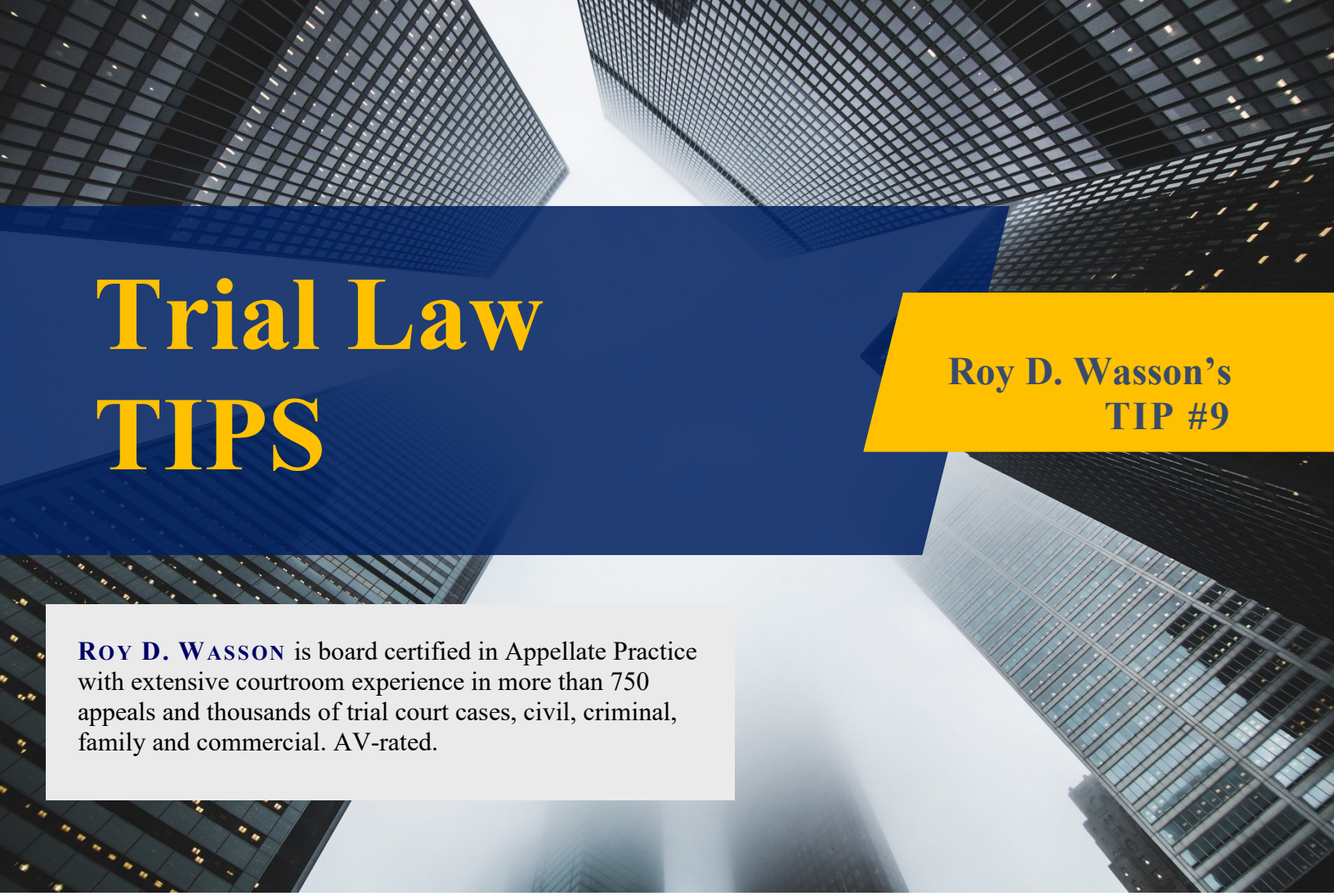

Trial Law TIPS

Roy D. Wasson's TIP #9

Roy D. Wasson is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Substantive Changes to Deposition Testimony (Debunking Another Courthouse Myth)

Introduction

This is an effort to disabuse our readers of the mistaken belief that deponents can correct only the court reporter's errors and typos by way of an errata sheet to a deposition. That is another "Courthouse Myth." There is absolutely no limit to the changes a deponent can make to the substance of his or her deposition testimony without having to say that the court reporter misunderstood or mis-transcribed the answer. However, while a plaintiff who is suing in a car crash case can change his or her testimony to say that she turned left instead of right at the intersection, the difficult part is balancing the need for accuracy with the loss of credibility one invites from the mere fact of changing an answer. The other parties may

Wasson & Associates, Chartered
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com

re-depose witnesses who change their answers, so litigants are left with the tactical problem of explaining how they could have been wrong the first time they testified about a matter, but not the second time.

