

RULE 30(E): GETTING THE LAST WORD

BY SARAH WILLIAMS



Depositions are widely-recognized as the critical moment in civil litigation when you discover the witnesses' testimony. Young attorneys can receive extensive training on formulating questions, exhausting memories, making objections and strategically introducing documents. Some training considers even the small details that set an atmosphere conducive to disclosure. But once the attorneys agree there are no further questions and the court reporter stops typing, many attorneys—young and old—consider their job done. They believe that they know the witness's testimony at that point. Few realize that the witness could take the transcript home and, with the benefit of time and reflection, dramatically rewrite the record.

That opportunity lurks in a particular detail of Rule 30—the errata sheet—an innocuous sounding form often sent out by court reporters as a matter of course. Some deposing attorneys wrongly believe that it will be used only to correct transcription errors and misspellings. Yet, Rule 30(e) provides explicitly for “changes in form or **substance**.”

To illustrate the problem, consider two examples. First, consider the professional expert who specialized in complex mathematical models. He was well-credentialed, but he made a mistake, using a two-dimensional equation for a three-dimensional variable. The mistake was undeniable and easily understood by a layperson once it was pointed out—we live in a three-dimensional world, ladies and gentlemen. Critically, the expert was unaware at deposition and, to the delight of the deposing attorney, he committed to the mistake on the record several times. Then two weeks later, he received the opposing expert report. Within 30 days, the expert produced an errata sheet changing the wrong answers to right answers, and replacing an erroneous explanation with language that was directly copied from the other expert's report. In a second example, consider the torts plaintiff who admitted at deposition that he knew about his damages many years before he filed his

lawsuit, meaning that he filed outside the statutory of limitations. A month later, his errata sheet changed the dates in his testimony to make his claims timely.

Those errata sheets are extreme, but the problem is not isolated. Other errata sheets that I have seen change “yes” to “no” and “no” to “yes” at critical points. Importantly, these depositions were all recorded by audio or video tape. There were no transcription errors. The court reporter wrote down precisely what the witness said, but it was not what the witness wanted to say later. Pursuant to Rule 30(e)(1)(B), the witnesses did provide reasons for the changes, but from the perspective of the deposing attorney, those reasons are paltry. A few witnesses claim to have misheard or misunderstood the question. Others wish to “clarify” their earlier testimony. Many say they changed their testimony simply because their original answer was incorrect.

So what happens to those errata sheets? Can you really lock a witness into his oral testimony at deposition? The answers depend on your jurisdiction.

The Unpopular Majority Rule

Early decisions on this question developed a majority rule that substantive changes would be permitted, and therefore, contradictory errata sheets submitted under Rule 30(e) could change the deposition testimony. That may come as a shock to deposing attorneys who thought they secured favorable testimony. But courts reaching this decision rely heavily on the plain language of Rule 30(e) and note that the rule explicitly envisions changes to substance, and provides for them without limitation.¹

Proponents of this view have reasoned that it allows for more complete discovery. If a witness realizes that her deposition testimony will be inconsistent with her position at trial, it is arguably better for the opposing party to learn about any change through an errata sheet,

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giving them time to investigate pretrial, rather than learning about the change for the first time when the witness takes the stand.²

Still, if you believe that the purpose of the deposition is committing the witness to his story, allowing that witness to rewrite his answers afterward seriously undercuts that purpose. Courts following the majority rule have tried to soften that impact by determining that “changes” in the context of Rule 30(e) are not what you might think. Generally, an errata sheet replaces the relevant parts of the original transcript and itself becomes the official record.³ Therein lays the importance of Rule 30(e). The errata sheet is not merely an affidavit, which any party could draft at any time; the errata sheet is the official deposition record. Accordingly, one might think that a rule allowing “changes in form or substance” allows the deponent to alter her original testimony. After all, the definition of the word change is to become something different. But that is not the position taken by courts following the majority rule, which have held that, “[n]othing in the language of rule 30(e) requires or implies that the original answers are stricken.”⁴

Thus, under the majority rule, you have both the original testimony and the errata sheet. The original is still fodder for impeachment and the finder-of-fact can assess the credibility of both.

The Increasingly Popular Minority Rule

Many courts have found the majority rule difficult to accept—so many that the majority rule is now a “majority” rule in name only. Most federal appellate courts to review the issue have held that changes would alter the original testimony, and therefore, an errata sheet cannot be used to make contradictory, substantive changes.⁵

This minority rule is difficult to square with the literal text of Rule 30(e) which expressly allows for “changes in... substance.” But it is supported by a principled understanding of fairness and the function of depositions. In a widely cited opinion, the Western District of Louisiana expressed the concern:

[Rule 30(e)] cannot be interpreted to allow one to alter what is said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from

interrogatories in that regard. A deposition is not a take home examination.⁶

There are already opportunities in civil litigation for written responses—interrogatories, responses to requests for production and affidavits. But the deposition is often the only chance to commit the witness to a spontaneous oral answer. That deserves protection.

