Discovery

Discovery Basics

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Discovery Basics

The discovery process is the way you (and the other party) learn more about the case. It includes an opportunity to look at documents the other side has that relate to the case. You also have an opportunity to ask the other side questions about what happened.

Discovery lets you learn the other side's version of when and where things happened. You get a good sense of the strength of your case, and where agreement might be reached. Many cases settle during the discovery process.

Note that the discovery process is not available in claims started by a petition. For more information on the difference between actions and petitions, see **Action or Petition.** Also, note that different discovery rules apply if you are in a proceeding where the "fast track" rule applies (see **Fast Track Litigation**).

Types of Discovery

There are several possible steps in the discovery process, although it may not be necessary for you to take all of these steps in your case.

- **Discovery of documents:** You must disclose to the other parties in the proceeding all of the documents that could be used by any party at trial to prove or disprove a material fact. This means that you must describe the documents that you have to the other party, and make them available for the other party to examine
- **Examination for discovery:** This is a meeting where one party asks an opposing party a series of questions

- **Interrogatories:** This is a series of written questions provided to the other party to be answered in writing. They may only be used with leave (permission) of the court
- **Pre-trial examination of witnesses:** This process may be used if there is a person who has material evidence relating to the case and who is not a party to the action. It may only be used with leave (permission) of the court

You may want to consult a lawyer before beginning the discovery process. A lawyer can give you important information and advice about how to find out what you need to know about the other party's case, as well as how much information you must disclose to the other parties in your proceeding. For information on finding a lawyer, see **Get Help**.

Discovery of Documents

Rule 7-1 sets out the requirements for discovery and inspection of documents. It allows you to get access to the documents of the other party that are relevant to your case and requires you to allow the other parties to see your relevant documents.

Read the Rules

Rule 7-1 Discovery and Inspection of Documents

Key Terms

A "**document**" for the purpose of a list of documents is not just a piece of paper. Rather, just about anything that stores information can be a document.

Rule 1-1 sets out the definition of "document." The definition is quite broad, and includes photographs, films, sound recordings, any record of a permanent or semi-permanent character, or any information recorded or stored by any means of any device.

When you're looking for documents, make sure you think of disks, tapes, and computer files, as well as photographs and films. Importantly, emails are

"documents". You will have to consider whether you have emails relevant to the case.

Document Retention

Once you expect litigation may occur, you cannot destroy documents that are relevant to that litigation. This means that you cannot shred or recycle important documents, delete emails, erase recordings, etc. Rather, you have an obligation to retain the relevant documents.

Which Documents Must Be Disclosed?

To begin the discovery of documents process, you must prepare a list of documents in **Form 22**.

Find the Form

Form 22 List of documents

Generally, there are two types of documents that have to be listed and disclosed:

- Documents that are or have been in your possession or control that could prove or disprove a "material fact" or
- Any other document you intend to refer to at trial

Key Terms

A "**material fact**" is a fact that is relevant to the claim or a defence to a claim.

The "material facts" in litigation are those facts relevant to the cases as described in the pleadings (the notice of civil claim, response to civil claim, any counterclaim, any third party claim, and the reply)

You have to list things that help or hurt your case. You do not get to choose not to list a document because it is harmful to your position.

Preparing a List of Documents

Once you have decided which documents need to be disclosed, you must list the documents on **Form 22**. The list must then be served on all other parties within 35 days after the end of the pleading period (e.g. when the notice of claim, response, counterclaim, reply, and any amendments are completed). However, quite often the parties agree to extend this period, as assembling documents can take a long time. Further, your obligation to produce documents is ongoing. If you find a relevant document after you have prepared a list, you need to prepare an amended list that includes that document.

Parts of Form 22

Part 1: Includes all documents that are or have been in your possession or control and that could be used by any party at trial to prove or disprove a material fact.

For example: 1.1 15 September 2008, contract of employment between XYZ Company and John Brown. (Then check the box if the document is no longer in your possession or control.)

Part 2: Includes all other documents (if any) that you intend to refer to at trial. For example, these may be documents that you know exist but that were never in your possession or control.

Part 3: Some of your documents may be "privileged" and that means that the other party is not entitled to see them. For example, communications between a lawyer and his or her client are privileged. If you consulted with a lawyer about your case and received a letter from the lawyer that gave you some advice about the case, the letter would be a privileged document and you would not be required to give a copy of it to the other party.

Other privileged documents are those created for the main purpose of helping you prepare to take your case to court. For example, if you met with a mechanical engineer to get some advice about an aspect of your case and took notes of your meeting, you could claim that the notes were privileged.

You may want to talk with a lawyer about the law relating to privileged documents, as it might be difficult for you to determine which documents are privileged. You may harm your case if you provide copies of privileged documents to the other side. You must, however, disclose the existence of documents for which you claim there is a privilege, by listing them in part 3 of Form 22. If you have documents that you claim are privileged, you must describe the nature of the document and the basis for making a claim of privilege.

