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To Err Is Human, to Correct … Divine

Rule Allows Litigants to Make Changes, in Form and Substance, to Deposition Testimony

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EVERY EXPERIENCED practitioner has had the unhappy experience of receiving back from the court reporter a deposition transcript that contains seriously mistranscribed estimony. The attorney may also learn that a lient, after reviewing his or her transcript, has a more clear recollection of events than that testified o in the deposition, misunderstood a question or sed a poor choice of words, with the result that he transcript does not accurately reflect his or her ntended testimony.

CPLR 3116(a) allows litigants to review their ranscripts and to correct such errors in their deposition testimony (although the fact of the correcons is fair game for subsequent cross-examinaon). New York litigators who defend depositions eed to be familiar with §3116(a). A proper use of he Rule can have material, even dispositive, conequences. Failure to be aware of the Rule and its cope places a lawyer at risk of missing opportunies to correct important testimony and to create n accurate record.

Principale v. Lewner, 187 Misc.2d 878, 724 N.Y.S.2d 575 (Sup. Ct., Kings Co. 2001) noted hat where the deposition transcript is rife with ypographical errors, CPLR 3116(e) offers a disnct remedy, i.e., a motion to exclude the trancript from being admitted into evidence because f such errors. The *Principale* court noted the earth of case law addressing §3116(e) and conluded it was "apparently a little used remedy," iven the existence of Rule 3116(a). CPLR 116(a) thus essentially remains the paramount ection for dealing with errors in transcripts.

CPLR 3116(a) says: "The deposition shall be ubmitted to the witness for examination and hall be read to or by him or her, and any changes n form or substance which the witness desires to make shall be entered at the end of the deposion with a statement of the reasons given by the witness for making them. The deposition shall hen be signed by the witness before any officer uthorized to administer an oath. If the witness ails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination."

Section 3116(a) differs from its federal counterpart, Fed. R. Civ. P. 30(e), in several respects. For example, §3116(a) automatically empowers corrections, whether requested or not, but Rule 30(e) requires the right to correct be specifically requested by the witness or a party before the deposition has ended (thus, it is advisable always to reserve that right, before any deposition concludes, as a matter of habit). Additionally, in federal court, the time to correct is 30 days; in New York courts it is 60 days (and one should assume, absent an understanding to the contrary, that an adversary will always argue that the time starts running from the time of receipt by the lawyer).

Changes in Form and Substance

CPLR 3116(a) provides a wealth of useful information and guidance. Perhaps the most important single fact is that the Rule is not limited to typographical errors; it also expressly authorizes changes in form and "substance." See generally *McNerney v. New York Polyclinic Hospital*, 18 A.D.2d 210, 238 N.Y.2d 729 (1st Dept. 1963) ("The required reading and signature of the completed deposition [citation to 3116(a)'s predecessor omitted] … tend to ensure its 'truthfulness and authenticity' … *a purpose only partly served by proof of accurate stenography*.") (emphasis added).

Almost 80 years ago, the First Department in *Van Son v. Herbst*, 215 A.D. 563, 214 N.Y.S. 272 (1st Dept. 1926), construing §3116(a)'s predecessor, said, in terms of what corrections are permitted: "Indeed, the new matter would have to be very remarkable or quite unresponsive and unjustified by the questions to require its exclusion." In that case, 35 changes were made and the objection was "that the corrections and interlineations destroy the probative value of the deposition and substitute for plaintiff's testimony that of his attorney…."

An appropriate use of §3116(a) in terms of "substance," while not risk-free (and always subject to cross-examination), can have material consequences.

First, by way of example, witnesses unexpectedly become unavailable for trial. Accordingly, care should be taken that corrections be timely made, when appropriate, so that the original transcript, and the corrections, may at least be considered to be offered for use at trial if the witness is unavailable. In *Cooper v. Mabru Associates*, 237 A.D.2d 188, 654 N.Y.S.2d 377 (1st Dept. 1977), the defendant argued that the plaintiff's deposition testimony should not be made available at trial because plaintiff's health had deteriorated and her testimony at trial was doubtful (presumably, the objection was that she therefore could not have been cross-examined on her corrections).

