the Journal

SPRING/SUMMER 2017 ISSUE 2, VOLUME 1

Tennessee Defense Lawyers Association

2017 JOINT SUMMER MEETING

with Alabama Defense Lawyers Association

Sandestin Golf & Beach Resort
June 15-18, 2017

Tennessee
Defense Lawyers
Association
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What I Meant to Say . . .

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UTOPIA

Relationships would likely last longer, lack strife, and present much less bickering if, following an argument, an ill-timed criticism, or slip of the tongue, an individual could change the statement made. This illustration could come true, depending on the jurisdiction, following a sworn deposition through the use of errata sheets.

BEST LAID PLANS

The date is set. The deposition has been noticed, and the attorney is prepared. The case is a slip and fall. The sole issue is whether a dangerous condition existed. Plaintiff tripped over a box when walking down an aisle at a client's store. Defense counsel is anticipating filing a Motion for Summary Judgment if Plaintiff's deposition goes to plan. Defense counsel needs Plaintiff to describe the box in as large a manner as possible to prevent the box from being a dangerous condition. The testimony follows:

Defense Counsel: What happened in the accident?

Plaintiff: I fell on the floor and injured my knee.

Defense Counsel: What caused the fall?

Plaintiff: I tripped over a box.

Defense Counsel: Was there anything blocking your view of the box?

Plaintiff: No.

Defense Counsel: How would you describe the box?

Plaintiff: It was a large box, cardboard.

Defense Counsel: How tall was it?

Plaintiff: I am not sure.

Defense Counsel: Did the top of the box rise above your knee cap?

Plaintiff: Yes.

Defense Counsel: Was it wider than two milk crates side by side?

Plaintiff: Yes.

The size of the box will now be displayed prominently in the Memorandum in Support of Motion for Summary Judgment.

THE TWIST

For some reason, the transcript has not arrived to begin the motion, and there was the odd occurrence at the end of the deposition when Plaintiff's counsel refused to waive signing. Then, the transcript arrives accompanied by an errata sheet. The pertinent testimony now reads (changes underlined):

Defense Counsel: What caused the fall?

Plaintiff: I tripped over a <u>hidden</u> box.

Defense Counsel: Was there anything blocking your view of the box?

Plaintiff: <u>Yes</u>.

Defense Counsel: How would you describe the box?

Plaintiff: It was <u>not</u> a large box, cardboard.

Defense Counsel: How tall was it?

Plaintiff: I am not sure.

Defense Counsel: Did the top of the box rise above your knee cap?

Plaintiff: <u>No</u>.

Defense Counsel: Was it wider than two milk crates side by side?

Plaintiff: <u>No</u>.

Now, the testimony has substantively changed. The changes were not made based upon an error by the court reporter. The potential for summary judgment may be on the ropes. Is this use of an errata sheet appropriate? If so, how can defense counsel combat it?

THE QUESTION

Jurisdictions have differing views on substantive changes to sworn testimony employing errata sheets. In Tennessee, these changes might survive a Motion to Strike. Tennessee Courts have not provided, or probably have not had the opportunity to provide, definitive guidance concerning the proper use of errata, substantive changes vs. errors in transcription. Other than the language of Rule 30.05 itself[1], no case law is instructive concerning how to properly use errata sheets to correct deposition testimony. Other jurisdictions, however, have had more opportunities to explore errata sheets and offer attorneys clear guidelines for their use. Indeed, practices among the federal circuits range across the lenient to restrictive spectrum. [2]

For example, the Sixth Circuit, demonstrating the restrictive spectrum as the strictest federal circuit, is the only federal circuit that "permits a deponent to correct ***only*** typographical and transcription errors."[3] In ***Trout v. FirstEnergy Generation Corp.***, the Sixth Circuit Court of Appeals reasoned that allowing a party to alter what was said under oath would be the equivalent of allowing a party to simply answer the deposition questions without any thought, and then carefully craft helpful responses at home for submission.[4] After all, "'[a] deposition is not a take home examination.'" [5] The Fourth Circuit applies the same rule as the Sixth Circuit with more leniency. [6]

The Third, Fifth, Seventh, Eighth, Ninth and Tenth Circuits, similarly, apply a rule known as the Sham-Affidavit Rule, again on a spectrum of restrictiveness.[7] Moreover, the Seventh, Ninth, and Tenth Circuits also apply the rule relatively strictly.[8] These Circuits allow a deponent to change her testimony only if the new testimony is not directly contradictory to the original testimony.[9]

