Case Focus

To Err Is Human; To Correct, Difficult:

In *Smaland Beach Association*, the Supreme Judicial Court Sets Demanding Standards for the Amendment of Deposition Testimony

By David Clancy

Imagine you depose an adverse witness who answers a key question with a categorical "Yes." This is an important admission, and you're pleased -- until an errata sheet arrives changing that answer to "No." Can an errata sheet really change "Yes" to "No"? In *Smaland Beach Association, Inc. v. Genova*, 461 Mass. 214 (2012), the Supreme Judicial Court addressed that question for the first time, and the answer is … "Maybe."

The propriety of a substantive change to sworn deposition testimony, holds the SJC, depends on the circumstances. In elaborating on that point, the SJC provides detailed — and cautionary — guidance on the proper use of deposition errata sheets, an important day-to-day practical issue that had previously been unsettled in Massachusetts state court.

Smaland was a contentious real-estate dispute. Smaland Beach Association, in Plymouth, sued its own members Arthur and Patricia Genova, who owned adjoining property, for encroachment and

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trespass, and the Genovas responded with various claims against Smaland, its officers and directors, and another local property-owner. Various individuals associated with Smaland were deposed. Evidently dissatisfied with their own sworn testimony, they made aggressive changes to it with a sheaf of errata sheets. “At various points in these errata sheets,” states the SJC, “the deponents wholly reversed their testimony from an affirmative to a negative response, or vice versa, struck existing testimony and replaced it with a different narrative, or added explanatory text to existing deposition testimony.”

An eyebrow-raising footnote 5 to the decision gives specific examples. “I’d say no” was changed to “I’d say yes.” “I don’t believe” was changed to “I believe.” Testimony about the Genovas cutting down a tree was changed from “I knew [the tree] was blocking” to “I knew [the Genovas] claimed it was blocking.” Another witness struck seven lines of testimony about an affidavit she signed at her counsel’s office and replaced it with “four paragraphs of testimony emphasizing her [own] role” in composing the affidavit. The errata sheets euphemistically described these changes as “clarifications.”

Smaland’s attorney was heavily involved in the preparation of these errata sheets, and the Genovas’ counsel argued that he had thereby made himself a witness at trial. On that basis, and because of an advice-of-counsel defense, the Superior Court judge disqualified him. “I’ve never seen errata sheets of that nature in my legal career,” the judge stated at the hearing. “They essentially totally changed the deposition testimony. Not to allow [the Genova’s counsel] to call him as a witness would be prejudicial…”

On an interlocutory appeal, the SJC vacated the disqualification ruling, but not because the SJC approved of the errata sheets. Instead, the SJC believed that the trial judge did not “sufficiently analyze the factors” relevant to the “severe” penalty of attorney disqualification. For that essentially procedural reason, the SJC remanded for further consideration, recognizing that after “further review” the trial judge might properly “again disqualify” the challenged attorney. In doing so, the Court referred to the

errata sheets as “unusual,” and took “this opportunity to clarify the use of errata sheets to alter deposition testimony.”

First and foremost, held the SJC, an errata sheet *can* make a substantive change to accurately-transcribed deposition testimony. A minority of federal courts have held otherwise. The SJC considered but rejected that strict rule, in large part because Massachusetts Rule of Civil Procedure 30(e) expressly contemplates changes to the “form or substance” of deposition testimony. The SJC described the minority view as imposing “an artificial stricture on the analogous Federal rule,” and described its own view as permitting “legitimate corrective changes and advanc[ing] the underlying purpose of the discovery process, i.e., ‘for the parties to obtain the fullest possible knowledge of the issues and facts before trial.’”

Nevertheless, the SJC cautioned, its more “expansive” reading of the rule does not mean that changes to substance may *freely* be made. Quite the contrary. A substantive change is improper unless counsel has first advised the witness “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.” It is also improper unless it is accompanied by a statement of reasons, which reasons “must be advanced in good faith and provide an adequate basis from which to assess their legitimacy.” The SJC puts counsel on notice that, “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.”

Also, under the SJC’s holding, even where a change is permitted as a matter of substance, it can have important procedural consequences. The deposition may be reopened if the new answers “would reasonably have triggered further inquiry” during the initial deposition — with an award of associated costs and attorneys’ fees “where fairness requires.” In addition, the original answers may be read at trial, along with the changed answers and the reasons provided for the change.

Preparing an errata sheet is a recurring aspect of litigation practice, but, until now, Massachusetts-specific guidance on this issue was sparse. The SJC identified only two Massachusetts state-court decisions, both by the Superior Court. Federal decisions (which are in any event non-binding in take an approach that Massachusetts state court) are inconsistent. As the SJC observed, a majority of federal courts take an approach that "allows any changes, whether in form or in substance, clarifying or contradictory," but a "growing minority" of federal courts have adopted "a narrower interpretation." That minority is itself divergent, with some courts permitting the correction of typographical and transcription errors only ("a deposition is not a take-home examination," stated one federal district court), and some courts also permitting the addition of text that clarifies, but does not contradict, existing testimony.

So while the issue remains unsettled in federal court, it is now settled in Massachusetts: a substantive change to a deposition transcript is a *possibility*, but only where specified procedural requirements have been satisfied, and only where the underlying reason for the change — which must be contemporaneously stated in writing — is legitimate. And, as the SJC warns in its coda,

> [W]e caution deponents and attorneys to use this privilege sparingly. The errata sheet is intended as a tool to correct mistakes in deposition testimony or subsequent transcription. 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.

This article began by asking rhetorically whether an errata sheet can change an answer from "yes" to "no," and summarized the SJC's recent answer as "maybe." On reflection, perhaps it is appropriate to conclude by amending that "maybe" as follows: "Maybe, *but only where the party and counsel proceed in good faith and with great care*." The reason of course is the SJC's detailed, firm, and cautionary guidance. ■