The court disagreed: "[A]ssuming such incapacity, defendant will suffer no prejudice since it will be able to impeach plaintiff by introducing the deposition and affidavit of changes at trial and pointing up their inconsistencies. Defendant cites no authority for the proposition that changes in the deposition, permissible as to both form and substance under CPLR 3116(a), must be stricken should it develop that the deponent will not be testifying at trial."

Second, even before trial, CPLR 3116(a), properly applied, can save a case during motion practice. In *Boyce v. Vazquez*, 249 A.D.2d 724, 671 N.Y.S.2d 815 (3d Dept. 1998), the issue was whether defendant had placed plaintiff's stalled vehicle too close to the center of the road, thereby negligently causing the mid-road accident that led to plaintiff's injuries. The defendant moved for summary judgment, relying upon plaintiff's original deposition testimony, indicating that the defendant had placed plaintiff's stalled vehicle at the side of the road, not the center. The court denied the motion, stating that "reliance on plaintiff's original deposition testimony was misplaced because, two weeks prior to the service of his motion, plaintiff, in the manner prescribed by C.P.L.R … 3116(a) … made changes in his deposition which placed the rear part of his truck in the eastbound lane of travel of North Street, thereby creating an obstruction."

The defendant had argued that these changes were improper, but the court disagreed: "[Defendant] also contends that the corrections should be considered because they are not credible. This contention is unavailing, since it is not the court's function, on a summary judgment motion, to assess credibility unless untruths are clearly apparent."

Similarly, in *Binh v. Bagland USA, Inc.*, 286 A.D.2d 613, 730 N.Y.S.2d 713 (1st Dept. 2001), the deponent changed a date (which directly affected the availability of a statute of limitations defense) and presented the new date in his errata

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heet, submitted approximately three months after is deposition, but seven months before defenants moved for summary judgment. Under the estimony in plaintiff's original deposition, his laim would have been time barred.

However, the Appellate Division noted that the motion court, stating its preference for disposng of cases on the merits, properly exercised its iscretion, in forgiving plaintiff's slight delay in urnishing the errata sheet … and correctly ruled hat the conflict between the original deposition estimony and the errata sheet raised an issue of redibility inappropriate for summary judgment reatment …. Upon this record, plaintiff's deposion correction does not appear to be patently ntrue or tailored to avoid the consequences of his arlier testimony, made as it was before defendants moved for summary judgment …." Although the ourt was willing to bend the 60-day rule, obvious-y the better practice is not to test that and to dhere strictly to the requirements of §3116(a).

As suggested by the *Binh* court, so-called "corections" can be taken too far. The purpose of 3116(a) is to make prior testimony more accurate r to clarify it, not simply to come up with a "beter story" when faced with prior damaging testimoy. In *Prunty v. Keltie's Bum Steer*, 163 A.D.2d 595, 59 N.Y.S.2d 354 (2d Dept. 1990), plaintiff pasenger, the brother of the intoxicated driver, sued he bar at which he and his brother had been rinking. At deposition, plaintiff admitted that he ad bought his brother a drink the night of the ccident.

The bar moved for summary judgment because laintiff had contributed to the driver's intoxicaon. In opposition to the motion, the plaintiff nd his brother put in affidavits stating that they o longer recalled whether there had been any rink purchased. The court was unimpressed, oting: "Absent prejudice to the other side, the ourt has the inherent power to permit changes o a deposition transcript after it has been gned." But the court concluded that "the plainff has attempted to avoid the consequences of he earlier admissions by raising a feigned factual sue, which is to defeat the appellant's motion or summary judgment."

So, too, in *Guevara v. Zaharakis*, 2003 N.Y. App. Div. LEXIS 2705 (2d Dept., March 17, 003), defendant moved for summary judgment ased, among other things, upon the plaintiff's dmission in a police report that he had fallen sleep at the wheel. Later, there appear to have een substantive changes to the plaintiff's depotion testimony to "correct" that admission: The court was again unpersuaded: "The laintiff's submissions failed to raise a triable sue of fact as to the Defendant's negligence. Rather, their submissions, including the correcon sheets to Guevara's deposition testimony, aised feigned issues intended to avoid the conequences of Guevara's earlier admissions…. "

In all circumstances where corrections are llowed, of course, the defending attorney hould be prepared for the inevitable cross-xamination at trial. Courts tend to allow the ury to assess the weight to be given to the fact f, and nature of, the corrections. In *Mikelson v. abcock*, 190 A.D.2d 1037, 593 N.Y.S.2d 657 4th Dept. 1993), plaintiff testified at deposition that she did not remember how the accident occurred. In resisting summary judgment, she claimed she had amnesia and that the amnesia had abated somewhat since her deposition, and her recollection (favorable to her) had now improved. The court ruled that it had been an error for the court below to grant summary judgment to the driver, stating, "Whether plaintiff's deposition testimony and averments regarding amnesia are true or were feigned to resist summary judgment presents a credibility issue that cannot be resolved by summary judgment."

