Errata Sheets and the Deposition Hallows

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The deposition process is one of the most important tools to clarify legal issues and to discover or confirm essential facts. A deposition allows counsel to gather information in a setting where the opposing attorney is unable to filter, influence, or help craft the responses. It offers an opportunity to gauge the demeanor of a witness and evaluate how that witness will present to a jury. In the best circumstances, a deposition can yield information fatal to an opponent's theory of liability or defense. The examining attorney may leave a deposition armed with newly discovered information sufficient to support a dispositive motion, shore up a new defense, or contradict an opponent's theory at trial. At the very least, depositions frequently alter the settlement value of a case.

Certainly, a deposition can be a powerful tool. But what if the completed deposition transcript is delivered to the examining attorney along with an errata sheet that substantively alters material deposition responses? What if the errata sheet directly contradicts the deposition testimony and alleges facts that are tailored to support the opponent's case theory? Can a witness wave the errata sheet like a magic wand and make bad testimony disappear?

Errata Sheet Changes

An errata sheet is a separate paper inserted into a deposition transcript and sent to the deponent when the witness or counsel has requested an opportunity for the witness to review and sign the deposition. The transcript is commonly sent to the witness along with a blank errata sheet and minimal instructions directing the witness to use the errata sheet if she wants to change the transcript. The errata sheet does not indicate what types of changes can be made or when it is appropriate to alter the transcript. The witness has an opportunity to review the deposition transcript and to list changes and the reasons for them on the errata sheet before she signs and returns the transcript for seal and submission by the court reporter as an original.

On its face, the errata sheet permits a witness to make any manner of change--to form or substance--so long as the other requirements of the rules are met. Form changes include typographical or clerical errors, misspellings, or errors in the transcription. Substantive changes materially alter the testimony to say something new or different. The trial rules that govern depositions do not limit the type of change a witness can make before signing the deposition. Substantive changes may fundamentally alter the deposition such that it becomes inconsistent with the original transcript and defeats the fundamental purpose of the deposition process, namely, to discover the knowledge or experience of the witness.

Rule 30 and Its Progeny

In addition to the lack of instruction and limitation in the errata sheet form, no limitation in the trial rules exists as to what alterations can be made to the transcript or what reasons are appropriate. Indiana Rule of Trial Procedure 30(E)(2) provides, "If the witness desires to change any answer in the deposition submitted to him, each change, with a statement of the reason therefore, shall be made by the witness on a separate form provided by the officer." A strict reading of Rule 30 would allow the witness to change any answer for any reason. Likewise, Federal Rule of Civil Procedure 30(e) is quite broad: "If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given."

In light of the liberal rules, which changes are appropriate and under what circumstances? A deponent may, and indeed should, make any changes needed to correct form, spelling, or transcription mistakes. There are also times when a transcription error may reasonably necessitate a substantive change to the testimony; for example, if the court reporter left out a prefix like "un-" or missed a "not." The key question is whether a deponent may give sworn testimony in a deposition and later substantively alter her answers even if the responses were accurately recorded. Both the Indiana state and federal Rule 30 would seem to allow substantive changes, but the courts are split on whether this is permissible.

The Majority Rule – Substantive Changes are Allowed

The majority of state courts, including Massachusetts, New York, Wyoming, and Texas, do not limit the scope of changes a deponent can make to her deposition testimony, so long as the changes are timely and a reason is given. Those states reason that the trial rules do not limit the type of change a deponent can make to a transcript of her deposition. In addition, while the state and federal Rule 30 require a reason for the change to be stated on the errata, there is no requirement that the reason be valid or even believable. The reasoning behind this rule is that depositions are often a stressful and confusing process for deponents, and they should have the opportunity to correct and clarify their answers where they believe they gave incorrect or incomplete responses.

Likewise, the majority of federal jurisdictions embrace a "plain language" reading of Federal Rule 30(e) and allow a deponent to make substantive changes without regard to the reasons. *See, e.g., Lugtig v. Thomas*, 89 F.R.D. 639, 652 (N.D. Ill. 1981); *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F.Supp. 1398 (N.D. Ill. 1993) ("[a] witness can make changes that contradict the original answers, and the reasons given need not be convincing"). However, the courts that allow contradictory changes are sticklers for compliance with the technical requirements of the rule, namely, that some reason is given for every change and that the changes are submitted within thirty days from the time she receives the transcript. *Id*. Those courts often strike the offensive errata sheet for procedural defects.

