



Questioning for Discovery

ACTION	NA	DATE DUE	DATE DONE	Notes
<p>1. Disclosure and Production of Documents</p> <p><i>* Please note, this checklist is designed only to serve as a guideline for counsel to use in fulfilling their obligations to disclose and produce their client's documents in a civil action, and in determining whether opposing counsel have properly fulfilled their obligations. As complete as this checklist tries to be, it does not contemplate every possible situation or circumstance.</i></p> <ul style="list-style-type: none"> • Familiarize yourself with the obligations in terms of disclosure and production of documents. <ul style="list-style-type: none"> • See rule 5-6(1)(b) which confirms that the affidavit of documents must disclose all documents relevant to any matter in issue in the action. 				
<ul style="list-style-type: none"> • Communicate these obligations in terms of disclosure and production of documents to your client. <ul style="list-style-type: none"> • Explain to your client the difference between disclosure and production. • Keep in mind that you will need to include in the affidavit of documents a "Certificate of Lawyer" which certifies that you have explained to the person swearing or affirming the affidavit of document the necessity of making full disclosure of all documents relevant to any matter in issue in the action and what kinds of documents are likely to be relevant to the allegations made in the pleadings. • Consider putting this advice to your client in writing. 				
<ul style="list-style-type: none"> • Gather up and collect all "documents" that may relate to matter in issue in action. Do not rely on client's judgment as to what document is "related"; meet with client and review documents personally. Make appropriate inquiries regarding electronic documents that exist and 				

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that may have existed at one time that may now be destroyed. This can be an extremely onerous task given the proliferation of such documentation. It is a task that requires very specific and detailed attention.				
<ul style="list-style-type: none"> Identify each document with specific description. 				
<ul style="list-style-type: none"> Set aside documents which will be withheld from production and identify reason for withholding. 				
<ul style="list-style-type: none"> Prepare affidavit of documents (see rule 5-6 for required form of affidavit): <ul style="list-style-type: none"> Description of each document should identify author/recipient, document type and date. 				
<ul style="list-style-type: none"> Documents should be organized for convenient reference. In most cases, this will be chronologically by date. 				
<ul style="list-style-type: none"> It is generally not necessary to identify documents comprised of letters between counsel unless they contain relevant information such as an admission or an offer to settle (in which case it is listed as privileged). The exception may be in situations where there are more than two counsel, especially when one is not a party to the correspondence. 				
<ul style="list-style-type: none"> The documents in the affidavit should be numbered for convenient reference, and the corresponding number should appear on or be associated with the documents being reproduced (for instance, through tabs or, in the case of electronic production, in the file name). 				
<ul style="list-style-type: none"> Identify accompanying enclosures separately. 				
<ul style="list-style-type: none"> Set out sufficient description of documents being withheld from production on ground of privilege without negating the privilege being claimed so that counsel opposite may have an opportunity to properly conduct questioning of the claim. 				

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<ul style="list-style-type: none"> List documents that were in your client's possession that may no longer be. This may include things like old emails or text messages which can no longer be retrieved or physical documents which have been lost or destroyed. 				
<ul style="list-style-type: none"> From time to time, consider whether additional documents have been discovered or created. If so, prepare supplementary affidavit of documents. 				
<ul style="list-style-type: none"> Review opposing parties' affidavits of documents, considering the following questions: <ul style="list-style-type: none"> Is it complete or are there obvious omissions? 				
<ul style="list-style-type: none"> Are documents withheld from production properly described so as to understand grounds for withholding? 				
<ul style="list-style-type: none"> Are grounds for withholding production properly set out? Inquire either prior to or at the time of the questioning. 				
<ul style="list-style-type: none"> Can grounds for withholding production be subject to challenge? Consider motion to compel production if grounds not valid following questioning, although challenge may be brought at any time, including immediately prior to trial or at trial. 				
<ul style="list-style-type: none"> Application for further and better affidavit of documents (if necessary) (rule 5-12). 				
<ul style="list-style-type: none"> Make arrangements to inspect and/or obtain copies of opposing parties' documents. On large productions, arrangements may be made to have documents photocopied at a professional printer to save costs. Electronic production is now commonplace and many counsel will simply include electronic copies of their producible documents when serving the affidavit of documents. 				
<ul style="list-style-type: none"> If appropriate, serve and file notice to produce documents (rule 5-11). This can be done at any time and can be helpful if you do not have a 				

