# Discovery or Surgical Strike: Effective Preparation for Non-Party Examinations

FOR THE ADVOCATES' SOCIETY

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## INTRODUCTION

Will challenges typically involve the examination of individuals who are not parties to the litigation.[*] Virtually every Order Giving Directions (OGD) requires the production of records from, and the ability to examine, either or both of the lawyer who drafted the will and the testator's health care provider. Unlike other civil litigation proceedings, the court routinely grants leave to examine these and other non-parties in estate litigation matters. The discovery process provides the examining party with a "safe environment". A question can be asked on discovery that counsel may not want to ask for the first time at trial. This is particularly so of a non-party. If the person being examined provides evidence that is detrimental to the party's case, counsel can prepare for and perhaps minimize the potential damage of such evidence when lead at trial. However, it is essential that before pursuing such examinations, counsel is fully aware of the obligations under the Rules of Civil Procedure and is properly prepared.

What do you hope to learn or accomplish by conducting the examination of the non-party? This begins with reviewing the issues. In will challenges the OGD sets out the issues to be tried. If your client is propounding the will, has the opposing party pursued an "everything but the kitchen sink" approach in the hope that something will come out which will create doubt about the validity of the will? If so, it may be more important to examine the opposing party before any non-party witnesses. If not, and the only issue is the deceased's testamentary capacity, it may be more time and cost effective to secure the evidence of other witnesses, who have no vested interest in the litigation.

[*] This paper is not intended to address issues related to expert witnesses

What is your theory of the case? What is your strategy? Are the documents so compelling and your client's case so strong that you want to plough ahead and use the evidence of the non-party as the lynchpin for a summary judgment motion? Or, is your client (perhaps a charity) unfamiliar with the issues and the deceased, and hopes to use the examination of the non-party as an opportunity to secure documents and information to assist it in knowing what case it has to meet? If the former, the examination will resemble a "surgical strike" undertaken to get specific documents and evidence to bolster a summary judgment motion. If the latter, it will be to gather all of the evidence that is available, to ascertain the strength of your opponent's case, and will be a traditional discovery.

After conducting the initial investigation of the documents and evidence, counsel must start with an assumption; if propounding the will, that it is valid, and if challenging it, that the will is not representative of the testator's intent. The object is then to marshal the facts and opinions of others in an effort to convince the opposing party, and ultimately the court, that the assumption is correct. In will challenges it is "all or nothing" litigation. The will is either valid or it is not and the one person who can shed light on its validity is no longer available to speak to the issues.

Much is driven by what facts, documents and evidence you are able to glean from your client, and the documents you are able to get through the OGD. The interview of the client is of crucial importance. It is counsel's job to know the law and the relevance of particular evidence to the issues to be tried. Clients rarely appreciate that they might have information, which on the surface appears minor or irrelevant, which may actually be instrumental in forging an early resolution of the litigation. By careful and thorough investigation counsel may be able to discover other non-parties who have key evidence.

Consideration should be given to seeking leave of the court to examine these non-parties as well, including whether they should be examined under Rule 36.04(2), which is discussed in more detail later in this paper.

This could include individuals other than the drafting solicitor and the treating or family physician. Relatives, friends, neighbours, personal support workers and other professionals such as dentists, accountants, financial advisors, and even the local bank teller might be appropriate persons to canvass for their observations and knowledge of the deceased. Anyone who has had regular, sustained contact with the deceased should be considered a potential non-party witness. As noted by the court in *Re Davis* [1963] 2 O.R. 666 (Ont. C.A.), the testimony of experts should not outweigh that of persons who had the opportunity to regularly observe and interact with the testator.

There are many cases where the court has had to, or chosen to, rely on the observations of non-professionals and/or anecdotal evidence in dealing with the issue of testamentary capacity, particularly where there is limited medical evidence of capacity, either because the health-care practitioner never turned his or her mind to the testator's capacity, or did not have the qualifications, time or experience to undertake such as assessment. The testimony of these lay people may be of equal or better value than medical reports where the physician was not directing his or her mind to the testator's capacity. As the court noted in *Re Davis* "…good sense may prevail over science or the law." Thus consideration should be given to including the discovery of these non-parties when drafting and securing an OGD.