The court distinguished *Prunty* by saying it did not involve the effects of amnesia, but rather involved "an attempt by plaintiffs to retract admissions made in the course of pretrial discovery." See also *Steiger v. Mason*, 125 A.D.2d 391, 509 N.Y.S.2d 112 (2d Dept. 1986) ("The court did not abuse [its] discretion by requiring that the appellants' counsel, in attempting to impeach the plaintiff … by the use of her deposition testimony, read both the oral answer and the change she had made in the transcript. A deposed party is entitled to change an answer before executing a deposition … and the fact that counsel was required to read both the oral answer and the change did not preclude him from probing that inconsistency or the inconsistency between the oral answer and the plaintiff's … testimony.").

Perhaps the most important single fact is that the Rule is not limited to typographical errors; it also expressly authorizes changes in form and "substance."

Procedural Requirements

Care should be taken to comply with the procedural requirements of §3116(a), lest a well-intended correction be voided. One thing to be mindful of is the 60-day requirement. Although some courts have been flexible on this point, as noted above, §3116(a) does state that no corrections can be made after 60 days and that if, at the end of that period, no corrections are made, the failure to sign within the required period means that the deposition "may be used as fully as though signed." See, e.g., *Thompson v. Hamptons Express*, 208 A.D.2d 824 (2d Dept. 1994).

It is also important to bear in mind §3116(a)'s requirement that a reason be given for each correction. The principal reasons, of course, are typographical error and improved recollection. In the oft-cited *Columbia v. Lee*, 239 A.D. 849, 264 N.Y.S. 423 (2d Dept. 1933), the Second Department said that the reason for each change must be given: "Either that it is an incorrect transcript or that his present recollection of the facts is more accurate, and he may then state what his corrected answer is and give any other explanation he desires with respect to his prior answer." The language "any other explanation" leaves open the question of whether or not changes can only be limited to typographical matters or matters of improved recollection.

In *Skeaney v. Silverbeach Realty Corp.*, 10 A.D.2d 537, 201 N.Y.S.2d 163 (1st Dept. 1960 per curiam), the First Department reaffirmed the rule in *Columbia v. Lee*. The court directed the plaintiff to "specify the reason for the changes in the examination before trial" consistent with *Columbia*, which reasons include that "it is an incorrect transcript or that … present collection of the facts is more accurate." But the court then reaffirmed that the deponent could give "any other explanation" he desired with respect to his prior answers.

In *Mansback v. Klaussner*, 179 Misc. 952, 40 N.Y.S.2d 647 (Sup. Ct. Special Term, New York Co., 1943), the court said, "The essential requisites are that the transcript shall show (1) what the testimony was as originally given and taken down and transcribed by the stenographer; (2) what the testimony is as recollected by the witness before he affixes his signature; (3) whether the corrections are due to a challenge to the accuracy of the stenographer or to a desire on the part of the witness to change what he said upon the examination." The court held that the witness needed to say it was a typographical error or "a desire on the part of the witness to change what he said on the examination …."

Whatever the explanation(s), it has been held repeatedly that each correction should receive its own explanation. In *Marine Trust Co. of Western New York v. Collins*, 19 A.D.2d. 857, 243 N.Y.S. 2d 993 (4th Dept. 1963), the court rejected a "global" statement, saying "the omnibus statement of the witness that corrections were made to correct his errors in testifying or were errors of the reporter was improper." See also, *Cillo v. Resjefal Corp.*, 295 A.D.2d. 257, 743 N.Y.S.2d 860 (1st Dept. 2002) ("a witness may make substantive changes to his or her deposition testimony provided the changes are accompanied by a statement of the reasons therefore").

CPLR §3116(a), properly used, can be a powerful tool in building, or defending, a client's case. The careful New York practitioner will be well-served by gaining a comfortable familiarity with that rule and the scope of its uses.