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Tips from the Trenches »

The iPad for Litigators: Storming the Courtrooms

By Sharon D. Nelson and John W. Simek

Only rarely do you see a new technology storm the courtroom, but the eagerness with which litigators are embracing the iPad is extraordinary. As we write this, we have just returned from giving a continuing legal education (CLE) program at which a litigator proudly held up his new iPad and pronounced: "This is a game changer." If you are not yet a believer, consider this: When we helped organize a webinar sponsored by the America Law Institute and the American Bar Association and called (cleverly) "The iPad for Litigators," so many lawyers registered (nearly 1,000) that we had to break it into three sessions so as not to overload the technology. The CLE made so much money that its sponsor, the ABA's Law Practice Management Section, quadrupled its anticipated yearly income. When we taught a similar CLE in Fairfax Circuit Court, we maxed out the space in our largest courtroom. We now have four more such CLEs scheduled.

The iPad's popularity results from its sleek design and impressive functionality. Before trial, you can use it to initiate and complete research, organize exhibits, compose deposition questions, manage deposition transcripts, prepare jury voir dire questions, and so much more. In court, you can communicate with other colleagues without having to say a word, record juror reactions, or do research on the fly, assuming the court will allow you to connect to the Internet during trial. The iPad is so slender that you can also, while walking about the courtroom and talking to the jury, link with courtroom presentation technology to show exhibits, do call-outs, and make annotations. The jury is able to focus on your message rather than being overwhelmed by bulky, cumbersome technology. And you are able to let your inner Abraham Lincoln shine as you perform your magic as a litigator.

By now you may be thinking, "If I have the iPad 2 , do I need to upgrade to the new iPad to take

advantage of these functions?" Nope. However, if you have the original iPad, you need to upgrade to allow applications, or apps, to clone the screen so that you can shoot it to other devices for display. If you are purchasing an iPad for the first time or upgrading, make sure you get enough storage space on the device—you may be showing videos or deposition testimony in court and will quickly max out the 16-gigabyte version. We recommend getting the 64-gigabyte model.

So what about accessories? First, you certainly need a cover, and there are scads of them—check out the reviews at iLounge. If you get a cover that can function as a stand, you won't need to purchase a separate stand. Second, if you're planning to use the iPad to make handwritten notes, you'll need a stylus of some sort. Blogger Jeff Richardson is fond of the Virtuoso ($19.95) or BoxWave Styra (now $22.95 at Amazon.com). Adonit Jot Pro ($29.99) is the favorite of Tom Mighell, author of two best-selling and must-read books, *The iPad in One Hour for Lawyers* and *iPad Apps in One Hour for Lawyers*.

If, on the other hand, you're a fast typist, as author Nelson is, you might prefer the standard issue Apple wireless keyboard that uses Bluetooth technology. The keyboard and iPad, with cover, fit without problem in her purse so she doesn't need to lug around a laptop, although in truth she prefers the laptop for really serious work. Finally, you need to get Apple's video graphics array (VGA) adapter ($29.95) to connect your iPad to a projector in the courtroom, and possibly a high-definition multimedia interface (HDMI) adapter ($29.95) to connect your iPad to a high-definition television.

The Downsides

Now for some of the not-so-great iPad attributes. No one likes to hear about security issues, but there are some with which you need to be familiar. Here are our basic concerns and some of the remedial steps you can take: First, make sure that you enable a lock code. Avoid the temptation to use a four-digit personal identification number (PIN); instead, configure a passphrase for locking the iPad. Configuring a lock code automatically enables encryption on the iPad. It's fairly weak encryption, but it is better than none at all. Next, configure the iPad to automatically wipe itself if there are 10 incorrect attempts to enter the unlock code. Even if you are slightly sauced, you ought to be able to get it right in 10 tries. Or stop at eight and try again in the morning! You will also want to configure the "Find My iPad" feature so that you can locate it if it is ever lost. This also enables you to wipe the contents of the iPad remotely.

We have long been critical of the iPad as a productivity device. Although it is a wonderful tool for consuming content, producing content has been more problematic. It is slowly getting better, but so many solutions are kludge fixes. For example, printing can be a headache. You can print directly from an iPad using a feature called AirPrint, but it only works with some newer printers. Many lawyers resist the expense and trouble of getting rid of a current printer in favor of a new AirPrint-compatible printer. Most users will print indirectly using a computer with AirPrint software support, which routes

the print request from the iPad to the computer and then to a printer via an attached USB printer. The computer has to be on to enable printing, but this seems to be the preferred option.

Another missing feature is the lack of a native folder structure as you are probably used to seeing on a Mac or Windows computer. Folder structures exist only within apps. There's no easy way to get files on and off an iPad, so folks use email to transfer documents or sync their iPad to cloud-based accounts like Dropbox. It can all be done, but it isn't elegant.

Apps for Lawyers

Despite some room for improvement, the iPad currently reigns as the premier litigation tool. So what are the lawyer's need-to-have productivity apps? Penultimate is a favorite for taking handwritten notes with a stylus. Or, if you prefer using a wireless keyboard like author Nelson, go with Evernote. But, if you are working on Microsoft Office files, Documents To Go is our favorite choice. This is the only app that allows you to see the Track Changes and Comments features of Word, and you can also work on Excel or PowerPoint files. All three apps sync easily with Dropbox. GoodReader, which makes reading and annotating documents a breeze and supports a wide range of file types, is another useful app for the busy litigator, because it allows organizing files into folders within its own structure.

We, of course, like the iPad most of all in the courtroom, where lawyers are taking to it en masse. There is no way in a column to list all the possible apps—your best source is Mighell's book of apps mentioned above—but, here is a concise list of the apps our litigating colleagues seem to favor.

Court Days Pro ($2.99). This app allows you to set up a case calendar with deadlines.

Idocument REVIEW (Free). This app allows you to review the documents in your case and mark them as relevant, privileged, or a "Hot Document." The volume of documents that you can work with is limited, however, and you have to first send the data to the vendor to convert it to a proprietary file type. We're not crazy about the idea of sending your potential evidence to someone else, but it is what it is.

The Deponent ($9.99). This app was designed by our friend and e-discovery expert (and attorney) Josh Gilliland. It allows you to prepare deposition questions in various practice areas. Some questions are suggested, but you can customize the questions to your liking.

TranscriptPad ($49.99). With this app, you can work with all of your deposition transcripts, search through the whole case, color-code certain case issues, and send out summary reports. Currently, the app reads only text files of the transcripts.

iJuror ($9.99). This is a juror selection app, which many colleagues regard favorably. It allows you to enter information about each potential juror and then to seat them in a virtual juror box once the selection and strike process is over.

TrialPad ($89.99). This is the big kahuna—hence the heftier price—but this is the app our litigating friends seem most excited about. You can load documents, photos, and videos from your Dropbox account into this app for use at hearings and at trial. It is a lot cheaper than Trial Director and its comrades, but it does many of the same things from the very slender and unobtrusive iPad. Once a document or an image is displayed, you can annotate it, perform call-outs, or redact portions of the file. This is one app that is regarded as a must-have for litigators.

ExhibitView ($69.99). This is a relative newcomer but worth mentioning. It does basically what TrialPad does, but it also has a desktop companion tool, so it has the advantage of allowing you to transfer your case file between your office computer and the iPad. It also has something called Witness Mode, which lets you give your iPad to a witness so that he or she can view and annotate an exhibit but without seeing any other documents in the case file. We haven't heard too much about this one from our litigating friends yet—TrialPad made it to the beachhead first.