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document which is referred to in a pleading (for instance, if necessary to respond to proceedings against your client).				
<p>2. Questioning of Opposing Party</p> <ul style="list-style-type: none"> Determine appropriate time for questioning (e.g., generally after disclosure and production of documents, subject to availability of party to be questioned, etc.). In most cases, your client will be present for their own questioning as well as that of the other party but consider whether there is an advantage to your client being present while you conduct questioning of the other party. 				
<ul style="list-style-type: none"> Determine parties to be questioned, as it may not be necessary to question all parties adverse in interest. Cost of questioning is a factor. Clients must realize they may face an expense of over \$1,000/day for court reporting costs alone. Consider if conduct money is an issue. If witnesses are all local, then the practice is to waive the costs. 				
<ul style="list-style-type: none"> Identify proper officers to be questioned on behalf of partnerships, corporate parties or Crown: <ul style="list-style-type: none"> Consider execution of agreement as to proper officer. 				
<ul style="list-style-type: none"> In complicated cases, consider an agreement to question more than one officer to avoid undertakings. In light of the Rules, this can only be done by agreement. If proceeding down this path, then have an agreement as to the exact responsibilities of each witness so that counsel cannot follow up with one witness what was missed with another. If this practice is agreed to, then proceed with questioning only one witness at a time. 				
<ul style="list-style-type: none"> Consider whether it would be appropriate to conduct questioning of a past officer and note that it is not binding unless parties agree otherwise. 				

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<ul style="list-style-type: none"> Consider whether questioning can be accomplished in writing or whether written questions can be used to shorten verbal questioning. See Rule 5-32 – <i>Written Questions</i> 				
<ul style="list-style-type: none"> Consider whether it is practical to conduct the questioning virtually, as opposed to in person. Factors to consider will include timing, cost, availability of equipment, necessity of travel and number of documents. 				
<ul style="list-style-type: none"> If necessary, serve appointment for attendance at questioning, along with sufficient conduct money. This should be a last resort as one should consider the schedule of opposite party and counsel as a matter of courtesy. 				
<ul style="list-style-type: none"> Prepare a list of factual issues that must be determined at trial. 				
<ul style="list-style-type: none"> Prepare a list of facts your client will wish to establish at trial. Consider what evidence you need from the other side to prove your case, to avoid having to rely upon eliciting the evidence at trial from the other side. <ul style="list-style-type: none"> Note that the other side may not call the witnesses you anticipate, or any witnesses at all, depending on the circumstances. Those acting for the plaintiff should give special consideration to this. 				
<ul style="list-style-type: none"> Prepare an outline of questioning topics. 				
<ul style="list-style-type: none"> Review each party's affidavit of documents and productions. Order paper or electronic copies of productions (if questioning will be conducted by virtual means, ensure that you have electronic copies of all productions). <ul style="list-style-type: none"> Consider whether everything that should be produced is in fact produced. 				
<ul style="list-style-type: none"> Consider seeking further productions by making the request for the same, listing documents that you would have expected to see in the productions. 				

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<ul style="list-style-type: none"> Consider bringing an application for the production if counsel refuses. 				
<ul style="list-style-type: none"> You may wish to proceed with the questioning nonetheless and make the request for production (via undertaking) on the record. Consider the cost of this, however, if you still need to bring an application to compel a response to the undertaking and/or have to go back to conduct another questioning. 				
<ul style="list-style-type: none"> Prepare an outline of your questions: <ul style="list-style-type: none"> Keep questions relatively short and direct. 				
<ul style="list-style-type: none"> Avoid multi-question questions. 				
<ul style="list-style-type: none"> Avoid convoluted questions. 				
<ul style="list-style-type: none"> If using written outline of questions, avoid being unnecessarily tied to your outline. Listen to the answers provided by the witness and ask follow-up and clarifying questions when necessary. 				
<ul style="list-style-type: none"> Design and word questions to obtain desired admissions. Admissions must be clear and capable of being read in at trial. <ul style="list-style-type: none"> Note: Sometimes counsel are concerned that they may give away their concerns or case by asking certain questions. There are two schools of thought. One says that you might as well ask the question and get the bad news over with early and uncover any dirt if it is there. The other holds that it is best not to ask questions that may alert the other side, asking only absolutely necessary questions for your case. At questioning, it is likely best to adopt the first school. At trial, the second is likely more advisable. 				
<ul style="list-style-type: none"> Conduct of questioning of opposing party: 				

