This article was published in a slightly different form in the 2008 issue of the
Federal Courts Law Review.

Rewriting the Record: A Federal Court Split on the Scope of Permissible Changes to a Deposition Transcript

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Introduction

In a deposition—as opposed to a cross-examination at trial—testimony is elicited prior to all the facts being known and prior to opposing counsel having an opportunity to fully prepare a witness's testimony. In many instances, the lawyer taking a deposition will seek to obtain straightforward admissions that can later form the basis of a motion for summary judgment. Even when conducting a deposition to discover facts, a skilled lawyer will be cognizant of what will support or defeat summary judgment. A practitioner's early focus on summary judgment cannot be overestimated.[1] Summary judgment is an opportunity for courts to reduce overcrowded dockets and spare limited judicial resources. Under these circumstances, a deponent's ability to correct a damaging statement can be frustrating to the lawyer who obtained the admission.

Rule 30 of the Federal Rules of Civil Procedure prescribes the manner in which depositions are conducted in federal court.[2] Rule 30 provides the circumstances in which a deposition may be taken, the necessary notice required to be given to a deponent and the appropriate duration of a deposition. A party's ability to amend a deposition transcript is governed by section (e) of Rule 30. Section (e) states:

> If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate[3] prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.[4]

In short, Rule 30(e) allows deponents to make "changes in form or substance."[5] Despite this plain language, federal courts are split over the scope of permissible changes that can be made pursuant to Rule 30(e).

The majority of federal courts conclude that a deponent is free to make any change to a deposition transcript and consider it beyond the purview of the courts to second-guess the sufficiency, reasonableness or legitimacy of the reasons provided for the changes.[6] To prevent abuse of Rule 30(e), these courts

require the maintenance of both the original and modified transcripts as part of the record and under certain circumstances permit the party taking the deposition to re-examine the deponent regarding the basis for making the changes.

Courts supporting a narrow interpretation of Rule 30(e) focus on the strategic interest of taking a deposition: namely to capture and preserve testimony in an adversarial manner. These courts interpret Rule 30(e) as permitting the correction of transcription errors—not the substantive rewriting of the record. The deletion of the original transcript after submission of an errata sheet reinforces the concerns of the minority. While one might expect corrections of typographical errors to become part of the record, a problem arises when the changes sought to be made are substantive in nature. As a result, a party can simply rewrite the record of a deposition and replace unfavorable responses to questions with carefully crafted answers weeks after the deposition has concluded. This unexpected result motivated one district court to reject wholesale substantive changes to a transcript, reasoning that a deposition is not a "take-home examination."[7] In response to similar complaints in the context of summary judgment, certain courts have adopted the "sham affidavits" rule to prohibit parties from attempting to defeat summary judgment by submitting an affidavit contradicting the party's previous deposition testimony.[8]

This article examines the legal reasoning and analysis of both the majority and minority views and highlights factors that should be considered by the Rules Committee.[9] To promote uniformity among the courts and to provide litigants with certain expectations on how their litigation will proceed, this article recommends that Rule 30(e) be amended.

I. Interpretations of Federal Rule of Civil Procedure 30(e)

A. Permitting Only Transcription Changes

Some courts permit deponents to correct only transcription errors. The leading case supporting this proposition is *Greenway v. International Paper Company*.[10] In *Greenway,* the plaintiff made 64 corrections to her deposition.[11] The changes were necessary, she explained, because they made her answers clearer, more accurate and more complete.[12] The defendants objected to the corrections, arguing that they "exceeded the bounds permitted by [Rule] 30(e)."[13] The district court agreed.

The district court found the changes excessive and contradictory to the deponent's testimony elicited at the deposition. Plaintiff's answers were changed from "No" to "Yes" and "Yes" to "No."[14] Rule 30(e), the court explained, could not "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."[15] The court concluded that the true purpose of Rule 30(e) was to permit only transcription corrections, "i.e., he reported 'yes' but [the deponent] said 'no.'"[16] In striking the changes, the district court refused to relegate a deposition to the level of "a take-home examination."[17] Thus, under *Greenway,* Rule 30(e) permits the correction of errors in transcription, not substance.

