

“A DEPOSITION IS NOT A TAKE HOME EXAMINATION”: FIXING FEDERAL RULE 30(E) AND POLICING THE ERRATA SHEET

Gregory A. Ruehlmann, Jr.

ABSTRACT—Federal Rule of Civil Procedure 30(e) allows a deponent thirty days after a deposition in which to make “changes in form or substance.” Courts are split in their interpretation of just how broad a range of alterations the Rule envisions and permits. Some take an expansive reading, presuming that deponents can make whatever changes they see fit, however radical or contradictory the amendments may seem. Others are stricter, permitting changes only when a typographical error affected the form or substance of the transcribed answer. The question of how permissively to treat a deponent's errata sheet is a vitally important one to the discovery process, with drastic consequences for individual litigants. This Comment is the first to comprehensively lay out the case in favor of strict requirements for deposition changes under Rule 30. It contends that the history of the Rule, the goals of swift and fair justice, and parallel developments in the discovery process militate against an expansive reading of Rule 30(e). Further, it proposes amendments to the Rule's text that will cure confusion and etch new procedural parameters to promote fairness in federal litigation.

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INTRODUCTION

In March of 1992, Linda Carter Greenway testified at a deposition for a lawsuit she had brought against International Paper Company in the District Court for the Western District of Louisiana.¹ Running over two hundred pages in length, the transcript of this thorough deposition was sent to Ms. Greenway for her approval and signature.² When the court reporter received back the approved copy, accompanying it was an errata sheet documenting sixty-four separate places wherein the plaintiff had altered her sworn testimony.³ These “corrections” turned many of Greenway’s answers on their heads: locations changed, distances shrank by half, simple “no, sir” responses became “yes, sir” followed by paragraph-long explanations.⁴

The reaction from presiding Judge F.A. Little, Jr., was succinct, forceful, and eminently sensible. “A deposition is not a take home examination,” he wrote in his opinion, ordering the changes deleted and the initial deposition treated as definitive—as if the plaintiff had never amended it and had simply failed to sign it.⁵

The reasoning of *Greenway v. International Paper Co.* has proven influential as federal courts weigh how to handle such profound changes to deponents’ testimony. The Ninth Circuit, for example, cited *Greenway* five

¹ *Greenway v. Int’l Paper Co.*, 144 F.R.D. 322, 323 (W.D. La. 1992).

² *Id.*

³ *Id.*

⁴ *Id.* at 323–25.

⁵ *Id.* at 325.

years ago, holding that the district court did not abuse its discretion when striking a plaintiff’s deposition changes.⁶ But the position that *Greenway* stated out remains, in fact, a minority one.

Under the language of Rule 30(e) of the Federal Rules of Civil Procedure, deponents are given thirty days after receiving notice that their deposition testimony is ready in which, “if there are *changes in form or substance*, to sign a statement listing the changes and the reasons for making them.”⁷ This phrase—“changes in form or substance”—has vexed courts since the Rules were adopted in the late 1930s.⁸ Some courts take what I call a “strict approach,” interpreting the phrase narrowly as Judge Little did in *Greenway*, while others embrace an expansive, “literal” reading of Rule 30(e).⁹ This latter position is usually characterized as the majority view.¹⁰ According to this approach, the phrase “changes in form or substance” means that deponents can make any changes they wish. Against the fear that their view gives free license to unscrupulous deponents, courts adhering to this latter school of thought are often quick to proffer two countervailing safeguards: that both versions of the deposition remain on the record¹¹ and that such changes can trigger a reopening of the deposition.¹²

Both sides cannot be right. Who has the proper interpretation? And why should it matter? To tackle the latter question before the former, the deposition has been called “the essential tool . . . of pre-trial discovery.”¹³ Whether or not this assessment is true, there can be no dispute that the deposition functions as one of the vital organs of civil litigation. The rules that govern depositions have outsized impact on the whole gamut of litigation—from discovery to summary judgment to trial and beyond. Hence, the way we permit depositions to be conducted, and thereafter amended, squarely impacts the administration of justice at every stage. It also attests to what we truly value as the theoretical underpinnings of the American discovery process.

Further underscoring the importance of interpreting Rule 30(e) is the sheer frequency of the situation confronted in *Greenway*. Too many cases

⁶ *Hambleton Bros. Lumber v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005).

⁷ FED. R. CIV. P. 30(e)(1)(B) (emphasis added).

⁸ See FED. R. CIV. P. 30(e) (1938).

⁹ Compare *Lutig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981) (holding that the clear language of Rule 30(e) permits any change that the witness desires), with *Summerhouse v. HCA Health Servs. of Kan.*, 216 F.R.D. 502, 506–08 (D. Kan. 2003) (holding that material changes that controvert original testimony violate the clear intent of Rule 30(e)).

¹⁰ See, e.g., *Reilly v. TXU Corp.*, 230 F.R.D. 486, 489 (N.D. Tex. 2005).

¹¹ See, e.g., *Lutig*, 89 F.R.D. at 641.

¹² See, e.g., *Reilly*, 230 F.R.D. at 491.

¹³ E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. CIN. L. REV. 1353, 1357 (2004) (emphasis omitted).

to count, at an increasing rate both at the federal and state level, have forced courts to consider what changes should be permitted to deposition transcripts and what changes should be excluded.¹⁴

The case law is plentiful on both sides of the divide. But that does not mean that the arguments in favor of each reading balance each other out. The truth is that, despite its prevalence and initial appeal, the expansive reading of Rule 30(e) promotes abuse, does prejudicial harm to litigants, transgresses the clear limitations of the liberal discovery process, and is at odds with the transcription-oriented history of the Rule and its predecessor in equity law.

This Comment is the first to comprehensively lay out the case in favor of strict requirements for deposition changes under Rule 30 of the Federal Rules. In it, I contend that the history of the Rule, the goals of swift and fair justice, and parallel developments in the discovery process militate against an expansive reading of Rule 30(e). Further, this Comment proposes amendments to the Rule that would cure it of confusion and etch new procedural parameters to promote fairness in federal litigation.

The Comment proceeds in four parts. Parts I and II provide necessary background information: first, sketching the history of depositions in federal practice and the origins of the Rule itself; second, mapping the contours of the circuit split and pitting the expansive reading of the Rule against the different strains of the strict approach that reject it. Part III unfolds a detailed argument in favor of the strict reading of Rule 30(e), though not without noting the virtues of the expansive reading. Part IV provides a solution to the circuit split: permit only changes to correct transcription errors and amend the Rule to accomplish this aim.

I. A BRIEF HISTORY OF THE DEPOSITION AND RULE 30(E)

A. *Depositions*

In early federal practice, pleadings largely served the pretrial functions of providing notice and formulating issues, as well as obtaining and revealing facts.¹⁵ But pleadings proved inadequate for the task, chiefly because parties engaged in a game of hide-the-ball that resulted in surprise at the trial stage.¹⁶ This was possible because in their first incarnation, prior

¹⁴ See, e.g., Steven F. Pflaum & Faustin A. Pipal, Jr., *Successful Practice Under the New Illinois Civil Discovery Rules*, CBA REC., Oct. 1995, at 20, 22 (explaining that the Illinois Supreme Court's amendment to its equivalent of Rule 30(e) limits deposition changes to correcting transcription errors and was motivated by increasing abuse of errata sheets); see also ILL. SUP. CT. R. 207(a) (“[C]orrections based on errors in reporting or transcription which the deponent desires to make will be entered upon the deposition . . .”).

¹⁵ *Hickman v. Taylor*, 329 U.S. 495, 500 (1947).

¹⁶ See *id.* at 501 (explaining that under a deposition-discovery system, civil trials in federal court “no longer need be carried on in the dark”).

to the advent of the Federal Rules of Civil Procedure, depositions did not function as discovery tools.¹⁷ Rather, they were intended to preserve evidence as an exception to the rule requiring *viva voce* witness testimony.¹⁸

Up until the 1938 adoption of the first version of the Federal Rules, the Federal Equity Rules governed the American civil system.¹⁹ The portion that initially controlled the deposition process was Equity Rule 67.²⁰ Entitled “Testimony, How Taken,” it was on the books from 1866 until 1911,²¹ when it was replaced by two new Equity Rules, 50 and 51.²²

The adoption of the Federal Rules of Civil Procedure (Rules) changed the function of depositions significantly. The drafters of the Rules identified a discovery-oriented deposition process as the key to eliminating the “trial by ambush” prevalent in federal courts at the time.²³ Looking to contemporary state deposition rules that allowed for at least some discovery-related use of the deposition,²⁴ they crafted Federal Rules 26–37 and transformed depositions into “front-line discovery tool[s].”²⁵

This represented a sea change in both the function²⁶ and scope²⁷ of depositions in pretrial litigation. Through discovery weapons like depositions and summary judgment, the federal system developed “new

¹⁷ Moritz, *supra* note 13, at 1353.

¹⁸ *Id.* at 1359.

¹⁹ See generally Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649 (1912) (repealed 1937) (adopting formal rules of equity practice).

²⁰ Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xxxix, lxxvii (1842) (repealed 1937).

²¹ *Id.*

²² Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649, 662–63 (1912) (repealed 1937).

²³ See Moritz, *supra* note 13, at 1367 (internal quotation marks omitted); see also FED. R. CIV. P. 26 advisory committee’s note (1938) (declaring that the rule “freely authorizes the taking of depositions” both for discovery and for obtaining evidence); Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 874–77 (1933) (laying out the case for discovery through oral examination before trial and written by the primary drafter of the original Rules 26–37).

²⁴ See Moritz, *supra* note 13, at 1366.

²⁵ *Id.* at 1356.

²⁶ See *Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947). The Court identified the pretrial deposition-discovery mechanism of Rules 26–37 as “one of the most significant innovations of the Federal Rules of Civil Procedure,” explaining:

The new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark.

Id. at 501.

²⁷ See Moritz, *supra* note 13, at 1369 (noting that the 1938 Rules defined the scope of depositions expansively, including any nonprivileged but relevant matter).

devices, with more appropriate penalties to aid in matters of proof.”²⁸ But in terms of the procedure of the deposition, the changes altered very little. The drafters instead deliberately maintained the formal and adversarial structure that depositions assumed under the pre-Rules federal practice.²⁹ The Rules laid out the features of the deposition that essentially continue today. They set requirements for the scope³⁰ and use³¹ of oral depositions, their timing,³² and their recording.³³ The Rules retained a trial-style setting in which the opposing party could question the deponent,³⁴ parties could raise objections,³⁵ and officers were to preside³⁶ and administer oaths to the deponents.³⁷

B. Rule 30(e)

Equity Rules 67, 50, and 51 keenly focused on the process of transcribing the testimony given at deposition.³⁸ But as demonstrated above, the Equity Rules did anticipate some period of review during which deponents could express certain concerns about the integrity of the transcription.

