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Discovery as a Forum for Persuasive Advocacy: Art and Science of Persuasion — Chapter IX

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The flash and dash of the courtroom is exhilarating for the lawyer but dangerous for the client. Accordingly, the truly successful lawyer will take his cases there only seldom. When he does go, he will go highly prepared; and that high level of preparation will be made possible by the apparently dull, but fascinatingly powerful tool, of discovery. And when a lawyer has been successful in keeping his client out of a trial, it will most often have been the same tool, discovery, which will have helped him do it.[1]

I. DISCOVERY AS A FORUM FOR PERSUASIVE ADVOCACY

The image of the persuasive litigator is often associated with trials. It is an image that evokes the courtroom scenario and the pressures that accompany it. Here, witnesses are tenaciously cross-examined, answers are carefully assessed, credibility is gauged, and lawyers make their opening and closing addresses in full view of the judge, jury, and public. It is an image that draws on the solemnity and magnitude of trial, where the potential for settlement has long passed and a verdict or judgment is the only potential outcome. It is from this situation, at the end of the litigation process, that our notions of persuasive advocacy are often derived.

In this ninth installment of the *Art and Science of Persuasion*, we look at how persuasive advocacy can and must extend beyond the courtroom. In particular, we examine the way that discovery is a critical forum in the process of developing a persuasive case. As will be shown, discovery permits the litigator to test the strength of each party's story, to investigate them for weaknesses, and ultimately to position the client for success at trial. By conducting discovery effectively, many of the same admissions, contradictions, and testimony that win trials can be elicited from witnesses. In fact, the power of discovery is such that it often renders trial unnecessary.

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[1] Robert B. White, Q.C., *The Art of Discovery* (Aurora: Canada Law Book, 1990) at 5.

The pre-trial discovery process is typically comprised of two components — disclosure of relevant documents (commonly described in Canada as "production of documents") and examination for discovery (sometimes described as "questioning"). The "examination" phase may be done by way of written interrogatories, but in most cases, it is conducted orally. Our focus in this installment is on oral examination and pre-examination advocacy, including documentary disclosure.

Since the inaugural issue of the *Art and Science of Persuasion* in the 2011 edition of the *Annual Review of Civil Litigation*, the series has focused on how the most persuasive litigators are compelling storytellers. Prior papers in the series have covered the essentials of story-centered litigation,[2] cognitive processes crucial to effective storytelling,[3] opening statements,[4] the use of soft science evidence,[5] experimental psychology,[6] the closing address,[7] the barrister's authority as narrator[8] and tribunal advocacy.[9] Uniting each paper is the argument that good advocacy depends upon good storytelling. Each paper builds on the idea that a winning case, no matter how small or big, must be presented as having a believable plotline, a credible narrative, and relatable characters. In short, the series demonstrates how litigation is won or lost by the moral force that the litigator can harness behind their client's version of events.

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2 Todd L. Archibald and J. Manuel Mendelzon, "The Trial Advocate as Storyteller: The Art and Science of Persuasion" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2011).

3 Todd L. Archibald and Shannon S.W. O'Connor, "Cognitive Psychology in the Courtroom: The Art and Science of Persuasion — Chapter II" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2012).

4 Todd L. Archibald and Joshua Tong, "Impactful Trial Opening Statements in the Courtroom: The Art and Science of Persuasion — Chapter III" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2013).

5 Todd L. Archibald and Jeremy Fox, "Examining the Reliability of Expert Soft Science Evidence in the Courtroom: The Art and Science of Persuasion — Chapter IV" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2014).

6 Todd L. Archibald and Christian Vernon, "Incorporating Insights from Experimental Psychology and Behavioural Economics into ADR Practices: The Art and Science of Persuasion — Chapter V" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2015).

7 Todd L. Archibald and Eric Brousseau, "The Closing Address: The Opening Chapter in Trial Preparation: The Art and Science of Persuasion — Chapter VI," in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2016).

8 Todd L. Archibald and Mark Friedman, "Advocating with Persuasive Authority: The Art and Science of Persuasion — Chapter VII" in Archibald & Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2017).

9 Todd L. Archibald and Brett Hughes, "Looking into an Advocacy Mirror: The Parallels Between Tribunals and Courts — The Art and Science of Persuasion — Chapter VIII," in Archibald, ed., *Annual Review of Civil Litigation* (Toronto: Thomson Canada Limited, 2018).

II. STORYTELLING AS PERSUASIVE ADVOCACY

As a form of advocacy, storytelling is among the most powerful tools available to the modern civil litigator. While all litigators must master the law, their task ultimately depends on presenting a compelling, credible, and convincing story that resonates with the judge or trier of fact. In the inaugural issue of the *Art and Science of Persuasion*, Mr. Justice Todd Archibald and J. Manuel Mendelzon explained how a story-centered approach is crucial to any successful litigation strategy:

> The most persuasive litigator is a compelling storyteller. This oft-repeated maxim may seem trite, however, many litigators consider this principle to be only pertinent to the preparation of a jury address, and not to all stages of their litigation. In reality, a well-constructed and coherent case narrative will resonate with conviction from the beginning of the case to its successful conclusion. Many litigators fail to adopt a story or theme-centered approach to litigation. They do not consider the strengths, weaknesses, and structure of their case's narrative until it is too late. These lawyers all too often end up, as the great Canadian humorist Stephen Leacock once wrote, "riding madly off in all directions."[10]

By presenting the evidence in the form of a story, the litigator transforms what is otherwise a series of often mundane historical facts into a theme that can be understood and embraced. As explained by Steven Lubet:

> Trials, then, are held in order to allow the parties to persuade the judge or jury by recounting their versions of the historical facts. Another name for this process is storytelling. Each party to a trial has the opportunity to tell a story, albeit through the fairly stilted devices of jury address, examination-in-chief and cross-examination, and the introduction of evidence. The framework for the stories — or their grammar — is set by the rules of procedure and evidence. The conclusion of the stories — the end to which they are directed — is controlled by the elements of the applicable substantive law. The content of the stories — their plot — is governed, of course, by the truth, or at least by so much of the truth as is available to the advocate. Thereafter, the party who succeeds in telling the most persuasive story should win.[11]

Just like any other human endeavour, trials are driven by the underlying storyline. The version of events that presents itself as the most compelling is the one that is likely to find success.

1. The Theory of the Case

The first component of any successful storyline is a 'theory of the case'. What sets the litigator apart as a storyteller is the ability to present a story in a manner

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[10] Archibald and Mendelzon, "The Trial Advocate as Storyteller" at 1.

[11] Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, Canadian Edition, adapted for Canada by Sheila Block and Cynthia Tape, National Institute for Trial Advocacy, Inc. 1995 at 1.

that satisfies the legal requirements of the claim or defence. As underlined by Archibald and O'Connor in the 2012 issue of the *Art and Science of Persuasion*:

> The theory of the case is the story of what really happened and the adaptation of the facts to the legal issues to be decided. It will logically and coherently lead the trier of fact to the conclusion favourable to the litigator's client — it will explain why a particular verdict is compelled by the law.[12]

A good theory of the case compels the judge or trier of fact to decide in the client's favour. The closer the litigator can fit the client's story into the relevant legal rules, the easier it will be for the judge or trier of fact to make a decision in their favour.

2. The Controlling Theme

Next to the theory of the case, a persuasive story must also adopt a controlling theme. While the theory of the case compels a certain legal conclusion, the theme justifies the outcome. Archibald and Mendelzon put it this way:

> If the litigator has created a compelling narrative for his or her case then the resolution to the dramatic problem will be obvious. The audience will gravitate towards the solution that most closely relates to their identification with the actions of an empathetic protagonist. In litigation, the solution to the dramatic problem in a client's story lies in the outcome. This will often manifest itself in a jury or a judge wanting to "do the right thing" in terms of delivering an appropriate verdict. If the "right thing" is unclear, or if there seems to be many possible "right" endings to the story, then the narrative will have been incoherent and muddled.[13]

A good theme provides the judge or trier of fact with the moral justification for deciding in the client's favour. When the judge can empathize with the client's situation, then that version of events gains momentum. When they see the injustice that would occur if the opposing party were to succeed, then success is near.

3. The Good Fact/Bad Fact Analysis

What makes the theme and theory crucial to the development of a successful case is that it allows the litigator to control the reception of the evidence. By introducing each piece of evidence as part of a larger theme and theory, the litigator is able to control the judge's perception of both the good and bad facts of the client's case. As articulated by Archibald and Mendelzon:

> From a purely practical perspective, by addressing a case's weaknesses, it allows a litigator to take ownership of the case's "bad facts," to put them in context, to explain

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[12] Archibald and O'Connor, "Cognitive Psychology in the Courtroom" at 12.
[13] Archibald and Mendelzon, "The Trial Advocate as Storyteller" at 10.

> them away, or to make them work in the overall story of the case. Most importantly, it prevents the litigator's opponent from weaving them effectively into the narrative of his or her own case. The perfect example of this theory at work comes from the world of advertising and the very successful and memorable campaign for Buckley's cough syrup: "It tastes awful. And it works." The advertisement acknowledges the weaknesses of the products but turns it around to an advantage.[14]

Dealing with weaknesses head-on creates credibility for the client, the litigator, and the story being presented. Attempting to bury bad facts provides the opposing side the opportunity to portray them in their own manner. Archibald and Brousseau argued that the best litigators are those who account for the bad facts and synthesize them into their case:

> The theme is your "foundation of persuasion" — it controls the way in which the trier of fact receives and perceives the evidence. A good theme may be powerful enough that the trier of fact will actually ignore, minimize or rationalize any evidence that conflicts with it. A good theme is therefore a powerful tool for dealing with bad facts.[15]

No story presents the client in a perfect light. A trial would not be necessary if it did. Persuasive advocacy means harnessing the bad facts and presenting them in a way that supports the desired outcome.