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<ul style="list-style-type: none"> It is typical to start questioning of any party with introductory matters such as establishing any short forms names, reminding the witness of the need for verbal answers and verifying that they are the party named in the claim (or the proper officer thereof). 				
<ul style="list-style-type: none"> Seek undertakings where information or document cannot be supplied at questioning. 				
<ul style="list-style-type: none"> Have necessary documents identified and marked as exhibits. When marking as an exhibit, be sure to establish all necessary elements of proof so document can be entered at trial from questions and answers. If documents are properly numbered in the affidavit of documents, then counsel may agree to dispense with the actual numbering of the documents by the court reporter. Confirm that copies may be used as if originals. 				
<ul style="list-style-type: none"> Maintain a list of exhibits. 				
<ul style="list-style-type: none"> Maintain a list of undertakings. 				
<ul style="list-style-type: none"> If opposing counsel objects to a question, ensure the question is stated clearly for the record. 				
<ul style="list-style-type: none"> Consider conducting a questioning of allegations in pleadings and their basis. 				
<ul style="list-style-type: none"> If the response is convoluted, then go back and break down the question and answer so as to make the responses capable of being read in at trial. Take your time and be certain to obtain what you need. 				
<ul style="list-style-type: none"> Once you have your admission, move on. Do not allow the witness to qualify the response. 				
<ul style="list-style-type: none"> Consider inquiring about affidavit of documents and documents that ought to be produced but are not. Inquire as to basis of any privilege claimed. Insist on itemization of privileged documents. Pay close attention to what is not in the listing. Should 				

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documents have been produced that are not, given what you have heard the witness say during testimony?				
<ul style="list-style-type: none"> If there are documents that are relevant, establish truth of contents and confirm position of witness regarding same. 				
<ul style="list-style-type: none"> Consider making a detailed inquiry of electronically stored documents that may exist or that may have existed at one time. Consider obtaining hard discs or server information. Consider making inquiries to confirm documents have not been electronically manipulated. 				
<ul style="list-style-type: none"> Lawyers may occasionally go “off the record” during questioning, primarily to discuss points of procedure or to gain clarity on the questions asked. This simply means that the discussion will not appear on the court reporter’s transcript. Ensure that the court reporter is aware when you are ready to go back “on the record”. 				
<ul style="list-style-type: none"> If your client is present for questioning of the other party, consider a brief discussion with your client prior to adjourning your questioning to ensure that you have covered all anticipated areas. 				
<ul style="list-style-type: none"> Adjourn questioning <i>sine die</i> subject to responses to undertakings and any questions or documents that may arise from the same, or any other limitations you see fit. Do not close if there are outstanding issues. 				
<ul style="list-style-type: none"> If witness is proper officer of partnership, corporation or Crown and has not satisfactorily informed himself or herself of matters in issue, consider application to question another officer [rule 5-19(2)]. 				
<ul style="list-style-type: none"> Prepare memorandum summarizing evidence given at questioning. 				
<ul style="list-style-type: none"> Send letter to opposing counsel confirming undertakings given by his or her client. Do not solely rely on summary put together by the court 				

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reporter as it could be inaccurate or not complete. Read the question asked and undertaking given.				
<ul style="list-style-type: none"> Consider application for order permitting questioning of non-party, if circumstances permit (rule 5-20). 				
<ul style="list-style-type: none"> Consider application to compel responses to questions objected to. Make it part and parcel of any other application you may have to save cost such as for production of documents. 				
3. Questioning of Client <ul style="list-style-type: none"> Identify proper officers to be questioning on behalf of partnerships, corporate parties or Crown. <ul style="list-style-type: none"> Consider execution of agreement as to proper officer. 				
<ul style="list-style-type: none"> Confirm scheduling of questioning with client by email or telephone. 				
<ul style="list-style-type: none"> Write to client, again confirming time, date and place of questioning, with advice as to general nature of what can be expected at questioning. 				
<ul style="list-style-type: none"> Meet with client to prepare for questioning: <ul style="list-style-type: none"> Explain nature of questioning and roles of everyone in attendance. Advise client that it is not a trial, and no judge will be present. 				
<ul style="list-style-type: none"> Advise client that the testimony given will be under oath and that they will be asked whether they wish to swear or affirm. 				
<ul style="list-style-type: none"> Review pleadings with client, advising that questions may be asked as to facts supporting allegations set out in claim/defence. 				
<ul style="list-style-type: none"> Ensure client is familiar with all produced documents and issues raised by those documents. 				
<ul style="list-style-type: none"> If timeline of relevant events is important, prepare chronology and ensure client agrees with and is familiar with chronology. 				