For example: 3.1 16 March 2007, letter from a lawyer, Jane Green, advice on damages in my claim for wrongful dismissal. (Then state the grounds on which you are claiming privilege, e.g., solicitor/client privilege.)

The nature of the privileged documents must be described in a way that, without revealing the privileged information, will enable the other parties to assess the validity of your claim for privilege.

If Your List of Documents Is Not Complete

If you later discover that your list is not accurate or complete, or come into possession of a document that should have been on your list, you must promptly serve an amended list on the other parties (see **Rule 7-1(9)**). And, if you think that certain documents should have been listed on the other party's list of documents, you can make a demand, in writing, that they prepare and serve a supplementary list, and make those documents available for inspection (see **Rule 7-1(10)**). If the party fails to comply with the demand within 35, days, you can apply to court for an order that the party comply with the demand.

Read the Rules

Rule 7-1 — Discovery and Inspection of Documents

Examining the Documents

Form 22 requires you to set out the location and time that the documents you have listed (other than the privileged documents) can be inspected.

Put all the documents (except any privileged documents) in a convenient file or three- ring binder and keep them available. The other parties are entitled to come

and look at the documents and can ask you to have copies of all or certain documents made for them. You are entitled to do the same. When you go to review the other party's documents, make a list of any documents you think are important to your case and get copies made for your files.

Copies of documents can be made upon payment to the other party, in advance, of photocopying fees (see **Rule 7-1(16)**). Often now people agree to exchange electronic versions of documents.

Requesting a Wider Scope of Documents

If you are aware of any documents that the above noted rules do not require to be disclosed, but you have a reason to inspect those documents, Rule **7-1(11)** allows you to request that the documents be disclosed. You must be able to describe the documents with reasonable specificity.

An example might be a document that could not be used to prove or disprove a material fact, but that might lead you to additional documents or evidence that could be used to prove or disprove a material fact.

Use of Documents

Do not use documents received in discovery for any purpose other than the litigation.

All the parties to a lawsuit have a very serious obligation to use the documents that are produced through the discovery process (including copies of records, transcripts of examinations for discovery, and answers to interrogatories) only for the proper purposes of the proceeding.

This is called the "implied undertaking" rule of confidentiality. This means you cannot obtain documents from another party, then turn around and try to use them in another proceeding. You cannot share them with people outside the litigation.

There are only two exceptions to this:

- Where a party has obtained permission from the Court to use the document for a different purpose and

- Where the owner of the document has consented to the document being used for another purpose

This obligation is to the court, and if you fail to meet it (for example, by circulating documents to people outside the case or by using documents from a particular proceeding for a different case) you can be held in contempt of court, which has serious consequences, including even potentially jail.

Examinations for Discovery

An examination for discovery is an oral examination under oath. It is another tool you can use along with document discovery to learn about the other side's version of the facts. **Rule 7-2** sets out the procedure for examinations for discovery.

Read the Rules

Rule 7-2 Examinations for Discovery

An examination for discovery involves a meeting where one party asks an opposing party questions about the issues in the dispute. For example, in a case arising from a motor vehicle accident, the driver of one car may want to ask the other party questions about how fast they were driving, whether they wear glasses, the injuries suffered as a result of the accident, etc.

Examinations for discovery are part of the litigation process, but they do not take place in open court, and no judges or court officials are present. The examination takes place in the presence of a court reporter that records each question and its answer, and then provides a transcript (a written record) of the examination. The party answering questions must take an oath or give a solemn affirmation that they will tell the truth. The transcript of the examination for discovery, or portions of it, may be used at trial.

Unless the court orders, or the parties agree, examinations for discovery are limited to 7 hours per party conducting the examination. So, for example, if there is 1 plaintiff and 2 defendants, each defendant may examine the plaintiff for up to 7 hours, resulting in the plaintiff being subjected to up to 14 hours of discovery.

Learn More

For fast track litigation under Rule 15-1, examinations for discovery are limited to a total of 2 hours by all parties conducting the examination. (See **Rule 15-1(11)**). So, in a fast track case, if there is one plaintiff, they may only be subjected to a total of up to 2 hours of discovery, regardless of the number of defendants. For more information see **Fast Track Litigation.**

These two processes – examinations for discovery and document discovery – are very important to preparing your case. They go hand in hand. Once you have documents, you can review them and determine which questions still need to be answered by the other party at an examination for discovery. And, when you have finished an examination for discovery, you might want to request further documents

Do You Have to Pay Anyone?

When you examine a person for discovery, you are required to pay them a witness fee**.** Make sure that you know how much it will cost you to examine the witness before you go ahead with the discovery. If the witness lives out of town, you will have to pay for their travel expenses, a per diem (per day) rate for meals, and a hotel if they have to stay overnight. Ask a lawyer for advice about this if you are concerned about the cost of examining your witness.