As noted earlier, in will challenge cases, the OGD routinely provides for the examination of the deceased's lawyer and physician. It is, however, important to note that the court must grant leave for such examinations pursuant to Rule 31.10. If a party seeks to examine a non-party witness s/he must meet all of the pre-requisites set out in the Rule, as they are conjunctive. In *Lloyds Bank Canada v. Canada Life Assurance Co.*, (1991), 47 C.P.C. (2nd) 157, the court

refused to grant the moving party leave to examine a non-party where the non-party agreed to meet with one set of solicitors for a party in the proceeding but would not meet with counsel for the moving party.

The court is not to make an order granting leave to examine a non-party witness unless it is satisfied that the proposed witness has information that is relevant to a material issue in the proceedings. Once that threshold is met, the court must also be satisfied that: a) the moving party cannot obtain the information from the non-party it seeks to examine in any other manner, or from a party that is subject to examination in the usual course; b) that it would be unfair to require the moving party to proceed to trial without having had the opportunity to secure the evidence of the non-party; and, c) that the examination will not inappropriately delay the trial, create unreasonable costs for the parties or result in unfairness to the person the moving party seeks to examine. This is discussed in more detail later in this paper. This is a cumulative test and all criteria are to be met. If the witness is prepared to be interviewed by a party and to provide the party with documents and his/her evidence related to the matters in issue, leave should not be granted. The party should provide the document and information (if asked) pursuant to Rule 31.06(2), negating one of the tests for leave to examine the non-party witness. (See also *L'Abbe v. Allen-Vanguard*, 2011 ONSC 7331 (CanLII) at paragraph 12).

A recent decision of Justice Myers in *Seepa v. Seepa* CanLII 2017 ONSC 5368 (CanLII) should give pause to those seeking documents from, and the examination of, non-parties. His Honour notes that current practice is for the parties to agree on the terms of the OGD and to proceed to request that the court grant the OGD on a consent basis. Justice Myers states that the orders appear generic in nature, are rarely crafted to apply to the particular facts or issues in the proceeding before the court, and lack the "minimal evidentiary threshold" required to permit the court to make an order granting leave under Rule 31.10. While acknowledging that one of the goals of the OGD is to

promote early disclosure and resolution, these orders should be customized to ensure that they are not fishing expeditions, and that they do not permit a party who has no real evidentiary basis to a will challenge to be given full reign to delve into the deceased's confidential medical and legal files. It will be interesting to see if this decision will change the practice of counsel and/or the court. Proportionality is also a consideration in determining who should be examined as a non-party and the scope of the examination. (Rule 29.2.03 of the *Rules of Civil Procedure*).

## PREPARING FOR THE DISCOVERY OF A NON-PARTY WITNESS

### a) Securing and Organizing Documents

Before conducting any discovery, counsel should secure and carefully review and organize all documents. There should of course be a provision in the OGD permitting or requiring either the Estate Trustee During Litigation (ETDL), if there is one, or a party, to secure the files and records of the non-party witnesses who are to be examined, together with any financial or other records that may be relevant. If the ETDL is tasked with securing the documents this may relieve the party from the costs associated with the productions. However, this will also mean that the party will not have any control over the timing of delivery of the documents. If the party believes it has a strong case and wants to proceed quickly, it may be preferable to maintain control over the document discovery by permitting each party to obtain whatever documents they deem necessary (bearing the costs itself) with an obligation to deliver copies to the opposing party.

Traditionally, the OGD provides for the production of medical, financial and legal records. But what of other documents that may be in the possession of third parties? These could include letters, emails, or other meta-data which could be relevant to capacity and undue influence. Rule 30.10 allows a party to

seek leave for the production or inspection of a document that is in the possession, control or power of a non-party and that is not privileged. The court must be satisfied that the document is relevant to a material issue in the proceedings and that it would be unfair to the moving party to have to proceed to trial without the document being produced. If someone asserts the document is either privileged or irrelevant, the court may inspect the document to determine the issue. This document discovery from non-parties may be quite important in the estate litigation context. Letters, emails, texts sent to others may offer evidence of the testator's mental capacity, the testator's thoughts and wishes, or even the testator's relationship and interactions with the parties. Consideration should still be given to Justice Myers' comments in *Seepa v. Seepa* regarding the necessary evidence that must be submitted before an order will be granted.