Federal Rule 30(e), adopted in 1938 with advisory committee notes written the year before, was dedicated to this posttestimonial period. The Rule’s advisory note made clear that 30(e) “follow[s] the general plan of [former] Equity Rule 51” and indicates that Rule 30(e) had roots in Equity Rule 50 as well.³⁹ The note added that Rule 30(e) “permit[s] the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it.”⁴⁰ The Rule itself states: “Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them.”⁴¹

²⁸ Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937) (emphasis omitted).

²⁹ Moritz, *supra* note 13, at 1373 (“[T]he conduct of the deposition itself looked very much the same under the new Rules as it did in the years immediately preceding.”).

³⁰ FED. R. CIV. P. 26(b) (1938).

³¹ FED. R. CIV. P. 26(d) (1938).

³² FED. R. CIV. P. 26(a), 30(a) (1938).

³³ FED. R. CIV. P. 30(c) (1938).

³⁴ FED. R. CIV. P. 26(a) (1938).

³⁵ FED. R. CIV. P. 26(e) (1938).

³⁶ FED. R. CIV. P. 28(a) (1938).

³⁷ FED. R. CIV. P. 30(c) (1938).

³⁸ See *infra* notes 152–164 and accompanying text.

³⁹ FED. R. CIV. P. 30(c) & (e) advisory committee’s note (1938) (second alteration in original).

⁴⁰ FED. R. CIV. P. 30(c) & (e) advisory committee’s note (1938).

⁴¹ FED. R. CIV. P. 30(e) (1938).

The essence of Rule 30(e)’s text, devoted to errata alterations, has changed only cosmetically since 1938, with the exception of some technical requirements. In 1993, a provision was added to require a signature only when a deponent requested to review the transcript.⁴² The 1993 amendment also instituted a thirty-day window in which deponents could submit their changes and reasons for making them.⁴³ The accompanying advisory note explained that the committee added this window “to reduce problems sometimes encountered when depositions are taken stenographically.”⁴⁴

The phrase “form or substance” persisted in the versions of Rule 30(e) that followed the 1938 original, down to the present day.⁴⁵ The Rule does not, nor has it ever, defined the terms “form” and “substance.”⁴⁶ The current language of the Rule, as it relates to deposition changes, is as follows:

On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which: (A) to review the transcript or recording; and (B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.⁴⁷

II. ANATOMY OF A CIRCUIT SPLIT

In the first few years after Rule 30(e)’s adoption, cases involving disputes over transcription changes appear to have risen rarely—perhaps because the rules surrounding the newfound purposes of depositions had been changed so recently that it took time for deponents and lawyers to work up the temerity and creativity to circumvent them. The first opinion on record to address the question was *De Seversky v. Republic Aviation Corp.*, a 1941 case.⁴⁸ There, a deposition unfolded under what the court labeled “unusual” circumstances, continuing gradually, “from time to time,” over the course of several months.⁴⁹ Afterwards, the deponent plaintiff amended his transcript under Rule 30(e) to contradict previous answers and the opposing party moved for an order requiring him to appear before the examining officer.⁵⁰ The motion aimed to force the deponent to face new questions and explain under oath the reasons for his changes.⁵¹

⁴² FED. R. CIV. P. 30(e) & advisory committee’s note (1993).

⁴³ FED. R. CIV. P. 30(e) & advisory committee’s note (1993).

⁴⁴ FED. R. CIV. P. 30(e) & advisory committee’s note (1993).

⁴⁵ See FED. R. CIV. P. 30(e).

⁴⁶ See *infra* notes 165–170 and accompanying text (providing working definitions through examples of what would reasonably fall into each category).

⁴⁷ FED. R. CIV. P. 30(e)(1).

⁴⁸ 2 F.R.D. 113, 114 (E.D.N.Y. 1941) (“I have not been presented with, nor have I found, any previous case which decides the question raised.”).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

The unusual factual circumstances of *De Seversky* help crystallize the issue. The court suggested that it might be “not unreasonable,” in the setting of such a protracted deposition, that a deponent might need to correct certain answers.⁵² It follows that *only* in such odd circumstances could nontranscriptive changes possibly be permissible in order to maintain the integrity and coherence of sporadic testimony. Moreover, the court crucially noted that “[a] witness . . . should not be able to destroy the usefulness of an examination by the means employed here.”⁵³

By the next decade, however, a few cases surfaced that reached the opposite conclusion and paved the way for an expansive approach to allowing changes in depositions. One such case was *Colin v. Thompson*, in which the district court cited *De Seversky*, yet held that under Rule 30(e) a deponent has the right to make changes, with or without good reason.⁵⁴

The dissonance that these early cases document carries into the present day and sets the scene for the discord we find in the case law on Rule 30(e). The divergent conclusions illustrate the competing considerations at work in the case law split: the desire to receive testimony within the liberal discovery process confronts the danger that a deponent may well undermine the deposition’s integrity and thereby prejudice the opposing party. This Comment proceeds now to explore the manners in which the authority split manifests these competing ideas.

A. *The Expansive Reading*

The essence of the expansive reading of Rule 30(e) is that the phrase “changes in form or substance” corresponds to a wide berth for deponents. Its most well-known articulation is from the case of *Lutig v. Thomas*, decided in 1981.⁵⁵ In *Lutig*, the U.S. District Court for the Northern District of Illinois contended that “[t]he language of the Rule places no limitations on the type of changes that may be made by a witness before signing his deposition” to make it final.⁵⁶ Nor, continued the court, does the language require a judge to examine “the sufficiency, reasonableness, or legitimacy of the reasons for the changes.”⁵⁷

⁵² *Id.*

⁵³ *Id.* at 115.

⁵⁴ 16 F.R.D. 194, 195 (W.D. Mo. 1954).

⁵⁵ 89 F.R.D. 639 (N.D. Ill. 1981). It is worth noting that both *Lutig* and *Greenway*, which is cited with similar frequency in favor of the strict reading, are district court opinions. The Supreme Court has not taken a position on the issue. The first circuit court opinion on point did not appear until 1997. See *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98 (2d Cir. 1997). By that time, both *Lutig* and *Greenway* had taken hold as the most referenced articulations of their respective positions. See, e.g., *Reilly v. TXU Corp.*, 230 F.R.D. 486, 487, 89 (N.D. Tex. 2005) (identifying *Greenway* as “[t]he case cited most frequently” in favor of a narrow reading, and *Lutig* as the “principal case” that stands for the broad reading of Rule 30(e)).

⁵⁶ 89 F.R.D. at 641.

⁵⁷ *Id.*

While the *Lutig* approach is often labeled the majority approach,⁵⁸ it is in fact the minority among circuit courts. The Second Circuit adopted *Lutig*'s reasoning in *Podell v. Citicorp Diners Club, Inc.*,⁵⁹ and remains the only court of appeals to do so.⁶⁰ Together, the two cases stand for the proposition that an expansive reading of Rule 30(e) can minimize unfairness by preserving the original answers on the record for impeachment purposes.⁶¹ *Lutig* also identifies a second safeguard against unfairness: the reopening of the deposition for further questioning once a deponent has made changes of a sufficient “number and type.”⁶²

B. Stricter Readings: A Range of Interpretations

Courts that adopt a stricter reading are united in their contention that the expansive reading is overbroad and prone to promote questionable tactics.⁶³ These courts “focus on the strategic interest of taking a deposition; namely to capture and preserve testimony in an adversarial manner” that parties can reasonably rely on to make their case.⁶⁴ These courts therefore hold on to an implied notion that deposition testimony should be regarded as akin to trial testimony, and thus not open to changes in accord with whatever caprice or ulterior motive a deponent harbors during the errata period.⁶⁵ Although these opinions espouse a strict reading of the Rule, the extent to which they constrict changes varies.

1. *Strictest of All: Greenway*.—The strictest of the strict approaches remains the most cited articulation, and comes from the Western District of Louisiana’s opinion in *Greenway v. International Paper Co.*⁶⁶ In *Greenway*, the court listed a series of the plaintiff’s deposition answers, counterpoised with her contradictory errata changes.⁶⁷ The opinion then struck the changes and staked its central claim:

⁵⁸ See, e.g., *Reilly*, 230 F.R.D. at 489 (“The broad view espoused by the *Lutig* court has been characterized as the traditional or majority view.”).

⁵⁹ See 112 F.3d at 103.

⁶⁰ Appellate courts that have adopted some version of the strict approach include the Third, Seventh, Ninth, and Tenth Circuits. See discussion *infra* Part II.B.2–II.B.3.

⁶¹ *Podell*, 112 F.3d at 103; *Lutig*, 89 F.R.D. at 641.

⁶² *Lutig*, 89 F.R.D. at 642 (concluding that the plaintiff’s changes in fact did necessitate reopening the examination).

⁶³ See, e.g., *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000) (commenting that reading the Rule broadly provides a “questionable basis for altering a deposition”).

⁶⁴ See Christopher Macchiaroli & Danielle Tarin, *Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript*, 3 FED. CTS. L. REV. 1, 3 (2009).

⁶⁵ See, e.g., A. Darby Dickerson, *Deposition Dilemmas: Vexatious Scheduling and Errata Sheets*, 12 GEO. J. LEGAL ETHICS 1, 57 (1998).

⁶⁶ 144 F.R.D. 322 (W.D. La. 1992).

⁶⁷ *Id.* at 323–25.

The 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. The Rule cannot be interpreted to allow one to alter what was 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.⁶⁸

The *Greenway* approach, then, limits permissible changes to ones that are transcriptive in nature in order to cure clerical errors that prevented the testimony from being fully and accurately reported. This, *Greenway* contends, captures the purpose of Rule 30(e).⁶⁹ The deficiency that *Greenway* diagnoses in the expansive approach is clear: the risk of bad faith dealings once deponents are away from the scrutiny that accompanies their live testimony and the oath that precedes it.⁷⁰ To counter this potential for bad faith and to avoid turning the deposition into what the court memorably called a “take home examination,” the court held that postdeposition changes must be limited to errors of transcription.⁷¹

2. *No New Factual Issues: The Ninth and Tenth Circuits.*—*Greenway* has been cited frequently but has not always been followed to its full extent. The Ninth and Tenth Circuits, for example, have adopted a version of the strict approach that is more forgiving and centers on the danger that fundamental errata changes can pose to pending or potential summary judgment dispositions.⁷²

The Tenth Circuit adopted its approach first, through dicta at the very end of an opinion called *Garcia v. Pueblo Country Club*.⁷³ Citing *Greenway*’s admonition against take-home examinations, the court expressed its distress with defendant’s “reliance upon errata from deposition testimony where that errata strayed substantively from the original testimony.”⁷⁴ Two years later, the court entered its opinion in *Burns v. Board of County Commissioners*, a case that, like *Garcia*, related to a summary judgment appeal.⁷⁵ There, the court equated a deponent’s material changes with the content of a sham affidavit, which is disregarded “when it

⁶⁸ *Id.* at 325.

