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Questioning

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Maximizing Questioning Evidence

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MAXIMIZING QUESTIONING EVIDENCE

> "To find truthful answers we must replace the search for answers with the search for truth."
> — A.A. Alebraheem

The pre-trial process of questioning parties who are adverse in interest is not about just getting answers to questions. When conducting a questioning, I do not really want the answer that the witness wants to give me, prepared and rehearsed as it may be. Rather, I want to get to the truth that will advance my client's case. The purpose and goal of questioning for discovery is to arrive at the truth concerning the issues in the lawsuit so that the truth can be used, ultimately, in getting justice, recourse, or resolution on behalf of the parties. One of the greatest sources of compelling and convincing evidence that is available to counsel are the admissions obtained from the questioning, whether oral or by way of written form, of the party opposite.

This paper will review the tactical advantages that can be achieved through the strategic use of questioning evidence, by way of reading in, at trial. It will also explore some of the law relative to the use that can be made of the questioning transcripts and answers to written questions, with a view to assisting litigators maximize this often over-looked and under-used tool.

WHY AND WHEN TO USE QUESTIONING EVIDENCE AT TRIAL?

I have noticed over the years that inexperienced or unprepared counsel consider questioning as a 'warm up' for trial or a chance to take your claim out for a 'test drive' to see how it performs. That is a serious mistake and is probably negligence on the part of the lawyer. Questioning is your best tool for getting the evidence you need to prove your case ***at trial***. We are all familiar with the Hollywood rendering of Miranda rights – "Anything you say can and will be used against you in a court of law". We ought to approach questioning with the same mindset, that we are endeavouring to obtain admissions that will be used to establish liability against the defendant when (not if) the claim goes to trial.

The scope of this presentation is not specifically on how to prepare for questioning, but to highlight that we need to keep in mind, as we prepare to question the party opposite, this query: "What do I want this defendant to say that I can use before a judge to prove my case?" By doing so, we will have much greater success in getting the questioning evidence that we need when the time for trial comes.

My own experience has been that, when acting as plaintiff's counsel, the most effective use of questioning evidence by way of read-ins occurs during my opening statement to the Court. I get the first chance to tell the Court what the case is all about. Accordingly, if I have obtained admissions

that help conclusively prove my case, why wait? Imagine the impact on a trial judge who hears, in the first fifteen minutes of the case, the *strongest and most compelling* evidence that you have, coming out of the defendant's mouth, in his own words. From that point onward, the defendant will be in the position of grinding his teeth, knowing that he will not really be able to deal with the best part of your case until his opens. It is a very powerful way to begin your case and can be very persuasive.

The concept of using read-ins as part of the opening statement is not well understood. Whenever I have done so, I have almost always faced an objection by defence counsel on the basis that it is not proper to do so in an opening. Those objections have never been successful. Although most judges are familiar with the process, most litigators are not. If authority on the subject is required, I will usually refer to *The Trial of an Action.*[1] At pages 74-75, the authors write: "[The opening statement] may also be the occasion on which counsel for the plaintiff advises the tribunal of formal admissions."

The authors also state:

> The evidence can be stated more specifically if it is contained in documents or admissions in an examination for discovery[2].

Finally, the authors include, as Appendix 3 at pages 187-193, an opening statement that refers to evidence obtained in the discovery process.

A Practical Example[3]:

In a case where I was counsel for a woman who suffered a permanent injury to her median nerve following the administration of a median nerve block, the issue was one of informed consent and whether the defendant doctor had advised of the risks inherent in the proposed procedure. As part of my opening, I used the following read ins from the defendant doctor's examination for discovery:

Q: And it is your evidence that neither of the three [alternative procedures]

25 poses any greater risk than any of the others to the

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[1] Sopinka, John et al. The Trial of an Action, 2nd ed. (Markham, Ont.: Butterworths, 1998)

[2] Ibid, p. 78

[3] Patterson v. Hryciuk, 2004 ABQB 934