

BFLG'S TIPS FOR QUESTIONING

Historically, in any court case, each party was required to attend for an “examination for discovery”. This was an out-of-court event where the lawyer asks the opposing party questions under oath to discover their case, obtain admissions, uncover the weaknesses in their case and test the witness’ credibility and reliability. A court reporter transcribes the questions and answers and then produces a transcript.

But when Ontario passed the Family Law Rules in 1999, the right to conduct an examination for discovery was removed. Instead, this was named “questioning” for family law cases and the right to question (i.e. cross-examine) a spouse before trial was heavily restricted.

Rule 20 of the Family Law Rules states:

20(1) Questioning under this rule shall take place orally under oath or affirmation.

(2) The right to question a person includes the right to cross-examine.

(3) In a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) by questioning the other party, in which case the party shall serve the other party with a summons to witness (Form 23) by special service in accordance with subrule 6 (4); or

(b) by affidavit or by another method, in which case the party shall serve the other party with a request for information (Form 20).

(4) In a case other than a child protection case, a party is entitled to obtain information from another party about any issue in the case,

(a) with the other party’s consent; or

(b) by an order under subrule (5).

(5) The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:

1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.

2. The information is not easily available by any other method.

3. The questioning or disclosure will not cause unacceptable delay or undue expense.

(6) If a person to be questioned is a special party or a child party, the court may, on motion, order that someone else be questioned in addition to or in place of the person.

(7) The court may make an order under subrule (5) that a person be questioned or disclose details about information in an affidavit or net family property statement.

(8) A party who wants to question a person or obtain information by affidavit or by another method may do so only if the party,

(a) has served and filed any answer, financial statement or net family property statement that these rules require; and

(b) promises in writing not to serve or file any further material for the next step in the case, except in reply to the answers or information obtained.

(9) The court may make an order under this rule affecting a non-party only if the non-party has been served with the notice of motion, a summons to witness (Form 23) and the witness fee required by subrule 23 (4), all by special service (subrules 6 (3) and (4)).

(10) Subrule 23 (7) (failure to obey summons to witness) applies, with necessary changes, if a person summoned under subrule (9) fails to obey the summons.

(11) The questioning shall take place in the municipality in which the person to be questioned lives, unless that person and the party who wants to do the questioning agree to hold it in another municipality.

(12) If the person to be questioned and the party who wants to do the questioning do not agree on one or more of the following matters, the court shall, on motion, make an order to decide the matter:

1. The date and time for the questioning.
2. The person responsible for recording the questioning.
3. The method for recording the questioning.
4. Payment of the expenses of the person to be questioned, if a non-party.

(13) The parties shall, not later than three days before the questioning, be served with notice of the name of the person to be questioned and the address, date and time of the questioning.

(14) If a person to be questioned lives outside Ontario and will not come to Ontario for questioning, the court may decide,

- (a) the date, time and place for the questioning;
- (b) how much notice the person should be given;
- (c) the person before whom the questioning will be held;
- (d) the amount of the witness fee to be paid to the person to be questioned;
- (e) the method for recording the questioning;
- (f) where necessary, that the clerk shall issue,
 - (i) an authorization to a commissioner (Form 20A) who is to supervise the questioning outside Ontario, and
 - (ii) a letter of request (Form 20B) to the appropriate court or authorities outside Ontario, asking for their assistance in getting the person to be questioned to come before the commissioner; and
- (g) any other related matter.

(15) A commissioner authorized under subrule (14) shall,

- (a) supervise the questioning according to the terms of the court's authorization, these rules and Ontario's law of evidence, unless the law of the place where the questioning is to be held requires some other manner of questioning;
- (b) make and keep a copy of the record of the questioning and, if possible, of the exhibits, if any;
- (c) deliver the original record, any exhibits and the authorization to the clerk who issued it; and
- (d) notify the party who asked for the questioning that the record has been delivered to the clerk.

(16) An order for questioning and a summons to witness may also require the person to bring any document or thing that is,

- (a) relevant to any issue in the case; and
- (b) in the person's control or available to the person on request.

(17) Subrules 19 (2), (4) and (5) (right to examine document and obtain copy, documents protected by legal privilege, use of privileged documents) apply, with necessary changes, to the documents mentioned in the order.

(18) Unless the court orders otherwise, a person to be questioned may be asked about,

- (a) the names of persons who might reasonably be expected to know about the claims in the case and, with the court's permission, their addresses;**
- (b) the names of the witnesses whom a party intends to call at trial and, with the court's permission, their addresses;**
- (c) the names, addresses, findings, conclusions and opinions of expert witnesses whom a party intends to call or on whose reports the party intends to rely at trial;**