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² In passing language, the Sixth Circuit has indicated some sympathy for a similar approach, but has not subsequently clarified or revisited the issue. *See Trout v. FirstEnergy Generation Corp.*, 339 F. App’x 560, 565 (6th Cir. 2009) (quoting an Ohio district court case, *Tuttle v. Tyco Elecs. Installation Servs., Inc.*, No. 2:06-cv-581, 2008 WL 343178, at *4 (S.D. Ohio Feb. 7, 2008), that reproduces *Greenway*’s “take-home examination” language).

⁷³ 299 F.3d 1233, 1242 n.5 (10th Cir. 2002).

⁷⁴ *Id.*

⁷⁵ 330 F.3d 1275 (10th Cir. 2003).

‘constitutes an attempt to create a sham fact issue’” to defeat summary judgment.⁷⁶ The court saw no reason to treat Rule 30(e) corrections any differently and held that the deponent’s changes did not pass muster under the circuit’s sham affidavit analysis.⁷⁷

Two years after *Burns*, the Ninth Circuit followed with the case of *Hambleton Bros. Lumber v. Balkin Enterprises, Inc.*⁷⁸ The court held that “Rule 30(e) is to be used for corrective, and not contradictory, changes.”⁷⁹ Additionally, using the sham affidavit parallel, the court held that while Rule 30(e) permits corrections “in form or substance,” it does not permit “changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment.”⁸⁰

The rule in the Ninth and Tenth Circuits thus invalidates deposition changes in a smaller set of circumstances than *Greenway*’s rule does. Rather than disallowing all nonclerical amendments, courts in these circuits strike deposition answers that aim to create new facts (or contradict facts from the earlier testimony) in order to sidestep a Rule 56 summary judgment motion. Changes that are corrective or that merely clarify may be permitted.⁸¹

3. *No Contradictions: Thorn and the Seventh Circuit.*—The Seventh Circuit moved a step further away from *Greenway*, but remains squarely in the strict camp. The controlling case is *Thorn v. Sundstrand Aerospace Corp.*, in which then-Chief Judge Richard Posner wrote the majority opinion in 2000.⁸² *Thorn* focuses on the sham affidavit context too, prohibiting any substantive change under Rule 30(e) “which actually contradicts the transcript . . . unless it can plausibly be represented as the correction of an error in transcription.”⁸³ Unlike *Hambleton Bros.* and *Burns*, *Thorn* does not extend this prohibition to instances where deponents attempt to use new information to create factual disputes—something Judge Posner chalked up to questionable strategy but read the Rule to permit.⁸⁴ Specifically, the court allowed a deponent in an age discrimination case to change his testimony from “what he said to what he meant.”⁸⁵ This involved striking his assertion that his company carried out layoffs based on “long-term potential” of workers and replacing it with the assertion that layoffs

⁷⁶ *Id.* at 1282 (quoting *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)).

⁷⁷ *Id.*

⁷⁸ 397 F.3d 1217 (9th Cir. 2005).

⁷⁹ *Id.* at 1226.

⁸⁰ *Id.* at 1225 (internal quotation marks omitted).

⁸¹ *Id.* at 1225–26.

⁸² 207 F.3d 383, 385 (7th Cir. 2000).

⁸³ *Id.* at 389.

⁸⁴ *See id.*

⁸⁵ *Id.*

were based on long-term potential of the product lines with which they worked.⁸⁶

4. *A “More Flexible Approach”*: Clark Building Systems and the Third Circuit.—The most recent addition to the growing number of circuits that reject an expansive approach to Rule 30(e) is the Third Circuit. In *EBC, Inc. v. Clark Building Systems, Inc.*, the court addressed the Rule in a summary judgment context.⁸⁷ The court asserted that the expansive reading’s safeguards “may often prove to be insufficient remedies.”⁸⁸ As in the previously mentioned cases, the court applied its sham affidavit analysis.⁸⁹ But because the circuit’s sham affidavit approach differs from that of the Seventh, Ninth, and Tenth Circuits, its analysis produced a different standard. The Third Circuit uses a “more flexible approach” to the sham affidavit doctrine,⁹⁰ under which each case is considered according to its fact-specific circumstances.⁹¹ Thus, depending upon the situation, a court may refuse to consider materially contradictory changes or may admit them at its discretion.⁹²

III. CHOOSING SIDES: WHY DEPOSITIONS SHOULD BE STRICTLY POLICED

Having sketched the developmental contours of both the Rule itself and the conflicted body of case law that it has occasioned, this Comment turns now to an argument in favor of policing the deposition process more strictly than an expansive reading supports. It starts by laying out the most persuasive aspects of the expansive approach. Then, it identifies the points where the approach begins to falter. The bulk of this Part then develops the reasons why the strict reading is the proper interpretation of Rule 30(e).

A. *Giving the Expansive Reading Its Due*

It is important to begin by recognizing the charms of the expansive reading. The interpretation has its learned defenders, and this is because it has its logical appeals. The plain language of Rule 30(e), the notion of a liberal discovery process, and the availability of other legal safeguards all lend strength to the expansive reading. None of them, however, are enough in the end to save it.

1. *The Appeal of “Plain Language.”*—The words of Rule 30(e) are plain, and these plain words refer to changes in form *or* in substance.

⁸⁶ *Id.*

⁸⁷ 618 F.3d 253, 258 (3d Cir. 2010).

⁸⁸ *Id.* at 268.

⁸⁹ *See id.* at 268–69.

⁹⁰ *Id.* at 269 (quoting *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007)) (internal quotation mark omitted).

⁹¹ *Id.* at 270.

⁹² *See id.* at 267–70 (including a list of factors considered under the circuit’s flexible approach).

Additionally, the Rule instructs court officers to attach “any changes the deponent makes” to the certificate that they append to the deposition transcript when it is ready for filing.⁹³

Any well-reasoned position in favor of strict deposition rules must grapple with the presence of these words, as well as the absence of any obvious qualifiers that would explicitly limit their scope.⁹⁴ The Rule’s references to both form and substance are not recent additions. Indeed, their inclusion predates the Rule’s most recent substantive amendment in 1993; the phrasing, prior to that year’s changes, was “[a]ny changes in form or substance which the witness desires to make.”⁹⁵ Reading this language, it is not entirely shocking that a court might reason, as the Southern District of Ohio once did, that “under the Rule, changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing, as long as the procedural requirements set forth in the Rule are also followed.”⁹⁶

2. *The Breadth of the Liberal Discovery Process.*—Adding to the allure of the expansive interpretation is the oft-repeated maxim that the discovery process in the federal district courts is a liberal one. The Federal Rules bestow upon depositions the role of primary discovery tool.⁹⁷ And “the deposition-discovery rules are to be accorded a broad and liberal treatment.”⁹⁸ The changes that the movement towards deposition-discovery rules wrought were decidedly positive; they nudged trials away from their tendency to devolve into a surprise-ridden game of blind man’s bluff and in the direction of a fair contest.⁹⁹ Any move that pushes back against this momentum threatens to carry an air of unwelcome retrogression.

3. *The Appeal of “Safeguards.”*—Finally, the expansive approach draws some additional persuasive force from the two major safeguards put forth by its defenders: (a) a possible reopening of the deposition, and (b) the near certainty that both versions of the deposition will be maintained in the

⁹³ FED. R. CIV. P. 30(e)(2).

⁹⁴ See, e.g., *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005) (concluding that the broad reading of Rule 30(e) is “consistent with the plain language of the Rule which expressly contemplates ‘changes in form or substance,’” and eschewing a stricter reading); Kirin K. Gill, Comment, *Depose and Expose: The Scope of Authorized Deposition Changes Under Rule 30(e)*, 41 U.C. DAVIS L. REV. 357, 373–76 (2007) (invoking the canons of plain meaning and *noscitur a sociis* to argue for a “broad” construction of permissible changes in light of the use of the words “form,” “substance,” and “any”).

⁹⁵ FED. R. CIV. P. 30(e) (1970).

⁹⁶ *United States ex rel. Burch v. Piqua Eng’g, Inc.*, 152 F.R.D. 565, 566–67 (S.D. Ohio 1993) (reproducing the 1993 language and emphasizing the word “any” in justifying its expansive reading of the Rule).

⁹⁷ See discussion *supra* Part I.

⁹⁸ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

⁹⁹ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

record.¹⁰⁰ At the very least, the existence of these checks serve as warning to deponents that, in a jurisdiction that reads Rule 30(e) as fairly open, they do not make their substantive changes in a vacuum or without any consequence whatsoever.

The first safeguard aims to ensure that in making large-scale changes, the deponent—or the deponent’s attorney if counsel goads the deponent to make the changes—may trigger a renewed round of deposition testimony.¹⁰¹ The prospect of this mechanism might cause deponents to think twice before changing denials to affirmatives or vice versa. And if triggered, the reopening may visit some justified punishment upon a deponent’s case. A second deposition may puncture a hole in the deponent’s credibility by giving an attorney the chance to ask follow-up questions.¹⁰² Further, a second deposition can also punish deponents’ pocketbooks by forcing them to pay for the opposing party’s expenses (in addition to their own) in taking the second deposition.¹⁰³

The second safeguard aims to ensure that, even where courts are reluctant to reopen a deposition, either because, under the expansive approach, they believe in letting all changes stand, or because they do not find an errata sheet in a particular instance to sufficiently contradict prior answers, they may still keep both versions of the deposition—old and amended—on the factual record.¹⁰⁴ This raises a tactical specter that might frighten a deponent who is otherwise tempted to make wholesale changes. After all, it is poor trial strategy in most instances to provide inconsistent answers.¹⁰⁵ The existence and extent of the discrepancies “are treated as

¹⁰⁰ See, e.g., *Reilly v. TXU Corp.*, 230 F.R.D. 486, 490 (N.D. Tex. 2005) (expressing confidence in the expansive reading, contending that “[w]hile the Court wholly agrees that a deposition should not be a ‘take home examination,’ [this] approach allows for legitimate corrective changes while implementing adequate safeguards to prevent abuse” (citation omitted)). It is worth noting that the safeguards are meant to protect parties against any such bad faith changes, even when the deponent in such circumstances is not himself the party opponent.

¹⁰¹ See, e.g., *Foutz v. Town of Vinton*, 211 F.R.D. 293, 295 (W.D. Va. 2002) (holding that because plaintiff’s proposed changes were “so substantive,” the deposition would be reopened to give defendants the chance to question plaintiff on the basis of his contradictions).

¹⁰² See *Reilly*, 230 F.R.D. at 491 (“Defendants may inquire about the reasons for the changes and the source of the changes, such as whether they came from Plaintiff himself or his counsel. In addition, Defendants may also ask follow-up questions to the changed responses.” (citation omitted)).

