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# Be Vigilant When It Comes to Deposition Corrections

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A short, snappy decision issued on March 30 by the Appellate Division, Second Department, stimulated this article. The appellate panel, in *Torres v. Board of Education of City of New York*,[1] held that errata sheets attempting to correct testimony in plaintiff's deposition transcript should have been struck when defendant moved to have them rejected. The corrections were deemed unacceptable because of shortcomings in meeting the requirements of CPLR 3116(a), the applicable state procedural rule, as well as governing case law. When errata sheets are ruled to be failures, what's left is the sworn "uncorrected" testimony. That result can prove to be fatal to a litigant's case if, for example, the version of the statement in the original transcript might justify summary judgment for the adversary. Several other calamitous consequences could ensue so failure to effect acceptable corrections can be, colloquially speaking, a "big deal."

At first blush, many litigators on both sides possibly view the practice of offering corrections to deposition transcripts as a kind of vanilla ministerial function, hardly controversial and unlikely to instigate the adverse lawyer's keen interest in the matter, let alone a snarl or bite. A passive, uninterested approach to the other side's proffer of deposition errata sheets, however, is not only neglectful, it is unwise. A head-in-the-sand attitude against closely examining proposed errata sheets can mean the difference between obtaining summary judgment for one's client as opposed to a lengthy, expensive trial whose outcome may be uncertain plus the expense of appellate proceedings. Errata sheets submitted by or on behalf of a deponent thus deserve devoted, detailed attention, not a perfunctory, hasty review.

In order to do that meaningfully, however, counsel must be familiar with the applicable procedural rule and some of the governing case law on the topic. In New York state courts, CPLR 3116(a) governs. In federal practice, Federal Rule of Civil Procedure 30(e) is controlling. The rules and case law reflect competing considerations. Line-drawing by courts reflects policy tensions. Lawyers have to understand the policy rationales to construct and deliver excellent advocacy.

For example, the procedural rules clearly permit some corrections within certain time frames.

That means that the law tolerates, if not welcomes, some post-deposition testimonial changes, likely in recognition of the realities that stenographers can make mistakes, as can deponents. As one federal appellate court said, "No one's memory is perfect. People forget things or get confused, and anyone can make an innocent misstatement or two. Or maybe even three or four."[2] Also, there is the law's objective of promoting truthful, accurate testimony. Acceptable corrections can assist in that regard.

On the other hand, the law's tolerance for changed testimony is not limitless. Deposition practice would become a burlesque if deponents could make abundant, material, substantive testimonial changes under the guise of "corrections." Allowing major changes could, for example, justify reopening depositions for supplementary proceedings. Were this to become ubiquitous, the system would bog down. Additional depositions would tax everyone, not to mention the expense factor.

Indeed, allowing transcript changes to be made willy nilly would destabilize an essential purpose of depositions, namely, to pin down the deponent's sworn testimony so that the litigants have some level of certainty as to what the facts are. After all, that's a pivotal goal of pretrial discovery. As we shall see, some courts are thus quite wary about the number and kind of "corrections" that errata sheets may proffer and the reasons for them. Indeed, on the federal courts side, there seem to be circuit splits on how "liberally" FRCP Rule 30(e) should be applied.[3]

## Illustrative Cases

Then, as a separate but related matter, there are significant ethical considerations that pertain to a lawyer's preparation of witnesses for deposition and trial. These were discussed in an excellent article by Denver attorney, Erin C. Asborno, in an ABA publication.[4] The ABA's Model Rules of Professional Conduct forbid a lawyer from knowingly offering false evidence or knowingly counseling or assisting a witness to testify falsely (Model Rules 3.3 and 3.4(b)). The comment to ABA Model Rule 3.4 lists "improperly coaching witnesses," among other items, as prohibited behavior.

On the other hand, "witness preparation" seems to be part of the attorney's ethical obligation to competently represent his client. Model Rule 1.1 says "competent representation" requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Does "witness preparation" include telling the witness what he should say? Does it include telling a deponent what "corrections" he should insert on errata sheets that offer changes to the transcript? Asborno's helpful article cites an 1880 New York decision picturesquely stating that a lawyer's duty is to "extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[5]

After discussing a number of sources, Asborno concludes that ethical witness preparation is an essential part of preparing for deposition or trial. However, "[t]he crucial issue is that the lawyer does not falsify, distort, improperly influence, or suppress the substance of the testimony to be given by the witness."[6] As can be seen, a lawyer's "coaching" of the deponent regarding corrections to be made in errata sheets can implicate ethical bounds. Moreover, if the corrections really are the lawyer's input, then it is the lawyer who, in effect, becomes the "testifier."

