determined by the Trial Judge. *Aviaco International Leasing Inc. v. Boeing Canada Inc.*, (2000), 2 C.P.C. (5th) 48.

Who May be Present at Discovery:

A party has a right to attend examinations for discovery. *Lesniowski v. H.B. Group Insurance Management Ltd.*, [2003] O.J. No. 6263 (Ont. Sup. Ct.) at para. 15. However, co-plaintiffs or co-defendants may be excused to prevent tailoring of evidence (especially where credibility will be a central issue). It's not a high test. *Lazar v. TD General Insurance Company*, 2017 ONSC 1242 at para. 48, *Keedi et al. v. The Wawanesa Mutual Insurance Company et al*, 2020 ONSC 904 (CanLII) at para. 26. However, the first party examined may attend the second party's examination, provided they don't communicate prior or during the second examination. *Solutions with Impact Inc. v. Domino's Pizza of Canada Ltd.*, [2010] O.J. No. 423 (Ont. Sup. Ct.) at para. 70. But see *Besner v. Ontario*, [2011] O.J. No. 5851 (Ont. Sup. Ct.) (Master), where the Court refused to

excuse the 3 defendant police officers from each other's discoveries.

However, mischief is less likely to occur by witnessing a co-party be cross examined on an affidavit. *1264237 Ontario Ltd. v. 1264240 Ontario Ltd.*, 88 O.R. (3d) 139 (Ont. Sup. Ct.) (2007) at para. 16.

Significantly, an examiners office is not a public court, and the examination is not a public hearing. *Baywood Paper Products Ltd. v. Paymaster Cheque-Writers (Can.) Ltd.*, [1986] O.J. No. 2974 (Dist. Ct.) at para. 21, *Abulnar v. Varity Corp.*, [1989] O.J. No. 1008 (H.C.J.). Beyond the parties and counsel, others may attend only with the consent of the party being examined or the consent of the Court. *Abulnar*. The Courts have allowed representatives of the Defendant's insurance company to attend, an agent of a party with special knowledge of the case, and experts. *Smith v. Walnut Dairy Ltd.*, [1945] O.J. No. 331 (H.C.J.), *International Chemalloy Corp. v. Friedman,* [1983] O.J. No. 2108 (Ont. Sup. Ct.) (Master) at paras. 24-25. Discovery, Law, Practice and Procedure in Ontario, Cass, Fred D. et al. 1993 (Thomson Canada Ltd). at pg. 211. However, an examining party's US counsel had no inherent right to attend. *Abulnar v. Varity Corp.*, 1989 CanLII 4333 (H.C.J.). Further, based on general trial practice (sequestration), it is likely other witnesses would be excused from the examination room at the request of the examining party.

Stock Response to Improper Refusals:

Q: ?

A: Refused

Q: Counsel, in a non-suggestive manner, please state the reasons for your refusal. R. 34.12(1).

A: .....

(If Relevance: Counsel, how are you defining relevance?)

Q: Counsel, in a bid to try to spare the Court from having to hear a refusals or directions motions, would you consider Rule 34.12(2), which permits a party to answer an objectionable question, while maintaining their objection?

A: Refused

Q: And counsel, regarding your refusal, am I correct that you are maintaining that refusal despite being informed that I will bring a motion and/or ask the Judge to draw a negative inference from the failure of your client to answer that question?

Some Sample Expert Discovery Questions:

1. Initially counsel, may I contact the expert directly if I have questions, or is the expert a party under your control?

2. I will request a copy of the expert's name, address and CV.

3. I will request an undertaking that all field notes, raw data and records made and used by the expert in preparing his report be produced.

4. I will request an undertaking for all facts relied upon by the expert in forming his findings, opinions and/or conclusions.

5. To the extent your expert postulates any theory, I will request an undertaking that all facts relied upon in support of said theory be provided.

6. What factual evidence are you aware is known to the expert, including any facts provided orally by counsel.

7. I will request an undertaking to ask the expert about all factual evidence known to the expert in regard to this case.

8. Has the expert provided any draft or preliminary findings, opinions or conclusions, and if so, what are they?

9. Ask for any observation the expert made. Ask that any draft reports be preserved and brought with the expert to trial.

10. I will request an undertaking about the opinions and findings of the expert as a potential trial witness, and if the expert's findings include any articles he has written. Should he rely

upon any of his own articles, I reserve the right to pose appropriate follow up questions.

11. What is the substance of the expert's proposed testimony?

Where the response is "**we will comply with the rules**" I would suggest the following:

WHERE AN EXPERT HAS BEEN RETAINED:

Q: Counsel, at discovery, your client is required to disclose the findings, opinions and conclusions of their experts, or to give an undertaking not to call the person as a witness. Do you undertake to not call said expert as a witness?

A: No.

Q: Counsel, I will be forced to treat your response as a refusal, pursuant to the authority of Rule 31.06(3) and *Kennedy v. Toronto Hydro-Electric System Ltd.*, 2012 CarswellOnt. 5217. Do we really need to schedule a refusals motion for this when the law is clear? Once more, will you give me the information today to which I'm entitled?

WHERE NO EXPERT HAS YET BEEN RETAINED:

Q: Counsel, I understand that as of today's date, no experts have been retained by you, is that correct?

A: Correct.

Q: Counsel, when you do retain an expert or experts, may I contact them directly, or will they be a party under your control?

A: Likely, a version of "no, you may not contact them."

Q: Counsel, of course, you will provide me with the names and addresses of any experts retained, along with copies of their CV's?

Q: Counsel, at discovery, your client is required to disclose the findings, opinions and conclusions of their experts, which is obviously not possible today. As such, I will request an undertaking to be provided with the findings, opinions and conclusions of any experts retained once you have them.

Q: Likewise, I will request an undertaking that all field notes, raw data and records made and used by any experts retained in preparing their reports be produced.

Q. I will request an undertaking for all facts relied upon by each expert in forming his findings, opinions and/or conclusions.

Q To the extent each of your experts postulates any theory, I will request an undertaking that all facts relied upon in support of said theory be provided.

Q I will request an undertaking as to all factual evidence known to any expert retained regarding this case, including any facts provided orally by counsel.

Q I will request an undertaking as to any draft or preliminary findings opinions and conclusions for each expert retained. I will request a further undertaking that those documents be brought with the expert to trial.

Q I will request an undertaking as to any observations each such expert makes in their investigation into this matter.

Q I will request an undertaking about the opinions and findings of the expert as a potential trial witness, and if the expert's findings include any articles he has written. Should he rely upon any of his own articles, I reserve the right to pose appropriate follow up questions.

Q I will request an undertaking to be provided with the substance of the expert's proposed testimony at trial.

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