¹⁰³ See, e.g., *Lugtig v. Thomas*, 89 F.R.D. 639, 642 (N.D. Ill. 1981) (“Since it is defendant’s actions which necessitate reopening the examination of defendant, the costs and attorneys fees connected with the continued deposition will be borne by defendant.”).

¹⁰⁴ See *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997) (holding that the district court was right to make deponent’s changed answers simply a part of the record along with original answers, rather than allowing him to replace the original answers).

¹⁰⁵ See *Dickerson*, *supra* note 65, at 59–60. *Dickerson* suggests that the language of Rule 30(e), as written, most logically endorses an approach that permits the court to accept changes, but also permits “opposing counsel, at her choosing, to introduce both versions to the jury.” *Id.* at 60.

subjects for impeachment that may affect the witness’s credibility,”¹⁰⁶ even without a second round of depositions.

B. *Stretching and Tension*

Despite the pull of the expansive interpretation of Rule 30(e), and despite the prevalence of this interpretation among district courts, it is fair to take note of the curious ways in which courts that adopt it find themselves stretching to justify their decisions. By cataloguing some of these stretching exercises, one begins to face some very substantive and not yet fully unpacked reasons why the expansive reading falls short.

First, while courts that rely upon the expansive approach are quick to echo the forceful pronouncement of *Lugtig* that “[t]he language of the Rule places no limitations on the type of changes that may be made” and requires no examination of the “sufficiency, reasonableness, or legitimacy of the reasons for the changes,”¹⁰⁷ the case law raises questions about how much of this is lip service and how much is true conviction. Closer inspection shows that these same courts are often quick to toss those changes on the grounds of other technicalities elsewhere in the Rule.¹⁰⁸ In addition to its provisions regarding the manner of permissible changes, Rule 30(e) lays out other, far less hotly contended, procedural instructions. Several of these instructions have been used to avoid taking sides on the errata question¹⁰⁹ or to effectively thwart the admission of amended deposition answers in opinions that otherwise profess to subscribe to the expansive approach. These procedures include: failing to request review of the deposition before

¹⁰⁶ *Holden v. Ill. Tool Works, Inc.*, No. H-06-3958, 2007 U.S. Dist. LEXIS 94470, at *7 (S.D. Tex. Dec. 27, 2007).

¹⁰⁷ *Lugtig*, 89 F.R.D. at 641. A quick Shepardizing expedition of this case on November 22, 2010, yielded at least fourteen federal opinions issued since 1999 that quote its holding favorably—even though Judge Posner rendered it bad law within its own circuit over a decade ago in *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

¹⁰⁸ Dickerson, *supra* note 65, at 55 n.270. (“A close reading of many ‘errata sheet’ cases suggests that when courts who embrace [the expansive] reading of Rule 30(e) are upset with the type [and] extent of changes . . . they strike the offending changes based on the deponent’s failure to comply with some technical aspect of Rule 30(e).”); see also Ilya A. Lipin, *Litigation Tactics Addressing Changes to Deposition Testimony Through Rule 30(e) Errata Sheet Corrections*, 63 ARK. L. REV. 741, 748–49 (2010) (encouraging practitioners to “attempt to preclude errata-sheet changes based on procedural grounds” in light of the expansive approach’s prevalence).

¹⁰⁹ See, e.g., *Agrizap, Inc. v. Woodstream Corp.*, 232 F.R.D. 491, 493 (E.D. Pa. 2006) (“Although courts are split over whether to allow substantive changes to a deposition, there is no debate that the procedural requirements of Rule 30(e) must be adhered to.”). In *Agrizap*, a breach of contract case decided before the District Court for the Eastern District of Pennsylvania and appealed to the Third Circuit, the witness changed his deposition responses from “I think we were offering them for sale” to “I don’t think we were offering them for sale” and from “Yeah” to “No.” *Id.* at 492 (emphases omitted). The court suppressed the changes not on the grounds that they amounted to arrant contradictions of previous testimony that cut to the heart of the complaint, but rather on the technical grounds that more than thirty days had passed and the deponent had not requested to review the transcript. *Id.* at 493.

amending it,¹¹⁰ failing to meet the thirty-day time requirement for changes,¹¹¹ failing to list the reasons for any change,¹¹² and failing to submit the changes to the court reporter.¹¹³ Courts sometimes make far more rigorous demands on deponents to show compliance with these technical measures than to show proper cause for the changes they attempt to make on the errata sheet.¹¹⁴ This method seems little more than an effort to accomplish by technicality what judges, squeamish to defy majority thinking in their jurisdiction, cannot bring themselves to do directly: disqualify spurious deposition alterations.¹¹⁵

Second, the very invocation of the expansive approach's safeguards—reopening depositions and maintaining original answers on the record—amounts to a kind of judicial stretching. It requires little more than a quick glance at the wording of Rule 30(e) to observe that the Rule mentions

¹¹⁰ FED. R. CIV. P. 30(e)(1); *see also* *Agrizap*, 232 F.R.D. at 493 (holding, before the Third Circuit adopted a version of the strict approach, that a deponent who reversed substantive deposition answers was barred from changing the transcript for failure to request review).

¹¹¹ FED. R. CIV. P. 30(e)(1); *see also* *Porter v. Hamilton Beach/Proctor-Silex, Inc.*, No. 01-2970-MaV, 2003 U.S. Dist. Lexis 14089, at *8–10 (W.D. Tenn. July 28, 2003) (holding that Rule 30(e) is not necessarily “limited only to corrections of errors made in transcribing,” but striking the substantively altered errata sheet of an expert witness in full because of failure to comply with the time requirement); *Davidson Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 136 F. Supp. 2d 901, 914 (W.D. Tenn. 2001) (excluding an errata sheet signed over sixty days after original transcript became available); *Pepper’s Steel & Alloys, Inc. v. U.S. Fidelity & Guar. Co.*, No. 85-0571-CIV-SPELLMAN, 1991 U.S. Dist. LEXIS 21564, at *4 (S.D. Fla. Mar. 22, 1991) (commenting that the Rule 30(e) time constraint ensures that deponents correct testimony while it is still fresh in their minds).

¹¹² FED. R. CIV. P. 30(e)(1)(B); *see also* *Holland v. Cedar Creek Mining, Inc.*, 198 F.R.D. 651, 653 (S.D. W. Va. 2001) (finding that courts usually “permit any changes,” but granting motion to exclude changes because deponent failed to provide reasons for them (quoting *Hlinko v. Virgin Atlantic Airways*, No. 96Civ.2873(KMW)(THK), 1997 WL 68563, at *1 (S.D.N.Y. Feb. 19, 1997) (internal quotation mark omitted)); *Duff v. Lobdell-Emery Mfg. Co.*, 926 F. Supp. 799, 803–04 (N.D. Ind. 1996) (striking changes for lack of explanation before the Seventh Circuit adopted its version of the strict reading in 2000 in *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383 (7th Cir. 2000)).

¹¹³ *See* FED. R. CIV. P. 30(e)(1)–(2); *see also* *Reed v. Hernandez*, 114 F. App’x 609, 611 (5th Cir. 2004) (upholding the district court’s ruling to exclude an improperly filed errata sheet where deponent never submitted the changes to the court reporter, and thus electing not to reach the district court’s second reason for exclusion: improper substantive changes).

¹¹⁴ *See, e.g., Holland*, 198 F.R.D. at 653 (“This court, like most courts, will insist on strict adherence to the technical requirements of Rule 30(e).”).

¹¹⁵ Ironically, the history of the Federal Rules suggests that failure to comply with the technical requirements for depositions was to be considered at worst a venial sin. A 1936 provision in the Advisory Committee’s Preliminary Draft to what is now Rule 32 cautioned that “[n]one of the foregoing errors or irregularities, even when not waived, nor any others, shall preclude or restrict the use of the deposition.” PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA 67 (1936). The provision lists one telling exception, however: “except in so far as the court shall find that *they substantially destroy its value as evidence or render its use unfair or prejudicial.*” *Id.* (emphasis added). This sounds exactly how one might explain the dangers that the strict reading of Rule 30(e) seeks to combat.

neither of these restraints.¹¹⁶ Neither Rule 30(e) nor any other rule alludes to deposition safeguards.¹¹⁷ It is hard to square this fact with the textual fidelity that advocates of the expansive approach claim for themselves. And although judges are known to devise their own solutions to the problems that rules name, those solutions should rest on some clear connection to the language and underlying purpose of the rules themselves—*particularly* when judges so forcefully invoke textualism to justify their decisions. The expansive reading’s twin safeguards do not appear in, nor do they implicitly flow from, the text of Rule 30(e). The Rule says what it says, or it does not.

The stretches in logic undertaken in these “majority approach” cases and the cases’ selective emphasis on textualism are two flaws that hint at the superiority of the strict reading. But they are far from alone in leading us away from the expansive reading. This Comment now turns to examining more thoroughly why the strict approach most successfully deals with the range of changes that deponents attempt to make under Rule 30(e).

C. *Why the Strict Approach Works Best*

The simplest and most direct diagnosis of the expansive reading of Rule 30(e) is that it falls short. Acolytes of this reading dangle safeguards in front of parties affected by an opponent’s cavalier deposition changes, but these safeguards amount to an ounce of comfort against a pound of potential trouble. The lack of oversight, restriction, or emphasis on the contemporaneousness of making changes in the deposition-taking process turn the deposition into a different, less reliable, and less unique discovery tool. Moreover, the “plain language” of the Rule vindicates the expansive reading only when the language is read in an ahistorical, context-free vacuum. Finally, the liberal discovery process of the American federal court system only supports the expansive reading when liberality is construed to preclude any well-defined, outer common-sense boundaries.

1. *“Safeguards”*: *Reliability, Deterrence and the Interrogatory Parallel*.—When a deponent submits a substantially altered errata sheet, courts adopting the expansive approach almost invariably try to reassure the uneasy party on the opposite side of the lawsuit. These reassurances most frequently take the shape of a recitation of the safeguards the court will put in place to protect the opponent from prejudice: keeping both deposition versions on the record and reopening the deposition.¹¹⁸ The

¹¹⁶ Taking this a step further, a few courts subscribing to the expansive reading of Rule 30(e) have undertaken an additional layer of extratextual thinking: determining whether opposing counsel has the right to attend the deposition modifications if a second round of questioning is triggered. *See, e.g.,* *Perkasie Indus., Corp. v. Advance Transformer, Inc.*, No. 90-7359, 1992 U.S. Dist. LEXIS 22431, at *10 (E.D. Pa. June 11, 1992) (concluding that opposing counsel does have that right).

¹¹⁷ *See* Dickerson, *supra* note 65, at 64 (observing that there are no built-in deterrents in Rule 30(e), only court-developed methods that may, or may not, always be followed).

