

## Products Liability

### *When Witnesses Change Deposition Testimony, Seize the Opportunity*

By

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Almost all of us have had the experience of an adverse witness making significant changes to his or her deposition transcript. The question then becomes how the deposing attorney will react. In response, I have seen attorneys file motions for sanctions and even motions *in limine* to prevent a deponent from testifying differently than they did at the time of deposition. Generally, I believe the deposing attorney is better off using the revisions to attack the credibility of the witness at trial.

I had a recent experience in which a very important witness attempted to make significant changes to his deposition transcript shortly before trial. This is not the first time I have had this situation arise when the case went to trial. Several years ago I tried a case in the Southern District of California in which the defendant made approximately fifty changes to his deposition. Before his cross-examination at trial, I made a separate booklet of the pages on which he had revised his testimony. I marked those transcript pages as a separate exhibit which made a very nice booklet of more than 30 pages of changes. I then proceeded to waive the booklet in front of the jury as we went through the revisions at trial. Much fun was had by some, but not all.

In my recent case, it was not the number of revisions that was so disturbing; rather, it was that the changes were to the most critical questions asked during the deposition. The case involved a lawsuit against an extremely large company involved in providing security alarm services to both homes and business. The defendant designated the director of engineering as the person most qualified (“PMQ”) under Code of Civil Procedure §2025.230 to testify on several technical issues related to the residential alarm system. This employee also was the company's representative on a subcommittee of a trade organization which had promulgated ANSI standards which were critical to the liability issues in our case. I deposed the witness as the PMQ approximately six weeks before trial. The witness was designated as an expert as well. During the PMQ deposition, I was able to obtain very favorable testimony regarding the ANSI standards and whether they applied to the employer.

On June 27, 2006, less than two weeks before trial, the defense attorney forwarded a copy of a letter to the court reporter, indicating that the witness had made changes to his transcript. All but one of the changes were on critical liability questions. Here is the letter:

**June 27, 2006**

**BY FACSIMILE (619) 234-7330**  
**The Legal Support Group**  
**501 West Broadway, Suite 460**  
**San Diego, CA 92101**

**Re: \_\_\_\_\_ v. \_\_\_\_\_**  
**Deposition of \_\_\_\_\_**  
**Date: May 25, 2006**

**Dear TLSG:**

**Mr. \_\_\_\_\_ has reviewed his deposition and has made the following changes:**

**28:8-10 - Should read, "It was not 0-0. 0-0 is the code for non-transmission. So it was not 0-0."**

**29:24 - Change "Yes" to "No"**

**29:19 - Change "That's correct" to "That's incorrect"**

**30:3 - Change "No" to "Yes"**

**30:6 - Change "Yes" to "No"**

**50:9 - Change "Yes" to "No"**

**50:12 - Change "Yes" to "No"**

**58:12 - Change "Yes" to "No"**

**60:24 - Change "Yes" to "No"**

**The signed verification will follow in separate letter.**

I must admit the letter increased my blood pressure for a period of time. Because the witness had a prepaid vacation to China during trial, we had agreed that we would take his trial testimony on videotape. Although we were initially reluctant, this turned out to be very positive for our client. It resulted in a significant amount of work during the immediate pretrial preparation period, but allowed us to prepare an edited video presentation that kept the jury's attention when it was played at trial.

One thing that is critical when a witness attempts to change deposition testimony is that the attorney taking the deposition has given appropriate admonitions. Although mundane and boring, it is critical information for a jury. During the trial testimony, I reminded the witness that we had discussed these issues at his deposition:

Q. Now, Mr. \_\_\_, when I deposed you on May 25 of this year, that was not your first time to testify, was it, sir?

A. No.

Q. So even though that you had been through the deposition process before and actually testified in trial, before we started that deposition on May 25, I went over some of the ground rules for depositions, didn't I, sir?

A. Yes.

Q. In fact, sir, I'd like you to take a look at Volume I of your deposition, which I have there for you. This is your deposition from May 25, 2006. And I've made a copy for your counsel as well. Now, when we went over those ground rules, sir, I'd like you to take a look at Page 10 and 11, I told you - - and I'm reading from the transcript. Please make sure I'm reading this accurately - - this is

Line 21, "The court reporter will prepare a booklet with all of the - - everything that's been said in here today and it's called a transcript. I don't know if you've seen a transcript before, but it's in a booklet form and it's in a question and answer format. You'll have an opportunity to review that transcript before it is finalized and you sign off on it. However, if you make changes to that transcript, which you have the right to do, and they are substantive changes, either myself or some other attorney may comment on it, on those changes, at the trial of this matter and it may affect your credibility. Do you understand what I mean by that?" And you answered "Yes." Is that correct?

