APPENDIX O: BEST PRACTICES

A - DISCOVERY PLANNING & SCHEDULING	Source
1. Within 30 days after the close of pleadings, all parties should hold a discovery conference by telephone to discuss the most expeditious and cost effective means to complete the discovery process, with regard to: a. Nature and complexity of the proceedings; b. Number of documents and potential witnesses involved; and c. Ease and expense of retrieving discoverable information.	Modified from US (Fed) discovery plan rule, and UK & Aus. proportionality tests. Other factors could include those under "complex case" definition in Ont. r. 77.09.1
2. No discovery (documentary, oral or written) should occur until counsel for all parties have had an opportunity to discuss the discovery process, and in particular: a. Dates for exchanging sworn affidavits of documents and productions; b. An agreed format for producing affidavit of documents and productions (e.g. electronic format, scanning copies of non-electronic documents on CD); c. Use of staged production of documents, in cases where there are voluminous productions, to ensure that the most relevant documents are produced promptly and that full production follows but does not delay timing of oral discoveries; d. Use of a joint book of productions (or a single searchable database); e. In jurisdictions where mandatory mediation exists, the selection of a mediator and proposed dates for the mediation; f. Use of agreed statements of fact, requests to admit, or demands for particulars to better clarify issues or identify non-contentious issues prior to oral discoveries; g. Use of written interrogatories prior to oral discoveries, after oral discoveries to follow-up on answers to undertakings, or instead of oral discoveries where their use will reduce the time and cost of the discovery process; h. Dates, location & expected duration of examinations for discovery, or dates for exchange of written questions & answers; i. Estimated dates for setting the matter down for a trial; and j. Potential need for individual judicial management for complex cases.	Modified from US (Fed), UK Pre-action protocols, Tex., NY & Ariz., and ABA Court Delay Reduction Committee,[1] and suggestions from case management masters; Advocates' Society, Principles of Civility for Advocates, paras 5 & 6[2]
3. After lawyers have completed a discussion of discovery issues, plaintiff's counsel (or plaintiff, if unrepresented) should prepare a letter listing any agreements that were reached during the discussion and deliver it to all parties.	Consultations
4. Each lawyer should discuss with his or her client the anticipated costs of each stage of the discovery process before commencing that stage of discovery.	Consultation with Sudbury & Algoma Bar Associations
5. No party should commence a discovery-related motion until all lawyers have met and conferred in a good faith effort to resolve discovery disputes.	ABA CDRC, AS Principles of Civility, para 5
6. The court expects lawyers to grant other lawyers' requests for reasonable extensions of time to comply with discovery obligations and other pre-trial matters, unless it is clearly inconsistent with the legitimate interests of the lawyer's client. Opposing reasonable requests wastes resources and needlessly inconveniences the court. A lawyer should never request an extension of time merely for the purposes of delay.	American College of Trial Lawyers (ACTL) Code of Pre-Trial Conduct (s. 1(c))[3]

[1] Court Delay Reduction Committee of the National Conference of State Trial Judges of the Judicial Division of the American Bar Association, "Discovery Guidelines Reducing Cost and Delay" (Spring 1997) The Judges' Journal 9 [hereinafter, ABA CDRC].
[2] The Advocates' Society, Principles of Civility for Advocates. http://www.advsoc.on.ca/civility/principles_tex.htm [hereinafter, AS Principles of Civility].
[3] American College of Trial Lawyers, Code of Pretrial Conduct. [hereinafter, ACTL Code]