B. Permitting Substantive Changes that Clarify and Explain a Deponent's Answers

Some courts invoke *Greenway's* language (quoted above) in agreeing that Rule 30(e) must have some limitations. Yet unlike *Greenway,* these courts have taken a middle-of-the-road approach, finding that Rule 30(e) permits substantive changes that clarify and explain a deponent's answers.

In *DeLoach v. Philip Morris Companies,* defendants sought to strike plaintiffs' deposition errata sheets that contained changes beyond typographical errors.[18] Rule 30(e), the defendants contended, permitted changes to correct transcription errors, not to alter and clarify answers given under oath.[19] The court disagreed and denied the defendants' motion to strike, reasoning that certain substantive changes are permitted under Rule 30(e). The court noted that during their deposition, the plaintiffs were asked about their understanding of the third amended complaint; plaintiffs did not have a copy of the complaint with them.[20] After the deposition, the plaintiffs reviewed the third amended complaint

and changed their testimony. The changes, the court explained, neither contradicted the deposition testimony nor "add[ed] new facts to support asserted claims[.]"[21] The changes clarified and explained the plaintiffs' answers based upon their subsequent review of the third amended complaint. Thus, under *DeLoach,* changes that clarify, correct a misstatement resulting from an inaccurate recollection of the pleadings, or correct a response resulting from a misunderstanding of the question are permitted under Rule 30(e).[22]

In *Rios v. Bigler,* Gloria Rios sued Dr. Lauren Welch for medical malpractice for failing to diagnose and treat her properly.[23] Rios's expert, Dr. Michael Stanton-Hicks, testified in his deposition that he did not believe Dr. Welch breached the duty of care by failing to diagnose Rios's condition.[24] After Dr. Stanton-Hicks's testimony, Dr. Welch moved for partial summary judgment. Dr. Stanton-Hicks then corrected his deposition in an errata sheet, explaining that he had not read Rios's entire testimony when he testified.[25] As Dr. Stanton-Hicks's corrected deposition supported Rios's claim, Rios strongly urged the court to consider the errata sheet in deciding Dr. Welch's summary judgment motion.[26]

In granting in part and denying in part summary judgment, the court declined to consider the errata sheet. It decided that deponents may not use errata sheets "to alter what has been said under oath."[27] Rule 30(e), the court continued, did not permit a deponent "to virtually rewrite portions of a deposition, particularly after the defendant has filed a summary judgment motion."[28] Rather, Rule 30(e) permits the deponent "to correct errors or to clarify or change an answer when a question is misunderstood."[29] The court therefore chose to consider only "those changes which clarify the deposition and not those which materially alter the deposition testimony as a whole."[30]

Applying this interpretation of Rule 30(e), the court disregarded Dr. Stanton-Hicks's errata sheet. The court refused to credit Dr. Stanton-Hicks's explanation that he "did not have the benefit of [Rios's] full deposition testimony before he expressed his unqualified opinions."[31] Rios, the court noted, was responsible for ensuring "that her expert was fully prepared and informed *before* the expert provided unwavering testimony on the issue of breach of duty to diagnose."[32] Rios "had a full opportunity to cross-examine this witness at the deposition to elicit any additional opinions and chose not to do so."[33] The court decided that allowing Dr. Stanton-Hicks to change his testimony would deprive Dr. Welch of the opportunity to question him about his new opinion.[34] Deciding that Rule 30(e) did not permit such changes, the court declined to consider the errata sheet.[35]

In *Hambleton Bros. Lumber Co. v. Balkin Enterprises,* the defendant moved to strike the plaintiff's deposition corrections submitted after the defendant moved for summary judgment.[36] The district court granted the motion, and the Ninth Circuit affirmed.[37] The Ninth Circuit noted that Rule 30(e) requires the party offering deposition corrections to provide a statement "giving reasons for the corrections."[38] As explained by the court, "the statement permits an assessment concerning whether the alterations have a legitimate purpose."[39] The court found the plaintiff's failure to provide a statement to mean "the corrections were not corrections at all, but rather purposeful rewrites tailored to manufacture an issue of material fact" to defeat summary judgment.[40]

The court likened such corrections to sham affidavits designed to create a material factual dispute by contradicting the deponent's prior deposition testimony.[41] As the court had prohibited sham affidavits, the court likewise prohibited sham corrections offered under Rule 30(e).[42] It explained that although Rule 30(e) "permits corrections 'in form or substance,' this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment."[43] Rule 30(e), the court concluded, permits "corrective…not contradictory, changes."[44]

