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REPORT

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THE THREE TYPES OF DEPOSITION ERRATA: "THAT'S NOT WHAT I SAID," "THAT'S NOT WHAT I MEANT," AND "LET ME JUST CHANGE MY ANSWER"

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The deposition you took was a success. The stage is set for summary judgment. In flies an errata sheet with material changes to the witness's testimony. The pivotal "yes" has become "no" or a meandering web of words. The sole reason given for the lawsuit just expanded into two or three. Perhaps "early 1990s" was rewritten to say "2019." What next?

On the flip side, you represent someone seeking to change prior deposition testimony. What can you do under governing law? What *should* you do in light of your ethical obligations?

Correcting deposition testimony may seem routine or even ministerial at first blush. But lawyers must be on their toes. Your tactics and preparation may be the difference between obtaining summary judgment for your client and marching onward to trial. Between meeting your ethical duties and flouting them. Between prevailing at trial and losing.

This article explores the law and practice of deposition errata under Ninth Circuit and California authorities.

What Types of Deposition Errata are Permitted?

In practice, we tend to see three types of deposition errata in Ninth Circuit and California and state court matters—those that:

Correct inaccurately recorded testimony ("that's not what I said");

Correct accurately recorded testimony of an inadvertently wrong answer ("that's not what I meant"); or

Correct accurately recorded testimony of an answer given correctly that is now inconvenient ("let me just change my answer").

While the first two categories are hardly controversial, the third category can be downright frustrating. But what is the legal standard?

Ninth Circuit. The relevant language of Fed. R. Civ. P. 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." Corrections cannot be "purposeful rewrites," "contradictory[] changes," or "changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment." *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225–26 (9th Cir. 2005). Simply put, "a deposition is not a take home exam[]" or an interrogatory. *Id.* (citation omitted).

To determine whether transcript errata may be disregarded as a sham, courts may consider "the number of corrections, whether the corrections fundamentally change the prior testimony, the impact of the corrections on the case (including the extent to which they pertain to dispositive issues), the timing of the submission of corrections, and the witness's qualifications to testify." *Lewis v. CCPOA Benefit Tr. Fund*, No. C-08-03228, 2010 WL 3398521, at *2 (N.D. Cal. Aug. 27, 2010). Also relevant is the question of whether deponent's counsel attended the deposition and had the opportunity to question his client or seek clarity about the questions asked by opposing counsel. *See*, *e.g.*, *Viasat, Inc. v. Acacia Commc'ns, Inc.*, No. 16cv463 BEN (JMA), 2018 WL 899250, at *5 (S.D. Cal. Feb. 15, 2018).

Even where "changes are not the 'paradigmatic examples' of contradiction, such as changing 'yes' to 'no'[,] . . . [they can be] contradictory nonetheless." *Mullins v. Premier Nutrition Corp.*, 178 F. Supp. 3d 867, 902 (N.D. Cal. 2016). Context is

important in determining whether a change is contradictory. *See, e.g., Exp. Dev. Can. v. ESE Elecs. Inc*., No. CV 16-02967-BRO (RAOx), 2017 WL 2713537, at *6 (C.D. Cal. June 20, 2017). Further, the errata must provide the reasons for the changes; one- or two-word statements will not suffice. *See, e.g.*, *Laster v. T-Mobile USA, Inc*., No. 05cv1167, 2009 WL 4842801, at *7 n.2 (S.D. Cal. Dec. 14, 2009), *vacated on other grounds*, 466 F. App'x 613 (9th Cir. 2012). Finally, the court may award sanctions for violations of Fed. R. Civ. P. 30(e). *See Combs v. Rockwell Int'l Cor*p., 927 F.2d 486, 488 (9th Cir. 1991).