Once the relevant documents are secured, counsel should thoroughly review them with his or her client. The documents might lead to the need to interview and discover additional non-party witnesses.

In will challenge litigation it is important to create a family tree and a chronology. The chronology will assist in the examination of party and non-party witnesses alike, particularly if counsel for all parties can agree on the relevant events and dates. This chronology can then be used during the examinations and filed with the court prior to the commencement of the trial. It saves time, expense and provides a framework and context for the examination of all party and non-party witnesses.

If counsel for the opposing party is willing to co-operate, a joint document brief containing all of the relevant documents should be prepared for use during the examinations. This can be marked as the first exhibit in all party and non-party examinations, which will not only limit the number of exhibits during an examination, but will also keep them organized.

Of course there may be documents which the other side is not prepared to admit or which are produced during the course of the examination or thereafter. If both counsel are not willing or able to agree on the contents of a document brief for the examinations, the documents that a party intends to put before the witness should be organized to the extent possible consistent with the order of the questions that are going to be asked on the examination. It is common to have a separate folder for each document, clearly labelled. The folder should contain not only the original of the document, if available, but also at least two additional copies – one for the witness, and one for each opposing party. This eliminates the need for counsel on the other side or the witness to inspect the document while the examining party waits. It also reduces the time spent on the examination, and provides the witness with the ability to review the document(s) throughout the questioning related to the document. The witness will not be in a position later to say that he or she did not have an opportunity to carefully review the content of the document(s).

The examination of a non-party witness can be contentious or even confusing if the witness is nervous. The witness may not have counsel and may be unfamiliar with the examination process. It is imperative that counsel proceed slowly and carefully. Care must be taken to mark all exhibits, and identify the exhibits on the record so that there is no confusion as to whether the document is an original or copy, and whether it has been actually identified by the witness. Once a document has been properly marked as an exhibit all copies should be put back in the proper file. It is not uncommon for documents to end up in the briefcase of opposing counsel or remain in the possession of the witness. You must keep control over your documents.

Consideration should be given to introducing documents through the non-party witness. Rather than trying to admit the documents under the *Evidence Act*, it is easier to have the documents verified by the party who created them. This could include the solicitor's file, original wills, doctors' notes, original letters

written by the deceased to a non-party, copies of cheques, beneficiary designations, written instructions of the deceased, etc.

Where such documents are produced and attested to by the non-party witness it may be helpful to secure the acknowledgement of the opposing party that no further proof is necessary for them to be submitted during trial.

**b) Securing and Preparing the Non-Party Witness**

Even though there may be an OGD providing for the examination of a non-party witness and waiver of privilege and confidentiality, such witnesses should still be served with a Summons to Witness. The Summons should include a statement requiring the witness to bring to the examination all documents in his or her possession related to the issues in the proceedings. However, this should not be news to the non-party witness. Rule 30.10 requires that a non-party whose documents are being sought must be served with the motion for leave. Interestingly, Rule 31.10 contains no similar provision regarding service. However, as noted the convenience of the non-party is a factor the court is required to take into consideration prior to granting leave to examine a non-party witness, perhaps it should be self-evident that the non-party should be served with the motion for leave.

Courts should, it is submitted, refuse to grant leave to examine the drafting solicitor (or any other witness, particularly one who could be the subject of a claim in related proceedings) unless he or she has been served with the motion, or the original application where such relief was sought. It is submitted that failing to serve the non-party does not permit the court to satisfy Rule 31.10. One of the pre-requisites for granting leave is that the court is satisfied that ordering such an examination does not create "…unfairness to the person the moving party seeks to examine". It is not clear how the court can assess that

required factor without the non-party having an opportunity to address the issue.

Further, it is just good practice. Service allows certain non-parties (primarily doctors and lawyers) with an opportunity to contact his or her insurer who will represent them at the examination. The Lawyers Professional Indemnity Company has made it clear that whenever someone wants to examine the drafting solicitor, that solicitor should immediately contact LawPro. If the drafting solicitor was not served with the application or motion, his or her counsel will likely move to set aside those aspects of the OGD that deal with the drafting solicitor's requirement to produce his or her file and to be examined.