III. PURPOSES OF PRE-TRIAL DISCOVERY

In the 1947 decision of the Court of Appeal of Ontario in *Modriski v. Arnold*, Hope J.A. articulated the purposes of discovery as follows:

> As I appreciate the matter, the purpose of discovery either by interrogatories as in England or by oral examination as in Ontario, would appear to be:
>
> 1. to enable the examining party to know the case he has to meet;
> 2. to enable him to procure admissions which will dispense with other formal proof of his own case, or
> 3. to procure admissions which will destroy his opponent's case.[16]

Three further elements were propounded by the Ontario High Court of Justice (sitting on appeal) in *Ontario Bean Producers' Marketing Board v. W.G. Thompson & Sons Ltd.* as follows:

> . . . (d) to facilitate settlement, pre-trial procedure and trials; (e) to eliminate or narrow issues; (f) to avoid surprise at trial . . .[17]

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[14] *Ibid.* at 18.
[15] Archibald and Brousseau, "The Closing Address" at 12.
[16] [1947] O.J. No. 132, [1947] O.W.N. 483 (C.A.).
[17] [1981] O.J. No. 2919 at para. 9.

In 2007, Master MacLeod (now Justice MacLeod) in *Andersen v. St. Jude Medical Inc. et al.* outlined "*the modern purposes of discovery*":

> The modern purposes of discovery may therefore be said to include disclosure verification and admission. They may be summarized as follows:
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> (a) Disclosure of the evidence and the legal theory of the opposing party;
>
> (b) Verification that all relevant documents have been produced; and
>
> (c) Admissions that will narrow the issues, dispense with formal proof, or reveal deficiencies in the opponent's case.
>
> These of course are not ends in themselves. They accomplish at least the following objectives:
>
> (a) Allowing the examining party to understand the case to be met;
>
> (b) Narrowing the issues that will require adjudication;
>
> (c) Streamlining pre-trial and trial procedures;
>
> (d) Facilitating settlement;
>
> (e) Determining if a full trial or a summary procedure may be appropriate; and
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> (f) Preparing for trial or other form of adjudication.[18]

IV. APPROACH TO THE DISCOVERY PROCESS

The process of preparation should begin with the end in mind. As underscored by the authors of *Discovery in Canadian Common Law: Practice, Techniques and Strategies*:

> As a general rule, preparation for discovery should be based on the premise that counsel should work backwards from the judgment being sought at trial. Put otherwise, it is helpful to conceptualize what amounts to almost a "draft closing" argument that sets out both the facts and applicable law while preparing for discovery.[19]

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[18] *Andersen v. St. Jude Medical Inc.*, 2007 CarswellOnt 9732 (S.C.J.) at paras. 17-18.

[19] Todd L. Archibald, James C. Morton & Sam R. Sasso, *Discovery in Canadian Common Law: Practice, Techniques and Strategies* (Toronto: Lexis Nexis Canada Inc., 2017) [*Practice, Techniques and Strategies*] at 5.

As has been described, this process involves the development of a theory of the case, the identification of the good facts and bad facts, and the development of objectives to be accomplished through the oral examination including setting up the story to be presented with great effect at trial. The development of a case theory is an evolutionary process, an important component of which is the review of documentary evidence both in the client's possession and as disclosed by the opposing side. This review may even lead to an identification of a new legal basis for the claim and new heads of damages.

The preparation and execution of an examination directly flows from the evidence needed to prove or disprove each legal point in issue. To start, the litigator must identify each constituent element of every cause of action or defence raised in the pleadings. They must then develop an understanding of how they would like to see those issues resolved at trial. As stated by senior litigator Steven Rosenhek:

> [b]efore you go into your examination, make a list in your mind (and on paper) of the things you would like to have admitted or confirmed. Think of what you need to prove your case or defend it successfully. Imagine what you would like to say in your mediation brief, pre-trial memorandum or closing argument, and work towards getting those points nailed down.[20]

An important element in preparing for the examination is the identification of both good and bad facts to be addressed in the examination. In *Discovery in Canadian Common Law: Practice, Techniques and Strategies*, this approach is outlined:

> Every case has good facts and bad facts. Bringing out the good facts is an important part of discovery; for example, obtaining admissions that contracts were signed, that parties received independent legal advice, that an injury has fully healed. But the framing of bad facts is even more important. Examining counsel will want the opposing side's bad facts to be elicited in the worst light possible, while counsel for the party who is answering the questions will attempt to have the facts framed in as neutral a light as possible. That being said, where a fact is bad and cannot be attenuated, it should be admitted squarely and dealt with accordingly. The concession of harmful facts is usually not a negative strategy. On the other hand, an attempt to cover them up or to improperly hinder the other side's ability to uncover the facts is never a successful strategy. If the facts truly undercut the strength of the case, then real thought should be given to settling the case.[21]

The authors also emphasized the importance of extensive preparation for the examination:

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[20] "Preparing Yourself for Examination for Discovery: The Basics" — Steven F. Rosenhek, December 9, 2005 — *Divine Discoveries: Building a Great Case*, at 3 [*Preparing Yourself for Examination for Discovery*].

[21] *Practice, Techniques and Strategies* at 6-7.

> Ideally, counsel should be able to reach the point where they can conduct an entire trial based upon the discovery transcripts. At first blush, it would seem arguable that such extensive preparation for discovery is excessive because most cases do not go to trial, and to prepare for discovery in this fashion, it is almost necessary to conduct trial preparation before discovery. In fact, however, the cost-savings of a shorter and more focused discovery usually balance out the extended costs of preparation. In addition, the sharpened focus of the discovery transcript is a major asset at trial and often, in itself, leads to an enriched settlement before trial.

V. DOCUMENTARY DISCLOSURE

The importance of obtaining documentary disclosure from the opposite party in advance of the examination for discovery is described by the authors of *Discovery In Canadian Common Law*, *Practice, Techniques and Strategies* as follows:[22]

> Counsel should hold the opposite party to its full discovery obligations as the documentary productions form the basis for sound preparation for the discovery. Once counsel has had an opportunity to review both the pleadings and the documentary productions, counsel will be in a position to determine what the real issues of the case are likely to be and to set out a list of good and bad facts to be discovered. It is upon these facts that the examination must focus.

In today's world, document productions should be largely comprised of electronically stored information ("ESI"). While the parties may have extensive documents in paper form, very few will not have been originally created electronically. People now interact and transact business electronically. Information is assembled, processed, recorded, shared and utilized electronically. Typical forms of ESI include, but are not limited to, *Word*, *PowerPoint*, and *Excel* documents, e-mail, instant messages, databases, information on social media, and information posted on the internet.[23] ESI has become ubiquitous and is being created at an ever-increasing rate. In most provinces of Canada, the rules of civil practice include some reference, either generally or specifically, confirming that a "*document*" or "*record*" includes data in electronic form.[24]

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[22] *Practice, Techniques and Strategies* at 1.

[23] *The Sedona Canada Principles Addressing Electronic Discovery, Second Edition*, November 2015 at 13.

[24] Susan Wortzman, *E-Discovery in Canada*, 3rd ed. (Toronto: LexisNexis Canada Inc., 2017) at 3-4 [*E-Discovery in Canada*]. Definitions of "document" are found at the following sections of provincial rules: Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 30.01; Alberta, *Alberta Rules of Court*, Alta Reg. 124/2010, Appendix; British Columbia, *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 1; Manitoba, *Court of Queen's Bench Rules*, Man. Reg. 553/88; New Brunswick, Rules of Court, N.B. Reg. 83-73, r. 31.01; Northwest Territories and Nunavut, Rules of Supreme Court, N.W.T.

ESI presents an entirely new source of evidence which did not exist in the paper-based world. It may be decisive for a particular case. As such, the importance of documentary production has been elevated.

The sheer volume of ESI has heightened proportionality issues, which had been of concern before the proliferation of ESI. As discussed below, best practices have been developed and in many jurisdictions in Canada there now are rules of civil practice or practice directions requiring proportionality in documentary production. As well, ESI has complicated the discovery process because ESI has aspects which do not exist in paper documents.[25]

Due to the diversity of forms of ESI, the characteristics of ESI, and the typical volume and wide dispersal of ESI in an organization, there now are considerations of preservation and specialized methods of collection and review for production purposes, which may be technologically-assisted. All of this has given birth to "electronic discovery" (or "e-discovery"),[26] as its own field of specialization. Most of this is outside the scope of this article, except as to its impact upon advocacy.

1. Electronically-Stored Information (ESI) As Evidence

The operation of vehicles and devices is sometimes monitored electronically. People's activities are also sometimes monitored, or at least they may leave a

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Reg. 010-96, r. 218; Prince Edward Island, *Rules of Civil Procedure*, r. 30.01; Saskatchewan, The Queen's Bench Rules, r. 17-1; Quebec, *An Act to establish a legal framework for information technology*, CQLR c. C-1.1, s. 3.

