SJC clarifies errata sheets

By Matthew J. Fogelman

A recent Supreme Judicial Court decision hopefully will play a large role in ending deposition abuses in which witnesses (typically working in conjunction with counsel) seek to alter their testimony with detailed errata sheets for some "strategic" gain in the litigation rather than to legitimately correct testimony.

Massachusetts Rules of Civil Procedure 30(e) provides:

> **Submission to Witness; Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

Rule 30(e) allows a witness to make modifications to a deposition within 30 days of receiving a transcript. Although witnesses typically use errata sheets to correct spelling and grammar mistakes or a misunderstanding by the stenographer (i.e., the steno typed "could" but the deponent said "could not" or "would"), witnesses and counsel occasionally use the errata sheets to make substantive changes to testimony (as permitted by the rule). These changes invariably open the witness up to additional deposition time, and provide fodder for opposing counsel to use the original deposition as cross-examination fodder at trial.

Still, the practice is generally frowned upon, since it is viewed as counsel attempting to rewrite testimony that could be viewed as unfavorable and substitute more favorable testimony. With that backdrop, in the recent case of *Smaland Beach Assoc. v. Genova*, SJC-10859, SJC Justice Robert J. Cordy wrote, "We caution deponents and attorneys to invoke this privilege sparingly. It is not to be used as a mechanism to inject additional facts into the testimony of a single deponent, or to align testimony across deponents."

The 2005 case involved plaintiff Smaland Beach Association (in Plymouth Superior Court) against defendants Arthur Genova and Allan Bartlett. The complaint involved a dispute over the defendants' property, which shared a common boundary with the plaintiff's beach lot.

The SJC seemed troubled by the errata sheets submitted by plaintiff's counsel, who produced more than 12 pages of substantive, single-spaced changes.

The SJC ruling may end the confusion among lawyers about how much of a witness's changed testimony can be presented at trial. Until now, some practitioners did not take seriously the requirement that they provide a meaningful explanation about why a witness needed to alter a deposition answer in an errata sheet. Now, it is clear that at trial, fair game will include the original answer, the reason given for the change and the new answer.

No Massachusetts appellate court had ever squarely decided "the propriety under this rule of submitting substantive changes to deposition testimony through errata sheets," Cordy said.

A few Superior Court cases had previously dealt with the topic, including *McHugh v. Kilp*, 12 Mass. L. Rptr. 683, *11, 17-18 (Mass. Super. Ct. 2001), and *Chaplin v. Quinn*, 17 Mass. L. Rep. 169, *10 (Mass. Super Ct. 2004). In those cases, the original and amended deposition answers were available for use at trial. In *McHugh*, the new deposition costs were to be borne by the party submitting the amended answers.

As a result of the dearth of appellate cases, the SJC turned to the federal court for guidance, Cordy said, noting that Massachusetts was adopting the approach used in the majority of jurisdictions, which does allow a witness to make any change to a deposition, whether in

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form or substance.

To mitigate the potential for abuse under such an approach, however, courts "have allowed the original and changed answers, as well as any reasons given for the changes, to remain part of the record, ... and reserved the right to reopen the deposition if the changes were material."

However, some limitations are necessary to guard against manipulation, Cordy noted, including potential sanctions. Thus, lawyers/witnesses submitting any changes must do so in "good faith."

"First, counsel must understand and should explain to deponents that any changes they make must represent their own good faith belief, and may not be undertaken simply to bolster the merits of a case," Cordy wrote. "Second, counsel must ensure that any submitted changes comply with the procedural requirements of Rule 30(e)."

"If there is any indication that an attorney has exploited the rule by arranging or facilitating the submission of errata sheets for the purpose of strategic gain in a case and not to correct testimony, his conduct may be grounds for sanctions," he said.

A final reason substantive changes are problematic (if done in bad faith/for strategic gain) is that they can render summary judgment difficult because they create issues of fact, or attempt to. Scrutinizing errata sheets is supported by the same reasoning that prohibits affidavits from being used at summary judgment to create fact issues and counter prior deposition testimony.

Things to keep in mind if the deponent is your client:

- Advise the client that making substantive changes to the errata sheet will probably lead to additional deposition time, the cost of which may be borne by the client.
- Changes must be made in good faith and not for strategic gain.
- Changes made in bad faith may subject you to sanctions.
- Errata sheets cannot be used to align testimony among different deponents.
- When making a change, you need to state the specific reason for the change.
- Advise the client that he/she will be examined at trial or at the next deposition with the original answer and the amended one.

Things to keep in mind if the deponent is your opponent:

- If the errata sheet changes prior answers, seek additional deposition time and ask the court to order your opponent to bear the costs.
- Analyze changes to see whether they are in good faith and not for strategic gain.
- If changes are made in bad faith, seek sanctions.
- Make sure your opponent has cited a specific reason for the change to the testimony.
- At trial or at additional deposition, examine the witness with the original answer and the amended one.