

“The Vestigial Rule”

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All right, let's see a show of hands. How many of you have taken a deposition prior to the commencement of an action to perpetuate testimony pursuant to Fed.R.Civ.P. 27? We've been practicing law a combined 83 years, and we have yet to bring or defend a motion under Rule 27. What is this rule? Is it a powerful tool we have overlooked all these years, or is it a vestigial organ – like the human appendix – that ought to be surgically removed before it becomes inflamed and poisons our body of useful rules?

Actually, we have lately come to know that the human appendix is *not* a vestigial organ at all; it is quite useful, merely misunderstood. But the purpose for Rule 27 is a bit harder to fathom. Rule 27 has not been amended substantively since 1948, so its meaning and import have not changed since the day when we (probably -- we've long forgotten) read it while we were in law school. But what exactly does it mean?

You probably live in a world more colorful than ours and already know all about Rule 27; but if not, you should know a little something about the Rule and why, now that we have focused on it, we think it is both useless and dangerous, and that it ought to be removed.

An Overview of the Rule

Rule 27 was designed to provide a mechanism to perpetuate — not discover but perpetuate — testimony prior to the filing of an

action or during an appeal. Although entitled and originally intended to apply only to depositions, the rule was amended in 1948 to include applicability to rules 34 and 35 to cover inspections and document production. *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir. 1961). To invoke the Rule, the petitioner must identify a potential action cognizable in a court of the United States which cannot presently be brought; and it must set out the facts it desires to establish.

That's right, set out the facts. Although contained in the section of the Federal Rules which deal with discovery, Rule 27 is not a discovery rule. A Rule 27 deposition is not meant to discover facts, but to memorialize and perpetuate them; the petitioner must already know the substance of the evidence it seeks before it can invoke Rule 27. *See Nevada v. O'Leary*, 63 F.3d 932, 936 (9th Cir. 1995) (petitioner could not satisfy Rule 27 because it could not "set forth the substance of the testimony"); *Ash v. Cort, et al.*, 512 F.2d 909 (3d Cir. 1975) ("We reiterate that Rule 27 is not a substitute for discovery."); *In re Ford*, 170 F.R.D. 504, 507 (M.D. Ala. 1997) ("Here, Ford seeks to discover or uncover testimony, not to perpetuate it.").

Rule 27 was not intended to smooth over the pot holes created by Rule 11. If you can satisfy Rule 11 and bring a claim, the liberal discovery rules which apply once an

action is commenced will allow you to take all the discovery you need to prove your claim; but if you cannot satisfy rule 11, you cannot make up the difference with Rule 27, since a Rule 27 deposition cannot be used to discover the facts necessary to frame a complaint. "[I]t is well settled that Rule 27(a) is not a method of discovery to determine whether a cause of action exists; and, if so, against whom action should be instituted." *In re Boland*, 79 F.R.D. 665, 668 (D.D.C. 1978).

So What's Wrong With This Rule?

Deiulemar Compagnia (Italian for "Deiulemar Company"), had chartered the ship *Allegra* from its owner, Pacific Eternity. After the *Allegra* was delivered back to Pacific Eternity, a dispute arose over the condition of the ship's engines while in Deiulemar's possession; pursuant to the charter agreement, that dispute had to be resolved by arbitration in London. While the ship was undergoing repairs in Baltimore, Deiulemar filed a Rule 27 petition to secure the right to physically observe and document the repairs. *In re Deiulemar Compagnia Di Navigazione S.P.A. v. M/v Allegra*, 198 F.3d 473, (4th Cir. 1999).

Now, here is where it gets strange. Remember, Rule 27 requires that there be some link to an action cognizable in a US federal court, which for some reason cannot currently be brought. This dispute, by agreement, was going to be heard in London Arbitration. Indeed, the

day after the Rule 27 petition was filed, *Deiulemar* actually filed the arbitration in London. So the underlying action was already pending – and it was an action which was not, could not be brought in a US court. No problem, thought the District Court. Since the ship was about to be repaired and sail out of US waters, it was time for extraordinary relief; the petition was granted to preserve the evidence. And the Fourth Circuit affirmed.

