# Depositions:

## Why Earlier Is Better

**Eliot G. Disner**

***Think that the best way to approach discovery is to start with the written material and work slowly up to the depositions? Better think again!***

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**MANY ARTICLES HAVE** graced publications like this one advising young, and perhaps not-so-young, lawyers *how* to take depositions in complex civil cases. The reason, of course, is that in our system of jurisprudence, depositions are the central cogs in the litigation machine. Indeed, they are the only discovery vehicle over which the evidence gatherer has *some* measure of control. In light of the importance of such discovery, this article concerns a related question. *When* should depositions be taken?

Given the choices, depositions represent by far the best opportunity a discovery taker has to stumble onto the truth, or to obtain uncensored testimony of percipient witnesses to the events which prompted the lawsuit, or which some lawyer claims prompted the lawsuit. But the opportunity to obtain such testimony, when it is ripe for the picking, is too often squandered by attorneys too cautious or lazy to enter the deposition orchard at dawn.

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In this article, we will explore why depositions are the best early discovery tool, why so many lawyers make the mistake of putting them off until late in the process, and how you might rethink the matter of discovery to avoid falling into the same trap.

**WHY START WITH DEPOSITIONS?** • Other forms of discovery give you much less control over the end product than depositions. Attorneys, sometimes teams of attorneys, often answer interrogatories and requests for admission in a careful and self-serving way. As for document production, "constipated" is about the only word that often describes it in the early going. It is true, of course, that many attorneys fairly and conscientiously assist their clients to answer interrogatories and requests to admit. Certainly too, many parties thoughtfully, carefully, and promptly produce all relevant documents requested. But in complex, high-stakes litigation, alas, this seems more the exception than the rule.

**Few Effective Sanctions for Failing To Respond to Other Forms of Discovery**

The general sanction for denying a request to admit a proffered fact that happens to be true is so slight that it is the order of the day to so respond when the occasion warrants. Similarly, the risk of producing documents in a trickle is to prompt a motion which, if successful, eventuates in a sanction that is likely to be a small fraction of the movant's expenses, if any sanction is ordered at all.

When it comes to documentary evidence, the discovery taker is never quite sure then that *everything* relevant has been, or will be produced, even after a successful motion to produce. How often do you come across an internal memo that refers to another document, which document is never produced...and about which the author and recipient, when quizzed at deposition, claim to know nothing?

**WHY DO SO MANY ATTORNEYS TAKE AN "INVERTED" APPROACH?** • Many attorneys take an "inverted" approach to discovery, staging it in the following sequence:

- 1. Documents;
- 2. Interrogatories;
- 3. Requests to admit;
- 4. Motion to compel;
- 5. Additional written discovery (if any); and
- 6. (Finally!) depositions.

Most attorneys tend to think of this approach as "methodical" rather than "inverted." They approach discovery as a process of collecting all *written* discovery necessary, then bringing any motions necessary, in the hope of learning as much as possible about the case before commencing any depositions. Some attorneys defend the inverted approach by arguing that there is little to be gained by taking a deposition unless you have already learned as much as possible about the case. But others make no attempt to seriously defend their inverted approach as a logical approach to litigation at all. For the latter (possibly a majority) the approach is little more than a concession to the dynamics of practice in a mid-size to large firm.

**How Law Firm Dynamics Drive the Inverted Approach**

Such firms typically have legions of young associates who are perceived by their elders to be incapable of taking or defending most depositions, but who are seen as plenty capable of churning out requests for documentary or other written discovery. Sometimes those requests are not fully addressed in the opponent's response (as young associates on the other side may be just as adroit at preparing boilerplate objections to them). Time-consuming and costly motions ensue. Senior associates and junior partners are anointed to handle such motions.