BT Chat HD (Free). You'll love the price, we know, and this is a nifty little app. If you're working in court with a team, it is not always desirable to whisper to one another or pass notes. With this app and a Bluetooth connection, team members can privately chat electronically.

Are there other possible apps? Yes, tons of them. This is part of the danger. You don't want to download all sorts of unvetted apps without really knowing their security features and their capabilities. So what's a busy lawyer to do? For the moment, watch Tom Mighell—he'll be updating his written materials as he continues to do webcasts, which are greatly in demand. Also, get references from colleagues. Finally, we really like the Apple app AppAdvice ($1.99). For that paltry price, you get a pretty good review and a sense of whether the app you're considering is worth buying.

So let that inner Abe Lincoln loose in the courtroom with the elegant and inconspicuous iPad. Your advocacy will soar without being overshadowed by technology, while the technology complements

your case. If you are not yet tech-savvy, let a colleague run the equipment. But, after some practice and preparation with the tools, many lawyers are comfortable enough to manage on their own. As Lincoln himself was wont to say, "Give me six hours to chop down a tree and I will spend the first four sharpening the axe."

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Comments

1. A complete fully-searchable database of Mobile Apps for Law can be found at www.mobileappsforlaw.com, with a free RSS feed of new apps.

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Getting the Most Out of Your iPad During Litigation | Cogent Legal

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Apple's sleek tablet has found its way into countless attorneys' homes. Perhaps it began as a gift and now sits on the coffee table as an email portal or a fun way to read the newspaper. Or, maybe it has fallen into the hands of the children as a means for playing Angry Birds. While attorneys use laptops and iPhones for work-related tasks, the iPad often remains underutilized at the office. But the iPad has numerous useful applications for the courtroom that set it apart from a computer or a smartphone.

The iPad is a perfect tool for displaying case information during trial. With new apps, easy touch-screen navigation, connectivity, and portability, the iPad can act as a remote control and quick editing device for your presentation. I'll describe some apps and connectivity options for turning your iPad into a powerful litigation tool.

Transferring Files

In order to use iPad apps for displaying slides and case documents, it's essential to understand how to transfer files from your computer to the device. The iPad doesn't function like a thumb drive—you can't plug it in and drag-and-drop files. The simplest way to load files is to use an online storage site, like **Dropbox.com**. You can open an account and upload up to 1GB of files from you computer, then log in on the iPad and download them. Apple's **iCloud** is a similar online storage site that you can use to sync files to the iPad. Once you are comfortable with these methods of transferring files, you can start using presentation apps.

Slide Presentation

New apps make it possible to display and control a slide-based presentation using the iPad. Since the iPad isn't bulky and has an intuitive touchscreen, it's a perfect device for strolling around the courtroom while changing to the next slide that the jury sees projected on a screen. Whether you use PowerPoint or Keynote to assemble your presentation, there are apps that integrate the iPad with both programs.

PowerPoint is the most popular slide presentation program. Despite PowerPoint's wide use, it has some flaws to keep in mind; for example, its graphic creation is limited, and PowerPoint does not embed video well, so you often must keep track of video files in a separate folder.

If you use PowerPoint, the **SlideShark** app allows you to display a your presentations on your iPad.

The app does not support hyperlinks on slides, embedded videos, animated GIFs, audio, or fancy slide transitions, and so it limits many of PowerPoint's features. But it does display simple slides and does a fade transition between them. To use the app, you open a free account with them online and upload your PowerPoint file to their server. It is then converted into a playable format that you can access within the iPad app.

Keynote is Apple's version of PowerPoint, and it integrates seamlessly with the iPad. It's easy to add media—just drag and drop photos and videos and format them within the program. Keynote embeds videos into the presentation and accepts any file format that QuickTime supports, including high-quality MP4 videos. Keynote has a range of drawing tools and tasteful background templates.

Once your presentation is complete, there are two iPad apps you can use to play the presentation.

Keynote Remote transforms your iPad into a simple remote control device. The presentation is stored and played through your Mac laptop, which is connected to the projector. Keynote Remote shows you the slide that is currently projected, plus the next slide in line, so that you can calibrate your images and discourse. To set up Keynote Remote, first make sure both the iPad and laptop are connected to the same Wi-Fi network. On the laptop, open your presentation in Keynote and choose "Preferences > Remote." On the iPad, start the Keynote Remote app, and you will see an option to "Link" to the laptop. Then, you are free to walk around the courtroom and wirelessly control the slideshow from the iPad's touchscreen.

If you want to eliminate the laptop completely, the Keynote App allows you to create a presentation on the iPad, and then project it directly. I find it a bit difficult to create a presentation from scratch using this app, so I recommend loading a Keynote file that you made on the computer, then using the Keynote App for last-minute pre-trial edits. Either of these Keynote apps can transform the way you interact with your courtroom presentation.

Exhibit Presentation

These apps allow you to store of your exhibit documents on your iPad and display them to the jury as needed. Like Keynote Remote, these apps use a "Presenter View" that lets you see on your iPad what is currently being projected and what exhibit will follow. Over the last year, exhibit presentation iPad apps have improved their functionality, and can certainly handle a small trial.

Exhibit A ($9.99) is lowest on the price spectrum. You can load case documents of up to 3MB onto the iPad via Wi-Fi, email, FTP, or iTunes, then create folders to organize them. A preview mode allows you to see the exhibit before displaying it to the jury. I would recommend this app for a smaller trial or mediation, because it has trouble handling large files.

TrialPad ($89.99) is a more comprehensive program. It can display a range of file types, including MP4 videos. You can import an entire case folder through Dropbox.com, which speeds up the file transfer process. TrialPad allows you to highlight text and create document call-outs, so you can visually emphasize your point.

Another option is TrialTouch ($69 per month), which allows you to upload files to their online server and access them on the iPad. This replaces Dropbox and provides a secure place for case-sensitive

information. The presentation software handles the same file types as TrialPad and is easy to learn and use.

Display

The final piece of the puzzle is connecting the iPad to a courtroom projector. The simplest way is by hardwire. AV Adapters ($39.99 from Apple) are available from Apple in various formats that you can attach to any projector. Plug the cable into the projector, attach the adapter to the other end, and connect the adapter to the iPad. Any content displayed on the iPad will show up on the projector's screen. The "presentation mode" in some of the apps I discussed can sense the external connection and will only display the current slide on the projector. The disadvantage to hardwiring is that the cable physically tethers you to the laptop, limiting your strolling ability.

Connecting wirelessly is a bit more complex. The newest version of the iPad features AirPlay, which wirelessly links the iPad to an AppleTV device ($99.99). The palm-sized AppleTV box hooks up to the projector with an HDMI cable, and then uses a Wi-Fi network to connect to your iPad. By using an Apple Airport Express ($99.99) or other WiFi hotspot, you can create your own Wifi network, and connect to Apple TV and project Wirelessly. You must activate Air Play on the iPad to share your screen with the projectors.

In Conclusion

I recommend giving some of these apps and connectivity tips a try. See what works for you. Practice using the presentation apps and learn their functionality. Set up the projection display by yourself before you go to mediation or trial. Turn the equipment on and off, run through your presentation several times. Get comfortable with the technology. You just might find that the shiny tablet on your coffee table is your newest courtroom asset.