Learn More

Schedule 3 of Appendix C to the Rules of Court sets out the fees payable to witnesses

Arranging the Examinations for Discovery

You arrange an examination for discovery using an Appointment to Examine for Discovery (**Form 23**). There are several things to consider when booking an examination for discovery.

Find the Form

Form 23 Appointment to Examine for Discovery

Who to Examine

If there is a single plaintiff or defendant, that is who you will want to examine.

If the defendant or plaintiff is a **company**, you want to examine the person who knows the most about the matters in question. Under **Rule 7-2(5)**, the corporation must, if asked, nominate someone to be examined who is knowledgeable about the issues. However, you do not have to pick to examine that person. Rather, you can examine anyone who is or has been a director, officer, employee, agent or external auditor of the corporation.

It is important however that you do not choose someone who would have no idea about the facts of the case. If you pick the Chief Executive Officer and they do not know anything about the dispute, you will not have a productive examination. You want to speak to someone knowledgeable.

If the defendant or plaintiff is the **government**, then they will choose who you examine. If you find that this person is not knowledgeable, you can later bring an application to the Court to seek additional time to examine someone else.

Serving Appointment to Examine for Discovery

You must serve **Form 23** at least 7 days before the date selected for the examination. It makes good sense to wait until all the pleadings have been filed by both parties before scheduling an examination for discovery. That way you will know exactly which issues are in dispute.

Preparing to Examine

It is a good idea to prepare a script of the questions you wish to ask so you do not forget to ask any important questions. You normally have only one opportunity to

conduct an examination for discovery so you need to make it count. Unlike court, you cannot go watch examinations for discovery in preparation for yours. In thinking about an examination for discovery, you need to consider:

- **When do you want to examine this person**? You need to make sure that you are available, that the person you want to examine is available (and their lawyer, if they have one)
- **What do you want to ask**? You might want to get advice from a lawyer to make sure you are asking questions of the other party that are both appropriate and admissible in court if the case proceeds to trial. See **Get Help**
- **What documents do you want to use in your discovery**? You can bring listed documents (either yours or theirs) to the discovery and ask questions about these documents
- **What court reporter will you use?** There are many court reporters and most of them will provide a boardroom that you can use for your discovery. Make sure you book the court reporter as early as possible. You can find court reporting services listed in your telephone directory or online

What Questions Can You Ask?

Questions on examinations for discovery can be quite broad and can be asked about anything that is related to your case. In some cases, the person being examined cannot answer a question right away and you might need to ask them to find out the answer after the examination and send it to you by letter. Typically, all discoveries begin with asking the person being examined to state their name, address, and occupation.

The person being examined for discovery must answer any question within his or her knowledge (or that is possible for them to find out), regarding any matter that is not privileged, relating to any matter in question in the action. You can also ask the person being examined the names and addresses of other people who might have information relevant to the proceeding.

The party being examined may refuse to answer a question. These are called objections. If the party asking the question does not believe that an objection is appropriate, they may schedule a chambers application after the examination to

ask a judge to direct the person to answer the question. For more information on bringing an application see **Chambers Applications.**

The evidence from an examination for discovery can be used at trial by the other side. It can be "read in" to the record if the person discovered made admissions. Further, it can be used to challenge credibility if different answers are made at discovery and on the stand. For more information on the use of an examination for discovery transcript, see **Evidence.**

Getting a Transcript of the Examination for Discovery

If you wish for a transcript of the discovery you may order it from the court reporter. Once you have paid the required fee for the copies they will provide you with an original transcript and as many copies (both electronic and paper) as you have ordered. If you decide to use all or any part of this transcript at trial, you will need to provide the Court with the original, so you will want to put this away in a safe place and use a copy.

Transcripts are set out in a question and answer format, with each question and answer being numbered in chronological order. The transcripts also set out any questions that have been left outstanding (the undertakings). These questions are those where the person had to find out information or needed to look at documents to find out the answer. You will want to keep track of these questions and make sure they are answered later. This is true whether you are the person being examined or the person doing the discovery.

Interrogatories

The requirements for interrogatories are set out in **Rule 7-3**. They are only allowed by consent or with leave (permission) of the Court. If you believe that interrogatories are necessary, you can ask for leave by filing an application under Part 8 of the rules. For more information on bringing an application see **Chambers Applications.** Interrogatories must be prepared by using **Form 24**.

Read the Rules

Rule 7-3 Discovery by Interrogatories

Find the Form

Form 24 Interrogatories

If the Court grants leave or the party consents, you can deliver interrogatories to any party in the action and they must be replied to within 21 days of delivery. Answers to interrogatories are delivered in the form of an **Affidavit**, so the party answering the questions swears to the truth of the answers. If there are more than two parties in your case but you wish only to send interrogatories to one party, you are required to send a copy of the interrogatories to all other parties for their information.