***"Depositions Are for the Heavy Hitters"***

However, depositions themselves, particularly *important* depositions, are reserved for the big firm's "top" litigators. Those litigators are likely to be stretched too thin, preoccupied with other cases, making rain for the firm, skiing at Vail, or otherwise in scarce supply. Because their usable time must be rationed, they expect to receive a three-ring binder replete with proposed questions (highlighted for the most important parts), including copies of documents (also highlighted) and any provocative interrogatory answers previously provided for examination of the witness. This big-firm pecking order lines up nicely with the inverted discovery approach. The work starts at the bottom of the ladder (paralegals and associates doing written discovery) and moves up (heavy hitters taking the depositions). So the firm's staff structure lines up nicely with the inverted discovery strategy.

***Small Firms Do It Too!***

But, medium-to-large defense firms are not alone in pursuit of such a strategy. On the plaintiffs' side, many underfunded small-firm attorneys pursue a discovery strategy that is not unlike their well-funded big-firm counterparts. The only difference is that such an underfunded counsel is angling for an early settlement of his client's case and, accordingly, will forgo costly discovery until the possibility of settlement has been exhausted, in the following order:

- 1. Written discovery efforts;
- 2. Anticipated settlement discussions;
- 3. Motions to compel;
- 4. Additional written discovery;
- 5. Depositions.

**Why Is the Inverted Approach Such a Bad Thing?**

The difficulty with the inverted approach is that you educate your opponent about the case before you use the one discovery tool that gives you the most control over the content of the evidence it may yield. By the time you are done with all of the written discovery and ready to take a deposition, opposing counsel and the witness may be as knowledgeable about your case as you are—if not more so. This will not be the case if you take the deposition much earlier.

**WHY IS IT A GOOD IDEA TO TAKE A DEPOSITION EARLY IN THE PROCESS? •** Lawsuits are typically an attorney's vision of the client's beef or claimed wrongdoing. Although the plaintiff's personnel are likely to know something went wrong in their business and even who caused it, they are unlikely to know that no available law fits the facts or provides a remedy as they would then articulate those facts. Similarly, a defendant's personnel may believe their conduct was perfectly reasonable, though it conversely may run afoul of some little-known law. Acknowledging the complexity of the law as we must, it is not that uncommon when the unvarnished state of the record does not fit neatly into *any* cause of action or fits *too* neatly into *some* cause of action.

**Witnesses Are Likely To Speak More Freely in the Early Stages**

Witnesses, therefore, may be willing to testify freely about what went wrong, and the environment within which the wrong occurred, but may not know what it takes to violate the law. This is not a permanent disability however. In time, the lawyers are likely to catch up with all the pertinent facts and the witnesses are likely to learn just enough about the applicable law. How often, for example, have we learned something important about a case six months after we *thought* we fully debriefed our client?

*An Example*

To take one example, various "bad acts" are not illegal under the U.S. antitrust laws if unilaterally performed by a company that has a small share of a so-called relevant market. Buttoning down a proper (or at least a thoughtfully defined) relevant market is, therefore, an important objective in such litigation. Key marketing and sales witnesses, when testifying, often inflate their own importance and performance and implicitly, or explicitly, that of their employer. To do so, however, such individuals frequently see the world in relatively narrow terms. The consequence is a market served up by the alleged perpetrator of the wrongdoing that is way too tight for its own good. Ask someone from Microsoft what it is like to have a market share that is *perceived* to be high. Conversely, the marketing personnel of the claimed victim of the alleged wrongdoing may glumly view the pertinent market in very broad terms, in which its employer, the plaintiff, is but an incidental piece. All such perceptions are relevant and normally admissible. Therein lies the opportunity to be gained from striking early.

With the passage of time, a defendant's solipsistic bias may be lessened as its sales and marketing people are educated to understand the *full* nature of the competition they face. Similarly, some sense might be knocked into the plaintiff's key witnesses on the issues that matter. None of this is about lying versus telling the truth. It is about one's subjective perspective and opinion, reasonably re-sculpted to accommodate economic reality, and, not so incidentally, the goal of winning the lawsuit. This is nothing more than the modern application of Plato's allegory of the cave. But how can a deposition taker capture the knee-jerk, unadorned view of a market held by his adversary's vice-president of sales unless that testimony is harvested quickly?