[25] The following was stated in the Introduction to *The Sedona Canada Commentary on Proportionality in Electronic Disclosure & Discovery, A Project of The Sedona Conference Working Group 7 (WG7) Sedona Canada, October 2010* [emphasis added]:

> The recent emphasis in most jurisdictions on the concept of proportionality poses challenges for lawyers, their clients, and judges. The concept has been recognized in rules for many years, but in practice, it has existed in tension with the belief that zealous advocacy notably required the pursuit of any information that might be related to the issues in the dispute.
>
> The recent changes to the rules in many jurisdictions underscore that proportionality is a practical requirement as much as a conceptual ideal. *For instance, in the field of discovery, consideration ought to be given to the fact that 99 percent of information today originates in electronic form. For litigation purposes, this information cannot simply be turned into paper and treated as if it were created on paper.*
>
> The characteristics of electronically stored information (ESI) and its sheer volume require the earliest attention of the lawyers involved in the litigation and their clients, and the cooperation between the lawyers on all sides of the litigation and their clients. Civil litigation simply becomes cost-prohibitive and burdensome without early and careful attention to identifying key sources of potentially relevant data and ensuring that only potentially relevant and unique data is preserved, collected and reviewed for production. In practice, the proportionality analysis involves the balance between the issues, the monetary and non-monetary remedies, and the rights in issue against the potential value of an information source in resolving the dispute.

[26] *The Sedona Canada Principles Addressing Electronic Discovery, Second Edition*, November 2015 at 2:

> Electronic discovery ("e-discovery") refers to the discovery of ESI. Information is "electronic" if it exists in a medium that can be, or needs to be, read using computers or other digital devices. Electronic media include magnetic disks, optical disks, magnetic tape and solid state drives. Electronic information can come in the form of e-mails, word-processing files, spreadsheets, web pages, databases, video recordings, sound recordings and thousands of other formats.

trail which can be followed or analyzed. The "when" and "what" of communications between people are now more a matter of record. ESI from monitoring, locational tracking, transactions and activities may be definitive in a case, but so also may be electronic conversations.

People now communicate electronically when in the past they would have done so in person or by telephone. When they do, they tend to be less guarded than in more formal written communications. Exchanges of individual electronic communications in a conversation sometimes resemble oral communications, except that each one comprises an electronic record.

Records of electronic communications may reduce the need to rely upon the recollection of witnesses. Even if not determinative of the case in themselves, they provide context and can be fertile ground for both the examination and trial. In his 2008 article *E-Discovery beyond the Federal Rules*, Richard Marcus explained the importance of an organization's internal electronic communications as a source for evidence, as follows:

> In short, for most organizations, it is not too far from the truth to say that everything is in electronically stored information; it could be viewed as the "corporate equivalent of DNA." And that "everything" would likely include a lot more loose banter than previously would have been written down.[27]

Simply put, factual disputes that once needed to be tested by cross-examination are now being resolved by reference to the documents. John Langbein, in his 2012 article *The Disappearance of Civil Trial in the United States*, underscores this point:

> In earlier times, when the procedure of oral trial took shape, evidence in contested cases was more likely than today to take the form of witness testimony — about what the witness saw or heard or said or did — as opposed to the writing and electronic records characteristic of much modern transactional life. Documentary evidence often "speaks for itself" (as a common phrase has it), and is usually less in need of the probing that occurs at trial.[28]

Discovery may be said to be no longer just a preview of the evidence likely to appear at trial. Rather, it is increasingly the forum that produces the evidence decisive in a case. Justice Perell's decision in *Time Development Group Inc. (In trust) v. Bitton* concerning a summary judgment motion is a recent example of emails being considered as definitive evidence:

> There is no need for a trial in this action. The law of abortive real estate transactions is well established, and with one possible exception, the facts of this case are uncontested

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[27] Richard L. Marcus, "E-Discovery beyond the Federal Rules", 37 U. Balt. L. Rev. 321 (2008) at 322-323, citing Nicholas Varchaver, "The Perils of E-mail", FORTUNE, Feb. 17, 2003 at 96.

[28] John Langbein, "The Disappearance of Civil Trial in the United States" (2012) 122 Yale L. J. 522 at 548.

or uncontestable because the parties left an indelible email record of the events and their positions.[29]

2. Proportionality and Adoption of *The Sedona Canada Principles*

Historically, dating back to the 1880s and the *Peruvian Guano* case,[30] the entitlement to documentary disclosure has been considered to be very broad.[31]

Documentary disclosure is now subject to considerations of proportionality,[32] so that what has technically been a positive-obligation production system in Canada (apart from Quebec)[33] now resembles, for many cases, a request-based system, with the scope of required production significantly narrowed.

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[29] *Time Development Group Inc. (In trust) v. Bitton*, 2018 ONSC 4384 at 67.

[30] *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (1882), 11 Q.B.D. 55 (C.A.).

[31] As described by the authors of *Discovery in Canadian Common Law: Practice, Techniques and Strategies* at 14:

> The breadth of discovery dates back to the 1880s and the *Peruvian Guano* case. That court, in discussing the parameters of discovery, commented:
>
> > We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." . . . It seems to me that every document relates to the matters in question in the action; which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may — not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences.

[32] An extensive history of proportionality in Canada is presented in Donald A. Short and Rachel A. Gold, "Proportionality in Theory and Practice" in Todd L. Archibald & Randall Scott Echlin, eds., *Annual Review of Civil Litigation* (Toronto: Thomson Reuters, 2014) at 373.

[33] In all provinces and territories except Quebec, a party to civil litigation has an obligation to provide disclosure (typically described as "production") of documents (or "records") without being requested to do so. The party is typically required to provide an Affidavit or Documents (or an Affidavit of Records), but in some jurisdictions only a statement or listing of documents in a prescribed form is required. The typical criterion for documentary disclosure is relevance (or documents which relate to a matter in issue or in question in the action), which criterion in most jurisdictions is not further defined. In Alberta, disclosure is required only of documents which are both "relevant and material". In British Columbia a party is only initially required to produce documents ". . . that could, if available, be used by any party of record at trial to prove or disprove a material fact", with the party receiving the disclosure having the right to demand disclosure of additional documents by submitting a written demand that identifies the additional documents or classes of documents with reasonable specificity and indicates the reason why such additional documents or classes of documents should be disclosed. The Federal Court Rules contain a narrowed test for relevance, which is that production of a document is required "if the party intends to rely on it or if the document tends to adversely affect the party's case or support another party's case".

In most jurisdictions in Canada, required production is stated to be premised upon the broad parameter of relevance, but in some jurisdictions, there is also now a required element of materiality and/or intention to refer to the documents at trial (Alberta and British Columbia). As well, in most jurisdictions in Canada, there now are rules of civil practice which generally or specifically impose proportionality limits on production of documents or examination for discovery, or both.[34] Factors to be considered as to proportionality under these rules include likely probative value of the evidence, importance of the issues involved in the dispute, the complexity of the proceeding and the amount involved.

In Ontario, the parameter for production was narrowed in Rule 30 from "*relating to any matter in issue*" to "*relevant to any matter in issue*" and rule amendments as to proportionality generally in Rule 1.04(1.1) and specifically as to discovery in Rule 29.2 became effective January 1, 2010. In *Warman v. The National Post Company et al.*,[35] a decision made soon after Ontario *Rule* changes came into effect, Master Short stated that the "'*broad and liberal*' *default rule of discovery* [had] *outlived its useful life*" and that proportionality was the new default rule, meaning that proportionality would replace relevancy as the most important principle guiding discovery in Ontario. In that case, Master Short adopted an "*eight-factor proportionality test for e-discovery*", including the specificity of the request for documents and the resources available to each party.[36]

In 2010 in British Columbia, materiality was added to the parameter for production, along with a general proportionality consideration. Shortly after that, the Supreme Court of British Columbia in their 2011 decision in *More Marine Ltd. v. Shearwater Marine Ltd.*, explicitly stated that the *Peruvian Guano* test no longer applied.[37]

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[34] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rules 1.04 (1.1), 29.2; *Supreme Court Civil Rules*, B.C. Reg. 168/2009, rule 1-3(2) (this rule came into effect on July 1, 2010); *Supreme Court Family Rules*, B.C. Reg. 169/2009, rule 1-3(2); and *Code of Civil Procedure*, C.Q.L.R., c. C-25, s. 4.2 [*Civil Code*]. *Alberta Rules of Court*, Alta. Reg. 124/2010, s. 1.2(4); *Queen's Bench Rules*, rule 1-3(4) (SK); *Court of Queen's Bench Rules*, Man. Reg. 553/88, ss. 20A(5), 20A(23), 20A(38), 20A(42) (for expedited actions); *Rules of Court*, N.B. Reg. 82-73, s. 1.02.1; and Nova Scotia's *Civil Procedure Rules*, Royal Gazette (19 November 2008), rr.14.08(3), 58.02(2), 58.03(d) (regarding disclosure obligations, and actions under $100,000).

[35] *Warman v. National Post Co.*, 2010 ONSC 3670 at para. 85.

[36] The eight-factor test was comprised of:

(1)the specificity of the discovery requests;
(2)the likelihood of discovering critical information;
(3)the availability of such information from other sources;
(4)the purposes for which the responding party maintains the requested data;
(5)the relative benefit to the parties of obtaining the information;
(6)the total cost associated with production;
(7)the relative ability of each party to control costs and its incentive to do so; and
(8)the resources available to each party.