If the OGD goes further and includes a provision waiving the deemed undertaking rule (Rule 30.1.01), you can be assured that counsel for the drafting lawyer will not only seek to set aside the paragraphs related to production, examination and the waiver related to his or her client, but will also seek costs from the moving party. It is not unusual to see OGDs which waive the deemed undertaking rule. It is also not unusual to see absolutely nothing within the application, motion record or affidavit materials which would justify granting such an order. This is, it is submitted, improper practice and should not be condoned by either the Bar or the Bench.

Waiver of the deemed undertaking rule should only be granted in exceptional circumstances and only where there is compelling evidence to support its waiver. It is difficult to understand why such an order would be sought in an early OGD unless the party was intending the examination of the non-party to be a fishing expedition. The examination of the drafting solicitor is not intended to secure information to pursue a claim against the lawyer. That is not the intent of Rule 31.10.

It is not uncommon for the drafting lawyer and his or her counsel to seek costs if a lawyer is to be examined. This includes the legal fees of counsel for the

lawyer, but also compensation for the lawyer. This can include the cost of reviewing the documentation, preparing for the examination, and the attendance at the examination and/or trial. It is to be noted that Rule 31.10 specifically provides that the court, in granting leave to examine a non-party, can make such orders regarding costs and terms as it deems appropriate. While not as common, other non-party witnesses often retain counsel, (this could include physicians, accountants and financial advisors who may have concerns about the examination process and potential claims that could be made against them) and it would not be unusual for these non-parties to seek costs as well.

Now that you have your order permitting you to examine the non-party witness, what do you do? Can you speak to them in advance of the examination? If you do, will your conversations or any notes that the witness took of your communications be discoverable? Who examines the witness first, the party propounding the will or the challenger? During the course of the examination who, if anyone, can object to the questions being asked of the witness?

There is no property in a non-party witness. Anyone can speak to the non-party witness in advance of the examination. These are not the witnesses of any party, but they are instead witnesses of the court. If counsel for the party knows that the non-party has counsel, the *Rules of Professional Conduct* (Rule 4.03(2)) require counsel for the party to communicate with the non-party's counsel. However, if the witness is a lawyer and there is a potential that one or both of the parties may make a claim against the lawyer, it is only proper to advise the witness to contact his or her insurer in advance of any substantive discussion.

Conversely, the non-party witness is under no obligation to submit to an interview with either party or their counsel in advance of the examination. Clearly, if the non-party is not served with the originating process, is not

compensated, and is made to feel as if he or she is being attacked, there will not be much co-operation.

However, if the witness is a “friendly”, in the sense that he or she “sides” with a particular party, it is not uncommon for the “friendly” party’s counsel to prepare the non-party witness (and his or her lawyer if retained) for the examination. If the non-party was the deceased’s long-standing lawyer who prepared all of the testator’s wills except the last one where a new beneficiary was inserted, (using that beneficiary’s lawyer) he or she may have more of a partisan view with regard to the validity of the last will. In such a case the witness may be prepared to discuss the issues in advance of the examination.

There is nothing improper in preparing a non-party witness for discovery, provided counsel does not suggest that the witness withhold evidence or mislead the other party or the court. If counsel has the opportunity to prepare the witness s/he should do so, particularly if the witness has empathy for the party’s position in the litigation. In all cases however, the witness should be instructed to answer truthfully and to the best of his or her ability, but only to answer the questions asked. It is important however that the witness’ testimony be candid and the court not view the witness as being “…unduly affected by partisanship…” *Banton v. Banton* 1998 CanLII 14926 (ONSC).

If the witness is “yours” you should, if you can, fully prepare the witness for the questions you intend to ask and the questions that you anticipate your opposing counsel will ask. If the witness takes notes of your conversation when you are preparing him or her, or if you provide the witness with documents or correspondence, this will be discoverable. In regard to your discussions with the non-party witness it is important to be cognizant that these communications are not privileged, and that opposing counsel may seek production of them as well.

**CONDUCT OF THE EXAMINATION**

The party who has sought leave of the court to examine the non-party is entitled to examine the witness first. However, as we have seen, many OGDs (including those provisions related to the examination of non-parties) are being granted on consent of all parties so there may be no "moving party", as contemplated by Rule 31.10, just an Application for a Certificate of Appointment of Estate Trustee with a Will, and a Notice of Objection. In such cases, it should be the party adverse in interest to the witness who should begin the examination. For example, if the party is propounding the will and the witness is the drafting solicitor, the challenger to the will should initiate the questions. Certainly if both parties agree to an alternate order, that should be followed. After one party proceeds the other may ask additional questions, remembering always that the questions should be limited to the material issues in the litigation. This is not a cross-examination. Any re-examination should be done by counsel for the non-party witness.