¹¹⁸ *See* discussion *supra* Part III.A.3 (discussing safeguards).

archetypal version of this judicial guarantee—and still probably the most fervent—comes from the *Lutig* case. “The original answer to the deposition,” Judge Will explained in his memorandum opinion, “will remain part of the record and can be read at the trial.”¹¹⁹ Quoting from Wright & Miller’s *Federal Practice & Procedure*, the judge continued, “the cross-examiner and the jury are likely to be keenly interested in the reasons [the deponent] changed his testimony.”¹²⁰

But strategic deterrents succeed only if a court is willing to take seriously the shifts in answers that are supposed to trigger them. This is no sure thing. Explaining that courts can reopen depositions where changes have rendered them “incomplete or useless,”¹²¹ for example, requires something of a leap of faith that judges who see no requirement in the Rule to “examine the sufficiency, reasonableness, or legitimacy of the reasons for the changes”¹²² will nonetheless make the determination required to find that the “number and type of changes” justify the reopening of the deposition.¹²³

When read expansively, Rule 30(e) gives deponents over four weeks to alter their answers in any manner they wish before sending them back to the court and opposing counsel. For this reason, the *Greenway v. International Paper Co.* opinion drew a parallel between such “corrected” depositions and written interrogatories, contending that the two should be more distinct than such an approach encourages.¹²⁴ As other courts have adopted *Greenway*’s approach—or some variation thereof—they have echoed this analysis.¹²⁵ The comparison is appropriate, and the observation that the two should not blur together so easily seems intuitive enough. In the federal system, depositions are governed by Rules 27 to 32,¹²⁶ where they are explicitly mentioned in the heading of each rule except Rule 29, making clear that this is their subject. Interrogatories are separately covered in Rule

¹¹⁹ *Lutig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981).

¹²⁰ *Id.* at 642.

¹²¹ *Id.*

¹²² *Id.* at 641.

¹²³ *See id.* at 642. A particularly eye-opening example of such misplaced faith is the case of *Allen & Co. v. Occidental Petroleum Corp.*, 49 F.R.D. 337 (S.D.N.Y. 1970), the very case to which *Lutig* cites for its proposition that “the language of the Rule places no limitations on the types of changes that may be made by a witness before signing his deposition.” *Lutig*, 89 F.R.D. at 641. In *Allen*, even in the face of 377 changes to the witness’ deposition, the court found that the changes did not so directly contradict testimony on vital points to necessitate reopening the deposition. *Allen*, 49 F.R.D. at 341.

¹²⁴ 144 F.R.D. 322, 325 (W.D. La. 1992) (“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.”).

¹²⁵ *See, e.g., Burns v. Bd. of Cnty. Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003) (quoting this section of *Greenway* in a decision that adopted a strict reading of Rule 30(e)); *Garcia v. Pueblo Country Club*, 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) (quoting same).

¹²⁶ *See* FED. R. CIV. P. 27–32.

33, a Rule from which the word “deposition” is tellingly absent.¹²⁷ Though it is true that a submitted interrogatory under Rule 33 carries no requirement to provide reasons for answers,¹²⁸ as a Rule 30(e) errata sheet does, the borders between these two distinct forms begin to collapse as more freedom is allowed during the “correction” phase of a deposition. This is because what fundamentally makes the deposition different from, and more reliable than, the interrogatory is not the compulsory force of some vaguely defined requirement to explain errata changes,¹²⁹ but rather the contemporaneous nature of the deposition-taking process itself. Requiring some degree of instantaneousness between the question and the answer gives the responding party less time to reconsider and then contrive a less true but more favorable answer.¹³⁰ The higher degree of reliability offered—at least theoretically—by the deposition collapses as courts abdicate their responsibility to police the correction process under Rule 30(e).

2. “Safeguards”: *Sham Affidavits and Summary Judgment*.—While the interrogatory parallel is instructive, the better analogy for questionable errata sheet conduct is to the common law doctrine of the sham affidavit. This is precisely because of the way both can impact the success of a summary judgment motion under Rule 56, which both practices seem improperly directed toward sidestepping. The expansive approach’s safeguards are small consolation to parties for whom summary judgment is denied or delayed as a result of an opponent’s efforts to refashion his sworn deposition testimony.¹³¹ Naturally, strategic deterrents succeed only if a

¹²⁷ See FED. R. CIV. P. 33.

¹²⁸ See FED. R. CIV. P. 33.

¹²⁹ But see Gill, *supra* note 94, at 377–78 (arguing that this particular difference is what separates an interrogatory on the one hand and a deposition amended under a liberally construed Rule 30(e) on the other).

¹³⁰ This thinking is an important underpinning of the hearsay exceptions in the Federal Rules of Evidence. See Macchiaroli & Tarin, *supra* note 64, at 11; see also JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL: STUDENT EDITION § 16.02[1] (8th ed. 2007) (explaining the reasoning behind Federal Rule of Evidence 803(1)’s hearsay exception for a present sense impression is that the spontaneous nature of the statement, following shortly after an event or condition, gives the declarant “little or no opportunity to fabricate”). This is not to say that the setting of a deposition is in any way precisely like the setting of a present-sense-impression situation—deponents obviously are removed from the events giving rise to the suit, and likely consult with counsel in some detail before answering questions. But the underlying logic is similar in at least one important respect: deponents, at the time of deposition, must give answers contemporaneously, without input from their counsel; for that reason, the answers given at the time of the deposition generally merit a higher degree of trustworthiness than the revisions to those answers, submitted after a thirty-day window in which to consult with counsel about the answers’ contents.

¹³¹ See *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 268 (3d Cir. 2010) (adopting a version of the strict approach that allows a district court to refuse to consider changes to a deposition when deciding a motion for summary judgment). In rejecting the expansive interpretation of Rule 30(e), the court reasoned:

[R]equiring trial judges in all cases to permit contradictory alterations could risk the defeat of summary judgment in a large swath of cases for which a Rule 56 disposition otherwise would be

deponent (and her counsel) believes that the potential risks of ignoring the deterrent outweigh the benefits.¹³² Outright prohibitions are therefore more effective. In the cases of deponents who know their suits will otherwise be doomed at the summary judgment stage, the possible benefit of ignoring the deterrent is obvious: simple survival.

At a time when less than 2% of federal cases end in trial,¹³³ depositions have become “almost exclusively a discovery tool.”¹³⁴ Summary judgment looms large in the landscape that inevitably results from this picture.¹³⁵ Attorneys, aware of the likely disposition of their cases at the pretrial stage, often view the taking of depositions as an opportunity to collect “straightforward admissions that can later form the basis of a motion for summary judgment.”¹³⁶ Deponents can frustrate opposing counsel’s effort when they alter their answers—either inoculating them against any harmful effect by erasing admissions or fortifying them with new content so as to give the appearance of novel factual issues.¹³⁷ The less strictly that Rule 30(e) is interpreted, the more leeway a deponent has to do just that.

Of course, errata sheets are not the only device by which a party can accomplish such questionable ends. Courts and legal scholars have been grappling for decades with similar problems in the context of postdeposition, or “sham,” affidavits.¹³⁸ Because courts in a summary judgment context must view all evidence in the light most favorable to the nonmovant,¹³⁹ the nonmoving party can thwart the movant’s case by

appropriate. Preservation of the original testimony for impeachment at trial serves as cold comfort to the party that should have prevailed at summary judgment.

Id.

¹³² Dickerson, *supra* note 65, at 64.

¹³³ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459, 461 (2004). For a more recent update on this statistic, see Marc Galanter & Angela Frozena, “A Grin Without a Cat”: Civil Trials in Federal Courts (May 1, 2010) (unpublished manuscript), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Marc%20Galanter%20and%20Angela%20Frozena,%20A%20Grin%20Wit%20a%20Cat.pdf>.

¹³⁴ Moritz, *supra* note 13, at 1356.

¹³⁵ See Macchiaroli & Tarin, *supra* note 64, at 2.

¹³⁶ *Id.*

¹³⁷ See *id.* In just one instance of this phenomenon, *Hambleton Bros.*, the court recounted twenty-seven portions of the plaintiff’s deposition that he “clearly altered to allege facts sufficient . . . where none before existed.” 397 F.3d 1217, 1225 n.6 (9th Cir. 2005). The deponent originally asserted, for example, that he did not know what the defendant had said to deceive him; he then changed this answer to reference, for the first time, a conversation in 1996 or 1997 in which defendant directly deceived him.

Id.

¹³⁸ See generally Michael D. Moberly, *Applying the Sham Affidavit Doctrine in Arizona*, 38 ARIZ. ST. L.J. 995, 998–99 (2006) (discussing the use of the sham affidavit doctrine to preserve the integrity of the summary judgment process in Arizona and noting the doctrine’s acceptance in most state and federal courts).

¹³⁹ See, e.g., FED. R. CIV. P. 56(c); Burns v. Bd. of Cnty. Comm’rs, 330 F.3d 1275, 1280–81 (10th Cir. 2003).

introducing an affidavit contradicting earlier deposition testimony.¹⁴⁰ Courts developed the sham affidavit doctrine to constrain the practice.¹⁴¹ Under the doctrine, a court can protect the integrity of the summary judgment process by disregarding a sham affidavit that is inconsistent with the affiant’s earlier deposition testimony.¹⁴² From its origins in a 1969 Second Circuit decision,¹⁴³ the doctrine has spread and developed to the point where the majority of federal and state courts recognize it as a means of policing the discovery process and weeding out improper efforts to create factual issues before summary judgment disposition.¹⁴⁴

For the past decade, federal courts have noted the parallels between sham affidavits and errata sheet corrections.¹⁴⁵ They have done so with good reason. To fail to treat errata sheet corrections the same way as sham affidavits threatens to give so much latitude to deponents that it would effectively threaten to render Rule 56 procedures a nullity.¹⁴⁶ Summary judgment would hardly, if ever, be granted if Rule 30(e) was read to bestow upon all deposed parties free rein to negate damaging testimony after thirty days of consultation with their attorneys.¹⁴⁷

It would be disastrous to allow an expansive reading of the Rule’s language to essentially neuter summary judgment.¹⁴⁸ The simplified

¹⁴⁰ See *United States v. Krieger*, 773 F. Supp. 580, 587 (S.D.N.Y. 1991).

¹⁴¹ See Moberly, *supra* note 138, at 997–98.

¹⁴² *Id.*

¹⁴³ *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); see also Ryan A. Mitchell, Comment, *Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?*, 37 U. BALT. L. REV. 255, 258 (2008) (tracing the sham doctrine back to *Perma Research*). The court in *Perma Research* reasoned that permitting parties to create an issue of fact simply by submitting an affidavit contradicting their own prior testimony would “greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” 410 F.2d at 578.