URL to article:
http://www.thejuryexpert.com/2012/09/getting-the-most-out-of-your-ipad-during-li...

TEN TIPS FOR EFFECTIVE BRIEF WRITING
(AT LEAST WITH RESPECT TO BRIEFS SUBMITTED TO JUDGE MICHAEL)*

I was once asked (OK, I once wished that I had been asked) what judges look for in written submissions. After considerable thought, and with some trepidation, I have tried to set some general principles down in writing. What follows is a list of ten ideas/suggestions for your consideration. I do not purport to speak for any of my colleagues; this list, for better or worse, is my own.

1. Remember, your goal is to persuade, not to argue. We all have had people come up to us at cocktail parties or family reunions and say, "You know, I would make a good lawyer because I just love to argue." Those statements could not be further from the truth. Guests on the Jerry Springer show argue. Lawyers persuade. The idea behind an effective brief is to have the audience (the judge and/or the law clerk) read the brief and say to themselves, "why are these parties fighting over such an obvious issue?"

2. Know thy audience. Most bankruptcy judges write and publish opinions. The first thing anyone should do when they begin writing a brief is find out whether the judge that will decide their case has already written on the issue. The bankruptcy judges in the Northern District make it easy for you; we both have indexes of our published opinions on the Court's website. We publish those opinions in order to give you some idea of what we have done and why. We try to be consistent. It is extremely frustrating (and remember, a frustrated judge is not easily persuaded) to have counsel in either written or oral argument raise an issue and be completely ignorant of the fact that we decided that issue in a published opinion last week, last month or last year. It is also embarrassing, both for you and for us. In addition, if your judge also serves in an appellate capacity (i.e. as a member of the Bankruptcy Appellate Panel), you might want to take a look at those opinions as well.

3. Know thy circuit. We are bound by published decisions of the United States Court of Appeals for the Tenth Circuit. If they have disposed of an issue, we must follow their lead. I know this sounds obvious; however, on more than one occasion, I have had an attorney ask me to follow a decision from another circuit which is directly contrary to controlling Tenth Circuit authority. I can't do that, even if I wanted to.

4. Know the facts of the cases you cite. At the writing of this little ditty, there are almost 300 volumes of West's Bankruptcy Reporter. Suffice it to say that some judge, somewhere, sometime has written and published an opinion which contains the magic words which support your position. It is extremely tempting to insert that quotation (I call them "sound bites") into your brief and say, "see, judge, other courts agree with me so I must be right." This is a dangerous practice. Courts decide real disputes. Real disputes are fact driven. For me, the facts of a case are at least as important as the legal analysis. Be wary of the case which is factually dissimilar to yours, but has a great sound bite. Be sure (either in your brief or at oral argument) to explain why the factually

* The following was written by The Honorable Terrence L. Michael, Chief United States Bankruptcy Judge for the Northern District of Oklahoma, and is available at http://www.oknb.uscourts.gov/sites/default/files/JMFiles/briefwritingtips.pdf

dissimilar case is applicable to your situation. Also, be cognizant of the difference between the holding of a case and the dicta contained therein. Most judges (this one included) find little value in dicta unless we already agree with it.

5. Shorter is better. Thurgood Marshall once said that in all his years on the Supreme Court, every case came down to a single issue. If that is true, why do most briefs contain arguments covering virtually every conceivable issue (good, bad or indifferent) which could arise in the case. Weak arguments detract from the entire presentation. If you feel compelled in a particular case to include everything including the kitchen sink, maybe you ought to take another look at settling the case.

6. Quality is Job One. Check your cites. Make sure they are accurate and that each case you are relying on is still good law. We do. There is nothing more frustrating than being unable to find a case because the citation contained in the brief is wrong. There is nothing less persuasive than finding out that a case you have cited to us has been overruled or misquoted. These flaws weaken your entire presentation.

7. Present the facts of your case accurately. In most (if not all) bankruptcy cases, the judge is the finder of fact. If you are submitting a pre-trial brief, don't allege facts that you cannot prove. As a corollary, don't forget at trial to prove up the facts you promised to prove up in your brief. If you are submitting a post-trial brief, make sure the facts are in the record. (I know this sounds too basic to merit discussion. This advice is based upon experience. There have been several occasions where an attorney has forgotten to prove up an element of his or her claim. If you don't believe me, just take a look at the list of published opinions on the web site.)

8. Tell me exactly what you want. It seems simple, but it isn't. Every brief (and motion, for that matter) should conclude with a statement telling the judge exactly what you want done in the particular case. We need to know.

9. Leave the venom at home. I have yet to meet a judge who enjoys reading a brief filled with hostility toward and/or personal attacks upon the other side. Whether you like (or get along well with) your opposition has little to do with the merits of a particular case. The most effective attack you can make is to persuade (there's that word again) me that the other side is wrong. Remember, if you win, they lose. Isn't that enough? Words like these:

ridiculous
scurrilous
ludicrous
preposterous
blatant
self-serving (come on, all evidence and argument is self-serving)
nonsensical

do not help you. Don't use them.

10. Seek reconsideration sparingly. I have been surprised by the number of motions to reconsider which counsel file. For a while, they seemed to be almost automatic after every adverse decision, although they have slowed somewhat. If we spend 50 or more hours researching and writing an opinion (which is not uncommon), why would one expect us to change our mind unless there is an obvious and egregious error. Most motions to reconsider are a waste of everyone's time. If you don't like the decision, appeal. It is your right. We don't take offense if you exercise it.

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Ten Fast Fixes for Better Briefs*

The foremost "fixes" we recommend to strengthen your writing include:

1. **Write in short sentences.** Short, declarative sentences are easier to understand and are much less taxing on the reader than long sentences with lots of subordinate clauses. If a sentence runs on for four or five lines, break it up into shorter sentences.

2. **Eliminate unnecessary words.** For example, change "in order to" to "to." Unnecessary words are distracting and impede the flow of your argument.

3. **Eliminate unnecessary facts.** Include a short, simple statement of every fact that supports your argument, but avoid needless demands on the reader's memory by discussing unnecessary facts.

4. **Begin each paragraph with a topic sentence.** The topic sentence introduces or summarizes the idea you are developing in the body of the paragraph. If you read a lot of U.S. Supreme Court opinions, you'll see that good legal writers always use topic sentences.

5. **Avoid long, unnecessary intros** to pleadings (e.g., "The Counter-Defendant in Quantum Meruit, by and through its attorneys, XYZ Law Firm, hereby blah, blah, blah [repeat title of pleading, thereby making the Court read, again, something it just read]..."). Get to the point.

6. **Use affirmative phrases.** Your plea is more effective if you tell your reader what something is, rather than what it is not. "Plaintiff's pleading was not on time" reads less well (and therefore is less powerful) than "Plaintiff's pleading was late." Scan your pleading for every use of the word "not" and ask yourself if an affirmative phrase might be more powerful and useful.

7. **Eliminate, or at least diminish, the passive voice.** Scan for every use of the words "is", "was", or "be." Try more active words. Say "the rule applies here" rather than "the rule is applicable here"; saying "a temporary injunction was issued by the court" is weaker than saying "the court issued a temporary injunction."

8. **Shorten it up.** Brevity is the soul of wit, but also power.

9. **Read your pleading when you're done.** Try reading it aloud. This simple step will save you great embarrassment, as it reveals errors, omissions, and infelicitous phrasing.