The Third, Fifth, and Eighth Circuits also apply the Sham-Affidavit Rule.[10] These Circuits apply the rule on a case-by-case basis and allow "contrary errata if sufficiently persuasive reasons are given, if the proposed amendments truly reflect the deponent's original testimony, or if other circumstances satisfy the court that amendment should be permitted."[11]

Finally, the First, Second and Eleventh Circuits, the most lenient Circuits, apply the traditional view; allowing a deponent to make any change, even if contradictory, as long as reasons are given and the changes are timely.[12] The reasoning behind such a lenient rule is that the deponent may be impeached at trial on her contradictory testimony.[13]

The states surrounding Tennessee have rules very similar, if not identical, to T.R.C.P. 30.05.[14] Much like Tennessee, few of those contiguous states offer guidance in application of the statute. Georgia, Mississippi and Missouri State Courts, however, have issued rulings on the subject. For example, in ***J.H. Harvey Co. v. Reddick***, the Court of Appeals of Georgia, like the First, Second and Eleventh Circuits, determined errata sheets may be used to make any changes desired subject to impeachment concerning the changes.[15] Missouri State Courts likewise follow the most lenient approach.[16] Mississippi, however, follows the stricter approach allowing only correction in transcription errors or minor clarification.[17]

But, there is little, if any, guidance in

1 "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." tenn. r. civ. p. 30.05.

2 Tennessee's Rule 30.05 tracks Federal Rule of Civil Procedure 30(e) which states in relevant part, that the deponent must be allowed to review the deposition transcript and "if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them."

*3 Devon Energy Corp. v. Westacott, No. CIV.A. H-09-1689, 2011 WL 1157334, at *5 (S.D. Tex. Mar. 24, 2011) (citing Trout v. FirstEnergy Generation Corp., 339 F. App'x 560, 566 (6th Cir. 2009) (emphasis added)).*

4 Trout, at 565.

*5 Id. (quoting Tuttle v. Tyco Elecs. Installation Servs., Inc., No. 2:06-CV-581, 2008 WL 343178, at *4 (S.D. Ohio Feb. 7, 2008)).*

6 Id; see also, E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 277 F.R.D. 286, 297 (E.D. Va. 2011)).

7 Id. at 5-6.

8 Id.

9 Id. (citing Thorn v. Sundstrand Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000); see also Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1226 (9th Cir. 2005)).

*10 Id. at *6.*

*11 Id. (citing EBC, Inc. v. Clark Bldg. Sys., Inc., 618 F.3d 253, 270 (3d Cir. 2010)); see also, Holverson v. ThyssenKrupp Elevator Corp., No. CIV. 12-2765 ADM/FLN, 2014 WL 3573630, at *12 (D. Minn. July 18, 2014).*

12 See, Lugtig v. Thomas, 89 F.R.D. 639, 641 (N.D. Ill. 1981); Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997); and Tingley Sys., Inc. v. CSC Consulting, Inc., 152 F. Supp. 2d 95, 120 (D. Mass. 2001)).

13 Id.

14 See generally, AL ST RCP R. 30(e), Ark. R. Civ. P. 30(e), ga. code ann. § 9-11-30, Ky. R. Civ. P. 30.05, M.R.C.P. 30(e), Mo. Ann. Stat. § 492.340, N.C. Gen. Stat. Ann. 1A-1, 30(e), SCRCP 30(e), Va. Sup. Ct. R. 4:5(e), W. Va. R. Civ. P. 30(e).

15 J.H. Harvey Co. v. Reddick, 240 Ga. App. 466, 473, 522 S.E.2d 749, 755 (1999).

16 Bergstrom v. Welco Mfg. Co., 487 S.W.3d 5, 6 (Mo. Ct. App. 2015), reh'g and/or transfer denied (Nov. 5, 2015).

17 Hyundai Motor Am. v. Applewhite, 53 So. 3d 749, 758 (Miss. 2011).

Tennessee Case Law regarding how errata sheets may be properly used. Thus, there is room for the Courts to decide the issue. Rule 30.05 provides:

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, 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, 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 32.04(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.[18]

Its Federal counterpart now reads:

(e) Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.[19]

Given the plain language of the TRCP, specifying "any changes in form or substance which the witness desires" assuming that is not limited to a witness "desiring" only to correct errors in transmission, Tennessee Courts may allow a more liberal approach allowing changes. The Court would likely adopt the Georgia/Missouri approach which, as outlined above, is essentially an "anything goes" approach. With that, deponents would be free to change their answers, but only at the expense of being vigorously cross-examined on the changes. That alone would dissuade some deponents from changing their answers so as not to look untrustworthy on the stand.