B - DOCUMENTARY DISCOVERY	**Source**
Affidavit of Documents	
1. Before commencing or defending a proceeding, lawyers should explain to their clients in detail the necessity of making full disclosure of all relevant documents, and that the obligation to disclose is a continuing obligation.	B.C. Practice Checklist[4] ; Ont. Rules of Professional Conduct, r. 4.01(4)
2. Before preparing an affidavit of documents, each of the client's documents should be organized. Consider placing a unique serial number on each document before copying them, particularly in cases with voluminous documents. This allows tracking of documents throughout the litigation process & permits them to be returned to the client without destroying the integrity & order of the client's files. Separate relevant, irrelevant & privileged documents. Originals should remain unmarked & retained in a safe place for possible use as exhibits at trial.	BC Practice Checklist (6.4)
3. Affidavits of documents should be exchanged within prescribed time periods or such other time as ordered by the Court.	Consultations
4. Affidavits of documents should be completed and sworn by the party or an appropriate representative. The exchange of unsworn affidavits does not satisfy the requirements of the rules.	Consultations
5. Documents listed in schedules to affidavits of documents should be individually itemized with sufficient description to identify each document, subject to the need to protect privileged documents. Schedules should never use boilerplate language to describe a group or class of documents. Unless parties agree or the court orders, parties should not "bundle" documents together in the schedules.	Consultations; ACTL Code (s. 5(c) 3)
6. Lawyers should not assert privilege over documents simply to avoid producing relevant documents. If only part of a document is privileged, the part that is not privileged should be produced.	ACTL Code (s. 5(c) 2)
7. Schedules to the affidavit of documents should always be organized chronologically, or by issue (e.g. financial statements, medical reports, human resource documents, etc), or both issue & date, depending on the number and types of documents.	Consultations
8. Lawyers who prepare affidavits of documents through electronic software programs should make them available electronically to all opposing parties, where requested. In a case with voluminous documentation, lawyers should consult with opposing lawyers before preparing affidavits to agree on a consistent electronic software program that can be used by all parties.	Consultations
9. Once an opposing party's affidavit of documents is received, counsel should immediately provide a copy to his or her client to determine whether any relevant documents appear to be missing.	BC Practice Checklist
Document Production	
10. Before producing documents, counsel should consult with opposing parties regarding the most efficient & least costly manner of production. Lawyers should consider the benefits of: a. A joint book of productions; b. Use of consistent software applications to list documents; c. Potential cost savings of scanning documents & making them available electronically, as opposed to hard copies.	Consultations

[4] Law Society of British Columbia, "Practice Checklists Manual: Personal Injury Plaintiff's Interview or Examination for Discovery", http://www.lawsociety.bc.ca/library/checklist/body_checklist_table.html#Litigation [hereinafter, BC Practice Checklist]

B - DOCUMENTARY DISCOVERY (continued)	Source
Electronic Discovery	
11. Lawyers should make clear to clients that the duty to disclose applies to all relevant electronic documents. At the outset, counsel should advise clients to take steps to preserve electronic evidence to ensure that spoliation does not occur. Types of electronic data that should be requested from a client include: hard drives; laptops; off-site computers or devices; files on network servers; phone mail message systems; personal organizers such as palm pilots; corporate electronic logs; data tapes; wireless devices such as cellular phones & pagers; zip disks; CD-ROM disks; and floppy disks.	Susan Wortzman, "Electronic Discovery: A Silent Killer"[5]
12. It is prudent to write to opposing counsel to put them on notice that electronic documents, including all active, residual & back-up data may be relevant, and that they should begin taking all steps to preserve such information. The letter may suggest steps which could be taken to preserve electronic data, including: ❑ Suspending the use of routine maintenance systems that overwrite data; ❑ Refrain from installing new software on the relevant systems; ❑ Refrain from recycling back-up tapes, and from deleting, modifying, overwriting, or defragmenting electronic files; and ❑ Introducing steps or policies to preserve information on home computers and portable devices.	Electronic Discovery; ABA Civil Discovery Standards[6]
13. To understand how opposing parties use & structure their electronic systems, consult with opposing counsel on the use of written questions to get such information. Written questions may be preferred, given that undertakings to these questions are usually given at oral examinations, and can best be answered in writing. Possible questions might include: ❑ What types of hardware does the company use, and where is it located? ❑ What types of software are incorporated into the party's system? ❑ Is there a network? ❑ Do any company employees use palm pilots, cell phones, pagers or other devices in connection with their employment? ❑ What types of media are used to store information? ❑ What types of media are recycled? ❑ What is the back-up schedule? ❑ Does the company have a policy regarding back-ups? ❑ What is the schedule for rotation of back-up media? ❑ Are all documents stored electronically? ❑ Do some documents have limited password access? ❑ Are any documents encrypted? ❑ Are some documents deleted? ❑ If so, when are documents identified for deletion and on what basis? ❑ Who makes the decision to delete a document? ❑ Is there a policy regarding deleting and ultimately destroying electronic information? ❑ Is there a policy regarding the use of e-mail? ❑ Is there a policy regarding document retention and storage? ❑ Are all documents printed out in paper format? If not, what types of documents are not routinely printed out?	Electronic Discovery

[5] S. Wortzman, Electronic Discovery: A Silent Killer, presented at Legal Tech Conference (Toronto, November 14, 2002) [hereinafter, Electronic Discovery].
[6] American Bar Association, Civil Discovery Standards (August 1999), www.abanet.org/litigation/taskforces/civil.pdf [hereinafter ABA Civil Discovery Standards].