- (d) if it is relevant to the case, the existence and details of any insurance policy under which the insurance company may be required to pay all or part of an order for the payment of money in the case or to pay back to a party money that the party has paid under an order; and
- (e) **any other matter in dispute in the case.**
- (19) If a person being questioned refuses to answer a question,**
- (a) **the court may, on motion,**
- (i) **decide whether the question is proper,**
- (ii) **give directions for the person's return to the questioning, and**
- (iii) **make a contempt order against the person; and**
- (b) **if the person is a party or is questioned on behalf or in place of a party, the party shall not use the information that was refused as evidence in the case, unless the court gives permission under subrule (20).**
- (20) *The court shall give permission unless the use of the information would cause harm to another party or an unacceptable delay in the trial, and may impose any appropriate conditions on the permission, including an adjournment if necessary.*
- (21) A person who has been questioned or who has provided information in writing by affidavit or by another method and who finds that an answer or information given was incorrect or incomplete, or is no longer correct or complete, shall immediately provide the correct and complete information in writing to all parties.**
- (22) If there is no objection, questions may be answered by the lawyer for a person being questioned, and the answer shall be taken as the person's own answer unless the person corrects or changes it before the questioning ends.**
- (23) *All the questions and answers at a questioning shall be recorded electronically or manually.*
- (24) When a party obtains evidence under this rule, rule 13 (financial disclosure) or rule 19 (document disclosure), the party and the party's lawyer may use the evidence and any information obtained from it only for the purposes of the case in which the evidence was obtained, subject to the exceptions in subrule (25).**
- (25) *Evidence and any information obtained from it may be used for other purposes,*
- (a) *if the person who gave the evidence consents;*
- (b) *if the evidence is filed with the court, given at a hearing or referred to at a hearing;*
- (c) *to impeach the testimony of a witness in another case; or*
- (d) *in a later case between the same parties or their successors, if the case in which the evidence was obtained was withdrawn or dismissed.*
- (26) *The court may, on motion, give a party permission to disclose evidence or information obtained from it if the interests of justice outweigh any harm that would result to the party who provided the evidence.*

Sadly, it is not uncommon for there to be misconduct during questioning. This may take the form of evasiveness, non-responsiveness, feigning ignorance, not answering the exact question, or avoiding the question altogether by answering with a question.

Because there is no supervision at questioning by a judge, sometimes lawyers and spouses will manipulate the process of oral discovery. That is one of the reasons why Rule 20(19) grants the spouse who is conducting the questioning the right to attend before a judge for a motion to compel answers to questions that were not answered. The Rule states that, in such a case, the judge can order the spouse to return to questioning to answer the refused questions and can even order the spouse in contempt.

Another remedy is to prohibit the spouse who has refused to answer the question to use that information as evidence in their case.

If a question is truly not proper, the lawyer for the spouse being questioned can object to the question and state the grounds for the refusal. This may be because the question does not relate to a contested issue in the case, or because the answer calls for speculation, or because it is only meant to badger the spouse, or for other reasons.

But some lawyers do not permit their clients to answer proper questions during questioning. They will interject and advise the client to not answer the question, not cite a reason why the question was refused, and not provide an undertaking to answer it later.

A very common response is that they take the question “under advisement”.

This is not an acceptable answer to a proper question.

As a result of this conduct during questioning, judges have been faced with motions to address unanswered questions.

The Report of the Task Force on Discovery Process of the Superior Court of Justice at <https://www.ontariocourts.ca/scj/news/publications/discoveryreview/executivesummary/> confirms that:

“Questions taken “Under Advisement” is neither a refusal nor an undertaking and that the Rules of Civil Procedure require questions to be answered or refused, and do not provide for a party to take questions under advisement.”

In the decision of Justice D'Auray in Burlington Resources v. The Queen 2017 DTC 1096, the court stated:

“In my view, the practice of **using the quasi-objection ‘under advisement’ needs to stop.** It is not a response contemplated by section 107 of the Rules. According to the Rules, a nominee either answer the question, refuses to answer and explains the basis for such refusal, or takes an undertaking if he or she does not know the answer. **The ‘under advisement’ quasi-objection is often a tactic used to gain time to reflect on which basis the question will be refused, without the party having to explain, at the time of discovery, why such question was refused. It deprives the party asking the question or the opportunity to rephrase the question. In my view, taking a question under advisement amounts to a ‘refusal’.**”

In the decision in MediaTube Corp. v. Bell Canada [2015] F.C.J. No. 902, the court stated:

“The Court does not support the over abundance of interruptions in an examination by the use of a quasi objection such as 'under advisement'. Witnesses should be permitted to answer proper questions. If the witness does not know the answer then that is the answer and that is when undertakings are appropriate to make further inquiries and provide answers on a follow-up examination or by way of writing if the circumstances are such that answers in writing are acceptable to the party examining. Parties to litigation are expected to generally follow the Rules keeping in mind that flexibility, civility and proportionality must be exercised in all cases.”

In the decision in Glaxo Group Ltd. v Novopharm Ltd. (1999), 3 C.P.R. (4th) 333, the court stated:

“I will also note that where the tactic of taking questions **under advisement** without explanation hinders the examination, there may be **cost consequences**.”

In conclusion, the purpose of questioning is to help settle or narrow cases for trial. It is not meant to serve as a place to run-up lawyer fees, cause stress or abuse the process. Lawyers who do so ultimately damage their own client's case, but also the reputation of all lawyers.

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