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PREPARING YOUR CLIENT DURING AN EXTENDED EXAMINATION FOR DISCOVERY

What can you discuss with your client?

By Ryan Wilson

As a lawyer, occasionally you may find yourself with examinations for discovery that are being held over multiple days with months in between. Such is the reality of complex matters and full schedules. What are you permitted to discuss with your client to prepare them for their continued examination for discovery?

In brief, the Court has enunciated the following principles:

- 1) where an examination for discovery is scheduled over multiple days, counsel is permitted to discuss with their client all issues relating to the case, including evidence that was given or will be given;
- 2) prudent counsel should advise opposing counsel of their intention to prepare their client and discuss the evidence with them; and;
- 3) opposing counsel should not unnecessarily oppose reasonable discussions.ⁱ

These principles diverge from those for examinations in chief and cross examinations at trial, where counsel is not permitted to discuss evidence already given as set out in rule 5.4 of the *Rules of Professional Conduct*.ⁱⁱ

The proper application of rule 5.4 of the *Rules of Professional Conduct* to examinations for discovery will depend upon various circumstances including the length of discovery, the time between discovery sessions and the necessity of counsel advising the client or obtaining instructions.ⁱⁱⁱ

However, in navigating extended examinations for discovery, the Court in *Iroquois Falls Power Corp. v Jacobs Canada Inc.* provided a set of guiding principles. These principles have been followed by the Court in subsequent cases.^{iv}

Guiding principles:

- 1) In a lengthy discovery or series of discoveries, counsel may consider it necessary to discuss evidence with the witness. Generally the intention to do so should be disclosed to opposing counsel and if there is an objection it may be necessary to seek leave of the court.
- 2) If there is a break between rounds of discovery, counsel is free to meet with the client to prepare for the upcoming discovery. It may also be necessary to discuss evidence already given to obtain instructions in regard to discovery motions, to advise the client of the duty to correct answers and to answer undertakings. It is prudent to disclose this intention to opposing counsel.
- 3) Counsel ought not unnecessarily oppose reasonable discussions between counsel and client provided they are disclosed.
- 4) It is legitimate, on the resumption of discovery, to ask the witness under oath if they were coached in any way as to what answers to give.^v

Before speaking with your client to prepare them for their upcoming continued examination for discovery, it is sensible to disclose to examining counsel the necessity to discuss evidence. If examining counsel does not agree, it may be necessary to obtain leave of the Court, but the Court has stated that the need for Court intervention or supervision should be rare.^{vi}

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ⁱ *Iroquois Falls Power Corp. v Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC).

ⁱⁱ *Iroquois Falls Power Corp. v Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC) at para 26; *Rules of Professional Conduct*, rule 5.4 and commentary number 7.

ⁱⁱⁱ *Iroquois Falls Power Corp. v Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC) at para 44.

^{iv} *MediaTube Corp. v Bell Canada*, 2015 FC 391 at para 23; *Polish Alliance of Canada v Polish Assn. of Toronto Ltd.*, 2011 ONSC 1851 at para 33.

^v *Iroquois Falls Power Corp. v Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC) at para 43.

^{vi} *Iroquois Falls Power Corp. v Jacobs Canada Inc.*, 2006 CanLII 35612 (ON SC) at para 44.