

## FOLLOWING UP ON YOUR EXAMINATION FOR DISCOVERY: WHERE DO WE GO FROM HERE?

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The voyage of discovery is not in seeking new landscapes but in having new eyes.

--Marcel Proust

For years, in my practice, the weeks and months following my client's examination for discovery were a key time frame in my personal injury cases.

The discovery had a certain aura. The client perceived attending the examination for discovery as something nerve-wracking and important. A somber day and a chance to tell their story. From time to time they received some long sought vindication by watching the cross examination of the defendant who harmed them and changed their life.

Both sides came prepared tackle in order, and usually left armed with the information they needed to evaluate the damages claim and assess any liability risks in the case. All signs pointed towards settlement discussions.

Not anymore.

Discoveries in our office are being set down much earlier than ever before. This seems to be a deliberate tactical choice made by defence counsel to attempt to set the agenda earlier in the case, perhaps in the hope that doing so will lead to quicker (and presumably less costly) resolution of the file.

In the current environment it is likely that discovery will not be the catalyst for settlement discussion that it once was. So it is perhaps more important than ever to follow through and follow up carefully on your client's discovery.

### **Keep the file on your desk.**

In almost every case your client will have revealed something unexpected, some little detail about themselves or their case while giving evidence that can assist you in blowing your case wide open.

In small cases it may be a feature of the accident or aftermath that was previously overlooked. In larger cases it might be a collateral witness previously unidentified that buttresses a weak economic theory.

If you are attending the discovery with your client, or if one of your colleagues is there in your place, the keys to moving forward from discovery are the same. Do not simply put the file back on the shelf. Consider where the evidence can take you. Listen to your client's answers. Listen to your opponent's questions.

Some lawyers, uncertain of how to take the next step with a case where settlement prospects seem distant and trial is very far off, may think it is easier or more prudent to put the file away for a while and look at it again in a few weeks or months.

This is perhaps a decision made not just because it is the easy thing to do. It may also be based on a sort of hope that if put back on the shelf the file will mature like a fine bottle of wine. Nice idea- if your client is catastrophically injured and you are resolved to take the case to trial come hail or high water. Perhaps

where you have already worked the file up, all your reports are in, and the discovery is really just a prelude to the trial.

Only in the rarest of cases will it be prudent to do nothing after your client's discovery.

A more careful approach is usually going to be to keep the file out, get yourself a cup of tea and take a detailed, keen look at what just happened. In a few weeks you will forget the nuance with which your client explained their situation. Act while the file is fresh in your mind. It is less time consuming to go over the file from top to bottom while it is fresh in your mind from the discovery. Touch the file once, not two or three times, and then move on to the next case that needs your attention.

### **Consider where the evidence can take you.**

Does your client pinpoint a specific area of pain in their neck that has not been properly investigated? Would an MRI help to see if the underlying problem is caused by a protruding disc or an undiagnosed fracture? This could provide helpful objective evidence to demonstrate why your client's problems are persisting. It can also rule out suspected problems which can give you and your client comfort in knowing what precise medical situation they are dealing with when they approach settlement or trial.

### **Consider what further evidence you need.**

Did your client discuss how their condition has been getting worse, not better?

Does the family doctor seem lost or overwhelmed and do you need to have an expert evaluate their condition to help out? Would an MRI be helpful? Does the family doctor think this will be of assistance?

Have you considered what collateral evidence you need? How will you get it? It is often better to talk to collateral witnesses early in the case – and then again closer to trial to get a broader perspective on what they see with your client.

Did your client give evidence of difficulties at work- who has likely seen your client struggle- their boss, coworkers, and friends? If their names came up at discovery you can expect the defence to get in touch with them, why wouldn't you?

### **A further word on MRI.**

I use MRI on most of my files because I find the information it provides really helpful. Positive results help me decide what further evidence my client needs. Negative results help my clients settle their case with greater certainty that there are no latent problems that we have overlooked.

When recovering the cost for an MRI, I treat it like any other expert report disbursement (i.e. GP, IME or accident reconstruction, etc.). Keep in mind that in order to claim this as a disbursement you should be able to establish that you held a belief that it was a reasonable and necessary expense at the time it was incurred. It is helpful evidence for the Registrar if the client's doctor also thinks it is necessary (for medical reasons or legal reasons - it does not matter) but generally it ought to be sufficient that you can say that you need it to properly advise your client and conduct their case.

I consider this easy to do with an MRI where my client has ongoing symptoms of pain. I believe that in order to properly advise the client on whether or not to settle, and for how much, I need to be sure there are no latent problems before settling.