¹⁴⁴ See Moberly, *supra* note 138, at 998; see also *Hinch v. Lucy Webb Hayes Nat’l Training Sch.*, 814 A.2d 926, 929 (D.C. 2003) (“Since *Perma*, all federal circuits that have considered applying the sham affidavit doctrine have adopted it in some form, as have most states.”). For an opposing view representing the minority federal position, see *Pfizer, Inc. v. Stryker Corp.*, 348 F. Supp. 2d 131, 136 n.11 (S.D.N.Y. 2004), which asserts that affidavit contradictions create credibility issues reserved for the trier of fact and resolved at the summary judgment phase in nonmovant’s favor.

¹⁴⁵ See, e.g., *Burns v. Bd. of Cnty. Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003) (“We see no reason to treat Rule 30(e) corrections differently than affidavits . . .”); see generally discussion *supra* Part II.B.2 (discussing several cases in which courts have pointed out the parallels between sham affidavits and errata sheet corrections).

¹⁴⁶ See *Eckert v. Kemper Fin. Servs., Inc.*, No. 95 c 6831, 1998 U.S. Dist. LEXIS 15788, *16–17 (N.D. Ill. Sept. 30, 1998) (arguing that Congress could not have written Rule 30(e) to permit the fabrication of sham issues of fact).

¹⁴⁷ See *id.*

¹⁴⁸ Of course, deponents are presumed still to be bound by the truth during these thirty days, and opposing counsel can use their fabricated alterations to effectively impeach them at trial. But the frequency with which these cases arise, and the fact that deponents can invoke their amended answers at trial in courts that follow the expansive approach, suggest that for scores of deponents the deterrence effect of these considerations is minimal.

standard of the Federal Rules for notice pleading depends for its efficacy on “liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.”¹⁴⁹ Denying summary judgment the power to function by allowing substantive deposition changes threatens to drown opposing parties in additional legal costs.¹⁵⁰ It also promises to further flood the federal system with lawsuits in which the only possible dispute of fact is one that deponents create themselves by the very act of altering the depositions. Confronting very similar circumstances, the sham affidavit doctrine sensibly refuses to recognize such “disputes” as the kind envisioned by Rule 56. By analogy, so must it also be with Rule 30(e) changes.

3. *“Plain Language:” Viewed in the Spirit and Context of a Clerical Purpose.*—Appeals to the plain language of Rule 30(e) are incomplete and misleading without reference to the Rule’s transcriptive focus. Read in historical context, the Rule appears to be distinctly clerical, ill-equipped—and never intended—to embrace substantive changes. Although its wording has changed over time, Rule 30(e) has retained one modest but steady focus: the who, how, and what of accurate transcription. The Rule is meant to secure an accurate representation of what was said, leaving to another day (and frequently to the mechanisms of Rule 56) the question of the meaning and implication of the deposition content for purposes of material factual disputes. The common understanding of Rule 30(e) has moved far afield from that mild ambition, giving us the confusion and circuit split we know today. Read in light of its history, the Rule clearly embraces a transcriptive focus.¹⁵¹

The original Equity Rule 67, and the twin Equity Rules 50 and 51 that succeeded it, had unmistakably clerical preoccupations with examiners of the court and stenographers.¹⁵² Amidst its provisions on scheduling and notice, Equity Rule 67 adjured the examiner to reduce the oral testimony to writing, either in a question–answer configuration or, with the parties’ consent, in narrative form.¹⁵³ Either party could request that the testimony

¹⁴⁹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

¹⁵⁰ *See, e.g., Hinch v. Lucy Webb Hayes Nat’l Training Sch.*, 814 A.2d 926, 929 (D.C. 2003) (“The purpose of the [sham affidavit] doctrine is to spare the moving party the needless effort and cost when a party’s prior statements show no actual factual dispute exists.”).

¹⁵¹ In Part I.B, *supra*, where this Comment outlined the history of Rule 30(e), it alluded to but did not unpack the fact that a stenographical focus threads together the Rule and its predecessors. This is because the aim in that Part was only to briefly unfold the Rule’s origin. But now it is time to pick up this thread again, because in addition to telling us how the Rule came to be, it also instructs us how we should read the Rule today.

¹⁵² Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649, 662–63 (1912) (repealed 1937); Rules of Practice for the Courts of Equity of the United States, 144 U.S. 689, 689–91 (1892) (repealed 1937).

¹⁵³ Rules of Practice for the Courts of Equity of the United States, 144 U.S. 689, 689–91 (1892) (repealed 1937).

be taken “by a skilful stenographer or by a skilful typewriter”—someone elected by the examiner and approved by the court or both parties.¹⁵⁴ The rule even developed a payment plan for stenographers: the party calling the deposed witness would cover their expenses in the first instance; thereafter, the court would mete out the costs between both parties.¹⁵⁵ Once the testimony was reduced to writing, whether by examiner or stenographer, Equity Rule 67 provided that its contents should be “read over to” the witness.¹⁵⁶ Thereafter, the witness was to sign the writing in the presence of the attendees, “provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.”¹⁵⁷

Equity Rule 67 said not a word further about the witness’s response to the deposition transcript. It mentioned nothing about corrections—in form *or* in substance—in its otherwise detailed description of the transcription process. The same was true for Equity Rules 50 and 51.¹⁵⁸ The new Equity Rules did, however, continue the fixation with the who and the how of transcription, as evidenced by the title of Equity Rule 50: “Stenographer–Appointment–Fees.”¹⁵⁹ This role was to be filled “[w]hen deemed necessary by the court or officer taking testimony”¹⁶⁰ The Rule envisioned a stenographer who would “take down testimony in shorthand, and, if required, transcribe the same.”¹⁶¹ The method of paying fees for this service was again set out in detail.¹⁶² Equity Rule 51 (“Evidence Taken Before Examiners, Etc.”) added a passage requiring objections during the deposition to be brief—a change that abuse of the old rule had made imperative.¹⁶³ Otherwise, though, Equity Rule 51 principally replicated the substance of Rule 67’s review provision.¹⁶⁴ The closest the rules came to addressing the question is the reasoning for a witness’s refusal to sign. Given that Equity Rule 50 allowed for recorders to write the testimony in shorthand, one can immediately imagine the errors, transcriptive in nature,

¹⁵⁴ *Id.* at 690.

¹⁵⁵ *Id.* at 691.

¹⁵⁶ *Id.* at 690.

¹⁵⁷ *Id.*

¹⁵⁸ Rules of Practice for the Courts of Equity of the United States, 226 U.S. 649, 662–63 (1912) (repealed 1937).

¹⁵⁹ *Id.* at 662.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 662–63.

¹⁶³ *Id.* at 663.

¹⁶⁴ *Id.* (“The testimony of each witness, after being reduced to writing, shall be read over to or by him, and shall be signed by him in the presence of the officer; provided, that if the witness shall refuse to sign his deposition so taken, the officer shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.”) (repealed 1937).

that could prompt a deponent to express frustration and refuse to sign the deposition.

The various versions of Rule 30(e), starting with its 1938 incarnation, permitted changes in form or substance at the deponent's request.¹⁶⁵ But these must be read in conjunction with the subject matter of the Equity Rule out of which Rule 30(e) emerged: transcription. That concern has remained central in the decades since. The 1993 advisory note, for example, explains that the committee added the thirty-day window for deposition changes in order "to reduce problems sometimes encountered when depositions are taken stenographically."¹⁶⁶ It is true that the advisory committee has never revised the Rule to indicate that changes in "form or substance" relate specifically to clerical errors. But by the same token, the committee has never amended the Rule or its advisory note to state clearly that it sets no restrictions either.¹⁶⁷

The transcriptive focus of the Rule's forebears provides a prism through which to interpret the phrase "changes in form or substance." When one reads Rule 30(e) in line with its origins and development, it becomes clear that Rule 30(e) was intended to target clerical corrections. Transcription errors can relate to matters of form as well as substance. Regarding form, a recorder might mistakenly type an assertion in the shape of a question or write out a deponent's aside to her attorney as if it were part of her answer. A stray or errant set of punctuation marks can misrepresent a witness's testimony, requiring the witness to make changes. The recorder's mistake could also be substantive in nature if the recorder omitted an important word from a deponent's answer or misheard a critical piece of what the deponent actually said.

The Rule's background also puts the lie to the notion that the use of the word "any"¹⁶⁸ frees the deponent to make literally any change that he or she wishes.¹⁶⁹ The use of "any" in the Rule's requirement that the officer "must attach any changes the deponent makes" has no such wide-ranging effect.¹⁷⁰ Common sense, as well as the focus on accurate transcription that cuts through the Rule, frames the "any" clause not as a deponent's free license to amend, but rather as an obligation upon the officer, in the name of accuracy,

¹⁶⁵ See discussion *supra* Part I.B.

¹⁶⁶ FED. R. CIV. P. 30(e) advisory committee's note (1993).

¹⁶⁷ Little can be made of the fact that the Supreme Court has yet to weigh in on the subject. In the first place, the issue of errata alterations would likely require interlocutory review, which the Court has shown reluctance to undertake. Further, the Court has repeatedly explained that the scope of the Federal Rules can only be altered by amendment, not by judicial interpretation. See *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

¹⁶⁸ FED. R. CIV. P. 30(e)(2).

¹⁶⁹ *But see Gill*, *supra* note 94, at 374–75 (relying upon one of the meanings of "any" listed in the Merriam-Webster Dictionary—"an undetermined number or amount"—along with the presence of the phrase "form or substance" to claim that "Rule 30(e) permits all changes to depositions").

¹⁷⁰ FED. R. CIV. P. 30(e)(2).

not to omit *any* of the changes that the deponent attempts to make. Even a judge who fervently subscribes to the strict reading of Rule 30(e) would want a complete record of the deponent’s proposed alterations.

4. *Even Liberal Discovery Processes Have Outer Limits.*—Over sixty years ago, in its oft-cited ruling of *Hickman v. Taylor*, the Supreme Court made it explicit that deposition-discovery rules for federal procedure “are to be accorded a broad and liberal treatment.”¹⁷¹ In advancing the stage at which a disclosure can be compelled, the Court reasoned that the process could reduce the possibility of surprise.¹⁷² But, the Court cautioned, “discovery, like all matters of procedure, *has ultimate and necessary boundaries.*”¹⁷³ As an example, the Court in *Hickman* pointed to Rule 30, as well as Rule 31, to indicate that limitations inevitably arise on the liberality of the discovery process “when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry.”¹⁷⁴

The outer, commonsense boundaries to which the Supreme Court refers militate against an expansive reading of Rule 30(e). In no respect can the federal discovery process be depicted as some sort of sacrosanct, infinitely open undertaking. The deposition-discovery process is restricted, quite intentionally, at points all along the spectrum to combat abuse, minimize prejudice, and promote the fair administration of justice. When deponents change their depositions in ways that add central details unspoken during the original testimony or that flatly contradict what was spoken in that earlier, supervised setting, they engage in precisely the sort of bad faith conduct our discovery process aims to check.

