

TRIALS

Why Not Trials Instead of Depositions?

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Like many older trial lawyers, I serve as an arbitrator from time to time. A recent American Arbitration Association continuing education program reminded me and other panel members that the norm should limit witnesses to testifying a single time: at the hearing, not in a deposition. Financial Industry Regulatory Authority (FINRA) Rule 12510 likewise states that depositions are “strongly discouraged,” with a few exceptions geared to providing recorded testimony for witnesses who cannot appear at the hearing.

Criminal procedure in my state, Oregon, seems to do just fine without depositions—not just in small cases, but as I was reminded by my friend, Multnomah County Senior Trial Judge Janice Wilson, even in the most significant matters, such as capital murder cases.

Yet, the default rule in state court civil procedure around the country is to allow depositions without meaningful limits. The mindset of most litigators is that they need to take depositions. Irving Younger’s *Ten Commandments* teaches aspiring lawyers to never ask a question at trial unless they already know what the answer will be.

Depositions are how lawyers learn those answers before trial.

This mindset is destroying trial practice. Even cases of limited economic exposure are managed under discovery budgets that approximate the value of the case. As a result, litigation practice now follows the model of taking depositions of every available witness, blowing through the budget, then settling the case without a trial.

I’ve always been suspect of Younger’s commandment. True, its application might spare embarrassment from getting a “bad” answer at trial. But in many cases, what’s the difference? Bad answers abound at depositions. More frequently than ever, a lawyer’s only encounter with a witness is at deposition.

This leads to the question: Why not skip the deposition and face the witness just once, at trial? In most cases, this would be just as efficient, maybe even more efficient. If the “bad” answer at trial erodes the lawyer’s confidence in her case, she can consider settling. If settlement can’t be reached, the jury is capable of a decision. Those who still try cases will tell you that the jury generally gets things right. Experienced judges will also tell you that impeaching a witness through a deposition transcript seldom impresses jurors as much as the cross-examiner thinks it does.

Document discovery and interrogatory rules requiring a summary of testimony are often sufficient to keep lawyers from flying blind at trial when they face a witness who has not been deposed. Given the explosion of digital applications, which record communications once limited to private conversations, lawyers have vastly more written material available for trial preparation than Professor Younger ever could have imagined.

The issue is more important than efficiency. The sad truth is that we are losing the jury trial. We need more of them. We need more of them for younger lawyers to build their bodies of work and their self-confidence. We need more of them for citizens to understand that the right to a jury trial was enshrined in the Bill of

Rights for good reason. It is a cornerstone of democracy.

By contrast, the Founders never mentioned—and likely never contemplated—the right to a deposition.

Most of us do not like change. We get used to doing things a certain way. I too take comfort in having a deposition transcript on my laptop to use at trial to impeach or keep a witness in line. But in many cases, the cost of doing the same thing twice, requiring the witness to testify first at a deposition and then at a trial, outweighs the benefit. I grew up at a time when depositions were used less in smaller cases. And you know what? Trial practice worked just fine when the witnesses testified just once at trial.

I propose discovery rule changes similar to FINRA Rule 12510, with no depositions as the default in any case valued at less than some agreed number, say \$200,000. Depositions for even larger cases should be discouraged, and when allowed, be limited in duration.

Several states have voluntary programs where the parties opt into streamlined trial programs with discovery limits. These voluntary programs are well intentioned, but they simply do not work. Just ask judges and lawyers (myself included) who have championed these efforts. They know opt in doesn’t work. If we want to transition to trial practice in lieu of depositions, mandatory rules are needed to limit deposition practice.

Another approach worth considering is to adopt ADR clauses in contracts specifying that disputes involving matters valued at less than an agreed amount will be tried (or arbitrated) with exchange of documents, but without depositions.

For all the deposition-craving readers who now have steam escaping their ears in anger, I offer a final point in rebuttal: Unless we devote resources to trials rather than depositions, economics dictate that the day is not far away when civil trials will vanish completely. Civil jury trials will become part of a quaint past. We will all be worse off when that day arrives. ■