

Depositions:

Who Goes First?



The order of depositions of the parties or major witnesses is usually worked out between counsel without substantial disagreement. Occasionally, serious conflicts arise because both attorneys perceive a tactical advantage to take the opponent's deposition first. We outline the civil rules governing the order of depositions in federal and state courts, and suggest basic principles for resolving disputes regarding who goes first.

A. In federal court, defendants no longer have priority in discovery.

Although the Federal Rules of Civil Procedure initially favored discovery by defendants first, the parties are on equal footing regarding priority in discovery under the current rules.

The original civil rules permitted discovery to be had in the order in which it was requested ("the priority rule"). Although plaintiffs were required to wait 20 days before commencing discovery to permit the defendant to obtain counsel, defendants with representation had the ability to provide deposition notices at any time after commencement of the action. 4 James W.M. Moore, et al., *Moore's Federal Practice* ¶ 26.32 (1994). The priority rule was criticized as allowing abuse of discovery. *Id.* at 26-409-12.

Then in 1970, amendments to Fed. R. Civ. P. 26(d) and 30(a) prevented application of the priority rule. The following section was added to Rule 26(d):

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Rule 30(a) provided:

After commencement of the action, any party may take the testimony of any person * * * by deposition upon oral examination. Leave of court * * * must be obtained only

if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant * * *, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery * * *.

Thus, discovery was to occur concurrently, and lawyers were to "bargain on equal footing." *Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Caton*, 130 F.R.D. 145, 148 (D. Kan. 1990).

The 1993 amendments to Rules 26 and 30 simply coordinate the timing of discovery with Rule 26(a) disclosures and Rule 26(f) conferences. However, in the District of Oregon, Rule 26(a) disclosures and Rule 26(f) conferences are not required. L.R. 230-1(a), L.R. 205-1(a)(3). Thus, it is entirely up to the parties to work out a

discovery schedule within the confines of the discovery deadline set by scheduling order, and neither defendants nor plaintiffs have priority in discovery under

the rules. L.R. 205-1(a)(3).

B. In state court, defendants do not necessarily have priority in discovery.

The timing of depositions in state court is covered by ORCP 39A, which is very similar to former Fed. R. Civ. Proc. 30(a) in effect before the 1993 amendments. Under ORCP 39A, a defendant has a right to notice a deposition or to seek discovery at any time after the service of summons, while plaintiffs must generally wait 30 days unless a defendant notices a deposition or otherwise requests discovery early in a case:

After the service of summons or the appearance of the defendant * * *, any party may take the testimony of any person * * *. Leave of court * * * must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery * * *.

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Once the defendant commences discovery, the plaintiff may notice a deposition without regard to the time of the defendant's notice. Thus, defendants do not necessarily have priority in depositions. *See, e.g., United States v. Bartsch*, 110 F.R.D. 128, 129 (N.D. Ill. 1986) (in a case involving the plaintiff's notice of the defendant's deposition to occur the day before plaintiff's scheduled deposition, the court held that the priority rule is abolished).

C. Fairness must guide the timing of depositions.

Although there are no Oregon cases regarding the proper order of depositions, federal cases indicate that fairness is the watchword in establishing the order of depositions.

Courts have rejected attempts by parties to strong-arm a favorable discovery schedule to the exclusion of other parties' discovery. *See Caton*, 130 F.R.D. 145 (the court refused to establish a discovery schedule that would permit one party to depose various opposing parties before any of its employees could be deposed, stating that courts do not grant motions to establish the sequence of discovery unless for the convenience of the parties, the witnesses, and in the interests of justice).

Courts also reject clear gamesmanship through timing of discovery requests and notices of deposition. *See Poeschl v. Superior Court in and for County of Ventura*, 40 Cal. Rptr. 697, 699 (Ct. App. 1964) (the court held that the trial court erred by ordering the plaintiff's deposition of the defendant to go forward when the plaintiff had not produced the defendant's prior statements, even though the plaintiff noticed the deposition first and the defendant agreed that the plaintiff was entitled to initial discovery, noting that the plaintiff's attempt to make "one-sided use of a prior statement of a party was obviously inequitable").

D. Who goes first, assuming no other unfairness to the parties.

We believe that disputes usually occur when opposing attorneys in good faith assess that there is a tactical advantage to taking the opponent's deposition first. Assuming that no other special circumstances would make it unfair for one or the other to go first, a court must arbitrarily resolve the dispute by giving the tactical advantage to one of the parties. Courts understandably dislike being placed in this position. Thus, to the extent possible, attorneys should settle such disputes without judicial intervention by using mechanisms that will either eliminate or minimize the perceived tactical advantage of going first. We suggest two below.

In larger cases where two or more attorneys represent each party, simultaneous depositions can be scheduled. Thus, the lead attorneys might depose the clients, with the second chairs defending. This would completely eliminate the problem of who goes first. A second suggestion is that the parties schedule back-to-back depositions, with the filing party being deposed in the morning, and the other party being deposed the same afternoon. If the depositions last longer than a half-day each, they can continue on succeeding days using the same back-to-back format. This has the advantage of minimizing the tactical advantage of going first and would likely encourage lawyers to take shorter and more direct depositions that immediately get to important matters. □

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MARCH

■ 10 Litigation Seminar/Retreat

Skamania Lodge • 4.5 MCLE credits plus 1 Ethics credit
9 a.m. to 3:45 p.m.

Distinguished practitioners and judges will speak on the distinctions, advantages and disadvantages of being in federal or state court; successfully conducting jury selection; enhancing career satisfaction for the litigator; with national expert Benjamin Sells; and advice from local practitioners on what works and what they've learned about managing time, and handling stress, tension, and burnout in a litigation practice.

■ 31 Dealing With a Protected Class Discrimination Case

Red Lion Jantzen Beach • Portland • 7 MCLE credits •
9 a.m. to 5 p.m.

This program explores an area of discrimination where claims are frequently alleged but not always understood. Title VII, and specifically the ADEA, will provide the backdrop for a discussion of the elements and theories of a protected class claim, proving liability and defenses to liability, effective discovery in a Title VII case, resolution strategies and valuing the Title VII case, use of experts, and presenting the *prima facie* defense, and rebuttal case.

APRIL

■ 6 Exploring New Technology for Your Law Office

Oregon Convention Center • 6 MCLE credits • 9 a.m. to
4:30 p.m.

Computer systems expert Rick Rodgers will introduce, explain, and advise you on creating an electronically integrated law office—an office where powerful hardware lets your sophisticated software connect and communicate internally, while linking you electronically to other offices and data bases.

■ 7 Using Quicken to Automate Cash Accounting in Your Law Office

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Rick Rodgers explains the routine law office accounting transactions that profoundly differentiate law practices from other business entities.