C – EXAMINATION BY WRITTEN QUESTION AND ANSWER	Source
When to Use Written Questions & Answers	
1. Lawyers should consider the use of written discovery in appropriate cases and where they are of the view that written questions & answers may result in: ❑ Clearer, more succinct and informative answers than those given at oral discovery; ❑ Additional time to consider and ask further questions; ❑ Avoidance of scheduling delays associated with oral discovery and lengthy examinations ❑ Avoidance of possible harassment and intimidation of an examined party; and ❑ A more cost effective and efficient discovery process.	Consultations; cross-jurisdictional research
2. Before commencing discoveries, counsel should consider agreeing on the use of written questions and answers for some or all of the examinations if it will save costs and time for parties. Written discovery may be useful in the following situations: ❑ Where cases rely heavily on documentary evidence or where there are only a few, non-controversial questions; ❑ As a "follow-up" to answers to undertakings; ❑ Where the questions deal with very technical or statistical matters that need to be compiled from various sources; ❑ Where a corporate officer adopts the evidence of other employees who have been examined; ❑ Where a corporate representative needs to obtain information from a number of employees; ❑ Where it is inconvenient to have the witness attend; ❑ To preserve evidence before trial; ❑ Prior to oral discovery, to obtain basic information about a party's position, or to obtain information from key witnesses or key documents. This may help to focus the oral examination.	Alberta Law Reform Institute, Document Discovery and Examination for Discovery; suggestions from case management masters
Content of Written Questions & Answers	
3. Lawyers should avoid "boilerplate" questions. They should carefully tailor questions to elicit information that is relevant to the issues in the case, or that is necessary to discover or understand those issues.	ACTL Code (s. 5(b)1)
4. Lawyers should avoid "boilerplate" answers. Answers should properly respond to the questions asked, unless otherwise objectionable. Lawyers should not interpret questions in a strained or unduly restrictive way in an effort to avoid responding to them or to conceal relevant, non-privileged information.	ACTL Code (s. 5(a)3)
5. Lawyers should not assert objections solely to avoid answering an appropriate question. If only part of a question is objectionable, the responding lawyer should object only to that part and answer the remainder of the question.	ACTL Code (s. 5(b)2)

D - ORAL EXAMINATION FOR DISCOVERY	Source
Scheduling Examinations for Discovery	
1. Before delivering a notice of examination or scheduling an examination, motion, or other pre-trial event, counsel for all parties should consult and work together to reasonably accommodate the needs and reasonable requests of all witnesses and participating lawyers. Lawyers should strive to agree upon a mutually convenient time and place, seeking to minimize travel expense and to allow adequate time for preparation.	ACTL Code (s. 1(a)); AS Principles of Civility, para. 11
2. Examinations, motions and other pre-trial events should be scheduled early enough during the pre-trial phase to avoid the difficult scheduling problems that often result form last-minute requests.	ACTLCode (s. 1(a))
3. Where a lawyer needs to reschedule discovery or other pre-trial event, he or she should promptly explain the reason for the request. A lawyer who receives a reasonable rescheduling request should strive to accommodate it.	ACTL Code (s. 1(b)); AS Principles of Civility, para 13.
4. If discoveries are expected to be lengthy, lawyers should consider alternating roles as examining lawyer. This may permit discoveries to be dealt with on an issue-by-issue basis, which may promote settlement of some issues and can prevent resentments that build up over lengthy discoveries.	Suggestions from case management masters
Preparation & Proper Questioning	
5. Lawyers should always prepare in advance of the examination & ensure they are familiar with the facts of a case, to avoid unnecessarily prolonging discoveries.	Consultations
6. Lawyers should limit questions to those necessary to develop the claims or defences in the case, or to obtain relevant testimony.	ACTL Code (s. 5(e)1); AS Principles of Civility, para 25.
7. Lawyers should conduct themselves with decorum and should never verbally abuse or harass the witness or unnecessarily prolong the examination.	ACTL Code (s. 5(e)4); AS Principles of Civility, para 1, 23.
Undertakings & Refusals	
8. Objections at oral examination should be made in good faith and should be adequately explained and limited. Lawyers should not assert privilege as an objection solely to withhold or suppress non-privileged information or to limit or delay their response.	ACTL Code (s. 5(a) 4, 6); AS Principles of Civility, para 21.
9. At an oral examination, parties should complete a list of undertakings and refusals as they are being provided. The use of a dictaphone to simultaneously record undertakings and refusals as they are provided may be helpful. The list should be reduced to writing and delivered to the party providing the undertakings/refusals within 5 business days after the examination.	Suggestions from case management masters
10. All undertakings should be answered within the prescribed timeframe, or such other time as agreed to by the parties.	Consultations
11. Unless there are compelling reasons to deny a request for additional time to respond to an undertaking, an opposing lawyer should grant the request without necessitating court intervention. Compelling reasons to deny such a request exist only if the client's legitimate interests would be materially prejudiced by the proposed delay.	ACTL, Code (s. 5(a) 8)
12. When providing undertakings, lawyers should be cognizant of their professional responsibility to fulfill undertakings. Lawyers should not provide undertakings that they know they will not be able to fulfill or to fulfill in a timely manner.	Ont, Rules of Professional Conduct, r. 4.01(7)
13. Lawyers should carefully consider how an undertaking is phrased, or consider alternatives to providing undertakings, including providing written authorization from a client permiting the examining lawyer to obtain requested documents or agreeing to have a second representative of your client with direct knowledge of the matters in issue be examined.	Consultations