10. We repeat this one because it's the most important: **Shorter is better.** State each idea as effectively as you can, and develop it as needed, but avoid repeating it over and over again. (When you think about it, several tips we've offered here are really just specific applications of this overarching principle.) Note that often the preferred statement is shorter than the clumsier alternative.

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* Contributed by Mark D. Attorri, Esq., Nelson Kinder + Mosseau PC

Rule 30(e): What You Don't Know Could Hurt You

Richard G. Stuhan and Sean P. Costello

Beware the sham errata sheet—or any other errata sheet!

YOU HAVE JUST TAKEN the perfect deposition in an important civil case. The witness answered "yes" and "no" to all the critical questions, and did so without elaboration or qualification. Every admission you needed to win your case on summary judgment, you got. Opposing counsel barely objected. Indeed, about the only thing she said during the entire deposition was that her client would like to review and sign the deposition after it is transcribed. The partners are impressed, and the client is thrilled with your play-by-play account of what transpired. You're a hero.

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The transcript arrives a couple of weeks after the deposition. For once, the transcript actually bears out your rosy description of the deposition. You settle in for a few days with copious amounts of coffee and set about drafting the motion for summary judgment. You finish the draft. The partners and client are pleased. Everyone thinks you have a slam dunk because of your killer deposition.

A few weeks later, you get the witness's deposition errata sheet in the mail. You expect the usual—corrected typos, spelling corrections, minor date changes, that kind of thing. But that is not at all what confronts you when you open the envelope. What you see is a complete rewrite of the witness's testimony. Virtually every critical "yes" is now a "no" and vice versa. The succinct, unqualified answers are accompanied by lengthy explanations that resemble "lawyered" responses to interrogatories. Your slam dunk summary judgment motion is now an airball. You consider a motion to strike the errata sheet and even for sanctions, or at least a strongly worded letter to opposing counsel.

KNOW YOUR JURISDICTION (OR YOUR JUDGE) • Before you spend the client's money writing that letter or preparing that motion, you had better get a handle on the law of your specific jurisdiction when it comes to the changes that can be made to deposition testimony via errata sheets. Depending on your jurisdiction, your opponent's conduct may be perfectly acceptable, and if you file that motion, you—not your opponent—may be the one facing sanctions or suffering professional embarrassment.

Since most of us would not think of using an errata sheet to rewrite or contradict sworn deposition testimony, this might come as a surprise—even to those lawyers who have been practicing for some time. Many readers are probably thinking to themselves that a rule allowing a witness to contradict deposition testimony via an errata sheet is impossible to reconcile with the well-settled prohibition against contradicting deposition testimony with a later-served affidavit in opposition to a summary judgment motion. (The Second Circuit is credited with originating the "sham affidavit" rule in *Perma Research & Development Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). Since then, virtually every circuit has adopted some version of the "sham affidavit" rule.) The bottom line is that, although some jurisdictions (or judges) do not permit such conduct, many—probably the majority—allow witnesses to change the substance of their deposition testimony, even contradict that testimony, through the use of an errata sheet. *See Pepsi-Cola Bottling Company of Pittsburgh, Inc. v. Pepsico, Inc.*, No. CIV.A.01-2009-KHV, 2002 WL 511506, *2 (D. Kan. April 3, 2002) ("The majority approach is that Rule 30(e) does not limit the types of changes a deponent may make to his or her deposition transcript").

A NOT-SO-HYPOTHETICAL HORRIBLE • Could it happen to you? Sure, and maybe it already has. It happened to one of us recently. One of the authors was on the receiving end of an errata sheet very much like the one in our hypothetical. It happened in the course of a products liability case in a New Hampshire state court. The plaintiffs brought a wrongful death action against a cigarette manufacturer, alleging that smoking cigarettes manufactured by the defendant gave the decedent cancer and caused his death. Clearly, the decedent's awareness of the alleged dangers of smoking was an important issue in the case. Although the decedent's mother testified that there was no doubt in her mind that her son had long been aware of the health risks of smoking, her errata sheet sought to negate those admissions:

Q. "Is there any doubt in your mind that [the decedent] was aware that smoking was bad for his health?"

A. "I think yes, he knew." (Amended answer: "No.")

Q. "He knew that smoking was bad for him?"

A. "Yes, I think so."

Q. "And that's true in the 1990s for sure, right?"

A. "Right." (Amended answer: "No.")

Q. "And that's true for the 1980s as well, isn't it?"

A. "Yes." (Amended answer: "No.")

The errata sheets also reflect an effort to blunt the impact of the mother's testimony that her husband (the decedent's father) discussed the health risks of smoking with the decedent. That testimony was altered as follows:

Q. "You don't know whether health concerns played any role in your husband's advice to his children about smoking?"

A. "Oh, yes."

Q. "And one of the reasons he gave his children that advice was because he was concerned about their health, isn't that right?"

A. "Yes." (Amended answer: "Yes, in recent years though.")

Q. "And he communicated that to his children, didn't he?"

A. "Yes." (Amended answer: "Yes, to some maybe.")

Q. "Including Harry, right?"

A. "Yes." (Amended answer: "I don't know.")

Q. "And would it be fair to say that your husband discussed cigarette smoking with [the decedent] as far back as the 1960's after he was married to [the plaintiff] and after [your husband] had quit?"

A. "Yes, I think so." (Amended answer: "No.")

Q. "Would it be fair to say that your husband also discussed smoking with [the decedent] during the 1970s and 1980s as well?

A. "Yes." (Amended answer: "No.")

Although the mother made it clear at her deposition that the health risks of smoking played an important role in her and her husband's efforts to encourage their children not to smoke, that testimony, too, would be invalidated by the proposed errata sheets:

Q. "And you had a rule against smoking by the kids, is that right?"

A. "Right." (Amended answer: "Right, because of fire risk.")

Q. "And do you recall the reasons why [your husband] stopped using cigars altogether?"

A. "For the same reason that he thought that he should quit the cigarettes."

Q. "And that was that they weren't good for his health, is that right?"

A. "Right." (Amended answer: "No, it was the smell and the mess.")

Q. "And as I understand it, you and your husband had a rule against the children smoking when they were growing up, is that right?"

A. "Yes." (Amended answer: "Yes, due to ashes.")

Plaintiff's counsel submitted similar "corrections" to the deposition testimony of the plaintiff, decedent's widow. For example, recognizing that the plaintiff's admission that cigarette advertising played no role in her husband's smoking decisions would be fatal to many of plaintiff's theories, counsel made the following alterations in the errata sheets:

Q. "Did [the decedent] ever tell you that advertising had anything to do with his decision to take that first puff?"

A. "No." (Amended answer: "No, but we both saw TV ads that made smoking attractive to us.")

Q. "My question is do you remember seeing any advertising which communicated to you that a particular cigarette was safe or safer or healthy?"

A. "I don't recall." (Amended answer: "I don't recall specifics off the top of my head but that was the message we got.)

The quoted testimony above was taken in *King v. Philip Morris, Inc.*, No. 99-C-856 (Hillsborough, NH Super. Ct.). Deposition of Jean King, July 12, 2001, at pages 29, 39-41, 44, 70, and 162-63. Deposition of Donna King, June 7, 2001, at pages 51, 89.

There are many more examples, but you get the point: This stuff happens in real life, and you need to be prepared for it. (In the above case, we filed a motion to strike the changes, but Judge Larry M. Smukler denied the motion. More on that below.)