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<ul style="list-style-type: none"> Consider rehearsing specific questions anticipated from opposing counsel. 				
<ul style="list-style-type: none"> Impress on client that questioning is being conducted for benefit of opposing party and describe consequences of discrepancy between evidence at questioning and trial. 				
<ul style="list-style-type: none"> Insist that client inform him- or herself as to matters that may not be within personal knowledge, particularly if witness is proper officer being questioned on behalf of partnership, corporation or Crown. 				
<ul style="list-style-type: none"> Advise client to confine responses to questions asked (avoid long rambling answers, speculation, guessing). Warn client about agreeing to matters that are proposed by counsel during questioning. The witness ought not to be pressured into agreeing unless he or she is certain the proposition is in fact correct. 				
<ul style="list-style-type: none"> Advise client not to answer any questions to which you object. 				
<ul style="list-style-type: none"> Warn client that you will not be able to discuss the case with them once their questioning has begun. 				
<ul style="list-style-type: none"> Warn client that you may re-question them at the end of the other lawyer's questioning. 				
<ul style="list-style-type: none"> Anticipate objectionable questions and assess grounds upon which objection could be made. 				
<ul style="list-style-type: none"> Conduct at questioning of client: <ul style="list-style-type: none"> Listen to every question very carefully for consideration of possible objection. 				
<ul style="list-style-type: none"> Assist client in retrieval of documents necessary to answer questions. 				
<ul style="list-style-type: none"> Ensure awkward, incomplete or convoluted questions are made more understandable before witness responds. 				

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<ul style="list-style-type: none"> Limit questions to matters of fact as opposed to opinion or speculation. There is authority that states, however, that if the witness is established as being an expert in an area, opinion questions may be proper. 				
<ul style="list-style-type: none"> Have client provide undertakings only to extent that client can reasonably comply with them. It is preferable that the client give undertakings only after approved by counsel. 				
<ul style="list-style-type: none"> If you are not certain whether to agree to the undertaking, it is in order to take it “under advisement” and respond later as to your position. It is not in order, however, to simply take all undertakings “under advisement.” An undertaking treated as such is taken as a refusal in the first instance. 				
<ul style="list-style-type: none"> Insist that opposing counsel close his or her questioning subject to any undertakings given by your client. 				
<ul style="list-style-type: none"> Be aware of provisions in Code of Professional Conduct that prohibit discussions with witness during cross-examinations. See <i>Code</i> 4.04(1) and (2). 				
<ul style="list-style-type: none"> Prepare memorandum summarizing evidence given at questioning. Comment for future reference on the performance of the witness. Is he or she going to be believed at trial? Was he or she rattled by the questions of opposing counsel? Consider having a very frank discussion with your client regarding this. 				
<ul style="list-style-type: none"> Attend to gathering of information and documents necessary to comply with undertakings. 				
<ul style="list-style-type: none"> Do not rely upon court reporter’s summary of undertakings. Review undertakings given and ensure they are exactly the same as the court reporter’s summary. Correct summaries if warranted. 				
<ul style="list-style-type: none"> Involve client in responding to undertakings to ensure there are no surprises on questioning of responses. Note the undertakings are the 				

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client's and not the lawyer's. As such, the client must accept the responses being provided on his or her behalf.				
<ul style="list-style-type: none"> Conduct a follow-up questioning of the other side's responses to undertakings, if necessary. Again, consider cost and whether necessary. 				
<ul style="list-style-type: none"> Carefully review the transcripts, noting the continuing duty on each party to correct an answer if the answer was incorrect or misleading at the time it was given, or if it becomes incorrect or misleading as a result of new information (rule 5-31). Make any corrections necessary by affidavit as soon as is practicable. 				

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