

Correcting Errors In Deposition Transcripts:

Rule 30(e), FRCP and IRCP.

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FRCP 30(e) and IRCP 30(e) are nearly identical

FRCP 30(e)

Review by the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

IRCP 30(e)

Review by the Witness; Changes.

(1) *Review; Statement of Changes.* Unless waived by the deponent and the parties, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

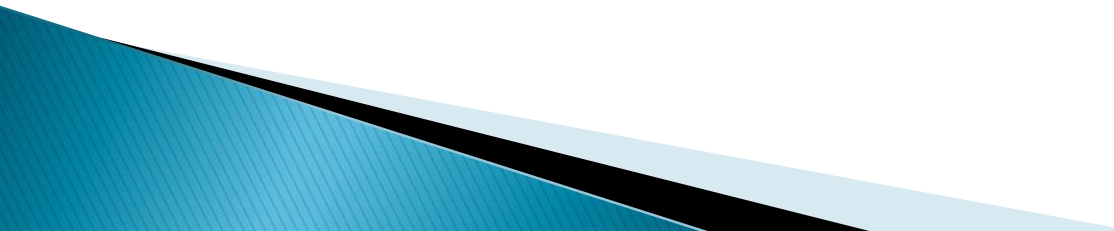
(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes Indicated in the Officer's Certificate.* The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

Interpretation of Identical Idaho and Federal Rules.

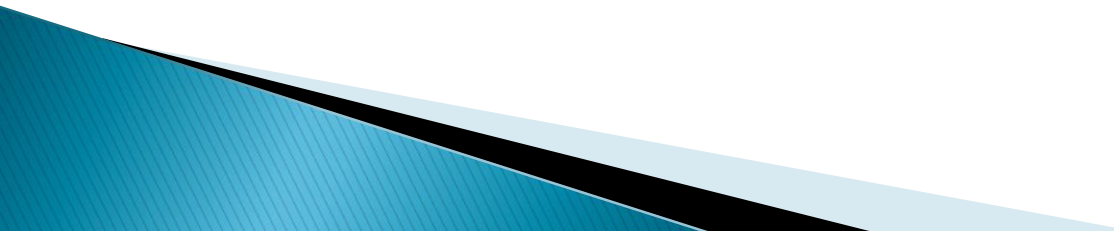
According to the Idaho Supreme Court: When a federal rule is identical in material respects to an Idaho rule, [Idaho Courts] may consider decisions of the federal courts interpreting the federal rule when interpreting the Idaho rule. *Martin v. Hoblit*, 133 Idaho 372, 376 n. 3, 987 P.2d 284, 288 n. 3 (1999).



Key Components of FRCP 30(e) and IRCP 30(e)

- ▶ There are three (3) key components of Rule 30(e):
 - Timeliness of Submitting Corrections
 - Scope of the Correction
 - Explanation
- ▶ In addition to addressing these three components, this presentation addresses other issues that arise including the effect of improperly transcribed testimony, missed objections and how to address the challenges of remote depositions.

Issue #1: Timeliness

- ▶ Rule 30(e)(1) provides in pertinent part: “the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available.”
 - ▶ Key takeaway: Availability of the transcript is different than possession of the transcript.
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Timeliness Cont.

See Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc., 397 F.3d 1217, 1224 (9th Cir. 2005) (The thirty-day correction clock begins upon notification of availability, not possession.)

Similarly, notification to legal counsel may constitute notification of availability. *Welsh v. R.W. Bradford Transp.*, 231 F.R.D. 297 (N.D. Ill. 2005).

- ▶ Exclusion of the corrections is the proper remedy for a deponent who fails to make corrections within the 30-day time period. *Hambleton*, 397 F.3d 1217.
- ▶ Calendar the 30-day period from witness's receipt or counsel's receipt (if deponent is represented by counsel)
- ▶ Errata sheets must be submitted court reporter within 30 days, not merely completed.

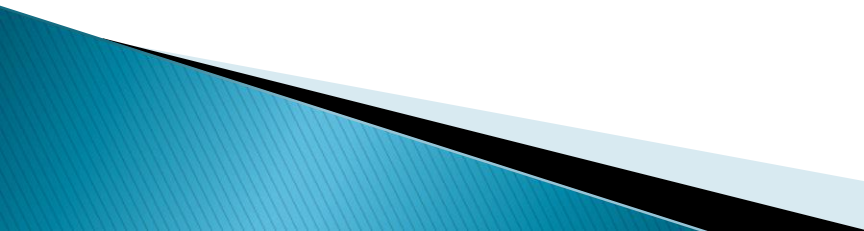
Timeliness Cont.

- ▶ Remedy for failing to timely correct testimony:

Exclusion of the corrections is the proper remedy for a deponent who fails to submit corrections within the 30-day time period to the court reporter. *Hambleton*, 397 F.3d 1217.

The decision of whether to exclude corrections is subject to Court's abuse of discretion. *Id.*

Issue # 2: Scope of Correction

- ▶ Both FRCP 30(e) and IRCP 30(e) allow a deponent to make changes to “form or substance”
 - ▶ Does this allow a deponent to make contradictory changes to testimony (i.e. to change a “no” answer to a “yes”)?
 - ▶ The answer is complicated.
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Scope cont.