**You Need To Know More To Answer a Question than You Need To Know To Ask One**

Many lawyers argue that they are not sufficiently prepared to conduct competently an important deposition at the early stage of a case, and that they too need to understand the pertinent facts and law before they can intelligently examine a witness. The reality, however, is that you need to know a lot less when *asking* questions than *answering* them. In the early going, a deposition examiner often has a tremendous tactical advantage over the witness he is deposing. The important consideration is not what the examiner actually knows about the case, but rather about what he *needs* to know to ask competent questions. The graph that appears at the end of this article depicts the relative state of needed knowledge typically possessed by attorneys and witnesses as a litigation proceeds. There is little doubt that the early advantage an attorney has over the witnesses of the opposing party evaporates over time.

*An Example*

Many years ago I was involved in a litigation in which my client was prevented from obtaining certain needed financing for a real estate project by its competitor's interference with the only available financing source. In early disclosures incident to a preliminary injunction motion, the defendant's attorneys provided three reasons why the putatively offensive actions occurred, none, of course, having the wrongful look and feel needed for us to prevail. Of course, what lawyers say is not evidence. But, not surprisingly, the individual who "worked with" the financing company was deposed early and parroted the reasons provided to him by his attorneys. All this proved to be good enough to turn back the injunction motion.

However, months later, after several discovery motions, when pertinent documents and records were finally produced, an internal memo authored by the witness revealed an entirely different set of reasons for the intervention of the defendant in this financing issue—*bad* reasons, for lack of a better word. At trial, the witness, after providing testimony consistent with his deposition, was confronted with his own dissonant memo in cross-examination. He then folded like an unlicensed street peddler just ahead of the constable. An eight-figure verdict was our prize. That mollified us somewhat from the loss of our earlier motion.

Had I waited to take the deposition of this individual until after discovery was provided, the attorneys would have located the memorandum and reminded the witness of its existence. He then would have provided testimony in a way that put the best spin on what really happened. Instead, the palpable contradiction between his deposition testimony and the pertinent memo was impossible to hide in the fish bowl in which trials occur.

**"Lost Opportunity" Extremely Unlikely**

Still, there is a concern that a key deposition, once begun, must then end and a later opportunity to ask "better" questions will be lost forever. However, opposing counsel typically provide an excellent reason for the adjourning the deposition at the end of the day, or sooner, to be continued to a later time—namely, their refusal to produce timely all documents reasonably requested to be produced at the time of the deposition. If, then, the deposition notice is accompanied by a reasonable document request, seldom will the production be complete when the deposition is commenced, no matter how reasonable it seems at the time. Frequently, a discovery motion or motions then will be necessary to obtain the relevant documents and the deposition will later resume.

**RETHINKING THE DISCOVERY PROCESS**

• Given the realities described above, an aggressive pattern of discovery would follow this sequence:

- 1. Some documents provided;
- 2. Early depositions initiated;
- 3. Some other discovery provided;
- 4. Discovery motions and rulings;
- 5. Balance of documents produced;
- 6. Interrogatories fully answered;
- 7. Admissions made or denied without qualification;
- 8. Depositions completed.

This sequence reflects the reality that attorneys frequently produce driblets of discovery at first. The floodgates only open after prolonged and costly discovery motions are heard and decided. Then, the "back-the-truck-up-to-the-door" mentality takes over. The discovery seeker is likely to be inundated with nearly every document in the warehouse! While the review process that must then occur resembles the tedium of sifting sand for gold, the product of the search can be just as productive.