If your client presents to you in your office with complaints of cognition problems and memory loss would you not send them for a proper evaluation by a specialist, even if their family doctor overlooked these problems (as often happens) or seemed to downplay their significance?

Of course you would.

MRI is no different. It is a useful and often necessary tool in evaluating your client's condition. The cost of an MRI is no different from any other disbursement. The key is whether you think it is reasonable and necessary.

### **Listen to your client. What is the real story they are telling?**

You cannot follow up effectively on your file if you don't listen to your client.

I have heard stories of lawyers working on other files, reading magazines, even taking phone calls or e-mails during their client's discovery. How can you spot the gems in your case or the gaps in the defence if you are not listening? In my experience clients do not always tell me things the same way they explain themselves at discovery. So try and listen carefully.

This is infinitely more difficult when you are dealing with opposing counsel who is unprepared or who struggle to get to the point in the case, but along the way, even these examinations for discovery can leave you headed in the right direction.

What the defence asks, even how they ask their questions may tip you off to what they perceive as the strength or weakness in your case. If you are alerted to this, you can fix the problem or buttress the evidence on a given point.

On the other hand what your client says and how she says it may give you an indication that there is a ticking time bomb in your case that must be defused before it explodes and causes irreparable harm to your client's claim.

### **Follow up.**

As lawyers we have a wide variety of tools at our disposal with which to move our client's claims forward. The burgeoning private/profit medical system which now parallel's the public system allows for easier access to specialists far more quickly than in previous years. You can use these resources to your client's advantage.

If medical follow up is warranted consider whether the specialist you need might have time available at the private clinic to assess your client. Many of the finest medical experts in town do not practice in the private clinics, but there are also many who do.

Consider the chronic pain programs. The St. Paul's clinic, historically a place which refused persons involved in litigation has now relented from that position and will accept your client in the right circumstances. The Victoria pain clinic is less expensive than other similar programs and seems to have greater availability to allow client's access to chronic pain management strategies, advice and treatment.

Go to your client's home. Go to their work if they will let you. Meet the friends they talked about at discovery. Decide for yourself if they can help you prove your client's claim that he cannot do his job as well, or as quickly, or that he no longer likes to socialize or go hiking with friends on weekends.

Interview your client's neighbours. Have they seen your client struggling to take out the trash, or mow the lawn? Neighbours may be more powerful witnesses than family members as the neighbour truly has no interest in the outcome of your client's case.

Some of this can and should be done early in the case but the truth is you are more likely to be able to crystallize your thoughts and narrow your approach to how these witnesses can help you, after hearing your client's evidence of how they get by every day.

Functional capacity evaluations can be incredibly helpful in establishing with some objectivity the level of your client's disability. Your client may be struggling yet still working full time. A good FCE can tell you whether the restrictions she has make her likely to be less employable in the open market. Why make a subjective argument (e.g. she thinks she is less able to compete) when you can get some objective data that supports that if she is not able to continue on with her sympathetic employer she will have real difficulty competing for work in the real world when she no longer has her current accommodations.

Consider using an occupational health doctor to assist you in determining if your client is truly able to engage in their usual occupation, or likely to ever return to it. If the job is safety sensitive these doctors may assist you in proving that it is not in anybody's best interest for your client to soldier on or hang on to their job when others might get hurt as a result.

Day in the life videos may help you to show your client's daily struggles in a manner that describes the severity of their condition beyond mere words. These can and probably should be prepared professionally to assist in their admission at trial. Even if you are unable to or choose not to use the video at trial, the video will give you more insight into the case than you may imagine. It will also allow you to ask your colleagues and partners to assess your client's appearance/ demeanor/ presentation before taking the case to trial.

### **Get Prompt Feedback**

If you cannot attend the discovery yourself it is critical to get early feedback and quality insight into the case from the lawyer who attends in your place. Attached is a sample memorandum prepared by my colleague Aimee King following an examination for discovery on a slip and fall case. I have removed the bulk of the actual notes from the discovery because the summary has most of what I need to decide how and where to go with this case. Everything from the impression left by the client with the defence counsel, to the evidence regarding his job prospects and income prospects is helpful and goes into the thought process of how best to move the client's case forward.

This type of detailed summary with some thoughtful analysis is very helpful in determining the best way in which to move forward with your client's claim. Consider putting similar thought and effort into your discovery follow-up. Give the necessary instructions to follow through on requests and to chase down the leads and *then* put your case back on the shelf.

Your client's case will be much the better off for the effort you put into the case in the days and weeks following the discovery.

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