As you can guess, some mistakes are ignored to stay away from the Pandora's Box that a correction can open. But where mistakes are made which can be said to amount to false testimony, the failure to make substantive corrections quickly can lead to sanctions against both the client and the attorney.

Rule 1.310(e) and the *Motel 6* Case

Ever since Fla. R. Civ. P. 1.310(e) was originally enacted more than forty years ago, that rule has expressly permitted deponents to make changes to the ***substance*** of their deposition testimony. The 1967 version of the rule provided: "Any changes in form or substance that the witness wants to make shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes." For twenty-five years after that rule was enacted, most attorneys apparently assumed incorrectly that the substantive "changes" referred to in that rule must have been changes which resulted from misunderstanding by the reporter, or mistakes in transcription or typing, in addition to spelling errors or other matters of mere "form."

The original 1967 "Authors' Comment" to Rule 1.310 provided a clear indication that more sweeping changes to deposition testimony than corrections to matters of form or transcription were permitted by the rule, wherein those comments noted: "The amendments may be of substance as well as form. ***The procedure is not applicable to errors made in reporting or transcribing the proceedings***. These should be remedied, not by changing, but by correcting the deposition before it is finally certified by the reporter and the officer." (Emphasis added). Those comments were largely overlooked

and the "Courthouse Myth" grew that deponents could make only corrections to matters of form and court reporter errors.

Then finally came the first Florida case clearly holding that the rule meant what it said. In *Motel 6, Inc. v. Dowling*, 595 So. 2d 260 (Fla. 1st DCA 1992), the court held that a witness could reconsider his or her testimony and make substantive changes to a deposition on the errata sheet, which would be admissible in evidence like the rest of the deposition. A party who wished to confront the witness about the changes had to reopen the deposition before trial, according to the First District in Motel 6:

> Rule 1.310(e), Florida Rules of Civil Procedure, expressly permits a witness to review his deposition testimony and make corrections, in both the form and substance, to his testimony. . . . [A]lthough the issue of the use of errata sheets at trial is one of first impression in Florida, we note that our decision on this point is consistent with decisions of the federal courts and other state courts which have interpreted substantially similar statutes. See e.g. Usiak v. New York Tank Barge Company, 299 F.2d 808 (2d Cir. 1962); Valley National Bank v. National Association for Stock Car Auto Racing, 153 Ariz. 374, 736 P.2d 1186 (Ariz. App. 1987); George v. Double D Foods, Inc., 155 Cal. App. 3d 36, 201 Cal. Rptr. 870 (Cal. App. 2d Dist. 1984); and Seattle First National Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (Wash. 1962).
>
> Nevertheless, the motel argues that this result is unfair because it was denied the opportunity to cross-examine Hickox concerning these changes. Thus, argues the motel, the errata sheet was nothing more than an affidavit. We disagree.
>
> ***If the motel wished to cross-examine Hickox regarding the changes, the burden was on the motel to reopen the deposition***. Sanford v. CBS, Inc., 594 F.Supp. 713, 225 U.S.P.Q. (BNA) 136 (N.D. Ill.

> 1984). Counsel could have then asked questions which were made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or with his attorney. Lugtig v. Thomas, 89 F.R.D. 639, 642 (N.D. Ill. 1981). By availing itself of this remedy, the motel could have discovered, pretrial, whether the changed answers were the result of collusion, as the motel now charges, or were the result of improved memory.

Id. at 261-62.

Lawyers quickly began using errata sheets for their intended purpose. But defense counsel soon started using language from the Motel 6 case to try to invade the attorney-client privilege.

Potential for Invasion into Attorney-Client Privilege

The reference in *Motel 6* to a party being able to ask at the re-opened deposition about whether changes to testimony "originated . . . with the deponent ***or with his attorney***" worked some mischief for awhile. When deponents made important changes to their testimony on errata sheets, the opposing parties would seek discovery of attorney-client communications and notes which reflected them. While trial judges mistakenly allowed such inquiries in some cases, the appellate decisions generally protected the privilege.