Even in the absence of specific rules, our Courts may exercise their inherent jurisdiction to place limits on documentary disclosure. In 2014, the Supreme Court of Canada in the seminal *Hryniak v. Mauldin* decision emphasized that courts have the power to apply an "*underlying principle of proportionality*" "*as a touchstone for access to civil justice*" "*even where proportionality is not specifically codified*" and called for a "*culture shift*."[38] The Supreme Court's decision in *Hryniak* has been applied by lower Courts more than 3,000 times. Although the *Hryniak* decision was in reference to a summary judgment motion, the decision has been applied several times to the discovery process.[39]

The Sedona Canada Principles Addressing Electronic Discovery ("*The Sedona Canada Principles*") have been widely adopted in Canada. *The Sedona Canada Principles*, which were first issued in January 2008, and then modified in 2015,[40] set out 12 Principles, with Commentary, as to proportionality, preservation, collection, processing, review and production of ESI, including the format, content and organization of information to be exchanged. The current edition describes proportionality and cooperation between the parties in developing a joint discovery plan as "*the overarching principles*".[41] Principles 2 and 4 state:

> Principle 2.
>
> In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account: (i) the nature and scope of the litigation; (ii) the importance and complexity of the issues and interests at stake and the amounts in controversy; (iii) the relevance of the available electronically stored

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[37] *More Marine v. Shearwater Marine Ltd.,* 2011 BCSC 166 (In Chambers):

> [10] The former rule governing discovery of documents was interpreted according to the long-established test in *Compagnie Financière du Pacifique v. Peruvian Guano Company* (1882), 11 Q.B.D. 55 at 63 (C.A.):
>
> > It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* — not which *must* — either directly or indirectly enable the party . . . either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party . . . either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences . . .
>
> [11] The new *Rules* recognize that application of a 19th century test to the vast quantity of paper and electronic documents produced and stored by 21st century technology had made document discovery an unduly onerous and costly task in many cases. Some reasonable limitations had become necessary and Rule 7-1 (1) is intended to provide them.

[38] *Hryniak v. Mauldin*, 2014 SCC 7 [*Hryniak*].

[39] *Koolatron v. Synergex*, 2017 ONSC 4245; *Duggan v. Lakeridge*, 2017 ONSC 1474; *Hanson v. Stollery Estate*, 2017 ONSC 528; *Demb v. Valhalla Group Ltd.*, 2015 ABQB 618; *J. Jenkins & Sons Landscaping v. SCS Consulting Group et al.,* 2015 ONSC 1922; *Dow Chemical Canada Inc. v. Nova Chemicals Corporation,* 2015 ABQB 2; *Allianz v. Canada*, 2014 ONSC 4198; *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.,* 2014 ONSC 660.

[40] *The Sedona Canada Principles* were issued by "*The Sedona Conference Working Group 7 (WG7) Sedona Canada*". It is one of 12 working groups of *The Sedona Conference*, based in Sedona, Arizona. Both the 2008 and 2015 editions are available for download from The Sedona Conference website.

[41] *The Sedona Canada Principles, Second Edition, November 2015* at 4.

> information; (iv) the importance of the electronically stored information to the Court's adjudication in a given case; and (v) the costs, burden and delay that the discovery of the electronically stored information may impose on the parties.
>
> Principle 4.
>
> Counsel and parties should cooperate in developing a joint discovery plan to address all aspects of discovery and should continue to cooperate throughout the discovery process, including the identification, preservation, collection, processing, review and production of electronically stored information.[42]

In Ontario, under the 2010 amendments to the *Rules of Civil Procedure*, it is required that the parties agree to a "*discovery plan in accordance with this rule*" "*before the earlier of (a) 60 days after the close of pleadings or such longer period as the parties may agree to; and (b) attempting to obtain the evidence*".[43] In preparing the discovery plan, the parties are required to "*consult with and have regard to*" *The Sedona Canada Principles*. Ontario Court decisions have equated failure to comply with *The Sedona Canada Principles* as failure to comply with the *Rules*.[44]

In many of the other provinces and territories across Canada, the rules of civil practice have been revised, or practice directions have been issued, relating to electronic discovery.[45] Most contain language similar to *The Sedona Canada*

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[42] In the 2015 Edition of *The Sedona Canada Principles,* some amendments were made to the Principles, among them Principle 4. The following was stated as the modification of Principle 4 [emphasis added]:

> Principle 4 has been amended to emphasize the concept of "cooperation" (versus "meet-and-confer") in developing a joint discovery plan.
>
> There are important new sections and an overall shift in emphasis throughout the Commentary for this Principle. First, there is new emphasis on the importance and value of discovery planning. This section proposes that the term "meet-and-confer" be replaced with "discovery planning," "consultation" or any similar term that does not suggest that in-person meetings are required.

[43] Ontario *Rules of Civil Procedure*, Rule 29.1 (which came into effect at the same time as Rules 29.3 and 1.04(1.1) as to proportionality were introduced).

[44] *Palmerston Grain, A Partnership et al. v. Royal Bank of Canada*, 2014 ONSC 5134 at para. 45; *Harris v. Leikin Group*, 2011 ONSC 5474 at para. 40.

[45] *Civil Procedure Rules* (Nova Scotia), Rules 14, and 16, which require a separate affidavit disclosing electronic information under Rule 16 and provides for default disclosure rules if the parties are unable to agree on electronic disclosure;

Court of Queen's Bench of Manitoba, *Practice Direction*: *Guidelines Regarding Discovery of Electronic Documents* (June 20, 2011; came into effect October 1, 2011) and Saskatchewan Court of Queen's Bench for Saskatchewan, *Civil Practice Directive No. 1: E-Discovery* (1 July, 2013) both expressly state that the parties should consult and have regard to refer to The Sedona Canada Principles Addressing Electronic Discovery and "*seek to agree on the substance of each's party's rights and obligations with respect to e-discovery, and on procedures required to give effect to those rights and obligations*";

Supreme Court of British Columbia, *Practice Direction Re: Electronic Evidence* (1 July, 2006) and Court of Queen's Bench of Alberta, *Civil Practice Note 4*: Guidelines for the Use of Technology in any Civil Litigation Matter (1 March 2006, which came into force on March 1, 2011, unless the parties agree that it applies for matters initiated prior to that date) are very similar in wording and provide for the practice

Principles or refer to *The Sedona Canada Principles* expressly (Nova Scotia, Saskatchewan and Manitoba). As well, *The Sedona Canada Principles* have been referred to with approval in court decisions outside Ontario.[46] The *Advocates' Society Best Practices for Civil Trials June 2015*[47] refers in *Best Practice #10* to *The Sedona Canada Principles* and states:

> Best Practice #10: Counsel should engage in document management and production after the close of pleadings and work together to prepare a discovery plan. Early organization of documents and agreement on the scope and manner of production will assist the parties in preparing the documents for trial.

The Commentary on *Best Practice #10* describes "*items which should be considered in the discovery plan and discussed by counsel*".

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direction to apply "*where the parties agree that it will apply, in whole or in part and sign a Protocol or where the Court orders*" (the Protocol is to be as agreed upon or a default protocol), and refer to the *Guidelines for the Discovery of Electronic Documents in Ontario*, October 2005, which preceded *The Sedona Canada Principles* (which had not been published until after the British Columbia Practice Direction was issued) and were largely based on *THE SEDONA PRINCIPLES: Best Practices Recommendations & Principles for Addressing Electronic Document Production. A Project of The Sedona Conference ® Working Group on Best Practices for Electronic Document Retention & Production*, published January 2004 (on which The Sedona Canada Principles were largely based).

The *Rules of Court for the Supreme Court of Yukon* provide in Rule 25(18) that "*parties may agree to produce documents in electronic form and any party may apply to the court for an order to produce documents in electronic form*" and "*If a document is in electronic form, the party inspecting it should be entitled, upon request, to receive a copy in that form*".

[46] *Spielo Manufacturing and Manship v. Doucet and Dauphinee*, 2007 NBCA 85; *Innovative Health Group Inc. v. Calgary Health Region*, 2008 ABCA 219; *Saint John (City) Conseil des fiduciaires du régime de retraite des employés c. Ferguson*, 2009 NBBR 74; *Dykeman v. Porohowski*, 2010 BCCA 36; *GRI Simulations Inc. v. Oceaneering International Inc.*, 2010 NLTD 85; *Liquor Barn Income Fund v. Mather*, 2011 BCSC 618; *ICS State v Irving Oil Limited*, 2011 NBQB 141; *Holtby, Re*, 2011 ABASC 622; *Velsoft Training Materials Inc. v. Global Courseware Inc.*, 2012 NSSC 295; *Murphy et al v. Bank of Nova Scotia et al,* 2013 NBQB 316; *Gardner v. Viridis Energy Inc.*, 2014 BCSC 204; *Cameco Corporation v. The Queen*, 2014 TCC 45; *The Wawanesa Mutual Insurance Company v. Wade*, 2015 NBCA 43; *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2014 CACT 9; *Canadian Imperial Bank of Commerce v. The Queen*, 2015 TCC 280; *Ouellet c. Compagnie de chemin de fer Canadien Pacifique*, 2017 QCCS 1181; *Ouellet c. Montreal Maine & Atlantic Canada Compagny*, 2019 QCCS 367; *LTS Infrastructure Services Limited Partnership and Rohl Enterprises Ltd. and Travelers Insurance Company of Canada*, 2019 NWTSC 10.

[47] Available through The Advocates' Society website: < https://www.advocates.ca/TAS/Publications/Best_Practices_Publications/TAS/Publications_Resources/Best_Practices_Publications.aspx > .

The *Best Practices* is dated a few months before publication of the Second Edition of *The Sedona Canada Principles*, but after the Second Edition had been issued for public comment.