California. Section 2025.520(b) of the California Code of Civil Procedure ("C.C.P.") similarly allows a deponent to make "change[s to] the form or the substance of the answer to a question" within 30 days, but does *not* require a signed statement listing the changes and the reasons for making them. Nonetheless, "sham" modifications are generally improper. *See Gray v. Reeves*, 76 Cal. App. 3d 567, 574 (1977). A court *may* reject an errata that "chang[es] the content of an answer given by a party directly in the deposition, especially where there is no assertion the original answer was incorrectly transcribed or the question was misleading or ambiguous." *Id.* Among published California decisions, however, it appears courts have rejected sham deposition errata only when they were submitted *after* the expiration of the 30-day period allowed by C.C.P. § 2025.520(b). *See id.*; *see also Shapero v. Fliegel*, 191 Cal. App. 3d 842, 849–50 (1987). Older published California decisions have allowed substantive changes to deposition testimony as long as they were timely, explaining that the proper remedy is the opposing party's ability to read aloud the original answer at trial. *See*, *e.g.*, *Lewis v. W. Truck Line*, 44 Cal. App. 2d 455, 461 (1941). The Rutter Guide and unpublished California decisions are generally in accord.

Practitioners contesting deposition errata may take some solace in the fact that in California state court federal decisions are persuasive on discovery issues absent contrary California decisions. *Liberty Mutual Ins. Co. v. Superior Ct*., 10 Cal. App. 4th 1282, 1288 (1992). At least one federal court applied both federal and California state law. *Fredianelli v. Jenkins*, 931 F. Supp. 2d 1001, 1007–08 (N.D. Cal. 2013). California courts also have inherent discretion to strike irrelevant and inadmissible evidence, but it appears that no California court has struck a deposition errata on that basis.

Not withstanding the similarities between Fed. R. Civ. P. 30(e) and C.C.P. § 2025.520(b), the key differences between the statutes and the dearth of published California decisions on sham deposition errata suggest that a deponent in California state court can simply change his or her substantive testimony for any reason whatsoever—and need not provide the reason, unlike in federal court—as long as the change is timely under C.C.P. § 2025.520.

How to Deal with "Let Me Just Change My Answer."

How do you avoid having your case harmed either by your opponent's sham errata or by submitting errata that will damage your credibility or be disregarded by the court?

First, create a clear record in the deposition. The attorney taking the deposition should frame questions narrowly, avoid objections if possible, and ensure that the witness's answer is unequivocal. *See* James D. Abrams & Devin M. Spencer, *Pretrial Discovery Strategies: Defending Against a Deponent's Errata Sheet Before, During, and After a Deposition*, Am. Bar Ass'n (Feb. 7, 2020), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2020/deposition-errata-sheet/. If your questions are vague or unclear, the witness is more likely to provide vague or unclear answers and then use an errata sheet to create a much different record, after spending time thinking about the case or consulting with counsel. *Id.* An unclear record is also more likely to blur the line between "that's not what I meant" and "let me just change my answer," giving opposing counsel a chance to argue later on that your questions were improper or misleading. If the attorney taking the deposition establishes a clear record, however, he or she may want to consider concluding the deposition with questions such as, "Have you answered each of my questions to the fullest extent of your ability?" or "Is there any additional information that you have that is responsive to any of my questions that you have not provided?" (subject to the risks of objection and the possibility that the deponent may try to change prior testimony or equivocate). Meanwhile, the defending attorney should timely and appropriately object throughout the deposition. The deposition should also be video-recorded.

Second, as an attorney counseling the deponent regarding any changes in testimony, you should be mindful of your ethical obligations to the court, the legal profession, and opposing counsel. The ABA's Model Rules of Professional Conduct rules 3.3 and 3.4 and California's Rules of Professional Conduct rules 3.3 and 3.4 prohibit a lawyer from knowingly offering false evidence or knowingly counseling or assisting a witness to testify falsely. "The 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." *See* Erin C. Asborno, *Ethical Preparation of Witnesses for Deposition and Trial*, Am. Bar Ass'n Litig. Section, Trial Prac. Comm. (Dec. 13, 2011), https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2011/121311-ethics-preparation-witnesses-deposition-trial/.

Third, attorneys on both sides must know and comply with the governing law, including the court's local rules and any

standing order. For instance, some courts do not allow new evidence to be submitted after a reply brief has been filed, without court approval. *See*, *e.g.*, *Fredianelli*, 931 F. Supp. 2d at 1007.

