Errata Sheets in Interferences[1]

By

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I. Introduction

We've recently received sharply contrasting decisions on errata sheets in three different interferences. In my opinion, the decision of a special master in a 35 UCS 146 action makes a lot more sense that the decisions of two APJ's in the administrative phases of two interferences.

II. Chapman v. Rhoads[3]

Chapman served two signed errata sheets on the last day for filing motions to suppress evidence and one unsigned errata sheet after the last day for filing motions to suppress evidence.

My colleagues believed, and Judge Medley agreed, that each of those errata sheets "ma[de] substantive changes to the original…transcripts."[4] Accordingly, my colleagues

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[3] Interference No. 105,209. My colleagues Michael Casey and Todd Baker represented Rhoads. Daniel P. Morris and Louis P. Herzberg of IBM's Yorktown Heights office represented Chapman.

[4] Paper No. 138, page 2.

"requested that the board authorize Rhoads to file a motion to strike the…errata sheets from the record."[5] However:

> Instead of authorizing Rhoads to file a motion to strike the errata sheets, the board made the determination that the service of the errata sheets was not timely, and authorized Chapman to file a miscellaneous motion seeking leave to have entered into the record of this interference the … errata sheets (paper 135).[6]

In that motion, Chapman argued that:

> the service of its errata sheets was timely made "since the standing order, the rules and the schedule of times in this interference do not specify a time when errata sheets are to be submitted…[and that, accordingly,] the submission of Chapman's errata sheets cannot be untimely."[7]

In its factual predicate, Chapman was absolutely correct. However, Her Honor refused to draw the proffered conclusion:

> Chapman's assertion that there is no time set in the rules, standing order, or times for taking action for the

[5] Id. at page 3.

[6] Id. at page 3.

[7] Id. at page 3.

> filing of errata sheets, begs the question. Chapman has failed, in the first instance, to specifically direct the board's attention to where in the rules, standing order or schedule of time[s], a party is authorized to serve and/or file errata sheets. As Chapman's errata sheets were apparently not authorized or contemplated by the rules in the first place, there was no occasion to consider the errata sheets …. Furthermore, even if errata sheets are permitted, which Chapman has failed to demonstrate, serving such errata sheets on the day of or after the day that any motions to suppress evidence were due cannot be said to have been timely made.[8]

Chapman sought to excuse the untimeliness of its service of the errata sheet by arguing that:

> the reason that it submitted its errata sheets approximately seven weeks after the cross examination depositions … was because the declarants were occupied in business related matters and end of the year vacations and holidays and were generally not available.[9]

Predictably, that argument didn't fly:

[8] Id. at page 4.

[9] Id. at page 3. May one suspect that Chapman's counsel was also so occupied?

> Chapman has failed to show good cause why the … errata sheets should be considered and entered into evidence in the interference record, especially at this late stage of the interference. Bd. R. 4(a). Time period 8 is set to expire on 31 January 2005. If the errata sheets are entered into the record, Rhoads has already indicated that they would seek to file a motion to strike the errata sheets. Allowing time for the party Rhoads to file a motion to strike the errata sheets, and the responsive papers to such a motion would undoubtedly result in an extension of time period 8 and would frustrate the overall goal of deciding the interference in a just, speedy and inexpensive manner.[10]

Next, Chapman argued that:

> the interest of fairness and justice requires that the factual record be made accurate by entering into evidence, the … errata sheets.[11]

and that:

> it is in the interest of justice to make the record accurate, and that its witnesses were not prepared for the types of

[10] Id. at page 4.

[11] Id. at page 4.

> questions that they were asked during their respective cross-examination depositions.[12]

However, Judge Medley turned this argument aside as follows:

> Chapman was not without recourse. Chapman could have made its objections on the record, and then filed a motion to suppress certain portions of the transcripts, based on the objections made. Paper 1, Stading Order, ¶ 16 and ¶ 14.1.2. Alternatively, or in conjunction, counsel for Chapman could have conducted redirect of its witness to explain on the record any inaccuracies that Chapman believed were made. Chapman failed to follow the proper procedures set forth in the Standing Order, and instead seeks to change the rules by submitting errata sheets that propose to substantially change the original transcripts …, all to the detriment of Rhoads. Such action does not further the goal of deciding this interference in a just, speedy and inexpensive manner.[13]

Finally, Judge Medley made a point addressed by the Special Master's opinion in the third of these three interferences:

[12] Id. at page 5.