Know Thy Jurisdiction

Lesson number one, therefore, is to know your jurisdiction. Indeed, it may be a good idea to learn the rules and how they have been interpreted before you take that first deposition, because knowing the rules ahead of time may help you decide how you want to approach the deposition and may even help you formulate your questions. There will be more on the differences among jurisdictions and the conflicting approaches that have emerged later in this article. First, however, we need to take a look at the underlying rules.

FEDERAL RULE OF CIVIL PROCEDURE 30(E) • The text of the federal rule is straightforward enough:

"If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording 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 majority of states have adopted rules identical to, or virtually identical to, Rule 30(e). A handful have not. Since a general survey of the state deposition rules is beyond the scope of this article, we will settle for an example. One state that has adopted a rule different than Federal Rule 30(e) is New Hampshire, the site of the case discussed above. N.H. Super. Ct. Rule 41 provides: "No deposition, as transcribed, shall be changed or altered, but any alleged errors may be set forth in a separate document attached to the original and copies." On its face, New Hampshire's rule appears more restrictive than the federal rule. It prohibits changes and allows only an identification of errors in transcription.

Since Rule 30(e) governs in all federal courts and in the majority of state courts, Rule 30(e) will be the focus of this article. Nonetheless, you should not assume that Rule 30(e) will control in the jurisdiction of your deposition, and you should learn the language of the rule before hopping on a flight or jumping in your car if you are taking the deposition in a jurisdiction other than the one in which you normally practice (whose rules you presumably already know).

Rule 30(e) makes clear that the ability to review and make changes to a deposition transcript is not automatic. If a witness wants to make changes, he must request the opportunity to do so, and he must make the request "before completion of the deposition." Moreover, he must make any changes within 30 days after being notified that the transcript is available. Aside from minor disputes over when a witness was "notified" that the transcript is available, this part of the rule does not generally lead to controversy.

Changes In Substance

When it comes to Federal Rule 30(e) (and state rules that have adopted its language), the

devil is in the part of the rule that speaks of "changes in form or substance." The "form" part is relatively easy. Few lawyers would complain if a witness used an errata sheet to correct misspellings (e.g., "ball" instead of "bawl"), typographical errors ("and" for "an"), or transcription errors (the witness said "racer," but the reporter heard "razor"). It is the word "substance" that has created a divergence of opinion when it comes to what changes may be effected by an errata sheet, and which has led to a variety of approaches to dealing with those changes. Does the rule permit a witness to change what she actually said to what she meant to say? (Suppose, for example, that the witness said "1971" when she really meant "1961.") More to the point, does the rule permit a witness to change what she said to what she (or her lawyer) wished she had said? If the rule allows that much, does it go so far as to allow a witness to contradict her prior testimony? And if the answer to either question is "yes," what are the options for the other side? The rest of this article explores these practical questions and their ramifications.

TEXT VERSUS POLICY: COMPETING INTERPRETATIONS OF THE SAME FIVE WORDS • Federal courts are all looking at the same rule, but they see different things. Federal courts have come to a variety of conclusions about what changes may be made to deposition transcripts and, specifically, what is meant by "changes in form or substance." For some courts, the word "substance" means that any changes are permitted. For other courts, the word "substance" has a more limited meaning.

"A Deposition Is Not A Take Home Examination": The Policy-Based Approach

In *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992), Judge Little ruled that an errata sheet cannot be used to "alter what was said under oath." In his view, "[t]he purpose of Rule 30(e) is obvious: Should the reporter make a substantive error, i.e., he reported 'yes' but I said 'no,' or a formal error, i.e., he reported the name to be 'Lawrence Smith' but the proper name is 'Laurence Smith,' then corrections by the deponent would be in order." *Id.* If it were otherwise, the court reasoned, "one could merely answer the questions with no thought at all then return home and plan artful responses. ... A deposition is not a take home examination." *Id.*

Although *Greenway* is really based on a policy judgment—that Rule 30(e) should not be construed to give witnesses carte blanche to rewrite their testimony—the court makes at least a token effort to reconcile its decision with the text of Rule 30(e). Judge Little does so by holding that a change in form is the correction of a typographical error or misspelling, while a change in substance is the correction of a transcription error.

If your jurisdiction follows *Greenway*, a witness can use errata sheets to correct testimony when the transcript does not accurately reflect what the witness said (or claims to have said). Thus, if the witness said "the light was red" but the reporter recorded "the light was green," *Greenway* would permit a correction. (*Greenway* does not address how to handle a situation in which the witness and the reporter cannot agree on what was actually said after the witness challenges the original transcription, however.) Nevertheless, in a *Greenway* jurisdiction, a witness cannot use an errata sheet to change what she said to what she meant to say or what she wished she had said. Thus, if the witness said "the light was green" but meant to say or wished she had said "the light was red," she is stuck with the former answer. The issue is black and white (or green and red) under *Greenway*.

Errata Sheets As Contradictory Affidavits

Other courts have reached the same result as *Greenway* using slightly different reasoning. They conclude that an errata sheet that purports to change the substance of deposition testimony is no different from an affidavit that contradicts deposition testimony and should be treated the same way. The Tenth Circuit in *Burns v. Bd. of County Comm'rs of Jackson County*, 330 F.3d 1275 (10th Cir. 2003), confronted a situation like our hypothetical. A witness had changed "no" answers to "yes" answers. The district court had disregarded the changes reflected in the errata and granted summary judgment to the other side based in part on the deposition answers. *Id.* at 1281. In affirming, the Tenth Circuit took the same approach it had taken in "sham affidavit" cases. The court applied a three-part test to determine whether the district court had properly disregarded the errata sheet. The court asked:

- Whether the witness was cross-examined at deposition;
- Whether the changes were based on newly discovered evidence; and
- Whether the earlier deposition testimony reflected confusion which the errata sought to explain.

The court of appeals found that three factors supported the district court's decision. *See also Wigg v. Sioux Falls School District*, 274 F. Supp. 2d 1084, 1091 (D. S.D. 2003) ("If a party were allowed to create material factual disputes by altering one's deposition testimony via an errata sheet, summary judgment would rarely, if ever, be granted").

The Textual Approach To Rule 30(e): A Witness Can Make Any Substantive Changes She Wants, As Long As She Follows Rule 30(e)'s Technical Procedures

Whatever the merits of *Greenway*'s policy judgment, it is difficult to reconcile that decision with the literal language of Rule 30(e). Calling the correction of a transcription error a "change in substance" is, frankly, a stretch. Most lawyers would lump transcription errors in the same category as misspellings and typographical errors. It is, therefore, not surprising that *Greenway* has not gained universal acceptance.

In contrast to the policy-based approach of *Greenway* is the majority approach, which holds that "substance" means what it says and that a witness is free to make whatever changes of "substance" she wishes to make to her transcript. Indeed, under this approach, an errata sheet may be used not only to change testimony but to contradict testimony.

"No Limitations On The Type Of Changes That May Be Made"

In every debate, each side has its own favorite mantra, and debates over rules of civil procedure are no exception. For those who think there are limits to what changes may be made by way of errata sheets, there is *Greenway*'s "[a] deposition is not a take home examination." Those staking out the opposite position like to quote the Northern District of Illinois: "The language of the Rule places no limitations on the type of changes that may be made...even if the changes contradict the original answers or even if the deponent's reasons for making the changes are unconvincing." *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981); *see also Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005) ("broad interpretation of Rule 30(e)...is consistent with the plain language of the Rule, which expressly contemplates 'changes in form or substance' accompanied by a signed statement reciting the reasons for the changes"); *United States ex rel. Burch v. Piqua Engineering, Inc.*, 152 F.R.D. 565 (S.D. Ohio 1993) ("under the Rule, changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing, as long as the procedural re-

quirements set forth in the Rule are also followed") *id.* at 566-67 (collecting cases).

