JENNER&BLOCK

"The Myth of the Seven Hour Limit"

By Jerold S. Solovy & Robert Byman October 30, 2006

Having invoked the Pirate Code's Right of Parlay -- guarantying safe passage -- our heroine is greatly surprised when Captain Barbossa says she cannot leave the ship: "The Code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl [*Pirates of the Caribbean*]." At times, it seems the Federal Rules of Civil Procedure might have been written by pirates. There are rules to be found there to be sure, but by and large they are more what you'd call guidelines. And nowhere is that more so than the seven hour deposition limit in Rule 30(d)(2).

It certainly sounds like a rule: "Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours." No ambiguity there. Limited to, not let's shoot for. Seven, not seven and a quarter. Clear. Solid. Ah, but then Jello is a clear solid. The Rule is a myth -- because its second sentence neatly takes away the certainty of the first: "The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination . . .." Not may, must. So the deposition *must be limited to seven hours*, but the court *must allow additional time* if needed for a fair examination.

Depositions Have Become To Trials What Kudzu is To Horticulture

How many times does the solution become the problem?

At the 1876 Centennial Exposition in Philadelphia, the Japanese constructed a beautiful garden filled with native Japanese plants. The large leaves and sweet-smelling blooms of kudzu captured the imagination of American gardeners who began to use it extensively. During the Great Depression kudzu appeared to be the solution to a host of problems, as CCC workers planted huge amounts for forage and erosion control. But kudzu grows *too* well. The vines grow as much as a foot per day, covering anything they contact. The vines can -- and did -- destroy entire forests by preventing trees from getting sunlight. The USDA declared kudzu a weed in 1972.

Like kudzu, the deposition is not exactly part of our native heritage; the *Magna Carta* speaks nobly of juries of peers but is serenely silent about pretrial depositions. The deposition is a relatively recent procedure introduced to address the problem of surprise and to make civil litigation more efficient; but in the hands of its abusers, it has grown like a weed into a weapon of litigation terrorism, as some litigants take endless depositions of every person with a pulse tangentially connected to the case.

We Need Limits On Depositions

Prior to the 2000 amendments which gave us Rule 30(d)(2), there was no time limit and no indication that courts were disposed to infer one. In *Horsewood v. Kids "R" Us*, 1998 U.S. Dist. LEXIS 13108, 9-10 (D. Kan., 1998), Ms. Horsewood, having already suffered 7 1/2 hours of deposition, was noticed for further sessions to go "from day to day until completed"; she moved for a protective order seeking a limit of six additional hours. Motion denied. "The Federal Rules of Civil Procedure do not set any limit on the length of depositions."

Um, did we mention that Ms. Horsewood's case was an ADA action? Did it really take day after day after day to ask her to self-describe her disability and her subjective belief that reasonable accommodations had not been made for it? Or is it possible that defendants were being defendants, preferring endless days of deposition to an end of the litigation?

"The Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances," explained the Advisory Committee as the reason for the adoption of the seven hour limit in 2000. *Can* result in undue costs and delays? In *some* circumstances? No creature of overstatement, that Advisory Committee. We have been at, oh, roughly, 16 gazillion depositions. And except for the ones we took ourselves, every single one of them was way too long.

For some lawyers, it is unthinkable that they might go to trial without first having asked every possible question of every

possible witness. It would be malpractice not to take every possible deposition, wouldn't it? We could not conceivably try a case properly without that pre-trial discovery, could we? Um, well, why not? In most arbitration forums, there is no absolute right to any, much less unlimited depositions. Yet those cases proceed just fine without them.

Here's the problem. Because we take depositions to discover what we don't know, we don't know what the right questions are and we must ask what later turn out to be unnecessary questions. Because we take depositions in a private conference room, we tend to be less concerned about asking limited and focused questions than we must be live before an audience of judge or jury. All of that is legitimate, a necessary evil of the process. But let's be real here. Some people -- not us, of course, not you, but some people -- take depositions for other reasons. If the reason is the same reason that dogs lick themselves -- simply because they can -- then those people need the discipline of limits. If the reason is to harass, to annoy, to shell the beach in anticipation of a settlement -- and let's face it, there are folks who make that a practice -- then those people need the restraint of limits. Limits are good. We need limits. Seven hours is enough; we should dig in our heels against giving up more time.

