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Pretrial Discovery: Defending Against an Errata Sheet

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Depositions are invaluable to the discovery process, both to uncover the facts and arguments to be used at trial and to preserve the testimony of relevant individuals before it is forgotten or skewed. Many new litigators may think that a witness's testimony is forever set in stone once the deposition ends. But how final is that testimony *really*? The answer in federal court is that the battle over the official record does not end with the deposition. Federal Rule of Civil Procedure 30(e) permits a deponent to make changes to his or her prior sworn testimony through a written statement called an errata sheet. Errata sheets often create post-deposition confusion for new litigators, as federal courts take vastly different approaches to Rule 30(e) and the scope of changes permitted by an errata sheet.

If opposing counsel files an errata sheet after his or her client has been deposed, defending attorneys generally should do three things to determine the best way to respond. First, review the errata sheet for procedural compliance with Rule 30(e) and move to strike it entirely if it does not conform to the rule's requirements. Second, review the errata sheet's changes and determine whether they substantively change the deponent's prior sworn testimony or simply correct typographical errors. Third, review and understand the court's approach to errata sheets in your jurisdiction. Then you are equipped to decide whether to reopen the deposition or move to strike the errata sheet.

The Basics of Rule 30(e) and Errata Sheets

The relevant language of Rule 30(e)(1) provides that a deponent may, within 30 days, "review the transcript . . . [and] if there are changes in form or substance, . . . sign a statement listing the changes and the reasons for making them."

New litigants should learn the procedural requirements of submitting an errata sheet. The 30-day period begins once the deposition transcript becomes available for review, not when the party physically receives the transcript. Fed. R. Civ. P. 30(e)(1). Several courts have held that the 30-day period begins when the court reporter informs *the witness's attorney* that the deposition transcript is available for review, no matter when the attorney notifies the witness or *actually gives* the witness the transcript to review. *See* *Welsh v. R.W. Bradford Transp.*, 231 F.R.D. 297, 301 (N.D. Ill. 2005) (citing *Rios v. Bigler*, 67 F.3d 1543, 1553 (10th Cir. 1995) (holding that notification to the witness's lawyer constitutes notification to the witness under Rule 30(e)).

The deponent must provide a specific reason for each correction or change to the deposition transcript. A failure to do so may cause the court to strike the errata sheet automatically. *See, e.g.*, *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 266 (3d Cir. 2010) ("[T]he failure to provide a statement of reasons alone suffices to strike a proposed change."). The errata sheet also should specify the page and line number of the testimony being corrected, the testimony as it reads in the transcript, and the revised testimony as it should read in the transcript. Litigants should consider disputing an errata sheet that fails to conform to the procedural requirements.

The rule provides for changes in "form or substance," but federal courts interpret this phrase differently and are divided over the scope of permissible changes.

Federal Courts' Approaches to Errata Sheets

Federal courts generally follow one of two main approaches to errata sheets. The traditional approach permits substantive changes to the deposition transcript, even if they contradict the deponent's prior testimony. On the other hand, the modern approach strictly construes the rule and limits permissible changes to typographical corrections only, such as spelling errors. Other federal courts fall somewhere in the middle, further complicating this legal landscape. Litigants must research and understand the approach in their jurisdiction to determine when it is advantageous to move to strike an errata sheet or whether to seek to reopen the deposition.

> **The traditional approach.** The traditional approach permits a deponent to change his or her testimony by submitting "timely corrections, even if they contradict the original answers, giving reasons." *Devon Energy Corp. v. Westacott*, No. 09-1689, 2011 WL 1157334, at *4 (S.D. Tex. 2011). "Under this approach, the fact and extent of the change are treated as subjects for impeachment that may affect a witness's credibility." *Id.* at *5. *See also Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2d Cir. 1997). The traditional approach permits substantive changes to the deponent's prior sworn testimony, including contradictory or completely new testimony. In this situation, the defending attorney must scrutinize the errata sheet's changes and the reasons provided by the deponent.
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> A derivative of the traditional approach permits substantive changes to prior testimony, even if the deponent's reasons for the change are unconvincing. See *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005). This opens the door to changes to the deponent's prior sworn testimony, regardless of whether the deponent offers a sufficient and convincing explanation for any substantive changes. *Compare Jackson v. Teamsters Local Union 922*, 310 F.R.D. 179, 183 (D.D.C. 2015) ("material revisions should not be accepted absent convincing explanations"), *with Seahorn Invs., LLC v. Fed. Ins. Co.*, 2015 WL 11004898, at *1 (S.D. Miss. 2015) (the deponent's proffered "clarification" was insufficient because it did not explain the correction's relation to the rest of the relevant

portion of the testimony). Because the court retains wide discretion under this flexible approach, defending attorneys should consider whether to file a motion to strike to persuade the court to act in their favor and reject any unfavorable changes in the errata sheet.

The modern approach. The Sixth, Seventh, Ninth, and Tenth Circuits have adopted some form of the modern approach. As the Sixth Circuit reasoned, Rule 30(e) "cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the question with no thought at all, then return home and plan artful responses. . . ." *Trout v. FirstEnergy Generation Corp.*, 339 F. App'x 560, 565 (6th Cir. 2009); *Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992) ("A deposition is not a take home examination."). This approach prohibits substantive changes to the deposition transcript and typically rejects material changes that go beyond correcting typographical errors in the deposition transcript.

The Ninth and Tenth Circuits allow a deponent to make "corrective" changes, but not contradictory changes or changes that would allow that party to survive summary judgment. See *Burns v. Bd. of Cty. Comm'rs of Jackson Cty.*, 330 F.3d 1275 (10th Cir. 2003); *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217 (9th Cir. 2005). Similarly, the Seventh Circuit prohibits contradictory changes, unless the deponent shows that the changes are effectively only correcting *errors* in the transcript. See *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000).