"Substance" Must Mean Something More Than "Form" Or "Mistake"

Courts adopting this approach do not look past the words of the rule itself. It means what it says, for good or ill. These courts reason that the word "substance" was put there for a reason and must (obviously) mean something other than "form" or "mistake." A witness, therefore, can make any changes she likes, whatever the reason, whether it means changing a "yes" to a "no," adding an explanation to an answer, or completely changing an answer. Indeed, courts taking the literalist approach to Rule 30(e) embrace the interpretation of the Rule that *Greenway* found unthinkable—that a witness could answer questions with no thought at all and then return home and plan artful responses. Stated otherwise, under *Lugtig* and its progeny, a deposition *is* a take home examination.

The Technical Requirements, And Living With The Results

Consistent with their "plain language" approach, courts in this camp demand that a witness strictly adhere to Rule 30(e)'s technical requirements—providing changes within 30 days and providing reasons for the changes—to avail herself of the rule's allowance for substantive changes. *See, e.g., Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651 (S.D. W. Va. 2001) ("The witness is...plainly bound by the rule to state specific reasons for each change. ... This court, like most courts, will insist on strict adherence to the technical requirements of Rule 30(e)").

Courts adopting this view reason that it is not for them to evaluate the credibility of the change or the reasons for making it. As Judge Turk of the Western District of Virginia explained, "[i]t is not necessary for the court to examine the sufficiency, reasonableness, or legitimacy of the reasons." *Foutz v. Town of Vinton, Virginia*, 211 F.R.D. 293, 295 (W.D. Va. 2002); *see also Colin v. Thompson*, 16 F.R.D. 194, 195 (W.D. Mo. 1954) (explaining that whether the witness's "reasons are good or not will not impair his right to make the changes"). Instead, the witness will have some explaining to do to the jury, which is the ultimate arbiter of the credibility of the witness's changes and the reasons for them. In other words, the witness is completely free to make whatever changes she wants, but she must live with the consequences. As the court explained in *Lugtig*:

"The witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial may be impeached by his former answers, and the cross-examiner and the jury are likely to be keenly interested in the reasons he changed his testimony. There is no apparent reason why the witness who changes his mind between the giving of the deposition and its transcription should stand in any better case."

89 F.R.D. at 642.

Amended Testimony Does Not Replace Original

The courts adopting the "plain meaning" approach clearly have some heartburn about their approach, and they have tried a variety of methods to try to ease their discomfort. First, virtually every court taking this approach holds that the amended testimony does not replace the original testimony. Thus, the original testimony remains part of the record and the witness is subject to examination and impeachment on the prior testimony and the reasons for the changes at trial. *See, e.g., Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997) ("when a party amends his testimony under Rule 30(e), '[t]he original answer to the deposition questions will remain part of the record and can be read at the trial'") (citation omitted); *cf. Thorn v. Sundstrand*

Aerospace Corp., 207 F.3d 383, 389 (7th Cir. 2000) (not adopting this approach, but observing that "the rule requires that the original transcript be retained (this is implicit in the provision of the rule that any changes made by the deponent are to be appended to the transcript)"). The insistence on preserving the integrity of the original transcript is not surprising. Indeed, it is essential to keeping this construction of Rule 30(e) moored to its underlying rationale of allowing the jury to test the credibility of the changes. As one court explained, "[i]f the original answers as well as the changes are made available to the jury when and if the deposition testimony is used at trial, the jurors should be able to discern the artful nature of the changes." *Elwell v. Conair, Inc.*, 145 F. Supp. 2d 79, 87 (D. Me. 2001); *cf. Thorn*, 207 F.3d at 389. Thus, the jury gets to sort out the conflicting responses.

Reopening Of The Deposition

Second, courts adopting the literalist approach hold that, depending on the severity of the changes, the deposition may be reopened so that the opposing party may question the witness about the changes and the reasons for making them. For example, in *Foutz v. Town of Vinton, Virginia*, 211 F.R.D. 293 (W.D. Va. 2002), the court ruled that, because "the changes [the deponent] propose[d] [we]re so substantive, the deposition must be reopened to give the defendants the opportunity to impeach Foutz with his contradictory answers." *Id.* at 295; *see also Reilly*, 230 F.R.D. at 491 ("in light of the number and significance of the Plaintiff's changes, the Court finds that reopening the deposition is an appropriate remedy"); *Holland*, 198 F.R.D. at 653 ("by making substantive changes, a deponent exposes himself to the potential reopening of his deposition"); *Innovative Marketing & Technology v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997). Some courts, however, impose a stricter standard on reopening a deposition; they will allow it only if the changes rendered the deposition "incomplete" or "useless." *See, e.g., Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1407 (N.D. Ill. 1993); *Lugtig*, 89 F.R.D. at 642.

One paradox of allowing the reopening of a deposition in which the deponent followed Rule 30(e)'s technical requirements is that it seems inconsistent with the plain meaning analysis that allowed the substantive change to begin with. Rule 30(e) does not, on its face, provide for the reopening of a deposition. Thus, it is difficult to view an order reopening a deposition as anything other than "judicial antacid"—i.e., an attempt by judges to quell that churning in their stomachs brought on by allowing a witness to rewrite her testimony with errata sheets.

Real World Problems With The "Plain Meaning" Approach

There are, moreover, serious practical problems with the literalist approach to Rule 30(e). Although some trial tactics treatises (such as Steven Lubet's *Modern Trial Advocacy: Analysis And Practice* (3d ed. 2004)) tout the advantages of "multiple impeachment"—and there may be some merit to this position—the fact that a witness who does an about-face in an errata sheet is subject to cross-examination and impeachment at trial is not a wholly satisfactory response to those who have questioned the literalist approach to Rule 30(e). For one thing, it ignores the effect such an approach has on the cost of litigation. If she is permitted to change, even contradict, her deposition testimony by means of an errata sheet, the witness—particularly a party-deponent—essentially gets a license to manufacture issues of fact, which could effectively preclude a motion for summary judgment. To say that such a party faces consequences down the road at trial is of little comfort to our hypothetical lawyer, who was busy preparing a slam dunk summary judgment mo-

tion before opening his mail. This cost should not be underestimated. Today, it is enormously expensive to take most cases to trial, and most clients are unwilling to face the risk and expense of trial if there is a chance of settling the case. The "plain language" approach, therefore, effectively increases plaintiffs' leverage in nuisance suits and "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues." *Perma Research v. Singer Co.*, supra; *see also* A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling And Errata Sheets*, 12 Geo. J. Legal Ethics 1 (1998).