3. Counsel's Involvement in the ESI Review Process

In the days before the proliferation of ESI, counsel would review documents provided by a client (which the client would have self-collected) in order to be informed about what had occurred, and in order to determine what was relevant for production to the other party. The first aspect ("the review for information") and the second aspect ("the review for production") are distinct, but formerly overlapped significantly and could be done at the same time.

Now, in most cases, the documentary evidence will largely (if not almost entirely) be in the form of ESI. Both the "review for information" and the "review for production" will involve reviewing ESI in its native format (or at least in another electronic format). Specialized review "tools" (i.e. computer software and processes) have been developed for this purpose. It might be feasible for lead counsel to review all of the potentially relevant ESI for information and production purposes using a review tool, depending upon the ESI volume and diversity. Increasingly, however, this is not feasible and the review for production is done by someone other than lead counsel, in many cases by teams of reviewers internal or external to the counsel's law firm. Also, increasingly, due to the sheer volume of ESI, the reviewers do not have "eyes-on" all of the potentially relevant documents because they utilize some form of technologically assisted review process.

The recently published *Technologically Assisted Review (TAR) Guidelines January 2019* (the "*TAR Guidelines*") provide the following description of technologically assisted review:

> Technology assisted review (referred to as "TAR," and also called predictive coding, computer assisted review, or supervised machine learning) is a review process in which humans work with software ("computer") to train it to identify relevant documents. The process consists of several steps, including collection and analysis of documents, training the computer using software, quality control and testing, and validation. It is an alternative to the manual review of all documents in a collection.
>
> Although there are different TAR software, all allow for iterative and interactive review. A human reviewer[48] reviews and codes (or tags) documents as "relevant" or "nonrelevant" and feeds this information to the software, which takes that human input and uses it to draw inferences about unreviewed documents. The software categorizes documents in the collection as relevant or nonrelevant, or ranks them in order of likely relevance. In either case, the number of documents reviewed manually by humans can be substantially limited while still identifying the documents likely to be relevant, depending on the circumstances...

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[48] Originally footnoted:

A human reviewer is part of a TAR team. A human reviewer can be an attorney or a non-attorney working at the direction of attorneys. They review documents that are used to teach the software. We use the term to help keep distinct the review humans conduct versus that of the TAR software.

> TAR typically ends with validation to determine its effectiveness. Ultimately, the validation of TAR is based on reasonableness and on proportionality considerations: How much could the result be improved by further review and at what cost? To that end, what is the value of the relevant information that may be found by further review versus the additional review effort required to find that information?
>
> There is no standard measurement to validate the results of TAR (or any other review process). One common measure is "recall," which measures the proportion of truly relevant documents that have been identified by TAR. However, while recall is a typical validation measure, it is not without limitations and depends on several factors, including consistency in coding and the prevalence of relevant documents. "Precision" measures the percentage of actual relevant documents contained in the set of documents identified by the computer as relevant.[49]

Locating, preserving, reviewing, and producing evidence may be the largest case expense.[50] Technologically assisted review (TAR) is done principally because of cost and timing considerations, although as noted in the *TAR Guidelines* it is now recognized that TAR is at least as accurate as linear review by human reviewers, which in either case is not expected to identify all relevant documents:

> . . . According to a 2012 Rand Corporation report, 73% of the cost associated with discovery is spent on review.
>
> The potential for significant savings in time and cost, without sacrificing quality, is what makes TAR most useful. Document-review teams can work more efficiently because TAR can identify relevant documents faster than human review and can reduce time wasted reviewing nonrelevant documents.
>
> Moreover, the standard in discovery is reasonableness, not perfection. Traditional linear or manual review, in which teams of lawyers billing clients review boxes of paper or countless online documents, is an inefficient method. Problems with high cost, exorbitant time to complete review, fatigue, human error, disparate attorney views regarding document substance, and even gamesmanship are all associated with manual document review. Studies have shown a rate of discrepancy as high as 50% among reviewers who identify relevant documents by linear review. The TAR process is also imperfect, and although no one study is definitive, research suggests that, in some contexts, TAR can be at least as effective as human review.[51]

While electronic records of communications may facilitate proof of what the advocate needs to establish to be successful, it is important to bear in mind that

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[49] Published by the Bolsch Judicial Institute and EDRM/Duke Law School, available online at: <https://www.edrm.net/resources/technology-assisted-review-tar-guidelines/>.

[50] Martin Redish, "Electronic Discovery and the Litigation Matrix", 51 Duke L.J. 561 (2001); Todd L. Archibald & P. Tamara Sugunasiri, *Ontario Superior Court Practice* (Toronto: Lexis Nexus Canada Inc. 2018) at 1268.

[51] The TAR Guidelines at iv-v.

the client may also have vulnerability, which may be hard to determine in the case evaluation.

The bulk of what has to be reviewed is typically comprised of e-mails. Often, particularly in large organizations, the volume is so extensive that people do not recall having received, or even sent, an email. People participate in email conversations peripherally or unwittingly, as when they are included in the distribution of an email for convenience, as a matter of form, or for information only (although the recipient may not even have read it).

It is common ground for counsel to place reliance upon the client to initially point out the key documents when pleading a case; then for counsel to await the production phase before undertaking a detailed review, followed by the review of production received from the opposite party. Counsel's diminished role in the ESI review can, depending upon the nature of the case, have real implications for the development of the case theory and the identification of further key documents. Whatever counsel will see will be filtered by the review team, whose identification of relevant documents is in turn dependent upon their training. If they are not alert to the importance of certain kinds of documents, then they will not be identified as relevant. The former benefit of counsel's eyes-on review, which had been *de rigueur* before ESI and is an integral part of developing the case theory, is thus impaired.

It is therefore essential for counsel to be involved in the reviewers' training and in assessing the reviewers' feedback and reports. Through the review process, the reviewers will have gained detailed case knowledge and learned how the documents fit in with the case theory and of other documents which may be significant but do not fall within the "relevance" circumference based upon the pleadings. Counsel needs to see at least some samples of what the reviewers are coding as not being relevant to ensure that their assessments are correct; this also could suggest to counsel new substantive positions or storylines. There will always be case specific considerations of costs, time and proportionality concerning how much review should be conducted prior to the production phase and the degree of lead counsel's involvement in the review process.

Counsel should not simply depend upon what turns up in the review for production process. There is no substitute for spending time with the client's key personnel who know the most and who can isolate what is important. What is found during the production process review should be discussed with the client. The client's recollection of events and of particular documents (or a range of documents) could be triggered or the client might advise of the existence of further documents which the client had not previously thought to be of relevance or importance.

Further, it should be kept in mind that the production which is ultimately received from the other side will also have to be reviewed, ideally by using the

same review tool. Case specific consideration as to the extent of lead counsel's involvement in that aspect is also required.

4. Discovery Agreements

A discovery agreement is a flexible tool. In Ontario, which is the only jurisdiction where a discovery agreement is mandatory, Rule 29.1 sets out the basic elements for a "discovery plan",[52] but there is otherwise no requisite content for a "discovery plan". The key is that it needs to be agreed upon early in the discovery process. The agreement should be about not only the scope of production but also address form of production and an exchange protocol, at a minimum.

The Ontario E-Discovery Implementation Committee (EIC) has developed extensive e-discovery and e-trial model documents and guidance materials,[53] including as to preparation for discovery plan negotiations, discovery plan agreements and discovery plans. The EIC has also developed *Model Document #11 — E-Trial Checklist*, to which *The Advocates' Society Best Practices for Civil Trials June 2015* refers. As well, the EIC has prepared a model chart[54] to assist parties in arguing production motions based on proportionality, which is referenced in *The Sedona Canada Principles*[55] and was also referenced by Justice Brown in *Guestlogix v. Hayter*.[56]

From an advocacy perspective, the key objectives of discovery planning are to reach agreement on its limits while still getting what is needed and in the format required both for evidentiary purposes, and for efficient review of the other side's productions (also bearing in mind a potential electronic trial).

As Principle 8 of *The Sedona Canada Principles* states, it is a best practice to agree "*on the format, content and organization of information to be exchanged*".[57]

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[52] Ontario Rule 29.1.03(3) provides the following as to the contents of the discovery plan:
(3) The discovery plan shall be in writing, and shall include,
(a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
(b) dates for the service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03;
(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;
(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
(e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

[53] Ontario Bar Association, *Model E-Discovery and E-Trial Precedents* at "Materials for use by the Court-Model Document #10," online: Ontario Bar Association <http://www.oba.org/en/publicaffairs_en/e-discovery/model_precedents.aspx>.

[54] Ontario Bar Association, *Model E-Discovery and E-Trial Precedents* at "Materials for use by the Court-Model Document #10," online: Ontario Bar Association <http://www.oba.org/en/publicaffairs_en/e-discovery/model_precedents.aspx>.

[55] *The Sedona Canada Principles*, Second Edition at 20.

[56] *Guestlogix v. Hayter*, 2010 ONSC 4384.

[57] *The Sedona Canada Principles, Second Edition* at XV.