[13] Id. at page 5.

> Lastly, Chapman has failed to direct the board's attention to supporting authority that stands for the proposition that substantial changes to a transcript, like those made in the … errata sheets are permitted under any circumstances. The board knows of none.[14]

III. **Benson v. Ginter**[15]

In this interference, the shoe was, regrettably, on our foot. We had served an errata sheet in which we sought to make what we thought was an obvious correction in a transcript -- i.e., changing a date from "1995" to -- 2004--[16]. However, Judge Lee turned us down:

> Counsel for Benson indicated that he does not know whether the witness actually answered "1995" or "2004" at the time of cross-examination. The APJ indicated that it is Benson's burden, in justifying the proposed errata, to demonstrate that the answer actually gave [sic] by the witness was "2004" and not "1995."[17] Apparently,

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[14] Id. at page 5.

[15] Interference No. 105,142. My colleagues Michael Casey, Todd Baker, Kurt Berger, and I represented Benson. Ginter was represented by Linda Thayer, Jerry Voight, and Ross Franks of Finnegan, Henderson's Palo Alto Office.

[16] In context, "1995" made no sense. Either the witness misspoke or the court reported mis-transcribed.

[17] During the conference call to discuss this issue, His Honor asserted that, if the witness misspoke, I should have noticed that and corrected his error during redirect. With all due respect, I think that His Honor's implication that defending counsel should catch every

> although a tape can be made available by the court reporter for a fee, Benson did not obtain a tape to ascertain what was the witness' original answer.

IV. National Semiconductor Corp. v. Ramtron International Corp.[18]

We had a hearing before Special Master Stephen L. Peterson of Finnegan, Henderson's Washington office. Both parties submitted proposed changes to the transcript of the hearing. Ramtron did not object to NSC's proposed changes, but NSC objected to Ramtron's proposed changes on the grounds that the original transcript was accurate in relevant part and that "correction was only justified where the reporter had made an error and not where the attorney or witness wished to rephrase a portion of the record."[19]

Special Master Peterson did not give Ramtron the opportunity to respond. Instead, he immediately ruled "that all of the requested changes to the record proposed by NSC and Ramtron, including the portions objected to by NSC, will be made."[20] He explained his ruling as follows:

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slip of a witness's tongue and correct them all on redirect expects too much of defending counsel. We're good, but we're not that good!

[18] Civil Action no. 1:03cv0061. This is a 35 USC 146 action in the United States District Court for the District of Columbia. My colleagues Michael Casey, Bill Enos, Andy Ollis, Frank West, and I represented Ramtron. NSC was represented by John Dondrea of Sidley & Austin's Dallas Office.

[19] Order dated March 17, 2005 page 2.

[20] Id. at page 2.

Rule 60(a) of the Federal Rules of Civil Procedure reads as follows:

> (a) Clerical Mistakes
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> Clerical mistakes in judgment, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

The case law is clear that as long as the "correction" is intended to make of record what was intended, it can be corrected. *See Dalton v. First Interstate Bank of Denver*, 863 F.2d 702, 704 (10th Cir. 1988).

I have reviewed all of the proposed changes and they appear to reflect what was intended. Should NSC choose to propose further changes to the hearing transcript in light of this ruling, it may do so. Any such changes by NSC should be proposed by March 30, 2005.

NSC proposed no further changes.

V. **Comments**

Errata sheets are good. Court reporters make mistakes in transcribing witnesses' testimony, attorneys' questions, and judicial utterances. Witnesses, attorneys, and, yes, even judges say things they clearly didn't mean. While such errors in transcripts are often immediately apparent, sometimes they are not – and, in any event, transcript errors impede and slow understanding by all concerned -- including appellate judges and clients.

Chapman was right that the Trial Section's rules, standing order, and schedule of times do not set the time for filing errata sheets. However, at least one of them jolly well should.

Moreover, although neither the Trial Section's rules, its standing order, nor its schedule of times contains anything like FRCP 60(a), at least one of them jolly well should.

Come on, Your Honors! Stop playing games with your "customers" and their counsel.