Timing

As noted above, the impeach-him-at-trial rationale for allowing wholesale changes to deposition testimony through errata sheets is difficult to reconcile with the prohibition on "sham affidavits." Perhaps one way for courts adopting this approach to reconcile the two rules would be to treat errata sheets submitted after a summary judgment motion has been filed differently from errata sheets submitted before the filing of a summary judgment motion. *See, e.g., Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994) ("It is the court's belief that a plaintiff is not permitted to virtually rewrite portions of a deposition, *particularly after the defendant has filed a summary judgment motion*, simply by invoking the benefits of Rule 30(e). ...") (emphasis added). This is not, however, a happy solution. As a practical matter, if a well-crafted case management plan is in place, the errata sheet will likely be due before summary judgment motions are due, because discovery usually ends several weeks before the dispositive motion deadline. It is, moreover, difficult to understand why the timing of a summary judgment motion should dictate how a substance-changing errata sheet is handled. The "sham affidavit" doctrine, after all, does not depend on whether the affidavit was submitted after the motion for summary judgment was filed. It just so happens that affidavits generally are not filed—because they are not necessary—until the time for responding to a motion for summary judgment has arrived. The point should be that the witness has attempted to manufacture an issue of fact, not when he has attempted to do so. Indeed, making the rule dependent on whether a motion for summary judgment has been filed would quickly and easily be manipulated by deponents who would simply make sure to file their errata sheets in advance of summary judgment. And the ultimate effect would be to chill the filing of summary judgment motions altogether.

Impeachment At Trial

There is also the matter of the mechanics of impeachment at trial. Courts approving the use of errata sheets to effect substantive changes in deposition testimony assume that an errata sheet that contradicts deposition testimony would provide for even more effective impeachment than would be possible with a deposition transcript alone. This assumption is unwarranted. Experienced trial lawyers are well aware that impeaching a witness with prior inconsistent statements is difficult under the best of circumstances. The particular kind of impeachment that the literalist courts envision would be particularly unwieldy. If impeachment with prior inconsistent statements has any chance of success, the contradiction between the witness's trial testimony and her earlier deposition testimony must be crisp, clear, and clean. Throwing errata sheets into the mix would make that objective nearly unattainable. And jurors are not so easily impressed with prior inconsistent statements. They either do not see the inconsistency or forgive it—they assume that the witness had an honest failure of recollection, not that she was lying when, for example, she testifies at trial that she smoked two packs per

day after testifying during her deposition that she smoked a pack a day.

"We All Make Mistakes, Counselor"

Suppose at trial the lawyer asks the witness whether the light was green or red. The witness testifies that it was "red." Suppose further that the witness earlier testified on deposition that the light was "green," but then changed her answer to "red" in her errata sheet. If you go through the impeachment litany and finally get to "and you testified at deposition two years ago that the light was 'green,'" the witness may very well say, "No, I said it was 'red' when I sent you that piece of paper, just like today." With that response, whatever chance you had of challenging the witness's testimony by showing a prior inconsistent statement is effectively down the drain. Sure, you can pursue it and point out that the witness is talking about the errata sheet, and not the deposition itself. But the witness will likely continue to spar with you; she might say that she misspoke at the deposition or even that the court reporter got it wrong. What do you do then—suspend your cross-examination so that you can track down the reporter and get her to check her notes? No matter how the examination plays out, the whole thing will get quite muddled and will take a lot of time. You won't score any points with the jurors through this kind of impeachment and may even get penalized for quibbling with the witness.

What Good Does Reopening A Deposition Do?

Reopening the deposition also presents problems. First and foremost, there is the fundamental issue of whether a further deposition to question a witness about the changes to her testimony would serve any real purpose. What are you supposed to ask the witness? Why did she change her answers? Chances are that the witness—particularly if she is represented by counsel—will say that she changed her answer because she realized that the original answer was inaccurate. How does that help you? Moreover, if the witness changed her answers after talking with her lawyer or while meeting with her lawyer, you are likely to be met with an objection from opposing counsel that you are seeking information that is subject to attorney-client privilege. Maybe you will decide that you want to litigate whether the privilege should apply, but that is going to cost you time and your client money, and it might not get you anywhere in the end. Thus, a reopened deposition is unlikely to produce anything of value.

If you are in a court that follows the literalist view of what errata sheets can be used for, is there anything you can do to help yourself? Maybe, and here's why it pays to know what your jurisdiction's rule is before taking that first deposition. Knowing that this is the rule, you may want to videotape the deposition. Although many of us generally videotape depositions these days anyway, knowing that your court will allow a witness to make substantive changes to her deposition might prompt you to videotape (and to justify the cost to the client) where you might not otherwise do so. The witness who knows his words were not only written down but recorded on a video for a judge and jury to see may be less inclined to rewrite her testimony. It will certainly deter her (or her lawyer) from unfairly attributing substantive changes to "transcription errors."

The Text-Meets-Policy-Approach: Substantive Changes Are Permitted As Long As They Do Not Contradict Deposition Testimony

Between the two poles, there is a middle ground that acknowledges that "substance" means something beyond transcription errors, but recognizes the pitfalls of a purely text-based approach. The Seventh Circuit is probably the most notable court to have made its home in the

middle. Although it is often cited in support of the argument that an errata sheet may not be used to change testimony, Judge Posner's decision in *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000), actually reflects a more subtle approach to the issue. Judge Posner set the stage for his resolution of the issue with this description of what occurred:

"When [the deponent] was asked at his deposition what criteria his superiors had told him to employ in making selections for the [reduction in force], he answered that he was to decide 'which people did we feel have the longest-term potential for those whose product lines we were eliminating.' Later—after [the plaintiff] had pointed to the quoted passage as being evidence of age discrimination (because of the reference to longest-term potential,' which [plaintiff] treats as a synonym for 'youngest')—[the deponent] submitted an errata sheet in which he sought to change the quoted words to 'which people were associated with the products that had the longest-term potential versus those whose product lines we were eliminating.'"

207 F.3d at 388. The deponent said that he wanted to change his answer because the answer originally given at deposition was "garbled." It was not an error in transcription, however, because, as Judge Posner explained, the court reporter submitted an affidavit stating that the testimony had been accurately transcribed. *Id.*

Changing Deposition To What The Deponent Meant

Judge Posner concluded that, "[w]hat [the deponent] tried to do, whether or not honestly, was to change his deposition from what he said to what he meant." *Id.* at 389. Although this struck Judge Posner as a "questionable basis for altering a deposition," he nonetheless concluded that "it is permitted by Fed. R. Civ. P. 30(e)." *Id.* But Judge Posner drew the line at changes that actually contradict deposition testimony: "We also believe, by analogy to the cases which hold that a subsequent affidavit may not be used to contradict the witness's deposition..., that a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a 'not.'" *Id.*

Other courts have taken a similar approach. In *DeLoach v. Philip Morris Companies, Inc.*, 206 F.R.D. 568 (M.D.N.C. 2002), for instance, the court went through the litany of cases representing both sides of the issue but ultimately did not choose a side. Instead, it concluded that the changes reflected in the errata sheets did not contradict the prior deposition testimony, but instead "explained" or "clarified" deposition responses. The use of errata sheets, the court held, was permissible in that circumstance. In so ruling, the court noted that deponents had followed Rule 30(e)'s procedures and that "a motion for summary judgment is not yet on the horizon." *Id.* at 573. The court emphasized the latter point because the defendants argued that the errata sheets should be treated like an affidavit that contradicts the affiant's prior testimony. *See id.* at 571. The court rejected defendant's argument not only because the errata sheets did not contradict the prior testimony, also but also because no summary judgment motion had been filed or threatened. *Id; cf. Reilly*, 230 F.R.D. at 490-91(rejecting sham affidavit analogy because no summary judgment motion was pending at the time of the defendant's motion to strike errata sheet, but granting defendant leave "at the summary judgment stage [to] re-urge their motion strike based on the line of cases applying the sham affidavit analysis").