**The Advantage**

With most, if not all, of the needed information finally in hand, the inchoate depositions can be resumed and completed. This experience, in toto, gives the evidence gatherer the advantage of one session in which she has more needed knowledge than the witness, and a second session in which she has more absolute knowledge than she had previously. But with rare exception, the latter deposition tends to be less productive than the more free-wheeling, shorter deposition taken perhaps 18 months earlier by a relatively ignorant lawyer of an even more ignorant witness.

**Keep an Eye on the Rules**

One thing that could throw a monkey wrench into this strategy is a proposed change to the Federal Rules of Civil Procedure. If enacted, starting on December 1, 2000, no deposition can take longer than one seven-hour day, except by agreement or court order. But even this proposal would not necessarily defeat the early deposition strategy. It may be possible to commence a deposition of a witness from whom documents are sought, find the production inadequate, then adjourn the deposition with three hours left to go. Then, when the balance of the documents are produced, there will be a strong argument for permitting the deposition to resume. It may even be possible in the ensuing discovery motion to argue that considerable time was wasted in the first session of the deposition because the witness failed to produce *all* the relevant documents. Incident to the order entered in connection with the discovery motion, the court is also likely to give the movant additional time for the "second phase" of the deposition.

**Don't Waste Witnesses**

If you do decide to take early depositions, there is always a risk that you might "waste" a witness. However, normally this need not concern you. An early deposition of the assistant vice-president of marketing might produce substantial advantageous testimony. But this does not mean that you should put off deposing the vice-president of marketing and the vice-president of sales until a later time. It is important to note, in connection with such depositions, that factfinders seldom differentiate between various "managing agents" of a company, *i.e.*, those who can bind the company by their admissions. There is no basis then for believing that a vice-president of marketing will be a "better" witness than an *assistant* vice-president of marketing. Remember, the issue here is not impressing the judge or jury with the *importance* of a witness, rather the *credibility* of all the evidence, from whatever source it arises.

**Is There Such a Thing as a "Wrong" Witness?**

Still, some fear that early depositions will result in the "wrong" witness altogether being deposed because the attorney will not know enough to ask for the "right" witness. However, even a *wrong* witness may contribute significantly to the development of the needed facts in a lawsuit. Sometimes this is because such a witness works *next to* the "right" witness and can repeat what *he* said. Sometimes, it is because the attorney for the witness also believes the witness is the wrong one—who knows nothing, then prepares him, or fails to prepare him accordingly. It may even be that the senior partner dispatches his associate to "cut his teeth" by defending this *unimportant* witness. Therein lies the advantage.

***An Example***

One case I recently participated in illustrated the serendipitous benefits that can accrue from deposing the "wrong" witness. Here is the background. My client was an aftermarket automobile accessories manufacturer, the products of which fit the vehicles of a major automaker. One day, notices went out from the automaker barring one of my client's products from a model line produced by it. The accessories manufacturer's sales plummeted and a lawsuit resulted. Our contention was that a decision made by the marketing department of the automaker was the reason our accessory sales were doomed, specifically because said automaker offered several factory options which directly competed against said accessory. Moreover, those factory options were the anchor for costly "packages," including other less desirable options sold therewith. Thus, if our client were successful, some vehicle buyers would forgo the factory option package and

purchase only the accessories they really wanted from the aftermarket supplier. There would be a substantial cost savings to the customer, but an even bigger loss to the automaker.

Naturally, the automaker would concede none of this theory. Instead, it mounted a "safety" defense, i.e., that the plaintiff's aftermarket accessory would jeopardize the safe operation of the vehicle, which justified its being banned. Since my client had been making the same accessory for this automaker's vehicles in prior years, this defense seemed implausible on its face. Still, several of the automaker's executives testified to the safety concern, however hollow that testimony seemed to ring.

As for the marketing justification that *seemed* quite obvious, no one would admit to any such link. Needless to say, in the sanitized document production that accompanied the depositions, there also were no documents directly establishing the link either.