A. That's correct, yes.

Q. And I went on to say, "So it's real important that we get your best testimony here today. Understood?" And you answered "Yes," correct?

A. Yes.

Q. And then I followed up and I said, "Is there any reason you can't testify accurately today?" And you said "No," correct?

A. That's there, yes.

Q. Now, after I had gone through those ground rules, I also asked you some questions about whether you understood my question and for you to let me know if you didn't, and at Line 15 on Page 11 it says, "Now, when I ask you questions today, if you don't understand a question, please let me know and I'll try to restate it in a way that's more understandable. Fair enough?" And your answer was "Yes." Is that correct?

A. Yes.

Q. And then I said to you again, before we started this deposition, "If you don't tell me you don't understand a question, I'm going to assume that you do. Agreed?" And your answer was "Okay. Yes." Is that right, sir?

A. That's there, yes.

Q. Now, my understanding, sir, is that you have made revisions to the transcript that we were just reading from and that relates to your May 25, 2006 deposition, is that true?

A. Yes.

Q. I'm going to show you a document that was provided to me on June 27, 2006, earlier this week. It's Exhibit 173.

Q. Okay. Mr. \_\_\_\_\_ as a document which includes the changes that you made to the deposition transcript. Is that right?

A. Yes.

Q. And these are changes that you ultimately approved to the transcript of your testimony on May 25, 2006, is that right?

A. Yes.

Q. Now, sir, these changes, there are several from "yes" to "no," correct?

A. Yes.

Q. And there's one change from "no" to "yes"?

A. Okay.

Q. Is that right?

A. Yes.

Q. And there's one change from "that's correct" to "that's incorrect"?

A. Yes.

Q. And you certainly understood that those were substantive changes?

A. Yes, regarding my testimony it was.

[What I learned while cross-examining the witness, was that he had made minor changes to a rough

transcript. However, at a meeting with senior employees of the company, they pointed out his testimony was incorrect and that he should change his answers.]

Q. Let's take a look at your final transcript, the one that you signed that's in front of you there, Volume I, and I'd like you to take a look at Page 50. Page 50, Line 6, this is a question I asked you on May 25. "Is it fair to say that the SIA standards that have been adopted as ANSI standards are standards that ADT abides by?" Your answer on May 25 was "Yes," correct?

A. That's correct.

Q. You have now changed that answer to "No"?

A. Yes, that's correct as well.

Q. I go on to ask you, "And that would include ANSI/SIA CP-01-2000, correct?" Your answer on May 25 was "Yes," correct?

A. Yes.

Q. You have now changed that answer to "No"?

A. That's right.

Q. Now I'd like you to take a look, sir, at Page 58. Line 9, "Question: And at some point, ADT adopted this entire standard as a standard that it would conduct its business by, correct?"

"Answer: Yes." That's the answer you gave on May 25?

A. That was the answer that I gave and subsequently is proven to be incorrect, that's correct.

Q. You've changed that answer, after talking to Mr. Dischert and after talking to Mr. Mooney, you've changed that answer from a "yes" to a "no," correct, sir?

A. And after those discussions, after reassessment of the situation at ADT where we use both SIA panels and - - both non - - SIA panels and use panels that are not - - will never be compliant unless SIA CP-01 is changed, we don't run our business by abiding totally by the SIA standard. I was incorrect when I answered that question.

Q. And Mr. Mooney and Mr. Dischert talked to you after you had read the rough transcript, after you had read the final transcript and signed it, and Mr. Mooney and Mr. Dischert talked to you, and then you changed that "Yes" to a "No," correct?

A. I changed the "Yes" to a "No" when it became obvious that I gave the wrong answer. I tried - I spoke to them about whether ADT had a policy. There was no policy. I looked at the transcript and I looked at the question again, and it says, "Is this the way ADT conducts its business?" And I mean I said yes, but it's obviously not the way we conduct our business because we're doing other things, and the SIA standards, as I said before, are manufacturing standards. They don't directly apply to ADT.

Some of the jurors were actually laughing when this section of the videotape was played. After the trial, the jurors all commented that they felt the witness had very little or no credibility.

It certainly is time consuming to prepare for a cross-examination of a witness who has made changes to a deposition transcript, but the value can be great, especially if you have properly gone through the admonitions at the time of the deposition. Remember, **the jurors need to know the seriousness of changing testimony and that this witness understood the seriousness when he made the changes.** The lesson is to go through the admonitions no matter how much opposing counsel whines or tries to get you to move on.