The Commentary to Principle 8 states it is best to obtain production of ESI in native format:

> For a number of reasons, ESI should wherever possible be produced in native format. First, the native version is the truest, most accurate version of the document; second native files are easier, faster and cheaper to transfer, upload and search than are any other format; third, conversion to other formats entails the loss of information; and fourth, native versions contain all of the application-level and user-created metadata for the files, some of which may be crucial to understanding the true meaning of the files. User-generated metadata is information about the document that is entered by a user at the file level—for example, the fields that can be populated in the Properties tab of a Microsoft Office document. In addition, many kinds of electronic files contain information that can be lost if it is simply converted to an image or other non-native format. Examples of such information include that which is: (a) in spreadsheets: macros, formulas, conditional formatting rules and hidden columns/rows/worksheets; (b) in presentations: speaker notes; (c) in word-processing documents: text-editing notations (''track changes''); and (d) in virtually all file types: comments, sticky notes and highlighting. Such information is as much a part of the document as the visible text and, in some investigations or litigation, could be highly relevant. Parties should therefore be prepared to produce files in native format or explain why they prefer not to. Parties should also be aware that most modern native file processing tools can extract metadata that indicates whether an individual file contains this kind of normally-hidden information and that these metadata fields (e.g. ''contains hidden text'') can be provided as part of the production.[58]

''Metadata'' is electronic information stored within or linked to an electronic file that is not normally seen by the file creator or viewer.[59] The author and history of documents may be determined from examining the metadata of the electronic form in which they were originally created. While in most cases, metadata will have no material evidentiary value, metadata can have utility to the process of the review and interpretation of documents.

ESI may be comprised of ''structured data'' (such as databases), in which the information is broken up into constituent elements stored in multiple tables, each with its own records and fields, from which reports based on specific queries or filters may be generated.[60] *The Sedona Canada Principles* recommend that the parties should agree ''*whether to produce native database files or provide, for example, specific reports from the database routinely produced, based on particular queries that contain specified records and fields*''.[61]

Consideration should also be given to agreeing to a staged approach to production.[62]

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[58] *Ibid*. at 54-55.
[59] *Ibid*. at 7.
[60] *Ibid*.
[61] *Ibid*. at 9.
[62] This approach is described in Wortzman, *E-Discovery in Canada*, at 130, as follows:

Reaching agreement with opposing counsel on the scope of production may also be useful to blunt deliberate over-production. Instead of trying to limit production, lawyers who seek a tactical advantage may use the threat of disproportionate discovery costs as a way to force opposing parties into an unfair settlement[63] or to over-produce with the strategic objective of obscuring key adverse documents. As Lord Justice Jacob eloquently remarked in *Nichia v. Argos*,[64] "*where does a wise man hide a leaf*?" Due to ESI volumes, over-production can be taken to a much higher level. Despite this reality, an "ESI document dump" may be less of a concern if what is received can be run through a TAR process. This will depend upon the over-production being received in a compatible format. Assistance might be provided by the Court in requiring that the producing party provide production in the format or organized as needed by the receiving party for efficient review, in keeping with Principle 8 (and related Commentary) of *The Sedona Canada Principles*. In a recent case, a party which had produced a high volume of electronic documents was ordered to categorize its productions according to matters in issue.[65]

> In many cases, the relevant custodians and records are not known at the outset of the case. This often leads to discovery requests involving many custodians, or similar overly-broad list of keyword, to ensure that unknown terms or custodians are included in the disclosure. Where one party requests a disproportionately excessive scope, the parties may agree to a stage production model. This would involve the producing party to disclose a subset of records from one or few custodians for review by the receiving party. The receiving party would then be allowed to make further requests based on the information already received. The cost to the producing party would be reduced, as they would not necessarily have to collect and review a large number of potentially irrelevant, or marginally relevant, records.

A similar staged approach can be adopted where different sources of information are involved. Instead of waiting until all information is collected and reviewed, the producing party would begin reviewing and producing readily-accessible information. Once this tranche is produced, the parties would agree whether less accessible (i.e., most costly) sources should be examined.

63 Michael Wolfson, "Addressing the Adversarial Dilemma of Civil Discovery", 36 Cleveland State L.R. 17 (1988).

64 In *Nichia v. Argos*, [2007] EWCA Civ 741, Lord Justice Jacob stated:

> 46. It is manifest that this is a much wider test than that for "standard disclosure." I have a feeling that the legal profession has been slow to appreciate this. What is now required is that, following only a "reasonable search" (CPR 31.7(1)), the disclosing party should, before making disclosure, consider each document to see whether it adversely affects his own or another party's case or supports another party's case. It is wrong just to disclose a mass of background documents which do not really take the case one way or another. And there is a real vice in doing so: it compels the mass reading by the lawyers on the other side, and is followed usually by the importation of the documents into the whole case thereafter — hence trial bundles most of which are never looked at.
>
> 47. Now it might be suggested that it is cheaper to make this sort of mass disclosure than to consider the documents with some care to decide whether they should be disclosed. And at that stage it might be cheaper — just run it all through the photocopier or CD maker — especially since doing so is an allowable cost. But that is not the point. For it is the downstream costs caused by overdisclosure which so often are so substantial and so pointless. It can even be said, in cases of massive overdisclosure, that there is a real risk that the really important documents will get overlooked — *where does a wise man hide a leaf*?

65 In the recent case *6Points Food Services Ltd. v. Carl's Jr. Restaurants LLC et al.*, 2018 ONSC 7469, the defendants complained that "the Plaintiff is attempting to 'bludgeon' them into settlement by its massive and unorganized overproduction of 24,000 documents." Master Sugunasiri stated that the Court has a "gatekeeping" role in the

In preparing for negotiating a discovery agreement, it is important for counsel to gain an understanding of the client's data sources, the potential difficulties in assembling and producing ESI, and of what the other side is likely to have as data sources. It is very important to not commit the client to an onerous and costly production. It may be advisable to bring along the client's IT person when meeting with opposing counsel to reach a discovery agreement. This paper centres upon discovery advocacy so that technical production approaches are largely tangential to the article's overall theme.

5. The Approach of the Courts

In most cases where parties seek our Courts' help over production issues, they have not engaged in discovery planning to a sufficient extent. Despite the consistent recognition of the value of discovery planning and that it is a best practice, discovery planning has been under-utilized. This is the case even in Ontario, where agreement to a discovery plan and having regard to *The Sedona Canada Principles* is now mandatory.[66]

Courts have repeatedly articulated the importance and benefits of discovery planning and the difficulty in making determinations as to the proper scope of production for the parties. Discovery planning is intended to be a collaborative rather than an adversarial exercise.[67] It should be governed by cooperation, communication and common sense.[68] There should be little tolerance for overly

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discovery process and can impose limits on overproduction. Master Sugunasiri ordered the plaintiff to "categorize its productions for ease of reference for all parties".

[66] In their 2017 book, the authors of *Practice, Techniques, and Strategies* stated the following as to the under-utilization of discovery planning in Ontario (at 71-72):

> The theoretical benefits of a discovery plan are obvious: a tailored approach to document collection including e-documents; refining the key issues and establishing parameters of relevance; and a reduction in costs due to greater efficiency. Having a discovery plan is also of value not only to counsel but to clients who will have a better understanding of the scope of documentary discovery and the time and costs involved in compiling their affidavit of documents.
>
> Unfortunately, discovery plans have worked better in theory than in practice. Despite the requirement under the Ontario rules, the imposition of discovery plans is rare [footnote reference to *Corbett v. Corbett*, [2011] O.J. No. 6455; 2011 ONSC 1602 (Ont. S.C.J.), supp. Reasons [2011] P.J. 5415, 2011 ONSC 7161 (Ont. S.C.J.)]. It is still common for cases to go from inception to resolution without a discovery plan or even an attempt at one. Left to their own devices, Ontario counsel have largely failed to follow the discovery plan rule, instead continuing on as if it had never been enacted. To date, only a limited body of case law has developed compelling Ontario counsel to change their ways. If necessary, our courts can assist in crafting a discovery plan through a case conference or a motion for direction. [footnote reference to *L'Abbe v. Allen Vanguard Corp*., [2011] O.J. No. 2906, 2011 ONSC 4000 (Ont. S.C.J. (Master))]. Our courts have the authority to impose a discovery plan where a party is not willing to agree to a discovery plan. [footnote reference to *TELUS Communications Co. v. Sharp (c.o.b. Residential Pros)*, [2010] O.J. No. 2095, 102 O.R. (3d) 93 (Ont. S.C.J. (Master)]. Justice Colin Campbell, one of the members of Sedona Canada, provided a helpful sample of a discovery plan in *Enbridge Pipelines v. BP Canada* [footnote reference to *Enbridge Pipelines Inc. v. BP Canada Energy Co*., 2010 O.J. No. 4397, 2010 ONSC 3796 (Ont. S.C.J. (Comm. List))].
>
> That being said, with case management (light touch or otherwise) becoming more commonplace in Ontario courts, discovery plans may gain prominence. Further, if one side is intent on having a discovery plan, there is little the other side can do to argue to the contrary and there is a good chance of success on a motion seeking compliance. The benefits of a discovery plan are too positive to be entirely ignored.

[67] *417 Infiniti Nissan v. Nissan Canada Inc*., 2014 ONSC 3719.

rigid, technical or petty squabbles that threaten to bog down the litigation in motions.[69] When huge numbers of documents are identified as potentially relevant, the ambit of relevance may have been drawn too widely and a more useful goal than relevance may be utility.[70]

In Ontario, if the parties fail to agree upon a discovery plan under Rule 29.1, a court may order that examinations for discovery be conducted in accordance with a court-imposed discovery plan.[71] A Court's imposition of a discovery plan defeats the parties' real benefits in discovery planning. Often, the outcome is that a Court will simply send the parties away with an admonition to try harder on implementation.[72]

Our Courts have expressed legitimate frustration at the lack of cooperation between counsel and counsel not recognizing the limits of proportionality. The need for a culture shift so that litigators learn to cooperate and not wear their adversarial hats has been repeatedly recognized.[73]

In *LeCompte v. Doran*,[74] Master MacLeod (now Justice MacLeod) referred to it having been concluded in the report of the *Report of the Task Force on the Discovery Process in Ontario*[75] and in the *Summary of Findings and Recommendations of the Civil Justice Reform Project*[76] that collaborative discovery planning required a cultural shift and could not be achieved simply by a rule amendment.