C. Permitting All Types of Changes

Other courts have interpreted Rule 30(e) to permit all types of changes, placing no limitation on substance,

materiality, or number. They justify a broad reading of Rule 30(e) as promoting accuracy and truthfulness without prejudicing the opposing party.[45] As the district court in *North Trade United States, Inc. v. Guinness Bass Import Company* reasoned:

> The rationale for allowing material changes to testimony is that the original answers to the deposition questions will remain part of the record and can be introduced at trial. Since the prior testimony is not removed from the record, the deponent may be cross-examined and impeached by any inconsistencies in his testimony. Under this approach, the finder of fact may make a determination as to the credibility of the deponent, thus reducing the risk that the record can be manipulated.[46]

Under this rationale, any unfairness to the opposing party in permitting the deponent to change its deposition without limit is balanced by keeping the original transcript in the record "for impeachment or further clarification."[47]

Podell v. Citicorp Diners Club, Incorporated illustrates how courts have applied a broad interpretation of Rule 30(e). Gary Podell sued TRW, Inc., a credit reporting agency, under the Fair Credit Reporting Act (FCRA) for failing to conduct proper investigations of disputed credit entries.[48] In particular, Podell claimed that TRW failed to send him an updated credit report confirming the validity of disputed credit entries in violation of the FCRA.[49]

Podell disputed that TRW sent him a confirmation. In his deposition, Podell testified that he did not believe TRW failed to send him a confirmation but that he might not have received the confirmation.[50] Podell then reviewed his deposition transcript under Rule 30(e) and crossed out his "damaging responses, and explained his doing so by annotations in the transcript: 'Speculation is improper. I did not receive a response to my July 2, 1991, letter to TRW' and at one point he noted: 'I did not receive anything.'"[51] TRW nonetheless moved for summary judgment, arguing that the FCRA required it only to send the confirmation, not to ensure that Podell received it.[52] The district court granted TRW summary judgment.[53]

On appeal, Podell argued that the district court erred in granting summary judgment because it relied on his original, not his amended, deposition answers.[54] He added that because Rule 30(e) permitted him to amend his deposition by replacing his old answers with new ones, the district court should have relied on his new answers.[55] Although it rejected Podell's argument and affirmed the district court, the Second Circuit agreed that, according to Rule 30(e)'s plain language, deponents may make "changes in form or substance" to their testimony.[56] It disagreed, however, that the changed answers should replace the original ones: "'Nothing in the language of Rule 30(e) requires or implies that the original answers are to be stricken when changes are made.'"[57] The original answers, it declared, "'will remain part of the record and can be read at the trial,' and the deponent is 'free to introduce the amended answer and explain the reasons for the change.'"[58] The Second Circuit crafted such a safeguard to discourage parties from abusing Rule 30(e)'s plain language permitting all deposition changes.

Like the Second Circuit in *Podell,* the district court in *Lugtig v. Thomas* permitted counsel to reopen the deposition to remedy excessive amendment to the deposition transcript.[59] The changes in *Lugtig* were purely substantive and "not corrections of typographical or transcription errors."[60] On thirty occasions, the defendant retracted responses, saying that he neither had an answer nor could remember.[61] "At other points, an answer of 'yes' was changed to 'no' or an answer of 'no' was changed to 'yes.'"[62] The defendant also changed numerical figures: "an answer of six feet, for example, was changed to read eight to ten feet; an answer of three minutes was changed to 10 – 20 seconds."[63] Defendant provided no explanation for the changes but rather "recorded on the last page of the corrections that Mr. Thomas's reasons for changing these answers are that he didn't understand the question or was confused at the time of answering."[64] While allowing the

changes to be made, the district court permitted counsel to reopen the deposition examination and make inquiries regarding the reasons and circumstances surrounding the changes.[65] The district court also required the defendant to state the specific reason for the particular change and make the changes directly on the original transcript, not on appended sheets.[66]

In addition to the *Podell* and *Lugtig* courts, other courts adopting the broad interpretation have found the preservation of both the original and amended transcripts as part of the record and the potential for reopening a deposition to be sufficient safeguards against abuse of Rule 30(e).[67]

II. Criticisms of the Majority View

As noted, courts adopting the broad interpretation have reasoned that it promotes accuracy.[68] Interpreting the rule broadly, however, might have the opposite effect of obfuscating truth and accuracy.