Moreover, depositions are not cheap. Attorneys spend hours preparing for them and more hours conducting them. A deposition may require significant travel expenses, and it always requires the expense of a court reporter. Courts differ on whether an errata sheet allows the deposing party to reopen the deposition, but regardless, a contradictory errata sheet can add expense and prolong the proceedings as the attorneys figure out what to do.⁷ So, while majority courts view complete discovery as a desirable outcome, minority courts view the additional process created by a contradictory errata sheet as an undesirable and unnecessary inefficiency.⁸

Under the minority rule, the original transcript is the deposition record. The errata sheet is a mere affidavit which can be stricken.

A Third Option

Rule 30(e) jurisprudence is hard to follow. District courts, which authored early opinions for one rule or the other, are now in circuits that follow the opposite rule, and within undecided circuits, district courts go in conflicting directions.⁹ To complicate matters, the Third Circuit has taken a position that is neither the majority or the minority rule, but rather leaves the matter entirely within the discretion of the district judge who considers whether the proffering party has provided sufficient justification for the changes in each and every case.¹⁰ As a result, it will often be impossible to know where the record stands without filing a motion to resolve contested changes.

Impact on Summary Judgment

Experienced litigators will argue that, at trial, it may make little difference whether the errata sheet is part of the deposition record or not. Either way, the witness can be confronted with conflicting versions of his testimony and his credibility can suffer the consequence. But at

summary judgment, the changes in an errata sheet can be the difference between a case's life and death.

Under the majority rule, a party can survive summary judgment with an errata sheet that contradicts earlier deposition testimony to create a disputed issue of material fact.¹¹ Under the minority rule, it cannot.¹² To illustrate the impact, remember the earlier example of the torts plaintiff who used an errata sheet to make his claims timely and survive the statute of limitations. Under the majority rule, his case goes to trial and he can try to explain his confusion about dates to the finder-of-fact. Under the minority rule, his case is over.

The reason for that difference invokes a related problem in civil litigation—the “sham” affidavit. Traditionally, a “sham” affidavit comes to life after one party has moved for summary judgment, outlining all of the undisputed facts in its favor, and the opposing party responds with self-serving affidavits that contradict its earlier discovery responses in a desperate attempt to get to trial.¹³ No one is fooled.

A Rule 30(e) errata sheet is not that, while not exactly. For one thing, the errata sheet has to be directly linked to the deposition testimony with explicit reasons for the differences.¹⁴ Second, it has to be submitted through the court reporter and not merely sent out to the other parties.¹⁵ Finally and most importantly, the errata must be submitted within 30 days. In most cases, that timeline means the witness has to make all changes before or near the close of discovery. The witness will not be rewriting her testimony in specific response to a summary judgment motion that the opposing party has already provided. Still, the situation is close enough that

minority courts regard a contradictory errata sheet as a “sham” affidavit and treat it accordingly. After all, just like the affidavit, an errata sheet may be created solely “in a tactical attempt to evade an unfavorable summary judgment.”¹⁶

The Problem in Reverse

It is natural to think about the problem from the receiving end—what happens when you masterfully elicit such devastating testimony that your opponent must dig through the bowels of Rule 30(e) to get past it? But the other side of the situation is just as ugly. What happens when your witness calls you a few days after you defended his deposition with concerns about his testimony? Can you prevent your rogue witness from making numerous changes to his errata sheet without warning you? Counseling those witnesses is delicate. It requires consideration of the substantive impact on the case, the witness's credibility and your own ethical obligations. Influencing an errata sheet is the equivalent of influencing the witness's testimony, and throughout the federal courts opposing counsel may inquire whether attorneys suggested the changes on the errata sheet.¹⁷ The best approach is to remember that good endings come from good beginnings. Before the deposition starts, a well-prepared witness should know the deposition process will end with an errata sheet, and he should know that errata sheet's purpose and its limitations.

¹ See, e.g., *Podell v. Citicorp*, 112 F.3d 98, 103 (2d Cir. 1997) (holding that the rule places no limitations on change and does not “require a judge to examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes even if they are unconvincing”) quoting *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981).