How did these courts get around the requirement of an action cognizable in a US court? Well, they found that there was a potential US action -- to enforce the arbitration award. Never mind that the discovery ordered under the Rule 27 petition would have no bearing whatsoever on any such US action (where the only issue would be whether to enforce the award, not to retry the merits of the arbitrators' decision). And the courts got around the facts -- that the arbitration was already pending before any action was taken on the Rule 27 petition and that the arbitration panel could under its own rules decide what discovery was allowable and desirable – by not directly addressing those facts.

The Fourth Circuit acknowledged that Federal discovery rules typically do not apply to disputes governed by arbitration provisions, citing its own recent decision in *Comsat Corp. v. National Science Found.*, 190 F.3d 269, 276 (4th Cir. 1999) ("A hallmark of arbitration -- and a necessary precursor to its efficient operation -- is a limited discovery process"). Nevertheless it gave one party – over the objection of the other – US discovery to use in the arbitration.

Trying to be charitable here, the courts were probably swayed by the fact that the London Arbitration rules give arbitrators the power to order physical inspections and document production, so the courts gave *Deiulemar* nothing it

could not have and should not have obtained in the arbitration. But a recent case has taken *Deiulemar* to a new and troubling level.

In *In Re Petition of Compania Chilena De Navegacion*, 2004 US Dist. LEXIS 6408 (E.D.N.Y. 2004), the court was similarly faced with a ship temporarily located in US waters which was about to sail; *Compania Chilena* (Chilean for Chilean Company) sought to take the depositions of nine crew members who were not US citizens and could not be expected to return to US jurisdiction. Like *Deiulemar*, the underlying dispute was, by agreement of the parties, to be arbitrated under London Arbitration rules. Nevertheless, relying on *Deiulemar*, the court ordered that the nine depositions proceed under Rule 27.

This time, Rule 27 was not merely used to provide a party with something it could have obtained anyway in the arbitration forum; the London Arbitration rules provide no mechanism for depositions. *London Court Of International Arbitration, Article 22*. Nine non-US citizens were required to sit for US depositions pursuant to US Rules – depositions whose only possible use would be in a London Arbitration whose Rules do not provide for that procedure.

There Is No Need for Rule 27

We would have thought that our Federal courts have enough work to do that they do not need to stretch the limits of arcane rules like Rule 27 to meddle into proceedings over which they have no real jurisdiction and no real interest. But that's just us. We presume that these courts saw a genuine need to give this sort of relief; but even so, they did not need Rule 27 to do it.

When Rule 27 was initially adopted in 1938 it was not to fill any void but rather to codify existing practice. "This rule offers a simple method of perpetuating testimony in cases where it is

usually allowed under equity practice or under modern statutes." *Notes of Advisory Committee on Rules*. Although not universally, most states then and now recognize the existence of an equitable cause of action to take discovery independent of a lawsuit on the merits where exceptional circumstances exist.

In *Lubrin v. Hess Oil Virgin Islands Corp.*, 109 F.R.D. 403 (D. V.I. 1986), *Lubrin* was a plaintiff looking for a defendant. *Lubrin* was injured during the course of his employment with *Hess* by coming into contact with chemicals escaping from a cargo tank designed and owned by third parties. *Lubrin* was barred from suing *Hess* under workers compensation laws and *Hess* would not voluntarily cooperate with him so that he could determine the identity of the third parties. The court found that *Lubrin* could bring an independent equitable action for discovery and obtain the right to a physical inspection and a 30(b)(6) deposition.

Lubrin could not have used Rule 27 to frame his complaint; but he didn't need to, since an equitable action for discovery provides far greater latitude than Rule 27. For example, in Florida, the equitable action can be brought for use in an action whether or not it is already pending or is merely anticipated; the equitable cause can be used to help frame a complaint, including identifying proper parties and proper legal theories. *Perez v. First National City Bank of New York*, 328 F. Supp.2d 1374 (S.D. Fla. 2004). Not all states recognize independent equitable actions, see *Austin vs. Johnston Coca-Cola Bottling Group, Inc.*, 891 P.2d 1143 (Kan. App. 1995), but the majority rule is to allow those actions.

It May Be Time For A Rulectomy

And that's all we need. We did not particularly need Rule 27 when it was originally adopted and we certainly do not need now a

rule which can be twisted to allow parties to evade arbitration agreements. The Judicial Conference of the United States is currently considering an amendment

to Rule 27 – a simple, non substantive, stylistic cleanup. But maybe the Conference should take a closer look at the Rule itself and

decide whether, like an appendix, it may no longer be necessary.



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