JENNER&BLOCK

"Rule 31 Depositions"

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"A pessimist," bemused Woody Allen, "confronted with two bad choices, chooses both."

A lawyer, confronted with several inadequate choices, chooses them all, yet probably overlooks an important additional option. You, Conan the Discoverer, have taken thousands of depositions. You, Gui the Inquisitor, have served millions of interrogatories. You, Attorney the Hun, have propounded gadzillions of requests to admit and document requests. But we bet you have seldom -- if ever -- taken a Rule 31 deposition.

We'll pause for a moment here while you run to the library and look up the Rule -- it's right there between Rule 30 (Depositions) and Rule 32 (Use of Depositions). You know those two Rules cold, of course. But Rule 31 -- not so much. Okay, we won't make you go to the library. Rule 31 provides for depositions upon written questions. A Rule 31 deposition is exactly like a Rule 30 deposition. You can designate a witness by name or description ala Rule 30(b)(1); or as a corporate representative ala Rule 30(b)(6). You can record the deposition by stenographic or audio or video means. You can demand the production of documents. The witness is under oath. She testifies orally. The only difference is that you aren't there when the questions are asked. You write your questions out in advance; your opponent, who also isn't there, writes out cross questions. You write out redirect; they write out re-cross. You send it all off to an "officer" who asks the questions.

Half deposition, half interrogatory, Federalrulenstein's Monster. What is this beast? We have been practicing for a – well, for a long time -- and we have never brought the rule to life, never taken a Rule 31 deposition. But now that we think about it, why not? We have overlooked an important tool.

Rule 31: An Overlooked But Valuable Tool

"Depositions on written questions are an extremely valuable tool for discovery and can properly substitute for trial testimony from an unavailable witness." *Horvath v. Deutsche Lufthansa. AG*. 2004 U.S. Dist. LEXIS 1733 (S.D.N.Y. 2004). You need testimony from someone who resides in a remote, hard-to-get-to, outrageously expensive-to-get-to spot like Timbuktu or New York City? Rule 31 may be the answer. You need testimony from an inmate? Rule 31 may be the answer. Now, of course, there are other vehicles by which to pose questions to these persons. There are interrogatories, requests to admit, requests for production, traditional depositions. All of these mechanisms have their pros and cons. But Rule 31 needs to be considered in the mix.

Let's start with a simple problem. Your client has provided you with a copy of what appears to be a memo from the President of ABC Widgets to his executive staff summarizing a meeting he had with a dozen or so other widget manufacturers at which everyone agreed to set the price of widgets at $5 per widge. Here's the question: Is this document a true and correct report of events made at the time by a person with knowledge of the events and was it prepared and maintained in the course of regularly conducted business activity?; that is, is it a business record, can you get it admitted against all twelve defendants?

You have choices. Serve a document request to get ABC's file copy of the memo. Serve an interrogatory. Serve a request to admit. Take a deposition. Take a Rule 31 deposition.

A document request is nice, but not enough by a long shot. You will get ABC's copy of the document and establish authenticity that way, but it will not establish that the document is a business record exception to the hearsay rule.

An interrogatory or request to admit directed to ABC should establish that the memo is a business record – as to ABC. It will do you diddlysquat as to the other 11 defendants. In *Zenith Radio Corp. v Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, (E.D. Pa. 1980), the plaintiff in a multi-party antitrust suit attempted to lay the foundation for the admission of evidence through an interrogatory answer which admitted the authenticity of certain documents. Problem was, however, that "under F.R.E. 801(c), an interrogatory answer is hearsay except as to the party furnishing the

answer, as to whom it is not hearsay under Rule 801(d)(2)." *Id*. at 1226.

A deposition solves the problem. Testimony taken with all parties having the opportunity to cross examine will establish the business record foundation in a manner admissible against all parties. But the problem with traditional depositions is that they are so expensive. Do the math: 1 deposition times 13 lawyers times rapacious hourly rates plus travel plus coffee and donuts equals a fortune. In a fee shifting case, a fortune you may have to pay.

Think Rule 31. You don't even have to pop for coffee and donuts.

