JENNER&BLOCK

"Deposition By Committee"

By Jerold S. Solovy & Robert Byman May 17, 2004

Fred Allen once observed that a committee is a group of persons who individually can accomplish nothing but together will readily agree that nothing can be done. We don't think much of committees. As Sir Barnett Cocks mused (why yes, we did recently get a new book of quotations, why do you ask?), "A committee is a cul-de-sac down which ideas are lured and then quietly strangled." Committees are useless -- except maybe when we set out to take the deposition of a corporate entity.

Do You Have To Talk To Three People To Get One Answer?

Consider this. You have served a Rule 30(b)(6) notice on the defendant, Really Big Company, commanding that Really Big produce a witness to testify on its behalf on ten enumerated topics. Really Big informs you that while no single individual is able to fully testify on any of the topics, it has identified three persons who, collectively, possess Really Big's entire knowledge. Really Big proposes three depositions on three successive days. You can ask the same questions of all three persons, and when you are done, the three sets of answers will serve as the corporate response.

Swell. You will have to spend three days out of town taking what ought to be a single day trip. The depositions are in Cleveland, the city of which Fred Allen said "I just returned from Cleveland; if you ever find yourself there, it's the only sane thing to do." But put aside the cost to your client of two extra days of depositions and the cost to you and your family of two extra days on the road. When you get to trial, how are you actually going to use the testimony you will get from three individuals on three different days?

This is a contract case. One of the main issues – maybe the only issue – is what constitutes the contract. Your position is that the contract, the whole contract and nothing but the contract is the Purchase Order. You expect that Really Big will say something else, but you want to know exactly what target you have to hit. You want a corporate admission from Really Big to pin down its story; you don't really care very much what the answer is so long as that you have a clear answer, so that you can move the trial along efficiently. So is the contract – according to Really Big – the Purchase Order? Or is it the combination of the Purchase Order and the Sales Confirmation? Or is it both of those plus a couple of subsequent side letters? If you have to ask three individuals that question, you can take to the bank that you will get three different answers. "Is it a fact that the Purchase Order is the entire agreement between the parties?" Volume I, p. 25: "Yes." Volume II, p. 251: "No." Volume III, p. 384: "I'm not certain." Great. So much for fixed targets and efficiency.

What's Wrong With Deposition By Committee?

Comes the epiphany. Why ask the question three times on three different days? Why not ask it just once – assemble the three individuals, swear them all in, ask the question, and let whoever speaks up give the answer? Worst case, you get all three different answers, but at least you get them all in the same place, on the same page.

Ah, but imagine the opportunity for gain. You may actually get the three people on the same page. If you ask the same question of three different persons on three different days, you are virtually certain to get three different answers; ask them as a group, however, and you have a real shot at getting a single answer. First there is the matter of deference. Chances are, the three individuals enjoy different status within Really Big, and the lesser executives are likely to defer altogether to the recollection of their senior, so you'll only get one answer. But even if two or more persons throw in their two cents, when they do it real time – that is, at the same time -- they are likely to turn to one another, put their heads together, and reach some consensus.

Lawyers, like nuns, are creatures of habit. We are accustomed to taking testimony from individuals, one at a time. Sheriffs swear in groups – they call them posses – but lawyers swear in individuals. Uh, huh, that's the way it has always been, but why? The Federal Rules require, in response to a 30(b)(6) request, that a corporate entity designate "one or more"

persons for testimony on described matters -- ***matters***, not matter. But while the persons and subjects are expressed in plurals, the deposition itself is described in the singular. A case could be made that the existing Rules as written permit, if not require, deposition by committee. But putting aside whether one side or the other could compel that result, the parties are free to agree to it – and we recently did just that.

We served our notice. Defense counsel told us they had three persons to produce. We proposed deposition by committee. Counsel agreed.

If Both Sides Think It's A Good Idea, Has One Of Them Miscalculated?

Now, there is an old maxim in the game of bridge: if both sides lead trumps, one of them has a screw loose. Both sides agreed to this unusual procedure. Was one of us crazy? The simple answer to that question is that we don't know, since we just completed the deposition and we are a fair piece away from trial. It took some courage on both sides to agree to this unusual procedure – and we salute our opposing counsel, Stacey Ballin of Squire, Sanders, for having that grit. Time may tell us that one of us was daft to agree to this brave new procedure; but right now it looks to us as if it was a win-win for both sides.

We swore in the three witnesses simultaneously and offered this preamble: "Good morning. This the deposition of [Really Big Company] pursuant to rule 30(b)(6) of the Federal Rules of Civil Procedure. We're all here for a bit of an experiment because neither Ms. Ballin nor I have ever done anything quite like what we propose to do today, but we think this will be more efficient, take less of your time, less of the parties' time, and therefore, will cost everyone less. What we're going to do today is ask questions of the corporate entity, with three human beings having been sworn in to give those answers. Frankly, while we hope that the reporter will figure out who gives which answer, we don't care all that much, since we simply seek answers on behalf of the corporation. I'm going to ask questions, and whoever feels that they're ready or able to answer the question will jump in and do so. And if the other persons think that a supplement or correction is necessary they'll do that. And that way we will have corporate answers when we're all done."

And, gosh, that's just what we got. We saved everyone two days of their lives. We saved the parties two days of legal fees. But mostly, we got unambiguous answers to our questions. As we went through each topic area, one of the three individuals would pick up the lead oar and jump in with an answer. From time to time – not often but with some regularity – one of the others would add a clarification or supplemental information. Someone would refresh someone else's recollection. But in general, whoever answered received deference – and silence – from the others. In not one instance was there any dissention among the three witnesses – so the end result was that the corporate entity gave singular answers.

From the corporate defendant's perspective, of course, singular answers are good – no internal impeachment. But it is equally good from the plaintiff's perspective. In any typical 30(b)(6) deposition – indeed in any deposition – there is bound to be some inconsistency between the deposition and the trial testimony. And, like most evidentiary admissions that are later contradicted, the jury need not wrestle with explanations much more difficult to accept than "well, that guy must have been confused by your question when he gave that deposition, but my trial testimony is the real deal." We haven't tried this yet, of course, but we predict that it will much harder to wriggle away from the inconsistency when the explanation has to be "well, all three of those folks, who were chosen because collectively they knew everything, must have been confused, but trust me, I know better." We now have Really Big's story, good, bad or indifferent, and we have a reasonable assurance that Really Big is going to have to stick to it. We don't have to reconcile or balance different responses; we don't have to collect and collate responses from multiple transcripts.

We're Not Sure Anyone Has Tried This Before, But Maybe They Should Have

We are not surprised that we could not find any case law in which this sort of thing was tried before. If it has been done before by agreement between some other ingenuous souls, well, they agreed, so there was no occasion for a court to referee. And, apparently, no one has yet tried to get a court to impose deposition by committee on an unwilling opponent. But we have been to the brink of this future, and it seems worthy. There no doubt will be times when it will not serve one or both parties' interests to use this approach. But we are going to suggest this to opponents when it is appropriate – and when our opponents refuse to agree simply because they are Luddites, we are going to consider asking a court to reason with them. We'll cite this article because, as George Bernard Shaw put it, "I like to quote myself; it adds spice to my conversation."

The only downside we observed to our experiment is that we didn't get to spend more time in Cleveland. Really. We would have liked to have seen more of the Rock & Roll Museum.

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