Reading, Correcting, and Signing Deposition Transcripts
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1. Introduction.

Both ORCP 39F and Fed. R. Civ. P. 30(e) allow deponents to read, correct, and sign the transcripts of their depositions. They also give a party the right to request that the deponent do so. The deponent may then make changes both to the form and the substance of the testimony. Some attorneys routinely have deponents correct and sign transcripts; others do not. This article describes the relevant procedural rules and strategic and practical considerations concerning reading, correcting, and signing transcripts.

2. Oregon and Federal Rules.

a. Fed. R. Civ. P. 30(e). Fed. R. Civ. P. 30(e) provides that if the deponent or a party makes a request "before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available" to review the record and, "if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them." The reporter's certificate accompanying the transcript must indicate whether a request for review was made and, if so, the reporter must append changes timely made. Id. Once the right of review has been waived, attempted changes will not be accepted by the court. See Blackthorne v. Posner, 883 F. Supp. 1443, 1454 n.16 (D. Or. 1995) (because reporter's certificate did not indicate that plaintiff had requested review, plaintiff's statement of corrections was rejected).

b. ORCP 39F. The Oregon rule is different from the federal rule as to the finality of waiver and in requiring a deponent's statement of correctness. Under ORCP 39F(1), "if any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness."

If there is no such request, then "no statement by the witness as to the correctness of the transcription or recording is required." ORCP 39F(3). However, if the deponent or any party later wishes to have the deponent examine and correct the transcript, the deponent or party may request leave of court. ORCP 39F(1).

The rule provides a three-part process for correcting the record. First, any changes by the deponent "shall be entered upon the transcript or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them." Second, the party taking the deposition shall promptly serve notice of the deponent's changes and reasons on all of the parties. Third, the "witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness." ORCP 39F(2).

3. To Exercise or Waive the Right?

There are two schools of thought regarding whether to request reading and signing of the transcript if the deponent is your client. One school of thought is to make case-by-case determinations. The rationale is that if the witness has corrected the transcript before trial, any deviation from the deposition testimony at trial becomes extremely difficult. The other school of thought is to have the client read and sign in every instance. Proponents of this school of thought believe that the value of this approach outweighs the benefit of perhaps getting more leeway for the client to explain deposition testimony at trial because 1) it focuses the client on the testimony that was given when it is fresh and 2) often, the transcript does not properly reflect the testimony actually given by the witness, sometimes on issues of significance in the case.

Many attorneys are unaware of the right of a party to request that the deponent review and correct the deposition transcript. This right may be useful when the witness is the opponent.

If the opponent in a state court case does make corrections, the opponent affirms again the accuracy of the testimony as corrected. Even if the opponent witness does not read and correct the transcript, the record will reflect that counsel requested corrections before trial, making last-minute testimony changes at trial more difficult for the witness. When the deponent is an independent witness, some attorneys make it a practice to recite on the record an explanation of the witness' right to review and correct testimony under the civil rules without making an actual request.

4. Suggestions for Reading and Signing.

Ideally, both the client and the lawyer should read the deposition transcript immediately after it is delivered while the testimony is still fresh in mind. If the client is going to review the transcript for corrections, the lawyer should have procedures designed to encourage the client to do so in a timely manner, see Griswold v. Fresenius USA, Inc., 978 F. Supp. 718, 721 (N.D. Ohio 1997) (untimely correction sheet stricken), and with the serious attention it deserves. One way is to have the client read the transcript at the lawyer's office, with the lawyer available for immediate consultation so that all questions or concerns about the testimony can be addressed before they are forgotten or omitted as unimportant. Otherwise, a form letter explaining the process should be sent with the transcript with follow up by the lawyer or staff.

One key instruction is that the client make only those changes that have a substantive impact on the testimony. Minor punctuation and spelling errors, for example, should not be corrected because such attention to minutia may be used to impeach the client who attempts to change substantive deposition testimony at trial that was not corrected earlier. The client should also be instructed that she may offer additional information, change testimony, and add explanations if necessary to make misleading, confusing, or inaccurate testimony accurate,

regardless of whether she thinks the error is a stenographic one or not. See Innovative Mktg. & Technology, L.L.C. v. Norm Thompson Outfitters, Inc., 171 F.R.D. 203, 205 (W.D. Tex. 1997) (substantive changes may be made regardless of reason for change). The client should also be advised to note reasons for each of the changes, e.g., "I recall X was said instead of Y in the transcript," "I have recalled an additional incident involving X," or "I misstated X." See, e.g., Sanford v. CBS, Inc., 594 F. Supp. 713, 714-15 (N.D. Ill. 1984) (noting requirement of reasons for each change).

5. Effect of Deposition Transcript Editing.

Given the effect of changes, a deponent does not in practice have free rein to change deposition testimony. Corrections to deposition testimony will not replace the original answers, Lugtig v. Thomas, 89 F.RD. 639, 641 (N.D. Ill. 1981); Innovative Mktg. & Technology, L.L.C., 171 F.R.D. at 205, and if made by a party, the original answers are admissible admissions. Podell v. Citicorp Diners Club, Inc., 112 F.3d 98, 103 (2d Cir. 1997). If a party witness makes extensive substantive changes to the deposition so that the deposition is incomplete, the deposition may be reopened to allow questions about the substance of the testimony as well as about the reasons for the changes, and the costs may be charged to the witness. See Lugtig, 89 F.R.D. at 642 (noting number and type of changes the defendant made). If the changes appear to have been made in utter disregard of the rule, it is also possible that a court will disregard all changes. See Baker v. Ace Advertisers' Serv., Inc., 134 F.R.D. 65, 73 (S.D.N.Y. 1991) (transcript was deemed accurate and signing deemed waived where the deponent crossed out or changed almost all original answers and did not explain reasons). If the deponent's changes are made in bad faith, the ultimate sanction of dismissal may be imposed. See Combs v. Rockwell Int'l Corp., 927 F.2d 487 (9th Cir. 1991) (where plaintiff swore that he had read and corrected

the transcript but in fact authorized attorney to do so, the case was dismissed as a sanction for falsifying evidence).