ABA

FLSA COLLECTIVE ACTION

ERRATA NOTES

THE GREAT RESIGNATION

VOL 47 NO 2
WINTER 2022

LITIGATION NEWS

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | LITIGATION SECTION

Removing Bias From Jury Selection

All Things Errata

By Brian A. Zemil, *Litigation News* Associate Editor

In most depositions, the deponent opts to "read and sign" the transcript, invoking Federal Rule of Civil Procedure 30(e). This rule allows the witness to make "changes in form or substance" to his or her sworn testimony after the deposition has concluded, creating the opportunity to use the errata sheet to repair any damaging testimony and overcome summary judgment. While federal courts uniformly recognize Rule 30(e) as a powerful litigation tool, they have diverging interpretations of the rule's phrase "in form or substance." It is important to be aware of the different ways courts view the term and to identify strategies to employ when witnesses seek to change their testimony.

If a deponent returns an errata sheet with changes, counsel should first confirm that the deponent cited the page and line at issue, explained the reason for each change in sufficient detail, and returned the errata sheet to the court reporter 30 days from the date he or she served the transcript on counsel, as required under the rule. Most courts find that a deponent's failure to comply with Rule 30(e)'s procedural requirements constitutes waiver, holding that an untimely submission "shall" be stricken by the court, as seen in *Reed v. Hernandez*.

If the deponent's submission is procedurally valid, counsel should then determine whether the witness's changes were substantive and whether the jurisdiction permits such changes. Some circuits have definitively ruled on the issue, but there are differences among jurisdictions on whether wholesale changes are allowed. Meanwhile, within undecided circuits, district courts have issued conflicting decisions.

Courts that preclude a deponent from making substantive modifications interpret "change in form" as a correction to spelling or typographical error, and "change in substance" as a correction in the transcription error. These courts reason that a contradictory errata sheet is akin to an impermissible "sham affidavit," opining, as in *Touchcom v. Bereskin & Parr*, that a deposition is not a "take-home exam" that can be revised after the witness has testified. In other words, errata sheets should not be used to "create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment." (See *Hambleton Bros. Lumber Co. v. Balkin Enters.*) The U.S. Court of Appeals for the Seventh Circuit, for example, in *Thorn v. Sundstrand Aerospace Corp.*, prohibits "contradictory" changes unless they constitute a transcription error.

Other courts do not limit the types of errata sheet changes a deponent can make. As in *Podell v. Citicorp Diners Club*, they permit sweeping alterations to deposition testimony, even if the changes materially contradict the original testimony and the witness's stated reasons for the changes are "unconvincing." Courts that broadly allow changes reason that the plain language of Rule 30(e) does not expressly limit a witness's ability to make substantive changes, providing for more complete discovery and opportunity to learn and investigate the changes pretrial.

Some courts, for example, *EBC, Inc. v. Clark Building Systems*, strike a balance between the narrow and broad views, permitting contradictory changes if the court determines the deponent offered a sufficient justification for the revision. In the U.S. Court of Appeals for the Third Circuit, trial judges have discretion to determine whether the deponent's explanation was sufficient.

If counsel ultimately determines that a witness's errata sheet contains substantive changes to a degree permissible under local law, he or she has the option to reopen the deposition at the expense of the party making the change and examine the witness to discover the reasons for and the source of the changes. Counsel's communications with the deponent regarding the errata sheet changes are fair game. Courts reject attempts to use attorney-client privilege to shield testimony about whether the lawyer's communications impacted the witness's decision, as witnessed in *Lugtig v. Thomas*. At trial, courts uniformly allow litigants to impeach the witness with both the original and corrected transcript.

Deciding to change sworn testimony through errata sheet submission is a risky litigation tactic that can adversely affect a witness's credibility, and thus a litigant's chance to win the case. Defending counsel should take precautions to avoid the potentially fatal problem by thoroughly preparing the witness, and if possible, rehabilitate any material unfavorable testimony during the deposition. If a deponent does ultimately submit substantive errata sheet changes, deposing counsel should identify case law to support a motion to strike the errata sheet, reopen the deposition, and request the production of communications between the witness and any third parties. LN

RESOURCES

- *Reed v. Hernandez*, 114 F. App'x. 609 (5th Cir. 2004).
- *Touchcom v. Bereskin & Parr*, 790 F. Supp. 2d 435, 465 (E.D. Va. 2011).
- *Hambleton Bros. Lumber Co. v. Balkin Enters.*, 397 F.3d. 1217, 1225–1226 (9th Cir. 2005).
- *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).
- *Podell v. Citicorp Diners Club*, 112 F.3d 98, 103 (2d Cir 1997).
- *EBC, Inc. v. Clark Bldg. Sys.*, 618 F.3d 253, 276–270 (3d Cir. 2010).
- *Lugtig v. Thomas*, 89 F.R.D. 639, 642 (N.D. Ill. 1981).