² See e.g., *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981). But note, the majority rule is no longer good law in the Seventh Circuit. See *Thorn v. Sundstrand Aerospace Corp*, 207 F.3d 383, 389 (7th Cir. 2000)(holding that changes in substance are impermissible when they contradict the transcript).

³ *De Seversky v. Republic Aviation Corp*, 2 F.R.D. 113, 115 (E.D.N.Y. 1941).

⁴ *Podell v. Citicorp*, 112 F.3d 98, 103 (2d Cir. 1997).

⁵ Compare *Podell v. Citicorp*, 112 F.3d 98 (2d Cir. 1997) (applying the majority rule) and *Gonzalez v. Fresenius Med.*, 689 F.3d 470, 480 (5th Cir. 2012)(agreeing with the majority rule) with *Thorn v. Sundstrand Aerospace*, 207 F.3d 383, 388-389 (7th Cir. 2000) (following the minority rule), *Hambleton Bros. v. Balkin*, 397 F.3d 1217, 1225 (9th Cir. 2005)(following the minority rule), *Garcia v. Pueblo Country Club*, 229 F.3d 1233, 1242 n. 5 (10th Cir. 2002)

(following the minority rule) and *Norelus v. Denny's Inc.*, 628 F.3d 1270, 1281-82 (11th Cir. 2010) (following the minority rule).

⁶ *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992), but note that in dicta the Fifth Circuit subsequently “does not necessarily disagree” with the majority rule, allowing substantive changes. *Gonzalez v. Fresenius Med.*, 689 F.3d 470, 480 (10th Cir. 2012).

⁷ See Richard G. Stuhan and Sean P. Costello, *Rule 30(e): What You Don't Know Could Hurt You?*, *The Practical Litigator*, January 2006, 7-19 at 14 (summarizing the case law on re-opening and noting that the rule does not mention re-opening).

⁸ See, e.g., *Norelus v. Denny's Inc.*, 628 F.3d 1270, 1281-82 (11th Cir. 2010) (criticizing an improperly submitted, contradictory errata sheet as a “waste of time and money” that “unquestionably prolonged and multiplied proceedings”)

⁹ See notes 2, 5, and 6, *supra*; and compare *Hodak v. Madison Capital*, No. 07-cv-05, 2008 WL 2598309 (E.D. Ky., June 25, 2008)(a Sixth Circuit district court following the majority rule) with *EEOC v. Skanska*, 278 F.R.D. 407 (W.D. Tenn.2012) (a Sixth Circuit district court following the minority rule).

¹⁰ *E.B.C. Inc. v. Clark Building Sys. Inc.*, 618 F.3d 253, 268 (3d Cir. 2010).

¹¹ See, e.g., *Rios v. AT&T Corp.*, 36 F.Supp.2d 1064, 1067 (N.D. Ill., 1999) (holding that it is possible to create a material issue of fact in an errata sheet, although granting summary judgment).

¹² See, e.g. *Hambleton Bros. Lumber Co. v. Balking Enterprises*, 397 F.3d 1217, 1225 (9th Cir. 2005) (affirming summary judgment in part).

¹³ See, e.g., *Yeager v. Bowlin*, 693 F.3d 1076 (9th Cir. 2012) (affirming summary judgment against a party who submitted a sham affidavit in response to his opponent's motion).

¹⁴ Rule 30(e)(1)(B); see also *Holland v. Cedar Creek*, 198 F.R.D. 651, 653 (S.D.W. Va. 2001) (striking an errata sheet that failed to identify reasons for the changes); *Sanford v. CBS, Inc.*, 594 F.Supp. 713, 715 (N.D. Ill. 1984) (a witness cannot claim the reasons were implied or give a single reason at the end).

¹⁵ See *Mader v. Motorola*, 1999 WL 519020 at *4 (N.D. Ill., July 4, 1999) (ruling against a party who failed to provide an errata sheet to the court reporter).

¹⁶ *Hambleton Bros. v. Balkin*, 397 F.3d 1217, 1224 (9th Cir. 2005)

¹⁷ See Wright and Miller, 8A FEDERAL PRACTICE AND PROCEDURE s. 2118, n. 6 (3d 2013) (noting that counsel may reopen the deposition to find out if changes originated with the deponent or his attorney); and see also *Gonzales v. Fresenius Medical Care North America*, 689 F.3d 470, 480 (5th Cir. 2012) (agreeing with the majority rule and holding that counsel can be sanctioned for exerting improper influence over the drafting of the errata sheet) and *Norelus v. Denny's Inc.*, 628 F.3d 1270, 1281-82 (11th Cir. 2010) (applying the minority rule and upholding sanctions against attorneys who created a long errata sheet).