- ▶ See *McKinnon v. YUM! Brands, Inc.*, No. 1:15-CV-00286-BLW, 2017 WL 3659166, at *10 (D. Idaho Aug. 24, 2017).
- ▶ In *McKinnon*, the deponents (plaintiff and a fact witness) made several contradictory changes to their deposition testimony (i.e., yes/no and correct/incorrect). Counsel then offered the corrected changes to defeat summary judgment.
- ▶ Chief Judge B. Lynn Winmill excluded the corrections. In excluding the corrections the Court explained as follows:
 - ▶ First, “Rule 30(e) is to be used to make ‘corrective, and not contradictory, changes.’” *Id.*, citing *Hambleton Bros. Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005).
 - ▶ Second, corrections are also examined under the Sham Affidavit Rule. “Under the sham affidavit rule, ‘a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.’” *Id.*, citing *Kennedy v. Allied Mut. Ins. Co.*, 952 F.3d 262, 266 (9th Cir. 1991)

Scope cont.

- ▶ The Seventh and Tenth Circuits are like the Ninth Circuit: Typographical corrections only.
- ▶
- ▶ Other Circuits are more flexible. Some approaches:
 - Substantive changes allowed, but modified testimony is attached on errata sheet (not replaced in original transcript). Most common approach.
 - Substantive changes allowed, but court will sanction abuse. *See Gonzalez v. Fresenius Med. Ctr.*, 689 F.3d 470 (5th Cir. 2012) (plaintiff changed testimony at trial even after deposition was re-opened to clarify earlier inconsistency)
 - Substantive changes allowed, but errata sheets cannot be unreasonably long. *Norelus v. Denny's, Inc.*, 628 F.3d 1270 (11th Cir. 2010) (868 changes made to 8-day deposition).

Scope Cont.

- ▶ Idaho does not follow the sham affidavit rule:
- ▶ *Major v. Security Equipment Corp.*, 155 Idaho 199, 207, 307 P.3d 1225, 1232 (2013):

This Court has never adopted the sham affidavit doctrine. We roundly criticized the doctrine in [*Mains v. Cach*, 143 Idaho 221, 141 P.3d 1090 (2006)] because a sham affidavit finding necessarily turns on a credibility finding as well as a finding of bad faith. That is beyond the power of the trial courts at the summary judgment phase.

- ▶ *See e.g. Tolmie Farms, Inc. v. Stauffer Chem. Co.*, 124 Idaho 607, 610, 862 P.2d 299, 302 (1993):

While we may agree that the purpose of summary judgment is served by a rule that prevents a party from creating sham issues by offering contradictory testimony, we perceive no “contradiction” where the witness asserts in his affidavit facts which, at the time of his earlier deposition, he specifically had asserted he could not recall. *Kennedy v. Allied Mut.*, 952 F.2d 262, 266–67 (9th Cir.1991) (district court must determine that affidavit contradicting prior testimony is a “sham” before it determines that affidavit cannot be used to create an issue of fact precluding summary judgment).

Issue #3: Sign and Explain

FRCP 30(e) and IRCP 30(e) require the deponent to explain the corrections.

“A statement of reasons explaining corrections may show that the alterations have a legitimate purpose.” But the explanation must be such that the Court can determine whether the changes are true corrections or ‘purposeful rewrites tailored to manufacture an issue of material fact....’” *McKinnon*, 2017 WL 3659166 *10 (citing *Hambleton*, 397 F.3d at 1224–25).

Again, the Court has broad discretion in determining the sufficiency of an explanation.



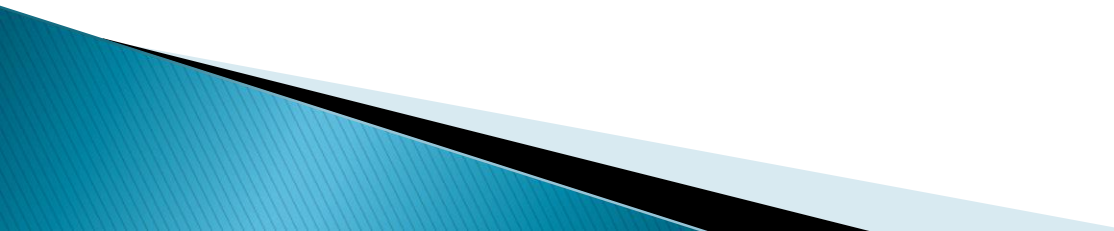
Sign and Explain Cont.

- ▶ Practice Tip: The Witness should state the full question (or citation to topic) and then explain the specific basis for the correction, especially if the jurisdiction is not especially forgiving to the deponent.
- ▶ *Jackson v. Teamsters Local Union*, 310 F.R.D. 179, 186 (D. D.C. 2015) (one-word explanation of basis for changes insufficient and errata sheets stricken; court would only permit “typographical” or “clerical” changes; contradictory changes not allowed).

Should your witness read and sign?

- ▶ Discuss the pros and cons of reading and signing
 - Failure to read and sign means that clear admissions can be used against the deponent
 - On the flip side, reading and signing is a second confirmation as to the accuracy of testimony and will make it hard for a witness to clarify at trial.

Incorrect Record and Missing Objections

- ▶ COVID-19 has resulted in the taking of depositions remotely (e.g., via Zoom) with witnesses, parties, legal counsel and the Court reporter at different locations.
 - ▶ This raises the risk that the record could be incorrect or an objection could be missed.
 - ▶ What should a deponent / practitioner do?
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Incorrect Record Cont.

- ▶ Counsel can consider adding video recording or real-time transcript in order to ensure a correct record.
- ▶ In the absence of these options, counsel may move to suppress the incorrect record promptly. *See* I.R.C.P. 32(d)(4) *and* F.R.C.P. 32(d)(4) (identical):

“An objection to how the officer transcribed the testimony, or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition, is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known.”

Questions?

Thanks!