Has The Summary Judgment Motion Been Filed?

Deloach, then, suggests that the extent to which an errata sheet may substantively change

prior deposition testimony depends not only on whether the proposed change "explains" or "contradicts" testimony but also on whether a summary judgment motion had been filed yet. Like all compromises, the middle-ground approach to Rule 30(e) is appealing. It is more faithful to the text than the policy-based approach and avoids the outrageous results that the literalist approach countenances.

The Line Between Clarification And Contradiction

But the superficial appeal of Judge Posner's approach masks a serious underlying problem. The problem lies not so much in the articulation of the rule as in its execution. Although it may be easy to distinguish between a change that seeks to "clarify" and one that seeks to "contradict" prior testimony in some cases, it will not be so easy to draw that distinction in others. Indeed, the distinction may prove quite elusive. Is a change from an unadorned "yes" to a "yes, but..." a clarification or a contradiction? To go back to our real world New Hampshire example, was changing "right" to "right, because of fire risk" a clarification or a contradiction? It is hard to say. The answer may depend on the context and purpose for which the testimony is offered. What is clear is that getting to the answer will require litigating the issue each time, as neither side in such a debate is likely to agree on the characterization of the change as a "contradiction" or "clarification." Thus, Judge Posner's approach may raise more questions than it answers about what kinds of changes are permitted by Federal Rule 30(e) and its state law analogs.

SHOULD RULE 30(e) BE AMENDED? • The current situation needs attention. A single set of rules governs civil procedure in the federal courts. The rules should be applied uniformly across jurisdictions. Rule 30(e) should mean the same thing in the Eastern District of Louisiana that it means in the Middle District of North Carolina or in the district courts of the Seventh Circuit. If the rules are applied in different ways in different jurisdictions, that is not much different from having different rules in different jurisdictions.

So what can be done about it? A lesson can be found in the amendments to Rule 26's initial disclosure requirements in 2000, when Rule 26 was amended "to establish a nationally uniform practice." The problem at that time was that Rule 26 had an "opt out" provision that expressly permitted district courts to establish different requirements. As a result, practitioners had to consult the local rules to determine what their obligations were under Federal Rule 26. The situation with Rule 30(e) is not much different. Courts have, as a practical matter, opted out of Rule 30(e)'s textual requirements, or, in other cases, have injected Rule 30(e) with additional requirements or prohibitions.

Rule 30(e) should be amended to conform to prevailing practice. Honest lawyers, in our experience, use errata sheets to correct spelling errors or transcription errors. The best practice, in our view, would be to allow errata sheets to be used for the correction of such errors. This is not to say that such a rule would eliminate all controversy. There will still be disputes over whether the reporter correctly transcribed what the witness said, but such disputes are manageable.

We recognize that allowing errata sheets to be used only for the correction of typographical and transcription errors may prove too limiting. There are certainly other circumstances in which using errata sheets to change the record would be in everyone's best interest. This is true not only for background facts, but also for facts relevant to disputed issues. Assume, for example, that a witness testified that an accident occurred on June 1 when, in fact, the accident oc-

curred on May 1. The witness was not attempting to mislead but was either distracted when the question was asked or (as has happened to most of us) had a momentary failure of recollection. Since the reporter accurately transcribed what the witness said, there would be no opportunity for correction if the bright-line rule we proposed were adopted. Since, however, it is abundantly clear that the accident occurred on May 1—the police report, medical records, and other witnesses' recollections are consistent on that point—it is difficult to see how the interests of justice would be served by forbidding a correction. To address such circumstances, we propose allowing the use of errata sheets to correct the record if either the parties agree to the change (as they almost surely would in our hypothetical) or the court approves the change. This approach, we submit, affords flexibility to effect appropriate "substantive" changes without giving unscrupulous lawyers carte blanche to rewrite damaging deposition testimony.

But no matter where you come out on the question of which approach is best, all should agree that a single approach should govern all depositions conducted under the federal rules. Only an amendment to Rule 30(e) can accomplish that goal.

CONCLUSION: LAWYER BEWARE • For now, however, litigators need to be cognizant of the rules that will govern not only the conduct of their depositions, but the ultimate content of the record that emerges from those depositions. It is a truism in our practice that the best prepared lawyer often wins—especially the one with the facts and law on her side. So, before you walk into that first deposition in a new jurisdiction, take the time to learn whether the witness you are questioning can treat the deposition "like a take home examination." That knowledge will serve you, and your client, well.

PRACTICE CHECKLIST FOR
Rule 30(e): What You Don't Know Could Hurt You

Few lawyers would even consider using an errata sheet to rewrite or contradict sworn deposition testimony. But the rules in some jurisdictions permit substantial revisions. Knowing what to expect can save you time and trouble.

- Know your jurisdiction. Know what a witness can change even before you take the deposition.

- The model for most states' rules is Fed. R. Civ. P. 30(e), which permits subsequent "changes in form or substance:

__ Changes in form present few difficulties. An errata sheet can be used to correct misspellings (e.g., "ball" instead of "bawl"), typographical errors ("and" for "an"), or transcription errors (the witness said "racer," but the reporter heard "razor");

__ Changes in "substance" create problems. (Can a witness change what she actually said to what she meant to say—or wishes she had said?) The interpretations of Rule 30(e) in the district courts and analogous state rules have taken different approaches, and arrived at different answers.

• Some courts take a policy-based approach and interpret "substance" very narrowly. ("A deposition is not a take home examination.") In jurisdictions that take such an approach, based on *Greenway v. International Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992), a witness can use errata sheets to correct testimony when the transcript does not accurately reflect what the witness said (or claims to have said). However, the witness cannot use an errata sheet to change what she said to what she meant to say or what she wished she had said.

• Under a "textual" approach to Rule 30(e), the witness can make any substantive changes she wants, as long as she follows Rule 30(e)'s technical procedures:

__ Under this approach, an errata sheet may be used not only to change testimony, but to contradict it. *See, e.g., Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981); *see also United States ex rel. Burch v. Piqua Engineering, Inc.*, 152 F.R.D. 565 (S.D. Ohio 1993);

__ When substantive changes are permitted, the revised testimony does not replace the original testimony, and the witness will probably have to explain the change at trial. Whether this will make much of a difference depends on the circumstances—jurors often are willing to accept the explanation that the witness innocently made a mistake, but if the changes seems too convenient or "overlawyered," they might draw negative inferences about the witness's credibility;

__ Under this approach, depending on the extent and importance of the changes, the deposition may be reopened so that the opposing party may question the witness about the changes and the reasons for making them;

__ Jurisdictions that permit substantive changes are sometimes circumspect about permitting significant changes after a motion for summary judgment has been filed. *See, e.g., Rios v. Welch*, 856 F. Supp. 1499, 1502 (D. Kan. 1994).

• In another approach, substantive changes are permitted as long as they do not contradict deposition testimony. *See, e.g., Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000); *DeLoach v. Philip Morris Companies, Inc.*, 206 F.R.D. 568 (M.D.N.C. 2002):

__ The extent to which an errata sheet may substantively change prior deposition testimony depends not only on whether the proposed change "explains" or "contradicts" testimony, but also on whether a summary judgment motion had been filed yet. Getting to the answer will require litigating the issue each time.