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CLIFFORD'S NOTES

CHANGING THE STORY

State, federal rules vary on correcting testimony

By BOB CLIFFORD

When a deponent wants to actually change testimony, to what extent do courts allow it? That depends on whether the case is in state court or in which federal court the case is pending.

Illinois Supreme Court Rule 207 allows deponents who have reserved their signature to make corrections to their deposition transcript "based on errors in reporting or transcription." The rule states that means that "the reporter erred in reporting or transcribing the answer or answers involved" and that [t]he deponent may not otherwise change either the form or substance of his answers." The rule goes on to state that the deponent has 28 days to review the transcript and submit changes.

That same deponent, however, may have very different corrections — literally — in federal court. Under Federal Rule of Civil Procedure 30(e), a deponent who reserves his or her signature to review the deposition transcript can make changes "in form or substance." If such changes are requested, the deponent must "sign a statement listing the changes and the reasons for making them."

A recent decision by the U.S. District Court in Virginia addressed the scope of Rule 30(e). *Grottoes Pallet Co. Inc. v. Graham Packaging Plastic Products Inc.*, Case No. 5:15-CV-00017, 2016 WL 93869 (decided Jan. 6, 2016). There, the court found that two general lines of cases have developed in the 3rd U.S. Circuit Court of Appeals — the "traditional" approach and the "modern" approach to Rule 30(e).

Under the traditional approach, the court noted that deponents are allowed to make substantive — even contradictory — changes to prior testimony, but that both versions must remain available for purposes of cross-examination at trial "so that the trier of fact can evaluate the honesty of the alteration" in determining whether the substantive correction should be permitted. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 389 (7th Cir.2000). "Sham" factual disputes, though, are not allowed.

The well-settled prohibition against contradicting deposition testimony with a later-served affidavit in opposition to a summary judgment motion, sometimes referred to as the "sham affidavit rule," originated with the 2nd Circuit in *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir.1969). Since then, some version of this doctrine has been adopted in virtually every circuit. *Buckner v. Sam's Club Inc.*, 75 F.3d 290, 292 (7th Cir.1996).

The "modern" approach construes Rule 30(e) more narrowly and allows only corrections based upon court reporter errors. The *Grottoes* court, acknowledging that the 4th Circuit had yet to rule on the subject, cited an unpublished 6th Circuit decision that held that "[t]he [r]ule 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 … A deposition is not a take-home examination.' " *Grottoes*, quoting *Trout v. FirstEnergy Generation Corp.*, 339 F.App'x 560, 565-66 (6th Cir. 2009).

Courts in the Eastern District of Michigan have followed *Trout*. See, *Walker v. 9912 E. Grand River Associates*, 11-12085, 2012 WL 1110005, at 3-4. (E.D.Mich. Apr. 3, 2012), rejecting the plaintiff's errata sheet as an attempt to materially alter deposition testimony and noting that the 6th Circuit only permits the use of an errata sheet to correct typographical or transcription errors; *Downing v. J.C. Penney Inc.*, 11-15015, 2012 WL 4358628 (E.D.Mich. Sept. 23, 2012).

The *Grottoes* court went on to explain that it was adopting a third approach — the case-by-case approach developed by the 3rd Circuit because it "allows deponents to make necessary changes via Rule 30(e) without also 'generat[ing] from whole cloth a genuine issue of material fact (or eliminate the same) simply by retailoring sworn deposition testimony to his or her satisfaction.' " *Grottoes*, quoting *EBC Inc., v. Clark Building System Inc.*, 618 F.3d 258, 268 (3d Cir. 2010).

The court went on to say that this more flexible approach gives the court discretion "to ignore errata sheets that propose 'substantive changes that materially contract prior deposition testimony, if the party proffering the changes fails to provide sufficient justification.' " *Id.*

The 7th Circuit follows this interpretation of the rule and has held that a deponent can make subsequent changes to explain one's testimony to say what he meant or to avoid confusion. Former chief judge Richard A. Posner wrote that "a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in the transcription, such as dropping a 'not.' " *Thorn*, at 389.

Similar to Illinois law, the federal rules allow a deponent to submit any changes 30 days after being notified by the court reporter that the transcript is available for review to submit any changes. One court has interpreted this to mean when the transcript was made available to the deponent's attorney, regardless of whether the attorney notified his client in a timely manner. *Welsh v. R.W. Bradford Transportation*, 231 F.R.D. 297 (N.D. Ill. 2005).

In the end, it really comes down to preparing your witness for deposition as you would for trial to avoid changing anything at all. CL

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