A. Contemporaneousness Lessens the Likelihood of Conscious Misrepresentation

The Federal Rules of Evidence provide a hearsay exception for res gestae, expressing "the notion that the relationship between event and statement was so close that the happening impelled the words out of the declarant."[69] Such "contemporaneousness lessens the likelihood of conscious misrepresentation."[70] Applying this notion to the Rule 30(e) context, the declarant's contemporaneous responses at a deposition are likely to be more truthful and accurate than responses carefully crafted days later. Admittedly, the hearsay exception refers to statements made by a declarant responding to a particularly startling event, not to statements made by a deponent recounting the event after it has long passed. Nonetheless, the basic notion that contemporaneousness lessens the likelihood of conscious misrepresentation contradicts the majority's rationale that unlimited amendment promotes truth and accuracy.

B. Undue Influence by Counsel

The rationale might also fail to suffice for another reason: lawyers, not the deponent, will almost certainly craft the deposition changes, reducing the likelihood that the answers are truthful and accurate.[71] Courts have recognized that consultations with witnesses during recesses and pending questions might affect the witnesses' testimony.[72] Trial courts often instruct a witness on the stand to refrain from speaking with counsel during the recess.[73] Courts are wary of giving counsel an opportunity to coach the witness or to influence the witness's testimony improperly. The instruction preserves the testimony's integrity and ensures that the testimony is the witness's own. No such judicial safeguard exists when deponents are permitted to make changes to their deposition testimony with the aid of an lawyer. This does not imply that lawyers draft fabrications for the deponents; perhaps they merely clarify the deponent's statements. Regardless, the risk exists that lawyers will interfere with, influence, and manipulate the deponent's testimony by crafting a more favorable, and perhaps contradictory, statement. As long as a broad reading of Rule 30(e) fosters this risk, changes are more likely to cloud truth and accuracy than protect it.

Given such risks, perhaps the proper place for the deponent to clarify his deposition is where it has principally been—at trial. This might seem particularly proper considering that, even before trial, parties have opportunities to avoid having to change deposition testimony. During the deposition, parties can rehabilitate or clarify the deponent's answers, and before the deposition, parties can ensure their witnesses are prepared.[74]

III. Criticisms of the Minority View

Despite the concerns raised by the minority, the overarching purpose of Rule 30(e) is to elicit the truth and provide "an accurate record for trial that will reduce inconsistencies."[75]

A. Transcript Errors Must Be Resolved Before Summary Judgment

Although the minority view is well-intentioned, the resulting harm it imposes on a party seeking to correct an error in a deposition transcript is excessive. A party cannot wait until trial to make substantive edits to his or her deposition transcript when summary judgment has the power to terminate that party's litigation. As the sham affidavit rule prohibits a deponent from correcting his deposition transcript when defending against summary judgment, Rule 30(e) must be interpreted broadly to allow all types of corrections to be made. Practitioners strive to provide the best legal representation possible to their clients, but it is completely unrealistic to expect an lawyer to understand the facts of a case better than the deponent. Often, certain answers to obscure deposition questions become relevant at later stages of the litigation: namely at summary judgment or at trial. A party should therefore be encouraged to review his or her deposition transcript and bring any errors found to the attention of counsel as soon as possible.

B. Adequate Remedies Exist to Prevent Abuse of Rule 30(e)

In contrast to the harms envisioned by the *Greenway* court 16 years ago, federal courts have worked to nullify the unexpected consequences of liberal amendment to a deposition transcript by offering several "protective mesaures": maintaining the initial transcript as part of the judicial record; allowing cross-examination as to the nature of changes made in the deposition and permitting the opposing party to reopen depositions. As explained by Judge Turk in *Foutz v. Town of Vinton,*

> [T]he better reasoned decisions interpret FRCP 30(e) broadly as to allow proposed deposition changes to be admitted into evidence. Because [Plaintiff] should not stand in any better case between giving of his deposition testimony and its transcription, and the changes he proposes are so substantive, the deposition must be reopened to give the defendants the opportunity to impeach [Plaintiff] with his contradictory answers.[76]