In *Feltner v. Internationale Nederlanden Post Bank Groep*, 622 So. 2d 123 (Fla. 4th DCA 1993), the court established a line between permissible inquiry at the re-opened deposition and impermissible inquiry into privileged areas:

> While the deposition may be reopened, its substance must relate to the changes. The question of the attorney/client privilege as it relates to the subject of the reopened deposition has not been explored fully in prior decisions. In Lugtig, the court stated that at a reopened deposition "deposing counsel can ask

> questions which were made necessary by the changed answers, questions about the reasons the changes were made, and questions about where the changes originated, whether with the deponent or with his attorney." 89 F.R.D. at 642. This comment was repeated with approval in Motel 6. Yet neither case addressed the attorney/client implications of such questioning, nor in either case was there a question as to whether documents relating to the errata sheets should be produced.
>
> The attorney/client privilege, when properly invoked, must be respected. It is not waived because a witness changes an answer to a question after consulting with an attorney. ***The fact of consultation may be brought out. However, the substance of the communications is protected.***

Id. at 125 (emphasis added).

The court in *Feltner* permitted the deposition to be reopened without firm limits on what questions could be asked about the reasons for the changed testimony. But the court quashed the trial judge's ruling permitting discovery of drafts of errata sheets reflecting attorney-client communications. If push comes to shove in proceedings surrounding a re-opened deposition, the appellate courts will probably grant certiorari to prevent invasions into the privilege. Do not waive any objection to questions about the substance of your communications with your client, or cave into an erroneous ruling by the trial court in that area without asking for a stay of the ruling for long enough to permit review by the DCA.

Use of Errata Sheet to Gain Credibility and Avoid Sanctions

Lawyers sometimes are faced with the difficult situation of counseling their clients to correct mistaken testimony in order to prevent attacks on credibility at trial with collateral evidence which is expected to be contrary to their clients'

deposition testimony. The problem is complex. If the revised testimony would be less favorable than the original testimony, and the deposition is not corrected, the deponent will lose credibility when the true state of affairs is revealed at trial. If the revised testimony is more favorable, then the fact of the revision opens up the deponent to a similar attack. Either way, the mere fact that the correction is made will likely be offered to demonstrate a lack of trustworthiness of the deponent.

But some mistakes are too big to go uncorrected. Your client could destroy his or her own case by a thoughtless answer or two after a misunderstood question. Memory problems could also jeopardize your client's case unless corrected by errata sheet after the deposition. While the reasons for the change can usually be explained to the jury, some mistakes might entitle the defense to a summary judgment on a claim or issue.

Even more of a concern than losing credibility is the need to correct a client who deliberately falsifies testimony or fails to reveal material facts. Such discovery misconduct can lead to sanctions including dismissal.

Lawyers also need to worry about themselves as professionals when their clients testify falsely, and that falsity is known to the attorney. "False testimony by a client also has ethical ramifications for the lawyer. Under rule 4-3.3(a)(4), . . . [i]f a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures . . . [which] may include disclosing the false testimony to the court or to the other party, even though the disclosure involves confidential information under rule 4-1.6.." Baker v. Myers Tractor Services, Inc., 765 So. 2d 149 (Fla. 1st DCA 2000). The last thing any of us needs is to jeopardize our law license by overlooking our client's false deposition testimony.

If you should choose to advise your client to use the errata sheet to attempt to rectify his or her false testimony, do

it before the other side moves to impose sanctions. In Baker, the deponent tried to "come clean" with some corrections to his deposition testimony, but waited too long to do so, and suffered dismissal which was affirmed on appeal:

> Among other things, appellant argues that the trial court erred in granting the dismissal because he filed an errata sheet to his deposition pursuant to rule 1.310(e), Florida Rules of Civil Procedure, by which he changed his testimony by disclosing the prior injuries to his knee. Without addressing whether the errata sheet, which did not state the reasons Baker was making the changes, was in compliance with rule 1.310(e), ***because the errata sheet was filed more than three months after the deposition in which appellant made the false statements and more than one week after the filing of the motion for involuntary dismissal which disclosed the false testimony, the filing does not cure the fraud*** in the instant case.

Id. at 151 (footnotes deleted and emphasis added).

Counsel your client to make such corrections as quickly as possible. Advise him or her to be specific with the reasons for the prior mistakes. The courts are on a rampage to punish those who misuse the system.

Conclusion

There is a lot for attorneys to think about when it comes to using Rule 1.310(e) to correct substantive matters in depositions. The first step is to realize that the procedure is there to be used. A good rule to live by in deciding whether or not to counsel your client to make such corrections is the phrase on many courtroom walls: "We who labor here, seek only truth."

Keep Tryin!

Roy

WASSON & ASSOCIATES, CHARTERED
28 West Flagler Street, Suite 600 Miami, FL 33130
(305) 372-5220 roy@wassonandassociates.com