Shortly after the release of the *Hryniak* decision, in *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund* concerning the approval of a discovery plan, Justice Perell of the Ontario Superior Court of Justice commented that counsel needed to be "recultured" to accept the proportionality principle:

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68 *Duggan v. Lakeridge,* 2017 ONSC 1474.

69 *Descartes Systems Group Inc. v. Trademerit Corp.*, 2012 ONSC 5283.

70 *L'Abbé et. al. v. Allen-Vanguard*, 2011 ONSC 7575, *6Points Food Services Ltd. v. Carl's Jr. Restaurants LLC et al.*, 2018 ONSC 7469.

71 Rule 29.1.05(2). This rule was recently added. Ontario case law had previously held that, if the parties failed to agree to a discovery plan, the court had jurisdiction to impose a discovery plan: *Telus Communications Co. v. Sharp*, 2010 ONSC 2878 (Master); *Ontario v. Rothmans Inc.*, 2011 ONSC 2504.

72 *Thompson v. Arcadia Labs Inc.*, 2016 ONSC 3745; *L'Abbé et. al. v. Allen-Vanguard*, 2011 ONSC 7575; *Maxi Boutique Inc. v. TD General Insurance Co.*, 2018 ONSC 5039.

73 *6Points Food Services Ltd. v. Carl's Jr. Restaurants LLC et al.,* 2018 ONSC 7469; *Duggan v. Lakeridge,* 2017 ONSC 1474.

74 *LeCompte v. Doran,* 2010 ONSC 6290 at para. 12:

> The requirement for collaborative discovery planning was introduced into the rules as a result firstly of the Discovery Task Force chaired by the Honourable Mr. Justice Colin Campbell and secondly of the Civil Justice Reform Project chaired by the Honourable Coulter Osborne. Both of these studies concluded that in cases of any complexity discovery planning was an essential step in efficiently moving the dispute towards resolution. Both also recognized that this required a cultural shift and the development of best practices. It could not be achieved simply by a rule amendment.

75 Online at: <http://www.ontariocourts.ca/scj/news/publications/discoveryreview/>.

76 Online at: <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>.

> Proportionality recognizes that perfection is the enemy of the good. Naturally enough, a litigant wants to know everything that might possibly be known to prove his or her case and a litigant wants to know everything about their opponent's case so as to not be taken by surprise and to be ready to disprove the opponent's case. But what a litigant wants is not necessarily what he or she needs, and the development and settling of a Discovery Plan should be approached by needs not wants.
>
> And what goes for discovery and disclosure needs to be approached having regard to the proportionality principle that means that a litigant — and more precisely his or her advocate — must be re-cultured to accept that the adversary system needs far less in procedure than a perfectionist and sometimes obsessed advocate might wish for.[77]

In her recent decision in *Maxi Boutique Inc. v. TD General Insurance Co.*, Master Sugunasiri described the Court's expectation as follows:

> . . . The point of requiring parties to agree to a discovery plan is to discourage the historical murder mystery approach to litigation. The old approach to discovery was to meander through the plot with the hope of finding out "who dunnit." The *Rules* change in 2010 reflects a cultural shift in which parties must think deeply about their cases early in the process with a view to having the most expeditious, cost-effective and efficient resolution of cases on their merits. The introduction of Rules 1.04 and Rule 29.1 are but two examples of this new approach.[78]

VI. THE EXAMINATION FOR DISCOVERY

1. Ask the Right Questions

Like documentary production, the examination for discovery flows from the issues in dispute. While it may be useful to simply proceed through each paragraph raised in the opposing party's pleading, the examination also provides the opportunity to develop a comprehensive understanding of who the opposing party is, what their evidence is, and the manner in which it will be presented. As described by senior counsel John Olah,

> [t]he fundamental purpose of the discovery process is to eliminate surprises at trial. You must be cognizant of all the adverse facts possessed by your opponent so that you will be in a position to overcome them. You achieve this objective by eliciting from the opposing party a full and detailed version of his story. In particular, it is imperative to ferret out all facts and evidence adverse to your position. Do not be afraid to ask questions that may be damaging to your case. Now is the time to find out about all damaging evidence. This is the time to learn how strong your opponent's case is and to detect any problems in your case. Seek out all such evidence; this knowledge will permit you to negate the adverse evidence possess by your opponent at trial.[79]

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[77] *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund* 2014 ONSC 660 at paras. 88-89.

[78] *Maxi Boutique Inc. v. TD General Insurance Co.*, 2018 ONSC 5039 at para. 6.

By the time that discovery concludes, each party should have outlined and been committed to their version of events.

2. Exhaust the Witness' Potential Evidence

Once the adverse party's evidence on each element of every cause of action or defence is canvassed, the final step is to exhaust the party's potential evidence. By asking basic open-ended questions on each element of their case such as: "is that all?", "is there anything else that you have to add?", the examiner triggers a prohibition contained in the rules that prevents the party from introducing any evidence on that point without first providing written notice.[80] John Olah summarizes this perspective as follows:

> At the conclusion of the examination for discovery, nail down the deponent's testimony. Offer him an opportunity to speak to any matters you have omitted to cover with him. This device will eliminate the standard explanation given by so many witnesses at trial, namely, that the witness did not have an opportunity to tell the examiner about this point at the examination for discovery.[81]

This, in short, is the examination for discovery at its most elementary level. By eliciting the opposing party's evidence on each point in issue and then closing the door on their ability to introduce anything new, the discovery process has served its basic function. Surprises are eliminated; ambush has been avoided.

3. Lay the Groundwork for Impeachment

The goal of the examination for discovery is therefore to elicit clear and unambiguous answers from the adverse witness that close off any potential ambiguities or pathways that would allow the witness to suggest an alternative answer at trial. While questions going strictly to credibility are generally prohibited, the examiner has the opportunity to ask questions that relate to the

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79 *The Art and Science of Advocacy* (Toronto: Thomson Reuters Canada, 2018) at 5-6 [*Art and Science*].

80 R. 31.09 (1) of the Ontario *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 states:

> Where a party has been examined for discovery or a person has been examined for discovery on behalf or in place of, or in addition to the party, and the party subsequently discovers that the answer to a question on the examination,
> (a) was incorrect or incomplete when made; or
> (b) is no longer correct and complete,
> the party shall forthwith provide the information in writing to every other party.

See also: *Court of Queen's Bench Rules*, Manitoba Regulation 553/88, r. 31.09; *Rules of Court*, NB Reg. 82-73, r. 32.09(1); *Nova Scotia Civil Procedure Rules*, Royal Gaz. Nov 19, 2008, 18.19(1); *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch. D, r. 30.09A(1); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. R-010-96, r. 260; *Rules of Court*, Yuk. Reg. O.I.C. 2009/65, r. 26(a).

81 *Art and Science* at 5-91.

opposing party's reliability. Senior litigators Timothy Pinos and S. John Page underline this principle as follows:

> First, when examining for discovery on a critical issue, you should be sure to thoroughly question and tie the witness down to his or her evidence respecting relevant factual elements . . .. This means that when you are dealing with matters of a witness' perception (i.e., was the light green or red at the time of the accident), you should politely and patiently examine with respect to all matters which could affect the ability of the witness to perceive what he or she alleges to have seen (i.e.: position in relation to the lights, obstructions, environmental conditions, distraction, etc.). Having thoroughly examined with respect to those factual circumstances, you can then start to develop your theory of the witness's credibility or lack of credibility that can then be used at trial.[82]

The believability and credibility of the witness's story depends on whether the judge or trier of fact is comfortable accepting their testimony as truth. In making that assessment, the judge will be persuaded by whether the details forming the context of their story are consistent. The more the examiner can box the witness in with what appear to be mundane or innocuous details, the more the litigator corrals them into a storyline that cannot be deviated from. This was put by Steven F. Rosenhek as follows:

> As you would with any cross-examination at trial, try not to make obvious exactly where you are going. Use the building-blocks approach. Build slowly and nail down background information (standard procedures, where files exist, who attends meetings, what are the usually forms of inter-office communications etc.) at the start of your examination before you get into the "nitty gritty."[83]

Should the witness later try to change their story at trial, then the stage is set for the litigator to point out all the inconsistencies, incongruities, and contradictions in the witness' story. Properly executed, it is not until after the admissions have been made that the witness sees their significance.

4. Leave the Strongest Admissions for Trial

The final step in the examination for discovery is to leave the best admissions for trial. Once the adverse witness has been committed to a particular version of events, the litigator moves on and leaves any final conclusions for trial. As stated by discovery text writer Robert White;

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[82] Timothy Pinos and S. John Page, *Credibility* paper prepared for the Ontario Bar Association Continuing Legal Education, December 9, 2005 — "Divine Discoveries: Building a Great Case" at 10.

[83] Steven F. Rosenhek, *Preparing Yourself for Examination for Discovery*: *The Basics*, paper prepared for the Ontario Bar Association Continuing Legal Education, December 9, 2005 — "Divine Discoveries: Building a Great Case at 5.