The best guidance as to the scope of any reopened deposition is Judge Ramirez's opinion in *Reilly v. TXU Corporation.*[77] In *Reilly,* the plaintiff's deposition errata sheet contained 111 changes; four were identified as "typographical" while the remaining 107 were identified as "clarification."[78] After contemplating the different approaches used by courts considering motions to strike deposition changes, the district court was persuaded by the reasoning of the cases applying a broad interpretation of Rule 30(e). Judge Ramirez stated:

> 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. Plaintiff, as the party making the…changes, will be responsible for costs and lawyer's fees.[79]

Such safeguards have prompted some commentators to declare that courts adopting the broad interpretation "take the better view."[80]

Other safeguards ensure that the deponent's amended deposition testimony is his own and not his lawyer's. First, district courts and juries are not easily manipulated by grossly inconsistent and contradictory testimony. Nor are courts and juries hesitant to draw negative inferences from such conduct. Second, as lapse in time is a factor in evaluating trustworthiness, it is more appropriate to allow the deponent to make substantive changes to a transcript within thirty days of receipt rather than years later at trial.[81] Third, judges have wide discretion to regulate the manner in which discovery is conducted in their courts, whether through local rules, pre-trial orders or in the judicial resolution of motions to compel. Courts may prefer using these methods to regulate the conduct of discovery, rather than applying an overly narrow reading of Rule 30(e) that will harm parties and render meritorious cases dismissed. As the Supreme Court stated in *Foman v. Davis,* "It is too late in the day and entirely contrary to the spirit of the [Rules] for decisions on the merits to be avoided on the basis of…mere technicalities."[82]

C. The Plain Language of Rule 30(e) Permits Changes in Form or Substance

Perhaps the minority's most challenging hurdle to overcome is its failure to reconcile a narrow interpretation with the plain language of Rule 30(e) that permits changes in form or substance. As the *Lugtig* court notes, "The language of the Rule places no limitations on the type of changes that may be made by a witness before signing his deposition."[83] Courts might find some textual support in the Rule's requirement that deponents explain their reasons for making the change. If the deponent may make any type of change without limit, then why would he need to explain the change? Requiring an explanation suggests some sort of judicial oversight, which in turn suggests that certain types of changes are not permissible. Perhaps the inherent tension within the rule—permitting changes in form or substance and yet requiring parties seeking to change their depositions to explain why the deponent is making the change—explains why courts are split on its scope and why both the minority and majority interpretations are able to offer persuasive rationales.[84] Until the Rules Committee resolves the split, a uniform interpretation seems unlikely.

Conclusion

The Federal Rules were adopted to provide litigants certain expectations on how litigation would proceed, regardless of the venue in which their action resided. In certain courts, Rule 30(e) has no limitations, while in other courts the failure to correct a misstatement can result in summary judgment. To the extent the Rules Committee seeks to permit unlimited changes to a deposition transcript, Rule 30(e) needs to be revised to provide for that level of amendment. To the extent Rule 30(e) is to be limited to typographical errors, the Committee must delete the word "substance" from Rule 30(e). As Chief Justice Warren stated in 1965, "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules."[85] As it currently stands, no uniformity exists among the federal courts in interpreting Rule 30(e)—a situation that must be resolved.

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1 *See* James W. McElhaney, *Discovery Is the Trial: Use Depositions as If They're the Only Chance You'll Have to Try the Case,* 93 A.B.A. J. 26 (2007) (reinforcing the importance of discovery given the vast majority of cases that settle prior to trial).

2 Fed. R. Civ. P. 30.

3 Certain federal courts strictly enforce the requirement that a court reporter identify on a certificate a request to correct a transcript. *See, e.g., Rios v. Bigler,* 67 F.3d 1543, 1551 (10th Cir. 1995) ("Under the plain language of Rule 30(e) therefore, the deponent or party must request review of the deposition before its completion."); *Agrizap, Inc. v. Woodstream Corp.,* 232 F.R.D. 491, 493 (E.D. Pa. 2006) (quoting *Rios,* 67 F.3d at 1551) (barring transcript corrections when neither party sought a review and the court reporter did not issue a certificate).