The Court, in granting leave, may set conditions on the interrogatories, such as the number and length, or what topics they are allowed to cover. Interrogatories may be useful in cases where, for example, you need specific, precise, factual information, such as:

- Numbers
- Data
- Bank accounts
- Inventory
- Contents of a house
- Customers of a particular company or
- Other technical information

Deciding whether or not it is worth the effort to file an application to allow the use of interrogatories may be something to discuss with a lawyer.

When you receive the answers to your interrogatories, make sure they gave you the answers you require, or provided you with a reasonable explanation as to why they did not answer your questions. **Rule 7-3(6)** sets out some reasons why interrogatory questions do not need to be answered. These are called objections and must also be included in the affidavit that is required in response to the interrogatories within 21 days after delivery.

Read the Rules

Rule 7-3(6) Objections to answer interrogatory

If interrogatories are delivered to you, you do not need to respond to them unless you agreed to respond or the Court has granted the other party leave to issue interrogatories. If the Court has granted leave, make sure that you respond to the interrogatories within 21 days. Because you have to answer interrogatories by affidavit, you need to see a lawyer or a notary to swear your affidavit.

Notice to Admit

A notice to admit is an extremely useful tool. Many lawyers rely heavily on Notices to Admit to prepare for trial. A notice to admit is a document where you ask the other side to admit that a fact is true or that a document is accurate (you can ask either that the facts in a document are true, or that the document is what it says it is).

Notices to admit can be delivered to any other party in the proceeding. They are dealt with in **Rule 7-7** and **Form 26**. Parties have 14 days to respond to a notice to admit.

Find the Form

Form 26 Notice to admit

Read the Rules

Rule 7-7 Admissions

If you are served with a Notice to Admit **you must respond within 14 days**. There is a very important time limit in **Rule 7-7(1)**. If you do not reply to a notice to admit within 14 days, you are deemed to have admitted the facts contained in the notice to admit. Those facts may be very important and it is difficult to withdraw an admission, even a deemed one, once it is made.

Once a fact is admitted, it is no longer at issue in the proceeding. A Notice to Admit can save you from having to prove facts at trial. This can lead to a huge savings of time and effort.

The practical part of a notice to admit is straightforward.

You prepare **Form 26**, in which you set out facts and attach documents. You ask the other party to admit the truth of the facts and the authenticity of the documents. The person receiving the notice to admit can either admit or deny the facts or documents. For example, if a term of the contract is in dispute, you can ask the other party to admit that the contract is the one that both parties signed.

Like a list of documents, set out each fact and document in separately numbered paragraphs. This makes it easier to respond to the notice to admit. The other party can answer each question by setting down the number of the question and then stating one of these two answers: admitted or denied. If the answer is admitted, that single word is all that is required. If the answer is denied, you need to set out the reason why it is denied. There is no official form for a response to a notice to admit, but you can simply take the form of the notice to admit and include the one-word response in that form.

Notices to admit are a very good tool to help you prepare for trial. A well-drafted notice to admit makes preparing for trial much easier, so you may want to consult with a lawyer once you have prepared your notice to admit, to make sure that it is in good form and will get the results you want.

If a party denies a fact and the Court later finds that the refusal to admit was unreasonable, the Court may order the party to pay the costs of proving the truth of the fact (see **Rule 7-7(4)**).

For this reason parties might admit facts in response to a Notice to Admit even if they previously denied the fact in their Response to Civil Claim. If you think a party is unreasonably denying something in their response, it may then make sense to send a notice to admit.

Pre-trial Examination of Witnesses

Pre-trial examination of witnesses is dealt with in **Rule 7-5**. In order to examine a witness under Rule 7-5, you must first bring an application to get an order from the

Court allowing the examination. For more information on bringing an application see **Chambers Applications.**

Read the Rules

Rule 7-5 Pre-Trial Examination of Witness

You can use this process when you need information from someone who is not a party to the proceeding and you cannot get this information any other way. This would also apply when the witness will not respond to your letters or telephone calls, so you need to compel them to answer your questions.

You must conduct an examination for discovery, not a pre-trial examination of a witness, if a person is:

- A party to the proceeding
- An officer or director of a party to the proceeding or
- A partner of a party to the action

If a person refuses to answer your questions, you must apply in chambers to get the Court to order the person to attend at an examination. If you get an order from the Court to examine the witness, you will need to prepare and serve a subpoena in **Form 25**.

Find the Form

Form 25 Subpoena

This procedure is rarely used. If you think it is going to be necessary in your case, you may want to consult a lawyer. They can let you know if there might be another way to get the information, as well as give you a sense of your chance of success.