Fourth, as the attorney who took the deposition, you should be vigilant and proactive when reviewing the errata and considering next steps. If the errata truly amounts to "let me just change my answer," a carefully crafted and persuasive demand letter can sway the opposing side to change course. A meet-and-confer phone call or informal discovery conference may also be helpful. Here is a nonexhaustive checklist of questions you may want to consider:

- Was the errata submitted within 30 days? *See Hambleton*, 397 F.3d at 1224–25; *Gray*, 76 Cal. App. 3d at 574.
- Was it signed by the deponent? *See* Fed. R. Civ. P. 30(e)(1)(B).
- Are there other procedural deficiencies (such as failure to specify the page and line number of the testimony being corrected)? *See id.*
- What is the impact of the changes on the case (including the extent to which they pertain to dispositive issues)? *See Lewis*, 2010 WL 3398521, at *2.
- What is the timing of the changes (in relation to summary judgment or class certification briefing, for instance)? *See Laster*, 2009 WL 4842801, at *7 n.2.
- Does the errata sheet actually explain the purported reason for the changes? *See id.*
- How many changes were made? *See Lewis*, 2010 WL 3398521, at *2.
- • Do the changes fundamentally alter the prior testimony (in context)? *Id.*
- What are the witness's qualifications to testify (and is the witness a trained expert)? *Id.* at *4.
- Did deponent's counsel attend the deposition and have the opportunity to question his client or seek clarity about the questions asked by opposing counsel? *See Viasat*, 2018 WL 899250, at *5.
- Do any of the changes concern the statute of limitations? *See Herriott v. Sanofi-Aventis U.S. LLC*, No. LA CV16-09181 JAK (GJSx), 2017 WL 8794204, at *5 (C.D. Cal. May 18, 2017).
- Does the conduct appear to be sanctionable? *See Combs*, 927 F.2d at 488.

If the other side refuses to retract the errata, you should weigh next steps in light of the various considerations, the most critical being your client's needs. While the most common procedural mechanism for redress is a motion to strike the errata, *see*, *e.g.*, *Hambleton*, 397 F.3d 1217, practitioners may also consider moving to reopen the deposition. And if the errata arrived after you filed a motion for summary judgment, you may need to address it in reply and/or file evidentiary objections. You may also consider moving *ex parte* if necessary (imagine, for instance, a sham errata submitted after your client filed its opposition to a motion for class certification).

Fifth, if you find yourself marching onward to trial, the attorney who defended the deposition should be prepared to explain the errata. And the attorney who took the deposition should craft a winning strategy for using errata to impeach the witness. Perhaps the most embarrassing scenario would be to forget the errata and ask the witness during cross-examination, "You said 'yes' to this question at your deposition, did you not?"—to which the witness replies, "Yeah, but then I corrected it," followed by an awkward silence. And do not waste the court's time by dwelling on nonsubstantive changes or apparent misquotes; try instead to clearly and concisely establish a nexus between the errata and the witness's credibility. For instance, in a 2018 bench trial before the Southern District of New York, the cross-examining attorney kept dwelling on defendant's expert witness's nonsubstantive corrections from "in fact" to "may," which appeared to irritate the court. April 24, 2018 Transcript at 1384–85, *Sacerdote v. N.Y. Univ*., 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (No. 16-cv-6284 (KBF)). "Let me just sort of cut this off," the judge said. "The issue is whether or not there's a reason that goes to [the witness's] overall credibility with that. So if she wants to tone down something that she said from 'in fact' to 'may,' unless you tell me that it's really changing the substance of her testimony in a way that's going to be important to me, I don't really care. So this, in the ether, isn't doing much." *Id.*

Takeaways

Create a clear record in the deposition (frame questions narrowly if taking the deposition; object appropriately and timely if defending). Know the governing law. Be mindful of your ethical obligations. Be vigilant and proactive in your approach. Always practice civility with respect to opposing counsel, but keep your eyes peeled for any misconduct. Be prepared at trial.

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