The questions should not delve into areas (particularly in dealing with professionals who are non-parties) such as "standard practice" or hypotheticals. If the professional is represented by counsel, he or she should and will likely object to any such questions. They are not evidence related to the particular issue at hand being the validity of the will in question. Further, going into these areas may invoke Rule 29.2.03(c) of the *Rules* as such questions may prejudice the non-party witness. For an excellent summary of the types of questions that would traditionally be put to drafting solicitors and health-care professionals see *Challenging the Validity of Wills*, Ian M. Hull, Carswell, 1996, pages 100-103.

If the witness has counsel, it is for him or her to object to any questions posed of the witness. It is not appropriate for the parties to object to questions unless it is evident that the witness is being harassed in some manner. However, if a party is going far beyond the scope of the issues raised in the litigation, and the witness has no counsel, it may be appropriate to interject. Each examination

will depend on the particular witness, his or her relationship to the deceased and the issues to be tried.

**POST EXAMINATION ISSUES**

How should the examining parties deal with undertakings and refusals? Under Rule 31.10 the court, in granting leave to examine a non-party witness, usually makes an order related to the costs of the examination. If such an order is not made within the OGD, Rule 31.10(3) would apply and the party examining is to provide every party who attended or was represented at the examination with a copy of the transcript of the examination at no charge. Again, if leave has been granted to a moving party, he or she would pay for and provide the transcript. However, if the examination was on consent and silent on the issue, it would be appropriate for each examining party to pay for and provide the transcript of his or her examination of the non-party.

It would also be wise to provide the non-party with a copy of the transcript. This is of particular importance if the party intends to call the non-party witness during the trial. This enables the witness to review the testimony and correct any answers given, or to address any undertakings.

The evidence of the non-party as set out in the transcript can used at the trial to impeach the witness, but may not be read in at trial as an admission. However, the value of the examination of non-party witnesses is to ascertain at any early stage the evidence that will either undermine or bolster a party's position in the litigation. It has value in facilitating the knowledge of the parties in estate matters where the deceased is not available to fill in what could be "gaps" in the evidence. Such examinations often take place prior to mediation and may assist in the early resolution of will challenge proceedings.

## DE BENE ESSE EXAMINATIONS

As noted earlier, litigation related to the validity of wills sometimes poses unique challenges for counsel involved. Given the nature of the litigation, it often involves witnesses who may be elderly, in ill health, experiencing a decline in cognition, or who may, due to retirement or work obligations, have left Ontario. Such a witness may have relevant or even crucial evidence which could assist your case, or more importantly, poke holes in your opponent's case. If there is a risk that the witness may not be available to testify when the trial is finally held, consideration should be given to seeking an examination, sometimes referred to as an examination *de bene esse,* pursuant to Rule 36.01(2) of the *Rules of Civil Procedure.*

As many civil trials now take months and sometimes years to be scheduled, there is a real possibility that a witness, who could be a contemporary of the deceased, might retire to another jurisdiction for most of the year, move away, die or become mentally incapable. Your witness could be the elderly neighbour who had an opportunity to observe and converse with the deceased on a regular basis; the long-time friend who played cards with the deceased every month; or the deceased's lawyer, family physician, personal care worker, accountant or financial advisor. Rule 36.01(2) permits a pretrial examination which ensures that the witness' relevant evidence may be secured, preserved and used at the trial without the requirement that the witness be in attendance at the trial.

Historically it has been possible to secure an order granting a *de bene esse* examination where there it can be shown that, due to illness, the witness may not be able to attend the trial to give evidence. However, the situations in which such examinations are possible have expanded in recent years. Under Rule 36.01(2) where a party proposes to introduce evidence (and in this case we are referring to a non-party), the party may, with leave of the court or the consent of

the other party or parties, examine the person under oath and make the transcript, videotape or other recording available to be tendered as evidence at the trial.