If that approach seems too lenient, Tennessee Courts could follow Mississippi's lead and only allow correction of transcription errors and minor clarification to deposition testimony via an errata sheet. This approach, like the Sixth Circuit approach seems a bit too harsh and could possibly lead to improper witness coaching.

Alternatively, Tennessee Courts might try to strike a balance between the most lenient and strictest approaches. This could possibly look something like the lenient Sham-Affidavit Rule described above. Under that approach, deponents would be allowed to make substantive changes to their testimony only under the court's discretion. The deponent would need to show that there are legitimate reasons for changing the testimony, and the court would decide on a case-by-case basis whether to allow the changes. This, of course, is not the most cost-effective approach given that, absent an agreed order, parties would have to draft motions on and argue the issue before the court. This approach does, however, provide a middle ground that would allow both sides a fair opportunity to have their arguments heard.

THE PLAN

From the defense perspective in the above referenced scenario on the trip on the box, a couple options exist to continue down the summary judgment path even if Tennessee takes the most lenient road. First, counsel can request a copy of the recording of the deposition. This request will ensure that Plaintiff cannot claim that the changed answers were not merely typographical errors. Next, Counsel may issue specific Requests for Admissions requesting plaintiff admit that when presented with the question, the original answer was given. Consider the following example:

REQUEST NO. 1: PLEASE ADMIT THAT YOU SUBMITTED TO A DEPOSITION UNDER OATH ON APRIL 3, 2016 AT THE LAW OFFICES OF RAINEY, KIZER, REVIERE & BELL LOCATED AT 201 4TH AVE N., NASHVILLE, TENNESSEE.

18 *Tenn. R. Civ. P. 30.05.*

19 *Fed. R. Civ. P. 30(e).*

RESPONSE:

REQUEST NO. 2: PLEASE ADMIT THAT YOU WERE ASKED "WHAT CAUSED THE FALL?" AND YOU RESPONDED UNDER OATH, "I TRIPPED OVER A BOX."

RESPONSE:

REQUEST NO. 3: PLEASE ADMIT THAT YOU WERE ASKED "WAS THERE ANYTHING BLOCKING YOUR VIEW OF THE BOX?" AND YOU RESPONDED UNDER OATH "NO".

RESPONSE:

REQUEST NO. 4: PLEASE ADMIT THAT YOU WERE ASKED "HOW WOULD YOU DESCRIBE THE BOX?" AND YOU RESPONDED UNDER OATH, "IT WAS A LARGE BOX, CARDBOARD."

RESPONSE:

REQUEST NO. 5: PLEASE ADMIT THAT YOU WERE ASKED "HOW TALL WAS IT?" AND YOU RESPONDED UNDER OATH, "I AM NOT SURE."

RESPONSE:

REQUEST NO. 6: PLEASE ADMIT THAT YOU WERE ASKED "DID THE TOP OF THE BOX RISE ABOVE YOUR KNEECAP?" AND YOU RESPONDED UNDER OATH, "YES."

RESPONSE:

REQUEST NO. 7: PLEASE ADMIT THAT YOU WERE ASKED "WAS IT WIDER THAN TWO MILK CRATES SIDE BY SIDE?" AND YOU RESPONDED UNDER OATH, "YES."

RESPONSE:

TORT LAW, continued

Finally, counsel proceeds with summary judgment. In Tennessee, a witness may not create an issue of fact by contradicting his/her own testimony.[20] This is known as the Rule of Cancellation.[21] Under that rule, "[t]wo sworn inconsistent statements by a party are of no probative value in establishing a disputed issue of material fact."[22] In effect, the two contradictory statements cancel each other out.[23] Thus, neither of the witness' statements could be used to defeat a summary judgment motion.

If an attorney is presented with the same situation in a non-summary judgment case, follow the same steps as above and impeach with the recording, requests for admission, and original transcript. However, changing substantive testimony would be advised before this type of tactic should the circumstances be dire. ■

20 *Tibbals Flooring Co. v. Stanfill, 410 S.W.2d 892, 896 (1967).*
21 *Id.*
22 *Price v. Becker, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991).*
23 *Tibbals, at 896.*