In the Appellate Division's Torres ruling on March 30,[7] plaintiff sued for personal injuries. He testified at a hearing on issues regarding the basis for his negligence suit against the New York City Board of Education. Then he was later deposed and testified in conflict with his testimony at the hearing. Pursuant to CPLR 3116(a), which allows a witness to make "changes in form or substance" to deposition testimony as long as the changes are accompanied by "a statement of the reasons given by the witness for making them," plaintiff served errata sheets offering his corrections. Defendant moved to strike those errata sheets. The trial court denied the motion, but the Appellate Division reversed and struck the corrections.

The Second Department panel stated: "A correction will be rejected where the proffered reason for the change is inadequate." Further, "material or critical changes" to testimony through the use of an errata sheet are also prohibited. Here, plaintiff made "numerous and significant" corrections to his testimony which would have been in conflict with his earlier testimony at the hearing. Additionally, the court deemed plaintiff's stated reasons for the changes—that he "mis-spoke" and that he was clarifying his testimony—"inadequate to warrant the corrections."

In *Horn v. 197 5th Avenue Corp.*,[8] plaintiff sued for injuries sustained when she tripped and fell over a sidewalk cellar door adjacent to the defendant's property at 197 Fifth Avenue in Brooklyn. However, at her deposition plaintiff repeatedly testified in great detail that she tripped and fell at 140 Fifth Avenue, some two to three blocks away and across the street from defendant's property.

Notwithstanding the "detailed, consistent and emphatic nature of the plaintiff's deposition testimony" regarding the accident location, plaintiff later executed an errata sheet containing "numerous substantive 'corrections' which conflicted with various portions of her testimony" and which sought to establish that she actually fell at 197 Fifth Avenue (defendant's building). The Appellate Division struck the errata sheets because plaintiff had failed, pursuant to CPLR 3116(a), to provide "an adequate reason for the numerous critical substantive changes she sought to make in an effort to materially alter her deposition testimony."

In *Ashford v. Tannenhauser*,[9] an employee fell from a ladder and described details about the ladder and how it "slid out from under him." In a post-deposition errata sheet, however, the injured plaintiff "radically changed much of his earlier testimony, with the vague explanation that he had been 'nervous' during his deposition." Since plaintiff failed to offer an adequate reason for "materially altering the substance of his deposition testimony," the changed testimony could not properly be considered in determining whether a defect or inadequacy in the ladder caused his fall. Plaintiff thus failed to raise a triable issue of fact. Judgment for defendant was warranted.[10] The New York decisions suggest that errata sheets presenting numerous or "substantive" or "material" changes in testimony or that present inadequate reasons for each such change or that are served untimely are vulnerable to be stricken. The decisions also illustrate that nullifying the attempted changes can lead to favorable dispositions for the adverse party.

## Federal Cases

In federal courts it is FRCP Rule 30(e) that prescribes the applicable procedure. The witness must submit an errata statement describing any changes within 30 days of notification that the transcript is available. The statement should specify the reasons for the changes and be

signed by the witness. The submitted changes are attached to the transcript. The courts vary as to whether and when they will allow changes in the substance of the testimony.[11] The statement of reasons for the corrections is important. A failure to give reasons can justify the court striking the added testimony. A statement that the proposed changes are to correct typographical errors and to provide defendants with more complete information on plaintiff's position was held adequate by a Virginia federal court.[12]

However, the author of the Rule 30(e) section in Moore's Federal Practice treatise observes that the courts "are divided on the type and extent of changes permitted." Some courts have concluded that any changes in form and substance are permitted, even contradictory testimony, since the rule places no limitations on the type of changes.[13] Some of these courts reason that there are adequate safeguards to prevent abuse, such as maintaining the original record, reopening the deposition in cases of contradictory testimony, and assessing the costs of additional discovery against the deponent.[14]

On the other hand, some federal courts hold that substantial changes are improper since the rule should not be used to permit a deponent to alter what was said under oath. These rulings suggest that material changes beyond correcting errors in transcription are not acceptable. Thus, a substantive correction of a key answer from "yes" to "no" would be problematic. Adding new testimony based on new evidence under the guise of correcting errors has been rejected.[15] Errata sheet substantive changes relied upon to try to defeat summary judgment motions can trigger a variant of the so-called "sham affidavit" rule which rejects affidavits contradicting prior sworn testimony to be used to defeat a summary judgment motion. In determining whether errata sheet changes constitute a "sham," courts consider a number of factors: the number of corrections; whether the corrections fundamentally change the prior testimony; the impact of the changes on the case (e.g., whether they pertain to dispositive issues); the timing of the corrections; and the witness's qualifications to testify.[16]