Does Rule 30 Impose a Seven Hour Limit? Um, Not so Much

But what does the seven hour rule really mean? Go on the record at 9 am, walk out with impunity at 4 pm? Not likely. Not hardly.

"A deposition is limited to one day of seven hours" leaves it ajar to argue that the clock simply runs from the first question to last. This is one of those cases where if your set of the Rules does not include the Advisory Committee Notes, it should. The Notes add clarity: "This limitation contemplates that there will be reasonable breaks during the day for lunch and other reasons, and that the only time to be counted is the time occupied by the actual deposition." So we only count actual deposition time. But how carefully do we count? Can we stop at seven hours, comfortable that our opponent will have to push a boulder uphill to get more time?

Probably not. In *Moore v. CVS Corp.*, 2005 U.S. Dist. LEXIS 3798 (D. Va. 2005) Moore's deposition was adjourned without objection after one of two defendants had examined for 6 hours and 45 minutes. When the other defendant sought to resume the deposition and suggested another 4 hours, the plaintiff argued that the seven hour limit was absolute absent an extremely rigorous showing of good cause.

The court acknowledged that there are cases that suggest seven hours is a real limit. *Beneville v. Pileggi*, 2004 U.S. Dist. LEXIS 13586 (D. Del. 2004) and *Cardenas v. Prudential Ins. Co*., 2003 U.S. Dist. LEXIS 9511, (D. Minn. 2003). But the court found that these cases were simply examples of failures by the movants to demonstrate good cause for additional time. "As the court's review of this case law shows, no court has construed the 2000 Advisory Committee notes as causing some profound change in the Rules requiring parties to use a stopwatch and immediately and finally adjourn a deposition after seven hours of testimony taken."

Nor did the *Moore* court think it necessary that there be an especially strong showing by the movant to extend the party beyond seven hours. Citing *Malec v. Trs. of Boston Coll.*, 208 F.R.D. 23, 24 (D. Mass. 2002), the court opined that "the better practice is for the deposition to go forward to determine how much is able to be covered in the seven hours and, then, if additional time is needed, for counsel to stipulate to extend the deposition for a specific additional time period. If the parties cannot reach a stipulation, then Court intervention may be sought." The court focused not so much on imposing a burden on the movant to demonstrate a need for more time as it did on the failure of the respondent to work out an accommodation that would have resolved the dispute before it reached the court.

Remember that the second sentence of Rule 30(d)(2) requires that the court must allow additional time "if needed for a fair examination." The Rule imposes a neutral standard of fairness rather than a burden of persuasion on the movant. So the seven hour limit is a big fat myth. Seven hours is simply the point at which the parties should try to reach an accommodation over how much more time will be allowed; and if they can't agree, the court will do what is fair, without imposing a particularly strong showing of need.

We Are Required To Accommodate, Not Limit

Why are we not surprised that courts want accommodations rather than arguments over time limits? No peeking, now, but do you remember Rule 1? Litigators who know Rule 26 and 30 by heart often forget it all starts with Rule 1: "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

So how do you think a Judge -- who does remember Rule 1 -- will construe an argument over whether the deposition ought to go an hour past seven? To fight over your hour, you will force the judge to spend his own hour. Say twenty minutes to read the papers, twenty minutes to calm down, twenty minutes to fashion an order that essentially sends both lawyers to their rooms without supper. Just, speedy and inexpensive presumes

that the parties will not waste their own and the Courts' time on trivia.

We wish the seven hour limit were a real rule. But it is not, and if you try to treat it as such you may have a problem. Aargh, me hearties. Think of it as more what you'd call a guideline.

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This article first appeared in the October 30, 2006, edition of *The National Law Journal.*