The Minority Rule – A Deponent May Not Alter What Was Said under Oath

The minority rule applied in states such as Mississippi, Delaware, Kansas, Lousiana, and Georgia is that testimony given under oath should not be altered. In those states the only changes permitted on an errata sheet are those of form: typographical, spelling, or transcription errors. The most frequently cited case espousing this rule notes that "a deposition is not a take home examination." *Greenway v. International Paper Co.*, 144 F.R.D. 322, 235 (W.D. La. 1992). The rationale for this rule is to prevent deponents from downplaying the deposition process because they can use the errata sheet to fix bad testimony later. "The Rule cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses." *Id.* at 232.

In *Greenway*, the court struck an errata sheet where the plaintiff made sixty-four changes to his deposition testimony. Among the voluminous and wordy alterations he changed *yes* answers to *no* and vice versa, changed a *correct* response to *I do not consider what you have said to be correct*, and changed one answer from *fifteen feet* to *eight feet*. *Id*. at 323-25. Holding that Rule 30(e) does not allow a deponent to alter what he said under oath, the court struck the errata changes and also took a request for sanctions under advisement. *Id*. at 325.

There is no reported state court case in Indiana addressing the scope of Indiana's Rule 30(E)(2). However, Indiana district courts and the Seventh Circuit, interpreting Federal Rule 30(e), which specifically provides for "changes in form or substance," have adopted a narrow application of the rule to allow for correction of transcription errors, including plausible form errors that change the substance of the testimony (such as dropping a *not*). *Thorn v. Sunstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000); *see also Treat v. Tom Kelley Buick Pontiac GMC, Inc*., 710 F. Supp. 2d 777 (N.D. Ind. 2010) (citing *Greenway*, 144 F.R.D. at 235).

In the jurisdictions where substantive errata changes are disallowed, including the Seventh Circuit, the law regards an errata sheet much like an affidavit filed to contradict or clarify deposition testimony. While there is no reported Indiana opinion on this issue, it is well settled in the state that "sham" affidavits are not permitted to contradict sworn testimony or to thwart an otherwise appropriate summary judgment. *Gaboury v. Ireland Road Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983). "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id*. A party who desires to exclude substantive errata changes may find it useful to analogize the errata sheet to a contradictory affidavit filed to avoid summary judgment.

Even where substantive changes are not permitted, there are some circumstances when a deponent may be permitted to alter deposition testimony. For example, if the testimony was confusing or ambiguous, the deponent may be permitted to clarify it. *Cowan v. Prudential Insurance Company of America*, 141 F.3d 751, 756 (7th Cir. 1998). *Cowan* was a sex discrimination claim in wherein the plaintiff was deposed and listed three

instances she claimed constituted sex discrimination or a hostile work environment. *Id*. Subsequently, she submitted an affidavit with some additional facts to support her claim. *Id*. The *Cowan* court allowed the affidavit because the deposition questions (asking for "anything else") were somewhat confusing and the affidavit added to the testimony but did not contradict it. *Id*. In general, however, those jurisdictions do not permit a witness to alter deposition testimony in the absence of a transcription error.

Responding to an Errata Sheet with Substantive Material Changes

When an errata sheet contains harmful substantive changes, the first line of defense is to attempt an informal resolution with opposing counsel. Contact the attorney and ask for the reasons behind the deposition changes. There may be a justifiable reason for the changes, such as confusion about the terminology or the identity of the parties. If the changes appear to be inappropriate, request that the attorney reconsider the errata changes and withdraw them.

If counsel or the witness is unwilling to withdraw the errata changes, consider whether it is more advantageous to strike the errata sheet or to use it at trial to show the inconsistencies to the jury. It may be preferable to confront the witness with the deposition and the errata changes at trial because an attempt to modify testimony implies guilty knowledge and draws the jury's attention to crucial facts that might otherwise go unnoticed. If the changes are material and may defeat summary judgment or would be ineffective at trial it may be better to file a motion to strike the errata sheet.

Procedural deficiencies are the best and most reliable way to strike an errata sheet. Confirm that the witness or counsel either requested to read and sign the deposition or declined to waive signature during the deposition. The rules also require the changes be submitted within thirty days of receipt of the transcript, and there must be a reason stated for each change.

If there is no procedural deficiency, counsel may move to strike the errata sheet on the basis of the inappropriate substantive changes. "When a party attempts to change the evidentiary record through contradictory errata sheets, [the] appropriate remedy is to order [the] errata changes 'deleted,' and to treat the transcript 'as if the plaintiff refused to sign the deposition or has waived the signing of the deposition.'" *Treat v. Tom Kelley Buick Pontiac GMC, Inc*., 710 F. Supp. 2d 777, 790-91 (N.D. Ind. 2010).

Although there is no state court authority in Indiana directly interpreting Rule 30(E)(2), custom and practice in Indiana do not ordinarily permit substantive changes, and a motion to strike may be well taken. The broad language of the rule should not permit deponents to give sworn testimony and then substitute better answers on an errata sheet after consideration and consultation with counsel. An errata sheet is not a magic wand.

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