The review period following the transcription of a deposition is one of those points of limitation. Restrictions are crucial, and not merely the technical requirements (e.g., the thirty-day window, the request to the officer to review) that circumscribe the process and become oddly central to the analysis of some courts’ disposition of Rule 30(e) questions.¹⁷⁵ Rather, restrictions are vital because the length of the review period implicates the fundamental concerns of the process: abuse, prejudice, and fair—as well as speedy—justice.

The temptation for abuse under a loosely construed Rule 30(e) is immense. It touches deponents as well as their legal counsel,¹⁷⁶ who are likely to have a better sense of what portions of a deposition are potentially

¹⁷¹ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

¹⁷² *Id.*

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ *Id.* at 507–08.

¹⁷⁵ See discussion *supra* Part III.B.

¹⁷⁶ See Dickerson, *supra* note 65, at 52 (“[S]ome attorneys encourage the deponent to change damaging testimony. Such conduct raises serious legal and ethical questions, because directing a witness to change his testimony is equivalent to witness coaching.”).

damaging.¹⁷⁷ Because of this, it is the attorneys, and not the deponents themselves, who will most probably craft the deposition changes.¹⁷⁸ As long as an expansive reading of Rule 30(e) prevails, courts will tempt attorneys, who are given a month away from oversight to mull their clients' testimony, to take actions that benefit their clients but which flout the ethical rules imposed upon their representation.¹⁷⁹ The same changes that opinions like *Lugtig* allow without any judicial scrutiny¹⁸⁰ can represent serious violations of the Model Rules of Professional Conduct for the lawyer who makes them.¹⁸¹ The Model Rules interdict attorneys from counseling or assisting a witness to testify falsely,¹⁸² to falsify evidence knowingly,¹⁸³ or generally to engage in conduct that is prejudicial to the administration of justice.¹⁸⁴ A single round of errata work on a client's deposition has the potential to implicate every single one of these ethical proscriptions. The Model Rules undoubtedly deter most attorneys from making good on their worst impulses. All the same, there is no reason to tempt attorneys to flout them with an expansive reading that is at odds with the purpose and history of Rule 30(e).

Interpreting Rule 30(e) involves answering integral questions about the nature of depositions and their place in a discovery process that, while liberal, is still circumscribed by common sense: what are depositions designed to avoid, what makes them distinct, and what purposes do they serve?

The deposition today is what it was in 1937: formal and adversarial. This is due in no small measure to the belief that a structured, adversarial milieu is likely to promote reliability and lead to a just outcome.¹⁸⁵ At the

¹⁷⁷ See, e.g., *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486 (9th Cir. 1991). In that case, the deponent was satisfied that his testimony was "correct and truthful," but he gave leeway to his lawyer to alter any of his responses. *Id.* at 488. The lawyer obliged, making thirty-six substantive changes that frequently reversed the deponent's "correct and truthful" answers to questions that were "of central importance in the upcoming summary judgment hearing." *Id.* The circuit court upheld dismissal of the case and imposed double costs and attorney's fees as sanctions for falsifying evidence. *Id.* at 488–89.

¹⁷⁸ Macchiaroli & Tarin, *supra* note 64, at 11.

¹⁷⁹ See Dickerson, *supra* note 65, at 57–58.

¹⁸⁰ See 89 F.R.D. 639, 641–42 (N.D. Ill. 1981).

¹⁸¹ See Dickerson, *supra* note 65, at 57–58.

¹⁸² MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2010).

¹⁸³ *Id.* R. 3.3(a)(4) ("A lawyer shall not knowingly offer evidence that the lawyer knows to be false.").

¹⁸⁴ *Id.* R. 8.4(d).

¹⁸⁵ See, e.g., *id.* R. 3.3 cmt. 11 (2010) (invoking "the truth-finding process which the adversary system is designed to implement"); *Boyd v. Univ. of Md. Med. Sys.*, 173 F.R.D. 143, 144 (D. Md. 1997) (stating that "[t]he setting for a deposition mimics trial" with the one exception being the presence of a judge); Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 500 (1990) ("The fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting

very least, as with contemporaneousness, this structure limits the deponent’s opportunity for dishonesty.¹⁸⁶

Thus, we breathe an air of formality into deposition proceedings in order to suggest that the deposition is an analog for the testimonial setting of the trial. In the process, we also demonstrate that a liberal discovery process is not the same as a boundless one. Thus, even though no judge presides over the process, the deposition still bears the mark of a trial-like setting, circumscribed by rules and infused with a degree of solemnity, to make this vital part of the discovery process more reliable and less prone to abuse.¹⁸⁷ Hence the Federal Rules require deponents to swear an oath before giving answers.¹⁸⁸ They require the deposition to be taken before an officer of the court who is authorized to administer oaths.¹⁸⁹ They permit counsel to subpoena a deponent to compel his or her appearance.¹⁹⁰ The Rules allow for the presence of opposing counsel and permit both examination and cross-examination.¹⁹¹ They provide for the expression of objections to questions.¹⁹² They further provide for stipulations by the parties.¹⁹³ The Rules prohibit the taking of a deposition before a person who is a party’s relative, employee or attorney, or who is financially interested in the action.¹⁹⁴

Contrast these formal requirements with the postdeposition review period that follows from an expansive approach, in which the liberal discovery process would seem to lose any substantive (as compared to procedural) requirements. Under the liberal reading of Rule 30(e), the mechanisms that endow the deposition with a trial-like aura have little

will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute.”).

¹⁸⁶ It is wishful thinking to imagine that depositions might take on a less adversarial character so long as we continue to structure them as a back-and-forth between a witness and opposing counsel. And there is no persuasive reason to walk away from such a structure. The interaction between one party and the other party’s attorney creates an inevitable tension; there are no delusions about where each side’s loyalties lie. The structure of the deposition functions as a check on the temptations for abuse that this tension may produce.

¹⁸⁷ See *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947) (pointing to Rules 30(b) and (d), governing depositions, as examples of points in the Federal Rules where liberal discovery gives way to limits that are deliberately put in place to curb abuse and bad faith).

¹⁸⁸ FED. R. CIV. P. 30(b)(5)(A)(iv).

¹⁸⁹ FED. R. CIV. P. 28(a)(1)(A)–(B).

¹⁹⁰ FED. R. CIV. P. 45(a)(1)(B).

¹⁹¹ FED. R. CIV. P. 30(c)(1).

¹⁹² FED. R. CIV. P. 30(c)(2).

¹⁹³ FED. R. CIV. P. 29.

¹⁹⁴ FED. R. CIV. P. 28(c). For an opposing view about the appropriateness of the foregoing cited features of the deposition-taking process, see Moritz, *supra* note 13, at 1373–74. In keeping with Moritz’s view of the Federal Rules on deposition procedure as atavistic remnants of an earlier purpose, he argues that rules regarding notice, officer qualifications, oath-taking, and the reduction of testimony to writing “likely preference neither fact-gathering nor testimony-preservation.” *Id.*

importance. Deponents take no additional oath to promote truthful responses during the review period and may take the entire thirty days to ruminate over their answers in concert with their own attorneys.¹⁹⁵ They may do so away from the gaze of opposing counsel or an officer of the court. And under the expansive view of Rule 30(e), they may make whatever changes they please to their sworn testimony during this period of zero oversight. Why should we permit deposition answers to be “corrected” substantively in the absence of the very strictures that govern every step of their production in the first place?

5. *The Deposition Process Is Already Designed to Discourage Abuse.*—An expansive reading of Rule 30(e) is also incompatible with other prohibitions imposed on the deposition process. Perhaps the most damning shortfall of the *Lugtig* approach is the striking way in which that interpretation is out of tune with the established guidelines for attorneys’ communication with their witness clients during the deposition process.

First, the expansive reading of Rule 30(e) contradicts prevailing thought about private conferences between deponents and their attorneys during depositions. After the 1970 revision of Rule 30, as part of an effort to deter deposition abuse, federal courts began targeting attorneys’ efforts to talk privately with their deposed clients once the deposition had started.¹⁹⁶ Courts promulgated local rules and handed down a number of decisions aimed to establish a dictate of “no consultation” and stamp out practices of “witness-coaching.”¹⁹⁷ One of the most frequently cited cases to tackle this issue was *Hall v. Clifton Precision*,¹⁹⁸ which held that it was improper for deponents to confer with their attorneys at any time between the beginning and conclusion of a deposition, including during recesses, but excepting discussions over whether to assert a privilege.¹⁹⁹ In support of its conclusion, the court in *Hall* cited to a number of orders from other courts “holding that such conversations are not allowed.”²⁰⁰ Since its entry, *Hall* has in turn become controlling case law that is widely and approvingly

¹⁹⁵ See FED. R. CIV. P. 30(e).

¹⁹⁶ See Moritz, *supra* note 13, at 1396; see also A. Darby Dickerson, *The Law and Ethics of Civil Depositions*, 57 MD. L. REV. 273, 282–86 (1998) (documenting jurisdictional efforts to limit private conferences and other practices through local rules).

¹⁹⁷ See David H. Taylor, *Rambo as Potted Plant: Local Rulemaking’s Preemptive Strike Against Witness-Coaching During Depositions*, 40 VILL. L. REV. 1057, 1062–63 & nn.22–25 (1995) (listing in detail a variety of local rules meant to quash private conferences, whether only during the actual questioning—except in the case of asserting a privilege—or during the questioning and recesses).

¹⁹⁸ 150 F.R.D. 525 (E.D. Pa. 1993); see also Moritz, *supra* note 13, at 1396 (describing *Hall* as “[o]ne of the most widely reported cases from this era”).

¹⁹⁹ *Hall*, 150 F.R.D. at 531–32.

²⁰⁰ *Id.* at 527 & n.2; see also Taylor, *supra* note 197, at 1099 n.215 (summarizing these cited orders and noting that they did not extend into short recesses between questions).

cited.²⁰¹ More and more courts follow *Hall*, holding that private conferences, when they involve advice for specific questions and answers, equate to impermissible witness coaching.²⁰² This situation mirrors that of an attorney advising a client to make specific changes to his deposition transcript.²⁰³ If it is forbidden in one circumstance, it should be forbidden in the other as well.²⁰⁴

Second, and more directly related to the scenario that Rule 30(e) covers, the expansive reading stands at odds with the reasoning that underpins restrictions on attorney communication elsewhere within Rule 30 itself. In 1993, the advisory committee revised Rule 30 to regulate the raising of objections during depositions by deponents’ counsel.²⁰⁵ The command that the committee put in place has moved from its original location in Rule 30(d) to 30(c)(2), but its language remains virtually identical. It reads: “An objection must be stated concisely in a nonargumentative and nonsuggestive manner.”²⁰⁶ The committee cited, as grounds for the requirement, its concern with “lengthy objections and colloquy, often suggesting how the deponent should respond.”²⁰⁷ To combat this suggestive practice and to protect the integrity of the deposition, Rule 30 now significantly constrains the way attorneys can communicate with the deponent—directly or indirectly—about their answers. Rule 30(c)(2) does not create safeguards allowing for the trier of fact to make credibility determinations about a deponent’s answers in light of the attorney’s longwinded and suggestive objections. Rather, the Rule nips in the bud the problematic practice it identifies and actively excludes the practice from the deposition process. It would render Rule 30 incoherent to argue in the face of Rule 30(c)(2) that Rule 30(e) allows deponents in tandem with their attorneys to make *any* change they wish in form or substance, leaving the policing up to the trier of fact far down the road of litigation.