The "sham" nature of errata sheet changes was extensively discussed in *Karpenski v. American General Life Cos.*,[17] a lawsuit by a physical therapist claiming that her disability policy was wrongfully terminated by the defendant insurance company. Plaintiff urged that the errata sheets of three defense witnesses should be stricken. One witness made 29 changes, another 45 changes and the third, 16 changes. After discussing the 'sham affidavit" rule, the court concluded that the three witnesses' errata sheets were "contradictory rather than corrective testimony and exceed the scope of changes permitted to deposition testimony under Rule 30(e)." Accordingly, the errata/jurats were stricken.[18]

A rather extreme case of deposition corrections is found in *Norelus v. Amlong*,[19] where the attorneys for a plaintiff employee claiming extreme sexual abuse at a Denny's restaurant workplace were sanctioned for improper litigation conduct. Among the claimed misdeeds was the submission of 868 errata changes to the alleged victim's deposition testimony. The plaintiff was an immigrant whose English was poor and an interpreter was needed.

The reason for 500 of the 868 changes was stated to be that the deponent "did not understand what was being asked." The others were classified into three broad classifications: "poor translation by interpreter," "clarification of response," and "refreshed recollection."[20] The appellate court majority called it a "novella-length errata sheet." The attorneys' creation and submission of this document and their continued pursuit of plaintiff's claims multiplied

proceedings in the case "unreasonably and vexatiously" justifying the award of sanctions.

## Conclusion

Correcting depositions may appear to be a routine, almost clerical-like procedural practice. Yet, significant dangers may lurk for the inattentive lawyer when errata sheets are proffered to correct transcripts of sworn testimony. Thus, vigilance is needed, not disinterest. The attentive lawyer will find, in the procedural rules and case law, potential avenues of redress to strike material, substantive changes to deposition transcripts. Alternatively, he can seek other relief such as reopening of depositions at the adverse party's expense to probe the basis for all changes.

**Endnotes:**

1. 2016 NY Slip Op 02350 (2d Dept. March 30, 2016).

2. *Norelus v. Denny's*, 628 F.3d 1270, 1273 (11th Cir. 2010).

3. See generally, J.W. Stempel, "Review of Transcript By Deponent," in 7-30 Moore's Federal Practice—Civil, §30.60 (2015) (LEXIS).

4. "Ethical Preparation of Witnesses for Deposition and Trial," 25 ABA, Verdict, No. 3, p. 12 (Summer 2011) (available from the American Bar Association, Section of Litigation, Trial Practice).

5. Id., citing *In re Eldridge*, 82 N.Y. 161 (1880).

6. Id.

7. Supra n. 1.

8. 123 A.D.3d 768 (2d Dept. 2014).

9. 108 A.D.3d 735 (2d Dept. 2013).

10. See also *Shell v. Kone Elevator Co.*, 90 A.D.3d 890 (2d Dept. 2011) ("numerous significant, substantive changes" to deposition testimony on errata sheet without providing a reason; changes struck); *Kelley v. Empire Roller Skating Rink*, 34 A.D.3d 533 (2d Dept. 2006) ("affidavit of correction" struck as it was untimely and without a "sufficient explanation" for the substantive change in deposition testimony).

11. See generally, S. Baicker-McGee and others, Federal Civil Rules Handbook, "Rule 30(e)—Review By The Witness; Changes," pp. 887-888 (2016); J.W. Stempel, "Review of Transcript By Deponent," §30.60 (in Moore's Federal Practice), supra n. 3.

12. J.W. Stempel, supra n. 3, at fn. 5 (citing *Foutz v. Town of Vinton, Virginia*, 211 F.R.D. 293, 295-296 (W.D. Va. 2002)).

13. See cases cited in J.W. Stempel, supra n. 3, at footnote 8.

14. Ibid.

15. See Id. at fn. 9 (citing cases).

16. See Id. at fn. 11—fn. 11.3 (citing cases).

17. 999 F.Supp.2d 1218 (W.D. Wash. 2014).

18. Id. at 1224-1225.

19. 628 F.3d 1270 (11th Cir. 2010).

20. Id. at 1285.

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