4 Fed. R. Civ. P. 30(e).

5 *Id.*

6 *See Reilly v. TXU Corp.,* 230 F.R.D. 486, 489 (N.D. Tex. 2005) (noting that the broad interpretation "has been characterized as the traditional or majority view") (citation omitted); *Lugtig v. Thomas,* 89 F.R.D. 639, 641 (N.D. Ill. 1981) ("[N]or does the Rule require a judge to examine the sufficiency, reasonableness or legitimacy of the reasons for the changes.").

7 *Greenway v. Int'l Paper Co.,* 144 F.R.D. 322, 325 (W.D. La. 1992) (endorsing a narrow reading of Rule 30(e) regarding changes to a deposition transcript).

8 *See Burns v. Bd. of County Comm'rs. of Jackson County,* 330 F.3d 1275, 1282 (10th Cir. 2003) (evaluating Rule 30(e) in the context of a sham affidavit); *Colantuoni v. Alfred Calcagni & Sons, Inc.,* 44 F.3d 1, 4-5 (1st Cir. 1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." (citations omitted)); *Barwick v. Celotex Corp.,* 736 F.2d 946, 959-60 (4th Cir. 1984) (affirming district court's disregard of affidavit that plainly contradicted affiant's sworn testimony).

9 For a summary of relevant cases and an analysis on the strategic interests in choosing whether to modify a deposition transcript, *see* Andrea T. Vavonese, *But Wait! There's More! Can a Witness Make Substantive Changes to His Deposition Testimony After the Fact?* Findlaw.com (Oct. 1, 2002), http://library.findlaw.com/2002/Oct/1/132398.pdf (last visited March 20, 2008).
10 144 F.R.D. at 322-25.
11 *Id.* at 325.
12 *Id.*
13 *Id.* at 323.
14 *Id.*
15 *Id.* at 325; *see Garcia v. Pueblo Country Club,* 299 F.3d 1233, 1242 n.5 (10th Cir. 2002) ("We do not condone counsel's allowing for material changes to deposition testimony and certainly do not approve of the use of such altered testimony that is controverted by the original testimony." (citations omitted)); *Burns,* 330 F.3d at 1282 (affirming *Garcia*); *Walker v. Freight Sys., Inc.,* No. Civ.A. 98-3565, 1999 WL 955364, at *7 (E.D. La. Oct. 19, 1999) (considering changes that "do not necessarily 'contradict' the original testimony…[to] go beyond the scope of Rule 30(e)").
16 *Greenway,* 144 F.R.D. at 325.
17 *Id.*
18 206 F.R.D. 568, 570 (M.D.N.C. 2002).
19 *Id.*
20 *Id.* at 572.
21 *Id.*
22 *Id.* at 573.
23 847 F. Supp. 1538, 1540 (D. Kan. 1994).
24 *Id.* at 1546.
25 *Id.* at 1544.
26 *Id.* at 1546.
27 *Id.* (citing *Greenway,* 144 F.R.D. at 325).
28 *Rios v. Welch,* 856 F. Supp. 1499, 1502 (D. Kan. 1994).
29 *Rios,* 847 F. Supp. at 1546 (citing *Greenway,* 144 F.R.D. at 325).
30 *Id.* at 1546-47.
31 *Rios,* 856 F. Supp. at 1502.
32 *Id.* (emphasis in original).
33 *Rios,* 847 F. Supp. at 1547.
34 *Id.*
35 *Id.* at 1546-47.
36 397 F.3d 1217, 1223 (9th Cir. 2005).
37 *Id.* at 1224, 1226.
38 *Id.* at 1224.
39 *Id.* at 1224-25.
40 *Id.* at 1225 (internal punctuation omitted).
41 *Id.*
42 *Id.*
43 *Id.* (citations omitted); *see Burns,* 330 F.3d at 1282 ("We see no reason to treat Rule 30(e) corrections differently than affidavits, and we hold that Burns' attempt to amend his deposition testimony must be evaluated under [the sham affidavit doctrine]."); *Thorn v. Sundstrand Aerospace Corp.,* 207 F.3d 383, 389 (7th Cir. 2000) ("We also believe, by analogy to the cases which hold that a subsequent affidavit may not be used to contradict the witness's deposition, that a change of substance which actually contradicts the transcript is impermissible unless it can plausibly be represented as the correction of an error in transcription, such as dropping a not." (citations and internal punctuation omitted))); *Eckert v. Kemper Fin. Servs., Inc.,* No. 95-C6831, 1998 WL 69956, at *5 (N.D. Ill. Sept. 30, 1998) ("Congress did not, however, write Rule 30(e) so plaintiffs could create sham issues of fact to defeat summary judgments.").
