SJC gives guidance on depo errata sheets

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Civil litigators say a recent Supreme Judicial Court decision will end deposition abuses in which witnesses alter their testimony with errata sheets.

Although the plaintiff's use of the sheets was not directly at issue in the case before the SJC, Justice Robert J. Cordy, in an issue of first impression, said the facts prompted the court to weigh in on the parameters of Mass. R. Civ. P. 30(e).

"While substantive changes to errata sheets are permitted under [the rule], we caution deponents and attorneys to invoke this privilege sparingly," Cordy wrote. "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."

Robert Kraus, who represents the defendants, said Rule 30(e) allows a witness to make minor modifications to a deposition within 30 days of receiving a transcript.

The SJC's opinion makes clear, however, that an errata sheet is not intended to be a tool for litigation or to correct mistakes made under oath.

"Depositions are not a take-home exam, and the court spoke very loudly here that an errata sheet is to be used in a limited fashion," Kraus said. "Moving forward, if some practitioner uses one to either materially alter or conform testimony of disparate witnesses, it's not going to be permitted, and it's now going to potentially be a sanctionable event."

The 27-page decision is Smaland Beach Association, Inc. v. Genova, et al. v. Bartlett, et al., Lawyers Weekly No. 10-003-12. The full text of the ruling can be found by clicking here.

'Baseless' accusations

Kraus, who practices at Kraus & Hummel in Plymouth, said the SJC was troubled by the errata sheets submitted by plaintiff's counsel, Lee P. Alfieri of Plymouth. In some instances, Alfieri produced more than 12 pages of substantive, single-spaced changes, according to Kraus.

Rule 30(e) was intended to allow witnesses to correct technical errors, Kraus said, not make wholesale changes prior to testimony.

"Some of the responses we received involved answers that were changed from 'no' to 'yes' and vice versa," he said. "On top of that, clarifications, modifications or alterations were made with very long explanations that were seemingly inconsistent with testimony provided at the deposition."

Alfieri said he did nothing wrong and called Kraus' accusations "baseless." He added that the defendants, in their filings, went so far as to accuse him of witness tampering.

"That was absurd, but what the [defendants] want very much to do is to make this trial about me or anything except what is really at issue," he said. "If we get down to the basic facts of the case and cut through the malarkey, they lose."

Alfieri said the facts in the underlying lawsuit spanned more than three decades. Most of the errata sheet changes removed ambiguities or clarified answers that were inconsistent with prior responses.

When he submitted the errata sheets at issue in 2006, Alfieri said, the defendants never challenged them or raised concerns with the court.

"What they did was come in three years later, on the eve of trial, yelling that there was something terrible about them, without providing any specificity whatsoever," he said. "I do not believe I did anything wrong, and if I was ever called upon to defend any particular change made on an errata sheet, it will withstand scrutiny."

Alfieri also said the defendants' accusations prompted Superior Court Judge Richard J. Chin to take the drastic step of disqualifying him from the case. The SJC, however, reversed that decision and remanded it to the Superior Court to conduct a full hearing.

"If [Chin] had done his job and examined the matter with the type of scrutiny that was required, he would have realized [the defendants] were making an awful lot of noise, and there was little or no substance to it," he said.

Scott A. Roberts of Hirsch, Roberts, Weinstein said the SJC's ruling ends the confusion among lawyers about how much of a witness's changed testimony can be presented at trial. Until now, the Boston lawyer said, many practitioners did not take seriously the requirement that they provide a meaningful explanation about why a witness needed to alter a deposition answer.

"The thing that this decision does is to help stop some of the gamesmanship that can go on," said Roberts, who was not involved in the case. "The fact that the court now says, with clarity, that

come time of trial you will be permitted to read not just the corrected answer, but the original answer and the reason given for the change, will go a long way towards allowing a jury to assess the credibility and validity of the change as well."

You're out

In 2005, plaintiff Smaland Beach Association filed suit 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.

Following the depositions of several third-party defendants and other deponents, errata sheets were submitted, which substantively changed the testimony.

The deponents used the sheets to switch answers from an affirmative to a negative, replace existing testimony with a different narrative, or add explanatory language to existing testimony. Although some modifications carried in-depth explanations, the typical reason given was to "clarify testimony."

Some deponents testified that Alfieri assisted them in drafting the errata sheets.

Prior to the start of trial in 2009, the defendants filed a memorandum before Judge Chin that listed Alfieri as a potential witness. Given what the judge called the "highly unusual" nature of the errata sheets "that totally change the deposition testimony," he ruled the defendants had a right to call Alfieri as a witness at trial.

As a result, Chin granted a motion to disqualify Alfieri from the trial.

Laying out the rules

Although the SJC remanded Chin's attorney disqualification decision for further hearing, Cordy wrote that the time had come to clarify the use of errata sheets in litigation.

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.

As a result, 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 allows a witness to make any change to a deposition, whether in form or substance.

To mitigate the potential for abuse under such an approach, he said, 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 said. Lawyers submitting a change must do so in good faith and provide an adequate basis from which to assess its legitimacy.

“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,” he wrote. “Second, counsel must ensure that any submitted changes comply with the procedural requirements of Rule 30(e).”

Because the text of the rule does not require that the original answers of a deponent be struck, he said, it may remain part of the record and be read to the jury, along with the new answer and reason provided for the change.

“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.