

GUIDE TO QUESTIONING

Questioning is an important part of many lawsuits. It is not a trial, but rather a pre-trial proceeding at which the parties (or their employees) are questioned under oath. The questions will relate to matters at issue in the lawsuit. The questions and answers are taken down by a court reporter and later produced as a written transcript. Questioning is one of the procedures established by the Rules of Court for helping each party to find out something about the other side's case in the lawsuit.

In Alberta, there is also a procedure referred to as Questioning on Affidavit. This is a pre-trial proceeding where the opposing party's lawyer will question you under oath on matters relating specifically to any affidavit that you have sworn. The transcript from Questioning on Affidavit will be provided to the chambers judge that hears any interim application in your lawsuit.

What is the purpose of Questioning?

1. To find out what the other party has to say about the matters which are at issue in the lawsuit;
2. To determine whether there are any areas of agreement; and
3. To try to obtain admissions from another party which can later be used against that party at trial.

The lawyer who is doing the questioning can ask a fairly broad range of questions dealing with the issues in the lawsuit. The lawyer for the party who is being examined is present to be sure that all the questions asked are proper and relevant, and to object if he feels that any questions are not proper or relevant.

Where will the Questioning be held?

Questioning is generally held at the offices of one of the lawyers involved in the case. The parties, their lawyers, and a reporter will be there. No judge is present because this is not a trial or even part of the trial.

If one of the parties does not consent to Questioning, it is possible to serve a Notice to Attend Questioning (in Alberta). This Notice requires the person who was served with the appointment to attend at the date and time listed in the appointment. The person served with the Notice will be provided with payment of the mandated amount for fees and may be paid mileage if they are required to travel to the location specified in the Notice. If a party does not attend for Questioning at the time and location specified in the Notice, it may be possible to obtain a court order requiring that person's attendance.

If the parties reside in different cities, the parties may agree to hold Questioning at a location that is approximately halfway between the two locales.

What are the times for Questioning?

Questioning is usually held from 10:00 am to 12:00 pm and from 1:00 pm to 4:30pm on the designated days. There will usually be a short break in the morning and in the afternoon. Generally, questioning will be completed in one day, but depending on the complexity of the lawsuit and the number of parties (and/or employees), additional days may be required.

What should be done to Prepare for Questioning?

Questioning is not intended to be a test of your memory and there is little you can do to prepare yourself for it. To the extent possible, we may recommend that you familiarize yourself with the relevant facts in the lawsuit (especially in civil law situations). You will simply be required to answer the questions that are asked of you. If you do not know the answer, you should say that you do not know. If you have the ability to obtain the answer or a document that contains the information requested, we may have the option of providing that information or document to the other party.

Will there be further Questioning?

In most instances, the answer is no. There may, however, be further Questioning if, for example, after providing any answers to undertakings, the other lawyer has further questions arising from those documents.

What is the Result of Questioning?

Questioning provides the opportunity to review the strengths and weaknesses of your case and those of the other side. For this reason, many lawsuits are settled after Questioning. Even if there is no settlement, the Questioning serves a very useful purpose because it acquaints us with much of the evidence. It also affords us an opportunity to obtain admissions from the other party which can be used at trial. Before scheduling a matter for Questioning, we will discuss whether the potential benefits of Questioning are worth the time and cost.

THE RULES OF QUESTIONING

There are basic rules which must be remembered by all clients when attending any Questioning process.

RULE NO. 1: TELL THE TRUTH

The first rule of Questioning is to always tell the truth. The oath should make this rule evident but even honest witnesses can become so concerned with what they are “supposed to say” that they forget the simple rule: “Just tell the truth”

When answering questions, just remember this: Don’t try to figure out where the examiner is going with his questions, or what he is trying to get at. Don’t worry about traps. If you try to fashion your answers to avoid what you think are traps, you will probably get yourself into trouble. If the truth is a trap, then we are already in trouble. No matter what you were asked, just tell the truth. Don’t worry about the effect your answer may have on the case. Just answer the question truthfully. If we can’t tell the truth and still win this case we should consider settling, right now.

RULE NO. 2: ANSWER ONLY WHAT YOU ARE ASKED

Answer only the question that you are asked. If you can answer with a “yes” or “no”, do so. The reason for this rule is obvious. The oral Questioning is intended to become the evidence of the other side. This is not the time for the witness to give reasons, explanations or elaborations which can only serve to educate his opponent and open further lines of inquiry.

Say only “yes or “no” if you can. You may wonder why. Questioning day is not your day in Court. It is not the day when we are going to try to persuade someone that your side of the story is the right one. You are going to testify because you have to. If you didn’t have to, I wouldn’t let you. You are there because the other lawyer wants to find out what you have to say, and try to get you to admit something which will help him with his case. Accordingly, the less you say the better.

You will find this very difficult to do. Most of the time, we speak to one another to help one another understand. Your purpose in Questioning is to answer questions and nothing more. Resist the urge to elaborate. Say as much as is necessary to honestly answer the question but no more.

RULE NO. 3 DON'T GUESS

If you don't know the answer to the question, say so. Never Guess.

This rule is necessary because most people believe, unconsciously perhaps, that if they are asked a question they ought to know the answer. For whatever reasons, most witnesses are very unlikely to say they don't know something which has to do with their case. If you don't have any knowledge as to the answer, avoid the urge to answer the question.

The reasons why guessing is dangerous are two-fold.

1. The guess may be wrong. If the witness has not made it clear that he is guessing, he will then be stuck with an affirmation under oath which the opposition may be able to disprove at trial – thus damaging the witness' credibility.
2. The guess may expose you to other areas of examination. For example, if you are asked a question for which you do not know the answer, you should say "I don't know". If instead, you say "I'm not sure but I think John Smith knows the answer" you've not only guessed, but also revealed to the examiner that someone named John Smith should probably be examined.

RULE NO. 4: ASK FOR CLARIFICATION WHEN NECESSARY

If you don't understand the question, say so. Most people engage in conversation to promote understanding and try to help their conversation partner when he is floundering. This tendency is skillfully exploited by some examiners who can elicit elaborate answers by being vague in their questions.

There is, however, a danger here. Some witnesses become so enamoured with the need of the examining lawyer to ask understandable questions that they become deliberately difficult. This not only delays the Questioning unduly, but reveals the witness as evasive or obstructionist. If you reasonably understand the question, please answer it. Do not answer if the question is ambiguous and you require clarification.