44 *Hambleton,* 397 F.3d at 1226.
45 *See, e.g., SEC v. Parkersburg Wireless LLC,* 156 F.R.D. 529, 535-36 (D.D.C. 1994) (declaring that the plain language of Rule 30(e) permits changes in form or substance "to provide an accurate record for trial that will reduce inconsistencies" (citing Fed. R. Civ. P. 30 (e))).
46 No. 3:03CV1982, 2006 WL 2263885, at *2 (D. Conn. Aug. 7, 2006) (citation omitted); *accord Reilly,* 230 F.R.D. at 490-92; *Foutz v. Town of Vinton,* 211 F.R.D. 293, 295 (W.D. Va. 2002); *Elwell v. Conair, Inc.,* 145 F. Supp. 2d 79, 87 (D. Me. 2001); *Titanium Metals Corp. v. Elkem Mgmt., Inc.,* 191 F.R.D. 468, 472 (W.D. Pa. 1998).
47 *SEC,* 156 F.R.D. at 535-36. Some courts go further, deciding that they "need not examine the sufficiency, reasonableness or legitimacy of the reasons given [for the change]." *Glenwood Farms, Inc. v. Ivey,* 229 F.R.D. 34,(D. Me. 2005) (citing *Podell v. Citicorp Diners Club, Inc.,* 112 F.3d 98, 103 (2d Cir. 1997)) (additional citation omitted). According to the *Glenwood Farms* court, "A substantial body of case law holds that, so long as the deponent gives reasons for changes or additions to his deposition testimony under the terms of Rule 30(e) and the original testimony remains in the transcript, no action by the court is indicated." *Id.* (citations omitted).
48 112 F.3d at 101.
49 *Id.*
50 *Id.* at 102.
51 *Id.* at 103.
52 *Id.* at 102.
53 *Id.*
54 *Id.* at 103.
55 *Id.*
56 *Id.*
57 *Id.* (quoting *Lugtig,* 89 F.R.D. at 641).
58 *Podell,* 112 F.3d at 103 (citation omitted).
59 89 F.R.D. at 642.
60 *Id.* at 641.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* (internal punctuation omitted).
65 Id. at 642.
66 Id.
67 *See Reilly,* 230 F.R.D. at 491; *Glenwood Farms,* 229 F.R.D. at 35; *Elwell,* 145 F. Supp. 2d at 86-7; *Titanium Metals,* 191 F.R.D. at 472; *Lugtig,* 89 F.R.D. at 642.
68 *SEC,* 156 F.R.D. at 535-36; *accord Reilly,* 230 F.R.D. at 490. In rejecting *Greenway,* the district court in *Elwell* reasoned that "[i]f the original answers as well as the changes are made available to the jury when and if the deposition testimony is used at trial, the jurors should be able to discern the artful nature of the changes." 145 F. Supp. 2d at 86-87; *see Great N. Storehouse v. Peerless Ins.,* No. Civ. 00-7-B, 2000 WL 1901266, at *2 (D. Me. Dec. 29, 2000) ("[W]hen a party amends his testimony under Rule 30(e), the original answer to the deposition questions will remain part of the record and can be read at the trial." (citation and internal punctuation omitted)). The compromise of having the original transcript be part of the record has routinely been endorsed by district courts as a disincentive for a party to make liberal changes to a deposition transcript. This compromise allows "the witness who changes his testimony on a material matter between the giving of his deposition and his appearance at trial [to] be impeached by his former answer[.]" *See Lugtig,* 89 F.R.D. at 642 (citing 8A CHARLES A. WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2118 2d ed. 1994)); *N. Trade,* 2006 WL 2263885, at *2 ("The rationale for allowing material changes to testimony is that the original answers to the deposition questions will remain part of the record and can be introduced at the trial." (citations omitted)).

