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THE PRACTICE Commentary and advice on developments in the law

How to Handle the Deposition 'Do-Over'

Procedural rules permit witnesses to submit changes to transcripts—but proceed with caution.

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The Fifth Law of Applied Terror, according to college folklore, holds that you will forget at least half the answers you memorized the night before the exam. The Corollaries to the Law are (a) if it is an open-book exam, you will forget the book; and (b) if it is a take-home exam, you will forget where you live. But if you have address labels sewn into your clothes, wouldn't it be relaxing if we could take the questions home?

Not in the court of now retired Judge F.A. "Pappy" Little, who famously observed that "a deposition is not a take-home examination" as he struck errata sheets provided by a witness who sought to make substantive changes to deposition testimony. A nice turn of phrase, but it is the minority view. You actually can in most jurisdictions take home the exam—or the deposition transcript. The real question is not whether you can, but whether you should. And with a few exceptions, I suggest that the answer is "hell, no." The major exception is for Federal Rules of Civil Procedure 30(b)(6) depositions—where the answer ought to be "yes, oh, boy, yes!"

First, let's review. Rule 30(e) permits a witness to take the deposition transcript home and submit errata—in form or substance—so long as a reservation of right is made on the record at the deposition and the changes are submitted with an explanation for the change within 30 days after the transcript is available. The errata are attached, but the original transcript is maintained, so the witness will have to explain the changes at trial, but the take-home answer is preserved.

Now, Little and the courts that follow his lead limit that right to typographical errors, not to actual changes of substance. The U.S. courts of appeals for the Third, Seventh and Tenth circuits follow the so-called "sham affidavit approach," holding that a change that contradicts the transcript is impermissible unless it can plausibly be represented as an error in tran-

scription, such as dropping a "not." But the majority view permits a deponent to change deposition testimony so long as the technical procedures of Rule 30(e)—reservation, reason, 30 days—are observed. The reason for the change need not even be plausible.

So, in every jurisdiction that follows the Federal Rules you have the right to have a witness sign an unchanged deposition; in every jurisdiction you have the right to make typographical changes. And in a majority of jurisdictions, you have the right to change anything. But remember, a right is decidedly different than an obligation.

ASK YOURSELF THIS QUESTION

Have you ever had a witness sign her deposition even when there are no errata? Yes? Really? Take a closer look at Rule 30(e). There is no provision that requires a signature at all, unless changes are suggested to the transcript. So what have you done when you voluntarily have the witness sign an unchanged transcript? Nature abhors a vacuum, and punishes a volunteer.

A witness who says something different at trial and in her deposition has to deal with that. "You just said the light was green? But at your deposition you said 'red.' Which is true?"

The response: "Well, I was confused by your question and thought you were asking what the color must have been for the other driver who plowed into me."

But a witness who has signed her deposition has deeper issues. "Which is true? And by the way, you didn't simply say 'red' at your deposition. You reviewed the transcript at your leisure over the following month and certified its accuracy by signing it. So why, you naughty scoundrel, should the jury believe your different testimony today?"

OK, but you have found typos, so to correct them you must have your witness sign errata sheets, right? Maybe. How important are the typos? Are they worth the even deeper hole you will have dug? "And by the way, you didn't simply say 'red' at your deposition. You reviewed the transcript at your leisure over the next month. You found and corrected trivial errors like the spelling of your dog's name. You had to look very closely to correct those errors. But you didn't change 'red.' You carefully certified that was true. So why, you lying scumbag, should the jury credit today's convenient and obviously false testimony?"

That's why I don't have witnesses sign depositions, except in the rare circumstance when a witness has blurted out something that could, if not corrected, result in summary judgment. It is a quaint mystery of our system that a witness is free at trial to contradict every word of her deposition, suffering only the slings of impeachment, but on summary judgment she is not allowed to submit an affidavit contradicting the deposition to create an issue of fact to defeat the motion absent a persuasive explanation for the change.

And then there are 30(b)(6) depositions. Magistrate Judge James Francis recently observed that he was not able to find any case addressing the interplay between Rule 30(b)(6) and Rule 30(e). So from tabula rasa he reasoned that a 30(b)(6) deposition can be a take-home examination. And why not? Even in those jurisdictions that apply the sham-affidavit rule to errata changes, most turn on the persuasiveness of the explanation for offering changed testimony.

When an individual who has sworn from personal recollection does a U-turn the new answer is inherently suspect. But when a corporate representative who has limited or no personal knowledge mouths the collective corporate mind, it is inherently understandable—indeed the Fifth Law of Applied Terror predicts—that she might forget the right answer.

It can be daunting to produce a 30(b)(6) witness, who has to assemble and recall the collective wisdom of an entire company in the hostile environment of examination under oath. But it takes the daunt out of the process to know that answers can be augmented, clarified and corrected under 30(e). Nothing quells the terror of an examination like knowing you can take it home and think things through—at least when you have a firm idea of where you live.

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