E - MOTIONS	Source
1. When a discovery dispute arises, opposing lawyers should attempt to resolveit by working cooperatively together. Lawyers should refrain from filing motions to compel or for sanctions unless they have genuinely tried, but failed to resolve the dispute through all reasonable avenues of compromise and resolution.	ACTL Code (s. 5(a)5, 6(a)); *Principles of Civility*, para 5.
2. A lawyer who has no valid objection to an opponent's proposed motion should immediately make that position known to opposing counsel. Such candour will permit the opposing party to file an unopposed or consent motion that will also save scarce court resources.	ACTL Code (s. 6(b)(c))
3. If the court makes an order at a motion, whether on consent or opposed, parties are required to comply with the order. Parties should expect to be penalized with costs if they fail to comply with an order.	Consultations
4. Where a discovery-related motion on refusals is brought, a lawyer must complete in detail a refusals chart grouping the refusals by issue, and provide sufficient opportunity for the opposing lawyer to complete details with respect to the reason for the refusal. The chart should be filed in advance of the motion.	Suggestions from case management masters

F - EXPERTS	Source
1. Counsel should turn their mind to obtaining required expert reports and opinions as soon as possible in the litigation process. Waiting until the eve of trial to obtain expert reports often results in postponing the trial date, delay in the resolution of the case, and scheduling difficulties for the court. A lawyer should never purposefully delay designating an expert witness or delivering an expert's report in an effort to postpone trial.	Medico-legal consultation; ACTL Code (s. 11(e).
2. In retaining an expert witness, counsel should respect the integrity of the expert's professional practices and procedures. Counsel should provide the expert with information that is believed to be relevant and material to the subject matter of the expert's written report. Experts are often not able to provide expert reports within short time periods and should be provided with sufficient time to prepare the requested report.	Medico-legal consultation; ACTL Code (s. 11(b)(d))
3. To reduce costs and avoid the possibility of competing expert evidence, lawyers should discuss the possibility of retaining a single independent expert.	Consultations; UK Pre-action protocols
4. Expert reports should clearly set out: ❑ The area of expertise of the expert, supported by the expert's credentials or C.V.; ❑ The nature of the opinion being sought & specific issues it relates to; and ❑ The factual assumptions on which the opinion is being given.	
5. Where there are experts with contradictory reports, consider a possible meeting of the experts to ascertain the areas on which agreement can be reached, or to clarify the reasons why the reports differ.	Quebec Code of Civil Procedure.

G – OTHER TECHNIQUES	Source
Requests to Admit & Agreed Statements of Fact	
1. Lawyers should use requests to admit more frequently on non-contentious issues. Using an agreed statement of fact also helps reduce the amount of time spent at oral examinations on non-contentious issues, allowing parties to focus on the real matters at issue in a case.	Suggestions from case management masters