In exercising its discretion to grant leave the court is required to consider the possibility that the witness may not be able to testify at trial due to "…death, infirmity or sickness"; that the witness could then be outside the jurisdiction of the court; the convenience of the witness who is to testify; the cost of bringing the witness to the trial; whether the witness should be required to give his or her evidence in person at the trial to ensure the trier has the opportunity to assess the witness; and any other factor that the court, in the particular circumstances of the case, considers relevant.

As a general rule, it is preferable that a witness testify at trial. New issues and questions can arise during the course of the proceedings and the trier should be able to observe, and if necessary address his/her own questions to the witness. However, it may be impractical or exceedingly costly to require the witness to participate in the trial. For example, a neighbour of the deceased who was privy to comments the testator made about his will, and who was also a witness to the execution of the will, but who has subsequently moved to another country, should probably be examined under Rule 36.01(2). In *Colistro v. TBay Tel,* 2013 ONSC 534 (CanLII), the court granted leave to examine a witness before trial where the witness, who normally resided in Australia, was visiting Ontario. It may also be foolhardy to "hope" that the witness as described above, who might be elderly and in bad health, "lasts" until the trial. In both cases it may be imperative that the evidence that the witness has regarding the issues before the court is preserved and presented at trial.

An examination under Rule 36.01(2) is <u>not</u> a discovery. It is a full and comprehensive examination which is intended to mirror what would otherwise take place during a trial. The person seeking leave of the court examines the witness in chief, and the party adverse in interest conducts the cross-examination. Re-examination (as limited by the *Rules*) is permitted in the usual

manner. This ensures that the party adverse in interest has the opportunity to test the witness' evidence and credibility. If rather than leave being sought both parties consent to the *de bene esse* examination, who conducts the examination in chief?

It should also be noted that where a party seeks leave of the court to conduct an examination under Rule 36.01(2), the court may, prior to the examination, order that the moving party pay any costs of the other party that could reasonably be expected with respect to such an examination. (See Rule 36.01(5).)

As noted earlier, in lieu of the witness being available to testify at trial, a transcript, videotape or other recording of the examination can be introduced as evidence at the trial. The evidence is not the exclusive evidence of the moving party and can be introduced as evidence by either party. (See *Wright v. Whiteside,* (1983) 40 O.R. (2nd) 732.) Of course the admissibility of the evidence taken before trial is always subject to the court's discretion as it may refuse to admit such evidence and require that the witness (if still able) attend at trial to testify. This is more likely where the evidence is highly contentious. (See Rule 36.04(2) and *Russett v. Bujold,* 2003 CarswellOnt 5501, and *Sidhu v. Diceglie Estate,* 2016 CarswellOnt 15180.)

Most litigators are familiar with oral examinations, but perhaps less so with videotaping. There are pros and cons to consider in determining which method to adopt. Videotaping permits the court to observe the witness, an opportunity which is more consistent with a witness giving testimony at trial. However, videotaping often changes the dynamic of the examination, both for the witness and counsel. It is essential that the witness be the only person who can be viewed in the videotape and that the videotape evidence be verified under oath by a third party who controls the taping, can attest that the record is accurate, that it has not been edited, and that it has not been altered in any way including being played at a speed other than what how it was originally recorded. (See *R. v. Maloney (No. 2)*, 1976 29 CCC (2nd) 431.

**SUMMARY**

In *Silvercreek II Limited v. Royal Bank of Canada*, 2014 ONSC 6751, (CanLII), Master Short summarized the purpose of discovery and its objectives (paragraphs 17 and 18):

- Disclosure of the evidence and the legal theory of the opposing party so that the examining party can understand the case to be met;
- Verification that all relevant documents have been produced;
- Admissions that will narrow the issues, dispense with formal proof, or reveal deficiencies in the opponent's case;
- Streamlining pre-trial and trial procedures;
- Facilitating settlement through mediation or otherwise; and
- Determining if a full trial or a summary procedure may be appropriate.

These are the goals that should be kept in mind when determining whether a non-party witness should be examined. Is it necessary to examine the non-party or can his or her evidence be secured through other means? It is imperative that counsel give consideration to all aspects of Rules 30.10 and 31.10, particularly in light of *Seepa v. Seepa*. We may see the "culture shift" suggested wherein the court may require the productions from, and examination of, non-party witnesses to be tailored to address the particular issues in the litigation and to address proportionality.