

Deposition Errata Sheets: Taking depositions in a Changes to Testimony foreign jurisdiction

Assume your witness makes damaging statements on important matters during the deposition. Is there anything that can be done?

Counsel should remember that both the state and federal rules allow a witness to make changes to the "form or substance" of deposition testimony. *See Fed. R. Civ. P. 30(e); Va. Sup. Ct. Rule 4:5(f)(1)*. Under the state rule, this can be done unless examination, reading, and signature of the deposition are waived by the witness. Under the federal rule, the opportunity to review the transcript and make changes applies only "[i]f requested by the deponent or a party before completion of the deposition." *Fed. R. Civ. P. 30(e)*.

Furthermore, any changes must be made within the time periods allowed under the rules (within 21 days after submission of the deposition to the witness under the state rule, within 30 days of notification that the transcript or recording is available under the federal rule). Counsel should be sure to "tickle" these deadlines on her calendar as soon as she receives the deposition transcript or is notified by the court reporter that it is available for review.

Any changes to the deposition testimony must also be accompanied by a statement of the reasons given by the witness for making them. Counsel and the witness should be sure that this requirement is handled carefully and properly. If counsel, for example, drafts the reasons for the changes, this fact will perhaps be drawn out and may be damaging to the credibility of the witness's revised testimony. Having the witness state and write the reasons for the changes in his own words and handwriting will often be the best course.

Counsel and the witness should bear in mind that significant changes in the substance of deposition testimony will probably result in further questioning, in a reconvened deposition and/or during cross-examination at trial, regarding the changes and the reasons for them. These consequences of substantive changes may cause the witness, or counsel, to regret the changes. Nevertheless, in situations where a witness concludes after the deposition that his deposition testimony was erroneous in an important aspect, and where there is a good explanation for the witness's mistake and his subsequent correction, counsel and the witness should be aware that the opportunity for correction may exist. Counsel should also be careful to make sure that the opportunity for review and correction is properly preserved in any deposition where a post-deposition change in testimony may be deemed necessary. The simplest way to preserve this opportunity would be to specifically request prior to completion of the deposition that the deposition transcript be submitted to the witness for examination, review, correction, and signing.

Additional valuable information, authorities, and guidance on these issues is provided in the following articles: Benjamin W. Glass III, "Myth and Reality of Deposition Errata Sheets," 10 *The Journal of the Virginia Trial Lawyers Association* 42 (Winter 1997-98); Robert E. Scully, Jr., "Deposition Editing in Virginia," VI *Virginia State Bar Litigation News* 1 (Summer 1999).

State and federal statutes exist which enable a lawyer to depose a witness in a foreign jurisdiction. *See Virginia Code §8:01-4 J et seq. (1950, as amended) (Uniform Foreign Depositions Act), and Rule 45 of the Federal Rules of Civil Procedure.*

Under the state act, the most efficient way to accomplish the taking of the deposition in a foreign jurisdiction is to contact a trial practitioner in that jurisdiction (the ATLA Directory is a good source) and to obtain the name of a court clerk in the jurisdiction knowledgeable with the procedure. Speak with that clerk and determine what is needed from the Virginia court in order to issue a subpoena from the foreign court to the witness to attend in that foreign jurisdiction. In the author's experience, what is required from the Virginia courts varies. Some foreign courts require a notice of deposition under seal by a Virginia court. Another foreign court required the entry of an Order (called a "Commission") by a Virginia judge. Obtain whatever it is the Clerk tells you and send it to the clerk in the foreign jurisdiction. It is helpful to stay in touch with the lawyer in that foreign jurisdiction to assist with having the subpoena served, arranging for an office for the deposition and a court reporter. Give yourself as much lead time as possible in arranging the deposition so as to have sufficient time to accomplish what needs to be done.

In federal practice, Rule 45 of the Civil Rules has simplified the process. Rule 45(a)(D)(2) requires that a subpoena issue from the court for the district in which the deposition is to take place. Rule 45(a)(D)(3) enables the attorney of record where the action is pending to sign the subpoena, as "an officer of the Court" for the court in which the deposition is to be taken provided the attorney is "authorized to practice" in the court where the action is pending. Thus, in cases in which the Virginia lawyer is acting as local counsel for out-of-state attorneys handling the case in Virginia, it is the author's belief that the subpoena must be signed by the Virginia lawyer. Once prepared, have the subpoena served upon the witness in the foreign jurisdiction, along with the necessary witness fees and mileage reimbursement.

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