Now, let's be clear. Rule 31 depositions have their limitations as well. The main drawback is that they are static; there is no opportunity to follow up on the responses to the questions. They are transparent; the questions must be fully disclosed in advance, so there is no opportunity to surprise your adversary or the witness with a line of questioning. Although the witness responds to the questions orally, there is no prohibition upon either side sharing the questions with the witness in advance – it is no different than meeting with a witness in advance of a traditional deposition to prepare. *See, Handi & Ibrahim Mango Co. v. Fire Ass'n of Philidelphia* , 20 F.R.D.181.182 (S.D.N.Y. 1957), where the court summarily rejected the argument that questions should not be disclosed in advance.

And Rule 31 depositions count. A Rule 31 deposition is a deposition, so it counts against the presumptive limit of ten depositions imposed by Rule 30, and it counts as a prior deposition, requiring leave of court if you later wish to do a Rule 30 deposition of the same individual.

Limitations or not, in the right case, Rule 31 may be the right vehicle, may be the best vehicle. Take our hypothetical antitrust case. As to each defendant, you want to know many things, but primarily (1) the prices charged for widgets from 1995 to present and the dates of each price increase; (2) the factors which led to each increase; (3) the dates of and participants in each meeting among the defendant manufacturers; and (4) the substance of each such meeting.

Interrogatories are probably an efficient way to get answers to the first three questions which ask for specific factual detail – if you don't care about the fact that those answers will only be admissible against the specific answering party. But odds are that you will get objections and obfuscation in response to the latter question about the substance of meetings. So interrogatories are a limited, not totally satisfactory solution.

A traditional 30(b)(6) deposition is the most flexible if not the most expensive way to fill in the holes likely to be left by the interrogatory answers. But consider Rule 31 first. Far cheaper. Far less time consuming. And, given the fact that the witness had the questions in advance, the court is likely to be sympathetic with obviously evasive or incomplete answers.

You May Be Able To Avoid A Live Deposition

You should also consider the possibility, when you receive a deposition notice, that you have grounds to seek to have the deposition converted to Rule 31. Ordinarily, a party is free is choose its method of discovery. *Richardson v. Sugg.* 220 F.R.D.343 (D. Ark. 2004). However, upon a showing of good cause, a court may alter the manner or place of discovery as it deems appropriate. *Colonial Capital Co. v. General Motors Corp*., 29 F.R.D. 514, 518 (D. Conn. 1961).

In *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 429 (E.D. Pa.,1981), acrimonious litigation led the plaintiff to file a notice of deposition on defense counsel. The court denied a motion for a protective order to quash the deposition. But "to reveal any problems of privilege" and, hopefully, "to avoid the potential flare-up of tempers . . . which would probably result from a direct oral confrontation of these advocates in this unusual setting," the court ordered that the deposition proceed under Rule 31, noting that "judges should not hesitate to exercise appropriate control over the discovery process."

In *Mulvey v. Chrysler Corp*., 106 F.R.D. 364 (D. R. I. 1985) the plaintiff sough to depose Chrysler's Chairman Lee Iacocca. The court ordered, after seeing an affidavit from Mr. Iacocca attesting a total lack of personal knowledge of relevant facts, that plaintiffs be relegated, at least in the first instance, to Rule 31. In *Alexander v FBI*, 186 F.R.D. 1 (D.D.C. 1998) the court ordered that noticed depositions of White House staffers proceed by Rule 31. This is not to say that all persons in high places can use Rule 31 as a get-out-of-deposition free card. In *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140 (D. Mass. 1987) four senior Ford officers lost their bid to avoid Rule 30 depositions where they simply asserted a lack of recollection as opposed to, ala the Iacocca case, a lack of knowledge. Where the issue was recollection versus knowledge, the court reasoned, the plaintiff has the right to probe with live questioning.

We Have Choices

We have choices. The zen of choices is best articulated by Dave Berry, who observes: "If a woman has a choice between catching a fly ball and saving an infant's life, she will choose to save the infant's life without even considering if there are men on base."

We realize only half of our readers (the half who like baseball)

will appreciate the thought – but the point is, when you have choices, you need to consider all the bases.

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