²⁰¹ See Taylor, *supra* note 197, at 1099–1100; see also *id.* at 1098 n.212 (laying out four district court cases that have cited *Hall* for the proposition that attorneys should not confer with deponents during questioning); Dickerson, *supra* note 65, at 61 n.320 (listing opinions in different jurisdictions that have approvingly quoted *Hall*).

²⁰² See, e.g., Chassen v. Fid. Nat’l Title Ins. Co., No. 09-291, 2010 WL 5865977, at *2 (D.N.J. July 21, 2010) (granting an additional deposition to discover attorney–client conversations that happened during a recess at a previous deposition); Ngai v. Old Navy, No. 07-5653, 2009 WL 2391282, at *4–6 (D.N.J. July 31, 2009); Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 527, 532–33 (M.D. Pa. 2002); Calzaturificio S.C.A.R.P.A. S.P.A. v. Fabiano Shoe Co., 201 F.R.D. 33, 40 (D. Mass. 2001).

²⁰³ Dickerson, *supra* note 65, at 60.

²⁰⁴ See *id.*

²⁰⁵ Moritz, *supra* note 13, at 1395.

²⁰⁶ FED. R. CIV. P. 30(c)(2).

²⁰⁷ FED. R. CIV. P. 30(d) advisory committee’s note (1993).

IV. FIXING THE SPLIT BY FIXING THE RULE

The expansive approach to errata changes conflicts with the history of Rule 30, the purpose of Rule 30, and basic notions of fair and speedy justice. As discussed earlier, even circuit courts rejecting *Lugtig* and its progeny have differed in their implementation of an alternative.²⁰⁸ This Part argues that the answer is to return to the reasoning of *Greenway*. It proposes that federal courts should adopt a strict reading of Rule 30(e) that limits errata alterations to clerical changes in which transcription errors have affected the witness's testimony "in form or substance."²⁰⁹ And in order to avoid further confusion, the Rule itself should be amended to reflect this approach.

A. *A Return to Clerical Concerns*

We have seen that Rule 30(e) is deeply rooted in a clerical history, aimed at accurately transcribing what was said and leaving to another day the question of clarifying what the words mean.²¹⁰ It is difficult to reconcile the expansive, "majority" approach with the history of the Rule or with the spirit undergirding the boundaries imposed upon the liberal discovery process. Against this backdrop, there can be no room for a reading of the Rule that "places no limitations on the type of changes that may be made" to a deposition.²¹¹ The task, therefore, must be to restore the Rule to its proper function—out of respect for its history, out of fidelity to the formalized structure of the deposition, and out of consideration for the party on the opposite side of a substantively altered deposition.²¹² While some of the other strict-reading cases point us in the right direction, we must ultimately embrace the approach of *Greenway* in order to restore deposition changes to their proper context.

On the subject of fairness to party opponents, the Third Circuit's 2010 decision in *EBG, Inc. v. Clark Building Systems, Inc.*²¹³ makes a trenchant observation. The court noted that "[p]reservation of the original testimony for impeachment at trial serves as cold comfort to the party that should have prevailed at summary judgment."²¹⁴ But the opinion fumbles the opportunity to fully do right by the historical context of Rule 30(e). The "more flexible

²⁰⁸ See discussion *supra* Part II.B.

²⁰⁹ FED. R. CIV. P. 30(e).

²¹⁰ See discussion *supra* Part III.C.3.

²¹¹ *Podell v. Citicorp Diners Club, Inc.*, 112 F.3d 98, 103 (2d Cir. 1997) (quoting *Lugtig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981)).

²¹² See *Dickerson*, *supra* note 65, at 65 (observing, without explicitly endorsing the idea, that changing the Rule so that most changes would be "limited to 'form'" would prevent deponents from changing substantive testimony to bolster their position).

²¹³ 618 F.3d 253 (3d Cir. 2010).

²¹⁴ *Id.* at 268.

approach” that *Clark Building Systems* adopted²¹⁵ permits courts to admit contradictory errata under two fuzzy conditions: if “sufficiently persuasive reasons” are given or “if other circumstances satisfy the court that amendment should be permitted.”²¹⁶

Judge Posner’s decision in *Thorn v. Sundstrand Aerospace Corp.*²¹⁷ takes us closer to a clerical reading because it categorically bars alterations directly at odds with sworn testimony²¹⁸ unless deponents can show the change aims to undo an error in transcription.²¹⁹ But the decision derails when it suggested that the deponent’s effort, “whether or not honestly, . . . to change his deposition from what he said to what he meant” was permitted by Rule 30(e).²²⁰ Even the *Hambleton Bros.* and *Burns* cases that take a harder line against sham-style changes fail to go quite far enough, in that they adopt the position that “Rule 30(e) is to be used for corrective, and not contradictory, changes,”²²¹ but do not sufficiently define “corrective.” Without more, the word could be stretched to cover additional details, affixed to previous answers in order to “correct” the conclusions that might have been drawn from those previous, unqualified answers.

We find ourselves, then, back where we began: with *Greenway*. Judge Little’s terse opinion takes proper measure of the purpose of Rule 30(e) and leaves no room for its clerical context to be ignored. It protects the opposing party and honors the integrity of both the deposition process and the transcriptive procedure that the Rule was intended to facilitate. Following *Greenway*, the errata phase of the deposition process should be strictly policed, and deponents should be allowed to make only clerical changes affecting form²²² (such as an assertion shown as a question, or a misspelled name) or substance (such as the accidental omission of the word “not”).²²³

B. Timing and Procedure

To accomplish this return to first principles of transcriptive accuracy and fairness to all parties, the advisory committee should revise Rule 30(e)

²¹⁵ *Id.* at 269 (quoting *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007) (internal quotation mark omitted).

²¹⁶ *Id.* at 270. The opinion does note one scenario where changes are permitted that seems to honor the clerical history of Rule 30(e): “[I]f the proposed amendments truly reflect the deponent’s original testimony.” *Id.*

²¹⁷ 207 F.3d 383 (7th Cir. 2000).

²¹⁸ *See id.* at 389.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Hambleton Bros. Lumber v. Balkin Enters., Inc.*, 397 F.3d 1217, 1226 (9th Cir. 2005); *accord Burns v. Bd. of Cnty. Comm’rs*, 330 F.3d 1275, 1282 (10th Cir. 2003).

²²² *See Greenway v. Int’l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992).

²²³ *See id.*

to reflect *Greenway's* thinking.²²⁴ The Rule ought to maintain its directive to provide the reasons for all changes. In doing so, we would keep the burden where it belongs: on the deponent, who is forced to show how the changes cure errors and represent what was actually said at the deposition. The updated version of the Rule should thus, when there is clerical error, grant deponents a period of time in which: "(A) to review the transcript or recording; and (B) if there are errors in the *transcription or recording*, either in form or substance, to sign a statement listing the changes and the reasons for making them."

Choosing the number of days for any window of time under procedural rules inevitably carries some degree of arbitrariness (why five days, for example, instead of six, or eight?). But because the acceptability of deposition changes depends on what was actually said and inaccurately transcribed, the thirty-day window currently laid out in the Rule is too long by any measure.²²⁵ The point is to correct the transcription flaws while memories are still fresh and while the court can check with the reporter who took down the deposition as well as the attorney who posed the questions. Sister provisions of the Federal Rules relating to depositions give parties two weeks with which to work. Under Rule 32, for instance, anything under fourteen days is considered "short notice" for deposition purposes, and attorneys cannot use depositions against a party who receives less notice than this and moves for a protective order.²²⁶ Similarly shortening the window in Rule 30(e)(1) to two weeks would better serve the need for fresh recollection and would be consistent with the time frame found within other deposition strictures. Reducing the time period also gives deponents and their attorneys sixteen fewer days in which to battle the temptation to try more substantive changes. The deponent's attorney would be required to act quickly before the opponent incorporates the deposition into the sort of summary judgment motion that would otherwise likely trigger improper changes.

C. Policing the Errata Sheet

Once the errata sheet has been submitted through the officer of the court,²²⁷ the procedure would largely track its current route. Most importantly, a copy would issue to the attorney from the opposing side who conducted the deposition.²²⁸ If the changes do not conform to the

²²⁴ Cf. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (explaining that matters covered by the Federal Rules of Civil Procedure must be changed by the process of amending the Rules rather than by judicial interpretation).

²²⁵ See FED. R. CIV. P. 30(e)(1).

²²⁶ FED. R. CIV. P. 32(a)(5)(A). Under the previous version, the window was eleven days rather than fourteen. FED. R. CIV. P. 32 (2006).

²²⁷ FED. R. CIV. P. 30(e)(2).

²²⁸ FED. R. CIV. P. 30(f)(1).

requirements of the tightened Rule 30(e), counsel may move to keep out the changes. In egregious cases where the deponent’s conduct amounts to “imped[ing], delay[ing] or frustrat[ing]”²²⁹ the deposition process, the court should be able, in addition to disregarding the changes, to sanction the deponent or her attorneys.²³⁰

CONCLUSION

As *Greenway v. International Paper* phrased it eighteen years ago, “[a] deposition is not a take home examination.”²³¹ The expansive interpretation of Rule 30(e) is fatally flawed because it treats it as one. It ignores the history and clerical function of the Rule itself, hints at a liberal discovery process that is boundless rather than circumscribed by common sense, collapses important distinctions between depositions and interrogatories, ignores the deliberately formal, adversarial setting of the deposition, tempts deponents and (especially) their attorneys to create sham factual disputes, and offers small consolation to opposing parties for whom summary judgment may otherwise be warranted. Ultimately, a strict reading of Rule 30(e) must prevail. And to end all confusion about the issue, the Rule itself should be amended to permit changes “in form or substance” only where there has been a breakdown in the transcription process with which the Rule should fundamentally be concerned.

²²⁹ FED. R. CIV. P. 30(d)(2).

²³⁰ See, e.g., *Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 1273, 1302 (11th Cir. 2010) (affirming the discretionary sanctions leveled by district court under 28 U.S.C. § 1927 (2006) against attorneys who submitted a sixty-three-page errata sheet with 868 alterations of plaintiff deponent’s testimony).

²³¹ 144 F.R.D. 322, 325 (W.D. La. 1992).