> [s]ometimes there will be a document which contradicts the oral evidence of the witness. Counsel should especially resist the temptation to confront the witness with the contradiction at the discovery. This is best saved until cross-examination at trial when the discrepancy can be used with more telling effect.[84]

Using an analogy, the examination for discovery is the process of leading the witness to the trapdoor, but refraining from pulling the release. As long as the documentary evidence is clear and unambiguous, then it should be left for trial. As stated by senior litigator David Roebuck,

> [g]enerally speaking, the object of cross-examination at discovery is not to pull the trigger on the witness. . . . Rather the function of cross-examination at the discovery stage is simply to close all the exit doors that may be available to the Defendant. The witness should not be confronted with the logical absurdity of the positions taken. Rather, the witness should be hedged about by further questions so that he or she will be unable to avoid the injury to credibility when confronted with the absurdity at trial.[85]

The examination for discovery is best used to circle the witness with the mundane and innocuous details of their case. The witness is then left unprepared and with nowhere to go when they find himself or herself, in full view of the judge or trier of fact, confronted with evidence of the inconsistency or contradiction in their evidence.

5. Use Civility as a Tactical Strategy

A central element of presenting a persuasive, compelling and successful story is to present oneself as a reliable narrator. In a system often characterized by overt partisanship, effective storytelling demands a narrator who can command the trust of the judge or trier of fact. Archibald and Friedman made that point as follows:

> . . . a story will only be credible if the person who is telling it is credible. In effect, decision-makers seek a trustworthy guide to take them through the case: the lawyer who honestly assesses the case is the lawyer whose narrative of events is most likely to be relied upon reaching a verdict.[86]

Credibility for the story is built on the narrator's reliability. The litigator's level of preparation, his/her familiarity with the facts and law, his/her conviction and dispassion all build trust for the story. In short, the more trustworthy the litigator, the more likely the story will be trusted.

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[84] White, "Art of Discovery" at 137.

[85] Tactical Considerations and Strategy for Plaintiffs, L. David Roebuck, The Law Society of Upper Canada "Mastering Discovery" — for the program held in Toronto on June 16, 1994, at D-3.

[86] Archibald and Friedman, "Advocating with Persuasive Authority" at 7.

An integral aspect of building reliability as a narrator is to conduct oneself with civility. As explained by Archibald and Brousseau, comporting oneself as approachable, courteous, and respectful creates reliability:

> No matter what happens or how opposing counsel conduct themselves, counsel must maintain their composure and always show the utmost respect to the judge, to opposing counsel, to witnesses and to the jurors themselves. Treating all parties with respect will enhance the advocates' stature as the reliable narrator in the room and will include the trier of fact to find in favour of the advocate's client.[87]

A litigator who uses the discovery process to be discourteous, sarcastic, or abusive to opposing witnesses and counsel will win no credibility. Rather, taking an antagonistic approach may very well draw out a similar response from the witness. As illuminated by Timothy Pinos and S. John Page;

> [o]n discovery, nobody important is watching and nobody notices if you are conducting a brilliant trial cross-examination. A combative cross-examination will be useless as a potential read-in at trial, since you are unlikely to get a clear admission as to anything. It will be equally useless as material to impeach a witness since the trail of questioning is so likely to be so heavily laden with qualifications and caveats so as to reduce the prospects of a clear inconsistency.[88]

Not only does *animus* devalue the utility of a witness' potential answer, but it draws attention away from the witness' response and towards the person asking the question.

In the examination for discovery, civility is not only a professional obligation, but it is also a useful strategic technique. By maintaining an approachable, neutral, non-confrontational demeanour, the examiner is able to elicit the facts and admissions required without alerting the opposing witness to their adversarial stance. As eloquently clarified by James Carthy, W.A. Derry Millar and Jeffrey Cowan;

> [t]he art of the oral examination is to make it a non-art. The examiner is there to elicit facts and obtain admissions where available — not to demonstrate skill as a cross-examiner. The opposite party should have the first lesson at facing cross-examination, at least by yourself, at the trial. . . . Much better the client methodical approach of a rather dull but nice person, which may enhance settlement opportunities and will certainly leave the witness unprepared for a more vigorous approach to cross-examination at trial.[89]

The examination for discovery is not a cross-examination. The same techniques that may elicit a credibility-damaging response from a witness sitting next to the

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[87] Archibald and Brousseau, "The Closing Address" at 4.

[88] Timothy Pinos and S. John Page, *Credibility*, paper preselected as a part of the Ontario Bar Association — Continuing Legal Education "Discoveries: Building a Great Case" at 8.

[89] Carthy et. al., *Ontario Annual Practice* (Canada Law Book, 2015) at 1116.

judge or jury will not generate the same impression when transcribed on paper. Rather, the examination for discovery is best used to lure the opposing witness into making admissions that they would not otherwise make if they had their guard up against an aggressive examiner. As stated by the authors of *Practice, Techniques and Strategies*,

> [t]here are tactical approaches within the mask of the neutral but friendly appearance which can be effective depending upon the witness. A "Columbo" approach often works with an overly arrogant witness. If he or she thinks that the counsel is not very astute, the witness will often be trapped very quickly into making admissions from a lawyer that he or she had underestimated.[90]

If it works out as desired, the litigator leaves the examination room with all the desired admissions needed to prove their case, having done little to forewarn the opposing witness of the examination to come at trial.

6. Discovery for Trial or Settlement?

As referenced above, Justice MacLeod in *Andersen v. St. Jude Medical Inc. et al.* articulated the "modern purposes of discovery" as including accomplishing the objectives of "facilitating settlement". In his article entitled "*The Discovery Plan*" in the ABA magazine *Litigation*[91] Jonathan Stern addressed the approach to discovery (albeit as to the U.S. discovery process where multiple depositions are permitted) with that consideration in mind:[92]

> . . . one of the biggest strategic decisions the litigator must make is whether discovery should be geared toward preparing for trial, settling the case, or supporting a motion for summary judgment. Once in a great while all three can be supported by the same action in discovery. Unfortunately, most of the time different steps in discovery would be taken to achieve each goal, particularly the trial preparation and settlement goals.
>
> Emphatically demonstrating to the other side the weaknesses in their case and the strengths opposing them is one discovery strategy to promote settlement. This can be done by conducting in depositions the same type of cross-examination of the opponent and adverse witnesses that you would use at trial. If, however, trial is likely where the case is headed, it may be a mistake to show all the cards during discovery. Doing so gives the opponent maximum opportunity to deal with what's coming. Where it is unclear whether a case will settle or be tried, it may be necessary to balance the approach.

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[90] *Practice, Techniques and Strategies* at 81.

[91] The Spring 1998 issue of the ABA magazine "Litigation" Vol. 24, No. 3 THE BIG PICTURE at 34 — 39, 75.

[92] *Ibid.*

VII. CONCLUSION: TIPS ON STORYTELLING AND DISCOVERY

Ultimately, civil litigation is a forum for resolving disputes. In doing so, the litigator is tasked with acting as the narrator for individuals who must re-tell their version of events to a judge or trier of fact that is a stranger to the situation. In doing so, the litigator's task is two-fold. First, they must present their client's story in a manner that meets all the legal criteria required for their claim or defence. But this does not end the matter. If the litigator intends to succeed, then they must also imbue their client's version of events with a sense of moral justification as well.

In order to develop a compelling storyline that resonates with the judge or trier of fact, the discovery process is essential. It is insufficient to wait until trial before developing the storyline. Rather, by using the appropriate practices and techniques during discovery, the litigator is able to walk into trial with their key contradictions and admissions already set in stone. The following points briefly summarize our important principles:

- Know the case in advance. The first part of discovery is to identify each constituent element of every cause of action or defence pled.
- Organize the case around these elements. Find out what each parties' evidence is on every point. Conduct a good fact/bad fact analysis. Find the weakness in each party's case and target it in order to develop a transcript that can be used at trial.
- Exhaust the witness' potential answers. Avoid ambush and commit the opposing party to their story by corralling them in.
- Ask simple questions that demand simple unambiguous answers. Break up conjunctive answers so that the witnesses' response is clear, understandable, and responsive to the question asked. If the witness' answer is opaque, ambiguous or unclear, repeat the question to ensure clarity.
- Ask closed-ended questions (in a cross-examination format) to close the witness in.
- Close the door. Question the witness on every element going to the reliability of their story. Build up the context around them so they cannot later back away and suggest an alternative story.
- Ask boiler-plater questions at the end of each subject such as "Have you told me everything on this point" or . . . "everything that you rely upon concerning paragraph 14 of the statement of claim." This approach will close in the witness and prohibit them from providing new evidence at trial.
- Leave the smoking gun at home. If you have an unambiguous contradiction in the documents, then save it for trial. The contradiction will have a stronger effect when presented in front of the judge

or trier of fact for the very first time. The witness, not having been alerted to it at discovery, will not then have had months, if not years, to come up with an explanation to attenuate its effect.

- Project a civil demeanour. The impact of the discovery will be enhanced. The discovery witness will likely be disarmed by your courteousness or even-temper. You will more readily obtain admissions from witnesses when you utilize a non-confrontational approach. That, however, only works if the witness is not truculent or openly hostile. In those cases, a firmer (but never hostile) approach may be needed. Let the witness' hostility permeate the transcript — not yours.

We hope these tips will assist in conducting a discovery that sets up the client for success at trial. These are the important building blocks to an impactful discovery and a persuasive case. To conclude, the following quote attributed to legendary trial lawyer Louis Nizer is apt: ''Preparation is the be-all of good trial work. Everything else — felicity of expression, improvisational brilliance — is a satellite around the sun. Thorough preparation is the sun.''[93]

[93] Louis Nizer, Newsweek (11 December 1973).