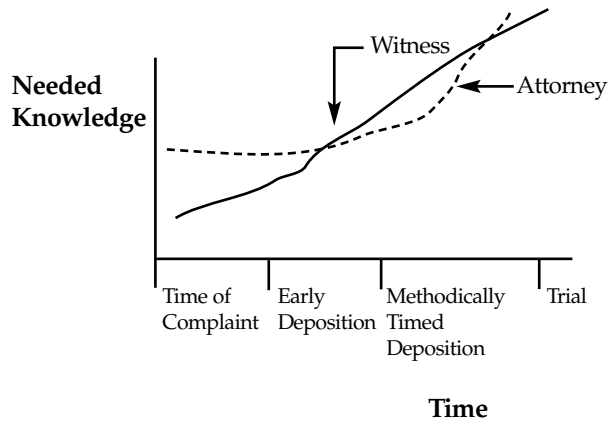
Then along came...well, let's call him "Mr. Green." Green was involved in internal accessories purchases and sales by the automaker, but not the particular accessory which was the subject of the ban, and not for the particular vehicle in question. I too had my doubts as to the value of this witness during the early part of the examination. However, it turned out that, years before, Green tried to add the "banned" accessory to his employer's own aftermarket "accessories" line (marketed directly to dealers and to the public). Lo and behold, Green too encountered resistance from his employer to his even thinking about selling this product.

Venting his pent-up frustration to me, years later, Green disclosed a conversation he had with the same department manager who was also involved in banning the sale of my client's products (purportedly for "safety" reasons). When Green asked this gentleman why the approval for his own accessory was not forthcoming after a several year "internal review" period, he was bluntly told, "Haven't you heard, we're emphasizing our OE [factory option] program. We're not approving your accessory. Don't call us; we'll call you!"

The important thing, of course, is not that these words were uttered, rather that Green repeated them so faithfully in his deposition—creating just the link we needed to make our case of wrongful, anticompetitively driven conduct. Plainly, my opposing counsel was caught flatfooted here. Believing that the witness was totally extraneous to proceedings, he failed to realize the damage that could be done by a witness who lived at least *near* the scene of the crime, so to speak.

**CONCLUSION** • Of course, there are likely to be strong and thoughtful arguments to counter the points made here. Still, there are countless times when striking first with early depositions can yield valuable results. Think about executing such a strategy when the stakes are high and the facts and law are complex—and you want to win.

**NEEDED KNOWLEDGE FOR DEPOSITION**



**PRACTICE CHECKLIST FOR**

**Depositions: Why Earlier Is Better**

Sometimes the accepted wisdom about things doesn't hold up under scrutiny, and this is certainly the case about discovery. Quite a few litigators think the best approach is always to complete written discovery first, then do the depositions. In reality, the opposite may be more often true.

• Why is it a good idea to take depositions early in the process? Because more than any other discovery tool, depositions give you substantial control over the evidence that they yield.

• Why is it a bad idea to do all of the written discovery and take the depositions last? Because you will probably educate the opposing witness and his or her counsel to the point where they know as much about your case as you do—perhaps more!

• If there is such a downside to the typical approach, why is it so common? First, because the work in most law firms gets assigned from the bottom up. Paralegals and associates handle the "less important" tasks (such as written discovery) and the heavy hitters do the important things (such as taking the depositions). Second, most attorneys believe that they cannot take an "effective" deposition unless they know as much about the case as possible.

• How can an early deposition be more effective if the deposing attorney hasn't learned all that there is to know? Because the witnesses are more likely to speak freely early in the process, before they have had an opportunity to develop positions that they believe to be in their best interest, and because it takes less knowledge to *ask* questions than to *answer* them.

• How do early depositions fit into an overall discovery scheme? By taking place early in the case, whether discovery is completed or not. More complete written discovery can be based on the early depositions, and the remainder of the depositions taken later.

• What are the risks of taking early depositions? You may not want to risk taking too many depositions at the early stage, thus squandering the opportunity to get responses from the *best* witnesses at the most opportune time. There are usually opportunities to take the depositions of *good* witnesses early in the process.