69 CHRISTOPHER MULLER & LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES § 267 (4th ed. 2000); FED. R. EVID. 803 (1), (2).

70 *Nuttall v. Reading Co.,* 235 F.2d 546, 553 (3d Cir. 1956) (citation omitted); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE UNDER THE RULES § 267 (4th ed. 2000) ("[T]he connection was so close that declarant had no time to lie or forget[.]"); FED. R. EVID. 803 advisory committee notes ("The theory of [the presentsense-impression exception] is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. Spontaneity is the key factor in each instance, though[.]" (citation omitted)).

71 In *Reilly,* the legalistic language of the deponent's change suggests a lawyer drafted it: "A problem I have with the interview process is that based on the documents produced by the Company, it does not appear that the same interview process criteria or procedures were applied to evaluate all the candidates consistently." 230 F.R.D. at 491 (internal punctuation omitted).

72 *See, e.g., O'Brien v. Amtrak,* 163 F.R.D. 232, 236 (E.D. Pa. 1995) ("Our reading of the depositions indicates that Defendants' counsel spoke almost as much, if not more, than the deponents did. As a result, it is difficult to determine whether the deponent's answers were his or her own, or Defense Counsel's.").

73 *See, e.g., Perry v. Leeke,* 488 US 272, 280-82 (1989) (finding trial court's order that witness not consult with his lawyer during a 15-minute recess not to violate a defendant's Sixth Amendment right to assistance of counsel); *Reynolds v. Alabama Dep't of Transp.,* 4 F. Supp. 2d 1055, 1066 (M.D. Ala. 1998) (borrowing the reasoning in *Perry* to hold that a "civil party does not have a right to consult with his counsel at any time about any matter during the course of his or her testimony").

74 *Rios,* 847 F. Supp. at 1544; *Rios,* 856 F. Supp. at 1502 (declining to consider the errata sheet of Rios's expert in part because Rios was responsible for ensuring "that her expert was fully prepared and informed *before* the expert provided unwavering testimony on the issue of breach of duty to diagnose" and because Rios "had a full opportunity to cross-examine this witness at the deposition to elicit any additional opinions and chose not to do so" (emphasis in original)).

75 *SEC,* 156 F.R.D. at 536.

76 211 F.R.D. at 295 (internal punctuation omitted); *see Hlinko v. Virgin Atl. Airways,* No. 96 Civ. 2873, 1997 WL 68563, at *1 (S.D.N.Y Feb. 19, 1997) (quoting *Allen & Co. v. Occidental Petroleum Corp.,* 49 F.R.D. 337, 340 (S.D.N.Y. 1970)) (holding that a court may "reopen a deposition to allow for further cross-examination of the deponent if the changes to the transcript are so substantial as to effectively render it incomplete or useless without further testimony" (internal punctuation and additional citation omitted)).

77 230 F.R.D. at 490.

78 *Id.* at 486-87.

79 *Id.* at 491 (citations omitted).

80 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 30.60[3] (3d ed. 1999 & Supp. 2007) ("Although it is unseemly to *see* a deponent 'rewriting' deposition testimony, the prior (presumably less advantageous) testimony is not expunged from the record. The deponent can be cross-examined about the changes and impeached by the inconsistency, with the finder of fact invited to determine that the initial reaction was the honest reaction. In cases of pronounced change, the deposing party is entitled to resume the deposition and grill the deponent about the inconsistencies. Thus, even though the post-deposition changes are not subject to immediate cross-examination, there is no great risk of successful manipulation." (citations omitted)).

81 See Fed. R. Evid. 803, advisory committee's note (1972 Proposed Rules) ("The most significant practical difference will lie in the time lapse allowable between event and statement.").

82 371 US 178, 181 (1962) (citation omitted); *see generally* 1 MOORE'S FEDERAL PRACTICE ¶ 1.21[2] (discussing history and purpose of Federal Rules).

83 *Lugtig,* 89 F.R.D. at 641 (citation omitted).

84 Fed. R. Civ. P. 30 (e).

85 *Hanna v. Plumer,* 380 US 460, 473 (1965) (quoting *Lumbermen's Mut. Cas. Co. v. Wright,* 322 F.2d 759, 764 (5th Cir. 1963)) (requiring service of process to be made in the manner prescribed by the federal rules rather than by state law).