

RULE 37

DEPOSITIONS UPON ORAL EXAMINATION

F. Submission to witnesses; changes; signing. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the transcription or stated in writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement,

together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of deposition in whole or in part.

COMMENT: Allowing a witness to change the substance of his deposition testimony, i.e., the actual language of the answers he gave under oath, imposes a potential financial hardship on the party taking the deposition and undercuts the fundamental reason for a deposition.

An example of the financial hardship imposed would occur when a deposition was taken for perpetuation in some other state, and then after taking the deposition and with no opportunity to further cross-examine the witness, a statement comes from him saying that his "yes" answer should now read "no," with a long explanation as to his reason for making the change, that his memory has now been refreshed, etc., etc. This change in testimony would require additional travel, court reporter and attorney expenses, all caused by an unscrupulous witness' attempt to unilaterally alter the substance of his sworn testimony.

Moreover, if the reason for a deposition is to obtain the whole truth, with the assistance of a thorough examination of the witness, then allowing that witness to change a substantive part of that whole truth permits the witness to avoid a thorough examination on the changed part -- unless the party is willing to bear the additional cost to have

the deposition retaken.

The words "or substance" should be deleted from proposed Rule 39.

G.(2) Filing. If requested by any party, the transcript or the recording of the deposition shall be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C.(4) of this rule, the party taking the deposition shall enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may be writing be agreed upon, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed upon request of any party under such terms and conditions as the court may direct.

COMMENT: With the current cost of litigants of court reporter fees in the taking of depositions, the proposed rule would serve to further increase litigants' costs. The filing of a deposition in court as is presently done in the federal courts, provides the court reporters with one more copy of the deposition which will serve no purpose to either side and, accordingly, the entire section should be deleted.