The case-by-case approach. The Third Circuit has taken a "case-by-case" approach, leaving to the judge's discretion the question of whether the deponent provided sufficient justification for the changes. This "allows deponents to make necessary changes via Rule 30(e) without also 'generat[ing] from whole cloth a genuine issue of material fact (or eliminat[ing] the same) simply by re-tailoring sworn deposition testimony to his or her satisfaction.'" *EBC, Inc.*, 618 F.3d at 268 (holding that when considering a motion for summary judgment, the district court has discretion to allow contradictory changes to become part of the record or may refuse to consider substantive changes that materially contradict prior testimony and lack sufficient justification).

In other jurisdictions, courts within the same district remain divided over the scope of changes permitted in an errata sheet. *See Travelers Indem. Co. of Conn. v. Attorney's Title Ins. Fund, Inc.*, No. 2:13-cv-670-FtM-38DNF, 2016 WL 866368, at *6–7 (M.D. Fla. 2016) (noting that courts in that district are divided on the scope of permitted changes).

Defending Against Errata Sheets

The first defense against an errata sheet is to create a clear record in the deposition. Taking a deposition requires tedious preparation, and new litigators should consider what information they want to elicit from the witness when strategizing their questions. During the deposition, the attorney must frame questions clearly and in a way that does not leave the attorney susceptible to objections, while also ensuring the witness's answers are clear. If the witness's testimony is unclear or vague, the witness may use an errata sheet to create a much different record, after the witness has had time to think about the case and talk to his or her attorney. Proper preparation for the deposition is the first line of defense against an errata sheet that tries to change deposition testimony substantively. It also is advisable to have the deposition recorded, which will make it difficult for deponents to make substantive changes to their answers by claiming a transcription error.

If an errata sheet is indeed filed, the defending attorney should review the changes and proffered reasons first to determine how best to respond. Specifically, the litigator should examine the errata sheet carefully to determine whether any change falls outside the scope of permissible changes and whether each change has a sufficient corresponding explanation, if the applicable jurisdiction calls for sufficient explanations. Depending on the content of the errata sheet, the defending attorney may move to reopen the deposition or move to strike the errata sheet's changes from the official deposition testimony.

A litigator defending against an errata sheet in a jurisdiction that takes the modern approach generally has fewer concerns than the litigator would in those jurisdictions that have adopted some form of the traditional approach. Under the modern approach, the defending litigator may move to strike the errata sheet if the changes themselves go beyond simply correcting typographical errors or are substantive in any way. The reasons for the substantive changes usually do not need to be examined, as the modern approach prohibits all substantive changes, regardless of the proffered reason.

In jurisdictions where courts have adopted the traditional or a "case-by-case" approach, a defending attorney must carefully examine both the changes and the reasons provided. If the reasons are insufficient to justify the changes, it may be appropriate to move to strike the errata sheet or move to reopen the deposition to clarify the record.

An errata sheet's effect can be most profound on summary judgment, where it creates further confusion and potential pitfalls for new litigants. In jurisdictions that permit substantive changes without requiring sufficient reasons, a party may survive summary judgment solely because the changes are contradictory and have created an issue of material fact. In that situation, it may be advantageous to reopen the deposition to clarify the record before filing for summary judgment. If the changes or reasons provided exceed the scope permitted in the

jurisdiction, it may be more advantageous to move to strike the errata sheet simultaneously with the summary judgment motion rather than reopen the deposition entirely.

It is important to remember that an errata sheet does not remove the deponent's original testimony. Instead, the changes that are accepted by a court merely become a part of the record. It is up to the trier of fact to determine which answers to credit, based in part on the deponent's credibility. Whether reopening the deposition or moving to strike, a litigator should attempt to exploit any logical inconsistencies that the new answers create and that can be resolved only by crediting the original answers. Of course, if the new answers help your position more than the original answers do, you may decide not to contest the changes at all.

Although reopening a deposition may be more costly and inconvenient than moving to strike an errata sheet, it could be thought of as an opportunity, with proper questioning, to attack a witness's overall credibility that is not available simply by moving to strike. The witness, after all, is admitting he or she needed a second round to give accurate answers. The more substantive the changes requested, the more likely it is that a motion for leave to reopen the deposition will be granted. *See* *Pina v. Children's Place*, 740 F.3d 785, 792 (1st Cir. 2014).

On the other hand, moving to reopen a deposition to clarify the record indicates some willingness to accept the errata sheet as part of the record. A subsequent motion to strike the errata sheet just because a follow-up deposition did not yield desired results likely would be precluded. Thus, the most prudent course of action may be to move to strike the errata sheet or, in the alternative, to reopen the deposition. This alternative motion has had varied success in the courts. *Compare* *Travelers Indem. Co. v. Attorney's Title Ins. Fund, Inc.*, No. 2:13-cv-670-FtM-38DNF, 2016 WL 866368, at *20 (M.D. Fla. 2015) (motion to strike granted), *with Medina v. Horseshoe Entm't*, 2006 U.S. Dist. LEXIS 49137, at *3, *10–11 (W.D. La. 2006) (denying defendant's motion to strike, but granting leave to reopen deposition), *and Pina*, 740 F.3d at 790–94 (both motions denied). But it gives litigators a chance to hedge their bets.

Errata sheets often are an overlooked part of the discovery and deposition process, but it is important for new litigators to recognize their role. By understanding which approach the courts in their jurisdiction take and the extent of changes the courts allow deponents to make in an errata sheet, new litigators will be better prepared to fight back when a witness tries to alter his or her deposition testimony after the fact by making substantive chances in an errata sheet.

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